June 7, 2001

John Gregory Lambros
Reg. No. 00436-124
U.S. Penitentiary Leavenworth
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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
U.S. CERTIFIED MAIL WITH RETURN RECEIPT #7000-0520-0021-3724-5253

RE: SUCCESSIVE §2255 - Re: Criminal No. 3-75-128, U.S. District Court for the District of Minnesota - Third Division.

Dear Clerk:

As per my December 12, 2000, letter to you requesting a PRISONER FORM for the filing of a SUCCESSIVE §2255 and your response stating,"We have no form. Other Circuits do - they're out on the internet. Or, just modify the __?__ form and in district court."

Basically I just copied the format used by private attorney's assisting inmates. Hopefully it will pass.

Anyway, please file the attached original and three copies of my SECOND or SUCCESSIVE §2255 as to APPRENDI vs. NEW JERSEY, 120 S.Ct. 2348 (2000).

Yes I understand that you have not granted RETROACTIVITY but I'm concerned about the one (1) year statute of limitations provision in §2255, that presented a problem in the Second circuit in BAILEY. I understand that you may just file the enclosed and give me a denial **WITHOUT PREJUDICE, THUS PRESERVING MY ISSUE.**

Thanking you in advance for your continued assistance.

Sincerely,

John Gregory Lambros

c:
U.S. Attorney, District of Minnesota
File

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: June 02, 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: June 02, 2001.**

and all attachments and exhibits on this 7th **DAY OF JUNE, 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

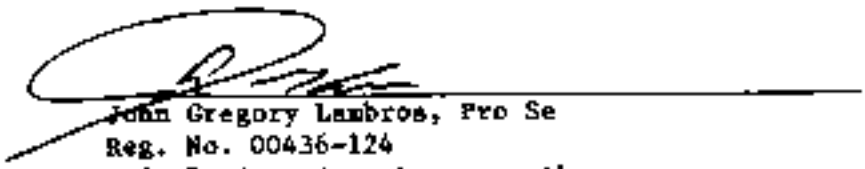
U.S. CERTIFIED MAIL NO. 7000-0520-0021-3724-5253

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



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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. 01-2370MN
vs.	*	In Re: Criminal No. 3-75-128,
UNITED STATES OF AMERICA,	*	United States District Court for the District of Minnesota - Third Division.
Plaintiff-Respondent,	*	

MOTION FOR LEAVE TO FILE 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, APPRENDI vs. NEW JERSEY, 120 S.Ct 2348 (2000).

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

DATED: June 02, 2001

Respectfully Submitted,

John Gregory Lambros, Pro Se

3.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JOHN GREGORY LAMBROS,	*	CIVIL APPEAL No. 01-2370MN
Defendant-Movant,	*	In Re: Criminal No. 3-75-128, United States District Court for the
vs.	*	District of Minnesota - Third Division.
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

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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. DURLOUIS, 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,

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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 CR-3-75-128 (Deft. 24) (Superceding Indictment), filed in the United States District Court for the District of Minnesota, Third Division, on February 23, 1976. See, EXHIBIT A. (hereinafter "MOVANT'S INDICTMENT")(Sixteen (16) pages total with forty-four (44) counts).

18. Movant's INDICTMENT was a forty-four (44) count INDICTMENT which named Movant LAMBROS in Counts 1, 41, 42, 43, & 44. Movant requested a jury trial and proceeded to trial.

19. On April 22, 1976, after three days of trial and after other defendants at the trial had entered guilty pleas, Movant entered a change of plea in this case as to Count 43 of the INDICTMENT so as to receive no more than five years incarceration and a special parole term of whatever length the Court determined, but at least three years. See, U.S. vs. LAMBROS, 544 F.2d 962, 963 (8th Cir. 1976). Counts 1, 41, 42, & 44 were dropped.

20. On June 21, 1976, Movant was sentenced on Count 43 of the INDICTMENT as charged in violation of Title 21 U.S.C. Section 841(a)(1) to five (5) years imprisonment plus a committed fine of $10,000.00 and three (3) year special parole term.

21. Counts 1, 41, 42, 43, & 44 within Movant's indictment stated violations of:

a. **Count 1:** ". . . willfully and knowingly did combine, conspire, confederate and agree together, with each other, . . ., to import into the United States and to distribute a schedule II narcotic drug controlled substance, namely cocaine; in violation of Title 21, United States Code, Sections 841(a)(1), 841(b)(1)(a), 846, 952(a), 960(a)(1) and 963. . . ."

b. **Count 41:** " . . . knowingly and intentionally did unlawfully possess with intent to distribute about one kilogram of cocaine, a schedule II narcotic drug controlled substance, in violation of Title 21, United States Code, Section 841(a)(1).

c. **Count 42:** ". . . knowingly and intentionally did unlawfully possess with intent to distribute about 196 grams of cocaine, a schedule II narcotic drug controlled substance, in violation of Title 21, United States Code, Section 841(a)(1)."

d. **Count 43:** ". . . knowingly and intentionally did unlawfully possess with intent to distribute about two pounds of cocaine, a schedule II narcotic drug controlled substance, in violation of Title 21, United States Code, Section 841(a)(1)."

e. **Count 44:** ". . . knowingly and intentionally did unlawfully possess with intent to distribute about one-half pound of cocaine, a schedule II narcotic drug controlled substance, in violation of Title 21, United States Code, Section 841(a)(1)."

CASE HISTORY:

22. On April 22, 1976, Movant entered a plea of guilty to Count 43 during his jury trial. Counts 1, 41, 42, & 44 were dismissed in exchange for plea.

23. On June 21, 1976, Movant was sentenced on Count 43 of the Indictment. See, **EXHIBIT B**. (June 21, 1976, JUDGMENT AND PROBATION/COMMITMENT ORDER)

24. On October 15, 1976, Movant's attorney filed a direct appeal that was decided and affirmed on November 16, 1976. See, U.S. vs. LAMBROS, 544 F.2d 962 (8th Cir. 1976)

25. On March 21, 1977, Movant's petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit was denied in LAMBROS vs. U.S., No. 76-827, 51 L.Ed.2d 774 (1977).

26. On May 1, 1979, Movant filed a motion to vacate his sentence as per Title 28 U.S.C. § 2255. U.S. District Court Judge Edward J. Devitt, Chief Judge, denied Movant's postconviction motion.

27. On January 11, 1980, Movant appealed the order of the United States District Court for the District of Minnesota.

28. On January 28, 1980, the Court of Appeals for the Eighth Circuit held that conclusory allegation that Movant's guilty pleas were "coerced and involuntary" because they were induced by government representations that his wife would be deported or prosecuted for related offenses if he did not plead guilty were insufficient to establish Movant's right to collateral relief in postconviction proceeding. Thus affirming. See, U.S. vs. LAMBROS, 614 F.2d 179 (8th Cir. 1980).

29. Movant did not petition the U.S. Supreme Court.

30. To the best of Movant's knowledge and officials at the United States Penitentiary Leavenworth, Movant is still serving this sentence as he has never received a discharge certificate from the United States Parole Commission or any other government agency. 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 CONVICTION AND SENTENCES MUST BE VACATED BASED ON THE FOLLOWING VIOLATIONS OF APPRENDI vs. NEW JERSEY, 120 S.Ct. 2348 (2000):

ISSUE ONE (1):

CAN MOVANT LAMBROS MAKE A VOLUNTARY AND INTELLIGENT PLEA OF GUILTY TO AN INDICTMENT THAT DOES NOT CONTAIN THE FACTS AND ELEMENTS OF THE CRIME CHARGED WITHIN THE INDICTMENT PURSUANT TO THE UNITED STATES SUPREME COURT DECISION APPRENDI vs. NEW JERSEY, 120 S.Ct. 2348 (2000)?

31. Movant's "SUPERCEDING" criminal indictment CR-3-75-128, filed

on February 23, 1976, was a forty-four (44) count indictment which named Movant LAMBROS in Counts 1, 41, 42, 43, & 44. Movant requested a jury trial and proceeded to trial. After three (3) days of trial Movant entered a change of plea as to Count 43 of the INDICTMENT so as to receive no more than five (5) years of incarceration. The government has forgone Counts 1, 41, 42, & 44 in the course of plea bargaining and Movant is actually innocent of those counts.

32. Movant LAMBROS is actually innocent of Counts 1, 41, 42, 43, & 44 and was prejudiced, as the record reflects, that at the time of Movant's guilty plea, neither Movant, nor his counsel, nor the District Court correctly understood the FACTS and ESSENTIAL ELEMENTS of the crimes with which Movant was charged in the indictment.

33. Movant should not be precluded from relying on APPRENDI vs. NEW JERSEY, 120 S.Ct. 2348 (2000), as Movant's guilty plea was involuntary and unintelligent because he was misinformed about the FACTS and ESSENTIAL ELEMENTS of the following crimes charged within Criminal Indictment CR-3-75-128:

a. **COUNT ONE (1):** Movant LAMBROS was charged as to " [.] . . will]fully and knowingly did combine, conspire, confederate and agree together, with each other, . . . , to import into the United States and to distribute a schedule II narcotic drug controlled substance, namely cocaine; in violation of Title 21, United States Code, sections 841(a)(1), 841(b)(1)(a), 846, 952(a), 960(a)(1) and 963." See, EXHIBIT A (Indictment).

b. **COUNT FORTY-ONE (41):** Movant LAMBROS was charged as to "[.] . . knowingly and intentionally did unlawfully possess with intent to distribute about one kilogram of cocaine, a schedule II narcotic drug controlled substance, in violation of Title 21, United States Code, Section 841(a)(1)." See, EXHIBIT A (Indictment).

c. **COUNT FORTY-TWO (42):** Movant LAMBROS was charged as to "[.] . . knowingly and intentionally did unlawfully possess with intent to distribute about 196 grams of cocaine, a schedule II narcotic drug controlled

substance, in violation of Title 21, United States Code, Section 841(a)(1)." See, **EXHIBIT A** (Indictment).

d. **COUNT FORTY-THREE (43):** Movant LAMBROS was charged as to "[.] . . knowingly and intentionally did unlawfully possess with intent to distribute about two pounds of cocaine, a schedule II narcotic drug controlled substance, in violation of Title 21, United States Code, Section 841(a)(1)."

e. **COUNT FORTY-FOUR (44):** Movant LAMBROS was charged as to "[.] . . knowingly and intentionally did unlawfully possess with intent to distribute about one-half pound of cocaine, a schedule II narcotic drug controlled substance, in violation of Title 21, United States Code, Section 841(a)(1)."

NECESSARY ELEMENTS AND FACTS TO SUSTAIN A CONVICTION:

34. A criminal indictment is required to allege all **ELEMENTS** of the offense required by statute in which the **GRAND JURY** returned in each count. The following legal cases offer proof of the **ELEMENTS** of the offense as to the following violations of Title 21, United States Code, that appear within **Count One (1):**

a. **Title 21 USC § 841(a)(1)** states, "(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." Quoting, 1981 U.S. Code Annotated, Title 21, Section 841. Every circuit court has held that the necessary **ELEMENTS TO SUSTAIN A CONVICTION** on Title 21 U.S.C. 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). Also,

POSSESSION is an **ELEMENT** in the substantive charge of either DISTRIBUTION or sale of narcotics of the 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). PLEASE NOTE that Count One (1) DID NOT contain the **ELEMENTS**, wording, **INTENT** or **POSSESSION**. Therefore, Count One (1) is DEFECTIVE as it does not contain each material element of the offense, Title 21 U.S.C. § 841(a)(1).

b. **Title 21 U.S.C. § 846** states, "Any person who attempts or conspires to commit any offense DEFINED in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy." Quoting, 1981 U.S. Code Annotated, Title 21, Section 846. The Fifth Circuit has consistently held that, **KNOWLEDGE**, **INTENT** and **PARTICIPATION** are the essential elements of 21 U.S.C. § 846. See, U.S. vs. BASEY, 816 F.2d 980, 1002 (5th Cir. 1987)("Before a defendant may be convicted of conspiracy under [21 U.S.C.] section 846, the government must prove both the existence of an agreement to commit a crime and that each conspirator KNEW OF, INTENDED TO JOIN, and PARTICIPATED IN THE CONSPIRACY . . . [K]nowledge, intent and participation, the essential elements of the crime, must be proved beyond a reasonable doubt." Also see, U.S. vs. LINDELL, 881 F.2d 1313, 1324 (5th Cir. 1989), cert. denied, 110 L.Ed.2d 642 (1990) (To sustain a conspiracy conviction [21 U.S.C. §846], "knowledge, intent, and participation, the essential elements of the crime, must be proved beyond a reasonable doubt"). Also see, U.S. vs. MAHOLIAS, 985 F.2d 869, 871, Head Note 15 (7th Cir. 1993) "Conspiracy to distribute a controlled substance is specific **INTENT** crime; government must prove that defendant conspired to distribute controlled substance with INTENT to distribute. . . . 21 U.S.C.A. §§ 841, 846." Quoting, U.S. vs. MONZON, 869 F.2d 338, 344 (7th Cir.), cert. denied, 104 L.Ed. 2d 650 (1989). MAHOLIAS, at 879. "When a crime requires the government to prove SPECIFIC INTENT, we have held that, because it is a MATERIAL ELEMENT to be proved

by the government, . . ." MAROLIAS, at 879. PLEASE NOTE that Count One (1) DID NOT contain the **ELEMENT**, word, **INTENT**. Therefore, Count One (1) is DEFECTIVE as it does not contain each material element of the offense, Title 21 U.S.C. § 846.

c. Title 21 U.S.C. § 952(a) states, "(a) It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any controlled substance in schedule I or II of subchapter I of this chapter, or any narcotic drug in schedule III, IV, or V of subchapter I of this chapter, except that -" Quoting, 1981 U.S. Code Annotated, Title 21, Section 952. The Fifth Circuit has held that **KNOWLEDGE** and **INTENT** are ELEMENTS of § 952(a). See, U.S. vs. FONSECA, 490 F.2d 464, 465 Head Note 4 (5th Cir. 1974), rehearing denied, 497 F.2d 1384, cert. denied, 42 L.Ed.2d 668 (1974) "[E]lements of KNOWLEDGE and INTENT present in **INDICTMENT** charging defendant with knowing and intentional IMPORTATION and possession of marijuana with intent to distribute were subjective and did not require direct proof. 21 U.S.C.A. §§ 841(a)(1), 952(a)."; U.S. vs. OJEBODE, 957 F.2d 1218, 1228 (5th Cir. 1992), cert. denied, 122 L.Ed.2d 683 (1993), "[H]owever, nowhere in the jury instructions is found the PROPER SCIENTER REQUIREMENT for an importation offense. Rather, the instructions include only the WORDS of the statute (21 U.S.C. §§ 952(a), 960(a)) and the definition of "WILLFULLY." The recitation of only statutory language **IS NOT** an adequate charge to the jury. The danger is that the language of the IMPORTATION STATUTE can be construed to allow conviction without proof of **SPECIFIC INTENT TO IMPORT** into the United States, an **ELEMENT** of the offense. . . . we find that the district court committed reversible error in its instructions on the importation charge on this issue." OJEBODE, at 1228. "The court omitted to charge the jury **[Grand Jury?]** on an ESSENTIAL ELEMENT of the crime of IMPORTATION, that of SPECIFIC INTENT, therefore misleading the jury **[Grand Jury?]** about the elements of an importation offense." OJEBODE, 1227.

PLEASE NOTE that Count One (1) DID NOT contain the ELEMENT, word, INTENT. Therefore, Count One (1) is DEFECTIVE as it does not contain each material element of the offense, Title 21 U.S.C. § 952(a).

d. TITLE 21 U.S.C. § 960(a)(1) states, "(a) Any person who - (1) contrary to section 952, 953, or 957 of this title, KNOWINGLY or INTENTIONALLY imports or exports a controlled substance, " (emphasis added). Quoting, 1981 U.S. Code Annotated, Title 21, Section 960. The Fifth Circuit again has held that SPECIFIC INTENT is an ELEMENT of § 960(a). See, U.S. vs. OJEBODE, 957 F.2d 1218, 1228 (5th Cir. 1992), cert. denied, 122 L.Ed.2d 683 (1993). "However, nowhere in the jury instructions is found the PROPER SCIENTER requirement for an importation offense. Rather, the instructions included only the words of the statute (21 U.S.C. §§ 952(a), 960(a)) and the definition of "willfully." The recitation of only statutory language is not adequate charge to the jury. The danger is that the language of the importation statute can be construed to allow conviction without proof of SPECIFIC INTENT to import into the United States, an ELEMENT OF THE OFFENSE. . . ., we find that the district court committed reversible error in its instructions on the importation charge on this issue." OJEBODE, 957 F.2d at 1228. See also, U.S. vs. ROBERTS, 887 F.2d 534, Head Note 4 (5th Cir. 1989), "INTENT TO DISTRIBUTE is an ESSENTIAL ELEMENT of the crime of possessing and IMPORTING more than five kilograms of cocaine with intent to distribute. 21 U.S.C.A. §§ 841, 952, 960." PLEASE NOTE that Count One (1) is DEFECTIVE as it does not contain each material element of the offense, Title 21 U.S.C. 960(a)(1).

e. Title 21 U.S.C. § 963 states, "Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy." Quoting, 1981 U.S. Code Annotated, Title 21, Section 963. The Fifth Circuit has held, "[U]ndeniably, INTENT is an ELEMENT of the crimes of importing marijuana

into the United States and **CONSPIRING TO IMPORT** marijuana into the United States." U.S. vs. GOODWIN, 492 F.2d 1141, 1149 (5th Cir. 1974). Foot Note 8 in GOODWIN, at 1149 is also of assistance, " . . . But §952(a) must be read with the penalty provisions in 21 U.S.C. § 960 as requiring KNOWLEDGE and INTENT before any punishment can be imposed. Courts have assumed, of course, that such a requirement does exist. . . . In the present case, the INDICTMENT charged that the defendants "did **KNOWINGLY** and **INTENTIONALLY** combine, **CONSPIRE**, confederate, and agree . . ." and that GOODWIN "did **KNOWINGLY** and **INTENTIONALLY IMPORT** . . ." (Violations of 21 U.S.C. § 963). PLEASE NOTE that Count One (1) is DEFECTIVE as it does not contain each material element of the offense, Title 21 U.S.C. § 963.

35. Count One (1) of Movant LAMBROS' INDICTMENT did not contain the word **POSSESSED** as required by Title 21 U.S.C. § 841(a)(1).

36. Count One (1) of Movant LAMBROS' INDICTMENT did not contain the word **INTENT** as required by Title 21 U.S.C. §§ 841(a)(1); 846; 952(a); 960(a)(1); and 963.

37. Both the words POSSESSED and INTENT are **FACTS** and **ELEMENTS** necessary to sustain a conviction on Count One (1) within Movant's indictment.

38. 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, APPRENDI, 120 S.Ct. at 2355-56. (emphasis added)

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

39. In criminal law, a crime generally consists of two (2) elements, a physical, wrongful deed (the "ACTUS REUS"), and a guilty mind that produces the act (the "MENS REA"). See, U.S. vs. APPELBAUM, 63 L.Ed.2d 250 (1980); NESBITT vs. HOPKINS, 907 F.Supp. 1317 (D.Neb. 1995), judgment aff'd, 86 F.3d 118 (8th Cir. 1996), cert. denied, 136 L.Ed.2d 414 (1996). The "MENS REA" is generally an ESSENTIAL ELEMENT of any criminal offense, U.S. vs. SPY FACTORY, INC. 960 F.Supp. 684 (S.D.N.Y. 1997), and applies to each statutory ELEMENT which criminalizes otherwise innocent conduct. See, STATE vs. RYAN, 249 Neb. 218, 543 N.W.2d 128 (1996), cert. denied, 136 L.Ed.2d 213 (1996). A crime is not committed if the mind of the person doing the act is innocent. See, LETCHWORTH vs. GAY, 874 F.Supp. 107 (E.D.N.C.).

40. The APPRENDI court clearly states, "[A]mong the most common definitions of **MENS REA** is "CRIMINAL INTENT." APPRENDI, 147 L.Ed.2d 435, 456 Foot Note 17. (emphasis added) Also, "[T]he defendant's INTENT in committing a crime is perhaps as close as one might hope to come to a core criminal offense "ELEMENT." APPRENDI, at 457.

41. In sum, the APPRENDI court reexamination of cases, and the history upon which they rely, confirms the footnote explanation and opinion that was expressed in U.S. vs. REESE, 92 U.S. 214, 232-233 (1876), in footnote 15:

> "[I]n addition to the reasons set forth in JUSTICE SCALIA's dissent, 523 U.S., at 248-260, it is **NOTEWORTHY** that the Court's extensive discussion of the term "sentencing factor" virtually ignored the pedigree of the **PLEADING REQUIREMENT AT ISSUE**. The rule was succinctly stated by Justice Clifford in his separate opinion in U.S. vs. REESE, 92 U.S. 214, 232-233 (1876): **"[T]he INDICTMENT MUST CONTAIN AN ALLEGATION OF EVERY FACT WHICH IS LEGALLY ESSENTIAL TO THE PUNISHMENT TO BE INFLICTED."** . . . (emphasis added)

(APPRENDI, 147 L.Ed.2d 454, FootNote 15 (2000))

42. Therefore, it is necessary that the words **POSSESSED** and **INTENT**, both allegations of fact which is legally essential to the punishment of Count One (1), should of appeared within the INDICTMENT, as it was impossible for the

GRAND JURY or the PETIT JURY, if Movant LAMBROS had not plead guilty on the third day of trial, 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 as to Count One (1).

GUILTY PLEA - VOLUNTARY AND INTELLIGENT:

43. APPRENDI was a result of a PLEA AGREEMENT and the INDICTMENT had no reference to the hate crime enhancement nor did it allege any such facts. Therefore, a GUILTY PLEA.

44. A plea of guilty is constitutionally valid only to the extent it is "voluntary" and "intelligent." See, BRADY vs. U.S., 25 L.Ed.2d 747 (1970).

45. Movant believes this issue is similar to BOUSLEY vs. U.S., 140 L.Ed.2d 828 (1998), were the U.S. Supreme Court held, "[t]hat the accused will be entitled to a hearing on the merits of his misinformation claim, if, on remand, the accused makes the necessary showing of ACTUAL INNOCENCE (see ¶ 32) to relieve his procedural default in failing to contest his § 924(c)(1) guilty plea in his prior direct appeal, as (1) if the record disclosed that at the time of the plea, neither the accused, nor his counsel, nor the District Court correctly understood the ESSENTIAL ELEMENTS OF THE CRIME with which he was charged, then the plea was INVALID under the Federal Constitution; (2) the accused was not precluded from relying on BAILEY vs. U.S. in support of his claim; and (3) even though the accused had failed to establish cause to relieve his procedural default, it was appropriate to remand the case to permit him to attempt to make a showing of ACTUAL INNOCENCE to relieve the default." (emphasis added) BOUSLEY, 140 L.Ed.2d at 829.

LEGAL CITE'S":

46. 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.

47. In U.S. vs. BERLIN, 472 F.2d 1002, 1008 (2nd Cir. 1973), cert. denied, 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." Also Head Note 7.

48. 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 HANLING 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 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.

49. 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.

50. U.S. vs. MILLER, 774 F.2d 883, 884-85 (8th Cir. 1985). "[T]he INDICTMENT contained no assurance that the GRAND JURY deliberated on the ELEMENTS [Facts] of any particular stated offense." Id. at 885.

51. 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 FUPO, 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."

52. In U.S. vs. TRAN, 234 F.3d 798, 806-809 (2nd Cir. 2000) The Second Circuit stated, "First, pleading guilty does not waive a defendant's right to indictment by a GRAND JURY. . . . Here, the record does not show that Son knowingly, intelligently and voluntarily waived his right to be tried and convicted only upon charges presented by a GRAND JURY." Id. at 806. 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 ONE (1):

53. Movant LAMBROS has proved to this Court that Count One (1) did not contain the facts and elements of the crimes charged, that being the words **POSSESSED** and **INTENT**.

54. APPRENDI confirmed the opinion that was expressed in U.S. vs. REESE, 92 U.S. 214, 232-233 (1876) as to pleading requirement and the fact the indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted. See, Paragraph 41.

55. APPRENDI also confirmed the definitions of **MENS REA**, "CRIMINAL INTENT." See, Paragraph 40.

56. Movant **LAMBROS** is ACTUALLY INNOCENT of all counts within the indictment, Counts 1, 41, 42, 43, & 44, and was prejudiced, as the records reflects, that at the time of Movant's guilty plea, neither Movant, nor his counsel, nor the District Court correctly understood the FACTS and ESSENTIAL ELEMENTS of the crimes with which Movant was charged in the indictment.

57. Failure of the GRAND JURY to make a special finding as to the **ELEMENTS** and **FACTS** of **POSSESSION** and **INTENT** is a jurisdictional defect. Movant's guilty plea must be vacated and Movant must be allowed to PLEA ANEW.

58. Movant respectfully submits that if, as APPRENDI establishes, drug type and drug quantity as ESSENTIAL ELEMENTS of Title 21 drug offenses, then the failure to allege **POSSESSION** and **INTENT** as ESSENTIAL ELEMENTS of Title 21 drug offenses, is every bit as jurisdictional a defect as the failure to allege a specific type of firearm in CASTILLO, 120 S.Ct. at 2096, quoting, U.S. vs. TRAN, 234 F.3d at 806. "[I]n order for an accusation of a crime (whether by indictment or some other form) to be proper under the common law, and thus proper under the codification of the common-law rights in the Fifth and Sixth Amendments, it MUST ALLEGE ALL ELEMENTS OF THAT CRIME; likewise, in order for a jury trial of a crime to be proper, all elements of the crime must be proved to the jury (and, under WINSHIP, proved beyond a reasonable doubt). APPRENDI, 120 S.Ct. at 2367, 2368 (Scalia; Thomas J.J. concurring)(147 L.Ed2d at 461).

ISSUE TWO (2):

MOVANT'S INDICTMENT IS MISSING SECTION 841(b) IN COUNTS 41, 42, 43, & 44, WHICH SPECIFIES THE PENALTIES FOR VIOLATIONS OF TITLE 21 U.S.C. SECTION 841(a). THEREFORE, MOVANT'S CONVICTIONS AND SENTENCES MUST BE VACATED EITHER BECAUSE THE COURTS FAILED TO STATE OFFENSES OR BECAUSE TITLE 21 U.S.C. SECTION 841(a) IS UNCONSTITUTIONAL.

59. Movant was indicted by the GRAND JURY on Counts 1, 41, 42, 43, and 44 and plead guilty after three (3) days of trial and the government agreed to dismiss counts 1, 41, 42, and 44. Movant is actually innocent of all counts. Movant was sentenced under Title 21 U.S.C. Section 841(a)(1) on Count 43. **Title 21 U.S.C. Section 841(b) DID NOT APPEAR WITHIN THE INDICTMENT**, which specifies the penalties for violations of Section 841(a) in Counts 41, 42, 43, & 44.

60. 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 or a SENTENCING JUDGE 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).

61. **A GENERIC VIOLATION OF TITLE 21 U.S.C. SECTION 841(a)(1) DOES NOT PROVIDE A PENALTY: THE U.S. SUPREME COURT AGREES.** See attached transcript of ORAL ARGUMENTS of EDWARDS vs. U.S., 140 L.Ed.2d 703 (1998). **EXHIBIT C.**

62. 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 CLIAM have obvious merit.

63. 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 DICTUM 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, 557 (8th Cir. 1993)(quoting the same)(". . ., and generally, one panel of this court must follow the decision of an earlier panel. The general rule does not apply, however, when a Supreme Court decision casts doubt on the earlier panel's decision."); FINKEL vs. STRATTON CORP., 962 F.2d 169 (2nd Cir. 1992) (holding same); U.S. vs. SANTANA, 6 F.3d 1 (1st Cir. 1993)(holding same); see also, CHARLES ALAN WRIGHT, **The Law of the Federal Courts** § 58, at 374 (4th ed. 1983). The statements quoted herein at a minimum satisfy the definition of **DICTUM** as found in both BLACK'S LAW DICTIONARY and BALANTINE'S LAW DICTIONARY.

64. The Supreme Court in **EDWARDS** provided the lower federal courts

with the following eye-opening discussions 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)

65. 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).** (emphasis added)

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

66. 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.**"

67. Movant introduces the February 23, 1998, U.S. Supreme Court ORAL ARGUMENTS in EDWARDS vs. U.S., 1998 WL 83179, TRANSCRIPT, U.S.S.CT., Pages 1, 2, 13, and 14, as **EXHIBIT C.**

CONCLUSION AS TO ISSUE TWO (2):

68. Movant has proved, as per DICTUM of the U.S. Supreme Court, that Counts 41, 42, 43, & 44 did not contain the penalty section of Title 21 U.S.C. § 841(b). See, Paragraph 64. (Justice Scalia).

69. APPRENDI confirmed the opinion that was expressed in U.S. vs. REESE, 92 U.S. 214, 232-233 (1876) as to pleading requirement and the fact the INDICTMENT must contain an allegation of every fact which is legally essential to the punishment to be inflicted. See, Paragraph 41.

70. Movant LAMBROS is ACTUALLY INNOCENT of all counts within the indictment, Counts 1, 41, 42, 43, & 44, and was prejudiced, as the records reflects, that at the time of Movant's guilty plea on Count 43, neither Movant, nor his counsel, not the District Court correctly understood the FACTS and ESSENTIAL ELEMENTS of the crime with which Movant was charged in the indictment.

71. Failure of the GRAND JURY to make a special finding as to the ELEMENTS and FACTS contained in Title 21 U.S.C. Section 841(b) (PENALTIES) is a jurisdictional defect. Movant's guilty plea must be vacated and Movant must be allowed to PLEA ANEW.

72. Movant respectfully submits that if, as APPRENDI establishes, drug type and drug quantity as ESSENTIAL ELEMENTS of Title 21 drug offenses, then the failure to allege a PENALTY as an ESSENTIAL ELEMENT of Title 21 drug offense, is every bit as jurisdictional a defect as the failure to allege a specific type of firearm in CASTILLO, 120 S.Ct. at 2096, quoting, U.S. vs. TRAN, 234 F.3d at 806. "[I]n order for an accusation of a crime (whether by indictment or some other form) to be proper under the common law, and thus proper under the codification of the common-law right in the Fifth and Sixth Amendments, it MUST ALLEGE ALL ELEMENTS OF THAT CRIME; likewise, in order for a jury trial of a crime to be proper, all elements of the crime must be proved to the jury (and, under WINSHIP, proved beyond a reasonable doubt). APPRENDI, 120 S.Ct. at 2367, 2368

(Scalia; Thomas J.J. concurring)(147 L.Ed.2d at 461).

73. WHEREFORE, Movant LAMBROS respectfully requests that this Court for all of the foregoing reasons (1) VACATE Count 43, due to the district courts lack of jurisdiction; or (2) VACATE Count 43 and allow Movant to plea anew; or (3) issue an IMMEDIATE release order for Movant's release from his illegal sentence; (4) issue an order causing the vacatur of Movant's term of imprisonment BUT leave the conviction in tact; (5) any further relief that this court may find just and proper.

C O N C L U S I O N

For all of the foregoing reasons, this Court must authorize a SECOND or SUCCESSIVE 28 U.S.C. § 2255 and/or VACATE and remand Movant's conviction and sentence in Count 43.

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

EXECUTED ON: June 2, 2001

Respectfully submitted,

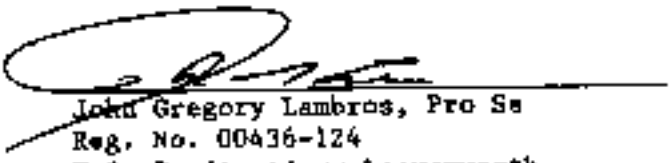

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EXHIBIT INDEX

1. EXHIBIT A: Superceding Indictment – Criminal Number CR-3-75-128, United States District Court for the District of Minnesota, Third Division, dated February 23, 1976;

2. EXHIBIT B: June 21, 1976, JUDGMENT AND PROBATION/COMMITMENT ORDER;

3. EXHIBIT C: EDWARDS vs. U.S., 1998 WL 83179, TRANSCRIPT, U.S.S.CT., Pages 1, 2, 13, and 14.

UNITED STATES DISTRICT COURT
DISTRICT OF [illegible]
THIRD DI.

UNITED STATES OF AMERICA

v.

CHARLES WILLIAM BLANCHARD
MARY JILL EUGBEE
KENNETH JAMES CLINE
DEBORAH ANN CORBETT
STANLEY ZANE CUTTS
ALEJANDRO BALDOMERO DE LA ROZ
ROSORIO DE LA ROZ
KAREN HELEN EBERLE
HARRIET LYNN ELSASSER a/k/a HARRIET MANIS
ROBART DOUGLAS FINN
ORLANDO LOPEZ a/k/a FRANCESCO
MARY ANN HIGGINBRIGHT
MARY ELIZABETH LACY a/k/a MARI LANGRE
THOMAS WILLIAM MAERTZ
EDUARDO MEDIA
MICHAEL SEARS MILNOR
SHARON LEE NELSON
ROBIN RAMIREZ
ROBERTO RAMIREZ
GARY RICHARDSON
DAVID MICHAEL ROGSTAD
RONALD MICHAEL SCHLEIS
GUSTAVO URIBE
JOHN GREGORY LAWRENCE a/k/a J.R. a/k/a JUNIOR

Cr. 3-75-128

INDICTMENT

(21 U.S.C. §841(a)(1))
§841(b)(1)(a)
§843
§846
§952(a)
§960(a)(1)
§963
18 U.S.C. §1952(a)(3)
and §2

(Superseding Indictment 3-75 Cr. 128)

THE UNITED STATES GRAND JURY CHARGES THAT:

COUNT 1

(1) From on or about the 19th day of November, 1973, and continuously thereafter up to and including the date of this indictment, in the State and District of Minnesota, and elsewhere, the defendants,

CHARLES WILLIAM BLANCHARD, MARY JILL EUGBEE, KENNETH JAMES CLINE, DEBORAH ANN CORBETT, STANLEY ZANE CUTTS, ALEJANDRO BALDOMERO DE LA ROZ, ROSORIO DE LA ROZ, KAREN HELEN EBERLE, HARRIET LYNN ELSASSER a/k/a HARRIET MANIS, ROBART DOUGLAS FINN, ORLANDO LOPEZ a/k/a FRANCESCO, MARY ANN HIGGINBRIGHT, MARY ELIZABETH LACY a/k/a MARI LANGRE, THOMAS WILLIAM MAERTZ, MICHAEL SEARS MILNOR, EDUARDO MEDIA, SHARON LEE NELSON, ROBIN RAMIREZ, ROBERTO RAMIREZ, GARY RICHARDSON, DAVID MICHAEL ROGSTAD, RONALD MICHAEL SCHLEIS and GUSTAVO URIBE, and JOHN GREGORY LAWRENCE a/k/a J.R. a/k/a JUNIOR,

willfully and knowingly did combine, conspire, confederate and agree together, with each other, and with Marc J. LeVasseur and Luis E. Correa, named as co-conspirators but not as defendants, and with diverse other persons whose names are to the Grand Jury unknown, to import into the United States and

FILED FEB 25 1976 19
ROBERT J. SHERMAN, Clerk
By [signature]

EXHIBIT A.

(169)

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to distribute a schedule II narcotic drug controlled substance, namely cocaine; in violation of Title 21, United States Code, sections 841(a)(1), 841(b)(1)(a), 846, 952(a), 960(a)(1) and 963.

(2) It was a part of said conspiracy that Marc J. LeVasseur and Michael S. Milnor would travel to Colombia, South America, and would employ other persons to travel to Colombia, South America, to purchase and to smuggle cocaine into the State of Minnesota for sale to other persons.

(3) It was a further part of said conspiracy that Alejandro De La Hoz and Luis E. Correa, and their associates, would receive cocaine smuggled from Colombia at Miami, Florida and at Puerto Rico, and would then sell the cocaine to Minnesota wholesalers, including Marc J. LeVasseur and Michael S. Milnor, and their associates.

(4) It was a further part of said conspiracy that Marc J. LeVasseur and Michael S. Milnor, with their associates, would sell the cocaine so acquired to their Minnesota customers, including Kenneth J. Cline, Stanley E. Cutts, Ronald M. Schleis, Mary Jill Hughes, Gary Richardson, David M. Roogstad and Charles W. Blanchard.

(5) In furtherance of the conspiracy and to effect the objects thereof the defendants (and their co-conspirators) performed the following overt acts:

OVERT ACTS

(1) On or about November 19, 1973, Robert D. Finn took out a loan at the First American National Bank in Duluth for $700.00 to finance a trip to purchase cocaine.

(2) On or about November 26, 1973, Michael S. Milnor carried about two ounces of cocaine to Minnesota from Colombia, South America.

(3) On or about May 11, 1974, at Duluth, Minnesota, Robert D. Finn loaned about $1500.00 to Marc J. LeVasseur and purchased an airline ticket for LeVasseur to enable a trip to South America.

(4) On or about May 17, 1974, at Cartagena, Colombia, Alejandro De La Hoz sold 108 grams of cocaine to Marc J. LeVasseur.

(5) On or about May 18, 1974, Marc J. LeVasseur carried 108 grams of cocaine to Minneapolis, Minnesota.

EXHIBIT A.

(6) On or about May 20, 1974, in Minneapolis, Minnesota, Marc J. LeVasseur sold about 50 grams of cocaine to Mary Jill Eaghee.

(7) On or about May 20, 1974, at Minneapolis, Minnesota, Marc J. LeVasseur sold about 50 grams of cocaine to Gary Richardson.

(8) On or about June 30, 1974, at Cali, Colombia, Robin and Roberto Ramirez sold about 250 grams of cocaine to Michael S. Milnor and Marc J. LeVasseur.

(9) On or about July 6, 1974, Michael S. Milnor and Marc J. LeVasseur carried about 250 grams of cocaine from Colombia to Minnesota.

(10) On or about July 26, 1974 at St. Paul, Minnesota, Alejandro De La Hoz sold about one kilogram (2.2 lbs.) of cocaine to Michael S. Milnor.

(11) On or about August 3, 1974, Mary E. Lacy and Marc J. LeVasseur carried about 400 grams of cocaine from Colombia into the United States and Michael S. Milnor met them at the Minneapolis-St. Paul Airport and took them to St. Paul, Minnesota.

(12) On or about October 13, 1974, Alejandro De La Hoz gave two kilograms (4.4 lbs.) of cocaine to Mark J. LeVasseur at Radisson South Hotel, Bloomington, Minnesota.

(13) On or about October 16, 1974, at St. Paul, Minnesota, Michael S. Milnor sold one-half pound of cocaine to Kenneth J. Cline.

(14) On or about October 23, 1974, Karen H. Eberle placed ten ounces of cocaine into her refrigerator at her apartment in St. Paul, Minnesota.

(15) On or about November 11, 1974, at Miami, Florida, Alejandro De La Hoz and Honorio De La Hoz and Orlando Lopez a/k/a Francesco a/k/a Francesqui gave five kilograms (11 lbs.) of cocaine to Mark J. LeVasseur.

(16) On or about November 12, 1974, at St. Paul, Minnesota, Michael S. Milnor and Marc J. LeVasseur gave two pounds of cocaine to Kenneth J. Cline, Stanley Z. Cutts and Ronald H. Schleis.

(17) On or about November 13, 1974, at St. Paul, Minnesota, Michael S. Milnor and Marc J. LeVasseur gave four pounds to Kenneth J. Cline, Stanley Z. Cutts, and Ronald H. Schleis.

(18) On or about November 13, 1974, in St. Paul, Minnesota, Michael S. Milnor and Marc J. LeVasseur gave one pound to Kenneth J. Cline, Stanley Z. Cutts, and Ronald M. Schleis.

(19) On or about November 13, 1974 at St. Paul, Minnesota, Michael S. Milnor and Marc J. LeVasseur gave four pounds of cocaine to Kenneth James Cline.

(20) On or about November 17, 1974, at Burnsville, Minnesota, Ronald M. Schleis did carry about two pounds of cocaine in his briefcase near Jack's Restaurant.

(21) On or about December 12, 1974, David M. Hongstad and Marc J. LeVasseur did fly to Miami, Florida, from Minneapolis-St. Paul International Airport.

(22) On February 9, 1975, Deborah A. Corbett, at San Juan, Puerto Rico, gave 15 kilograms (33 lbs.) of cocaine to Marc J. LeVasseur, Thomas W. Maerts and Robert D. Finn.

(23) On or about October 15, 1975, Alejandro De La Hoz and Luis E. Correa delivered two kilograms (4.4 lbs.) of cocaine to Michael S. Milnor, at the Radisson South Hotel, Bloomington, Minnesota.

(24) On or about October 16, 1975, Luis E. Correa delivered two kilograms (4.4 lbs.) of cocaine to Michael S. Milnor at the Radisson South Hotel in Bloomington, Minnesota.

(25) On or about October 16, 1975, Sharon L. Nelson accompanied Alejandro De La Hoz to the First National Bank of Minneapolis in Minneapolis, Minnesota.

(26) On or about October 18, 1975, in Bloomington, Minnesota, at the Registry Hotel, Kenneth J. Cline gave .7 grams of cocaine to undercover federal narcotic agent Markus S. Kryger.

EXHIBIT A.

COUNT 2

On or about the 26th day of November, 1973, in the State and District of Minnesota, the defendants,

MICHAEL S. MILNOR and ROBART D. FINN,

knowingly and intentionally did import about 56 grams of cocaine, a schedule II narcotic drug controlled substance, into the United States from Colombia, contrary to Title 21, United States Code, section 952(a) in violation of Title 21, United States Code, section 960(a)(1).

COUNT 3

On or about the 27th day of November, 1973, in the State and District of Minnesota, the defendant,

MICHAEL S. MILNOR,

knowingly and intentionally did unlawfully distribute about 56 grams of cocaine, a schedule II narcotic drug controlled substance in violation of Title 21, United States Code, section 841(a)(1).

COUNT 4

On or about the 27th day of November, 1973, in the State and District of Minnesota, the defendant,

MARY JILL BUCREE,

knowingly and intentionally did unlawfully possess with intent to distribute about 56 grams of cocaine, a schedule II narcotic drug controlled substance in violation of Title 21, United States Code, section 841(a)(1).

COUNT 5

On or about the 17th day of May, 1974, in the State and District of Minnesota, the defendant,

ALEJANDRO DE LA HOZ,

knowingly and intentionally did unlawfully import about 108 grams of cocaine, a schedule II narcotic drug controlled substance, into the United States from Colombia, contrary to Title 21, United States Code, section 952(a), in violation of Title 21, United States Code, section 960(a)(1).

COUNT 6

On or about the 18th day of May, 1974, in the State and District of Minnesota, the defendant,

HOBART D. FINN,

knowingly and intentionally did import about 108 grams of cocaine, a schedule II narcotic drug controlled substance, into the United States from Colombia, contrary to Title 21, United States Code, section 952(a), in violation of Title 21, United States Code, sections 960(a)(1).

COUNT 7

On or about the 20th day of May, 1974, in the State and District of Minnesota, the defendant,

MARY JILL BUCHER,

knowingly and intentionally did unlawfully possess with intent to distribute about 50 grams of cocaine, a schedule II narcotic drug controlled substance in violation of Title 21, United States Code, section 841(a)(1).

COUNT 8

On or about the 20th day of May, 1974, in the State and District of Minnesota, the defendant,

GARY RICHARDSON,

knowingly and intentionally did unlawfully possess with intent to distribute about 50 grams of cocaine, a schedule II narcotic drug controlled substance in violation of Title 21, United States Code, section 841(a)(1).

COUNT 9

On or about the 6th day of July, 1974, in the State and District of Minnesota, the defendants,

ROBER RAMIREZ, ROBERTO RAMIREZ, MICHAEL S. MILNER, and HOBART D. FINN, knowingly and intentionally did import about 250 grams of cocaine, a schedule II narcotic drug controlled substance, into the United States from Colombia, contrary to Title 21, United States Code, section 952(a), in violation of Title 21, United States Code, section 960(a)(1).

EXHIBIT A.

COUNT 10

On or about the 7th day of July, 1974, in the State and District of Minnesota, the defendant,

GARY RICHARDSON,

knowingly and intentionally did unlawfully possess with intent to distribute about 30 grams of cocaine, a schedule II narcotic drug controlled substance, in violation of Title 21, United States Code, section 841(a)(1).

COUNT 11

On or about the 7th day of July, 1974, in the State and District of Minnesota, the defendant,

MICHAEL S. MILNOR,

knowingly and intentionally did unlawfully distribute about 200 grams of cocaine, a schedule II narcotic drug controlled substance in violation of Title 21, United States Code, section 841(a)(1).

COUNT 12

On or about the 26th day of July, 1974, in the State and District of Minnesota, the defendant,

ALEJANDRO DE LA MOZ,

knowingly and intentionally did unlawfully distribute about one kilogram (2.2 lbs.) of cocaine, a schedule II narcotic drug controlled substance in violation of Title 21, United States Code, section 841(a)(1).

COUNT 13

On or about the 27th day of July, 1974, in the State and District of Minnesota, the defendant,

MICHAEL S. MILNOR,

knowingly and intentionally did unlawfully distribute about one kilogram (2.2 lbs.) of cocaine, a schedule II narcotic drug controlled substance in violation of Title 21, United States Code, section 841(a)(1).

EXHIBIT A.

COUNT 14

On or about the 3rd day of August, 1974, in the State and District of Minnesota, the defendants,

MICHAEL S. MILNOR and MARY LACY a/k/a MARY LEMERE,

knowingly and intentionally did import about 400 grams (.9 lbs.) of cocaine, a schedule II narcotic drug controlled substance, into the United States from Colombia, contrary to Title 21, United States Code, section 952(a), in violation of Title 21, United States Code, section 960(a)(1).

COUNT 15

On or about the 3rd day of October, 1974, in the State and District of Minnesota, the defendants,

GUSTAVO URIBE, EDUARDO MEJIA, and ALEJANDRO DE LA HOZ,

knowingly and intentionally did import about four kilograms (8.8 lbs.) of cocaine, a schedule II narcotic drug controlled substance, into the United States from Colombia, contrary to Title 21, United States Code, section 952(a), in violation of Title 21, United States Code, section 960(a)(1).

COUNT 16

On or about the 13th day of October, 1974, in the State and District of Minnesota, the defendant,

ALEJANDRO DE LA HOZ,

knowingly and intentionally did unlawfully distribute about two kilograms (4.4 lbs.) of cocaine, a schedule II narcotic drug controlled substance in violation of Title 21, United States Code, section 841(a)(1).

COUNT 17

On or about the 14th day of October, 1974, in the State and District of Minnesota, the defendants,

MICHAEL S. MILNOR, KAREN M. EBERLE,
HARRIET L. ELSASSER a/k/a HARRIET HARRIS and SHARON L. NELSON,

knowingly and intentionally did unlawfully distribute about two pounds of cocaine, a schedule II narcotic drug controlled substance in violation of Title 21, United States Code, section 841(a)(1).

COUNT 18

On or about the 16th day of October, 1974, in the State and District of Minnesota, the defendants,

MICHAEL S. MILNOR, KAREN M. EBERLE,
HARRIET L. ELSASSER a/k/a HARRIET HANIS and SHARON L. NELSON,

knowingly and intentionally did unlawfully distribute about one-half pound of cocaine, a schedule II narcotic drug controlled substance, in violation of Title 21, United States Code, section 841(a)(1).

COUNT 19

On or about the 16th day of October, 1974, in the State and District of Minnesota, the defendant,

KENNETH J. CLINE,

knowingly and intentionally did unlawfully possess with intent to distribute about one-half pound of cocaine, a schedule II narcotic drug controlled substance, in violation of Title 21, United States Code, section 841(a)(1).

COUNT 20

On or about the 22nd day of October, 1974, in the State and District of Minnesota, the defendant,

DAVID ROHOSTAD,

knowingly and intentionally did unlawfully possess with intent to distribute about 38 grams of cocaine, a schedule II narcotic drug controlled substance, in violation of Title 21, United States Code, section 841(a)(1).

COUNT 21

On or about the 23rd day of October, 1974, in the State and District of Minnesota, the defendant,

CHARLES BLANCHARD,

knowingly and intentionally did unlawfully possess with intent to distribute about 28 grams of cocaine, a schedule II narcotic drug controlled substance, in violation of Title 21, United States Code, section 841(a)(1).

EXHIBIT A.

COUNT 22

On or about the 23rd day of October, 1974, in the State and District of Minnesota, the defendant,

KAREN H. EHEMLE,

knowingly and intentionally did unlawfully possess with intent to distribute about 10 ounces of cocaine, a schedule II narcotic drug controlled substance, in violation of Title 21, United States Code, section 841(a)(1).

COUNT 23

On or about the 11th day of November, 1974, in the State and District of Minnesota, the defendants,

GUSTAVO URIBE, EDUARDO MEJIA,
ALEJANDRO DE LA HOZ, HONORIO DE LA HOZ,
and ORLANDO LOPEZ a/k/a FRANCESCO a/k/a FRANCESQUI,

knowingly and intentionally did import about 10 kilograms (22 lbs.) of cocaine, a schedule II narcotic drug controlled substance, into the United States from Colombia, contrary to Title 21, United States Code, section 952(a), in violation of Title 21, United States Code, section 960(a)(1).

COUNT 24

On or about the 11th day of November, 1974, in the State and District of Minnesota, the defendants,

ALEJANDRO DE LA HOZ, HONORIO DE LA HOZ,
ORLANDO LOPEZ a/k/a FRANCESCO a/k/a FRANCESQUI,

knowingly and intentionally did unlawfully possess with intent to distribute about five kilograms (11 lbs.) of cocaine, a schedule II narcotic drug controlled substance, in violation of Title 21, United States Code, section 841(a)(1).

COUNT 25

On or about the 12th day of November, 1974, in the State and District of Minnesota, the defendants,

MICHAEL S. WILMOR AND KAREN H. EHEMLE,

knowingly and intentionally did unlawfully distribute about two pounds of cocaine, a schedule II narcotic drug controlled substance, in violation of Title 21, United States Code, section 841(a)(1).

COUNT 26

On or about the 12th day of November, 1974, in the State and District of Minnesota, the defendants,

KENNETH J. CLINE, STANLEY Z. CUTTS, and RONALD H. SCHLEIS,

knowingly and intentionally did unlawfully possess with intent to distribute about two pounds of cocaine, a schedule II narcotic drug controlled substance, in violation of Title 21, United States Code, section 841(a)(1).

COUNT 27

On or about the 13th day of November, 1974, in the State and District of Minnesota, the defendants,

MICHAEL S. MILNOR and KAREN H. EBERLE,

knowingly and intentionally did unlawfully distribute about four pounds of cocaine, a schedule II narcotic drug controlled substance, in violation of Title 21, United States Code, section 841(a)(1).

COUNT 28

On or about the 13th day of November, 1974, in the State and District of Minnesota, the defendants,

KENNETH J. CLINE, STANLEY Z. CUTTS and RONALD H. SCHLEIS,

knowingly and intentionally did unlawfully possess with intent to distribute about three pounds of cocaine, a schedule II narcotic drug controlled substance, in violation of Title 21, United States Code, section 841(a)(1).

COUNT 29

On or about the 13th day of November, 1974, in the State and District of Minnesota, the defendants,

MICHAEL S. MILNOR and KAREN H. EBERLE,

knowingly and intentionally did unlawfully distribute about five pounds, two ounces of cocaine, a schedule II narcotic drug controlled substance, in violation of Title 21, United States Code, section 841(a)(1).

COUNT 30

On or about the 13th day of November, 1974, in the State and District of Minnesota, the defendants,

KENNETH J. CLINE, STANLEY Z. CUTTS and RONALD SCHENIO,

knowingly and intentionally did unlawfully possess with intent to distribute about one pound of cocaine, a schedule II narcotic drug controlled substance, in violation of Title 21, United States Code, section 841(a)(1).

COUNT 31

On or about the 13th day of November, 1974, in the State and District of Minnesota, the defendant,

KENNETH J. CLINE,

knowingly and intentionally did unlawfully possess with intent to distribute about four pounds of cocaine, a schedule II narcotic drug controlled substance, in violation of Title 21, United States Code, section 841(a)(1).

COUNT 32

On or about the 14th day of October, 1975, in the State and District of Minnesota, the defendants,

GUSTAVO UICHE, EDUARDO KRYJA and ALEJANDRO DE LA ROZ,

knowingly and intentionally did import about four kilograms (8.8 lbs.) of cocaine, a schedule II narcotic drug controlled substance, into the United States from Colombia, contrary to Title 21, United States Code, section 952(a), in violation of Title 21, United States Code, section 960(a)(1).

COUNT 33

On or about the 15th day of October, 1975, in the State and District of Minnesota, the defendant,

ALEJANDRO DE LA ROZ,

knowingly and intentionally did unlawfully distribute about two kilograms (4.4 lbs.) of cocaine, a schedule II narcotic drug controlled substance, in violation of Title 21, United States Code, section 841(a)(1).

COUNT 34

On or about the 15th day of October, 1975, in the State and District of Minnesota, the defendants,

MICHAEL S. MILNOR and SHARON L. NELSON,

knowingly and intentionally did unlawfully possess with intent to distribute about two kilograms (4.4 lbs.) of cocaine, a schedule II narcotic drug controlled substance, in violation of Title 21, United States Code, section 841(a)(1).

COUNT 35

On or about the 16th day of October, 1975, in the State and District of Minnesota, the defendants,

MICHAEL S. MILNOR and SHARON L. NELSON,

knowingly and intentionally did unlawfully possess with intent to distribute about two kilograms of cocaine, a schedule II narcotic drug controlled substance, in violation of Title 21, United States Code, section 841(a)(1).

COUNT 36

On or about the 18th day of October, 1975, in the State and District of Minnesota, the defendant,

KENNETH J. CLINE,

knowingly and intentionally did unlawfully distribute about .7 grams of cocaine, a schedule II narcotic drug controlled substance, in violation of Title 21, United States Code, section 841(a)(1).

COUNT 37

On or about the 15th day of October, 1974, in the State and District of Minnesota, the defendants,

KAREN R. EBERLE and KENNETH J. CLINE,

knowingly and intentionally did use a communication facility, that is, a telephone, in facilitating the knowing and intentional distribution by Michael S. Milnor, Karen R. Eberle, Harriet L. Eleanor a/k/a Harriet Davis, and Sharon L. Nelson, of one-half pound of cocaine, a schedule II narcotic

drug controlled substance, a felony under Title 21, United States Code, section 841(a)(1), in that Karen H. Eberle used said telephone to transmit to one Kenneth J. Cline in the District of Minnesota, a communication informing Kenneth J. Cline that she, the said Karen H. Eberle, had contact with persons who were available to sell cocaine to Kenneth J. Cline, and Cline did advise Karen H. Eberle that he would meet with those persons, all in violation of Title 21, United States Code, sections 843(b), 841(a)(1).

COUNT 38

On or about the 12th day of December, 1974, in the State and District of Minnesota, the defendant,

DAVID M. ROMSTAD,

did travel in interstate commerce from the State of Minnesota to Miami in the State of Florida, with intent to promote, manage, establish, and carry on an unlawful activity, said unlawful activity being a business enterprise involving narcotics in violation of the laws of the United States, that is, the unlawful importation and distribution of cocaine, and thereafter David M. Romstad did perform and attempt to perform acts to promote, manage, establish, and carry on said unlawful activity, in violation of Title 18, United States Code, section 1952(a)(3).

COUNT 39

On or about the 29th day of January, 1975, in the State and District of Minnesota, the defendants,

HOBART D. FINN, THOMAS W. MAERTZ, and MARY E. LACY a/k/a MARY LYMERE, together with Marc J. LeVasseur (a non-defendant herein), did travel in interstate and foreign commerce from the State of Minnesota to Colombia, South America, and Hobart D. Finn, Thomas W. Maertz, and Marc J. LeVasseur, did proceed on to San Juan, Puerto Rico, and the defendants,

MICHAEL S. MILNOR and MARY A. MIDDLEWRIGHT,

did aid and abet said travel with intent to promote, manage, and carry on an unlawful activity, said unlawful activity being a business enterprise involving narcotics in violation of the law of the United States,

that is, the unlawful importation and distribution of cocaine, and thereafter, Hobart D. Finn, Thomas W. Haertz, and Hart J. LeMasseur, did perform and attempt to perform acts to promote, manage, and carry on said unlawful activity, in violation of Title 18, United States Code, section 1952(a)(3) and Title 18, United States Code, section 2.

COUNT 40

On or about the 14th day of June, 1975, in the State and District of Minnesota, the defendant,

SHARON L. NELSON,

did use and caused to be used a facility in interstate commerce, that is, the United States mail, from Cartagena, Colombia, to St. Paul, State of Minnesota, with the intent to promote, manage, establish, carry on, and facilitate the promotion, management, establishment and carrying on of an unlawful activity, said unlawful activity being a business enterprise involving narcotics in violation of the laws of the United States, that is, the unlawful importation and distribution of cocaine, and thereafter did perform and attempt to perform acts to promote, manage, and carry on said unlawful activity, in violation of Title 18, United States Code, section 1952(a)(3) and Title 18, United States Code, section 2.

COUNT 41

On or about the 27th day of July, 1974, in the State and District of Minnesota, the defendant,

JOHN GREGORY LANGROS,

knowingly and intentionally did unlawfully possess with intent to distribute about one kilogram of cocaine, a schedule II narcotic drug controlled substance, in violation of Title 21, United States Code, Section 841(a)(1).

COUNT 42

On or about the 9th day of August, 1974, in the State and District of Minnesota, the defendant,

JOHN G. LAMBROS,

knowingly and intentionally did unlawfully possess with intent to distribute about 196 grams of cocaine, a schedule II narcotic drug controlled substance, in violation of Title 21, United States Code, Section 841(a)(1).

COUNT 43

On or about the 14th day of October, 1974, in the State and District of Minnesota, the defendant,

JOHN G. LAMBROS,

knowingly and intentionally did unlawfully possess with intent to distribute about two pounds of cocaine, a schedule II narcotic drug controlled substance, in violation of Title 21, United States Code, Section 841(a)(1).

COUNT 44

On or about the 15th day of October, 1974, in the State and District of Minnesota, the defendant,

JOHN G. LAMBROS,

knowingly and intentionally did unlawfully possess with intent to distribute about one-half pound of cocaine, a schedule II narcotic drug controlled substance, in violation of Title 21, United States Code, Section 841(a)(1).

A TRUE BILL.

United States Attorney

Foreman

United States of America vs. 004-6-124 **United States District Court** for

DEFENDANT: JOHN GREGORY LAMBROS — DISTRICT OF MINNESOTA-THIRD DIVISION

a/k/a J. R. a/k/a Junior — DOCKET NO. Cr. 3-75-126 Def't. 2

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date → MONTH: June DAY: 21 YEAR: 1976

[ ] 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 Thompson (Name of counsel)

PLEA

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

FINDING & JUDGMENT

There being a finding/verdict of [ ] NOT GUILTY. Defendant is discharged [ ] GUILTY.

Defendant has been convicted as charged of the offense(s) of having knowingly and intentionally possessed with intent to distribute cocaine, a schedule II narcotic drug controlled substance in violation of Title 21 United States Code section 841(a)(1) as charged in Ct. 43 of the Indictment.

SENTENCE OR PROBATION ORDER

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 five (5) years to be served concurrent with sentence imposed in Cr. 3-76-17, plus a committed fine of $10,000 to be paid for by deposit in the Registry on file with the Clerk; plus a three (3) year special parole term.

SPECIAL CONDITIONS OF PROBATION

ADDITIONAL CONDITIONS OF PROBATION

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.

COMMITMENT RECOMMENDATION

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

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.

CERTIFIED AS A TRUE COPY ON DATE June 21, 1976

Douglas L. Hall

SIGNED BY [X] U.S. District Judge [ ] U.S. Magistrate

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

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 C.

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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 charged 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 that 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 brief, says any person who attempts or conspires to commit any offense defined in this 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 you have before you 846, which you just read, which says any person who attempts or conspires to commit any offense defined in this chapter shall be subject to the 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 of 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--

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EXHIBIT C.

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 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).
*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 dealing with 846, referring to 841 as the object statute.
We think it's fairly clear that what Congress would have intended here is when 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 conspiracy under very traditional Pinkerton-type conspiracy vicarious--
QUESTION: May I interrupt with just one question to be sure--what if, in this 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 of crack. That's the judge's view. The judge could nevertheless sentence on the 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 the other counts is they weren't convinced beyond a reasonable doubt, but there's a big range there between that and preponderance of the evidence where the court 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 convicts