ISSUE ________:

INEFFECTIVE ASSISTANCE OF COUNSEL AND/OR COURT ERROR AS TO MOVANT LAMBROS' DUE PROCESS RIGHTS BEING VIOLATED AS TO COUNTS 1, 5, 6, AND 8, AS THE GOVERNMENT'S PLEA OFFER CONTAINED ERRONEOUS INFORMATION AS TO PAROLE ELIGIBILITY, MANDATORY MINIMUM AND MAXIMUM SENTENCES AND GUIDELINE RANGES. MOVANT WAS PREJUDICED.

Movant Lambros' due process and substantial rights were violated when his Attorney Charles W. Faulkner was ineffective when he provided Movant Lambros erroneous information as to the sentences he could receive for all counts within the indictment, during the government's written plea proposal dated November 16, 1992 thru November 23, 1992. See, U.S. vs. LAMBROS, 65 F.3d 698, 700 (8th Cir. 1995)(Mandatory life sentence in Count One (1) was not in place at the time of the crime charged, the district court erred in applying it to Lambros. Lambros must be resentenced.) Movant was prejudiced.

FACTS:

1. Lambros was indicted on May 17, 1989, on a nine (9) count indictment. Lambros was charged in Counts **1, 5, 6, 8, and 9.**

2. **COUNT 1:** Count One (1) of the indictment charged Lambros with conspiracy to distribute cocaine in excess of five (5) kilograms from **JANUARY 1, 1983 thru FEBRUARY 27, 1988.** A violation of Title 21 USC §§841(a) and 846 provided a term of imprisonment of not more than life and **NO MANDATORY MINIMUM PENALTY.** See, **EXHIBIT A.** (Fact sheet with legal cites) No parole is available and the guidelines apply to this count.

3. **COUNT 5:** Count Five (5) on the indictment charged Lambros with possession with intent to distribute two (2) kilo's of cocaine on **JULY 8, 1987.**

A violation of Title 21 USA §841(a) provided a term of imprisonment not less than five (5) years and not more than forty (40) years. If committed after one or more prior convictions a term of imprisonment not less than ten (10) years and not more than life imprisonment. **FEDERAL PAROLE APPLIED TO THIS SENTENCE. GUIDELINES DO NOT APPLY TO THIS COUNT.** Supervised release applied to this sentence. See, **EXHIBIT A.** (Fact sheet with legal cases)

4. **COUNT 6:** Count Six (6) on the indictment charged Lambros with possession with intent to distribute two (2) kilo's of cocaine on **OCTOBER 23, 1987. STATUTORY PENALTY:** Same as Count Five (5) within paragraph three (3) above. See, **EXHIBIT A.** (Fact sheet with legal cases)

5. **COUNT 8:** Count Eight (8) on the indictment charged Lambros with possession with intent to distribute two (2) kilo's of cocaine on **DECEMBER 22, 1987. STATUTORY PENALTY:** Same as Counts 5 and 6, **EXCEPT:**

a. **NO FEDERAL PAROLE;** (Crime occurred after 11-1-87)

b. **GUIDELINES APPLIED;** (Crime occurred after 11-1-87)

c. **SUPERVISED RELEASE APPLIED.** (Crime occurred after October 27, 1986).

6. **COUNT 9:** Count Nine (9) on the indictment charged Lambros with traveling in interstate commerce from Minnesota to California with intent to carry on in an unlawful activity, in violation of Title 18 USC §§1952(a)(3) and 1952(b)(1). Lambros was not **EXTRADITED** from Brazil to the U.S. on this Count.

7. **JUNE 14, 1991:** On June 14, 1991, Brazilian Attorney Vernon D. McNamee with the Law Firm "ESCRITORIO DE ADVOCACIA RUY RIBEIRO, Rio de Janeiro, Brazil reviewed the United States request for extradition of Lambros from Brazil, Process No. 539-1/120, as to the indictment in this action. The June 14, 1991, **LEGAL OPINION STATED:**

a. Lambros is protected by the Brazilian Constitution and therefore, "be subject to the **MAXIMUM PUNISHMENTS** permitted by this 'carta

magna." (emphasis added) See, Paragraph 6.

b. "Federal Constitution of Brazil **PROHIBITS** the death penalty, **LIFE IMPRISONMENT**, ..." See, Paragraph 6. (emphasis added)

c. "Thus, there would be blatant violation of his right here should he [Lambros] be extradited to be tried under a more severe judiciary regime which could **PUNISH FOR LIFE IMPRISONMENT, AS IS IN THIS CASE**. This condition of direct inequality in punishments between the two systems could create an untorlarable situation." (emphasis added) See, Paragraph 6.

d. "c- As a last resort, the Constitution should be used as base for arguing extradition with **RESTRICTIONS TO** the death penalty, **LIFE IMPRISONMENT** etc. In this end, **ANY EXCESSIVE PUNISHMENT, IN EXCESS OF 30 YEARS SHOULD BE COMBINED TO ESTABLISH A MAXIMUM SENTENCE TO BE SERVED OF 30 YEARS**. (emphasis added) See, Paragraph 8(c).

See, **EXHIBIT B.** (June 14, 1991, Letter and Legal Opinion by Attorney McNamee)

8. Movant Lambros and Lambros' father, John W. Lambros personnally handed Attorney Charles W. Faulkner a copy of the June 14, 1991 letter and legal opinion by Attorney Vernon D. McNamee **BEFORE** November 16, 1992, the day the Government offered Movant Lambros a written plea proposal. In fact, Movant Lambros believes he offered Attorney Faulkner a copy of the June 14, 1991 letter and legal opinion during his first meeting with Attorney Faulkner. Movant Lambros' father, John W. Lambros, personally contracted Attorney McNamee while in Rio de Janeiro, Brazil while visiting Movant Lambros after his arrest for extradition in this action.

9. **NOVEMBER 17, 1992:** On November 17, 1992, Attorney Charles W. Faulkner wrote Movant Lambros a letter advising Lambros to **ACCEPT THE ATTACHED NOVEMBER 16, 1992 WRITTEN PLEA PROPOSAL FROM U.S. ATTORNEY HEFFELFINGER AND ASST. U.S. ATTORNEY PETERSON.** See, **EXHIBIT C.** Attorney Faulkner stated that the only sentence I could receive was a MANDATORY LIFE WITHOUT POSSIBILITY OF PAROLE on one of the counts and agreed with the government as to sentences

Movant Lambros could receive on **Counts 1, 5, 6, and 8.** The Government stated and Attorney Faulkner agreed that Movant Lambros could receive the following penalties:

a. **COUNT ONE (1):** Only MANDATORY LIFE WITHOUT PAROLE;

b. **COUNT FIVE (5):** Maximum penalty of life **WITHOUT PAROLE**;

c. **COUNT SIX (6):** Maximum penalty of life **WITHOUT PAROLE**;

d. **COUNT EIGHT (8):** Mandatory Minimum of Ten (10) years without parole and a ~~mandatory~~ maximum of life without parole.

10. The information contained within the **NOVEMBER 17, 1992** letter from Attorney Faulkner and the attached plea agreement from the government was **INVALID**, as it did not contain the correct information as to:

a. PAROLE ELIGIBILITY in Counts Five and Six;

b. Incorrect mandatory minimum sentence information, as to all counts, due to DOCTRINE OF SPECIALTY and statute.

c. Incorrect maximum sentence information, as to all counts, due to DOCTRINE OF SPECIALTY and statute.

d. Incorrect information as to the GUIDELINES applying to Counts 5 and 6.

11. **STANDING:** Lambros, an extradited person from Brazil to the USA in this action could legally "raise whatever objections to his prosecution that [the surrendering country [Brazil]] might have." See, LEIGHNOR vs. TURNER, 884 F.2d 385, 388 (**8th Cir.** 1989). Also see, WASHINGTON vs. PANG, 940 P.2d 1293, 1316 (Wash. 1997)(En Banc), cert. denied, 139 L.Ed.2d 608 (1997).

12. **SPECIALTY DOCTRINE:** The specialty doctrine has been explained: "[T]he requested state **[Brazil]** retains an interest in the fate of a person whom it has extradited, so that, for example, he is tried for an offense other than the one for which he was extradited, **OR IS GIVEN A PUNISHMENT MORE SEVERE THAN THE ONE APPLICABLE AT THE TIME OF THE REQUEST FOR EXTRADITION, THE RIGHTS OF THE REQUESTED STATE, AS WELL AS THE PERSON, ARE VIOLATED."** See, WASHINGTON vs. PANG, 940 P.2d

1293, 1318 & Fn. 56 (Wash 1997)(Restatement (Third) of the Foreign Laws of Nations, Ch. 7, at 557-58.)

13. Movant Lambros understood that the Brazilian Constitution, Article 5, Clause XLVIII(b), prohibited the imposition of any penalty of a lifelong character. See, PANG, 940 P.2d at 1352. Brazilian **Article of Law #75** of the Brazilian Criminal Code, the same as a U.S. Criminal Statute, **LIMITS THE MAXIMUM PRISON SENTENCE TO THIRTY (30) YEARS IN BRAZIL.** See, PANG, 940 P.2d at 1352. In fact, on July 1, 2001, the STAR TRIBUNE [Minneapolis] Sunday paper offered a story on page A6, as to Former Police Col. Ubiratan Guimaraes being sentenced to 632 years in prison for the deaths of 102 persons, **BUT FACES ON MORE THAN 30 YEARS IN PRISON - THE MAXIMUM JAIL SENTENCE ALLOWED UNDER BRAZILIAN LAW.** See, **EXHIBIT D.**

14. **DOCTRINE OF DUAL CRIMINALITY:** Under the doctrine of dual criminality, an accused person may be extradited **ONLY** if the conduct complained of is considered criminal by the jurisprudence or under the laws of **BOTH** requesting and asylum states. **"THE DOCTRINE OF DUAL CRIMINALITY IS SPECIFICALLY INCORPORATED INTO THE TREATY BETWEEN THE UNITED STATES AND BRAZIL THROUGH ARTICLE I, WHICH STATES ....."** See, PANG, 940 P.2d at 1322-1323.

> "... according to the laws of the place where the fugitive or person so charged shall be found, would justify his commitment for trial if the crime or offense had been there committed."

PANG, 940 P.2d at 1323.

15. In PANG, the Brazilian Supreme Court ruled that PANG could only be prosecuted by the State of Washington (U.S.) "for the crime of arson in the first degree resulting in four (4) deaths ... **WITHOUT THE ADDITIONAL CHARGE OF FOUR (4) COUNTS OF FIRST DEGREE MURDER."** See, PANG, 940 P.2d at 1325.

16. Movant Lambros **COULD NOT** of been committed for trial in Brazil on **COUNTS 5, 6, and 8** within the indictment, as **Count One (1)** the overarching

conspiracy-to-distribute count included **SUBSTANTIVE OFFENSE COUNTS 5, 6, and 8.** Under Brazilian law, **DOUBLE PUNISHMENT ["A BIS IN IDEM"]** for the same act is not allowed. The following principles of BRAZILIAN LAW would not of allowed Movant Lambros to stand trial on Counts 5, 6, and 8 due to the Count One (1) conspiracy count:

a. **BIS IN IDEM:** Double punishment for the same act. See, PANG, 940 P.2d at 1338-1339;

b. **PRINCIPLE OF SUBSIDIARITY:** Subsidiarity is implied when the crime defined by one of the rules is an **ELEMENT OR A LEGAL CIRCUMSTANCE OF ANOTHER CRIME.** See, PANG, 940 P.2d at 1341 ("There is subsidiarity in the case of a complex crime (CC, Article 103). It is said to be complex a crime which has as element or aggravating circumstance, a fact which on its own constitutes a crime.")

c. **ARTICLE 77, BRAZILIAN LAW:** Extradition will not be granted when the fact motivating the request is not considered a crime in Brazil or in the requesting State. See, PANG, 940 P.2d at 1349.

LEGAL CASES TO SUPPORT LAMBROS' RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AT "PLEA BARGAINING STAGE" IN CORRECTLY ADVISING LAMBROS OF POTENTIAL SENTENCES.

17. Sixth Amendment right to counsel attaches at all critical stages in a proceeding "after the initiation of formal charges." MORAN vs. BURBINE, 89 L.Ed.2d 410, 427 (1986), which has been held to include plea negotiations. See, BORIA vs. KEANE, 99 F.3d 492, 496-97 (2nd Cir. 1996)(holding that ineffective assistance of counsel during plea negotiations justified §2254 habeas relief); also in BORIA the court stated:

> "First, to show STRICKLAND ineffectiveness it must appear that, under the totality of circumstances, Greenwald failed to exercise the **SKILLS** and **DILIGENCE** that a reasonably competent **ATTORNEY WOULD PROVIDE UNDER SIMILAR CIRCUMSTANCES.** 466 U.S. at 688."

The STRICKLAND COURT "granted certiorari to consider the standard by which to judge a contention that the Constitution requires that a criminal judgment be overturned because of the actual **INEFFECTIVE ASSISTANCE OF COUNSEL.**" 466 US at 684. Later it pointed to "[p]revailing norms of practice as reflected in **AMERICAN BAR ASSOCIATION STANDARDS"** as guides **"TO DETERMINING WHAT IS REASONABLE."** Id. at 688.

The American Bar Association's standard on the precise question before us is simply stated in its **MODEL CODE OF PROFESSIONAL RESPONSIBILITY, ETHICAL CONSIDERATION 7-7 (1992):**

A defense lawyer in a criminal case has the duty to advise his client **FULLY ON WHETHER A PARTICULAR PLEA TO A CHARGE APPEARS TO BE DESIRABLE.**

Anthony G. Amsterdam, in **TRIAL MANUAL 5 FOR THE DEFENSE OF CRIMINAL CASES (1988),** observed:

** The decision whether to plead guilty or contest a criminal charge is **ORDINARILY THE MOST IMPORTANT SINGLE DECISION IN ANY CRIMINAL CASE.** But counsel may and **MUST** give the client **THE BENEFIT OF COUNSEL'S PROFESSIONAL ADVICE ON THIS CRUCIAL DECISION.** §201 at 339 (the word "must" was emphasized by the author; ..)

.... 'prior to trial an accused is entitled to rely upon his counsel to make an independent examination of the **FACTS, CIRCUMSTANCES, PLEADINGS AND LAWS INVOLVED AND THEN TO OFFER HIS INFORMED OPINION AS TO WHAT PLEA SHOULD BE ENTERED.'** VON MOLTKE vs. GILLIES, 332 U.S. 708, 721 (1948).

See, BORIA vs. KEANE, 99 F.3d 492, 496-497 (2nd Cir. 1996)

18. The American Bar Association Code of Professional Responsibility, "Ethical Consideration", Canon Seven (7)-13 states: "The responsibility of a public prosecutor ... is to seek justice, not merely to convict. This special duty exists because: ... (3) in our system of criminal justice the accused is to be given the benefit of **ALL REASONABLE DOUBTS."**

19. In 2001, the U.S. Supreme Court held that (1) for purposes of the STRICKLAND vs. WASHINGTON rule for obtaining relief for an alleged violation of the Sixth Amendment right to effective counsel, **A DEFENDANT ESTABLISHES PREJUDICE** where it is shown that (a) the trial court errored in a Guidlelines determination, and (b) as a result of such error, about which counsel failed to argue, the defend-

ant's sentence was **INCREASED**; (2) although the amount by which a defendant's sentence is increased may possibly be a factor to consider in determining whether counsel's performance in failing to argue the point constitutes ineffective assistance, the amount of increase cannot serve as a bar to a showing of **PREJUDICE**. See, GLOVER vs. U.S., 148 L.Ed.2d 604, 605 (2001).

20. SOTO vs. U.S., 37 F.3d 252, 254-256 (7th Cir. 1994), trial counsel's failure to contest Title 21 USC §846 **MANDATORY MINIMUM** which ended before the November 18, 1988, enactment date of mandatory minimums for drug conspiracies can constitute ineffective assistance of counsel. "Appointed counsel would not be of much use at all if they are not expected to point out and urge their clients to avoid **PLEA ARRANGEMENTS** that subject them to penalties much more severe than what likely is legally appropriate and **WOULD RESULT AFTER A PROPERLY CONDUCTED TRAIL.**" Id. at 256. **LAMBROS' PLEA AGREEMENT SUGGESTED A SENTENCE UP TO 365 MONTHS.**

21. U.S. vs. MARTIROSIAN, 967 F.2d 1036 (5th Cir. 1992): Rule 11(c)(1) requires the district court, **BEFORE ACCEPTING A GUILTY PLEA TO INFORM THE DEFENDANT:**

> the nature of the charge to which the plea is offered, **THE MANDATORY MINIMUM PENALTY PROVIDED BY LAW, IF ANY, AND THE MAXIMUM POSSIBLE PENALTY PROVIDED BY LAW ...**

Rule 11 is intended to ensure that a defendant makes an informed and voluntary plea. A complete failure of the district court to address any one of these concerns when accepting a plea **REQUIRES REVERSAL;** Rule 11(h) harmless error analysis is inapplicable. Id. at 1038-1039. **THIS CASE IS IMPORTANT:** If movant Lambros had excepted the government's PLEA AGREEMENT his case would of been remanded to permit Lambros to replead, as the court illegally sentenced Lambros in Count 1 to a sentence **EXCEEDING** and **MAXIMUM SENTENCE PROVIDED BY LAW** and **EXCEEDED THE MANDATORY MINIMUM PENALTY PROVIDED BY LAW.** See, LAMBROS, 65 F.3d 698, 700 (8th Cir. 1995).

22. PITTS vs. U.S., 763 F.2d 197. 200-201 (6th Cir. 1985), Pitts filed a §2255 motion as to his attorney's misadvice as to **MAXIMUM SENTENCES** on all

THREE (3) COUNTS OF THE INDICTMENT and misadvice by the trial court on his maximum possible exposure to the two counts he pled guilty to. This case, **like LAMBROS'**, "... involved affirmative misstatements of the maximum possible sentence. Id. at 201" "Numerous cases have held that misunderstanding of this nature invalidate a guilty plea. See, e.g. U.S. vs. RUMERY, 698 F.2d 764 (5th Cir. 1983) (ineffective assistance of counsel when maximum exposure was five (5) years but court appointed attorney advised him of maximum possible exposure of thirty years); U.S. vs. HERROLD, 635 F.2d 213 (3rd Cir. 1980)(per curiam)(trial court's misadvice in telling defendant of maximum possible sentence of forty-five (45) years invalidated the plea when twenty-five years was the maximum possible sentence); U.S. vs. SCOTT, 625 F.2d 623 (5th Cir. 1980)(per curiam)(on collateral attack, court held that guilty plea in invalid by the trial court's telling defendant of a five (5) year maximum exposure when he faced a possible six (6) year maximum exposure); HAMMOND vs. U.S., 528 F.2d 15 (4th Cir. 1975)(on collateral attack, guilty plea invalidated when court clerk and court appointed attorney misadvised defendant that total exposure was in excess of ninety (90) years when total exposure was actually only fifty-five (55) years.) .... **THE EFFECTS OF THE PLEA AGREEMENT MAY HAVE BEEN TO EXACERBATE THE PROBLEM.** Id. at 201." In PITTS the court illustrated the fallacy of the government's argument by referring to ALLEN vs. U.S., 634 F.2d 316 (5th Cir. 1981)(per curiam) within FootNote 5 on page 201:

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> **"..., an overstatement of the defendant's maximum possible exposure will influence him, IF ANYTHING, TO PROCEED TO TRIAL AND TAKE HIS CHANCES.** Id. at 317. (emphasis added)"

See, PITTS vs. U.S., 763 F.2d 197, 201 FootNote 5 (6th Cir. 1985).

23. **ERRONEOUS PAROLE ELIGIBILITY ADVICE BY ATTORNEY:** The lead case in the Eighth Circuit is HILL vs. LOCKHART, 877 F.2d 698 (8th Cir. 1989); this case went **EN BANC** at HILL vs. LOCKHART, 894 F.2d 1009 (8th Cir. 1990)(en banc) where it reaffirmed: "erroneous **PAROLE ELIGIBILITY** advice given to petitioner was ineffective assistance of counsel rendering his guilty plea invalid." Id. at 698. "The failure

of Hill's lawyer to ascertain, **THROUGH MINIMAL RESEARCH,** the applicable statute governing parole eligibility for second offenders, and to inform his client accurately when asked about that eligibility, FELL BELOW THE OBJECTIVE STANDARD OF REASONABLENESS REQUIRED BY THE SIXTH AMENDMENT." Id. at 703. (emphasis added) "To succeed under STRICKLAND, Hill NEED NOT SHOW PREJUDICE in the sense that he probably would have been acquitted or **GIVEN A SHORTER SENTENCE AT TRIAL,** but for his attorney's error. **ALL WE MUST FIND HERE IS A REASONABLE PROBABILITY THAT THE RESULT OF THE PLEA PROCESS WOULD HAVE BEEN DIFFERENT - THAT HILL 'WOULD NOT HAVE PLEADED GUILTY AND WOULD HAVE INSISTED ON GOING TO TRIAL,' .... - IF COUNSEL HAD GIVEN ACCURATE ADVICE."** Id. at 704. (emphasis added). **NOTE:** Both Lambros' attorney and the U.S. Government informed Movant Lambros on November 17, 1992, within the **"WRITTEN PLEA PROPOSAL/AGREEMENT"** that Movant Lambros **COULD NOT RECEIVE PAROLE IN COUNTS FIVE (5) AND SIX (6). THIS IS NOT TRUE.** See, Paragraphs 3, 4, and 9 within this motion.

24. **EIGHTH CIRCUIT CASE AS TO PLEA BARGAINING PROCESS:** U.S. vs. UNGER, 665 F.2d 251 (8th Cir. 1981)(evidentiary hearing granted as to attorney's misrepresentation as to sentence defendant could receive); GARMON vs. LOCKHART, 938 F.2d 120 (8th Cir. 1991)(denied effective assistance of counsel when his attorney incorrectly informed him that he would have to serve only one-sixth of his plea bargain sentence).

25. **LIFE WITHOUT PAROLE MISADVICE:** The Sixth Circuit stated in SPARKS vs. SOWDERS, 852 F.2d 882 (6th Cir. 1988)("there was no such penalty as **LIFE WITHOUT PAROLE** under Kentucky law, and such gross misadvice concerning parole eligibility could constitute ineffective assistance of counsel in defendant's §2254")

26. **FORTUNE TELLER OR LEGAL HISTORIAN:** The Fifth Circuit stated in KENNEDY vs. MAGGIO, 725 F.2d 269, 272-273 (5th Cir. 1984)("As we stated in COOKS, 'although counsel need not be a fortune teller, he must be a reasonable competent legal historian. Though he need not see into the future, he must reasonably recall **(OR AT LEAST RESEARCH)** the past...' 461 F.2d at 532. Such research is not

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demonstrated in this case. .... It is elementary that a plea entered in reliance on the defendant's attorney PATENTLY ERRONEOUS STATEMENT OF LAW in relation to the facts does not meet this standard.")

27. U.S. vs. WHYTE, 3 F.3d 129 (5th Cir. 1993), The Fifth Circuit vacated WHYTE's plea agreement when the district court affirmatively misstated the law as to the minimum and maximum sentence/penalty, term of supervised release and maximum fine WHYTE could receive. **MOREOVER THE PLEA AGREEMENT CORROBORATED THE COURT'S MISTAKE.** Id. at 130.

28. HAWKINS vs. MURRAY, 798 F.Supp. 330, 335 (E.D.Va. 1992), Absolute parole ineligibility **MUST** be communicated to defendant **BEFORE PLEA** where the ineligibility is direct consequence of the plea. Id. at 335. **NOTE:** In Lambros' plea the government stated that no parole existed in Counts 5 and 6, when infact PAROLE DID EXIST. (See Paragraphs 3 and 4 in this motion)

29. NOLAN vs. ARMONTROUT, 973 F.2d 615, 617 (8th Cir. 1992) "Inaccurate parole advise may support a claim of ineffective assistance of counsel. Nolan must show 'actual ineffectiveness' as defined in STRICKLAND ..., and that he 'pleaded guilty as a direct consequence of his counsel's erroneous advice and .. but for this advice, the outcome of the plea process would have been different.'" Id. at 617.

30. U.S. vs. GORDON, 156 F.3d 376 (2nd Cir. 1998) This is an excellent case. Before trial GORDON was offered a PLEA AGREEMENT that offered the incorrect information as to GORDON'S PENALTIES within the indictment. GORDON would not accept the plea, and the district court held a bench trial and found

*** GORDON guilty on all twelve counts. The Second Circuit held: (1) defendant was denied effective assistance of counsel at plea negotiations when defense counsel grossly underestimated defendant's potential maximum sentence, and (2) **DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ORDERING NEW TRIAL AS REMEDY FOR VIOLATION OF DEFENDANT'S RIGHT TO EFFECTIVE ASSISTANCE.**

31. U.S. vs. HERNDON, 7 F.3d 55 (5th Cir. 1993), HERNDON pleaded guilty to a **WRITTEN PLEA AGREEMENT** that did not advise defendant of the mandatory minimum or maximum sentence he could receive. The district court failed to inform the defendant of the MANDATORY MINIMUM SENTENCE. The court stated, "... we think there is a significant possibility that awareness of such minimum would have affected the defendant's decision to plead guilty. First of all, a statutory minimum necessarily colors the evaluation by a defendant and his counsel of his potential sentence, because it inherently sets a minimum below which a sentence determined by the guidelines cannot go. More significantly, in **DRUG CASES**, such as this one, awareness of a statutory minimum will, in and of itself, inform a defendant as to the gross ranges of **DRUG QUANTITIES** which the government contends may be involved; and if those quantities are in **DISPUTE**, as they were here, a defendant might well conclude that rather than **PLEADING GUILTY** and facing a sentence based on a quantity which he disputes, he **WOULD JUST AS SOON HAVE HIS DAY IN COURT UNDER A 'NOT GUILTY' PLEA WITH A CHANCE OF GETTING OFF ENTIRELY.** Other panels of this court have expressed similar sensitivity to the error of **NON-DISCLOSURE OR MIS-DISCLOSURE OF MANDATORY MINIMUMS.** (citing cases)" Id. at 58. The court vacated the conviction and sentence and remanded for REPLEADING.

32. U.S. vs. HARVEY, 791 F.2d 294, 300-301 (4th Cir. 1986), offers an excellent overview of plea bargains and commercial contracts, as to there analogous relationship.

33. U.S. vs. DAY, 969 F.2d 39 (3rd Cir. 1992), ineffective assistance of counsel, as counsel did not explain defendant might be classified as a career offender and be subject of enhanced penalties under the guidelines.

CONCLUSION:

34. Movant Lambros' court appointed attorney failed to exercise

the skills and diligence that a reasonable competent attorney would provide during PLEA NEGOTIATIONS, ordinarily the most important single decision in any criminal case, when he failed to make an independent examination of the facts, circumstances, pleadings and **LAWS** involved within Movant Lambros' indictment.

35. Movant Lambros has proved "PREJUDICE" as to his Sixth Amendment right to effective cousel when the trial court errored in sentencing Movant Lambros to an illegal sentence on Count One (1), a mandatory life sentence without parole, when Count One (1) provided a term of **NO MANDATORY MINIMUM PENALTY AND A TERM OF IMPRISONMENT OF NOT MORE THAN LIFE.** See, U.S. vs. LAMBROS, 65 F.3d 698, 700 (8th Cir. 1995). The government's November 17, 1992, **WRITTEN PLEA PROPOSAL** that was mailed to Movant by his attorney stated the only sentence Movant could receive was a mandatory life sentence without parole on Count One (1). As a result of such error, about which counsel failed to argue, Movant Lambros' sentence was increased. There is a reasonable probability that the result of the plea process would have been different - that Movant Lambros would not have gone to trial and would have pleaded guilty - if counsel had given accurate advice. Movant did not have **ACCURATE INFORMATION** upon which to make his decision to **PURSUE FURTHER PLEA NEGOTIATIONS WITH THE GOVERNMENT AND THE DISTRICT COURT.** Movant believes that the district judge was very open to all plea negotiations, as no other co-conspirator within Movant's indictment received more than a **FOUR (4) YEAR SENTENCE.**

36. Movant Lambros has also proved "PREJUDICE" as to the incorrect information his attorney offered as to the sentences he could receive in **COUNTS 5, 6, and 8,** as to the availability of federal parole, guideline application to counts, and applicable penalties. As a result of such errors in Count 5, 6, and 8, about which counsel failed to argue or advise Movant, Movant's sentence was increased. There is a reasonable probability that the result of the plea process would have been different - that Movant Lambros would not have gone to trial and would have pleaded guilty - if counsel had given accurate advice. Movant did not have

ACCURATE INFORMATION upon which to make his decision to **PURSUE FURTHER PLEA NEGOTIATIONS WITH THE GOVERNMENT AND THE DISTRICT COURT.** Again, Movant believes that the district judge was very open to all plea negotiations, as no other co-conspirator within Movant's indictment received more than a **FOUR (4) YEAR SENTENCE.**

37. The prejudice to Movant Lambros can be presented no clearer to this court, as the PLEA AGREEMENT CORROBORATED THE COURT'S MISTAKE within Count One (1).

38. As proved by the trial transcripts, both the **DRUG QUANTITIES and DRUG TYPE** where in **DISPUTE IN THIS CASE.** See, Paragraph 31 in this motion, U.S. vs. HERNDON, 7 F.3d at 58. Also see, May 17, 1989, GRAND JURY TRANSCRIPT of **DEA AGENT JOHN J. BOULGER,** Page 33, lines 16 thru 22, ".... as referenced in **OVERT ACT PARAGRAPH 21 [Indictment],** there were some discussions between Don Hendrickson and Mr. Lambros concerning drug trafficking, correct? A. That's correct. They met on three (3) separate occasions and discussed **MARIJUANA TRANSACTIONS** and other drug transactions." Movant Lambros was sentenced for cocaine. The government even stated to the jury during closing arguments, **"EVEN ACCEPT LAMBROS' TESTIMONY THAT HE'S DEALING MARIJUANA. HE HAS A DRUG RELATIONSHIP WITH JOHN LAMBROS."** See, January 15, 1993, TRIAL TRANSCRIPTS, Vol. VII, Page 886, U.S. Assistant Attorney Douglas R. Peterson, lines 15 thru 17.

39. The government's November 16, 1992, WRITTEN PLEA PROPOSAL by U.S. Assistant Attorney Peterson stated Movant Lambros' applicable guideline range would be **292 to 365 months.** Lambros was resentenced to **360 months.** Therefore, the plea proposal was requesting **FIVE (5) MONTH LONGER SENTENCE FOR LAMBROS.** See, PLEA PROPOSAL Paragraph 11. The U.S. Supreme Court stated, "...it is not forbidden to extend a proper degree of leniency in return for guilty pleas. .... Those cases, as we have said, unequivocally recognize the constitutional propriety of extending **LENIENCY** in exchange for a plea of guilty and of **NOT EXTENDING LENIENCY** to those who have not demonstrated those attributes on which leniency is based." See, CORBITT

vs. NEW JERSEY, 58 L.Ed.2d 466, 477, 439 US 212, 223-224 (1978)(emphasis added)

40. It was the government's **INTENT** during the plea bargaining process with Movant Lambros to **"EXTEND LENIENCY"** for a guilty plea, 292 to 365 month sentence instead of a mandatory life sentence without parole. See, CORBITT vs. NEW JERSEY, at 477.

41. Movant Lambros requests this court to vacate his sentence on all counts and remand this case for new plea negotiations so the government may resubmit a new written plea agreement that reflects there intent to extend leniency for Movant's guilty plea. Movant believes he will plead guilty after the government discloses all errors within the government's statement of law and facts of the case. Movant has met the standard set by the Eighth Circuit in proving "... a reasonable probability that the result of the plea process would have been different." See, HILL vs. LOCKHART, 877 F.2d at 704 (8th Cir. 1989), reaffirmed **EN BANC,** 894 F.2d 1009.

DEFINITIONS:

1. **"REASONABLE PROBABILITY" = 20%:** Judge Weinstein, Senior District Judge offered and concluded in his detailed discussion of the reasonable probability standard to be, "While 'reasonable probability' .... seems deliberately designed to be fuzzy in concept and articulation, it is suggested that a **PROBABILITY OF 20%** ....represents a sensible and enforceable standard ...." and that "requiring a petitioner to meet a **BURDEN GREATER THAN 20%** ....would therefore seem unfair and unreasonable." See, U.S. vs. COPELAND, 369 F.Supp.2d 275, 287-288 (E.D.N.Y. 2005).

2. **Rule 11(a)(2) of the Fed.R.Crim.P.:** This rule permits a defendant to enter a conditional guilty plea "with the consent of the court and the government,... reserving the right to have an appellate court review an adverse determination of a specified pre-trial motion." Some U.S. Attorney's will not enter into such conditional pleas as a matter of policy. In U.S. vs. DELGADO, No. 6:05-cr-30-Orl-31KRS (M.D.Fla. 04/08/05) Judge Presnell informed the U.S. Attorney that Rule 11, entrusted the government with "a veto power," but pointedly commented that "an implicit assumption, in this regard, is that the government will act in good faith."

SUMMARY OF LAMBROS INDICTMENT AND PENALTIES:

INDICTED ON COUNTS 1, 5, 6, 8, and 9:

1. Count 1: CONSPIRACY to distribute over 5 kilo's of cocaine.

   STATUTORY PENALTY: No minimum and maximum of life. [0 to life]

   GUIDELINES ARE APPLICABLE TO THIS OFFENSE.

   NO PAROLE AVAILABLE TO THIS OFFENSE.

2. Count 5: Possession with intent to distribute cocaine, 2 kilo's.

   STATUTORY PENALTY: 5 to 40 years with no priors.
   10 to life with priors.

   GUIDELINES **DO NOT** apply to this offense.

   FEDERAL PAROLE DOES APPLY TO THIS OFFENSE. Thus, you go to the parole board after doing one-third of your time and may be released.

   SUPERVISED RELEASE TERMS APPLY TO THIS THIS OFFENSE.

3. Count 6: same as Count 5 above. The date of the crime is different. Still before November 1, 1987.

4. Count 8: Possession with intent to distribute 2 kilo's of coke.

   STATUTORY PENALTY: 5 to 40 years no priors.
   10 to life with priors.

   GUIDELINES APPLY.

   NO PAROLE ON THIS OFFENSE. MUST DO 85% OF TIME.

   SUPERVISED RELEASE TERMS APPLY TO THIS OFFENSE.

NOTE: Attorney Faulkner nor the Government within there PLEA AGREEMENT, **SEE PARAGRAPH TEN (10),** advised Lambros that under the **DOCTRINE OF SPECIALTY** that Lambros' prior crimes **COULD NOT** be used against him, as Lambros was not extradited for those crimes of the parole violations that attached to them. "Under the doctrine of specialty, 'the requisitioning state **MAY NOT**, without permission of the asylum state, try **OR PUNISH** the fugitive for **ANY CRIMES** committed **BEFORE** the extradition except the crimes for which he was extradited.' See, **U.S. vs. MIRO,** 29 F.3d 194, 199-200 (5th Cir. 1994)("We may assume, arguendo, that **INCREASING** a sentence to compensate for unextradited crimes might, under proper circumstances, be a deviation from a legal rule such that it would constitute error. Id. at 200)

EXHIBIT A.

FACTS WITHIN MAY 17, 1989, INDICTMENT - USA vs. JOHN GREGORY LAMBROS, No. CR-4-89-82 AND STATUTORY PENALTIES LAMBROS COULD RECEIVE FOR EACH COUNT:

1. Lambros was indicted on May 17, 1989 on a nine (9) count indictment. Lambros was charged in Count **1, 5, 6, 8, and 9.**

2. **COUNT 1:** Count 1 charged a conspiracy to distribute in excess of 5 kilograms of Cocaine, in violation of 21 USC §§841(a) and 846, from on or about **January 1, 1983 thru February 27, 1988.** **STATUTORY PENALTY: A TERM OF IMPRISONMENT OF NOT MORE THAN LIFE.** **NOTE:** No mandatory minimum penalty may accompany this conviction because the version of section 846 within the dates of the conspiracy makes no provision for the imposition of a minimum penalty. See, US. vs. MONTOYA, 891 F.2d 1273, 1293-1294 (7th Cir. 1989). Congress amended §846 on November 18, 1988. See, U.S. vs. OSBORNE, 931 F.2d 1139, 1145 (7th Cir. 1991); U.S. vs. McNEESE, 901 F.2d 585, 602-603 (7th Cir. 1990); **U.S. vs. LAMBROS**, 65 F.3d 698, 699-700 (8th Cir. 1995). The GUIDELINES are applicable to this offense, as it "STRADDLED THE NOVEMBER 1, 1987 EFFECTIVE DATE OF THE SENTENCING GUIDELINES." See, LAMBROS, 65 F.3d at 700. **BUT SEE,** U.S. vs. MIRO, 29 F.3d 194, 198 (5th Cir. 1994)(Guidelines **NOT APPLIED** to pre-November 1, 1987 portion of straddling mail fraud offense).

3. **COUNT 5:** Count 5 charged possession with intent to distribute approximately two (2) kilograms of cocaine in violation of 21 USC §841, on **JULY 8, 1987.** **STATUTORY PENALTY: A TERM OF IMPRISONMENT NOT LESS THAN FIVE (5) YEARS AND NOT MORE THAN FORTY (40) YEARS. IF COMMITTED ATER ONE OR MORE PRIOR CONVICTIONS A TERM OF IMPRISONMENT NOT LESS THAN TEN (10) YEARS AND NOT MORE THAN LIFE IMPRISONMENT. FEDERAL PAROLE APPLIED TO THIS SENTENCE:** The Parole Commission and Reorganization Act of 1976 ("PCRA") governed the parole of federal prisoners prior to November 1, 1987. The Guidelines became effective on November 1, 1987, and apply to offenders who commit crimes on or after that date. **GUIDELINES DO NOT APPLY TO THIS COUNT. SUPERVISED RELEASE TERMS DO APPLY TO CRIMES COMMITTED IN THE INTERIM PERIOD BETWEEN OCTOBER 27, 1986, AND NOVEMBER 1, 1987.** See, Gozlon-Peretz vs. United States, 112 L.Ed.2d 919, 933 (1991). But see, U.S. v. Padilla, 869 F.2d 372, 381-382 (8th Cir. 1989)(amount of supervised release versus amount of special parole in question).

4. **COUNT 6:** Count 6 charged possession with intent to distribute approximately two (2) kilograms of cocaine in violation of 21 USC §841, on **OCTOBER 23, 1987. STATUTORY PENALTY:** Same as Count Five (5). **FEDERAL PAROLE APPLIED AND SUPERVISED RELEASE APPLIED TO THIS SENTENCE. GUIDELINES DO NOT APPLY.**

5. **COUNT 8:** Count 8 charged possession with intent to distribute approximately two (2) kilograms of cocaine in violation of 21 USC §841, on **DECEMBER 22, 1987. STATUTORY PENALTY:** same as Count Five (5) and Six (6). **FEDERAL PAROLE DID NOT APPLY AS CRIME OCCURRED AFTER NOVEMBER 1, 2987. GUIDELINES APPLIED TO THIS COUNT AS IT OCCURRED AFTER NOVEMBER 1, 1987. SUPERVISED RELEASE TERMS APPLIED.**

6. **COUNT 9:** Count 9 charged on **February 12, 1988,** as to Lambros traveling in interstate commerce from Minnesota to California with the intent to carry on in an unlawful activity, in violation of 18 USC §1952(a)(3) and §1952(b)(1). **LAMBROS WAS NOT EXTRADITED FROM BRAZIL ON THIS COUNT.**

EXHIBIT A.

ESCRITÓRIO DE ADVOCACIA RUY RIBEIRO
AV. ERASMO BRAGA, 277 – S/608/612 – TELS. 242-9408 – 252-8796 – 242-4873 – 242-4874
RIO DE JANEIRO
TELEFAX (021) 242-1154

Rio de Janeiro, 14 June 1991.

Mr. John G. Lambros
Custódia Policia Federal
Av. Rodrigues Alves nº 7
Rio de Janeiro- RJ
CEP: 20.080

Dear Mr. Lambros,

Per your request, we have reviewed Extradition Process nº 539-1/120 in which the United States Government has requested your extradition to the United States to answer charges for conspiracy and possession of more than 5(five) kilograms of cocaine with the intention of distribution of such during the period of 1 January 1983 to 27 February 1988, possession of quantities exceeding 2(two) kilograms of cocaine with intent of distribution of said substance, and interstate activity in promotion and administration of cocaine distribution.

The results of our review are contained in the attached legal opinion.

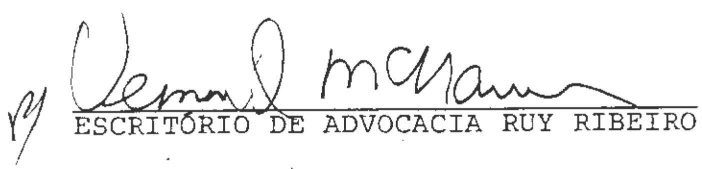
In view of the difficulty in guaranteeing sucess of available courses of action in the defense of the referenced extradition process, we feel that perhaps the most economical solution would be to utilize the services of a public defender, particularly due to your family's alleged limited financial resources.

It should be pointed out that extradition processes do not judge the merit of the charges. They merely base the processes on the formalities to be complied with as related to Brazilian law and/or international treaties or, in the absence of such treaties, on the guarantee of reciprocity on a case by case basis.

EXHIBIT B.

However, should you desire to continue to pursue your defense in this process through our offices, please advise us so that we may agressively and timely develop proper defense arguments.

Very truly yours,



ESCRITÓRIO DE ADVOCACIA RUY RIBEIRO

EXHIBIT B.

ESCRITÓRIO DE ADVOCACIA RUY RIBEIRO
AV. ERASMO BRAGA, 277 – S/608/612 – TELS. 242-9408 – 252-8796 – 242-4873 – 242-4874
RIO DE JANEIRO
TELEFAX (021) 242-1164

LEGAL OPINION

Extradition Process nº 539 - 1/120: JOHN GREGORY LAMBROS

1- Scope: This opinion covers the legal aspects of the request for extradition of JOHN GREGORY LAMBROS presented by the U.S. Government, the legal formalities which must be complied with, pre-extradition restraint, family considerations, possibility of extradition to the more severe law, restrictions to extradition, possible defense postures, and conclusions.

2- Legal aspects of the request for extradition: The documents apresented by the U.S. Government are proper documents and are in the necessary legal form to be considered by the Government of Brazil. Competent authority in the U.S. has ordered pre-trial confinment of Mr. Lambros in Penal Process nº 4-89-82. Said authority eminates from indictments by the Grand Jury of the U.S. Justice Court in the District of Minnesota and ordered in 17 May 1989.

The charges against Mr. Lambros as presented by said Grand Jury also meet Brazilian legal requirements for similar crimes comitted in Brazil or for which, by international treaty, Brazil also has the obligation to punish.

The extradition request meets all of the formal requirements prescribed by the Extradition Treaty between the United States of Brazil (now, Federal Republic of Brazil) and the United States of América, promulgated in Brazil on 11 February 1965 by Decree nº 55.750 and Brazilian law nº 6.815 dated 19 August 1980 as amended by law nº 6.964 dated 10 December 1981.

Statutary limitations have been complied with, both in the U.S. and Brazil, verified by copy of Title 18, USC, art. 3282.

Circumstances surrounding the allleged crimes have been documented sufficiently to indicate grounds for trial as well as proper indication of the accused, Mr. Lambros.

EXHIBIT B.

3- Legal formalities: In addition to the legal requirements stated above, correct procedural formalities have been complied with meeting the criteria of the Federal Constitution of Brazil promulgated in 5 Octuber 1988 which requires all prison orders be issued by judiciary powers, to wit , the Braziliam Federal Supreme Court. (STF)

The request for extradition also meets the required formalities in that the court order issued by the Federal District Court in Minnesota was presented to the Brazilian Government by the U.S. State Department via the American Embassy in Brasilia, the from the Brazilian Foreign office to the Ministry of Justice and thence to the Federal Supreme Court.

All other formalities required by Art. VIII and IX of Decree nº 55.750(Extradition Treaty)have been complied with).

4- Pre-extradition restraint: Pre-extradition confinement is correct as such action was ordered by the competent judiciary authority as prescribed by the Federal Constitution of Brazil in Art. 5º, section LXI and Art. 84 of Law nº 6.815/80 in compliance with the extradition request. This confinement will continue until final decision has been made by the Brazilian Supreme Court (Art. 84 of Law nº 6.815/80) without the possibility of bail or other forms of releaseprending trial, such as house arrest, etc..

5- Family considerations: Irrevelant is the fact that a Brazilian wife or child who is dependent economically on the Accused. "Súmula" nº 421 is explicit on this subject that being married to a Brazilian or having a Brazilian child does not impede extradition.

On the other hand, the eminent jurist, Celso D. Albuquerque Mello "in Direito Internacional Público - Vol. 2"points out that while the law impedes expulsion because of Brazilian wife or child, logic would follow to provide the same protection in the case of extradition. However, he admites that such action would also imply impunity for crimes committed extra-territorily. The argument is countered by the fact that the Brazilian Penal Code in its Art. 7º II a. combined width § 2º a. of the same article, permits

Brazil to try individuals for crimes committed elsewhere and when the agent is found to be in national territory.

6- Extradition to the country of the more severe law: Although Art. 5º XLVII of the Federal Constitution of Brazil prohibits the death penalty, life imprisomment, forced labor, banishment or other cruel punishment, the ex-tradition treaty between the U.S. and Brazil specifically mentions only the death penalty as reason for denying extradition based on punishments.

However, logic should also follow that since Mr. Lambros is in Brazil (it is irrevelant as to how he got here or how long he has been here), he is protected by Art. 5º "caput" of the Federal Constitution and therefore, be subject to the maximium punishments permitted by this "carta magna".

Thus, there would be blatant violation of his rights here should he be extradited to be tried under a more severe judiciary regime which could punish for life imprisonment, as is in this case. This condition of direct inequality in punishments between the two systems could create an untorlarable situation.

7- Restriction to extration: Extradition specifically is not permitted by law or treaty if: a) Brazil intends to exercise its jurisdiction (Art. 7º § 2º a Penal Code), b) if the crime for which Mr. Lambros to be extradited is "res juricata", c) the crime has passed the statute of limitations, d) the crime is to be tried by a special court, e) for military or political crimes, f) or if the punishment in Brazil is less than one year.

8- Possible defense postures: In every of the above considerations for possible defense postures, there are previous decisions by the S.T.F. which permits extradition. Based on case research of simular situations during the past 15 years, there appears to be no "solid right" on which a corresponding solid defense can be built.

However, except for the "Súmula" for extradition for persons having a Brazilian wife and child, the other cases are only decisions in which there is always a possiblity to obtain a different and favorable decision, although it is our considered opinion that such a thing probably will not happen.

EXHIBIT B.

22

The best chance for defense appears to be:

a- Attempt to keep Mr. Lambros here in Brazil for trial based on Art. 7º II a, § 2º a of the Penal Code since Brazil is competent to try the case because he is already here. In this aspect, having a Brazilian child might help.

b- Competence for Brazil to try the case as stated above combined with the Brazilian Constitution which prohibits the death penalty, life imprisonment, etc, reforces the thesis for having a local trial. This was considered in Extradition nº 472 USA without favorable consideration although the Attorney General considered it as a limiting factor in the extradition conditions.

c- As a last resort, the Constituition should be used as base for arguing extradition with restrictions to the death penalty, life imprisonment etc. In this end, any excessive punishment, in excess of 30 years should be combined to establish a maximim sentence to be served of 30 years.

9- Conclusions: The situation as presented by the USG is favorable for extradition. Possible defense against extradition with favorable results cannot be guaranteed . Pursuit of an agressive defense by private attorneys would be very expensive and may not be sucessful.

However, extradition to the U.S., in no way, prejudices an adequate defense against the charges there since the materiality of the crimes are not judged as part of the extradition other than verifiying that the crimes there are also punishable here.

Vernon D. McNamee

EXHIBIT B.

FAULKNER & FAULKNER
Attorneys-at-Law
Suite 500
701 Fourth Avenue South
Minneapolis, Minnesota 55415
Telephone: (612) 337-9573
Telecopier: (612) 338-0218

Charles W. Faulkner
Sheila Regan Faulkner

November 17, 1992

Mr. John Lambros
Anoka County Jail
325 East Jackson St
Anoka, MN 55303]

Re: United States v John Lambros

Dear John,

Attached please find the results of our negotiations for a plea agreement in your case. It allows you considerable latitude to argue that you ought to be treated in the same range as the other defendants and it avoids the mandatory life count. I think it is reasonable to conclude that the Government won't go much further than this and that they would relish the possibility of telling Judge Murphy that you were made a fair [illegible] you up for a life term without possibility of parole.

My best information is that the witnesses against you are available and willing to testify in a trial. The case against you is one without a chance of success either on the legal or factual issues. The agents would prefer you go to trial and get life.

My best advice given all the circumstances is that you should accept this offer. You must contact me to do so before November 23, 1992.

Sincerely,

Charles W. Faulkner

U.S. Department of Justice

United States Attorney
District of Minnesota

234 United States Courthouse
110 South Fourth Street
Minneapolis, Minnesota 55401

612/348-1500
FTS/777-1500

November 16, 1992

Charles W. Faulkner, Esq.
Suite 500
701 Fourth Avenue South
Minneapolis, MN 55415

Re: United States v. John Gregory Lambros
Criminal No. 4-89-82(5)

Dear Mr. Faulkner:

Enclosed please find the government's written plea proposal consistent with our discussions within the last ten days. This offer will remain outstanding until Monday, November 23, 1992. If it is acceptable, please contact Mary Kaye Conery, Judge Murphy's calendar clerk, to schedule entry of the plea.

Very truly yours,

THOMAS B. HEFFELFINGER
United States Attorney

BY: DOUGLAS R. PETERSON
Assistant U.S. Attorney

DRP:ac

Enclosure

cc: Dick Ripley, DEA

EXHIBIT C.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION
Criminal No. 4-89-82(5)

UNITED STATES OF AMERICA, Plaintiff, v. JOHN GREGORY LAMBROS, Defendant.	)	PLEA AGREEMENT AND SENTENCING GUIDELINES RECOMMENDATIONS

The parties to the above-captioned case, the United States of America, by its attorneys, Thomas B. Heffelfinger, United States Attorney for the District of Minnesota, and Douglas R. Peterson, Assistant United States Attorney, and the defendant John Lambros, and his attorney, Charles Faulkner, Esquire, hereby agree to dispose of this case on the following terms and conditions:

FACTUAL BASIS

The parties agree that on or about December 22, 1987, the defendant arranged for an associate, George Angelo a/k/a "Rapid Rick", to pick up approximately two kilograms of cocaine at the Sheraton Northwest at Brooklyn Park, Minnesota. This cocaine was distributed by Lawrence Randall Pebbles through his courier, Tracy Penrod. Subsequent to delivery, Lambros paid Pebbles with cash delivered by Angelo to Penrod.

PLEA AGREEMENT

1. The defendant will enter a plea of guilty to Count VIII of the Indictment which charges him with the possession with intent to distribute cocaine in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B).

2. The defendant understands that because of his prior convictions, the Count VIII charge carries a maximum potential penalty of:

a. Life imprisonment without parole;

b. A $4,000,000 fine;

c. A term of supervised release of life;

d. A mandatory special assessment fee of $50; and

e. The assessment to the defendant of the cost of prosecution, supervision and imprisonment.

3. The defendant also understands that because of his prior criminal record, the Count VIII charge carries a mandatory minimum term of imprisonment of ten years without parole and a mandatory minimum term of supervised release of eight years.

4. The government agrees to dismiss Counts I, V, and VI at the time of sentencing. Counts V and VI carry the same maximum potential penalties as the Count VIII charge. Conviction on the Count I charge, however, would carry a mandatory term of imprisonment of life without parole and a fine maximum of $8 million. The government will also reconfirm its prior agreement to dismiss Count IX pursuant to the agreement entered into between the governments of the United States and Brazil at the time of the defendant's extradition.

5. The defendant agrees he is competent to enter into this plea agreement and he waives any right he may have to challenge the competency finding of the Honorable Franklin L. Noel, United States Magistrate, dated October 30, 1992.

6. Likewise, the defendant waives any right to upset his

EXHIBIT C.

plea or otherwise challenge his prosecution based upon a challenge to the extradition process which brought the defendant from Brazil to the United States.

GUIDELINE RECOMMENDATIONS

7. The defendant understands that his sentence on the Count VIII charge will be determined and based upon the applicable sentencing guidelines under the Sentencing Reform Act of 1984. The proper application of those guidelines is a matter solely within the discretion of the Court. The defendant understands that he will not be entitled to withdraw from the plea agreement in the event the Court calculates the guidelines differently from the defendant, the government and/or the probation office.

8. Under this agreement, the defendant is not bound to any particular guideline recommendations and will be free to dispute any guidelines calculation which may be found applicable to his case. The defendant will also be free to argue for a downward departure from the applicable guideline range.

9. For its part, the government will take the following position with respect to the sentencing factors applicable to Count VIII:

a. Because the government's investigation links the defendant to the receipt of approximately six kilograms of cocaine, it will argue that the applicable base offense level is level 32 under U.S.S.G. § 2D1.1(c)(6);

b. Although the Count I conspiracy charge involves larger quantities of cocaine, the government agrees to waive its right to argue that additional quantities of cocaine should be attributed to the defendant under U.S.S.G. §§ 1B1.3 and 2D1.4;

c. There should be no adjustment for role in the offense as contemplated by U.S.S.G. § 3B1.4;

d. Because of the defendant's flight to Brazil, the two level enhancement for obstruction of justice under U.S.S.G. 3C1.1 is applicable;

e. Although the government agrees that the defendant is entitled to a two level adjustment for acceptance of responsibility under U.S.S.G. § 3E1.1, the defendant's flight to Brazil does not entitle him to the additional one point reduction available as of November 1, 1992; and

f. The government's position results in a combined offense level of 32.

10. The defendant understands that his criminal history includes two drug trafficking charges from the District of Minnesota and one assault charge from this district. Given that the defendant was on parole from these offenses, the parties estimate that the defendant will receive 8 criminal history points, leaving him within Category IV. Investigation concerning the defendant's criminal history continues. The defendant understands that if the presentence investigation reveals any prior adult or juvenile sentences which should be included within his criminal history under the sentencing guidelines, then the guideline range outlined in this agreement will be adjusted to reflect the range appropriate for the criminal history of the defendant.

11. The government will be free to argue that the defendant's criminal history makes him a career offender under U.S.S.G. § 4B1.1. If the Court deems the defendant to be a career offender, the applicable offense level would be level 35 (level 37 less the acceptance of responsibility reduction) and the defendant's

EXHIBIT C.

26

applicable guideline range would be 292 to 365 months. Absent a career offender finding, the government's guideline calculations (level 32-Category IV) find the applicable guideline range to be 168 to 210 months.

The foregoing accurately sets forth the full extent of the plea agreement and sentencing stipulations in the above-captioned case.

Respectfully submitted,

Dated:

THOMAS B. HEFFELFINGER
United States Attorney

BY: DOUGLAS R. PETERSON
Assistant U.S. Attorney
Attorney ID Number 14437X

Dated:

____
CHARLES FAULKNER, Esq.
Attorney for Defendant

Dated:

____
JOHN GREGORY LAMBROS
Defendant

EXHIBIT C.

FACTS FROM GOVERNMENT WRITTEN PLEA PROPOSAL DATED NOVEMBER 16, 1992 AND COVER LETTER FROM ATTORNEY CHARLES W. FAULKNER FORWARDING PLEA TO LAMBROS DATED NOVEMBER 17, 1992:

1. On November 16, 1992, U.S. Attorney Thomas B. Heffelfinger and U.S. Assistant Attorney Douglas R. Peterson wrote Lambros' Attorney Charles W. Faulkner as per there discussions/negociations for ten (10) days as to the sentences Lambros could receive in this action and a plea proposal as per same. See, **EXHIBIT** _____ (November 16, 1992 cover letter and copy of the five (5) page "PLEA AGREEMENT AND SENTENCING GUIDELINES RECOMMENDATION" in this action)

2. On November 17, 1992, Attorney Charles W. Faulkner mailed Lambros a copy of the government's November 16, 1992 "PLEA AGREEMENT." Attorney Faulkner stated to Lambros within his letter:

a. "Attached please find the results of our negotiations for a plea agreement in your case."

b. "It allows you considerable latitude to argue that you ought to be treated in the same range as the other defendants and it avoids the **MANDATORY LIFE COUNT**." (emphasis added)

c. "I think it is reasonable to conclude that the Government won't go much further than this and that they would relish the possibility of telling Judge Murphy that you were made a fair offer and rejected it, thus setting you up for a **LIFE TERM WITHOUT POSSIBILITY OF PAROLE**." (emphasis added)

d. "The agents would prefer you go to trial and get life." (emphasis added)

See, **EXHIBIT** _______ (November 17, 1992, letter from Attorney Faulkner to Lambros)

3. The government's November 16, 1992 "PLEA AGREEMENT AND SENTENCING GUIDELINES RECOMMENDATIONS" stated the following facts:

a. Page 1: The government wants Lambros to plea guilty to **COUNT VIII OF THE INDICTMENT**. [Charged acts occurring on **December 22, 1987**]

PAGE 2 (Facts from plea proposal from government)

b. Page 2: The government informs Lambros that **Count VIII** charge carries a maximum potential penalty of **LIFE IMPRISONMENT WITHOUT PAROLE, $4,000,000 FINE, and a TERM OF SUPERVISED RELEASE OF LIFE.** See, Paragraph 2.

c. Page 2: The government informs Lambros that **Count VIII** carries a **MANDATORY MINIMUM TERM OF IMPRISONMENT OF TEN (10) YEARS WITHOUT PAROLE AND A MANDATORY MINIMUM TERM OF SUPERVISED RELEASE OF EIGHT (8) YEARS.**

d. Page 2: The government states in paragraph four (4):

> "The government agrees to dismiss Counts **I, V, AND VI** at the time of sentencing. **Count V and VI CARRY THE SAME MAXIMUM POTENTIAL PENALTIES AS THE COUNT VIII CHARGE.** Convictions on the **COUNT I CHARGE,** however, would carry a **MANDATORY TERM OF IMPRISONMENT OF LIFE WITHOUT PAROLE AND A FINE MAXIMUM OF $8 MILLION.** The government will also reconfirm its prior agreement to dismiss Count IX pursuant to the agreement entered into between the governments of the U.S. and **BRAZIL** at the time of the defendant's **EXTRADITION.**

e. Page 4: The government states in paragraph 10, "The defendant understands that his criminal history includes two (2) drug trafficking charges from the District of Minnesota and one (1) assault charge from this district. Given that the defendant was **ON PAROLE FROM THESE OFFENSES,** the parties estimate that the defendant will receive a criminal history points, leaving his within Category IV.

EXHIBIT C.

SUMMARY IN BRIEF OF PLEA AGREEMENT:

Count 1: Only MANDATORY LIFE WITHOUT PAROLE

COUNT 5: MAXIMUM PENALTY OF LIFE **WITHOUT PAROLE.** See Paragraph 4.

COUNT 6: MAXIMUM PENALTY OF LIFE **WITHOUT PAROLE.** See Paragraph 4.

COUNT 8: MANDATORY MINIMUM OF TEN (10) YEARS **WITHOUT PAROLE** and a MANDATORY MAXIMUM OF LIFE **WITHOUT PAROLE.**

EXHIBIT C.

Sunday **Star Tribune**
JULY 1, 2001
NEWSPAPER OF THE TWIN CITIES

World digest

PAGE A6 • STAR TRIBUNE **

SUNDAY, JULY 01, 2001

Brazil: *Ex-cop sentenced in '92 riot*

Former police Col. Ubiratan Guimaraes was sentenced to 632 years in prison for ordering police to quell an uprising at Sao Paulo's Carandiru prison complex, which was built for 3,200 inmates but now houses nearly 8,000. He was found guilty of being responsible for the deaths of 102 inmates who were shot on Oct. 2, 1992. Guimaraes, 58, faces no more than 30 years in prison — the maximum jail sentence allowed under Brazilian law. About 120 police troopers participated in the raid, and 83 have been charged in the massacre.

PLEASE NOTE: "Guimaraes, 58, faces NO MORE THAN 30 YEARS IN PRISON - THE MAXIMUM JAIL SENTENCE ALLOWED UNDER BRAZIL LAW." [Article 75 of the Brazilian Criminal Code]

WHY WAS JOHN GREGORY LAMBROS GIVEN A MANDATORY LIFE SENTENCE WITHOUT PAROLE WHEN BRAZILIAN LAW DOESN'T ALLOW SAME???

EXHIBIT D.