June 21, 2001

John Gregory Lambros
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CLERK
U.S. Court of Appeals for the Eighth Circuit
Thomas F. Eagleton Court House
Room 24.329
111 South 10th Street
St. Louis, Missouri 63102
U.S. CERTIFIED MAIL WITH RETURN RECEIPT # 7000-0520-0021-3728-9516

RE: SUCCESSIVE §2255 - CRIMINAL No. 4-99-82, U.S. DISTRICT COURT FOR THE DISTRICT OF MINNESOTA, FOURTH DIVISION.

Dear Clerk:

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

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

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

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

Thanking you in advance for your continued assistance.

Sincerely,

John Gregory Lambros

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

1.

CERTIFICATE OF SERVICE

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

a. MOTION FOR LEAVE TO FILE A SECOND OR SUCCESSIVE MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE UNDER 28 U.S.C. § 2255 BY A PRISONER IN FEDERAL CUSTODY. Dated: June 18, 2001.

b. MOVANT'S MEMORANDUM OF FACT AND LAW IN SUPPORT OF (AFFIDAVIT FORM) MOTION FOR LEAVE TO FILE A SECOND OR SUCCESSIVE MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE UNDER 28 U.S.C. § 2255 BY A PRISONER IN FEDERAL CUSTODY. Dated: June 18, 2001.

and all attachments and exhibits on this 21st DAY OF JUNE, 2001, to the following via U.S. Mail from the U.S. Penitentiary Leavenworth Mail-Room FOR FILING IN THIS ACTION:

1. CLERK
U.S. COURT OF APPEALS FOR THE EIGHTH CIRCUIT
Thomas F. Eagleton Court House
Room 24.329
111 South 10th Street
St. Louis, Missouri 63102
Tel. No. (314) 244-2400

U.S. CERTIFIED MAIL NO. 7000-0520-0021-3728-9516

RETURN RECEIPT REQUESTED

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

2. U.S. ATTORNEY'S OFFICE
600 U.S. Courthouse
300 South 4th Street
Minneapolis, Minnesota 55415

3. INTERNET RELEASE ON: www.brazilboycott.org

4. E-Mail release to Global Human Rights Groups.

John Gregory Lambros, Pro Se
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JOHN [redacted] LAMBROS
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Leavenworth, Kansas 66048-1000 USA

DEFENDANT-MOVANT, PRO SE

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JOHN GREGORY LAMBROS,	*	
Defendant-Movant,	*	CIVIL APPEAL NO. 01-2671 (8th Circuit)
vs.	*	In re: Criminal No. 4-99-82.
UNITED STATES OF AMERICA,	*	U.S. District Court for the District of Minnesota, Fourth Division.
Plaintiff-Respondent.	*	

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

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

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

DATED: June 18, 2001

Respectfully Submitted,

John Gregory Lambros, Pro Se

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

JOHN GREGORY LANDROS,	*	CIVIL APPEAL No. 01-2671 (8th Circuit)
Defendant-Movant,	*	In Re: Criminal No. 4-89-82, U.S. District Court for the District of Minnesota, Fourth Division.
vs.	*	
UNITED STATES OF AMERICA,	*	
Plaintiff-Respondent.	*	MOVANT'S MEMORANDUM OF FACT AND LAW IN SUPPORT OF: (Affidavit Form)

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

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

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

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

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

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

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

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

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

penalty for a crime must be charged in an indictment, submitted to a jury, and proved beyond a reasonable doubt." JONES vs. U.S., 526 U.S. 227, 243 n.6 (1999). Moreover, before JONES virtually every circuit held that the amount of drugs and the type of drugs was not an element of a Title 21 offense but instead was only a sentencing factor. See, e.g., U.S vs. CISNEROS, 112 F.3d 1272 (5th Cir. 1997); U.S. vs. DORLOUIS, 107 F.3d 248 (4th Cir. 1997); U.S. vs. SILVERS, 84 F.3d 1317 (10th Cir. 1996); U.S. vs. MORENO, 899 F.2d 465 (6th Cir. 1990); U.S. vs. GIBBS, 813 F.2d 596 (3rd Cir. 1987); U.S. vs. WOOD, 834 F.2d 1382 (8th Cir. 1987). Indeed, even after JONES, the Eleventh Circuit and others continued to find that the quantity and type of drugs was a sentencing factor. See, U.S. vs. HESTER, 199 F.3d 1287, 1291-92 (11th Cir. 2000); U.S. vs. THOMAS, 204 F.3d 381, 382-83 (2nd Cir. 2000); U.S. vs. JONES, 194 F.3d 1175, 1186 (10th Cir. 1999); U.S. vs. WILLIAMS, 194 F.3d 100, 106-107 (D.C. Cir. 1999). The fact that so many courts consistently followed a practice contrary to the rule announced in APPRENDI is compelling evidence that the rule is NEW. See, CAIN vs. REDMAN, 947 F.2d 817, 821 (6th Cir. 1991). The sheer number of opinions in APPRENDI (Five justices joined in the opinion of the Court and two of these, Justices Thomas and Scalia, issued concurring opinions. Four justices dissented in two opinions) also supports the conclusion that the rule was not compelled by pre-existing precedent. O'DELL, 521 U.S. at 159 ("[t]he array of views expressed in [a Supreme Court decision] itself suggest the rule announced there was, in light of the court's precedent, 'susceptible to debate among reasonable minds'").

4. On February 9, 2001, the Ninth Circuit held in FLOWERS vs. WALTER, 239 F.3d 1096 (Per Curiam) "[T]he Antiterrorism and Effective Death Penalty Act's exception to its prohibition on successive habeas petitions, which allows a prisoner to present a SECOND OR SUCCESSIVE habeas corpus petition when it relies on a new constitutional rule that has been "made retroactive to cases on collateral

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

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

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

APPRENDI CLAIMS FALL WITHIN THE SECOND TEAGUE EXCEPTION:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

RIVERS, at 289.

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

BACKGROUND:

THE CHARGES IN THE INDICTMENT:

17. Movant JOHN GREGORY LAMBROS was named as a defendant in a SECRET INDICTMENT filed on May 17, 1989, in the United States District Court for the District of Minnesota. Indictment number: CR-4-89-82.

18. The indictment charged Movant in five (5) counts of a nine (9) count indictment in violations of Title 21 U.S.C. §§ 846, 841(a)(1), 841(b)(1)(A), 841(b)(1)(B) and Title 18 U.S.C. §§ 2(a), 1952(a)(3), 1952(b)(1). The violations specifically charged:

a. COUNT ONE (1): Conspiracy to possess with intent to distribute in excess of five kilograms of cocaine; all in violation of Title 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(A). From January, 1983 to February, 1988.

b. COUNT FIVE (5): Aiding and abetting with intentionally possess with intent to distribute approximately two kilograms of cocaine; all in violation of Title 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B), and Title 18 U.S.C. § 2(a). From on or about July 6, 1987.

c. COUNT SIX (6): Aiding and abetting with intentionally possess with intent to distribute approximately two kilograms of cocaine; all in violation of Title 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B), and Title 18 U.S.C. § 2(a). From on or about October 23, 1987.

d. COUNT EIGHT (8): Aiding and abetting with intentionally possess with intent to distribute approximately two kilograms of cocaine; all in violation of Title 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B), and Title 18 U.S.C. § 2(a). From on or about December 22, 1987.

e. COUNT NINE (9): Travel in interstate commerce from Minnesota to California with intent to promote and manage unlawful activities, namely, the distribution of cocaine; all in violation of Title 18 U.S.C. §§ 1952(a)(3) and 1952(b)(1). From on or about February 12, 1988.

19. EXHIBIT A: (Criminal Indictment No. 4-89-82)

CASE HISTORY:

20. Movant was arrest in 1991 in Brazil on Indictment number CR-4-89-82, a SECRET INDICTMENT filed on May 17, 1989.

21. The Brazilian Supreme Court extradited Movant on all Counts EXCEPT Count 9, violations of Title 18 U.S.C. §§ 1952(a)(3) and 1952(b)(1), as they are not crimes in Brazil.

22. Movant LAMBROS made his initial appearance infront of the U.S. District Court for the District of Minnesota an pled not guilty.

23. Movant's jury panel and trial started on January 04, 1993. The government moved to dismiss Count 9 due to the Brazilian Supreme Court extradition order.

24. On January 15, 1993, The Honorable Judge Diana E. Murphy, Chief United States District Judge stated within her JURY INSTRUCTIONS to the jury:

> "[A]n indictment is only a formal method of accusing a defendant of a crime. It is not evidence of any kind.
>
> The defendant has pleaded "not guilty" to the charges. This plea puts in issue each of the ESSENTIAL ELEMENTS of the offenses and imposes on the Government the burden of establishing each element beyond reasonable doubt.
>
> The defendant [LAMBROS] contends that he was never involved in any cocaine dealing activities of the Pebbles organization.
>
> You will note the indictment charges that offenses were committed on or about a certain day. The proof need not establish with certainty the exact date. It is sufficient if the evidence establishes beyond a reasonable doubt that an offense was committed on a date reasonably near that alleged.
>
> Also, the evidence NEED NOT PROVE THE ACTUAL AMOUNT OF THE CONTROLLED SUBSTANCE that was part of the alleged transaction OR THE EXACT AMOUNT OF THE CONTROLLED SUBSTANCE ALLEGED AS POSSESSED BY THE DEFENDANT with the intent to distribute.
>
> The Government must prove beyond a reasonable doubt, however, that a MEASURABLE AMOUNT OF THE CONTROLLED SUBSTANCE was, in fact, knowingly and intentionally possessed by the defendant [LAMBROS] with the intent to distribute.

(emphasis added) The above jury instructions are from the January 15, 1993, TRANSCRIPTS OF TRIAL, Volume VII, pages 934 and 935. See, EXHIBIT B.

25. On January 15, 1993, the jury found Movant LAMBROS guilty of Counts 1, 5, 6, and 8.

26. On January 27, 1994, Movant LAMBROS was sentenced to the following terms of imprisonment:

a. **COUNT ONE (1):** Mandatory life sentence without parole.

b. **COUNT FIVE (5):** 120 month sentence.

c. **COUNT SIX (6):** 120 month sentence.

e. **COUNT EIGHT (8):** 360 month sentence.

all sentences are to served concurrently. Movant was also sentenced to serve eight (8) years of supervised release.

27. On September 8, 1995, the U.S. Court of Appeals of the Eight Circuit VACATED Count One (1) and remanded for resentencing on that count. See, U.S. vs. LAMBROS, 65 F.3d 698.

28. December 7, 1995, Writ of Certiorari filed on Count 5, 6, & 8.

29. January 16, 1996, U.S. Supreme Court denied Writ of Certiorari. See, U.S. vs. LAMBROS, 116 S.Ct. 796.

30. February 10, 1997, RESENTENCING on Count One (1). Movant was resentenced to 360 Months on Count One (1). See, February 11, 1997, AMENDED JUDGMENT IN CRIMINAL CASE ORDER by U.S. District Court Judge Robert G. Renner. EXHIBIT C.

31. April 18, 1997, Habeas corpus petition under 28 U.S.C. §2255 filed by Movant.

32. April 28, 1997, direct appeal as to to RESENTENCING.

33. May 1, 1997, Habeas corpus petition dismissed.

34. May 8, 1997, Motion for leave to reconsider/amend May 1, 1997 order.

35. July 31, 1997, District Court denied motion for leave to amend

motion for reconsideration.

36. August 25, 1997, Application for a Certificate of Appealability/ Notice of Appeal filed.

37. September 2, 1997, direct appeal denied.

38. Writ of Certiorari on denial filed.

39. January 12, 1998, Writ of Certiorari denied.

40. July 7, 1998, Court of Appeals for the Eighth Circuit denied application for certificate of appealability dated April 18, 1997.

41. January 2, 1999, Movant filed § 2255 petition regarding RESENTENCING on Count One (1).

42. March 5, 1999, Traverse Response to government opposition dated February 19, 1999.

43. April 6, 1999, Honorable Judge Robert G. Renner, dismissed Movant's § 2255 petition.

44. May 3, 1999, April 30, 1999, motion for issuance of Certificate of Appealability and Notice of Appeal filed.

45. May 19, 1999, Honorable Judge Robert G. Renner, granted Movant's application for a Certificate of Appealability.

46. Order granting Movant's motion for extension of time to file appellate brief, dated September 24, 1999. Movant granted until October 4, 1999, to file appellate brief.

47. November 30, 2000, U.S. Court of Appeals for the Eighth Circuit affirmed the District Court.

48. Movant brought a motion for reconsideration.

49. December 1, 1999, the motion was denied.

50. Movant requested rehearing by the panel.

51. February 1, 2001, the petition for rehearing was denied.

52. May 2, 2001, Movant filed a Writ of Certiorari to the U.S. Supreme Court.

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

ISSUE ONE (1):

THE JURY DID NOT PROVE BEYOND A REASONABLE DOUBT THE TYPE OF DRUGS INVOLVED WITHIN COUNTS 1, 5, 6, AND 8. WHETHER THE DRUG WAS: MARIJUANA, COCAINE, AND/OR UNSPECIFIED AMOUNT OF A "CONTROLLED SUBSTANCE."

53. Movant will prove to this Court that the GRAND JURY, the concurrence of 12 or more jurors, AGREED UPON THE FACT that Movant LAMBROS met on at least three (3) separate occasions and discussed MARIJUANA TRANSACTIONS as referenced in Count One (1), OVERT ACT PARAGRAPH NUMBER 21 in Movant's indictment. Count One (1), OVERT ACT PARAGRAPH NUMBER 21 states:

> "21. On several occasions in January 1988, LAMBROS met with a confidential informant and discussed LAMBROS' interest in narcotics activites, including LAMBROS' interest in the cocaine business."

See, GAITHER vs. U.S., 413 F.2d 1061, 1066 (1969) ("[F]or this reason, 12 ordinary citizens must agree upon an indictment before a defendant is tried on a felony charge. The content of the charges, as well as the decision to charge at all, is entirely up to the grand jury - subject to its popular veto, as it were. The grand jury's decision not to indict at all, or NOT TO CHARGE THE FACTS ALLEGED BY THE PROSECUTORIAL OFFICIALS, is not subject to review by any other body. The sweeping powers of the grand jury over the terms of the indictment entail very strict limitations upon the power of prosecutor or court to change the indictment found by the jurors, or to prove at trial facts different from those charged in that indictment. Since the grand jury has unreviewable power to refuse indictment, and to alter a proposed indictment, PROOF AT TRIAL OF FACTS DIFFERENT FROM THOSE CHARGED CANNOT GENERALLY BE JUSTIFIED ON THE GROUNDS THAT THE SAME FACTS WERE BEFORE THE GRAND JURY

AND THAT THE JURORS MIGHT OR EVEN SHOULD HAVE CHARGED THEM." GAITHER, 413 F.2d at 1066) (emphasis added).

54. The May 17, 1989, GRAND JURY TRANSCRIPT, of testimony by JOHN J. BOULGER, Sergeant with the Minneapolis Police and assigned to the Drug Enforcement Administration Task Force, clearly states on page 33 that Movant LAMBROS met on three (3) separate occasions and discussed MARIJUANA TRANSACTIONS as to Count 1, Overt Act Paragraph Number 21, stating within the grand jury transcript:

a. Q. Earlier, we had talked about your use of an informant by the name of Donald Hendrickson during the course of this investigation. As I understand it, Mr. Hendrickson had some contact with JOHN LAMBROS, correct?

b. A. He did.

c. Q. And in particular, in January of 1988 as REFERENCED IN OVERT ACT PARAGRAPH NUMBER 21, there were some discussions between Don Hendrickson and Mr. LAMBROS concerning drug trafficking, correct?

d. That's correct. They met on three separate occasions and discussed MARIJUANA TRANSACTIONS and other drug transactions.

EXHIBIT B: (GRAND JURY TESTIMONY OF JOHN J. BOULGER, May 17, 1989, Pages 1, 13, 14, and 33)

55. Movant's attorney only supplied Movant with the grand jury testimony of JOHN J. BOULGER, 43 pages. Therefore, Movant is unable to offer exhibits to this court as to the alleged information and/or facts offered to the GRAND JURY as to all MARIJUANA and cocaine allegations by the government. Movant would appreciate this Court to ORDER the U.S. Attorney in Minnesota to forward copy of all GRAND JURY transcripts within this above-entitled action to Movant.

56. Movant LAMBROS testified at trial that he discussed and purchased MARIJUANA from co-defendant LARRY PEBBLES. See, TRIAL TRANSCRIPT, Volume VI, page 755, lines 3 thru 20.

57. During the final argument of U.S. Assistant Attorney DOUGLAS

PETERSON, Peterson states to the jury: "[H]e's dealing cocaine to JOHN LAMBROS. EVEN ACCEPT LAMBROS' TESTIMONY THAT HE'S DEALING MARIJUANA. He has a drug relationship with JOHN LAMBROS." See, Volume VII, page 886, lines 15 thru 17. EXHIBIT E.

58. EVIDENCE PRESENTED TO THE JURY during Movant LAMBROS' trial which supports the receipt of MARIJUANA by Movant may be found on the following pages of the TRIAL TRANSCRIPTS: 140, 141, 516, 529, 532, 533, 557, 755, 758, 761, 766, 769, 771, 794, 803, 804, 805, 844, 856, 857, 862, 863, 864, 867, 886, 910, 911, 922, and 924.

59. Movant LAMBROS offers this Court an INDEX of GRAND JURY, TRIAL, and SENTENCING transcript evidence presented as to MARIJUANA TRANSACTIONS in this case by offering Movant LAMBROS' July 7, 2000, letter to Attorney Gregory J. Stemmos, BRIGGS & MORGAN. The letter is a three (3) page letter that offers the exact page and line within Movant's transcript as to MARIJUANA. EXHIBIT F.

60. Evidence throughout Movant's trial supported convictions for conspiracy to RECEIVE a CONTROLLED SUBSTANCE, Count One (1), and possession AS TO RECEIVING a CONTROLLED SUBSTANCE, Counts five (5), six (6), and eight (8). That controlled substance being MARIJUANA, as Movant ADMITTED during trial. See, U.S. vs. BAKER, 10 F.3d 1374, 1418 (9th Cir. 1993), cert. denied, 130 L.Ed.2d 289 (Defendant in drug distribution case was improperly convicted for distributing four pounds of methamphetamine; evidence showed ONLY that defendant had RECEIVED DRUGS, NOT THAT HE DISTRIBUTED IT, and there was no showing that distribution was in furtherance of any conspiracy); see, U.S. vs. HAROLD, 531 F.2d 704, 705 (5th Cir. 1976)(per curiam) ("To distribute means to DELIVER . . . It does not mean to RECEIVE); Also see, U.S. vs. ONE 1977 - 36 FOOT CIGARETTE OCEAN RACER, 624 F.Supp. 290, 295 (S.D.Fla. 1985)(MARIJUANA is a "CONTROLLED SUBSTANCE" for the purpose of Title 21 U.S.C. 801, et seq.)

61. A GENERAL JURY VERDICT was given by the petit jury in conspiracy Count One (1). The petit jury DID NOT make a "SPECIAL FINDING" as to which "OVERT

ACTS" were committed in an effort to accomplish some object of the conspiracy in Count One (1). Therefore, Movant LAMEROS could of been found guilty of: (a) marijuana; (b) cocaine; or (c) controlled substance. (Remember the GRAND JURY agreed upon the fact three (3) MARIJUANA TRANSACTIONS occurred in OVERT ACT, paragraph 21 in Count 1).

62. CONSPIRACY IS ITSELF A CRIME: It has been clear since BRAVERMAN vs. U.S., 87 L.Ed. 23 (1942), that the allegation, in a single count of conspiracy, of an agreement to commit several crimes is not duplicitous, AS CONSPIRACY IS ITSELF THE CRIME . . . A single conspiracy may have as its objective the distribution of two (2) different drugs without rendering it duplicitous. See, U.S. vs. DALE, 178 F.3d 429, 431 (6th Cir. 1999), quoting U.S. vs. OWENS, 904 F.2d 411, 414-15 (8th Cir. 1990). Also, the DALE court quoted GRIFFIN vs. U.S., 502 U.S. 46, 56-57, 116 L.Ed.2d 371 (1991) ("'When a jury returns a guilty verdict on an indictment charging several acts in the conjunctive, as [defendant's] indictment did, the verdict stands if the evidence is sufficient with respect to any one of the acts charged." . . . Seven of the eight circuits that have directly considered this issue have decided that the PUNISHMENT IMPOSED CANNOT EXCEED THE SHORTEST MAXIMUM PENALTY AUTHORIZED IN THE STATUTES CRIMINALIZING THE MULTIPLE OBJECT IF THE PUNISHMENT AUTHORIZED BY THE CONSPIRACY STATUTE DEPENDS ON THE PUNISHMENT PROVIDED FOR THE SUBSTANTIVE OFFENSES WHICH WERE THE OBJECTS OF THE CONSPIRACY. That is the case here. The maximum sentence for conspiring to distribute a controlled substance to be distributed. 21 U.S.C. § 846. Given the facts in this case, the maximum sentence for a conspiracy to distribute MARIJUANA is five (5) years, 21 U.S.C. § 841(b)(1)(D), while a conspiracy to distribute crack [cocaine] would yield a forty-year maximum sentence, 21 U.S.C. § 841(b)(1)(B). Five courts of appeals [OWENS, 8th Cir] have held that when the jury returns a GENERAL VERDICT to a charge that a conspiratorial agreement covered multiple drugs, the defendant MUST BE SENTENCED AS IF HE DISTRIBUTED ONLY THE DRUG CARRYING THE LOWER PENALTY." DALE, 178 F.3d at 432.

63. A GENERAL JURY VERDICT was given by the petit jury in Counts 5, 6, and 8. The petit jury DID NOT make a "SPECIAL FINDING" as to the type of drug/controlled substance involved. Therefore, Movant LAMEROS could of been found guilty of: (a) marijuana; (b) cocaine; or (c) controlled substance. The petit jury was allowed to retire with factually inaccurate impression as to which controlled substance(S) were part of Counts 5, 6, and 8. See, DRISCOLL vs. DELO, 71 F.3d 701, 715 (8th Cir. 1995) (denied effective assistance of counsel because his lawyer allowed the jury to retire with the factually inaccurate impression that the victim's blood was possibly on Driscoll's knife)

64. Movant LAMEROS testified at trial that he was receiving MARIJUANA from Larry Pebbles not cocaine.

65. The government DID NOT request a "SPECIAL VERDICT" as to the TYPE of drug/controlled substance involved in Counts 1, 5, 6, or 8. It is the responsibility of the government to request a "SPECIAL VERDICT". See, U.S. vs. BARNES, 158 F.3d 662, 672 (2nd Cir. 1998) ("In OROZCO-PRADA we approved of the suggestion of the D.C. Circuit that it is "THE GOVERNMENT'S RESPONSIBILITY TO MAKE SPECIAL VERDICTS." Id. at 1084 (citing BROWN vs. U.S., 299 F.2d 436, 440 n.3 (D.C.Cir.), cert. denied, 8 L.Ed.2d 812 (1962)).

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

67. The JURY INSTRUCTIONS WERE CONFUSING as to the TYPE OF CONTROLLED SUBSTANCE involved in Counts 1, 5, 6, and 8. The following statements by Judge Murphy proves same:

a. "Also, the evidence need not prove the actual amount

of the CONTROLLED SUBSTANCE that was part of the alleged transaction or the EXACT AMOUNT of the CONTROLLED SUBSTANCE alleged as possessed by the defendant with the intent to distribute. The government MUST PROVE beyond a reasonable doubt, however, that a MEASURABLE AMOUNT OF THE CONTROLLED SUBSTANCE was, in fact, knowingly and intentionally possessed by the defendant with the intent to distribute. See, COURT TRANSCRIPTS, Vol. VII, page 935. (emphasis added)

b. To assist you in determing whether there was an agreement to distribute or possess with intent to distribute cocaine, you are advised that the ELEMENTS of those drug crimes are: One, that the defendant, at some point during the time charged in the indictment, distributed, or possessed with intent to distribute, a CONTROLLED SUBSTANCE; See, COURT TRANSCRIPTS, Vol. VII, page 938 (emphasis added).

c. Section 841(a)(1) of Title 21 USC provides, in part, that it shall be unlawful for any person knowingly or intentionally to possess with intent to distribute a CONTROLLED SUBSTANCE. In order to make out the charges in Counts II, III, and IV [Counts 5, 6, & 8], the Government must prove three essential elements beyond a reasonable doubt: One: The defendant John Lambros possessed the CONTROLLED SUBSTANCE described; Two: The defendant knew that the substance was a CONTROLLED SUBSTANCE; See, COURT TRANSCRIPTS, Vol. VII, pages 942 and 943.

d. It is not necessary for the Government to prove that the defendant knew the precise nature of the CONTROLLED SUBSTANCE that was possessed with the intent to distribute. It MUST PROVE beyond a reasonable doubt, however, that the defendant did know that some type of CONTROLLED SUBSTANCE was possessed with intent to distribute. See, COURT TRANSCRIPTS, Vol. VII, pages 943 and 944. (emphasis added)

68. The words "CONTROLLED SUBSTANCE" was used throughout Movant's trial and JURY INSTRUCTIONS. Therefore, viewing the information the jury received during trial and the JURY INSTRUCTIONS as a WHOLE, this Movant can only rationally conclude that the jury was subjected to the following TYPES of labels as to the

[redacted] Movant could of been found guilty of: (a) [redacted]; (b) [redacted]; and/or (c) COCAINE.

69. [redacted]: The RULE OF LENITY is applicable in this action, as the RULE OF LENITY provides that "where text, structure, and history fail to establish that the Government's position is unambiguously correct, [Courts] apply the RULE OF LENITY and resolve the ambiguity in [the defendant's] favor." See, U.S. vs. GRANDERSON, 511 U.S. 39, 54, 127 L.Ed.2d 611 (1994). AMBIGUITY concerning the ambit of criminal statutes should be resolved in FAVOR OF LENITY, HEWIS vs. U.S., 401 U.S. 808, 28 L.Ed.2d 493, 497 (1971), and when choice must be made between two readings of what conduct Congress has made a crime, it is appropriate, BEFORE choosing the harsher alternative, to require that Congress should have spoken in language that is clear and definite, U.S. vs. UNIVERSAL C.I.T. CREDIT CORP., 344 U.S. 218, 97 LEd 260 (1952). Moreover, unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance in the prosecution of crime. See, U.S. vs. BASS, 404 U.S. 336, 349, 30 L.Ed.2d 488, 497 (1971). Also see, U.S. vs. THAN, 234 F.3d 798, 800, Hand Note 16 (2nd Cir. 2000) ("RULE OF LENITY" [redacted] the sentencing court to [redacted] (2) [redacted].)

70. TITLE 21 U.S.C. § 812 - [redacted]: Movant states Section 812(a) of Title 21 states: "[T]here are established FIVE (5) [redacted], to be known as [redacted] I, II, III, IV, and V."

LEGAL CASES TO ASSIST THIS COURT:

71. U.S. vs. NICHOLSON, 231 F.3d 445 (8th Cir. 2000)([redacted]) This Courts ruling in NICHOLSON and facts in NICHOLSON will assist all parties as Movant LAMBROS' case is identical. Movant will highlight the following points from NICHOLSON: (a) JENKINS challenges his sentence under APPRENDI vs. NEW JERSEY, (Id. at 449); (b) JENKINS convicted of conspiracy to distribute CONTROLLED SUBSTANCE,

21 U.S.C. § 846, and of possessing COCAINE BASE with intent to distribute, 21 U.S.C. § 841. (Id. at 449); (c) . . ., the EVIDENCE AT TRIAL did authorize the JURY TO CONCLUDE that he conspired to distribute COCAINE and MARIJUANA. There was TESTIMONY that he bought COCAINE and MARIJUANA for resale . . . The government introduced numerous tapes of drug-related telephone calls . . . This EVIDENCE would support the INFERENCE that Mr. Jenkins CONSPIRED with these people to distribute drugs. (Id. at 454); (d) There was also SUFFICIENT EVIDENCE to uphold the JURY'S GENERAL VERDICT that Mr. Jenkins violated 21 U.S.C. § 841(a) by possessing a CONTROLLED SUBSTANCE with the intent to distribute . . . For purposes of the GENERAL VERDICT, IT DOES NOT MATTER WHICH SUBSTANCE THE JURY BELIEVED MR. JENKINS POSSESSED. (Id. at 454); (e) We cannot rule out the possibility that the JURY followed this instruction and convicted Mr. Jenkins on a finding of MARIJUANA distribution EVEN THOUGH HIS INDICTMENT ALLEGED COCAINE BASE. (Id. at 454); (f) Mr. Jenkins is entitled to that assumption. We held in U.S. vs. HATTIER, that, where a JURY renders a GENERAL VERDICT that may REST ON ANY OF SEVERAL ALTERNATIVE FACTUAL FINDINGS, the court "should sentence the defendant on the ALTERNATIVE THAT YIELDS A LOWER SENTENCING RANGE." (Id. at 454).

HOLDING: (U.S. vs. NICHOLSON, 231 F.3d 445 (8th Cir. 2000)(REMANDING CASE) pages 445, 446, 448, 449, 454, and 455))

72. U.S. vs. SHEPPARD, 219 F.3d 766, 768 fn. 2 (8th Cir. 2000) This Court stated, ". . . Thus, to the extent APPRENDI applies, the jury need only be instructed to find, as it did in this case, that a particular TYPE and QUANTITY of controlled substance was involved in the offense." Also, "To convict a defendant of violating 21 U.S.C. §841(a), or of conspiracy to violate §841(a) in violation of 21 U.S.C. §846, "[t]he government is not required to prove that the defendant actually knew the exact nature of the substance with which he was dealing." Id. at 769.; and "[A]t the instruction conference, SHEPPARD argued that JONES required the court to submit the issue of quantity to the jury as an element of the offense. The Court

declined to do so but, at the government's request, did submit a "SPECIAL FINDING" dealing with DRUG TYPE and QUANTITY. Answering this finding in the affirmative, the jury unanimously found beyond a reasonable doubt that more than 500 grams of methamphetamine were involved in SHEPPARD'S offenses. Because the indictment had alleged this drug type and quantity, and because the district court made a drug quantity finding at sentencing that was consistent with the jury's SPECIAL FINDING, SHEPPARD received all the Fifth and Sixth Amendment protections, that JONES and APPRENDI require." Id. at 769.

73. U.S. vs. LOWE, 2000 WL 1766673 (S.D.W.Va. 11/28/2000)(Judge Goodwin) This case addresses an important issue regarding the application of APPRENDI to cases involving MARIJUANA - NAMELY WHAT IS THE CORRECT STATUTORY MAXIMUM PENALTY FOR A DEFENDANT CONVICTED OF DISTRIBUTING MARIJUANA. The courts have carved out a general rule that, in drug cases where drug quantity is not proved by a jury beyond a reasonable doubt, APPRENDI limits the maximum sentence that can be imposed to the lowest default statutory maximum. Under the complex statutory scheme enacted by Congress, a defendant convicted of distributing MARIJUANA can be sentenced under one (1) of five (5) different statutory maximum penalty schemes - ranging from one (1) year to life imprisonment depending on a number of factors; and, as this case shows, it is easy to confuse which of the statutory provisions apply and under what circumstances. Four (4) of the penalty provisions for MARIJUANA convictions are set forth in 21 U.S.C. §841(b)(1) and the fifth is set forth in § 841(b)(4). In general, the penalty range applicable to particular drugs depends on the quantity of the drug attributable to the defendant. The LOWE case is the first case to have considered and analyzed the provisions of § 841(b)(4) - and it held that the default statutory maximum penalty in MARIJUANA cases where the jury has not determined the drug quantity by proof beyond a reasonable doubt should be ONLY ONE (1) YEAR - NOT THE FIVE (5) YEAR MAXIMUM SPECIFIED IN THE CATCH-ALL PROVISIONS OF 21 U.S.C. § 841(b)(1)(D). After considering the parties' briefs on that issue, Judge Goodwin held

that "in light of APPRENDI, when a defendant is charged with distribution of MARIJUANA without more, the defendant is subject to the statutory maximum penalty of one (1) year of imprisonment pursuant to § 841(b)(4). To expose a defendant to the increased penalties within § 841(b)(1)(D), the government must charge in an indictment, submit to a jury, and prove beyond a reasonable doubt that the amount of MARIJUANA distributed was not small or that the DISTRIBUTION WAS FOR REMUNERATION." Judge Goodwin also noted that "[d]etermining whether § 841(b)(4) or § 841(b)(1)(D) applies also affects whether the defendant is CONVICTED OF A MISDEMEANOR OR A FELONY. As the Fourth Circuit stated in United States vs. WILSON, 284 F.2d 407, 408 (4th Cir. 1960), '[a] fact which distinguishes a violation punishable by imprisonment for not more than one year from a violation punishable by imprisonment for ten years cannot be permitted to rest upon conjecture or surmise.'" The courts conclusion in this case had been suggested by DICTA in U.S. vs. HENDERSON, 105 F.Supp.2d 523 (E.D.N.Va. 2000) (which was also written by Judge Goodwin; and is supported by the Fifth Circuit's later decision in U.S. vs. SALAZAR-FLORES, 238 F.3d 672 (5th Cir. 2001). Although the Fifth Circuit did not thoroughly analyze the issue in that case, it clearly implied that § 841(b)(4) is the proper baseline default for MARIJUANA cases where the quantity is contested.

74. Title 21 U.S.C. § 841(b)(4) states: "Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of MARIJUANA for no remuneration shall be treated as provided in SECTION 844 OF THIS TITLE AND section 3607 of title 18.

75. Title 21 U.S.C. § 844 states penalties of not more than one (1) year for first time offenders; not less than 15 days but not more than two (2) years after a prior drug conviction; not less than 90 days but not more than three (3) years after two or more prior drug convictions.

CONCLUSION TO ISSUE ONE (1):

76. The District Court used COCAINE as the type of drug to sentence

Movant on in Counts 1, 5, 6, and 8, when the jury was not requested to prove the actual or exact amount of the controlled substance during jury instructions, nor requested to make a "SPECIAL FINDING" as to the TYPE of controlled substance by the government or the Court.

77. Evidence presented to the GRAND JURY, PETIT JURY, and the final argument of U.S. Assistant Attorney Douglas Peterson to the jury stating: "[H]e's dealing cocaine to John Lambros. EVEN ACCEPT LAMBROS' TESTIMONY THAT HE'S DEALING MARIJUANA. He has a drug relationship with John Lambros." See, Paragraph 57 and EXHIBIT E, allows the inference that Movant LAMBROS purchased MARIJUANA from the alleged conspiracy.

78. Movant's Fifth and Sixth Amendment protections where violated as the jury did not make a "SPECIAL FINDING" as to the TYPE of controlled substance involved in Counts 1, 5, 6, and 8. Therefore, Movant's sentence must be vacated.

79. Movant states that Title 21 U.S.C. Section 841(b)(4) only allows a STATUTORY MAXIMUM sentence of not less than 90 days but not more than three (3) years due to Movant's prior convictions. Therefore Movant should be remanded back to the District Court for resentencing under Title 21 U.S.C. § 841(b)(4) on Counts 1, 5, 6, and 8 as to the alleged receipt of MARIJUANA.

ISSUE TWO (2):

THE JURY DID NOT PROVE BEYOND A REASONABLE DOUBT THE QUANTITY OF DRUG/CONTROLLED SUBSTANCE INVOLVED WITHIN COUNTS 1, 5, 6, AND 8.

80. The petit jury was instructed by United States District Court Judge Murphy that:

> "[A]lso, the evidence NEED NOT prove the actual amount of the controlled substance that was part of the alleged transaction OR the exact amount of the controlled substance alleged as possessed

by the defendant with the intent to distribute.

The Government must prove beyond a reasonable doubt, however, that a **REASONABLE AMOUNT OF THE CONTROLLED SUBSTANCE** was, in fact, knowingly and intentionally possessed by the defendant [LAMBROS] with the intent to distribute." (emphasis added)

See, **EXHIBIT B**.

81. Therefore, the petit jury was not instructed to find a **QUANTITY** of drug/controlled substance in Counts 1, 5, 6, and 8.

82. A **GENERAL JURY VERDICT** was given by the petit jury that did not include a **"SPECIAL FINDING"** as to the **QUANTITY** of a drug/controlled substance in Counts 1, 5, 6, and 8.

83. On January 27, 1994, Movant LAMBROS was sentenced to the following Titles, Sections and Nature of Offenses:

a. **COUNT ONE (1)**: Mandatory life sentence without parole. Title 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), and 846, as to Conspiracy to possess with intent to distribute and distribution of more than 5 kilograms of cocaine.

b. **COUNTS FIVE (5) and SIX (6)**: 120 month sentence. Title 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B), as to aiding and abetting in the knowing and intentionally possession of cocaine with intent to distribute.

c. **COUNT EIGHT (8)**: 360 month sentence. Title 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B), as to aiding and abetting in the knowing and intentionally possession of cocaine with intent to distribute.

d. All of the above sentences are to served concurrently and Movant was also sentenced to serve **EIGHT (8) YEARS OF SUPERVISED RELEASE**.

84. On September 8, 1995, the Eighth Circuit Court of Appeals vacated Count One (1) and remanded for resentencing on Count One (1). See, U.S. vs. LAMBROS, 65 F.3d 698.

85. On February 10, 1997, Movant LAMBROS was **RESENTENCED** on Count One (1) to a term of **360 MONTHS** without parole to run concurrently with sentences

imposed on Counts 5, 6, and 8. Movant was also sentenced to serve eight (8) years of supervised release. Title 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), and 846, as to the Conspiracy to possess with intent to distribute and to distribute more than 5 kilograms of cocaine. See, EXHIBIT C.

86. Therefore, Movant was sentenced under the penalty statutes:

a. Title 21 U.S.C. § 841(b)(1)(A);

b. Title 21 U.S.C. § 841(b)(1)(B).

LEGAL CASES TO ASSIST THIS COURT:

87. U.S. vs. MURPHY, 109 F.Supp.2d 1059 (D.Minn. 2000) "[A]fter APPRENDI, to the extent that the government seeks to subject a drug offender to the higher penalties under 841(b)(1)(A) or (b)(1)(B), it must submit drug type and QUANTITY TO THE JURY, and the JURY must find those facts beyond a reasonable doubt." Id. at 1064.

88. PARISE vs. U.S., 117 F.Supp.2d 204 (D.Conn. 2000) "[B]y applying the prior conviction provision of §841(b)(1)(A), PARISE was exposed to a greater punishment than he would have received under §841(b)(1)(B), as the former triggered a MANDATORY MINIMUM that required raising the sentence he otherwise would have received under §841(b)(1)(B) and the SENTENCING GUIDELINES. The maximum sentence statutorily authorized in PARISE'S case, given the GUIDELINES, was 235 months. Using a statute under which he was not convicted as authority for enhancing his statute his statute was NOT PROPER. Id. at 209-210. (emphasis added)"

89. U.S. vs. MOVET, 922 F.2d 624, 628-629 (10th Cir. 1991) The Court stated: (a) "[W]e conclude that section 851(a)(1) applies when a defendant's prior convictions have the effect of increasing the MINIMUM or MAXIMUM STATUTORY SENTENCE for the crime charged." Id. at 629; (b) "[T]hese penalty provisions, as amended, specifically provide for INCREASING the MAXIMUM and MINIMUM STATUTORY PENALTIES on the basis of a defendant's prior convictions. See, 21 U.S.C. § 841 (b)(1)(A) (raises statutory minimum on the basis of prior convictions from TEN (10)

to TWENTY (20) YEARS); § 841(b)(1)(B) (raises statutory minimum on from FIVE (5) to TEN (10) YEARS and statutory maximum from FORTY (40) to LIFE); § 841(b)(1)(C) (raises statutory maximum from TWENTY (20) to THIRTY (30) YEARS). Thus, section 841 establishes additional penalties for recidivists, and section 851 provides a measure of protection from their harsh effects." Id. at 628. (emphasis added).

CONCLUSION:

90. Therefore, to the extent APPRENDI applies, the jury was instructed NOT TO MAKE A FINDING of the actual amount of the controlled substance that was part of the alleged transaction or the exact amount of the controlled substance alleged as possessed by Movant LAMBROS with intent to distribute. See, U.S. vs. SHEPPARD, 219 F.3d 766, 768 n.2, 769 (8th Cir. 2000)(The jury's SPECIAL FINDING dealing with drug TYPE and QUANTITY of methamphetamine was all that JONES and APPRENDI required for FIFTH and SIXTH AMENDMENT protections.)

91. Movant LAMBROS' FIFTH and SIXTH AMENDMENT protections where violated as the jury did not make a SPECIAL FINDING as to the QUANTITY of controlled substances involved in Counts 1, 5, 6, and 8. Movant's convictions must be vacated and he must be resentenced under the correct statute.

92. Movant states that two (2) different types of CONTROLLED SUBSTANCES are alleged within Movant's indictment and offered to the jury as evidence. See, ISSUE ONE (1). Those controlled substances being MARIJUANA and COCAINE.

93. For the sake of this argument, as to QUANTITY, Movant believes that this Court must vacate Movant's sentence under the RULE OF LENITY as the lower statutory maximum for MARIJUANA applies. The maximum sentence in a MARIJUANA case where no threshold quantity is found is five (5) years, Title 21 U.S.C. § 841(b)(1)(D) and Movant believes after an evidentiary hearing, Movant would be sentenced under Title 21 U.S.C. § 841(b)(4) (See, Paragraph 79 for statutory maximum on § 841(b)(4)).

94. If this Court, after evaluating Issue One (1), decides that Movant Lambros is responsible for receiving a "CONTROLLED SUBSTANCE," conspiracy to distribute and distribution of an unspecified amount of an unspecified controlled substance, as defined by Title 21 U.S.C. § 841(a)(1) and § 846, Movant LAMBROS should be sentenced under Title 21 U.S.C. § 841(b)(3). The RULE OF LENITY would allow same, as Movant can only be attributed with an unspecified amount of a schedule V controlled substance, which carries a term of imprisonment of not more than one (1) year, or two (2) years with a prior conviction.

ISSUE THREE (3):

THE DISTRICT COURT ENHANCED MOVANT'S TERM OF SUPERVISED RELEASE, THAT WERE NOT CALCULATED IN ACCORDANCE WITH APPRENDI BUT, RATHER, WERE BASED UPON DRUG QUANTITY FOUND BY TRIAL JUDGE BY PREPONDERANCE OF THE EVIDENCE. TITLE 18 U.S.C.A. SECTION 3583(b)(2).

95. Movant was sentenced to a term of SUPERVISED RELEASE of eight (8) years on Counts 1, 5, 6, and 8.

96. The maximum term of SUPERVISED RELEASE allowable by STATUTE for drugs/controlled substances which DOES NOT require some showing of drug amount is THREE (3) YEARS. See, Title 18 U.S.C. Section 3583(b)(2) (providing, in the default supervised release statute, for a term of supervised release of "NOT MORE THAN THREE (3) YEARS" for a CLASS C OR CLASS D FELONY). See, U.S. vs. MESRACK, 225 F.3d 556, 578 (5th Cir. 2000), cert. denied, 148 L.Ed. 2d 716.

97. A violation of § 841(b)(1)(C) is a CLASS C FELONY, a violation of § 841(b)(1)(D) is a CLASS D FELONY, and a violation of § 841(b)(4) is a CLASS A MISDEMEANOR. See, Title 18 U.S.C. § 3559(a). Under Title 18 U.S.C. § 3583(b)(2), the MAXIMUM term of SUPERVISED RELEASE for a CLASS C or D FELONY is three (3) years.

98. Movant believes he should be resentenced for a violation of § 841(b)(4) as to the default STATUTORY MAXIMUM PENALTY IN MARIJUANA cases where the jury has not determined the drug quantity by proof beyond a reasonable doubt, that being ONLY ONE (1) YEAR. See, Paragraph 73 for an overview on U.S. vs. LOWE.

99. Therefore, Title 18 U.S.C. § 3559(a)(6) states, "[O]ne year or less but more than six months, as a CLASS A MISDEMEANOR," and Title 18 U.S.C. § 3583(b)(3) states, "[f]or a CLASS E FELONY, or for a MISDEMEANOR (other than a petty offense), NOT MORE THAN ONE (1) YEAR [of Supervised Release]."

100. The RULE OF LENITY is applicable in this action, as 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. THAS, 234 F.3d 798, 800, Head Note 16 (2nd Cir. 2000); also refer to paragraph 69.

CONCLUSION AS TO ISSUE THREE (3):

101. WHEREFORE, Movant LANDROS respectfully requests that this Honorable Court for the above stated reasons VACATE Counts 1, 5, 6, and 8, due to the excessive amount of SUPERVISED RELEASE and resentence Movant to a term of NOT MORE than ONE (1) YEAR OF SUPERVISED RELEASE, as per Title 18 U.S.C. § 3583(b)(3) for a MISDEMEANOR. Movant requests an evidentiary hearing.

ISSUE FOUR (4):

> THE DISTRICT COURT ENHANCED MOVANT LANDROS' SENTENCE UNDER THE SENTENCING GUIDELINES, THAT WERE NOT CALCULATED IN ACCORDANCE WITH APPRENDI.

102. On March 13, 2001, the United States Court of Appeals for the District of Columbia became the only federal appellate court to hold that APPRENDI

applies to sentencing guideline ENHANCEMENTS under U.S.S.G. § 3B1.1(a) because of their potential to increase sentences. In UNITED STATES vs. FIELDS, No. 99-3113S (D.C.Cir. 3/13/01), the defendant's sentence had been increased by four levels for his leadership role. "Because the fact of leadership role may increase a defendant's sentence beyond the prescribed statutory maximum, APPRENDI applies. Accordingly, the issue of leadership MUST BE CHARGED IN AN INDICTMENT, SUBMITTED TO A JURY, AND PROVED BEYOND A REASONABLE DOUBT." (emphasis added)

103. Movant received the following sentencing guideline ENHANCEMENTS:

a. BASE OFFENSE LEVEL: The base offense level was 32 because the offense involved mor that five (5) kilograms of cocaine. See, Paragraph 33 within Movant PRESENTENCE INVESTIGATION REPORT (hereinafter PSI) dated March 19, 1993. Movant received 32 points.

b. ADJUSTMENT FOR ROLE IN THE OFFENSE: As to Movant's alleged decision-making authority under § 3B1.1(c). Movant received an additional two (2) points. See, Paragraph 36 in PSI.

c. ADJUSTMENT FOR OBSTRUCTION OF JUSTICE: Movant received an additional two (2) points. See, Paragraph 37 in PSI.

104. EXHIBIT H: (Movant LAMEROS' PRESENTENCE INVESTIGATION REPORT, prepared by Jay F. Meyer, U.S. Probation Officer, Minneapolis, Minnesota, Submitted to the Court on March 19, 1993. Pages P.1, P.2, 1, 2, & 7)

CONCLUSION AS TO ISSUE FOUR (4):

105. WHEREFORE, Movant LAMEROS requests that this Court vacate the above listed sentencing guideline ENHANCEMENTS as they where not submitted to the jury and proven beyond a reasonable doubt.

ISSUE FIVE (5):

JANUARY 27, 1994 SENTENCING HEARING OF MOVANT LAMEROS IN THIS ACTION AS TO APPRENDI ISSUES.

106. The following statements where made during Movent's SENTENCING HEARING on January 27, 1994, before the Honoreble Diana E. Murphy, Chief United States District Judge:

a. Page 21: "DEFENDANT LAMBROS: And going back to the pre-sentence investigation, on page 2, I'd like the Court to be aware of No. 2 paragraph. It states that on June 5th LAWRENCE PEBBLES received a 15-MONTH prison sentence. I believe there's some law, Title 18, 3553, [Title 18 U.S.C. §3553(6)], No. 6, saying that there should not be - - that there should be some continuity between the individual who was the kingpin and those underneath. I don't know exactly how to say it."

b. Page 22: "THE COURT: I know what you mean. You're saying that he got off pretty light compared to what you're faced with."

c. Page 22: "DEFENDANT LAMBROS: Well, he's a snitch. And page No. 3, Mr. Pebbles has stated to us THAT HE ADMITS SELLING MARIJUANA TO ME. He made the statement to an outside individual, and I believe Mr. Faulkner was made aware of that information. And I'd like it to go on record that Mr. Pebbles ADMITS SELLING MARIJUANA TO ME, AND I WANTED HIM SUBPOENAED TO STATE THAT. As you know, I'm here for allegedly Mr. Pebbles selling me cocaine. IT WAS FOR MARIJUANA, AS I'VE STATED BEFORE, AND HE MADE THIS STATEMENT."

d. Page 26: "Number 26, "When testifying, Lambros also repeatedly denied dealing cocaine and contradicted much of the incriminating evidence offered by LAWRENCE PEBBLES," and so forth. THERE AGAIN, Mr. Pebbles is WILLING TO BE SUBPOENAED - - and I asked Mr. Faulkner to testify to the fact that he received a fax from Attorney Orren, stating that Mr. Pebbles would be available for SUBPOENA for sentencing, STATING THAT HE DID MARIJUANA BUSINESS, jewelry, and other liquidation business. Is that not true, Mr. Faulkner?"

e. Page 26: "Does the Court want me to answer these questions at this point?"

f. Page 26: "THE COURT: Well, I think it's irrelevent here as

far as - - the record right now is about your objections to the PSI."

g. Page 26: "DEFENDANT LAMBROS: Well, this is my OBJECTION. I want him to verify it."

h. Page 27: "THE COURT: Well, Mr. - -" [interesting is the fact the record does not state what was said in the Court room].

i. Page 27: "DEFENDANT LAMBROS: It says MARIJUANA. I want him to - -" [again the record is blank. WHY?]

j. Page 27: "THE COURT: I just will assume, for the purposes of the RECORD, THAT ALL OF THAT IS TRUE, FOR PURPOSES OF WHAT WE HAVE TO DO TODAY."

107. EXHIBIT I: (Movant LAMBROS' January 27, 1994, SENTENCING TRANSCRIPT, Pages 1, 21, 22, 26, and 27)

CONCLUSION AS TO ISSUE FIVE (5):

108. WHEREFORE, this Movant believes that the above requests by Movant LAMBROS to subpoena LAWRENCE PEBBLES, Movant's attorney refusing to subpoena PEBBLES, and the Courts statement on page 27 stating that the RECORD will state that Movant LAMBROS was purchasing MARIJUANA from PEBBLES will assist this Court in vacating Movant LAMBROS' sentences and resentencing Movant for MARIJUANA convictions.

CONCLUSION

For all of the foregoing reasons, this Court must authorize a SECOND or SUCCESSIVE 28 U.S.C. § 2255 and/or VACATE and remand Movant's convictions and sentences in Counts 1, 5, 6, and 8.

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

EXECUTED ON: June 18, 2001.

Respectfully submitted,

John Gregory Lambros, Pro Se
Reg. No. 00436-124
U.S. Penitentiary Leavenworth
P.O. Box 1000
Leavenworth, Kansas 66048-1000 USA
Web site: www.brazilboycott.org

EXHIBIT INDEX

1. EXHIBIT A: INDICTMENT - Criminal No. 4-89-82, Filed on May 17, 1989. Stamped "SECRET." U.S. District Court for the District of Minnesota.

2. EXHIBIT B: January 15, 1993, TRANSCRIPTS OF TRIAL, Volume VII, pages 825, 934, and 935.

3. EXHIBIT C: February 11, 1997, AMENDED JUDGMENT IN CRIMINAL CASE ORDER by U.S. District Court Judge Robert G. Renner.

4. EXHIBIT D: May 17, 1989, GRAND JURY TESTIMONY TRANSCRIPT OF JOHN J. BOULGER, Pages 1, 13, 14, and 33.

5. EXHIBIT E: Final argument of U.S. Assistant Attorney Douglas Peterson, Volume VII, Page 886. "[I]ven accept Lambros' testimony that he's dealing MARIJUANA."

6. EXHIBIT F: Movant LAMBROS' July 7, 2000, letter to Attorney Gregory J. Steenson, BRIGGS & MORGAN.

7. EXHIBIT G: U.S. vs. NICHOLSON, 231 F.3d 445 (8th Cir. 2000)(REHEARING DENIED) Pages 445, 446, 448, 449, 454, and 455)

8. EXHIBIT H: LAMBROS' PRESENTENCE INVESTIGATION REPORT (PSI), Submitted to the Court on March 19, 1993. Pages F.1, F.2, 1, 2, & 7.

9. EXHIBIT I: January 27, 1994, SENTENCING HEARING TRANSCRIPT, Pages 1, 21, 22, 26, and 27.

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

EXECUTED ON: June 18, 2001

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SECRET

OCDE CASE #
MC-MN-013

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

UNITED STATES OF AMERICA, Plaintiff, v. LAWRENCE RANDALL PEBBLES, RALPH ANDRO, IRA JAY BERINE, GEORGE FREDERICK ANGELO a/k/a "RAPID RICK", JOHN GREGORY LAMBROS, and PAMELA RAE LEMON a/k/a "TAMMY", Defendants.	INDICTMENT 4-89-87 (21 U.S.C §§ 841(a)(1), 841(b)(1)(A), 841(b)(1)(B), 841(b)(1)(C), and 846) (18 U.S.C. §§ 1952(a)(3) and 1952(b)(1)) (18 U.S.C. § 2(a))

THE UNITED STATES GRAND JURY CHARGES THAT:

COUNT I

From on or about the 1st day of January, 1983, to on or about the 27th day of February, 1989, in the State and District of Minnesota, and elsewhere, the defendants,

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

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

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EXHIBIT A.

DEM #160

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

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

OVERT ACTS

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

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

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

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

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

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EXHIBIT A.

5. During the course of the conspiracy, Lambros supplied cocaine to Michael Kenneth Lemon (not indicted herein), brother of Pamela Rae Lemon a/k/a "Tammy."

6. On or about February 22, 1987, Lemon a/k/a "Tammy", acting on behalf of Lambros, met with Tracy Steele Penrod a/k/a Tracy Greer (not indicted herein) at the Sheraton Northwest, Brooklyn Park, Minnesota and Lemon a/k/a "Tammy" delivered a substantial amount of currency to Penrod for the purchase of cocaine.

7. On or about March 4, 1987, Penrod, acting at the direction of Pebbles, used room 118 at the Sheraton Northwest, Brooklyn Park, Minnesota, for the purpose of distributing cocaine.

8. On or about March 4, 1987, Angelo a/k/a "Rapid Rick", Ralph Amaro, a confidential informant, and others, obtained large quantities of cocaine from Penrod, who was acting at the direction of Pebbles.

9. On or about July 8, 1987, Lemon a/k/a "Tammy", acting on behalf of Lambros, picked up approximately two kilograms of cocaine from Penrod, who was acting at the direction of Pebbles, at the Sheraton Northwest, Brooklyn Park, Minnesota.

10. On or about July 11, 1987, Amaro picked up approximately one kilogram of cocaine from Penrod, who was acting at the direction of Pebbles, at the Kings Grant Inn in Boston, Massachusetts.

11. On or about October 24, 1987, Lemon a/k/a "Tammy", acting on behalf of Lambros, picked up two kilograms of cocaine

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from Penrod, who was acting at the direction of Pebbles, at the Sheraton Northwest, Brooklyn Park, Minnesota.

12. On or about October 23, 1987, Phillippi picked up approximately four kilograms of cocaine from Penrod, who was acting at the direction of Pebbles, at the Holiday Inn, Eau Claire, Wisconsin.

13. On or about October 26, 1987, Amaro picked up approximately one and one-quarter kilograms of cocaine from Penrod, who was acting at the direction of Pebbles, in Boston Massachusetts.

14. On or about November 27, 1987, Christine Lenczuk (not indicted herein), acting at the direction of Lambros, delivered cash to Pebbles at the Ramada Inn, East Boston, Massachusetts.

15. During the week of December 14, 1987, Penrod, acting at the direction of Pebbles, transported a substantial quantity of cocaine from Los Angeles, California for distribution at Brooklyn Center, Minnesota, Bettendorf, Iowa, and elsewhere.

16. On or about December 21, 1987, Phillippi picked up approximately four kilograms of cocaine from Penrod at the Ramada Inn in Brooklyn Center, Minnesota.

17. On or about December 22, 1987, Angelo a/k/a "Rapid Rick", with Lambros parked nearby, picked up approximately two kilograms of cocaine from Penrod at the Sheraton Northwest in Brooklyn Park, Minnesota. After receiving the cocaine, Angelo a/k/a/ "Rapid Rick", replacing Lemon as a courier, delivered cash to Penrod after meeting with Lambros.

18. On or about December 22, 1987, Berine travelled from Minneapolis, Minnesota, to Bettendorf, Iowa, where he checked into the Holiday Inn.

19. On or about December 22, 1987, Pebbles travelled to Bettendorf, Iowa, where Pebbles obtained the remaining cocaine from Penrod at the Holiday Inn. Pebbles then moved the cocaine to the hotel room of Berine.

20. On or about December 22, 1987, Pebbles distributed approximately one-half kilogram of cocaine to Penrod at the Holiday Inn in Bettendorf, Iowa, along with instructions for delivery of the cocaine to Thomas Schriever in St. Louis, Missouri. Pebbles distributed the remainder of the cocaine to Peter J. Dokas (not indicted herein), Amero, and others.

21. On several occasions in January 1988, Lambros met with a confidential informant and discussed Lambros' interest in narcotics activities, including Lambros' interest in the cocaine business.

22. On or about January 14, 1988, Lencsuk, acting at the direction of Lambros, delivered cash to Pebbles at the Ramada Inn, East Boston, Massachusetts.

23. On or about February 12, 1988, Lambros and an associate travelled from Minnesota to Anaheim, California, and checked into the Emerald Inn, 1717 Southwest Street, Anaheim, California, in room 1510.

24. On or about February 12, 1988, Lambros delivered approximately $46,000 in cash to Pebbles Emerald Inn, Anaheim, California as an advance payment for cocaine.

EXHIBIT A.

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25. On or about February 20, 1988, Pebbles met with Penrod in Garden Grove, California, to discuss plans for Penrod to transport cocaine for distribution to Schriewer, Lambros, Amero, Van Gundy, Phillippi, and others.

26. On or about February 22, 1988, Pebbles and an associate obtained approximately ten kilograms of cocaine, approximately nine and one-half kilograms of which was transferred by Pebbles to Penrod for delivery to Schriewer, Lambros, Amero, Van Gundy, Phillippi, and others.

27. On or about February 25, 1988, Pebbles, in the presence of Penrod, distributed approximately one kilogram of cocaine to Schriewer at the La Quinta Motel in St. Louis, Missouri.

28. On or about February 27, 1988, Penrod, acting at the direction of Pebbles, distributed approximately one kilogram of cocaine to Van Gundy and two kilograms of cocaine to Phillippi, with the remainder intended for Lambros, Amero, and others.

COUNT II

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

RALPH AMERO,

did travel from the State of Massachusetts to the State of Minnesota with intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of an unlawful activity, namely, the distribution of

EXHIBIT A.

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

COUNT III

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

RALPH AMERO,

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

COUNT IV

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

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

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

COUNT V

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

JOHN GREGORY LAMBROS, and
PAMELA RAE LEMON,

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

COUNT VI

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

JOHN GREGORY LAMBROS, and
PAMELA RAE LEMON,

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

COUNT VII

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

IRA JAY BERINE,

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

EXHIBIT A.

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

COUNT VIII

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

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

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

COUNT IX

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

JOHN GREGORY LAMBROS,

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

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

A TRUE BILL

UNITED STATES ATTORNEY FOREPERSON

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EXHIBIT A-

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

FOURTH DIVISION

United States of America, Plaintiff, -vs- John Gregory Lambros, Defendant.	4-89 Crim. 82(05) Minneapolis, Minnesota January 15, 1993 9:30 o'clock a.m.

VOLUME VII

TRANSCRIPT OF TRIAL

BEFORE THE HONORABLE DIANA E. MURPHY,
CHIEF UNITED STATES DISTRICT JUDGE, and a jury

APPEARANCES:

For the Plaintiff: Douglas R. Peterson, Assistant U. S. Attorney

For the Defendant: Charles W. Faulkner

Court Reporter: Edith M. Fitto
552 U. S. Courthouse
Minneapolis, Minnesota

EXHIBIT B.

Vol. VII 925-961

50.

Now, that concludes Count I, which charges the conspiracy and charges Mr. Lambros with being a member of the conspiracy that's charged there. The remaining counts deal with individual transactions.

Count II. On or about July 8, 1987, in this District, Lambros and Lemon, each aiding and abetting the other, did knowingly and intentionally possess with intent to distribute approximately two kilos of cocaine." And then it gives the statutes.

Count III relates to October 23, '87, and charges "Lambros and Lemon, each aiding and abetting the other, knowingly and intentionally possessing with intent to distribute approximately two kilos of cocaine."

And, finally, Count IV. "On or about the 22nd day of December, '87, in this District, the defendants Angelo and Lambros, each aiding and abetting the other, did knowingly and intentionally possess with intent to distribute approximately two kilos of cocaine."

An indictment is only a formal method of accusing a defendant of a crime. It is not evidence of any kind.

The defendant has pleaded "not guilty" to the charges. This plea puts in issue each of the essential elements of the offenses and imposes on the Government the

burden of establishing each element beyond reasonable doubt.

The defendant contends that he was never involved in any of the cocaine dealing activities of the Pebbles organization.

You will note the indictment charges that offenses were committed on or about a certain day. The proof need not establish with certainty the exact date. It is sufficient if the evidence establishes beyond a reasonable doubt that an offense was committed on a date reasonably near that alleged.

Also, the evidence need not prove the actual amount of the controlled substance that was part of the alleged transaction or the exact amount of the controlled substance alleged as possessed by the defendant with the intent to distribute.

The Government must prove beyond a reasonable doubt, however, that a measurable amount of the controlled substance was, in fact, knowingly and intentionally possessed by the defendant with the intent to distribute.

Count I does charge the defendant with conspiracy to distribute and possess cocaine, a controlled substance, in violation of Title 21, United States Code, Section 846, which provides, in part, that any person who conspires to commit any

UNITED STATES DISTRICT COURT
Third Division District of Minnesota

RECEIVED

UNITED STATES OF AMERICA

v.

Case Number CR 4-89-82(05)

JOHN GREGORY LAMBROS
Defendant.

AMENDED JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, JOHN GREGORY LAMBROS, was represented by Colia Ceisel.

Remanded by the Eighth Circuit Court of Appeals for the limited purpose of imposing sentence on Count 1 consistent with the version of 21 USC 841(b)(1)(ii) in effect as of February 27, 1988, the ending date of the cocaine conspiracy in which defendant participated.

The defendant was found guilty on count(s) 1, 2, 3, & 4 after a plea of not guilty. Accordingly, the defendant is adjudged guilty of such count(s), involving the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 USC 841(a)(1) and [redacted] and 846	Conspiracy to possess with intent to distribute and to distribute more than 5 kilograms of cocaine.		1
21 USC 841(a)(1) and [redacted] and 18 USC 2	Aiding and abetting in the knowing and intentionally poss. of cocaine with intent to distribute.		2,3,4

As imposed on February 10, 1997 by remand of the Eighth Circuit of Appeals, the defendant is sentenced as provided in pages 2 through 4 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $200.00, for count(s) 1,2,3,4, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Dated: February 11, 1997

Defendant's Soc. Sec. No: 476-54-9196
Defendant's Date of Birth: 08/14/50

ROBERT G. RENNER, Senior Judge
United States District Court

FEB 11 1997
FILED
FRANCIS E. DOSAL, CLERK
JUDGMENT ENTD

EXHIBIT C.

efendant: JOHN GREGORY LAMBROS
ase Number: CR 4-89-82(05)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned as to ount One for a term of **360 MONTHS** without parole. This sentence to run concurrently with sentences imposed Count 2, 3,and 4. As to Counts Two and Three a sentence of **120 MONTHS** and as to Count Four a sentence **360 MONTHS**. Counts Two, Three and Four to be served concurrently with the sentence as to Count One.

OURT ORDERS that all conditions set forth in the original sentence imposed on January 27, 1994, remain in fect.

The Court makes the following recommendations to the Bureau of Prisons: Defendant be returned to the FCI at evenworth, Kansas.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this Judgment as follows:

Defendant delivered on _____ to _____

_____, with a certified copy of this Judgment.

RTIFIED ORIGINAL AND TRUE COPY IN 4 PAGES.

UNITED STATES MARSHAL

TED: February 11, 1997

By _____
Deputy Marshal

DEPUTY CLERK

Page 1

UNITED STATES OF AMERICA)
)
DISTRICT OF MINNESOTA)

BEFORE A GRAND JURY OF THE UNITED STATES

FOR THE DISTRICT OF MINNESOTA

TESTIMONY OF:

JOHN J. BOULGER

The following is a transcript of testimony of the above witness before a United States Grand Jury for the District of Minnesota on this 17th day of May, 1989, in the United States Courthouse at St. Paul, Minnesota, commencing at 11:51 a.m.

APPEARANCE:

DOUGLAS R. PETERSON

ASSISTANT UNITED STATES ATTORNEY
District of Minnesota

ORIGINAL

43 Total Pgs

CATHERINE FAHY
SYNDICATED REPORTERS
1024 GRAIN EXCHANGE BUILDING
MINNEAPOLIS, MINNESOTA 55415
612-333-6549

EXHIBIT D.

55

B:N 60

13

for us. We utilized electronic surveillance videotape equipment. We recorded telephone calls with the consent of one party. There was no wire tapping done in this case, but the Court allows us to record telephone calls if one of the two parties involved in the telephone call consents to it. So we used tape recorded conversations made by an informant with Mr. Pebbles to get information as to what was going on in the investigation.

We utilized subpoenas to obtain travel records, documents regarding automobiles owned by various people within the group.

We used subpoenas to get hotel records to show where these people were, when they were there, and what calls they were making from the hotel rooms while they were staying in these hotel rooms.

And these things allowed us to kind of put together a general picture of who was involved, what their roles were, what the time frame was for a particular trip that Mr. Pebbles or Miss Greer would make, so we could kind of get an overall picture as to who was in the organization, how frequently they were doing this and how much drugs were involved.

Q The informant who was utilized in the investigation, at least one of them, is a gentleman by the name of Donald Hendrickson, correct?

A That's correct.

Q I'll show you what has been marked as Grand Jury Exhibit G. Is this a transcript of some of the testimony of Donald Hendrickson?

A Yes, sir.

MR. PETERSON: This would not be a transcript that you would have copies of but I'll simply mark a copy here.

THE WITNESS: Yes, sir.

MR. PETERSON: Mr. Foreperson, I would ask that this Grand Jury receive this transcript as it was a transcript of a proceeding before another Grand Jury.

THE FOREPERSON: Okay.

BY MR. PETERSON:

Q The informant, Donald Hendrickson, as I understand it, had contact with Lawrence Pebbles?

A Yes.

Q John Lambros?

A Yes.

Q And also had contact with Tracy Penrod or Tracy Greer?

A That's correct.

Q And I understand that you've also undertaken a number of other interviews of other various witnesses to some of these events?

bills?

A That the cash payments were moneys that had been generated through the sales of cocaine and that Pebbles would have the money delivered to the law office or contact people and ask them to bring money over to the law office because he was frequently out of town and in south Florida or in Brazil or in California and the office needed the cash to run with. So he would ask these individuals to take money over and deliver it to the law office so the bills could be met at the law office.

Q Earlier, we had talked about your use of an informant by the name of Donald Hendrickson during the course of this investigation. As I understand it, Mr. Hendrickson had some contact with John Lambros, correct?

A He did.

Q And in particular, in January of 1988 as referenced in Overt Act Paragraph Number 11, there were some discussions between Don Hendrickson and Mr. Lambros concerning drug trafficking, correct?

A That's correct. They met on three separate occasions and discussed marijuana transactions and other drug transactions.

Q With regard to Mr. Hendrickson's suggestions and proposals, what did Mr. Lambros indicate concerning the nature of his business?

brings forward one trade slip for Lawrence Pebbles.

Before I talk some more about that, keep in mind that you know, through the testimony of Pamela Lemon, that John Lambros' money laundering activities include transferring his assets into Pamela Lemon's name and having the investments put in her name so that they can be reported on her tax return rather than his.

Mr. Lambros in his testimony, of course, disputed that. I leave it to you to decide whether or not to believe Pamela Lemon in that respect. Her testimony was clear. Her testimony was firm.

But Mr. Lambros says, well, there's this trade slip, Defense Exhibit 1 and Defense Exhibit 2. First of all, keep in mind your common sense again. Lawrence Pebbles is a careful guy. He's dealing cocaine to John Lambros. Even accept Lambros' testimony that he's dealing marijuana. He has a drug relationship with John Lambros.

He has all these cash businesses to keep things away from the Government. So Mr. Lambros wants you to believe that Lawrence Pebbles does one stock transaction involving a thousand bucks in his name through the stock firm of one of his primary drug clients. It doesn't make sense.

And it's with that that I ask you, when you deliberate on this issue, to refer to John Lambros' own tax return, the tax return filed in 1988 for tax year 1987, a

July 7, 2000

John Gregory Lambros
Reg. No. 00436-124
U.S. Penitentiary
P.O. Box 1000
Leavenworth, Kansas 66048-1000
Web site: www.brazilboycott.org

Attorney Gregory J. Stenmoe
BRIGGS & MORGAN
2400 IDS CENTER
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Minneapolis, Minnesota 55402
Web site: www.briggs.com
U.S. CERTIFIED MAIL NO. 7099-3220-0003-7350-0943 - RETURN RECEIPT REQUESTED

RE: LAMBROS vs. HAHLBECK, et al.
COUNT ONE (1) MAXIMUM SENTENCE FOR MARIJUANA IS FIVE (5) YEARS
SEE, U.S. vs. DALE, 178 F.3d 429 (6th Cir. 1999)

Dear Mr. Stenmoe:

As you know, the CONSPIRACY within my indictment included the alleged distribution and/or possession of MARIJUANA. Although not stated within my indictment, evidence presented at trial and GRAND JURY testimony offers proof of same. The CONSPIRACY count is count one (1) within my indictment.

U.S. vs. DALE, 178 F.3d 429 (6th Cir. 1999):

In DALE, as in the EIGHTH CIRCUIT, the District Court committed plain error in imposing maximum sentence for conspiracy to distribute crack cocaine, rather than imposing maximum sentence for conspiracy to distribute marijuana, where jury was given enhanced unanimity instructions but returned only a GENERAL VERDICT FORM. This case offers references to EIGHTH CIRCUIT cases needed for this argument.

CONSPIRACY:

Conspiracy is itself the crime. See, DALE, at 431. A single conspiracy may have as its objective the distribution of two different drugs without rendering it duplicitous. See, DALE, at 431.

Seven of the eighth circuits that have directly considered this issue have decided that the punishment imposed [in distribution of Marijuana & cocaine] CANNOT exceed the SHORTEST maximum penalty authorized in the statutes criminalizing the multiple objects [marijuana/cocaine] if the punishment authorized by the CONSPIRACY statute depends on the punishment provided for the substantive offenses which were the objects of the CONSPIRACY. See, DALE, at 432. [Eighth Circuit included]

This is the case in both DALE and LAMBROS. The maximum sentence for conspiracy to distribute a CONTROLLED SUBSTANCE depends on the CONTROLLED SUBSTANCE TO BE DISTRIBUTED. Title 21 U.S.C. § 846. LAMBROS' and DALE's facts are the same, thus the maximum sentence for a conspiracy to distribute MARIJUANA is FIVE (5) YEARS, Title 21 U.S.C. § 841(b)(1)(D).

EVIDENCE PRESENTED TO THE JURY DURING LAMBROS' TRIAL WHICH SUPPORTS THE ALLEGED POSSESSION AND/OR POSSIBLE DISTRIBUTION OF MARIJUANA:

TRIAL AND GRAND JURY TRANSCRIPT EVIDENCE AS TO MARIJUANA:

1. GRAND JURY TESTIMONY OF JOHN J. BOULGER, DEA AGENT: May 17, 1989, at 11:51 a.m., page 33, lines 20 thru 22;

2. Testimony of Larry Pebbles during trial: Volume I, pages 140, 141;

3. SENTENCING TRANSCRIPT: Lambros stating to court at sentencing that he purchased marijuana from Larry Pebbles and Lambros requesting to have PEBBLES subpoenaed to state same again at the sentencing court so he could be sentenced for marijuana. SENTENCING TRANSCRIPT pages 22, 27; (Please note that FAULKNER would not offer the argument and refused to subpoena PEBBLES.)

4. Testimony of JOHN J. BOULGER, DEA Agent: Volume III, page 516, lines 23 thru 25;

5. Testimony of JOHN J. BOULGER, DEA Agent: Volume IV, pages 529, lines 15 thru 18; page 532, lines 23 thru 25; page 533, lines 3 thru 9; page 557, lines 1 thru 7; (Remind us which drugs were involved in those discussions. Two drugs, MARIJUANA AND COCAINE)

6. Testimony of JOHN GREGORY LAMBROS: Volume VI, page 755, lines 3 thru 20; (I admit to the purchase of MARIJUANA); page 758, lines 18 & 19; page 761, lines 4 thru 20; page 766, lines 16 thru 19; page 769, lines 11 & 12; page 771, lines 4 thru 6, 13 thru 14; page 794, lines 8 & 9, lines 12 thru 25; page 803, lines 19 thru 23; page 804, lines 23 thru 25; page 805, lines 1 thru 5;

7. Testimony of JOHN GREGORY LAMBROS: Volume VII, page 844, lines 1 thru 11;

8. Testimony of JOHN J. BOULGER: Volume VII, page 856 & 857. Boulger lies on the stand as to PEBBLES never stating that he sold marijuana to Lambros. Page 862, Boulger admits that PEBBLES is involved in the MARIJUANA business. Page 863, Boulger admits other marijuana deals that PEBBLES was involved in during the CONSPIRACY. Page 864, Boulger again admits MARIJUANA during the investigation and/or CONSPIRACY. Page 867, lines 11 thru 16.

9. FINAL ARGUMENT OF U.S. ASSISTANT ATTORNEY DOUGLAS PETERSON: VOLUME VII, page 886, lines 15 thru 17, "[He's dealing cocaine to John Lambros. EVEN ACCEPT LAMBROS' TESTIMONY THAT HE'S DEALING MARIJUANA. He has a drug relationship with John Lambros]".

10. REBUTTAL BY U.S. ATTORNEY PETERSON: VOLUME VII, page 910, lines 8 thru 10; lines 20 & 21; page 911, lines 3 thru 24; page 922, lines 19 & 20;

11. JURY INSTRUCTIONS BY JUDGE MURPHY: VOLUME VII, starts on page 924.

GENERAL VERDICT FORM was requested by Judge Murphy in my trial as to Count One (1) the Conspiracy Count. Therefore, the above references to pages within my transcripts, that you have copy of, proves that I could only of been sentenced under MARIJUANA, Title 21 U.S.C. § 841(b)(1)(D), A MAXIMUM OF FIVE YEARS INCARCERATION ON COUNT ONE.

Hopefully the above argument will assist you and your research staff as to the negligence by Attorney Faulkner. You may even want to add this letter to your response to Attorney Faulkner's request for SUMMARY JUDGEMENT.

I have attached a copy of U.S. vs. Hill, 178 F.3d 429 (6th Cir. 1999) for your review.

Thanking you in advance for your continued assistance.

Sincerely,

John Gregory Lambros

c:
File

Smith's hypertension did not significantly impair his ability to work.

VI

Finally, the ALJ's finding that any pain or limitation of motion in Mr. Smith's ankle would not prevent him from performing medium work was supported by substantial evidence. There is no indication that the ALJ failed to consider Mr. Smith's most recent X-ray indicating mild to moderate degeneration; indeed, the ALJ expressly found that Mr. Smith's right foot was severely inverted and that he suffered from "slight sclerosis." *See* A.R.27. Nevertheless, the ALJ was entitled to give credence to Dr. Bharti's report, which indicated that Mr. Smith's ambulation was normal despite his impairment. Furthermore, the ALJ properly noted that the claimant had admitted that "this long-standing eversion of the right foot did not prevent him from doing his past work which required prolonged periods of standing and walking." A.R.27. Given this evidence, I cannot conclude that the ALJ's conclusion was patently wrong, even if we would have reached a different conclusion.

Conclusion

Because I believe that the ALJ's conclusion is supported by substantial evidence, and that reasonable minds could differ concerning whether Smith is disabled, I would affirm the ALJ's decision to deny him benefits.

UNITED STATES of America, Appellee,

v.

Debra NICHOLSON, Appellant.

United States of America, Appellee,

v.

Rodney Dewayne Floyd, Appellant.

United States of America, Appellee,

v.

Donald R. Miller, also known as Donnie Miller, Appellant.

United States of America, Appellee,

v.

Frankie Webb, Appellant.

United States of America, Appellee,

v.

Marcus Deshun Sanders, Appellant.

United States of America, Appellee,

v.

Maurice Jerome McDonald, Appellant.

United States of America, Appellee,

v.

Jamo Jenkins, also known as Jaymo Jenkins, Appellant.

Nos. 99-2205EA, 99-3125EA, 99-3358EA, 99-3674EA, 99-3982EA, 99-4194EA and 00-1185EA.

United States Court of Appeals, Eighth Circuit.

Submitted: Sept. 13, 2000.

Filed: Nov. 1, 2000.

Rehearing Denied in No. 99-3125 Nov. 29, 2000.

Rehearing Denied in No. 99-3358 Nov. 30, 2000.

As Corrected Dec. 8, 2000.

Rehearing Denied in No. 00-1185 Dec. 11, 2000.

Defendants were convicted in the United States District Court for the Eastern District of Arkansas, Stephen M. Reasoner, J., on various charges relating to their involvement in drug distribution conspiracy, and they appealed. The Court of Appeals, Richard S. Arnold, Circuit Judge,

EXHIBIT C.

63.

held that: (1) evidence supported convictions; (2) government did not breach plea agreement with respect to sentence recommendation for one defendant; (3) district court did not err in classing second defendant as career offender under Sentencing Guidelines; (4) third defendant was not entitled to acquittal based on alleged variance between indictment and evidence at trial, on theory that evidence failed to reveal a complete "wheel conspiracy;" (5) third defendant was entitled to resentencing on certain charges, to extent that trial court, rather than jury, decided facts necessary to impose sentence beyond statutory maximum; and (6) fourth defendant's sentence had to fall within statutory maximum of five years given ambiguity in jury's factual findings as to whether he distributed marijuana or cocaine base.

Affirmed in part; vacated and remanded in part.

1. Criminal Law ⇐272.1(2)

Government did not breach plea agreement under which it had agreed to request downward departure in sentencing based on defendant's assistance to the prosecution, where court asked whether knowledge of defendant's pretrial conduct had any effect on government's sentence recommendation, and prosecutor stated that he would not recommend probation were it not for the plea agreement; rather than undercutting its own motion for downward departure, prosecutor merely gave a candid response to a question from the court. U.S.S.G. § 5K1.1, p.s., 18 U.S.C.A.

2. Sentencing and Punishment ⇐1696

Even if district court considered defendant's missed pretrial services appointments that occurred before her plea bargain, court did not abuse its discretion in rejecting government's recommendation of probation and instead in sentencing her to 15 months' imprisonment, where defendant actually received a downward departure of more than 50% off bottom end of her sentencing range in spite of conduct on pretrial release that district court described as "awfully near contemptuous."

3. Sentencing and Punishment ⇐414

Court need not ignore relevant evidence at sentencing hearing simply because that evidence may relate to conduct that preceded defendant's plea agreement.

4. Criminal Law ⇐273.1(2)

Whether to approve or reject a plea agreement is a matter confided to sound discretion of the trial court.

5. Conspiracy ⇐47(12)

Conviction for conspiracy to distribute controlled substances was supported by testimony that defendant bought kilogram of cocaine from co-conspirator for $25,000, that he repeatedly bought nine-ounce quantities of crack from second co-conspirator at about $700 per ounce, and that people who buy crack in that quantity are typically reselling it, and by tapes of two telephone conversations in which defendant discussed drug transactions with members of the conspiracy. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 406, 21 U.S.C.A. § 846.

6. Sentencing and Punishment ⇐1304

District court did not err in classing defendant as career offender under Sentencing Guidelines when sentencing him for conspiracy to distribute controlled substances, despite defendant's contention that one of two prior felony convictions on which that categorization was based occurred during course of present conspiracy; there was no evidence that defendant was involved in present conspiracy any earlier than six months after date he was convicted of relevant state offense, and jury's general verdict implicating defendant in conspiracy that began several years before the state conviction did not prove when his own involvement began. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 406, 21 U.S.C.A. § 846; U.S.S.G. § 4B1.1, 18 U.S.C.A.

7. Criminal Law ⇐1134(3)

Court of Appeals would not consider whether judge who issued wiretap order

acted illegally in allowing
mit until indictment before
rly required notice to no
ons whose telephone calls
d under the order, absent
defendant that the postpon
caused him any actual harm

8. Criminal Law ⇐661

Defendant opened the
ny concerning his possess
in connection with his d
refusing to stipulate to h
the firearm, which was fou
sion when he was arres
Evid.Rule 403, 28 U.S.C.A.

9. Conspiracy ⇐43(12)

In prosecution for c
tribute controlled subst
was not entitled to acqui
leged variance between in
dence at trial, based on h
evidence failed to reveal
conspiracy," and that sub
did not connect each "
with the others; even if
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U.S.C.A. § 846.

10. Indictment and Inf

Variance claim, by
contends that evidence
complete "wheel cons
there was insufficient e
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will warrant reversal if
not support the single
fendant was prejudice
tween indictment and p

11. Sentencing and P

Defendant was en
ing on charges of cons
controlled substances
15 pounds of marijuan
imposed life sentence

EXHIBIT C. 1 4

erally attacked his sentence, and government did not contend that application of the decision would be barred by *Teague*, so that issue was not before the Court of Appeals. 28 U.S.C.A. § 2255

17. Conspiracy ⇐47(12)

Evidence supported convictions for conspiracy to distribute cocaine and marijuana, where there was testimony that defendant bought cocaine and marijuana for resale from three co-defendants, and that he introduced a fourth co-defendant to one of those three, and government introduced numerous tapes of drug-related telephone calls between codefendant and a person identified by another codefendant as the defendant. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 406, 21 U.S.C.A. § 846.

18. Drugs and Narcotics ⇐122.2

Evidence supported jury's general verdict that defendant possessed a controlled substance with intent to distribute, where jury heard taped telephone conversation in which a person identified as defendant discussed a recent drug purchase with codefendant, and second codefendant testified that defendant and first codefendant were discussing a purchase of nine ounces of cocaine, and he [illegible] that language of the conversation would have been consistent with a purchase of nine ounces of marijuana. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(a), 21 U.S.C.A. § 841(a).

19. Sentencing and Punishment ⇐975

Defendant's sentences for conspiracy to distribute and possession of controlled substances with intent to distribute had to fall within statutory maximum of five years for each of his convictions, since instructions and evidence would have permitted jury to convict defendant on a finding of marijuana distribution even though his indictment alleged cocaine base, and his conspiracy conviction suffered from the same ambiguity. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401, 406, 21 U.S.C.A. §§ 841, 846.

20. Sentencing and Punishment ⇐935

Facts that determine a defendant's statutory maximum penalty must be found by jury, not the judge.

21. Drugs and Narcotics ⇐122.3

Evidence supported defendant's conviction for aiding and abetting the distribution of cocaine base, even if defendant was not present at actual sale, where defendant admitted that he telephoned his brother in order to help co-defendant arrange a crack purchase, and jury was presented with six tape recordings of conversations between defendant and his brother regarding the transaction, and three tapes of conversations between defendant and co-defendant. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401, 21 U.S.C.A. § 841.

22. Criminal Law ⇐1028(11)

Court of Appeals could not review district court's sentencing decision, where district Court considered exercising its discretion to grant a downward departure in sentencing range but declined to do so.

23. Sentencing and Punishment ⇐797

Where prior convictions are sentenced under separate docket numbers, and there is no formal order of consolidation, convictions are counted separately for purposes of sentencing guideline governing computation of criminal history with respect to prior sentences imposed in unrelated cases. U.S.S.G. § 4A1.2(a)(2), 18 U.S.C.A.

24. Constitutional Law ⇐250.3(1), 278(1)

Sentencing disparity between offenses involving crack and those involving powder cocaine does not violate Due Process and Equal Protection clauses of the 14th Amendment. U.S.C.A. Const.Amend. 14; Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401, 21 U.S.C.A. § 841.

James J. Leastmeister, argued, Little Rock, AR, for Nicholson.

Jimmy Don Eaton, argu
AR, for Floyd.

Mark Alan Jesse, argu
AR, for McDonald.

Danny R. Williams, argu
AR, for Jenkins.

Patrick C. Harris, Assis
ney, argued, Little Rock,
ey), U.S. Attorney, on the
ed States.

Before RICHARD S. A
and FAGG, Circuit Judges

RICHARD S. ARNOL

The following defendant
of the following offenses
ment in an Arkansas drug
ha Nicholson, of conspi
money in violation of 1
Rodney Dewayne Floyd,
distribute controlled subs
§ 846, and of unlawful u
to facilitate a drug trans
§ 843(b); Donald R. Mil
abetting the distribution
21 U.S.C. § 841; Frank
sessing cocaine base wi
distribute, 21 U.S.C. § 84
ing a firearm during a
U.S.C. § 924(c)(1); Mau
Donald, of conspiracy t
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§§ 922(g)(1), 924(a)(2);
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21 U.S.C. § 841; and M
conspiracy to distribut
stances, 21 U.S.C. § 846

On appeal, these
raise various issues.
claims that the Distric
not accepting the gov
mendation of probation
gues that the evidence
not warrant a conspir

EXHIBIT C. 65.

Jimmy Don Eaton, argued, Little Rock AR, for Floyd.

Mark Alan Jesse, argued, Little Rock, AR, for McDonald.

Danny R. Williams, argued, Little Rock, AR, for Jenkins.

Patrick C. Harris, Assistant U.S. Attorney, argued, Little Rock, AR (Paula Casey, U.S. Attorney, on the brief), for United States.

Before RICHARD S. ARNOLD, LAY, and FAGG, Circuit Judges.

RICHARD S. ARNOLD, Circuit Judge.

The following defendants were convicted of the following offenses for their involvement in an Arkansas drug conspiracy: Debra Nicholson, of conspiracy to launder money in violation of 18 U.S.C. § 1956; Rodney Dewayne Floyd, of conspiracy to distribute controlled substances, 21 U.S.C. § 846, and of unlawful use of a telephone to facilitate a drug transaction, 21 U.S.C. § 843(b); Donald R. Miller, of aiding and abetting the distribution of cocaine base, 21 U.S.C. § 841; Frankie Webb, of possessing cocaine base with the intent to distribute, 21 U.S.C. § 841, and of possessing a firearm during a drug offense, 18 U.S.C. § 924(c)(1); Maurice Jerome McDonald, of conspiracy to distribute controlled substances, 21 U.S.C. § 846, of two counts of distributing cocaine base, 21 U.S.C. § 841, and of being a felon in possession of a firearm, 18 U.S.C. §§ 922(g)(1), 924(a)(2); James Jenkins, of conspiracy to distribute controlled substances, 21 U.S.C. § 846, and of possessing cocaine base with the intent to distribute, 21 U.S.C. § 841; and Marcus Sanders, of conspiracy to distribute controlled substances, 21 U.S.C. § 846.

On appeal, these seven defendants raise various issues. Ms. Nicholson claims that the District Court erred in not accepting the government's recommendation of probation. Mr. Floyd argues that the evidence against him did not warrant a conspiracy conviction, disputes his classification as a career offender, and appeals from the denial of a motion to exclude evidence. Mr. McDonald and Mr. Jenkins, among other things, challenge their sentences under *Apprendi v. New Jersey*, — U.S. —, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). Mr. Miller raises a sufficiency-of-the-evidence argument and appeals from the denial of a sentence reduction. Mr. Sanders questions the calculation of his criminal history score, and Mr. Webb attacks the sentencing disparity between offenses involving crack and those involving powder cocaine. We hold that *Apprendi* requires the resentencing of defendants McDonald (except for the life sentence for crack distribution) and Jenkins. In all other respects, we affirm the judgments of the District Court.

I.

[1] Defendant Debra Nicholson appeals from the District Court's denial of a motion for reconsideration of her sentence. She contends that she should have been given probation, as her lawyer requested and the government recommended, instead of fifteen months' imprisonment followed by three years of supervised release. We affirm.

On the basis of the facts stated in her presentence report, adopted in full by the Court below and not challenged on appeal, Ms. Nicholson was liable under the Sentencing Guidelines to be imprisoned for anywhere from three years and one month to three years and ten months. In accordance with Ms. Nicholson's Plea Agreement, however, and in exchange for her service as a government witness, the United States filed a motion under U.S.S.G. § 5K1.1 recommending probation.

At Ms. Nicholson's sentencing hearing, her attorney requested that she receive probation rather than imprisonment because of her status as a single mother. The District Judge first noted that Ms. Nicholson had twice previously received

his case. Shortly after the District Court entered a judgment in Mr. Jenkin's case, he filed a motion that we construe as a motion to set aside his sentence under 28 U.S.C. § 2255. The District Court ruled on that motion some months later, after which point Mr. Jenkins filed a notice of appeal. The notice of appeal was filed within the 60-day time period prescribed in Rule 11 of the Rules Governing Section 2255 Proceedings. Although Mr. Jenkins neglected to appeal his conviction directly, we properly have jurisdiction over the instant appeal from his § 2255 motion. This does not preclude our applying *Apprendi*,[1] because Mr. Jenkins has not previously collaterally attacked his sentence. *Cf. Rodgers v. United States*, 229 F.3d 704 (8th Cir.2000) (*Apprendi* does not apply retroactively to a second or successive § 2255 motion).

[17] Mr. Jenkins argues that both his conviction and his sentence were illegal. We begin with his conviction. Contrary to Mr. Jenkins's position, the evidence at trial did authorize the jury to conclude that he conspired to distribute cocaine and marijuana. There was testimony that he bought cocaine and marijuana for resale from co-defendants Clinton Lewis, William Wadlington, and Maurice McDonald, Tr. 438, 441–42, 1576–77, and that he introduced co-defendant Ricky Rogers to McDonald, Tr. 762. The government introduced numerous tapes of drug-related telephone calls between William Wadlington and someone whom Lewis, having heard the tapes, identified as Mr. Jenkins. Tr. 1682–1686. Clinton Lewis was a party to one of these calls. Tr. 1685. This evidence would support the inference that Mr. Jenkins conspired with these people to distribute drugs.

[18] There was also sufficient evidence to uphold the jury's general verdict that Mr. Jenkins violated 21 U.S.C. § 841(a) by possessing a controlled substance with the intent to distribute. The jury heard a taped telephone conversation in which a person identified as Mr. Jenkins discussed a recent drug purchase with William Wadlington. Clinton Lewis, whom the Court allowed to interpret the slang-filled conversation for the jury, testified that Wadlington and Jenkins were discussing a purchase of nine ounces of cocaine. Tr. 1568. He also said that the language of the conversation would have been consistent with a purchase of nine ounces of marijuana. Tr. 1586–88. For purposes of the general verdict, it does not matter which substance the jury believed Mr. Jenkins possessed.

[19] For sentencing, however, it matters a great deal. The jury was instructed that it could find that Mr. Jenkins violated § 841(a) even if it found "that the controlled substance distributed was not cocaine base, but another controlled substance, either cocaine, marijuana, or PCP."[2] Tr. 2056. We cannot rule out the possibility that the jury followed this instruction and convicted Mr. Jenkins on a finding of marijuana distribution even though his indictment alleged cocaine base. Mr. Jenkins's conspiracy conviction suffers from the same ambiguity. Assuming that the jury based each of its guilty [illegible] upon a finding that Mr. Jenkins conspired to possess, did possess, and intended to distribute nine ounces of marijuana, he would be subject to a maximum sentence of five years on each count. See 21 U.S.C. §§ 841(b)(1)(D), 846.

Mr. Jenkins is entitled to that assumption. We held in *United States v. Nattier* that, where a jury renders a general verdict that may rest on any of several alternative factual findings, the court "should sentence the defendant on the alternative that yields a lower sentencing range." 127 F.3d 655, 661 (1997). Under the Supreme Court's decision in *United States, Nattier* no [illegible] where the verdict' the judge's applic Guidelines within statute. See 523 S.Ct. 1475, 140 L *Edwards* does no different statutory See *Edwards*, 52 1475 (limiting hold not exceed statute di, 120 S.Ct. at 2 *Edwards*). As t and Mr. Jenkins good law.

[20] The Dist case rightly notic had an exception ported a specific able doubt. For the defendant's for money launde him for conspirac dering, despite th general verdict 127 F.3d at 661. however, the jury one finding. In decided, on the that the jury mu kins's connection of crack, and on statutory sentenc that kind and qu ing Tr. at 16. W yds. To the ex eption authorize jury, to find th defendant's stat does not survive role in sentenc outer limits by indictment and simply, facts tha punishment gre legally prescrib Amendment's fi ments' of a sep *prendi*, 120 S.Ct

1. The United States did not contend, either on brief or at the oral argument, that Mr. Jenkins's *Apprendi* argument was not cognizable in a § 2255 petition. In particular, the government did not, at that time, argue that the *Apprendi* point would be barred by *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060 (1989). Whether an *Apprendi* argument is *Teague*-barred thus remains an open question in this Circuit.

2. This instruction was correct, notwithstanding Mr. Jenkins's argument to the contrary.

EXHIBIT C. 67

Court's decision in *Edwards v. United States*, *Nattier* no longer applies to cases where the verdict's ambiguity affects only the judge's application of the Sentencing Guidelines within the limits provided by statute. See 523 U.S. 511, 513–14, 118 S.Ct. 1475, 140 L.Ed.2d 703 (1998). But *Edwards* does not affect a case where different statutory maximums might apply. See *Edwards*, 523 U.S. at 515, 118 S.Ct. 1475 (limiting holding to sentences that do not exceed statutory maximum); *Apprendi*, 120 S.Ct. at 2356 n. 21 (distinguishing *Edwards*). As to a case such as that—and Mr. Jenkins has one—*Nattier* is still good law.

[20] The District Court in the present case rightly noted that the rule in *Nattier* had an exception where the evidence supported a specific finding beyond a reasonable doubt. For example, in *Nattier* itself, the defendant's unambiguous conviction for money laundering justified sentencing him for conspiracy to commit money laundering, despite the ambiguity of the jury's general verdict on his conspiracy count. 127 F.3d at 661. In Mr. Jenkins's case, however, the jury made no such unambiguous finding. Instead the District Judge decided, on the strength of the evidence, that the jury must have accepted Mr. Jenkins's connection with over 1.5 kilograms of crack, and on that basis he applied the statutory sentencing range appropriate to that kind and quantum of drugs. Sentencing Tr. at 15. We disagree with this analysis. To the extent that the *Nattier* exception authorized a judge, rather than a jury, to find the facts that determine a defendant's statutory maximum penalty, it does not survive *Apprendi*. "The judge's role in sentencing is constrained at its outer limits by the facts alleged in the indictment and found by the jury. Put simply, facts that expose a defendant to a punishment greater than that otherwise legally prescribed were [for the Sixth Amendment's framers] by definition 'elements' of a separate legal offense." *Apprendi*, 120 S.Ct. at 2359 n. 10.

Mr. Jenkins's case must be, and is, remanded for resentencing. On remand, his sentences of imprisonment must fall within the statutory maximum of five years for each of his convictions.

V.

The remaining defendants may be considered together.

[21, 22] Mr. Miller raises a sufficiency-of-the-evidence argument regarding his conviction for aiding and abetting the distribution of cocaine base. He admits, however, that he telephoned his brother, Tommy Miller, in order to help Calvin Woodruff arrange a crack purchase. The jury was presented with six tape recordings of conversations between Mr. Miller and his brother regarding the transaction, Ex. 25–81, 25–83, 25–85, 25–86, 25–87, 25–91; Tr. 602–608, and three tapes of conversations between Mr. Miller and Mr. Woodruff, Ex. 25–80, 25–84, 25–82; Tr. 616–620. Mr. Miller's argument appears to be that he was not present at the actual sale. But even if he wasn't, the jury could have found that he aided and abetted it. See *United States v. Atkins*, 473 F.2d 308 (government had a submissible case for aiding and abetting against defendant who arranged but was not present at transaction), *cert. denied*, 412 U.S. 951, 93 S.Ct. 2751, 37 L.Ed.2d 160 (1973). Mr. Miller also argues that his minimal involvement justifies a downward departure from his sentencing range. The District Court considered exercising its discretion to grant a downward departure but declined to do so. We cannot review that decision. *United States v. Sloss*, 162 F.3d 1166 (table), 1998 WL 490182 (8th Cir.1998) (per curiam).

[23] Mr. Sanders claims that the District Court erroneously calculated his criminal history category by adding two points for each of three state felony convictions. According to Mr. Sanders, the three convictions should have been counted as one under U.S.S.G. § 4A1.2(a)(2), because they were informally consolidated

EXHIBIT C.

68.

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

UNITED STATES OF AMERICA

v.

JOHN GREGORY LAMBROS

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

PRESENTENCE INVESTIGATION

Prepared For:

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

Prepared By:

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

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

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

Plea/Verdict:

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

Offense:

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

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

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

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

Statutory Penalty:

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

69.

Defendant's Name: John Gregory Lambros
Docket Number: CR 4-89-82(05)

	Counts 2, 3 and 4: A minimum 10 years imprisonment up to life imprisonment, a minimum 8-year term of supervised release, a fine of up to $4,000,000, and a special assessment of $50 on each count.
andatory Minimum:	YES
lea Agreement:	None.
rrest Date: ustodial Status:	May 17, 1991. Ordered detained; in custody.
etention:	Defendant IS subject to the mandatory detention provisions under 18 U.S.C. § 3143.
etainers:	On June 22, 1992, the U. S. Parole Commission placed a detainer on defendant.
odefendants:	Lawrence Pebbles (01) Ralph Amero (02) Ira Jay Berins (03) George Frederick Angelo (04) Pamela Ray Lamon (05)
ate Report Prepared:	February 24, 1993
ate Revised:	March 19, 1993
ate Submitted to Court:	March 19, 1993
dentifying Data:	
ate of Birth:	August 14, 1950 (age 42)
ace/Sex:	White/Male
ocial Security Number:	476-54-9196
. S. Marshal Number:	00436-124
BI Number:	929 916 H
itizenship:	United States
umber of Dependents:	None
ducational Level:	College Graduate
egal Address:	None
elephone:	None
isposition:	1/27/94: Ct. 1: CBOP life; Ct 2: CBOP 120 months; Ct. 3: CBOP 120 months; and Ct. 4: CBOP 360 months; all counts to run concurrent to each other and to Ct. 1; $200 special assessment; and no fine. In custody.

PART A. THE OFFENSE

Charges and Convictions

1. On May 17, 1989, a 9-count Indictment was filed in the District of Minnesota charging the defendants, Lawrence Randall Pebbles, Ralph Amero, Ira Jay Berine, George Frederick Angelo, John Gregory Lambros, and Pamela Ray Lemon, with the following:

Count 1 charged that on or about January 1, 1983, to February 27, 1988, Lawrence Randall Pebbles, Ralph Amero, Ira Jay Berine, George Frederick Angelo, John Gregory Lambros, and Pamela Ray Lemon with Conspiracy to Distribute in Excess of Five (5) Kilograms of Cocaine, in violation of 21 U.S.C. §§ 846 and 841(a)(1).

Count 2 charged that on March 4, 1987, Ralph Amero Travelled from Massachusetts to Minnesota With the Intent to Carry on in an Unlawful Activity, Namely the Distribution of Cocaine, in violation of 18 U.S.C. §§ 1952(a)(3) and 1952(b)(1).

Count 3 charged that on October 4, 1987, Ralph Amero Possessed With Intent to Distribute Approximately Eight (8) Ounces of Cocaine, in violation of 21 U.S.C. § 841(a)(1).

Count 4 charged that on March 4, 1987, George Frederick Angelo Possessed With Intent to Distribute Approximately One (1) Kilogram of Cocaine, in violation of 21 U.S.C. § 841(a)(1).

Count 5 charged that on July 8, 1987, John Gregory Lambros and Pamela Ray Lemon Aided and Abetted Each Other in the Possession With the Intent to Distribute Approximately Two (2) Kilograms of Cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and 2.

Count 6 charged that on October 23, 1987, John Gregory Lambros and Pamela Ray Lemon Aided and Abetted Each Other in the Possession With the Intent to Distribute Approximately Two (2) Kilograms of Cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and 2.

Count 7 charged that on December 22, 1987, Ira Jay Berine Travelled in Interstate Commerce

from Minnesota to Iowa With the Intent to Carry on in an Unlawful Activity, that is the Distribution of Cocaine, in violation of 18 U.S.C. §§ 1952(a)(3) and 1952(b)(1).

Count 8 charged that on December 22, 1987, George Frederick Angelo and John Gregory Lambros Aided and Abetted Each Other in the Possession With the Intent to Distribute Approximately Two (2) Kilograms of Cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and 2.

Count 9 charged that on February 12, 1988, John Gregory Lambros Travelled in Interstate Commerce from Minnesota to California With the Intent to Carry on in an Unlawful Activity, that is the Distribution of Cocaine, in violation of 18 U.S.C. §§ 1952(a)(3) and 1952(b)(1).

2. On June 5, 1992, Lawrence Randall Pebbles received a 50-month prison sentence in U. S. District Court after he pled guilty to Conspiracy to Distribute Cocaine. This sentence was ordered to run consecutively to a 36-month prison sentence he received on May 11, 1989, for a conviction of Filing False Tax Returns.

3. Charges against Ralph Amero were dismissed in July 1989.

4. Ira Berine pled guilty to a one-count Information charging Use of a Communication Facility While Committing a Drug Offense on May 17, 1991. He was sentenced to 14 months imprisonment.

5. George Frederick Angelo is a fugitive.

6. On December 8, 1989, Pamela Lamon was sentenced to two months imprisonment after she earlier pled guilty to a Superseding Indictment charging Conspiracy to Defraud the Internal Revenue Service.

7. John Gregory Lambros went to trial. The counts in which he was named (Counts 1, 5, 6, and 8) were renumbered as Counts 1, 2, 3, and 4. On January 15, 1993, a jury returned guilty verdicts on all four counts. Count 9 was dismissed by the Government.

8. Since the conspiracy extended past November 1, 1987, the Sentencing Reform Act of 1984 is applicable to Counts 1 and 4.

Related Cases

9. None.

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EXHIBIT B.

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

Adjustment for Acceptance of Responsibility

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

Offense Level Computations — Level

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

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

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

Counts 1 and 4 - Conspiracy to Distribute Cocaine

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

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

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

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

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

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

39. Total Offense Level 36

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

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EXHIBIT B.

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

FOURTH DIVISION

United States of America, Plaintiff, -vs- John Gregory Lambros, Defendant.	4-89 Crim. 82(05) Minneapolis, Minnesota January 27, 1994 3:00 o'clock p.m.

TRANSCRIPT OF PROCEEDINGS
(Sentencing)

BEFORE THE HONORABLE DIANA E. MURPHY,
CHIEF UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: Douglas R. Peterson, Assistant U. S. Attorney

For the Defendant: Charles W. Faulkner

Court Reporter: Edith M. Fitto
552 U. S. Courthouse
Minneapolis, Minnesota

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my benefit. And at this point in time I would ask Mr. Faulkner, at the termination of today's sentencing hearing, to request the Court that he be removed from the case.

THE COURT: Well, there's one thing here, Mr. Lambros, that's important, and the Court of Appeals has a rule, that the lawyer who is present at the time of the trial should file the notice of appeal. Unless the notice of appeal is filed within ten days, you lose your right to appeal.

So Mr. Faulkner should file the notice of appeal. I assume you have no objection to being removed here, Mr. Faulkner?

MR. FAULKNER: No objection, Your Honor.

THE COURT: Okay. So I grant your motion, Mr. Lambros. I know that you're indigent. I will see that another attorney is appointed to represent you on appeal, but Mr. Faulkner will be charged with the responsibility of seeing that the notice of appeal is filed within the ten days.

MR. FAULKNER: The notice is prepared, Your Honor, and will be filed.

THE COURT: Okay.

DEFENDANT LAMBROS: And going back to the presentence investigation, on page 2, I'd like the Court to be aware of No. 2 paragraph. It states that on June 5th Lawrence Pebbles received a 15-month prison sentence.

I believe there's some law, Title 18, 3553, No. 6,

saying that there should not be -- that there should be some continuity between the individual who was the kingpin and those underneath. I don't know exactly how to say it.

THE COURT: I know what you mean. You're saying that he got off pretty light compared to what you're faced with.

DEFENDANT LAMBROS: Well, he's a snitch. And page No. 3, Mr. Pebbles has stated to us that he admits selling marijuana to me. He made the statement to an outside individual, and I believe Mr. Faulkner was made aware of that information. And I'd like it to go on record that Mr. Pebbles admits selling marijuana to me, and I wanted him subpoenaed to state that.

As you know, I'm here for allegedly Mr. Pebbles selling me cocaine. It was for marijuana, as I've stated before, and he made this statement. And Mr. Faulkner was made aware of the fact. I believe DEA agents stated that Pebbles never sold me marijuana. That has to do with paragraph 12.

Mr. Angelo is in here. Mr. Angelo was a client of mine when I was in the investment banking business. I did not deal drugs with Mr. Angelo.

On page 4, paragraph 16, it talks about Tracy Greer, stating that she met me at the Sheraton. Tracy Greer misidentified me on the stand during the court proceedings. Again, they say in the presentence investigation that she met

nightclub prior to going to work for Mr. Pebbles. There would be no reason whatsoever for me not to speak to Margaret Duval.

I mean, it was convenient for the Government to put that in there. Funds were dropped off. They were for legal services by Mr. Pebbles. But I've known Ms. Duval for quite some time. And, yes, she did also visit my offices in the IDS, where she dropped off funds for options trading with Mr. Pebbles.

Number 26, "When testifying, Lambros also repeatedly denied dealing cocaine and contradicted much of the incriminating evidence offered by Lawrence Pebbles," and so forth. Then, again, Mr. Pebbles is willing to be subpoenaed -- in fact, asked to be subpoenaed -- and I asked Mr. Faulkner to testify to the fact that he received a fax from attorney Jeff Orr, stating that Mr. Pebbles would be available for subpoena for sentencing, stating that he did marijuana business, jewelry, and other liquidation business.

Is that not true, Mr. Faulkner?

MR. FAULKNER: Does the Court want me to answer these questions at this point?

THE COURT: Well, I think it's irrelevant here as far as -- the record right now is about your objections to the PSI.

DEFENDANT LAMBROS: Well, this is my objection. I want him to verify it.

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THE COURT: Well, Mr. --

DEFENDANT LAMBROS: It says marijuana. I want him to --

THE COURT: I just will assume, for purposes of the record, that all of that is true, for purposes of what we have to do today.

DEFENDANT LAMBROS: And on page 7 it talks about committing perjury. Mr. Peterson is saying I don't have implants. Yet the Court won't let me have an MRI. May 6th, I went to Abbott-Northwestern Hospital.

THE COURT: Okay, let's not get into that. I just issued another order on it. I know that you disagree with it, but let's not get into that now.

DEFENDANT LAMBROS: Okay. Number 36, I exercised authority over individuals. I didn't exercise authority over anybody, because I wasn't doing cocaine business. So I disagree with the enhancement of two points.

Number 40 talks about my previous convictions. As to constitutional law in Brazil, the specialty doctrine applies; thus, all previous offenses are not applicable here.

I was arrested on the parole violation warrant. The Supreme Court in Brazil threw it out, because it was not applicable. If you look in the treaty of extradition between the United States and Brazil, you will notice that any offense has to be dealt with in a special --

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