CERTIFICATE OF SERVICE

I certify under the penalty of perjury that I mailed the following:

a. MOTION FOR LEAVE TO FILE A SECOND OR SUCCESSIVE MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE UNDER 28 U.S.C. §2255 BY A PRISONER IN FEDERAL CUSTODY. **Dated: April 6, 2001;**

b. MOVANT'S MEMORANDUM OF FACT AND LAW IN SUPPORT OF (AFFIDAVIT FORM) MOTION FOR LEAVE TO FILE A SECOND OR SUCCESSIVE MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE UNDER 28 U.S.C. §2255 BY A PRISONER IN FEDERAL CUSTODY. **Dated: April 6, 2001.**

and all attachments and exhibits on this 12 **DAY OF APRIL, 2001**, from the **U.S. Penitentiary Leavenworth Mailroom**, to the following individuals via U.S. Mail, **FOR FILING IN THIS ACTION:**

1. CLERK
U.S. Court of Appeals for the Eighth Circuit
Thomas F. Eagleton Court House
Room 24.329
111 South 10th Street
St. Louis, Missouri 63102
Tel. (314) 244-2400

U.S. CERTIFIED MAIL NO. 7000-0520-0021-3725-7270
RETURN RECEIPT REQUESTED

FOR FILING: One (1) original and three (3) copies.

2. U.S. Attorney's Office
600 U.S. Courthouse
300 South 4th Street
Minneapolis, Minnesota 55415

3. INTERNET RELEASE ON WWW.BRAZILBOYCOTT.ORG

John Gregory Lambros, Pro Se
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OR F.L. 1.

JOHN GREGORY LAMBROS

Prisoner # 00436-124

U.S. Penitentiary Leavenworth

P.O. Box 1000

Leavenworth, Kansas 66048-1000

DEFENDANT - MOVANT PRO SE

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JOHN GREGORY LAMBROS, Defendant-Movant,	*	CIVIL APPEAL NO. _____
vs.	*	In Re: Criminal No. 3-76-54 U.S. District Court for the District of Minnesota - Third Division.
UNITED STATES OF AMERICA, Plaintiff-Respondent.	*	

MOTION FOR LEAVE TO FILE A SECOND OR SUCCESSIVE MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE UNDER 28 U.S.C. §2255 BY A PRISONER IN FEDERAL CUSTODY.

COMES NOW the Defendant-Movant, JOHN GREGORY LAMBROS, and hereby moves this Honorable Court for leave to file a second or successive motion to vacate, set aside or correct sentence under Title 28 U.S.C. §2255 by a prisoner in federal custody. This motion is brought pursuant to 28 U.S.C. §2244(b) and §2255, and is based on a new rule of constitutional law recently announced by the United States Supreme Court, that was previously unavailable, and requires retroactive application to cases on collateral review.

Movant hereby submits the attached, "MOVANT'S MEMORANDUM OF FACTS AND LAW IN SUPPORT OF," the above-entitled motion, in AFFIDAVIT FORM.

DATED: April 06, 2001

Respectfully submitted,

John Gregory Lambros, Pro Se

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

JOHN GREGORY LAMBROS,	*	CIVIL APPEAL No._____
Defendant-Movant,	*	In Re: Criminal No. 3-76-54 U.S. District Court for the District of Minnesota - Third Division.
vs.	*	
UNITED STATES OF AMERICA,	*	
Plaintiff-Respondent.	*	MOVANT'S MEMORANDUM OF FACT AND LAW IN SUPPORT OF: (Affidavit Form)

MOTION FOR LEAVE TO FILE A SECOND OR SUCCESSIVE MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE UNDER 28 U.S.C. §2255 BY A PRISONER IN FEDERAL CUSTODY.

COMES NOW the Defendant-Movant, JOHN GREGORY LAMBROS, and hereby moves this Honorable Court for leave to file a second or successive motion to vacate, set aside or correct sentence under 28 U.S.C. §2255 by a prisoner in federal custody. This motion is brought pursuant to 28 U.S.C. §2244(b) and §2255, and is based on a new rule of constitutional law recently announced on June 26, 2000 by the United States Supreme Court in APPRENDI vs. NEW JERSEY, 120 S.Ct. 2348 (2000), that was previously unavailable, and requires retroactive application to cases on collateral review.

Movant does not wish to frustrate this court in filing this motion in a premature fashion nor have this motion counted against Movant, if movant is premature, due to the following legal problems: (1) The Third Circuit has held that a new Supreme Court case may be made retroactively applicable to cases on collateral review, and therefore relief may be had on a second or successive §2255 motion under §2255, if the case falls within one of the TEAGUE exceptions. See, WEST vs. VAUGHN, 204 F.3d 53, 59 (3rd Cir. 2000). Thus if Movant was in the Third Circuit, and waited to file a second or successive motion until the

Supreme Court explicitly makes APPRENDI retroactively applicable to cases on collateral review, Movant may be found to be untimely. If APPRENDI falls within the second TEAGUE exception (as Movant believes it does), in the Third Circuit a prisoner is entitled to relief now on a second or successive §2255 motion. (2) The statute of limitations provision in §2255 indicates that a defendant has one (1) year from "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." The Second Circuit held in a case discussing BAILEY vs. U.S., 133 L.Ed.2d 472 (1995), that the one (1) year began to run when BAILEY was decided (not when it was applied retroactively in BOUSLEY vs. U.S., 140 L.Ed2d 828 (1998)). See, TRIESTMAN vs. U.S., 124 F.3d 361, 371 & n.13 (2nd Cir. 1997). Therefore, a prisoner in the Second Circuit would be barred by the statute of limitations if he/she waited until a year after APPRENDI is explicitly made retroactive to cases on collateral review before filing a second or successive §2255 motion. This Movant is uneducated in law and does not want to be barred by the statute of limitations.

APPRENDI vs. U.S. ANNOUNCED A "NEW" RULE OF CONSTITUTIONAL LAW THAT DIRECTLY AFFECTS THE VALIDITY OF THE SENTENCE MOVANT IS SERVING AND REQUIRES RETROACTIVE APPLICATION TO CASES ON COLLATERAL REVIEW:

1. The Supreme Court in TEAGUE vs. LANE, 489 U.S. 288 (1989) held that a right that has been newly recognized by the Supreme Court is not to be applied retroactively on collateral review UNLESS it falls within one of two exceptions. First, a new rule should apply retroactively if it prevents law-making authority from criminalizing certain kinds of conduct. TEAGUE, 489 U.S. at 307. Second, a new rule should apply retroactively if it "requires the observance of the procedures implicit in the concept of ordered liberty." Id.

(citations omitted). The Supreme Court has described this exception as applying to "watershed rules fundamental to the integrity of the criminal proceeding." SAWYER vs. SMITH, 497 U.S. 227, 234 (1990). Accord SAFFLE vs. PARKS, 494 U.S. 484, 495 (1990). To qualify under the second TEAGUE exception, "the new rule must satisfy a two-pronged test: (1) it must relate to the accuracy of the [proceeding]; and (2) it must alter "our understanding of the 'bedrock procedural elements' essential to the [fundamental] fairness of a proceeding." NUTTER vs. WHITE, 39 F.3d 1154, 1157 (11th Cir. 1994)(quoting SAWYER, 497 U.S. at 242).

2. Movant concedes that the rule announced in APPRENDI is a "NEW" rule subject to TEAGUE. In TEAGUE, the Court explained that "a case announces a new rule when it breaks new ground or imposes a new obligation on the States or Federal Government .... To put it differently, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." TEAGUE, 489 U.S. at 301. To determine whether a rule announced in APPRENDI is "new," the Court must assess the state of the law as it existed at the time Movant's conviction became final and then determine whether the Court should have felt compelled to adopt the rule at issue. O'DELL vs. NETHERLAND, 521 U.S. 151, 159 (1997). If, in light of existing law, the Court acted reasonably by not recognizing the rule when Movant was indicted, convicted, and sentenced, the rule is "new" under TEAGUE. See id. ("TEAGUE asks court-court judges to judge reasonably, not presciently"). See also, CAIN vs. REDMAN, 947 F.2d 817, 821 (6th Cir. 1991)(a rule sought by federal habeas corpus petition is "new" as long as the correctness of the rule is susceptible to debate among reasonable minds)(citing BUTLER vs. McKELLAR, 494 U.S. 407 (1990).

3. The rule announced in APPRENDI is surely "NEW" for purposes of TEAGUE. In JONES the court noted that its prior cases merely "suggest[ed] rather than establish[ed]" the principle that any FACT that increases the maximum

penalty for a crime must be charged in an indictment, submitted to a jury, and proved beyond a reasonable doubt." JONES vs. U.S., 526 U.S. 227, 243 n.6 (1999). Moreover, before JONES virtually every circuit held that the amount of drugs and the type of drugs was not an element of a Title 21 offense but instead was only a sentencing factor. See, e.g., U.S. vs. CISNEROS, 112 F.3d 1272 (5th Cir. 1997); U.S. vs. DORLOUIS, 107 F.3d 248 (4th Cir. 1997); U.S. vs. SILVERS, 84 F.3d 1317 (10th Cir. 1996); U.S. vs. MORENO, 899 F.2d 465 (6th Cir. 1990); U.S. vs. GIBBS, 813 F.2d 596 (3rd Cir. 1987); U.S. vs. WOOD, 834 F.2d 1382 (8th Cir. 1987). Indeed, even after JONES, the Eleventh Circuit and others continued to find that the quantity and type of drugs was a sentencing factor. See, U.S. vs. HESTER, 199 F.3d 1287, 1291-92 (11th Cir. 2000); U.S. vs. THOMAS, 204 F.3d 381, 382-83 (2nd Cir. 2000); U.S. vs. JONES, 194 F.3d 1178, 1186 (10th Cir. 1999); U.S. vs. WILLIAMS, 194 F.3d 100, 106-107 (D.C.Cir. 1999). The fact that so many courts consistently followed a practice contrary to the rule announced in APPRENDI is compelling evidence that the rule is NEW. See, CAIN vs. REDMAN, 947 F.2d 817, 821 (6th Cir. 1991). The sheer number of opinions in APPRENDI (Five justices joined in the opinion of the Court and two of these, Justices Thomas and Scalia, issued concurring opinions. Four justices dissented in two opinions.) also supports the conclusion that the rule was not compelled by pre-existing precedent. O'DELL, 521 U.S. at 159 ("[t]he array of views expressed in [a Supreme Court decision] itself suggest the rule announced there was, in light of the court's precedent, 'susceptible to debate among reasonable minds'").

4. On February 9, 2001, the Ninth Circuit held in FLOWERS vs. WALTER, No. 99-35552 (Per Curiam) "[T]he Antiterrorism and Effective Death Penalty Act's exception to its prohibition on successive habeas petitions, which allows a prisoner to present a SECOND OR SUCCESSIVE habeas corpus petition when it relies on a new constitutional rule that has been "made retroactive to cases on collateral

review by the Supreme Court," 28 USC 2244(b)(2)(A), codifies the retroactivity approach of TEAGUE vs. LANE, 489 U.S. 288 (1989), the U.S. Court of Appeals for the Ninth Circuit decided February 9, 2001. Invoking one of TEAGUE'S two exceptions to its general rule of nonretroactivity, the court held that Section 2244(b)(2)(A) allows a prisoner to present a SUCCESSIVE PETITION that relies on a new rule of bedrock principle that was not expressly declared retroactive by the Supreme Court." Quoting, CRIMINAL LAW REPORTER, Vol. 68, No. 20, page 441, February 21, 2001. The Ninth Circuit's per curiam opinion went on to AGREE with the minority view expressed in WEST vs. VAUGHN, 204 F.3d 53 (3rd Cir. 2000), and to hold that a NEW RULE OF CONSTITUTIONAL LAW MAY BE APPLIED RETROACTIVELY IN THE ABSENCE OF AN EXPRESS RULING ON RETROACTIVITY BY THE SUPREME COURT. Also, the court stated, "[W]e find nothing in the language of §2244(b)(2)(A) that suggests that Congress intended to eliminate the third approach in enacting AEDPA; i.e., to reject the retroactivity standard set forth by the Supreme Court in TEAGUE." Quoting, CRIMINAL LAW REPORTER, Vol. 68, No. 20, page 442, February 21, 2001.

THIS COURT MUST APPLY TEAGUE BEFORE CONSIDERING THE MERITS OF THIS CLAIM:

5. The Supreme Court in CASPARI vs. BOHLEN, 127 L.Ed.2d 236, 245 (1994), stated, "[A] threshold question in every habeas case therefore, is whether the court is obligated to apply the TEAGUE rule to the defendant's claim. We have recognized that the nonretroactivity principle "is not 'jurisdictional' in the sense that [federal courts] . . . must raise and decide the issue sua sponte." . . . Thus, a federal court may, but need not decline to apply TEAGUE if the State does not argue it. . . . But if the State does argue that the defendant seeks the benefit of a NEW RULE OF CONSTITUTIONAL LAW the court **MUST** apply TEAGUE before considering the MERITS OF THE CLAIM." (Citations omitted)

APPRENDI CLAIMS FALL WITHIN THE SECOND TEAGUE EXCEPTION:

6. The rule announced in APPRENDI is also a "WATERSHED" rule that requires retroactive application. The reasoning employed by the Eleventh Circuit in NUTTER vs. WHITE, 39 F.3d 1154 (11th Cir. 1994), compels this result.

7. In NUTTER, the Eleventh Circuit had to decide whether the rule announced in CAGE vs. LOUISIANA, 498 U.S. 39, 112 L.Ed.2d 339 (1990)(per curiam), was retroactive under the SECOND TEAGUE exception. In CAGE, the Supreme Court found a jury instruction that contained language diluting the reasonable doubt standard violated due process because it allowed the jury to convict on a lower standard of proof than beyond a reasonable doubt. CAGE, 498 U.S. at 41. In SULLIVAN vs. LOUISIANA, 508 U.S. 275, 124 L.Ed.2d 182 (1993), the Supreme Court held that CAGE violations, when challenged on direct appeal, were not subject to harmless error but were, instead, per se reversible. The Court reasoned that harmless error review was only possible where the petit jury actually passed upon the statutory element:

> Harmless-error review looks, we have said, to the basis on which "the jury ACTUALLY RESTED ITS VERDICT, [citation omitted]. The inquiry, in other words, is not whether, in a trial that occurred without the error a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in THIS trial was surely attributable to the error That must be so, because to hypothesize a guilty verdict that was never in fact rendered - no matter how inescapable the findings to support that verdict might be -- would violate the jury trial guarantees. [Citations omitted.]

SULLIVAN, 508 U.S. at 280-81 (emphasis in original).

8. In NUTTER vs. WHITE, 39 F.3d 1154 (11th Cir. 1994), the Eleventh Circuit, relying on SULLIVAN held that the rule announced in CAGE was subject to review on collateral attack. The Court reasoned that the rule fell within the SECOND TEAGUE exception because it "guards against conviction of the innocent

by ensuring the SYSTEMATIC accuracy of the criminal system." NUTTER, 39 F.3d at 1157 (emphasis added). Moreover, the CAGE rule satisfied the "fairness" prong of TEAGUE'S SECOND exception as it "implicate[d] a fundamental guarantee of trial procedure because use of a lower standard of proof frustrates the jury-trial guarantee." Id. at 1158. Accord HARMON vs. MARSHALL, 69 F.3d 963, 964-65 (9th Cir. 1995)(holding CAGE retroactive under TEAGUE); ADAMS vs. AIKEN, 41 F.3d 175, 178-179 (4th Cir. 1994)(same).

9. The rule announced in APPRENDI alters a defendant's rights in all ways recognized in CAGE and SULLIVAN, and more. As in CAGE, the new rule elevates the burden of proof to beyond a reasonable doubt. Moreover, the new rule requires the element to be presented to and passed upon the grand jury, as required by the Presentment Clause of the Fifth Amendment. Imposing an enhanced penalty based on facts not alleged in an indictment impermissibly allows a defendant to be sentenced "on a charge the grand jury never made against him." STIRONE vs. U.S., 361 U.S. 212, 219, 4 L.Ed.2d 252 (1960). See also RUSSELL vs. U.S., 369 U.S. 749 (1962)(holding that to permit defendants to "be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him," would deprive them "of a basic protection which the guaranty of the intervention of the grand jury was designed to secure"). Thus, the rule in APPRENDI "not only improve[s] accuracy [of the trial and conviction], but also '"alter[s] our understanding of the BEDROCK procedural elements"' essential to the fairness of a proceeding." SAWYER, 497 U.S. at 242 (citations omitted).

10. Both the majority and dissenting opinions in APPRENDI recognized the significance of the case. As the majority correctly perceived:

> At stake in this case are constitutional protections of surpassing importance: the proscription of any deprivation of liberty without "due process of law," Amdt. 14, and the guarantee that "[i]n all criminal prosecutions, the accused shall enjoy the right to

> a speedy and public trial, by an impartial jury," Amdt. 6. Taken together, these rights indisputably entitled a criminal defendant to "a jury determination that [he] is charged, beyond a reasonable doubt."

APPRENDI, 120 S.Ct. at 2355-2356. See also IN RE WINSHIP, 397 U.S. 358, 363 (1970)(reasonable doubt requirement "has vital role in our criminal procedure"). In a footnote, the Supreme Court also recognized that its holding implicated the Presentment Clause of the Fifth Amendment, although that issue had been raised by APPRENDI. APPRENDI, 120 S.Ct. at 2355, n.3. The Supreme Court ultimately concluded that the New Jersey procedure that allowed a judge to determine an aggravating factor that extended the defendant's sentence an additional ten (10) years constituted "an unacceptable departure from the jury tradition that is an indispensable part of our criminal justice system." Id. at 2366. Conversely, Justice O'Connor's dissent pointed out that APPRENDI "will surely be remembered as a WATERSHED CHANGE IN CONSTITUTIONAL LAW." See id. at 2380 (O'Connor, J., dissenting). Thus, the justices strongly suggested that the new rule announced in APPRENDI implicated BEDROCK procedures that are implicit in the concept of ordered liberty and that impact the fundamental fairness of the criminal justice system.

11. Accordingly, several courts have held that APPRENDI claims fall within the SECOND TEAGUE exception and applies to cases on initial collateral review. For example, the Eighth Circuit has repeatedly accepted review of APPRENDI claims in INITIAL Section 2255 motions. See, e.g., U.S. vs. NICHOLSON, 231 F.3d 445, 454 (8th Cir. 2000); ROGERS vs. U.S., 229 F.3d 704, 705 (8th Cir. 2000); U.S. vs. MURPHY, 109 F.Supp.2d 1059 (D.Minn. 2000); see also, PARISE vs. U.S., 117 F.Supp.2d 204 (D.Conn. 2000); DARITY vs. U.S., 124 F.Supp.2d 355 (W.D.N.C. 2000)(in Judge THORNBURG'S subsequent memorandum rejecting the government's motion for reconsideration [DARITY II], Judge Thornburg went further and not only concluded that APPRENDI fit within the SECOND of the two TEAGUE exceptions,

he also concluded that APPRENDI "ANNOUNCED A NEW RULE OF CONSTITUTIONAL SUBSTANTIVE LAW WHICH IS AUTOMATICALLY RETROACTIVE." (Emphasis added)). In MURPHY, 109 F.Supp.2d 1059, Judge Doty held that "[t]here can be little doubt that the sweeping new requirement announced by the Court in APPRENDI is so grounded in fundamental fairness that it may be considered of WATERSHED importance." MURPHY, 109 F.Supp.2d at 1064. The MURPHY court noted that the Supreme Court's conclusion in APPRENDI that the Constitution requires a jury finding beyond a reasonable doubt on any fact which increases the statutory maximum penalty "compels a radical shift in criminal procedure in federal criminal cases." Id. The MURPHY court rejected the argument that there is no significant difference between a district court finding of fact by a preponderance of the evidence as to drug quantity and a jury finding of proof beyond a reasonable doubt as to the quantity issue. Quoting from the Supreme Court itself in APPRENDI and in IN RE WINSHIP, 297 U.S. 358 (1970), the MURPHY Court explained:

> "There is A VAST DIFFERENCE BETWEEN . . . a judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt, and allowing the judge to find the required fact under a lesser standard of proof." 120 S.Ct. at 2366; see also IN RE WINSHIP, 397 U.S. 358, 363 (1970)(quoting COFFIN vs.U.S., 156 U.S. 432, 453 (1895))("The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence-that BEDROCK 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.'").

MURPHY, 109 F.Supp.2d at 1064 (emphasis added).

The MURPHY court, therefore, concluded that the APPRENDI decision falls under the SECOND exception to the TEAGUE non-retroactivity principle. Accord DARITY vs. U.S., 124 F.Supp.2d 355 (W.D.N.C. Dec. 4, 2000).

12. Those courts that have decided to the contrary generally have relied upon decisions construing the retroactivity of U.S. vs. GAUDIN, 515 U.S. 506 (1995). In GAUDIN, the Supreme Court held that in a false statement prosecution, the question of materiality must be decided by the jury instead of by the court. Several circuits, including the Eleventh Circuit, have declined to give retroactive effect to GAUDIN under TEAGUE. See, U.S. vs. SWINDALL, 107 F.3d 831, 835-36 (11th Cir. 1997); BILZERIAN vs. U.S., 127 F.3d 237, 241 (2nd Cir. 1997), cert. denied, 527 U.S. 1021 (1999); U.S. vs. SHUNK, 113 F.3d 31, 37 (5th Cir. 1997). GAUDIN, however, involved far less significant principles than APPRENDI.

13. As noted by the Eleventh Circuit in SWINDALL, the harm to be corrected by GAUDIN was not the violation of the "beyond a reasonable doubt" standard which "implicate[d] the accuracy of the conviction." SWINDALL, 107 F.3d at 836. Rather, the problem to be corrected in GAUDIN was that "the wrong entity was making the decision." Id. The Court explained that, if Swindall contended that "the judge used a less exacting standard than 'beyond a reasonable doubt' in its determination that the false statements were material," this "would implicate the accuracy of the material finding," and, thus, would fall within the scope of TEAGUE'S SECOND exception. Id.

14. In the instant case, the District Court judge did, in fact, use a less exacting standard than beyond a reasonable doubt in its determination of the elements of Movant's crime, including drug type and quantity and thereby implicated the accuracy of the elements of the crime. Accordingly, the APPRENDI error(s) at issue in this case clearly falls within the scope of TEAGUE'S SECOND exception. Accordingly, for all of the foregoing reasons, APPRENDI has retroactive application to SECOND OR SUCCESSIVE Section 2255 motions such as the Movant's motion.

15. One final note, in RIVERS vs. ROADWAY EXPRESS, 128 L.Ed2d 274, 278, Head Note 9a, 9b (1994), the Supreme Court expounded on the RETROACTIVE application of a **JUDICIAL INTERPRETATION OF AN EXISTING STATUTE.** The court held that:

> "9a, 9b. A judicial construction of a STATUTE is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction; when Congress enacted a new statute, Congress has the power to decide when the statute will become effective -- so that the new statute may govern from the date of enactment, from a specified future date, or even from an expressed announced earlier date -- BUT WHEN THE UNITED STATES SUPREME COURT **CONSTRUES A STATUTE**, THE SUPREME COURT IS EXPLAINING ITS UNDERSTANDING **OF WHAT THE STATUTE HAS MEANT CONTINUOUSLY SINCE THE DATE WHEN THE STATUTE BECAME LAW**; in statutory cases, the Supreme Court has no authority to depart from the congressional command setting the effective date of a law that Congress has enacted."

RIVERS, at 278, Head Note 9a, 9b.

> "It is this Court's responsibility to say what a statute means, and once the court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law. A judicial construction of a **STATUTE** is an authoritative statement of what the **STATUTE** MEANT BEFORE AS WELL AS AFTER THE DECISION OF THE CASE GIVING RISE TO THAT CONSTRUCTION."

RIVERS, at 289.

16. This Movant respectfully requests this Court to ORDER retroactive application to this SECOND OR SUCCESSIVE Section 2255 motion as per the U.S. Supreme Court ruling in APPRENDI and consider the following claims/issues upon the merits based upon APPRENDI.

BACKGROUND:

THE CHARGES IN THE INDICTMENT:

17. Movant JOHN GREGORY LAMBROS was named as a defendant in Criminal Indictment Number 3-76-54, filed in the United States District Court for the District of Minnesota, Third Division, on September 14, 1976. See, **EXHIBIT A.** (hereinafter "MOVANT'S INDICTMENT")

18. Movant's INDICTMENT was a seven (7) count indictment which named Movant in Counts 1, 2, 3, 4, 5, & 7. Movant requested a jury trial.

19. On February 15, 1977, a jury found Movant guilty on Counts 4, 5, and 7 of the indictment. See, U.S. vs. LAMBROS, 564 F.2d 26, 27 (8th Cir. 1977). Also see, **EXHIBIT B** (March 7, 1977, JUDGMENT AND PROBATION/COMMITMENT ORDER). **THE JURY RENDERED A GENERAL JURY VERDICT.**

20. Counts 4, 5, and 7 within Movant's INDICTMENT stated violations of:

a. Count 4: " . . . knowingly and intentionally did unlawfully distribute approximately 55.75 grams of heroin, a Schedule I narcotic drug controlled substance, in violation of Title 21, United States Code, Section 841(a)(1)."

b. Count 5: " . . . knowingly and intentionally did unlawfully distribute approximately 24.88 grams of heroin, a Schedule I narcotic drug controlled substance, in violation of Title 21, United States Code, Section 841(a)(1)."

c. Count 7: " . . . did knowingly conspire, combine, confederate and agree togeather, with each other, and with diverse other persons whose names are to the Grand Jury unknown, to distribute a narcotic drug controlled substance, namely heroin; in violation of Title 21, United States Code, Sections 841(a)(1) and 846."

CASE HISTORY:

21. Movant does not believe the government filed an information prior to Movant's jury trial under Title 21 U.S.C. § 851(a)(1). Section 851(a) states that the government must file an information prior to a jury trial or guilty plea when it seeks to increase a persons sentence on the basis of a prior conviction. The enhanced punishment to which Section 851 refers are those provided by STATUTE. For example, Section 841(b)(1)(C) increases the statutory maximum penalty from twenty (20) years to thirty (30) years. See, U.S. vs. FOSTER, 68 F.3d 86, 89 (4th Cir. 1995); U.S. vs. NOVEY, 922 F.2d 624, 628 (10th Cir. 1991).

22. On February 15, 1977, a jury found Movant guilty on Counts 4, 5, & 7, **RENDERING A GENERAL JURY VERDICT** on Count 4, 5, & 7. See, U.S. vs. LAMBROS, 564 F.2d 26, 27 (8th Cir. 1977).

23. Movant was sentenced on March 7, 1977, by United States District Court Judge Donald D. Alsop, on Counts 4, 5, & 7 to a term of imprisonment for a period of fifteen (15) years, with a special parole term of five (5) years to follow. Said sentence to run consecutively and not concurrently with the sentence presently being served by Movant. The court ordered Movant incarcerated at the United States Penitentiary at Terre Haute, Indiana. See, **EXHIBIT B**.

24. Movant's attorney filed a NOTICE OF APPEAL with the Court and filed a direct appeal for Movant on August 30, 1977, that was denied by Eighth Circuit on October 27, 1977.

25. To the best of Movant's recollection, Movant did not file a Title 28 U.S.C.A. Section 2255. Movant is contacting his past Attorney to verify.

26. Movant is still serving this sentence, as the United States Parole Commission has a DETAINER on Movant due to alleged non-completion of parole and special parole of this sentence.

MOVANT'S CONVICTIONS AND SENTENCES MUST BE VACATED BASED ON THE FOLLOWING VIOLATIONS OF APPRENDI vs. NEW JERSEY, 120 S.Ct. 2348 (2000):

ISSUE ONE (1):

THE JURY DID NOT PROVE BEYOND A REASONABLE DOUBT WHETHER THE CONTROLLED SUBSTANCE INVOLVED WITHIN COUNTS 4, 5, AND 7 WAS "A NARCOTIC DRUG", "NOT A NARCOTIC DRUG", AND/OR "CONTROLLED SUBSTANCE."

27. Movant was sentenced to fifteen (15) years on Counts 4, 5, and 7, under Title 21 U.S.C., Section 841(b)(1)(A) **WHICH IS NOT WRITTEN WITHIN MOVANT'S INDICTMENT.** In 1977, Section 841(b)(1)(A) required the CONTROLLED SUBSTANCE in schedule **I** or **II** to be **A NARCOTIC DRUG.**

28. In 1977, Section 841(b)(1)(B) required the CONTROLLED SUBSTANCE in schedule I or II **NOT TO BE A NARCOTIC DRUG.**

29. The jury **DID NOT** make a **"SPECIAL FINDING"** as to the CONTROLLED SUBSTANCE being **"A NARCOTIC DRUG"** or as to the **TYPE** of CONTROLLED SUBSTANCE in Counts 4, 5, and 7.

30. The Eighth Circuit, this Circuit, as every other circuit, held **BEFORE** APPRENDI that the AMOUNT of CONTROLLED SUBSTANCE and **TYPE** of CONTROLLED SUBSTANCE was not an ELEMENT of Title 21 offenses but instead was only a sentencing factor. Thus, NO JURY DETERMINATION AS TO AMOUNT AND TYPE OF CONTROLLED SUBSTANCE WAS EVER REQUIRED UNLESS THE GOVERNMENT REQUESTED SAME. See, U.S. vs. WOOD, 834 F.2d 1382, 1388 (8th Cir. 1987). Also, every circuit has held that the necessary ELEMENTS to SUSTAIN A CONVICTION on §841(a)(1) possession of a CONTROLLED SUBSTANCE with intent to distribute are that a person (1) knowingly; (2) possessed the CONTROLLED SUBSTANCE; (3) with intent to distribute it. See, U.S. vs. WRIGHT, 845 F.Supp. 1041, 1055 (D.N.J. 1994), affirmed 46 F.3d 1120, (quoting cases from the 5th and 4th Circuit). **PLEASE NOTE** that Counts 4 and 5 in Movant's INDICTMENT stated, ". . . did unlawfully distribute . . ." and Count 7 in Movant's INDICTMENT

stated, " . . . conspire, . . ., to distribute . . ." Therefore, **POSSESSION** is an element in the substantive charge of either **DISTRIBUTION** or sale of narcotics. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(a)(1), 21 U.S.C.A. § 841(a)(1). See, U.S. vs. JACKSON, 526 F.2d 1236, 1237, Head Note 3 (5th Cir. 1976). Of interest, is the fact that the word **POSSESSION** does not appear within Counts 1, 2, 3, 4, 5, 6, or 7, and the word **INTENT** does not appear within Count 7. Therefore, Movant's ENTIRE INDICTMENT is **DEFECTIVE** as it does not contain EACH MATERIAL ELEMENT of the offense. See, U.S. vs. CABRERA-TERAN, 168 F.3d 141, 143, 145 (5th Cir. 1999)(the Court stated, "[T]o be sufficient, an INDICTMENT must allege EACH MATERIAL ELEMENT of the offense; if it does not, it fails to charge that offense.") Movant will address this issue later.

31. Movant's INDICTMENT states in Counts 4, 5, and 7 that Movant was " . . . in violation of Title 21, United States Code, **Section 841(a)(1);**" and Count 7 also included Section 846. Title 21 U.S.C. 841(a)(1) states: (1977)

> **§ 841. Prohibited acts A**
>
> **Unlawful acts**
>
> **(a)** Except as authorized by this subchapter, it shall be **UNLAWFUL** for any person knowingly or intentionally -
>
> **(1)** to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a **CONTROLLED SUBSTANCE**; or

See, **EXHIBIT C.** (1981 - Title 21 U.S.C.A. § 841, West Publishing Company)

32. On February 15, 1977, the jury found Movant guilty of Counts 4, 5, and 7, offering a GENERAL JURY VERDICT, as to violations of **Title 21 U.S.C. Section 841(a)(1).** See, U.S. vs. SHEPPARD, 219 F.3d 766, 769 (**8th Cir.** 2000), the Eighth Circuit stated, "[T]o **CONVICT** a defendant of violating 21 U.S.C. **§ 841(a)**, or of conspiring to violate **§ 841(a)** in violation of 21 U.S.C. § 846, '[t]he **GOVERNMENT IS NOT REQUIRED TO PROVE THAT THE DEFENDANT ACTUALLY KNEW THE EXACT NATURE OF THE SUBSTANCE WITH WHICH HE WAS DEALING.**' U.S. vs. JEWELL,

532 F.2d 697, 698 (9th Cir.)(en banc), cert. denied, 426 U.S. 951, 96 S.Ct. 3173, 49 L.Ed.2d 1188 (1976)." The Ninth Circuit stated in JEWELL, at 698, ("[T]he statute [21 U.S.C. §841(a)(1)] is violated only if **POSSESSION** is accompanied both by knowledge of the nature of the act and also by the intent 'to manufacture, distribute, or dispense.'").

33. Movant states that the **JURY INSTRUCTIONS** where **CONFUSING** as to the type of drug or "SPECIAL FINDING" as to the type of drug involved was **"A NARCOTIC DRUG", "NOT A NARCOTIC DRUG", AND/OR "CONTROLLED SUBSTANCE."** See, U.S. vs. BARNES, 158 F.3d 662, 672 (2nd Cir. 1998)("[I]n OROZCO-PRADA **we approved** of the suggestion of the D.C. Circuit that it is '**the government's responsibility to seek SPECIAL VERDICTS.**")

34. The jury DID NOT understand that CONSPIRACY is **ITSELF A CRIME.** See, U.S. vs. DALE, 178 F.3d 429, 431 (6th Cir. 1999) The Sixth Circuit in DALE also referred to OROZCO-PRADA and BARNES explaining 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** and that it is the RESPONSIBILITY OF THE GOVERNMENT TO REQUEST A SPECIAL VERDICT. DALE, 178 F.3d at 433.

35. Jury instructions should be **VIEWED AS A WHOLE.** See, U.S. vs. MURPHY, 109 F.Supp.2d 1059, 1065 (D.Minn. 2000)(Viewing the instructions as a whole, the court concluded that the issue of drug quantity was not subjected to a reasonable doubt determination by the jury in defendant's case. Therefore, imposing a sentence under the harsher provisions of §841(b)(1)(A) was unlawful and defendant's motion as to this claim must be granted.)

36. The words **"CONTROLLED SUBSTANCE"** was used within Movant's INDICTMENT, throughout Movant's trial and throughout the **JURY INSTRUCTIONS.** Therefore, viewing the information the jury received during trial and the JURY INSTRUCTIONS as a **WHOLE**, this Movant can only rationally conclude that the jury

was subjected to the following TYPES of labels as to the CONTROLLED SUBSTANCE Movant could of been found guilty of: (a) **CONTROLLED SUBSTANCE**; (b) **A NARCOTIC DRUG**; (c) **A NON-NARCOTIC DRUG.**

37. **TITLE 21 U.S.C. §812 - SCHEDULES OF CONTROLLED SUBSTANCES:** Movant states Section 812(a) of Title 21 States: "[T]here are established **FIVE (5) SCHEDULES OF CONTROLLED SUBSTANCES**, to be known as **SCHEDULES I, II, III, IV, AND V.**"

38. **RULE OF LENITY:** The RULE OF LENITY provides that "where text, structure, and history fail to establish that the Government's position is unambiguously correct, [Courts] apply the RULE OF LENITY and resolve the ambiguity in [the defendant's] favor." See, U.S. vs. GRANDERSON, 511 U.S. 39, 54 (1994). AMBIGUITY concerning the ambit of criminal statutes should be resolved in FAVOR OF LENITY, REWIS vs. U.S., 401 U.S. 808, 28 L.Ed.2d 493 (1971), and when choice must be made between two readings of what conduct Congress has made a crime, it is appropriate, BEFORE choosing the harsher alternative, to require that CONGRESS should have spoken in language that is clear and definite, U.S. vs. UNIVERSAL C.I.T. CREDIT CORP., 344 U.S. 218. Moreover, unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance in the prosecution of crime. See, U.S. vs. BASS, 404 U.S. 336, 349, 30 L.Ed.2d 488, 497 (1971). Also see, U.S. vs. TRAN: 234 F.3d 798, 800 (2nd Cir. 2000), where the Second Circuit stated in HEAD NOTE 16 "RULE OF LENITY" requires the sentencing court to impose the LESSER of two penalties where there is an actual ambiguity over which penalty should apply; and HEAD NOTE 19: "Defendant is afforded LENITY only where a penal provision DID NOT accord him fair warning of the sanctions the law placed on that conduct."

39. The U.S. Supreme Court stated in IN RE WINSHIP, 397 U.S. 358, 364, 25 L.Ed.2d 368 (1970), "the Due Process Clause protects the accused against convictions **EXCEPT** upon proof beyond a REASONABLE DOUBT of **EVERY FACT NECESSARY TO CONSTITUTE THE CRIME WITH WHICH HE IS CHARGED.**" The proof beyond a reasonable

doubt standard has become imbedded in society's lexicon as the standard necessary to check prosecutorial overreaching. Accordingly, before a person is to be FOUND GUILTY, subjected to a sentence of incarceration, and stigmatized by the penalty, it is incumbent that those facts be arduously tested by a jury through proof beyond a reasonable doubt. See, WINSHIP, at 361 (stating that "[t]he requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt dates at least from our early years as a NATION").

CONCLUSION AS TO ISSUE ONE (1):

40. Therefore, due to the ALLEGEDLY CORRECT jury determinations by the jury in 1976, where NO jury determination as to the TYPE or QUANTITY of the CONTROLLED SUBSTANCE was ever required. WOOD, 834 F.2d at 1388 (8th Cir. 1987). The jury's GENERAL JURY VERDICT as to Movant being guilty, as per the INDICTMENT, of only Title 21 U.S.C. § 841(a)(1), in Counts 4, 5, and 7, which allows only for a conviction of a CONTROLLED SUBSTANCE, and NOT allowing for a conviction of a particular type, amount, or finding of the CONTROLLED SUBSTANCE being " A NARCOTIC DRUG" or "NOT A NARCOTIC DRUG," dictates that Movant be sentenced under Title 21 U.S.C. §841(b)(1)(B)(3) which allows Movant to be sentenced for a CONTROLLED SUBSTANCE to a term of imprisonment of not more than one (1) year with no prior convictions. It is important to remember that the Government only requested the jury to return a GUILTY VERDICT to violations of Title 21 U.S.C. §841(a)(1) in all counts, that is, the distribution of a CONTROLLED SUBSTANCE.

41. The RULE OF LENITY supports paragraph forty (40).

42. To the extent APPRENDI applies, the jury did not make a "SPECIAL FINDING" dealing with the CONTROLLED SUBSTANCE within Movant's trial to satisfy the FIFTH and SIXTH AMENDMENT protections due Movant. See, SHEPPARD, 219 F.3d 766, 768 n.2, 769 (8th Cir. 2000).

43. Movant's sentences under Counts 4, 5, and 7 must be vacated

due to the FIFTH and SIXTH AMENDMENT violations, as for the above stated reasons. Movant must be resentenced under Title 21 U.S.C. SECTION 841(b)(1)(B)(3), TO NO MORE THAN ONE (1) YEAR.

ISSUE TWO (2):

THE JURY DID NOT PROVE BEYOND A REASONABLE DOUBT ALL FACTS AND ELEMENTS IN COUNTS 4, 5, AND 7. MOVANT'S CONVICTIONS BASED THEREON MUST AUTOMATICALLY BE VACATED.

44. Movant's INDICTMENT DID NOT contain the word POSSESSION within Counts 4, 5, and 7, nor the word INTENT within Count 7. Both words are FACTS and ELEMENTS necessay to sustain a conviction on Title 21 U.S.C. § 841(a)(1). See, EXHIBIT A.

45. The NECESSARY ELEMENTS AND FACTS to sustain a conviction for possession of [a controlled substance] with intent to distribute are that the defendant (1) KNOWINGLY (2) POSSESSED the [controlled substance] (3) with INTENT to distribute it." See, U.S. vs. SANCHEZ, 961 F.2d 1169, 1175 (5th Cir.) cert. denied, 121 L.Ed.2d 248 (1992); see SALMON, 944 F.2d at 1113; U.S. vs. OLIVIER-BECERRIL, 861 F.2d 424, 426 (5th Cir. 1988); U.S. vs. SAMAD, 754 F.2d 1091, 1096 (4th Cir. 1984). Quoting, U.S. vs. WRIGHT, 845 F.Supp. 1041, 1055 (D.N.J. 1994).

46. Both POSSESSION and INTENT are facts and ELEMENTS in the substantive charge of either DISTRIBUTION or sale of narcotics. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(a)(1), 21 U.S.C.A. §841(a)(1). See, U.S. vs. JACKSON, 526 F.2d 1236, 1237, Head Note 3 (5th Cir. 1976). Of interest, is the fact that the word POSSESSION does not appear in Counts 1, 2, 3, 4, 5, & 7.

47. In APPRENDI, the Supreme Court observed: (120 S.Ct. at 2355-56)

> At stake in this case are constitutional protections of surpassing importance: the proscription of any deprivation of liberty without "due process of law." . . . and the guarantee that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." . . . Taken together, these rights indisputably entitle a criminal defendant to "a jury determination that [he] is guilty of **EVERY ELEMENT** of the crime with which he is **CHARGED**, beyond a reasonable doubt." . . . ("[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of **EVERY FACT** necessary to constitute the crime with which he is charged"). See, 120 S.Ct. at 2355-56.

(Quoting, U.S. vs. MURPHY, 109 F.Supp.2d 1059, 1063 (D.Minn. 2000)

48. APPRENDI clearly states that anything other than prior convictions cannot be used to enhance Movant above the statutory maximum barring a determination by the jury beyond a reasonable doubt. Therefore, if the FACT and **ELEMENT** of Title 21 U.S.C. §841(a)(1) offense, **"POSSESSION"** and **"INTENT"**, is not charged in the INDICTMENT, it was IMPOSSIBLE for the **GRAND JURY** or the **PETIT JURY** to make a finding by SPECIAL VERDICT, under the principles of APPRENDI, without knowing what those FACTS and ELEMENTS are as it relates to the evidence presented in the government's case-in-chief.

49. In U.S. vs. CABRERA-TERAN, 168 F.3d 141, 143-145 (5th Cir. 1999) The Fifth Circuit stated, "[T]o be sufficient, an INDICTMENT must allege **EACH** MATERIAL **ELEMENT** [Fact] of the offense; if it does not, it fails to charge that offense. This requirement stems directly from one of the central purposes of an INDICTMENT, to ensure that the **GRAND JURY** finds probable cause that the defendant has committed each **ELEMENT** of the offense, hence justifying a trial, as required by the **FIFTH AMENDMENT.**" Id. at 143. "[t]he indictment is JURISDICTIONAL. A facially complete complaint cannot make up for the shortcomings of the INDICTMENT; the parties cite, and we can find, no caselaw as to how it might." Id. at 145.

50. In U.S. vs. BERLIN, 472 F.2d 1002, 1008 (2nd Cir.), cert. denied, 412 U.S. 949, 93 S.Ct. 3007, 37 L.Ed.2d 1001 (1973). The Second Circuit stated, ". . . an indictment failing to allege all ELEMENTS of offense required by statute will not be saved by simply citing the statutory section." Id. at 1003, Head Note 7.

51. The EIGHTH CIRCUIT stated in U.S. vs. CAMP, 541 F.2d 737, 739-740 (8th Cir. 1976), when it REVERSED a conviction due to the fact that the word "FORCIBLY" being omitted from the INDICTMENT. In CAMP, the statute under which the INDICTMENT was returned, Title 18 U.S.C. §111, begins: Whoever FORCIBLY assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in Section 1114 ... (emphasis added). The Eighth Circuit also referenced and applied the standards of HAMLING vs. U.S., 41 L.Ed.2d 590 (1974), that the "WORDS of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the ELEMENTS necessary to constitute the offense..." and the reasoning consistent with RULE 7 of the Federal Rules of Criminal Procedure, which requires both that an INDICTMENT "BE A PLAIN, CONCISE, AND DEFINITE WRITTEN STATEMENT OF THE ESSENTIAL FACTS CONSTITUTING THE OFFENSE CHARGED" and that an INDICTMENT "state for EACH COUNT the . . . citation of the statute . . . which the defendant is alleged to have violated." The rule's wording makes two (2) requirements - - the statement of the ESSENTIAL FACTS and the citation of the statute.

52. In U.S. vs. DENMON, 483 F.2d 1093 (8th Cir. 1973), the EIGHTH CIRCUIT stated that the failure of the INDICTMENT to charge that the defendant acted KNOWINGLY, UNLAWFULLY and WILLFULLY was fatally defective to the government's prosecution. Therefore, the COURT HELD THAT THE INDICTMENT WAS LEGALLY INSUFFICIENT TO COMPLY WITH THE GRAND JURY CLAUSE OF THE FIFTH AMENDMENT.

53. In U.S. vs. MILLER, 774 F.2d 883, 884-85 (8th Cir. 1985), the Eighth Circuit again stated, "It is generally sufficient that an INDICTMENT set

forth the offense in the **WORDS OF THE STATUTE ITSELF**, as long as 'those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all ELEMENTS necessary to constitute the offense to by punished.'" Quoting, HAMLING vs. U.S., 418 U.S. 87, 117 (1974). Also, "[T]he INDICTMENT contained no assurance that the **GRAND JURY** deliberated on the **ELEMENTS [Facts]** of any particular state offense." Id. at 885.

54. U.S. vs. ZANGGER, 848 F.2d 923, 925 (8th Cir. 1988), again the Eighth Circuit stated, "[B]ecause the 'STATUTORY CITATION [appearing in ZANGGER'S INDICTMENT] **DOES NOT** ensure that the **GRAND JURY** has considered and found all essential **ELEMENTS [Facts]** of the offense charged,' see PUPO, 841 F.2d at 1239, the indictment violates ZANGGER'S **FIFTH AMENDMENT** right to be tried on charges found by the GRAND JURY, see CAMP, 541 F.2d at 740."

55. In U.S. vs. TRAN, 234 F.3d 798, 808-809 (2nd Cir. 2000), "In this case, the district court DID NOT have JURISDICTION to enter a CONVICTION **OR** impose a sentence for an OFFENSE NOT CHARGED IN THE INDICTMENT, namely the 'seperate, aggravated crime' of using **OR AIDING AND ABETTING** the use **OR** carrying of a short-barreled rifle. CASTILLO, 120 S.Ct. at 2096. Rather, the district court's jurisdiction was limited to trying (in this case accepting a GUILTY PLEA from) these defendants, and thereafter convicting and sentencing these defendants, **ON THE OFFENSE CHARGED IN THE INDICTMENT**, namely the use **OR** carrying, **OR** aiding and abetting the use **OR** carrying, of a simple firearm."

CONCLUSION AS TO ISSUE TWO (2):

56. The jury did not prove beyond a reasonable doubt the **FACTS** and **ELEMENTS** necessary to sustain a conviction on Title 21 U.S.C. § 841(a)(1), as the INDICTMENT did not contain the word **POSSESSION** within Counts 4, 5, and 7 nor the word **INTENT** within Count 7. Thus, violations of APPRENDI vs. NEW JERSEY, 120 S.Ct. 2348 (2000), as to the Presentment and Due Process Clause of the Fifth Amendment.

57. Failure to include an ESSENTIAL ELEMENT [**FACT**] of a crime in an INDICTMENT is a jurisdictional defect. Movant's convictions on Counts 4, 5, and 7 must be vacated. Movant was prejudiced.

58. Failure of the PETIT JURY to make a SPECIAL FINDING as to the ELEMENTS and FACTS as to **POSSESSION** and **INTENT** is a jurisdictional defect. Movant's convictions on Counts 4, 5, and 7 must be vacated. Movant was prejudiced.

ISSUE THREE (3):

MOVANT'S INDICTMENT IS MISSING SECTION 841(b), WHICH SPECIFIES THE PENALTIES FOR VIOLATIONS OF SECTION 841(a). THEREFORE, MOVANT'S CONVICTIONS AND SENTENCES MUST BE VACATED EITHER BECAUSE THE COUNTS FAILED TO STATE OFFENSES OR BECAUSE TITLE 21 U.S.C. § 841(a)(1) IS UNCONSTITUTIONAL.

59. Movant was indicted by the GRAND JURY on Counts 1, 2, 3, 4, 5, and 7 and found guilty by a PETIT JURY on Counts 4, 5, and 7. Movant was sentenced under Title 21 U.S.C. Section 841(a)(1). **TITLE 21 U.S.C. Section 841(b) DID NOT APPEAR WITHIN THE INDICTMENT**, which specifies the penalties for violations of Section 841(a). Accordingly, neither the GRAND JURY that returned the indictment nor the PETIT JURY that convicted Movant made findings in this action concerning the **TYPE** of drugs at issue in Counts 4, 5, and 7. Without any reference to or attempt to plead **Section 841(b)** and without any SPECIAL FINDING by the jury on the **TYPE** or **AMOUNT** of drugs, the application of the enhanced penalty provision of Title 21 was **UNCONSTITUTIONAL**. Alternatively, Section 841 and 846 must be deemed unconstitutional, since Congress apparently made the intentional decision to simultaneously base a defendant's sentence on TYPE of drug(s), while unambiguously placing the authority for determining that fact in the sentencing court,

rather than the GRAND and PETIT JURIES. APPRENDI, 120 S.Ct. at 2362-2363 ("[i]t is unconstitutional for a legislature to remove from the jury the assessment of **FACTS** that increase the prescribed range of penalties to which a criminal defendant is exposed."); JONES, 119 S.Ct. at 1229 (Scalia, J., concurring) ("it is unconstitutional to remove from the JURY the assessment of **FACTS** that alter the congressionally prescribed range of penalties to which a criminal defendant is exposed").

60. In CASTILLO vs. U.S., 120 S.Ct. 2090 (2000) the Supreme Court held that the **TYPE OF WEAPON** possessed by a defendant was an ESSENTIAL ELEMENT of Title 18 U.S.C. §924(c). In so ruling, the Supreme Court held that punishment-enhancing factors are to be considered "ELEMENTS" of an aggravated, separate statutory offense - - and that such elements are to be alleged in the indictment, proved to the jury at trial, and found by the jury beyond a reasonable doubt before the "enhanced sentence may constitutionally be applied." CASTILLO, 120 S.Ct. at 2095-2096.

61. "Calling a particular kind of **FACT** an 'ELEMENT' carries certain legal consequences." RICHARDSON vs. U.S., 526 U.S. 813, 817-818 (1998). One such consequence is that the defendant's PETIT JURY must pass unanimously on that ELEMENT using a beyond a reasonable doubt standard of proof. RICHARDSON, 526 U.S. at 817-818. Another "consequence" is that the GRAND JURY must pass upon and include every ELEMENT in an INDICTMENT. See, U.S. vs. CASTILLO, 120 S.Ct. 2090 (2000). The failure to include an essential ELEMENT in an INDICTMENT is a fundamental, jurisdictional defect that renders any conviction on a defective indictment a nullity.

62. Unless done knowingly and intelligently, a defendant CANNOT "waive" his right to an INDICTMENT by a GRAND JURY. Accordingly, a GRAND JURY'S failure to return a proper INDICTMENT is a jurisdictional defect that is not waived, even by a GUILTY PLEA. See, U.S. vs. BELL, 22 F.3d 274, 275 (11th Cir.

1994); U.S. vs. MEACHAM, 626 F.2d 503, 509-510 (5th Cir. 1980). Also see, U.S. vs. TRAN, 234 F.3d 798 (2nd Cir. 2000) ("[W]here the district court acted without subject matter jurisdiction, this Court does not have the discretion not to notice and correct the error; it must notice and correct the error" and "[i]t is therefore inappropriate to resort to discretionary plain error review in such cases.")" U.S vs. SPINNER, 180 F.3d 514 (3rd Cir. 1999) (remanding for reindictment where the original INDICTMENT failed to allege the INTERSTATE COMMERCE COMPONENT). For similar reasons, any deviation by a PETIT JURY from the ELEMENTS charged by the GRAND JURY is jurisdictional and PER SE reversible error. See, STIRONE vs. U.S., 361 U.S. 212 (1960); EX PARTE BAIN, 121 U.S. 1 (1887).

63. **A GENERIC VIOLATION OF § 841(a)(1) DOES NOT PROVIDE A PENALTY: THE U.S. SUPREME COURT AGREES.** See attached EXHIBIT of transcript of ORAL ARGUMENTS of EDWARDS vs. U.S., 140 L.Ed.2d 703 (1998).

64. On February 23, 1998, the U.S. Supreme Court heard ORAL ARGUMENTS in **EDWARDS vs. U.S.**, 140 L.Ed.2d 703 (1998), although the Supreme Court denied petitioner's claim in a later OPINION decided April 28, 1998, it made perfectly clear both in its statement "For these reasons, we need not, and we do not, consider the **MERITS** of petitioners' statutory and constitutional claims," and, the following cited excerpts of the colloquy that took place during the ORAL ARGUMENTS, that the statutory claims presented both in EDWARDS and in this CLAIM have obvious merit.

65. Carefully consider the following statements of the Supreme Court, even if technically DICTUM, must be accorded great weight and should be treated as authoritive when, as in this instance, badges of reliability abound. See, McCOY vs. MASSACHUSETTS INST. OF TECHNOLOGY, 950 F.2d 13, 19 (1st Cir. 1991)(concluding that "federal appellate courts are bound by the Supreme Court's considered DICTA almost as firmly as by the Court's outright holdings, particularly when . . . a DICTUN is of recent vintage and not enfeebled by any subsequent statement"); See

also, CITY OF TIMBER LAKE vs. CHEYENNE RIVER SIOUX TRIBE, 10 F.3d 554 (8th Cir. 1993)(HOLDING SAME); FINKEL vs. STRATTON CORP., 962 F.2d 169 (2nd Cir. 1992) (Holding Same); U.S. vs. SANTANA, 6 F.3d 1, 9 (1st Cir. 1993)(Holding Same); see also, CHARLES ALAN WRIGHT, The Law of the Federal Courts §58, at 374 (4th ed. 1983). The statement quoted herein at a minimum satisfy the definition of **DICTUM** as found in both BLACK'S LAW DICTIONARY and BALENTINE'S LAW DICTIONARY.

66. The Supreme Court in **EDWARDS** provided the lower federal courts with the following eye-opening discussion as well as GUIDANCE where **JUSTICE SCALIA** stated:

> "There are no penalties in Section 841(a). When you read 841(a) you have no idea what the penalties are, **SO THAT CANNOT BE THE OFFENSE**." Well - - "referred to in 846."
>
> "I can read you 841(a) and you can't tell me what penalty is prescribed for that. . . . You have to go down to (b) to figure it out."

(**EDWARDS**, 1998 WL 83179, TRANSCRIPT, U.S.S.CT., Page 13)

67. When the government responded that the penalties for Section 841(a) are enumerated in Section 841(b), **JUSTICE SCALIA RETORTED** that Section 841(b) then becomes part of the offense. Later in the hearing Assistant United States Solicitor General, Edward C. Dumont, Esq., at page 14, *34 states:

> "[M]r. DUMONT: Well, for present purposes my point would be, we would establish that at sentencing to the judge, and the **CONVICTION WOULD BE VALID. EVEN IF IT WERE TRUE THAT WE COULD NOT IMPOSE A TERM OF IMPRISONMENT, THE CONVICTION, THE SPECIAL ASSESSMENT AND THE RECORD AND SO ON WOULD REFLECT A CONVICTION FOR A FELONY, AND THAT FELONY WOULD BE DEFINED BY §841(a). IT WOULD HAVE NOTHING TO DO WITH §841(b).**

(EDWARDS, 1998 WL 83179, TRANSCRIPT, U.S.S.CT., Page 14)

68. **EXHIBIT D** is the EDWARDS, 1998 WL 83179, TRANSCRIPT, U.S.S.CT. pages 1, 2, 13, and 14.

69. Obviously, the U.S. Supreme Court agrees with Movant's argument

THAT THERE ARE NO PENALTIES FOR A VIOLATION OF §841(a), and the Assistant to the Solicitor General's statement above is just about as close as he could come to conceding, without actually saying: "I concede that without putting the defendant on NOTICE in the INDICTMENT of the **§841(b)** subsection of the statute - the offense defined in **§ 841(a) DOES NOT PROVIDE FOR PUNISHMENT OF IMPRISONMENT OR FINE.**"

CONCLUSION AS TO ISSUE THREE (3):

70. WHEREFORE, Movant respectfully requests that this Court for all of the foregoing reasons (1) VACATE Counts 4, 5, and 7 due to the districts courts lack of jurisdiction; or (2) issue an IMMEDIATE release order for Movant's release from his illegal sentence, (3) issue an order causing the vacatur of Movant's term of imprisonment BUT leave the convictions in tact, and (4) any further relief that this Court may find just and proper.

CONCLUSION

71. For all of the foregoing reasons, this Court must vacate Movant's convictions and sentences and/or authorize a SECOND or SUCCESSIVE 28 U.S.C. §2255.

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

EXECUTED ON: April 6, 2001

Respectfully submitted,

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INDEX OF EXHIBITS ATTACHED

EXHIBIT A: Criminal Indictment Number 3-76-54, U.S. vs. JOHN GREGORY LAMBROS and MYLES JOSEPH STANDISH, III. Filed September 14, 1976. Four (4) pages in length.

EXHIBIT B: March 7, 1977, JUDGMENT AND PROBATION/COMMITMENT ORDER. One (1) page.

EXHIBIT C: 1981 - West Publishing Co., Title 21 U.S.C.A. § 841. Pages 102, 103, 104, and 105.

EXHIBIT D: EDWARDS vs. U.S., 140 L.Ed.2d 703 (1998), **ORAL ARGUMENTS** transcript dated February 23, 1998, pages 1, 2, 13, and 14. Also available at 1998 WL 83179, TRANSCRIPT, U.S.S.CT.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

UNITED STATES OF AMERICA	)	CR 3-76-54
	)	
v.	)	INDICTMENT
	)	
JOHN GREGORY LAMBROS and MYLES JOSEPH STANDISH, III	)	(21 U.S.C. §§841(a)(1) and 846)

THE UNITED STATES GRAND JURY CHARGES THAT:

COUNT I

On or about the 24th day of May, 1976, in the State and District of Minnesota, the defendants,

JOHN GREGORY LAMBROS and MYLES JOSEPH STANDISH, III, knowingly and intentionally did unlawfully distribute approximately 28.013 grams of heroin, a Schedule I narcotic drug controlled substance, in violation of Title 21, United States Code, Section 841(a)(1).

COUNT II

On or about the 7th day of June, 1976, in the State and District of Minnesota, the defendants,

JOHN GREGORY LAMBROS and MYLES JOSEPH STANDISH, III, knowingly and intentionally did unlawfully distribute approximately 55.91 grams of heroin, a Schedule I narcotic drugcontrolled substance, in violation of Title 21, United States Code, Section 841(a)(1).

COUNT III

On or about the 7th day of June, 1976, in the State and District of Minnesota, the defendants,

JOHN GREGORY LAMBROS and MYLES JOSEPH STANDISH, III, knowingly and intentionally did unlawfully distribute approximately 44.94 grams of heroin, a Schedule I narcotic drug controlled substance, in violation of Title 21, United States Code, Section 841(a)(1).

EXHIBIT A-1.

Filed SEP 14 1976 19
Harry H. Sisler, Clerk
By Geraldine L. Brown
Deputy

DDa CR 2-79 (1) 14

31.

COUNT IV

On or about the 17th day of June, 1976, in the State and District of Minnesota, the defendants,

JOHN GREGORY LAMBROS and MYLES JOSEPH STANDISH, III,

knowingly and intentionally did unlawfully distribute approximately 55.75 grams of heroin, a Schedule I narcotic drug controlled substance, in violation of Title 21, United States Code, Section 841(a)(1).

COUNT V

On or about the 17th day of June, 1976, in the State and District of Minnesota, the defendant,

JOHN GREGORY LAMBROS,

knowingly and intentionally did unlawfully distribute approximately 24.88 grams of heroin, a Schedule I narcotic drug controlled substance, in violation of Title 21, United States Code, Section 841(a)(1).

COUNT VI

On or about the 17th day of June, 1976, in the State and District of Minnesota, the defendant,

MYLES JOSEPH STANDISH, III,

knowingly and intentionally did unlawfully possess with intent to distribute approximately 24.88 grams of heroin, a Schedule I narcotic drug controlled substance, in violation of Title 21, United States Code, Section 841(a)(1).

COUNT VII

From on or about May 23, 1976, to on or about June 17, 1976, in the State and District of Minnesota, the defendants,

JOHN GREGORY LAMBROS and MYLES JOSEPH STANDISH, III,

did knowingly conspire, combine, confederate and agree together, with each other, and with diverse other persons whose names are to the Grand Jury unknown, to distribute a narcotic drug controlled substance, namely heroin; in violation of Title 21, United States Code, Sections 841(a)(1) and 846.

EXHIBIT A-2.

OVERT ACTS

In furtherance of the conspiracy and to effect the objects thereof, the defendants performed the following overt acts, and other acts not here enumerated, within the District of Minnesota:

1. On May 24, 1976, Myles Joseph Standish, III had a telephone conversation with a person whom Standish referred to as his main source of supply.

2. On May 24, 1976, Myles Joseph Standish, III did enter the residence of John Gregory Lambros at 1759 Van Buren Avenue, St. Paul, Minnesota.

3. On May 24, 1976, Myles Joseph Standish, III did sell 28.013 grams of heroin to Agent Michael N. Campion for the sum of $2,500.

4. At about 8:20 p.m. on June 7, 1976, Myles Joseph Standish, III and John Gregory Lambros together exited from the residence of John Gregory Lambros at 1759 Van Buren Avenue, St. Paul, Minnesota.

5. At about 9:00 p.m. on June 7, 1976, Myles Joseph Standish, III did sell 44.94 grams of heroin to Agent Michael N. Campion for the sum of $4,000 at the residence of Myles Joseph Standish, III at 3211 Lake Johanna Boulevard, Arden Hills, Minnesota.

6. At about 12:30 p.m. on June 17, 1976, at his residence in Arden Hills, Myles Joseph Standish, III did sell about 55.75 grams of heroin to Agent Michael N. Campion for the sum of $4,400 and did advise Agent Campion that he, Standish, would go to meet his man to obtain more heroin.

7. Following the time of Overt Act No. 6, Myles Joseph Standish, III did meet with John Gregory Lambros at the area of the Red Barn restaurant at Snelling Avenue and Carroll Street in St. Paul, Minnesota.

EXHIBIT A-3.

8. On June 17, 1976, and following the time of Overt Act No. 7, Myles Joseph Standish, III did possess an additional 24.88 grams of heroin, in St. Paul, Minnesota.

A TRUE BILL

and, United States Attorney

Foreman

EXHIBIT A-4.

...es of America vs. 00458-124(W)

United States District Court for

John Gregory Lambros

District of Minnesota - Third Division

DOB 08-13-50

DOCKET NO. CRIM. 3-76-54 (Deft.# 1)

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date → MONTH DAY YEAR March 7, 1977

[ ] WITHOUT COUNSEL — However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[X] WITH COUNSEL — Peter J. Thompson (Name of counsel)

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea, [ ] NOLO CONTENDERE, [X] NOT GUILTY

There being a [redacted] verdict of

[ ] NOT GUILTY. Defendant is discharged

[X] GUILTY. to Counts IV, V and VII of the Indictment.

Defendant has been convicted as charged of the offense(s) of having knowingly and intentionally did unlawfully distribute heroin, a Schedule I narcotic drug controlled substance, as set forth in Counts IV and V; in violation of Title 21, United States Code, Section 841(a)(1). having knowingly conspired, combined, confederated with others to distribute a narcotic drug controlled substance, namely heroin, as set forth in Count VII; in violation of Title 21, United States Code, Sections 841(a)(1) and 846.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of fifteen (15) years, with a special parole term of five (5) years to follow. Said sentence to run consecutively and not concurrently with the sentence presently being served.

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

The court orders commitment to the custody of the Attorney General and recommends,

that the defendant be incarcerated at the United States Penitentiary at Terre Haute, Indiana.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

EXHIBIT B.

District Judge / Magistrate [signature]

CERTIFIED AS A TRUE COPY ON THIS DATE March 7, 1977

[signature]

Library References

Drugs and Narcotics ⇐47. C.J.S. Drugs and Narcotics §§ 105 to 107.

Code of Federal Regulations

Identification requirements, see 21 CFR 1316.01 et seq.

PART D—OFFENSES AND PENALTIES

§ 841. Prohibited acts A

Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

Penalties

(b) Except as otherwise provided in section 845 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a controlled substance in schedule I or II which is a narcotic drug, such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than $25,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, a fine of not more than $50,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 6 years in addition to such term of imprisonment.

(B) In the case of a controlled substance in schedule I or II which is not a narcotic drug or in the case of any controlled substance in schedule III, such person shall, except as provided in paragraphs (4), (5), and (6) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine of not more than $15,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this

subchapter or subchapter II of this chapte
ed States relating to narcotic drugs, ma
stimulant substances, have become final,
tenced to a term of imprisonment of not
of not more than $30,000, or both. Any se
imprisonment under this paragraph shall,
prior conviction, impose a special parole
addition to such term of imprisonment ar
a prior conviction, impose a special parol
in addition to such term of imprisonment.

(2) In the case of a controlled substa
person shall be sentenced to a term of
than 3 years, a fine of not more than $1
son commits such a violation after one o
him for an offense punishable under this
under any other provision of this subch
this chapter or other law of the United
drugs, marihuana, or depressant or stim
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ment of not more than 6 years, a fine o
both. Any sentence imposing a term o
paragraph shall, in the absence of such
special parole term of at least one year
imprisonment and shall, if there was suc
a special parole term of at least 2 years
imprisonment.

(3) In the case of a controlled substa
son shall be sentenced to a term of imp
one year, a fine of not more than $5,0
commits such a violation after one or
an offense punishable under this para
any other provision of this subchapter o
ter or other law of the United States
marihuana, or depressant or stimulant
nal, such person shall be sentenced to a
more than 2 years, a fine of not more tha

(4) Notwithstanding paragraph (1)
person who violates subsection (a) of t
small amount of marihuana for no rem
provided in subsections (a) and (b) of se

(5) Notwithstanding paragraph (1)
person who violates subsection (a) of
ing, distributing, dispensing, or posses
ture, distribute, or dispense, except as
ter, phencyclidine (as defined in sec
shall be sentenced to a term of impri
years, a fine of not more than $25,000,
mits such a violation after one or mor
an offense punishable under paragraph

EXHIBIT C-1.

36.

rary References

C.J.S. Drugs and Narcotics §§ 105 to 107.

Federal Regulations

CFR 1310.01 et seq.

FENSES AND PENALTIES

§ A

Unlawful acts

by this subchapter, it shall be unlawful intentionally—

distribute, or dispense, or possess with distribute, or dispense, a controlled sub-

ute, or dispense, or possess with intent a counterfeit substance.

Penalties

rovided in section 845 of this title, any on (a) of this section shall be sentenced

controlled substance in schedule I or II ch person shall be sentenced to a term than 15 years, a fine of not more than son commits such a violation after one f him for an offense punishable under lony under any other provision of this of this chapter or other law of the Unit- le drugs, marihuana, or depressant or become final, such person shall be sen- ment of not more than 30 years, a fine both. Any sentence imposing a term of graph shall, in the absence of such a ecial parole term of at least 3 years in risonment and shall, if there was such special parole term of at least 6 years prisonment.

trolled substance in schedule I or II or in the case of any controlled sub- erson shall, except as provided in para- this subsection, be sentenced to a term than 5 years, a fine of not more than son commits such a violation after one him for an offense punishable under ony under any other provision of this

subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine of not more than $30,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 3 years, a fine of not more than $10,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 6 years, a fine of not more than $20,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine of not more than $5,000, or both. If any person commits such a violation after one or more convictions of him for an offense punishable under this paragraph, or for a crime under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 2 years, a fine of not more than $10,000, or both.

(4) Notwithstanding paragraph (1)(B) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in subsections (a) and (b) of section 844 of this title.

(5) Notwithstanding paragraph (1)(B) of this subsection, any person who violates subsection (a) of this section by manufacturing, distributing, dispensing, or possessing with intent to manufacture, distribute, or dispense, except as authorized by this subchapter, phencyclidine (as defined in section 830(c)(2) of this title) shall be sentenced to a term of imprisonment of not more than 10 years, a fine of not more than $25,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under paragraph (1) of this paragraph, or for

EXHIBIT C-2.

37

a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 20 years, a fine of not more than $50,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment.

(6) In the case of a violation of subsection (a) of this section involving a quantity of marihuana exceeding 1,000 pounds, such person shall be sentenced to a term of imprisonment of not more than 15 years, and in addition, may be fined not more than $125,000. If any person commits such a violation after one or more prior convictions of such person for an offense punishable under paragraph (1) of this paragraph, or for a felony under any other provision of this subchapter, subchapter II of this chapter, or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, and in addition, may be fined not more than $250,000.

Special parole term

(c) A special parole term imposed under this section or section 845 of this title may be revoked if its terms and conditions are violated. In such circumstances the original term of imprisonment shall be increased by the period of the special parole term and the resulting new term of imprisonment shall not be diminished by the time which was spent on special parole. A person whose special parole term has been revoked may be required to serve all or part of the remainder of the new term of imprisonment. A special parole term provided for in this section or section 845 of this title shall be in addition to, and not in lieu of, any other parole provided for by law.

Piperidine offenses and penalty

(d) Any person who knowingly or intentionally—

(1) possesses any piperidine with intent to manufacture phencyclidine except as authorized by this subchapter, or

(2) possesses any piperidine knowing, or having reasonable cause to believe, that the piperidine will be used to manufacture phencyclidine except as authorized by this subchapter,

shall be sentenced to a term of imprisonment of not more than 5 years, a fine of not more than $15,000, or both.

Pub.L. 91-513, Title II, § 401, Oct. 27, 1970, 84 Stat. 1260; Pub.L. 95-633, Title II, § 201, Nov. 10, 1978, 92 Stat. 3774; Pub.L. 96-359, § 8(c), Sept. 26, 1980, 94 Stat. 1194.

EXHIBIT C-3.

Historical No

References in Text. "This subchapter", referred to in subsecs. (a), (b)(1), (2), (3), (5), (6), and (d), was in the original "this title" which is Title II of Pub.L. 91-513, Oct. 27, 1970, 84 Stat. 1242, and is popularly known as the "Controlled Substances Act". For complete classification of Title II to the Code, see Short Title note set out under section 801 of this title and Tables volume.

"Subchapter II of this chapter", referred to in subsec. (b)(1), (2), (3), (5), and (6), was in the original "title III", meaning Title III of Pub.L. 91-513, Oct. 27, 1970, 84 Stat. 1285. Part A of Title III comprises subchapter II of this chapter. For classification of Part B, consisting of sections 1101 to 1505 of Title 18, see Tables volume.

Schedules I, II, III, IV, and V, referred to in subsec. (b)(1), (2), and (3), are set out in section 812(c) of this title.

1984 Amendment. Subsec. (b)(1)(B). Pub.L. 98-359, § 511(1); added reference to par. (6) of this subsection.

Subsec. (b)(6). Pub.L. 98-359, § 511(2), added par. (6).

1978 Amendment. Subsec. (b)(1)(B). Pub.L. 95-633, § 201(1), inserted ", except as provided in paragraphs (4) and (5) of this subsection," following "such person shall".

Library Refere

Drugs and Narcotics ⇔11 et seq. C.

West's Federal

Indictment, see § 7151 et seq.
Sentence and fine, see § 7321 et seq.

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special parole term

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is authorized by this subchapter, or

piperidine knowing, or having reasonable
the piperidine will be used to manufacture
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401, Oct. 27, 1970, 84 Stat. 1260; Pub.L.
v. 10, 1978, 92 Stat. 3774; Pub.L. 96–359, §
t. 1194.

Historical Note

References in Text. "This subchapter", referred to in subsecs. (a), (b)(1), (2), (4), (5), (b), and (d), was in the original "this title" which is Title II of Pub.L. 91–513, Oct. 27, 1970, 84 Stat. 1242, and is popularly known as the "Controlled Substances Act". For complete classification of Title II to the Code, see Short Title note set out under section 801 of this title and Tables volume.

"Subchapter II of this chapter", referred to in subsec. (b)(1), (2), (3), (5), and (6), was in the original "title III", meaning Title III of Pub.L. 91–513, Oct. 27, 1970, 84 Stat. 1255. Part A of Title III comprises subchapter II of this chapter. For classification of Part B, consisting of sections 1101 to 1105 of Title III, see Tables volume.

Schedules I, II, III, IV, and V, referred to in subsec. (b)(1), (2), and (3), are set out in section 812(c) of this title.

1984 Amendment. Subsec. (b)(1)(B). Pub.L. 98–359, § 8(c)(1), added reference to par. (8) of this subsection.

Subsec. (b)(8). Pub.L. 98–359, § 8(c)(2), added par. (8).

1978 Amendment. Subsec. (b)(1)(B). Pub.L. 95–633, § 201(1), inserted ", except as provided in paragraphs (4) and (5) of this subsection," following "such person shall".

Subsec. (b)(6). Pub.L. 95–633, § 201(2), added par. (6).

Subsec. (d). Pub.L. 95–633, § 201(3), added subsec. (d).

Effective Date of 1978 Amendment. Amendment by Pub.L. 95–633 effective Nov. 10, 1978, see section 203(a) of Pub.L. 95–633 set out as an Effective Date note under section 820 of this title.

Effective Date. Section effective the first day of the seventh calendar month that begins after the day immediately preceding Oct. 27, 1970, see section 704(a) of Pub.L. 91–513, set out as an Effective Date note under section 801 of this title.

Repeals. Pub.L. 98–359, § 8(b), Sept. 26, 1984, 98 Stat. 1194, repealed section 408(d) of Pub.L. 91–513, formerly set out under this section, which had provided for the repeal of subsec. (d) of this section effective Jan. 1, 1983.

Legislative History. For legislative history and purpose of Pub.L. 91–513, see 1970 U.S.Code Cong. and Adm.News, p. 4566. See, also, Pub.L. 95–633, 1978 U.S. Code Cong. and Adm.News, p. 9494; Pub. L. 98–359, 1984 U.S.Code Cong. and Adm. News, p. 3182.

Library References

Drugs and Narcotics ⇐=81 et seq. C.J.S. Drugs and Narcotics §§ 146, 151, 152, 160, 168, 170.

West's Federal Forms

Indictment, see § 7151 et seq.
Sentence and fine, see § 7251 et seq.

Notes of Decisions

EXHIBIT C-4. 39.

Citation 1998 WL 83179
1998 WL 83179 (U.S.Oral.Arg.)

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Vincent EDWARDS, Reynolds A. Wintersmith, Horace Joiner, Karl V. Fort, and Joseph Tidwell, Petitioners,
v.
UNITED STATES.
No. 96-8732.
United States Supreme Court Official Transcript.
Feb. 23, 1998.

Washington, D.C.
The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:00 p.m.
APPEARANCES:
STEVEN SHOBAT, ESQ., Chicago, Illinois; on behalf of the Petitioners.
EDWARD C. DUMONT, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

EXHIBIT D-1.

40.

1997 WL 781687 (Amicus.Brief)>>

*2 CONTENTS

*3 PROCEEDINGS

(1:00 p.m.

CHIEF JUSTICE REHNQUIST: We'll hear argument this afternoon in Number 96-8732, Vincent Edwards, et al., v. United States.

Mr. Shobat. Am I pronouncing your name correctly?

MR. SHOBAT: Yes.

CHIEF JUSTICE REHNQUIST: Thank you.

ORAL ARGUMENT OF STEVEN SHOBAT
ON BEHALF OF THE PETITIONERS

MR. SHOBAT: Mr. Chief Justice and may it please the Court:

The ambiguous general verdicts returned in this case cannot support the sentencing court's finding that the conspiracy embraced both objectives charge in this dual object conspiracy, the two objectives being the distribution of powder cocaine and the distribution of crack cocaine, and they cannot be for four reasons.

First, Congress required the jury to determine the type of drug involved in the drug conspiracy before sentence could be imposed upon that object.

Second, the Fifth and Sixth Amendment rights to a jury determination of all the essential elements of a conspiracy requires the jury to determine what the object *4 of the offense was, and particular to the type of drug.

Third, the Due Process Clause of the Fifth Amendment does not permit punishment to be imposed in excess of the statutory maximum provided by Congress and, finally, nothing in the Sentencing Guidelines, to the extent tha they ever could, undermines these principles.

With respect to what Congress intended, it's clear that in enacting section 846 Congress wanted to fix the maximum punishment available to a person convicted of that section to the offense, the object of which the conspiracy was intending to accomplish.

QUESTION: Mr. Shobat, does your argument depend on finding that both the type and the quantity of drugs are elements of the section 846 conspiracy?

MR. SHOBAT: No, Your Honor, it does not. It's clear that Congress, in listing the various different factors in section 841(b), intended that some of them be elements of the offense and some of them not be. Congress made it explicitly clear in enacting section 851 that the existence of a prior conviction was one of the factors listed in 841(b) that should not be

Now, section 846, which is on pages 1 and 2 of the appendix in the blue brie says any person who attempts or conspires to commit any offense defined in th sub-chapter shall be subject to the same penalties, and so on.

The offenses are defined by the other sections in that portion of the United States Code. If you then look at 841, which is the object defense here, 841(a defines the offense, and the offense is either possession or--with the intent to distribute, or distribution--

*32 QUESTION: Well, it can't define the offense if, indeed, as you just read, you are to be punished with the same penalties as those prescribed for the offense. There are no penalties prescribed for 841(a). When you read 841(a) you have no idea what the penalties are, so that cannot be the offense

MR. DUMONT: Well--

QUESTION:--referred to in 846.

MR. DUMONT: Well, with respect, we would obviously disagree with that.

What you know from 846 is that you're looking for an object offense. The object offense is defined in 841(a), which says, unlawful acts, except as authorized and so on you may not distribute, or possess--

QUESTION: Right.

MR. DUMONT:--with intent to distribute controlled substances.

QUESTION: Right, and if all I had before me was 841, I would agree. But yo have before you 846, which you just read, which says any person who attempts conspires to commit any offense defined in this chapter shall be subject to t same penalties as those prescribed for the offense. There are no penalties prescribed for the offense of violating 841(a).

MR. DUMONT: Well--

*33 QUESTION: I can read you 841(a) and you can't tell me what penalty is prescribed for that.

MR. DUMONT: Well, with respect--

QUESTION: You have to go down to (b) to figure it out.

MR. DUMONT: With respect, I can, because what I'll say is, you look down to (b), which prescribes the penalties for the offense defined in (a).

QUESTION: Fine. I'm willing to accept (b). Then (b) becomes part of the offense.

MR. DUMONT: We disagree about that.

QUESTION: That's fine.

MR. DUMONT: We disagree about that, obviously, and our analysis is that 841(a) defines an offense which is complete once the jury finds that you have distributed or manufactured or possessed with the intent a controlled substance, and it's true they--in a substantive count, then in the nature of things they will have to find a controlled substance involved.

I would point out, as came out from some of the questions, in a conspiracy offense that's not at all clear. There are certainly conspiracies for which you could be charged and which you could be found guilty where you would have no idea what the type of substance involved was.

*34 Now, I grant you, that will give rise, in those cases, if they actually happen, to strange sentencing issues under both 841(b) and under the guidelines, because it's not clear what you do with something where you really don't know even what type of drug was involved, but the fact is the conviction would--

EXHIBIT D-3.

QUESTION: You apply the minimum. I think that's an easy answer, isn't it? It's up to the Government to prove whatever is necessary to prove in order to impose a penalty and if you can't figure out what it was, the most you can impose is the minimum, I would assume. What's hard about that?
MR. DUMONT: That's a potential answer to that question.
QUESTION: It seems to me it's the only answer. The burden's on the Government to establish what needs to be established to impose the penalty, isn't it?
MR. DUMONT: Well, for present purposes my point would be, we would establis that at sentencing to the judge, and the conviction would be valid.
Even if it were true that we could not impose a term of imprisonment, the conviction, the special assessment and the record and so on would reflect a conviction for a felony, and that felony would be defined by 841(a). It woul have nothing to do with 841(b).
*35 841(b) has to do with prescribing the penalties that are appropriate under particular circumstances for violations of 841(a).
QUESTION: And if you commit the offense of conspiracy you perhaps under one view would simply be subject to the risk of being sentenced based on what the conspiracy turned up and the judge says, it's 5 grams, or 10 grams, or whatever.
MR. DUMONT: That's absolutely right, and our point here is, when you move into the realm of conspiracy--now, 846 obviously covers a wide range of different target statutes and so on, and in this particular case we're dealin with 846, referring to 841 as the object statute.
We think it's fairly clear that what Congress would have intended here is wh you are convicted of conspiracy to violate 841 what happens is the judge at sentencing looks at the complex of offense conduct involved in that conspirac under very traditional Pinkerton-type conspiracy vicarious--
QUESTION: May I interrupt with just one question to be sure--what if, in th case, instead of a general verdict you have a special verdict and the jury--a whole stream of different alternatives, and the jury found not guilty as to 9 out of the 10, but on one they *36 said he was guilty of conspiring to distribute 5 grams of powder, and that's all.
Under your view, could the judge nevertheless sentence--the judge has a different view of the evidence. He thinks he really committed 100 kilograms crack. That's the judge's view. The judge could nevertheless sentence on th basis of his view of the evidence even in the conspiracy context.
MR. DUMONT: Well--
QUESTION: With specific findings.
MR. DUMONT: I would say particularly in the conspiracy context--in the conspiracy context, the answer is clearly yes, because as long as the conviction is valid, everything else is a sentencing factor and, as the court pointed out in Watts, the difference in standard of proof makes a huge difference there, because all the jury has said by declining to convict on th other counts is they weren't convinced beyond a reasonable doubt, but there's big range there between that and preponderance of the evidence where the cour can operate.
Now, what I will say is, it's a harder case if you have a substantive--a set of substantive distribution counts and the jury acquits on several but convic