IN THE

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JOHN GREGORY LAMBROS,

Plaintiff - Appellant

-vs-

J.W. BOOKER, et al.,

Defendant - Appellee

CASE NO.

00 - 3118

On Appeal from the United States District Court

for the District of Kansas

Case No. 98-3148-RDR

BRIEF OF APPELLANT

John Gregory Lambros
Appellant Pro - Se
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May 10, 2000

John Gregory Lambros
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Clerk
U.S. Court of Appeals for the Tenth Circuit
Byron White U.S. Courthouse
1823 Stout Street
Denver, Colorado 80257
U.S. Certified Mail No. Z-138-418-121 - RETURN RECEIPT REQUESTED

RE: FILING: 00-3118, LAMBROS vs. BOOKER
Dist/Ag docket: 98-CV-3148-RDR

Dear Clerk:

Attached for FILING are four (4) copies, one original and three copies, of my opening brief. If more copies are needed, please reproduce and bill me and I'll have my family forward funds for same.

Please note that I served you with my DOCKETING STATEMENT on May 4, 2000, that should be reviewed at the same time as my opening brief, as it contains rulings from the lower court.

Thanking you in advance for your continued assistance and please contact me if I've made any mistakes in this filing.

All defendants have been served as per the CERTIFICATE OF SERVICE within my opening brief, page 31.

Sincerely,

John G. Lambros, Pro Se

c:
U.S. Parole Commission
Warden J.W. Booker, Jr.

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d. January 27, 1994, Sentencing Transcript page six (6), U.S. vs. LAMBROS, CR-4-89-82, U.S. District Court for the District of Minnesota, Fourth Division, before the Honorable Diana E. Murphy, regarding PAROLE COMMISSION DETAINER..... D

e. TREATY OF EXTRADITION BETWEEN THE UNITED STATES OF AMERICA AND THE UNITED STATES OF BRAZIL, as offered in STATE OF WASHINGTON vs. MARTIN SHAW PANG, Supreme Court of Washington, **(En Banc)**, Decided July 31, 1997, Cite as 940 P.2d 1293, 1354 thru 1361..... E

10. APPENDIX:

Appellant is requesting this Court to review the record of the District Court due to lack of funds by Appellant to copy the record.

Attached is Appellant's May 2, 2000, motion to the Clerk of the District Court, "REQUEST TO CLERK TO CERTIFY AND TRANSFER RECORDS," and Certificate of Service as to same.

Thanking this Court in advance for your consideration in this issue..... F.

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SUPPLEMENTAL STATEMENT

This Appellant, John Gregory Lambros, Pro Se, requested the Clerk of the Court for the District of Kansas, May 2, 2000, to certify and transfer the COMPLETE RECORDS in cases:

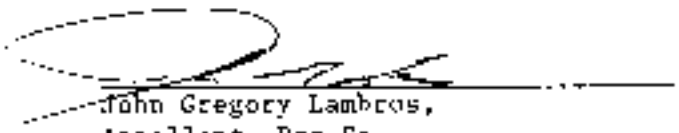
1. LAMBROS vs. U.S. PAROLE COMMISSION, et al., Case No. 95-3119-RDR;

2. LAMBROS vs. BOOKER, et al., Case No. 98-3148-RDR. (Case on appeal)

to this Court.

Case number 95-3119-RDR is the case used by the lower court as a basis in its **ABUSE OF WRIT** determination in case number 98-3148-RDR.

Appellant is requesting this Court to review both of the above cited cases in its determination of this appeal.



John Gregory Lambros,
Appellant, Pro Se

STATEMENT OF ISSUES

I. WHETHER APPELLANT LAMBROS WAS REQUIRED TO SHOW "CAUSE AND PREJUDICE" OR SHOWING THAT DISMISSAL OF HIS NEW CLAIM WOULD RESULT IN A "MISCARRIAGE OF JUSTICE," WHEN THE RESPONDING PARTIES DID NOT INVOKE THE DEFENSE, ABUSE OF THE WRIT BECAUSE IT WAS SUCCESSIVE.

McCleskey vs. Zant, 499 U.S. 467, 494 (1991);

U.S. vs. Kleinbart, 27 F.3d 586, 593 n.5 (D.C. Cir.) cert. denied, 513 U.S. 978 (1994)

Lewandowski vs. Makel, 949 F.2d 884 (6th Cir. 1991), Head Note 4.

II. WHETHER "CAUSE" EXISTS AS TO ATTRIBUTABLE ACTS AND OMISSIONS BY THE U.S. ATTORNEYS OFFICE THAT INTERFERED WITH THE CLAIM'S PRESENTATION BY CONCEALING EVIDENCE OR UNREASONABLY RESISTING REQUESTED DISCOVERY AND/OR IF THE JUDGE IN THE EARLIER PROCEEDING IMPEDED THE CLAIM'S PRESENTATION.

McCleskey vs. Zant, 499 U.S. 467, 494 (1991)

Murray vs. Carrier, 477 U.S. 478, 488 (1986)

State of Washington vs. Martin Shaw Pang, 940 P.2d 1293 (Wash. 1997), cert. denied, 139 L.Ed2d 608)

STATEMENT OF THE CASE

The Appellant herein, John Gregory Lambros, was indicted by a United States Grand Jury for the District of Minnesota on May 17, 1989, which is not at issue here.

On August 21, 1989, the U.S. Parole Commission issued a U.S. Parole Violation Warrant for violations of the following offenses: a) failure to submit written supervision reports; b) failure to report change in employment; c) failure to report change in residence; d) law violations.

PUNISHMENT for the above U.S. Parole Violation Warrant is **5,357 days.**

Appellant was arrested in Rio de Janeiro, Brazil on May 17, 1991 on the above described United States Parole Commission, Parole Violation Warrant, by DEA Agent Terry Anderson and Brazilian Authorities.

Appellant was living in Brazil at the time for the purpose of conducting legitimate business. Subsequent to his arrest, Appellant was held in prison in Brazil until he was extradited to the United States on or about June 20, 1992. During the year or so in which the Appellant was held in Brazil, he was forcibly taken to Brasilia, Brazil without an extradition hearing in Rio de Janeiro, Brazil as per Brazilian Law. In Brasilia Lambros was held in the same cell with FRANCISCO TOSCONINO (500 F.2d 270 (1974)), TOSCONINO had been arrested this time by Italian officials for extradition to Italy, where he was subjected to daily incidents of physical and psychological abuse and torture. This abuse and torture was carried out not only by agents of the Brazilian Government but also by agents of the Government of the United States. In addition to the abuse, the Appellant is certain that these agents also implanted some sort of electrodes into his body for the purpose of monitoring and controlling his actions via radio telemetry. The electrodes have caused the Appellant daily un-tolerable pain and suffering and continue to do so through the present day due to radio telemetry. The Appellant has been able

to confirm the presence of these electrodes through the results of x-rays taken at the Federal Medical Center in Rochester, Minnesota. These results have confirmed the presence of foreign bodies in the Appellants' skull. (x-ray pictures of Appellant's implants within his skull are available within the BOYCOTT BRAZIL web site: **www.brazilboycott.org**)

On April 30, 1992, the Brazilian Federal Supreme Court GRANTED IN PART, by majority of votes, the United States request for the extradition of Appellant on some of this May 17, 1989, Indictment, not at issue here. The Brazilian Supreme Court **DID NOT** grant extradition on the August 21, 1989, U.S. Parole Commission Warrant that Appellant was arrested on by U.S. Agents in Brazil on May 17, 1991, that is ponishable by **5,357 days**, due to the following **Articles** contained within the U.S. - Brazil Extradition Treaty: (For a copy of the U.S. - BRAZIL EXTRADITION TREATY, See, STATE OF WASHINGTON vs. MARTIN SHAW PANG, 940 P.2d 1293 (Wash. 1997), cert. denied, 139 L.Ed2d 608):

1. TREATY OF EXTRADITION BETWEEN THE UNITED STATES OF AMERICA AND THE UNITED STATES OF BRAZIL in its entirety is in WASHINGTON vs. PANG, 940 P.2d at 1354-1361.

2. ARTICLE I;

3. ARTICLE II;

4. ARTICLE III;

5. ARTICE V(4): Extradition shall not be granted in any of the following circumstances, (4) When the person sought would have to appear, in the requesting State, before an EXTRAORDINARY TRIBUNAL OR COURT [**U.S. Parole Commission**];

6. ARTICLE VIII: Requesting State [U.S.] was to offer Brazil a statement of the crime or offense [Parole Violation Warrant] of which the fugitive is accused or convicted;

7. ARTICLE IX(1) & (2): The request for extradition . . . shall be supported by the following documents: (1) In the case of a person who has been convicted of the crime or offense for which his extradition is sought: **A DULY CERTIFIED OR AUTHENTICATED COPY OF THE FINAL SENTENCE OF THE COMPETENT COURT.** (2) In the case of a person who is merely charged with the crime or offense for which his extradition is sought: **A DULY CERTIFIED OR AUTHENTICATED COPY OF THE WARRANT OF ARREST OR OTHER ORDER OF DETENTION ISSUED BY THE COMPETENT AUTHORITIES OF THE REQUESTING STATE, TOGETHER WITH THE DEPOSITION UPON WHICH THE WARRANT OR ORDER MAY HAVE BEEN ISSUED AND SUCH OTHER EVIDENCE OR PROOF AS MAY BE DEEMED COMPETENT IN THE CASE.**

The documents specified in this Article **MUST CONTAIN** a precise statement of the criminal act of which the person sought is charged or convicted, the place and date of the commission of the criminal act, and they must be accompanied by an AUTHENTICATED COPY OF THE TEXTS OF THE APPLICABLE LAWS OF THE REQUESTING STATE including the laws relating to the limitation of the legal proceedings or the enforcement of the penalty for the crime or offense for which the extradition of the person is sought, and data or records which will prove the identity of the person sought.

THE U.S. GOVERNMENT DID NOT SUBMIT A COPY OF APPELLANT LAMBROS' "PAROLE VIOLATION WARRANT" TO THE BRAZILIAN SUPREME COURT. NOR ANY BACKGROUND INFORMATION AS TO THE "PAROLE VIOLATION WARRANT."

8. ARTICLE XI: A parole violation is not illegal in Brazil as escape is legal in Brazil and a parole violation is the same as escape.

9. **ARTICLE XXI:** A person extradited by virtue of the present Treaty **MAY NOT BE TRIED OR PUNISHED BY THE REQUESTING STATE FOR ANY CRIME OR OFFENSE COMMITTED PRIOR TO THE REQUEST FOR HIS EXTRADITION, OTHER THAN THAT WHICH GAVE RISE TO THE REQUEST. . . .** Therefore, the U.S. Parole Violation Warrant may not be used as a detainer on Appellant Lambros.

FACTS OF THE CASE

1. Appellant Lambros was appointed Attorney David J. Phillips of the Federal Public Defenders Office, Kansas City, Kansas on July 26, 1994, to represent Appellant in the H-13 application to the U.S. Parole Commission as per the August 21, 1989, U.S. Parole Commission Warrant that Appellant was arrested on by U.S. Agents in Brazil on May 17, 1991, that is punishable by **5,357 days.**

2. On September 28, 1994, Appellant Lambros was served the U.S. Parole Commission NOTICE OF ACTION, as per the H-13 application to the parole commission. The NOTICE OF ACTION stated, "Let Detainer stand. Schedule for dispositional record review September 1997. . . . APPEALS PROCEDURE: The above decision is appealable to the National Appeals Board under Title 28 C.F.R. 2.26."

3. On October 6, 1994, Attorney David J. Phillips DENIED to represent Appellant Lambros in his National Appeal, stating that Title 28 C.F.R. 2.26 governs appeals to the National Appeals Board and "NOTES AND PROCEDURES," 2.26-11(1)(viii) states that decisions to let a detainer stand is a non-appealable decision.

4. Attorney Phillips stated Appellant's only option was to file a Writ of Habeas Corpus under Title 28 USC §2241 as per my denial of appeal.

5. Appellant Lambros and Attorney Phillips entered into a law suit that is not at issue here.

6. On or about March 13, 1995, Appellant filed a Petition for Writ of Habeas Corpus under Title 28 U.S.C. §2241 in the United States District Court for the District of Kansas. See, JOHN GREGORY LAMBROS vs. U.S. PAROLE COMMISSION and U.S. DEPARTMENT OF JUSTICE, **Case No. 95-3119-RDR**, that listed the following grounds/issues:

a. DENIAL OF DUE PROCESS RIGHTS TO APPEAL U.S. PAROLE COMMISSION NOTICE OF ACTION, 5th AMENDMENT.

5. BREACH OF CONSENT DECREE BY U.S. PAROLE COMMISSION "NOTICE OF ACTION," DATED SEPTEMBER 28, 1994.

7. On May 11, 1995, Assistant U.S. Attorney Melenie D. Caro, Topeka, Kansas stated within the U.S. PAROLE COMMISSIONS, et al. **ANSWER AND RETURN**, in Case No. **95-3119-RDR**, on page 4, **ISSUE**: "Petitioner [Lambros] contends he has been denied his right to an administrative appeal regarding the results of his dispositional record review under 18 U.S.C. §4214." Attorney Caro proceeded with her ARGUMENT as to same and did not address any other issue.

8. On February 5, 1998, United States District Judge Richard D. Rogers ORDERED that Appellant Lambros' writ of habeas corpus be denied in Case No. **95-3119-RDR.**

9. On or about May 4, 1998, Appellant Lambros filed a PETITION FOR WRIT OF HABEAS CORPUS under Title 28 U.S.C. §2241 that is the basis of this appeal. See, LAMBROS vs. BOOKER And U.S. PAROLE COMMISSION, **Case No. 98-3148-RDR.**

10. Appellant Lambros stated clearly on page one (1), "Movant states that he is appearing before this Court only for the above purpose, [LACK OF JURISDICTION OF PERSON OF PETITIONER) and **ONLY RAISES ONE QUESTION AS TO LACK OF JURISDICTION OVER MOVANT AS TO THE FACT A PAROLE VIOLATION IS NOT LISTED IN THE EXTRADITION TREATY BETWEEN BRAZIL AND THE [Federal] U.S. AS AN EXTRADITABLE CRIME.**"

11. On **May 28, 1998, APPROXIMATELY TWENTY-ONE (21) AFTER THE COURT RECEIVED APPELLANT LAMBROS' § 2241, AT ISSUE HERE, THE COURT ORDERED,** "that the petition is DISMISSED pursuant to Title 28 U.S.C. § 2244(a)."

12. The respondents and/or Defendants in Civil Action 98-3148-RDR, **DID NOT RESPOND IN THIS ACTION NOR INVOKE A DEFENSE.** Thus the legal standard governing new-claim successive petitions. See, McCLESKEY vs. ZANT, 499 U.S. 467, 494 (1991)("[w]hen a prisoner files a second or subsequent application [for a

writ of habeas corpus], THE GOVERNMENT BEARS THE BURDEN OF PLEADING ABUSE OF THE WRIT.") **ONLY** if the defendants/respondents/state satisfy this pleading and proof burden, did the burden revert to the petitioner to "DISPROVE ABUSE" by making an adequate showing of "cause and prejudice" or by showing that dismissal of the new claim would result in a "miscarriage of justice." See, McCLESKEY vs. ZANT, supra, 499 U.S. at 494-95.

13. PLEASE NOTE: It is this Appellant's information that he and the Court are confronted with a situation of **PRE** and **POST** enactment of the Anti-terrorism and Effective Death Penalty Act of 1996 (AEDPA) in this case, as Case No. **95-3119-RDR** was **PRE** AEDPA and Case No. **98-3148-RDR** was **POST** AEDPA.

14. On **JUNE 5, 1998**, Appellant Lambros filed a "MOTION TO ALTER OR AMEND ORDER AND/OR HAVE ORDER VACATED UNDER FEDERAL RULES OF CIVIL PROCEDURE RULE 59(e), DATED MAY 28, 1998."

15. On **MARCH 22, 2000**, the Court ORDERED AND ADJUDGED that Appellant's motion to alter and amend judgement is granted to include discussion of the dismissal of the dismissal of the petition as an abuse of the writ, and that no other codification to the Court's decision to dismiss the petition is warranted.

15. Upon review of the Courts MARCH 22, 2000, ORDER, this Appellant notes that **NOT ONE CASE CITED BY THE COURT IS POST AEDPA.** This Appellant is very confused and requests the appellate court for direction or possibly offer direction to the district court in the handling of this case. This Appellant is not educated in law and can only wonder if STRADDLES as to **PRE** and **POST AEDPA** are applicable here.

16. Appellant Lambros states under the penalty of perjury that his maximum guilt in not raising his EXACT JURISDICTIONAL CLAIM within his first §2241 is, "OMISSION CAUSED BY CARELESSNESS DUE TO EDUCATION AND BRAIN CONTROL IMPLANTS PLACED WITHIN HIM IN BRAZIL THAT STILL CONTROL HIM," as Appellant has acted in good faith and did not cause substantial disruption to the court or opposing party. See, PIONEER INVEST. SERV. CO. vs. BRUNSWICK ASSOC. LTD. PART-

NERSHIP, 507 U.S. 380, 388-92, 395 n.14, 397-99 (1993) (canvassing federal courts' interpretations of various court rulings using "EXCUSABLE NEGLECT" language to describe situations in which procedural defaults are excused and concluding that "EXCUSABLE NEGLECT" concept has "FLEXIBLE MEANING," "is not limited to situations where the failure to timely file is due to circumstances beyond the control of the filer," and comprehends some situations involving the party's or counsel's "OMISSIONS CAUSED BY CARELESSNESS" as long as party at fault acted in GOOD FAITH and did not cause substantial disruption to court and opposing party).

ISSUE I :

WHETHER APPELLANT LAMBROS WAS REQUIRED TO SHOW "CAUSE AND PREJUDICE" OR SHOWING THAT DISMISSAL OF HIS NEW CLAIM WOULD RESULT IN A "MISCARRIAGE OF JUSTICE," WHEN THE RESPONDING PARTIES DID NOT INVOKE THE DEFENSE, ABUSE OF THE WRIT BECAUSE IT WAS SUCCESSIVE.

Appellant asserts the legal standards governing new-claim successive petitions prior to the enactment of the Antiterrorism and Effective Death Penalty Act of April 24, 1996.

FACTS:

1. The Court states in its March 22, 2000 ORDER, "Because petitioner alleges error in the parole violation warrant he unsuccessfully challenged in his earlier habeas petition, and because petitioner satisfies neither the CAUSE AND PREJUDICE NOR MANIFEST INJUSTICE STANDARDS REQUIRED TO AVOID DISMISSAL OF A SUCCESSIVE OR ABUSIVE PETITION, McCLESKEY vs. ZANT, 499 U.S. 467 (1991), the court finds this matter should be dismissed. See, Page 2 in March 22, 2000, ORDER. The Court also included a discussion of the dismissal of the petition as an abuse of the writ. See, Page 3 in March 22, 2000, ORDER.

2. The defendants/respondants within this action **NEVER FILED A RESPONSE PLEADING IN THIS ACTION.** LAMBROS vs. BOOKER & U.S. PAROLE COMMISSION, Case No. 98-3148-RDR. Therefore, it is the defendants/respondants BURDEN OF CLAIMING, AS A DEFENSE, that this Appellant's §2241 writ constituted an abuse of the writ because it was successive. See, McCLESKEY vs. ZANT, 499 U.S. 467, 494 (1991)([w]hen a prisoner files a second or subsequent application [for a writ of habeas corpus], the government bears the burden of pleading abuse of the writ). In this regard, the abuse of the writ doctrine functioned as a classic affirmative defense. As the moving party, this Appellant BORE NO BURDEN

WHATSOEVER until and unless the responding party chooses to invoke the defense. And it is only after the government satisfies the pleading burden that the burden reverts to the petitioner to "disprove abuse in **PRE-AEDPA** abuse of the writ cases." See also, U.S. vs. KLEINBART, 27 F.3d 586, 593 n.5 (D.C. Cir.), cert. denied, 513 U.S. 976 (1994) (government's failure to plead writ abuse with specificity is not excused by fact that petitioner was "on notice that the Government intended to pursue the defense"; "McCLESKEY does not suggest that the Government's burden is lifted when the petitioner has notice that the Government intends to persue an abuse of the writ defense. Rather, the Government's burden is unqualified."); LEWANDOWSKI vs. MAKEL, 949 F.2d 884 (6th Cir. 1991) Head Note 4 (although state argued abuse of writ to magistrate judge, it failed to plead writ abuse specifically in objections to magistrate judge's report and **THEREBY WAIVED DEFENSE**.)

DISCUSSION:

3. The McCLESKEY decision merely outlined the manner in which the state may raise the DEFENSE of abuse of the writ. In making the judgement whether to invoke the defense in **NON-AEDPA** cases, the state's legal representatives have an obligation, both professionally and to the court, to refrain from asserting the defense unless they believe in good faith that the petitioner has abused the writ. The general ethical obligation to refrain from nonmeritorious arguments, See, ABA, Code of Professional Responsibility, DR 7-102(A)(1) (1969)(lawyer may not "[f]ile a suit, assert a position, conduct a defense, . . . or take other action . . . when he knows or when it is obvious that such action would merely serve to harass or maliciously injure another"), has particular force in this context, because assertion of the defense automatically places on the petitioner a difficult burden of proving "an elaborate negative." See, SANDERS vs. U.S., 373 U.S. 1, 15 (1963).

4. Under the McCLESKEY standard, the state's satisfaction of its burden of PLEADING ABUSE (and, apparently, of proving that the petition in fact is successive) [The government could not prove Appellant's petition to be successive due to the fact there had been NO FINAL DETERMINATION ON THE MERITS OF APPELLANT's FIRST PETITION, See, HILL vs. LOCKHART, 894 F.2d 1009, 1010 (8th Cir.)(en banc), cert. denied, 497 U.S. 1011 (1990)("The District Court did not abuse its discretion in hearing Hill's second petition, because there had been no final determination ON THE MERITS OF HILL'S FIRST PETITION.") shifts to the petitioner the burden to "disprove abuse." Although the McCLESKEY decision did not address the mechanics of this burden-shifting process, the prior practice that McCLESKEY confirmed, See, e.g., Advisory Note to Rule 9 of the Rules Governing §2254 Cases ("'Nor do we think that a procedure which allows the imposition of a forfeiture for abuse of the writ, without allowing the petitioner an opportunity to be heard on the issue, comports with the minimum requirements of fairness'" (quoting JOHNSON vs. COPINGER, 420 F.2d 395, 399 (4th Cir. 1969))); PRICE vs. JOHNSON, 334 U.S. 266, 292 (1948) (prisoner due "fair[] opportunity to meet all possible objections to the filing of his petition"); MILLER vs. SOLEM, 758 F.2d 144, 144-45 (8th Cir. 1985)(citing cases)(Successive petition for habeas corpus may not be dismissed as abuse of writ unless petitioner has been given reasonable opportunity to prove he has not abused writ.) and litigants' general right to fair notice and an opportunity to be heard, See, MULLANE vs. CENTRAL HANOVER BANK & TRUST CO., 339 U.S. 306, 314-15 (1950), require that the court (1) inform the petitioner that the state's pleading has been deemed adequate and that the issue of ABUSE OF THE WRIT is properly before the court, and (2) permit the petitioner adequate time to submit pleadings on the questions whether his failure to raise the claim in the earlier petition is excused under either the "cause and prejudice" or "miscarriage of justice" doctrines. Prior to the McCLESKEY decision, it was common practice for the courts to inform

the petitioner and counsel that dismissal for ABUSE OF THE WRIT was being contemplated. See, SPADLEY vs. DUGGER, 825 F.2d 1566, 1568 (11th Cir. 1987) ("district court **MAY NOT DISMISS A PETITION SUA SPONTE** pursuant to Rule 9(b) without first providing the petitioner both with specific notice that the dismissal pursuant to Rule 9(b) is contemplated and with a reasonable opportunity to prove that he has not abused the writ"); URDY vs. McCOTTER, 773 F.2d 652, 656 (5th Cir. 1985)(reversing Rule 9(b) dismissal for lack of requisite notice and opportunity to be heard), and to give the petitioner a fair opportunity (typically ten (10) days or more) to proffer an explanation for omitting the claim from the prior petition.

CONCLUSION:

5. This Appellant requests this court to remand this case back to the district court as Appellant can satisfy the burden of disproving abuse either by making an adequate showing of "cause" and "prejudice" or by showing showing that the dismissal of the new claim would result in a "miscarriage of justice."

6. Appellant requests this court to order the adjudication of all factual disputes regarding issues it questions as to Appellants' extradition from Brazil within an evidentiary hearing.

7. Appellant requests this court to order the district court to make specific findings and **LEGAL CONCLUSIONS**, as this court is unable to facilitate appellate review of writ-abuse dismissal without same. See, PRICE vs. JOHNSON, 334 U.S. at 292; POTTS vs. ZANT, 638 F.2d 727, 746-52 (5th Cir.), cert. denied, 454 U.S. 877 (1981); ELLIS vs. MABRY, 601 F.2d 363, 364 (8th Cir. 1979). The standard of review on appeal is abuse of discretion. See, HERBST vs. SCOTT, 42 F.3d 902, 905-06 (5th Cir.), cert. denied, 515 U.S. 1148 (1995); McGARY vs. SCOTT, 27 F.3d 181, 183 (5th Cir. 1994)(court of appeals will reverse "district

court's decision to dismiss a second or subsequent federal habeas petition for abuse of the writ . . . only if we find an abuse of . . . discretion . . . A court abuses it discretion when it bases its decision on an **ERRONEOUS LEGAL CONCLUSION** or on a **CLEARLY ERRONEOUS FINDING OF FACT.**"); U.S. ex rel. TOWNSEND vs. TWOMEY, 452 F.2d 350, 353 (7th Cir.), cert. denied, 409 U.S. 854 (1972) (abuse of discretion found when district court reaches MERITS of same claim successive petition).

8. This Court need only note that the U.S. Parole Commission's August 21, 1989 warrant **WAS NOT** given to the Brazilian Supreme Court before April 30, 1992, the day the Brazilian Supreme Court granted extradition to Appellant Lambros to the United States. Therefore, not complying to Articles 5, 8, 9, 11, & 21. See, WASHINGTON vs. PANG, 940 P.2d 1293 (Wash. 1997), cert. denied, 139 L.Ed2d 608. PANG at 1354-1361 offer copy of U.S.-BRAZIL EXTRADITION TREATY. The district court never made a finding of fact in this case.

9. The U.S. Parole Commission and Warden Booker have **LACKED JURISDICTION** to impose a detainer against Appellant Lambros due to the fact the Brazilian Supreme Court never authorized jurisdiction, as per the extradition treaty, thus no showing of cause and prejudice was necessary for issue to be cognizable on postconviction petiton for collateral review. See, KELLY vs. U.S., 29 F.3d 1107 (7th Cir. 1994)(District Court's Lack of JURISDICTION to impose enhanced sentence was not harmless, even concurrent sentence could be corrected, thus, no showing of cause and prejudice was necessary for issue to be congnizable on postconviction pecfion for collateral review); HARRIS vs. U.S., 149 F.3d 1304, 1305 (11th Cir. 1998) Head Note 4 (Because **JURISDICTIONAL CLAIMS MAY NOT BE DEFAULTED**, a defendant need not show "cause" to justify his failure to raise such a claim.) The U.S. Parole Commission and Warden Booker have not complied with the U.S. - BRAZIL EXTRADITION TREATY strict procedural requirements. A federal court not only has the power but also the obligation at any time to inquire into jurisdiction whenever the possibility that jurisdiction does not exist arises.

ISSUE II. :

WHETHER "CAUSE" EXISTS AS TO ATTRIBUTABLE ACTS AND OMISSIONS BY THE U.S. ATTORNEYS OFFICE THAT INTERFERED WITH THE CLAIM'S PRESENTATION BY CONCEALING EDIVENCE OR UNREASONABLY RESISTING REQUESTED DISCOVERY AND/OR IF THE JUDGE IN THE EARLIER PROCEEDING IMPEDED THE CLAIM'S PRESENTATION.

Appellant Lambros' due process rights where violated when "cause" was established due to "INTERFERENCE BY OFFICIALS' . . . makes compliance . . . impracticable." See, McCLESKEY, supra, 499 U.S. at 494 (quoting MURRAY vs. CARRIER, 477 U.S. 478, 488 (1986).

FACTS:

1. On August 21 1989, the U.S. Parole Commission issued a **WARRANT** for the arrest of Appellant Lambros, punishable by 5,357 days.

2. On May 17, 1991, Appellant Lambros was arrested in Rio de Janeiro, Brazil on the August 21, 1989 U.S. Parole Commission **WARRANT** by U.S. Agents and Brazilian Federal Police.

3. Between May 17, 1991 and April 30, 1992, the U.S. Department of State and the U.S. Parole Commission **REFUSED** to offer Brazil a statement of the August 21, 1989, U.S. Parole Commission WARRANT that Appellant Lambros was arrested on in Rio de Janeiro, Brazil on May 17, 1991. Therefore, the U.S. Department of State and the U.S. Parole Commission refused to offer a "DULY CERTIFIED OR AUTHENTICATED COPY OF THE WARRANT OF ARREST OR OTHER ORDER OF DETENTION ISSUED BY THE COMPETENT AUTHORITIES OF THE REQUESTING STATE, TOGETHER WITH THE DEPOSITION UPON WHICH THE WARRANT OR ORDER MAY HAVE BEEN ISSUED AND

SUCH OTHER EVIDENCE OR PROOF AS MAY BE DEEMED COMPETENT IN THE CASE." See **ARTICLE IX(1)(2)** of the U.S.--BRAZIL EXTRADITION TREATY [available within WASHINGTON vs. PANG, 940 F.2d 1293, 1354-1361 (Wash. 1997)].

4. **ARTICLE XXI**, of the U.S.--BRAZIL EXTRADITION TREATY states, "A person extradited by virtue of the present TREATY **MAY NOT BE TRIED OR PUNISHED BY THE REQUESTING STATE FOR ANY CRIME OR OFFENSE COMMITTED PRIOR TO THE REQUEST FOR HIS EXTRADITION, OTHER THAN THAT WHICH GAVE RISE TO THE REQUEST**, ..." See, PANG, at 1354-1361.

5. **ARTICLE V(4)**, of the U.S.--BRAZIL EXTRADITION TREATY clearly states that extradition shall not be granted if the person sought would have to appear in the requesting state, before an **EXTRAORDINARY TRIBUNAL OR COURT**. The U.S. Parole Commission is an EXTRAORDINARY TRIBUNAL OR COURT.

6. On April 30, 1992, the Brazilian Supreme Court GRANTED, in part, the U.S. request for the extradition of Appellant Lambros as to a May 17, 1989, Indictment, not at issue here.

7. Appellant's lawyers and representatives of the U.S. Department of State at the Embassy in Brasilia, Brazil stated that Appellant would not be prosecuted for the U.S. Parole Violation Warrant and would be given thirty (30) days to leave the U.S. before the U.S. Parole Violation Warrant would be valid, as per the U.S.--BRAZIL EXTRADITION TREATY, **ARTICLE XXI.**

8. On December 9, 1992, in pretrial hearings before U.S. Magistrate Judge Franklin L. Noel, in U.S. vs. LAMBROS, CR-4-89-82, a U.S. District Court for the District of Minnesota, Fourth Division, U.S. Drug Enforcement Agent Terryl Anderson stated that he arrested Appellant on May 17, 1991, on a U.S. Parole Violation Warrant in Rio de Janeiro, Brazil, therefore **TAKING** took place as Appellant was placed in jail. Proof of same was supplied to Defendants within the following REPORT & RECOMMENDATION and ORDER:

a. Judge Jonathan Lebedoff's 12/21/92 REPORT AND RECOMMENDATION in U.S. vs. LAMBROS, CR-4-89-52, page one (1);

b. U.S. Magistrate Judge Franklin L. Noel, October 30, 1992, ORDER, in U.S. vs. LAMBROS, CR-4-89-82, page one (1).

9. On or about July 26, 1994, Attorney David J. Phillips was appointed to represent Appellant in the H-13 application to the U.S. Parole Commission as per the August 21, 1989, U.S. Parole Violation Warrant against Appellant Lambros. Attorney David J. Phillips **REFUSED TO INVESTIGATE APPELLANT'S ARREST IN BRAZIL BY U.S. AGENTS ON THE AUGUST 21, 1989 U.S. PAROLE VIOLATION WARRANT NOR APPLICATION OF THE U.S.—BRAZIL EXTRADITION TREATY TO THE AUGUST 21, 1989, U.S. PAROLE VIOLATION WARRANT.** Attorney Phillips merely forwarded Appellant's information as to proof of his arrest in Brazil to the U.S. Parole Commission and copy of the U.S.--BRAZIL EXTRADITION TREATY.

10. On or about March 13, 1995, Appellant filed a Petition for writ of Habeas Corpus under Title 28 U.S.C. §2241 to the U.S. District Court for the District of Kansas, JOHN GREGORY LAMBROS vs. U.S. PAROLE COMMISSION and the U.S. Department of Justice refused to investigate or covered-up the facts as to the U.S. Department of Justice and U.S. Parole Commission's **REFUSAL** to submit documents to the Brazilian Supreme Court, as per the requirements of the U.S.--BRAZIL EXTRADITION TREATY, as to the August 21, 1989, U.S. Parole Violation Warrant against Appellant Lambros.

11. The District Court refused to investigate or hold an evidentiary hearing on the merits as to the May 17, 1991, arrest of Appellant Lambros in Rio de Janeiro, Brazil on the August 21, 1989, U.S. Parole Violation Warrant and the reasons the U.S. Parole Commission and the U.S. Department of Justice **REFUSED** to submit documents to the Brazilian Supreme Court, as per the requirements of the U.S.--BRAZIL EXTRADITION TREATY.

DISCUSSION:

12. **PREJUDICE**: The U.S. Supreme Court's definition of the "MATERIALITY" element of certain PROSECUTORIAL SUPPRESSION of **EVIDENCE** violations, that there is a "significant" or "reasonable likelihood that [the error] could have affected the judgement." See, U.S. vs. BAGLEY, 473 U.S. 667, 683 (1985) (plurality opinion); U.S. vs. VALENZUELA-BERNAL, 458 U.S. 858, 874 (1982). See, KYLES vs. WHITLEY, 514 U.S. 419, 434 (1995)(discussing "materiality" and "prejudice" standards for purposes of **PROSECUTORIAL SUPPRESSION OF EVIDENCE** and ineffective assistance claims and emphasizing that, in order to establish prejudice, claimant must prove that violation undermines confidence in outcome but need not prove that it is "'more likely that not'" that, but for violation, outcome would have been different (citing authority)]; RATLIFF vs. U.S., 999 F.2d 1023, 1026 (6th Cir. 1993)("it is obvious that [section 2255 movant] will suffer **ACTUAL PREJUDICE** if his claim (of erroneous order of restitution) is not heard, because he will be forced to pay an award of restitution which could not otherwise be upheld.").

13. The STRICKLAND element of PREJUDICE is satisfied because "there was at the very least a REASONABLE PROBABILITY" that petitioner would have prevailed on appeal if appellate counsel had raised erroneously omitted state law claim. See, MAYO vs. HENDERSON, 13 F.3d 528, 536 (2nd Cir. 1994); AGAN vs. SINGLETARY, 12 F.3d 1012, 1018 (11th Cir. 1994)(STRICKLAND requirement of "REASONABLE PROBABILITY" of a different result is simply a probability sufficient to undermine confidence in the outcome of the case, a standard less than proof by a preponderance of the evidence.").

14. JURISDICTIONAL DEFECTS CANNOT BE PROCEDURALLY DEFAULTED:

Therefore, this Appellant did not have to show cause and prejudice to collaterally attack his August 21, 1989, U.S. Parole Violation Warrant that is lodged as a DETAINER on ground that the U.S. Parole Commission LACKED JURISDICTION to impose, due to non-compliance with the U.S. - BRAZIL EXTRADITION TREATY. See, HARRIS vs. U.S., 149 F.3d 1304, 1305 Head Note 2 & 4 (Jurisdictional defects cannot be procedurally defaulted)(Because jurisdictional claims may not be defaulted, a defendant need not show "cause" to justify his failure to raise such a claim.) (Furthermore, we are bound to assure ourselves of jurisdiction even if the parties fail to raise the issue. See, INSURANCE CORP. OF IR, LTD, 456 U.S. at 707 ("[A] court . . . will raise lack of subject-matter jurisdiction on its own motion."); FITZGERALD, 760 F.2d at 1251 ("A federal court not only has the power but also the OBLIGATION at any time to inquire into jurisdiction whenever the possibility that jurisdiction does not exist arises.") (citing PHILBROOK vs. GLODGETT, 421 U.S. 707, 95 S.Ct. 1893, 44 L.Ed.2d 525 (1975); CITY OF KENOSHA vs. BRUNO, 412 U.S. 507, 93 S.Ct. 2222, 37 L.Ed.2d 109 (1973). Id. at 1308.) The Seventh Circuit has reached a similar result in KELLY vs. U.S., 29 F.3d 1107 (7th Cir. 1994)(The Court concluded, "Because jurisdictional defects are nonwaivable, Kelly need not provide us with an excuse ('cause and prejudice') adequate to convince us to forgive his waiver." Id. at 1114)

HAVE THE FOLLOWING PARTIES DISPLAYED ATTRIBUTABLE ACTS AND OMISSIONS THAT INTERFERED WITH THIS APPELLANT'S CLAIM PRESENTATION BY CONCEALING FACTS AND EVIDENCE TO SHOW A FUNDAMENTAL MISCARRIAGE OF JUSTICE.

15. FACTS SUPPRESSED BY PARTIES:

a. August 21, 1989 U.S. PAROLE VIOLATION WARRANT;

b. Appellants arrest on August 21, 1989 U.S. PAROLE VIOLATION WARRANT IN BRAZIL;

c. Brazilian Supreme Court was not presented with a "DULY CERTIFIED OR AUTHENTICATED COPY OF THE AUGUST 21, 1989 U.S. PAROLE VIOLATION WARRANT AGAINST APPELLANT JOHN GREGORY LAMBROS, TOGETHER WITH THE DEPOSITION UPON WHICH THE WARRANT MAY HAVE BEEN ISSUED AND SUCH OTHER EVIDENCE OR PROOF AS MAY BE DEEMED COMPETENT IN THE CASE," on or before April 30, 1992, the day the Brazilian Supreme Court GRANTED, in part, the U.S. request for extradition of Appellant Lambros to the U.S. See, ARTICLE IX(1)(2) of the U.S. - BRAZIL EXTRADITION TREATY.

16. **TREATIES:** Any conflicting law of a state must yield to provisions of a treaty within the scope of the treaty-making power. See, SANTOVINCENZO vs. EGAN, 284 US 30, 52 S.Ct. 81; Every treaty made by the authority of the United States is superior to the Constitution and laws of any individual state. If a law of a state is contrary to a treaty, it is void. See, HAUENSTEIN vs. LYNHAM, 100 US 483; This court will not alter, amend, or add to any treaty, by inserting any clause, small or great, any more than to a law. See, THE AMIABLE ISABELLA, 6 Wheat 1; Treaties, like statutes, must rest on the words used; nothing adding thereto, nothing diminishing. See, LEAVENWORTH, L. & G. R. CO. vs. U.S., 92 U.S. 733; In interpreting a treaty, the United States Supreme Court's role is limited to giving effect to the intent of the treaty parties; when the parties to a treaty both agree as to the meaning of a treaty provision, and that interpretation follows the clear treaty language, the Supreme Court must, absent extraordinarily strong contrary evidence, defer to that interpretation. See, SUMITOMO SHOJI AMERICA, INC. vs. AVAGLIANO, 457 US 176, 102 S Ct. 2374; If a treaty admits of two interpretations, one limited and the other liberal, one excluding and the other furthering private rights, the more liberal one should be adopted. See, SHANKS vs. DUPONT, 3 Pet 242; JORDAN vs. TASHIRO, 278 US 123, 49 S Ct. 47; NIELSEN vs. JOHNSON, 279 U.S. 47, 49 S.Ct. 223; The entire instrument must be examined in order that the real intention of the two governments, which must control,

may be ascertained. See, U.S. vs. TEXAS, 162 U.S. 1, 16 S.Ct. 725; In the term "laws," in a treaty, is included CUSTOM and USAGE, when once settled, though it may be comparatively of recent date, and is not one of those to the contrary of which the memory of man runneth not. See, STROTHER vs. LUCAS, 12 Pet. 410; A counsel of a foreign government cannot be heard to question the termination of a treaty provision to which his government has agreed. See, VAN DER WEYDE vs. OCEAN TRANSPORT CO., 297 US 114, 56 S.Ct. 392; A private party who finds the continued existance of a treaty inconvenient may not invoke the doctrine of rebus sic stantibus on behalf of the parties to the treaty when they continue to assert its vitality. See, TRANS WORLD AIRLINES, INC. vs. FRANKLIN MINT CORP. (US), 104 S.Ct. 1776, 80 L.Ed2d 273 (1984); A treaty is the supreme law of the land, and binds the courts as much as an act of Congress. See, U.S. vs. THE PEGGY, 1 Cranch 103; FELLOWS vs. BLACKSMITH, 19 How 366; The Federal Constitution, the laws of the United States made in pursuance thereof, and ALL TREATIES made under the authority of the United States, are the supreme law of the land. See, BOUDINOT vs. U.S., (Cherokee Tobacco) 11 Wall 616; A Treaty of the United States is a law of the land, as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the PRIVATE CITIZEN or subject may be determined. See, U.S. vs. RAUSCHER, 119 US 407, 7 S.Ct. 234; Until a treaty has been denounced, it is the duty of both the government and the courts to SANCTION the performance of the obligations reciprocal to the rights which the TREATY DECLARES and the government asserts, even though the other party to it holds to a different view of its meaning. See, FACTOR vs. LAUBENHEIMER, 290 US 276, 54 S.Ct. 191; A treaty CANNOT CHANGE THE CONSTITUTION or be held valid if in violation thereof. See, BOUDINOT vs. U.S. (The Cherokee Tobacco), 11 Wall 616.

17. **U.S. PAROLE COMMISSION, U.S. ATTORNEYS OFFICE, U.S. DEPARTMENT OF STATE, U.S. DEPARTMENT OF JUSTICE, AND WARDEN BOOKER:** The following cases

demonstrate how prosecutorial or police suppression of evidence or other discovery-related practices, facts as outlined in paragraph fifteen (15)(a,b & c), violated Appellant Combres' DUE PROCESS RIGHTS:

a. KYLES vs. WHITLEY, 514 U.S. 491 (1995) ("Because the net effect of the evidence withheld by the State in this case raises a reasonable probability that its disclosure would have produced a different result, KYLES is entitled to a new trial.");

b. RIGGINS vs. REES, 74 F.3d 732 (6th Cir. 1996) (state's REFUSAL to provide petitioner with TRANSCRIPTS, rather than merely court reporter's tape recordings, of previous two trials which ended in mistrial, violated Equal Protection Clause);

c. BANKS vs. REYNOLDS, 54 F.3d 1508 (10th Cir. 1995)(prosecution suppressed evidence that at least three other men were previously arrested for crime with which petitioner was charged, that two of them had been positively identified by eyewitnesses, and that cell-mate of one of previously arrested suspects claimed that suspect had confessed to crime.)

d. BOWEN vs. MAYNARD, 799 F.2d 593 (10th Cir.), CERT. DENIED, 479 U.S. 962 (1986) (prosecutor suppressed sheaf of investigative reports)

e. WALKER vs. LOCKHART, 763 F.2d 942 (8th Cir. 1985) (en banc), CERT. DENIED, 478 U.S. 1020 (1986) (prosecutorial suppression of exculpatory evidence)

f. LAMBERT vs. BLACKWELL, 962 F.Supp. 1521 (E.D. Pa. 1997), vacated & remanded on nonexhaustion grounds, 134 F.3d 506 (3rd Cir. 1998)(petitioner "proved at least by CLEAR AND CONVINCING EVIDENCE" "at least twenty-five" instances of "OBSTRUCTION OF JUSTICE, PERJURED TESTIMONY, the WHOLESALE SUPPRESSION OF EXCULPATORY EVIDENCE AND THE FABRICATION OF INCULPATORY EVIDENCE" by prosecutors and police officers which resulted in "trial [that] was corrupted from start to finish by wholesale prosecutorial misconduct" and conviction of innocent women)

18. **U.S. DISTRICT JUDGE RICHARD D. ROGERS:** CLAIMS RELATING TO MITIGATING CIRCUMSTANCES: (A) Claims, arising under LOCKETT vs. OHIO, 438 U.S. 586 (1978), that trial court improperly restricted consideration of non-statutory mitigating factors:

a. GORE vs. DUGGER, 933 F.2d 904 (11th Cir. 1991)(per curiam), cert. denied, 502 U.S. 1066 (1992) (unconstitutional exclusion of nonstatutory mitigating evidence of alcohol and drug ingestion at time of killing)

b. SONGER vs. WAINWRIGHT, 769 F.2d 1488 (11th Cir. 1985)(en banc), cert. denied, 481 U.S. 1041(per curiam)(sentencing judge UNCONSTITUTIONALLY limited mitigating circumstances to factors enumerated in statute).

(B) OTHER CLAIMS RELATING TO MITIGATING CIRCUMSTANCES:

c. PARKER vs. DUGGER, 499 U.S. 308 (1991)(trial court sentenced petitioner to death on basis of asserted absence of mitigating circumstances, though mitigating circumstances manifestly were present).

d. DUTTON vs. BROWN, 812 F.2d 593 (10th Cir.), cert. denied, 484 U.S. 836 (1987)(trial court barred petitioner's mother from testifying as mitigation witness because she attended trial in violation of rule on witness).

e. WALKER vs. DEEDS, 50 F.3d 670 (9th Cir. 1995)(sentencing judge VIOLATED DUE PROCESS CLAUSE by failing to follow state law procedure - in which petitioner had constitutionally protected "LIBERTY" interest - for determining applicability of "habitual criminal" sentence).

f. U.S. vs. MAYBECK, 23 F.3d 888 (4th Cir. 1994)(section 2255 movant improperly sentenced as career offender under Federal Sentencing Guidelines based on ERRONEOUS CLASSIFICATION OF PRIOR CONVICTION as one involving violence).

19. **U.S. PAROLE COMMISSION:** CLAIMS ARISING DURING THE POST-TRIAL, APPELLATE, OR POSTCONVICTION STAGES OF A CASE:

a. YOUNG vs. HARPER, 117 S.Ct. 1148 (1997)(revocation of so-

called "preparole" status, conducted without due process protection which MORRISSEY vs. BREWER, 408 U.S. 471 (1972) assures individuals subject to parole revocation, violated DUE PROCESS CLAUSE because "preparole" "program . . . differed from parole in name alone") **[Please note that no such crime of a "SPECIAL PAROLE VIOLATION" exists in Brazil, that which Appellant Lambros' August 21, 1989 U.S. Parole Violation Warrant is for].**

b. LYNCE vs. MATHIS, 117 S. Ct. 891 (1997)(1992 statute's retroactive revocation of five years' worth of good time credits that petitioner accumulated under regulations in effect in 1986 when offense and guilty plea occurred, and petitioner's rearrest and reincarceration after being released based on accumulated credits, violated EX POST FACTO clause.)

c. BLACKLEDGE vs. PERRY, 417 U.S. 21 (1974) (vindictive reprosecution following successful appeal) **[vindictive reprosecution after successful extradition from Brazil]**

d. BELK vs. PURKETT, 15 F.3d 803 (8th Cir. 1994)(procedures used to revoke petitioner's parole violated due process requirements established in MORRISSEY vs. BREWER, 408 U.S. 471 (1972); "Petitioner has been imprisoned for almost two years now based upon revocation procedures which did not approach the most MINIMAL REQUIREMENTS OF DUE PROCESS OR RELIABILITY.")

20. **ATTORNEY DAVID J. PHILLIPS:** Attorney Phillips represented Appellant Lambros in 1994 as per the August 21, 1989, U.S. Parole Violation Warrant in front of the U.S. Parole Commission.

a. KIMMELMAN vs. MORRISON, 477 U.S. 365 (1986)(petitioner convicted after attorney failed to make obvious and meritorious objections to tainted evidence forming basis of state's case.)

b. BROWN vs. MYERS, 137 F.3d 1154 (9th Cir. 1998)(counsel failed to investigate and present available testimony supporting petitioner's alibi.)

c. BAYLOR vs. ESTELLE, 94 F.3d 1321 (9th Cir. 1996), cert. denied, 117 S.Ct. 1379 (1997)(counsel was ineffective in failing to pursue adequate investigation of potential exculpatory serological evidence in sexual assault case.

d. FOSTER vs. LOCKHART, 9 F.3d 722 (8th Cir. 1993)(counsel's decision not to investigate potentially viable defense was unreasonable and could not be justified as "TACTICAL DECISION" to focus exclusively on alternative defense).

e. CHAMBERS vs. ARMONTROUT, 907 F.2d 825 (8th Cir.), cert. denied, 498 U.S. 369 (1990)(counsel failed to interview and call witnesses who would have supported petitioner's claim of self-defense).

f. PATRASSO vs. NELSON, 121 F.3d 297 (7th Cir. 1997)(counsel failed to investigate and do other preparation needed to challenge prosecution's case and present case in mitigation).

g. BAXTER vs. THOMAS, 45 F.3d 1501 (11th Cir.), cert. denied, 516 U.S. 946 (1995)(because trial attorneys did not obtain petitioner's school and hospital records, they failed to find and present evidence of petitioner's psychiatric problems and prior commitment to psychiatric institution.) [Attorney Phillips refused to obtain copy of all records submitted to the Brazilian Supreme Court that verifies that the August 21, 1989, U.S. Parole Violation Warrant was not presented to the Brazilian Supreme Court thus Appellant Lambros was not granted extradition on same]

h. MASON vs. HANKS, 97 F.3d 887 (7th Cir. 1996)(appellate counsel omitted apparently meritorious claim that "admission of testimony concerning the informant's statements was inadmissible hearsay UNDER INDIANA LAW."; "When we are convinced that a petitioner might well have won his appeal on a significant and obvious question of STATE LAW that his counsel omitted to pursue, we are compelled to conclude, as we do here, that the appeal was not fundamentally fair and that the resulting affirmance of his conviction is not reliable"). [**TREATY LAW**]

21. **TITLE 5 U.S.C.A. § 706, ADMINISTRATIVE PROCEDURES ACT**: CLAIMS ARISING DURING U.S. PAROLE COMMISSION AND U.S. DISTRICT COURT REVIEW:

a. Title 5, U.S.C.A. §706, SCOPE OF REVIEW: To the extent necessary to decisions and when presented, the reviewing court shall decide all RELEVANT QUESTIONS OF LAW, **INTERPRET CONSTITUTIONAL AND STATUTORY PROVISIONS**, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall:

> (1) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (2) hold unlawful and set aside agency action, finding, and conclusions found to be -
>
> > **(A) arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law;**
> >
> > **(B)** contrary to constitutional right, power, privelege, or immunity;
> >
> > **(C)** in excess of statutory **jurisdiction, authority, or limitations; or short of statutory right;**
> >
> > **(D) WITHOUT OBSERVANCE OF PROCEDURE REQUIRED BY LAW;**
> >
> > **(E)** unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or the record of an Agency hearing provided by statute; or
> >
> > **(F)** unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, **THE COURT SHALL REVIEW THE WHOLE RECORD** or those parts of it cited by a party, and due account shall be taken of the rule of **PREJUDICIAL ERROR**.

b. The court, trial judge, are presumed to know the law and to apply it in making their decisions. See, WALTON vs. ARIZONA, 111 L.Ed2d 511, 517 Head Note 6 (1990).

c. **FACT ISSUE**: The fact issue exists whether Appellant Lambros

was arrested in BRAZIL on the August 21, 1989, U.S. PAROLE COMMISSION WARRANT and if the **BRAZILIAN SUPREME COURT WAS PRESENTED WITH A COPY OF THE AUGUST 21, 1989 U.S. PAROLE COMMISSION WARRANT AND/OR OTHER EVIDENCE OR PROOF AS MAY DEEMED COMPETENT UNDER THE U.S. - BRAZIL EXTRADITION TREATY BEFORE APRIL 30, 1992, WHEN THE BRAZILIAN SUPREME COURT GRANTED EXTRADITION OF APPELLANT LAMBROS TO THE UNITED STATES FOR OTHER CRIMINAL VIOLATIONS THAT DID NOT INCLUDE THE AUGUST 21, 1989 U.S. PAROLE VIOLATION WARRANT.** The U.S. Parole Commission has not proved that it provided the Brazilian Supreme Court with the August 21, 1989, WARRANT nor has it proved that the Brazilian Supreme Court authorized Appellant Lambros' extradition on the August 21, 1989, WARRANT. See, HIGGINS vs. KELLEY, 574 F.2d 789 (1978) (Absent complete record of agency action, reviewing court is INCAPABLE of complying with procedural requirements statutorily mandated by the Administrative Procedure Act. 5 U.S.C.A. §§ 706, 706(2)(D), Head Note 1)(FBI's refusal to honor former special agent's request for production of documents, . . . results in wrongful exclusion at administrative level of information to which agent is entitled for preparation of proper defense to his dismissal, RESULTING IN INCOMPLETE RECORD FOR REVIEW IN DISTRICT COURT HEARING AGENT'S ACTION SEEKING REINSTATEMENT AND BACK PAY AND REQUIRING REMAND. Id. Head Note 4).

d. **"SUBSTANTIAL EVIDENCE:"** This Court, the Tenth Circuit, has stated that "SUBSTANTIAL EVIDENCE," for purpose of Administrative Procedure Act (APA), is more than mere scintilla, and must be such relevant evidence as reasonable person might accept as adequate to support conclusion; evidence is not substantial if it is overwhelmed by other evidence or if it constitutes mere conclusions. See, OLENHOUSE vs. COMMODITY CREDIT CORP., 42 F.3d 1560, 1563 Head Note 29 (10th Cir. 1994) The OLENHOUSE case offers an excellent overview of the APA standards to be applied by the Court and the Appeals Court.

e. **REVIEWING AGENCY'S [PAROLE BOARD] DECISION:** In reviewing

the agency's decision, a court must consider ANY EVIDENCE that "fairly detracts" from the agency's findings and conclusions. See, UNIVERSAL CAMERA CORP. vs. NLRB, 340 U.S. 474, 488, 71 S.Ct. 456, 464-65, 95 L.Ed 456 (1951); quoting JOHNSON vs. OFFICE OF THRIFT SUPERVISON, 81 F.3d 195, 201 (D.C. Cir. 1996).

f. **THE PAROLE STATUTE:** Title 18 U.S.C. §4203 (1982), and the ADMINISTRATIVE PROCEDURE ACT, Title 5 U.S.C. § 706(2)(A) (1982), commit parole decisions to the sound discretion of the PAROLE COMMISSION. See, ROTH U.S. PAROLE COMMISSION, 724 F.2d 836, 839-40 (9th Cir. 1984); Although the Parole Commission's substantive decisions on merits are exempt from review under Title 18 U.S.C.A. §4218(d), courts retain power to review allegations that the PAROLE COMMISSION has taken action in violation of its own regulations or acted without observance of procedures required by law. See, KIRK vs. WHITE, 627 F.Supp. 423 Head Note 1 (E.D.Va. 1986)(Title 5 U.S.C.A. §706(2)(D)).

g. **COURT OF APPEALS:** In reviewing district court's conclusion that agency failed to comply with procedural requirements of Administrative Procedure Act, Court of Appeals is free to make independent determination. On appellate review of district court's findings that agency actions were arbitrary and capricious, district court's conclusions of law are accorded deference given to finding of fact, and reviewing court may freely set them aside if erroneous. See, WASHINGTON STATE FARM BUREAU vs. MARSHALL, 625 F.2d 296, Head Notes 2 & 8 (9th Cir. 1980). The Court of Appeals reviews district court's conclusion as to whether that conclusion was based upon erroneous legal standard or upon CLEARLY ERRONEOUS FINDINGS OF FACT. Title 5 U.S.C.A. §706(2)(D). See, KILROY vs. RUCKELSHAUS, 738 F.2d 1448 Head Note 6 (9th Cir. 1984).

CONCLUSION

22. For the reasons stated herein, Appellant Lambros requests this court to distinguish carefully whether Appellant's claim, "LACK OF JURISDICTION OF PERSON OF PETITIONER," as presented within his second and/or successive habeas corpus application is the same as claims that were presented in his prior application. U.S. District Court of Kansas, Case No. 95-3119-RDR, denied on February 5, 1998, or whether, on the other hand, the claim is sufficiently different from claims previously litigated that it "was not presented in prior application."

23. Appellant requests this Court to follow its published standard in PARKS vs. REYNOLDS, 958 F.2d 989, 995 (10th Cir. 1992). Appellant maintains that his is "FACTUALLY INNOCENT," and that his is raising a constitutional claim, that if not resolved would result in a "FUNDAMENTAL MISCARRIAGE OF JUSTICE," thus serving as an additional safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty.

24. Therefore, this Court must determine whether a constitutional violation occurred and the probability it CAUSED the PAROLE BOARD and DISTRICT COURT to convict an innocent man. This inquiry involves three prongs and this Appellant will summarize same in order: (1) a constitutional violation: A **TREATY VIOLATION** occurred within the U.S.--BRAZIL EXTRADITION TREATY as outlined as to FACTS SUPPRESSED BY THE U.S. PAROLE COMMISSION AND THE DISTRICT COURT IN PARAGRAPH 15(a)(b)&(c). The U.S. Constitution and ALL TREATIES are the supreme law of the land; (2) a probable effect on the jury's determination: One may use any standard, "fair probability," "reasonable probability," or the "more likely than not" standards; and (3) The conviction of an innocent man. This court has emphasized that an integral part of this three-pronged inquiry is the claim or showing of innocence. Factual innocence must mean **AT LEAST** sufficient claims and facts that--had the jury considered them--probably

would have convinced the jury that the defendant was factually innocent. See, PARKS, 958 F.2d 989, 995.

25. This Court has further stated, "[T]he showing of factual innocence at this stage of a habeas proceeding must be more than an incremental additional set of doubts. The federal court, in applying the "probability caused" prong of the standard, can only justify interference with the jury's verdict where the factual showing of innocence claim is directly related to the constitutional violation and is so strong that, had the excluded probative evidence been before it, **[Proof August 21, 1989 Parole Violation Warrant was presented to the Brazilian Supreme Court, as per U.S.—BRAZIL Extradition Treaty requirements, and Appellant was extradited on same]**, the jury probably would have concluded that the defendant was innocent." See, PARKS, at 996.

26. Therefore, this Appellant has proved FACTUAL INNOCENCE as per the violation of the U.S.--BRAZIL EXTRADITION TREATY.

27. Appellant requests this Court to remand this case back to the District Court, if necessary, as the District Court has never ruled on the MERITS of the Brazilian Supreme Court being presented with the August 21, 1989 Parole Violation Warrant and Appellant being extradited from Brazil on same. A second petition is not successive (and not subject to dismissal under SANDERS vs U.S.) if the Court DID NOT dismiss the earlier action "on the merits." See, SANDERS vs. U.S., 373 U.S. 1, 15-16 (1961). Accord 28 U.S.C. §2244(b)(1994) (superseded)(successive petition rule applies only "after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law."); RULE 9(b) of the Rules Governing §2254 cases ("prior determination... on the merits.") Explicitly codifying SANDERS' holding on the 1966 amendments to 28 U.S.C. §2244(b), **CONGRESS** limited successive petition dismissal to situations in which relief was denied in the earlier proceeding

"after an EVIDENTIARY HEARING ON THE MERITS OF A MATERIAL FACTUAL ISSUE, or after, A HEARING ON THE MERITS OF AN ISSUE OF LAW. Consistent with this language and with SANDERS' holding, the courts have concluded that "with prejudice" dismissals of prior petitions **ARE NOT ON THE MERITS WHEN:**

> a. The claim as pleaded in either the prior or current petition alleges dispositive facts that are not "conclusively" disproved by the record and that were not tested at an evidentiary hearing in the prior proceeding. See, SANDERS, 373 U.S. at 5, 16, 19-20;
>
> b. The prior determination in other respects was summary and not based upon the legal merits of the petitioner's claim. See, SMAITH vs. YEAGER, 393 U.S. at 126.

28. Appellant requests this Court to serve the ENDS OF JUSTICE, in accomodating this Appellant as to the interests at stake in the writ abuse context, the McCLESKEY Court accordingly concluded that an Appellant's presentation of "a meritorious constitutional claim" in an alleged successive petition "overrides" the systemic interests in finality and conservation of federal judicial resources as long as the Appellant acted with "reasonable care and diligence" at the time of the earlier petition and did not "withhold claims for manipulative purposes." See, McCLESKEY, at 492-93. Appellant Lambros states under the penalty of perjury that he has acted with "reasonable care and diligence" at the time of his earlier petition and did not "withhold claims for manipulative purposes."

CONCLUSION

For the reasons stated herein, John Gregory Lambros respectfully requests that this Honorable Court make an Order dismissing the PAROLE VIOLATION DETAINER issued in 1989 by the United States Parole Commission, due to the fact it does not comply with the U.S. - BRAZIL EXTRADITION TREATY that Lambros was extradited on in 1992.

Respectfully submitted,

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

UNSWORN DECLARATION UNDER PENALTY OF PERJURY

I JOHN GREGORY LAMBROS, declare under penalty of perjury that the foregoing is true and correct, as are all the attached exhibits within this appeal brief. Title 28 U.S.C. §1746.

EXECUTED: May 21, 2000

John Gregory Lambros, Pro Se

CERTIFICATE OF SERVICE

I, JOHN GREGORY LAMBROS, certify under the penalty of perjury that the foregoing appeal brief was served in an envelope, postage prepaid, on this 10th day of May, 2000, to the following:

1. Clerk
   United States Court of Appeals for the Tenth Circuit
   Byron White U.S. Courthouse
   1823 Stout Street
   Denver, Colorado 80257

2. U.S. Parole Commission
   5550 Friendship Blvd.
   Chevy Chase, Maryland 20815

3. Warden J.W. Booker, Jr.
   USP Leavenworth
   1300 Metropolitan Ave.
   P.O. Box 1000
   Leavenworth, Kansas 66048

John Gregory Lambros, Pro Se
Reg. No. 00436-124
USP Leavenworth
P.O. Box 1000
Leavenworth, Kansas 66048-1000

1. THIS IS AN ACTION MESSAGE.

2. SUMMARY. ON APRIL 30, 1992, THE BRAZILIAN FEDERAL SUPREME COURT (STF) GRANTED, IN PART, BY MAJORITY OF VOTES, THE U.S. REQUEST FOR THE EXTRADITION OF JOHN GREGORY LAMBROS. THE FUGITIVE IS WANTED IN MINNESOTA TO STAND TRIAL FOR VIOLATION OF NARCOTICS LAWS. HE SHOULD BE READY TO BE REMOVED FROM BRAZILIAN TERRITORY WITHIN APPROXIMATELY ONE WEEK. END SUMMARY.

3. LAMBROS IS CHARGED WITH A) CONSPIRACY AND POSSESSION WITH INTENT TO DISTRIBUTE COCAINE; B) AIDING AND ABETTING, POSSESSION WITH INTENT TO DISTRIBUTE COCAINE; AND C) TRAVEL IN INTERSTATE COMMERCE WITH INTENT TO DISTRIBUTE COCAINE. IN HIS ORAL PRESENTATION TO THE STF, THE EMBASSY'S FSN LEGAL ADVISOR REITERATED ALL THE POINTS CONTAINED IN THE LAMBROS EXTRADITION DOCUMENTATION PROVIDED BY THE USG. THE STF JUSTICES DECIDED, HOWEVER, BY MAJORITY OF VOTES, THAT LAMBROS SHOULD BE PROSECUTED AND TRIED IN THE U.S. ONLY FOR CHARGES (A) AND (B) LISTED ABOVE, AND NOT FOR (C), I.E., FOR TRAVEL IN INTERSTATE COMMERCE BECAUSE THIS IS NOT A CRIME IN BRAZIL. THE U.S.-BRAZIL EXTRADITION TREATY AND BRAZILIAN LAW PROVIDE THAT EXTRADITION CAN BE EFFECTED ONLY WHEN THE ACT ATTRIBUTED TO THE FUGITIVE IS CONSIDERED A CRIME BOTH IN THE U.S. AND BRAZIL.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

CR-4-89-82

United States of America,

Plaintiff,

v.

REPORT AND RECOMMENDATION

John Gregory Lambros

Defendant.

Assistant United States Attorney Douglas R. Peterson for plaintiff.

Charles W. Faulkner, Esq. for defendant.

THIS MATTER came before the undersigned United States Magistrate Judge on the 9th day of December, 1992 for a hearing on defendant's pretrial motions. Defendant was present in court. The court heard testimony from Deputy United States Marshal John Marchiniak and Drug Enforcement Administration ("DEA") Special Agent Terryl Anderson. The defendant testified on his own behalf.

I. PROCEDURAL HISTORY.

On May 17, 1991, defendant Lambros was arrested in Brazil by DEA Agent Terryl Anderson and Brazilian authorities pursuant to a parole violation warrant. Defendant arrived in the country through an extradition process on June 20, 1992. Defendant Lambros made his initial appearance before this court on June 22, 1992, and moved to have his detention hearing postponed until June 25, 1992. The detention hearing was held on June 25, 1992. Defendant appeared before this court and alleged that Brazilian

EXHIBIT - B

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

CR-4-89-82

United States of America,

Plaintiff,

v.

ORDER

John Gregory Lambros

Defendant.

Assistant United States Attorney Douglas R. Peterson for plaintiff.

Defendant present with counsel Charles W. Faulkner.

THIS MATTER came before the undersigned United States Magistrate Judge on the 30th day of September, 1992 for a hearing on defendant's competency to stand trial. The court heard testimony from Dr. L. Thomas Kucharski, Dr. William Charles Wells, and Ms. Judith Ann Swanson on behalf of the plaintiff. The defendant testified on his own behalf.

PROCEDURAL HISTORY

On May 13, 1989, defendant Lambros was arrested in Brazil by DEA Agent Terry Anderson and Brazilian authorities pursuant to a parole violation warrant. On June 22, 1992, defendant Lambros made his initial appearance before this court. Defendant Lambros stated at this initial appearance that while he was in Brazil, Brazilian authorities implanted a bionic device in his head. On June 25, 1992, defendant appeared before this court for a preliminary hearing. The defendant reiterated his allegation that

EXHIBIT - C

11/12a

(9)

Mr. Lambros was arrested on June 19, 1992. But he argues that that date should be May 17, 1991 when he was arrested by Brazilian authorities.

And I believe the Government in this instance agrees, the basic position being that Mr. Lambros should receive credit in terms of time in custody from the date of his arrest in Brazil on May 17, 1991. I believe that's the position.

Paragraphs 44 and 45 refer to a Parole Commission detainer, that the defense position is that there wasn't a detainer placed on him while he was in Brazilian custody, that he wasn't served with detainer papers, and so on. The Government believes that these are appropriate matters to be concerned and that a detainer was issued.

Okay. Perhaps under the circumstances of this case it's best to also outline the areas of dispute that have been raised in connection with the application of the guidelines to the facts. And here, again, there are a large number of areas of dispute.

Paragraphs 26, 27 and 28 is whether Mr. Lambros should receive an enhancement for obstruction of justice. The Government's position and the PSI's position is that he testified falsely, committed perjury at trial. He denies it.

Paragraph 36 of the PSI suggests that Mr. Lambros should get a two-point increase for role in the offense. He

EXHIBIT D.

FULL SESSION

EXTRADITION No. 654-1

UNITED STATES OF AMERICA

VOTE

THE HONORABLE JUSTICE SEPÚLVEDA PERTENCE (PRESIDENT): My vote, with the utmost respect to the Assigned Justice and all the others who voted with him, follows the Honorable Justice Maurício Corrêa's vote, His Honor's corrected vote, that is.

Concerning the object of the extradition, I do not doubt this Court's power to restrict it in this case. The dual criminality decision, the most basic one, [and] one of the first tasks of this hearing's passive judgment, is applied to the fact described in the charge to which it answers, or to the sentence imposed on the person sought. Not on the coincidence of legal systems, taken in abstracts (e.g. Extr. 605, Celso de Mello).

What do we know about the case? Clearly, in the note requesting extradition, it says that, having committed the crime of Arson, during this fire, the collapsing of one of the slabs caused the death of four firemen. That case, to me, is typical of Arson, with the special enhancement clause—the resulting death, mentioned in [in] the Penal Code, Article 258. And, furthermore, it seemed to me during the discussion that not even in American Law there would be the concurrence of Arson with Murder in the First Degree. It is much more than clear, that in American Law, Murder in the First Degree, in the event of Intentional Fire Setting, presupposes that the agent kill someone to commit the Arson, or in escaping, after setting the fire. A typical case would be someone who wants to gain entry into a building to set a fire and kills the watchman; or, after setting the fire [the agent] kills the watchman who tries to arrest him, when he was leaving. Obviously, this is not the case, as described by the Requesting State in its Diplomatic Note, now the object of this extradition hearing.

But, I am not going to venture into the extremely delicate area—although (a matter

over which) the passive extradition court has competence to verify dual criminality in the original State. The Brazilian Law is sufficient for me, where, besides Arson qualified by the resulting death, there can also be Arson concurrent Homicide; if Homicide is committed, according to Article 121, Par. 2, no. 5 "to ensure the execution, cover-up, impunity or advantage of another crime."

The other question—eligibility or not of the commutation of a life sentence—expected to be exciting, wasn't, because the Court's majority preferred to maintain its established jurisprudence.

My position is known. I was overruled and I reaffirm my opinion. I understand that we must demand commutation of penalties forbidden by the Constitution in Brazil. I am not going to debate the entire issue over again, but I understand that the problem does not conform with the other constitutional guarantees.

An extradition is an international cooperation for penal suppression and, according to me, the imposition of penalties that were found to be offensive to human dignity or to the very function of the penalty as conceived by the Constitution, which for this reason, clearly forbade it, must be excluded from this cooperation.

Therefore, agreeing with the votes of the Honorable Justices Maurício Corrêa, Marco Aurélio and Celso de Mello, I also would demand the commutation of the penalties.

[Signature illegible]

OPINION APPENDIX B

Treaty of Extradition Between the United States of America and the United States of Brazil[1]

The United States of America and the United States of Brazil, desiring to make more effective the cooperation of their respective countries in the repression of crime, have resolved to conclude a treaty of extradition and for this purpose have appointed the following Plenipotentiaries

1. Signed on January 13, 1961, entered into force on December 17, 1964. 15 U.S.T. 2093, T.I.A.S. No. 5691. Additional Protocol to Treaty, signed on June 18, 1962, entered into force on December 17, 1964. 15 U.S.T. 2112, T.I.A.S. No. 5691. Clerk's Papers at 50–60.

EXHIBIT E.

OPINION APPENDIX B- Continued

The President of the United States of America: His Excellency John Moors Cabot, Ambassador of the United States of America to Brazil, and

The President of the United States of Brazil: His Excellency Horacio Lafer, Minister of State for External Relations,

Who, having communicated to each other their respective full powers, found to be in good and due form, agree as follows.

Article I

Each Contracting State agrees, under the conditions established by the present Treaty and each in accordance with the legal formalities in force in its own country, to deliver up, reciprocally, persons found in its territory who have been charged with or convicted of any of the crimes or offenses specified in Article II of the present Treaty and committed within the territorial jurisdiction of the other, or outside thereof under the conditions specified in Article IV of the present Treaty: provided that such surrender shall take place only upon such evidence of criminality as, 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.

Article II

Persons shall be delivered up according to the provisions of the present Treaty for prosecution when they have been charged with, or to undergo sentence when they have been convicted of, any of the following crimes or offenses:

1. Murder (including crimes designated as parricide, poisoning and infanticide, when provided for as separate crimes); manslaughter when voluntary.

2. Rape; abortion; carnal knowledge of (or violation of) a girl under the age specified by law in such cases in both the requesting and requested States.

3. Malicious wounding, willful assault resulting in grievous bodily harm.

OPINION APPENDIX B—Continued

4. Abduction, detention, deprivation of liberty, or enslavement of women or girls for immoral purposes.

5. Kidnapping or abduction of minors or adults for the purpose of exacting money from them or their families or any other person or persons, or for any other unlawful end.

6. Bigamy.

7. Arson.

8. The malicious and unlawful damaging of railways, trains, vessels, aircraft, bridges, vehicles, and other means of travel or of public or private buildings, or other structures, when the act committed shall endanger human life.

9. Piracy, by the law of the nations; mutiny on board of vessel or an aircraft for the purpose of rebelling against the authority of the Captain or Commander of such vessel or aircraft, or by fraud or violence taking possession of such vessel or aircraft.

10. Burglary, defined to be the breaking into or entering either in day or night time, a house, office, or other building of a government, corporation, or private person, with intent to commit a felony therein; housebreaking.

11. Robbery.

12. Forgery or the utterance of forged papers.

13. The forgery, falsification, theft or destruction of the official acts or public records of the government or public authority, including Courts of Justice, or the uttering or fraudulent use of the same.

14. The fabrication or the utterance, circulation or fraudulent use of any of the following objects: counterfeit money, whether coin or paper; counterfeit titles or coupons of public debt, created by national, state, provincial, territorial, local, or municipal governments, counterfeit bank notes or other instruments of public credit; and counterfeit seals, stamps, dies, and marks of State or public administration.

15. The introduction of instruments for the fabrication of counterfeit coins or bank notes or other paper currency as money

EXHIBIT E.

OPINION APPENDIX B Continued

16. Embezzlement by any person or persons hired, salaried or employed, to the detriment of their employers or principals.

17. Larceny.

18. Obtaining money, valuable securities or other property by false pretenses, or by threats of injury.

19. Receiving any money, valuable securities or other property knowing the same to have been unlawfully obtained.

20. Fraud or breach of trust by a bailee, factor, trustee, executor, administrator, guardian, director or officer of any company or corporation or by anyone in any fiduciary capacity.

21. Willful non-support or willful abandonment of a minor or other dependent person when death or serious bodily injury results therefrom.

22. Perjury (including willfully false expert testimony), subornation of perjury.

23. Soliciting, receiving, or offering bribes.

24. The following offenses when committed by public officials: extortion, embezzlement.

25. Crimes or offenses against the bankruptcy laws.

26. Crimes or offenses against the laws of both countries for the suppression of slavery and slave trading.

27. Crimes or offenses against the laws relating to the traffic in, use of, or production or manufacture of, narcotic drugs or cannabis.

28. Crimes or offenses against the laws relating to the illicit manufacture of traffic in substances injurious to health, or poisonous chemicals.

29. Smuggling, defined to be the act of willfully and knowingly violating the customs laws with intent to defraud the revenue by international traffic in merchandise subject to duty.

30. Aiding the escape of a prisoner by force of arms.

OPINION APPENDIX B—Continued

31. Use of explosives so as to endanger human life or property.

32. Procuration, defined as the procuring or transporting of a woman or girl under age, even with her consent, for immoral purposes, or of a woman or girl over age, by fraud, threats or compulsion, for such purposes with a view in either case to gratifying the passions of another person; profiting from the prostitution of another.

33. The attempt to commit any of the above crimes or offenses, when such attempt is made a separate offense by the laws of the Contracting States.

34. Participation in any of the above crimes or offenses.

Article III

Except as otherwise provided in the present Treaty, the requested State shall extradite a person accused or convicted of any crime or offense enumerated in Article II only when both of the following conditions exist:

1. The law of the requesting State, in force when the crime or offense was committed, provides a possible penalty of deprivation of liberty for a period of more than one year, and

2. The law in force in the requested State generally provides a possible penalty of deprivation of liberty for a period of more than one year which would be applicable if the crime or offense were committed in the territory of the requested State.

Article IV

When the crime of offense has been committed outside the territorial jurisdiction of the requesting State, the request for extradition need not be honored unless the laws of the requesting State and those of the requested State authorize punishment of such crime or offense in this circumstance.

The words "territorial jurisdiction" as used in this Article and in Article I of the present Treaty mean: territory, including territorial waters, and the airspace therefor, belonging to or under the control of one of the Contracting States; and vessels and aircraft be-

EXHIBIT E.

OPINION APPENDIX B—Continued

belonging to one of the Contracting States or to a citizen or corporation thereof when such vessel is on the high seas or such aircraft is over the high seas.

Article V

Extradition shall not be granted in any of the following circumstances:

1. When the requested State is competent, according to its laws, to prosecute the person whose surrender is sought for the crime or offense for which that person's extradition is requested and the requested State intends to exercise its jurisdiction.

2. When the person whose surrender is sought has already been or is at the time of the request being prosecuted in the requested State for the crime or offense for which his extradition is requested.

3. When the legal proceedings or the enforcement of the penalty for the crime or offense committed has become barred by limitation according to the laws of either the requesting State or the requested State.

4. When the person sought would have to appear, in the requesting State, before an extraordinary tribunal or court.

5. When the crime or offense for which the person's extradition is requested is purely military.

6. When the crime or offense for which the person's extradition is requested is of a political character. Nevertheless:

a. The allegation by the person sought of political purpose or motive for the request for his extradition will not preclude that person's surrender if the crime or offense for which his extradition is requested is primarily an infraction of the ordinary penal law. In such case the delivery of the person being extradited will be dependent on an undertaking on the part of the requesting State that the political purpose or motive will not contribute toward making the penalty more severe.

b. Criminal acts which constitute clear manifestations of anarchism or envisage the overthrow of the bases of all political organizations will not be classed as political crimes or offenses.

c. The determination of the character of the crime or offense will fall exclusively to the authorities of the requesting State.

OPINION APPENDIX B—Continued

Article VI

When the commission of the crime or offense for which the extradition of the person is sought is punishable by death under the laws of the requesting State and the laws of the requested State do not permit this punishment, the requested State shall not be obligated to grant the extradition unless the requesting State shall not be obligated to grant the extradition unless the requesting State provides assurances satisfactory to the requested State that the death penalty will not be imposed on such person.

Article VII

There is no obligation upon the requested State to grant the extradition of a person who is a national of the requested State, but the executive authority of the requested State shall, subject to the appropriate laws of that State, have the power to surrender a national of that State if in its discretion it be deemed proper to do so.

Article VIII

The Contracting States may request, one from the other, through the channel of their respective diplomatic or consular agents, the provisional arrest of a fugitive as well as the seizure of articles relating to the crime or offense.

The request for provisional arrest shall be granted provided that the crime or offense for which the extradition of the fugitive is sought is one for which extradition shall be granted under the present Treaty and provided that the request contains:

1. A statement of the crime or offense of which the fugitive is accused or convicted;

2. A description of the person sought for the purpose of identification;

3. A statement of the probable whereabouts of the fugitive, if known; and

EXHIBIT E.

OPINION APPENDIX B.--Continued

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

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

Article IX

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

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

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

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

The documents in support of the request for extradition shall be accompanied by a duly certified translation thereof in the language of the requested State.

OPINION APPENDIX B.--Continued

Article X

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

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

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

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

Article XI

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

Article XII

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

Article XIII

Extradition having been granted, the surrendering State shall communicate promptly

EXHIBIT E.

OPINION APPENDIX B--Continued

to the requesting State that the person to be extradited is held at its disposition

If, within 60 days counting from such communication-except when rendered impossible by *force majeure* or by some act of the person being extradited or the surrender of the person is deferred pursuant to Articles XIV or XV of the present Treaty such person has not been delivered up and conveyed out of the jurisdiction of the requested State, the person shall be set at liberty

Article XIV

When the person whose extradition is requested is being prosecuted or is serving a sentence in the requested State, the surrender of that person under the provisions of the present Treaty shall be deferred until the person is entitled to be set at liberty, on account of the crime or offense for which he is being prosecuted or is serving a sentence, for any of the following reasons: dismissal of the prosecution, acquittal, expiration of the term of the sentence or the term to which such sentence may have been commuted, pardon, parole, or amnesty.

Article XV

When, in the opinion of competent medical authority, duly sworn to, the person whose extradition is requested cannot be transported from the requested State to the requesting State without serious danger to his life due to grave illness, the surrender of the person under the provisions of the present Treaty shall be deferred until such time as the danger, in the opinion of the competent medical authority, has been sufficiently mitigated

Article XVI

The requesting State may send to the requested State one or more duly authorized agents, either to aid in the identification of the person sought or to receive his surrender and to convey him out of the territory of the requested State.

Such agents, when in the territory of the requested State, shall be subject to the applicable laws of the requested State, but the expenses which they incur shall be for the account of the State which has sent them.

Article XVII

Expenses related to the transportation of the person extradited shall be paid by the requesting State. The appropriate legal officers of the country in which the extradition proceedings take place shall, by all legal means within their power, assist the officers of the requesting State before the respective judges and magistrates. No pecuniary claim, arising out of the arrest, detention, examination and surrender of fugitives under the terms of the present Treaty, shall be made by the requested State against the requesting State other than as specified in the second paragraph of this Article and other than for the lodging, maintenance, and board of the person being extradited prior to his surrender.

The legal officers, other officers of the requested State, and court stenographers in the requested State who shall, in usual course of their duty, give assistance and who receive no salary or compensation other than specific fees for services performed, shall be entitled to receive from the requesting State the usual payment for such acts or services performed by them in the same manner and to the same amount as though such acts or services had been performed in ordinary criminal proceedings under the laws of the country of which they are officers.

Article XVIII

A person who, after surrender by either of the Contracting States to the other under the terms of this present Treaty, succeeds in escaping from the requesting State and takes refuge in the territory of the State which has surrendered him, or passes through it in transit, will be detained, upon simple diplomatic request, and surrendered anew, without other formalities, to the State to which his extradition was granted.

Article XIX

Transit through the territory of one of the Contracting States of a person in the custody of an agent of the other Contracting State, and surrendered to the latter by a third

EXHIBIT K.

OPINION APPENDIX B—Continued

State, and who is not of the nationality of the country of transit, shall, subject to the provisions of the second paragraph of this Article, be permitted, independently of any judicial formalities, when requested through diplomatic channels and accompanied by the presentation of the original or of authenticated copy of the document by which the State of refuge has granted the extradition. In the United States of America, the authority of the Secretary of State of the United States of America shall be first obtained.

The permission provided for in this Article may nevertheless be refused if the criminal act which has given rise to the extradition does not constitute a crime or offense enumerated in Article II of the present Treaty, or when grave reasons of public order are opposed to the transit.

Article XX

Subject to the rights of third parties, which shall be duly respected:

1. All articles, valuables, or documents which relate to the crime or offense and, at the time of the arrest, have been found in the possession of the person sought or otherwise found in the requested State shall be surrendered, with him, to the requesting State.

2. The articles and valuables which may be found in the possession of third parties and which likewise are related to the crime or offense shall also be seized, but may be surrendered only after the rights with regard thereto asserted by such third parties have been determined.

Article XXI

A person extradited by virtue of the present Treaty may not be tried or punished by the requesting State for any crime or offense committed prior to the request for his extradition, other than that which gave rise to the request, nor may he be re-extradited by the requesting State to a third country which claims him, unless the surrendering State also agrees or unless the person extradited having been set at liberty within the requesting State, remains voluntarily in the requesting State for more than 30 days from the date on which he was released. Upon such release, he shall be informed of the consequences to which his stay in the territory of the requesting State would subject him.

OPINION APPENDIX B—Continued

Article XXII

The present Treaty shall be ratified and the ratifications thereof shall be exchanged at Washington as soon as possible.

The present Treaty shall enter into force one month after the date of exchange of ratification. It may be terminated at any time by either Contracting State giving notice of termination to the other Contracting State, and the termination shall be effective six months after the date of such notice.

IN WITNESS WHEREOF the respective Plenipotentiaries have signed the present Treaty and have affixed hereunto their seals.

DONE in duplicate, in the English and Portuguese languages, both equally authentic, at Rio de Janeiro, this thirteenth day of January, one thousand nine hundred sixty-one.

[SEAL] JOHN M. CABOT

[SEAL] HORACIO LAFER

ADDITIONAL PROTOCOL TO THE TREATY OF EXTRADITION OF JANUARY 13, 1961, BETWEEN THE UNITED STATES OF AMERICA AND THE UNITED STATES OF BRAZIL

The United States of America and the United States of Brazil,

Having concluded at Rio de Janeiro, on January 13, 1961, a Treaty of Extradition for the purpose of making more effective the cooperation between the two countries in the repression of crime,

And desiring to make clear that their respective nationals will be subject to extradition only if the constitutional and legal provisions in force in their territories permit it,

Have resolved to sign an Additional Protocol to the aforementioned Treaty of Extradition and, to this end, have appointed the following Plenipotentiaries:

The president of the United States of America: His Excellency Lincoln Gordon, Ambassador Extraordinary and Plenipotentiary to Brazil, and

EXHIBIT E.

OPINION APPENDIX B—Continued

The President of the Republic of the United States of Brazil: His Excellency Francisco Clementino de San Tiango [sic] Dantas, Minister of State for External Relations,

Who, having communicated to each other their respective full powers, found to be in good and due form, agree as follows

Article I

Article VII of the Treaty of Extradition concluded between the countries at Rio de Janeiro, on January 13, 1961, shall be interpreted as follows

"The Contracting Parties are not obliged by this Treaty to grant extradition of their nationals. However, if the Constitution and laws of the requested State do not prohibit it, its executive authority shall have power to surrender a national if, in its discretion, it be deemed proper to do so."

Article II

The present Protocol shall enter into force on the same date as the Treaty of Extradition of January 13, 1961, and shall cease to be effective on the date of termination of the Treaty.

In WITNESS hereof, the respective Plenipotentiaries have signed the present Additional Protocol and have fixed hereunto their seals

DONE in duplicate, in the English and Portuguese languages, both equally authentic, at Rio de Janeiro, on this eighteenth day of June, one thousand nine hundred sixty-two.

LINCOLN GORDON

FC DE SAN TIAGO [SIC] DANTAS

[SEAL]

WHEREAS the Senate of the United States of America by their resolution of May 16, 1961, two thirds of the Senators present concurring therein, did advise and consent to the ratification of the treaty and by their resolution of October 22, 1963, two thirds of the Senators present concurring therein, did advise and consent to the ratification of the additional protocol;

OPINION APPENDIX B—Continued

WHEREAS the President of the United States of America ratified the treaty on May 29, 1961 and the additional protocol on October 29, 1963, in pursuance of the advice and consent of the Senate, and the Government of the United States of Brazil has duly ratified the treaty and the additional protocol;

WHEREAS the respective instruments of ratification of the treaty and the additional protocol were duly exchanged at Washington on November 17, 1964;

AND WHEREAS it is provided in Article XXII of the treaty that the treaty shall enter into force one month after the date of exchange of ratification, and it is provided in Article II of the additional protocol that the additional protocol shall enter into force on the same date as the treaty;

NOW THEREFORE, be it known that I, Lyndon B. Johnson, President of the United States of America, do hereby proclaim and make public the said treaty and additional protocol, to the end that the same and every article and clause thereof may be observed and fulfilled in good faith on and after December 17, 1964, one month after the day of exchange of instruments of ratification, by the United States of America and by the citizens of the United States of America and all other persons subject to the jurisdiction thereof

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the Seal of the United States of America to be affixed.

DONE at the city of Washington this twentieth day of November in the year of our Lord one thousand nine hundred sixty-four and of the independence of the United States of America the one hundred eighty-ninth.

[SEAL]

Lyndon B. Johnson.

By the President:

GEORGE W. BALL

Acting Secretary of State

EXHIBIT E.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

JOHN GREGORY LAMBROS,	*	
Petitioner,	*	
vs.	*	**CASE NO. 98-3148-RDR**
J.W. BOOKER, et al.,	*	**REQUEST TO CLERK TO CERTIFY AND**
Respondents.	*	**TRANSFER RECORDS**

I, JOHN GREGORY LAMBROS, Petitioner, Pro Se, (hereinafter Movant) pursuant to Rule 11 of the Federal Rules of Appellate Procedure, you are requested to certify and transmit to the Tenth Circuit Court of Appeals the following **COMPLETE RECORDS** in cases:

a. Lambros vs. U.S. PAROLE COMMISSION, et al., Case No. **95-3119-RDR**;
b. Lambros vs. BOOKER, et al., Case No. **98-3148-RDR.**

The above cases where used as a basis in an abuse of writ ORDER in the above-entitled case, thus both are needed by the Tenth Circuit Court of Appeals in review of this current action.

Thanking you in advance for your consideration in forwarding the complete record in both of the above cited cases.

DATED: May 2, 2000

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

EXHIBIT F.

CERTIFICATE OF SERVICE

LAMBROS vs. BOOKER, et al., Case No. 98-3148-RDR

FOR FILING:

I, JOHN GREGORY LAMBROS, Pro Se, certify under the penalty of perjury the the following motion/request:

a. REQUEST TO CLERK TO CERTIFY AND TRANSFER RECORDS, dated May 2, 2000.

was served in an envelope, postage prepaid, on this 3rd day of May, 2000, to the following:

1. CLERK OF THE COURT
   U.S. District Court
   444 S.E. Quincy, Room 490
   Topeka, Kansas 66683

   One original and one copy

2. CLERK
   U.S. Court of Appeals for the Tenth Circuit
   Byron White U.S. Courthouse
   1823 Stout Street
   Denver, Colorado 80257

   NOTICE OF APPEAL FILED ON APRIL 17, 2000 - NO APPEAL NUMBER ISSUED TO DATE.

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

EXHIBIT P.