September 27, 2005

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CLERK OF THE COURT
708 Warren E. Burger Federal Building
316 North Robert Street
St. Paul, Minnesota 55101
U.S. CERTIFIED MAIL NO. 7002-2410-0001-3729-4895

RE: LAMBROS vs. USA, Criminal No. 4-89-82(5)(DSD)

Dear Clerk:

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

1. MOTION FOR RELIEF FROM JUDGMENT OR ORDER, DUE TO INTERVENING CHANGE IN CONTROLLING LAW, **U.S. vs. BOOKER,** 160 L.Ed.2d 621 (January 12, 2005), UNDER ANY ONE OF THREE SEPARATE SUBSECTIONS OF FEDERAL RULES OF CIVIL PROCEDURE 60(b) - SECTIONS ONE (1), FIVE (5), AND SIX (6).

Is it possible to issue a civil case number to this action, as it allows all parties to keep different requests from overlapping, and eliminates possible mistakes if I have two (2) different actions pending at the same time?

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 Gregory 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 mailbox/mailroom on this **27th DAY OF SEPTEMBER, 2005,** to:

2. The clerk of the court as addressed above;
3. U.S. Attorney's Office, 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 FOR RELIEF FROM JUDGMENT OR ORDER, DUE TO INTERVENING CHANGE IN CONTROLLING LAW, U.S. vs. BOOKER, 160 L.Ed.2d 621 (January 12, 2005), 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 for relief from judgment or order, in this above-entitled action, due to the United States Supreme Court decision on January 12, 2005, in UNITED STATES vs. BOOKER, 125 S.Ct. 738, 160 L.Ed.2d 621, which found:

> The Sentencing Guidelines to be violative of the Sixth Amendment of the Constitution in that it conflicts with an accused's right to a jury trial. To the extent that the sentencing calculation under the Sentencing Guidelines may be **INCREASED** from one guideline range to another based on **FACTS NOT PROVED BEYOND A REASONABLE DOUBT BY A JURY**, the Court found that it ran afoul of the Constitution. The Court found that the Sentencing Guidelines **ARE ONLY ADVISORY**.

I. U.S. vs. BOOKER IS RETROACTIVE:

1. BOOKER invalidated the Guidelines both on a Sixth Amendment jury trial violation as well as the APPRENDI vs. NEW JERSEY, 530 U.S.466, 147 L.Ed.2d 435 (2000) due process doctrine. Jointly those basis compel retroactivity. See,

2.

e.g. IN RE WINSHIP, 397 U.S. 358, 25 L.Ed.2d 368 (1970); RING vs. ARIZONA, 536 U.S. 584; see, also U.S. vs. MURPHY, 109 F.Supp. 1059, 1064 (D.Minn. 2000) rev'd in MURPHY vs. U.S., 268 F.3d 599 (8th Cir. 2001). Because the foundation of BOOKER's new rule of constitutional law rests on both the APPRENDI due process doctrine and the IN RE WINSHIP Sixth Amendment right to jury trial with respective beyond a reasonable doubt proof standard, retroactivity in necessary.

2. BOOKER has arguably made its rules retroactive through its Guideline clarifying amendments. It is well established Guideline clarifying amendments are RETROACTIVE. See, e.g. U.S. vs. GARCIA-CRUZ, 40 F.3d 986, 990 (9th Cir. 1994) ("Under the law of our circuit, amendments to the Sentencing Guidelines which are 'clarifying' as opposed to 'substantive' may be given retroactive effect"); see also, U.S. vs. STINSON, 30 F.3d 121, 122 (11th Cir. 1994) (per curium)(collecting cases). BOOKER made no substantive changes in the Guidelines, it merely interpreted them (BREYER, J., Slip Opinion, pg. 25)("our remedial interpretation of the Sentencing Act") advisory as "'Congress would have intended"' (id. pg. 2) had it known its mandatory provision violated the Sixth Amendment right to jury trial. See, also id. pg. 22. ("Hence we have examined the statute in depth to determine Congress' likely intent in light of today's holding.") Because the BOOKER Sentencing Reform Act amendments did not change the Guidelines substantively but merely interpreted them as advisory instead of mandatory, such amendment is only a clarifying amendment necessarily retroactive.

II: BOOKER DEADLINE AS TO RETROACTIVITY:

3. The Supreme Court stated in U.S. vs. DODD, No. 04-5286, Decided June 20, 2005, that any successive petition or other claim for relief upon a new rule of law, must be filed **WITHIN ONE (1) YEAR OF THE DATE THE NEW RULE WAS ANNOUNCED.** DODD said this was the case even when the new rule of law was not yet made retroactive. In fact the court recognized that their ruling would require individuals

TO FILE FOR RELIEF BEFORE THEY EVEN KNOW WHETHER THE NEW RULING WAS RETROACTIVELY APPLICABLE OR NOT.

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

4. The Supreme Court stated in GONZALES vs. CROSBY, 125 S.Ct. 2641 (2005), that when a defendant's §2255 motion is denied on grounds that are later shown to be either factually incorrect or based upon an erroneous legal standard, a defendant may seek relief under **RULE 60(b).** Such an avenue of relief would not fall under the extremely strict standards for a successive §2255.

5. Attorney Robert A. Ratliff, SHIELDS, RATLIFF, GREEN, & KERN, P.C., Mobile, AL. stated within the September 2, 2005, Volume 2, "RATLIFF'S LAW REVIEW" "The cumulative result of this caselaw is there is now ample support that APPRENDI/ BLAKELY/BOOKER should be applied retroactively and depending on the particular facts of your case, you may be entitled to relief either through a recall of the mandate motion or a **RULE 60(b) MOTION.** But you must act quickly. The last possible date according to DODD to raise any claim under BOOKER will be January 11, 2006." See, **EXHIBIT A.**

6. 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 issue 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 GONZALES vs. SECRETARY OF DEPT. OF CORRECTIONS, 366 F.3d 1253, 1309 (11th Cir. 2004)(Chief Judge EDMONDSON, concurring in part and dissenting in part)("What Gonzalez' 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).

7. United States Supreme Court Justice STEVENS offered his opinion as to the use of a **RULE 60(b) MOTION** in ABDUR'RAHMAN vs. BELL, 154 L.Ed.2d 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).

8. This court is bound by the Eighth Circuit's 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 a subsuquent 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).

IV. BACKGROUND FACTS:

9. Movant Lambros' sentencing was based on **JUDGE - FOUND FACTS** that included:

a. **DRUG TYPE AND QUANTITY ENHANCEMENTS:** Movant raised objections at both his initial January 1994 sentencing and his resentencing in February 1997 as to the jury not entering a **"SPECIAL VERDICT FORM"** as to the drug type and quantity. **(GENERAL JURY VERDICT ENTERED).** Based on solely judge-found facts, the district court established a **BASE OFFENSE LEVEL** within the guidelines for a violation of 21 U.S.C. §§ 841(a)(1) and 846 at thirty-two (32), because the offense allegedly involved more than five (5) kilograms of cocaine, found in §2D1.1. See, **EXHIBIT B** (Movant Lambros' PRESENTENCE INVESTIGATION REPORT, Dated: February 24, 1993, Paragraph 33.) Movant Lambros admitted to purchasing a small amount of Marihuana during the conspiracy. Therefore, the **BASE OFFENSE LEVEL** would be somewhere between **LEVEL 10 thru LEVEL 14.** (Base Offensse Level) A base offense level of 10 with criminal history points of VI equals a 24 to 30 month sentence. A base level of 11 equals 27 to 33 months. A base offense level of 12 equals 30 to 37 months. A base level of 13 equals 33 to 41 months. A base level of 14 equals 37 to 46 months of imprisonment. See, **EXHIBIT C** (Sentencing Table) See, **U.S. vs. MACEDO,** 406 F.3d 778, 787-789 (7th Cir. 2005)(Imposition of enhanced sentence under Sentencing Guidelines based on supplemental judicial fact finding as to purity and drug quantity which exceeded quantity found by jury violated defendant's Sixth Amendment jury trial rights under **U.S. vs. BOOKER** to jury determination of facts used to determine sentence.)

b. **ADJUSTMENT FOR ROLE IN THE OFFENSE ENHANCEMENT:** Movant Lambros was given a two (2) point enhancement within the guidelines because of the judge - found fact that Movant was allegedly some type of decision maker with authority in planning the conspiracy, found under §3B1.1(c). See, **EXHIBIT B** (Page 7, Paragraph 36)

c. **OBSTRUCTION OF JUSTICE ENHANCEMENT:** Movant Lambros was given

a two (2) point enhancement within the guidelines because of the judge-found fact that Movant committed perjury that resulted in an obstruction of justice. Movant appealed this issue on direct appeal. See, U.S. vs. LAMBROS, 65 F.3d 698, 702 (8th Cir. 1995). See, **EXHIBIT B** (Page 7, Paragraph 37) Also see, **U.S. vs. MACEDO**, 406 F.3d 778, 789-790 (7th Cir. 2005)

10. Movant Lambros PRESENTENCE INVESTIGATION REPORT states under "Sentencing Options", Paragraph 79, Page 14, "**GUIDELINE PROVISIONS:** Based on a total offense level of **37 (Thirty-Seven)** and a criminal history category of VI, the guideline range for imprisonment is **360 months to life.** Movant was initially sentenced to a MANDATORY LIFE SENTENCE WITHOUT PAROLE that was vacated by the Eighth Circuit and resentenced to **360 MONTHS OF IMPRISONMENT.** See, **EXHIBIT B.**

11. **SUMMARY:** Movant Lambros argues that the district court erred in imposing over a **TWENTY (20) - LEVEL INCREASE** in calculating his adjusted **BASE OFFENSE LEVEL** within the guidelines - thereby enhancing Movant Lambros' ultimate sentence - based on a:

a. Drug type and quantity enhancement. See, ¶9(a);

b. Adjustment for role in the offense enhancement. See, ¶9(b);

c. Obstruction of justice enhancement. See, ¶9(c);

finding made solely by the sentencing judges at Movant original sentencing and Movant's resentencing.

V. RULE 60(b) FEDERAL RULES OF CIVIL PROCEDURE:

12. 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 vehicle for this particular motion. Movant is a jailhouse lawyer and does not believe Rule 60(b) - Sections (2), (3), and (4) are applicable in this action, but requests this court to apply same if needed to pre-

serve the issues raised within this action.

13. 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) sub-sections 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 **U.S. vs. BOOKER**, 160 L.Ed.2d 621 (2005), 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 subsections one (1) or sub-section 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).

14. 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) govern this motion.

VI. LEGAL CASE LAW TO SUPPORT:

15. U.S. vs. MACEDO, 406 F.3d 778, 779 Head Note 7 (7th Cir. 2005), "Imposition of enhanced sentence under Sentencing Guidelines based on supplemental judicial fact finding as to purity and drug quantity which exceeds quantity found by jury violated defendant's Sixth Amendment jury trial rights under **U.S. vs. BOOKER** to jury determination of facts used to determine sentence. U.S.C.A. Const. Amend. 6; U.S.S.G. §§ 2D1.1(a)(3), 2D1.1(c)(4), 18 U.S.C.A." See, **EXHIBIT D.**

16. U.S. vs. PIRANI, 406 F.3d 543 (8th Cir. 2005). "In **BOOKER**, the Supreme Court applied the core Sixth Amendment principle of BLAKELY to enhancements imposed under the mandatory federal Sentencing Guidelines - "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." 125 S.Ct. at 756." Id. at 548.

CONCLUSION

17. 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.

18. Movant respectfully requests this Court to vacate judgment and resentence Movant due to an intervening change in controlling law, **U.S. vs. BOOKER**, under any one of three separate subsections of Federal Rules of Civil Procedure 60(b) - Sections one (1), five (5), and/or six (6).

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

EXECUTED ON: SEPTEMBER 27, 2005.

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

Ratliff's Law Review

by
Robert A. Ratliff
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Number 7 September 2, 2005 Volume 2

HURRICANE KATRINA UPDATE

We have survived another hurricane. The feds and nature combined cannot stop our efforts to help individuals in their fight for justice. Our local phone services will be undergoing some repair for the next few days, so you may have difficulty getting through. Please be patient and keep trying. We are in the office and looking forward to helping you.

How Can Booker Work For You?

On January 12, 2005, the United States Supreme Court resolved the case of United States v. Booker. In its 5-4 decision, the High Court did what defense attorneys find to be challenging and frustrating. It found the omnibus Sentencing Guidelines to be violative of the Sixth Amendment of the Constitution in that it conflicts with an accused's right to a jury trial. To the extent that the sentencing calculation under the Sentencing Guidelines may be increased from one guideline range to another based on facts not proved beyond a reasonable doubt by a jury, the Court found that it ran afoul of the Constitution. Finding that the Sentencing Guidelines are only advisory, the Supreme Court brought constitutionality back to the criminal sentencing process but also brought confusion to the status of many, many criminal cases pending in the courts.

Eight months later, the various circuits and their many district courts, have been all across the spectrum as to how to apply Booker, attempting to restrict its apparent implications to minimize the effect on pending criminal cases both on direct appeal and collateral review. The biggest question is whether the impact and import of Booker can be made retroactive.

The average lay person would expect that the decision of the Supreme Court must be retroactive. If the Court says that the prior applications of the Sentencing Guidelines was unconstitutional, it would only be fair to apply that analysis to current and prior cases. Prior Supreme Court decisions would even give support for that view. In Yates v. Aiken, 108 S.Ct 534 (1988) the Supreme Court had the opportunity to review when new rulings should be made applicable to cases on collateral review. In reaching its conclusion, the Court looked to a prior decision of the Court to distinguish between new rules of law and new applications of already well established principles.

The Yates court, looking to a prior opinion of Justice Harlan in Desist v. United States, 89 S.Ct 1030 (1969), recognized that this distinction between new rules, and the application of old rules to new situations, was well settled. *"[W]hen a decision of this Court merely has applied settled precedents to new and different factual situations, no real question has arisen as to whether the later decision should apply retrospectively. In such cases, it has been a foregone conclusion that the rule of the later case applies in earlier cases, because the later decision has not in fact altered that rule in any material way."* United States v. Johnson, 457 U.S. 537,

EXHIBIT A.

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549, 102 S.Ct.
2579, 2586, 73 L.Ed.2d 202 (1982)

Unfortunately, the ideas of due process and the Sixth Amendment right to the primacy of jury making decisions beyond a reasonable doubt seems to be considered a new idea and not *"settled precedent."* One of the reasons for this is the statutory limitation, created by Congress, restricting gatekeeping requisites for collateral petitions of habeas corpus (the one-year rule).

That defendants have a due process right to be sentenced according to accurate information, and found guilty of every element of the offense beyond a reasonable doubt, is a well established, longstanding principle of our system of justice. It is this principle that we need to get our judges to recognize as a right that must always be applied currently and retroactively to give support to the clear views of the Constitution.

One judge who grappled with this issue was United States District Court Judge Joseph Bataillon. In the recent case of United States v. Okai, 2005 WL 2042301 (D. Neb. Aug. 22, 2005), Judge Joseph Bataillon continues the strong analysis he started in the previous case of United States v. Huerta-Rodriguez in the areas of due process and burdens of proof. The key point to his analysis is as follows:

Although a misallocation of fact finding responsibility (judge versus jury) does not warrant retroactive application, Schriro, 124 S. Ct. at 2523, the same cannot be said for the retroactivity of application of a preponderance of evidence standard as opposed to a reasonable doubt standard. See Hankerson v. North Carolina, 432 U.S. 233 (1977) (giving retroactive effect to rule requiring proof of all elements of crime beyond a reasonable doubt and voiding presumptions that shift the burden of proof to defendant); Ivan v. City of New York, 407 U.S. 203, 205 (1972) (holding that the purpose of a reasonable doubt standard is "to overcome an aspect of a criminal trial that impairs the truth-finding function, and Winship is thus to be given complete retroactive effect"). Application of a lower standard of proof may be an error that significantly affects factfinding accuracy and undermines society's confidence in the result of the trial. See Schiro, 128 S. Ct. at 2523.

In reading his opinions, we believe he is correct in holding that the principle of burden of proof, that is "beyond a reasonable doubt" versus "a preponderance of the evidence" is a principle that carries with it retroactive application. Consequently, it is that avenue upon which collateral review issues should be driven and not the misallocation of fact finding responsibilities, a course of belief rejected by so many circuit courts to date.

BOOKER DEADLINE AND RETROACTIVITY; OR YOU SNOOZE, YOU LOSE!

The Okai case is the first to recognize the basic and fundamental distinction made by the Supreme Court in Schriro. We have made this argument many times and in many courts. Ultimately, I believe this will be the language the Supreme Court seizes upon in its analysis of whether Apprendi/Blakely/Booker should be applied retroactively. I believe that because it was the application of the reasonable doubt standard of review that was central to the In re Winship decision. This case and the legal reasoning contained therein should in my opinion be the basis for any Booker claim regardless of the age of the case.

But it is important to note that in United States v. Dodd, the Supreme Court stated that any successive petition or other claim for relief based upon a new rule of law, must be filed within one year of the date the new rule was announced. Dodd said this was the case even when the new rule of law was not yet made retroactive. In fact the court recognized that their ruling would require individuals to file for relief before they would even know whether the new ruling was retroactively applicable or not.

But at the same time, the Supreme Court also issued their opinion in Gonzalez v. Crosby, 125 S.Ct. 2641 (2005). In Gonzalez, the Court reinvigorated Rule 60(b). What the Gonzalez ruling basically holds is that when a defendant's § 2255 motion is denied on grounds that are later shown to be either factually incorrect or based upon an erroneous legal standard, a defendant may seek relief under Rule 60(b). Such an avenue of relief would not fall under the extremely strict standards for a successive 2255.

Additionally, the Ninth Circuit has recently

given more credibility to motions to recall the mandate. A motion to recall the mandate circumvents the normal retroactivity concerns by allowing a defendant to re-open his direct appeal. There is technically no time limit to such a motion.

In U.S. v. Crawford, 2005 WL 2030497 the Ninth Circuit recalled the mandate in its own case because the defendant was able to demonstrate in the record that the District court judge was dissatisfied with the sentence mandated by the guidelines and the caselaw cited by the defendant foreshadowed the Supreme Court decision in Booker. Many people who appealed after Apprendi could make this same claim.

The cumulative result of this caselaw is there is now ample support that Apprendi/Blakely/Booker should be applied retroactively and depending on the particular facts of your case, you may be entitled to relief either through a recall of the mandate motion or a ~~Rule 60(b) motion~~. But you must act quickly. The last possible date according to Dodd to raise any claims under Booker will be January 11, 2006. (Booker was decided on January 12, 2005) There is certainly no guarantee you will receive relief right away from the District or Appellate Courts. In fact, you may lose initially, but eventually the Supreme Court will weigh in on retroactivity and only those who properly preserved their issues will be entitled to seek relief. If you have not filed yet, I urge you to contact the attorney of your choice and file something as soon as possible.

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CASE UPDATE SECTION

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U.S. 1st Circuit Court of Appeals

US v. Delgado-Hernandez (08/24/05 - No. 03-2245)
Defendant's conviction for illegal possession of a firearm is affirmed where he has not met his heavy burden of establishing that any deficiencies in the proceedings amounted to plain error.

Gonzalez v. Justices of the Mun. Court of Boston (08/24/05 - No. 03-2732)
Plaintiff's pending state prosecution does not compromise his right not to be twice put in jeopardy for the same offense since the initial proceeding based on the same complaint had not resulted in an acquittal within the cognizance of the Double Jeopardy Clause.

US v. Melendez-Torres (08/25/05 - No. 04-1914)
Defendant's conviction for manslaughter is affirmed over his claim that the absence of a "fast track" program in the District of Maine violated his equal protection rights.

U.S. 2nd Circuit Court of Appeals

US v. Gonzalez (08/22/05 - No. 03-1356)
Defendant's guilty plea was inadequate to support conviction on an aggravated drug charge where he had been misinformed as to his right to have the statutory drug quantity proved to a jury rather than the court.

Carson v. Fischer (08/23/05 - No. 04-3018)
Denial of plaintiff's writ of habeas corpus is affirmed over his claim that his right to a public trial was violated when the state trial court effected a limited courtroom closure during the testimony of a confidential informant.

US v. Ramirez (08/23/05 - No. 03-1262, 04-0726)
Defendants' convictions for visa fraud and mail fraud are vacated where venue was improper.

US v. Roque (08/26/05 - No. 03-1452, 03-1490)
Defendant's plea and waiver of right to appeal sentence are not subject to withdrawal or vacatur based on intervening changes in federal sentencing law.

U.S. 3rd Circuit Court of Appeals

Fountain v. Kyler (08/25/05 - No. 03-4777)
Plaintiff's counsel did not provide ineffective assistance when she failed to predict the Pennsylvania Supreme Court's later ruling regarding the non-retroactivity of an amended death penalty statue.

EXHIBIT A.

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

UNITED STATES OF AMERICA

v.

JOHN GREGORY LAMBROS

Docket No. CR 4-89-82
Defendant No. (05)

PRESENTENCE INVESTIGATION

Prepared For:

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

Prepared By:

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

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

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

Plea/Verdict:

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

Offense:

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

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

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

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

Statutory Penalty:

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

EXHIBIT B.

13.

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

Adjustment for Acceptance of Responsibility

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

Offense Level Computations — Level

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

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

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

Counts 1 and 4 - Conspiracy to Distribute Cocaine

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

34. **Specific Offense Characteristics:** None. 0

35. **Victim Related Adjustments:** None. 0

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

37. **Adjustment for Obstruction of Justice:** +2

38. **Adjustment for Acceptance of Responsibility:** 0

39. Total Offense Level 36

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

EXHIBIT — B.

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70. From February 1974 to May 1976, the defendant was associated with Pure Water Beverage Company of St. Paul, Minnesota. The defendant was in business on a partnership basis with his father; they dealt in water purification devices for offices and homes. He earned a salary of $16,000 annually. The business was sold in 1976.

71. In 1976, the defendant and another individual formed a partnership in a cassette duplication business called, "Lamren, Incorporated," of St. Paul, Minnesota.

72. From January 1984 to January 1985, the defendant worked as a stockbroker with Heiner and Stock, Incorporated, 3602 IDS Center, Minneapolis, Minnesota.

73. From 1985 to 1987, the defendant worked as a stockbroker with First Preferred Investments, 4000 IDS Center, Minneapolis, Minnesota.

74. From December 1987 to December 1988, the defendant worked for Fundamental Equities, Room 2470 Center Village, 431 South Seventh Street, Minneapolis, Minnesota. The defendant left this work when the company went out of business.

75. From December 1988 to February 1989, the defendant worked as a stockbroker for Investment Concepts, Incorporated, Suite 800, 331 South Second Avenue South, Minneapolis, Minnesota. The company went out of business.

76. From March 1989 to May 1989, the defendant worked as a stockbroker for L'Argent Equities, 900 Second Avenue South, Minneapolis, Minnesota.

Financial Condition: Ability to Pay

77. The defendant has no known assets or liabilities.

PART D. SENTENCING OPTIONS

Custody

78. **Statutory Provisions:** Count 1 requires a mandatory life imprisonment. 21 U.S.C. §§ 841(b)(1)(A) and 846. Counts 2, 3, and 4 require a minimum 10 years imprisonment and up to life imprisonment. 21 U.S.C. § 841(b)(1)(B).

79. **Guideline Provisions:** Based on a total offense level of 37 and a criminal history category of VI, the guideline range for imprisonment is 360 months to life.

SENTENCING TABLE

(in months of imprisonment)

	Offense Level	Criminal History Category (Criminal History Points) I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
	1	0-6	0-6	0-6	0-6	0-6	0-6
	2	0-6	0-6	0-6	0-6	0-6	1-7
	3	0-6	0-6	0-6	0-6	2-8	3-9
	4	0-6	0-6	0-6	2-8	4-10	6-12
Zone A	5	0-6	0-6	1-7	4-10	6-12	9-15
Zone A	6	0-6	1-7	2-8	6-12	9-15	12-18
	7	0-6	2-8	4-10	8-14	12-18	15-21
	8	0-6	4-10	6-12	10-16	15-21	18-24
	9	4-10	6-12	8-14	12-18	18-24	21-27
Zone B							
	10	6-12	8-14	10-16	15-21	21-27	24-30
	11	8-14	10-16	12-18	18-24	24-30	27-33
Zone C	12	10-16	12-18	15-21	21-27	27-33	30-37
	13	12-18	15-21	18-24	24-30	30-37	33-41
	14	15-21	18-24	21-27	27-33	33-41	37-46
	15	18-24	21-27	24-30	30-37	37-46	41-51
	16	21-27	24-30	27-33	33-41	41-51	46-57
	17	24-30	27-33	30-37	37-46	46-57	51-63
	18	27-33	30-37	33-41	41-51	51-63	57-71
	19	30-37	33-41	37-46	46-57	57-71	63-78
	20	33-41	37-46	41-51	51-63	63-78	70-87
	21	37-46	41-51	46-57	57-71	70-87	77-96
	22	41-51	46-57	51-63	63-78	77-96	84-105
	23	46-57	51-63	57-71	70-87	84-105	92-115
	24	51-63	57-71	63-78	77-96	92-115	100-125
	25	57-71	63-78	70-87	84-105	100-125	110-137
	26	63-78	70-87	78-97	92-115	110-137	120-150
	27	70-87	78-97	87-108	100-125	120-150	130-162
Zone D							
	28	78-97	87-108	97-121	110-137	130-162	140-175
	29	87-108	97-121	108-135	121-151	140-175	151-188
	30	97-121	108-135	121-151	135-168	151-188	168-210
	31	108-135	121-151	135-168	151-188	168-210	188-235
	32	121-151	135-168	151-188	168-210	188-235	210-262
	33	135-168	151-188	168-210	188-235	210-262	235-293
	34	151-188	168-210	188-235	210-262	235-293	262-327
	35	168-210	188-235	210-262	235-293	262-327	292-365
	36	188-235	210-262	235-293	262-327	292-365	324-405
	37	210-262	235-293	262-327	292-365	324-405	360-life
	38	235-293	262-327	292-365	324-405	360-life	360-life
	39	262-327	292-365	324-405	360-life	360-life	360-life
	40	292-365	324-405	360-life	360-life	360-life	360-life
	41	324-405	360-life	360-life	360-life	360-life	360-life
	42	360-life	360-life	360-life	360-life	360-life	360-life
	43	life	life	life	life	life	life

EXHIBIT C.

Affirmed in part, vacated in part, and remanded.

1. Indictment and Information ⇐113
Jury ⇐34(1)

Government's mislabeling in indictment of methamphetamine as schedule III drug, rather than correctly labeling it as schedule II drug did not violate *Apprendi*, which requires a drug type and amount sufficient to trigger a higher statutory maximum be charged in indictment and found by jury, given that the indictment listed specific drug and quantity charged and jury found defendant guilty of conspiring to import, possessing, and attempting to possess a specific drug type and amount. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(a)(1), (b)(1)(B)(viii), (b)(1)(D), 21 U.S.C.A. § 841(a)(1), (b)(1)(B)(viii), (b)(1)(D).

2. Controlled Substances ⇐9

Regulation reclassifying methamphetamine from schedule III to schedule II substance, in accordance with Attorney General's statutory authority to reclassify controlled substances through regulation, applies to all forms of methamphetamine, notwithstanding that statute which lists the drug classification schedule classifies methamphetamine as a schedule II drug when it is contained in "any injectable liquid," but classifies methamphetamine as a schedule III drug when it is in any other form. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 201(a), 202(c), 21 U.S.C.A. §§ 811(a), 812(c); 21 C.F.R. § 1308.12(d).

3. Criminal Law ⇐1139, 1152(1)

District court's choice of jury instruction is reviewed de novo when the underlying assignment of error implicates a question of law; however, general attacks on jury instructions are reviewed for an abuse of discretion.

4. Jury ⇐34(1)

Apprendi, requiring jury determination of any fact other than a prior conviction that increases a sentence beyond a statutory maximum, did not require that jury find defendant guilty beyond a reasonable doubt of importing, possessing, or attempting to possess a specific amount of methamphetamine as opposed to finding drug range used by trial court in special verdict form; drug range was acceptable because the drug type and amount necessary to trigger the higher statutory maximums were found by the jury beyond a reasonable doubt. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(b)(1), 21 U.S.C.A. § 841(b)(1).

5. Indictment and Information ⇐79

Where an error in an indictment does not go to an element of the crime, but rather is typographical in nature, a defendant is not prejudiced.

6. Criminal Law ⇐1167(1)

Improper designation of methamphetamine as schedule III drug in indictment did not prejudice defendant, where defendant was directed by indictment to applicable statute and afforded proper notice of the charges against him. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 202(c), 21 U.S.C.A. § 812(c); 21 C.F.R. § 1308.12(d).

7. Jury ⇐34(1)

Imposition of enhanced sentence under Sentencing Guidelines based on supplemental judicial fact finding as to purity and drug quantity which exceeded quantity found by jury violated defendant's Sixth Amendment jury trial rights under *U.S. v. Booker* to jury determination of facts used to determine sentence. U.S.C.A. Const. Amend. 6; U.S.S.G. §§ 2D1.1(a)(3), 2D1.1(c)(4), 18 U.S.C.A.

EXHIBIT D.

17.