UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Number 97-4205

UNITED STATES OF AMERICA,

Petitioner-Appellee,

v.

NORBERTO LAUREL JIMINEZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Illinois
District Court Number 92-40004-001-JLF

The Honorable J. Phil Gilbert,
Chief Judge Presiding

BRIEF FOR DEFENDANT-APPELLANT NORBERTO LAUREL JIMINEZ

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JURISDICTIONAL SUMMARY

On January 29, 1992, a grand jury in the Southern district of Illinois returned a one count indictment, charging Defendant-Appellant, Norberto Laurel, with conspiracy to distribute more than five kilograms of cocaine, a violation of Title 18 United States Code, Sections 841 & 846. On August 27, 1997 Defendant filed the following three Motions, all which were denied by the Honorable James L. Foreman on September 22, 1997: Motion to Dismiss Indictment Based on Double Jeopardy, Motion to Dismiss Indictment Based on Speedy Trial and Motion to Enforce Plea Agreement. On September 29, 1997 Defendant entered into a Conditional Plea Agreement with the Government, and on December 8, 1997 Defendant timely filed his Notice Pursuant to Federal Rules of Criminal Procedure 11(a)(2) which preserved in writing his desire to appeal the aforesaid three orders. A presentence report was prepared and timely objections were filed. On December 15, 1997, Defendant-Appellant was sentenced to a term of one hundred fifty-one (151) months, less 37 months already served on the sentence imposed in the Central District of Illinois, docket number 95-10093, for a total of one hundred fourteen (114) months on this charge pursuant to the Sentencing Guidelines. The judgment and sentence were imposed by the Honorable James L. Foreman, a District Judge of the United States District Court for the Southern District of Illinois, in Benton, Illinois. The judgment herein was entered on December 15, 1997, and the Notice of Appeal is being filed in a timely manner.

Attorney Stobbs is Defendant-Appellant's court appointed Criminal Justice Act (C.J.A.) Attorney and Attorney Prendergast agreed to be appointed by the Honorable James

L. Foreman as Defendant-Appellant's Attorney on a pro bono basis throughout these proceedings.

The jurisdiction of the District Court was invoked by the Government under the criminal laws of the United States. Defendant-Appellant invokes this Court's jurisdiction under 28 United States Code, Section 1291 and Rule 4(b) Fed.R.App.P. The judgment and sentence in this case was imposed by the United States District Court for the Southern District of Illinois, which is located within the jurisdiction of the United States Court of Appeals for the Seventh Circuit. 28 U.S.C. Sec 41.

Defendant is presently incarcerated at FCI Bastrop, P.O. 1010, Highway 95, Bastrop, Texas 78602.

STATEMENT OF THE CASE

Defendant-Appellant, Norberto Laurel Jiminez, was charged with Conspiracy to distribute cocaine in the Central District of Illinois in an Indictment filed on October 7, 1992, and this case will hereinafter be referred to as ***Laurel I***. Prior to this, in a *suppressed* indictment filed in the Southern District of Illinois, Laurel was charged with conspiracy to distribute cocaine, and this is the same conspiracy as that which Defendant was charged in ***Laurel I***.

On September 20, 1996, Defendant-Appellant was sentenced in the Central District of Illinois on the ***Laurel I*** indictment, which had been dismissed and replaced with an information charging Defendant-Appellant with the crime of possession with intent to distribute cocaine.

On April 28, 1997, Defendant-Appellant was brought to the Southern District of Illinois and on January 13, 1998 the amended Judgment in a Criminal Case was entered and Defendant-Appellant was sentenced to a term of imprisonment totaling one hundred fourteen (114) months, and specifically the amended Judgement in a Criminal Case stated "the Defendant is sentenced to a total of one hundred fifty-one (151) months, less thirty-seven (37) months already served on the sentence imposed in the Central District of Illinois (95-CR-10093) for a total of one hundred fourteen months on this charge, to be concurrent to the sentence imposed in the Central District of Illinois under Docket Number 95-CR-10093. This sentence was imposed pursuant to the Sentencing Guidelines.

STATEMENT OF FACTS

The three issues presented for review all involve the fact that Defendant-Appellant was charged with conspiracy to distribute cocaine in violation of 21 U.S.C. § 846 in both the Central District of Illinois and the Southern District of Illinois. (See Appendix A). Pursuant to negotiations between the Government and Defendant-Appellant, a notice pursuant to Federal Rules of Criminal Procedure 11(a)(2) (See Appendix B) was filed.

Likewise, the parties agree as to the facts in this case which are set out in the Government's responses to the Motions filed by Defendant-Appellant, which states: "A grand jury in the Southern District of Illinois indicted the defendant on January 29, 1992. [Hereinafter "the current charge"]. It charged the defendant with conspiracy to distribute cocaine. Approximately nine months later, a grand jury in the Central District of Illinois indicted the defendant in case number 92-10075. It charged the defendant with conspiracy to distribute cocaine. [Hereinafter "case number 92-10075"]. The current charge and case number 92-10075 involve the same conspiracy. In November of 1994, authorities in Texas arrested the defendant and sent him to the Central District of Illinois for prosecution in case number 92-10075. On January 3, 1996, as part of plea negotiations in the Central District of Illinois, the defendant was charged with possession with intent to deliver cocaine on or before October 1987. [Hereinafter "case number 95-10093"]. The apparent purpose of that indictment was to create a pre-guidelines charge to which the defendant could plead guilty and avoid a potential life sentence under the guidelines. *See Transcript of Hearing on Motion to Withdraw Guilty Plea and Sentencing Hearing* at 2-8. [Hereinafter "Transcript of

Hearing at _____"]; Attachment A. Under the terms of the plea agreement, the Central District of Illinois agreed to dismiss case number 92-10075. At the defendant's sentencing hearing, the government did in fact dismiss that charge. *See Transcript of Hearing at 14.*" A grand jury in the Southern District of Illinois indicted the Defendant on January 29, 1992 (Appendix C). [Hereinafter "the current charge"]. *This will be referred to as* ***Laurel II*** *in Defendant-Appellant's brief.* It charged the Defendant with conspiracy to distribute cocaine. Approximately nine months later, a grand jury in the Central District of Illinois indicted the Defendant in case number 92-10075 (Appendix D) and charged the Defendant with conspiracy to distribute cocaine. [Hereinafter "case number 92-10075"]. *This will be referred to as* ***Laurel I*** *in Defendant-Appellant's brief.* The current charge in case number 92-10075 involves the same conspiracy. In November of 1994, authorities in Texas arrested the Defendant and sent him to the Central District of Illinois for prosecution in case number 92-10075. On January 3, 1996, as part of plea negotiations in the Central District of Illinois, the Defendant was charged with possession with intent to deliver cocaine on or before October 1987. [Hereinafter "case number 95-10093"]. (Appendix E). The apparent purpose of that indictment was to create a pre-guideline charge to which the Defendant could plead guilty and avoid a potential life sentence under the Guidelines. . . Under the terms of the plea agreement, the Central District of Illinois agreed to dismiss case number 92-10075. At the Defendant's Sentencing Hearing, the Government did in fact dismiss that charge.

"When Defendant-Appellant was brought before the United States District Court for the Southern District of Illinois on April 28, 1997, sixty-three (63) months had passed since

he was indicted by the Central District of Illinois and some twenty-nine (29) months after he was arrested and transported to the Central District of Illinois. Once he was brought before the United States District Court for the Souther District of Illinois, he filed a Motion to Dismiss Indictment Based Upon Double Jeopardy and filed a Brief in support of this Motion (Appendix F), and the Government filed its response (Appendix G), and the United States District Court for the Southern District of Illinois denied the Defendant-Appellant's Motion. (Appendix H).

Defendant also filed a Motion to Dismiss Indictment Based Upon Speedy Trial Violations (Appendix I) which the Government responded to (Appendix J) and which the Court denied (Appendix K).

Finally, Defendant filed a Motion to Enforce Plea Agreement and filed a Brief (Appendix L) to which the Government responded (Appendix M) and which the United States District Court for the Southern District of Illinois denied (Appendix N).

STATEMENT OF APPELLATE REVIEW

Issue I

The Court of Appeals reviews the issue of the denial, without an evidentiary hearing, of a Motion to Dismiss Indictment Based Upon Double Jeopardy by a de novo review of the merits of the Double Jeopardy claim. U.S.A. v. Dortch, 5 F.3d 1056 (7th Cir. 1993), and the factual allegations in the Motion and Brief are assumed to be true. U.S.A. v. Deleon, 710 F.2d 1218 (7th Cir. 1983).

Issue II

The Court of Appeals reviews the issue of the denial, without an evidentiary hearing, of a Motion to Dismiss Indictment Based Upon Violation of Speedy Trial right by a de novo review of the merits of the Speedy Trial claim and the factual allegations in the Motion and Brief are assumed to be true. U.S.A. v. Deleon, 710 F.2d 1218 (7th Cir. 1983).

Issue III

The Court of Appeals reviews the issue of the denial, without an evidentiary hearing, of a Motion to Enforce Plea Agreement by a de novo review U.S.A. v. Prewitt, 34 F.3d 436 (7th Cir. 1994), and the factual allegations in the Motion and Brief are assumed to be true. U.S.A. v. Deleon, 710 F.2d 1218 (7th Cir. 1983).

SUMMARY OF ARGUMENT

Issue I

Both of the parties agree that the conspiracy for which Defendant-Appellant Laurel was charged within the Central District of Illinois is identical to the conspiracy for which he was charged in the Southern District of Illinois. Defendant-Appellant's position that jeopardy attached when his plea was changed in the Central District of Illinois to the charge of possession. When Defendant-Appellant was sentenced in the Central District of Illinois the District Judge had before him all of the pertinent information, and this information was identical to that which the sentencing judge in Laurel II had before him in the Southern District of Illinois. Finally, Defendant-Appellant feels that the Blockburger test was applied incorrectly and that probably would have barred his being prosecuted in Laurel II.

Issue II

When Defendant-Appellant changed his plea in the Central District of Illinois as part of the plea negotiations the Assistant U.S. Attorney there agreed to essentially dismiss the conspiracy if Defendant-Appellant were to plead guilty to simple possession which he did. Defendant-Appellant feels that if his Central District of Illinois Plea Agreement were enforced that he could not be charged again with conspiracy, since it was dismissed in the Central District of Illinois.

Issue III

Defendant-Appellant's right to a speedy trial was violated since so much time passed between the time he was indicted in the Southern District of Illinois and the time he was

brought before the Court in the Southern District of Illinois.

ARGUMENT I

THE DISTRICT COURT ERRED IN OVERRULING DEFENDANT'S MOTION TO DISMISS ON THE GROUNDS OF DOUBLE JEOPARDY FOR THE REASON THAT BLOCKBURGER AS APPLIED, IS INADEQUATE AND THUS UNCONSTITUTIONAL IN THAT AN INDIVIDUAL CHARGED WITH THE SAME CONSPIRACY IN TWO DISTRICTS IS DEPRIVED OF HIS 5TH AMENDMENT RIGHT TO DOUBLE JEOPARDY PROTECTION SINCE BLOCKBURGER, TECHNICALLY APPLIED, WILL NEVER AFFORD DOUBLE JEOPARDY PROTECTION TO FUTURE DEFENDANTS SIMILARLY SITUATED.

Introduction

Laurel asserts that Laurel II alleges the same offense, conduct and ultimately the same conspiracy to which he had previously pled guilty and was sentenced, and therefore, violates his fifth amendment right not to be placed in double jeopardy. In the District Court he further claimed that this second prosecution constituted a violation of his plea agreement since it was his understanding that his plea of guilty would preclude further prosecution.

A denial of a Motion to Dismiss on grounds of Double Jeopardy is a question of law, and a district's court's Double Jeopardy ruling is subject to *de novo* review by the appellate court. United States v. Benefield, 874 F.2d 1503 (11th Cir. 1989).

In 1791, the Fifth Amendment to the United States Constitution was ratified by the individual states and declared in force. The Fifth Amendment's Double Jeopardy clause provides:

> . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . .

That amendment represents a constitutional policy of finality for a Defendant's benefit in federal criminal proceedings. United States v. Jorn, 400 U.S. 470, 479, 91 S. Ct. 547, 27 L. Ed. 2d 543 (1970). As the Supreme Court explained in Green v. United States, 355 U.S. 184, 187-88, 78 S.Ct. 221, 2 L. Ed. 2d 199 (1957):

> The underlying idea, one that is deeply ingrained in a least the Anglo-American system of jurisprudence, is that the State, with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent, he may be found guilty.

See also, United States v. DiFrancesco, 449 U.S. 117, 126-31, 101 S.Ct. 426, 431-34, 66 L. Ed. 2d 328 (1980).

Anglo-American criminal jurisprudence at the time of the Fifth Amendment's ratification consisted of a single act, single offense theory of crimes. The original drafters could not fathom the extent to which Congress would expand the scope of federal statutes. An entirely new breed of crimes expanded the breadth of the criminal law's net and proscribed entire courses of conduct. Compound-complex offenses such as drug conspiracies had not been conceived, and by the time they were enacted, Blockburger was unable to constitute the entirety of the "same offense" analysis. Professor Brenner writes that because the transition from traditional criminal liability theories to new offense categories and enhancing penalties:

> . . .was well advanced by 1932, the 'same evidence' test was, if not already hopelessly out of date, rapidly becoming so when the United States Supreme Court adopted it in Blockburger. This accounts for much of the confusion that

exists in the jurisprudence of Double Jeopardy, since the Court was applying an antedated standard [Blockburger] to statutes that increasingly departed from traditional images of criminal liability.

Brenner, S.C.A.R.F.A.C.E.: A Speculation on Double Jeopardy and Compound Criminal Liability, 27 New Eng.L.Rev.915, 919 (1993). Even though the complexity and sophistication of current criminal statutes could not be envisioned by the drafters of the Fifth Amendment, the basic principle enunciated by them and their intent should not be lost or set aside.

Analysis

Blockburger does not require merely a comparison of the statutory elements and such an application of Blockburger is not the sole test to be applied in successive prosecutions for compound-complex offenses.

The jurisprudence of Double Jeopardy encompasses two aspects: multiple punishment claims and successive prosecution claims. North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072, 23 L.Ed. 2d 656 (1969). The Defendant here is concerned with the application of Double Jeopardy principles as they apply to successive prosecutions.

The Supreme Court in Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), set out the rule that "the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." Id. at 304. This "same elements" test has frequently been referred to as the "Blockburger test."[1] Application of that test, even in simple, one-act cases has been neither

[1]Because Blockburger does not require a court to compare evidence it is not truly a "same evidence" test.

easy nor consistent. Its application to compound-complex cases is nothing less than schizophrenic.[2]

The Supreme Court has not clearly determined how Blockburger is to be applied in cases involving successive prosecutions. Several tests for determining the "same offense" have been used by the Supreme Court in its double jeopardy jurisprudence, some of which are a derivation of Blockburger's "same elements" test and others supplementing Blockburger's initial starting point. In its short-lived decision in Grady v. Corbin, 495 U.S. 508, 110 S. Ct. 2048, 109 L. Ed. 2d 548 (1990), the Court supplemented the Blockburger test by creating a "same conduct" test, whereby if in a subsequent prosecution, the Government proves conduct that constitutes an offense for which the Defendant has already been prosecuted, that subsequent prosecution is barred by principles of double jeopardy. This formulation was arguably the most protective double jeopardy analysis promulgated by the Court. However, after United States v. Dixon, 509 U.S. 688, 113 S. Ct. 688, 125 L. Ed. 2d 556 (1993), the Court has allegedly returned to a simple, single prong analysis under Blockburger.

There is still significant incongruity, however, as to what Blockburger requires. Some courts seem to state that Blockburger sets out a rigid "same elements" test, which requires

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[2]By "compound-complex offense" we mean an offense which requires proof that the Defendant(s) engaged in a course of complex criminal activity and in addition committed predicate acts by violating other criminal statues. Poulin, Double Jeopardy Protection Against Successive Prosecutions in Complex Criminal Cases: A Model, 25 Conn. L. Rev. 95, 96 (1992).

only a comparison of the elements of the statutory crimes charged. United States v. Dixon, 509 U.S. 688, 125 L. Ed. 2d 556, 579-581 (1993) (Rehnquist, C.J, concurring in part and dissenting in part); United States v. Phillips, 664 F.2d 971, 1006 (5th Cir. 1981) cert. denied, 457 U.S. 1136, 102 S.Ct. 2965, 73 L.Ed.2d 1354 (1982). For example, if Statute X has elements A, B, and C, and Statute Y has elements A, B, and D, each statute has an element which the other does not and thereby satisfies Blockburger. This was the approach taken by Judge Foreman in denying appellant Laurel's Motion to Dismiss.

A "same evidence" test lies somewhere in between the "same conduct" test of Grady and "same elements" tests of Blockburger, whereby the analysis would center on the proof that is offered or relied upon to secure a conviction. This would be accomplished through investigating the alleged violative conduct set out in the successive indictments and which will later be proved at trial.

The current trend is that Blockburger has set up a "same elements" test. However, there is still little clarity in this area. In a recent review of the double jeopardy question, United States v. Dixon, supra, Justice Scalia, in a plurality opinion, claims to reject the "same conduct" test for double jeopardy analysis, reverting to the more rigid "same elements" test of Blockburger, but a closer scrutiny of his opinion discloses an analysis somewhere between the two tests. The opinion in Dixon covered 78 pages with five justices writing separately. Such an opinion clearly indicates that the Court is not comfortable with the state of the law in this area and it has not spoken with a coherent voice. Justice Scalia relied on two early opinions from 1911 and 1906 to overrule Grady, stating that the Court in those cases upheld

prosecutions after concluding that the Blockburger test and only the Blockburger test was satisfied. See, Gravieres v. United States, 220 U.S. 338, 343, 31 S.Ct. 421, 55 L.Ed 489 (1911), and Burton v. United States, 202 U.S. 344, 379-381, 26 S.Ct. 688, 50 L.Ed. 1057 (1906).[4] Dixon, supra, at 575. Those cases applied a version of Blockburger to single act, multiple offense situations where the prosecutions were brought successively. Additionally, the Dixon case involved subsequent prosecution after prosecution for criminal contempt involving the same incident, not a compound-complex situation such as is involved here. In United States v. Dixon, supra, at least four Justices, and possibly five,[5] actually examined the content of the particular court order violated by the defendants rather than the more general statutory elements of the criminal contempt provision under which they were charged in determining whether the subsequent prosecution should be barred. Chief Justice Rehnquist, joined by Justices O'Connor and Thomas, concurring in part and dissenting in part, disagreed with Justice Scalia's application of Blockburger and stated that despite what Justice Scalia claimed, his analysis was more of a "same evidence" test, rather than a "same elements" test,

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[4]It appears Justice Scalia's reliance was misplaced. In Burton the Court employed the following rule to resolve the double jeopardy issue: "It is well settled that 'the jeopardy is not the same when the two indictments are sol diverse as to preclude the *same evidence* from sustaining both.' 1 Bishop Crim. Law, s. 1051." 202 U.S. at 381 (Emphasis added). The Court therefore concluded that "[T]he two charges were not identical in law, and that the same evidence would not have sustained each." Id. Likewise the Gavieres Court, relying on Burton, looked to the evidence of each crime to determine if double jeopardy applied. 31 S. Ct. at 423.

[5]See United States v. Dixon, S.Ct. at 2855-61 (Scalia, J., joined by Kennedy, J.); Id. at S.Ct. at 2873-74 (White, J., joined by Stevens, J.); Id. S.Ct. At 2890-91 (Souter, J., joined by Stevens, J.).

to which Chief Justice Rehnquist subscribes. The Chief Justice Rehnquist stated:

> . . . Justice Scalia's double-jeopardy analysis bears a striking resemblance to that found in Grady-not what one would expect in an opinion that overrules Grady.

Dixon, 125 L. Ed. 2d at 581. Therefore, there is no clear majority supporting one interpretation of Blockburger over the other.[6]

There is as little uniformity among the circuits as there is among the Justices of the Supreme Court. In United States v. Liller, 999 F.2d 61 (2d Cir. 1993) (a post-Dixon case), the Second Circuit Court of Appeals stated:

> ...in certain circumstances, including where one of the statutes covers a broad range of conduct, it is appropriate under Blockburger to examine the allegations of the indictment rather than only the terms of the statutes.

Id. at 63; citing, United States v. Seda, 978 F.2d 779, 781-82 (2d Cir. 1992). Compare, however, United States v. Adams, 1 F.3d 1566 (11th Cir. 1993) (ultimately limiting the Blockburger analysis to only the statutory elements), where the Eleventh Circuit Court of Appeals noted that the Supreme Court had never been forced to apply Blockburger in the context of compound and predicate offenses, and thus has not had to decide whether Blockburger was to be applied abstractly to statutory elements, or specifically to the indictment in the particular case. Id. at 1573, citing Whalen v. United States, 445 U.S. 684, 710-11, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980) (Rehnquist, J., dissenting).

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[6]Judge Foreman relied exclusively on a rigid application, of the Blockburger statutory elements test in denying Defendant Laurel's Motion to Dismiss.

The reason for applying an expansion of Blockburger in Mr. Laurel's situation is clear. Successive prosecutions for the "same offense" are not barred if the Defendant has committed the same offense twice. Further prosecution should be barred if the second offense is the same as the first but just labeled differently. For the purposes of determining "same offense," therefore, a statutory element analysis is wholly inadequate. There must be an underlying factual analysis to determine if two separate offenses have been committed; thus, the "totality of the circumstances" test.

"[T]he proliferation of complex and compound-complex offenses calls for a more protective double jeopardy rule. Under these statutes, the prosecution can adjust charges slightly and force a Defendant through multiple proceedings for a single criminal operation" Poulin, Double Jeopardy Protection Against Successive Prosecutions in Complex Criminal Cases: A Model, 25 Conn. L. Rev. at 147-8.

Supplementing Blockburger in the modern criminal jurisprudential context is necessary not only when charging the same conspiracy statute twice. The Government has many tools with which to prosecute crime. Collusion between the legislature, which supplies the tools, and the prosecuting authority, which uses those tools, must be checked by the judiciary. The legislature currently has no limit on the variety of criminal statutes it may enact[7] and in no way is this Defendant requesting this Court to limit the legislative duties in this respect. However, the manner in which the Government manipulates these malleable

[7]Alvernaz v. United States, 450 U.S. 333, 101 S. Ct. 1137, 67 L. Ed. 2d 275 (1981).

tools is limited by the Fifth Amendment. Supplementation of Blockburger in the context of successive prosecutions for compound-complex offenses that have as their basis predicate acts that overlap significantly is therefore required to afford Defendants the constitutional guarantee of the Fifth Amendment. To allow successive prosecutions on the basis of Blockburger alone, would send a signal to prosecutors that they can prosecute any individual as many times as they desire and likewise will send a chilling message to Defendants that a plea whereby a conspiracy count is dismissed does not mean that he cannot be indicted in another part of the country for this same conspiracy. Likewise, if the judiciary is not willing to oversee this practice, a strong message will also be delivered to the legislature, which may shift or alter a single element of an offense to create a totally distinct offense that can pass Blockburger scrutiny.

If this Court affirms the District Court's Order denying appellant's Motion to Dismiss, the universal maxim that no man is to be brought into jeopardy of his life more than once for the same offense, will be reduced to a reference in a history textbook. The District Court misinterpreted the mandate of the Supreme Court in Dixon, supra, when it relied exclusively on a rigid application of Blockburger and held that the offenses charged in the two indictments were "probably not the same 'offense.'" (L.F. 265, et seq.) The District Court's approach is inadequate in the compound-complex offense context. The District Court relied on two simple facts to reach its final conclusion. Such an archaic and technical analysis falls woefully short of that required by the Fifth Amendment, thereby effectively denying the appellant the right to not be placed twice in jeopardy.

In such cases, the prosecution, even when faced with double jeopardy proscriptions, can skillfully craft an indictment that is pled under a different statute, while actually pursuing the same criminal agreement or conduct which has previously been prosecuted. Furthermore, the prosecution can dress-rehearse its case by prosecuting a narrower offense and then improve the evidence and its presentation to obtain conviction on broader charges. In addition, if frustrated by an unsatisfactory outcome in a broad case, the prosecution can pursue additional, narrower charges. In a long term conspiracy situation there is virtually no end to the number of prosecutions that can be brought merely by charging different overt acts or different (albeit overlapping) time frames.

Moreover, to allow fragmentation of prosecutions to achieve the goals served by the statutes defining compound-complex offenses gives too little weight to the protection accorded to criminal defendants by the Double Jeopardy Clause. Consequently, statutes or "legislative intent" cannot end the inquiry since the Fifth Amendment must override even the statutory purposes.

"Totality of Circumstances" Test

Since Mr. Laurel's offenses raise double jeopardy problems due to having the conspiracy charge dismissed in one District and brought in another, the courts simply cannot rigidly apply the "same-elements" test to determine double jeopardy claims in prosecutions of compound-complex offenses. Rather, the "totality of the circumstances" approach, which compares courses of conduct to determine whether separate conspiracy charges are the same, should be applied to determine whether the separate compound-complex charges are actually

the same. It is Defendant Laurel's position that while the two convictions for possession and conspiracy are distinct from one another in a technical sense, when looking at them as a whole they are in fact the same offense.

Such an analysis is supported by the type of reasoning found in Harris v. Oklahoma, 433 U.S. 682 (1977) and Brown v. Ohio, 432 U.S. 161 (1977) and Ashe v. Seenson, 397 U.S. 436 (1970), all of which effectively recognize extensions of the pure Blockburger "same elements" test. Ironically, Justice Scalia relied heavily on Harris in reaching his conclusion that Grady must be overruled.

In Harris the Court held that a Defendant, who had been prosecuted for felony-murder committed during a robbery, could not be prosecuted for the robbery because the robbery and the felony-murder statute, they were incorporated in that statute through its requirement that the prosecution prove a felony. Harris' holding is, nevertheless, consistent with the Blockburger test if viewed in a common sense way. (ie: If the totality of the circumstances is considered). Two offenses are the same for purposes of double jeopardy if one offense wholly encompasses the other even if the "elements" are not technically the same. The felony-murder statute under which Harris was prosecuted did not mention robbery, though it required proof of the lesser offense to establish guilt of the greater.

Similarly, in Brown vs. Ohio, supra, an expanded version of Blockburger was applied by looking at the proof as well as the elements of the offense. Brown had been prosecuted in one Ohio county for joyriding in a stolen car on December 8, 1973, and was later prosecuted in another Ohio county for the original theft of the car as well as joyriding on

November 29, 1973. A technical application of "the same elements" test could have led to the conclusion that these prosecutions were not for the same offense because each required proof of events on a different date; each thus required proof of an element (ie., the specific date in question) not required by the other. In fact, the venue of each offense was different. However, the Court rejected that interpretation and held that the two offenses were the same for double jeopardy purposes. The Court recognized that the overlap in the evidence coupled with the substance of the offenses created a "same offense" situation even if technically the crimes involved different "elements."

Ashe v. Swenson, supra, held that Blockburger "same elements" test would be relaxed where the second prosecution would require relitigation of "factual issues" that were necessarily resolved in the Defendant's favor in the first prosecution even though the second prosecution involved additional "elements."

The Court's decision in Illinois v. Vitale, 447 U.S. 410 (1980) further indicates the sometimes necessary expansion of the pure Blockburger "same elements" test. In Vitale, the Defendant was involved in a car accident that resulted in two deaths. Vitale was convicted of failing to reduce his speed to avoid an accident, and the state subsequently prosecuted him for the reckless homicide on the basis of the same traffic mishap. The Supreme Court first discussed whether the statutes in question satisfied the Blockburger test. The Illinois Supreme Court had stated that "the lesser offense, failing to reduce speed, requires no proof beyond that which is necessary for conviction of the greater, involuntary manslaughter," but the opinion did not say whether proof of reckless homicide would always prove failure to

reduce speed. Therefore, the Supreme Court held that it was unclear whether the two offenses were greater and lesser offenses under the Blockburger test, as applied in Brown, and then remanded the case to the state court to make that determination. The Court stated, however, that regardless of the outcome of the Blockburger test, "if in the pending manslaughter prosecution Illinois relies on and proves a failure to slow to avoid an accident as the reckless act necessary to prove manslaughter, Vitale would have a substantial claim of double jeopardy."

Factors Considered

Under the "totality of the circumstances" test as applied to the conspiracy cases, the courts have traditionally considered the following factors: (1) time; (2) persons acting as co-conspirators; (3) the statutory offenses charged in the indictment; (4) the overt acts charged or any other description of the offenses charged which indicate the nature and the scope of the activity which the Government sought to punish in each case; and (5) places where the events alleged as part of the conspiracy took place. Thomas, 759 F.2d at 662; Tercero, 580 F.2d at 314. See also: United States v. Maza, 983 F.2d 1004, 1013 (11th Cir. 1993) (five factors); United States v. Calderone, 982 F.2d 42, 45 (2d Cir. 1992) (eight factors); United States v. Elgersma, 979 F.2d 750, 754 (9th Cir. 1992) (five factors).

The factors noted above are guidelines only. The essence of the determination is whether there is one agreement to commit two crimes, or more than one agreement, each with a separate object. Thomas, 759 F.2d at 662. The Court will therefore look beyond the indictments and will consider all of the evidence, including evidence adduced at the previous

trial, evidence expected to be presented at the second trial and information developed at any evidentiary hearing conducted on the double jeopardy issue. Id.

Application of the foregoing "totality of the circumstances" factors to this case indicates that the two "conspiracies" alleged against Laurel are, in fact, only one long-term conspiracy, to which Laurel has already pled guilty, been convicted and been sentenced.

Furthermore, in North Carolina v. Pearce, 395 U.S. 711, 717, (1969), the Supreme Court identified three distinct aspects of the double jeopardy clause: "It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." This threefold protection was specifically reaffirmed in Dixon, supra, 113 S.Ct. At 2855.

Laurel had already been punished for the conduct alleged in the Southern District of Illinois and any second punishment based on such previously considered conspiracy is barred by not only the second but also the third aspect of the Double Jeopardy Clause of the United States Constitution that prohibits multiple punishments for the same offense. The Supreme Court addressed this aspect in Jeffers v. United States, 432 U.S. 137 (1977) and concluded that cumulative sentences for conspiracy (§846) and continuing criminal enterprise (§848) were prohibited. See also: United States v. Maull, 806 F2d 1340 (8th Cir. 1986). The additional question in this case is whether Laurel has already been punished for the conduct constituting the alleged conspiracy violations. When sentenced in the Central District of Illinois, the sentencing judge had before him and presumably took into consideration when

sentencing, much of the same conduct alleged in the present indictment, and the aspect of the Central District of Illinois Plea Agreement will be discussed supra. The obvious difficulty for Defendant Laurel is that he "only" pleaded guilty to possession in the Central District of Illinois, but as part of that plea, the Government dismissed the conspiracy charge. As such, the Government is now attempting to punish Laurel again for the same "offense" and the question becomes if Mr. Laurel had pleaded guilty to conspiracy in the Central District of Illinois for the same amount as possession, would Double Jeopardy apply?

This situation is somewhat analogous to United States v. Koonce, 945 F.2d 1145 (10th Cir. 1991), wherein the overall conduct was considered in applying the sentencing guidelines in the first case and the same conduct was sought to be punished by a second prosecution. In Koonce, supra, the court held that the double jeopardy clause prohibited such a result. Koonce had been prosecuted in South Dakota District Court for distribution of methamphetamine, and found guilty. In calculating his guidelines range, the court took into consideration additional quantities of methamphetamine discovered during a search of his house in Monticello, Utah.

Thereafter, Koonce was prosecuted in Utah for possession of that methamphetamine found in his house in Utah. The Court of Appeals found that Koonce, having been punished in South Dakota for the Utah possession under the guidelines, could not be prosecuted or punished in Utah for the same possession. The court concluded:

> In sum, the Government has pointed to no authority that has held that Congress intended, in the Guidelines, to punish a Defendant a second time for conduct that has previously been

> aggregated into the base offense level for a related sentence in an earlier prosecution. To the contrary, as we have pointed out able, there is substantial evidence that the Guidelines procedure for aggregating fungible offense conduct was intended to prevent exactly this type of double punishment.

id at 1153.

The Second Circuit followed Koonce's lead in United States v. McCormick, 992 F.2d 437 (2d Cir. 1993) which involved multiple counts of bank fraud charged in both the District of Vermont and the District of Connecticut. McCormick was first charged and convicted in Connecticut. At sentencing, the Government filed a sentencing memorandum describing not only McCormick's fraudulent conduct in Connecticut but also similar schemes in Vermont. The Connecticut Court accepted the Government's argument that this was relevant conduct under U.S.S.G. 1B1.3 (a) (2). The Second Circuit agreed with the district court in finding that the later prosecution of McCormick in Vermont for conduct that was already incorporated into his Connecticut sentence would be a second punishment, and that the availability of concurrent sentence did not eliminate the double jeopardy problem.

In the first prosecution Laurel was not sentenced under the sentencing guidelines, but the principle is the same. The whole of Laurel's conduct, having been considered and relied upon by the Court in imposing its sentence, Laurel cannot, under the double jeopardy clause, be the subject of a second subsequent prosecution or punishment. The same widespread long-standing conspiracy, subject of the present indictment, is the very same conspiracy the court, at the Government's insistence, took into consideration at the sentencing in the first

case. As such, if Laurel is convicted, he will be punished for the same conspiracy.

A review of the "Government's version of the offense" submitted to the court in the original case and a comparison of that version to the indictment in the present case (Ap.C) demonstrates that Laurel has already been punished for the conduct now alleged. This comparison graphically illustrates the overlap between the Government's contention as to what Laurel and his co-conspirators did in the previous case and what is now alleged in the present case.

ARGUMENT II

PLEA AGREEMENT IN CENTRAL DISTRICT PRECLUDES PROSECUTION IN OTHER DISTRICTS FOR SAME CONSPIRACY

The Plea in Central District case No. 95-10093 and subsequent dismissal of Central District case No. 92-10075 (Conspiracy), constitutes res judicata or, more specifically, collateral estoppel, as to the Conspiracy Indictment herein and, therefore, the Indictment should be Dismissed. This appears to be a case of first impression in the Seventh Circuit.

In United States v. Harvey, 791 F.2d (Fourth Cir., 1986), the Court held that the plea agreement in the Eastern District of Virginia was ambiguous and the ambiguity was to construed against the Government. The Court vacated the District of South Carolina Order denying the Motion to enforce the Plea agreement from the Eastern District of Virginia and remanded the case to the District of South Carolina for further proceedings. Harvey, at 295. The Court held that the plea agreement prevented further prosecutions for those offenses anywhere, by any agency of the Government. Harvey, at 303.

In Harvey the Defendant was Indicted in two Districts for Conspiracy to distribute hashish. The Indictment from the Eastern District of Virginia alleged that the Conspiracy and related substantive counts occurred between the spring of 1980 through January of 1981, the District of South Carolina Indictment, alleged that the Conspiracy and related substantive counts occurred from 1974 to the present. Harvey, at 298, footnote 3. The Defendant pled guilty to one count of the Virginia Indictment which alleged "interstate travel with the intent to carry on the illegal activity of possession and distribution of hashish," in exchange, the

Government agreed to dismiss the remaining counts, including the Conspiracy count. Harvey, at 295,296.Harvey served his six-month active sentence and was arrested on the South Carolina Indictment shortly after his release. He then moved to enforce the plea agreement. Harvey, at 297.

The facts in Harvey are very similar to the facts in the instant case. However, there are facts present here which are more egregious than those present in Harvey. Specifically, the Office of the United States Attorney for the Southern District waited until well after the plea in the Central District to bring the Defendant before this Court. The Defendant was prejudiced in the delay as he waived an apparently valid Statute of Limitations objection to the Information which he pled to in exchange for the promise that the Conspiracy Indictment would be dismissed. There is no indication that the Office of the United States Attorney for the Southern District notified the Defendant, prior to the plea in the Central District, that he had been under Indictment in the Southern District since January of 1992. This Defendant and any ordinary individual, under those circumstances would naturally believe that he would not be subject to further prosecution for the same Conspiracy in any District.

The Government has argued that Harvey has never been followed in the 7th circuit. A review of the case cited by the Government reveals that each of their cases is significantly distinguishable on the facts.

In U.S. v. Rourke, 74 F.3rd 802 (7th Cir.,1992) the Defendant plead guilty in the Northern District of Illinois for conspiracy with intent to deliver marijuana. Rourke at 803. Subsequently, the FAA advised Defendant that his pilot's license would be revoked due to

the conviction. Rourke at 804.

The instant case involves charges filed by the U.S. Attorney for two adjoining districts in Illinois' the Central and Southern. Further, the revocation of a pilot's license is an administrative sanction and cannot be equated to the Judicial sanction of imprisonment.

In the U.S. v. Ingram, 979 F.2d 1179 (7th Cir.,1992), the Defendant entered into a plea agreement in April of 1989 in the District of Colorado for Distribution of Methamphetamine, a pre-guideline offense. Ingram at 1182-83. During the plea negotiations, Ingram was advised that Defendant was being investigated for other activity criminal activity outside of Colorado. The AUSA told Defendant's attorney that he was neither willing or authorized to bind any Federal District other than the District of Colorado. Ingram at 1182. In May of 1989 the Western District of Wisconsin returned an indictment, charging a separate conspiracy involving the Defendant Ingram at 1183. Ingram is distinguishable from the instant case as Ingram involved separate conspiracies, one of which was not charged at the time of the Plea. Here, the Government admits that the conspiracy charged in the Central and Southern Districts was the same conspiracy. The Indictment from the Southern District was suppressed. The Defendant was not advised, either at the time of his arrest on the Central District Indictment, or at the time of his plea in the Central District, that the Indictment had been filed in the Southern District for the very same conspiracy. The government then negotiated the Plea in the Central District which the Defendant entered, without knowledge of the Southern District charges which were pending.

The Defendant then pled to a Possession charge which was, on its face, beyond the

Statute of Limitations. In exchange, the conspiracy charge and possibility of life imprisonment, was dismissed. The dismissal was illusory. The United State's Attorney's office in the Central District either knew or should have known of the pending charges against the Defendant in the Southern District. The Defendant should have been advised he was already charged with the same conspiracy in the Southern District which the Central District was offering to dismiss, and that the Southern District would not honor the plea agreement in the Central District.

Ingram expounds the principle that "the Government must fulfill any promise that it expresses by or implied by makes in exchange for Defendant's guilty plea." Ingram at 1184. The 7th Circuit in Ingram goes on to cite to Harvey favorably. The reference is abundantly relevant to the fact of this case. In discussing the issue of ambiguity of a plea agreement, the court writes:

> "If it is unambiguous as a matter of law, and there is no suggestion of government overreaching of any kind, the agreement should be interpreted and enforced accordingly." *Id.* Plea agreements, however, are "unique contracts" and the ordinary contract principles are supplemented with a concern that the bargaining process not violate the defendant's right to fundamental fairness under the Due Process Clause. *Carnine*, 974 F.2d at 928. "[B]oth to protect the plea bargaining defendant from overreaching by the prosecutor and to insure the integrity of the plea bargaining process, the 'most meticulous standards of both promise and performance must be met by [the government].'" *United States v. Bowler*, 585 F.2d 851, 854 (7th Cir.1978) (quoting *Correale v. United States*, 479 F.2d 944, 947 (1st Cir.1973)). Accordingly, even if a plea agreement is unambiguous on its face, courts may refuse to enforce it if the government is found guilty of overreaching. Ingram at 1184.

In the instant case the Government is over reaching as the offices of the United State Attorney have withheld relevant information concerning the changes in the Southern District

which induced the Defendant to plea to a facially defective Information in exchange for an illusory promise for dismissal of the conspiracy. Fundamental fairness was violated when, either intentionally or unintentionally, the government failed to advise this Defendant of the charges pending in the Southern District. One must query, why the government kept the Indictment in the Southern District under seal until the Defendant's arrest in May of 1997? Why not unseal the Indictment as the Central District warrant was served on 11/13/94 in Texas? Presumably, there was no further need of secrecy. Additionally, it appears that this Defendant was one of the last to be arrested and that the other conspirators had been tried or plead guilty. Again, there was no need for keeping the indictment sealed. One can assume that the Defendant's arrest and prosecution in the Central District was known to the U.S. Attorney office in the Southern District. Prosecution and Judicial economy would have been served by prompt notification. Such notification is fundamentally fair to Defendants and is not burdensome to the Government nor the Court.

The Government also relied on Stanton v. Neal 880 F.2d 962 (7th Cir.,1989). Stanton is easily distinguishable as it involved promises from the State's Attorney of Fayette County that the Defendant would not be prosecuted for escape from prison. Unfortunately, the Defendant in Stanton escaped form prison in Champaign County, not Fayette County. Stanton at 963.

> State's attorneys in Illinois work for their respective counties, not the State Attorney General. United States Attorneys, on the other hand, work for, are accountable to, and can be controlled by one central authority--the Attorney General of the United States. While United States Attorneys arguably speak for the entire federal government, the same cannot be said of state's attorneys in Illinois. Neal at 966.

Therefore, Fayette County State Attorney had no authority to bind Champaign County State Attorney.

The Government has argued that in U.S. v. Prewitt, 34 F.3d 436 (7th Cir.,1994) the 7th Circuit implicitly rejected Harvey. Again, the facts are distinguishable. In Prewitt, the Defendant was advised, prior to plea, that he was being investigated in the Southern District. The Defendant in Prewitt knew that there was a strong possibility of future prosecution in the Southern District and that his agreement only precluded prosecution in the North District of Indiana. Prewitt at 440. The court in Prewitt does not cite or refer to Harvey.

The Government is attempting to "push the envelope" beyond the realm of the fair administration of justice. Allowing the government to proceed with this prosecution makes illusory the purported dismissal of the Conspiracy count in the Central District and indicates that the waiver of the Defendant's Statute of Limitations objection to the Count to which he pled was given for nothing in return. Therefore, the Government of the United States, will have induced the Defendant to plead to a charge which was clearly outside the Statute of Limitations without providing any real consideration. Such a result will have a chilling effect on plea negotiations in other conspiracy cases. Therefore, the U.S. Attorney's for the Southern District should be bound by the dismissal of the identical conspiracy charged in the Central District.

ARGUMENT III

DEFENDANT SIXTH AMENDMENT RIGHT TO A SPEEDY TRIAL WAS VIOLATED

In order to determine wether a sixth amendment Speedy Trial violation has occurred, the court must apply a four part balancing test. The factors to be considered are:

(1.) The length of the delay;

(2.) The reasons for the delay;

(3.) The prejudice to the Defendant resulting form the delay;

(4.) The nature of the Defendants assertion of his speedy trail right.

Barker v. Wingo, 407 U.S. 514, 530-533 (1972).

The Defendants Sixth Amendment right to a speedy trial was violated by the lengthy delay. Approximately sixty-eight months elapsed between the date of his Indictment in the Southern District until the September, 1997 trial date. The length of the delay is "presumptively prejudicial" and further inquiry is required to determine wether there was a violation of the sixth amendment right to a speedy trial. The twelve-month delay has been found to be presumptively prejudicial. United States v. Jackson, 542 F.2d 403,407 (7th Cir., 1976).

The next focus is the reason for the delay. The government had a Constitutional duty to make a good faith effort to bring the Defendant to trial. Smith v. Hoouy, 393 U.S. 374,383 (1969). The Defendant herein was arrested in Texas on November 13, 1994 on the Central District Warrant. Thereafter, he was turned over to the custody of the authorities in the

Central District. The Defendant was never advised that he faced identical charges in the Southern District as the indictment was sealed and the government chose not to serve the arrest warrant. There appears to have been no compelling reason to keep the indictment suppressed. Most or all of the alleged Co-Conspirators have been tried and convicted or have plead guilty prior to the trials, "several years ago." (See transcript of Central District Sentencing Hearing on September 20, 1996, pp.5-6).

The delay between the Defendants arrest in November of 1994 in the Central District and his first court appearance on April 28, 1997, approximately twenty-nine months, is attributable to the government. This is a case of first impression. The government has argued that the time that Defendant spent incarcerated on "other" charges cannot be charged against the government. The government has relied on United States v. Kimberlin, 805 F.2d 210(7th Cir.,1986), for support. In Kimberlin, the Defendant was facing charges in different districts on completely different charges. The Defendant faced Indiana charges involving fire arms and bombing, Kimberlin at 215-216, at the same time he faced charges in Texas for conspiracy to posses, import and distribute four thousand pounds of marijuana, Kimberlin at 225. It is clear that the Defendant in Kimberlin was aware of the charges in each of the Districts. Here, the Defendant faced charges for the same conspiracy in adjoining Districts in Illinois. There can be no doubt that each District knew of the others charges. The government chose to proceed on the Central District charges first. The government also chose, for whatever reason, not to advise the Defendant that he also faced the same charges in the Southern District. This tactic of the prosecution was prejudicial to the Defendant and

violated the principals of the fair administration of Justice.

The delay is also attributable to the government as it was used to gain a tactical advantage. By not advising the Defendant of the charges, the Southern District was able to "double dip" the punishment of the Defendant. The government has argued that the Defendant was not prejudice by the delay. The record clearly evidences the prejudice as the Defendant was led to believe that the charges involving the conspiracy would be dismissed, in exchange for a plea to a procession charge which was, on its face, beyond the statue of limitations. Only after he had plead guilty to the facially defective possession charge in the Central District, did the Defendant learn of the conspiracy charges in the Southern District. Therefore, the dismissal of the conspiracy charge in the Central District was illusory as evidence by the subsequent prosecution in the Southern District for the same conspiracy which was dismissed pursuant to the Plea Agreement in the Central District.

Prosecutorial and Judicial economy would have them served had the Defendant and his Attorney been advised of the Indictment in the Southern District prior to the disposition of the Central District case. Fundamental fairness prohibits this type of "sandbagging." One must question what interest is served by such a prosecution. The interest are not due process and the fair administration of justice.

The court should also consider the nature or timing of the Defendants assertion of his speedy trial right. The Defendant did not become aware of the Southern District indictment until March 24, 1997. This is well after the January 3, 1996 plea in the Central District which was finalized at the September 20, 1996 hearing on Defendants Motion to Withdraw

Guilty Plea. Surely this delay must be attributable to the government. The filing of the Motion to Dismiss for Speedy Trail Violation was timely as the facts and issues are complicated on the prosecution itself, unusual. The government had approximately two and one-half years to consider the speedy trial ramifications. The Defendant and his Attorneys had only months.

Based upon the foregoing and by applying the balancing test as set forth in Kimberlin, the delay between the Defendants arrest on the Central District Warrant in November of 1994 and his arrest on May 5, 1997 for the Southern District Warrant, must be attributable to the government, and the Southern District Indictment should be Dismissed as the government violated the Defendant's Sixth Amendment right to a speedy trial.

CONCLUSION

For the reasons stated above, Defendant-Appellant Laurel respectfully suggests to this Court that the judgment imposed on him should be vacated and that the indictment filed in the United States District Court for the Southern District of Illinois be dismissed for having violated his constitutional rights to double jeopardy and as having violated the Plea Agreement entered into in the Central District of Illinois.

Respectfully Submitted:

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East Alton, Illinois 62024
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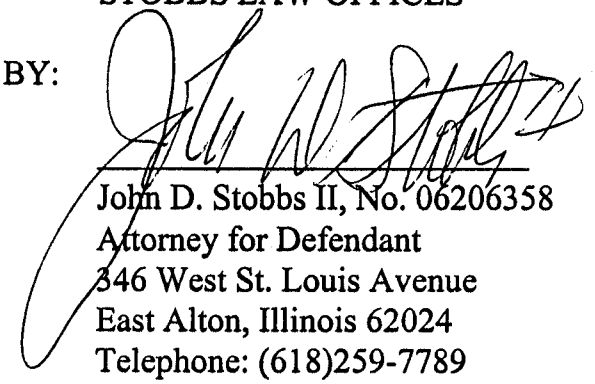
FAX: (618)259-4145

CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 32(d)(2)

The undersigned, being the attorney for the Defendant-Appellant in the above entitled cause, does hereby certify that the brief and argument filed herein, being the principle brief of the Defendant-Appellant, complies with the type volume limitations set forth in Circuit Rule 32(d) in said brief and argument of Appellant containing 6453 words. The undersigned further sates that he is relying on the word count of the word processing system used to prepare the said brief and argument of Appellant in making this certification.

Respectfully Submitted:

STOBBS LAW OFFICES

BY: 

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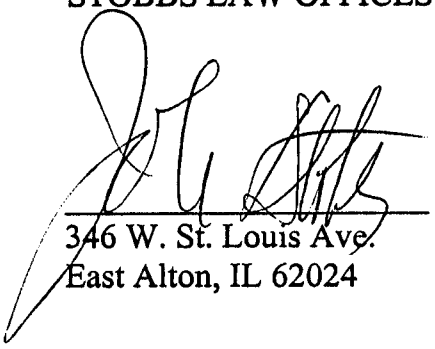
CERTIFICATE OF SERVICE

The undersigned certifies that on the 2 day of February, 1998, a copy of the attached ***Brief*** was served on the following persons by depositing a copy of same in an envelope with postage prepaid in the United States Mails in the Post Office in East Alton, Illinois addressed as set out, namely:

Mr. Ralph Friederich
Assistant U.S. Attorney
Nine Executive Drive, Suite 300
Fairview Heights, Illinois 62208

STOBBS LAW OFFICES

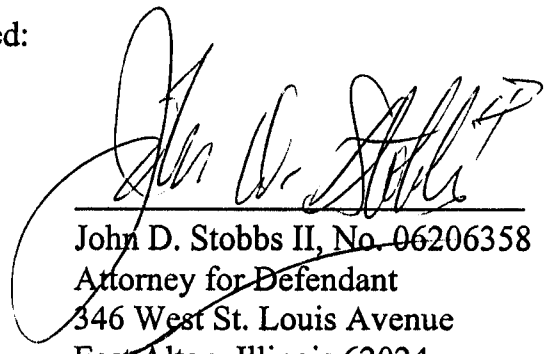


346 W. St. Louis Ave.
East Alton, IL 62024

ATTORNEY'S CERTIFICATE

I have included all material requested by Circuit Rule 30 (a) and (b) in this Appendix.

Respectfully Submitted:



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APPENDIX

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APPENDIX A

JUDGMENT IN A CRIMINAL CASE

United States District Court

Southern District of Illinois at Benton

UNITED STATES OF AMERICA
v.
NORBERTO LAUREL

Date of Original Judgment: 12/15/1997
(or Date of Last Amended Judgment)

Reason for Amendment:

- ☐ Correction of Sentence on Remand (Fed. R. Crim. P. 35(a))
- ☐ Reduction of Sentence for Changed Circumstances (Fed. R. Crim. P. 35(b))
- ☐ Correction of Sentence by Sentencing Court (Fed. R. Crim. P. 35(c))
- ☒ Correction of Sentence for Clerical Mistake (Fed. R. Crim. P. 36)

AMENDED JUDGMENT IN A CRIMINAL CASE

(For Offenses Committed On or After November 1, 1987)

Case Number: 4:92CR40004-001

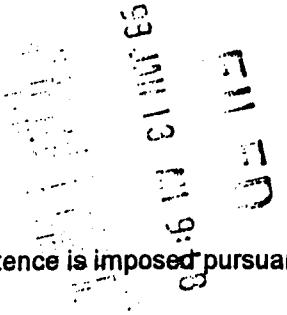
John Stobbs and Paul Prendergast
Defendant's Attorney

- ☐ Modification of Supervision Conditions (18 U.S.C. § 3563(c) or 3583(e))
- ☐ Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reasons (18 U.S.C. § 3582(c)(1))
- ☐ Modification of Imposed Term of Imprisonment for Retroactive Amendment(s) to the Sentencing Guidelines (18 U.S.C. § 3582(c)(2))
- ☐ Direct Motion to District Court Pursuant to ☐ 28 U.S.C. § 2255, ☐ 18 U.S.C. § 3559(c)(7), or ☐ Modification of Restitution Order

THE DEFENDANT:

- ☒ pleaded guilty to count(s) 1 of the Indictment
- ☐ pleaded nolo contendere to which was accepted by the court.
- ☐ was found guilty on count(s) after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 U.S.C. § 846	Conspiracy to Distribute and Possess with Intent to Distribute Cocaine	08/30/1990	1



The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant

- ☐ The defendant has been found not guilty on
- ☐ Count(s) (is)(are) dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 354-36-9911
Defendant's Date of Birth: 10/15/1943
Defendant's USM No.: 26681-077
Defendant's Residence Address:
1320 Madison Street
Laredo TX 78040
Defendant's Mailing Address:
1320 Madison Street
Laredo TX 78040

12/15/1997
Date of Imposition of Judgment

James L. Foreman
Signature of Judicial Officer

James L. Foreman
District Judge
Name & Title of Judicial Officer

1/13/98
Date

DEFENDANT: NORBERTO LAUREL

CASE NUMBER: 4:92CR40004-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 114 month(s).

** **The defendant is sentenced to a total of 151 months, less 37 months already served on the sentence imposed in the Central District of Illinois (95-CR-10093) for a total of 114 months on this charge, to be concurrent to the sentence imposed in the Central District of Illinois under Docket Number 95-CR-10093.**

☐ The court makes the following recommendations to the Bureau of Prisons:

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

- ☐ at _____ a.m./p.m. on _____.
- ☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

- ☐ before 2 p.m. on _____.
- ☐ as notified by the United States Marshal.
- ☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
Deputy U.S. Marshal

DEFENDANT: NORBERTO LAUREL

CASE NUMBER: 4:92CR40004-001

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 5 year(s).

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

☐ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

☒ The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The

See Special Conditions of Supervision - Page 4

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: **NORBERTO LAUREL**

CASE NUMBER: **4:92CR40004-001**

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall participate as directed and approved by the probation officer for treatment of narcotic addiction, drug dependence, or alcohol dependence, which includes urinalysis or other drug detection measures and which may require residence and/or participation in a residential treatment facility.

The defendant shall participate in a program of mental health treatment, as directed by the probation officer, until such time as the defendant is released from the program by the probation officer.

The defendant shall not incur new credit charges or open additional lines of credit without the approval of the probation officer unless the defendant is in compliance with the installment payment schedule.

The defendant shall provide the probation officer with access to any requested financial information.

DEFENDANT: NORBERTO LAUREL

CASE NUMBER: 4:92CR40004-001

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	$ 50.00	$ 5,000.00	$

☐ If applicable, restitution amount ordered pursuant to plea agreement . . . . . $ _____

FINE

The above fine includes costs of incarceration and/or supervision in the amount $_____

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

☒ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☒ The interest requirement is waived.

☐ The interest requirement is modified as follows:

RESTITUTION

☐ The determination of restitution is deferred until _____ . An Amended Judgment in a Criminal Case will be entered after such a determination.

☐ The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Name of Payee	* Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
Totals:	$_____	$_____	

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994 but before April 23, 1996.

DEFENDANT: NORBERTO LAUREL

CASE NUMBER: 4:92CR40004-001

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A ☒ in full immediately; or

B ☐ $ _____ immediately, balance due (in accordance with C, D, or E); or

C ☐ not later than _____; or

D ☐ in installments to _____ day(s) after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

E ☐ in _____ *(e.g. equal, weekly, monthly, quarterly)* installments of _____ over a period of _____ year(s) to commence _____ day(s) after the date of this judgment.

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

Special instructions regarding the payment of criminal monetary penalties:

The defendant shall make fine payment from any wages he may earn in prison. Any portion of the fine that isnot paid in full at the time of the defendant's release from imprisonment shall become a condition of supervision.

☐ Joint and Several

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program are to be made as directed by the court, the probation officer, or the United States attorney.

DEFENDANT: **NORBERTO LAUREL**

CASE NUMBER: **4:92CR40004-001**

STATEMENT OF REASONS

☐ The court adopts the factual findings and guideline application in the presentence report.

OR

☒ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Court overrules all of defendant's objections to the P.S.I.

Guideline Range Determined by the Court:

Total Offense Level: **31**

Criminal History Category: **IV**

Imprisonment Range: **151 to 188 months**

Supervised Release Range: **at least 5 years**

Fine Range: $ 15,000.00 to $ 4,000,000.00

☐ Fine waived or below the guideline range because of inability to pay.

Total Amount of Restitution: $ _____

☐ Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(d).

☐ For offenses committed on or after September 13, 1994 but before April 23, 1996 that require the total of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.

☐ Partial restitution is ordered for the following reason(s):

☐ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

OR

☒ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for following reason(s):

Pursuant to U.S.S.G. 5G1.3, defendant is sentenced to 151 months, less 37 months already served on the sentence in the Central District of Illinois (95-10093) for a total of 114 months. The Court sentences the defendant at the low end to serve as appropriate punishment and as a deterrent to others.

OR

☐ The sentence departs from the guideline range:

☐ upon motion of the government, as a result of defendant's substantial assistance.

☐ for the following specific reason(s):