MARCH 7, 2013

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

U.S. CERTIFIED MAIL NO.
7008-1830-0004-2646-8539

CLERK OF THE COURT
U.S. COURT OF APPEALS FOR THE EIGHTH CIRCUIT
Thomas F. Eagleton U.S. Courthouse
111 South 10th Street, Room 24.329
St. Louis, Missouri 63102
Tel. (314) 244-2400
Website: www.ca8.uscourts.gov

RE: USA vs. LAMBROS, Criminal Docket NO.'s 3-76-17; and 3-75-128.
U.S. DISTRICT COURT FOR THE DISTRICT OF MINNESOTA.

Dear Clerk:

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

1. MOTION FOR LEAVE TO FILE SECOND OR SUCCESSIVE MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE UNDER 28 U.S.C. §2255(f)(3) AND §2255(h)(2) BY A PRISONER IN FEDERAL CUSTODY AND MEMORANDUM OF FACT AND LAW IN SUPPORT OF SAME. **DATED: March 7, 2013**

I have served copy on the U.S. Attorney.

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

Sincerely,

JOhn Gregory Lambros, Pro Se

CERTIFICATE OF SERVICE

I JOHN GREGORY LAMBROS certify that I mailed a copy of the above-entitled motion within a stamped envelop with the correct postage to the following parties on **MARCH 7, 2013** from the U.S. Penitentiary Leavenworth mailroom:

2. Clerk of Court for U.S. Court of Appeals for the Eighth Circuit, as addressed above;
3. U.S. Attorney's Office, U.S. Courthouse, 316 N. Robert Street, St. Paul, Minnesota 55101.

John Gregory Lambros, Pro Se

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JOHN GREGORY LAMBROS, Defendant - Movant, vs. UNITED STATES OF AMERICA, Plaintiff - Respondent.	*	CIVIL NO. 13-1561 United States Distict Court for the District of Minnesota: INDICTMENT No's: 3-76-17; and 3-75-128. AFFIDAVIT FORM

MOTION FOR LEAVE TO FILE SECOND OR SUCCESSIVE MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE UNDER 28 U.S.C. §2255(f)(3) AND §2255(h)(2) BY A PRISONER IN FEDERAL CUSTODY AND MEMORANDUM OF FACT AND LAW IN SUPPORT OF SAME.

COMES NOW the Defendant - Movant, JOHN GREGORY LAMBROS, hereby moves this Honorable Court for leave to file a second or successive motion to vacate, set aside or correct a sentence under 28 U.S.C. §§ 2255(f)(3) and 2255(h)(2) by a prisoner in federal custody. This motion is brought due to the U.S. Supreme Court's rulings that strengthens rights to counsel during plea bargaining. On March 21, 2012, the U.S. Supreme Court handed down two (2) decisions that expanded the opportunities for defendants to overturn their convictions on the basis of **POST-CONVICTION CLAIMS** that their attorneys did an unreasonably poor job during plea negotiations. Defendants who can show that their attorneys failed to communicate plea offers or failed to give them competent counsel regarding a plea offer can get a lower sentence or have the prosecutor re-extend the plea offer, even if the defendants received a fair trial after they rejected the offer, the court makes clear. See, MISSOURI vs. FRYE, 132 S. Ct. 1399; 182 L. Ed. 2d 379 (March 21, 2012) and LAFLER vs. COOPER, 132 S. Ct. 1376; 182 L. Ed. 2d 398 (March 21, 2012). MISSOURI and LAFLER announced a type of Sixth Amendment

violation that was previously unavailable, and requires retroactive application to cases on collateral review.

I. TIMELINESS OF THIS MOTION

1. Movant argues that the Supreme Court recognized a new right in deciding MISSOURI and LAFLER, and seeks relief pursuant to same. Title 28 U.S.C. §2255(f)(3) states that the one year limitation period begins on "the date on which the right asserted was initially recognized by the Supreme Court." The Supreme COurt has clarified that the statute means what it says and rejects the argument that §2255(f)(3)'s limitations period should start when the right asserted is made retroactive. DODD vs. U.S., 545 U.S. 353, 162 L.Ed.2d 343 (2005). The United States Supreme Court decided MISSOURI and LAFLER on March 21, 2012. Therefore, this motion is timely.

II. RETROACTIVE APPLICATION OF MISSOURI AND LAFLER

2. **MISSOURI v. FRYE:** On **HABEAS CORPUS REVIEW**, Frye claimed his **SIXTH AMENDMENT RIGHT** to effective assistance of counsel was violated because his counsel failed to inform him of the prosecution's plea offer and he would have accepted the offer if he had known about it. The first hurdle Frye had to overcome in making his claims was to convince the Supreme Court that he had a right to effective assistance of counsel at the **PLEA-BARGAINING STAGE, GIVEN THAT THE SUPREME COURT HAS NEVER RECOGNIZED A CONSTITUTIONAL RIGHT TO PLEA BARGAINING.** Yet the majority in Frye had little trouble recognizing **PLEA BARGAINING AS A "CRITICAL STAGE" AT WHICH THE SIXTH AMENDMENT GUARANTEED THE DEFENDANT THE RIGHT TO COUNSEL.**

Extrapolating from the court's opinion in HILL v. LOCKHART, 474 U.S. 52 (1985) and its more recent decision in PADILLA v. KENTUCKY, 176 L. Ed. 2d 284 (2010),

Kennedy held that the **SIXTH AMENDMENT GUARANTEED FRYE THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL DURING PLEA BARGAINING.** Neither HILL nor PADILLA was directly on point because they focused more on whether counsel's misadvice negated their client's guilty plea. In HILL, defense counsel misinformed the defendant of the amount of time he would have to serve before he became eligible for parole. In PADILLA, the court set aside a plea because defense counsel misinformed the defendant of the immigration consequences of the conviction. Yet the language from these cases became critical to the task of finding a general duty of effective assistance of counsel in plea bargaining. In particular, KENNEDY focused on the court's statement in PADILLA that **"THE NEGOTIATION OF A PLEA BARGAIN IS A CRITICAL PHASE OF LITIGATION FOR PURPOSE OF THE SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL."** (emphasis added)

Yet, recognizing the right to effective assistance of counsel during plea bargaining was just step number one (1) in the court's analysis. The more challenging task was defining what standard should be used in measuring whether counsel has met **SIXTH AMENDMENT REQUIREMENTS.** Pursuant to the ineffective assistance of counsel standard set forth in STRICKLAND v. WASHINGTON, 466 U.S. 668 (1984), a defedant must demonstrate that counsel's representation fell below professional standards.

STEP NUMBER TWO (2) OF THE STRICKLAND ANALYSIS, as applied to plea bargaining, is a little more challenging. How does a defendant show that counsel's ineffective assistance during plea bargaining prejudiced his or her case? **HERE, THE COURT HELD THAT TO ESTABLISH PREJUDICE, FRYE WOULD HAVE TO SHOW "A REASONABLE PROBABILITY THAT THE END RESULT OF THE CRIMINAL PROCESS WOULD HAVE BEEN MORE FAVORABLE BY REASON OF A PLEA TO A LESSER CHARGE OR A SENTENCE OF LESS PRISON TIME."** If it is an offer, like that in FRYE, that could be withdrawn by the prosecution or rejected by the court, the defendant must show that the offer would have remained and that he would have received the benefit of the plea bargain.

JUSTICE ANTONIN SCALIA wrote for the four dissenters, who objected to the majority's decision on the most basic level. As the dissent states, "The plea-bargaining process is a subject worthy of regulation, since it is the means by which most criminal convictions are obtained. **IT HAPPENS NOT TO BE, HOWEVER, A SUBJECT COVERED BY THE SIXTH AMENDMENT**, which is concerned not with fairness of plea bargaining but with the fairness of conviction." (emphasis added) FRYE never argued that he was not guilty of the offense to which he plead guilty. His conviction was fair, even though he might have hoped for a more favorable resolution of the case.

3. **LAFLER v. COOPER:** On **HABEAS CORPUS REVIEW PURSUANT TO 28 U.S.C. §2254 AND SUBJECT TO THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996 (AEDPA)**, Anthony Cooper was charged with assault with intent to murder, possession of a firearm by a felon, possession of a firearm in commission of a felony, misdemeanor possession of marijuana, and for being a habitual offender. Cooper pointed a gun and shot at his victim's head. The shot missed and the victim ran, Cooper shot again and hit her in the buttocks, hip, and abdomen. She survived the shots.

Prosecutors twice offered to dismiss two of the charges and recommended a sentence of 51 to 85 months for the other charges. Defendant admitted his guilt in communication with the court and expressed a willingness to accept the offer. However, he changed his mind when his lawyer convinced him that the prosecution would be unable to establish intent to murder the victim because she had been shot below the waist. Cooper ended up going to trial, rejecting yet another plea offer on the first day of trial. He was convicted by a jury and **RECEIVED A MANDATORY MINIMUM SENTENCE OF 185 to 360 MONTHS' IMPRISONMENT, MORE THAN THREE TIMES WHAT HE WOULD HAVE RECEIVED IF HE HAD ACCEPTED THE PROSECUTION"S INITIAL PLEA OFFER.**

Using the analytic structure established in FRYE and STRICKLAND, the Supreme Court held that counsel's advice constituted ineffective assistance of counsel. First, the parties conceded that counsel's performance was deficient.

No competent counsel would have believed that COOPER could not be found to have the intent to murder simply because his shots had hit the victim below the waist. Second, the court held that, but for counsel's deficient performance, there was a reasonable probability that he and the trial court would have accepted the guilty plea.

The real issue was what the remedy should be. **HOW COULD COOPER BE MADE WHOLE AT THIS POINT?** The Supreme Court held that the **PROPER REMEDY WAS TO ORDER THE STATE TO REOFFER THE PLEA BARGAIN.**

While raising issues similar to those of FRYE, COOPER added another dimension to the court's decision to recognize a right to effective assistance of counsel during plea bargaining. COOPER'S case was not like that of HILL, in which the court had held that improper advice by counsel could invalidate a guilty plea. COOPER **WENT TO TRIAL.** He did not argue that he received an unfair trial. Rather, he **RELIED ON A YET-TO-BE-RECOGNIZED RIGHT TO ACCEPT A PLEA BARGAIN.**

In the end, the court found the distinction to be without a difference. The defendant's fair trial did not wipe clean his lawyer's deficiencies. With plea bargaining such a critical aspect of the criminal justice system, saying that a fair trial makes up for any deficiencies in counsel's conduct during the pretrial process ignores the reality of the substantial effect plea bargaining can have on a defendant's future.

4. **CONCLUSION:** The lessons of FRYE and COOPER seem simple on their face: Defense counsel must convey all plea offers to a client and then provide adequate advice as to whether to accept such offers. Defense lawyers have a **SIXTH AMENDMENT** duty to professionally advise their clients with respect to such negotiations

II(A). TITLE 28 U.S.C. §2255(f)(3):

5. The relevant portion of 28 U.S.C. §2255(f)(3) states that:

"if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review;".

Movant states that §2255(f)(3) does not require that the **RETROACTIVITY DETERMINATION MUST BE MADE BY THE SUPREME COURT ITSELF.** Had Congress desired to limit §225(f)(3)'s retroactivity requirement, it would have similarly placed a **"BY THE SUPREME COURT"** limitation immediately after the phrase "made retroactively applicable to cases on collateral review" in §2255(f)(3). Both FRYE and COOPER are retroactively applicable on collateral review.

II(B). TITLE 28 U.S.C. §2255(h)(2):

6. The relevant portion of 28 U.S.C. §2255(h)(2) is premised on:

"a **NEW RULE OF CONSTITUTIONAL LAW,** made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." (emphasis added)

II(C). TEAGUE vs. LANE, 489 U.S. 288, 109 S. Ct 1060, 103 L.Ed.2d 334 (1989)

7. TEAGUE and subsequent cases, the Supreme Court laid out the framework for determining when a rule announced in one of its decisions should be applied retroactively in criminal cases that are already final on direct review. Under TEAGUE **"AN OLD RULE APPLIES BOTH NO DIRECT AND COLLATERAL REVIEW,** but a new rule is generally applicable only to cases that are still on direct review." See, **WHORTON vs. BOCKTING,** 549 U.S. 406, 416, 127 S.Ct. 1173, 167 L.Ed.2d 1 (2007) (quoting GRIFFITH v. KENTUCKY, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed. 2d 649 (1987). A **NEW RULE** may "appl[y] retroactively in collateral proceeding only if (1) the rule is substantive or (2) the rule is a 'watershed rul[e] of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." Id. (quoting SAFFLE vs. PARKS, 494 U.S. 484, 495, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990) (quoting in turn TEAGUE vs. LANE, 489 U.S. 288, 311, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) (plurality opinion) (internal quotations omitted)).

8. If this court conclude that the Supreme COurt has announced an **OLD RULE, THIS MOTION APPLIES RETROACTIVELY:** however, if the **RULE IS NEW,** this Court must then consider whether one of the two (2) exceptions applies to make this motion retroactive. See, WHORTON, 549 U.S. at 416.

9. Movant argues that TEAGUE is inapplicable, becuase IT **IS SIMPLY THE APPLICATION OF AN OLD RULE.** FRYE and COOPER does not announce a new rule and that it is an extension of the rule in STRICKLAND vs. WASHINGTOIN, 466 U.S 668 (1984) - requiring effective assistance of counsel -, and that its holding should apply retroactively. The Supreme Court's conclusion in FRYE and COOPER is **OPPOSITE THE HOLDING OF EVERY FEDERAL CIRCUIT COURT TO HAVE ADDRESS THE ISSUE.** Therefore, the Supreme Court held that plea bargaining is a "critical stage" at which the **SIXTH AMENDMENT GUARANTEES THE DEFENDANT THE RIGHT OF EFFECTIVE COUNSEL.** The Supreme Court concluded that **STRICKLAND** applies to advice regarding plea bargaining.

II(C)(1). THE EXTENSION OF AN OLD RULE

10. In highlighting the importance of the right to effective assistance of counsel at the plea-bargaining stage, the Supreme Court recognized plea bargaining as a "critical stage" at which the **SIXTH AMENDMENT** guarantees a defendant the right to counsel. **THE SUPREME COURT HAS NEVER RECOGNIZED A CONSTITUTION RIGHT TO PLEA BARGAINING.** Justice Kennedy held that the **SIXTH AMENDMENT GUARANTEES THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL DURING PLEA BARGAINING.** In his opinions in FRYE and COOPER, Justice Kennedy held that the minimum standards set forth in STRICKLAND vs. WASHINGTON, also apply to plea bargaining.

11. The Supreme Court did not break new ground, it simply pointed out the errors in the lower courts that prevented them from considering ineffective assistance of counsel claims under STRICKLAND. The Supreme COurt found that the lower courts' impermissibly removed advice regarding plea bargaining from the

the ambit of the **SIXTH AMENDMENT RIGHT TO COUNSEL.**

12. Movant's research has not found a case that could show how FRYE and COOPER can be construed as a new rule not dictated by STRICKLAND. The Supreme Court has noted that "the STRICKLAND test provides sufficient guidance for resolving virtually all ineffective-assistance-of-counsel claims," and Movant requests this Court find STRICKLAND has provided such guidance in FRYE and COOPER. See, WILLIAMS vs. TAYLOR, 529 U.S. 362, 391, 120 S.Ct. 1495, 146 L.Ed. 2d 389, 416 (2000). Therefore, FRYE and COOPER applied STRICKLAND to a new set of facts without establishing a new rule because, the Supreme Court merely cited to professional standards and expectations and identified competent counsel's duty in accordance thereof. Movant again requests this Court to find FRYE and COOPER apply retroactively.

II(C)(ii). TYLER v. CAIN, 533 U.S. 656, 121 S.Ct. 2478, 150 L.Ed.2d 632 (2001).

13. In TYLER, the Supreme Court explained that a case is "made retroactive to cases on collateral review by the Supreme Court" for purposes of the statutory limitations on second or successive hadeas petitions if an "only if this Court has held that the new rule is retroactively applicable to cases on collateral review." Id. at 662. The TYLER Court explained, however, that "this Court can make a rule retroactive **OVER THE COURSE OF TWO (2) CASES** .... Multiple cases can render a new rule retroactive .... if the holdings in those cases **NECESSARILY DICTATE RETROACTIVITY OF THE NEW RULE.**" Id. at 666.

14. Justice O'Connor, who supplied the crucial fifth vote for the majority, wrote a concurring opinion, and her reasoning adds to the understanding of the impact of TYLER. She explains that it is possible for the Court to "make" a case retroactive on collateral review without explicitly so stating, as long as the Court's holdings "logically permit no other conclusion than that the rule is

retroactive." See, 533 U.S. at 668-69, 150 L.Ed. 2d at 646-47. For example.

Justice O'Connor explained that"

> "If we hold in Case One that a particular type of rule applies retroactively to cases on collateral review and hold in case Two that a given rule is of that particular type, then it necessarily follows that the given rule applies retroactively to cases on collateral review. In such circumstances, we can be said to have "made" the given rule retroactive to cases on collateral review."

But Justice O'Connor qualified this approach by explaining that:

> "The relationship between the conclusion that a new rule is retroactive and the holdings that "make" this rule retroactive, however, must be strictly logical - - i.e., the holdings must dictate the conclusion and not merely provide principles from which one may conclude that the rule applies retroactively."

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

II(D). "PRIMA FACIE EVIDENCE" FROM UNITED STATES COURT OF APPEALS THAT HAVE APPLIED LAFLER AND FRYE "RETROACTIVELY" TO HABEAS PETITIONERS WHOSE CASES ARE ALREADY FINAL ON DIRECT REVIEW!

15. On September 28, 2012, the published "OPINION" by the United States Court of Appeals for the Ninth Circuit, TYRONE W. MILES vs. MICHAEL MARTEL, WARDEN, Docket No. 10-15633, held that LAFLER vs. COOPER and MISSOURI vs. FRYE apply RETROACTIVELY: **(MILES vs. MARTEL, 696 F.3d 889, 899-900, and FootNotes 3 & 4.)**

> "This case fits squarely between LAFLER and FRYE. As in LAFLER, a habeas case subject to AEDPA like this one, 'the favorable plea offer was reported to the client but, on advice of counsel, was rejected.' LAFLER, 132 S. Ct. at 1383. **(FootNote 3)** And like FRYE, 'after the [plea] offer lapsed the defendant still pleaded guilty, but on more severe terms.' id. **(FootNote 4)"**

FootNote 3:

> "In LAFLER, the Court held that STRICKLAND is appropriate 'clearly established federal law' to apply to claims of

> ineffective assistance of counsel in plea bargaining, even when the claim relates to a foregone plea. See, LAFLER, 132 S. Ct. at 1384. **BY APPLYING THIS HOLDING IN LAFLER, A HABEAS PETITION SUBJECT TO AEDPA, THE COURT NECESSARILY IMPLIED THAT THIS HOLDING APPLIES TO HABEAS PETITIONERS WHOSE CASES ARE ALREADY FINAL ON DIRECT REVIEW; i.e. THAT THE HOLDING APPLIES RETRO-ACTIVELY. ...."** (emphasis added)

See, MILES vs. MARTEL, No. 10-15633 (9th Cir., September 28, 2012) (Page 11917 within "OPINION" of the U.S. Court of Appeals Ninth Circuit "PUBLICATION".)

ALSO SEE ATTACHED: EXHIBIT A. (Pages 11903, 11906, 11907, and 11917 of MILES vs. MARTEL)

16. The Ninth Circuit held in MILES vs. MARTEL, "Following the United States Supreme Court's decision in LAFLER vs. COOPER and MISSOURI vs. FRYE, we reverse the district court's denial of Mile's petition for habeas corpus and remand to the district court to hold an evidentiary hearing on Mile's claims." Id. at 11907.

17. U.S. vs. RAFAEL E. RIVAS-LOPEZ, 678 F.3d 353, 357 and Footnote 23 (5th Cir. April 18, 2012). The Court vacated Movant's sentence due to ineffective assistance of counsel when his attorney overestimated his sentence exposure under a pro-offered plea due to the holdings in MISSOURI vs. FRYE and LAFLER vs. COOPER. This action was filed as a **§2255 MOTION.**

18. MERZBACHER vs. SHEARIN, No. 10-7118 (4th Cir. January 25, 2013) (PUBLISHED) MERZBACHER was sentenced to four (4) life sentences by the State of Maryland in 1995. When his direct appealed failed, MERZBACHER sought state post-conviction relief alleging his **TRIAL LAWYERS DENIED HIM EFFECTIVE ASSISTANCE OF COUNSEL IN FAILING TO NOTIFY HIM OF, AND COUNSEL HIM ABOUT, A PRE-TRIAL PLEA OFFER.** The State refused to grant relief. MERZBACHER petitioned for a writ of habeas corpus in federal court, which was granted pursuant to 28 U.S.C. §2254, on July 30, 2010. The State of Maryland filed a timely appeal. The Fourth Circuit stated within its evaluation of this case - citing to MISSOURI vs. FRYE and LAFLER vs. COOPER and **APPLIED THE TWO (2) ELEMENT FRYE PREJUDICE TEST:**

SECTION IV: (Page 15)

> "To show prejudice from ineffective assistance of counsel in

a case involving a **PLEA OFFER**, petitioners must demonstrate a reasonable probability that (1) "they would have accepted the earlier plea offer had they **BEEN AFFORDED EFFECTIVE ASSISTANCE**

*** **OF COUNSEL,**" and (2) "the plea .... **FRYE, 132 S.Ct. at 1409; accord LAFLER, 132 S.Ct. at 1385.**" (emphasis added)

The State Court most certainly did not follow this precise language in its findings. **(It could not have done so for the**

*** **Supreme Court did not issue FRYE and LAFLER until WELL AFTER THE STATE COURT HAD RULED.)** But, the state court did make findings relevant to **BOTH ELEMENTS OF THE FRYE PREJUDICE TEST. WE**

*** **CONSIDER, IN TURN, ITS FINDINGS WITH RESPECT TO EACH OF THOSE TWO (2) ELEMENTS."** (emphasis added)

THE LAST TWO (2) SENTENCES PROVE THE COURT APPLIED FRYE AND LAFLER RETROACTIVELY!

See, EXHIBIT B. (MERZBACHER vs. SHEARIN, No. 10-7118 (4th Cir. January 25, 2013, Pages 1 and 15)

III. MOVANT LAMBROS' BACKGROUND AND FACTS IN THIS ABOVE-ENTITLED ACTION:

III(A). THE CHARGES IN THE TWO (2) INDICTMENTS:

19. Movant JOHN GREGORY LAMBROS was named as a defendant in the following **TWO (2) INDICTMENTS THAT ARE RELATED, AS THE PLEA OF GUILTY WAS ENTERED AT THE SAME TIME ON BOTH INDICTMENTS:**

a. **INDICTMENT NO. 3-76-17:** Filed on March 24, 1976. This is a two (2) count indictment as to the actions of Movant Lambros on February 24, 1976, when U.S. Marshals and DEA Agents arrived at Movant's residence to **EFFECT HIS ARREST PURSUANT TO INDICTMENT NO. 3-75-128.** Indictment No. 3-76-17 stated Movant was in violation of Title 18 U.S.C. Sections **111 and 114.**

b. **INDICTMENT NO. 3-75-128:** On February 23, 1976, a Federal Grand Jury returned a superseding 44-count indictment in which Movant Lambros was charged with four (4) counts of possession with intent to distribute cocaine in counts 41 through 44.

20. **EXHIBIT C:** Indictment in USA vs. LAMBROS, No. **3-76-17,** filed on on March 24, 1976, pursuant to violations of Title 18 U.S.C. Sections **111 and 114.** Also attached is copy of the "JUDGMENT AND PROBATION/COMMITMENT ORDER" for same, dated June 21, 1976.

21. **EXHIBIT D: PRESENTENCE REPORT** for John Gregory Lambros, as to **INDICTMENTS 3-75-128 and 3-76-17,** dated May 27, 1976. This is only page one (1) of the PSI REPORT.

22. **EXHIBIT E:** January 29, 2013, letter from the U.S. Department of Justice U.S. Parole Commission to John Gregory Lambros, stating that Movant Lambros still has a pending detainer warrant from the above two (2) indictments due to revocation of parole on same.

23. **EXHIBIT F:** USA vs. LAMBROS, 544 F.2d 962, 962-965 (8th Cir. 1976). This is the decision/opinion from the Eighth Circuit Court of Appeals in the direct appeal of **INDICTMENT NO's: 3-75-128 and 3-76-17.**

III(B). CASE HISTORY

24. On December 8, 1975, a 40-count indictment was filed on 23 persons for cocaine distribution. On February 23, 1976, a Federal Grand Jury returned a superceding, 44-count indictment in which Movant Lambros was charged with four (4) counts of possession with intent to distribute cocaine - Counts 41 thru 44.

25. On February 24, 1976, U.S. Marshals and DEA Agents arrived at Movant Lambros' residence to effect his arrest pursuant to the indictment. At approximately **11:15 P.M.,** Movant was awaken after **DRINKING AND TAKING BARBITURATES** by loud knocking at his door. Movant asked who was there and got the response, **"JIM".** At this point Movant looked out the window and saw several long-haired men standing in front to the back door. "He [Movant] said he had approximately

two (2) grams of cocaine in his home, as well as several thousand dollars in cash, **AND THOUGHT THAT HE WAS ABOUT TO BE RIPPED OFF.** He [Movant] states he ran into another room, picked up his .9 millimeter pistol and fired two (2) shots through the door. After this, shots were returned by the people outside, and defendant yelled that he gave up." **See, PSI REPORT,** Pages 6 and 7. The government's version of Movant Lambros' arrest is as follows:

> "On February 24, 1976, U.S. Marshals and Agents of the Drug Enforcement Administration arrived at defendant's [Movant Lambros'] residence to effect his arrest pursuant to the indictment. While other Agents surrounded the house, two DEA Agents, accompanied by a Deputy U.S. Marshall, approached the **SIDE DOOR AND RANG THE DOOR BELL. [Approx. 11:15 P.M.]** Defendant Lambros came to the door and placed his face against the window. Agents asked him to open the door, **AND LAMBROS SAID,**
> *** **"WHO ARE YOU?" THE AGENT IN CHARGE ANSWERED "JIM." LAMBROS SAID, "I DON'T KNOW YOU."** The Deputy Marshal then stated, "We're Federal Officers with a warrant for your arrest." As defendant Lambros walked away from the door, other Agents called out, "John, we're Federal Agents. We have a warrant for your arrest. Open the door." When defendant reached the top of the stairs, he turned into a room, out of the Agents' sight. Agents then attempted to force the door open but were unable to do so. Approximately 30 seconds later, defendant re-appeared from the area of the dining room, carrying a pistol. Agents observed the gun and stepped back. Defendant then fired two shots through the glass window of the door. The bullets missed the Agents, but glass fragments struck one Agent in the face, lodging in his eye. Agents then returned defendant's fire, and soon after, defendant surrendered. ...."

See, PSI REPORT, Pages 4 and 5.

26. The above **GOVERNMENT VERSION** of Movant Lambros' arrest on February 24, 1976, is not totally correct. Movant Lambros stated that after he placed his face against the window and asked who the people were outside his side door, that is never used by visitors - as the house was a duplex and the side door accessed both apartments and to the best of Movant's recollection no door bell exists for the side door due to the common access - and a person answered **"JIM"**, Movant Lambros said **"I DON'T KNOW YOU" and IMMEDIATELY TURNED AND RAN UP THE STAIRS TO GET HIS PISTOL.** Movant Lambros did not hear anyone say "We're Federal Officers with a warrant for your arrest."

27. The $64,000.00 question is: Why would Movant Lambros return to the door and fire **ONLY TWO (2) SHOTS THROUGH THE GLASS WINDOW COVERING THE TOP HALF**

OF THE DOOR IF HE WAS REFUSING ARREST? Movant Lambros' Browning .9 millimeter had eleven (11) more rounds that were not fired and numerous other loaded guns within the apartment/duplex that he did not discharge. Movant Lambros states that it was only **AFTER** he discharged two (2) shots and the agents discharged numerous shotguns and other firearms while yelling "John, we're Federal Agents", **did he KNOW THE PERSONS OUTSIDE HIS SIDE DOOR WHERE FEDERAL AGENTS.**

28. On April 22, 1976, after three (3) days of trial in **INDICTMENT NO. 3-75-128,** and after other defendants at the trial had entered guilty pleas, Movant's attorney stated to Movant that it would be best to plead guilty to one (1) count of the cocaine conspiracy - Count 43 of the indictment - as the government would not sentence Movant to more than five (5) years of incarceration and that there is no reason why the Court would sentence you to more than five (5) years on **INDICTMENT NO. 3-76-17,** even though the penalty carries a maximum of ten (10) years. Also, both

*** sentences would run concurrently and the government **WOULD NOT DEPORT MOVANT'S WIFE OR PURSUE COCAINE-RELATED CHARGES AGAINST HER.** Additionally, the government would not pursue charges against Movant for **POSSESSION OF THREE (3) ELECTRONIC DEVICES WHICH SEEM TO BE BUGGING DEVICES.** See, U.S. vs. LAMBROS, 544 F.2d at 963-965. See, **EXHIBIT F.**

29. DEA Agents had informed Movant's wife Christina that they would **DEPORT HER AFTER THEY FOUND HER "RESIDENT GREEN CARD" WITHIN HER PURSE ON FEBRUARY 24, 1976, DURING MOVANT'S ARREST.** Movant's wife became very angry with the DEA and responded that she was born on hay and lived on lard sandwiches when she was young before she was brought to the United States. The issue of Christina's deportation as a noncitizen was a daily topic between Movant and his wife before trial while he was on bail. Movant's attorney stated that the DEA could request to have Movant's wife deported and it would be best to plead guilty. **THIS INFORMATION WAS DEEPLY FLAWED! IT WAS MOVANT'S ATTORNEY OBLIGATION TO PROVIDE CORRECT LEGAL ADVICE ON THE DEPORTATION CONSEQUENCES OF MOVANT'S WIFE BEFORE MOVANT PLEAD GUILTY.**

30. Movant't attorney did not investigate nor ask Movant Lambros any questions as to what the functions of the **"THREE (3) ELECTRONIC DEVICES WHICH SEEM TO BE BUGGING DEVICES AND WHICH THE FBI HAS BEEN INVESTIGATING FOR US."** The three (3) electronic devices were not in use and within Movant's house on February 24, 1976. In fact, Movant does not know if the three divices were functional for any type of illegal purpose.

IV. MOVANT LAMBROS' CONVICTIONS AND SENTENCES MUST BE VACATED IN:

a. INDICTMENT NO. 3-76-17; and

b. INDICTMENT NO. 3-75-128;

BASED ON THE FOLLOWING VIOLATIONS OF MISSOURI vs. FRYE, 132 S.Ct. 1399 (2012) AND LAFLER vs. COOPER, 132 S.CT. 1376 (2012):

ISSUE ONE (1):

MOVANT LAMBROS' ATTORNEY WAS INEFFECTIVE DURING THE PLEA OFFER AS HE DID NOT POSSESS AN UNDERSTANDING OF THE ISSUE OF DEPORTATION OF A NONCITIZEN'S RIGHT TO REMAIN IN THE UNITED STATES AND PRESERVING THE POSSIBILITY OF DISCRETIONARY RELIEF FROM DEPORTION. ALSO MOVANT'S ATTORNEY WAS INEFFECTIVE DURING THE PLEA OFFER FOR NOT INVESTIGATING ELECTRONIC DEVICES THAT THE GOVERNMENT CLAIMED WHERE ILLEGAL - WHEN IN FACT THEY WHERE NOT ILLEGAL. LAMBROS' SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WAS VIOLATED.

31. Movant Lambros, pursuant to the ineffective assistance of counsel standard set forth in STRICKLAND vs. WASHINGTON, 466 U.S. 668 (1984), will offer the following facts that demonstrate that his counsel's representation fell below professional standards during plea bargaining. Also the following will prove that Movant Lambros was **PREJUDICED**, when his attorney did not understand and/or investigate the issue of deporation of his noncitizen wife and the electronic devices

within Movant's house the government claime where illegal. A reasonable probability exists that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time.

32. No competent counsel would have believed the following facts are true if he/she had researched the law in relation to the facts. See, U.S. vs. BROCE, 102 L.Ed. 2d 927, 936 (1989), ... "[a]nd why the plea 'cannot be truly voluntary unless the **DEFENDANT POSSESSES AN UNDERSTANDING OF THE LAW IN RELATION TO THE FACTS**," Id. at 936.

33. Movant's attorney stated that the DEA and/or U.S. Attorney could request that his wife Christina be deported, as she was a noncitizen of the United States but a legal resident of the United States in possession of a "RESIDENT GREEN CARD", before and during plea bargaining, a process most resembling horse-trading. The court records prove the importance of Movant's concern that his wife Christina **NOT BE DEPORTED**, "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.**" See, U.S. vs. LAMBROS, 544 F.2d at 964.

34. Movant wife was a legal resident of the United States and in possession of a "RESIDENT GREEN CARD", during all times in this above-entitled action.

35. Movant's wife was a **STATELESS PERSON** that was born within a Displaced Person ("DP") refugee camp(s) that where set-up across Europe. Movant's wife parents were born in the Ukraine. It is my understanding that persons born within the DP refugee camps are **STATELESS** with no country offering them citizenship. Thus, it would of been impossible for the DEA and/or U.S. Attorney to deport Movant's wife Christina, as no country had offered her citizenship. Movant's attorney should of investigated this information and informed Movant of same. It was Movant's attorney obligation to provide correct advice on the deportation consequences of Movant's wife, since the government was threatening deportation of her and cocaine related charges that would result in deportation.

36. **ELECTRONIC DEVICES:** Movant Lambros was in possession of three (3) electronic devices which he used for his personal use during telephone conversations and/or the recording of telephone conversations he was a party too. To the best of Movant's knowledge at this time, the devices are not illegal.

37. Movant's attorney did not investigate if the three (3) electronic devices where illegal or the functions of same. It is Movant's belief that the government informed Movant's attorney that Movant had been under investigation by the FBI and AT&T for being a "PHONE PHREAK" - a person who saw the phone system as an illicit puzzle to be conquered - as Movant was allegedly in possession of a **TELEPHONE "BLUE BOX"** on December 27, 1972. Movant was ordered to be interviewed by a grand jury but was never charged by the Federal Government. Therefore, it is Movant's understanding that his alleged possession of a **"BLUE BOX" WAS NOT ILLEGAL.** In fact, Movant has been informed that he was a victim of **"PROJECT GREENSTAR"**, a secret warrantless wiretapping campaign by **AT&T** in the 1960's and 1970's to combat phreaking. This turned out not to be one of AT&T's finest hours in history.

38. Just for the record, Steve Jobs and Steve Wozniak constructed and sold blue boxes within the Berkeley dorms - going door to door - managing to sell several dozen at $170.00 each. Jobs has been quoted saying: "If we hadn't made **BLUE BOXES**, there would have **BEEN NO APPLE".**

CONCLUSION OF ISSUE ONE (1):

39. Movant Lambros would not have plead guilty to **INDICTMENT NO:**

a. 3-76-17; and

b. 3-75-128.

on April 22, 1976, after three (3) days of trial in the cocaine conspiracy case 3-75-128, if Movant had POSSESSED AN UNDERSTANDING OF THE LAW IN RELATION TO THE FACTS regarding the deportation of his wife and the fact that the three (3) electronic devices he was in possession of are legal.

40. WHEREFORE, as per MISSOURI vs. FRYE and LAFLER vs. COOPER, Movant Lambros respectfully requests this Court to vacate INDICTMENTS:

a. 3-76-17; and

b. 3-75-128,

due to Movant's attorney being ineffective during PLEA BARGAINING. Movant believes the U.S. Attorney must re-extend the plea offer to Movant.

ISSUE TWO (2):

MOVANT LAMBROS' ATTORNEY WAS INEFFECTIVE DURING THE PLEA OFFER AS HE DID NOT POSSESS AN UNDERSTANDING OF THE STATUTORY LAW AND DEFENSES AVAILABLE WITHIN INDICTMENT NO. 3-76-17 - PERTAINING TO AN ASSAULT AND RESISTANCE AGAINST U.S. AGENTS. LAMBROS' SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WAS VIOLATED.

41. Movant Lambros, pursuant to the ineffective assistance of counsel standard set forth in STRICKLAND vs. WASHINGTON, 466 U.S. 668 (1984), will offer the following facts that demonstrate that his counsel's representation fell below professional standards during plea bargaining. Also, the following will prove that Movant Lambros was **PREJUDICED**, when his attorney did not understand the statutory laws and defenses available within **INDICTMENT NO 3-76-17**, the violations of Title 18 U.S.C. Sections **111 and 114.** See, **EXHIBIT C.** A reasonable probability exists that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time.

42. No competent counsel would have believed the following facts are true if he/she had researched the law in relation to the facts. See, U.S. vs. BROCE, 102 L.Ed. 2d 927, 936 (1989), ..."[a]nd why the plea 'cannot be truly voluntary unless the **DEFENDANT POSSESSES AN UNDERSTANDING OF THE LAW IN RELATION TO THE FACTS**," Id. at 936.

43. **INDICTMENT NO. 3-76-17,** is a two (2) count indictment dated March 24, 1976. Both Counts One (1) and Two (2), are in violation of Title 18 USC Sections 111 and 114. See, **EXHIBIT C.**

44. Title 18 U.S.C. Section **114** states, "[W]hoever, within the **SPECIAL MARITIME AND TERRITORIAL JURISDICTION OF THE UNITED STATES,** and ...." First, the statute clearly required that the offense 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. SECTION 7.** This jurisdiction **ONLY INCLUDES FEDERAL LAND, AND PROPERTY SUCH AS FEDERAL COURTHOUSES AND MILITARY BASES.** See, U.S. vs. MARKIEWICZM, 978 F.2d 786, 797 (2nd Cir. 1992) and U.S. vs. PRENTISS, 206 F.3d 960, 967 (10th Cir. 2000). The violations within the indictment occurred at Movant's duplex/apartment that was located within the city of St. Paul and/or Ramsey County, which is **NOT FEDERAL LAND.** (No cession by State of Minnesota to U.S. occurred)

45. Movant Lambros plead guilty to a crime that did not occur on federal land. The grand jury returned an illegal indictment, Movant's attorney did not know the law and Movant plead guilty to an indictment he was **"ACTUALLY INNOCENT"** of, as the Court did not have jurisdiction. An **ILLEGAL SENTENCE CONSTITUTES "A MISCARRIAGE OF JUSTICE"** and may be appealed despite the existence of an otherwise valid waiver. See, U.S. vs. ANDIS, 333 F.3d 886, 890-893 (8th Cir. 2003)(en banc)("a sentence is illegal when it is not authorized by law ..." Id. at 892.).

46. Also of interest is the fact Movant Lambros qualifies for the **"ACTUAL INNOCENCE" EXCEPTION.** See, BAYLESS vs. USA, 14 F.3d 410 (8th Cir. 1993):

> ".... Bayless was sentenced **UNDER THE WRONG STATUTE.** See, JONES vs. ARKANSAS, 929 F.2d 375, 381 (8th Cir. 1991) (applying procedural default's **ACTUAL INNOCENCE EXCEPTION TO DEFEDNANT SENTENCED UNDER AN INAPPLICABLE STATUTE).**" (emphasis added) **Id. at 411.**

DEFENSES FOR TITLE 18 U.S.C. SECTION 111

47. Movant was informed by his attorney that he really did not have any defenses if he went to trial on **INDICTMENT NO. 3-76-17**, during the plea bargaining process on April 22, 1976, after three (3) days of trial in **INDICTMENT NO. 3-75-128. THIS WAS INCORRECT INFORMATION IN RELATION TO THE FACTS OF THE CASE.**

48. The following defenses where available to Movant if he had proceeded to trial for violations of Title 18 U.S.C. Section **111:**

a. U.S. vs. GRIMES, 413 F.2d 1376 (7th Cir. 1969), person entitled to use reasonable force in defense of his friends and fellow prisoner from attack by prison guards if he reasonably believed that his friend was being subjected to unprovoked physical attack by prison guards.

b. U.S. vs. PERKINS, 488 F.2d 652 (1st Cir. 1973), district court properly charged jury that **IF DEFENDANT WAS IGNORANT OF OFFICERS' IDENTITY HE COULD NOT BE CONVICTED** unless he used more force than was necessary to protect person or property of himself or others.

c. U.S. vs. DANEHY, 680 F.2d 1311 (11th Cir. 1982), In prosecution for violation of 18 USC §111 trial court should instruct jury that it cannot find defendant guilty unless jury believed that defendant intended to forcibly resist, oppose, impede or interfere with Coast Guard personnel and that defendant could not so intend if he acted out of reasonable belief that Coast Guard personnel were **STRANGERS WHO INTENDED TO INFLICT HARM UPON HIM.**

d. U.S. vs. YOUNG, 464 F.2d 160 (5th Cir. 1972), defendant, who was convicted of assaulting federal officers and damaging property of United States and who TESTIFIED that he thought he was being harassed by local rowdies, was entitled to jury instructions that he **COULD NOT BE GUILTY OF OFFENSES CHARGED IF HE ACTED OUT OF REASONABLE BELIEF THAT FEDERAL AGENTS WERE STRANGERS WHO INTENDED TO INFLICT HARM UPON HIM.**

e. U.S. vs. GOLDSON, 954 F.2d 51 (2nd Cir. 1992), The Court improperly refused jury instructions in which defendant wished to contend that he did not throw brick at undercover agent, but if he did, he did so only because he thought agent was private citizen intending to harm him, since there was ample evidence of both theories, and wholly inconsistent defenses are permissable.

f. U.S. vs. CORRIGAN, 548 F.2d 879 (10th Cir. 1977), under 18 USC §111, jury instructions should include statement that if defendant lacks knowledge of officer's identity and reasonably believes he is subject of hostile attack, he is entitled to use reasonable force in his own defense.

The above-entitled cases prove that Movant Lambros had defenses to offer the jury if he had proceeded to trial on **INDICTMENT NO. 3-76-17.**

49. Movant offered proof that the federal agents did not identify themselves when they where asked by Movant Lambros on February 24, 1976 at approximately **11:15 P.M.:**

> "[Agents], approached the side door and rang the door bell. Defendant Lambros came to the door and placed his face against the window. Agents asked him to open the door, **AND LAMBROS SAID "WHO ARE YOU?" THE AGENT IN CHARGE ANSWERED "JIM". LAMBROS SAID, "I DON'T KNOW YOU."** .....

This is the government's version of the story, as per the Presentence Investigation Report, Pages 4 and 5. See above paragraphs 25, 26 and 27.

CONCLUSION OF ISSUE TWO (2):

50. Movant has offered the above proof that Movant's attorney was ineffective for not understanding the statutory law and defenses available within **INDICTMENT NO. 3-76-17.**

51. Movant Lambros would not have plead guilty to **INDICTMENT NO.:**

a. 3-76-17; and

b. 3-75-128,

on April 22, 1976, after three (3) days of trial in the cocaine conspiracy case 3-75-128, if Movant has POSSESSED AN UNDERSTANDING OF THE LAW IN RELATION TO THE FACTS regarding the statutory law and defenses within **INDICTMENT NO. 3-76-17.**

52. WHEREFORE, as per MISSOURI vs. FRYE and LAFLER vs. COOPER, Movant Lambros respectfully requests this Court to vacate INDICTMENTS:

a. 3-76-17; and

b. 3-75-128.

due to Movant's attorney being ineffective during PLEA BARGAINING. Movant believes the U.S. Attorney must re-extend the plea offer to Movant.

V. MOVANT LAMBROS REQUESTS AN EVIDENTIARY HEARING:

53. Movant Lambros believes he is entitled to an evidentiary hearing in this action and requests same. "A §2255 motion can be dismissed without a hearing if (1) the petitioner's allegations, accepted as true, would not entitle him to relief, or (2) the allegations cannot be accepted as true because they are contradicted by the record, inherently incredible, or conclusions rather than statement of fact." See, CARDENAS-CELESTINO vs. U.S., 552 F.Supp. 2d 962, 968 (W.D. MO. 2008)(citing SANDERS vs. U.S., 341 F.3d 720, 721 (8th Cir. 2003)). In other words, a petitioner is "entitled to a hearing on a §2255 motion 'unless the motion, files, and record conclusively show' that the defendant is not entitled to relief." See, U.S. vs. REGENOS, 405 F.3d 691, 694 (8th Cir. 2005) (quoting KOSKELA vs. U.S., 235 F.3d 1148, 1149 (8th Cir. 2001)). In this case, Movant Lambros' allegations are **PROVEN FACTS** and can be accepted as true, as the record is attached as exhibits.

VI. CONCLUSION:

54. For all of the foregoing reasons, this Court must authorize a SECOND or SUCCESSIVE motion to VACATE Movant's convictions and sentences in **INDICTMENT NO's:**

a. 3-76-17; and

b. 3-75-128.

55. Movant requests this Court to follow the majority in LAFLER vs. COOPER and offer Movant Lambros a remedy that must "NEUTRALIZE THE TAINT" of the constitutional violations. The circumstances require "the prosecution to re-offer the plea proposal."

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

EXECUTED ON: MARCH 7, 2013

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

Website: www.BrazilBoycott.org

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TYRONE W. MILES,
Petitioner-Appellant,
v.
MICHAEL MARTEL, Warden,
Respondent-Appellee.

No. 10-15633
D.C. No.
1:08-cv-01002-JF
OPINION

Appeal from the United States District Court
for the Eastern District of California
Jeremy D. Fogel, District Judge, Presiding

Argued and Submitted February 15, 2012
Submission Vacated February 21, 2012
Resubmitted September 28, 2012
San Francisco, California

Filed September 28, 2012

Before: Procter Hug, Jr., Betty B. Fletcher, and
Richard A. Paez, Circuit Judges.

Opinion by Judge B. Fletcher

EXHIBIT A.

COUNSEL

Michael S. Romano (argued), Susannah J. Karlson (Certified Law Student), Mills Legal Clinic of Stanford Law School, Stanford, California, for the petitioner-appellant.

Kamala D. Harris, Attorney General of California; Michael P. Farrell, Senior Assistant Attorney General; Brian G. Smiley, Supervising Deputy Attorney General; David Andrew Eldridge (argued), Deputy Attorney General, Office of the California Attorney General, Sacramento, California, for the respondent-appellee.

OPINION

B. FLETCHER, Circuit Judge:

"[C]riminal justice today is for the most part a system of pleas, not a system of trials. . . . [T]he right to adequate assistance of counsel cannot be defined or enforced without taking account of the central role plea bargaining plays in securing convictions and determining sentences." *Lafler v. Cooper*, 132 S. Ct. 1376, 1388 (2012). Because of "[t]he reality [ ] that plea bargains have become so central to the administration of the criminal justice system . . . ," *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012), the Supreme Court recently recognized that the Sixth Amendment right to counsel "extends to the plea-bargaining process. During plea negotiations defendants are entitled to the effective assistance of competent counsel." *Lafler*, 132 S. Ct. at 1384 (internal citations and quotation marks omitted); *see also Frye*, 132 S. Ct. at 1407.

Petitioner-Appellant Tyrone Wayland Miles ("Miles") claims that he received ineffective assistance of counsel during plea-bargaining process. He alleges that counsel advised him to reject a plea offer of six years' imprisonment without

EXHIBIT A.

alerting him that he was being charged with a crime that would qualify as a "third strike" under California law. He later entered an open plea and was sentenced to a three strikes sentence of twenty-five years to life in prison. Without granting an evidentiary hearing, the California Supreme Court summarily denied his state petition for a writ of habeas corpus. Following the United States Supreme Court's recent decisions in *Lafler v. Cooper* and *Missouri v. Frye*, we reverse the district court's denial of Miles's petition for habeas corpus and remand to the district court to hold an evidentiary hearing on Miles's claims.

I

Miles grew up in Hanford, California. He is a Navy veteran who deployed to the Persian Gulf three times, including during Operation Desert Storm. He married and had his first child while in the Navy. During that time, however, Miles began to exhibit signs of depression, anxiety, and substance abuse. He received an honorable discharge and returned with his family to Hanford, where his substance abuse and depression worsened. As a result of his drug addiction and erratic behavior, Miles's wife left him and returned with their child to her family in Virginia.

In 1993, while Miles was under the influence of drugs and alcohol, some of his friends asked him to act as a lookout while they robbed a store. Five days later, Miles acted as a lookout to a second robbery. The police caught Miles, and he was charged for his involvement in the robberies together, under the same case number. Miles pled guilty and served three years in prison.

After his release from prison, Miles moved back home to Hanford and lived next door to his parents. He worked various jobs and had two more children with his girlfriend. Miles also remained addicted to methamphetamine and committed several minor criminal offenses. Miles's substance abuse

EXHIBIT A.

> sel. Defendants must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, . . . [and] that the end result of the criminal process would have been more favorable . . . .

Id. at 1409. The Court remanded to the state court for it to determine if Frye could show prejudice, especially in light of his intervening arrest for the same offense while the current charges and plea offer were pending. *Id.* at 1411.

C

This case fits squarely between *Lafler* and *Frye*. As in *Lafler*, a habeas case subject to AEDPA like this one, "the favorable plea offer was reported to the client but, on advice of counsel, was rejected." *Lafler*, 132 S. Ct. at 1383.[3] And like *Frye*, "after the [plea] offer lapsed the defendant still pleaded guilty, but on more severe terms." *Id.*[4] Applying clearly estab-

[3]In *Lafler*, the Court held that *Strickland* is the appropriate "clearly established federal law" to apply to claims of ineffective assistance of counsel in plea bargaining, even when the claim relates to a foregone plea. *See Lafler*, 132 S. Ct. at 1384. By applying this holding in *Lafler*, a habeas petition subject to AEDPA, the Court necessarily implied that this holding applies to habeas petitioners whose cases are already final on direct review; *i.e.* that the holding applies retroactively. This holding is also consistent with our prior circuit precedent that applied *Strickland* in the plea-bargaining context. *See, e.g., Nunes*, 350 F.3d at 1051-53 (applying *Strickland* to a foregone plea bargain); *Turner v. Calderon*, 281 F.3d 851, 879-80 (9th Cir. 2002) (citing *Strickland and Hill v. Lockhart*, 474 U.S. 52 (1985)); *United States v. Blaylock*, 20 F.3d 1458, 1465-66 (9th Cir. 1994)

[4]The district court, ruling without the benefit of *Lafler* and *Frye*, rejected Miles's habeas claim based on a lack of constitutional infirmity in his subsequent guilty plea. But based on *Lafler* and *Frye*, neither a trial free of constitutional flaw nor a voluntary and intelligent guilty plea "wipes clean any deficient performance by defense counsel during plea bargaining." *Lafler*, 132 S. Ct. at 1388 (discussing a subsequent trial); *see Frye*, 132 S. Ct. at 1405-08 (discussing the application of *Strickland* where the defendant subsequently pleads guilty to less favorable terms).

EXHIBIT A.

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JOHN JOSEPH MERZBACHER,
Petitioner-Appellee,
v.
BOBBY P. SHEARIN; DOUGLAS F. GANSLER,
Respondents-Appellants.

No. 10-7118

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
Andre M. Davis, Circuit Judge, sitting by designation.
(1:07-cv-00067-AMD)

Argued: October 23, 2012

Decided: January 25, 2013

Before MOTZ, DUNCAN, and FLOYD, Circuit Judges.

Reversed by published opinion. Judge Motz wrote the opinion, in which Judge Duncan and Judge Floyd joined.

COUNSEL

ARGUED: Edward John Kelley, OFFICE OF THE ATTORNEY GENERAL OF MARYLAND, Baltimore, Maryland, for Appellants. Henry Mark Stichel, GOHN, HANKEY & STICHEL, LLP, Baltimore, Maryland, for Appellee. ON

EXHIBIT B.

We note that although the *Strickland* test speaks of performance first and prejudice second, in announcing its test the Supreme Court explained that "there is no reason for a court deciding an ineffective assistance claim" to resolve "both components of the inquiry if the defendant makes an insufficient showing on one." 466 U.S. at 697. Rather, "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Id.* We find this is just such a case, and accordingly turn to the *Strickland* prejudice prong.

IV.

To show prejudice from ineffective assistance of counsel in a case involving a plea offer, petitioners must demonstrate a reasonable probability that (1) "they would have accepted the earlier plea offer had they been afforded effective assistance of counsel," and (2) "the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law." *Frye*, 132 S. Ct. at 1409; *accord Lafler*, 132 S. Ct. at 1385.

The state court most certainly did not follow this precise language in its findings. (It could not have done so for the Supreme Court did not issue *Frye* and *Lafler* until well after the state court had ruled.) But, the state court did make findings relevant to both elements of the *Frye* prejudice test. We consider, in turn, its findings with respect to each of those two elements.

A.

As to whether Merzbacher demonstrated a reasonable probability that he would have accepted the ten-year plea, the state court found Merzbacher did not because "he avidly and vociferously maintained his innocence" throughout the proceedings, was still subject to numerous civil suits, would not have

EXHIBIT B.

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. 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.

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.

Filed MAR 24 1976 19

Harry A. Sieben, Clerk

By

A TRUE BILL

United States Attorney

Foreman

EXHIBIT C.

27.

DOCKET NO. Cr. 3-76-17

JUDGMENT AND PROBATION/COMMITMENT ORDER

AO 245 (6/74)

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date

MONTH	DAY	YEAR
June	21,	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 Thompson
(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 Braseth 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.

COMMITMENT 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.

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

EXHIBIT C.

Edward J. Devitt

Date June 21, 1976

CERTIFIED AS A TRUE COPY ON
THIS DATE June 21, 1976
BY Douglas J. Hefte
[ ] CLERK
[X] DEPUTY

EXHIBIT C.

PROBATION FORM 2a
FEB 65

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

PRESENTENCE REPORT

00436-124

NAME JOHN G. LAMBROS

DATE May 27, 1976

ADDRESS

DOCKET NO. 3-75-128 & 3-76-17

OFFENSE Indictment, Count 43 - Possess with intent to distribute 2 pounds of cocaine, 21 USC 841(a)(1). Indictment, Count 1 - Assault on Federal Officer with dangerous weapon, 18 USC 111 and 1114.

LEGAL RESIDENCE Same

AGE 25 DATE OF BIRTH 8-13-50

PENALTY 15 years and/or $25,000 and at least 3 years special parole. 10 years and/or $10,000.

SEX Male RACE White

CITIZENSHIP U. S.

PLEA Guilty, 4-22-76

EDUCATION 2 years college

VERDICT

MARITAL STATUS Married

CUSTODY At liberty on $50,000 cash bond.

DEPENDENTS Wife

ASST. U.S. ATTY Joseph T. Walbran

SOC. SEC. NO.

DEFENSE COUNSEL
Peter Thompson
IDS Center
Minneapolis, Minnesota

FBI NO. 929 916 H

DETAINERS OR CHARGES PENDING: None

CODEFENDANTS (Disposition) 23 co-defendants

DISPOSITION
3-75-128: 5 yrs.impr.w/3 yrs.SPT & $10,000 com.fine.
3-76-17: 10 yrs.impr.,conc.

USPO, Glenn Baskfield

DATE 6-21-76

EXHIBIT D.

SENTENCING JUDGE Honorable Edward J. Devitt

I read my Pre-Sentence report today 4-2-79. Gordon Tunbo

FPI-MI—4-9-75-100M-3630

EXHIBIT D.

29.

U.S. Department of Justice
United States Parole Commission

Office of the General Counsel

90 K Street, N.E., Third Floor
Washington, D.C. 20530

Telephone: (202) 346-7036
Facsimile: (202) 357-1083

January 29, 2013

John Gregory Lambros
Register No. 00436-124
U.S.P. Leavenworth
P.O. Box 1000
Leavenworth, KS 66048-1000

Re: Letters Dated February 6, 2012, May 5, 2012, and August 28, 2012

Dear Mr. Lambros:

Please note that the Commission's pending detainer warrant will not be executed until you have finished serving the 30-year term imposed on you by the U.S. District Court for the District of Minnesota in Case No. 89-cr-82-05. After it is executed, the Commission will conduct a revocation hearing, at which you should raise any arguments you wish to present concerning revocation.

Very truly yours,

Rockne J. Chickinell
General Counsel

Johanna E. Markind

By: Johanna E. Markind
Attorney

30.

EXHIBIT E.

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 308, 313 (8th Cir.), *cert. denied*, 412 U.S. 931, 93 S.Ct. 2751, 37 L.Ed.2d 160 (1973); *White v. United States*, 399 F.2d 813, 819 (8th 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 Lepp 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.

UNITED STATES of America, Appellee,

v.

John Gregory LAMBROS, Appellant.

Nos. 76–1580, 76–1581.

United States Court of Appeals, Eighth Circuit.

Submitted Oct. 15, 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

12. Downey also argued that the government acted contrary to the law in not disclosing that none 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.

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

Affirmed.

1. Criminal Law ⇐274(2)

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

2. Criminal Law ⇐274(1)

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

3. Criminal Law ⇐274(1)

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

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

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

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

VAN OOSTERHOUT, Senior Circuit Judge.

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

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

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

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

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

Your Honor, the defendant as part of the negotiation will also this morning tender to the Court a change of plea to Count 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-ne-

32

EXHIBIT F.

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 electronics 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. 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.

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 consequence 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*, 168 U.S.App.D.C. 312, 514 F.2d 208, 220–222 (1975). In *United States v. Benson*, 469 F.2d 222, 223 (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*, 440 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

34.

EXHIBIT F.

ted against foreign officials or their family members in the United States or against official guests of the United States adversely affect the foreign relations of the United States.

"Accordingly, this legislation is intended to afford the United States jurisdiction concurrent with that of the several States to proceed against those who by such acts interfere with its conduct of foreign affairs."

Federal Preemption. Section 3 of Pub.L. 92–539 provided that "Nothing contained in this Act shall be construed to indicate an intent on the part of Congress to occupy the field in which its provisions operate to the exclusion of the laws of any State, Commonwealth, territory, possession, or the District of Columbia on the same subject matter, nor to relieve any person of any obligation imposed by any law of any State, Commonwealth, territory, possession, or the District of Columbia."

Immunity from Criminal Prosecution. Section 5 of Pub.L. 88–493 provided that: "Nothing contained in this Act [Pub.L. 88–493] shall create immunity from criminal prosecution under any laws in any State, Commonwealth of Puerto Rico, territory, possession, or the District of Columbia."

§ 113. Assaults within maritime and territorial jurisdiction

Whoever, within the special maritime and territorial jurisdiction of the United States, is guilty of an assault shall be punished as follows:

(a) Assault with intent to commit murder or rape, by imprisonment for not more than twenty years.

(b) Assault with intent to commit any felony, except murder or rape, by fine of not more than $3,000 or imprisonment for not more than ten years, or both.

(c) Assault with a dangerous weapon, with intent to do bodily harm, and without just cause or excuse, by fine of not more than $1,000 or imprisonment for not more than five years, or both.

(d) Assault by striking, beating, or wounding, by fine of not more than $500 or imprisonment for not more than six months, or both.

(e) Simple assault, by fine of not more than $300 or imprisonment for not more than three months, or both.

(f) Assault resulting in serious bodily injury, by fine of not more than $10,000 or imprisonment for not more than ten years, or both.

(As amended May 29, 1976, Pub.L. 94-297, § 3, 90 Stat. 585.)

Revision Notes

Based on title 18, U.S.C., 1940 ed., § 455 (Mar. 4, 1909, ch. 321, § 276, 35 Stat. 1143).

Opening paragraph was added to preserve the jurisdictional limitation provided for by section 451 of title 18, U.S.C., 1940 ed., now section 7 of this title. (See reviser's note thereunder.)

Phraseology was simplified.

§ 114. Maiming within maritime and territorial jurisdiction

Whoever, within the special maritime and territorial jurisdiction of the United States, and with intent to maim or disfigure, cuts, bites, or slits the nose, ear, or lip, or cuts out or disables the tongue, or puts out or destroys an eye, or cuts off or disables a limb or any member of another person; or

Whoever, 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 $25,000 and imprisoned not more than twenty years, or both.

(As amended May 24, 1949, c. 139, § 3, 63 Stat. 90; Oct. 12, 1984, Pub.L. 98–473, Title II, § 1009A, 98 Stat. 2141.)

Revision Notes

1948 Act

Based on title 18, U.S.C., 1940 ed., § 462 (Mar. 4, 1909, ch. 321, § 283, 35 Stat. 1144).

The words "within the special maritime and territorial jurisdiction of the United States, and" were added to preserve jurisdictional limitation provided for by section 451 of title 18, U.S.C., 1940 ed., now section 7 of this title. (See reviser's note thereunder.)

Changes in phraseology were made.

1949 Act

This section [section 3] corrects a typographical error in section 114 of title 18, U.S.C.

§ 115. Influencing, impeding, or retaliating against a Federal official by threatening or injuring a family member

(a) Whoever assaults, kidnaps, or murders, or attempts to kidnap or murder, or threatens to assault, kidnap or murder a member of the immediate family of a United States official, a United States judge, a Federal law enforcement officer, or an official whose killing would be a crime under 18 U.S.C. 1114, as amended, with intent to impede, intimidate, interfere with, or retaliate against such official, judge or law enforcement officer while he is engaged in or on account of the performance of his official duties, shall be punished as provided in subsection (b).

(b)(1) An assault in violation of this section shall be punished as provided in section 111 of this title.

(2) A kidnaping or attempted kidnaping in violation of this section shall be punished as provided in section 1201 of this title.

EXHIBIT G.

35