CERTIFICATE OF SERVICE

U.S. vs. LAMBROS, CIVIL NO. 99-28 (RGR); Criminal File No. 4-89-82(05).

FOR FILING:

I hereby state under the penalty of perjury that a true and correct copy of the following:

a. MOTION TO VACATE ALL JUDGMENTS AND ORDERS BY UNITED STATES DISTRICT COURT JUDGE ROBERT G. RENNER PURSUANT TO RULE 60(b)(6) OF THE FEDERAL RULES OF CIVIL PROCEDURE FOR VIOLATIONS OF TITLE 28 U.S.C.A. § 455. Dated: April 13, 2001.

was served on the following this 20th day of April, 2001, via U.S. Mail through the U.S. Penitentiary Leavenworth mailroom, to:

1. Clerk of the Court
   District of Minnesota
   U.S. Federal Courthouse
   316 North Robert Street
   St. Paul, Minnesota 55101
   U.S. CERTIFIED MAIL NO. 7000-0520-0021-3716-5926

   One (1) original and one (1) copy for filing.

2. U.S. Attorneys Office
   District of Minnesota
   U.S. Federal Courthouse, Suite 600
   300 South 4th Street
   Minneapolis, Minnesota 55415

3. INTERNET RELEASE TO ALL "BOYCOTT BRAZIL" SUPPORTERS AND HUMAN RIGHTS GROUPS GLOBALLY FOR REVIEW, COMMENT, AND RELEASE.

4. Lambros' family members.

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

Web site: www.brazilboycott.org **(Please Support - Thank You)**

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

UNITED STATES OF AMERICA,	*	
Respondent,	*	CIVIL FILE NO. 99-28 (RGR)
vs.	*	Criminal File No. 4-89-82(05)
JOHN GREGORY LAMBROS,	*	
Petitioner.	*	

MOTION TO VACATE ALL JUDGEMENTS AND ORDERS BY UNITED STATES DISTRICT COURT JUDGE ROBERT G. RENNER PURSUANT TO RULE 60(b)(6) OF THE FEDERAL RULES OF CIVIL PROCEDURE FOR VIOLATIONS OF TITLE 28 U.S.C.A. § 455.

NOW COMES the Petitioner, JOHN GREGORY LAMBROS, (hereinafter Movant) and moves this Honorable Court pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure to vacate ALL JUDGMENTS and ORDERS by United States District Court Judge Robert G. Renner for violations of Title 28 U.S.C.A. §§ 455(a) and 455(b)(3). The U.S. Supreme Court made clear that "[R]elief from final judgment 'for any other reason,' pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure, is neither categorically available nor categorically unavailable for all violations of 28 USCS § 455, which defines the circumstances that mandate the disqualification of federal judges; in determining whether a judgment should be VACATED for a violation of § 455, it is appropriate to consider (1) the risk of injustice to the parties in the particular case, (2) the risk that the denial of relief will produce injustice in other cases, and (3) the RISK IN UNDERMINING THE PUBLIC'S CONFIDENCE IN THE JUDICIAL PROCESS; a court, in making such a determination, must continuously bear in mind that, in order to perform its function in the best way, JUSTICE MUST SATISFY THE APPEARANCE OF JUSTICE." See, LILJEBERG vs. HEALTH SERVICES CORP., 100 L.Ed.2d 855, 860 (1988).

ANALYSIS OF TITLE 28 U.S.C. § 455:

1. The Ninth Circuit Court of Appeals in U.S. vs. ARNPRIESTER, 37 F.3d 466, 467 (9th Cir. 1994) stated, "[2]8 U.S.C. § 455(a) requires that any judge of the United States "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(b)(3) requires that the judge "shall also disqualify himself" in any proceeding where "he has served in governmental employment and in such capacity participated as counsel, adviser or material witness or expressed an opinion concerning the merits of the particular case in controversy." Also, "United States District Judge CANNOT adjudicate case that he or she as United States Attorney began." Id. at 466, Head Note 2.

FACTS:

2. On or about February 26, 2001 Movant was reviewing past indictments in Criminal proceedings: (a) CR-3-76-54; (b) CR-3-75-128; and (c) CR-3-76-17. The INDICTMENT where provided by Attorney Gregory J. Stenmoe of BRIGGS and MORGAN, in Civil Action, LAMBROS vs. FAULKNER, et al., Civil No. 98-1621 (DSD/JMM). See, **EXHIBIT A:** (PLAINTIFF'S MOTION TO ENTER NEWLY DISCOVERED EVIDENCE INTO THIS ACTION. **"CLAIM EIGHTEEN (18)."** Dated: March 15, 2001.)

3. Movant reviewed U.S. vs. LAMBROS, 544 F.2d 962 (8th Cir. 1976) in which the Eighth Circuit affirmed Criminal proceedings (a) CR-3-75-128; and (b) CR-3-76-17.

4. **ROBERT G. RENNER, U.S. Attorney, Minneapolis, Minnesota,** was on brief within U.S. vs. LAMBROS, 544 F.2d 962, 963 (8th Cir. 1976). **EXHIBIT B:** (Page 963 of U.S. vs. LAMBROS, 544 F.2d 962).

5. **ROBERT G. RENNER,** was the U.S. Attorney in Minneapolis, Minnesota on September 14, 1976, when Movant was indicted on Criminal indictment CR-3-76-54.

6. The statutory duty of each United States Attorney [**ROBERT G. REHNER in 1976**] within his district is to "prosecute for all offenses against the United States." 28 U.S.C. § 547. Responsibility for prosecution necessarily includes responsibility for investigation: there can be no prosecution unless it is preceded by investigation. Responsibility for prosecution and the precedent investigation is that of the United States Attorney in his district; other attorneys are only his assistants, 28 U.S.C. § 542 and § 543. See, U.S. vs. ARNPRIESTER, 37 F.3d 466, 467 (9th Cir. 1994). The Ninth Circuit continued by stating:

> "The attorney responsible for the precedent investigation of a person suspected of violations of the laws of the United States would reasonably be believed not to be impartial when that person was subsequently indicted, tried and convicted. The attorney responsible for such investigation was in government employment when he participated as the responsible counsel in investigating the case that resulted in the indictment, trial and conviction. Both section 455(a) and section 455(b)(3) require Judge McNamee to recuse himself." Id. at 467.
>
> ". . . What disqualifies a former government prosecutor from acting for a private client in the same matter for which he had official responsibility operates equally to disqualify him from sitting as a judge in the same matter. A United States District Judge CANNOT adjudicate a case that he or she as United States Attorney began." Id. at 467.

7. **ROBERT G. REHNER**, U.S. Attorney in Minneapolis, Minnesota became a United States District Judge on **February 20, 1980.**

8. In 1995 the United States Court of Appeals for the Eighth Circuit vacated Count 1 in this underlying criminal file (CR-4-89-82(05)) and remanded for resentencing. See, U.S. vs. LAMBROS, 65 F.3d 698 (8th Cir. 1995).

9. In February of 1997, **UNITED STATES DISTRICT JUDGE ROBERT G. REHNER**, resentenced Movant to 360 months on Count One (1), as per Brazilian law that limits a sentence to 30 years, to be served concurrently with the terms of imprisonment imposed for the remaining offenses of conviction. **JUDGE REHNER**

stated within his April 6, 1999, filed April 6, 1999, **ORDER** in this above-entitled action: (See, Page 2 and 3)

> "(I)n February of 1997, this Court resentenced Petitioner to 360 months on count one, to be served concurrently with the terms of imprisonment imposed for the remaining offenses of conviction. At the time of his resentencing, **PETITIONER RAISED SEVERAL CHALLENGES TO HIS CONVICTIONS AND TO HIS SENTENCE PURSUANT TO FED. R. CRIM. P. 33. THE COURT CONSTRUED THESE CHALLENGES AS A HABEAS CORPUS PETITION [§ 2255], AND DENIED PETITIONER THE RELIEF HE REQUESTED.** See, Resentencing Memorandum of Feb. 19, 1997. On April 18, 1997, Petitioner filed a § 2255 petition, seeking relief from his conviction and sentence. This Court **[Judge Renner]** denied the petition as a second or successive petition, or, alternatively, as without merit. See, ORDER of May 1, 1997.
>
> Petitioner now brings the instant Petition pursuant to 28 U.S.C. § 2255. He alleges that this Petition is not a second or successive petition within the meaning of §§ 2244(b) and 2255 because the Court erred in construing his **RULE 33** motions a habeas petition [§ 2255], and because the instant Petition challenges only his RESENTENCING as to count one, whereas his previous petition challenges his convictions and his sentencing pursuant to counts five, six, and eight.
>
> . . . Petitioner challenges the Court's decision to construe Petitioner's **RULE 33 MOTIONS** as a habeas petition (Issue Two); **THE INCREASE OF HIS SENTENCE FOR A CRIME FOR WHICH HE WAS NOT EXTRADITED (namely, VIOLATIONS OF PAROLE), IN VIOLATION OF THE EXTRADITION TREATY BETWEEN THE UNITED STATES AND BRAZIL (Issue Three);**

Key Point —

EXHIBIT C: (April 6, 1999, ORDER by U.S. Judge Robert G. Renner. 4 pages)

10. U.S. Judge **ROBERT G. RENNER** was the U.S. Attorney in Minnesota who was responsible for investigating and prosecuting Movant in Criminal proceedings CR-3-76-54; CR-3-75-128; and CR-3-76-17. On **August 21, 1989**, the U.S. Parole Commission included the above three (3) criminal violation to issue a U.S. PAROLE VIOLATION WARRANT, pursuant to Section 4213, Title 18, U.S.C., that was signed by Carol Gitty, U.S. Parole Commission, North Central Region.

11. The August 21, 1989, U.S. PAROLE COMMISSION WARRANT required Movant to serve an additional **5,357 days of incarceration.** Therefore a **CONSECUTIVE**

SENTENCE to sentences Movant was not extradited from Brazil on. This is illegal as Brazilian law does not allow same. See, **ARTICLE 75** of the Brazilian Criminal Code, which limits the **MAXIMUM** prison sentence to thirty (30) years in Brazil. Quoting, STATE OF WASHINGTON vs. MARTIN SHAW PANG, 940 P.2d 1293 (Wash 1997), cert. denied, 139 L.Ed.2d 608 (1997).

12. Movant was arrested on May 17, 1991 in Rio de Janeiro, Brazil in a joint venture arrest by U.S. Drug Enforcement Agents and Brazilian Federal Police on the August 21, 1989 U.S. Parole Violation Warrant.

13. The U.S. Parole Violation Warrant was not included within the official request to the Brazilian Government for Movant's arrest and extradition, only information as to same. A "DULY CERTIFIED OR AUTHENTICATED COPY OF THE FINAL SENTENCE OF COMPETENT COURTS" is required by law. See, U.S. - BRAZIL EXTRADITION TREATY, Article IX(1).

14. The Brazilian Supreme Court **DID NOT** extradite Movant on the August 21, 1989, U.S. Parole Violation Warrant and Movant was informed by his Brazilian Attorney's and a Brazilian Supreme Court Justice that the United States could not **INCREASE** his punishment on the crimes he was being extradited on due to the crimes included within the August 21, 1989, U.S. Parole Violation Warrant. This appears to be consistent with other rulings. See, U.S. vs. BAKHTIAR, 964 F.Supp. 112, 117 (S.D.N.Y. 1997)(The Swiss Federal Court was careful to prevent extradition for money laundering offenses, which are not punishable under Swiss law. Their approach accords with the principles of the Treaty, and we should respect it. We should not allow a doubtful argument, **BASED ON A TECHNICAL APPLICATION OF OUR DOMESTIC SENTENCING GUIDELINES**, to result in punishing Mr. Bakhtiar for money laundering offenses for which the Swiss denied extradition. As stated in JOHNSON vs. BROWNE, 51 L.Ed. 816 (1907); Also see, U.S. vs. MIRO, 29 F.3d 194, 200 (5th Cir. 1994)("that increasing a sentence to compensate for UNEXTRADITED CRIMES might, under proper circumstances be a deviation from a legal rule such that it could

constitute error.")

15. ARTICLE XXI, of the U.S. - BRAZIL EXTRADITION TREATY, states:

> [A] person extradited by virtue of the present Treaty **MAY NOT BE TRIED OR PUNISHED** by the requesting state for any crime or offense committed **PRIOR** to the request for his extradition, other than that which gave rise to the request, . . .

The key words in the above quote from ARTICLE XXI are "**MAY NOT BE TRIED OR PUNISHED.**"

16. In the United States of America, a **PAROLE VIOLATION** is defined as an **ESCAPE**. See, ANDERSON vs. CORALL, 263 U.S. 193, 196 (1923):

> [The parolee's] violation of the parole evidenced by the warden's warrant and his conviction, sentence to the confinement in Joliet penitentiary . . . was in legal effect on the same plane as **AN ESCAPE FROM THE CUSTODY AND CONTROL OF THE WARDEN**. His status and rights were analogous to those **OF AN ESCAPED CONVICT**.

QUOTING, U.S. vs. POLITO, 583 F.2d 48, 54, and 55 (2nd Cir. 1978)

17. In BRAZIL, **ESCAPE IS LEGAL**, if no force of arms is used.

18. The terms "**PENALTY, FORFEITURE, or LIABILITY**" in the general federal savings statute, Title 1, U.S.C. Section 109, "were used by Congress to **INCLUDE ALL FORMS OF PUNISHMENT FOR CRIME.**" See, WARDEN vs. MARRERO, 417 U.S. 653, 661, 41 L.Ed.2d 383, 390 (1974), quoting, U.S. vs. ULRICH, 28 F. Cas 328, 329 (C.C.E.D. Mo. 1875) (The Supreme Court held that MARRERO'S **PAROLE INELIGIBILITY WAS A "PENALTY,"** under Section 109. Also, the Supreme Court stated in WARDEN vs. MARRERO, id. at 391, that the words "penalty, forfeiture, and liability," are synonymous with "**PUNISHMENT,**" in connection with crimes of the highest grade. **SPECIAL PAROLE IS A PENALTY** within the meaning of the savings clause. See, U.S. vs. GARCIA, 877 F.2d 23, 24 (9th Cir. 1989).

19. Under **MARRERO** and GARCIA, the ongoing supervision after release mandated by Title 18 U.S.C. Section 4164 is a "**PENALTY**" within the meaning of the SAVINGS CLAUSE. See, MARTIN vs. U.S. PAROLE COMMISSION, 108 F.3d 1104, Head Note 1

20. Movant has raised WRITTEN OBJECTIONS to the increase of this sentences that he is currently incarcerated on due to the U.S. Parole Violation WARRANT since his initial trial in front of the Honorable U.S. Judge D. Murphy. See, SENTENCING TRANSCRIPT PAGES: 32, lines 1 thru 12; Page 7, starting on line 4; and Page 9, line 24 thru Page 10, line 3. Sentencing took place on January 27, 1994, at 3:00 P.M.

21. Movant raised objection to JUDGE RENNER both in written and oral form at his RESENTENCING in February, 1997, as to the increase in Movant's sentence due to the U.S. Parole Violation Warrant and those past criminal violations contained within the U.S. Parole Violation Warrant.

22. Movant's sentences were INCREASED, based on a technical application of the U.S. Sentencing Guidelines, due to the ELEMENTS OF THE CRIMES included within the U.S. Parole Violation Warrant. The same crimes that JUDGE RENNER investigated and prosecuted Movant on in 1976.

23. By using the ELEMENTS of the crimes contained within the U.S. Parole Violation Warrant against Movant to increase his sentence is in violation of CONTRACT LAW, REQUIREMENT OF DOUBLE INCRIMINATION UNDERLYING THE TREATY OF BRAZIL, SEPARATION DRAWN BY THE BRAZILIAN SUPREME COURT BETWEEN ESCAPE/PAROLE VIOLATION AND THE OFFENSE FOR WHICH MOVANT WAS EXTRADITED, DUE PROCESS, and the DOCTRINE OF SPECIALTY, as Movant was "PUNISHED" for elements of crimes, crimes JUDGE RENNER investigated and prosecuted Movant on in 1976, Movant was not extradited on.

EXPERT WITNESS AS TO THE ABOVE FACTS AND APPLICATION OF BRAZILIAN LAW:

24. Attorney Gregory J. Stenmoe, a partner with the law firm BRIGGS and MORGAN, and his researchers spent months researching the effects of Movant's U.S. PAROLE VIOLATION detainer which is totally inclusive of Movant's PRIOR CONVICTIONS: (a) CR-3-76-54; (b) CR-3-75-128; and (c) CR-3-76-17.

25. Attorney STENMOE and his law firm BRIGGS and MORGAN represented Movant in a civil action within the U.S. District Court in Minnesota, LAMBROS vs. FAULKNER, et al., Court File No. 98-1621 (DSD/JMM).

26. Movant offers this Court, as an EXHIBIT, a copy of Attorney STENMOE'S memorandum of law and fact submitted in LAMBROS vs. FAULKNER, et al., on August 15, 2000, entitled "PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' COMPREHENSIVE MOTION TO DISMISS OR FOR SUMMARY JUDGMENT." See, **EXHIBIT D.** (This document is twenty-nine (29) pages in length).

27. Attorney STENMOE clearly points out the following facts and law to support those facts as to Movant's current illegal "IN CUSTODY" status due to his **UNITED STATES PAROLE COMMISSION VIOLATION/PRIOR CONVICTIONS:** (remember the U.S. Parole Commission Violation **REPRESENTS** Movant's PRIOR CONVICTIONS)

a. Mr. Lambros is currently "IN CUSTODY" serving a 52½ year imprisonment for a United States Parole Commission violation that he was arrested on in Brazil, retaking took place, 5,357 days (14½ years) and a 360 month (30 years) sentence for convictions on one count of conspiracy to distribute cocaine and three counts for aiding and abetting the possession of cocaine with intent to distribute. See, Page 1 and 2.

b. Mr. Lambros' U.S. Parole Violation detainer "is viewed as a consecutive sentence in the AGGREGATE, not as a discrete segment."

c. Mr. Lambros' position is that his 30 year sentence Defendant's represented him at is his CONSECUTIVE SENTENCE. This being the case, Mr. Lambros could not of been sentenced to more than fifteen and one-half (15½) year sentence due to the U.S.-BRAZIL EXTRADITION TREATY that requires that no one in Brazil will be sentenced to more than a **THIRTY (30) YEAR SENTENCE.** See, Foot Note 1, page 2.

d. The Government's November 16, 1992 WRITTEN PLEA PROPOSAL and and Defendant Faulkner's November 17, 1992 letter to Plaintiff Lambros that contained a copy of the government's PLEA PROPOSAL should of stated that Plaintiff Lambros was facing a **MAXIMUM** sentence of 15½ years due to August 21, 1989 **U.S. PAROLE COMMISSION WARRANT/ DETAINER THAT ADVERSELY AFFECTED THE LENGTH OF HIS SENTENCE EXPOSURE.** See, Foot Note 1, page 2.

e. Lambros currently has a 30 year-sentence with a 8-year term of supervised release, to be served upon release from imprisonment. **THUS A 38-YEAR TERM.**

f. BRAZIL DOES NOT ALLOW MORE THAN A 30-YEAR SENTENCE. [See, STATE OF WASHINGTON vs. MARTIN SHAW PANG, 940 P.2d 1293, 1352 (Wash. 1997) (This constitutional prohibition, absolute and impossible

to bypass, contains, in reality, the very basis of the legal norm consolidated by **ARTICLE 75 OF THE BRAZILIAN CRIMINAL CODE, WHICH LIMITS THE MAXIMUM PRISON SENTENCE TO 30 (thirty) YEARS.)** See, Foot Note 1, page 2.

g. ADDITION:

38 years
14½ years
52½ Years Total.

Therefore, 22½ year sentence MORE than BRAZIL ALLOWS. Subtracting 22½ years from the 30-year maximum, **EQUALS 7½ YEARS**, which is consistent with Lambros' belief that he was going to get a 7-year plea agreement. See, Foot Note 1, page 3.

h. Had Mr. Faulkner known or had he informed the federal prosecutor that the actual MAXIMUM sentence on the conspiracy charge was on **15½ years (30 years minus 14½ DUE TO THE U.S. PAROLE VIOLATION DETAINER)** instead of the MANDATORY LIFE sentence without parole, the federal prosecutor may have offered Mr. Lambros a plea agreement of less than seven years actually offered and Mr. Lambros would have accepted this offer. See, Page 9.

i. Mr. Lambros was tried for a **PAROLE VIOLATION, which is not a crime in Brazil**, but Mr. Faulkner did not research or raise this issue. Mr. Lambros was tried on Counts 5, 6, and 8, which are not crimes in Brazil, but Mr. Faulkner did not research or raise the issue. See, Foot Note 10, page 12.

j. . . . because **PAROLE VIOLATION IS NOT A CRIME IN BRAZIL**, . . . See, Foot Note 11, Page 12.

28. The above quotes clearly prove that Movant LAMBROS' **PRIOR CONVICTIONS**, also known as the August 21, 1989 **U.S. PAROLE VIOLATION WARRANT/DETAINER** where considered and acted upon by **JUDGE RENNER** during Movant February of 1997, RE-SENTENCING, RULE 33 MOTIONS, and two (2) § 2255's. The same PRIOR CONVICTIONS Judge Renner prosecuted Movant on in 1976, as an U.S. Attorney.

A PRIOR CONVICTION IS THE ONLY FACTOR THAT INCREASES A PENALTY BEYOND THE STATUTORY MAXIMUM THAT NEED NOT BE SUBMITTED TO A JURY:

29. The recent holding in APPRENDI vs. NEW JERSEY, 147 L.Ed.2d 435 (2000) preserved the specific holding in ALMENDAREZ-TORRES vs. U.S., 140 L.Ed2d 350 (1998) that was observed by **JUDGE RENNER** when he used Movant's **PRIOR CONVICTIONS** as sentencing factors at Movant's RESENTENCING.

30. **JUDGE RENNER** had discretion to depart upwards under U.S.S.G. §4A1.3. See, U.S. vs. WILLIAMS, 235 F.3d 858, 864 & 864 n.5 (3rd Cir. 2000) Foot Note 5, states, "Section 4A1.3 allows the District Court to consider departing from the applicable Guideline range "[i]f reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's **PAST CRIMINAL CONDUCT** or the likelihood that the defendant will commit other crimes.:

31. The Eighth Circuit allows the District Judge to DEPART DOWNWARD under §4A1.3 after reviewing the historical facts of defendant's **PRIOR CONVICTIONS**, including age when offenses committed, **ASSESSMENT OF SERIOUSNESS OF CRIMES**, etc. See, U.S. vs. SENIOR, 935 F.2d 149 (8th Cir. 1991)(Overstatement of seriousness of defendant's **CRIMINAL HISTORY** was a circumstance unusual enough to warrant departure from guideline range and imposition of statutory minimum sentence of ten years for conspiracy to distribute cocaine and possessing it with intent to distribute. U.S.S.G. §4A1.3, p.s., 18 U.S.C.A.App., SENIOR at 149, Head Note 2.)

32. The Sentencing Commission did not adequately take into account cases that are, for one reason or another, unusual. See, KOON vs. U.S., 135 L.Ed.2d 392, 116 S.Ct. 2035 (1996). **THEREFORE, IT FALLS TO THE DISTRICT JUDGE TO MAKE SUCH DETERMINATION.**

33. Guidelines provide court with authority to depart downward in sentencing career offender under 4A1.3, where defendant's conduct is exaggerated by his criminal history score. See, U.S. vs. BROWN, 903 F.2d 540 (8th Cir. 1990)

34. District Court should have let defendant attack CONSTITUTIONALITY OF CONVICTIONS that were basis for enhancing his sentence as career offender. See, U.S. vs. BREITKREUTZ, 8 F.3d 688 (9th Cir. 1993).

35. §5H1.8 CRIMINAL HISTORY. A defendant's criminal history is relevant in determining the appropriate sentence.

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36. In U.S. vs. NISHOE, 241 F.3d 214 (2nd Cir. 2000) U.S. District Court Judge SCHEINDIN, AT SENTENCING, granted a "HORIZONTAL DEPARTURE" by moving horizontally across the Guideline Sentencing Table (as permitted by the provisions of U.S.S.G. §4A1.3) to reduce the defendant's criminal history category (CHC) from level VI to level V. Judge SCHEINDIN assessed defendant's PRIOR CONVICTIONS "ON AN INDIVIDUALIZED BASIS." Id. at 220. The Court also stated, "[W]e think the Commission's sensible recognition that a CHC may overrepresent a defendant's likelihood of recidivism PERMITS A SENTENCING COURT, in appropriate cases, to include in its INDIVIDUALIZED CONSIDERATION of a section 4A1.3 departure the relationship between the punishment prescribed by a CAREER OFFENDER CHC and the DEGREE OF PUNISHMENT IMPOSED FOR PRIOR OFFENSES." Id. at 220.

37. Movant LAMBROS is a CAREER OFFENDER. Judge Renner was allowed to make INDIVIDUALIZED CONSIDERATIONS as to movant's PRIOR CONVICTIONS that Judge Renner prosecuted Movant LAMBROS on.

MOVANT'S TITLE 28 U.S.C. §2255's CONTAINED ISSUES INVOLVING HIS "PRIOR CONVICTIONS;"

38. In February of 1997, Judge Renner resentenced Movant. At the time of resentencing, Movant raised several challenges to his convictions and to his sentence pursuant to Federal Rules of Criminal Procedure 33. Judge Renner construed these challenges as a HABEAS CORPUS PETITION, §2255,* OVER MOVANT'S OBJECTIONS TO WITHDRAW SAME SO AS TO PRESENT THE MOTIONS AS INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS, TO NO AVAIL. See, ADAMS vs. U.S., 155 F.3d 582 (2nd Cir. 1998)(At least until it is decided whether a movant's right to bring a future petition to vacate sentence can be affected by a conversion or RECHARACTERIZATION OF A MOTION made under some other rule as being under the statute providing for motions to vacate, district courts SHOULD NOT undertake such recharacterization unless (a) the movant, with knowledge of the potential adverse consequences of such recharacterization, AGREES to have the motion so recharacterized, or (b) the court finds that, notwithstanding its designation, the motion should be

considered a motion to vacate because of the nature of the relief sought, and offers the movant the opportunity to WITHDRAW THE MOTION rather than have it so recharacterized. ADAMS, at 582, Head Note 1. Movant was PREJUDICED by the recharacterization of his Rule 33 motions to §2255.

39. Movant filed two (2) §2255 petitions seeking relief from his convictions and sentences that where denied by JUDGE RENNER. Issues contained within those §2255 petitions required rulings as to the effects of Movant's PRIOR CONVICTIONS on his current sentence.

ON MARCH 24, 1976, U.S. ATTORNEY ROBERT G. RENNER ILLEGALLY INDICTED MOVANT:

40. On March 24, 1976, Criminal Indictment Number CR-3-76-17, U.S. Attorney Robert G. Renner illegally indicted Movant Lambros on Violations of Title 18 U.S.C. §§ 111 and 114. Title 18 U.S.C. Section 114 in 1976, was for the violation of "MAIMING WITHIN MARITIME AND TERRITORIAL JURISDICTION OF THE UNITED STATES." All acts that occurred within the indictment occurred on private property. See, EXHIBIT A.

41. U.S. Attorney Robert G. Renner or someone within his office FALSIFIED DOCUMENTS TO THE EIGHTH CIRCUIT COURT OF APPEALS. See, U.S. vs. LAMBROS, 614 F.2d 179, 180 (8th Cir. 1980) "After three days of trial before a jury, and after several codefendants at the trial entered guilty pleas, LAMBROS withdrew previously entered pleas of not guilty and entered guilty pleas to one count of possession of cocaine with intent to distribute in violation of 21 U.S.C. §841(a)(1), and ONE COUNT OF ASSULT WITH A DEADLY WEAPON UPON A UNITED STATES MARSHAL AND AGENTS OF THE DRUG ENFORCEMENT ADMINISTRATION IN VIOLATION OF 18 U.S.C. §§ 111 and 1114. The INDICTMENT AND JUDGMENT AND COMMITMENT ORDER CLEARLY STATE VIOLATIONS OF §§ 111 and 114. EXHIBIT E. (Page 180 from U.S. vs. LAMBROS, 614 F.2d 179 (8th Cir. 1980).

42. U.S. District Court Judge Robert G. Renner continued to use the March 24, 1976, Criminal Indictment Number CR-3-76-17 to enhance Movant's RESENTENCING on Count One (1) in February of 1997. Criminal Indictment Number CR-3-76-17 is ILLEGAL and government documents have been FALSIFIED to keep Movant within prison and enhance his current sentence.

TITLE 28 U.S.C.A. SECTION 455:

43. Title 28 U.S.C.A. Section 455. DISQUALIFICATION OF JUSTICE, JUDGE, OR MAGISTRATE, states:

> (a) Any justice, judge, or magistrate of the United States shall DISQUALIFY himself in any proceeding in which his IMPARTIALITY MIGHT REASONABLY BE QUESTIONED.
>
> (b) He shall also DISQUALIFY himself in the following circumstances:
>
> (3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

VIOLATIONS OF TITLE 28 U.S.C.A. SECTION 455 "DOES NOT REQUIRE SCIENTER:"

44. Violations of Title 28 U.S.C.A. §455 which requires judge to disqualify himself in any proceeding in which his impartiality might reasonably be questioned DOES NOT REQUIRE SCIENTER, although judge's lack of knowledge of disqualifying circumstances may bear on question of remedy. See, LILJEBERG vs. HEALTH SERVICES ACQUISITION CORP., LA., 100 L.Ed.2d 855 (1988). Quoting, U.S. C.A. Title 28, §455, Note 473. REMEDIES OR RELIEF - GENERALLY.

45. BLACK'S LAW DICTIONARY offers the following definition for the word SCIENTER. "1. A degree of knowledge that makes a person legally responsible for the consequences of his or her act or omission; the fact of an act's having been done knowingly. . . ."

REMAND:

46. Failure of judge to recuse himself in criminal prosecution after judge learned that he was subject of grand jury investigation required that a new trial be granted. See, U.S. vs. GARRUDO, 869 F.Supp. 1574, 1575 Head Note 11 (S.D.Fla. 1994); Also see, Head Note 2 on page 1574, "[S]cienter is not required in order to find violation of statute requiring judge to recuse himself if impartiality might reasonably be questioned. 28 U.S.C.A. §455.

47. In U.S. vs. JORDAN, 49 F.3d 152, 154 Head Note 14 (5th Cir. 1995) the Court stated, "[J]udge's failure to recuse herself on grounds that her impartiality could be reasonably questioned REQUIRED REVERSAL OF SENTENCE where defendant, a first time offender, received a sentence of 300 months in prison followed by five years' probation for nonviolent white collar crimes and judge had essentially unbridled sentencing discretion in the preguidelines case. 28 U.S.C.A. §455(a)."

48. In EL FENIX DE PUERTO RICO vs. M/Y JOHANNY, 954 F.Supp. 23 (D.Puerto Rico 1996) the court stated, "[a]ppropriate remedy for violation of recusal statute [28 U.S.C.A. §455(a)] was to VACATE PRIOR JUDGMENT."

49. In NIXON vs. U.S., 620 F.2d 486 (5th Cir. 1980) The Court vacated defendant's §2255, as a nullity, and remanded the cause for further proceedings due to violations of Title 28 U.S.C.A. 455(b)(3).

50. In PRESTON vs. U.S., 923 F.2d 731 (9th Cir. 1991) The Ninth Circuit stated, "[R]ecusal motion filed 18 months after case was filed was timely, where grounds for recusal were not known until ten days before motion was filed. 28 U.S.C.A. §455." See, HEAD NOTE 3 and page 733. Also see, POLAROID CORP. vs. EASTMAN KODAK CO., 867 F.2d 1415, cert. denied, 104 L.Ed. 2d 425 (1989) The U.S. Court of Appeals for the Federal Circuit stated, "Statute providing circumstances under which justice, judge, or magistrate must disqualify him or herself has NO "TIMELINESS" REQUIREMENT." 28 U.S.C.A. §455(b).

THE FILING OF THIS MOTION IS TIMELY:

51. Movant LAMBROS is currently planning to appeal to the U.S. Supreme Court from the Eighth Circuit Court of Appeals judgment that AFFIRMED **JUDGE RENNER'S** denial of Movant's January 2, 1999, §2255 Motion to vacate, set aside, or correct his **RESENTENCING** on **COUNT ONE (1)** in February of 1997.

52. The Eighth Circuit Court of Appeals AFFIRMED judgment in LAMBROS va. U.S., Appeal numbers 99-2768/2880 on November 30, 2000. On January 11, 2001, Attorney Williams filed a PETITION FOR REHEARING to the Court that was denied on February 1, 2001. Attorney Williams has requested the Eighth Circuit to be removed from filing a Writ of Certiorari for Movant and Movant has requested the Eighth Circuit to ORDER Attorney Williams to prepare and file the Writ of Certiorari for Movant. The U.S. District Court for the District of Minnesota CASE/FILE NUMBER IS **CIV-99-28.**

53. To assist this Court in the **TIME LINE** of Movant's RESENTENCING and HISTORY in Movant's case, Movant is attaching his **December 22, 1999. FILED** December 27, 1999, "APPELLANT JOHN GREGORY LAMBROS' PRO SE REPLY BRIEF TO THE APPELLEE' BRIEF DATED NOVEMBER 30, 1999," to the U.S. Court of Appeals for the Eighth Circuit, as **EXHIBIT F.** (This Motion is fifteen (15) pages in length) (not including letter to the clerk, cover-page and preface)

54. **PLEASE NOTE** that the "STATEMENT OF THE CASE" within Movant's December 22, 1999, REPLY BRIEF offers an excellent overview of the **TIME LINE** in this action from Movant's indictment on May 17, 1989. See page one (1) thru six (5), paragraphs 1 thru 26. See, **EXHIBIT F.**

U.S. DISTRICT COURT JUDGE ROBERT G. RENNER EMPLOYMENT HISTORY:

55. The following information was offered by the Minneapolis, Minnesota public library.

56. Robert G. Renner was the United States Attorney for Minneapolis, Minnesota from 1969 to 1977.

57. Robert G. Renner was an United States Magistrate Judge in the District of Minnesota from 1977 to 1980.

58. Robert G. Renner was appointed by President Carter to United States District Court Judge on February 20, 1980.

59. Robert G. Renner was the United States Attorney for Minneapolis, Minnesota during the indictment of Movant LAMBROS in the following criminal proceedings in the District of Minnesota, Minneapolis/St. Paul:

a. CR-3-75-128, with judgment entered on June 21, 1976;

b. CR-3-76-17, with judgment entered on June 21, 1976;

c. CR-3-76-54, with judgment entered on March 7, 1977.

60. Therefore, Robert G. Renner, as U.S. Attorney for the District of Minnesota, participated and prosecuted Movant on the above three (3) criminal actions listed in paragraph 59, as per his STATUTORY DUTY, Title 28 U.S.C. §547, as other attorneys within his office are only assistants, 28 U.S.C. §§ 542 and 543. See, U.S. vs. ARNPRIESTER, 37 F.3d 466, 467 (9th Cir. 1994). It is the opinion of this Movant and those individuals Movant has surveyed within the international human rights sector, that United States District Court Judge Robert G. Renner's "IMPARTIALITY MIGHT REASONABLY BE QUESTIONED," as stated within Title 28 U.S.C. §455(a).

CONCLUSION:

61. Movant LAMBROS is requesting this Court to refer this action to the Chief Judge for an objective assessment of presiding U.S. District Court Judge Robert G. Renner's violaitons of Title 28 U.S.C. §455(a) and §455(b)(3). See, POTASHNICK vs. PORT CITY CONST. CO., 609 F.2d 1101 (5th Cir. 1980), rehearing denied, 613 F.2d 314, cert. denied, 66 L.Ed.2d 22. (Under 28 U.S.C. §455 governing disqualification of judges, judge is required to excercise his

discretion in favor of disqualification if he has ANY QUESTION about the propriety of his sitting in a particular case; so-called "duty to sit" of former statute has been eliminated, and it is PREFERABLE FOR JUDGE TO ERR ON THE SIDE OF CAUTION AND DISQUALIFY HIMSELF IN A QUESTIONABLE CASE.)(A judge faced with a potential ground for disqualification ought to consider how his participation in a given case looks to the AVERAGE PERSON ON THE STREET; use of the word **"MIGHT" ["IMPARTIALITY MIGHT REASONABLY BE QUESTIONED"]** in statute was intended to indicate that disqualification should follow if reasonable man, were he to know all the circumstances, would HARBOR DOUBTS about judge's impartiality. Id. Head Note 4.)

62. Movant LAMBROS is requesting U.S. District Court Judge Robert G. Renner to recuse himself from all past, current and future legal actions as to Movant LAMBROS and transfer all legal proceedings to another U.S. District Court Judge.

63. Movant LAMBROS is requesting U.S. District Court Judge Robert G. Renner and/or another U.S. District Court Judge, after review of this motion, to VACATE ALL JUDGMENTS AND ORDERS U.S. District Court Judge Robert G. Renner has entered in as to all legal proceedings involving Movant JOHN GREGORY LAMBROS. Therefore, restoring Movant LAMBROS to the point – BUT NOT FURTHER – where he was **RESENTENCED** by U.S. District Court Judge ROBERT G. RENNER, on Count One (1), February 10, 1997. This would be inclusive of Movant's Title 28 U.S.C. §2255's filed and ruled on by Judge Renner. Movant believes the word restoring also means RECALLING ALL JUDGMENTS and/or ORDERS back to February 10, 1997, RESENTENCING.

64. ALL DECLARATIONS WITHIN THIS DOCUMENT AND EXHIBITS ATTACHED ARE UNDER THE THE PENALTY OF PERJURY, AS PER TITLE 28 U.S.C. §1746.

EXECUTED ON: **April 13, 2001**

Respectfully submitted,

John Gregory Lambros, Pro Se
U.S. Penitentiary Leavenworth, P.O. Box 1000
Leavenworth, Kansas 66048-1000

Web site: www.brazilboycott.org

CERTIFICATE OF SERVICE

LAMBROS vs. FAULKNER, et al., Civil No. 98-1421 (RHD/JGL)

FOR FILING:

I hereby state under the penalty of perjury that a true and correct copy of the following document:

a. PLAINTIFF'S MOTION TO ENTER NEWLY DISCOVERED EVIDENCE INTO THIS ACTION. "CLAIM EIGHTEEN (18)." Dated March 15, 2001.

was served on the following this 16th day of March, 2001, via U.S. Mail through the prison authorities, to:

1. CLERK OF THE COURT, District of Minnesota, 316 North Robert Street, St. Paul, Minnesota 55101. One original and one copy. U.S. CERTIFIED MAIL NO. 7000-0520-0021-3725-4859 - RETURN RECEIPT REQUESTED.

2. Attorney Gregory J. Stammes, BRIGGS & MORGAN, 2400 IDS CENTER, 80 South Eighth Street, Minneapolis, Minnesota 55402.

3. Attorney Donna Rae Johnson and Attorney Deborah Ellis, 700 St. Paul Bldg., 6 West Fifth Street, St. Paul, Minnesota 55102.

4. INTERNET ACTIVIST to BOYCOTT BRAZIL SUPPORTERS and HUMAN RIGHTS GROUPS GLOBALLY.

5. LAMBROS' family members.

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

Web site: www.brazilboycott.org (Please support - Thank you.)

EXHIBIT A.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

JOHN GREGORY LAMBROS, Plaintiff,	*	CIVIL FILE NO. 98-1421 (RHD/JGL) U.S. Judge Duty
vs.	*	
CHARLES W. FAULKNER, et al., Defendants.	*	AFFIDAVIT FORM

PLAINTIFF'S MOTION TO ENTER NEWLY DISCOVERED EVIDENCE INTO THIS ACTION. "CLAIM EIGHTEEN (18)" Dated: March 15, 2001.

COMES NOW, JOHN GREGORY LAMBROS, Plaintiff, Pro Se, (hereinafter Movant) offering this Court the filed March 24, 1976, INDICTMENT of Movant, UNITED STATES OF AMERICA vs. JOHN G. LAMBROS, Cr. 3-76-17. EXHIBIT A. Defendants' allowed the Court to use this indictment and information contained within against Movant during the trial and sentencing of Movant. Plaintiff was prejudiced. The following TRUE AND CORRECT facts exist as to INDICTMENT Cr. 3-76-17 being: DEFECTIVE, DUPLICITOUS, MULTIPLICITOUS, AND LACK OF JURISDICTION BY U.S. DISTRICT COURT THAT ACCEPTED THE PLEA AND SENTENCED MOVANT:

1. On February 21, 2001 Attorney Stammes mailed Movant copies of his past INDICTMENTS that were used to enhance Movant's sentence by the U.S. Government during the filing of Title 21 U.S.C.A. §851, Proceedings to Establish Prior Convictions. In which Defendant's represented Movant. EXHIBIT B.

2. Attorney Peter Thompson, currently with THOMPSON and SICOLI, LTD., 2520 Park Ave., Minneapolis, Minnesota 55404-4403, Tel. (612) 871-0700, represented Movant during the plea bargaining and sentencing of INDICTMENT Cr. 3-76-17, in which Movant was sentenced to TEN (10) YEARS. EXHIBIT C. (JUDGEMENT AND COMMITMENT ORDER)

1.

EXHIBIT A.

3. INDICTMENT Cr. 3-76-17 filed on March 24, 1976. In the United States District Court, District of Minnesota was a two (2) count INDICTMENT in violation of Title 18 United States Code, Sections 111 AND 114. County I and II described the February 24, 1975 misrepresentation by Federal Officials to Movant as to there true identity. Movant had no knowledge of the identity of alleged victim Federal Marshalls and Federal Drug Enforcement Administration Agents. Court hearings established that the agents identified themselves as "FBI OTHER OF." The acts described within the indictment occurred at Movant's residence in St. Paul. THE LAND AND/OR RESIDENCE HAS NOT CEDED BY THE UNITED STATES GOVERNMENT NOR FORMAL CESSION THEREOF TO THE UNITED STATES BY THE STATE OF MINNESOTA OCCURRED WHERE THE ACTS OCCURRED.

4. Title 18 U.S.C. Section 114 in "1976", was for the violation of "MAIMING WITHIN MARITIME AND TERRITORIAL JURISDICTION OF THE UNITED STATES." The statute states, "[W]hoever, within the special maritime and territorial jurisdiction of the United States, with intent to maim or disfigure, cuts, bites, or slits the nose, ear, or lip, or cuts out or disables the tongue, or puts out or destroys an eye, or cuts off or disables a limb or any member of another person; or . . . Shall be fined not more than $1,000.00 or IMPRISONED BUT NOT MORE THAN SEVEN (7) YEARS or both." See, U.S. vs. STONE, 472 F.2d 909, 915 (5th Cir. 1973), EXHIBIT B (Id. page 915).

5. The term "SPECIAL MARITIME AND TERRITORIAL JURISDICTION OF THE UNITED STATES," as used within Title 18 U.S.C. is defined at Title 18 U.S.C. Section 7. This term means that the crime must take place on land owned by the U.S. Government. See, U.S. vs. LEWIS, 111 F. 930 (C.C.W.D.Tex. 1901) (Whether a homicide committed within the boundaries of a state constituted an offense against the laws of the United States, OF WHICH A FEDERAL COURT HAS JURISDICTION, depends on two (2) questions: First, whether there had been such a cession by the state to the United States of the territory upon which the act alleged to

EXHIBIT A.

constitute the crime was committed as to render such territory a "place or district of country under the exclusive jurisdiction of the United States," within former §§ 451 and 457 of this title (now this section and § 1111 of this title) which was a QUESTION OF LAW for the court; and, second, if such cession was made, whether the act was committed within the territory so ceded, which was a QUESTION OF FACT, to be submitted to the jury.); U.S. vs. HERNANDEZ-FUNDORA, 58 F.3d 802, cert. denied, 132 L.Ed2d 290, on remand (District Court was entitled to determine that federal correctional institution fell within SPECIAL MARITIME AND TERRITORIAL JURISDICTION OF THE UNITED STATES, and to remove that issue from consideration by jury in trial for assault by defendant upon another inmate.)(1995).

6. The U.S. District Court did not have JURISDICTION to convict and sentence Movant for INDICTMENT Cr. 3-76-17 filed on March 24, 1976, as the alleged act did not occur on the grounds and lands reserved and acquired for use of the United States.

7. Count I named the following U.S. Government officials: (a) Deputy United States Marshall James L. Propotnick; (b) Special Agent Donald E. Nelson of the Federal Drug Enforcement Administration; and (c) James P. Ecsenth of the Federal Drug Enforcement Administration.

8. Count II named Deputy United States Marshall Lacy A. Chaney.

9. Count I and II both cite violations of Title 18 U.S.C. §§ 111 and 114, on the basis a single violation and/or single action of Movant. The INDICTMENT merely names different federal officers that where allegedly affected thereby.

10. Title 18 U.S.C. Section 111 was defined by the U.S. Supreme Court as to MULTIPLE OFFENSES in LADNER vs. U.S., 3 L.Ed-2d 199 (1958) (Congressional meaning was open to question on face of this section penalizing assault on federal officer engaged on official duty and, accordingly said section was construed NOT

EXHIBIT A.

TO CREATE MULTIPLE OFFENSES FROM SINGLE ACT MERELY BECAUSE MORE THAN ONE FEDERAL OFFICER WAS AFFECTED THEREBY).

11. Therefore, INDICTMENT Cr. 3-76-17, if valid, should of only charged one (1) count, not two (2) counts.

12. DEFECTIVE INDICTMENT: The failure to include the ELEMENT of "MAIMING", by charging Movant with violating Title 18 U.S.C. § 114, RENDERS AN INDICTMENT CONSTITUTIONALLY DEFECTIVE. See, U.S. vs. MORALES-ROSALES, 538 F.2d 1359, 1361-1362 (9th Cir. 1968)(The failure of an information to charge an offense is JURISDICTIONAL DEFECT that is NOT WAIVED BY GUILTY PLEA). Therefore, the government's failure to plead with specificity all of the charges against Movant created a DEFECTIVE INDICTMENT which failed to put this Movant on proper notice of the charges against him. See also, U.S. vs. PUPO, 841 F.2d 1235 (4th Cir. 1988), cert. denied, 488 U.S. 842 (1988)(a defective indictment could not be saved by reference to a particular statute. Here the indictment failed to allege the words "knowing and intentionally").

13. RULE OF LENITY: The rule of lenity requires the sentencing court to impose the lesser of two penalties where there is an actual ambiguity over which penalty should apply. See, U.S. vs. TRAN, 234 F.3d 798, 800 (2nd Cir. 2000); U.S. vs. CANALES, 91 F.3d 363, 367-368 (2nd Cir. 1996)(offering other cases to support).

14. Movant was sentenced on Count I of INDICTMENT Cr. 3-76-17 to a term of imprisonment for a period of ten (10) years. See, EXHIBIT C.

15. Count I charged violations of Title 18 U.S.C. §§ 111 AND 114. SECTION 111 carried a maximum penalty of imprisonment not more than THREE (3) YEARS. SECTION 114 carried a maximum penalty of imprisonment not more than SEVEN (7) YEARS. See, U.S. vs. FIORE, 443 F.2d 909, 915 (9th Cir. 1971). See, EXHIBIT D.

16. Movant should not of been sentenced to more than SEVEN (7) YEARS UNDER THE RULE OF LENITY.

EXHIBIT A.

17. Movant respectfully requests to SUPPLEMENT paragraph twelve (12) to include: The ELEMENTS of "INTENT" and "DISFIGURES" as elements of violating Title 18 U.S.C. § 114. See, U.S. vs. SCROGGINS, 27 F.Cas. 999, No. 16249 (C.C.Ark. 1847) (The particular weapon, means, or instrument used is not material, provided the result is MAIMING or DISFIGURING with INTENT to do so).

18. Movant believes the government officials named in paragraphs seven (7) and eight (8), PROPOTNICK, WILSON, BARNETT, and CHANEY, violated Title 18 U.S.C. Section 1001, which provides: "[W]hoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000.00 or imprisoned not more than five years, or both." See, U.S. vs. UCO OIL CO., 546 F.2d 833, 836 (9th Cir. 1976) (The law of fraud knows no difference between express representation on the one hand and implied misrepresentation or concealment on the other. UCO, at 836) When they testified at the GRAND JURY, during pretrial hearings, and the filing of government documents as to Movant's violations of Title 18 U.S.C. Section 114, in which they claimed occurred on property owned by the United States Government.

CONCLUSION:

19. To the best of Movant's knowledge Defendant Attorney Charles Faulkner never requested a copy of the INDICTMENTS that where used to enhance my sentence and used during trial testimony in front of the JURY.

20. This Movant was PREJUDICED by Defendants' actions in allowing an invalid INDICTMENT, Cr. 3-76-17, to be used against Movant.

EXHIBIT A.

21. Movant respectfully requests this court to enter the above information as NEWLY DISCOVERED EVIDENCE INTO THIS ACTION, as CLAIM EIGHTEEN (18).

22. I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT. Title 28 U.S.C.A. § 1746.

EXECUTED ON: March 26, 2001

Respectfully submitted,

John Gregory Lambros, Pro Se
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U.S. Penitentiary Leavenworth
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Leavenworth, Kansas 66048-1000
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6

6.

EXHIBIT A.

22

UNITED STATES OF AMERICA

v.

JOHN G. LAMBROS

INDICTMENT

(18 U.S.C. §§111 and 114)

THE UNITED STATES GRAND JURY CHARGES THAT:

COUNT I

On or about the 24th day of February, 1976, in the State and District of Minnesota, the defendant,

JOHN G. LAMBROS,

knowingly, intentionally, and by means and use of a deadly and dangerous weapon, that is, a Browning .9 mm semi-automatic pistol, did forcibly assault, resist, oppose, impede and interfere with Deputy United States Marshall James L. Propotnick, and Special Agents Donald E. Nelsen and James P. Bennett of the Federal Drug Enforcement Administration while the said officers were engaged in the performance of their official duties; in violation of Title 18, United States Code, Sections 111 and 114.

COUNT II

On or about the 24th day of February, 1976, in the State and District of Minnesota, the defendant,

JOHN G. LAMBROS,

knowingly, intentionally, and by means and use of a deadly and dangerous weapon, that is, a Browning .9 mm semi-automatic pistol, did forcibly assault, resist, oppose, impede and interfere with Deputy United States Marshall Lake A. Lindley while the said officer was engaged in the performance of his official duty; in violation of Title 18, United States Code, Sections 111 and 114.

MAR 24 1976

Filed
Harry H. Bishop, Clerk
By

A TRUE BILL

United States Attorney

Foreman

EXHIBIT A.

EXHIBIT A.

BRIGGS AND MORGAN
PROFESSIONAL ASSOCIATION

2400 IDS CENTER
80 SOUTH EIGHTH STREET
MINNEAPOLIS, MINNESOTA 55402
TELEPHONE (612) 334-8400
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WRITER'S E-MAIL
gsteenoe@briggs.com

February 21, 2001

via EXPRESS MAIL

PRIVILEGED AND CONFIDENTIAL

John G. Lambros
Reg. No. 00416-124
U.S.P. Leavenworth
P.O. Box 1000
1300 Metropolitan Avenue
Leavenworth, Kansas 66048

Dear John:

Enclosed are the Indictments that you requested. Please verify that we got the right ones.

With regard to a Rule 59(e) motion on Judge Doty's ruling, as you may know, correcting legal errors, or preventing manifest injustice may be grounds for the motion. However, case law does not appear to support such a motion under the circumstances in your case. Please let me know your thoughts and whether you would like us to go forward with making the motion. If so, please describe in detail the grounds and cases that you believe would support such a motion. Thank you.

Very truly yours,

BRIGGS AND MORGAN

By _____
Gregory J. Steenoe

Enclosures

GJS:djp

EXHIBIT B.

EXHIBIT A.

JUDGMENT AND PROBATION/COMMITMENT ORDER

DOCKET NO. Cr. 3-76-17

Date of Judgment: June 21, 1976

PLEA: GUILTY, and the court being satisfied that there is a factual basis for the plea. NOLO CONTENDERE, NOT GUILTY

FINDING & JUDGMENT: Defendant has been convicted as charged of the offense(s) of having knowingly, intentionally, and by means and use of a deadly and dangerous weapon, forcibly assaulted, resisted, opposed, impeded and interfered with Deputy United States Marshal Fropotnick and Special Agents Holden and Braesch of the Federal Drug Enforcement Administration while said officers were engaged in the performance of their official duties; in violation of Title 18 United States Code, Sections 111 and 114; as charged in Ct. I of the Indictment.

SENTENCE OR PROBATION ORDER: ... ten (10) years.

SPECIAL CONDITIONS OF PROBATION:

ADDITIONAL CONDITIONS OF PROBATION:

COMMITMENT RECOMMENDATION:

EXHIBIT C.

Edward J. Devitt

June 21, 1976

CERTIFIED AS A TRUE COPY ON

DATE: June 21, 1976

Douglas J. Hoffe
Deputy

EXHIBIT A.

as the appellant claims, but in the *conjunctive*, for *both* Stone's home and his car. The arresting officers followed him to his home and served the search warrant as well as an arrest warrant on May 2. Even if the search warrant were held invalid, there is an independent ground for sustaining the legality of the search of the car; it was incident to Stone's arrest, the legality of which is not attacked. Chambers v. Maroney, 1970, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419.

The search of the car was unproductive except for fingerprint lifts and samples of hair which were matched to that of the victim.[4]

The search of the house produced a pair of cowboy boots and a gold colored short-sleeved sweat shirt identified by Mrs. Doe as similar to articles worn by her attacker.

(8) The appellant next urges that he was further prejudiced when the trial court allowed the jury to consider all six counts of the indictment against him. Stone asserts that Count Three's charge of assault with intent to commit rape, is a lesser included offense within the crime of rape charged in Count Six, and should not have been presented to the jury as a separate crime. He also urges that Count Two which charged assault with a dangerous weapon, is a lesser offense within the charge of maiming and disabling under Count Four.

[10, 11] Appellant is correct when he asserts that a charge of assault with intent to rape is included in a charge of rape. The government apparently concedes this point in its brief on appeal. Appellee's Brief, p. 26. We do not consider whether assault with a dangerous weapon is a lesser included offense within the charge of disabling and maiming, since we conclude that the latter charge (Count Four) should not properly have been submitted to the jury at all. Title 18 U.S.C., Section 114, defines the offense of disabling and maiming:

> "Whoever . . . with intent to maim or disfigure, cuts, bites, or slits the *nose, ear* or *lip*, or cuts out or disables the *tongue*, or puts out or destroys an eye, or *cuts off or disables a limb or any member* of another person; or
>
> Whoever . . . with like intent, throws or pours upon another person, any scalding water, corrosive acid or caustic substance
>
> Shall be fined not more than $1,000 or imprisoned not more than seven years or both." (Emphasis added)

Only rarely has this section received interpretation by the courts. See e. g., United States v. Scroggins, C.C.Ark. 1847, Fed.Case No. 16,243. But taking the plain meaning of the language of the statute we hold that the facts here fail to support a charge under it. Evidence was introduced at trial that Mrs. Doe's assailant cut off part of the hair on her head and her pubic hair, hit and kicked her, whipped her with a branch, cut her wrist with a knife, and burned her with his lighted cigarette and the car's cigarette lighter. No evidence was introduced regarding damage to Mrs. Doe's nose, ears, lips, tongue, or eyes, or that her assailant threw or poured damaging substance upon her. Nor does the language "cuts off or disables a limb or any member" cover the physical abuse Mrs. Doe suffered here. We conclude that this charge should not have been submitted to the jury.

[12] In summary the trial court erred when the jury was permitted to consider Count Three charging assault with intent to commit rape, and Count Four, charging maiming and disabling, and further erred when sentence was imposed after conviction for these two

4. A large quantity of Mrs. Doe's hair, (which the discoverer, an army sergeant, first thought to be a wig), a pair of Lt. Doe's gloves identified by Mrs. Doe as taken from her home and worn by her assailant, her blue panty hose used to disguise the attacker's features, and a pair of men's briefs or jockey shorts, were all found at the remote scene of Mrs. Doe's night of terror. The discovery of these objects occurred May 3, the morning following Stone's arrest.

EXHIBIT B. EXHIBIT A.

24.

enhancement of punishment for subsequent violation of Federal Narcotics Act, trial court did not abuse its discretion in denying motion to withdraw guilty pleas.

Affirmed.

1. Criminal Law ⇐274(2)

Trial court did not abuse its discretion in denying defendant's motion to withdraw guilty pleas on charges of possession of cocaine with intent to distribute and assault with deadly weapon upon United States marshals, in view of absence of evidence that Government breached terms of plea bargain agreement, despite fact that defendant, at time he entered guilty pleas, was not informed that punishment for any subsequent violation of Federal Narcotics Act could possibly be enhanced by reason of conviction of narcotics offense to which he entered guilty plea. Fed.Rules Crim.Proc. rule 11, 18 U.S.C.A.

2. Criminal Law ⇐274(1)

Presentence motions in criminal case are to be judged on a fair and just standard.

3. Criminal Law ⇐274(1)

Possibility of enhanced punishment for subsequent conviction under Narcotics Act was collateral and not direct consequence of guilty plea to charge of violating Federal Narcotics Act, and thus court, in proceedings held pursuant to motion to withdraw guilty pleas, was not obligated to explain collateral consequence of possible enhanced punishment. Fed.Rules Crim.Proc. rule 11, 18 U.S.C.A.

Peter J. Thompson, Minneapolis, Minn., for appellant.

Joseph T. Walbran, Asst. U. S. Atty., Minneapolis, Minn., for appellee; Robert G. Renner, U. S. Atty., Minneapolis, Minn., on brief.

Before VAN OOSTERHOUT, Senior Circuit Judge, and HEANEY and BRIGHT, Circuit Judges.

VAN OOSTERHOUT, Senior Circuit Judge.

This is an appeal by defendant Lambros from final judgment convicting him on pleas of guilty on the charges hereinafter described, the resulting sentence, and the denial of his motion for leave to withdraw guilty pleas made by him.

No. 76–1580 is the prosecution based on a multiple count indictment against the defendant and numerous other persons charging an extensive conspiracy to import cocaine and distribute it in Minnesota. Lambros entered a plea of guilty to Count 43 charging possession of two pounds of cocaine with intent to distribute, in violation of 21 U.S.C. § 841(a)(1).

No. 76–1581 is an indictment charging assault with a deadly weapon upon United States Marshals at the time of defendant's arrest on the drug charge.

On April 22, 1976, after three days of trial of multiple defendants before a jury in case No. 76–1580, and after other defendants at the trial had entered guilty pleas, the record reflects the following proceedings:

MR. WALBRAN: [Assistant United States Attorney.] Your honor, on yesterday morning, on this, our fourth day of trial, and what would be our third day of evidence taken in the cocaine conspiracy case 3–75–128, we have arrived at a satisfactory disposition of the case. It is the intention of the defendant John T. Lambros to enter a change of plea in the case number 128 as to Count 43 of the indictment. That would be a tender of a negotiated plea, Your Honor, under which the defendant would receive no more than five years incarceration and a special parole term of whatever length the Court determines, but at least three years.

Your Honor, the defendant as part of the negotiation will also this morning tender to the Court a change of plea to Count 1 of that other indictment in 3-76–17 pertaining to an assault and resistance against certain Deputy U. S. Marshals and narcotics officers. That is a non-ne-

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

UNITED STATES OF AMERICA,

Respondent,

v

JOHN GREGORY LAMBROS,

Petitioner.

Criminal File No. 4-89-82(05)
Civil File No. 99-28 (RGR)

ORDER

This matter is before the Court on Petitioner John Lambros' Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255. Because the Court lacks subject matter jurisdiction over the Petition, it is dismissed.

Petitioner was indicted in 1989 for the distribution of and conspiracy to distribute more than 9 kilograms of cocaine. Petitioner was not tried for those offenses until 1993, however, because Petitioner fled to Brazil and the Government was forced to extradite him from that country. After a jury trial, Petitioner was convicted on four counts of the indictment, and in 1994, Judge Diana Murphy of this Court sentenced Petitioner to life in prison on count one, to 120 months on counts five and six, and to 360 months on count eight, all sentences to run concurrently. On direct appeal of his sentence, the Eighth Circuit affirmed Petitioner's convictions on all counts, but vacated the life sentence Petitioner received for count one and remanded for resentencing. See United States v. Lambros, 65 F.3d 698 (1995). The United States Supreme Court denied certiorari, and Petitioner's convictions on all counts and sentencing on all counts but count one became final.

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JUDGMENT ENTD
DEPUTY CLERK

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2.6

In February of 1997, this Court resentenced Petitioner to 360 months on count one, to be served concurrently with the terms of imprisonment imposed for the remaining offenses of conviction. At the time of his resentencing, Petitioner raised several challenges to his convictions and to his sentence pursuant to Fed. R. Crim. P. 33. The Court construed these challenges as a habeas corpus petition, and denied Petitioner the relief he requested. See Resentencing Memorandum of Feb. 19, 1997. On April 18, 1997, Petitioner filed a § 2255 petition, seeking relief from his conviction and sentence. This Court denied the petition as a second or successive petition, or, alternatively, as without merit. See Order of May 1, 1997.

Petitioner now brings the instant Petition pursuant to 28 U.S.C. § 2255. He alleges that this Petition is not a second or successive petition within the meaning of §§ 2244(b) and 2255 because the Court erred in construing his Rule 33 motions as a habeas petition, and because the instant Petition challenges only his resentencing as to count one, whereas his previous petition challenged his convictions and his sentencing pursuant to counts five, six, and eight.

Petitioner's argument that the instant Petition challenges a sentence he could not have challenged in his earlier petition (because his resentencing on count one was not yet final) raises an interesting issue. There is one problem with Petitioner's argument, however. All but one of the issues raised in the Petition are not related to Petitioner's resentencing on count one.[1] Petitioner challenges the Court's decision to construe Petitioner's Rule 33 motions as a habeas petition (Issue Two); the increase of his sentence for a crime for which he was not extradited

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[1] The Court notes again that Petitioner cannot here raise a challenge to his conviction on count one, since all aspects of his conviction were affirmed by the Eighth Circuit, and Petitioner therefore could have raised a challenges to his count one conviction in his first § 2255 petition.

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(namely, violation of parole), in violation of the extradition treaty between the United States and Brazil (Issue Three); insufficient evidence to indict and convict him on count one (Issue Four); ineffective assistance of counsel for failure to seek the suppression of evidence (Issue Five); and legally insufficient indictment with respect to counts five, six, and eight (Issue Six).

Only Issue One raises any sort of challenge to Petitioner's resentencing on count one, and this challenge is devoid of merit. In Issue One, Petitioner alleges that his due process rights were violated when this Court resentenced him a consecutive sentence on count one. However, as noted in the initial judgment of conviction, all of Petitioner's sentences are to run concurrently. Nothing in the resentencing memorandum changed Petitioner's sentences to consecutive sentences.

In any case, it is clear that this Court does not have subject matter jurisdiction over the Petition. "No matter how powerful a petitioner's showing, only [the court of appeals] may authorize the commencement of a second or successive petition." Nunez v. United States, 96 F.3d 990, 991 (7th Cir. 1996). Petitioner argues that this Petition is not successive. While he may be technically correct with respect to his challenge to the count one resentencing, it is clear that the Petition is indeed a "second" petition. See Wainwright v. Norris, 958 F. Supp. 426 (E.D. Ark. 1996) (finding that, even if petition was not legally successive, it was a second petition and court could not entertain it absent court of appeals' authorization). In fact, the Petition is Petitioner's *third* petition. Thus, the Court lacks subject matter jurisdiction and must dismiss the Petition. See, e.g., id.; Vancleave v. Norris, 150 F.3d 926, 927 (8th Cir. 1998). Petitioner must seek authorization in the Eighth Circuit for the filing of any further petitions.

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Accordingly, IT IS **HEREBY ORDERED** THAT:

Petitioner John Gregory Lambros' Petition under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence [Docket No. 1] is DISMISSED.

Dated: ~~March~~ APRIL 6, 1999

Robert G. Renner
United States District Court Judge

EXHIBIT C.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

JOHN GREGORY LAMBROS,

Plaintiff,

vs.

CHARLES W. FAULKNER, sued as Estate/Will Business Insurance of deceased Attorney Charles W. Faulkner, SHEILA REGAN FAULKNER, FAULKNER & FAULKNER, and JOHN AND JANE DOE,

Defendants.

CIVIL CASE # 98-1621 (DSD/JMM)

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' COMPREHENSIVE MOTION TO DISMISS OR FOR SUMMARY JUDGMENT

INTRODUCTION

John Gregory Lambros seeks relief from this Court for the actions of Charles W. Faulkner, his federally-appointed public defender. Mr. Lambros respectfully asks this Court to deny the Defendants' Motion to Dismiss, because Mr. Lambros has stated a claim upon which relief may be granted, and the Defendants' Motion for Summary Judgment, because genuine issues of material fact exist with regard to Mr. Lambros' claims.

FACTUAL BACKGROUND

Mr. Lambros is currently "IN CUSTODY" serving a 52½ year imprisonment for a United States Parole Commission violation that he was arrested on in Brazil, retaking took place, 5,357 days (14½ years) and a 360 month (30 years) sentence for convictions on one count of conspiracy to

distribute cocaine and three counts for aiding and abetting the possession of cocaine with intent to distribute.[1] During his criminal trial, Mr. Lambros was represented by Charles W. Faulkner, a federal public defender appointed pursuant to 18 U.S.C. section 3006A. Id. During the plea negotiations, Mr. Faulkner told Mr Lambros that the minimum and maximum penalty that he faced for conviction on Count (1) was a MANDATORY life sentence without parole, thus the only sentence he could receive. Mr Faulkner was wrong and Mr. Lambros suffered "actual prejudice."[2] See United States v. Lambros, 65 F 3d 898, 899 (10th Cir. 1995). During the investigation prior to Mr. Lambros' trial, Mr. Lambros repeatedly requested that Mr Faulkner investigate the circumstances surrounding Mr. Lambros' extradition and holding in Brazil[3] and that Mr. Faulkner

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On June 13, 2000, the Tenth Circuit Court of Appeals ORDERED the 5,357 day U.S. Parole Commission Warrant of August 21, 1989, valid. See, LAMBROS vs. BOOKER, et al., No. 00-3118, Mr. Lambros' U.S. Parole Violation detainer "is viewed as a consecutive sentence in the AGGREGATE, not as a discrete segment." See, e.g. CARLOTTE vs. FORDICE, 132 F.3d 36, 43 (1995). Prisoners serving consecutive sentences are "IN CUSTODY" under any one of them. See, e.g. PEYTON vs. ROWE, 20 L.Ed.2d 426, 434-435 (1968). Thus, for purposes of the "CUSTODY" requirement, that is, "consecutive sentences should be treated as a continuous series," so that a prisoner "remains in 'IN CUSTODY' under ALL of his consecutive sentences until all are served. See, e.g. CARLOTTE, Id. at 40. Mr. Lambros' position is that his 30 year sentence Defendant's represented him at as his CONSECUTIVE SENTENCE. This being the case, Mr. Lambros could not of been sentenced to more than fifteen and one-half (15½) year sentence due to the U.S.-Brazil Extradition Treaty that requires that no one in Brazil will be sentenced to more than a thirty (30) year sentence. The government's November 16, 1992 WRITTEN PLEA PROPOSAL and Defendant Faulkner's November 17, 1992 letter to Plaintiff Lambros thus contained a copy of the government's PLEA PROPOSAL should of noted that Plaintiff Lambros was facing a MAXIMUM sentence of 15½ years due to August 21, 1989 U.S. Parole Commission warrant/DETAINER that adversely affected the length of his sentence exposure. Please note that Judge Murphy had JURISDICTION during Plaintiff's PLEA PROPOSAL and/or BARGAINING as to the U.S. Parole Violation Warrant DETAINER that Mr. Lambros was arrested on in Brazil. See e.g. THOMPSON vs. MISSOURI PAROLE BOARD OF PAROLE, 929 F.2d 396, 398-401 (8th Cir. 1991)(DETAINER lodged by Missouri Parole board with MINNESOTA prison gave board custody of petitioner and GAVE MINNESOTA DISTRICT COURT JURISDICTION TO CURE MISSOURI BOARD'S VIOLATION.

Lambros currently has a 30-year sentence with a 5-year term of supervised release, to be served upon release from imprisonment. Thus a 35-year term. See U.S. vs. ROBERTS, 5 F.3d 365 (9th Cir. 1993). ([If Roberts violates the conditions of his supervised release he can be sent back to prison for up to three more years. Title 18 U.S.C. § 3583(e)(3). Thus, Robert's MAXIMUM sentence is at least twenty (23) years, not twenty (20) years. Because of the term of supervised release, Roberts received a potentially longer sentence than he was apprised of at his plea hearing.)

On June 13, 2000, the Tenth Circuit ORDERED the 5,357 days (14½ years) PAROLE VIOLATION WARRANT/DETAINER VALID. See August 21, 1989 U.S. PAROLE COMMISSION WARRANT that Lambros was arrested in BRAZIL.

BRAZIL DOES NOT ALLOW MORE THAN A 30-YEAR SENTENCE. See Lambros August 3, 2000 Affidavit at ¶ 4 and Exhibit A. Also see, U.S. v. Gallo-Chamorro, 48 F.3d 502, 503 (continued...)

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[1](...continued)
(11th Cir. 1995) (Columbia does not allow more than a 30-year sentence, that is enforced within the United States); U.S. v. Abello-Silva, 948 F.2d 1168, 1174 (10th Cir. 1991).

ADDITION:

18 years
14 ½ years
32½ years total

Therefore, 22½ year sentence MORE than BRAZIL ALLOWS. Subtracting 22½ years from the 30-year maximum, equals 7½ years, which is consistent with Lambros' belief that he was going to get a 7-year plea agreement.

[2]"ACTUAL PREJUDICE" is a term of art meaning only that REVERSAL on the basis of error CANNOT OCCUR unless (1) some kind of prejudice is found to be present and (2) that finding is based not on a presumption of the prejudice premised on the general type of violation BUT rather on an analysis of the specific facts and circumstances of the proceeding in which the error occurred. See, e.g., UNITED STATES vs. OLANO, 507 U.S. 725-35, 736, 739-41 (1993).

[3]Mr. Lambros alleges that he was subjected to torture while held in the Brazilian prison. The Second Circuit dealt with a case in which Francisco Toscanino, who Mr. Lambros met while in the Brazilian prison, alleged that Brazilian authorities had tortured and interrogated him while he was held in a Brazilian prison. See United States v. Toscanino, 500 F.2d 267 (2nd Cir. 1974). The Second Circuit remanded the case and on remand, the trial court denied Mr. Toscanino's motion to vacate the conviction because Mr. Toscanino did not produce sufficient evidence to show that the (continued...)

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research the application of extradition law governed by the United States-Brazil extradition treaty. (Lambros Aff. at 10-19). Mr. Faulkner failed to do so. (Lambros Aff. at 10-19). During trial, Mr. Lambros repeatedly requested that Mr. Faulkner file certain motions and make certain objections to strengthen Mr. Lambros' defense. (Lambros Aff. at 10-19) Yet again, Mr. Faulkner failed Mr. Lambros. (Lambros Aff at 10-19). Mr. Lambros is now attempting to hold the Defendants[1] responsible for all of Mr. Faulkner's failures by pursuing a legal malpractice, a RICO and a failure to pay a contractual lien cause of action.

[1](...continued)
United States was an active participant in his abduction, torture and interrogation. See United States v. Toscanino, 398 F. Supp. 916, 916 (E.D.N.Y. 1975).

[2]Mr. Lambros currently has a motion to add the Defendants' insurance companies as defendants in this case. (Order dated 12/22/1999). See Sachs v. St. Paul Fire & Marine Insurance Co., 309 F.Supp. 1339 (D.D.C. 1969)(the Court held that if any element of the Complaint MIGHT fall within the policy coverage, then the duty to defend applies)

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ARGUMENT

1. **Mr. Lambros' Claims Should Not Be Dismissed Pursuant to Rule 12(b)(6)[3] for Failure to State a Claim Because Mr. Lambros Has Stated a Legal Malpractice Claim Upon Which Relief Can Be Granted.[4]**

In reviewing a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), a court should construe all allegations in the complaint as true, and "view the complaint, and all reasonable inferences arising therefrom, in the light most favorable to the plaintiff." St. Croix Waterway Ass'n v. Meyer, 178 F.3d 515, 519 (8th Cir. 1999). The issue regarding a 12(b)(6) motion is not "whether plaintiff will ultimately prevail," but whether the plaintiff will be allowed to produce evidence to support his allegations and causes of action. Richards v. Union Labor Life Ins. Co., 804 F. Supp. 1101, 1102 (D. Minn. 1992). Dismissal on the pleadings is an "extreme remedy" and is disfavored by the courts. Id. As a result, dismissal is warranted "only if it is clear that no relief can be granted under any set of facts that could be proved consistent with the allegations." St. Croix Waterway Ass'n, 178 F.3d at 519 (citing Frey v. City of Herculaneum, 44 F.3d 667, 671 (8th Cir. 1995)). See also Fed. R. Civ. P. 12(b)(6).

In addition, the federal court system has noted that there is a "well established judicial policy of holding *pro se* complaints to less stringent standards in pleading." Childress v. Northern, 618 F. Supp. 44, 48 (D. D.C. 1985). The United States Supreme Court stated, "[A] pro se complaint,

[3]Because Defendants have submitted material[s] outside the pleadings in this case, the motion is converted to one for summary judgment. See Fed. R. Civ. Pro. 56(c). Nevertheless, Mr. Lambros will address the merits of the motion.

[4]Additional arguments can be found in Exhibit 2, Plaintiff's earlier Response to Defendants' Motion to Dismiss dated May 11, 1999 and May 19, 1999, which are in Affidavit form. (Docket Entries 50 and 54).

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however inartfully pleaded,' must be held to 'less stringent standards than formal pleadings drafted by lawyers' and can only be dismissed for failure to state a claim if it appears 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" Hughes v. Rowe, 449 U.S. 5, 9-10 (1980) (quoting Haines v. Kerner, 404 U.S. 519 (1972) (citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957)).

A. **Mr. Lambros' Complaint Sufficiently Alleges Conduct that Constitutes Legal Malpractice.**

"Fatal or not, legal malpractice in criminal cases is all too common." In re Greenfield, 11 Cal. App. 3d 336, 344 (1970). To succeed on a legal malpractice cause of action, Mr. Lambros must show (1) the existence of an attorney-client relationship;[1] (2) the attorney's negligence or breach of contract; (3) the attorney's negligence or breach of contract proximately caused the plaintiff damages; and (4) but for the attorney's conduct, the plaintiff would have prevailed in the cause of action. See Rehm v. Dunkley & Bennett, P.A., 520 N.W.2d 406, 408 (Minn. 1994) (citing Blue Water Corp. v. O'Toole, 336 N.W.2d 279, 281 (Minn. 1983)). In reference to the proximate cause element, the Minnesota Supreme Court stated

> For negligence to be a proximate cause of any injury, it must appear that if the act is one which the party ought, in the exercise of ordinary care, to have anticipated was likely to result in injury to others, then he is liable for any injury proximately resulting from it, even though he could not have anticipated the particular injury which did happen.

Id. at 409 (emphasis omitted); Fletcher v. Zellmer, 909 F. Supp. 678, 682 (D. Minn. 1995) (noting that an act constitutes "the proximate cause of the damage if the conduct was a substantial factor in bringing about the injury").

[1] Defendants do not dispute the existence of an attorney-client relationship between Mr. Lambros and Mr. Faulkner. (Def. Memo. at 17).

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Mr. Lambros' complaint states a claim for legal malpractice in four categories of activities. The standards and causation elements for each are applied as follows:

1. Incorrect sentencing information

Several courts have stated that the standards for a legal malpractice claim and an ineffective assistance of counsel claim are "analogous, if not identical." United States v. James, 915 F. Supp. 1092, 1094 (S.D. Cal. 1996); see also McCord v. Bailey, 636 F.2d 606, 609 (D.C. Cir. 1980). Sharp v. Alaska, 816 P.2d 1358, 1361, n. 4 (Alaska 1991); Knoblauch v. Kenyon, 415 N.W.2d 286, 289 (Mich. Ct. App. 1987); Benson v. Minnesota, 582 N.W.2d 241, 245 (Minn. 1998). As a result, factual allegations that form the basis for an ineffective assistance of counsel claim can also support a cause of action for legal malpractice. See 3 Ronald E. Mallen & Jeffrey M. Smith, Legal Malpractice, § 23:1, 245-46, n. 1 (4th ed. 1996).

For example, federal appellate courts have held that an attorney's failure to give a criminal defendant accurate information about the maximum sentence or the length of time until parole eligibility constitutes ineffective assistance of counsel. See U.S. v. Orlando, 168 F.3d 341 (8th Cir. 1999) (attorney's failure to read and understand the Sentencing Guidelines prejudiced defendant in that he was sentenced to more time than was permissible under the circumstances); United States v. Gordon, 156 F.3d 376, 380 (2d. Cir. 1998) (noting that providing erroneous information of sentencing exposure constituted a breach of the lawyer's duty to fully advise a client and "fell below the prevailing professional norms" regarding advising a client); Teague v. Scott, 60 F.3d 1167, 1172 (5th Cir. 1995) (reversing a grant of summary judgment on the grounds that the attorney did not accurately inform the criminal defendant of his sentence exposure); Hill v. Lockhart, 894 F.2d 1009, 1010 (8th Cir. 1990) (noting that defendant basing his decision whether to plead guilty on the

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incorrect advice of counsel regarding eligibility of parole constituted ineffective assistance of counsel). See Exhibit K-8 through K-11 to Lambros August 3, 2000 Affidavit* for additional cases and analysis relevant to this issue.

Similarly, an error in sentence exposure can form the factual basis for a legal malpractice claim. In Geddie v. St. Paul Fire & Marine Ins. Co., 354 So. 2d 718, 719 (La. Ct. App. 1978), the appellate court affirmed the trial court's oral holding that the attorney's failure to have his client's sentence reduced constituted legal malpractice for which the attorney was liable for the additional period of incarceration. See id. The legal malpractice plaintiff, Geddie, was sentenced to four years for a crime that had a maximum penalty of two years. See id. Mr. Geddie's criminal attorney failed to take any action to have the sentence reduced and the trial court held that this failure constituted legal malpractice for which the attorney was liable to Mr. Geddie. See id.

In Claim I of his Preliminary Statement, Mr. Lambros stated a claim upon which relief could be granted when he alleged that Mr. Faulkner committed legal malpractice by providing inaccurate sentence exposure information. Defendants assert that Mr. Faulkner was merely the "transmitter" of the U.S. Attorney's incorrect information and therefore not liable for legal malpractice. (Def. Memo. at 18) (stating that "the fact that the prosecutor's position was determined to be wrong did not make Mr. Faulkner's act of transforming the information negligent"). Nevertheless, Mr. Faulkner himself was also a provider of incorrect information because he wrote a letter to Mr. Lambros that stated that Mr. Lambros was exposed to "a life term without possibility of parole" and because Mr. Faulkner admitted that he recommended to Mr. Lambros that Mr. Lambros would "look at a lifetime

*References to "Lambros Aff." herein are to Mr. Lambros' August 3, 2000 Affidavit, as corrected and supplemented by Mr. Lambros' August 7, 2000 Affidavit.

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sentence." (June 15, 1998 Complaint, Ex. H) (Faulkner Aff. dated 12/15/93 at 3). As noted in the case law above, a criminal defense attorney's duty does not end with his passing on information. At the very least, it encompasses passing on accurate information, especially in regard to sentence exposure. It is clear that Mr. Faulkner did not fulfill his duty to provide Mr. Lambros with accurate sentencing information. Moreover, Mr. Faulkner could have anticipated that his providing Mr. Lambros with inaccurate sentence exposure, either through his own letter or by forwarding the letter of the U.S. Attorney, was likely to result in injury to Mr. Lambros because Mr. Lambros no longer could make an educated decision about whether to accept or reject the plea offer. Finally, but for the fact that Mr. Faulkner provided Mr. Lambros with inaccurate sentencing information, Mr. Lambros would be serving a lesser sentence. Had Mr. Faulkner known or had he informed the federal prosecutor that the actual maximum sentence on the conspiracy charge was only 15½ years (30 years minus 14½ due to the U.S. Parole Violation Detainer) instead of the MANDATORY life sentence without parole, the federal prosecutor may have offered Mr. Lambros a plea agreement of less than the seven years actually offered* and Mr. Lambros would have accepted this offer. (Lambros Aff. at 23, 25).

2. Failure to investigate

One federal court has noted that an attorney's failure to investigate potentially exculpatory witnesses constitutes ineffective assistance of counsel and most likely constitutes the factual basis

*Judges also can be mistaken about their ability to downward depart a sentence. See United States v. Monk, 15 F.3d 25, 29 (2nd Cir. 1994). The Second Circuit remanded a case for re-sentencing on the grounds that the trial judge did not appreciate his authority to downwardly depart from the sentencing guidelines in a case where the defendant was convicted of possession of crack cocaine, but was not convicted of possession with intent to distribute. See id.

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for a successful legal malpractice suit. *See Sullivan v. Werner*, 1989 U.S. Dist. LEXIS 2557, *5 (N.D. Ill. 1989) (noting that "the facts of this case come exceedingly close to establishing the defendants' malpractice as a matter of law) (hereinafter *Werner*) (Stenmos Aff. Ex. A). In *Werner*, the defendant-attorneys neglected to interview five witnesses whose testimony would corroborate Mr. Sullivan, the criminal defendant's, version of the story. *See id.* at *1. Mr. Sullivan was found guilty of murder and subsequently sentenced to twenty-five years in prison. *See id.* at *1. After serving eight years of his sentence, Mr. Sullivan was finally released from prison after the Seventh Circuit found the attorneys' failure to investigate and interview the witnesses deprived Mr. Sullivan of his constitutional right to effective assistance of counsel. *See id.* at *3. The court denied Mr. Sullivan's motion for summary judgment on his legal malpractice claim, but it noted that the attorneys' failure to interview the five witnesses "appears inexplicable." *Id.* at *6 (denying the motion for summary judgment based on collateral estoppel because the defendant-attorneys had not yet had an opportunity to fully challenge the evidence in the plaintiff's petition for habeas corpus relief upon which his release from prison was premised).

In addition, a state appellate court has noted that a defendant-attorney's failure to interview a potential witness constituted factual basis upon which to reverse the trial court's grant of summary judgment in favor of the defendant-attorney. *See Connelly v. Stewartz*, 577 N.E.2d 437, 440-41 (Ohio Ct. App. 1989). In *Connelly*, the defendant-attorney determined that the plaintiff's codefendant, who was willing to testify to the criminal defendant's innocence, was an unreliable witness without ever speaking to the codefendant. *See id.* at 440. The court reversed summary judgment in favor of the attorney because reasonable minds could differ as to whether the "defendant competently fulfilled his duty to plaintiff to thoroughly investigate the facts of the plaintiff's case...." *Id.* at 440.

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In Claim III of his Preliminary Statement, Mr. Lambros alleged that Mr. Faulkner failed to investigate Mr. Lambros' case because Mr. Faulkner did not interview Mr. Lambros' Brazilian attorneys and Brazilian government officials who had information about the torture that Mr. Lambros underwent while in the Brazilian prison awaiting extradition. In Claim IV, Mr. Lambros explained that Mr. Faulkner also failed to investigate by neglecting to hire a local psychologist and by neglecting to set up a medical x-ray for Mr. Lambros. As noted by the Connelly court, Mr. Faulkner had a duty to "thoroughly investigate the facts" of Mr. Lambros' case. Connelly, 577 N.W.2d at 440. Mr. Faulkner breached his duty to Mr. Lambros because he did not thoroughly investigate any facts related to Mr. Lambros' experiences in Brazil. (Lambros Aff. at 15) Mr. Faulkner could have anticipated that his failure to investigate the facts surrounding Mr. Lambros' extradition, conviction, and imprisonment would be likely to result in injury to Mr. Lambros. Mr. Lambros has stated a claim upon which relief can be granted because he was convicted and sentenced, and presently "in custody" for a period of 52½ years as a result of Mr. Faulkner's failure to investigate, and has suffered damage in the form of the loss of his freedom and other damages (Lambros Aff. at 27, 28).

3. Failure to become familiar with the applicable extradition law

The American Bar Association Model Rules of Professional Conduct affirmatively require that an attorney be competent when they state that "[a] lawyer shall provide competent representation to a client." ABA Model Rules of Professional Conduct Rule 1.1. The Model Rules also state that "[c]ompetent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." ABA Code of Professional Responsibility DR 6-101 (A)(2) (1980).

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In Claims II, VII, VIII, XII, XIII, XIV, XV of his Preliminary Statement, Mr. Lambros stated a claim upon which relief can be granted for Mr. Faulkner's failure to provide competent representation to Mr. Lambros. Mr. Faulkner did not have the requisite knowledge or skill regarding United States and Brazilian extradition law and he neglected to acquire such knowledge and skill. (Lambros Aff. at 10-19). In addition, Mr. Faulkner's failure to research these issues illustrate his lack of thorough preparation in the representation of Mr. Lambros. In fact, in Claim II Mr. Lambros pointed out that Mr. Faulkner's failure to know the law caused Mr. Lambros' family to have to pay legal fees associated with the research and preparation of a motion pursuant to Federal Rule of Criminal Procedure 32. Mr. Lambros repeatedly requested that Mr. Faulkner research and raise several issues regarding extradition law, including the doctrine of "dual criminality," the doctrine of specialty,[1] and the extradition treaty requirements. (Lambros Aff. at 10-19). Yet Mr. Faulkner did not do so and as a result, Mr. Lambros has been damaged by the loss of his freedom. Moreover, Mr. Faulkner could have anticipated that his failure to acquire the requisite knowledge about extradition

[*]The doctrine of dual criminality states that no country can try an extradited criminal for an action that is not recognized to be a crime under the extraditing country's law. See United States v. Gallo-Chamorro, 48 F.3d 502, 507 (11th Cir. 1995). Mr. Lambros was tried for a parole violation, which is not a crime in Brazil, but Mr. Faulkner did not research or raise this issue. (Lambros Aff. at 49). Mr. Lambros was tried on Counts 5, 6, and 8, which are not crimes in Brazil, but Mr. Faulkner did not research or raise the issue.

[1]"The doctrine of specialty can best be stated as the rule that 'the courts of [the United States] will not try a defendant extradited from another country on the basis of a treaty obligation for a crime not listed in the treaty.'" United States v. Gallo-Chamorro, 48 F.3d 502, 506 (11th Cir. 1995) see also United States v. Fang, 940 F.2d 1293, 1294 (Wash. 1997) (addressing the doctrine of specialty in the context of an individual who was extradited from Brazil for arson, but then was tried for first degree murder). Mr. Lambros was tried in the United States for crimes that were not listed in the United States-Brazilian Extradition Treaty because parole violations is not a crime in Brazil, but Mr. Faulkner did not research or raise this issue. (Lambros Aff. at 49)

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law would cause Mr. Lambros damage because Mr. Faulkner knew or should have known that failure to raise violations of extradition law could cost Mr. Lambros his freedom.

4. Failure to make certain motions and objections before and during trial

In Claims V, IX, X, Mr. Lambros has stated additional claims upon which relief can be granted for Mr. Faulkner's continued lack of competency in his representation of Mr. Lambros. Mr. Lambros explained that Mr. Faulkner repeatedly failed to file motions to suppress testimony, motions to dismiss the conviction on the grounds of insufficient evidence, and pretrial objections to the sufficiency of the indictment. (Pre. Stat. at 8-9, 11-13). As a result of Mr. Faulkner's failure to make these motions and objections, Mr. Lambros is serving a 52½ year "in custody" sentence. Mr. Faulkner could easily foresee that his failure to file these motions and make these objections would cause Mr. Lambros injury because the subject of these motions and objections were the evidences upon which Mr. Lambros was convicted. (Lambros Aff.)

In conclusion, Mr. Lambros has stated several claims upon which relief can be granted and as a result, Defendant's 12(b)(6) motion to dismiss should be denied.

B. Defendant Charles Faulkner is Not Immune From Legal Malpractice Claims Brought Under Federal Law.

Defendants are correct when they assert that Minnesota law grants public defenders immunity from state legal malpractice claims. (Def. Memo. at 7.) Nevertheless, Defendants are entirely incorrect in their assertion that "there is no federal statutory right to claim legal malpractice." (Def. Memo. at 8.) A plaintiff asserting a claim of legal malpractice against his former federal public defender can bring the claim under the Federal Torts Claims Act. See Sullivan v. United States, 21 F.3d 198, 200-02 (7th Cir. 1994), cert. denied, 115 S. Ct. 670 (1994) (noting that federal

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public defenders are considered "employees of the government" for the purposes of being covered under the Federal Tort Claims Act), see also 28 U.S.C. §§ 2671-80 (2000).[13]

In Ferri v. Ackerman, the United States Supreme Court held that "federal law does not now provide immunity for court-appointed counsel in a state malpractice suit brought by [a] former client." Ferri v. Ackerman, 444 U.S. at 205 (emphasis added)." The Court noted that the role of the public defender is different from the roles of other federal employees, including judges and prosecutors, who are accorded immunity because the public defender's "principal responsibility is to serve the undivided interests of his client," whereas the principal responsibility of a judge or prosecutor is to serve the interests of society. Id. at 203-04. The Court noted that the duties of the public defender more closely resemble the duties of privately retained counsel, who enjoy no immunity from civil liability, and that "an indispensable element of the effective performance of [the responsibilities of a public defender] is the ability to act independently of the Government and to oppose it in adversary litigation." Id. at 204. The Court stated that "fear that an unsuccessful defense of a criminal charge will lead to a malpractice claim does not conflict with performance of that function," and that most likely this fear will provide an incentive "to perform that function competently." Id. As a result, the Court held that the federal public defender does not have

[13] Mr. Lambros' original complaint dated June 15, 1998 included a reference to a Federal Tort Claims Act claim. On August 18, 1997, Daniel M. Scott, federal public defender, acknowledged Mr. Lambros' Federal Tort Claims Act claim request and stated that "In Ferri v. Ackerman, 100 S.Ct. 402 (1979), the Supreme Court made clear that federally appointed counsel is subject to suit for malpractice." (Lambros Aff. at 43 (Exhibit A. to June 15, 1998 Complaint)).

[14] In an opinion that has been applied by the Eighth Circuit district courts, the Seventh Circuit has expanded on the scope of both the Federal Tort Claims Act and the Ferri decision. See Sullivan v. United States, 21 F.3d 198, 206 (7th Cir. 1994); Echols v. Dwyer, 914 F. Supp. 325, 327 (E.D. Mo. 1996).

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immunity from state malpractice suits brought by former clients. See id. at 204.[14]

In light of the liberal interpretation accorded *pro se* pleadings, Mr. Lambros' Preliminary Statement can be interpreted to state a cause of action for legal malpractice under the Federal Tort Claims Act. Defendants admit that Mr. Faulkner was a federally-appointed public defender under 18 U.S.C. section 3006A. (Def. Memo at 3). According to the Federal Tort Claims Act and the Sullivan decision, Mr. Lambros can bring a claim against his federally-appointed public defender for "injury or loss of property ... arising or resulting from the negligent or wrongful act or omission," including legal malpractice. 18 U.S.C. § 2679(b); Sullivan, 21 F.3d at 200-02.

C. Mr. Lambros' Conviction Does Not Preclude His Pursuit of a Civil Remedy For Damages.

Defendants assert that Mr. Lambros must prove the reversal of his conviction before Mr. Lambros can recover for damages in a civil lawsuit. (Def. Memo. at 10). Nevertheless, several courts have stated that a plaintiff's guilt or innocence is not relevant to the subsequent legal malpractice cause of action. "Although not *an essential element* of a legal malpractice claim, the requisite causal connection between the alleged negligence and resulting injury may be established by evidence of a conviction which has been subsequently set aside because of counsel's ineptitude."

[14] The dissenting opinion in Dziubak also persuasively argued that public defenders should not be accorded immunity from legal malpractice claims because indigent clients are not given the right to choose their lawyers, "but must depend on whomever is assigned in matters that are of the most extreme gravity." Dziubak, 503 N.W.2d at 778 (Gardebring, J. dissenting). Justice Gardebring criticized the Minnesota Supreme Court for creating "just the kind of two-tier criminal justice system that the Supreme Court hoped to obliterate in its landmark decision, Gideon v. Wainwright, 372 U.S. 335 (1963)." Dziubak, 503 N.W.2d at 778. As a result of the Minnesota Supreme Court's Dziubak holding, clients who can afford to pay for criminal counsel are not deprived of their right to seek civil redress for injury caused by counsel, yet indigent clients are deprived of this right. See Dziubak, 503 N.W.2d at 778-79.

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Cassidy, 577 N.E.2d at 439 (citations omitted) (emphasis added). The Seventh Circuit has gone so far as to note that "[a]mong other things, the attorney is also shielded from liability because of the initial mistake. A criminal defendant suing his attorney for legal malpractice would not be contributorily negligent because he actually had committed the charged crime." American Int'l Adjustment Co. v. Galvin, 86 F.3d 1455, 1462 (7th Cir. 1996). In addition, the Minnesota Supreme Court has also implied that proof of innocence is not required when a plaintiff in the fourth element of a legal malpractice suit as "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding *would have been different*." Bolinski, 581 N.W.2d at 845 (emphasis added); see also Driebek, 503 N.W.2d at 778, n. 2 (Gardebring, J. dissenting) (noting that a legal malpractice plaintiff has the burden of proving that with more adequate counsel, he or she "would have obtained a *more favorable outcome*") (emphasis added).

Also, it is important to note that "[g]uilt usually is irrelevant if the attorney's error concerns the extent or severity of the sentence." 3 Mallen & Smith, supra, at 242. In Geddie, the court affirmed a judgment against an attorney and held him responsible for the excessive portion of the sentence. See Geddie, 334 So. 2d at 721. In these cases, the "but for" element can be satisfied by showing that but for the attorney's negligence, the criminal defendant would have obtained a lesser sentence.

As a result, the Defendants are incorrect when they assert that Mr. Lambros' conviction prevents him from seeking relief for Mr. Faulkner's legal malpractice. (Def. Memo. at 10-13). The fact that Mr. Lambros has been convicted of his criminal charges does not foreclose the possibility of pursuing a claim upon which relief can be granted for his legal malpractice cause of action against Mr. Faulkner. Mr. Lambros only needs to assert in his pleadings that but for Mr. Faulkner's

negligence, Mr. Lambros could have obtained a *more favorable outcome*. Mr. Lambros did assert that he would have had a more favorable outcome in several instances in his Preliminary Statement. (Pre. Stat. at 8, 10, 19). Mr. Lambros alleged that he would have been acquitted, that he would have had a lesser sentence, and that he would not have been tried for certain crimes, all of which are more favorable outcomes than the actual outcome of Mr. Lambros' criminal trial. (Id.) Moreover, with regard to Mr. Lambros' claims alleging that Mr. Faulkner provided him with inaccurate sentencing information, Mr. Lambros' alleged guilt or innocence is irrelevant to proving that he could have received a lesser sentence.

D. Mr. Lambros' Claims Are Not Subject to Collateral Estoppel Based on Mr. Lambros' Criminal Convictions.

Defendants allege that Mr. Lambros' conviction collaterally estops him from pursuing a civil legal malpractice cause of action for damages. (Def. Memo. at 10). Defendants cite the United States Supreme Court decision in Heck v. Humphrey as support for their collateral estoppel argument, but the Heck opinion only held that "[a] claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under § 1983." 512 U.S. 477, 487 (1994). Because Mr. Lambros is not bringing a section 1983 claim, Heck does not apply to his situation. Both the Third and Tenth Circuits have recently distinguished Heck vs. Humphrey, thus allowing Mr. Lambros to recover damages against Defendants. See, e.g. NELSON vs. LASHBURN, 109 F.3d 142 (3rd Cir. 1997) and MARTINEZ vs. CITY OF ALBUQUERQUE, 184 F.3d 1123, 1125 (10th Cir. 1999). In MARTINEZ vs. CITY OF ALBUQUERQUE, The Tenth Circuit stated, "careful comparison between HECK and the facts of this case demonstrate that to the extent MARTINEZ' federal suit DOES NOT CHALLENGE THE LAWFULNESS OF HIS

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ARREST AND CONVICTION (a challenge HECK would prohibit at this point), HECK does not bar him from pursuing his civil rights claims in federal court." Id. at 1125. Defendants also rely on the Seventh Circuit decision in Levine v. King for their proposition that Mr. Lambros is collaterally estopped from relitigating the issues that led to his conviction, however the Levine court applied Illinois law, which is not controlling precedent on Mr. Lambros' lawsuit and for this Court. See Levine v. King, 123 F.3d 580, 582 (7th Cir. 1994).

The few courts that have held that a criminal defendant's failure to prevail on an ineffective assistance of counsel claim bars relitigation of some of the issues involved in the legal malpractice claim, did so because the elements of a legal malpractice claim and an ineffective assistance of counsel claim were substantially similar." See McCord v. Bailey, 636 F.2d 606, 609 (D.C. Cir. 1980); Zeidwig v. Ward, 548 So. 2d 209, 214 (Fla. 1989); Kopblumb v. Kenyon, 415 N.W.2d 286, 292 (Mich. Ct. App. 1987), see also United States v. James, 915 F. Supp. 1092, 1094 (S.D. Cal. 1996) (noting that the standard for ineffective assistance of counsel is "analogous, if not identical, to the standard for civil malpractice"). In general, collateral estoppel is not applied unless the (1) the same issue is at stake in both cases and (2) the issue was actually litigated and decided in the first suit. See McCord, 636 F.2d at 609. The McCord court applied the doctrine of collateral estoppel to the plaintiff's legal malpractice claim specifically because the legal malpractice claim and the ineffective assistance of counsel claim had similar factual issues and similar legal standards. See

[10]The Minnesota Supreme Court recently declined to rule on the specific issue of whether a criminal defendant seeking post-conviction relief is barred from relitigating issues that arose in a previous legal malpractice lawsuit against his former attorney. See Bobinski, 582 N.W.2d at 245 (noting that because the evidence presented to show that the alleged plea offer existed was insufficient to grant the plaintiff's motion for reversal of summary judgment, there was no need to address the issue of collateral estoppel).

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McCord, 636 F.2d at 609-10.

Mr. Lambros' ineffective assistance of counsel claim focused on errors and omissions by Mr. Faulkner that led to Mr. Lambros' conviction, whereas Mr. Lambros' malpractice claim focuses on errors and omissions that led to excessive incarceration for Mr. Lambros. Mr. Lambros' criminal case and his civil case do not have the same issues at stake -- the issue in Mr. Lambros' criminal case was his legal guilt whereas the issue in Mr. Lambros' legal malpractice case is excessive incarceration. Therefore, Mr. Lambros is not collaterally estopped from pursuing his legal malpractice claims because he has not previously litigated the issues underlying his claim in a similar cause of action.

II. **Defendants Are Not Entitled to Summary Judgment as Mr. Lambros' Claims Presents Genuine Issues of Material Fact Exist With Regard to Mr. Lambros' Claims of Legal Malpractice.**[11]

It is well established that summary judgment is proper only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. Pro. 56(c). In determining whether to grant summary judgment, a court must view the evidence in the light most favorable to the non-moving party. Maryland v. University of Minnesota, 43 F.3d 357, 360 (8th Cir. 1994). Additionally, where there has been no opportunity for discovery, courts are especially reluctant to grant summary judgment. See Palmer v. Tyson Inc., 856 F.2d 1111 (8th Cir. 1988) (noting that "if the failure to allow discovery deprives the nonmovant

[11]Additional arguments and factual support in opposition to Defendants' Motion can be found in Exhibit 2, Plaintiff's earlier Response to Defendants' Motion to Dismiss dated May 11, 1999 and May 19, 1999, which are in Affidavit form (Docket Entries 50 and 54).

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of a fair chance to respond to the motion, however, summary judgment is not proper and will be reversed"); Costlow v. United States, 552 F.2d 560, 564 (3rd Cir. 1977) (noting that "by acting on the motion for summary judgment without argument, and without reference to what might be developed in discovery, which was being diligently pursued, the court erred"). As the Court is well aware, it has stayed discovery in this case pending resolution of this motion. Further, Mr. Lambros has previously submitted an extensive listing of proposed discovery necessary for his case. Ex. 1 (Plaintiff's Response to Court Order dated December 22, 1999, Regarding Discovery - Dated January 20, 2000 - Docket Entry 52) (attached hereto).

A. **Genuine Issues of Material Fact Exist With Regard to All of Mr. Lambros' Allegations of Legal Malpractice.**

As stated earlier, in a cause of action for legal malpractice, a plaintiff must show (1) the existence of an attorney-client relationship; (2) the attorney's negligence or breach of contract; (3) the attorney's negligence or breach of contract proximately caused the plaintiff damages; and (4) but for the attorney's conduct, the plaintiff would have prevailed in the cause of action. See Rouse v. Dunkley & Bennett, P.A., 520 N.W.2d 406, 408 (Minn. 1994) (citing Bloo Water Corp. v. O'Toole, 336 N.W.2d 279, 281 (Minn. 1983)).

As noted earlier, Mr. Lambros' legal malpractice claims fall into four factual categories. All of Mr. Lambros' claims have genuine issues of material fact for which summary judgment is improper.

1. Incorrect sentencing information

As discussed earlier, an attorney's failure to give a criminal defendant accurate information about his or her sentence exposure can form the basis for a legal malpractice cause of action. See

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Geddie, 334 So.2d at 719. With regard to Mr. Lambros' claims, there exist genuine issues of material fact about whether Mr. Faulkner breached his duty to provide Mr. Lambros with accurate sentencing information, whether Mr. Faulkner proximately caused Mr. Lambros' damages, and whether but for Mr. Faulkner's conduct, Mr. Lambros would have obtained a more favorable outcome. First, Mr. Faulkner did provide Mr. Lambros with inaccurate sentencing information when he wrote a letter to Mr. Lambros stating that Mr. Lambros was exposed to "a life term without possibility of parole." (June 15, 1998 Complaint, Ex. H). This information was clearly inaccurate and Mr. Lambros suffered "actual prejudice" because the Eighth Circuit had to reduce Mr. Lambros' sentence to conform with the current statutory limitations on the minimum/maximum sentence for the conspiracy charge. See United States v. Lambros, 65 F.3d 698, 699 (8th Cir. 1996). Second, genuine issues of material fact exist regarding whether Mr. Faulkner's actions proximately caused Mr. Lambros damages because Mr. Faulkner could have anticipated that Mr. Lambros was likely to suffer damage as a result of his lack of accurate knowledge while making the decision about whether to accept or reject the government's plea offer. As noted earlier, if Mr. Faulkner had informed the federal prosecutor and Mr. Lambros that the maximum sentence was actually only 15½ years, it is possible that the federal prosecutor would have offered Mr. Lambros a lesser sentence on the plea agreement and Mr. Lambros would have accepted this lesser sentence. (Lambros Aff. at 23, 25).[11] Finally, genuine issues of material fact exist regarding whether "but for" Mr. Faulkner's

[11]Pam Lemon, Larry Pebbles, Ralph Amero and Ira Jay Berins, Mr. Lambros' codefendants, were offered and accepted lesser plea agreements or their indictments were dismissed. Pam Lemon received a sentence of 2 months with work release and supervised release for 2 years and on information and belief, the indictments for Larry Pebbles and Ralph Amero were dismissed and Ira Jay Berins received a term of imprisonment of 14 months pursuant to a plea. (Lambros Aff. at 26, (continued...)

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actions, Mr Lambros would be serving less jail time because Mr. Lambros may have accepted a plea offer. (Lambros Aff. at 23, 25).

2. Failure to investigate

Moreover, an attorney's failure to thoroughly investigate the circumstances surrounding a client's arrest, alleged crime, and potential witnesses can constitute the basis for a legal malpractice cause of action. See Weiner, 1989 U.S. Dist. LEXIS 2557 at *5; Cassidy, 577 N.E.2d at 440-41. In the case at hand, there exist genuine issues of material facts with regard to whether Mr Faulkner breached his duty to Mr. Lambros to investigate the arrest, alleged crime and potential witnesses. As noted earlier, Mr. Faulkner breached his duty to Mr. Lambros when he did not personally interview nor hire an investigator to interview Mr. Lambros' Brazilian attorneys and Brazilian government officials who had information about Mr. Lambros incarceration while in Brazil. (Lambros Aff. at 16). In addition, Mr. Faulkner did not hire a local psychologist or set up medical x-ray examinations to corroborate Mr. Lambros allegations regarding the torture he sustained while awaiting extradition. (Lambros Aff. at 18) Furthermore, genuine issues of material fact exist with regard to whether Mr. Faulkner should have anticipated that his failure to investigate the circumstances surrounding Mr. Lambros arrest, extradition, and conviction would cause Mr. Lambros damage. Finally, a genuine issue of material fact also exists with regard to whether Mr. Faulkner was the "but for" cause of Mr. Lambros' damages. (Lambros Aff. at 27, 28, 29)

[12](...continued)
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3. Failure to become familiar with the applicable extradition law

As noted earlier, competent representation includes acquisition of the requisite knowledge and skill combined with thoroughness and preparation. See ABA Model Rules of Professional Conduct Rule 1.1. Mr. Lambros has alleged several genuine issues of material fact with regard to whether Mr Faulkner breached his duty to Mr. Lambros to become familiar with the applicable extradition law, whether Mr. Faulkner proximately caused Mr. Lambros' damage, and whether but for Mr Faulkner's conduct, Mr. Lambros would have obtained a more favorable outcome. First, Mr. Faulkner breached his obligation to obtain the requisite knowledge regarding extradition law in the following manner: (1) failure to research whether the United States-Brazil Extradition Treaty prohibits the imposition of consecutive sentences; (2) failure to research regarding whether Mr Lambros was used for unextraditable crimes; (3) failure to research whether Mr. Lambros was sentenced in violation of the Brazilian Constitution, (4) failure to research the application of the Brazilian legal doctrines of specialty and dual criminality; (5) failure to research whether Mr. Lambros' charges of aiding and abetting, Counts 5, 6, and 8, were extraditable crimes; and (6) failure to research whether the United States-Brazil Extradition Treaty denied the trial court jurisdiction over Mr. Lambros for his alleged violations of state law. (Lambros Aff. at 10-19). In fact, Mr. Faulkner's failure to research became such a problem for Mr. Lambros that a different party had to perform research and prepare a motion on behalf of Mr. Lambros. (Lambros Aff. at 30). Moreover, there exist genuine issues of material fact regarding whether Mr. Faulkner should have anticipated that his failure to investigate the applicable extradition laws would cause Mr. Lambros to be incarcerated. Finally, there exist genuine issues of material fact regarding whether "but for" Mr. Faulkner's failure to investigate, Mr. Lambros would have obtained a more favorable outcome in his

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criminal trial. (Lambros Aff.).

4. Failure to make certain motions and objections before and during trial

As stated earlier, Mr. Lambros has also alleged genuine issue of material facts regarding whether Mr. Faulkner breached his duty to provide competent representation to Mr. Lambros when Mr. Faulkner (1) failed to file a motion to suppress testimony that was obtained in violation of Title 18 U.S.C. section 201(c)(2); (2) failed to file a motion to dismiss the charges against Mr. Lambros on the grounds that the government did not have sufficient evidence to show that Mr. Lambros was involved in a single transaction of at least five kilograms of cocaine; and (3) failed to make several objections to the sufficiency of the indictment under Title 18 U.S.C. 2 (a). (Lambros Aff.). In addition, there exist genuine issues of material fact regarding whether Mr. Faulkner should have foreseen that his failure to file these motions or make these objections would have been likely to result in damage to Mr. Lambros. Finally, whether Mr. Faulkner's breach of duty constituted the "but for" cause of Mr. Lambros' lengthy incarceration is also a genuine issue of material fact for which a fact finder is needed. (Lambros Aff.).

B. Expert Testimony is Not Needed To Defeat Defendants' Motion For Summary Judgment on the Legal Malpractice Claims.

Defendants assert that Minnesota Statute Section 544.42 requires that a plaintiff asserting a legal malpractice cause of action against his former attorney provide the court with expert testimony. (Def. Memo. at 25). Minnesota Statute Section 544.42 has never been applied by the courts. However, a close reading indicates that the statute does not require expert testimony, it only specifies the process to be used in the event that the plaintiff plans to use expert testimony to support his claims. See Minn. Stat. § 544.42, subd. 2. The statute states that a party must provide an expert's

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affidavit "in a action against a professional alleging negligence or malpractice .. where expert testimony is to be used by a party to establish a prima facie case." Minn. Stat. § 544.42, subd. 2 (emphasis added). The language does not constitute a requirement that expert testimony be used.

Nevertheless, some courts have held that a plaintiff should use expert testimony to establish the requisite standard of care to be applied to the defendant-attorney's actions. See Williams v. Callaghan, 938 F. Supp. 46, 49-50 (D.C. Cir. 1996); Hill v. Dicky County, Co., 312 Minn. 324, 337, 252 N.W.2d 107, 116 (1977); see generally, 4 Mallen & Smith, supra, at 238-39. However, an expert witness is not required if the "attorney's lack of care and skill is so obvious that the trier of fact can find negligence as a matter of common knowledge." Williams, 938 F. Supp. at 50 (citations omitted) (explaining that allowing a statute of limitations to run is an example of a situation where expert testimony is not required to establish the standard of care); see also Hill, 312 Minn. at 337, 252 N.W.2d at 116 (stating that no expert testimony is required when the "conduct is such that it could be adequately evaluated by a jury without expert testimony").

Mr. Lambros does not need expert testimony to show that Mr. Faulkner breached the standard of care in criminal representation. A trier of fact does not need expert testimony to know that Mr. Faulkner's actions, including his failure to do research, his rendering incorrect information, and his failure to investigate the circumstances of the arrest, conviction, and extradition, all constitute an obvious "lack of care and skill."[9] Hill, 312 Minn. at 337, 252 N.W.2d at 116. In addition, Mr. Lambros has not presented expert testimony to support his cause of action because

[9]Mr. Friedberg's affidavit on its face is deficient because he failed to review the entire record, but chose to review only parts of it.

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discovery has been stayed in this proceeding." (Order dated 01/26/2000). As a result, Defendants cannot assert that Mr. Lambros' failure to attach an expert's affidavit constitutes grounds upon which to grant their motion for summary judgment.[2]

III. Mr. Lambros' Claims Regarding Defendants' Violation of RICO Should Not Be Dismissed Pursuant to Rule 12(b)(6) Because Mr. Lambros Has Stated A Claim Upon Which Relief Can Be Granted and Defendants Are Not Entitled to Summary Judgment Because Genuine Issues of Material Fact Exist.

A. Defendants' Motion to Dismiss Mr. Lambros' RICO Claims Should Be Denied.

As noted by the Eighth Circuit, RICO includes a civil enforcement section that "permits private individuals harmed by criminal RICO activity to recover damages." Bowman v. W. Auto Supply Co., 985 F.2d 383, 384 (8th Cir. 1993). The United States Supreme Court has held that in order for a plaintiff to establish standing to bring a RICO civil enforcement suit, the plaintiff's injury must have resulted from a violation of 18 U.S.C. section 1962 regarding prohibited activities. See Sedima S.P.R.L. v. Imrex Co., 473 U.S. 479, 496-97 (1985). Mr. Lambros has stated a claim upon which relief can be granted for violation of RICO. Mr. Lambros alleged that the Defendants acted in concert, by participating directly or indirectly in the conduct of the affairs of the law firm, to violate the RICO provisions related to bribery, mail fraud, wire fraud, obstruction of justice, and tampering with witnesses. (Plaintiff's Response to Def's Mot. Dated April 26, 1999). As defined by 18 U.S.C. section 1961, racketeering activities include all the activities listed and alleged by Mr.

[1]Accordingly, Mr. Lambros has been placed in an impossible position, a previously undisclosed expert has been introduced at the eleventh hour and Mr. Lambros has effectively been denied the right to notice Mr. Friedberg for deposition and challenge his conclusions. See Palmer, 856 F.2d at 1134.

[2]Should the Court find that expert testimony is required, Mr. Lambros has submitted herewith a Motion for Appointment of a Legal Expert.

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Lambros. See 18 U.S.C. § 1961(1). Mr. Lambros has alleged that the Defendants conspired to violate RICO through their participation in these activities, thereby violating section 1962's prohibition on such activities. As a result, Mr. Lambros has stated a RICO claim upon which relief can be granted. (Lambros Aff. at 31).

B. Defendants' Motion for Summary Judgment on Mr. Lambros' RICO Claims Should Be Denied.

Moreover, there exist genuine issues of material fact with regard to Mr. Lambros' RICO claims. First, Defendants claim that only Mr. Faulkner worked on Mr. Lambros' case, yet Mr. Lambros alleged that other individuals were involved in the preparation of his criminal defense. (Lambros Aff. at 30). As a result, a factfinder must determine whether Mr. Faulkner acted alone. Second, there exist genuine issues of material fact regarding whether Defendants violated RICO when they entered into a "scheme to intimidate, corruptly coerce, and corruptly persuade witnesses and clients in official proceedings to withhold, fabricate and falsify evidence, information, and testimony." (Pl's Response to Def's Motion dated April 26, 1999) (Lambros Aff.). As a result, summary judgment is improper on this claim.

IV. Mr. Lambros' Claims Regarding Defendants' Failure to Pay a Commercial Lien Should Not Be Dismissed Pursuant to Rule 12(b)(6) Because Mr. Lambros Has Stated a Claim Upon Which Relief Can Be Granted and Defendants Are Not Entitled to Summary Judgment on Mr. Lambros' Claims of Failure to Pay a Commercial Lien Because Genuine Issues of Material Fact Exist.

Mr. Lambros should be allowed to pursue his commercial lien claim for one reason -- no one informed Mr. Lambros that his lien was invalid. (Lambros Aff. at 35). Apparently everyone involved, except Mr. Lambros, was advised of these alleged defects. Mr. Lambros believed that he had obtained a valid commercial lien against Mr. Faulkner and defendants, and those charged with

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a public duty allowed him to continue this belief. (Lambros Aff. at 32) Considering that Mr. Lambros is a pro se plaintiff, this is the height of deception. As a result, Mr Lambros' claim should not be dismissed and summary judgment should not be granted because Mr. Lambros is entitled to the opportunity to correct any alleged deficiencies in his commercial Lien.

CONCLUSION

Mr. Lambros respectfully requests that this Court deny the Defendants' Motion to Dismiss and Motion for Summary Judgment because the Defendants did not sustain their burden of convincing this Court that Mr. Lambros failed to state a claim upon which relief can be granted or that there exist no genuine issues of material fact with regard to Mr. Lambros' claims. Mr. Lambros, on the other hand, has put forth evidence to show both that he has stated several claims upon which relief can be granted and that there exist genuine issues of material fact regarding each of these claims. Granting Defendants' Motion to Dismiss or Motion for Summary Judgment in this case is not only unwarranted, it is entirely unjust. See Lambros Aff.; Ex. 1 (Plaintiff's Response Regarding Discovery - January 20, 2000 - Docket Entry 52) (attached hereto); Ex. 2 (Plaintiff's Response to Defendant's Motion to Dismiss - May 18, 1999 and May 19, 1999 - Docket Entries 50 and 54) (attached hereto), All Court Submissions to Date.

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Dated: August 15, 2000

Respectfully Submitted,

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statements made by him during the plea proceedings. *Blackledge v. Allison, supra*, 431 U.S. at 73–74, 97 S.Ct. 1621.

[9, 10] Where an evidentiary hearing is not required, the district court retains discretion to determine whether counsel should be appointed. *McTyre v. Pearson*, 435 F.2d 332, 335 (8th Cir. 1970), *cert. denied*, 402 U.S. 947, 91 S.Ct. 1540, 29 L.Ed.2d 117 (1971). It was not an abuse of that discretion in this instance for the district court to refuse to appoint counsel to assist Degand with his motion.

We agree with the district court that the motions, files, briefs, and records of this case conclusively demonstrate that the petitioner is entitled to no relief.

Accordingly, the judgment of the district court is affirmed.

UNITED STATES of America, Appellee,

v.

John Gregory LAMBROS, Appellant.

No. 79-1752.

United States Court of Appeals, Eighth Circuit.

Submitted Jan. 11, 1980.

Decided Jan. 28, 1980.

Appeal was taken by defendant from an order of the United States District Court for the District of Minnesota, Edward J. Devitt, Chief Judge, denying defendant's postconviction motion. The Court of Appeals held that conclusory allegation that defendant'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 defendant's right to collateral relief in postconviction proceeding where it was apparent from record that, after electing to plead guilty only after several days of trial and after several codefendants changed their pleas to guilty, defendant acknowledged agreement with respect to his wife, yet assured trial court that his guilty pleas were wholly voluntary and not induced by threats.

Affirmed.

1. Criminal Law ⇐997.1

Representations of a defendant at a guilty plea hearing constitute a formidable, although not insurmountable, barrier in any subsequent collateral proceeding. 28 U.S.C.A. § 2255.

2. Criminal Law ⇐997.11

Conclusory allegations that defendant'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 defendant's right to collateral relief in postconviction proceeding where it was apparent from record that, after electing to plead guilty only after several days of trial and after several codefendants changed their pleas to guilty, defendant acknowledged agreement with respect to his wife, yet assured trial court that his guilty pleas were wholly voluntary and not induced by any threats. 28 U.S.C.A. § 2255.

3. Criminal Law ⇐997.16(2)

An evidentiary hearing is necessary in a postconviction case where factual issues are presented, but such a hearing is not necessary when files and records conclusively show that no relief is warranted. 28 U.S.C.A. § 2255.

4. Criminal Law ⇐997.16(2)

District court was not required to hold a hearing before ruling on defendant's motion for postconviction relief.

Samuel Harris, I.L.A.C., Terre Haute, Ind., on brief, for appellant.

Thorwald H. Anderson, Jr., U. S. Atty., and Joseph T. Walbran, Asst. U. S. Atty., Minneapolis, Minn., on brief, for appellee.

Before HEANEY, ROSS and HENLEY, Circuit Judges.

PER CURIAM.

John Gregory Lambros, proceeding pro se, appeals from an order of the district court denying his post-conviction motion filed pursuant to 28 U.S.C. § 2255. We affirm.

In April, 1976, Lambros and several codefendants were tried on a multiple-count indictment charging an extensive conspiracy to import and distribute cocaine in Minnesota. Lambros was also charged with assaulting federal officers with a deadly weapon at the time of his arrest on the drug charges. After three days of trial before a jury, and after several codefendants at the trial entered guilty pleas, Lambros withdrew previously entered pleas of not guilty and entered guilty pleas to one count of possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1), and one count of assault with a deadly weapon upon a United States Marshal and agents of the Drug Enforcement Administration in violation of 18 U.S.C. §§ 111 and 1114. The guilty pleas were entered pursuant to a negotiated plea agreement, the terms of which were fully set forth in the record at the plea hearing. In return for the guilty pleas, the government agreed to make sentence recommendations and to move for dismissal of all other counts of the indictment. In addition, the United States Attorney advised the defendant and the court as follows:

> It is further our assurance, Mr. Lambros, that we will not pursue any cocaine-related charges against his wife Christina. This is a matter which concerns him and we are satisfied the ends of justice have already been served in her case.

On the day of sentencing, Lambros filed a motion for leave to withdraw his pleas of guilty, on grounds unrelated to his present motion. The motion was denied and Lambros was sentenced to ten years imprisonment on the assault charge and to a concurrent five-year sentence on the drug charge, plus a fine of $10,000 and a three-year special parole term. Both the conviction and the denial of the motion for leave to withdraw the guilty pleas were affirmed by this Court on appeal. *United States v. Lambros*, 544 F.2d 962 (8th Cir. 1976), *cert. denied*, 430 U.S. 930, 97 S.Ct. 1550, 51 L.Ed.2d 774 (1977).

Lambros initiated the present action on May 1, 1979, by filing a motion to vacate sentence and a supporting affidavit. Upon recommendation of a United States Magistrate, the district court denied the motion without holding an evidentiary hearing. This appeal followed.

The sole basis of the motion is Lambros' claim that his 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. In support of his claim, Lambros refers to the government's agreement not to prosecute his wife.[1]

At the plea hearing, both Lambros and his attorney affirmed that the United States Attorney accurately stated the terms of the plea agreement. Lambros was then carefully questioned by the United States Attorney, on behalf of the court, as to the voluntariness of his pleas. Lambros stated clearly that he desired to plead guilty, that his pleas were voluntary and that they were not induced by any threats or promises other than those stated on the record. In addition, Lambros said that he fully understood his rights and the consequences of his plea, admitted that he was guilty of the offenses charged, and stated that he had

1. Lambros does not allege that the government has failed to honor this agreement in any respect. *See Richardson v. United States*, 577 F.2d 447, 449 n.1, 451 (8th Cir. 1978), *cert. denied*, 442 U.S. 910, 99 S.Ct. 2824, 61 L.Ed.2d 276 (1979). The government advises that although Mrs. Lambros was arrested on drug charges along with Lambros, she was not indicted. *See* Brief of Appellee at 11, n.6.

December 27, 1999

John Gregory Lambros
Reg. No. 08436-124
USP Leavenworth
P.O. Box 1000
Leavenworth, Kansas 66048-1000 USA

Clerk
U.S. Court of Appeals for the Eighth Circuit
U.S. Courts & Customs House
1114 Market Street
St. Louis, Missouri 63101
U.S. CERTIFIED MAIL NO. Z-253-381-750

RE: FILING In U.S. vs. LAMBROS, Nos. 99-2746 and 99-2680

Dear Clerk:

Attached for filing is my "APPELLANT JOHN GREGORY LAMBROS' PRO SE REPLY BRIEF TO THE APPELLEE' BRIEF DATED NOVEMBER 30, 1999."

Please find one (1) original and three (3) copies of the above for filing.

Thanking you in advance for your continued assistance.

Happy Holidays,

John Gregory Lambros

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above document was served on the following:

a. Jeffrey S. Paulsen, Assistant U.S. Attorney, District of Minnesota, 600 United States Courthouse, 300 South Fourth Street, Minneapolis, Minnesota 55415;

b. Attorney Maureen Williams, P.O. Box 581304, Minneapolis, Minnesota 55458-1304.

on this 27 day of December, 1999.

John Gregory Lambros, Pro Se
P.O. Box 1000
Leavenworth, Kansas 66048-1000

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

Nos. 99-2746 and 99-2680
MNT

CIVIL BRIEF

UNITED STATES OF AMERICA,

APPELLEE,

vs.

JOHN GREGORY LAMBROS,

APPELLANT.

Appeal from the United States District Court for the District of Minnesota

APPELLANT JOHN GREGORY LAMBROS' PRO SE REPLY BRIEF TO THE APPELLEE' BRIEF DATED NOVEMBER 30, 1999.

John Gregory Lambros
Appellant, Pro Se
Reg. No. 08436-124
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EXHIBIT F.

APPELLANT JOHN GREGORY LAMBROS' PRO SE REPLY BRIEF TO THE APPELLEE' BRIEF DATED NOVEMBER 30, 1999:

Appellant JOHN GREGORY LAMBROS, Pro Se, responds to the government's response brief dated November 30, 1999, as per Appellant's attorney, Maureen Williams, MOTION dated December 17, 1999, which stated, "Appellant's attorney also requests that the appellant be allowed the opportunity to submit a pro se reply brief."

Appellant denies each and every allegation made by the government except as admitted or explained herein.

On May 18, 1999, United States District Court Judge CRABTREE Appellant's Application for a Certificate of Appealability as to the following two (2) issues presented by Appellant within his April 30, 1999, MOTION FOR ISSUANCE OF CERTIFICATE OF APPEALABILITY:

ISSUE ONE (1):

MOVANT WAS DENIED DUE PROCESS BY COURT AS TO SUBJECT MATTER JURISDICTION OVER MOVANT'S JANUARY 2, 1999, §2255 TO VACATE, SET ASIDE, OR CORRECT HIS RESENTENCING ON COUNT ONE (1), THUS WARRANTING APPELLATE REVIEW.

See, Pratt vs. U.S., 129 F.3d 54, 61 - HEAD NOTE 11 (1st Cir. 1997), The First Circuit Court of Appeals stated, "[i]f motion to vacate sentence results in RESENTENCING, prisoner is free, under Antiterrorism and Effective Death Penalty Act, to move for further relief based on errors that transpired in course of RESENTENCING. Title 28 U.S.C.A. §§ 2244(b)(3)(A), 2255.

ISSUE TWO (2):

INEFFECTIVE ASSISTANCE OF COUNSEL AS MOVANT WAS TOLD BY COUNSEL WHO REPRESENTED HIM AT RESENTENCING THAT MOVANT WOULD BE ALLOWED TO FILE A TITLE 28 U.S.C.A. §2255 MOTION AS TO ERRORS THAT TRANSPIRED IN COURSE OF RESENTENCING.

The Government/Appellee presents the following STATEMENT OF THE ISSUE to this Court on page vi within its brief:

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ISSUE ONE (1):

WHETHER THE DISTRICT COURT PROPERLY DISMISSED LAMBROS' THIRD SECTION 2255 PETITION FOR LACK OF JURISDICTION WHERE LAMBROS HAD NOT OBTAINED PERMISSION FROM THE COURT OF APPEALS TO FILE A SUCCESSIVE PETITION.

It should be noted that the government/ Appellee did not present a response to this Appellant's second issue, thus the Government/Appellee, after examining the pleadings, facts, and relief requested by this Appellant, has admitted that no substantial controversy exists and directing such further proceedings in this action to conform with the relief requested by Appellant Lambros WITHIN HIS PRO SE APPEAL BRIEF, dated June 5, 1999, served June 7, 1999.

The Government/Appellee also tries to misdirect this Court within the wording of ISSUE ONE (1) by not stating Appellant Lambros' §2255 was attacking his RESENTENCING. The issue as to the number of §2255's Appellant Lambros has filed is not an issue here only the fact that Appellant is filing his FIRST §2255 as to his RESENTENCING.

APPELLANT LAMBROS SUBMITS THE FOLLOWING BRIEF IN RESPONSE TO THE GOVERNMENT/ APPELLEE' REPLY BRIEF:

Please note that the following brief is identical to Appellant Lambros' June 5, 1999, served June 7, 1999, APPEAL BRIEF. Appellant has submitted same due to the fact that this Court is attempting to deny this Appellant from submitting same and the issue is currently in-front of a three (3) judge panel of this Court. Therefore, this Appellant is using his right and opportunity to submit a pro se reply brief to the Government/Appellee to submit his original June 5, 1999, BRIEF, which appears to be fair play. Thank you.

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STATEMENT OF ISSUES

I. Should the Appellant be freed, under Anti-terrorism and Effective Death Penalty Act, to move for further relief based on errors that transpired in course of resentencing, pursuant to Title 28 U.S.C. §2255.

Pratt v. U.S., 129 F.3d 54 (1st. Cir. 1997)

U.S. v. Davis, 113 F.3d 118 (3rd Cir. 1997)

U.S. v. DeBiasi, 893 F.Supp. 171 (E.D.N.Y. 1995)

Wainwright v. Norris, 958 F.Supp. 426 (E.D. Ark. 1996)

II. Was Appellant's counsel ineffective during resentencing when she informed Appellant that he would be able to move for further relief, pursuant to Title 28 U.S.C. §2255, based on any efforts counsel made in course of resentencing.

U.S. v. Day, 969 F.2d 39 (3rd Cir. 1992)

U.S. v. Morrison, 449 U.S. 361 (1981)

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STATEMENT OF THE CASE

1. The Appellant herein, John Gregory Lambros, was indicted by a United States Grand Jury for the District of Minnesota on May 17,1989. The indictment originally listed five counts against the Appellant. The fifth count of the counts against appellant, however, which charged him with traveling in interstate commerce with intent to carry on in an unlawful activity, was dismissed due to the extradition treaty between Brazil and the United States, as traveling in interstate commerce with intent to carry on in an unlawful activity is not a crime in Brazil.

2. The Appellant pleaded not guilty to these charges and a jury trial commenced on January 4, 1993, in the United States District Court for the District of Minnesota, Fourth Division. On January 15, 1993, the jury found the Appellant guilty on all four counts.

3. The Appellant's Sentencing Hearing was held on January 27, 1994. At that time, the Appellant was sentenced to a mandatory term of life imprisonment on Count One; a term of imprisonment of 120 months on Counts Two and Three; and a term of 360 months imprisonment on Count four. All sentences were to be served concurrently. In addition, the Appellant was sentenced to serve a term of supervised release of eight years, and pay a $200.00 special assessment.

4. September 8, 1995, U.S. Court of Appeals for the Eighth Circuit vacated Count One and remanded for resentencing on that count. See, U.S. vs. LAMBROS, 69 F.3d 848.

5. December 7, 1995, Movant's attorney filed a writ of certiorari on Counts 5, 6, & 8.

6. January 16, 1996, The U.S. Supreme Court denied Movant's writ of certiorari on Counts 5, 6, & 8. See, U.S. vs. LAMBROS, 116 S.Ct. 796.

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7. February 10, 1997, Movant was RESENTENCED on Count One (1). Please note that Movant filed motions to be considered by the Court under Federal Rules of Criminal Procedure, RULE 33 before resentencing that where considered under Title 28 U.S.C. §2255, as expressed in U.S. vs. DIRENZARDO, 880 F.2d 1216 (11th Cir. 1989). Movant objected and the Court would not allow Movant to withdraw his Rule 33 pro se motions. See, ADAMS vs. U.S., 155 F.3d 582 (2nd Cir. 1998) (Key Note 1: at least until it is decided whether a Movant's right to bring a future petition to vacate sentence can be affected by a CONVERSION OR RECHARACTERIZATION of a motion made under some other rule as being under the statute providing for motions to vacate [§2255], DISTRICT COURTS SHOULD NOT UNDERTAKE SUCH RECHARACTERIZATION UNLESS (a) the movant, with knowledge of the potential adverse consequences of such recharacterization, AGREES to have the motion so recharacterized, or (b) the court finds that, notwithstanding its designation, the motion should be considered a motion to vacate [§2255] because of the nature of the relief sought, and OFFERS THE MOVANT THE OPPORTUNITY TO WITHDRAW THE MOTION RATHER THAN HAVE IT SO RECHARACTERIZED [§2255]. See also, U.S. vs. DITTRICH, Criminal No. 95-68, IN THE U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA, ORDER dated and filed December 8, 1998, by U.S. Judge Charles R. Wolle, who stated on page 4 & 5, "[I] agree that the Anti-terrorism and Effective Death Penalty Act of 1996 (AEDPA) casts a new light upon the district court's practice of recharacterizing a pro se litigants motion under some other provision [Rule 33] as a section §2255 motion. This previously harmless practice may now be harmful to a litigant because the AEDPA limits the courts ability to hear SECOND OR SUCCESSIVE §2255 MOTIONS. Dittrich's motion for a new trial [Rule 33] SHOULD NOT HAVE BEEN TREATED AS A SECTION 2255 MOTION and therefore should not have been subject to a certificate of appealability."

8. April 18, 1997, Movant filed what he considered and still considers his FIRST §2255 on Counts 5, 6, & 8, so as to comply with the stringent limitations set forth within the meaning of the 1996 Anti-Terrorism and Effective Death Penalty Act (AEDPA).

9. April 28, 1997, Movant's attorney filed an appeal brief to the U.S. Court of Appeals for the Eighth Circuit on issues raised in the RESENTENCING on Count One (1), February 10, 1997. See, U.S. vs. LAMEROS, Case No. 97-1551 MNM1. Movant requested his attorney to raise the issue as to Movant's RULE 33 Motions being considered as a §2255 at resentencing. When Movant received copy of the appeal brief the issue WAS NOT INCLUDED.

10. May 1, 1997, Judge Kyrper considered Movant's April 18, 1997, §2255 on Counts 5, 6, & 8 to be a second or successive motion within the meaning of Title 28 U.S.C. §2255. The Court also stated:

> (A)lternatively, if the Court is not correct in determining this to be a second or successive petition, the Court finds that it is WITHOUT MERIT for the reasons stated in its February 19, 1997, ORDER.
>
> This petition is dismissed.

What is interesting and must be considered by this court, is the fact that Movant's RULE 33 MOTIONS submitted BEFORE RESENTENCING on February 10, 1997, and found to be WITHOUT MERIT for the reasons stated in the Courts February 19, 1997, ORDER, ARE NOT THE SAME ISSUES ADDRESSED WITHIN MOVANT'S §2255. ALL OF MOVANT'S §2255 ISSUES ADDRESSED INEFFECTIVE ASSISTANCE OF COUNSEL, the elements that ARE ALREADY ADDRESSED WITHIN A §2255. Therefore, it is legally impossible for Judge Kyrper to be legally correct in making such a statement. See, MOLINA vs. RICHE, 686 F.2d 1126, 1130-31 (9th Cir. 1989) (As the Supreme Court noted in KIMMELMAN vs. MORRISON, 477 U.S. 365, 374, (1986), a claim of INEFFECTIVE ASSISTANCE with regard to an issue is "DISTINCT" from any claim concerning the underlying issue itself, "BOTH IN NATURE AND IN THE REQUISITE ELEMENTS OF PROOF." Indeed, the two claims will generally protect different

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...sorts of rights and require different legal analyses. In short, "THE TWO CLAIMS HAVE SEPARATE IDENTITIES AND REFLECT DIFFERENT CONSTITUTIONAL VALUES." Id. at 375; 106 S.Ct. at 2383). As this Court understands, Movant has always maintained that he was innocent as to the crimes stated with the indictment in this action, so as to meet the "ends of justice" standard, if applicable. Also see, U.S. vs. ROBINSON, 8 F.3d 398, 405 (7th Cir. 1993) (The well established general rule is that, absent extraordinary circumstances, the district court should not consider §2255 motions while a direct appeal is pending. . . The rational for the rule is a sound one: "the disposition of the appeal may render the [§2255] motion moot.")

11. May 8, 1997, July 2, 1997, & July 9, 1997. Movant filed motions for leave to amend the Courts May 1, 1997, ORDER, as per Federal Rules of Civil Procedure Rule 15(a), as per movant's §2255.

12. July 31, 1997, the district court denied Movant's motions for reconsideration and for leave to amend. Civil No. 97-942.

13. August 25, 1997, Movant filed a MOTION FOR ISSUANCE OF CERTIFICATE OF APPEALABILITY/PROBABLE CAUSE, as per his §2255. Civil No. 97-942.

14. August 25, 1997, Movant filed NOTICE OF APPEAL as per his §2255. Civil No. 97-942.

15. September 2, 1997, the U.S. Court of Appeals for the Eighth Circuit denied the appeal that Movant's attorney filed as to RESENTENCING on Count One (1). U.S. vs. LAMBROS, Case No. 97-1553 EMMI, that was dated April 28, 1997. Movant's attorney submitted a writ of certiorari on this denial. Movant does not have a date as to the filing of same.

16. September 15, 1997, the Clerk for the Eighth Circuit Court of Appeals wrote Movant and stated that his August 25, 1997, NOTICE OF APPEAL, as per movant's §2255, Civil No. 97-942, will be treated as an application for certificate of appealability in accordance with Rule 22(b) and forwarded to a panel of judges for consideration and given docket number 97-3449-EMMI.

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17. September 30, 1997, Judge Hanser, ORDERED, Movant's CERTIFICATE OF APPEALABILITY, denied, as per his April 18, 1997, §2255 on Counts 5, 6, & 8. Civil No. 97-942.

18. January 12, 1998, the U.S. Supreme Court denied Movant's ATTORNEY'S writ of certiorari as to to Movant's RESENTENCING ON COUNT ONE (1).

19. July 7, 1998, the U.S. Court of Appeals for the Eighth Circuit DENIED Movant's APPLICATION FOR CERTIFICATE OF APPEALABILITY on Movant's April 18, 1997, §2255, as per Counts 5, 6, & 8. Civil No. 97-942.

20. January 2, 1999, Movant filed his pro se petition under Title 28 USC §2255, AS TO RESENTENCING ON COUNT ONE (1) ON JANUARY 10, 1997.

21. February 19, 1999, the government filed OPPOSITION TO MOVANT'S §2255 filed by Movant on January 2, 1999, stating, "Lambros has failed to receive certificate of his successive petition from the Eighth Circuit. As a result, THIS COURT LACKS JURISDICTION and the petition should be summarily denied." The government DID NOT ADDRESS THE MERITS OF THE ISSUES PRESENTED.

22. March 5, 1999, Movant filed his March 2, 1999, TRAVERSE RESPONSE to government opposition response within Movant's January 2, 1999, §2255, as to RESENTENCING on Count One (1) on February 10, 1997. Also attached to Movant's TRAVERSE RESPONSE was Movant's "MOTION FOR PARTIAL SUMMARY JUDGEMENT PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE 55(a), 55(e), & 56(c).

23. April 6, 1999, Judge Hanser DISMISSED Movant's petition under Title 28 U.S.C. §2255, filed on January 2, 1999, as to RESENTENCING on Count One (1) on February 10, 1997, stating, "BECAUSE THE COURT LACKS SUBJECT MATTER JURISDICTION OVER THE PETITION, IT IS DISMISSED."

24. May 3, 1999, Movant filed his April 30, 1999, MOTION FOR ISSUANCE OF CERTIFICATE OF APPEALABILITY and NOTICE OF APPEAL, as to Movant's §2255, filed on January 2, 1999, as to RESENTENCING on Count One (1) on February 10, 1997. Movant raised two (2) issues opposing the courts lack of subject matter jurisdiction.

15. May 19, 1999, Judge Bennet ORDERED that Movant's APPLICATION FOR A CERTIFICATE OF APPEALABILITY IS GRANTED AS TO BOTH ISSUES RAISED IN THE APPLICATION.

26. The Appellant now appeals his GRANTED certificate of appealability as to both issues raised in application.

FACTS STATEMENT

27. The Appellant was arrested in relation to the charges mentioned herein on May 17, 1991, in Brazil. The Appellant was living in Brazil at the time for the purpose of conducting legitimate business. [Trial Transcript, P. 768] Subsequent to his arrest, the Appellant was held in prison in Brazil until he was extradited to the United States on or about June 26, 1991. During the year or so in which the Appellant was held in Brazil, he was forcibly taken to Brasilia, Brazil without an extradition hearing in the State of Rio de Janeiro, Brazil, as per Brazilian law, nor given a bail hearing due to the fact a $50,000 bail had been established by the U.S. Government. In Brasilia, Lambros was held in the same cell as Francisco Tescedino (500 F.2d 270 (1974)) where he was subject to daily incidences of physical and psychological abuse and torture. This abuse and torture was carried out not only by agents of the Brazilian Government but also by agents of the Government of the United States. In addition to the abuse, the Appellant is certain that these agents also IMPLANTED SOME PART OF ELECTRODES INTO HIS BODY FOR PURPOSES OF MONITORING AND CONTROLLING HIS ACTIONS VIA RADIO TELEMETRY. The electrodes have caused the Appellant daily un-tolerable pain and suffering and continue to do so through the present day due to radio telemetry. The Appellant has been able to confirm the presence of these electrodes through the service of X-rays taken at the Federal Medical Center in Rochester, Minnesota. Appellant has forwarded copy of the x-ray confirming the presence of these electrodes to doctors in Sweden, who have also confirmed the presence of foreign bodies in Appellant John Gregory Lambros' skull. Swedish doctors have released the results of there findings as to foreign bodies in Lambros' skull to the United Nations and the Swedish Government to be included as part of Swedish study in outlawing brain control implants to persons incarcerated in Sweden. Since the late 1950's persons incarcerated in Sweden have been implanted with brain control implants as have many babies without the permission of the persons.

28. Throughout the Appellant's trial he continuously denied any involvement whatsoever with the sale or distribution of cocaine. The Appellant now reaffirms his position that he has never sold or distributed cocaine, only marijuana, and therefore should not have been found guilty of these charges.

29. Appellant's attorney Collis F. Colpet stated to Appellant during the course of representing Appellant, that he would be able to raise any issues and/or errors that transpired in the course of REPRESENTING within Movant's Title 28 U.S.C.A. §2255, Motion to Vacate, Set Aside, or Correct, After she filed a direct appeal.

30. Appellant's Attorney at REPRESENTING refused to file issues that Appellant requested her to file within the direct appeal.

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ARGUMENT

I. SHOULD THE APPELLANT BE FREE, UNDER ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT, TO MOVE FOR FURTHER RELIEF BASED ON ERRORS THAT TRANSPIRED IN COURSE OF RESENTENCING, PURSUANT TO TITLE 28 U.S.C. §2255.

The Appellant asserts that he was denied due process by the Court as to subject matter jurisdiction over Appellant's January 2, 1999, §2255 to vacate, set aside, or correct his RESENTENCING on Count One (1).

FACTS:

31. Movant was resentenced on Count One (1) on February 10, 1997, IN HOVD. An order vacating a sentence requires the district judge to resentence as if sentencing de novo. See, U.S. vs. MALDONADO, 996 F.2d 598, 599 (2nd Cir. 1993) ("[W]hen a sentence has been vacated, the defendant is placed in the same position as if he had never been sentenced."); cf. U.S. vs. TERACHAN, No. 93-30004, 1994, WL 32637 (when sentence is vacated and remanded, remand "WIPED THE SLATE CLEAN AND THE DISTRICT COURT WAS REQUIRED TO SENTENCE FROM SCRATCH ON A TABULA RASA."), quoting, U.S. vs. BRIGGS, 843 F.Supp. 171, 178-79 (E.D.N.Y. 1995).

32. Under "SENTENCING PACKAGE DOCTRINE," which is usually applied on direct appeal, RESENTENCING is allowed on ALL COUNTS following reversal of ONE on direct appeal when multicount conviction predates aggregate sentence or "sentencing package." See, U.S. vs. DAVIS, 112 F.3d 118, 119, Key Note 3, (3rd Cir. 1997); See also, THAYER vs. U.S., 937 F.Supp. 662, 665-66 (E.D.Mich. 1996)(applying SENTENCING PACKAGE DOCTRINE to RESENTENCING under §2255), DAVIS, 112 F.3d at 123.

33. The District Court stated correctly that Movant's §2255 is successive when this Movant's criminal proceedings is considered AS A WHOLE.

34. The District Court stated correctly that Movant is "TECHNICALLY CORRECT" that Movant's January 2, 1999, §2255, challenging his Count One (1) RESENTENCING is NOT SUCCESSIVE. See, April 6, 1999, ORDER, by Judge Kenner, page 3.

35. Movant's January 2, 1999, §2255, is Movant's FIRST §2255 as to his RESENTENCING on Count One (1) and challenge in respect to those issues, although Movant believes that under the SENTENCING PACKAGE DOCTRINE he should be able to challenge all counts, "THE ENTIRE AGGREGATE SENTENCE."

36. The District Court cited a district court case to support its position "finding that, even if petition was NOT LEGALLY SUCCESSIVE, it was a second petition and court could not entertain it absent court of appeals' authorization." See, WAINWRIGHT vs. NORRIS, 956 F.Supp. 826 (E.D. Ark. 1996).

LAW:

37. PRATT vs. U.S., 129 F.3d 54, 55, (Key Note 1)) (1st Cir. 1997). The First Circuit Court of Appeals stated, "If motion to vacate sentence results in RESENTENCING, prisoner is free, under Antiterrorism and Effective Death Penalty Act, to move for further relief based on errors that transpired in course of RESENTENCING. 28 U.S.C.A. §§ 2244(b)(3)(A), 2255.

CONCLUSION:

38. Movant requests that this Court issue an ORDER stating that Movant's January 2, 1999, §2255 Motion to Vacate, Set Aside, or Correct his RESENTENCING on Count One (1) was filed in an orderly fashion and that the District Court DOES HAVE subject matter jurisdiction over same.

39. Movant requests that this Court remand this case with an ORDER to have the district court rule on the MERITS OF EACH ISSUE within Movant's RESENTENCING on Count One (1), §2255.

40. Movant requests that this court remand this case with an ORDER stating

"on February 10, 1997, Movant Lambros was resentenced on Count One (1), and under the "SENTENCING PACKAGING DOCTRINE," Movant Lambros was entitled to challenge all counts, "THE ENTIRE AGGREGATE SENTENCE." See, U.S. vs. DAVIS, 112 F.3d 118, 119, Key Note 3 (3rd Cir. 1997) and THATER vs. U.S., 937 F.Supp. 882, 885-86 (E.D.Mich. 1996).

II. WAS APPELLANT'S COUNSEL INEFFECTIVE DURING RESENTENCING WHEN SHE INFORMED APPELLANT THAT HE WOULD BE ABLE TO MOVE FOR FURTHER RELIEF, PURSUANT TO TITLE 28 U.S.C. §2255, BASED ON ANY ERRORS COUNSEL MADE IN COURSE OF RESENTENCING.

Movant was denied effective assistance of counsel during his RESENTENCING on Count One (1), as Movant was told by his attorney, Colin F. Caisel, that he would be able to raise any issues and/or errors that transpired in the course of RESENTENCING within Movant's Title 28 U.S.C.A. §2255 Motion to Vacate, Set Aside, or Correct, after she had filed a direct appeal. (Caisel also filed a petition for a writ of certiorari)

FACTS:

41. Movant was resentenced on Count One (1) on February 10, 1997, DE NOVO, and represented by Attorney Colin F. Caisel.

42. During the course of representing Movant as to his RESENTENCING, Attorney Caisel stated that Movant would be able to raise any issues and/or errors that transpired in the course of RESENTENCING within Movant's Title 28 U.S.C.A. §2255 Motion to Vacate, Set Aside, or Correct, after she filed a direct appeal.

43. Movant believes that Attorney Caisels' refusal and/or neglect to file issues that Movant requested her to file, plus the fact that she instructed Movant that he would be able to file a §2255 Motion is ineffective assistance of counsel, as the District Court stated that it lacks subject matter jurisdiction as to Movant's January 2, 1998, §2255, challenge to his Count One (1) RESENTENCING.

DISCUSSION AND/OR THEORY OF LAW:

44. Due to the fact that Movant and this Court are entering a virgin area

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of law as to Movant's right to request further relief, §2255, based on errors that transpired in the course of RESENTENCING due to the Antiterrorism and Effective Death Penalty Act, Movant offers the following legal scenario as to the tailored injury suffered by this Movant when his counsel's representation fell below an objective standard of reasonableness measured by the prevailing professional norms of effective assistance of counsel.

45. This Movant's Sixth Amendment right to counsel accrues at all critical stages in the proceedings after the initiation of formal charges. See, MONAE vs. BURBINE, 475 U.S. 412, 431 (1986), which has been held to include plea negotiations. See, DORIA vs. KEANE, 99 F.3d 492, 496-97 (2nd Cir. 1996) (holding that ineffective assistance of counsel during plea negotiations justified §2254 habeas relief); U.S. vs. DAY, 969 F.2d 39, 44 (3rd Cir. 1992) (holding that §2255 could provide relief where trial counsel was ineffective by giving defendant misunderstood advice about his sentence exposure under the Sentencing Guidelines during plea negotiations); TORO vs. FAIRMAN, 940 F.2d 1065, 1067 (7th Cir. 1991); BUCKMAN vs. WAINWRIGHT, 639 F.2d 262, 263 (5th Cir. 1981).

46. Movant states that his attorney grossly breached her duty as a defense lawyer in a criminal case by offering incorrect information as to Movant's right to file a Title 28 U.S.C.A. §2255, Motion to Vacate, Set Aside, or Correct. Therefore, Movant's attorney fell below the prevailing professional norms.

REASONABLE PROBABILITY THAT THE OUTCOME WOULD BE DIFFERENT:

47. Movant's attorney was aware at RESENTENCING that the district court construed Movant's Federal Rules of Criminal Procedure, RULE 35 motions as Movant's §2255. See, April 8, 1999, ORDER, by District Court, page 2. Therefore, Movant was prejudiced because Attorney Caisel misinformed that Movant could file a §2255 after his RESENTENCING direct appeal as to errors that transpired in

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the course of RESENTENCING. Attorney Caisel's advice affected this Movant's right to file a §2255 as to his RESENTENCING and the outcome of the proceedings would of been different if Movant was informed that he would be barred from filing a §2255 as to his RESENTENCING, as Movant WOULD OF FILED A SUPPLEMENTAL APPEAL BRIEF with Attorney Caisel on direct.

RELIEF:

48. If this Court determines that Movant has suffered a Sixth Amendment violation as to the blatant injustice that has occurred to Movant by his Attorney, Movant thinks, in his limited capacity, that the correct remedy is for this Court to ORDER the district court to RECALL, the February 10, 1999, RESENTENCING OF MOVANT ON COUNT ONE (1) MANDATE AND ISSUE A NEW ONE SO AS NOT TO UPSET MOVANT'S CONVICTION OF COUNT ONE (1) AND/OR THIS APPEARANCE OF IT, SO AS TO AFFORD MOVANT AN OPPORTUNITY TO INVOKE A DIRECT APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT AS TO ISSUES RAISED WITHIN MOVANT'S JANUARY 2, 1999, §2255, CHALLENGING ERRORS THAT TRANSPIRED IN THE COURSE OF RE-SENTENCING. This Movant only requests to be restored to the point where he was RESENTENCED by the District Court.

49. The Supreme Court of the United States has announced that where there has been a finding of ineffective assistance of counsel in a §2255 proceedings, the remedy "should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." See, U.S. vs. MORRISON, 449 U.S. 361, 364 (1981). Those "competing interests" include "the necessity for preserving society's interest in the administration of criminal justice." Id.

CONCLUSION:

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50. Movant requests that this Court certify that Appellant's counsel was ineffective during resentencing when she informed Appellant that he would be able to move for further relief, pursuant to Title 28 U.S.C. §2255, based on any errors counsel made in the course of resentencing.

51. Appellant also requests relief in the restoring of Appellant to the point - BUT NOT FURTHER - where he was RESENTENCED by the district court on Count One (1) SO HE MAY FILE A SUPPLEMENTAL DIRECT APPEAL.

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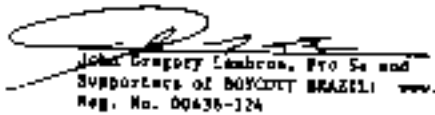
CONCLUSION

52. For the reasons stated herein, John Gregory Lambros respectfully requests that this Honorable Court make an Order stating (a) district court had subject matter jurisdiction as to Appellant's January 2, 1999, §2255; (b) ORDER district court to rule on the merits of each issue within Appellant's §2255; (c) ORDER that Appellant's February 10, 1997, resentencing was under the "SENTENCING PACKAGING DOCTRINE" thus Appellant was entitled to challenge all counts, "THE ENTIRE AGGREGATE SENTENCE;" (d) ORDER that Appellant's counsel was ineffective during resentencing; (e) ORDER that Appellant be restored and/or RECALLED to his February 10, 1997, resentencing and be given an opportunity to invoke a supplemental direct appeal to this court as to issues occurring within his resentencing.

ALL DECLARATIONS WITHIN THIS DOCUMENT ARE UNDER THE PENALTY OF PERJURY, AS PER TITLE 28 U.S.C. §1746.

EXECUTED ON: December 31, 1999



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