

ISSUE \_\_\_\_\_ :

INEFFECTIVE ASSISTANCE OF COUNSEL AND/OR COURT ERROR AS TO MOVANT JOHN GREGORY LAMBROS' DUE PROCESS RIGHTS BEING VIOLATED IN COUNTS ONE (1), FIVE (5), SIX (6), AND EIGHT (8) - CONSPIRACY AND POSSESSION WITH INTENT TO DISTRIBUTE CONTROLLED SUBSTANCE - WHEN MOVANT LAMBROS WAS SENTENCED UNDER THE STATUTE [ Title 21 U.S.C. § 841(b)] FOR CONTROLLED SUBSTANCES POSSESSED FOR PERSONAL USE THAT WERE INVOLVED IN THE OFFENSES OF CONSPIRACY TO DISTRIBUTE AND POSSESS WITH INTENT TO DISTRIBUTE A CONTROLLED SUBSTANCE. MOVANT LAMBROS WAS PREJUDICED.

Movant Lambros' due process rights were violated and he was prejudiced, when he was originally sentenced in 1994 and resentenced in 1997 for controlled substances/drugs possessed for PERSONAL USE that were involved in Counts One (1), Five (5), Six (6), and Eight (8) of the offenses of conspiracy to distribute and possess with intent to distribute a controlled substance for STATUTORY SENTENCING PURPOSES. Movant Lambros was prejudiced. See, U.S. vs. ASCH, 207 F.3d 1238, 1244-1246 (10th Cir. 2000).

LAW:

1. U.S. vs. ASCH, 207 F.3d 1238 (10th Cir. 2000). In this case, the object of defendant's meth conspiracy and possession was DISTRIBUTION. Thus, drugs handled by defendant in transactions that lacked the common objective of distribution COULD NOT be included in determining the applicable sentencing range under the STATUTE, TITLE 21 U.S.C. §841(b). Absent evidence defendant agreed to or intended to distribute the drugs she personally consumed, these quantities must be excluded when determining the STATUTORY RANGE, but can be considered when

determining the sentencing range under the more expansive Sentencing Guidelines. Although a defendant bears the burden of proving her intent to consume, "the ultimate burden of proof on the quantity of drugs involved in the offense remains with the government at all times." Id. at 1246.

2. U.S. vs. RODRIGUEZ-SANCHEZ, 23 F.3d 1488, 1494-1497 (9th Cir. 1994). In this case, the court based defendant's sentence on the ENTIRE QUANTITY of pure methamphetamine defendant possessed and sentenced defendant to the ten (10) year mandatory minimum sentence under the STATUTE, Title 21 U.S.C. §841(b)(1)(A). The JURY returned a guilty verdict with no finding as to amount defendant intended to distribute and testified that he "intended generally to distribute only a very small amount to friends." Id. 1491 The Ninth Circuit vacated defendant's sentence and remanded to the district court for a factual determination of the amount of drugs defendant intended to distribute and the new sentence imposed accordingly, when it held, "... we hold that possession of drugs with the intent to distribute them, in violation of §841(a)(1) INVOLVES - under §841(b)(1)(A) - ONLY THOSE DRUGS WHICH ARE INTENDED FOR DISTRIBUTION." Id. 1496. (emphasis added)

GOVERNMENT DID NOT PRODUCE EVIDENCE OF MOVANT LAMBROS' INTENT AND/OR AGREEMENT TO DISTRIBUTE DRUGS:

3. Movant was convicted on four (4) counts in this action, the conspiracy to distribute and possession with the intent to distribute drugs over an extended period of time, 1983 thru 1988. The government did not produce any evidence of Movant Lambros' intent and/or agreement to distribute drugs. The government did produce evidence that Movant used cocaine, as Movant's parole officer testified that Movant had violated the conditions of his parole and/or special parole term through urinalysis testing on or about 1986 thru 1988. Therefore proof to cocaine consumed by Movant Lambros.

GOVERNMENT DID NOT REQUEST A "SPECIAL VERDICT" AS TO AMOUNT OF CONTROLLED SUBSTANCE(S) POSSESSED FOR PERSONAL USE BY MOVANT LAMBROS:

4. The government DID NOT request a "SPECIAL VERDICT" as to the TYPE AND AMOUNT of drug(s)/controlled substance(s) involved within Counts 1, 5, 6, and 8, that were possessed for "PERSONAL USE", by Movant Lambros, for STATUTORY SENTENCING PURPOSES. It is the responsibility of the government to request a "SPECIAL VERDICT". See, U.S. vs. BARNES, 158 F.3d 662, 672 (2nd Cir. 1998)(failure of defendant to seek a SPECIAL VERDICT does not prevent him from raising the issue on appeal.)

5. The indictment and evidence presented at trial should be viewed as a whole. Therefore, Movant Lambros could have been found guilty of: (a) cocaine; (b) marijuana; or (c) some other type of controlled substance. Also, Movant Lambros testified at trial that he used cocaine and marijuana during the time of the conspiracy. The government verified same with testimony from United States Parole Officer Dale Harbour. The government did not request testimony as to the type and amount of controlled substances Movant Lambros PERSONALLY USED, during the conspiracy.

JURY INSTRUCTIONS WERE CONFUSING AS TO "TYPE" AND "ACTUAL AMOUNT" OF CONTROLLED SUBSTANCE(S) INVOLVED IN COUNTS 1, 5, 6, AND 8 - FOR DISTRIBUTION:

6. The jury instructions were confusing as to the "TYPE" and "ACTUAL AMOUNT" of controlled substance(s) involved within Counts 1, 5, 6, and 8, Movant Lambros AGREED TO OR INTENDED TO DISTRIBUTE. The following statements by Judge Murphy prove same:

a. "Also, the evidence NEED NOT prove the actual amount of the CONTROLLED SUBSTANCE that was part of the alleged transaction or the EXACT AMOUNT of the CONTROLLED SUBSTANCE ALLEGED AS POSSESSED BY THE DEFENDANT WITH THE INTENT TO DISTRIBUTE. The government MUST PROVE beyond a reasonable doubt, however, that

a MEASURABLE AMOUNT OF THE CONTROLLED SUBSTANCE was, in fact, knowingly and intentionally possessed by the defendant WITH THE INTENT TO DISTRIBUTE." See, COURT TRANSCRIPTS, Vol. VII., Page 935 (emphasis added)

b. "It is NOT NECESSARY for the government to prove that the defendant KNEW THE PRECISE NATURE OF THE CONTROLLED SUBSTANCE that was possessed with the INTENT TO DISTRIBUTE. It MUST PROVE beyond a reasonable doubt, however, that the defendant did know that SOME TYPE OF CONTROLLED SUBSTANCE WAS POSSESSED WITH INTENT TO DISTRIBUTE." See, COURT TRANSCRIPTS, Vol. VII., Pages 943 and 944. (emphasis added)

RULE OF LENITY APPLIES HERE:

7. The RULE OF LENITY is applicable in this action, as the Rule of Lenity provides that "where text, structure, and history fail to establish that the government's position is unambiguously correct, [Courts] apply the Rule of Lenity and resolve the ambiguity in [the defendant's] favor." See, U.S. vs. GRANDERSON, 511 U.S. 39, 54, 127 L.Ed.2d 611 (1994). Also see, U.S. vs. TRAN, 234 F.3d 798, 800, Head Note 16 (2nd Cir. 2000) ("Rule of Lenity requires the sentencing court to impose the lesser of two (2) penalties where there is an actual ambiguity over which penalty should apply.")(emphasis added)

CONCLUSION:

8. The District Court used Cocaine as the TYPE OF DRUG to sentence Movant Lambros on in Count's 1, 5, 6, and 8. Movant was prejudiced when the court did not make a finding, nor the jury, as to the amount and type of controlled substance Movant Lambros intended to distribute, as Movant could only be sentenced under the STATUTE, Title 21 U.S.C. §841(b), for controlled substances/drugs that where intended and/or agreed to distribute.

9. Movant Lambros was sentenced on the entire quantity of Cocaine stated within the indictment under the STATUTE. Therefore, this Movant requests this Court to vacate Movant sentences and hold an evidentiary hearing for a factual determination of the amount and type of drugs/controlled substances Movant Lambros intended to distribute and the new sentence imposed accordingly.