June 12, 2001

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

CLERK
U.S. Court of Appeals for the Eighth Circuit
Thomas F. Eagleton Court House
Room 24.329
111 South 10th Street
St. Louis, Missouri 63102
U.S. CERTIFIED MAIL WITH RETURN RECEIPT # 7000-0520-0021-3724-5277

RE: SUCCESSIVE §2255 - Criminal No. 3-76-17, U.S. District Court for the District of Minnesota.

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 AFFRENDI vs. NEW JERSEY, 120 S.Ct. 2348 (2000).

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

Thanking you in advance for your continued assistance.

Sincerely,

John Gregory Lambros

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

CERTIFICATE OF SERVICE

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

a. MOTION FOR LEAVE TO FILE A SECOND OR SUCCESSIVE MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE UNDER 28 U.S.C. §2255 BY A PRISONER IN FEDERAL CUSTODY. Dated: June 08, 2001;

b. MOVANT'S MEMORANDUM OF FACTS 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 08, 2001.

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

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

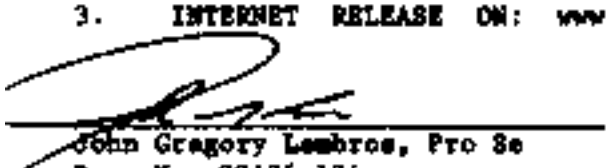
U.S. CERTIFIED MAIL NO. 7000-0520-0021-3724-5277

RETURN RECEIPT REQUESTED

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

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

3. INTERNET RELEASE ON: www.brazilboycott.org



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JOHN GREGORY LAMBROS
Prisoner # 00436-124
U.S. Penitentiary Leavenworth
P.O. Box 1000
Leavenworth, Kansas 66048-1000

DEFENDANT-MOVANT, PRO SE

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JOHN GREGORY LAMBROS,	*	
Defendant-Movant,	*	CIVIL APPEAL NO. 01-2703 (8th Circuit)
vs.	*	In Re: Criminal No. 3-76-17, United States District Court for the District of Minnesota.
UNITED STATES OF AMERICA,	*	
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 08, 2001

Respectfully Submitted,

John Gregory Lambros, Pro Se

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UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

JOHN GREGORY LAMMOS,	*	CIVIL APPEAL No. 01-2703 (8th Circuit)
Defendant-Movant,	*	In Re: Criminal No. 3-76-17. United States District Court for the
vs.	*	District of Minnesota.
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 LAMMOS, and hereby moves this Honorable Court for leave to file a second or successive motion to vacate, set aside or correct sentence under 28 U.S.C. §2255 by a prisoner in federal custody. This motion is brought pursuant to 28 U.S.C. §2244(b) and §2255, and is based on a new rule of constitutional law recently announced on June 26, 2000 by the United States Supreme Court in APPRENDI vs. NEW JERSEY, 120 S.Ct. 2348 (2000), that was previously unavailable, and requires retroactive application to cases on collateral review.

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

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

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

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

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(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 1178, 1186 (10th Cir. 1999); U.S. vs. WILLIAMS, 194 F.3d 100, 106-107 (D.C.Cir. 1999). The fact that so many courts consistently followed a practice contrary to the rule announced in APPRENDI is compelling evidence that the rule is NEW. See, CAIN vs. REDMAN, 947 F.2d 817, 821 (6th Cir. 1991). The sheer number of opinions in APPRENDI (Five justices joined in the opinion of the Court and two of these, Justices Thomas and Scalia, issued concurring opinions. Four justices dissented in two opinions.) also supports the conclusion that the rule was not compelled by pre-existing precedent. O'DELL, 521 U.S. at 159 ("[t]he array of views expressed in [a Supreme Court decision] itself suggest the rule announced there was, in light of the court's precedent, 'susceptible to debate among reasonable minds'").

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

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

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

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

APPRENDI CLAIMS FALL WITHIN THE SECOND TEAGUE EXCEPTION:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

RIVERS, at 289.

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

BACKGROUND:

THE CHARGES IN THE INDICTMENT:

17. Movant JOHN GREGORY LAMBROS was named as a defendant in Criminal Indictment CR-3-76-17, filed in the United States District Court for the District of Minnesota, on March 24, 1976. See, EXHIBIT A. (hereinafter "MOVANT'S INDICTMENT") (One (1) page with two (2) counts).

18. Movant's INDICTMENT was a two (2) count INDICTMENT which named Movant LAMBROS in Counts 1 and 2. Movant requested a jury trial.

19. On April 22, 1976, Movant LAMBROS plead guilty to Criminal Indictment CR-3-76-17, as part of a negotiated plea on drug charges, to Count 1 of the INDICTMENT pertaining to an alleged assault against Deputy U.S. Marshals and narcotics officers. The plea was non-negotiated and the offense allegedly carried a maximum penalty of ten years and $10,000.00 fine. See, U.S. vs. LAMBROS, 544 F.2d 962, 963-964 (8th Cir. 1976).

20. On June 21, 1976, Movant was sentenced to ten (10) years imprisonment on Count One (1), in violation of Title 18, United States Code, Sections 111 and 114. Count Two (2) was dropped. See, EXHIBIT B. (June 21, 1976, JUDGMENT AND PROBATION/COMMITMENT ORDER).

21. Counts 1 and 2 within Movant's indictment stated violations of:

a. Count 1: ". . . John G. Lambros, knowingly, intentionally, and by means and use of a deadly and dangerous weapon, that is, a Browning .9 mm semi-automatic pistol, did forcibly assault, resist, oppose, impede and interfere with Deputy United States Marshall James L. Propotnick, and Special Agents Donald E. Nelson and James F. Braseth of the Federal Drug Enforcement Administration while the said officers were engaged in the performance of their official duties; in violation of Title 18, United States Code, Sections 111 and 114." (emphasis added)

b. Count 2: ". . . John G. Lambros, knowingly, intentionally, and by means and use of a deadly and dangerous weapon, that is, a Browning .9 mm semi-automatic pistol, did forcibly assault, resist, oppose, impede and interfere with Deputy United States Marshall Leon A. Cheney while the said officer was engaged

in the performance of his official duty; in violation of Title 18, United States Code, Sections 111 and 114." (emphasis added)

CASE HISTORY:

22. On February 24, 1976, U.S. Marshals and Agents of the Drug Enforcement Administration arrived at Movant LAMBROS' residence, half of a duplex located at 1759 Van Buren, St. Paul, Minnesota, to effect an arrest pursuant to criminal indictment CR-3-75-128 (Daft. 24)(Superceding Indictment, filed in the United States District Court for the District of Minnesota, Third Division, on February 23, 1976.

23. DEA Agents and U.S. Deputy Marshals rang the back door bell of 1757 and 1759 Van Buren at approximately 10:30 P.M. Movant LAMBROS entered the back-door stairwell where the yet unknown individuals saw Movant LAMBROS at the top of the stairs and the individuals stated, "OPEN THE DOOR." Movant LAMBROS responded, "WHO ARE YOU?" The unknown persons responded, "JIM." Movant LAMBROS responded, "I DON'T KNOW YOU." Movant LAMBROS then ran into his lower duplex and grabbed his registered Browning .9 mm semi-automatic pistol and returned to the back-door upper stairwell overlooking the back-door and fired two (2) shots through the UPPER GLASS WINDOW of the back-door. The bullets missed the agents, but ALLEGEDLY glass fragments struck one agent in the face. Agents then returned fire, and Movant LAMBROS immediately surrendered when the agents identified themselves as federal agents.

24. On March 24, 1976, Movant was indicted by a Federal Grand Jury, Criminal indictment CR-3-76-17 District of Minnesota. See, EXHIBIT A.

25. On April 19, 1976, a jury trial commenced relative to the drug charges in Criminal Indictment CR-3-75-128, but before completion of the trial, Movant LAMBROS withdrew his previous plea of not guilty and entered a plea of guilty to Count 43 of the drug charges. AT THIS TIME Movant LAMBROS was arraigned

on the assault charges, Criminal Indictment CR-3-76-17, and entered a plea of guilty to Count 1 after approximately three days of trial. See, U.S. vs. LAMBROS, 544 F.2d 962 (8th Cir. 1976).

26. On June 21, 1976, Movant LAMBROS was sentenced to ten (10) years imprisonment on Count 1 of the assault charge, Criminal Indictment CR-3-76-17.

27. On October 15, 1976, Movant's attorney filed a direct appeal to the Eighth Circuit Court of Appeal on both Criminal Indictments CR-3-76-17 and CR-3-75-128. On November 16, 1976, the Eighth Circuit AFFIRMED same. See, U.S. vs. LAMBROS, 544 F.2d 962 (8th Cir. 1976). Writ of Cert. DENIED, 51 L.Ed.2d 774.

28. On May 1, 1979, Movant LAMBROS filed a motion to vacate his sentence and supporting affidavits pursuant to Title 28 U.S.C. § 2255. It appears from U.S. vs. LAMBROS, 614 F.2d 179 (8th Cir. 1980) that Movant attacked both Criminal Indictment CR-3-76-17 and CR-3-75-128 within the same motion. The District Court denied Movant's motion.

29. On January 11, 1980, Movant appealed the District Court's ruling to the Eighth Circuit Court of Appeals and was denied on January 28, 1980. See, U.S. vs. LAMBROS, 614 F.2d 179 (8th Cir. 1980).

30. Movant did not appeal to the United States Supreme Court.

31. To the best of Movant's knowledge and officials at the United States Penitentiary Leavenworth, Movant is still serving this sentence as he has never received a discharge certificate from the United States Parole Commission or any other government agency. The United States Parole Commission has a DETAINER on Movant due to alleged non-completion of parole of this sentence.

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):

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

32. Movant's criminal indictment CR-3-76-17, filed on March 24, 1976, District of Minnesota, was a two (2) count indictment which named Movant LAMBROS in both Counts 1 and 2, in violations of Title 18 U.S.C. §§ 111 and 114. See, EXHIBIT A.

33. Movant was arraigned and entered a plea of guilty to Count 1 of the indictment during a jury trial relative to unrelated drug charges on April 22, 1976. The court record is reflected in U.S. vs. LAMBROS, 544 F.2d 962, 963-964 (8th Cir. 1976). See, EXHIBIT C. (U.S. vs. LAMBROS, 544 F.2d 962).

34. Movant plea was ". . . a non-negotiated plea. That is, the offense carries a maximum penalty of ten years and $10,000.00 and Mr. Lambros will simply enter a plea of guilty. . . . Have I correctly stated the negociations, Mr. Thompson? MR. THOMPSON: [Defendant LAMBROS' attorney.] Yes. MR. WALBRAN: Mr. Lambros, have I correctly stated it? DEFENDANT LAMBROS: Yes, you have. MR. WALBRAN: Do you understand it? DEFENDANT LAMBROS: Yes, I do. THE COURT: You want to plead guilty to Count 43 in the major 128 case and you want to plead guilty to the indictment in 3-76-17? DEFENDANT LAMBROS: Yes, Your Honor." See, U.S. vs. LAMBROS, 544 F.2d 962, 963-964, EXHIBIT C.

35. Movant LAMBROS is actually innocent of Counts 1 and 2 and was prejudiced, as the record reflects, that at the time of Movant's guilty plea, neither Movant, nor his counsel, nor the District Court correctly understood the

FACTS and ESSENTIAL ELEMENTS of the crimes with which Movant was charged in the indictment.

36. Movant should not be precluded from relying on APPRENDI vs. NEW JERSEY, 120 S.Ct. 2348 (2000), as Movant's guilty plea was INVOLUNTARY and UNINTELLIGENT because he was MISINFORMED about the FACTS and ESSENTIAL ELEMENTS of the following crimes charged within CRIMINAL INDICTMENT CR-3-76-17:

a. COUNT ONE (1): On or about the 24th day of February, 1976, in the State and District of Minnesota, the defendant, JOHN G. LAMBROS, ...; in violation of Title 18, United States Code, Sections 111 and 114. See, Paragraph 21(a) and/or EXHIBIT A for complete language.

b. COUNT TWO (2): On or about the 24th day of February, 1976, in the State and District of Minnesota, the defendant, JOHN G. LAMBROS, . . .; in violation of Title 18, United States Code, Sections 111 and 114. See, Paragraph 21(b) and/or EXHIBIT A for complete language.

NECESSARY ELEMENTS AND FACTS TO SUSTAIN A CONVICTION FOR VIOLATIONS OF TITLE 18, U.S.C. §§ 111 AND 114:

37. A criminal indictment is required to allege all ELEMENTS of the offense required by statute in which the GRAND JURY returned in each count of the indictment. The following legal cases offer proof of the ELEMENTS of the offense as to the following violations of Title 18, United States Code, that appear within COUNT ONE (1) AND TWO (2):

a. TITLE 18 U.S.C. § 111 states, "[W]hoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than three years, or both." "[W]hoever, in the commission of any such acts uses

a deadly or dangerous weapon, shall be fined not more than $10,000 or imprisoned not more than ten years, or both." (1976). The Eighth Circuit has clearly ruled that WILLFULLY is an element of Title 18 U.S.C. Section 111. See, POTTER vs. U.S., 691 F.2d 1275, 1280 (8th Cir. 1982), "[A] violation of 18 U.S.C. § 111 requires a finding, and the jury was so instructed, that (1) Potter forcibly resisted, opposed, impeded, intimidated and interfered with a federal law enforcement officer; (2) that this occurred while the officer was engaged in the performance of his official duties; and (3) that Potter did so WILLFULLY." PLEASE NOTE that both Count One (1) and Two (2) DID NOT contain the ELEMENT, wording, WILLFULLY. Therefore, Count One (1) and Two (2) is DEFECTIVE as it does not contain each material element of the offense, Title 18 U.S.C. § 111. Also see, U.S. vs. BRUCE, 33 F.R.D. 133 (N.D.Miss. 1963)(Counts in INDICTMENT charging that defendant did KNOWINGLY and WILLFULLY impede and interfere with U.S. deputy marshals . . . were sufficient); In U.S. vs. CAMP, 541 F.2d 737, 739 (8th Cir. 1976) the Eighth Circuit clearly ruled that Title 18 U.S.C. § 111 and the sufficient language needed within an INDICTMENT, must include, ALL ESSENTIAL ELEMENTS OF THE OFFENSE. Therefore, the word INTIMIDATES would be an essential element and DOES NOT APPEAR within Movant's indictment. The Eighth Circuit reversed the conviction in CAMP because the word "FORCIBLY" was omitted from the INDICTMENT as to Title 18 U.S.C. § 111.

b. SENTENCE ENHANCEMENT OF TITLE 18 U.S.C. § 111: The Ninth Circuit clearly stated in U.S. vs. YOUNG, 936 F.2d 1050, 1051 Head Note 2 (9th Cir. 1991) "[W]ithin statute defining offenses of assaulting a federal officer, use of a deadly or dangerous weapon is not an essential element of the crime but is simply a "SENTENCE ENHANCEMENT," which need not be pled in the charging indictment, even though sentence for using such weapon could exceed the "normal" statutory maximum, where the statute did not contain any questionable presumptions and use of weapon is factor that is traditionally and properly considered at sentencing phase of criminal proceeding. Title 18 U.S.C.A. § 111." (emphasis added)

c. TITLE 18 U.S.C. § 114 states, "[W]hoever, within the SPECIAL MARITIME AND TERRITORIAL JURISDICTION OF THE UNITED STATES, and with intent to maim or disfigure, cuts, bits, or slits the nose, ear or lip, or cuts out or disables the tongue, or puts out or destroys an eye, or cuts off or disables a limb or any member of another person; or Whoever, within the SPECIAL MARITIME AND TERRITORIAL JURISDICTION OF THE UNITED STATES, and with like intent, throws or pours upon another person, any scalding water, corrosive acid or caustic substance - Shall be fined not more than $1,000 or imprisoned not more than seven (7) years or both." (Emphasis added) (1976). First, the statute clearly requires that the offense Title 18 U.S.C. § 114 occurred ". . . within the SPECIAL MARITIME AND TERRITORIAL JURISDICTION OF THE UNITED STATES, . . ." The term "SPECIAL MARITIME AND TERRITORIAL JURISDICTION OF THE UNITED STATES", as used in Title 18 is defined in Title 18 U.S.C.A. § 7. This term means that the alleged crime must take place on land owned by the United States Government. See, U.S. vs. LEWIS, 111 F. 630 (C.C.W.D. Tex. 1901) (Whether a homicide committed within the boundaries of a state constituted an offense against the laws of the United States, OF WHICH A FEDERAL COURT HAD JURISDICTION, depends on two (2) questions: First, whether there had been such a cession by the state to the United States of the territory upon which the act alleged to constitute the crime was committed as to render such territory a "place or district of country under the exclusive jurisdiction of the United States," within former §§ 451 and 452 of this title [now this section and § 1111 of this title] which was a QUESTION OF LAW for the court; and, second, if such cession was made, whether the act was committed within the territory so ceded, which was a QUESTION OF FACT, to be submitted to the jury.); U.S. vs. HERNANDEZ-FUNDORA, 58 F.3d 802, cert. denied, 132 L.Ed.2d 290, on remand (District Court was entitled to determine that federal correctional institution fell within SPECIAL MARITIME AND TERRITORIAL JURISDICTION OF THE UNITED STATES, and to remove that issue from consideration by jury in trial for assault by defendant upon another inmate.)

(The federal enclave laws are a group of statutes that permits the federal courts to serve as a forum for the prosecution of certain crimes when they occur within the "[s]pecial maritime and territorial jurisdiction of the United States', 18 U.S.C. § 7; this jurisdiction includes federal land, and property such as federal court-houses and military bases. U.S. vs. MARKIEWICZ, 978 F.2d 786, 797 (2nd Cir. 1992), cert. denied, 122 L.Ed.2d 369 (1993)) Quoting, HERNANDEZ-FUNDORA, 58 F.3d at 807-808 fn. 2 (2nd Cir. 1995). Please refer to paragraph twenty-two (22) that clearly states that on February 24, 1976 Movant was living at 1759 Van Buren, St. Paul, Minnesota, a duplex and land owned by Movant in which Movant paid taxes to the City of St. Paul and/or Ramsey County, which is not federal land. Also the ELEMENTS of Title 18 U.S.C. 114 are (a) intent to torture; (b) maim; (c) disfigure; (d) cuts; (e) bites; (f) slits the nose, ear, or lip.; (g) cuts out or disables the tongue; (h) puts out or destroys an eye; (i) cuts off or disables a limb or any member of another person; (j) throws or pours upon another person, any scalding water, corrosive acid, or caustic substance. See, U.S. vs. STONE, 472 F.2d 909, 915 (5th Cir. 1973) The Fifth Circuit stated, "[T]itle 18 U.S.C., Section 114, defines the offense of disabling and maiming: . . . No evidence was introduced regarding damage to Mrs. Doe's nose, ears, lips, tongue, or eyes, or that her assailant threw or poured damaging substance upon her. Nor does the language "cuts off or disables a limb or any member" cover the physical abuse Mrs. Doe suffered here. We conclude that THIS CHARGE SHOULD NOT HAVE BEEN SUBMITTED TO THE JURY." STONE, 472 F.2d at 915, cert. denied, 66 L.Ed.2d 482 (1980).

38. Count One (1) and Count Two (2) of Movant INDICTMENT did not contain the words WILLFULLY or INTIMIDATES as required by Title 18 U.S.C. § 111.

39. Count One (1) and Count Two (2) of Movant INDICTMENT did not contain the words SPECIAL MARITIME AND TERRITORIAL JURISDICTION OF THE UNITED STATES AND/OR STATE THE EXACT LOCATION THE FEDERAL CRIME OCCURRED WITHIN THE INDICTMENT (see, U.S. vs. PRENTISS, 206 F.3d 960, 967 (10th Cir. 2000)), INTENT TO

TORTURE, MAIM, DISFIGURE, CUT, BITE, SLITS THE NOSE, EAR, or LIP, CUTS OUT or DISABLES THE TONGUE, PUTS OUT or DESTROYS AN EYE, CUTS OFF or DISABLES A LIMB or ANY MEMBER OF ANOTHER PERSON, THROWS or POURS UPON ANOTHER PERSON ANY SCALDING WATER, CORROSIVE ACID, or CAUSTIC SUBSTANCE as required by Title 18 U.S.C. § 114.

40. All of the words described within Paragraphs thirty-eight (38) and thirty-nine (39), as to Title 18 U.S.C. §§ 111 and 114 are FACTS and ELEMENTS necessary to sustain a conviction on Count one (1) and Count Two (2) within Movant's INDICTMENT.

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

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

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

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

107 (E.D.N.C.).

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

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

> "[I]n addition to the reasons set forth in JUSTICE SCALIA'S dissent, 523 U.S., at 268-260, it is NOTWORTHY that the Court's extensive discussion of the term "sentencing factor" virtually ignored the pedigree of the PLEADING REQUIREMENT AT ISSUE. The rule was succinctly stated by Justice Clifford in his separate opinion in U.S. vs. REESE, 92 U.S. 214, 232-233 (1876): "[T]he INDICTMENT MUST CONTAIN AN ALLEGATION OF EVERY FACT WHICH IS LEGALLY ESSENTIAL TO THE PUNISHMENT TO BE INFLICTED." . . . (emphasis added)

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

45. Therefore, it is necessary that the words WILLFULLY, INTIMIDATES, and all the words of Title 18 U.S.C. § 114, as outlined in paragraph 39, all allegations of fact which are legally essential to the punishment of Counts One (1) and Two (2), should of appeared within the INDICTMENT, as it was impossible for the GRAND JURY or the PETIT JURY, if Movant LAMBROS had not plead guilty on the third day of trial on unrelated charges, to make a finding by SPECIAL VERDICT, under the principles of APPRENDI, without knowing what those FACTS and ELEMENTS are as it relates to the evidence presented in the government's case-in-chief as to Count One (1) and Count Two (2).

GUILTY PLEA - VOLUNTARY AND INTELLIGENT:

46. APPRENDI was a result of a PLEA AGREEMENT and the INDICTMENT had

no reference to the hate crime enhancement nor did it allege any such facts. PLEASE NOTE in Movant's INDICTMENT the government made no reference to the location of the alleged acts in Count 1 or Count 2, nor did it allege any facts that the alleged Violations of Title 18 U.S.C. §§ 111 and 114 OCCURRED ON A FEDERAL ENCLAVE, which permits the federal courts to serve as a forum for Movant's prosecution. See, Paragraph 37(c), pages 18 & 19.

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

48. Movant believes this issue is similar to BOUSLEY vs. U.S., 140 L.Ed.2d 828 (1998), were the U.S. Supreme Court held, "[t]hat the accused will be entitled to a hearing on the merits of his MISINFORMATION CLAIM, if, on remand, the accused makes the necessary showing of ACTUAL INNOCENCE (see ¶ 35) to relieve his procedural default in failing to contest his § 924(c)(1) GUILTY PLEA in his prior direct appeal, as (1) if the record disclosed that at the time of the PLEA, neither the accused, nor his counsel, nor the District Court correctly understood the ESSENTIAL ELEMENTS OF THE CRIME with which he was charged, then the plea was INVALID under the Federal Constitution; (2) the accused was not precluded from relying on BAILEY vs. U.S., in support of his claim; and (3) even though the accused had failed to establish cause to relieve his procedural default, it was appropriate to remand the case to permit him to attempt to make a showing of ACTUAL INNOCENCE to relieve the default." (emphasis added) BOUSLEY, 140 L.Ed.2d at 829.

LEGAL CITE'S:

49. U.S. vs. CABRERA-TEXAM, 168 F.3d 141, 143, 145 (5th Cir. 1999) The Fifth Circuit stated, "[T]o be sufficient, an INDICTMENT must allege EACH MATERIAL ELEMENT (Fact) of the offense; if it does not, it fails to charge that offense. This requirement stems directly from one of the central purposes of an INDICTMENT, to ensure that the GRAND JURY finds PROBABLE CAUSE that the defendant has committed each ELEMENT of the offense, hence justifying a trial, as required

by the FIFTH AMENDMENT." Id. at 143. "[t]he INDICTMENT is JURISDICTIONAL. A facially complete complaint cannot make up for the shortcomings of the INDICTMENT; the parties cite, and we can find, no caselaw as to how it might." Id. at 145.

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

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

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

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

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

55. In U.S. vs. THAN, 234 F.3d 798, 806-809 (2nd Cir. 2000) The Second Circuit stated, "First, pleading guilty does not waive a defendant's right to indictment by a GRAND JURY . . . Here, the record does not show that Son knowingly, intelligently and voluntarily waived his right to be tried and convicted only upon charges presented by a GRAND JURY." Id. at 806. In this case, the district court DID NOT have JURISDICTION to enter a conviction or impose a sentence for an OFFENSE NOT CHARGED IN THE INDICTMENT, namely the 'separate, aggravated crime' of using or aiding and abetting the use or carrying of a short-barreled rifle. CASTILLO, 120 S.Ct. at 2096. Rather, the district Court's jurisdiction was limited to trying (in this case accepting a GUILTY PLEA from) these defendants, and thereafter convicting and sentencing these defendants, ON THE OFFENSE CHARGED IN THE INDICTMENT, namely the use or carrying, or aiding and abetting the use or carrying, of a simple firearm."

CONCLUSION AS TO ISSUE ONE (1):

56. Movant LAMBROS has proved to this Court that Counts 1 and 2 DID NOT contain the FACTS and ELEMENTS of the crimes charged, violations of Title 18, United States Code, Sections 111 and 114.

57. Movant LAMBROS has proved to this Court that the violations

for a jury trial of a crime to be proper, all elements of the crime must be proved to the jury (and, under WINSHIP, proved beyond a reasonable doubt). APPRENDI, 120 S.Ct. at 2367, 2368; 147 L.Ed.2d at 461 (Scalia; Thomas J.J. concurring)

for a jury trial of a crime to be proper, all elements of the crime must be proved to the jury (and, under WINSHIP, proved beyond a reasonable doubt). APPRENDI, 120 S.Ct. at 2367, 2368; 147 L.Ed.2d at 461 (Scalia; Thomas J.J. concurring)

C O N C L U S I O N

For all of the foregoing reasons, this Court must authorize a SECOND or SUCCESSIVE Title 28 U.S.C. § 2255 and/or VACATE and remand Movant's conviction and sentence in Count 1.

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

EXECUTED ON: JUNE 08, 2001

Respectfully submitted.

John Gregory Lembros, Pro Se
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Leavenworth, Kansas 66048-1000
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EXHIBIT INDEX

1. EXHIBIT A: Criminal Indictment CR-3-76-17, filed in the United States District Court for the District of Minnesota, on March 24, 1976.

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

3. EXHIBIT C: UNITED STATES vs. JOHN GREGORY LAMBROS, 544 F.2d 962 (8th Cir. 1976)

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

EXECUTED ON: JUNE 08, 2001

Respectfully submitted,

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UNITED STATES OF AMERICA

v.

JOHN G. LAMBROS

INDICTMENT

(18 U.S.C. §§111 and 114)

THE UNITED STATES GRAND JURY CHARGES THAT:

COUNT I

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

JOHN G. LAMBROS,

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

COUNT II

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

JOHN G. LAMBROS,

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

MAR 24 1976

Filed ____ 19__

Harry A. Blesbe, Clerk

By _____

A TRUE BILL

_____
United States Attorney

_____
Foreman

EXHIBIT A.

32

- 0040 - THR

DOCKET NO. 6 Cr. 3-76-17

[redacted]

COUNSEL

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

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

[X] WITH COUNSEL Peter Thomson (Name of counsel)

PLEA

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

FINDING & JUDGMENT

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

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

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of ten (10) years.

SPECIAL CONDITIONS OF PROBATION

ADDITIONAL CONDITIONS OF PROBATION

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

RECOMMENDATION

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

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

EXHIBIT 3.

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

Edward J. Devitt

CERTIFIED AS A TRUE COPY ON THIS DATE June 21, 1976

Douglas J. Hoffe, CLERK, BY DEPUTY

Date June 21, 1976

eyeglasses. He also testified that Downey would be able to see the outline of the courtroom gates (separating the courtroom seats from the witness stand) at a distance of 25 feet. We cannot say that Dr. Lucas was not a qualified expert witness. The trial court did not abuse its discretion in appointing Dr. Lucas and allowing him to express his opinion as an expert. *United States v. Atkins*, 473 F.2d 908, 913 (8th Cir.), cert. denied, 412 U.S. 951, 93 S.Ct. 2751, 37 L.Ed.2d 160 (1973); *White v. United States*, 399 F.2d 613, 619 (9th Cir. 1968).

[16] Downey next contends that the trial judge erroneously refused to allow him to exhibit to the jury special eyeglasses prepared by Dr. Lucas. The defense intended to produce the eyeglasses for the jury's use in determining Downey's visual acuity without glasses. In light of Dr. Lucas' testimony that he did not know what effect the eyeglasses would have on a farsighted or nearsighted person, the trial judge did not abuse its discretion in denying the admission of the eyeglasses.

[17] Downey argues that the district court erred in allowing testimony of unrelated and irrelevant bad conduct by both defendants. Items not previously discussed herein included (1) testimony by Lapp that commencing about a month before the instant robbery he and Downey had made automobile trips to Kentucky and Pennsylvania for the avowed purpose of bank robberies (which were not carried out) and (2) testimony by Agent Northcutt that Downey, when questioned concerning the source of funds for Downey's purchase of the 1969 Thunderbird shortly after the robbery, stated that he "bought it with proceeds from gambling; namely, poker and from a little bit of stealing." We are satisfied that this testimony was admissible to show preparation, plan, intent, knowledge and identity. Fed.R.Evid. 404(b). It is important to note also that the trial judge immediately instructed the jury that the defendant Downey was not on trial for any acts not mentioned in the indictment.

Finally [12] Downey argues there was insufficient evidence to support the guilty verdict against him. In light of our discussion of the evidence and the hearsay statement introduced against Moss we conclude that Downey's contention of insufficient evidence has little merit.

Affirmed.

12. Downey also argued that the government acted contrary to the law in not disclosing that some of the robbers wore glasses and that Downey allegedly jumped the teller cages and collected the money. The transcript of the hearing on motions indicates, however, that it had been disclosed that Downey had allegedly jumped the teller cages. Also the discussion by Downey's counsel at this hearing indicates that he was aware that the evidence would show that all three principals wore stocking masks and that none of them wore glasses. Downey's argument, therefore, has little merit.

UNITED STATES of America, Appellee,

v.

John Gregory LAMEROS, Appellant.

Nos. 76-1660, 76-1661.

United States Court of Appeals, Eighth Circuit.

Submitted Oct. 18, 1976.

Decided Nov. 16, 1976.

The United States District Court for the District of Minnesota, Edward J. Devitt, Chief Judge, convicted defendant on pleas of guilty on charges of possession of cocaine with intent to distribute and assault with deadly weapon upon United States marshals, and defendant's motion to withdraw guilty pleas was denied and defendant appealed. The Court of Appeals, Van Oosterhout, Senior Circuit Judge, held that despite fact that defendant was not informed, at time he entered guilty pleas, of possible

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

Affirmed.

1. Criminal Law ⇐274(2)

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

2. Criminal Law ⇐274(1)

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

3. Criminal Law ⇐274(3)

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

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

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

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

VAN OOSTERHOUT, Senior Circuit Judge.

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

No. 76-1559 is the prosecution based on a multiple count indictment against the defendant and numerous other persons charging an extensive conspiracy to import cocaine and distribute it in Minnesota. Lambros entered a plea of guilty to Count 48 charging possession of two pounds of cocaine with intent to distribute, in violation of 21 U.S.C. § 841(a)(1).

No. 76-1561 is an indictment charging assault with a deadly weapon upon United States Marshals at the time of defendant's arrest on the drug charge.

On April 22, 1976, after three days of trial of multiple defendants before a jury in case No. 76-1559, and after other defendants at the trial had entered guilty pleas, the record reflects the following proceedings:

MR. WALBRAN: [Assistant United States Attorney.] Your honor, on yesterday morning, on this, our fourth day of trial, and what would be our third day of evidence taken in the cocaine conspiracy case 3-75-138, we have arrived at a satisfactory disposition of the case. It is the intention of the defendant John T. Lambros to enter a change of plea in the case number 138 as to Count 48 of the indictment. That would be a tender of a negotiated plea, Your Honor, under which the defendant would receive no more than five years incarceration and a special parole term of whatever length the Court determines, but at least three years.

Your Honor, the defendant as part of the negotiation will also this morning tender to the Court a change of plea to Count I of that other indictment in 3-76-17 pertaining to an assault and resistance against certain Deputy U. S. Marshals and narcotics officers. That is a non-no-

gotiated plea. That is, the offense carries a maximum penalty of ten years and $10,000 and Mr. Lambros will simply enter a plea of guilty.

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

It is also part of the negotiations that the United States Attorney will not pursue a potential or latent charge arising from Mr. Lambros' possession of three electronic devices which seem to be bugging devices and which the FBI has been investigating for us. We will not pursue those charges now.

Have I correctly stated the negotiations, Mr. Thompson?

MR. THOMPSON: [Defendant's attorney.] Yes.

MR. WALSHAN: Mr. Lambros, have I correctly stated it?

DEFENDANT LAMBROS: Yes, you have.

MR. WALSHAN: Do you understand it?

DEFENDANT LAMBROS: Yes, I do.

THE COURT: You want to plead guilty to Count 43 in the major 128 case and you want to plead guilty to the indictment in 3-76-17?

DEFENDANT LAMBROS: Yes, Your Honor.

Thereafter the prosecuting attorney, at the court's request and in the presence of the defendant and his attorney, explained defendant's constitutional rights in detail and the penalties involved in the pending charges, and questioned defendant with respect to his knowledge and understanding of such rights, and the voluntariness of his guilty pleas. Thereafter the court personally addressed and interrogated the defendant as follows:

THE COURT: Did you give true answers?

DEFENDANT LAMBROS: Yes, Your Honor, I did.

THE COURT: To all these questions, they were all truthful?

DEFENDANT LAMBROS: Yes, sir.

THE COURT: Do you want to plead guilty to this count?

DEFENDANT LAMBROS: Yes, Your Honor, I do.

THE COURT: You are guilty?

DEFENDANT LAMBROS: Yes, Your Honor, I am.

THE COURT: Do you have any questions you want to ask about it?

DEFENDANT LAMBROS: No, Your Honor.

THE COURT: You fully understand everything that is going on?

DEFENDANT LAMBROS: Yes, Your Honor.

THE COURT: Have you had enough time to visit with your lawyer about pleading guilty to this count?

DEFENDANT LAMBROS: Yes, I have, Your Honor.

THE COURT: Then I will accept the guilty plea as to Count 43 with the understanding that I will read the probation report, and if I think the limitation of time that you have negotiated is appropriate I will accept it, and you have negotiated for a maximum of five years plus a special parole term of unlimited duration; and it's also understood, I understand, that you plead guilty to the assault count, the assault indictment in 3-76-17.

It's also understood that the United States Attorney will not prosecute your wife for some possible offense and that there will be no other drug-related prosecutions on behalf of the government. Is that the full understanding that you have?

DEFENDANT LAMBROS: Yes.

Defendant's constitutional rights and the consequences of his guilty plea were also explained in connection with the assault

charge. The question of accepting the defendant's guilty plea on the assault charge was taken up immediately following the Rule 11 hearing on the drug charge.

Time for sentencing was fixed for June 21, 1976. On the morning of that day and before sentencing, defendant filed a motion for leave to withdraw his guilty plea in each of the two cases based upon two grounds, to wit: (1) Defendant's arrest on June 17, 1976, on a new drug charge materially changed defendant's position and violated the express and implied terms of the plea bargain and nullified the plea bargain agreement. (2) While defendant was advised as to certain consequences of his guilty plea in accordance with Rule 11(c), he was not apprised that the consequences could also expose him to substantially longer terms of imprisonment for subsequent convictions under the Federal Narcotics Act.

The court denied the motion and subsequently, on July 29, filed a memorandum explaining its reasons for so doing.

On June 21, 1976, Lambros was sentenced to ten years imprisonment on the assault charge and to a concurrent sentence of five years on the drug charge, plus a fine of $10,000, and a three-year special parole term. Immediately thereafter, on motion of the United States Attorney, all other counts of the indictment were dismissed. We find nothing in the record which reflects in any way a failure of the Government to carry out its plea bargain obligation with respect to not prosecuting defendant's wife, or in any other respect.

[1] Defendant seeks a reversal upon the broad ground, supported by various contentions hereinafter set out and discussed, that the court abused its discretion in denying his presentence motion for leave to withdraw his plea of guilty. We find no abuse of discretion and affirm the conviction.

The standard for review of motions to withdraw a guilty plea before sentence is somewhat more lenient than that applying to such motions filed after sentencing.

[2] Presentence motions are to be judged on a "fair and just" standard. *United States v. Bradin*, 535 F.2d 1039, 1040 (8th Cir. 1976). A good discussion of the fair and just standard is found in *United States v. Barker*, 166 U.S.App.D.C. 312, 514 F.2d 208, 220–222 (1975). In *United States v. Benson*, 469 F.2d 222, 225 (8th Cir. 1972), we stated:

> In *United States v. Woosley*, 440 F.2d 1280 at 1281 (CA8 1971) we said: "Rule 11 proceedings are not an exercise in futility. The plea of guilty is a solemn act not to be disregarded because of belated misgivings about the wisdom of the same." We are abundantly satisfied that the trial court's denial of appellant's motion to withdraw his plea of guilty was not an abuse of discretion. *United States v. Rawlins*, 449 F.2d 1043, 1045–1046 (CA8 1971).

Defendant's contention that the Government breached its plea bargain agreement is wholly without merit. Defendant's June 17 arrest, which occurred nearly two months after his guilty plea, is based on a drug offense alleged to have been committed on June 17, 1976. There is no support for defendant's claim that an investigation of defendant for narcotics offenses was in operation at the time of the guilty plea or that the Government had any knowledge at the time of the guilty plea that the defendant was continuing to operate an illegal drug business.

Defendant also challenges the sufficiency of the court's personal participation in the Rule 11 proceedings. He concedes that appropriate questions and information were sought by the Government attorney and points to no way in which he was misled or prejudiced by the Rule 11 proceedings. Before accepting the guilty plea, the court by personal, direct inquiries, heretofore set out in detail, ascertained that the defendant's responses to the Government attorney's questions were truthful, that he fully understood his rights and the consequences of his plea, that he had no question to ask, that he admitted that he had committed the

acts charged and that he was guilty of the offenses charged, and that he had a full opportunity to consult with his attorney with respect to his plea.

Defendant was an intelligent person and was represented by competent, self-employed counsel.

The court by its personal questioning on a sound basis in effect adopted the extensive record made by the prosecuting attorney. We hold that there has been substantial compliance with Rule 11, reserving for the moment the issue next discussed.

Defendant further contends that under certain circumstances punishment for a subsequent violation of the Federal Narcotics Act can be enhanced by reason of his prior conviction under the narcotics act, and that he was entitled to be informed of such consequences, and that he was not so informed. The trial court in its opinion held that such was a collateral consequence and not a direct consequence, and in support thereof, stated:

> The cases cited by defendant do indicate that a defendant must be informed of certain legal consequences of his plea. Courts have used the label "direct" consequences to denote those which must be communicated and the label "collateral" consequences for those which need not. In *Weinstein v. United States*, 326 F.Supp. 687, 690 (C.D.Calif.1971), a case presenting a similar claim of involuntariness, the court stated:
>
> > Rather petitioner would have us hold that he must be told of all possible collateral consequences which might ensue from a plea of guilty or from a conviction, since the results collaterally in the future are the same. No authority is cited to support him.
>
> It is true that the present sentence he is serving on a narcotics charge was enhanced because of this 1965 narcotics conviction on his plea of guilty, but we know of no ruling in this or any other Circuit that he should have been advised of this possibility before entering the original plea. We agree with the holding in *Fee v. United States*, 307 F.Supp. 674, 676 (W.D.Va.1962):
>
> > To the best of my knowledge it has never been suggested that the court . . . is under any duty to warn of such a possible result. [They] have a right to assume that the defendant will not be guilty of a subsequent offense. . . .
>
> In *Cuthrell v. Director*, 475 F.2d 1364, 1366 (4th Cir. 1973), the court states and holds:
>
> > The law is clear that a valid plea of guilty requires that the defendant be made aware of all "the direct consequences of his plea." . . . By the same token, it is equally well settled that, before pleading, the defendant need not be advised of all collateral consequences of his plea, or, as one Court has phrased it, of all "possible ancillary or consequential results which are peculiar to the individual and which may flow from a conviction of a plea of guilty. " . . ."
>
> The distinction between "direct" and "collateral" consequences of a plea, while sometimes shaded in the relevant decisions, turns on whether the result represents a definite, immediate and largely automatic effect on the range of the defendant's punishment. [Citations omitted.]

The trial court stated that it was not taking the subsequent charge into consideration in imposing sentence.

[3] We agree that the possibility of enhanced punishment in a subsequent narcotics act violation is a collateral and not a direct consequence of the guilty plea, and hence that the court in the Rule 11 proceedings is not obligated to explain the collateral consequence.

In support of its exercise of discretion in denying the motion to withdraw the guilty plea, the court stated:

> Defendant admits that an established ground for refusing to allow plea withdrawal is the possibility of prejudice to

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the government. The defendant was part of a widespread drug distribution scheme. Many of the key witnesses were co-conspirators who wished to lessen their sentences. They have now pleaded guilty, been sentenced, and transferred to prison. The expense of assembling them for trial would be great and, more importantly, the incentive for them to testify with the possibility of sentence reduction foreclosed is small. When this prejudice is weighed against defendant's motivation for withdrawal, the merit of the motion is insubstantial. Defendant does not contend that he is innocent or that he has unearthed a valid defense. Rather he simply wants to put all of his criminal offenses in one basket. He can only do this at a great cost to the government. Therefore, withdrawal will not be allowed.

The record in the present case fully supports the trial court's determination. The record shows that three days of the prosecutor's time, the time of the witnesses, and the time of the court was consumed in the jury trial before the guilty plea was entered, and that considerable difficulty would be involved in assembling the many witnesses used by the Government in the multiple conspiracy charges, and in refreshing the recollections, and in obtaining many witnesses incarcerated in penal institutions.

We are convinced that the court did not abuse its discretion in denying leave to the defendant to withdraw his guilty plea to the two charges here involved.

Affirmed.

Homer H. BLEVINS and Continental Insurance Co., Inc., Appellees,

v.

COMMERCIAL STANDARD INSURANCE COMPANIES, Appellant.

No. 78-1232.

United States Court of Appeals, Eighth Circuit.

Submitted Oct. 14, 1978.

Decided Nov. 16, 1978.

Appeal was taken from an order of the United States District Court for the Western District of Arkansas, Paul X Williams, Chief Judge, entering judgment in favor of an injured party and an excess insurer who intervened in injured party's direct action against the primary insurer regarding payment of a personal injury judgment arising from an automobile accident. The Court of Appeals, Van Oosterhout, Senior Circuit Judge, held that the Arkansas direct action statute does not require the issuance of a writ of execution and its return nulla bona before allowing a direct action against the primary insurer; that the district court's determination that the underlying personal injury judgment against the tortfeasor was not procured by fraud, collusion or bad faith and was therefore binding on the primary insurer was not clearly erroneous; and that the excess insurer became subrogated to the rights of the insured to recover from the primary insurer legal expenses it incurred.

Affirmed.

1. Courts ⇐=406.2

In diversity case, interpretation of district court on question of state law is entitled to great deference.

2. Insurance ⇐=612.1(5)

Arkansas statute permitting injured party holding judgment against tort-feasor to maintain direct action against tort-feasor's liability insurer provided such judgment remains unsatisfied at expiration of 30 days from serving of notice of entry of