March 02, 2009

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CLERK OF THE COURT
U.S. District Court for the Southern District
of Florida
United States Courthouse
400 North Miami Avenue
Miami, Florida 33128
Tel. (305) 523-5100

RE: USA vs. RAYO-MONTANO, et al., Criminal No. 1:06-cr-20139-DMM (All Defendants)

Dear Clerk:

Attached for **FILING** in the above-entitled action is one (1) original and one (1) copy of:

1. JOHN GREGORY LAMBROS' MOTION FOR LEAVE TO FILE A PETITION OF INTERVENTION - OR ALTERNATIVELY - JOHN GREGORY LAMBROS' MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF. **Dated: March 2, 2009.**

Please contact me if I have not followed any of the filing rules.

Thank you in advance for your consideration in this most important matter.

Sincerely,

John Gregory Lambros, Pro Se

CERTIFICATE OF SERVICE

I declare under the penalty of perjury that a true and correct copy of the above listed motion was mailed within a stamped addressed envelop from the USP Leavenworth legal mail box/room on this **2nd DAY OF MARCH, 2009, TO:**

2. Clerk of the Court, as addressed above.
3. Andrea G. Hoffman, U.S. Asst. Attorney, 11200 N.W. 20th Street, Miami, Florida 33172.
4. Hugo A. Rodriguez, Attorney, 1210 Washington Ave., Suite 220, Miami Beach, Florida 33139. Tel. (305) 373-1200.
5. Luis Ignacio Guzman, Consel General of Colombia, 280 Aragon Ave., Coral Gables, Florida 33134.

John Gregory Lambros, Pro Se

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
[Miami]

UNITED STATES OF AMERICA,	*	
Plaintiff,	*	**CRIMINAL DOCKET NO. 1:06-cr-20139-DMM**
vs.	*	**Honorable Judge Donald M. Middlebrooks**
PABLO JOAQUIN RAYO-MONTANO,	*	
DAINER CAMACHO-BENITEZ, et al.	*	**AFFIDAVIT FORM**
Defendants.	*	
	*	

JOHN GREGORY LAMBROS' MOTION FOR LEAVE TO FILE A PETITION OF INTERVENTION

OR ALTERNATIVELY

JOHN GREGORY LAMBROS' MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

COMES NOW, Intervenor or alternatively Amici JOHN GREGORY LAMBROS, Pro Se, (hereinafter Intervenor) offering his "MOTION FOR LEAVE TO FILE A PETITION OF INTERVENTION" or alternatively "MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF", as the existence of a common question of law and fact exists before this Court. This Intervenor will significantly contribute to the full development of the underlying factual issues which currently violate principles of clearly established federal law relevant to enforcing extradition treaties and the terms of specific extraditions.

This Intervenor believes that the current disparity between the extradition decree's limitation and the sentence(s) this Court will impose upon the Defendant's in this action, will cause an "injury in fact." See, LUJAN vs. DEFENDERS OF WILDLIFE, 119 L.Ed.2d 351, 364 (1992). Defendant's DAINER CAMACHO-BENITEZ, PABLO JOAQUIN RAYO-MONTANO, and other defendant's within this action who have been or will be extradited from COLOMBIA, BRAZIL, and VENEZUELA will be sentenced to more

than thirty (30) years. Sentences for criminal offenses may not exceed thirty (30) years within the countries of COLOMBIA, BRAZIL, and VENEZUELA, thus language of the sentence limitation is contained within the extradition decree from the Supreme Court's of COLOMBIA, BRAZIL, and VENEZUELA and the Ministry of Foreign Affairs when extraditing persons to the United States. Therefore, if the Defendant's within this action are sentenced to more than thirty (30) years - disparity between the extradition decree limitation and the sentence imposed - proof is offered as to a sufficient possibility of "future injury." This injury may be "redressed by a favorable decision" by this Court with the assistance of this Intervenor.

The Defendant's in this action have a legal right to be protected at a sentencing hearing, when pure issues of law are presented which set forth the principles of interpretation and international comity relevant to enforcing extradition treaties and the terms of specific extradition. RAUSCHER and BROWNE established that the extraditing country's expectations regarding punishment limitations must be respected if they are within that country's rights under the extradition treaty. See, U.S. vs. RAUSCHER, 119 U.S. 407, 7 S.Ct. 234, 30 L.Ed. 425 (1886), and JOHNSON vs. BROWNE, 205 U.S. 309, 27 S.Ct. 539, 51 L.Ed. 816 (1907). (emphasis added). In RAUSCHER, the Supreme Court found that an extraditing country has the right to decide the grounds of extradition, which bind the receiving country. See, RAUSCHER, 119 U.S. at 419-20. Also, "the processes by which it is to be carried into effect." RAUSCHER, 119 U.S. at 420-21. Most importantly, this means that language in a foreign nation's extradition order invoking provisions of an extradition treaty must be enforced by federal courts. See, BROWNE, 205 U.S. at 311-12.

JURISDICTION

1. John Gregory Lambros believes this Court may allow him "PERMISSIVE" intervention in this action, as the existence of a common question of law and/or fact exists. See Fed. R. Civ. P. 24(b)(1)(B).

2. INTERVENTION HAS BEEN ALLOWED IN CRIMINAL CASES: A women convicted of selling cocaine would be permitted to intervene in habeas corpus action brought by individuals convicted of cocaine-related offenses to challenge constitutionality of provisions of state law governing treatment of particular felony drug offenders, where, her principal contentions were similar to those raised by named plaintiffs in original petition, so that there were common questions of law and fact; and where addition of women would not unduly delay or prejudice adjudication of rights of original parties. See, UNITED STATES EX REL. CARMONA vs. WARD, 416 F.Supp. 276 (S.D. NY. 1976).

3. This motion is timely as Plaintiff's DAINER CAMACHO-BENITEZ, PABLO JOAQUIN RAYO-MONTANO, and possibly others have not been sentenced by this Court. Thus, Plaintiff's right to appeal sentencing within this court have not expired.

4. Intervenor John Gregory Lambros was arrested in Brazil in 1991 by U.S. and Brazilian Officials, as per the request of the United States Government. After contesting extradition to the United States, he was extradited to the United States in June 1992 and convicted of cocaine offenses in January 1993. Lambros was sentenced to **MANDATORY LIFE WITHOUT PAROLE** for conspiracy to distribute cocaine and three counts of possession-with-intent-to-distribute cocaine. Lambros challenged the disparity between Brazil's extradition treaty, which clearly states in ARTICLE XI:

> "The determination that extradition based upon the request therefore should or should not be granted shall be **MADE IN ACCORDANCE WITH THE DOMESTIC LAW OF THE REQUESTED STATE [Brazil]**, and the person whose extradition is desired shall have the right to use such remedies and recourses as are authorized by such law."

EXHIBIT A. (STATE vs. PANG, 940 P.2d 1293, 1358), affirmed 139 L.Ed2d 608 (1997) and his sentence, to no-avail. Brazil's Constitution clearly states within ARTICLE 5, Clause XLVII(b) that there will be no sentence of **LIFE [in prison].** Also ARTICLE 75 of the Brazilian Criminal Code, limits the maximum prison sentence to thirty (30) years. See trial excerpts from the extradition of MARTIN SHAW PANG by Brazilian

Supreme Court Justice MARCO AURELIO and Justice CELSO DE MELLO. when they granted the request of extradition of PANG to the United States, with the following **RESTRICTIONS:**

> "I also exclude the possibility of [this person] receiving a **LIFE SENTENCE,** therefore establishing that he cannot **REMAIN UNDER THE STATE'S CUSTODY FOR MORE THAN THIRTY (30) YEARS."** (emphasis added)

EXHIBIT B. See, PANG, at 1350.

> ".... I grant the request now under examination, with the **RESTRICTION**, which I consider necessary, of **COMMUTING** the **LIFE SENTENCE** to **a PRISON SENTENCE NOT TO EXCEED 30 (THIRTY) YEARS,** agreeing completely with the learned vote of the Honorable Mauricio Correa." (emphasis added)

EXHIBIT C. See, PANG, at 1352.

Lambros' attorney refused to appeal his **MANDATORY LIFE SENTENCE** as to the disparity between Brazil's extradition treaty - which does not allow a prison sentence to exceed 30-years - and his sentence. Lambros' appeal was based only on the fact that his conspiracy charge was not mandated, as the MANDATORY part did not take effect until November 1988. Lambros was resentenced. See, U.S. vs. LAMBROS, 65 F.3d 698 (8th Cir. 1995). **See, EXHIBIT D.** (U.S. vs. LAMBROS, 65 F.3d at 698)

PARTIES

5. To the best of this Intervenor's knowledge, the following defendant's in this above-entitled action have been extradited from foreign countries to be prosecuted in this action: (or in the process of being extradited)

a. **PABLO JOAQUIN RAYO-MONTANO:** Defendant RAYO-MONTANO was arrested in **BRAZIL** on or about May 17, 2006 by DEA and Brazilian Officials, as per a grand jury indictment in this above-entitled action. Defendant RAYO-MONTANO may be sentenced to **LIFE SENTENCES (possibly MANDATORY LIFE)** in Counts 1, 2, and 3, when consulting the **STATUTE** and the **U.S. FEDERAL SENTENCING GUIDELINES** (18 USCS Appx). Defendant RAYO-MONTANO is a citizen of **COLOMBIA.** - Brazil's Constitution and domestic law do not allow **LIFE SENTENCES AND ONLY ALLOW A PERSON TO "REMAIN IN THE**

STATE'S CUSTODY FOR NO-MORE THAN THIRTY (30) YEARS." See, **EXHIBIT B.** The docket sheet does not reflect RAYO-MONTANO's return to the United States, as his extradition proceedings in Brazil have not been finalized. (Intervenor only has docket sheet entries thru 1/13/2009 - entry #754)

b. **DAINER CAMACHO-BENITEZ:** Defendant CAMACHO-BENITEZ was arrested in **COLOMBIA** by DEA and Colombian Officials, as per a grand jury indictment in this above-entitled action. Defendant CAMACHO-BENITEZ was extradited from Colombia on or about 2008 and this Court appointed **ATTORNEY HUGO A. RODRIGUEZ,** Miami, Florida to represent him in this action. See, DOCKET SHEET entries: 569, 570, 573, 574, 575, & 581. On **MAY 24, 2008**, this Intervenor (Lambros) wrote Attorney Rodriquez via U.S. Certified Mail No. 7005-3110-0003-4742-4904 - advising him of of the **"QUESTION OF LAW OR FACT IN COMMON"** in this action:

> **"THE TERM OF SUPERVISED RELEASE MUST BE INCLUDED WITHIN CAMACHO-BENITIZ's TOTAL SENTENCE WHICH CAN BE NO MORE THAN THIRTY (30) YEARS** - as per the language of the sentence limitation contained within the extradition decree from the Supreme Court of **COLOMBIA** and the Ministry of Foreign Affairs when extraditing."

Research indicates that the Colombian Supreme Court **ALWAYS** includes a resolution that states, "...., if extradited and convicted, ... must not be sentenced to remain under the State's custody for more than **THIRTY (30) YEARS."** See, U.S. vs. GALLO-CHAMORRO, 48 F.3d 502, 503 (11th Cir. 1995); U.S. vs. ABELLO-SILVA, 948 F.2d 1168, 1174 (10th Cir. 1991). Also, USA vs. SALAZAR-ESPINOSA, et al., Docket No. 1:05-cr-00517-LAK-1, U.S. District Court for the Southern District of New York. Defendant CAMACHO-BENITEZ and his Attorney Hugo Rodriguez filed a **"NOTICE OF INTENT TO PLEAD GUILTY"** on October 7, 2008, that was entered into the docket sheet as entry number 715. See, **EXHIBIT E.** (Docket Sheet entry 715 on 10/07/2008). It is Intervenor Lambros' understanding that CAMACHO-BENITEZ has not been sentenced in this above-entitled action, thus the "QUESTION OF LAW AND/OR FACT IN COMMON" is ripe for adjudication.

c. **UNKNOWN DEFENDANT'S WITHIN THIS ABOVE-ENTITLED ACTION THAT WILL BE EXTRADITED FROM COLOMBIA, BRAZIL, AND VENEZUELA:** Intervenor Lambros incorporates all unknown Defendant's within this action who will be or have been arrested in Colombia, Brazil, and Venezuela, and extradited to the United States to be prosecuted within this action. These unknown Defendant's, if extradited, will have **RESTRICTION** of commuting life sentences and establishing the fact that they **CANNOT REMAIN UNDER THE STATE'S CUSTODY FOR MORE THAN THIRTY (30) YEARS.**

d. **INTERVENOR JOHN GREGORY LAMBROS:** Lambros incorporates paragraph four (4) on page 3 & 4 within this motion. (Jurisdiction)

e. **LUIS IGNACIO GUZMAN, Consel General for Colombia:** Intervenor Lambros has written Consel General Guzman via U.S. Certified Mail on June 3, 2008 and November 17, 2008, explaining the **"QUESTION OF LAW AND/OR FACT IN COMMON" - :**

> **"Whether the United States Court's are not enforcing the conditions/resolutions within the extradition decree by the Supreme Court of Colombia when they do not include the term of 'SUPERVISED RELEASE' within the maximum thirty (30) year term of custody?"**

Counsel General Guzman responded to Intervenor Lambros on July 30, 2008, stating "we have taken due note of its contents". Counsel General Guzman's office is located in Coral Gables, Florida, thus his appearance within this action will not impose severe travel problems when requested to appear as a witness to interpret the extradition ORDER of the Supreme Court of Colombia.

f. **ANDREA G. HOFFMAN, Assistant U.S. Attorney:** On May 5, 2006 Attorney Hoffman and U.S. Attorney Acosta filed an indictment in this action. The "CERTIFICATE OF TRIAL ATTORNEY" for the U.S. was signed by Attorney Hoffman, Court ID# A5500885, and submitted within the extradition requests sent to Brazil and Colombia. Intervenor Lambros has written Attorney Hoffman via U.S. Certified on March 27, 2007 regarding the illegal extradition of RAYO-MONTANO from Brazil. Attorney HOFFMAN has never responded to Lambros.

g. **BOYCOTT BRAZIL - www.BrazilBoycott.org:** Intervenor John Gregory Lambros is founder and President of "BOYCOTT BRAZIL" a website and non-profit organization to educate the world as to the illegal extradition processes that exist within Brazil's State and Federal Government. Also, the objective of "BOYCOTT BRAZIL" is to undertake actions on the behalf of persons being extradited to the United States "in a way that will increasingly assure that they receive the sentence limitations contained within extradition decrees and treaties, which are made in accordance with the domestic laws of the requested country." Therefore, effective and enduring representation in the decision making councils of government, as well as by applying processes which will obtain direct or indirect reimbursement for the unfair exploitation to which they may have been subjected. "BOYCOTT BRAZIL" has over one million (1,000,000) supporters worldwide and commanded TOP LISTING - 1st place - search engine ratings within Google, Yahoo!, and MSN for over ten (10) years under the terms "BOYCOTT BRAZIL" and "BRAZIL BOYCOTT".

CLAIMS

6. The principle claim as to whether the term of "SUPERVISED RELEASE" must be included within the conditions of extradition limiting what sentence could be issued to persons extradited to the United States, will be presented within two (2) issues, as the Countries of Colombia and Brazil are currently represented within this action.

7. ISSUE ONE (1):

WHETHER THE EXPECTATIONS OF THE EXTRADITING COUNTRY - COLOMBIA -, AS EXPRESSED IN ITS EXTRADITION ORDERS AND TREATY, ARE HONORED, WHEN A TERM OF "SUPERVISED RELEASE" IS NOT INCLUDED WITHIN THE THIRTY (30) YEAR LIMITATION IN REMAINING UNDER UNITED STATES CUSTODY. CAMACHO-BENITEZ's SENTENCE WILL VIOLATE THE TERMS OF THE EXTRADITON TREATY

AND DECREE LIMITATIONS IF HE REMAINS UNDER THE CUSTODY OF THE UNITED STATES FOR MORE THAN THIRTY (30) YEARS. - THE CONDITIONS OF CAMACHO-BENITEZ's EXTRADITION FROM COLOMBIA LIMITED WHAT SENTENCE COULD BE ISSUED AS WELL AS WHAT SENTENCE COULD BE SERVED.

8. ISSUE TWO (2):

WHETHER THE EXPECTATIONS OF THE EXTRADITING COUNTRY - BRAZIL -, AS EXPRESSED IN ITS EXTRADITION ORDERS AND TREATY, ARE HONORED, WHEN A TERM OF "SUPERVISED RELEASE" IS NOT INCLUDED WITHIN THE THIRTY (30) YEAR LIMITATION IN REMAINING UNDER UNITED STATES CUSTODY. PABLO JOAQUIN RAYO-MONTANO SENTENCE WILL VIOLATE THE TERMS OF THE EXTRADITION TREATY AND/OR DECREE LIMITATIONS IF HE REMAINS UNDER THE CUSTODY OF THE UNITED STATES FOR MORE THAN THIRTY (30) YEARS. - THE CONDITIONS OF PABLO JOAQUIN RAYO-MONTANO's EXTRADITION FROM BRAZIL LIMITED WHAT SENTENCE COULD BE ISSUED AS WELL AS WHAT SENTENCE COULD BE SERVED.

DISCUSSION:

9. Defendant's RAYO-MONTANO, CAMACHO-BENITEZ and Intervenor Lambros where indicted on cocaine-related offenses. All U.S. drug law violations include as part of the SENTENCE a REQUIREMENT that the person be placed on a term of **SUPERVISED RELEASE** after imprisonment. See, Title 21 U.S.C. §841(b)(1)(A):

> ".... Notwithstanding section 3583 of Title 18, a sentence under this subparagraph shall, in the absence of such prior conviction, impose a **TERM OF SUPERVISED RELEASE** of at least 5 years in **ADDITION TO SUCH TERM OF IMPRISONMENT** and shall, if there was such a prior conviction, impose a **TERM OF SUPERVISED RELEASE** of at least 10 years in **ADDITION TO SUCH TERM OF IMPRISONMENT.**" (emphasis added)

10. The United States Court of Appeals for the Ninth Circuit has ruled and clearly stated within the following cases that **"SUPERVISED RELEASE"** is a

"TERM OF IMPRISONMENT", because the supervised release term itself is part of the punishment imposed for a person's original crime. See, U.S. vs. ROBERTS, 5 F.3d 365, 368-369 (9th Cir. 1993):

> Roberts was advised by the Court that he faced a statutory maximum sentence of twenty (20) years, as per Title 21 U.S.C. §841(b)(1)(C). (emphasis added)
>
> "At sentencing, Roberts received the twenty (20) year maximum **PLUS** a three (3) year term of **SUPERVISED RELEASE** pursuant to the Sentencing Guidelines. ..... If Roberts violates the conditions of his **SUPERVISED RELEASE**, the Court may revoke his **SUPERVISED RELEASE AND SEND HIM BACK TO PRISON FOR UP TO THREE (3) MORE YEARS.** 18 U.S.C. §3583(e)(3). Thus, Robert's **MAXIMUM SENTENCE IS AT LEAST TWENTY-THREE (23) YEARS, NOT TWENTY (20) YEARS.** Because of the term of **SUPERVISED RELEASE,** Roberts received a **POTENTIALLY LONGER SENTENCE THAN HE WAS APPRISED OF AT HIS PLEA HEARING.** (emphasis added)

11. Also see, U.S. vs. ETHERTON, 101 F.3d 80, 81 (9th Cir. 1996):

> Etherton was sentenced to 51 months in prison for one count of conspiracy to manufacture marijuana in violation of Title 21 USC §841(b)(1)(C) and §846.
>
> The district court sentenced Etherton to 51 months in prison to be followed by a three (3) year term of **SUPERVISED RELEASE.**
>
> Etherton completed his prison term and began serving his **SUPERVISED RELEASE.**
>
> Etherton violated the terms of his **SUPERVISED RELEASE,** and the Court sentenced him to **SEVEN (7) MONTHS IN PRISON.**
>
> The Ninth Circuit ruled, "The seven months imprisonment is not punishment for a new substantive offense, rather '**IT IS THE ORIGINAL SENTENCE THAT IS EXECUTED WHEN THE DEFENDANT IS RETURNED TO PRISON AFTER A VIOLATION OF THE TERMS OF ... SUPERVISED RELEASE.**' UNITED STATES vs. PASKOW, 11 F.3d 873, 881 (9th Cir. 1993). We held in PASKOW that '**A TERM OF SUPERVISED RELEASE ... IS SIMPLY PART OF THE WHOLE MATRIX OF PUNISHMENT WHICH ARISES OUT OF A DEFENDANT'S ORIGINAL CRIMES.**' Id. at 883"

12. The above case law proves that the term of "SUPERVISED RELEASE" must be included within the sentence issued by this Court when sentencing Defendant's RAYO-MONTANO and CAMACHO-BENITEZ, so as to meet all expectations of the extraditing country.

AMICUS CURIAE

13. This Intervenor requests that this Court "IN THE ALTERNATIVE" allow JOHN GREGORY LAMBROS to file an AMICUS CURIAE BRIEF or MEMORANDUM OF LAW in this action.

14. The legal definition of AMICUS CURIAE is as follows:

> Means literally, friend of the court. A person with strong interest or views on the subject matter of an action may petition the court for permission to file a brief, ostensibly on behalf of a party but actually to suggest a rationale consistent with its own views.

See, BLACK'S LAW DICTIONARY, 75 (5th ed. 1979)

15. John Lambros believes as AMIEI has stated an INTEREST IN THE CASE and the above information is RELEVANT and DESIRABLE, since it alerts this Court to possible inplications of law in sentencing the Defendants in this action.

16. Lambros believes even when a party is very well represented, an amicus may provide important assistance to the Court. "Some amicus briefs collect background or factual references that merit judicial notice. Some friends of the court are entities with particular expertise not possessed by any party to the case. Others argue points deemed too far-reaching for emphasis by a party intent on winning a particular case. Still others explain the impact a potential holding might have on an industry or other group." See, LUTHER T. MUNFORD, WHEN DOES THE CURIAE NEED AN AMICUS?, 1 J.App. Prac. & Process 279 (1999).

17. Lambros does not want to undertake the distasteful task of showing that the attorney for the parties he wishes to support is incompetent. See, Robert L. Stern, APPELLATE PRACTICE IN THE UNITED STATES 306 (2d ed. 1989) (The lawyer preparing an amicus brief "would normally be unwilling to state, except in most unusual circumstances, that the counsel for the party being supported will do an inadequate job.").

18. A restrictive policy towards this amicus may create the perception of viewpoint discrimination and the openness of this Court.

RELIEF

19. Lambros requests this Court to grant him permissive intervention in this action, as the existence of a common question of law and/or fact exists.

20. Lambros requests in the ALTERNATIVE to be allowed to file an amicus brief or amicus memorandum of law.

21. I JOHN GREGORY LAMBROS, declare under the penalty of perjury that the foregoing is true and correct. Title 28 USCA §1746.

EXECUTED ON: MARCH 02, 2009

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been frivolous. Denial of Stenson's request served no legitimate purpose.

Most disturbing about the majority's rejection of Stenson's claim is the fact the majority cites nothing in the record upon which it could conceivably be argued Stenson equivocated in his request. The majority merely notes Stenson did not refute the trial court's conclusion he did not really wish to proceed without counsel, as if the trial court's conclusion stands as evidence of Stenson's state of mind. While Stenson's main objective in his motions was [776] to remove Leatherman from his case, his desire in the event his motion for substitution was denied was clear: he wished to represent himself. A conditional request is not an equivocal one. The majority's decision, therefore, stands as the triumph of form over substance.

The denial of the right to self-representation is not amenable to a harmless error analysis: "The right is either respected or denied; its deprivation cannot be harmless." *McKaskle v. Wiggins*, 465 U.S. 168, 177 n. 8, 104 S.Ct. 944, 950 n. 8, 79 L.Ed.2d 122 (1984).

CONCLUSION

I would reverse Stenson's conviction and remand for a new trial without consideration of other issues.

132 Wash.2d 852

[852] **STATE of Washington, Respondent,**

v.

Martin Shaw PANG, Petitioner.

No. 64786–1.

Supreme Court of Washington, En Banc.

Argued April 8, 1997.

Decided July 31, 1997.

Defendant was charged with four counts of murder in the first degree and one count of arson in the first degree. The Superior Court, King County, Larry Jordan, J., denied motion to dismiss or sever murder counts. Defendant moved for direct discretionary review. The Supreme Court, Smith, J., held that: (1) defendant had standing to object to violation of terms of order on extradition issued by Federal Supreme Court of Brazil; (2) Brazil did not waive any objection it could have made to prosecution for murder; (3) specialty doctrine prohibited state from prosecuting defendant for crimes specifically excluded in extradition order; and (4) state was obligated to follow decision of Federal Supreme Court of Brazil which ruled that, as a condition for extradition, defendant could not be prosecuted on murder counts.

Reversed.

Durham, C.J., filed dissenting opinion in which Dolliver and Talmadge, JJ., joined.

Alexander, J., filed opinion joining in dissent.

1. **Extradition and Detainers** ⇐19

In absence of asylum country's consent to prosecution of accused for crime other than that for which accused was extradited, extradited person may raise any objections to post-extradition proceedings that might have been raised by rendering country.

2. **Extradition and Detainers** ⇐19

Only asylum country's express consent to prosecution will be considered a waiver of doctrine of specialty, under which requesting country may not prosecute accused for a crime other than that for which accused was extradited.

3. **Extradition and Detainers** ⇐19

Letter from Brazil Minister of Justice to United States Attorney General, in which Minister discussed ruling by Brazil's Federal Supreme Court that state could try extraditee for arson but not for murder, was neither an implicit waiver nor an explicit waiver of doctrine of specialty, and thus defendant had standing to assert limitations on his post-extradition prosecution; Minister explained in follow-up letter than he had provided no type

EXHIBIT A.

AFFIRMED by Supreme Ct. 139 L.Ed.2d 608 (1997)

OPINION APPENDIX B—Continued

4. A declaration that there exist and will be forthcoming the relevant documents required by Article IX of the present Treaty.

If, within a maximum period of 60 days from the date of the provisional arrest of the fugitive in accordance with this Article, the requesting State does not present the formal request for his extradition, duly supported, the person detained will be set at liberty and a new request for his extradition will be accepted only when accompanied by the relevant documents required by Article IX of the present Treaty.

Article IX

The request for extradition shall be made through diplomatic channels or, exceptionally, in the absence of diplomatic agents, it may be made by a consular officer, and shall be supported by the following documents:

1. In the case of a person who has been convicted of the crime or offense for which his extradition is sought: a duly certified or authenticated copy of the final sentence of the competent court.

2. In the case of a person who is merely charged with the crime or offense for which his extradition is sought: a duly certified or authenticated copy of the warrant of arrest or other order of detention issued by the competent authorities of the requesting State, together with the depositions upon which such warrant or order may have been issued and such other evidence or proof as may be deemed competent in the case.

The documents specified in this Article must contain a precise statement of the criminal act of which the person sought is charged or convicted, the place and date of the commission of the criminal act, and they must be accompanied by an authenticated copy of the texts of the applicable laws of the requesting State including the laws relating to the limitation of the legal proceedings or the enforcement of the penalty for the crime or offense for which the extradition of the person is sought, and data or records which will prove the identity of the person sought.

The documents in support of the request for extradition shall be accompanied by a

OPINION APPENDIX B—Continued

duly certified translation thereof into the language of the requested State.

Article X

When the extradition of a person has been requested by more than one State, action thereon will be taken as follows:

1. If the requests deal with the same criminal act, preference will be given to the request of the State in whose territory the act was performed.

2. If the requests deal with different criminal acts, preference will be given to the request of the State in whose territory the most serious crime or offense, in the opinion of the requested State, has been committed.

3. If the requests deal with different criminal acts, but which the requested State regards as of equal gravity, the preference will be determined by the priority of the requests.

Article XI

The determination that extradition based upon the request therefor should [968]or should not be granted shall be made in accordance with the domestic law of the requested State, and the person whose extradition is desired shall have the right to use such remedies and recourses as are authorized by such law.

Article XII

If at the time the appropriate authorities of the requested State shall consider the documents submitted by the requesting State, as required in Article IX of the present Treaty, in support of its request for the extradition of the person sought, it shall appear that such documents do not constitute evidence sufficient to warrant extradition under the provisions of the present Treaty of the person sought, such person shall be set at liberty unless the requested State or the proper tribunal thereof shall, in conformity with its own laws, order an extension of time for the submission by the requesting State of additional evidence.

Article XIII

Extradition having been granted, the surrendering State shall communicate promptly

EXHIBIT A.

OPINION APPENDIX A—Continued

according to the Criminal Law Code, Article 250:

> . . . to cause a fire, exposing to risk of life, the physical integrity or the property of another:
>
> Penalty—confinement, from three to six years. . . .

In considering the resulting "death", there is the qualifying [clause] included in the first portion of Article 258, which says:

> . . . If serious bodily harm results from an intentional crime of common danger, the prison sentence is increased by half—the penalty of Article 250—if it results in death, it is doubled. In the case of non-intentional [crime] [illegible] and then by lack of prudence, negligence and lack of skill—if bodily harm—as it relates to fire—results from the act, the penalty would be increased by half, if it results in death, the sentence imposed for Non-Intentional Homicide is increased by one third.

Now, looking at the facts in the narrative, my opinion is that the case, from the point of view of dual criminality, taking into consideration Brazilian legislation, fits in the first portion of Article 258 of our Criminal Law Code. Therefore I agree, on this, with Justice Francisco Rezek.

There is the issue of life sentence. The established jurisprudence of this Court, I [956]believe, unless I am mistaken, is to lay down conditions for granting the Extradition, when there is the risk of the Person Sought being sentenced to death. Therefore, we proceed with the utmost care in clause XLVII of the list of basic guarantees, as included in the Constitution, Article 5's "caput", pertaining to foreign nationals living in Brazil. The question is: Is it possible to distinguish; is it possible to establish the application of the clause, obstructing certain procedure, if it implies in "death", and not proceed in exactly the same way, when there is risk of a life sentence? What would be the basis for the divergence, if guarantees are placed in the same clause of Article 5?

Article 5 is categorical, in clause XLVII:

> XLVII—there will be no sentences:

OPINION APPENDIX A—Continued

> a) of death, unless war has been declared, according to Article 84, XIX:
>
> b) of life [in prison]:
>
> c) of forced labor;
>
> d) of exile;
>
> e) of cruelty;

I do not see how this Court's Jurisprudence can make a stand as to the restriction, concerning paragraph "a" and not continue in the same vein, since the basis is the same, as to paragraph "b", concerning the impossibility of a life sentence, as it exists in American law.

First, I am unable—and in this respect I am one of Justice Francisco Rezek's disciples—to place the Treaty above the Political Document of the Republic [Constitution]. I look at its content and I place the treaties at the same level as our ordinary laws.

Second, concerning specific law, which some think it is demanded by constitutional rule, we do have that. Our Criminal Law Code states that no one will remain in prison for more than thirty years. Thus, the requirement defined in our jurisprudence is being echoed by the very Brazilian Criminal Law Code.

Therefore, in this case, I remove the possibility for the Person sought for Extradition to answer for Murder in the First Degree—having in mind the material conflict, the four counts, the four Murders—and, further, I also exclude the possibility of [this person] receiving a life sentence, therefore establishing that he cannot remain under the State's custody for more than thirty years.

I grant the Request [for Extradition] on these terms, therefore, partially.

[Signature illegible]

FULL SESSION

EXTRADITION No. 654-1 USA

VOTE

JUSTICE CARLOS VELLOSO: Mr. President, in examining the request for [957]extradition, the Brazilian judge must verify if the mentioned criminal acts, according to the laws of the Requesting State, are also typical here, [dual criminality] i.e., if they

EXHIBIT B.

OPINION APPENDIX A—Continued

nately joined in international treaties, and another based on constitutional statute—standard regulations that are clearly revealed as unmatched in degree of validity, efficacy and authority.

It is necessary to accentuate, in this respect, that the standard derived from international treaties, within the Brazilian legal system, allows the placement of these acts of public international law, in the hierarchy of sources, in the same plane and degree of efficacy given to internal laws of an infra-constitutional character. (JOSÉ ALFREDO BORGES, in Revista de Direito Tributário [Taxation Law Magazine], vol. 27–28, pg. 170–173; FRANCISCO CAMPOS, in RDA [expansion unknown] 47 / 452; ANTONIO ROBERTO SAMPAIO DORIA, "Da Lei Tributária no Tempo" [Of Taxation Law in Time], pg. 41, 1968; GERALDO ATALIBA, "Apontamento de Ciencia das Finanças, Direito Financeiro e Tributário" [Finance Science Finance and Taxation Law Code, Annotated], pg. 110, 1969, RT [expansion unknown]; IRINEU STRENGER, "Curso de Direito Internacional Privado" [Private International Law Course], pg. 108–112, 1978, Forense; JOSÉ FRANCISCO REZEK, "Direito dos Tratados" [Treaty Laws], pg. 470–475, items 393–395, 1984, Forense, v.g.).

Indeed, there is no hierarchic-standard precedence or priority of these [950]international acts, compared to internal positive law, specially according to clauses contained in the Constitution of the Republic, since the external standard practice is not superimposed on what is found in our Basic Law level.

I know, Mr. President that in 1985 this Court changed its orientation as far as the jurisprudence is concerned, which conditioned the handing over of the person sought for extradition to the existence of a formal agreement—previously done by the requesting State—concerning the commutation of the life sentence penalty in temporary sanction of prison sentences (RTJ 108 / 18—RTJ 111 / 16).

In fact, Extradition Hearing No. 426–3, requested by the Government of the United States of America, led the Federal Supreme Court, per majority vote to declare "... irrelevant the allegation for the restriction of life sentence commutation in prison sentences, due to lack of provision in the Law or in the treaty" (RTJ 115 / 969).

Despite the current prevailing orientation in this Court, I do not see—consistent with the votes in previous extradition hearings (Ext. 486—The Monarchy of Belgium, for instance)—how to give precedence to penalty rules only present in formal agreements (international treaties) or simply of a legal nature as far as rules contained in the Constitution, which prohibit, absolutely, the imposition of any penalty of a lifelong character (CC, Article 5, clause XLVII, b).

This constitutional prohibition, absolute and impossible to bypass, contains, in reality, the very basis of the legal norm consolidated by Article 75 of the Brazilian Criminal Code, which limits the maximum prison sentence to 30 (thirty) years (DAMÁSIO E. DE JESUS, "Código Penal Anotado" [Criminal Law Code Annotated] pg. 212, 5th Edition, 1995, Saraiva; CELSO DELMANTO "Código Penal Comentado" [Comments on the Criminal Law Code], pg. 121, 3rd ed., 1991, Renovar; JULIO FABRINI MIRABETE, "Manual de Direito Penal" [Criminal Law Manual], vol. I/320, item 7.6.7, 9th ed., 1995, Atlas; ÁLVARO MAYRINK DA COSTA, "Direito Penal—Parte Geral" [Criminal Law—General Part], vol. I, tome II / 579, 4th ed., 1992, Forense; JORGE ALBERTO ROMEIRO, "Curso de Direito Penal Militar" [Military Criminal Law Course], p. 196, item No. 114, 1994, Saraiva; LUIZ VICENTE CERNICHIARO / PAULO JOSÉ DA COSTA JÚNIOR, "Direito Penal na Constituição" [Criminal Law in the Constitution], p. 112–114, 1990, RT).

From the teachings of CELSO RIBEIRO BASTOS (Comentário à Constituição do Brasil" [Comments on the Brazilian Constitution], vol. 2 / 242, 1989, Saraiva) for whom the Brazilian criminal legislature "... grasped very well the sense of the Greater Law precept", because in fixing the limit of time mentioned (CC, Article 75), it defined the maximum penalty legally possible in our country.

EXHIBIT C.

Id. The Fifth Circuit reasoned that the Commission's invocation of broader authority to support section 4B1.1 would have prospective application. *Id.* Following the *Bellazerius* opinion, the Sentencing Commission submitted to Congress a nearly identical amendment to the background commentary to section 4B1.1. 60 Fed.Reg. 25074, 25086–87 (1995). If there is any doubt that the Commission was relying on section 994(h) as its authority for the inclusion of conspiracy in the enumeration of offenses, such doubt is swept away by the Commission's more recent efforts to extend the statutory basis to section 994, specifically subsections (a)–(f). The amendment specifically cites 28 U.S.C. § 994(a)–(f) as authority for section 4B1.1. Moreover, the stated reason for the additional background commentary is the *Price* decision. 60 Fed.Reg. at 25087. This proposed amendment confirms that the Commission's sole rationale and authority for section 4B1.1 is section 994(h), and remained so at the time Mendoza–Figueroa committed his offense, entered his guilty plea, and received his sentence.

In my view, *Price* and *Bellazerius* have the better argument because they apply the guidelines and commentary as written. The Sentencing Commission plainly meant what it said in stating that section 994(h) was the basis of its Guideline. This is made abundantly clear by the Commission's proposal to modify the basis for the Guideline, as noted by the Fifth Circuit in *Bellazerius*, 24 F.3d at 702, and by the Commission's subsequent submission of the modification to Congress. 60 Fed.Reg. at 25086.

For these reasons, I conclude that the Sentencing Commission exceeded its statutory authority by including a drug conspiracy offense in the definition of a career offender, and I would reverse the sentence.

UNITED STATES of America, Appellee,

v.

John Gregory LAMBROS, Appellant.

No. 94–1332.

United States Court of Appeals, Eighth Circuit.

Submitted May 18, 1995.

Decided Sept. 8, 1995.

Following his extradition from Brazil, defendant was convicted in the United States District Court for the District of Minnesota, Diana E. Murphy, J., of conspiracy to distribute cocaine and three counts of possession of cocaine with intent to distribute. Defendant was sentenced to life in prison, and he appealed. The Court of Appeals, Wollman, Circuit Judge, held that: (1) defendant was not subject to statute's mandatory life sentence for conspiracy to distribute cocaine; (2) career offender provisions of Sentencing Guidelines were applicable to defendant's conspiracy conviction and one of his possession convictions; (3) evidence established that defendant was not tortured in Brazil with complicity of American officials while he awaited extradition; (4) evidence sustained finding that defendant was competent to stand trial; and (5) evidence sustained finding that defendant willfully perjured himself, warranting sentencing enhancement for obstruction of justice.

Convictions affirmed; sentence vacated and remanded.

1. Conspiracy ⇐51

Defendant who was convicted of a conspiracy to distribute cocaine was not subject to statute's mandatory life sentence, where statute did not take effect until well after conspiracy end date charged in indictment. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(b)(1)(A)(ii), as amended, 21 U.S.C.A. § 841(b)(1)(A)(ii).

2. Criminal Law ⇐51

Defendant who was convicted of conspiracy to distribute cocaine was not eligible for

		10/01/2008)
10/06/2008	714	Judgment Returned Executed as to Eyder Xiomara Bejarano-Olaya on 9/26/08. (vjk) (Entered: 10/06/2008)
10/07/2008	715	NOTICE *of Intent to Plead Guilty* by Dainer Camacho-Benitez (Rodriguez, Hugo) (Entered: 10/07/2008)
10/07/2008	716	ORDER granting 694 Motion for clarification as to who should continue representation of the defendant as to Adalberto Pena-Cordoba (32). Signed by Judge Donald M. Middlebrooks on 10/6/08. (lk) (Entered: 10/07/2008)
10/07/2008		Attorney update in case as to Adalberto Pena-Cordoba. Attorney Kenneth Mitchell Swartz terminated. (lk) (Entered: 10/07/2008)
10/08/2008	717	MOTION to Continue Trial by Adalberto Pena-Cordoba. Responses due by 10/27/2008 (Garcia, Ruben) (Entered: 10/08/2008)
10/08/2008	718	AMENDED JUDGMENT as to Eyder Xiomara Bejarano-Olaya (18), Count(s) 4. Dismissed; Count(s) 4s. Defendant sentenced to 70 months imprisonment to be followed by 3 years of supervised release. Defendant assessed $100.00. Defendant shall receive credit for time served since 5/16/06. Signed by Judge Donald M. Middlebrooks on 10/8/08. (tp) (Entered: 10/09/2008)
10/09/2008	719	Sealed Document (igo) (Entered: 10/10/2008)
10/09/2008	720	Sealed Document (igo) (Entered: 10/10/2008)
10/10/2008	721	ORDER AMENDING JUDGMENT AND COMMITMENT. 712 Motion to Reduce Sentence as to Fidel Sandoval-Rosero (25) is Granted. The previously imposed sentence is reduced to time served. All other conditions previously imposed shall remain in full force and effect. Signed by Judge Donald M. Middlebrooks on 10/10/08. (tp) (Entered: 10/10/2008)
10/14/2008	722	NOTICE OF ATTORNEY APPEARANCE: Martin L. Roth appearing for Ever Giovanni Hurtado-Paz (Roth, Martin) (Entered: 10/14/2008)
10/14/2008	723	ORDER CONTINUING TRIAL as to Adalberto Pena-Cordoba Time excluded from 12/1/08 until 1/5/09. Jury Trial reset for 1/5/2009 09:00 AM in West Palm Beach Division before Judge Donald M. Middlebrooks. Motion granted 717 MOTION to Continue Trial filed by Adalberto Pena-Cordoba. Signed by Judge Donald M. Middlebrooks on 10/14/08. (tp) (Entered: 10/15/2008)
10/15/2008	724	Minute Entry for proceedings held before Judge Donald M. Middlebrooks: Sentencing held on 10/15/2008 for Luis Segundo Polanco-Garcia (8). Count(s) 1, 2, 2s, 3, 3s, Dismissed; Count(s) 1s, Defendant sentenced to 135 months imprisonment to be followed by 3 years of supervised release. Defendant assessed $100.00. Court Reporter: Karl Shires. Phone: 561-514-3728 (ar) Modified on 10/16/2008 (ar). (Entered: 10/15/2008)

EXHIBIT E.