September 07, 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
708 Warren E. Burger Federal Building
316 North Robert Street
St. Paul, Minnesota 55101
U.S. CERTIFIED MAIL NO. 7003-3110-0005-5771-6785

RE: LAMBROS vs. USA, Criminal Number 4-89-82(5)(DSD)

Dear Clerk:

Attached for **FILING** in the above entitled action is one (1) original and one (1) copy of:

1. MOTION TO VACATE FEBRUARY 10, 1997, JUDGMENT DUE TO INTERVENING CHANGE IN CONTROLLING LAW, CASTRO vs. UNITED STATES, 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). Dated: **September 07, 2004.**

Please contact me if I have not followed any of the filing rules.

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

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

Sincerely,

John G. Lambros, Pro Se

CERTIFICATE OF SERVICE

I declare under the penalty of perjury that a true and correct copy of the above listed document/motion was mailed within a stamped addressed envelope from the USP Leavenworth mailroom on this **07th day of September, 2004,** to:

1. U.S. Attorney's Office, District of Minnesota, 600 U.S. Courthouse, 300 South Fourth STreet, Minneapolis, Minnesota 55415.

John Gregory Lambros, Pro Se

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

JOHN GREGORY LAMBROS,	*	**CIVIL NO.** ______________
Petitioner,	*	**Criminal No. 4-89-82(05)**
vs.	*	
UNITED STATES OF AMERICA,	*	**AFFIDAVIT FORM**
Defendant.	*	

MOTION TO VACATE FEBRUARY 10, 1997, JUDGMENT DUE TO INTERVENING CHANGE IN CONTROLLING LAW, CASTRO vs. UNITED STATES, 157 L.Ed2d 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).

NOW COMES Petitioner, JOHN GREGORY LAMBROS, Pro Se, (hereinafter Movant) and requests this Court to VACATE the resentencing judgment on February 10, 1997, in this above-entitled action, due to the United States Supreme Court decision on December 15, 2003 in CASTRO vs. UNITED STATES, 124 S.Ct. 786, 157 L.Ed.2d 778, which held:

> (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'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 warning, the prisoner's **1994 MOTION [Rule 33]** 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. **(emphasis added)**

See, **EXHIBIT A** (CASTRO, 157 L.Ed.2d at 779)

I. A CHANGE IN THE LAW CAN BE THE BASIS FOR RULE 60(b) RELIEF:

1. The Eighth Circuit and other courts have stated, "A CHANGE IN THE LAW CAN IN APPROPRIATE CIRCUMSTANCES BE THE BASIS FOR RULE 60(b) RELIEF." See, BENSON vs. ARMONTROUT, 767 F.2d 454, 455 (8th Cir. 1985); COX vs. WYRICK, 873 F.2d 200, Head Note 1 (8th Cir. 1989); BEN HUR CONST. CO. vs. GOODWIN, 116 F.R.D. 281, affirmed 855 F.2d 859 (8th Cir. 1988)(Decision of the Supreme Court of the U.S. or U.S. Court of Appeals may provide extraordinary circumstances for granting relief from judgment under Rule 60(b)(6) due to change in law); BRADLEY vs. RICHMOND SCHOOL BOARD, 416 U.S. 696, 714, 40 L.Ed.2d 476, 489-490 (1974)(Court has duty to apply supervening rule of law despite its prior decisions to the contrary when the new legal rule is valid and applicable to the issues of the case.); THE SCHOONER PEGGY, 5 U.S. (1 Cranch) 103, 2 L.Ed. 49 (1801)(A court will apply the new rule even if it was announced while the case is on appeal.); AGOSTINI vs. FELTON, 138 L.Ed.2d 391, 395 (1997)(allowing relief under Rule 60(b)(5) to alter permanent injunction in light of Supreme Court's decision to overrule earlier constitutional precedent on which injunction was based.); and GONZALEZ vs. SECRETARY FOR DEPT. OF CORRECTIONS, 366 F.3d 1253, 1309 (11th Cir. 2004)("What Gonzalez's Rule 60(b)(6) motion alleges, in so many words, is that 'an intervening change in the controlling law dictates a different result." I suggest that Rule 60(b) is the perfect vehicle for invoking the **INTERVENING-CHANGE-IN-THE-LAW EXCEPTION** to the mandate rule. In fact, I can think of no other procedural rule that is as tailor made for this situation as Rule 60(b)(6)."). (emphasis added).

2. On December 15, 2003, the U.S. Supreme Court **PROMULGATED A NEW PROCEDURE** to be followed if the district court desires the recharacterized motion [Rule 33] to count against the pro se litigant as a first 28 USC §2255 motion in later litigation. See, CASTRO vs. U.S., 157 L.Ed.2d at 789. Justice STEVENS of the court offered his opinion as to the use of a **RULE 60(b) MOTION** in ABDUR'RAHMAN vs. BELL, 154 L.Ed2d 501, 505 (2002):

. . ., while a **RULE 60(b) MOTION** is designed to cure **PROCEDURAL VIOLATIONS IN AN EARLIER PROCEEDING** - here, a habeas corpus proceeding - that raise questions about that **PROCEEDING'S INTEGRITY.** Id. at 505. (emphasis added).

3. This Court is bound by the Eighth Circuit precedent in this action, which clearly states, "Guinan correctly points out that neither BOLDER nor BLAIR mandates that all Rule 60(b) motions in habeas cases be treated as subsequent habeas petitions. We do not rule out the possibility that a habeas case may present circumstances in which a Rule 60(b) motion might properly be examined as such rather than as a subsequent habeas petition." See, GUINAN vs. DELO, 5 F.3d 313, 316 (8th Cir. 1993). Also see, HOOD vs. U.S., 342 F.3d 861, 864 (8th Cir. 2003)(The District Court, however, is bound, as are we, to apply the precedent of this Circuit).

II. BACKGROUND FACTS:

4. On February 23, 2004, the Honorable U.S. District Court Judge David S. Doty, stated within his ORDER in U.S.A. vs. LAMBROS, Civil No. 99-28(DSD), Criminal No. 4-89-82(5)(DSD/FLN), on page two (2), Footnote three (3):

> Defenant's [Lambros'] **FIRST** collateral attack purportedly sought relief pursuant to **Fed. R. Crim. P. 33, BUT WAS CONSTRUED AS A §2255 MOTION.** Defendant's second attempt was denied both as a successive §2255 motion and as lacking merit. Defendant's third attempt was denied for lack of jurisdiction, because defendant had failed to obtain permission from the court of appeals to file a successive habeas petition, as required by 28 U.S.C. §2255. (emphasis added)

See, **EXHIBIT B** (February 23, 2004, ORDER, USA vs LAMBROS, Civil No. 99-28(DSD), Criminal No. 4-89-82(5)(DSD/FLN), U.S. District Court for the District of Minnesota)

5. On February 10, 1997, the Honorable Robert G. Renner, at the U.S. Courthouse, St. Paul, Minnesota, District of Minnesota, RESENTENCED Movant Lambros in Criminal No. CR-4-89-82(05), due to the decision in U.S. vs. LAMBROS, 65 F.3d 698 (8th Cir. 1995). Movant Lambros filed motions before RESENTENCING to be considered

at the February 10, 1997, RESENTENCING. All motions filed by Movant Lambros where to be considered under Federal Rule of Criminal Procedure 33. The February 10, 1997, TRANSCRIPTS state the following:

> 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. However, such motions would clearly be untimely even if correctly denominated as **RULE 33 MOTIONS.** 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 raise them again on appeal and beyond, although many were previously litigated and thus are procedurally barred. The defendant is in agreement with - - I am sorry - - the court is in agreement with the view expressed in United States versus DiBernardo, a 1989 case decided by the Eleventh Circuit Court of Appeals. DiBernardo held that a motion could properly be considered under 28 United States Code, **SECTION 2255,** if imprisonment based on a previous adjudication of guilt was imminent. While defendant has not technically been in custody on Count 1 since the Eighth Circuit's remand, such custody has indeed been imminent. 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. (emphasis added)

See, Page 4 and 5, **EXHIBIT C** (February 10, 1997, RESENTENCING TRANSCRIPT)

> Regarding this resentencing, I refer to 59 Criminal Law Reporter, page 1188 on 5/29/96. It's U.S. vs. MOORE, Tenth Circuit, 953121. And in there it says when a defendant's sentence is **VACATED ON APPEAL AND REMANDED FOR NEW SENTENCING**, the lower court **MUST BEGIN ANEW. I AM ASKING FOR THESE PROCEEDINGS TO BE ANEW.** . . .
> The lower Court must begin anew with de novo proceedings. I am requesting complete - - everything starting new with these proceedings, as of **U.S. vs. ORTIZ, 25 F.3d 934, 935.** De novo resentencing permits the receipt of any relevant evidence the court could have heard **AT THE FIRST SENTENCING HEARING. U.S. vs. WARNER, 43 F.3d 1335 and 1340,** Tenth Circuit, 1994. Federal Rules of Criminal Procedure, 32(b)(6)(d) allows parties to raise new objections to the presentence report for good cause shown. Thus, this court's current conflict - - current conflict - - in not allowing - - and I repeat, in not allowing - - Lambros and Counsel Ceisel to **RAISE NEW ISSUES** with respect to the presentence report at any time prior to the imposition of sentence is a sentencing error. (emphasis added)

See, Page 14 and 15, **EXHIBIT C.**

Also, I would like to bring up regarding - - this is very important - - in regard to Count 1, Your Honor, I'm raising the argument right now that I was denied due process of law and effective assistance of counsel when at sentencing a **GENERAL VERDICT** - - I repeat, a **GENERAL VERDICT** - - was rendered by the jury which did not specify which substantive offense of a multi object conspiracy was committed. (emphasis added)

Page 16 and 17, **EXHIBIT C.**

Instead of charging movement with a separate offense on each of the offenses following the jury verdict, the government failed to request a **SPECIAL VERDICT FORM** identifying which offense movement **CONSPIRED TO COMMIT.** (emphasis added)

Page 18, **EXHIBIT C.**

I'm saying that a **GENERAL VERDICT** was rendered and that this Court doesn't have any idea on what phase of 841, if it's 841 or other counts, that it's sentencing me on today. So, I don't see how I can be sentenced until we have an **EVIDENTIARY HEARING** as to what exactly I was found guilty of by the jury. I guess that's enough for that right now.

Your Honor, when you were speaking now, **YOU SAID THAT ALL THE MOTIONS THAT ARE FILED TO DATE ARE BEING CONSTRUED UNDER 2255?**

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

Okay. **AND YOU ARE SAYING NONE OF THEM ARE UNDER RULE 33?**

THE COURT: YES.

Okay. I would like to read from you **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?

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.

Pages 19 and 20, **EXHIBIT C.**

This is a March 15th motion to bar past criminal offenses in the **RESENTENCING** of John Gregory Lambros that will be used to enhance current sentence and place Lambros in a career offender's status due to double jeopardy challenges. I believe **ALL THESE ARE VALID RULE 33 MOTIONS.** (emphasis added)

Page 27, **EXHIBIT C.**

Again, I am asking - - to get to the crux - - for a new trial under **RULE 33** as to requesting reversal of Count 1 due to **MARGARET MURPHY NOT OBEYING THE JANUARY 11th, 1993 SUBPOENA OF JUDGE D. MURPHY TO TESTIFY AND SUPPLY DOCUMENTS.** Under KYLES vs. WHITLEY, 131 L.Ed.2d 490 [1995], it says that absence of the suppressed evidence denied Lambros a fair trial, thus resulting in a verdict unworthy of - - (emphasis added).

Pages 35 and 36, **EXHIBIT C.**

Attorney Ceisel: .... I did not hire a radiologist to review the x-rays in this case.

Page 44, **EXHIBIT C.**

JOHN W. LAMBROS: . . . [Quoting from Dr. Logan, M.D. evaluation of John G. Lambros] Page 13 of the same, Logan, M.D., and again, Mr. Logan, Mr. Lambros not mentally ill or disillusional. **I AM NEITHER SUPPORTING OR REFUTING HIS ASSERTION HE HAS AN IMPLANT.** Now, there are a great deal of contradictions in that report. ..... (emphasis added).

Page 56, **EXHIBIT C.**

PAT LAMBROS: And I appreciate your giving me the opportunity to say a few words. Because of his imprisonment for a year in **BRAZIL**, he suffered inhumane **TORTURE** that no one should ever have to go through. I also believe it's possible that an **IMPLANT WAS INSERTED INTO HIS BRAIN TO CONTROL HIS THOUGHTS.** He is not the same son I have known all my life. **IN THE SUMMER OF '92, TWO (2) SKULL X-RAYS WERE TAKEN, AND THAT WAS AT THE FEDERAL PRISON IN ROCHESTER. THE FIRST ONE SHOWED AN ABNORMALITY. THE SECOND ONE SHOWED THERE WAS A 37 TO 38 PERCENT (%) DISCREPANCY BETWEEN THE DEGREE OF INTENSITY USED.** And why this is - - this was done, I really don't know. We have never been told. (emphasis added)

Page 61, **EXHIBIT C.**

THE COURT: Yes, Mr. Lambros.

THE DEFENDANT: Yes, Your Honor. I don't have a complete under-

standing. Now, the **MOTIONS THAT I - - THAT WE SPOKE ABOUT, ARE THEY - -**

THE COURT: **I HAVE DENIED THEM** and I have informed you that a written opinion will be submitted so that you will have it in front of you exactly what the court has done.

THE DEFENDANT: Okay. And regarding the **GENERAL VERDICT**, on which element - -

**** THE COURT: That's a matter of argument that you will raise with the Court of Appeals if there is an appeal. (emphasis added)

Page 64, **EXHIBIT C.**

6. Attorney COLIA F. CEISEL told Movant Lambros that he would be would be able to file another Title 28 USC Section **2255** on February 10, 1997. This was not a true statement by Attorney Ceisel.

7. Movant Lambros has never filed a Title 28 USC Section **2255** that has not been considered a "SUCCESSIVE §2255 MOTION." See, Paragraph four (4) in this motion, **EXHIBIT B.**

8. Attorney CEISEL would not raise issues Movant Lambros requested on his appeal from resentencing on February 10, 1997, **NOR ISSUES THE COURT SUGGESTED - GENERAL JURY VERDICT**. See Page 64, **EXHIBIT C.**

9. Movant Lambros requested Attorney CEISEL to raise the **GENERAL JURY VERDICT ISSUE** on appeal from the February 10, 1997, RESENTENCING. See, Movant Lambros' letter to Attorney CEISEL dated March 14, 1997, via U.S. Certified Mail No. Z-209-887-400. See, **EXHIBIT D.** Attorney CEISEL refused to appeal the **GENERAL JURY VERDICT ISSUE ON APPEAL** and stated that I could raise same within my **§2255.**

10. Attorney CEISEL knew Movant Lambros' request to be sentenced for **MARIJUANA** was valid, instead of cocaine, as Movant Lambros' indictment stated Movant Lambros conspired to purchase **MARIJUANA** within **COUNT ONE (1)** and ample trial testimony confirmed Movant Lambros attempt to purchase **MARIJUANA** during the conspiracy count. The **GENERAL JURY FORM** (General Jury Verdict) did not allow the jury to indicate which drug, cocaine/marijuana, it found to be the **OBJECT OF THE CONSPIRACY**. Both the District

Court - Judge Renner - and Attorney CEISEL knew they were **BOUND** to apply the Eighth Circuit Court of Appeals precedent in U.S. vs. OWENS, 904 F.2d 411, 414-415 **(8th Cir. 1990)**, which clearly states that when a jury returns a guilty verdict on an indictment charging a conspiracy to distribute or purchase two (2) drugs and a **GENERAL JURY VERDICT** is found by the jury, the **PUNISHMENT IMPOSED CANNOT EXCEED THE SHORTEST MAXIMUM PENALTY AUTHORIZED BY THE DRUG CARRYING THE LOWER PENALTY.** Given the facts of Movant's case, the maximum sentence for a conspiracy to distribute **MARIJUANA** is five (5) years, 21 U.S.C. §841(b)(1)(D). See also, U.S. vs. DALE, 178 F.3d 429, 432-434 (6th Cir. 1999)(Seven of eight circuits have considered the **GENERAL JURY VERDICT** issue and have decided that the punishment cannot exceed the shortest maximum penalty for the drugs involved in the **CONSPIRACY**. Id. at 432, which offers an overview of all circuit court decisions within footnote 1.) See, **EXHIBIT E.** (Exhibit E is U.S. vs. DALE, 178 F.3d at 432-433). See also, U.S. vs. ZILLGITT, 286 F.3d 128, 134-138 (2nd Cir. 2002); U.S. vs. ALLEN, 302 F.3d 1260, 1267-1276 (11th Cir. 2002)(**Sentencing Issue** where government alleges a conspiracy of multiple controlled substances)("The recognized remedy for a **DALE-RHYMES** violation **EXCLUDES** any consideration of a **HARMLESS ERROR REVIEW.** Such a review questions whether a conviction should, despite error during the trial, be affirmed. In this case we do not set aside the conviction of the Defendants, but rather vacate the sentences and remand for re-sentencing, or at the option of the prosecution, allow for a new trial on the **COUNT 1 CONSPIRACY** charge with the understanding that the jury will be provided a special verdict as to Court 1." ALLEN, 302 F.3d at 1276).

11. Therefore, if **HARMLESS ERROR** does not apply to a **GENERAL JURY VERDICT** violation, as described in OWENS and DALE, Movant LAMBROS had a solid issue at RESENTENCING on February 10, 1997. Movant received a thirty (30) year sentence, whereas the maximum sentence applicable to a conspiracy to distribute **MARIJUANA** is five (5) years. Likewise Movant LAMBROS has an excellent argument that Judge Renner was ineffective in not ruling his **RULE 33 MOTION** on the GENERAL JURY VERDICT was not

the **CORRECT MOTION TO BE FILED AT RESENTENCING**, rather than converting Movant's **RULE 33 MOTION INTO A §2255 MOTION.** Attorney CEISEL was also ineffective in not raising the GENERAL JURY VERDICT issue on Movant's direct appeal to his resentencing as requested by Movant LAMBROS. See, **EXHIBIT D.** At the time of the February 10, 1997, RESENTENCING, the precedent in U.S. vs. OWENS, 904 F.2d 411, 414-415 **(8th Cir. 1990) BOUND** Attorney CEISEL to raise the GENERAL JURY VERDICT issue, as a **REASONABLY COMPETENT ATTORNEY.**

12. At this point we know nothing of **WHY** Judge Renner converted Movant Lambros' **RULE 33 MOTIONS**, including the **GENERAL JURY VERDICT MOTION**, into a §2255 without Movant approval nor **WHY** Movant Lambros' attorney Colia CEISEL (the same attorney at resentencing and on appeal from resentencing) refused to raise **RULE 33 MOTIONS** that where converted into a §2255 on direct appeal. Lambros was instructed by Attorney CEISEL that he would be able to file another §2255 and not to appeal the conversion of the **RULE 33 MOTIONS** the Court had converted into Movant Lambros' first **§2255.** Movant Lambros had many **MERITORIOUS CLAIMS THAT WERE VALID RULE 33 MOTIONS AT RESENTENCING ON FEBRUARY 10, 1997.** Movant Lambros has never been given the right to raise the **GENERAL JURY VERDICT** issue within a **§2255 MOTION** that would of entitled Movant Lambros to a **HEARING** on a section 2255 motion when the Movant asserts properly-supported facts that, if proven, would entitle him to relief. See, BRUCE vs. U.S., 256 F.3d 592, 597 (7th Cir. 2001); RODRIGUEZ vs. U.S., 286 F.3d 972, 986 (7th Cir. 2002)(**HEARING** required on section 2255 motion "when factual disputes exist" that cannot be determined on the paper record before the Court).

13. **FINAL BACKGROUND FACT:** On April 13, 2001, filed April 24, 2001, Movant Lambros filed a "MOTION TO VACATE ALL JUDGMENTS AND ORDERS BY DISTRICT COURT JUDGE **ROBERT G. RENNER** PURSUANT TO RULE 60(b)(6) OF THE FEDERAL RULES OF CIVIL PROCEDURE FOR VIOLATIONS TO TITLE 28 U.S.C.A. §455," within the U.S. District Court for the District of Minnesota, **CIVIL NO. 99-28(DSD), CRIMINAL NO. 4-89-82(5)(DSD).** Movant Lambros alleged and proved within the above filing the **JUDGE ROBERT G. RENNER** held the position of U.S. Attorney in Minnesota during 1969 thru 1977, during which time

he indicted and prosecuted Movant Lambros on three (3) criminal indictments, as per his statutory duty, Title 28 U.S.C. §547, as other attorneys within his office are only assistants, Title 28 U.S.C. §§ 542 and 543. See, U.S. vs. ARNPRIESTER, 37 F.3d 466, 467 (9th Cir. 1994). U.S. Attorney **ROBERT G. RENNER** personally signed two (2) of the indictments against Movant Lambros. On February 10, 1997, the now Honorable **ROBERT G. RENNER RESENTENCED** Movant Lambros, as per the ORDER of the Eighth Circuit on charges Movant was indicted on in May 1989, Criminal File No. 4-89-82(5), District of Minnesota, to an **ENHANCED SENTENCE BASED ON THE THREE (3) CRIMINAL INDICTMENTS HE INDICTED MOVANT LAMBROS ON IN 1975 AND 1976.** Note worthy is the fact: U.S. Attorney **ROBERT G. RENNER** signed two (2) of the criminal indictments in 1975 and 1976. Therefore, U.S. Attorney **ROBERT G. RENNER** conducted the investigations and **GRAND JURIES** in the 1975 and 1976 criminal indictments.

14. The District Court enjoys the inherent power to grant relief where the judgment or ORDER is obtained through a **FRAUD ON THE COURT.** See, UNIVERSAL OIL PRODS CO. vs. ROOT REFINING CO., 90 L.Ed. 1447 (1946); HAZEL-ATLAS GLASS CO. vs. HARTFORD-EMPIRE CO., 88 L.Ed. 1250 (1944).

III. **MOVANT LAMBROS REQUESTS TO FILE AN INITIAL §2255 MOTION:**

15. Movant Lambros has not filed an initial §2255 due to the February 10, 1997, RESENTENCING COURT **RECHARACTERIZING** movant's **RULE 33 MOTIONS, AS A FIRST MOTION FOR POSTCONVICTION RELIEF UNDER §2255.** The Court did not warn Movant that the recharacterization meant that any subsequent §2255 motion would be subject to §2255's restrictions on "second or successive" motions, nor did the District Court provide movant an opportunity to withdraw his **RULE 33 MOTIONS** or to amend it so that it contained all the §2255 claims that Movant believed that this Movant had.

16. The District Court on February 10, 1997, denied Movant Lambros his statutory jurisdiction, jurisdiction as conferred by legislation enacted pursuant to the constitution of the United States of America on behalf of which the court functions,

to file Movant' **FIRST MOTION FOR FEDERAL POSTCONVICTION RELIEF UNDER 28 USCS §2255.** See, CASTRO vs. U.S., 157 L.Ed.2d 778 (2003); MORALES vs. U.S., 304 F.3d 764, 767 **(8th Cir. 2002).**

17. **RETROACTIVE APPLICATION OF CASTRO vs. U.S. (2003):** Movant Lambros believes that the effects of the CASTRO decision apply retroactively to Movant's case. Justice BREYER who delivered the CASTRO opinion of the court stated:

a. "The District Court that considered Castro's **1994 motion** failed to give Castro warnings of the kind we have described. Moreover, this Court's 'supervisory power' determinations normally apply, like other judicial decisions, **RETROACTIVELY,** at least to the case in which the determination was made." See, CASTRO, 157 L.Ed.2d at 788. (emphasis added)

18. **EQUITABLE TOLLING IS APPLICABLE TO THE ONE-YEAR LIMITATION PERIOD UNDER TITLE 28 U.S.C. §2255:** This Court has the power equitably to toll the statute of limitations for a §2255 motion, as the Eighth Circuit Court of Appeals and all of its sister courts have consistently held that §2255's period of limitation is **NOT JURISDICTIONAL** but is instead a **PROCEDURAL STATUTE OF LIMITATIONS SUBJECT TO EQUITABLE TOLLING.** See, DUNLAP vs. U.S., 250 F.3d 1001, 1004 (6th Cir. 2001)(Collecting Cases, and listing MOORE vs. U.S., 173 F.3d 1131, 1134 **(8th Cir. 1999)).**

19. **EQUITABLE TOLLING IS A REMEDY IS THIS CASE:** Equitable tolling is a remedy reserved for "[e]xtraordinary circumstances far beyond the litigant's control [that] ... prevented timely filing." See, NOLAN vs. U.S., 358 F.3d 480, 484 (7th Cir. 2004)(Nolan was a federal prisoner proceeding under §2255). Movant Lambros could not file his initial §2255 petition before the CASTRO ruling on December 15, 2003, due to Judge Renner's ruling on February 10, 1997 to convert all of Movant's **RULE 33 MOTIONS** into Movant's first §2255. Movant should not be penalized for any shortcomings in the district court's treatment of his **RULE 33** motions at RESENTENCING.

20. Justice SCALIA, with whom Justice THOMAS, in there separate opinion in CASTRO stated:

> The Court does not address whether Castro's motion filed under Federal Rule of Criminal Procedure 33 should have been recharacterized, and its discussion scrupulously avoids placing any limits on the circumstances in which district courts are permitted to recharacterize. That is particularly regrettable since the Court's **NEW RECHARACTERIZATION PROCEDURE** does not include an option for the **PRO SE LITIGANT TO INSIST THAT THE DISTRICT COURT RULE ON HIS MOTION AS FILED;** ..... (emphasis added)
>
> "Liberal construction" or Pro Se pleadings is merely an embellishment of the notice-pleading standard set forth in the Federal Rules of Civil Procedure, and thus is consistent with the general principle of American jurisprudence that **"THE PARTY WHO BRINGS A SUIT IS MASTER TO DECIDE WHAT LAW HE WILL RELY UPON."** THE FAIR vs. KOHLER DIE & SPECIALTY CO., 228 US 22, 25, 57 L.Ed. 716, 33 S.Ct. 410 (1913)." (emphasis added)
>
> Recharacterization is unlike "liberal construction," in that it requires a court deliberately to override the Pro Se litigant's **CHOICE OF PROCEDURAL VEHICLE FOR HIS CLAIM.** It is .... (emphasis added)
>
> .... I is not the job of a federal court to create a "better correspondence" between the substance of a cliam and its underlying procedural basis.

CASTRO vs. U.S., 157 L.Ed.2d at 789.

> Even if one does not agree with me that, because of the risk involved, pleadings should **NEVER BE RECHARACTERIZED** into first §2255 motions, surely one must agree that running the risk is unjustified **WHEN THERE IS NOTHING WHATEVER TO BE GAINED BY THE RECHARACTERIZATION. CASTRO'S RULE 33 MOTION WAS VALID AS A PROCEDURAL MATTER, AND THE CLAIM IT RAISED WAS NO WEAKER ON THE MERITS WHEN PRESENTED UNDER RULE 33 THAN WHEN PRESENTED UNDER §2255.** The recharacterization was therefore unquestionably improper, and Castro should be relieved of its consequences. (emphasis added)

CASTRO vs. U.S., 157 L.Ed.2d at 790-791.

Therefore, Movant believes that his RULE 33 motions filed at the February 10, 1997 RESENTENCING should be ruled upon again by this Court as **RULE 33 MOTIONS**, as they where valid RULE 33 Motions as a procedural matter. Movant Lambros is not requesting to much to start anew with the February 10, 1997, RESENTENCING, as the recharacterization was unquestionably improper and Movant should be relieved of all consequences.

21. **MOVANT IS NOT REQUESTING A SECOND OR SUCCESSIVE §2255 PETITION:** Movant understands that the section of law pertinent to second or successive petitions explicitly requires the retroactive determination of CASTRO vs U.S. to be made by the Supreme Court, stating that a court of appeals may authorize a second or successive application if it would rest on "a new rule of constitutional law, MADE RETROACTIVE TO CASES ON COLLATERAL REVIEW BY THE SUPREME COURT, that was previously unavailable." See, 28 U.S.C. §2255 ¶8(2) (emphasis added) Movant Lambros is requesting **AN INITIAL §2255 PETITION IN THIS CASE.**

22. Since Movant LAMBROS is requesting an initial habeas petition, §2255 subsection (3) controls. Subsection (3) refers to "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." Since the language of subsection (3) differs from the language governing second or successive motions, **IT IS POSSIBLE THAT LOWER COURTS CAN DECLARE NEW RULES RETROACTIVE ON INITIAL PETITIONS.** See, U.S. vs. SANDERS, 247 F.3d 139, 146 fn. 4 (4th Cir. 2001).

23. **CASTRO vs. U.S., CONSTITUTES A PROCEDURAL RULE BECAUSE IT DICTATES WHAT FACT-FINDING PROCEDURE MUST BE EMPLOYED TO ENSURE A FAIR §2255 DURIING RECHARACTERIZATION OF MOTIONS. TEAGUE vs. LANE, 103 L.Ed.2d 334 (1989) ANALYSIS:**

24. In TEAGUE vs. LANE, the Supreme Court established a three-step inquiry to determine when new rules of criminal procedure apply retroactively on collateral review. First, the court must determine the date on which the defendant's conviction became final. See, O'DELL vs. NETHERLAND, 521 U.S. 151, 156-157 (1997). Second, the court must decide whether the Supreme Court's ruling indeed constitutes a "new rule" of constitutional criminal procedure. Third, if the rule is new, then it does not apply retroactively unless it falls within one of the two narrow exceptions to the TEAGUE bar.

25. CASTRO vs. U.S., is subject to TEAGUE'S three-step test because it

constitutes a PROCEDURAL RULE that dictates what fact-finding procedure must be employed to ensure a fair trial. TEAGUE, 489 US at 312; APPRENDI, 120 S.Ct. at 2354.

26. New rules of constitutional criminal procedure are generally not applied retroactively on collateral review. This rule is subject only to the TWO (2) NARROW EXCEPTIONS discussed in TEAGUE. TEAGUE'S **FIRST** exception addresses new rules which forbid "criminal punishment of certain primary conduct" and new rules which prohibit "a certain category of punishment for a class of defendants because of their status or offense." See, O'DELL, 521 U.S. at 157. The first exception does not apply to this case.

27. **TEAGUE'S SECOND EXCEPTION:** For a rule to qualify, the new rule must be such that, without it, "the likelihood of an accurate conviction is seriously diminished." TEAGUE, 489 U.S. at 313, 103 L.Ed.2d at 358. Improving the accuracy of trial, however, is not sufficient. Rather, a "rule that qualifies under this exception must not only improve accuracy, but also alter our understanding of the **BEDROCK PROCEDURAL ELEMENTS ESSENTIAL TO THE FAIRNESS OF A PROCEEDING."** SAWYER vs. SMITH, 497 U.S. 227, 242, 111 L.Ed.2d 193, 211 (1990). Also see, U.S. vs. MURPHY, 109 F.Supp.2d 1059, 1063 (D.Minn. 2000)("... the second exception, which applies to those 'watershed rules of criminal procedure' which 'alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding' and 'without which the likelihood of an accurate conviction is seriously diminished." "(The TEAGUE doctrine is founded on the notion that one of the 'principal functions of habeas corpus [is] 'to assure that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted.") (emphasis added).

28. Movant likens CASTRO to CAGE vs LOUISIANA, 489 U.S. 39, 40-41, 112 L.Ed.2d 339 (1990), in which the Supreme Court announced a NEW RULE that a jury instruction equating the reasonable doubt standard with "moral certainty" unconstitutionally diluted the reasonable doubt standard. CAGE falls within the

SECOND TEAGE EXCEPTION and applies retroactively on collateral review. See, ADAMS vs. AIKEN, 41 F.3d 175, 178 (4th Cir. 1994). Movant believes this Court should read CASTRO to hold that this country's criminal justice system malfunctioned so fundamentally prior to CASTRO, in allowing a District Court to recharacterize a pro se litigant's motion under **RULE 33** into a first motion for postconviction relief under **§2255**, as to merit the retroactive application of CASTRO. In short, the new rule announced in CASTRO raises to the level of a watershed rule of criminal procedure which "alter[s] our understanding of the bedrock elements essential to the fairness of a proceeding." See, SAWYER, 497 U.S. at 242.

29. In CASTRO the Supreme Court has indicated, at least by implication, "Moreover, this Court's 'supervisory power' determinations normally apply, like other judicial decisions, RETROACTIVELY, at least to the case in which the determination was made." See, CASTRO, 157 L.Ed.2d at 788. (emphasis added)

30. The Supreme Court has held or recognized that NEW RULES are entitled to **FULL RETROACTIVE EFFECT**, so as to be retroactively applicable to cases which had become final at the time of the announcement:

a. an indigent appellant's rights to a free transcript. GRIFFIN vs. ILLINOIS, 100 L.Ed. 891 (1956);

b. an accused's right to counsel at arraignment. HAMILTON vs. ALABAMA, 7 LEd.2d 114 (1961);

c. an accused's right to counsel at trial. GIDEON vs. WAINWRIGHT, 9 L.Ed.2d 799 (1963);

d. an accused's right to counsel on appeal. DOUGLAS vs. CALIFORNIA, 9 L.Ed.2d 811 (1963);

e. judicial procedures for determining the voluntariness of a confession. JACKSON vs. DENNO, 12 L.Ed.2d 908 (1964);

f. applicability of the Fifth Amendment's prohibition of double jeopardy to the states through the Fourteenth Amendment. PRICE vs. GEORGIA, 26 L.Ed. 2d 300 (1970);

g. standard of proof constitutionally required in trials of juveniles for offenses which would be crimes if committed by adults. V. vs. NEW YORK, 32 L.Ed.2d 659 (1972).

IV. RULE 60(b):

31. Movant Lambros believes he has showed a mark change in the applicable law and now it is necessary to determine whether any of the three (3) clauses of Rule 60(b) are the proper procedural vehicle for this particular motion.

32. Movant is requesting this court to review the following procedureal issues of whether a change in law is remediable under any of the three (3) subsections of Rule 60(b), which this Movant relies. Movant FIRST claims that a change in law constitutes a **"MISTAKE"** within the meaning of Rule 60(b)(1). Therefore, to correct that mistake and remove the judgment(s) previously entered herein. SECOND, after CASTRO, it is no longer equitable that the judgment in this action have prospective application and Movant is entitled to relief from judgment under Rule 60(b)(5). Lastly, in the event that this court finds that relief from judgment is not appropriate under either subsection one (1) or subsection five (5) of Rule 60(b), Movant invokes subsection six (6) of that Rule which allows for relief from operation of a final judgment for "any other reason[.]" See, Fed.R.Civ.P. 60(b)(6).

33. Movant understands, Rule 60(b)(6) **ONLY** applies if the reasons offered for relief from judgment are **NOT** covered under the more specific provisions of Rule 60(b)(1) thru (5). See, LILJEBERG vs. HEALTH SERV. ACQUISITION CORP., 100 L.Ed.2d 855, 874-875 and fn. 11. Based upon the mutual exclusivity doctrine, this court must first consider whether either Rule 60(b)(1) or Rule 60(b)(5) governs this motion.

IV.(A): RULE 60(b)(1) -- "MISTAKE"

34. Movant believes that Rule 60(b)(1) may be utilized by this Court to remedy the change in controlling law in this action. Rule 60 does not independently define "mistake," but that word "can easily be interpreted to encompass errors in law." See, KEVIN PARKER, Note, RELIEF FROM FINAL JUDGMENT UNDER RULE 60(b)(1) DUE TO JUDICIAL ERRORS OF LAW, 83 Mich. L.Rev. 1571, 1572 (1985)("Judicial Errors"). "Errors in law," in turn, have been held to include disregarding a change in controlling law. See, Id. at 1576 (citing, SCHILDHAUS vs. MOE, 335 F.2d 529 (2nd Cir. 1964). Courts are split as to whether Rule 60(b)(1) is the proper procedural vehicle when a party is claiming an INTERVENING CHANGE IN CONTROLLING LAW. In TARKINGTON vs. U.S. LINES CO., 222 F.2d 358, 359 (2nd Cir. 1955), the Second Circuit held that when the Supreme Court rendered a decision, eleven days after entry of judgment, which "conflict[ed] with the case on which the trial judge relied in directing a verdict, th[at] ... judge should have treated plaintiff's motion as [one] under Fed. Rules Civ. Proc. Rule 60(b) ...., to correct the mistake."

IV.(B): RULE 60(b)(5) — "PROSPECTIVE APPLICATION"

35. The two (2) requirements for obtaining relief from final judgment under Rule 60(b)(5) are that (1) the judgment has prospective application and (2) it is no longer equitable that it should so operate. See, 7 J. Moore & J. Lucas, Moore's Federal Practice 60.26[4] (2nd ed. 1982).

36. The February 10, 1997, RULINGS by the Honorable Robert G. Renner, ORDERED that **ALL** of Movant's motions filed under Federal Rules of Criminal Procedure **33 [RULE 33 MOTIONS]** would be treated as arising under Title 28 USC Section 2255, and denied. Therefore, the Court did not offer a final judgment on the **MERITS** of Movant **RULE 33 MOTIONS**, nor **PROVIDE THIS MOVANT AN OPPORTUNITY TO WITHDRAW THE RULE 33 MOTIONS/§2255 MOTIONS/ISSUES OR TO AMEND THE ISSUES SO THAT THEY CONTAINED ALL THE §2255 CLAIMS THAT THIS MOVANT BELIEVED HE WANTED TO RAISE.** Movant understands that

"A final judgment on the MERITS of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. See, COMMISSIONER vs. SUNNER, 333 U.S. 591, 597, 68 S.Ct. 715, 719, 92 L.Ed. 898 (1948).

37. The Fifth Circuit in KIRKSEY vs. CITY OF JACKSON, 714 F.2d 42, 43 (5th Cir. 1983) indicated that Rule 60(b)(5) relief may be justified if the law changes subsequent to the initial decision and if the parties would be bound by the previous judgment by res judicata: "If dismissal would bar a new and independent action between the same parties based on the same claims .... then it would have 'prospective application' by virtue of the continuing effect of the bar."

IV.(C): RULE 60(b)(6) -- "EXTRAORDINARY CIRCUMSTANCES"

38. Rule 60(b)(6) provides for relief from FINAL JUDGMENT where there is "any other reason justifying relief from the operation of the judgment." Rule 60(b)(6) "confers broad discretion on the trial court to grant relief when "appropriate to **ACCOMPLISH JUSTICE**." (emphasis added) INTERNATIONAL CONTROLS CORP. vs. VESCO, 556 F.2d 665, 668 n.2 (2nd Cir. 1977), cert. denied 54 L.Ed.2d 758 (1978) (quotations omitted) and KLAPPROTT vs. U.S., 335 U.S. 601, 615 (1949). "It is 'properly invoked where there are extraordinary circumstances,' [citations omitted] or where the judgment may work an EXTREME AND UNDUE HARDSHIP, [citations omitted] and 'should be liberally construed when **SUBSTANTIAL JUSTICE WILL THUS BE SERVED**.'" See, MATARESE vs. LeFEVRE, 801 F.2d 98, 106 (2nd Cir. 1986), cert. denied, 94 L.Ed. 2d 523 (1987):

> "A postjudgment change in law having retroactive application may, in special circumstances, **CONSTITUTE AN EXTRAORDINARY CIRCUMSTANCE WARRANTING VACATION OF A JUDGMENT**." (emphasis added)

See, MATARESE, 801 F.2d 98, 106, citing, inter alia, PIERCE vs. COOK & CO.,

518 F.2d 720 (10th Cir. 1975), cert. denied, 47 L.Ed.2d 89 (1976); McGRATH vs. POTASH, 199 F.2d 166 (D.C. Cir. 1952); see also, ADLER vs. BERG HARMON ASSOC., 790 F.Supp. 1235, 1245 n.10 (S.D.N.Y. 1992).

39. **OF GREAT IMPORTANCE** is the Second Circuit's statement in MATARESE, vs. LeFEVRE, 801 F.2d 98, 106 (1986):

> "We think it particularly appropriate for the district court to **ENTERTAIN A RULE 60(b)(6) MOTION ON GROUNDS OF A RETROACTIVE CHANGE OF LAW IN THE CONTEXT OF A HABEAS CORPUS PROCEEDING, IN WHICH '[C]ONVENTIONAL NOTIONS OF FINALITY OF LITIGATION HAVE NO PLACE.'** SANDERS vs. U.S., 373 U.S. 1, 8, 83 S.Ct. 1068, 1073, 10 L.Ed.2d 148 (1963); id. at 17, 83 S.Ct. at 1078 (court has discretion to grant a hearing on a successive petition for **HABEAS CORPUS** upon a showing that there has been an intervening change in the law)."

40. The Eighth Circuit stated that a "Change in law having retroactive application may, in appropriate circumstances, provide basis for granting relief under Rule 60(b). See, COX vs. WYRICK, 873 F.2d 200, 201 (8th Cir. 1989). Also see, BENSON vs. ARMONTROUT, 767 F.2d 454, 455 (8th Cir. 1985).

CONCLUSION

41. This Court has jurisdiction to pursue a RULE 60(b) MOTION to reopen this case that had been reviewed on appeal. See, STANDARD OIL CO. vs. U.S., 50 L.Ed.2d 21 (1976). In that case, the Supreme Court made clear that a party wishing to pursue a Rule 60(b) motion to reopen a case that had been reviewed on appeal was not required to obtain leave of the appellate court or a withdrawal of the appellate court's mandate before proceeding in the district court. The court reasoned that the district judge would not be flouting the existing mandate by acting on the motion since the appellate decision related only "to the record and issues then before the court, and [did] not purport to deal with possible later events." Id. at 23.

42. Movant is requesting this Court to follow in the steps of the U.S.

Supreme Court on December 15, 2003, when the Court **PROMULGATED A NEW PROCEDURE** to be followed when district court's recharacterize **RULE 33 MOTIONS** to count against a pro se litigant as a first 28 USC §2255 motion in later litigation, VACATING the district court's February 10, 1997 RESENTENCING JUDGMENT due to the district court considering **ALL** of Movant's RULE 33 motions as a first 28 USC §2255 motion in later litigation. See, CASTRO, 157 L.Ed.2d 778 (2003). By VACATING the February 10, 1997, RESENTENCING JUDGMENT, this court would be able to start anew and correctly rule on Movant's RULE 33 MOTIONS and allow Movant to file his **FIRST §2255** motion containing all of the claims that he believes he has.

43. **SEVENTH CIRCUIT RETROACTIVE APPLICATION OF CASTRO vs. U.S. ON APRIL 22, 2004:** The Seventh Cirucit gave RETROACTIVE APPLICATION to CASTRO vs. U.S., 157 L.Ed.2d 778 (2003), in WILLIAMS vs. U.S., 366 F.3d 438, 439 (7th Cir. 2004). The Seventh Circuit dismissed as UNNECESSARY Williams' application for leave to commence a successive collateral attack after being denied collateral relief under §2255 over two (2) years earlier, under CASTRO. "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 ¶8.**" Id. at 439.

44. The Tenth Circuit **TOLLED** the time of a defendant's §2255 filing due to district court's recharacterizing motion as §2255. See, U.S. vs. KELLY, 235 F.3d 1238, 1242-1243 (10th Cir. 2000).

45. The Second Circuit agrees with this Movant as to the procedure of VACATING the February 10, 1997 RESENTENCING JUDGMENT and 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. See, 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 re-characterization of his §3582 motion as a §2241 petition was improper. Accordingly,

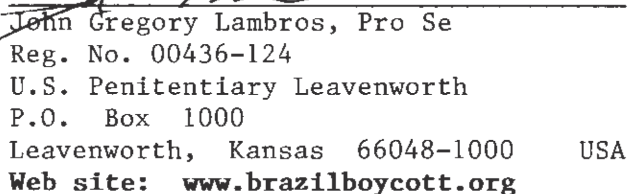
the judgment of the district court is VACATED and the case REMANDED to give Simon an opportunity to decline to have his §3582 motion converted into a §2241 petition. Foot Note 12: '.... If Simon opts to decline, he is then free to pursue whatever relief he may have available, in whatever venue available, 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.'").

46. Movant respectfully requests this Court to vacate judgement due to an intervening change in controlling law under any one of three separate subsections of Federal Rules of Civil Procedure 60(b) - sections one (1), five (5), and/or six (6).

47. 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: **SEPTEMBER 07, 2004.**

Respectfully Submitted,



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

HERNAN O'RYAN CASTRO, Petitioner

v

UNITED STATES

540 US —, 157 L Ed 2d 778, 124 S Ct —

[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 F3d 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 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 F3d 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

23.

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.

HEADNOTES

Classified to United States Supreme Court Digest, Lawyers' Edition

Courts § 538.12; Criminal Law § 74.5; Supreme Court of the United States § 9 — recharacterization of motion — successive motion for postconviction relief — supervisory power — procedure rule

1a, 1b. With respect to federal courts' longstanding practice of sometimes recharacterizing a motion, which a pro se litigant had labeled differently, as the litigant's first motion for federal postconviction relief under 28 USCS § 2255, a Federal District Court's recharacterization powers were limited, in that the court had to (1) notify the litigant that the court intended to recharacterize the pleading, (2) warn the litigant that this recharacterization meant that any subsequent § 2255 motion would be subject to § 2255's restrictions on "second or successive" motions, and (3) provide the litigant an opportunity to withdraw the motion or to amend it so that it contained all the § 2255 claims that the litigant believed the litigant had. If the District Court failed to do these things, then the motion could not be considered to have become a § 2255 motion, for purposes of applying to later motions the "second or successive" restrictions, as:

(1) Subjection of any subsequent motion under § 2255 to the restrictive conditions imposed upon a "second or successive" motion could be a serious consequence.

(2) No one in the case at hand contested the lawfulness of similar requirements that had been placed on such recharacterization by nine Federal Courts of Appeals.

(3) The United States Supreme Court agreed with the Federal Govern-

EXHIBIT A.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Criminal No. 4-89-82(5)(DSD/FLN)
Civil No. 99-28(DSD)

United States of America,

Plaintiff,

v.

ORDER

John Gregory Lambros,

Defendant.

This matter is before the court upon defendant's request for a Certificate of Appealability ("COA"). For the following reasons, defendant's request is denied.

BACKGROUND

On January 15, 1993, defendant was convicted by jury trial of various drug-trafficking offenses.[1] On January 27, 1994, he was sentenced to a term of life imprisonment on count 1 of the indictment, along with concurrent terms of 120 and 360 months on the other counts of conviction. On October 5, 1995, the United States Court of Appeals for the Eighth Circuit vacated the judgment with respect to count 1, affirmed the judgment on all other counts and remanded to the district court for re-sentencing on count 1.

[1] The trial was conducted before the Honorable Diana E. Murphy, United States District Judge.

FILED FEB 23 2004
Richard D. Sletten, CLERK
Judgment Ent'd. ______
Deputy Clerk's Initials ______

See United States v. Lambros, 65 F.3d 698, 700 (8th Cir. 1995). On February 10, 1997, defendant was re-sentenced by Senior United States District Judge Robert G. Renner to a term of 360 months imprisonment on count 1.[2] Defendant subsequently filed various motions to vacate the judgment and repeatedly sought relief from the sentence pursuant to 28 U.S.C. § 2255.[3]

On April 24, 2001, defendant filed a motion to vacate all judgments and orders issued by Judge Robert G. Renner pursuant to Fed. R. Civ. P. 60(b)(6). On March 8, 2002, this court dismissed that motion after construing it as an impermissible successive § 2255 motion. (Order of Mar. 8, 2002.) Defendant requested a COA of the dismissal of the purported Rule 60(b) motion. The court denied the request because defendant had not shown that "the issues deserve[d] further proceedings." (Order of May 29, 2002.) Defendant appealed the denial of the Rule 60 motion and COA, and the court of appeals affirmed. See United States v. Lambros, 40 Fed. Appx. 316, 2002 WL 1402099 (8th Cir. July 1, 2002), cert. denied, 537 U.S. 1135 (2003).

[2] The case was reassigned to Judge Renner following Judge Murphy's appointment to the United States Court of Appeals for the Eighth Circuit in 1994.

[3] Defendant's first collateral attack purportedly sought relief pursuant to Fed. R. Crim. P. 33, but was construed as a § 2255 motion. Defendant's second attempt was denied both as a successive § 2255 motion and as lacking merit. Defendant's third attempt was denied for lack of jurisdiction, because defendant had failed to obtain permission from the court of appeals to file a successive habeas petition, as required by 28 U.S.C. § 2255.

EXHIBIT B.

Defendant then moved to vacate the judgment denying his Rule 60(b) motion due to alleged intervening changes in the law. That motion was denied as lacking merit. (Order of Oct. 23, 2003.) Defendant challenged that order by bringing a motion to alter or amend judgment pursuant Fed. R. Civ. P. 59. The court denied the motion because Rule 59 is inapplicable to judgments other than "the original judgment in [the] case." (Order of Nov. 6, 2003, citing Fed. R. Civ. P. 59(e) advisory committee's note.) Defendant now requests a COA pursuant to 28 U.S.C. § 2253.

DISCUSSION

To be eligible for a COA, an applicant must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); Tiedeman v. Benson, 122 F.3d 518, 522 (8th Cir. 1997). The substantial showing requirement under § 2253 is a more stringent standard than the good faith and non-frivolous standard applied to applications to proceed in forma pauperis. See Kramer v. Kemna, 21 F.3d 305, 307 (8th Cir. 1994) ("[g]ood faith and lack of frivolousness, without more, do not serve as sufficient bases for issuance of a certificate"). Instead, the applicant must show that the issues to be raised on appeal are "debatable among reasonable jurists," that different courts "could resolve the issues differently," or that the issues otherwise "deserve further proceedings." Flieger v. Delo, 16 F.3d 878, 882-83 (8th Cir.)

(citing Lozado v. Deeds, 498 U.S. 430, 432 (1991) (per curiam)), cert. denied, 513 U.S. 946 (1994); Cox v. Norris, 133 F.3d 565, 569 (8th Cir. 1997), cert. denied, 525 U.S. 834 (1998).[4] When a district court grants a COA, it is "inform[ing] the Court of Appeals that the [applicant] presents a colorable issue worthy of an appeal." Kruger v. Erickson, 77 F.3d 1071, 1073 (8th Cir. 1996) (per curiam).

There are several reasons why defendant's request must be denied. First, defendant now acknowledges that the past two cycles of Rule 60(b) and related motions were in fact disguised successive § 2255 motions. Defendant states that he "moves this Honorable Court pursuant to 28 U.S.C. § 2253(c)(1) which requires a Certificate of Appealability (COA) before an appeal may be taken from 'the final order in a habeas corpus proceeding.'"[5] (Def.'s Mem. Supp. Mot. COA at 1.) That admission is fatal, because this

---

[4] Lozado, Kemna and Flieger describe the showing necessary to obtain a certificate of probable cause, as was required under § 2253 before its amendment in 1996. At that time, Congress replaced the certificate of probable cause requirement with the current certificate of appealability requirement. Nonetheless, "[t]he same substantive standard governs the issuance of the pre-Act certificate of probable cause and the post-Act certificate of appealability." Ramsey v. Bowersox, 149 F.3d 749, 759 (8th Cir. 1998).

[5] Defendant must necessarily be proceeding under 28 U.S.C. § 2253(c)(1)(B), because subsection (A) applies only to habeas actions arising out of State court process. See 28 U.S.C. § 2253 (c)(1)(A) & (B). Defendant is not challenging state action. Subsection (B) requires a COA only when an appeal is taken from "the final order in a proceeding under section 2255." Id. (emphasis added).

EXHIBIT B.

25.

court lacks jurisdiction over successive § 2255 motions brought without prior authorization from the circuit court. See 28 U.S.C. § 2255; Nims v. Ault, 251 F.3d 698, 706 (8th Cir. 2001) (Bye, J., dissenting); Boykin v. Unites States, 2000 WL 1610732, at *1 (8th Cir. 2000). It is undisputed that defendant has previously moved pursuant to § 2255 and that he has not obtained authorization from the circuit court for the current round of collateral attacks. Alternatively, if this series of motions does not constitute a collateral attack on the sentence pursuant to § 2255, a COA is unnecessary and defendant's request would be denied as moot. Defendant again cites Zeitvogel for the proposition that a COA must be obtained in order to appeal the denial of a Rule 60 motion. See Zeitvogel v. Bowersox, 103 F.3d 57, 57 (8th Cir. 1996). As the court discussed in its previous order, that case does not hold that a COA is a prerequisite to an appeal from the denial of a Rule 60(b) motion. (Order of Nov. 6, 2003 at 2 n.2.)

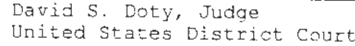
Second, if the motions in question did not constitute an unauthorized successive § 2255 motion and a COA was for some reason required, the request would nonetheless be denied. Defendant's claims have already been considered by the court of appeals. It is not within the province of this court to review, or to authorize review of, matters decided by that body. See 28 U.S.C. § 1331; Baker v. Riss & Co., 444 F.2d 257, 259 (8th Cir. 1971) (noting limited jurisdiction of the federal courts).

Finally, for the reasons stated in the court's orders of March 8, 2002, May 23, 2002, October 23, 2003 and November 6, 2003, defendant has not made a "substantial showing of the denial of a constitutional right" or presented an issue about which "'reasonable jurists could debate.'" 28 U.S.C. § 2253(c)(2); Miller-El v. Cockrell, 537 U.S. 322, 336 (2003) (quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000)).

CONCLUSION

For reasons stated, **IT IS HEREBY ORDERED** that defendant's application for a Certificate of Appealability is denied.

Dated: February 20, 2004



David S. Doty, Judge
United States District Court

EXHIBIT B.

67 TOTAL PAGES

1 UNITED STATES FEDERAL COURT
2 FOR THE DISTRICT OF MINNESOTA

---

3 United States of America,
4 Plaintiff,
5 -vs- File No. CR.4-89-82(05)
6 John G. Lambros,
7 Defendant.

8
9
10 TRANSCRIPT OF PROCEEDINGS in the
11 above-entitled matter before the Honorable
12 Robert G. Renner on February 10, 1997 at
13 United States Federal Courthouse, St. Paul,
14 Minnesota, at 10:00 a.m.
15
16 APPEARANCES:
17 Douglas Peterson, Assistant United States
18 Attorney, appeared as counsel on behalf of the
19 Government.
20 Colia Ceisel, Attorney, appeared as
21 counsel on behalf of the Defendant.
22
23
24 REPORTED BY:
25 BARBARA J. EGGERTH, R.P.R.

27

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 C.

1 Honor, and he has a motion before the court to
2 allow them to address the court.
3 THE COURT: I'll take it under
4 advisement. We'll see how things go.
5 MS. CEISEL: Thank you, Your Honor.
6 THE COURT: I am ready to commence
7 the court's part of this matter. I would ask
8 that you listen closely and I will tell you
9 that all parties will have an opportunity to
10 make their presentations, although the court
11 intends to limit oral presentations.
12 Before the court is the matter of the
13 United States versus John Lambros, Criminal
14 Number 4-89-82(05). It is necessary to
15 briefly review the procedural history of this
16 case. The defendant was previously convicted
17 in this court on four counts involving a
18 conspiracy to distribute cocaine. The
19 Honorable Diana Murphy sentenced the defendant
20 to two 120-month terms for Counts 2 and 3, a
21 360-month term for Count 4, and a term of life
22 imprisonment on Count 1. The defendant
23 appealed. Subsequently, the Eighth Circuit
24 affirmed all convictions, but vacated the life
25 sentence on Count 1 finding that while such a

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 C.

28

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

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 C.

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

1 material responding to the various motions
2 that have been made by Mr. Lambros. I do not
3 intend to elaborate on any of that material.
4 The government would rest on the written
5 position that has already been provided to the
6 court.
7 As for the sentence to be imposed this
8 morning on Count 1, the government is driven
9 by the fact that, despite this flurry of
10 paper, we settle back in the fact that
11 Mr. Lambros committed a serious crime and
12 Mr. Lambros has a serious criminal history,
13 and so the government reaffirms its view that
14 a serious sentence should be imposed on
15 Count 1, and the government has asked for a
16 sentence of 360 months without parole.
17 THE COURT: And the documents you
18 suggest to the court have been received and
19 defendant is aware of them and has received
20 copies of the same?
21 MR. PETERSON: Yes. I have
22 provided those all along the way to his
23 counsel, Ms. Ceisel.
24 THE COURT: Very well. Is there
25 anything further you would add at this time?

30.

EXHIBIT C.

1 MR. PETERSON: No, judge.
2 THE COURT: Very well. I leave it
3 to the defense; who wishes to be first,
4 Ms. Ceisel or your client?
5 MS. CEISEL: Your Honor, I believe
6 Mr. Lambros wishes to speak first, but I'm not
7 entirely clear as to what the procedure is at
8 this point. He wants to address the court
9 regarding the balance of his motions. And if
10 I understood correctly, he has a half an hour
11 to do that?
12 THE COURT: Yes.
13 MS. CEISEL: And then we're going
14 to follow with the sentencing issues?
15 THE COURT: Yes. Two different
16 approaches.
17 MS. CEISEL: I believe that he
18 wishes to speak first then, Your Honor.
19 THE COURT: All right.
20 THE DEFENDANT: Your Honor --
21 THE COURT: Would you use the
22 microphone, please, Mr. Lambros?
23 THE DEFENDANT: Yes, sir. Thank
24 you, Judge Renner, for letting me address you
25 today.

1 First of all, I would like to apologize
2 to this court for having to address this court
3 under the control of a foreign government. As
4 you know, I have supplied various documents,
5 including x-rays, that have been -- I don't
6 want to use the word "altered," but the
7 intensity settings were changed to prove that
8 I don't have these implants. That's another
9 issue probably for another day. There is
10 military CIA and NSA concerns regarding this
11 issue. To move forward --
12 THE COURT: I should advise you the
13 court has considered this matter, and it
14 considers it at this time, along with the
15 other motions that remain in your view -- give
16 me that last -- let's start over again.
17 THE DEFENDANT: Start over?
18 THE COURT: This won't count
19 against your time or anything.
20 THE DEFENDANT: Thank you.
21 THE COURT: I want to make sure
22 that what you are saying is being correctly
23 reported.
24 THE DEFENDANT: Would you like me
25 to speak slower, sir?

EXHIBIT C.

1 THE COURT: Just start over with
2 your remarks concerning the implants.
3 THE WITNESS: Okay. Your Honor, I
4 apologize for having to address this court and
5 the problems that occurred against this
6 government due to the fact that I was
7 implanted by a foreign government. I do have
8 the implants in me. I was brought into a
9 torture interrogation facility that was
10 constructed by the U.S. Army Corps of
11 Engineers back in the late '60s. I have
12 supplied information from the individual that
13 taught those individuals, Mr. Purvis
14 Cartwright, who spoke on the phone to my
15 attorney, Colia Ceisel. He was incarcerated.
16 Also, I had asked Douglas Peterson to contact
17 the U.S. Army. He was part of the Operations
18 Condor. Condor took place throughout South
19 America, and Operation Phoenix took place
20 throughout Asia. During that time, the U.S.
21 Army, CIA and NSA did mass implantations to
22 human beings. I was -- the individuals that
23 are interfacing with me right now are having
24 problems. The facility I was in is known as
25 this. Mr. Cartwright offered to be briefed to

1 the F.B.I. with Steve Gilkerson who is locally
2 here. Mr. Gilkerson will not take comments
3 from him due to the military classification of
4 the project. The x-rays that were first taken
5 at Rochester showed the implant. Previous
6 x-rays were taken at a different intensity
7 setting, sir. The government has not allowed
8 me to take x-rays again at that intensity
9 setting. The de-patterning room that I was
10 held in, the facility that the U.S. government
11 constructed that no U.S. individual was ever
12 to be placed in, I was placed in and
13 tortured. And Margaret Murphy, who was
14 subpoenaed during trial that didn't show up,
15 would testify to this effect. Jewish
16 intelligence uses de-patterning quite
17 extensively, and my whole body's been
18 de-patterned. I don't know if you are
19 familiar with the technology, but they call
20 them satellite prisoners. It's a form of
21 slavery. That's enough for the implantation
22 at this point in time.
23 To move forward, Dr. Logan wrote a letter
24 on January 28th stating in the part 2, My
25 opinion -- Mr. Lambros's second issue is

EXHIBIT C.

1 whether denial of competency hearing is a
2 denial of due process. In other words, is a
3 competency hearing required even if there is
4 no disagreement on the issue by the experts.
5 My opinion did not address whether Mr. Lambros
6 was functionally incompetent, but only that
7 any impairment in that regard was not the
8 result of mental illness. I believe Dr. Logan
9 is familiar with my implantation and also the
10 project that's taken place. He worked for the
11 Bureau of Prisons when Project MK Ultra was
12 taking place and they were doing implantation
13 at the Atlanta Penitentiary back in the late
14 '60s. So, I don't know if he is under NSA
15 contract for 25 or 30 years where he can't
16 divulge it, but there is a good chance that he
17 is. But again, he says that my opinion did
18 not address whether Mr. Lambros was
19 functionally incompetent. I'm functionally
20 incompetent. I can't assess information the
21 way I used to. I was an investment banker
22 here in town and I am very good at what I used
23 to be. They stole a lot of money from me down
24 in Brazil, among other things, Your Honor, and
25 the reason they implanted me was for that; for

1 extortion.
2 Regarding this resentencing, I refer to
3 59 Criminal Law Reporter, page 1188 on
4 5/29/96. It's U.S. versus Moore, Tenth
5 Circuit, 953121. And in there it says when a
6 defendant's sentence is vacated on appeal and
7 remanded for new sentencing, the lower court
8 must begin anew. I am asking for these
9 proceedings to be anew. They will include a
10 new presentence investigation and everything
11 else. And also that it talks about the
12 exceptions. As most rules within our judicial
13 structure, it is subject to exceptions in the
14 interest of justice. I am requesting all
15 information that's disseminated at this
16 hearing be construed under the interest of
17 justice, Your Honor. The lower court must
18 begin anew with de novo proceedings. I am
19 requesting complete -- everything starting new
20 with these proceedings, as of U.S. versus
21 Ortez 25 Fed 3d 934, 935. De novo
22 resentencing permits the receipt of any
23 relevant evidence the court could have heard
24 at the first sentencing hearing. U.S. versus
25 Ortez and U.S. versus Warren, 43 Fed 3d 1335

EXHIBIT C.

1 and 1340, Tenth Circuit, 1994. Federal Rules
2 of Criminal Procedure, 32 (b) (6) (d) allows
3 parties to raise new objections to the
4 presentence report for good cause shown.
5 Thus, this court's current conflict -- current
6 conflict -- in not allowing -- and I repeat,
7 in not allowing -- Lambros and Counsel Ceisel
8 to raise new issues with respect to the
9 presentence report at any time prior to the
10 imposition of sentence is a sentencing error.
11 The Georgetown Law Journal states -- on page
12 1292 talks about under Federal Rules of
13 Criminal Procedure 32 (b) (6) that I have 35
14 days to review my PSI. I requested a new PSI
15 and challenged all of the information within
16 it. Now, I have been denied that and I have
17 been denied the 35 days to review same. I am
18 not waiving any rights regarding information
19 or procedures surrounding my PSI report, thus
20 reserving all rights to challenge my
21 presentence investigation report, Your Honor.
22 Rule 32 (c) (1) states that once a defendant
23 makes an allegation of factual inaccuracy, the
24 government bears the burden of showing it to
25 be inaccurate. In front of me -- I just

1 received it this morning -- this is a
2 supplement to the presentence report. I
3 imagine Mr. Meyer was the one who composed
4 this. He is stating that my statutory penalty
5 for Count 1 is life imprisonment. I disagree
6 with that. I believe, as this court knows,
7 846 conspiracy, the penalty phase of 846 is
8 the 841. That's the object and the penalty.
9 And under that, within that time frame, I
10 believe the most I could have received was not
11 more than 30 years as was released by National
12 Legal Professional Associates out of Ohio in
13 their paper to the Eighth Circuit. So, that's
14 my position. The most I can be given on the
15 conspiracy count is 30 years, Your Honor, not
16 a life sentence. That's where I disagree with
17 Mr. Meyer and this court. Also, the 841 (b)
18 (1) (a) had a repeat offender provision which
19 called only for a term of imprisonment of not
20 more than 30 years and/or a fine.
21 Also, I would like to bring up regarding
22 -- this is very important -- in regard to
23 Count 1, Your Honor, I'm raising the argument
24 right now that I was denied due process of law
25 and effective assistance of counsel when at

EXHIBIT C.

1 sentencing a general verdict -- I repeat, a
2 general verdict -- was rendered by the jury
3 which did not specify which substantive
4 offense of a multi object conspiracy was
5 committed. Therefore, to carry my argument
6 further, Your Honor, under the 841 penalty
7 facet, the least -- the least penalty of the
8 offense is what I'm subject to. My -- am I
9 flowing correctly for you, sir? I'm sorry.
10 I'm stuttering and rambling a little bit.
11 THE COURT: You are doing fine.
12 THE DEFENDANT: Pardon me?
13 THE COURT: You're doing fine. I am
14 not asking you any questions because I
15 understand from your submissions what it is
16 you are saying and I don't want to use up any
17 of your time.
18 THE DEFENDANT: Okay. If you
19 understand what I am saying, we can flow
20 faster.
21 THE COURT: I think I do.
22 THE DEFENDANT: Okay. So, on that
23 particular situation what I am saying is that
24 I went through my -- went through the
25 transcripts here and I laid it out just

1 downstairs, I received them yesterday, where a
2 jury just gave a blanket verdict, general
3 verdict, so they didn't say which count or
4 which element of the conspiracy I was guilty
5 of. And that's not correct. So, I have a
6 brief that was done for somebody else out of
7 Leavenworth that's excellent, and it gets into
8 the multiple object conspiracy. And -- let's
9 see. Instead of charging movement with a
10 separate offense on each of the offenses
11 following the jury verdict, the government
12 failed to request a special verdict form
13 identifying which offense movement conspired
14 to commit. They didn't do this in this case.
15 So, as you are right today going to give me a
16 penalty for which facet of 841? And there is
17 other facets of the conspiracy. As you go
18 through the trial transcripts, Judge Murphy
19 reads the different elements of Conspiracy
20 Number 1. I would be more than happy to share
21 that with you right now, but it doesn't say
22 which one the jury found me guilty of. And
23 there is crimes in there that carry maybe five
24 years or ten years. I haven't had a chance to
25 research this. How do we attack this? I

EXHIBIT C.

1 mean, I don't know how I am supposed to
2 communicate with you right now.
3 THE COURT: I leave that to you.
4 THE DEFENDANT: Okay. Are you
5 clear what I'm trying to say, Your Honor?
6 THE COURT: I think so.
7 THE DEFENDANT: Okay. So, I don't
8 have to go into -- any deeper into this
9 issue?
10 THE COURT: Well, that's up to you
11 to what extent you are going to explore any
12 issue.
13 THE DEFENDANT: I'm saying that a
14 general verdict was rendered and that this
15 court doesn't have any idea on what phase of
16 841, if it's 841 or other counts, that it's
17 sentencing me on today. So, I don't see how I
18 can be sentenced until we have an evidentiary
19 hearing as to what exactly I was found guilty
20 of by the jury.
21 I guess that's enough for that right
22 now.
23 Your Honor, when you were speaking now,
24 you said that all the motions that are filed
25 to date are being construed under 2255?

38.

1 THE COURT: That's what I said,
2 yes.
3 THE DEFENDANT: Okay. And you are
4 saying none of them are under the Rule 33?
5 THE COURT: Yes.
6 THE DEFENDANT: Okay. I would like
7 to read from you the Rule 33, and again I
8 would like to reemphasize the interest of
9 justice facet of Rule 33, which I believe this
10 court is denying me the due process of, and a
11 motion for a new trial based on the grounds of
12 newly discovered evidence may be made only
13 before or within two years after -- the key
14 word -- final judgment. Today is the final
15 judgment, Your Honor. So, I believe all the
16 motions are valid Rule 33 motions, and I would
17 like to continue under that -- under those
18 pretenses.
19 Is it proper for me to ask you to
20 reconsider that at this point in time or no?
21 THE COURT: I assume you have asked
22 me that. If that's what you want to place of
23 record, I recognize that as being your
24 position.
25 THE DEFENDANT: Okay. Thank you.

EXHIBIT C.

1 The other point I would like to bring up
2 is the quantity of the controlled substance.
3 This, as you know, sentencing is the place to
4 bring up the quantity of a controlled
5 substance. And my position is that I never
6 had the cocaine. The court -- the Eighth
7 Circuit said -- I don't have it in front of me
8 -- that I perjured myself and lied as to --
9 due to the fact that I gave an astounding
10 story in Brasilia being with Toscanino. I
11 don't know if you recall that or not, Your
12 Honor. On March of '94, I think it was, after
13 we had been denied certiorari, which I wasn't
14 aware of, I submitted to the Supreme Court
15 along with the Senate of Foreign Relations
16 Committee Jessie Helms, who is the chair of
17 that committee, information as to my
18 imprisonment with Toscanino; the same
19 Toscanino that's in the books. I think it's
20 500 Fed 2d. I also submitted the information
21 to Mr. Peterson who has taken no effort on his
22 part to confirm it. He says -- he keeps on
23 writing in his -- in his filings that he's
24 done this investigation. He hasn't done
25 anything. I was in prison with Toscanino.

1 Toscanino again was tortured with me in the
2 same facility. I have given Mr. Peterson the
3 address to Toscanino in the penitentiary in
4 Italy. I have given him the address to
5 Mr. Toscanino's attorneys. I have given
6 Mr. Peterson a copy of the newspaper article.
7 What has Mr. Peterson done? He's right there
8 sitting. Nothing. This is justice? That man
9 should be in bars before anybody else. He
10 hasn't done a darn thing to investigate.
11 Margaret Murphy, who had all that information
12 of the torture facility, has he chosen to
13 address her? I have asked on Brady violations
14 the same thing. He has done nothing to
15 investigate. This is the true criminal. This
16 man cannot be respected in this courtroom. As
17 to the quantity of controlled substance, the
18 sentencing commission as of November 1st,
19 1995, amended 2 (d) 1.1, that requires this
20 court to exclude excess moisture in
21 determining the weight of marijuana or drugs.
22 If, in fact, I'm being penalized for drugs,
23 then the weight of those substances should be
24 deducted to give this court a fair -- to meet
25 within the legislative changes in U.S. versus

EXHIBIT C.

1 Smith 51 Fed 3d 980.
2 Will this court address more information
3 regarding the weight of the drugs?
4 THE COURT: I leave that to you,
5 Mr. Lambros.
6 THE DEFENDANT: Okay. I guess I
7 just want it on the record that I'm requesting
8 the court to look at the weight of the drugs,
9 which it hasn't done, nor did it ever do
10 during trial as to the transcripts we just
11 went through on the quantity.
12 Going back to the x-rays -- I'm sorry I
13 am jumping around -- again, I ask the -- I
14 requested a competency hearing where I
15 requested an expert for this competency
16 hearing. And under U.S. versus Rembert, 683
17 Fed 2d 1023, this is a letter quoting to
18 Dr. Logan on July 9th. Dr. Logan, it is very
19 important that you understand that I am
20 requesting you to review all past x-rays, CAT
21 scans and MRIs as I will be introducing same
22 at the competency hearing. The Federal Rules
23 of Evidence offers two ways of introducing
24 x-rays; pictorial testimony and silent witness
25 models. You may wish to review same under

1 U.S. versus Rembert. As you know, these
2 rules, constitutional and otherwise, apply
3 differently in trial and sentencing context.
4 For example, hearsay is inadmissible during
5 trial, but clearly admissible over claims of
6 violations of confrontation rights in
7 sentencing proceedings. I am being denied my
8 due process during these sentencing
9 proceedings. Information is clearly
10 admissible to this court. And that's under
11 U.S. versus Badger, 983 Fed 2d 1443, cert.
12 denied in 1993. Also, there is a
13 September 4th letter to Colia Ceisel, expert
14 radiologist to present testimony as to
15 implants within my skull that show in U.S.
16 Bureau of Prisons x-rays from U.S. Bureau of
17 Prisons Medical Facility, Rochester. I asked
18 Ms. Ceisel to obtain an expert to go over the
19 x-rays again. Basically, the x-rays that were
20 shot that showed the foreign bodies that the
21 government refuses to take at that intensity
22 setting. And for the Eighth Circuit, I quote
23 Foster versus Lockhart 9 Fed 3d 722. And
24 defendant presented plausible -- I believe
25 there is ineffective assistance of counsel

40.

EXHIBIT C.

1 claim here for Ms. Ceisel not securing an
2 expert as to radiology. During the trial --
3 or during the competency hearing that first
4 took place, the experts that had gone up never
5 talked about the reliability of the process
6 that was used in taking x-rays, and which
7 would include the type of camera used, its
8 general reliability, the quality of its
9 products, the purpose of -- the general
10 reliability of the system, etcetera.
11 Your Honor, we will go through the -- I
12 would like to start with the motions here. On
13 October 10th, I sent copies to this court,
14 newly discovered evidence, regarding an
15 affidavit from Samuel Haywood Myles and John
16 Bond as to information as to the U.S. Marshals
17 seeing implants within my skull at Abbott
18 Northwestern Hospital when they took me down
19 there. Also, John Bond is the individual who
20 was with Purvis Cartwright who was part of the
21 operation in implanting people. These are
22 affidavits and information I submitted to this
23 court, hopefully to have them in a hearing to
24 inform this court as to the implantation of
25 humans in Brazil; forced implantations and

41.

1 torture. My November 1st letter here to the
2 clerk is motion for an enlargement of time.
3 Basically, I believe I rendered information on
4 the thought-detecting machine, the
5 psychological language machine, that's being
6 used by our government that's manufactured in
7 the United States that's being used to
8 forcibly interrogate foreign citizens and U.S.
9 citizens abroad. And from what I understand,
10 it's occurring now in the United States. I
11 spoke with a professor at MIT who said he is
12 familiar with the project, and part of MIT
13 personnel were used in constructing this
14 machine in conjunction with Stanford people.
15 Also, Dr. Sutton wrote the Phoenix letter. I
16 am sure Judge Murphy is not very enchanted
17 about what he stated about her. Dr. Sutton is
18 a past Hoover and student of war revolution
19 and peace, UCLA and Stanford University, and
20 the world's most renown expert in Russian arms
21 control and money laundering, and
22 well-respected within the U.S. Senate. He
23 exposes the cover-up of the mass implantation
24 and the corruption within the Department of
25 Justice that probably filters down to

EXHIBIT C.

1 Mr. Peterson's level.
2 On February 10th, I asked for a -- I
3 filed motions regarding funds taken and issues
4 for resentencing as to double jeopardy as past
5 enhancements of past offenses. That's on the
6 -- within the court's record. That deals
7 with forfeiture that took place on -- back in
8 the '70s. This is a March 15th motion to bar
9 past criminal offenses in the resentencing of
10 John Gregory Lambros that will be used to
11 enhance current sentence and place Lambros in
12 a career offender's status due to double
13 jeopardy challenges. I believe all these are
14 valid Rule 33 motions.
15 Here, Your Honor, petition on May 7th to
16 the clerk was a motion. Petition for
17 evidentiary hearing, clarification as to the
18 cause of arrest in Brazil on May 17 to
19 determine if prison time in Brazil counts
20 towards Count 1, which you're sentencing me on
21 -- which I assume you'll be sentencing me on
22 today, and -- or towards a parole violation.
23 I was arrested in Brazil on a parole
24 violation, and it's my understanding under the
25 laws of retaking that is the sentence I would

1 serve first, and I'm looking to this court for
2 an evaluation as to am I serving a sentence
3 right now on Count 1, 2, 3 and 4, or am I
4 serving a sentence under a -- for a parole
5 violation?
6 THE COURT: Do you have something
7 to add?
8 THE DEFENDANT: I am asking you
9 which I am being sentenced under. I mean,
10 which -- how I am serving my time right now.
11 Is it proper for me to ask you that?
12 THE COURT: You can ask it. Your
13 question is on the record. I reserve the
14 right to respond at any time during the course
15 of these proceedings, but at this time I have
16 nothing to say.
17 THE DEFENDANT: Okay, Your Honor.
18 My position is, number 1, I was arrested on a
19 parole violation. There was no such crime as
20 a parole violation in Brazil. Parole
21 violation is the same as escape, and escape is
22 legal in South America as in most countries
23 and throughout Europe. And that was not part
24 of the extradition agreement with the State
25 Department that I would be tried or sentenced

EXHIBIT C.

42.

1 for any type of parole violation.
2 Also, May 14th, the motion to vacate
3 denial of federal benefits in Count 1,
4 resentencing. It clearly states that the
5 government cannot take away my federal
6 benefits. They took it away. Judge Murphy
7 took my federal benefits away, and it's under
8 -- let's see -- I believe under 21 USC 861
9 (a) (1). And it's an ex post facto situation
10 and it applies only to convictions occurring
11 after September 1st, 1989. Thus, my federal
12 benefits should be -- should not have been
13 taken away. I am asking this court to
14 reinstate all federal benefits.
15 On docket sheet number 152, my motion to
16 have the court order U.S. Assistant Attorney
17 Douglas Peterson to order polygraph testing
18 and questioning for the U.S. Department of
19 State, past and present employees, and U.S.
20 Department of Justice, past and present
21 employees, and contract agents who are
22 responsible for having John Gregory Lambros
23 placed in the known brain and body -- placed
24 in the known brain and body implantation and
25 torture interrogation, Federal Police Station,

43.

1 Brasilia, Brazil, knew that had de-patterning
2 cell rooms within and during 1991 through 1992
3 that were built by U.S. Army Corps of
4 Engineers in the late 1960s as shown by past
5 U.S. Army Rangers Intelligence Officer Purvis
6 Cartwright, Bureau of Prisons Inmate Number
7 59478079, who trained Brazilians in the use of
8 implantation and torture at the above-stated
9 police station. Again, this is also to be
10 construed as Brady information. Douglas
11 Peterson again has done nothing. In here,
12 there is another inmate I spoke to and I met,
13 James Reyes/Paulo Gaveria, who was also
14 implanted. He is serving time in federal
15 prison right now. And Toscanino may also be
16 implanted. His attorneys haven't chosen to
17 share that with me yet.
18 Docket sheet number 166, Julianne
19 McKinney and Harlan Girard. Harlan Girard is
20 -- I don't know what function he is within
21 NATO, but he is on the circuit there and
22 speaks regarding implantation. He is -- he
23 speaks throughout the world regarding the
24 subject. His associate, Julianne McKinney,
25 which holds upper U.S. -- I am told not to get

EXHIBIT C.

1 into that right now. Anyway, her letter to me
2 on July 27 of 1995, on page 6, the
3 psychological operations associated with these
4 experiments invariably involve attempts at
5 focusing the experimentee's attention and
6 hatred on a decoy to the exclusion of all
7 else. Your decoy is the Brazilian government
8 and a couple of American stooges. The use of
9 foreign nationals is standard in these
10 operations. Keep in mind the fact that at a
11 moment's notice the freaks running you can
12 switch their input for purposes of
13 re-persuading you that extraterrestrials,
14 Satan, and/or U.S. military are, in fact,
15 involved, whatever turns them on. Your best
16 approach is to ignore the attempt at
17 controlling your beliefs and perceptions, and
18 that you instead focus on the tantrums when
19 you start obstructing their activities and
20 running up their expenses. And this is the
21 most important statement on page 6 of the
22 letter of July 27. You got a taste of that
23 when you threw water on their microwave
24 emitters down in Brazil. Lots of fun, wasn't
25 it? And that was during a -- that was during

1 approximately a three-week stage when I was
2 being banged off the cellblock in the cell.
3 That was probably during a three-week stage --
4 that was during a three-week stage where I was
5 heavily -- well, used electric shock with the
6 microwave emitters and bounced off the cell
7 walls where the microwave emitter was in. And
8 basically they can control you by shooting the
9 microwaves into you and controlling your whole
10 body. There again, I offered the statements
11 from Andreaci who was incarcerated and still
12 in the United States and who was under the
13 control of a parole officer in Miami, but
14 Mr. Peterson again has refused to interview
15 him. Why? And he can verify all this. It
16 doesn't make sense. What's he trying to cover
17 up? So -- and he hasn't chose to interview
18 Julianne McKinney, who has a higher
19 classification of probably clearance in U.S.
20 government than anybody in this room, and
21 definitely higher than Mr. Peterson. And he
22 chose not to interview and she has given a
23 statement as to what happened to me down there
24 for the torture, but nobody will interview
25 these people. Why? What's everybody afraid

EXHIBIT C.

1 of, the truth?
2 Docket sheet 167. In this is a motion
3 for determination of status of Count 1 before
4 resentencing. I raise the objection that this
5 court did not have jurisdiction to bring me on
6 trial due to the fact that the alleged areas
7 where the crimes were committed were not
8 federal enclaves. Due to the fact that -- due
9 to this fact, it was the state's duty to
10 prosecute me and not the federal government.
11 It was not -- thus, legislative jurisdiction
12 was not -- was not seated. And I have
13 requested Mr. Peterson and those reviewing
14 this to show me where the federal government
15 owns the land where the crimes were
16 committed. Thus, the federal government has
17 no authority to have me here. I won't get
18 into other areas on that. I'll let the motion
19 speak for itself, and I have requested Colia
20 Ceisel to intervene and offer information.
21 Docket number 168, motion for evidentiary
22 hearing as to the willful conspiracy by U.S.
23 Assistant Attorney Douglas Ray Peterson, and
24 known and unknown individuals as to the
25 violations of fraud, false statements,

1 perjury, false declarations before a court or
2 a grand jury in the prosecution of John
3 Gregory Lambros in this above-entitled case.
4 In this motion, Your Honor, it clearly shows
5 through a Freedom of Information released by
6 the federal marshals -- this is an attorney's
7 initials, DRP.
8 Is that your initials here,
9 Mr. Peterson?
10 MR. PETERSON: It is, Mr. Lambros.
11 THE DEFENDANT: So, this is your
12 handwriting?
13 MR. PETERSON: That's correct.
14 THE DEFENDANT: Mr. Peterson lied
15 to this court, Your Honor, something he has
16 been doing all along. He said -- he told the
17 Brazilian government I had a mandatory life
18 without parole. He let me get convicted on
19 mandatory life without parole.
20 Mr. Peterson, right here it says, cocaine
21 conspiracy, 21 USC 846, potential penalty.
22 What does that say, Mr. Peterson?
23 MR. PETERSON: Mr. Lambros, make
24 your argument to the court.
25 THE DEFENDANT: Your Honor, it says

EXHIBIT C.

45.

1 maximum life, mandatory minimum, 10 years. I
2 had no mandatory life. Mr. Peterson doesn't
3 like me. If I didn't have these implants, I'd
4 probably show him how to do some law, believe
5 it or not, although I am not trained. But he
6 has lied to the court, he has lied to the
7 foreign governments and everything else. And
8 here in his own handwriting that was submitted
9 to people, he has lied to everyone.
10 I would even ask the --
11 THE COURT: Your time is up,
12 Mr. Lambros. I am going to give you an extra
13 10 minutes within which to sum up your case,
14 so you bear in mind your 10 minutes starts
15 from now.
16 THE DEFENDANT: Okay. I won't have
17 enough time to go through the rest of my
18 information.
19 Again, I am asking -- to get to the crux
20 -- for a new trial under Rule 33 as to
21 requesting reversal of Count 1 due to Margaret
22 Murphy not obeying the January 11th, 1993
23 subpoena of Judge D. Murphy to testify and
24 supply documents. Under Kyles versus Whitley,
25 131 Lawyers Edition, 2d 490, it says that

1 absence of the suppressed evidence denied
2 Lambros a fair trial, thus resulting in a
3 verdict unworthy of --
4 COURT REPORTER: Slow down, please.
5 THE DEFENDANT: Pardon me?
6 COURT REPORTER: Please slow down.
7 THE DEFENDANT: Oh, I'm sorry.
8 Under Kyles versus Whitley, under Kyles it
9 makes no difference -- okay. This is Docket
10 sheet number 182. Okay. Under Kyles versus
11 Whitley, 131 Lawyers Edition, 2d 490. Under
12 Kyle, it makes no difference whether the
13 testimony of other witnesses might have been
14 sufficient to convict defendant Lambros absent
15 Margaret Murphy's testimony. In short, a
16 showing of materiality does not require
17 demonstration by a preponderance that
18 disclosure of the suppressed evidence would
19 have resulted ultimately in the defendant's
20 acquittal. This court will also find that
21 U.S. Judge Murphy erred in failing to follow
22 the normal procedures of Title 28 USC 1826 and
23 Title 18 401, Chambers versus Nasco, which
24 offers an excellent overview of the normal
25 procedure to stop the trial and request the

46.

EXHIBIT C.

1 U.S. Marshals to secure any individual that
2 has been subpoenaed to testify. Defendant
3 Lambros submitted the following two documents
4 that should be considered. These are past
5 documents that I submitted. In conclusion
6 regarding this document, the defendant prays
7 that this court will order an evidentiary
8 hearing as to the facts that the court and the
9 U.S. Assistant Attorney Peterson had an
10 affirmative duty to disclose material evidence
11 favorable to criminal defendant. Brady versus
12 Maryland. The prosecutor's obligation to
13 disclose material information to defendant and
14 jury is a fundamental component of the
15 guarantees of criminal defendants -- that
16 criminal defendants receive fair trials.
17 Further, it is well settled that the
18 disclosure obligation includes evidence that
19 would be used to impeach the credibility of a
20 witness. Giglio. Thus, this court should not
21 lightly excuse Brady violations because the
22 government's nondisclosure in this case
23 significantly impaired defense's ability to
24 impeach the credibility of a principal
25 prosecution witness. The ruling to reverse

47.

1 Count 1 for a new trial is in order. Again, I
2 request a new trial due to the subpoena of
3 Margaret Murphy, that she didn't show up, and
4 the information she has will confirm -- will
5 confirm my torture.
6 Your Honor, there is too many other
7 motions here that have to go through. Oh,
8 also the information on Michael Ayd recanted
9 his testimony is very important. Michael Ayd
10 testified that I talked to him about drugs.
11 He gets in there. He assumed I was talking
12 about cocaine. And I was talking to Mr. Ayd
13 about drugs, but it was marijuana, not
14 cocaine, that I had done drug dealings with
15 Pebbles with. Remember, I had purchased three
16 or four hundred pounds of marijuana from
17 Mr. Pebbles. I never purchased cocaine. And
18 Mr. Pebbles delivered that to my house. And
19 that testimony with John Bolger -- lied on the
20 stand -- and I have since spoken with Larry
21 Pebbles, and Larry Pebbles said he released
22 all the information to the DEA as to my
23 marijuana purchases. Yet, John Bolger of the
24 DEA lied saying that I never purchased
25 marijuana.

EXHIBIT C.

1 So, all -- I guess not being literate in
2 law, Your Honor, I am requesting a new trial.
3 I think the strongest points I have is the
4 Margaret Murphy where the subpoena was issued
5 by Judge Murphy, and she didn't show up during
6 trial to offer testimony as to the torture and
7 interrogation facility I was kept in. The
8 Brady violations by Mr. Peterson where he
9 refused to interview Toscanino, which his
10 address is available. Intervene with the
11 newspaper articles as his -- that state --
12 that clearly show that he was incarcerated
13 with me in Brasilia, Brazil in the same
14 torture interrogation facility. And he has
15 even refused to ask -- to write to the
16 Brazilian government asking if Toscanino was
17 held with me. And --
18 THE COURT: Your time is up,
19 Mr. Lambros.
20 THE DEFENDANT: Okay. Thank you for
21 your time.
22 THE COURT: Does the government
23 have any response?
24 MR. PETERSON: No, Your Honor.
25 THE COURT: Ms. Ceisel, is there

1 anything you would place of record at this
2 time?
3 MS. CEISEL: Just a few things,
4 Your Honor. Your Honor, Mr. Lambros, in
5 speaking with him over the weekend, has asked
6 that I submit to the court report of the
7 competency evaluation done by Dr. Logan and
8 also a follow-up letter that Dr. Logan wrote
9 in response to some questions by Mr. Lambros.
10 I offer those to the court at this time.
11 THE COURT: Any objection by the
12 government?
13 MR. PETERSON: No, Your Honor.
14 THE COURT: They will be received.
15 MS. CEISEL: In submitting them,
16 Your Honor, I would like it to be clear that I
17 advised Mr. Lambros that those are not part of
18 the record, that those are covered by
19 attorney-client privilege, and that I do not
20 believe it's in his best interest to have
21 those admitted, but he has directed me to
22 offer them nonetheless.
23 THE COURT: So, you are opposing
24 the admission of these documents?
25 MS. CEISEL: I don't think it helps

48.

EXHIBIT C.

1 his case, Your Honor, but he wants them
2 admitted.
3 THE COURT: Well, is there any
4 reason why I shouldn't receive them under seal
5 so that they will be preserved for whatever
6 purpose?
7 MS. CEISEL: No, Your Honor, there
8 is not.
9 THE COURT: Mr. Peterson, do you
10 have any suggestions in this regard?
11 MR. PETERSON: I would just leave
12 that to Mr. Lambros. If he would like them
13 under seal because it's his own information,
14 that would be fine with me. If he would
15 prefer that they be in the public record,
16 that's fine with me, too.
17 THE COURT: Let's ask Mr. Lambros
18 right now. What do you want to do?
19 THE DEFENDANT: The information is
20 already on public record on web sites.
21 THE COURT: I'm sorry?
22 THE DEFENDANT: The information is
23 already of public record on web sites
24 internationally, so there is no need to seal
25 it.

49.

1 MS. CEISEL: Your Honor, he is
2 saying that he has put it on his home page and
3 it's accessible through the Internet, so it's
4 already a matter of worldwide public record.
5 THE COURT: Well, it seems to me
6 that under the circumstances I should receive
7 it as being offered, and there is no
8 objection. Very well. We'll dispose of it in
9 that fashion.
10 MS. CEISEL: Thank you, Your
11 Honor.
12 Your Honor, I would like -- there are two
13 points at which Mr. Lambros addressed the
14 court on the competence of counsel. I would
15 like to just -- I guess three. And I would
16 like to just make a couple factual
17 clarifications on those issues.
18 He mentioned a telephone conversation
19 that he claims I had with Purvis Cartwright.
20 So the record is clear, Mr. Lambros called me
21 from Leavenworth, put someone on the telephone
22 who would not identify himself, who gave me
23 some information, and then Mr. Lambros has
24 since told me and has since referred to that
25 as a telephone conversation with Purvis

EXHIBIT C.

1 Cartwright. I have no idea with whom I had a
2 telephone conversation nor had I any prior
3 knowledge of the voice or person at the other
4 end of the line.
5 THE COURT: Have you discussed this
6 matter with Mr. Lambros?
7 MS. CEISEL: I have, Your Honor.
8 THE COURT: And his response?
9 MS. CEISEL: His response is that
10 he had Purvis Cartwright talking with me. And
11 there was a separate affidavit which was
12 submitted by Mr. Lambros which has been
13 provided to the court.
14 In terms of a competency hearing, as the
15 court is aware, I did have another
16 psychiatrist interview Mr. Lambros at some
17 length. That report is now in the record. I
18 asked for an appointment of a counsel -- or a
19 psychiatrist -- chosen by myself rather than
20 having Mr. Lambros again evaluated through the
21 federal medical system. That expert spent a
22 substantial amount of time with Mr. Lambros.
23 He is an expert recommended to me by the
24 Federal Public Defenders office in the area of
25 Leavenworth. As the report makes clear, he is

50.

1 of the opinion that Mr. Lambros is not
2 suffering from any mental illness which
3 renders him incompetent. I did not hire a
4 radiologist to review the x-rays in this
5 case. I did have available the results of the
6 CT scan that were done by the expert chosen by
7 Mr. Lambros's family. I also had available
8 the results of the MRI done through the
9 Cushing Memorial Hospital in Kansas at the
10 direction of the staff psychiatrist at
11 Leavenworth.
12 I have nothing further in terms of the
13 factual record, Your Honor. I do have some
14 matters to address in terms of sentencing.
15 THE COURT: Yes. That will be
16 next. Very well. We will now proceed to
17 sentencing. Defendant's request for a new PSR
18 is denied. Further, the court will not
19 disturb the sentencing factors determined to
20 be applicable for the sentencing court with
21 the exception of the length of sentence under
22 Count 1. Specifically, the defendant is a,
23 quote, career offender, unquote, under the
24 guidelines providing an offense level of 37.
25 His criminal history category is 6. Under the

EXHIBIT C.

1 sentencing guidelines, Chapter 5, part A, the
2 range of imprisonment is 360 months to life.
3 First, the parties will be heard with
4 respect to the other sentencing factors.
5 Ms. Ceisel, do you have anything in this
6 regard?
7 MS. CEISEL: I do, Your Honor.
8 THE COURT: This will be followed,
9 Mr. Lambros, by your remarks so that you -- I
10 am advising you so that you may be prepared.
11 THE DEFENDANT: Okay.
12 MS. CEISEL: Again, Your Honor, I
13 have available for the court a letter that
14 sets forth evidence as to Mr. Lambros's
15 current medical condition. He has asked that
16 this be admitted as part of the sentencing
17 exhibits. He understands that this is
18 otherwise confidential medical information.
19 Is that accurate, Mr. Lambros?
20 THE DEFENDANT: I am sorry. I
21 wasn't listening.
22 MS. CEISEL: I have available for
23 the court the letter that I received from
24 Leavenworth detailing your medical condition
25 at this time. Do you understand that that is

1 confidential medical information and it can
2 not normally be admitted in court?
3 THE DEFENDANT: I wish to have it
4 admitted in court.
5 MS. CEISEL: Is it your direction
6 then that you wish me to offer this despite
7 the normal medical privilege?
8 THE DEFENDANT: That's correct.
9 THE COURT: Very well. The court
10 recognizes the fact that the privilege is
11 waived. It may be received.
12 MS. CEISEL: Your Honor, at
13 Mr. Lambros's direction, I have before the
14 court a motion to sentence him outside the
15 applicable guideline range. Specifically, he
16 is asking that the court sentence him to a
17 five-year term of imprisonment on Count 1 of
18 this indictment. One of the main reasons that
19 he makes that request is his medical condition
20 as revealed by that letter from Leavenworth.
21 He has Hepatitis C. While it is not an
22 invariable death sentence, it affects -- it
23 greatly increases the likelihood that he will
24 develop liver cancer or else cirrhosis. It
25 affects his prognosis for a long -- or the

EXHIBIT C.

51

1 chances of him outliving his sentence. He
2 also feels that -- Mr. Lambros would urge the
3 court to consider a five-year sentence because
4 he thinks that more fairly reflects the
5 criminality of his part in the events proved
6 by the government.
7 If the court is not in agreement with
8 Mr. Lambros's motion for departure, I would
9 ask the court on his behalf to limit the
10 sentence to 30 years. Judge Murphy, who heard
11 the trial evidence in this case, clearly
12 indicated that she, but for the mandatory
13 minimum sentence, would have sentenced
14 Mr. Lambros to a 30-year term. She had the
15 option on Count 4, when she did the original
16 sentencing, of sentencing anywhere between 30
17 years and life. And that count, where she was
18 not constrained by what she believed at the
19 time was a mandatory minimum sentence, she
20 chose the low end of the range. She chose the
21 30 years. I would suggest to the court that
22 it would be appropriate to give deference to
23 her long familiarity with the case, her long
24 contact with Mr. Lambros, and her decision as
25 to the appropriate sentence after hearing all

52

1 of the testimony in this case.
2 It is easy to get impatient with
3 Mr. Lambros, and it is easy out of that
4 impatience to decide to just throw the book at
5 him. He brings before the court the same
6 motions, the same claims, the same evidence
7 over and over again. In the process of
8 bringing those before the court, he is
9 insulting to the officers of the court and to
10 the people that must report to this court.
11 All of that is obvious and true. Nonetheless,
12 it does not justify going beyond the 30-year
13 sentence, that is the low end of the range,
14 despite an immediate emotional reaction which
15 would make that option attractive.
16 In speaking with Dr. Logan, it was clear
17 that he did not believe that Mr. Lambros was
18 suffering from either mental illness or defect
19 that would render him incompetent. However,
20 Dr. Logan did not rule out the possibility
21 that Mr. Lambros has a fixed belief that he,
22 in fact, has the implants. In other words, he
23 did not share the opinion of FMC Rochester
24 that this was simply a game on Mr. Lambros's
25 part. That seemed to me at first a

EXHIBIT C.

1 contradictory set of statements. And when I
2 questioned him further, what he said is that
3 what -- that many people wander around with a
4 fixed belief that is not susceptible to any
5 kind of testing, but it is not a mental
6 illness, it is not a mental disease, and it
7 does not render them incompetent, and to some
8 extent whether or not someone's fixed belief
9 is faith or a delusion depends on your point
10 of view. An example would be those people who
11 are involved in New Age philosophy and firmly
12 believe that they channel spirits from another
13 time. There are many competent people who
14 share that belief. It is a true belief, it is
15 not done to malinger or to play games, but it
16 is -- it is a fixed belief. It is not
17 susceptible to reality testing, but it is --
18 it does not render them incompetent. I would
19 suggest to the court that as annoying as
20 Mr. Lambros's presentation can be, and as
21 annoying as his continual submissions on the
22 same issues can be, that that is not the basis
23 upon which he should be sentenced here today.
24 If the court will not grant the departure to
25 sentence below the guideline range, I would

1 ask the court to apply the 30-year range that
2 is the bottom of the guideline range.
3 Thank you.
4 THE COURT: Very well.
5 Mr. Peterson, is there any response by
6 government?
7 MR. PETERSON: For the record, Your
8 Honor, the government opposes the motion for a
9 downward departure. The government would also
10 note that from its point of view the original
11 finding that Mr. Lambros is a malingerer
12 remains consistent with the practice before
13 this court, and I also believe that his
14 testimony or statement this morning also
15 confirms his competency to stand resentencing.
16 THE COURT: Thank you.
17 I'll address you personally at this time,
18 Mr. Lambros. You have heard the remarks of
19 your attorney and you've heard the
20 government's remarks in this connection. Do
21 you have anything to inform the court
22 concerning the sentence to be imposed?
23 THE DEFENDANT: Your Honor, I am
24 unclear of one thing now. I spoke with Colia
25 Ceisel. She was supposed to submit a motion

53.

EXHIBIT C.

1 for downward departure for five years due to
2 my Hepatitis C; is that correct?
3 MS. CEISEL: I did, and I believe I
4 addressed the court on that matter. However,
5 in the alternative if the court does not grant
6 that motion, I asked that the court sentence
7 you at the very bottom of the range.
8 THE DEFENDANT: Okay. But it's my
9 understanding the motion has been submitted
10 and that we did ask for five years due to the
11 Hepatitis C?
12 MS. CEISEL: That's correct.
13 THE DEFENDANT: Thank you. Again,
14 I would like to bring up Dr. Logan's letter as
15 to my opinion did not address whether
16 Mr. Lambros was functionally incompetent. I
17 believe I am functionally incompetent due to
18 the implants and the control that I'm under
19 right at this point in time by a foreign
20 government. I am being tortured. My whole
21 body is being controlled. And the direct
22 interface does not allow me to communicate
23 with this court in -- I don't know what the
24 best word is -- in the ways that I would
25 without the control element in me. My body's

1 being degenerated due to this control, and I
2 don't know what I did to deserve this. But
3 from what they said to Judge Murphy, I am
4 being used as a political puppet, and I guess
5 I have to take that as the reason why because
6 I don't function in the stratus of national
7 security.
8 As to the departure, on October 16th I
9 submitted a letter to the clerk of courts as
10 to departure to support downward departure
11 pursuant to 5 (h) (1.4) based on my
12 extraordinary physical impairments.
13 Extraordinary physical impairments being,
14 number 1, the Hepatitis C, which I have been
15 given, I believe now, close to five more years
16 to live. The U.S. Bureau of Prisons has
17 denied me a liver transplant. I don't believe
18 I filed the motion correctly asking for a
19 liver transplant because they used the
20 Disability Act, and I didn't quote the law
21 correctly when I filed it. But -- and also
22 the removal of the brain control implants or
23 the parametric cavities. Now, it's my
24 understanding that -- well, the following
25 documents will assist the forthcoming expert

EXHIBIT C.

1 testimony with respect to -- I believe the
2 thesis of this is whether the Bureau of
3 Prisons can care for my medical problems. I
4 don't believe the Bureau of Prisons can care
5 for my medical problems: Number 1, giving me
6 a transplant, which they can't, and number 2,
7 allowing me to function with these brain
8 control implants, parametric cavities.
9 Because they won't, I don't believe I should
10 be incarcerated. And I believe the U.S.
11 Bureau of Prisons, under the sentencing
12 guidelines pursuant to 5 (h) 1.4, a case on
13 that is United States versus Sherman, 53 Fed
14 3d 782, where they gave downward departure to
15 an individual that was obese and where it was
16 remanded for expert testimony. Again, I am
17 requesting expert testimony as to why I should
18 be given a liver transplant if I am going to
19 be given over five more years or X amount --
20 or how many years I am supposed to be given,
21 and the removal of my implants.
22 Again, I don't have anything more to say,
23 Your Honor. I think this is all wrong, and I
24 believe the government's -- Douglas Peterson's
25 involved in the cover-up in not exposing my

55

1 torture with Toscanino, that was plainly
2 offered to him, and in his malingering ways of
3 not contacting the correct authorities as to
4 the torture -- as to the torture facility. He
5 has never once contacted my attorneys nor
6 contacted the president of Brazil --
7 THE COURT: I remind you,
8 Mr. Lambros, this is a matter of downward
9 departure. You're expanding beyond that
10 matter.
11 THE DEFENDANT: Oh, okay.
12 THE COURT: Have we heard you out
13 then with regard to your position as to
14 downward departure?
15 THE DEFENDANT: Yes, yes. I also
16 would like to submit this request -- I mean,
17 this memo from Attorney Jeff Orren to the
18 court. That was addressed to Colia Ceisel.
19 Do I just give this to him?
20 THE COURT: You are making that an
21 offer.
22 Is there any objection?
23 MR. PETERSON: No, Your Honor.
24 THE COURT: Very well. It will be
25 received. Is that your -- have you completed,

EXHIBIT C.

1 Mr. Lambros?
2 THE DEFENDANT: Yes. Also, my
3 father and mother would like to address the
4 court.
5 THE COURT: And would you tell me
6 how long they request?
7 THE DEFENDANT: Well, I believe
8 they'll each need only two, three, four
9 minutes, Your Honor.
10 THE COURT: Very well.
11 MS. CEISEL: May they approach,
12 Your Honor?
13 THE COURT: You may call them.
14 MS. CEISEL: Mr. Lambros, Senior.
15 Your Honor, for the record, approaching
16 the microphone at this time is John Lambros's
17 father, John Lambros, Senior, I believe.
18 JOHN W. LAMBROS: John W.
19 MS. CEISEL: John W. Lambros, thank
20 you.
21 JOHN W. LAMBROS: Thank you for the
22 opportunity of addressing the court. I have
23 just a few things that I would like to
24 reiterate that perhaps have not been fully
25 addressed. I have lived with my son 47

56.

1 years. I went through all the parental
2 problems. I was in business with my son. His
3 record was very admirable in most areas. His
4 competency and ability were no question.
5 However, in the last 10 or 12 years, there is
6 a lot of question as to whether he was
7 maintaining that. I want to, first of all,
8 call the evaluation of page 2 of Logan, M.D.,
9 and I quote, There are concerns about
10 Mr. Lambros's judgment. Page 4,
11 Dr. Kucharski, Rochester Federal Medical
12 Center, quote, Lambros has personality
13 disorder. Page 5, Criqui, Ph.D., Lambros has
14 residual schizophrenia, posttraumatic
15 delusion. Page 6, G. Ibarra, M.D.,
16 Leavenworth, Lambros has delusional disorder,
17 prescribed antipsychotic medication and is
18 currently receiving psychotherapy. Page 13 of
19 the same, Logan, M.D., and again, Mr. Logan,
20 Mr. Lambros not mentally ill or
21 disillusional. I am neither supporting or
22 refuting his assertion he has an implant.
23 Now, there are a great deal of contradictions
24 in that report. I guess -- and it's not easy
25 for a father to say this -- but with what my

EXHIBIT C.

1 son has gone through, I really question
2 whether he's playing with a full deck. I am
3 very serious. It's very hard for me to say
4 that, but I would just give you the background
5 and to the best of my recollection on why he
6 has gone through and is incompetent. And this
7 is to the best of my recollection. When he
8 was in trouble, I flew to Rio de Janeiro. I
9 spoke to John Lowell, an embassy officer by
10 phone and personally, and also to Margaret
11 Murphy, an embassy officer concerning about
12 bail and also about visitation. Nothing could
13 be arranged by either one of them, which as a
14 citizen and someone who had fought for my
15 country, is a poor way to treat a citizen.
16 The only visit we were able to conduct was
17 with attorneys. Now, this is the crux of it.
18 The treatment in the Brazil cells, the filth,
19 the lack of water and food, clothes, even a
20 pad to sleep on, overcrowding, being
21 persecuted as the word goes, as a gringo, a
22 foreigner, reminded me really of -- I was in
23 WW II, and the conditions in some of those
24 prison camps were better than what they had in
25 Brazil, and it's no question in my mind

57

1 diminished his faculties considerably. Now,
2 this same condition -- again, I can show proof
3 -- the Brazil attorneys which I hired noted
4 this and his diminished mental capacities.
5 His robust health, which you look at him now,
6 he's bad news, he's bloated, he was tortured,
7 he is no semblance of the son I had for 47
8 years. When he came back here, he would not
9 accept legal counsel which has been
10 substantiated by Faulkner, his original
11 attorney. He says the man is incompetent.
12 This is a matter of record. He wouldn't
13 accept family counsel from his mother, from
14 his brother, from his sister, from myself. He
15 even turned down a very desirable plea bargain
16 which was submitted which anybody in their
17 right mind would say, What's with you? You're
18 going to turn down eight, ten, fifteen years
19 and take life? Now, the existing attorney,
20 Attorney Ceisel, and Faulkner, the two
21 Brazilian attorneys, and all of these remarks
22 I gave you out of there, all indicated his
23 incapacity, if you will. I'll show you -- or
24 I will point out to you in conclusion that at
25 the time of his trial I believe there were

EXHIBIT C.

1 eight coconspirators, which -- what degree of
2 guilt they were charged with or not charged
3 with, I don't know. What I do know is that
4 everyone in that group of eight, with the
5 exception of my son and his poor judgment, we
6 will call it, or incompetency is another word,
7 they all cooperated and they were all given
8 probation. And the supposed kingpin of it,
9 Pebbles, I guess was charged on an income tax
10 thing. My son, through his lack of good
11 judgment, if you will, incompetency, sat by
12 and watched all of this. This, I believe, is
13 the best thing I can say is -- questions his
14 competency. Thank you again.
15 THE COURT: I take it that your
16 presentation at this time is in support of a
17 motion for downward departure?
18 JOHN W. LAMBROS: Yes, sir. I am
19 sorry.
20 THE COURT: Very well.
21 JOHN W. LAMBROS: I am not versed.
22 There again, my last arguing statement would
23 be that do you think it's a competent man that
24 is coming up and saying, Hey, judge, are you
25 completely acquainted with Rule 33 or some of

58

1 the other things that he questioned and come
2 up and castigate the Assistant United States
3 Attorney or whatever? No one in their right
4 mind does things like this, Judge. Thank
5 you.
6 MS. CEISEL: Your Honor, at this
7 time I understand that Mrs. Lambros wishes to
8 address the court.
9 THE COURT: I'm sorry?
10 MS. CEISEL: At this time, I
11 understand that Mrs. Lambros wishes to address
12 the court.
13 THE COURT: Very well.
14 PAT LAMBROS: Thank you, Your
15 Honor. I have very little to say because I'm
16 --
17 THE COURT: You are making --
18 PAT LAMBROS: I am sorry I am very
19 emotional today, but I am John's mother.
20 THE COURT: I am not trying to pick
21 on you. As I understand it, you are making
22 this argument in favor of your son in his
23 request for a reduced sentence?
24 PAT LAMBROS: That is correct, Your
25 Honor.

EXHIBIT C.

1 THE COURT: Very well.
2 PAT LAMBROS: And I appreciate your
3 giving me the opportunity to say a few words.
4 Because of his imprisonment for a year in
5 Brazil, he suffered inhumane torture that no
6 one should ever have to go through. I also
7 believe it's possible that an implant was
8 inserted into his brain to control his
9 thoughts. He is not the same son I have known
10 all my life. In the summer of '92, two skull
11 x-rays were taken, and that was at the federal
12 prison in Rochester. The first one showed an
13 abnormality. The second one showed it was
14 normal. The way I understand, that there was
15 a 37 to 38 percent discrepancy between the
16 degree of intensity used. And why this is --
17 this was done, I really don't know. We have
18 never been told.
19 I was present at his trial in January of
20 1993. He definitely was not competent to
21 stand trial at that time. I'm afraid that
22 people might believe that this is just an
23 exhibition for a court case. His father and I
24 talk to him all the time. This is not an
25 exhibition. This is the way he is day in and

1 day out. And he was led to believe if found
2 guilty he would have to serve a mandatory life
3 imprisonment and without parole. Also, at
4 that trial -- I realize I don't know all the
5 things that do go on at a trial, but there
6 were witnesses. Everybody's looking for their
7 own back. I guess I understand that, but John
8 is this crazy human being that believes he
9 would never say anything against another
10 person. I'm sorry he spoke so terribly to
11 Mr. Peterson today. But once he has a friend,
12 he sticks by a friend. These people got up
13 and told these awful stories about him. There
14 was a young lady that peddled cocaine
15 throughout the United States with a little
16 child in her car, and she got off without
17 being sentenced at all. I can't believe these
18 things or else I don't know the justice
19 system, and I've lived almost 70 years now,
20 his father is 74, and I don't understand
21 this. But all I know is that trial was a
22 tragedy being played out before my eyes and
23 there was nothing I could do about it.
24 Your Honor, my son is suffering. He has
25 Hepatitis C. He needs medical help. I am

59

EXHIBIT C.

1 sorry. My eyes are so -- I can't even read
2 this. John is going through a living hell.
3 So are we. This is a tragedy that has taken
4 place. Someone has to do something about
5 this. I just don't know how much more we can
6 endure. Thank you for your time.
7 THE COURT: Thank you.
8 Very well, Mr. Lambros, would you stand
9 before the court at this time with your
10 attorney? I will address you personally then
11 at this time. John Gregory Lambros, your
12 motion for downward departure is denied. John
13 G. Lambros, as being the previous judgment of
14 the court that you are guilty of conspiracy to
15 possess with intent to distribute more than
16 five kilograms of cocaine, you are hereby
17 committed to the custody of the Bureau of
18 Prisons for a term of 360 months. This
19 sentence will run concurrently with the
20 sentence imposed on January 27, 1994, and all
21 conditions set forth at that time will remain
22 in effect. It is recommended that the
23 defendant be returned to confinement at
24 Leavenworth.
25 I must tell you also in the event you

1 wish to appeal this sentence, you have 10 days
2 within which to file your notices of appeal.
3 Ms. Ceisel, you will, if he wants to
4 appeal, you will be available to make sure
5 that proper instruments are filed?
6 MS. CEISEL: Yes, sir.
7 THE COURT: Yes, Mr. Lambros.
8 THE DEFENDANT: Yes, Your Honor. I
9 don't have a complete understanding. Now, the
10 motions that I -- that we spoke about, are
11 they --
12 THE COURT: I have denied them and
13 I have informed you that a written opinion
14 will be submitted so that you will have it in
15 front of you exactly what the court has done.
16 THE DEFENDANT: Okay. And
17 regarding the general verdict, on which
18 element --
19 THE COURT: That's a matter of
20 argument that you will raise with the Court of
21 Appeals if there is an appeal.
22 THE DEFENDANT: So, you are giving
23 me --
24 THE COURT: Well, I'm not -- your
25 attorney will advise you in that. It's not

EXHIBIT C.

60.

1 proper for the court to attempt to be your
2 attorney, too.
3 THE DEFENDANT: Okay.
4 THE COURT: Is there anything
5 further then at this time?
6 MS. CEISEL: No, Your Honor.
7 MR. PETERSON: Your Honor, one of
8 the issues that was before the court is
9 whether or not this would be a no parole
10 sentence, and the government would request
11 that the judgment would reflect that it be a
12 no parole sentence.
13 THE COURT: Yes.
14 MR. PETERSON: And then in
15 addition, there was the issue of supervised
16 release, and I don't know whether the court is
17 interested in imposing such a term of --
18 THE COURT: Isn't that overkill?
19 MR. PETERSON: It's not necessary.
20 I just want to make sure that the court is
21 addressing that question, so I will certainly
22 leave that to the court.
23 THE COURT: We will address that
24 question. Is there anything further,
25 Ms. Ceisel?

1 MS. CEISEL: No, Your Honor.
2 THE COURT: Mr. Lambros?
3 THE DEFENDANT: No, Your Honor.
4 THE COURT: Very well. Good luck
5 to you.
6 MS. CEISEL: Thank you.
7 (Resentencing concluded at
8 11:38 a.m.)
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

EXHIBIT C.

61.

1 STATE OF MINNESOTA)
2) SS
3 COUNTY OF RAMSEY)
4
5 I, Barbara J. Eggerth, Court
6 Reporter, do hereby certify that the foregoing
7 pages, 1 through 66 inclusive, are a true and
8 correct transcript of my stenotype notes.
9 That the cost of the original
10 has been charged to the party who noticed the
11 deposition or hearing, and that all parties
12 who ordered copies have been charged at the
13 same rate.
14 Dated at Coon Rapids,
15 Minnesota, on this 18th day of March, 1997.
16
17
18 ______________________________
Barbara J. Eggerth, R.P.R.
19 Notary Public, Anoka
County, Minn.
20
21
22
23
24
25

EXHIBIT C.

March 14, 1997

John Gregory Lambros
Reg. No. 00436-124
USP Leavenworth
P.O. Box 1000
Leavenworth, Kansas 66048-1000
Web site: http://members.aol.com/BrazilByct

U.S. CERTIFIED MAIL NO.
Z-209-887-400

Attorney Colia F. Ceisel
Suite 500, Minnesota Building
46 East 4th Street
St. Paul, Minnesota 55101-1113

RE: APPEAL ISSUE ON RESENTENCING, LETTER TWO (2).

Dear Colia:

This is letter number two (2) addressing appealable issues I want you to raise from my resentencing on February 10, 1997, in front of Judge Renner.

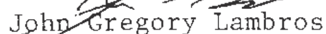
Please recall that Judge Renner refused to address me as to the object/overt acts that I was being sentenced to on February 10, 1997 and my argument of the general jury verdict, thus this argument is ripe for appeal:

> DEFENDANT'S SENTENCING ON THE CONSPIRACY COUNT MUST BE VACATED AND REMANDED FOR A NEW TRIAL WHERE IT WAS NOT KNOWN OR THE JURY INTENDED TO CONVICT DEFENDANT FOR A COCAINE-RELATED CONSPIRACY OR FOR A MARIJUANA-RELATED CONSPIRACY, WHICH HAS A PERMISSIBLE MAXIMUM SENTENCE OF FIVE (5) YEARS, OR FOR CONSPIRACY INVOLVING BOTH DRUGS; IN THE ALTERNATIVE THE GOVERNMENT MUST SENTENCE THE DEFENDANT ON THE BASIS OF THE QUANITY OF MARIJUANA INVOLVED IN THE CONSPIRACY AND NOT THE QUANTITY OF COCAINE.

Attached is my nine (9) page motion regarding same and the six (6) pages of excerpts from GRAND JURY and TRIAL TESTIMONY which proves that the jury knew of the OVERT ACTS of MARIJUANA.

Again please incorporate the above entitled entire motion **or** forward your draft so I may approve same prior to being submitted to the Eighth Circuit.

Sincerely,



John Gregory Lambros

c: Internet release and file

EXHIBIT D.

63.

EXHIBIT D.

distribution of both drugs. While Dale moved under Rule 29 for an acquittal on all counts after the government's case had closed, he no longer seems to dispute the sufficiency of the evidence on the conspiracy to distribute marijuana. He argues that the jury, based on the specific unanimity instruction, could have found that he only conspired to distribute marijuana, rather than both drugs, in returning the general verdict. This ambiguity, he says, indicates the danger of duplicity. Instead, his argument actually goes to the sentencing issue addressed below. The conspiracy count was not duplicitous, and the district court did not err in refusing to sever or dismiss the count.

B. Is Dale's sentence improper where the jury was given an enhanced unanimity instruction but only a general verdict form and where the sentence exceeds the maximum sentence for conspiracy to distribute marijuana?

[4, 5] While Dale's conviction for conspiracy to distribute both marijuana and crack will stand if Dale was given an appropriate sentence, whether the sentence was appropriate remains in question. *See Griffin v. United States,* 502 U.S. 46, 56–57, 112 S.Ct. 466, 116 L.Ed.2d 371 (1991) ("'When a jury returns a guilty verdict on an indictment charging several acts in the conjunctive, as [defendant]'s indictment did, the verdict stands if the evidence is sufficient with respect to any one of the acts charged.'" (quoting *Turner v. United States,* 396 U.S. 398, 420, 90 S.Ct. 642, 24 L.Ed.2d 610 (1970))). Dale does not challenge his conviction as it relates to a conspiracy to distribute marijuana. He did not argue at sentencing that he should, on the basis of the general jury verdict and the enhanced unanimity instruction, be sentenced only for a conspiracy to distribute marijuana, rather than crack. The sentence will thus be reviewed for plain error only. *See United States v. Olano,* 507 U.S. 725, 732, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). Plain error exists where denial of review would result in a manifest miscarriage of justice. *See United States v. Cox,* 957 F.2d 264, 265 (6th Cir.1992).

Seven of the eight circuits that have directly considered this issue have decided that the punishment imposed cannot exceed the shortest maximum penalty authorized in the statutes criminalizing the multiple objects if the punishment authorized by the conspiracy statute depends on the punishment provided for the substantive offenses which were the objects of the conspiracy.[1] That is the case here. The maximum sentence for conspiring to distribute a controlled substance depends on the controlled substance to be distributed. 21 U.S.C. § 846. Given the facts in this case, the maximum sentence for a conspiracy to distribute marijuana is five years, 21 U.S.C. § 841(b)(1)(D), while a conspiracy to distribute crack would yield a forty-year maximum sentence. 21 U.S.C. § 841(b)(1)(B).

Five courts of appeals have held that when the jury returns a general verdict to a charge that a conspiratorial agreement covered multiple drugs, the defendant must be sentenced as if he distributed only the drug carrying the lower penalty.[2]

While neither the Sixth Circuit nor the Supreme Court has directly addressed the issue at hand, the decision in a case presenting a related issue does lend some light to the question. In *Edwards v. United States,* 523 U.S. 511, 118 S.Ct. 1475, 140 L.Ed.2d 703 (1998), the Court held that a judge is authorized to determine for sentencing purposes, after a general guilty verdict on a charged conspiracy to distribute both cocaine and crack, whether crack, as well as cocaine, was involved in the conspiracy to distribute and may also determine the amounts involved. In addition, the Court noted the judge's ability to consider "relevant conduct" for purposes of sentencing; however, the Court added that "petitioners' statutory and constitutional claims would make a difference if it were possible to argue, say, that the sentences imposed exceeded the maximum that the statutes permit for a cocaine-only conspiracy. That is because a maximum sentence set by statute trumps a higher sentence set forth in the Guidelines." *Edwards,* 118 S.Ct. at 1477.

[6] In *Edwards* the sentences imposed were within the statutory limits applicable to a cocaine-only conspiracy, so the "difference" referred to by the Court was not relevant to the case. The implication here, however, is that the shorter maximum sentence should be used if the verdict is merely general, rather than specific, and the one drug allows for a sentence above the maximum for another charged drug. This implication is strengthened by the Court's approving reference to *United States v. Orozco–Prada,* 732 F.2d 1076, 1083–84 (2d Cir.1984), which held that following a general jury verdict on a conspiracy to distribute both cocaine and marijuana, a court may not sentence a defendant under the statutory penalties for cocaine conspiracy, as the jury may have found only a marijuana conspiracy.

In *Orozco–Prada* the Second Circuit explained that while special verdicts are generally not favored in criminal cases, they are appropriate when the information sought is relevant to the sentence to be imposed. *See Orozco–Prada,* 732 F.2d at 1084. The Second Circuit's procedure in such cases is to withhold judgment on the conviction for thirty days. The government may, within that time, consent to a re-sentencing. If the government does so, the court affirms the conviction and remands the case for re-sentencing. If the government does not consent, the court vacates the conviction and remands the case for a new trial.

[7] The question of a forfeiture of the issue of a special verdict is also addressed by the Second Circuit, which held that it is the responsibility of the government to request a special verdict, meaning that the defendant does not forfeit the sentencing issue on appeal when he fails to seek a special verdict at trial. *See United States v. Barnes,* 158 F.3d 662, 672 (2d Cir.1998). The Ninth Circuit even reviews the sentence *de novo* when the government does not seek a special verdict although the information available through a special verdict is relevant to the sentence. *See United States v. Garcia,* 37 F.3d 1359, 1369–70 (9th Cir.1994). Here, counsel for Dale did raise the issue of a special verdict, although not in so many words, but he did not press the issue or formally object to the general verdict procedure used. Still, the question is addressed in this appeal rather than considered forfeited because the use of the general verdict procedure was plain error. *See Cox,* 957

1. *See United States v. Garcia,* 37 F.3d 1359, 1370 (9th Cir.1994); *United States v. Fisher,* 22 F.3d 574, 576 (5th Cir.1994); *United States v. Owens,* 904 F.2d 411, 414–15 (8th Cir.1990); *Newman v. United States,* 817 F.2d 635, 637–39 (10th Cir.1987); *United States v. Orozco-Prada,* 732 F.2d 1076, 1083–84 (2d Cir.1984); *United States v. Quicksey,* 525 F.2d 337, 340–41 (4th Cir.1975); *Brown v. United States,* 299 F.2d 438 (D.C.Cir.1962). The one court that seems to disagree, the Seventh Circuit, faced a drug conspiracy case involving more than one controlled substance but was addressing a problem of applying the sentencing guidelines rather than a problem of a minimum or maximum statutory sentence. *See United States v. Edwards,* 105 F.3d 1179, 1180 (7th Cir.1997), *aff'd,* 523 U.S. 511, 118 S.Ct. 1475, 140 L.Ed.2d 703 (1998).

2. *See United States v. Barnes,* 158 F.3d 662, 668 (2d Cir.1998); *United States v. Garcia,* 37 F.3d 1359, 1370 (9th Cir.1994); *United States v. Bounds,* 985 F.2d 188, 194–95 (5th Cir.1993); *United States v. Owens,* 904 F.2d 411, 414–15 (8th Cir.1990); *Newman v. United States,* 817 F.2d 635, 637 (10th Cir.1987). In addition, in dicta, the Eleventh Circuit has interpreted *Edwards v. United States,* 523 U.S. 511, ––––, 118 S.Ct. 1475, 1477, 140 L.Ed.2d 703 (1998), to hold that in a conspiracy to distribute case with two controlled substances but only a general verdict, "if the amount of one substance involved leads to a lower statutory maximum sentence than would apply to the amount of the other substance ... then the district court must stay below the lower statutory maximum." *United States v. Riley,* 142 F.3d 1254, 1256 (11th Cir.1998).

EXHIBIT E.