August 13, 2012

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U.S. CERTIFIED MAIL NO.
7008-1830-0004-2646-8263

CLERK OF THE COURT
U.S. Court of Appeals for the Eighth Circuit
Thomas F. Eagleton U.S. Courthouse
111 South 10th Street, Room 24.329
St. Louis, Missouri 63102
Tel. (314) 244-2400
Website: www.ca8.uscourts.gov

RE: JOHN LAMBROS vs. USA, No. 12-2427

Dear Clerk:

Attached for **FILING** in the above-entitled action is copy of my:

1. MOVANT LAMBROS' RESPONSE TO "UNITED STATES RESPONSE TO DEFENDANT'S APPLICATION TO FILE SUCCESSIVE SECTION 2255 HABEAS PETITION" - DATED: July 23, 2012.

It is my understanding that you will serve the U.S. Attorney via **ELECTRONIC MAIL.** If this is not correct, please advise and I will serve the U.S. Attorney. **PLEASE FORWARD THE COURT RULES ON SERVICE VIA ELECTRONIC MAIL AS THE PRISON DOES NOT HAVE SAME AND IT CUT-COST IF I DO NOT HAVE TO SERVE THE GOVERNMENT.** Thank you!

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

Sincerely,

John Gregory Lambros, Pro Se

CERTIFICATE OF SERVICE

I JOHN GREGORY LAMBROS certify that I mailed a copy of the above-entitled motion within a stamped envelop with the correct postage to the following parties on **AUGUST 13, 2012** from the U.S. Penitentiary Leavenworth mailroom:

2. Clerk, U.S. Court of Appeals for the Eighth Circuit, as addressed above.

John Gregory Lambros, Pro Se

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JOHN GREGORY LAMBROS,	*	
Petitioner - Movant,	*	**CASE NO. 12-2427**
vs.	*	
UNITED STATES OF AMERICA,	*	**DISTRICT COURT FOR THE DISTRICT OF MINNESOTA - Criminal No. 4-89-82**
Respondent.	*	
	*	**AFFIDAVIT FORM**

MOVANT LAMBROS' RESPONSE TO "UNITED STATES RESPONSE TO DEFENDANT'S APPLICATION TO FILE SUCCESSIVE SECTION 2255 HABEAS PETITION" - DATED: JULY 23, 2012.

Petitioner JOHN GREGORY LAMBROS, Pro Se, (hereinafter "Movant") responding to the United States of America (hereinafter "Govt.") response to this above-entitled action dated July 23, 2012.

John Gregory Lambros, declares under the penalty of perjury the following:

1. I am the Petitioner/Movant in this above-entitled action that was filed on or about June 8, 2012 with the district court in Minnesota and forwarded to this Court. Movant's motion contained a page introduction and 77 numbered paragraphs with exhibits A thru G. See, Rules of Civil Procedure, Rule 10(b)(a party must state its claims or defenses in numbered paragraphs, each limited as far as practicable to a single set of circumstances). Also see, RULE 12 "Applicability of the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure", within "RULES GOVERNING SECTION 2255 PROCEEDINGS FOR THE UNITED STATES DISTRICT COURTS" ("The Federal Rules of Civil Procedure ...., may be applied to a proceeding under these rules.")

2. On or about July 26, 2012, Movant received the Government's response to Movant application to file a successive section 2255. The Government's

response was ten (10) pages in length and contained four (4) attachments. Movant requests this Court to note that the Government **DID NOT** follow the requirements stated within Civil Rules of Civil Procedure, **RULE 8(b)**, as to how any responsive pleading to a federal action must be drafted. The government's nonresponsive language in its response to most of Movant's complaint neither admitted or denied the factual allegations and has resulted in the averments of Plaintiff's action to be deemed admitted by the government. Movant requests that this Court proceed on that basis. See, RULE 8(b)'s plain roadmap, as it identifies only three (3) alternatives as available for use in an answer to allegation of a complaint: admit those allegations, to deny them or to state a disclaimer (if it can be made in the objective and subjective good faith demanded by Rule 11) in the express terms of the second sentence of Rule 8(b), which then entitles the pleader to the benefit of a deemed denial. **RULE 8(d)** states that averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, **ARE ADMITTED WHEN NOT DENIED IN THE RESPONSIVE PLEADING.**

The government's answers fall far short of the RULE 8(b) standard, as they **DO NOT SPECIFICALLY ADDRESS ANY-NUMBERED PARAGRAPH OF PLAINTIFF'S ACTION.** Again, Movant requests this Court to proceed in this action, as the government has admitted to all the allegations within Movant's §2255. See, RULE 8(d). Movant is proceeding pro se, and his claims are plainly and cogently presented in numbered separate allegations. It is the government's job, and not this Court's, to perform the work called for by Rule 8(b), subject to the obligations set forth in Rule 11.

3. Movant LAMBROS DENIES each and every material allegation contained in the government's July 23, 2012 "RESPONSE", except as herein may be expressed and specifically admitted.

GOVERNMENT'S RESPONSE - PAGE ONE (1):

4. The government states that Movant's co-defendant, Lawrence Pebbles

- a Minnesota Attorney with a law firm in St. Paul - directed an international cocaine conspiracy from Colombia through southern California and south Florida to destinations throughout the United States, which resulted in a seizure of nine and one-half kilograms of cocaine from Attorney Pebbles and his courier. Attorney Pebbles was arrested on or about February 27, 1988. This is true, as per the testimony of Attorney Lawrence Pebbles, during his testimony for the United States Government at Movant Lambros' trial. Attorney Pebbles received a four (4) year sentence for assisting the government. The government does not state that Attorney Pebbles also admitted to being an international **"MARIJUANA"** smuggler who conspired to sell thousands of kilograms of "MARIJUANA" from Colombia and Mexico to destinations throughout the United States. Movant Lambros testified that he purchased "MARIJUANA" from Attorney Lawrence Pebbles during Movant Lambros' trial and the U.S. Attorney instructed the jury to believe Movant Lambros' testimony as to his purchase of marijuana from Attorney Pebbles.

5. The government states that Movant Lambros fled to the country of Brazil. This is not true. Attorney Pebbles was arrested on or about February 27, 1988 and his arrest was front page news in both the St. Paul and Minneapolis newspapers, due to his status as an attorney and owner of a law firm. Movant Lambros did not flee due to Attorney Pebbles arrest, he continued working daily - only four blocks from the U.S. Courthouse - as a registered stockbroker and investment banker and reporting monthly to his U.S. Parole Officer Dale Harbour. In fact, on November 23, 1988, Movant Lambros was released from U.S. Federal Parole and placed on "SPECIAL PAROLE" and instructed he did not have to report monthly with the probability that Movant would be taken off "SPECIAL PAROLE" within three to five months. Movant does not understand why he was on "SPECIAL PAROLE" at the time he was violated by the U.S. Parole Commission on August 21, 1989. Therefore, one and one-half (1½) years passed from Attorney Pebbles arrest to when Movant Lambros accepted a job offer in Brazil to structure the legal operations of a pharmaceutical manufacture and to

take same public in a public offering within two to four countries in South America, - Brazil did not have copyright or trademark law from 1964 when military leaders of Brazil took control of the Brazilian Government and suspended the Brazilian Constitution and treaties that Brazil had entered into including "THE TREATY OF EXTRADITION BETWEEN THE UNITED STATES OF AMERICA AND THE **UNITED STATES OF BRAZIL**" that was signed on January 13, 1961. Brazil was returned to civilian rule in 1985 which allowed Brazilian's to elect a new congress and new state legislatures and governors in the first nationwide general election. On October 5, 1988, Brazilian's enacted a **NEW CONSTITUTION OF BRAZIL** and renamed the country the "REPUBLICA FEDERATIVO do BRAZIL" (Federative Republic of Brazil) - thus a perfect country for manufacturing pharmaceutical generics. Movant's trial transcript proves that Attorney Pebbles had a brokerage account with Movant Lambros and DEA records should show that Attorney Pebbles tried to hire Movant Lambros in 1986 to move to Brazil to monitor his real estate projects involving home and apartment buildings, farming and the lobbying of the relocation of the soccer stadium in Rio de Janeiro, Brazil to outside the city near land he owned. Attorney Pebbles even offered to get Movant off U.S. Parole if he moved to Brazil. Movant's background in commodities - passing commodities exam in 1984 - and relationship with Cargil was very important to Attorney Pebbles. Movant Lambros was arrested in Rio de Janeiro, Brazil in 1991, due to a U.S. Parole Commission warrant dated August 21, 1989, by DEA Agent Anderson, as per his testimony during Movant's pretrial hearings.

6. The government states that Movant Lambros "contested his extradition, taking his case to the Supreme Court three or four times." Movant doesn't really understand what the government is saying here? It is Movant's understanding that his attorney's had to make several appearances before the Supreme Court of Brazil, Movant only appeared before a single Brazilian Supreme Court justice once. Movant believes that one of his attorney's appearances centered around the torture Movant Lambros received in the torture facility he was held at

in Brasilia, Brazil. This Court made the following ruling on September 8, 1995 when vacating Movant's "MANDATORY LIFE SENTENCE WITHOUT PAROLE", because the sentence was not legal under a law in effect at the time of Movant's alleged crime:

> "Lambros alleges that he was tortured during his thirteen months in Brazilian prison while contesting extradition to the United States, and that American officials were complicit in this torture. In various hearings below, Lambros has testified extensively as to his mistreatment in Brazil. Testimony on the topic of Lambros' treatment in Brazil was also given by two DEA Agents who served there. The record also includes persuasive indirect evidence that Lambros was not mistreated in Brazil: a psychologist at the competency hearing concluded that Lambros' symptoms were not consistent with torture." Id. at 700-701.
>
> .....
>
> "Although a specific finding on the question whether Lambros had been tortured with American complicity would have been preferable, the state of the record obviates the need for remand. First, as discussed below, **LAMBROS' TESTIMONY IS UNRELIABLE** because he perjured himself in other regards at trial, **AND IT IS ALSO FANTASTIC.** (For instance, **LAMBROS MAINTAINS THAT HE WAS HELD IN THE SAME BRAZILIAN CELL WHERE THE MISTREATMENT ALLEGED IN UNITED STATES vs. TOSCANINO, 500 F.2d 267 (2nd Cir. 1974), OCCURRED, AND EVEN ASSERTS THAT HE MET TOSCANINO THERE.)** Second, two DEA agents testified that Lambros' arrest was peaceful and that they had no knowledge of any subsequent mistreatment. Third, and most telling, a psychologist's evaluation prepared for the competency hearing below declared that:
>
> > ..... Indeed, we note that Lambros' counsel at oral argument conceded that the **UNITED STATES ATTORNEY'S OFFICE IN THIS CASE WENT TO GREAT LENGTHS TO ASSURE ITSELF THAT LAMBROS WAS NOT MISTREATED IN BRAZIL."**

See, UNITED STATES vs. LAMBROS, 65 F.3d 698, 700 thru 701 (8th Cir. 1995).

7. After this Court September 8, 1995 ORDER - Movant contacted **FRANCISCO TOSCANINO** via his family and requested that he forward information from the interviews we offered to the press in Brasilia, Brazil, including any articles and his attorney's name and address in Brazil. On February 12, 1996, Maxime Toscanino - the son of Francisco Toscanino - wrote Movant and Attorney Jeff Orren stating that Francisco was in a maximum security prison near Naples, Italy and offered the name of Francisco Toscanino's lawyer during his extradition - Dr. Julio Cardella, Rua General Osorio, 939, Campinas - Sao Paulo, Brazil and phone number.

Also included with the letter was copy of the October 20, 1991, Sunday newpaper article from CAMPINAS, [Sao Paulo, Brazil] entitled "MAFIOSO DA CAMORRA PRESO SOFREU TORTURAS NA DITADURA" by Jose Francisco Pacola, states Francisco Toscanino is currently being held at the Federal Police Station in Brasilia, Brazil awaiting his extradition to Italy. See. **EXHIBIT A.** (February 12, 1996, letter from Maxime Toscanino and above entitled article dated October 20, 1991).

8. The Government also failed to mention that John A. Lowell, Consul for the United States of American Embassy in Rio de Janeiro, Brazil guaranteed Movant a "HEARING" in the Federal Court in Rio de Janeiro, Brazil in his letter dated May 29, 1991, as per his visit with Movant on May 24, 1991. The hearing never occurred nor did Movant see any legal official, as Movant Lambros was taken to Brasilia, Brazil and tortured.

9. U.S. Federal Judge Diana E. Murphy issued a subpoena for Margaret Murphy, Counsel General, American Embassy, to appear at Movant's trial on January 14, 1993, Courtroom three at 9:00 a.m., as Margaret Murphy, Consul General visited Movant in Brasilia, Brazil during his torture. Margaret Murphy did not appear nor forward "any and all records relating to John Lambros." It was also Counsel General Margaret Murphy duty as Counsel General to oversee the investigation of Movant Lambros' torture in Brasilia, Brazil. Why wasn't Movant's trial stopped until Margaret Murphy could be found by the U.S. Marshals and brought to Movant's trial?

GOVERNMENT'S RESPONSE - PAGE TWO (2):

10. The government states "At resentencing, the guideline range was correctly computed without objection to be 360 months to life imprisonment. The government requested a sentence of 360 months. The district court then imposed a sentence of 360 months imprisonment, the bottom of the guideline range." The government failed to state that it has always been Movant Lambros' position that

HE COULD NOT FACE MORE THAN A 30-YEAR TERM OF IMPRISONMENT. See, Movant Lambros' supplemental brief that was granted and considered by this Court during Movant's direct appeal regarding the vacating of Court One (1), as it violates the Ex Post Facto Clause of the U.S. Constitution, pages 6 thru 9:

> **"2. The Appellant was disadvantaged.**
>
> The Appellant was also disadvantaged by the retrospective application of the **1988 Amendments.** **PRIOR TO THE 1988 AMENDMENTS,** §841 had a repeat offender provision which called only for a term of imprisonment of **"not more than 30 years"** and/or a fine. If the provisions of § 841(b)(1)(A) applicable at the time of the Appellant's alleged offense had been properly applied in this case, then the Appellant would have faced a maximum term of imprisonment of **30 YEARS.** As a result of the retrospective application of the **1988 Amendments,** however, the Appellant's sentence was increased to the mandatory term of life imprisonment. ....." See Pages 8 and 9.

This Court stated that the above supplemental brief Argument was granted. See, U.S. vs. LAMBROS, 65 F.3d 698, Footnote 1 (8th Cir. 1995). Movant Lambros' family hired the attorney's from "National Legal Professional Associates" before sentencing, who contacted Movant's attorney and informed him that the maximum sentence Movant could receive was **30-YEARS** due to two (2) reasons: (H. Wesley Robinson, Director of Client Services for "NLPA", Cincinnati, Ohio)

a. Movant Lambros' conspiracy **ENDED** on or about February 27, 1988. The **NEW CONSPIRACY LAWS DID NOT GO INTO EFFECT UNTIL 120 DAYS AFTER NOVEMBER 1988.** When a person is convicted of drug **CONSPIRACY** in violation of 21 U.S.C. §846 and the object of the conspiracy is possession with the intent to distribute illegal drugs in violation of §841(a), the penalty provision of §841(b) applies. The language of the conspiracy law **BEFORE NOVEMBER 1988 CLEARLY STATES - 21 U.S.C. § 846:**

> ** "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."** **

The statute above - §846 - made no reference to a **MANDATORY MINIMUM PENALTY,** rather, it provided only that a sentence imposed under that section may not exceed the maximum penalty accompanying the substantive offense charged as the object of the

conspiracy. Where a conspiracy statute fails to make reference to special penalty provisions such as mandatory minimum periods of incarceration, the special penalties may not be imposed for convictions under the conspiracy statutes.

b. Again, Count One (1), the overarching conspiracy-to-distribute count under Title 21 U.S.C. §§ 846, 841(a)(1), and **841(b)(1)(A)**, involed the following **DISCRETE COUNTS WITHIN MOVANT LAMBROS INDICTMENT - Counts 5, 6, and 8 all in violation of Title 21, U.S.C. 841(b)(1)(B). See EXHIBIT B.** (Movant's indictment Counts 5, 6, & 8 - Pages 7, 8, and 9). Each of the counts are for a specific quantity, at a particular point in time, and thus the **DISCRETE ACTS MUST BE TREATED AS SEPARATE VIOLATIONS.** Title 21 U.S.C. **§841(b)(1)(B) ONLY ALLOWS A MAXIMUM SENTENCE OF 30-YEARS AFTER ONE OR MORE PRIOR CONVICTIONS.** See, 1986 Amendment of Title 21 U.S.C. Title 841, that became operational on October 27, 1986. **EXHIBIT C. (2012 MATTHEW BENDER & CO., -** Title 21 U.S.C. Section 841, HISTORY, ANCILLARY LAWS and DIRECTIVES).

c. Movant Lambros was also informed by the United States Department of State who visited Movant in Brasilia, Brazil that the Brazilian Constitution, Article 5, Clause XLVII(b), prohibits, the imposition of any penalty of a lifelong character. See, STATE OF WASHINGTON vs. PANG, 940 P.2d 1293, 1352 (Wash. 1997)(En Banc), cert. denied, 139 L.Ed.2d 608 (1997). Also, Brazilian **Article of Law 75** of the **Brazilian Criminal Code,** the same as a U.S. Criminal Statute, **LIMITS THE MAXIMUM PRISON SENTENCE TO THIRTY (30) YEARS.** See, WASHINGTON vs. PANG, 940 P.2d 1293, 1352. The U.S. Counsel members stated that Movant would not get a sentence longer than **30-YEARS.** Movant Lambros informed his attorney and the Government about the 30-year maximum sentence Movant could receive due to Brazilian law. Movant Lambros had legal **STANDING**, as an extradited person from Brazil to the United States of America, State of Minnesota, **TO RAISE ANY OBJECTION TO POST-EXTRADITION PROCEEDINGS WHICH MIGHT HAVE BEEN RAISED BY BRAZIL, THE RENDERING COUNTRY.** See, LEIGHNOR vs. TURNER, 884 F.2d 385, 389 **(8th Cir. 1989).** Persons

extradited from Colombia by ORDER of Colombia's Supreme Court and/or Department of State **ENFORCE A 30-YEAR MAXIMUM CRIMINAL SENTENCE**, as per Colombia's constitution and laws. See, U.S. vs. ABELLO-SILVA, 948 F.2d 1168, 1174 (10th Cir. 1991); U.S. vs. GALLO-CHAMORRO, 48 F.3d 502, 503 (11th Cir. 1995); and Manuel Felipe Salazar-Espinosa who was described by the U.S. government as one of the world's biggest drug lords ".... was sentenced to **30-years** in prison for directing an organization that shipped tons of cocaine into the USA. ..... Kaplan said Salazar-Espinosa, 58 could have faced life in prison, **BUT U.S. PROSECUTORS HONORED COLOMBIA'S REQUEST NOT TO SEEK THE MAXIMUM SENTENCE."** See, attached article "BIG FISH' DRUG LORD GETS 30-YEARS IN PRISON." **EXHIBIT D.** (USA TODAY, February 6, 2008, Page 3A.) USA vs. MANUEL FELIPE SALAZAR-ESPINOSA, Criminal Docket No. 1:05-cr-517-LAK-1, U.S. District Court for the Southern District of New York (Foley Square).

d. Movant also believes that Judge Robert G. Renner should have **DISQUALIFIED HIMSELF** from resentencing Movant Lambros as per Title 28 U.S.C. §455, as the average person on the street "MIGHT" harbor doubts and reasonably question Judge Renner's impartiality toward Movant Lambros, as Judge Renner was the United States Attorney for Minnesota that investigated and prosecuted Movant in 1975 and 1976. In fact, Judge Renner as U.S. Attorney signed indictments in the prosecution of Movant in 1975 and 1976. Also see, U.S. vs. LOVELACE, 565 F.3d 1080 (8th Cir. 2009)(remanded to different judge where judge improperly relied on his personal knowledge of defendant's history).

GOVERNMENT'S RESPONSE "DEFENDANT'S POST-CONVICTION CHALLENGES" - PAGE 2 and 3:

11. The government offers a time line from Movant's resentencing - February 10, 1997 - thru Movant's June 8, 2012 current filing. This information appears within Movant's original June 8, 2012 filing within paragraphs 27 thru 53. As per **RULE 8(d)** of the Federal Rules of Civil Procedure - refer to ¶ 1 and ¶ 2 - the government **ADMITS MOVANT'S PARAGRAPHS 28, 29, 30 amd 31.** Specifically, Movant

Lambros was **DENIED THE RIGHT TO FILE A TITLE 28 U.S.C. §2255 TO RAISE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS AGAINST HIS ATTORNEY** when Judge Renner reclassified Movnant's **Rule 33 Motion as a §2255 Motion against Movant's requests not to.** See, MORALES vs. U.S., 304 F.3d 764 (8th Cir. 2002) and CASTRO vs. USA, 540 U.S. 375 (2003).

12. **MOVANT STATES THAT THIS IS HIS FIRST §2255**, due to the above reclassification of Movant's Rule 33 Motion into a §2255. Also, this Court should consider giving Movant one complete opportunity to file an amended §2255 if this §2255 is considered his first.

GOVERNMENT'S RESPONSE "ARGUMENT" - Page 3 thru 10:

PAGE 3 and 4:

13. The government states that in order to obtain authorization to file a successive §2255 motion, a prisoner must assert claims included within 28 U.S.C. §§ 2244(b)(2), 2255. Lambros' claims do not satisfy either of these criteria. Therefore, this Court should deny authorization to file a successive §2255 motion and dismiss Lambros' appeal. This is not true. Lambros filed his Second or Successive Motion pursuant to Title 28 U.S.C. §2255(f)(3) and §2255(h)(2), due to the two (2) U.S. Supreme Court decisions handed down on March 21, 2012, that expanded the opportunities for defendants to overturn their convictions on the basis of **POST-CONVICTION CLAIMS** that their attorneys did an unreasonably poor job during plea negotiations. Movant Lambros only has to show that his attorney failed to communicate plea offers **OR FAILED TO GIVE HIM COMPETENT COUNSEL REGARDING A PLEA OFFER.** Movant Lambros has proved this due to this Court's ORDER in U.S. vs. LAMBROS, 65 F.3d 698 (8th Cir. 1995), which vacated his MANDATORY LIFE SENTENCE WITHOUT PAROLE because the sentence was not legal at the time of the crime charged within the indictment. Both government written plea proposals - **November 16, 1992 and December 10, 1992** - clearly stated that the only sentence Movant Lambros could receive for Count One (1)

was a **MANDATORY TERM OF IMPRISONMENT OF LIFE WITHOUT PAROLE.** The Supreme Court cases stated that Movant can receive a lower sentence or have the prosecutor re-extend the plea offer, even if Movant Lambros received a fair trial after he rejected the government's plea offer, the court made clear. See, MISSOURI vs. FRYE, 132 S.Ct. 1399; 182 L. Ed. 2d 379 (March 21, 2012) and LAFLER vs. COOPER, 132 S. Ct. 1376; 182 L. Ed. 2d 398 (March 21, 2012). MISSOURI and LAFLER announced a type of Sixth Amendment violation that was previously unavailable, and requires retroactive application to cases on collateral review.

14. MISSOURI vs. FRYE was on **HABEAS CORPUS REVIEW**, thus retroactive.

15. LAFLER vs. COOPER was on **HABEAS CORPUS REVIEW** pursuant to 28 U.S.C. §2254 and subject to the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), thus retroactive.

16. Movant also would like to inform this Court as to the other **INCORRECT INFORMATION CONTAINED WITHIN THE GOVERNMENT'S DECEMBER 10, 1992 "PLEA PROPOSAL"** as per government **"ATTACHMENT 3":** (July 23, 2012)

a. **Page 2, Paragraph 2:** The government states that **ABSENT THE FILING OF AN INFORMATION**, the Count VIII charge carries a **MAXIMUM PENALTY OF FORTY (40) YEARS.** This is not true. Count VIII was for a violation of **21 U.S.C. § 841(b)(1)(B) [See EXHIBIT B]** which only had a maximum penalty of **15-YEARS** absent the filing of an information. See, **EXHIBIT C.**

b. **Page 2, Paragraph 4:** "Counts V and VI carry the **SAME MAXIMUM** and minimum potential penalties as the **Count VIII charge.**" This is not true. Again, both Count V and VI are violations of **21 U.S.C. § 841(b)(1)(B) [See EXHIBIT B]** which only have a **MAXIMUM PENALTY OF 15-YEARS** absent the filing of an information. See, **EXHIBIT C.**

c. **Page 2, Paragraph 4:** "Conviction on the Count I charge, however, would trigger a **MAXIMUM TERM OF IMPRISONMENT OF LIFE WITHOUT PAROLE, ...**" This is not true. Count One (1) the conspiracy has a maximum penalty of **15-YEARS** absent the filing of an information. Please refer to paragraph 10. See, **EXHIBIT C.**

Please note that Count One (1) within Movant Lambros' indictment states that Movant Lambros must **"DISTRIBUTE IN EXCESS OF FIVE KILOGRAMS OF ... COCAINE.."** First the statute Title 21 U.S.C. § 841(b)(1)(A), at the time of the alleged crime does not require "in excess of five (5) kilograms". Second, Title 21 U.S.C. § 841 (b)(1)(A) **REQUIRES** that there be at least one single violation of five (5) kilograms or more of cocaine. The record will not support such a finding. See, U.S. vs. WINSTON, 37 F.3d 235, 240-241 (6th Cir. 1994)(Winston was sentenced to a mandatory term of life imprisonment pursuant to 21 U.S.C. §841(b)(1)(A)):

> "It is obvious from the statute's face - from its use of the phrase **"A VIOLATION"** - that this section refers to a **SINGLE VIOLATION** ..."
>
> "This straigtforward understanding of the statute is not only in keeping with our duty to 'construe narrowly the applicability of any criminal statute,' (cites omitted), but is also in keeping with Congress' expressed purpose in enacting 21 U.S.C. §841(b), which was to target major drug traffickers and manufactures, kingpins, and masterminds of criminal organizations ... **IF WE WERE TO CONSTRUE 21 U.S.C. §841(b)(1)(A) AS**
>
> *** **APPLYING TO AGGREGATE AMOUNTS OF DRUGS HELD ON VARIOUS SEPARATE OCCASIONS,** it could be users who never possess more than a few grams at a time. The phrase **"A VIOLATION"** makes it clear that this was not Congress's intent."

See, U.S. vs. WINSTON, 37 F.3d at 240-241. Also see, **EXHIBIT B Pages 1 and 2** of Lambros' indictment - Count One. The jury made a general jury verdict on all counts and **NO FINDING** as to amount of drugs Movant Lambros was responsible for in each count.

PAGE 6:

17. Movant wishes to thank the government for discovering the **"REVISED PLEA PROPOSAL"** - Attachment 3, dated December 10, 1992. Movant Lambros did not have copy of same within his records. Movant apologizes to this Court for loosing the December 10, 1992 "REVISED PLEA PROPOSAL" during the past twenty (20) years. The government states "As evidenced by his correspondence, Lambros **WAS NOT INTERESTED IN PLEADING GUILTY** and continued to prepare for trial informing

counsel that he wanted full disclosure of the government's case." This is not true. Attachment 4 - Lambros' December 21, 1992 letter to Attorney Faulkner and U.S. Attorney Peterson **NEVER STATED LAMBROS WAS NOT INTERESTED IN PLEADING GUILTY!** Page 3 of Movant Lambros' letter asked why only 234 pages of government documents were submitted to Lambros? Also, please remember that it was still Movant Lambros' understanding that he could not receive more than a 30-year sentence and Attorney Faulkner would not argue the maximum 30-year sentence within the **"PLEA AGREEMENT AND SENTENCING GUIDELINES RECOMMENDATIONS"** submitted by the government. The bottom line is how can a person enter into a plea agreement when his Attorney, U.S. Attorney, nor the District Court Judge know the correct law. See, GLOVER vs. U.S., 531 U.S. 198, 148 L.Ed. 2d 604 (2001)(Erroneous sentencing determination unlawfully increased defendant's prison sentence establishes prejudice for Sixth Amendment ineffective-counsel claim.) The Supreme Court has held that counsel has a constitutionally imposed duty to **CONSULT** with defendant's as to the advantages and disadvantages of taking a plea offer or an appeal. See, ROE vs. FLORES-ORTEGA, 528 U.S. 470, 480 and 478 (2000).

MOVANT LAMBROS DID NOT STATE THAT HE WAS NOT INTERESTED IN PLEADING GUILTY KNOWINGLY!

18. **MISCARRIAGE OF JUSTICE:** Because the parties, as shown in the initial brief and above, wrongly believed that Movant Lambros could only receive a MANDATORY LIFE SENTENCE WITHOUT PAROLE and other incorrect illegal sentences as outlined above, the government's theory that Movant Lambros has waived his rights is incorrect. Movant's attorney was ineffective, as was the government. In U.S. vs. ARONJA-INDA, 422 F.3d 734, 737 (8th Cir. 2005), this Court held that the government has the burden of establishing that an appeal is barred by waiver, including that application of waiver would not result in a **MISCARRIAGE OF JUSTICE**. In U.S. vs. RUTAN, 956 F.2d 827, 829 (8th Cir. 1992) held that **AN ILLEGAL SENTENCE** can be challenged under 28 U.S.C. §2255 for babeas corpus relief, so a defendant is not

entirely without recourse from an erroneous sentence. U.S. vs. ANDIS, 333 F.3d 886 (8th Cir. 2003)(en banc), discussed RUTAN and held that imposition of an **ILLEGAL SENTENCE CONSTITUTED "A MISCARRIAGE OF JUSTICE"** and may be appealed despite the existence of an otherwise valid waiver:

> "When reviewing a purported waiver, we must confirm that the appeal falls within the scope of the waiver and that both the **WAIVER AND PLEA AGREEMENT** were entered into **KNOWINGLY AND VOLUNTARILY.** Even when these conditions are met, however, we **WILL NOT ENFORCE A WAIVER WHERE TO DO SO WOULD RESULT IN A MISCARRIAGE OF JUSTICE.** (emphasis added)

See, ANDIS, at 890.

The errors within the PLEA AGREEMENT offered to Movant Lambros amount to a fundamental defect which inherently results in a complete **MISCARRIAGE OF JUSTICE.** Movant Lambros would of gladly accepted a reasonable sentence, as offered and received by the other co-defendants. Therefore, the government is incorrect when it states "There is absolutely no merit under these circumstances to Lambros' claim that FRYE or LAFLER somehow offer him relief from his sentence."

PAGE 6, 7, and 8:

19. The government states "More fundamentally, however, there has been no showing that the rule in FRYE and LAFLER satisfies TEAGUE." This is not true.

20. First, as per **RULE 8(d)** of the Federal Rules of Civil Procedure, the government has **ADMITTED WHEN NOT DENIED IN THE RESPONSIVE PLEADING** that Movant Lambros' paragraph five (5) is correct on pages 5 and 6. "Movant Lambros states that [Title 28 U.S.C.] §2255(f)(3) **does not** require that the **RETROACTIVITY DETERMINATION MUST BE MADE BY THE SUPREME COURT ITSELF.** Had Congress desired to limit §2255(f)(3)'s retroactivity requirement, it would have similarly placed a **"BY THE SUPREME COURT"** limitation immediately after the phrase "made retroactively

applicable to cases on collateral review" in §2255(f)(3). Both FRYE and COOPER are retroactively applicable on collateral review." See, U.S. vs. LOPEZ, 248 F.3d 427, 430-431 (5th Cir. 2001)(a new "constitutional right" would qualify under §2255(f)(3)):

> "Thus, we hold that §2255(f)(3) does not require that the retroactivity determination must be made by the Supreme Court itself." (emphasis added)

See, U.S. vs. LOPEZ, 248 F.3d at 432.

Again, both FRYE and COOPER inform us that defense lawyers have a **SIXTH AMENDMENT** duty to professionally advise their clients with adequate correct advise to whether to accept a plea offer. This did not occur in Movant plea offer.

21. Second, as per **Rule 8(d)** of the Federal Rules of Civil Procedure, the government has **ADMITTED WHEN NOT DENIED IN THE RESPONSIVE PLEADING** that Movant Lambros' paragraphs 7, 8, 9, 10, 11, 12, 13 and 14 are correct on pages 6 thru 9, as to **"THE EXTENSION OF AN OLD RULE", "TEAGUE vs. LANE" and "TYLER vs. CAIN".** Movant restates and incorporates same here.

22. The government spend several pages informing this Court that TEAGUE vs. LANE, 489 U.S. 288 (1989) and subsequent cases by the Supreme Court laid out the framework for determining when a rule announced in one of its decisions should be applied retroactively to criminal cases that are already final on direct review. Under TEAGUE **"AN OLD RULE APPLIES BOTH ON DIRECT AND COLLATERAL REVIEW,** but a new rule is generally applicable only to cases that are still on direct review." See, WHORTON vs. BOCKTING, 549 U.S. 406, 416 (2007)(quoting GRIFFITH vs. KENTUCKY, 479 U.S. 314 (1987). If this Court concludes that the Supreme Court has announced an **"OLD RULE", THIS MOTION APPLIES RETROACTIVELY;** however, if the **RULE IS NEW,** this Court must consider whether one of the two (2) exceptions applies to make this motion retroactive. See, WHORTON, 549 U.S. at 416.

23. Movant Lambros argues that TEAGUE is inapplicable. FRYE and COOPER does not announce a new rule and that both cases are an extension of the

rule in STRICKLAND vs. WASHINGTON, 466 U.S. 668 (1984) - requiring effective assistance of counsel -, and that its holding should apply retroactively. The Supreme Court's conclusion in FRYE and COOPER is opposite the holding of every federal circuit court to have address the issue. Therefore, the Supreme Court held that **PLEA BARGAINING** is a "critical stage" at which the **SIXTH AMENDMENT GUARANTEES** the defendant the right to effective counsel. The Supreme Court concluded that STRICKLAND applies to advice regarding plea bargaining.

24. **THE EXTENSION OF AN OLD RULE:** The Supreme Court has never recognized a constitutional right to plea bargaining. JUSTICE KENNEDY held that the SIXTH AMENDMENT guarantees the right to effective assistance of counsel during plea bargaining, stating that the minimum standards set forth in STRICKLAND vs. WASHINGTON, also apply to plea bargaining.

25. The Supreme Court did not break new ground, it simply pointed out the errors in the lower courts that prevented them from considering ineffective assistance of counsel claims under STRICKLAND. The Supreme Court found that the lower courts' impermissibly removed advice regarding plea bargaining from the ambit of the Sixth Amendment right to counsel. Therefore, FRYE and COOPER applied STRICKLAND to a new set of facts without establishing a new rule because, the Supreme Court merely cited to professional standards and expectations and identified competent counsel's duty in accordance thereof. Movant requests this Court to find FRYE and COOPER apply retroactively.

26. **TYLER vs. CAIN, 533 U.S. 656 (2001):** The government did not cite TYLER vs. CAIN - **WHY??** In TYLER, the Supreme Court explained that a case is "made retroactive to cases on collateral review by the Supreme Court" for purposes of the statutory limitations on second or successive habeas petitions if and "only if this Court has held that the new rule is retroactively applicable to cases on collateral review." Id. at 662. The TYLER Court explained, however, that "**THIS** ** **COURT CAN MAKE A RULE RETROACTIVE OVER THE COURSE OF TWO (2) CASES** .... Multiple **

cases can render a new rule retroactive .... if the holdings in those cases NECESSARILY DICTATE RETROACTIVITY OF THE NEW RULE." Id. at 666.

27. Justice O'Connor, who supplied the crucial fifth vote for the majority, wrote a concurring opinion, and her reasoning adds to the understanding of the impact of TYLER. She explains that it is possible for the Court to "make" a case retroactive on collateral review WITHOUT EXPLICITLY SO STATING, as long as the Court's holdings "logically permit no other conclusion than that the rule is retroactive." See, 533 U.S. at 668-669, 150 L.Ed. 2d at 646-647. For example, Justice O'Connor explained that:

> "If we hold in Case One that a particular type of rule applies retroactively to cases on collateral review and hold in Case Two that given rule is of that particular type, then it necessarily follows that the given rule applies retroactively on collateral review. In such circumstances, we can be said to have "made" the given rule retroactive to cases on collateral review."
>
> "The relationship between the conclusion that a new rule is retroactive and the holdings that "make" this rule retroactive, however, must be strictly logical - - i.e., the holdings must dictate that conclusion and not merely provide principles from which one may conclude that the rule applies retroactively."

TYLER vs. CAIN. 533 U.S. at 668-69, 150 L.Ed.2d at 646-47.

PAGES 8 AND 9:

27. The government states "The only Court of Appeals to have examined whether LAFLER or FRYE apply retroactively held they do not." This is not true. The following cases have applied FRYE and LAFLER retroactively:

a. U.S. vs. RAFAEL E. RIVAS-LOPEZ, 678 F.3d 353, FootNote 23 (5th Cir. April 18, 2012). The Court vacated Movant's sentence due to ineffective assistance of counsel when his attorney overestimated his sentence exposure under a prooffered PLEA due to the holdings in MISSOURI vs. FRYE and LAFLER vs. COOPER. This action was filed as a §2255 MOTION raising claims of ineffective assistance of counsel.

b. U.S. vs. YUBY RAMIREZ, the Eleventh Circuit offered immediate release to a women sentenced to **LIFE** on a 2001 conviction. This was a **§2255 motion submitted by Yuby Ramirez.** Movant Lambros is not able to offer the case cite, as the prison library computers have not been updated to provide May 2012 rulings. The information was contained within **THE WALL STREET JOURNAL, Monday, May 7, 2012, Page B6. See, EXHIBIT E.** The history of YUBY RAMIREZ vs. USA, is available at 315 Fed. Appx. 227; 2009 U.S. App. LEXIS 3299, No. 08-11489; Filed on February 18, 2009 for the U.S. Court of Appeals for the Eleventh Circuit. Please note that the 11th Circuit vacated and remanded the district court's judgment of Yuby Ramirez's **§2255 HABEAS CORPUS PETITION.**

c. JOHNSON vs. URIBE, No. 11-55187, June 22, 2012, U.S. Court of Appeals for the Ninth Circuit. "In an opinion by Judge Algenon L. Marbley, sitting by designation, the court ruled that the only way to restore the **HABEAS CORPUS PETITIONER** to the position he would have been in had there been no Sixth Amendment violation was **TO GIVE HIM A DO-OVER ON THE WHOLE BARGAINING PROCESS.** - Simply resentencing the petitioner would not satisfactorily erase the taint because counsel's failure to investigate and challenge the erroneous enhancements meant that the plea negotiations were unfairly tilted in the prosecution's favor from the outset, the court explainted."

> "The Court stressed that the U.S. Supreme Court's recent decisions in **MISSOURI vs. FRYE,** ... (U.S. 2012), and **LAFLER vs. COOPER,** ... (U.S. 2012), reaffirmed the principle that defendants have a Sixth Amendment right to effective assistance of counsel that runs throughout the **PLEA BARGAINING PROCESS."** (emphasis added)

See, **EXHIBIT F.** (Criminal Law Reporter, Vol. 91, No. 14, Pages 525 and 526, July 4, 2012)

d. TITLOW vs. BURT, 2012 U.S. App. LEXIS 10241; 2012 FED App. 0147P (U.S. Appeals Court for the Sixth Circuit No. 10-2488). Filed on May 22, 2012. The Sixth Circuit reversed TITLOW'S writ of habeas corpus arising out of **PLEA-BARGAINING.** The Court stated, "This right extends to the **PLEA-BARGAINING**

PROCESS, during which defendants are 'entitled to the effective assistance of competent counsel.' **LAFLER vs. COOPER**, 132 S.Ct. 1376, 1384, 182 L.Ed. 2d 398 (2012)(internal quotion marks omitted). '[T]he right to adequate assistance of counsel cannot be defined or enforced without taking account of the central role **PLEA BARGAINING** plays in securing convictions and determining sentences." Id. at 1388"

CONCLUSION:

28. For all of the foregoing reasons, this Court must authorize a SECOND or SUCCESSIVE MOTION and VACATE Movant's convictions and sentences in Counts 1, 5, 6, and 8.

29. Movant requests this Court to follow the majority in LAFLER vs. COOPER and offer Movant Lambros a remedy that must "NEUTRALIZE THE TAINT" of the constitutional violations and due to the fact that MANDATORY SENTENCES limited sentencing discretion, the circumstances require "the prosecution to re-offer the plea proposal."

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

EXECUTED ON: August 10, 2012

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February 12, 1996

MAXIME TOSCANINO
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ATTORNEY JEFF ORREN
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26 East Exchange Street,
St. Paul, Minnesota.
55101-2264

Gentlemen:

My father is in a Maximun Security Prison, near Naples (Italy), where he can't even make copies.

Enclosed are copies of the Newspaper Article you need and the address of his Brazilian Lawyer in 1991:

Dr. JULIO CARDELLA
Rua General Osorio, 939
Campinas - Sao Paulo.
CEP 13.013 - Brazil.

Phone No. 55-192-340608.

If you need anything else, please don't hesitate to contact me.

Sincerely,

MAXIME TOSCANINO.

EXHIBIT A.

1.

PROTÁSIO NÉNE AJ

O italiano Francesco Toscanino, que aguarda julgamento de extradição preso em Brasília

Mafioso da Camorra preso sofreu torturas na ditadura

Ele foi seqüestrado no Uruguai e depois enviado ilegalmente para os Estados Unidos

JOSÉ FRANCISCO PACOLA

A cela da Polícia Federal em Brasília, onde está trancafiado o italiano Francesco Toscanino enquanto aguarda o julgamento do pedido de sua extradição formulado pelo governo italiano, abriga um personagem que sentiu na pele as astrocidades da ditadura militar e transformou-se, sem querer, em mais uma testemunha de um período negro da história recente brasileira. Toscanino viveu experiência semelhante à de Universindo Diaz e Lilian Celiberti, seqüestrados em Porto Alegre em 1978 por um comando formado por militares uruguaios e policiais gaúchos e levados para o Uruguai, onde foram condenados a cinco anos de prisão. Cinco anos antes, durante o governo Médici, Toscanino havia cumprido à força o caminho inverso.

Seqüestrado no Uruguai por agentes daquele país, foi entregue a policiais brasileiros que o torturaram durante 18 dias, antes de o enviarem, dopado, aos Estados Unidos, para ser processado e condenado por tráfico de drogas. A "expulsão" com destino certo teve sua irregularidade reconhecida pela própria Justiça brasileira no ano passado.

A história da "expulsão" do italiano Francesco Toscanino do Brasil envolve operações policiais irregulares que começaram no Uruguai e avançaram os limites da soberania nacional com a conivência das autoridades. No dia 6 de janeiro de 1973 ele foi atraído por um telefonema para um boliche localizado em uma área deserta de Montevidéu, onde morava com a esposa e cinco filhos depois de deixar a Argentina pela repercussão negativa de seu envolvimento com o tráfico de drogas. Ao chegar ao boliche, Toscanino foi dominado por policiais uruguaios liderados por Hugo Campos Hermedia, que seria agente pago pelo governo norte-americano. Agredido a coronhadas de revólver até ficar inconsciente, foi amarrado, teve os olhos vendados e foi trazido até a fronteira brasileira.

EXHIBIT A.

EXHIBIT A.

SECRET

OCDE CASE # NC-MN-013

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

UNITED STATES OF AMERICA, Plaintiff, v. LAWRENCE RANDALL PEBBLES, RALPH AMERO, IRA JAY BERINE, GEORGE FREDERICK ANGELO a/k/a "RAPID RICK", JOHN GREGORY LAMBROS, and PAMELA RAE LEMON a/k/a "TAMMY", Defendants.	INDICTMENT 4-89-82 (21 U.S.C §§ 841(a)(1), 841(b)(1)(A), 841(b)(1)(B), 841(b)(1)(C), and 846) (18 U.S.C. §§ 1952(a)(3) and 1952(b)(1)) (18 U.S.C. § 2(a))

THE UNITED STATES GRAND JURY CHARGES THAT:

COUNT I

From on or about the 1st day of January, 1983, to on or about the 27th day of February, 1988, in the State and District of Minnesota, and elsewhere, the defendants,

LAWRENCE RANDALL PEBBLES,
RALPH AMERO,
IRA JAY BERINE,
GEORGE FREDERICK ANGELO a/k/a "RAPID RICK"
JOHN GREGORY LAMBROS, and
PAMELA RAE LEMON a/k/a "TAMMY",

did willfully and knowingly combine, conspire, confederate and agree with each other, and others known and unknown to the Grand Jury, to violate Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(A), that is, to knowingly and intentionally possess with intent to distribute and

3.

EXHIBIT B.

DEM #160

(1)

FILED 17 MAY 1989
FRANCIS E. DOSAL, CLERK
CLERK'S INITIALS

distribute in excess of five kilograms of mixtures and substances containing detectable amounts of cocaine, a Schedule II controlled drug substance; all in violation of Title 21, United States Code, Section 846.

OVERT ACTS

The Grand Jury charges that in furtherance of said conspiracy and to accomplish the objects thereof, the defendants and co-conspiractors did commit the following overt acts:

1. During the course of the conspiracy, Lawrence Randall Pebbles maintained an office at 1033 Grand Avenue, St. Paul, Minnesota.

2. During the course of the conspiracy, Pebbles used coded notations to disguise the telephone numbers for his co-conspirators, including Ira Jay Berine, John Gregory Lambros, Ralph Amero, Janet Diane Phillippi (not indicted herein), Terry Van Gundy (not indicted herein), and Thomas Schriewer (not indicted herein).

3. During the course of the conspiracy, Pebbles' secretary and receptionist handled cash payments by George Frederick Angelo a/k/a "Rapid Rick", Berine, Lambros and others for the purchase of cocaine from Pebbles.

4. On several occasions during the course of the conspiracy, Angelo a/k/a "Rapid Rick" provided Pebbles' office manager with cash payments for cocaine transactions.

EXHIBIT B.

cocaine, a Schedule II controlled drug substance, in violation of Title 21, United States Code, Section 841(a)(1), and thereafter did perform and attempt to perform acts to promote, manage, carry on and facilitate the promotion, management and carrying on of said unlawful activity; all in violation of Title 18, United States Code, Sections 1952(a)(3) and 1952(b)(1).

COUNT III

On or about the 4th day of March 1987, in the State and District of Minnesota, the defendant,

RALPH AMERO,

did knowingly and intentionally possess with intent to distribute approximately eight ounces of cocaine, a Schedule II controlled drug substance; all in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(C).

COUNT IV

On or about the 4th day of March, 1987, in the State and District of Minnesota, the defendant,

GEORGE FREDERICK ANGELO a/k/a "RAPID RICK",

did knowingly and intentionally possess with intent to distribute approximately one kilogram of cocaine, a Schedule II controlled drug substance; all in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(B).

COUNT V

On or about the 8th day of July, 1987, in the State and District of Minnesota, the defendants,

5.

EXHIBIT B.

JOHN GREGORY LAMBROS, and
PAMELA RAE LEMON,

each aiding and abetting the other, did knowingly and intentionally possess with intent to distribute approximately two kilograms of cocaine, a Schedule II controlled drug substance; all in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(B), and Title 18, United States Code, Section 2(a).

COUNT VI

On or about the 23rd day of October, 1987, in the State and District of Minnesota, the defendants,

JOHN GREGORY LAMBROS, and
PAMELA RAE LEMON,

each aiding and abetting the other, did knowingly and intentionally possess with intent to distribute approximately two kilograms of cocaine, a Schedule II controlled drug substance; all in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(B), and Title 18, United States Code, Section 2(a).

COUNT VII

On or about the 22nd day of December, 1987, in the State and District of Minnesota, the defendant,

IRA JAY BERINE,

did travel in interstate commerce from the State of Minnesota to the State of Iowa, with intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment

EXHIBIT B.

6.

and carrying on of an unlawful activity, namely, the distribution of cocaine, a Schedule II controlled drug substance, in violation of Title 21, United States Code, Section 841(a)(1), and thereafter did perform and attempt to perform acts to promote, manage, carry on and facilitate the promotion, management and carrying on of said unlawful activity; all in violation of Title 18, United States Code, Sections 1952(a)(3) and 1952(b)(1).

COUNT VIII

On or about the 22nd day of December, 1987, in the State and District of Minnesota, the defendants,

GEORGE FREDERICK ANGELO a/k/a "RAPID RICK", and
JOHN GREGORY LAMBROS,

each aiding and abetting the other, did knowingly and intentionally possess with intent to distribute approximately two kilograms of cocaine, a Schedule II controlled drug substance; all in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(B), and Title 18, United States Code, Section 2(a).

COUNT IX

On or about the 12th day of February, 1988, in the State and District of Minnesota, the defendant,

JOHN GREGORY LAMBROS,

did travel in interstate commerce from the State of Minnesota to the State of California with intent to promote, manage, establish, carry on and facilitate the promotion, management,

EXHIBIT B.

Amendments:

1978. Act Nov. 10, 1978 (effective on enactment, as provided by § 203(a) of such Act, which appears as 21 USCS § 830 note), in subsec. (b), in para. (1)(B), inserted ", except as provided in paragraphs (4) and (5) of this subsection,", and added para. (5); and added subsec. (d).

1980. Act Sept. 26, 1980, in subsec. (b), in para. (1)(B), substituted "except as provided in paragraphs (4), (5), and (6) of this subsection" for "except as provided in paragraphs (4) and (5) of this subsection", and added para. (6).

1984. Act **Oct**. 12, 1984, in subsec. (b), in the introductory matter, inserted "or 405A", in para. (1), redesignated subparas. (A) and (B) as subparas. (B) and (C), added new subpara. (A), in subpara. (B) as so redesignated, substituted "except as provided in subparagraphs (A) and (C)", for "which is a narcotic drug", substituted "$125,000" for "$25,000", substituted "of a State, the United States, or a foreign country" for "of the United States", and substituted "$250,000" for "$50,000", in subpara. (C) as so redesignated, substituted "less than 50 kilograms of marihuana, 10 kilograms of hashish, or one kilogram of hashish oil" for "a controlled substance in schedule I or II which is not a narcotic drug" substituted "and (5)" for ", (5), and (6)", substituted "$50,000" for "$15,000", substituted of a State, the United States, or a foreign country" for "of the United States", and substituted "$100,000" for "$30,000", in para. (2), substituted "$25,000" for "$10,000", substituted "of a State, the United States, or a foreign country" for "of the United States", and substituted "$50,000" for "$20,000", in para. (3), substituted "$10,000" for "$5,000", substituted "of a State, the United States, or a foreign country" for "of the United States", and substituted "$20,000" for "$10,000", in para. (4), substituted "(1)(C)" for "(1)(B)", substituted para. (5) for one which read: "Notwithstanding paragraph (1)(B) of this subsection, any person who violates subsection (a) of this section by manufacturing, distributing, dispensing, or possessing with intent to manufacture, distribute, or dispense, except as authorized by this title, phencyclidine (as defined in section 310(c)(2)) shall be sentenced to a term of imprisonment of not more than 10 years, a fine of not more than $25,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under paragraph (1) of this paragraph, or for a felony under any other provision of this title or title III or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 20 years, a fine of not more than $50,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment.", and deleted para. (6), which read: "In the case of a violation of subsection (a) involving a quantity of marihuana exceeding 1,000 pounds, such person shall be sentenced to a term of imprisonment of not more than 15 years, and in addition, may be fined not more than $125,000. If any person commits such a violation after one or more prior convictions of such person for an offense punishable under paragraph (1) of this paragraph, or for a felony under any other provision of this title, title III, or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, and in addition, may be fined not more than $250,000.".

Such Act further (effective and applicable as provided by § 235 of such Act, which appears as 18 USCS § 3551 note), in subsec. (b)(4), deleted "subsections (a) and (b) of" preceding "section 404", and inserted "and section 3607 of title 18, United States Code"; and deleted subsec. (c), which read: "Revocation of supervised release term. A term of supervised release imposed under this section or section 418, 419, or 420 may be revoked if its terms and conditions are violated. In such

EXHIBIT C.

EXHIBIT C.

8.

circumstances the original term of imprisonment shall be increased by the period of the term of supervised release and the resulting new term of imprisonment shall not be diminished by the time which was spent on special parole. A person whose term of supervised release has been revoked may be required to serve all or part of the remainder of the new term of imprisonment. A term of supervised release provided for in this section or section 418, 419, or 420 shall be in addition to, and not in lieu of, any other parole provided for by law.".

1986. Act **Oct**. **27**, **1986**, in subsec. (b), in the introductory matter, substituted ", 405A, or 405B" for "or 405A", in para. (1), substituted subparas. (A) and (B) for ones which read:

"(A) In the case of a violation of subsection (a) of this section involving--

"(i) 100 grams or more of a controlled substance in schedule I or II which is a mixture or substance containing a detectable amount of a narcotic drug other than a narcotic drug consisting of--

"(I) coca leaves;

"(II) a compound, manufacture, salt, derivative, or preparation of coca leaves; or

"(III) a substance chemically identical thereto;

"(ii) a kilogram or more of any other controlled substance in schedule I or II which is a narcotic drug;

"(iii) 500 grams or more of phencyclidine (PCP); or

"(iv) 5 grams or more of lysergic acid diethylamide (LSD);

such person shall be sentenced to a term of imprisonment of not more than 20 years, a fine of not more than $250,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this title or title III or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than **40 years**, a fine of not more than $500,000, or both

"(B) In the case of a controlled substance in schedule I or II, except as provided in subparagraphs (A) and (C), such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than $125,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this title or title III or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, a fine of not more than $250,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 6 years in addition to such term of imprisonment.".

Such Act further, in subsec. (b), in para. (1), redesignated former subpara. (C) as subpara. (D), and added a new subpara. (C), and substituted subpara. (D), as so redesignated, for one which read: "In

EXHIBIT C.

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the case of less than 50 kilograms of marijuana, 10 kilograms of hashish, or one kilogram of hashish oil or in the case of any controlled substance in schedule III, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine of not more than $50,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this title or title III or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine of not more than $100,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment.", in para. (2), substituted "a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual" for "a fine of not more than $25,000", and substituted a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual for "a fine of not more than $50,000", in para. (3), substituted "a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or $100,000 if the defendant is an individual or $250,000 if the defendant is other than an individual" for "a fine of not more than $10,000", and substituted "a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or $200,000 if the defendant is an individual or $500,000 if the defendant is other than an individual" for "a fine of not more than $20,000", in para. (4), substituted "1(D)" for "1(C)", and substituted para. (5) for one which read "Notwithstanding paragraph (1), any person who violates subsection (a) by cultivating a controlled substance on Federal property shall be fined not more than--

"(A) $500,000 if such person is an individual; and

"(B) $1,000,000 if such person is not an individual.";

in subsec. (c), substituted ", 405A, or 405B" for "405A"; and in subsec. (d), in the concluding matter, substituted "a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual" for "a fine of not more than $15,000", and added subsec (e).

Such Act further (effective as provided by § 1004(b) of such Act, which appears as a note to this section), in subsecs. (b)(1)(D), (b)(2) and (c), substituted "term of supervised release" for "special parole term".

1988. Act Nov. 18, 1988, in subsec. (b)(1), in subpara. (A), in cl. (vi), deleted "or" following the semicolon, in cl. (vii), inserted ", or 1,000 or more marihuana plants regardless of weight", added "or" following the semicolon, and added cl. (viii), and in the concluding matter, substituted "a prior conviction for a felony drug offense has become final" for "one or more prior convictions" and inserted the sentence beginning "If any person commits a violation . . .".

Such Act further, in subsec. (b), in para. (1), in subpara. (B), in cl. (vi), deleted "or" following the semicolon, in cl. (vii), inserted ", or 100 or more marihuana plants regardless of weight", added "or" following the semicolon, and added cl. (viii), and in subpara. (D), substituted "50 or more marihuana plants" for "100 or more marihuana plants", and added para. (6).

Act Nov. 18, 1988 (effective 120 days after enactment, as provided by § 6061 of such Act, which

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10.

appears as 21 USCS § 802 note) substituted subsec. (d) for one which read:

"(d) Any person who knowingly or intentionally--

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

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

shall be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both.".

Such Act further added subsecs. (f) and (g).

1990. Act Nov. 29, 1990, in subsec. (b)(1), in subparas. (A)(ii)(IV) and (B)(ii)(IV), substituted "any of the substances" for "any of the substance".

11.

EXHIBIT C.

similar laws, according to the Puerto Rican Legal Defense and Education Fund, which tracks the data.

'Big fish' drug lord gets 30 years in prison

A man described by the U.S. government as one of the world's biggest drug lords — Manuel Felipe Salazar-Espinosa — was sentenced to 30 years in prison for directing an organization that shipped tons of cocaine into the USA. Calling Salazar-Espinosa "a very big fish," federal Judge Lewis Kaplan said the defendant caused tons of cocaine to enter the USA and laundered tens or even hundreds of millions of dollars in drug proceeds. He was ordered to forfeit $50 million.

Kaplan said Salazar-Espinosa, 58, could have faced life in prison, but U.S. prosecutors honored Colombia's request not to seek the maximum sentence.

Also ...

▶ RIVERHEAD, N.Y. — A man accused of hacking his

12.

EXHIBIT D.

Federal Appeals Court Overturns Life Sentence

Less than two months ago, a divided U.S. Supreme Court ruled that a defendant's conviction may be voided if the defendant had turned down a plea bargain because of incompetent legal advice.

On Thursday, a federal appeals court threw out the life sentence of a woman convicted in 2001 on a drug-related murder-conspiracy charge.

The decision by the 11th U.S. Circuit Court of Appeals means that a Miami woman, Yuby Ramirez, soon will be released from prison after serving 11 years.

"This is why you go to law school for cases like this," said David Markus, her lawyer. "I'm just really thrilled for her and her family."

Ms. Ramirez's former lawyers turned down two plea offers from federal prosecutors, believing that she faced no more than 10 years in prison and that she would prevail on a statute-of-limitations argument.

After her conviction in 2001, Ms. Ramirez was sentenced to life in prison.

The appeals court on Thursday ordered that she be released from custody because she had already served more than 10 years in prison--the longest of the two plea offers.

Ms. Ramirez, 40 years old, was convicted in a conspiracy to murder a witness preparing to testify against alleged South Florida drug kingpins Salvador Magluta and Willie Falcon.

Chad Bray

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13.

EXHIBIT E.

Federal Appeals Court Overturns Life Sentence

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13.

EXHIBIT E.

amounting to abandonment of the client can constitute an "extraordinary circumstance" that justifies vacating a default judgment pursuant to Rule 60(b)(6).

Not Petitioner's Fault. In an opinion by Judge Marvin J. Garbis, the Ninth Circuit held that a district court can grant a habeas petitioner relief under Rule 60(b)(6) if his failure to file a timely notice of appeal was the result of abandonment by his counsel.

In *Stein*, unlike in this case, a party sought relief pursuant to Rule 60(b)(6) after failing to file a timely notice of appeal on account of a lack of notice of the entry of the orders from which the party sought to appeal, the court pointed out. The *Stein* court said the applicable rules on notice and appellate procedure left no gap for Rule 60(b) to fill.

This case is distinguishable in that the petitioner is not claiming a lack of proper notice, the court said. Rather, counsel received notice, and the petitioner is claiming abandonment by counsel, it pointed out.

More on point is *Maples*, the court said. In that case, as in this one, there was no right to counsel in the relevant proceedings. The *Maples* court reasoned that although a lawyer ordinarily is the client's agent, leaving the client to bear the risk of counsel's negligent conduct, things are entirely different when counsel has abandoned the client without notice. Under principles of agency law, the Supreme Court said, the client cannot be charged with the acts or omissions of an attorney who has abandoned him, nor can he be blamed for failing to act on his own behalf when he reasonably believes counsel is acting for him.

"An indigent prisoner who had been misled by his attorney to believe that he was awaiting a trial or hearing date . . . was wholly unaware that the district court had denied his Section 2254 petition."

JUDGE MARVIN J. GARBIS

Counsel's failure to formally withdraw in this case deprived the petitioner of the opportunity to proceed pro se and to personally receive docket notifications from the court, the circuit court observed. Because of this, "an indigent prisoner who had been misled by his attorney to believe that he was awaiting a trial or hearing date and believed that his attorney was continuing to represent him, was wholly unaware that the district court had denied his Section 2254 petition," the court observed.

The court accordingly remanded the case for the district court to determine whether counsel effectively abandoned the petitioner and, if so, whether to exercise its discretion to grant Rule 60(b)(6) relief.

Randall Riccardo, of Mill Valley, Calif., argued for the petitioner. Christopher Joseph Wei, of the California Attorney General's Office, San Francisco, argued for the state.

BY ALISA A. JOHNSON

Full text at http://pub.bna.com/clr/1115115.pdf

Right to Counsel

Overlooked Sentencing Errors in Plea Talks Require Redoing Plea Process to Erase Taint

The remedy for a defense lawyer's failure to notice that the state's plea offers involved erroneous sentencing enhancements is to vacate the resulting conviction based on the client's guilty plea and not simply to reverse the sentence, despite evidence that the client would have accepted the deal even if the sentence had been accurately calculated, the U.S. Court of Appeals for the Ninth Circuit ruled June 22. (*Johnson v. Uribe*, 9th Cir., No. 11-55187, 6/22/12)

In an opinion by Judge Algenon L. Marbley, sitting by designation, the court ruled that the only way to restore the habeas corpus petitioner to the position he would have been in had there been no Sixth Amendment violation was to give him a do-over on the whole bargaining process.

Simply resentencing the petitioner would not satisfactorily erase the taint because counsel's failure to investigate and challenge the erroneous enhancements meant that the plea negotiations were unfairly tilted in the prosecution's favor from the outset, the court explained.

Due Date. The petitioner was arrested for submitting a fraudulent check and a false credit application to steal a vehicle from a car dealership. At his pretrial hearing, the petitioner asked to be released until trial so he could attend the impending birth of his child.

Because the petitioner had previously failed to appear at a hearing, the prosecutor said she would agree to his own-recognizance release only on the condition that he plead guilty and accept a sentence of 14 years and four months. That sentence reflected several enhancements based on the petitioner's criminal history.

If the petitioner complied with the conditions of his release and returned to court for resentencing, the prosecutor said she would not file any new charges based on his failure to appear and would agree to a lower sentence of just six years.

The petitioner agreed to the terms, and the trial court accepted the conditional plea. When he later failed to appear, the court imposed the full sentence of 14 years and four months.

A federal district judge granted the petitioner habeas relief and remanded the matter for resentencing. The judge ruled that the petitioner had received ineffective assistance of counsel because the lawyer failed to notice that the sentence enhancements had been incorrectly tabulated and imposed a longer term of incarceration than if he had been convicted on all counts. The judge also found that defense counsel failed to perform an adequate investigation into the facts of his client's case and failed to adequately research the sentencing options.

The judge declined to vacate the guilty plea, however, accepting a magistrate judge's conclusion that the petitioner would have pleaded guilty even if his lawyer had provided effective assistance and caught the erroneous

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14.

enhancements. On remand, the state court sentenced the petitioner to 11 years and four months.

Unfair Negotiating Advantage. The court of appeals agreed that the petitioner is entitled to habeas relief but held that the district judge's remedy for the Sixth Amendment violation was inadequate. He must be released unless the state courts vacate his conviction and remand for a new trial, it ruled.

According to the court, the district judge did not go far enough to cure the ineffective assistance. The defense lawyer's failure to perform an adequate investigation into the facts of the case or adequately research the sentencing options tainted the entire plea negotiation by giving the prosecution a leg up from the start, it said.

The court stressed that the U.S. Supreme Court's recent decisions in *Missouri v. Frye*, 2012 BL 67235, 90 CrL 849 (U.S. 2012), and *Lafler v. Cooper*, 2012 BL 67236, 90 CrL 850 (U.S. 2012), reaffirmed the principle that defendants have a Sixth Amendment right to effective assistance of counsel that runs throughout the plea-bargaining process.

Here, defense counsel's failure to investigate and discover that the prosecution was using a flawed formula to enhance the sentence meant that the prosecution had an unfair advantage from the beginning, the court reasoned.

"Had Johnson's assistance of counsel been constitutionally adequate, his attorney would have duly objected to the erroneous calculation of three additional enhancements at the outset, and the government would have been negotiating from a 'weaker,' and certainly different, prospective sentencing position," the court said.

Impact of Error Unclear. The court rebuffed the argument that the petitioner got the full benefit of his bargain because it was clear he would have accepted the offer even if his defense counsel had provided effective assistance and made sure the statutory maximum was properly calculated.

The court acknowledged that the district judge found that the petitioner would have agreed to the deal if the possible sentence had been properly calculated, but it said it could not accept that conclusion. It is "impossible" to surmise how the earlier stages of the plea negotiation process might have progressed had defense counsel rendered effective assistance, it said.

The Sixth Amendment violation caused the entire plea negotiation process to proceed on an erroneous sentencing calculation that was weighted against the petitioner, the court said. The prosecution's plea offers "were most likely less desirable than they would have been had the erroneous enhancements been removed," it observed.

Kamala D. Harris, Gary W. Schons, Kevin R. Vienna, and Ronald A. Jakob, of the California Attorney General's Office, represented the state. Michael J. Proctor, Michael V. Schafler, and Albert Giang, of Caldwell Leslie & Proctor PC, Los Angeles, represented the petitioner.

BY LANCE J. ROGERS

Full text at http://pub.bna.com/cl/11-55187.pdf

Tax Enforcement

Tax-Avoidance Products, Seminars Weren't Protected by First Amendment

The government's conviction of defendants who conducted seminars on how customers could use a bogus trust device to avoid paying federal income taxes did not violate the First Amendment's free-speech guarantee, the U.S. Court of Appeals for the Ninth Circuit held June 26. (*United States v. Meredith*, 9th Cir., No. 05-50452, 6/26/12)

"We agree that mere advocacy of tax evasion—and nothing more—cannot support convictions for conspiracy or fraud," the court said. "However, the defendants did far more than advocate. They developed a vast enterprise that helped clients hide their income from federal and state tax authorities," it explained in an opinion by Judge Milan D. Smith Jr.

Speech Integral to Commission of Crime. The defendants were convicted of conspiracy to defraud the United States and mail fraud based on their activities related to a company that sold anti-tax books, seminars, counseling, and a trust device that they purported could be used to avoid paying any tax.

For example, one of the mail fraud convictions was based on the defendants' causing a customer who had read their books and attended their seminars to file amended tax returns seeking repayment of the taxes he had already paid.

The defendants relied primarily upon *United States v. Dahlstrom*, 713 F.2d 1423 (9th Cir. 1983), in which the court overturned the tax fraud convictions of defendants who had sold bogus trust devices that supposedly enabled users to avoid paying taxes. The *Dahlstrom* court concluded that the exception to the First Amendment's free-speech protection for "incitement of imminent unlawful activity" did not apply, saying, "Nothing in the record indicates that the advocacy practiced by these defendants contemplated imminent lawless action."

Distinguishing *Dahlstrom*, the Ninth Circuit said the First Amendment exception implicated by this case is the one for "speech that is integral to a crime," which was first recognized in *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949).

The defendants and their employees did more than merely "encourage" their customer to file fraudulent amended returns, the court stressed. The customer not only received "specific instructions" from the defendants' books and seminars, but he also discussed his plans in detail with employees. "These discussions were integral to the crime," the court said.

Alvarez v. United States. The Ninth Circuit handed down its ruling before the U.S. Supreme Court decided, in *Alvarez v. United States*, 91 CrL 513 (U.S. 2012), to strike down the federal statute that makes it a crime to lie about having been awarded military honors.

The defendants had relied in part on the Ninth Circuit's decision below in *Alvarez*, 617 F.3d 1198, 89 CrL 15 (9th Cir. 2010), which also struck down the Stolen Valor Act.

The Ninth Circuit decided that its decision in *Alvarez* did not help the defendants in this case because the Stolen Valor Act "applies to pure speech," whereas the de-

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15.