April 16, 2002

John Gregory Lambros
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CLERK OF THE COURT
District of Minnesota
U.S. Federal Courthouse
316 North Robert Street
St. Paul, Minnesota 55101
U.S. CERTIFIED MAIL NO. 7001-0320-0003-3595-0673

RE: LAMBROS vs. USA, Civil NO. 99-28 (DSD)
Criminal No. 4-89-82(5) (DSD)

Dear Clerk:

Attached for **FILING** are the following documents: (one original and one copy)

a. **ADDENDUM TO: MOTION FOR ISSUANCE OF CERTIFICATE OF APPEALABILITY, Dated: April 10, 2002.** This Motion is dated **April 16, 2002.**

Thanking you in advance for your continued assistance in this matter.

Sincerely,

John Gregory Lambros, Pro Se

CERTIFICATE OF SERVICE

I declare under the penalty of perjury that a true and correct copy of the above listed motion was mailed within a stamped addressed envelope from the USP Leavenworth Mailroom on this **16th day of April, 2002,** to:

1. U.S. Attorneys Office, District of Minnesota, U.S. Federal Courthouse, Suite 600, 300 South 4th Street, Minneapolis, Minnesota 55415.

John Gregory Lambros, Pro Se

ofc
file

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

JOHN GREGORY LAMBROS,	*	**CIVIL NO. 99-28 (DSD)**
Petitioner,	*	Criminal No. 4-89-82(5) (DSD)
Vs.	*	
UNITED STATES OF AMERICA,	*	**AFFIDAVIT FORM.**
Defendant.	*	**David S. Doty, U.S. Senior District Judge**

ADDENDUM TO:

MOTION FOR ISSUANCE OF CERTIFICATE OF APPEALABILITY
Dated: April 10, 2002.

Now comes the Petitioner, JOHN GREGORY LAMBROS, Pro Se, (hereinafter Movant) and moves this Honorable Court to except this **ADDENDUM TO** Movant's filed April 10, 2002, "MOTION FOR ISSUANCE OF CERTIFICATE OF APPEALABILITY."

Judge Doty stated within his March 08, 2002, ORDER in this action on page two (2), as to the BACKGROUND in this action:

> "The present petition marks Lambros' fifth post-conviction collateral attack on his conviction and sentence. The first such petition was filed at the time of his resentencing. Although described as a motion pursuant to Fed. R. Crim. P. 33, the district court **CONSTRUED IT AS A PETITION FOR § 2255 HABEAS CORPUS RELIEF AND DENIED IT.**"

MAIN TRENDS AMOUNG APPEALS COURTS AGAINST RECHARACTERIZED MOTIONS:

1. The following Court of Appeals have relied on the following finding, "Whether a petitioner's initial post-conviction motion was filed before or after the AEDPA's effective date or whether the **DISTRICT COURT'S RE-CHARACTERIZATION OF THAT MOTION WAS SUA SPONTE** or upon the government's motion, a **DISTRICT COURT'S RE-CHARACTERIZATION OF A PETITIONER'S INITIAL POST-CONVICTION MOTION WILL NOT BE CONSIDERED A 'FIRST' HABEAS PETITION FOR AEDPA PURPOSES UNLESS THE PETITIONER IS GIVEN NOTICE OF THE CONSEQUENCES OF SUCH RE-CHARACTERIZATION.**" See, Eleventh Circuit's

2.

holding in CASTRO vs. UNITED STATES, 2002 U.S. App. LEXIS 13. In 1994, Castro filed a pro se Motion for New Trial pursuant to Federal Rule of Criminal Procedure 33, based on newly discovered evidence. The District Court treated Castro's motion as requesting relief pursuant to both **RULE 33 and § 2255** and subsequently denied the motion. Later, in 1997, Castro filed his first § 2255 habeas petition and the district court concluded that the petition was successive and dismissed the motion for lack of jurisdiction. **THIS IS EXACTLY WHAT HAPPENED TO MOVANT LAMBROS.**

2. The Eleventh Circuit's decision relied heavily upon similar holdings in sister circuits like:

a. RAINERI vs. U.S., 233 F.3d 96 (1st Cir. 2000)(filed **RULE 33**);

b. U.S. vs. MILLER, 197 F.3d 644 (3rd Cir. 1999);

c. ADAMS vs. U.S., 155 F.3d 582 (2nd Cir. 1998).

3. Movent is attaching as an **EXHIBIT** the March 01, 2002, article from the NATIONAL LEGAL PROFESSIONAL ASSOCIATES, **NEWSLETTER** entitled, "**RECHARACTERIZED POST CONVICTION MOTIONS**", pages 3, 4, & 5.

CONCLUSION:

4. Hopefully the above information will assist this Court in understanding that Movant Lambros has always had his § 2255 motions treated as SUCCESSIVE due to Judge Renner construing Movant's **RULE 33 MOTION AS A § 2255 AT RESENTENCING.**

4. I JOHN GREGORY LAMBROS, declare under the penalty of perjury that the foregoing is true and correct. Title 28 U.S.C.A. § 1746.

EXECUTED ON: April 16, 2002

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Vol. 15 No. 3 March 1, 2002

NATIONAL LEGAL PROFESSIONAL ASSOCIATES

"The pursuit of justice is a team effort."

Newsletter

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likely have been influenced to accept a plea agreement he would

RECHARACTERIZED POST CONVICTION MOTIONS

Pursuant to the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), successive habeas corpus petitions may be heard only after an appellate court certifies that the petition contains (1) "newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable fact finder would have found the movant guilty of the offense"; or (2) "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." Otherwise, a petition under 28 U.S.C. § 2255 will be barred as "successive." Consequently, a court's election to treat a motion received under some other provision of law as a motion under § 2255 – a practice formerly approved of prior to AEDPA's adoption – might become extraordinarily harmful to a prisoner's rights. For that very reason, the practice of conversion has come under fire post-AEDPA, and a majority of Circuits now hold that when a district court re-characterizes a federal prisoner's post-conviction motion as a petition under 28 U.S.C. § 2255, it does not render the prisoner's subsequent attempt to file a petition under § 2255 a "second or successive petition" subject to AEDPA. Some conflicts and variation, however, continue to exist between Circuits. The following is an illustration of the main trends among the Circuits regarding re-characterized habeas petitions.

The dominant line of thought regarding re-characterized post-conviction motions is exemplified by the Eleventh Circuit's holding in *Castro v. United States*, 2002 U.S.

4.

App. LEXIS 13. Hernan O'Ryan Castro was convicted and sentenced in 1992 to twenty years imprisonment for conspiracy to possess with intent to distribute cocaine and conspiracy to import cocaine. In 1994, Castro filed a *pro se* Motion for New Trial pursuant to Federal Rule of Criminal Procedure 33, based on newly discovered evidence. The district court treated Castro's motion as requesting relief pursuant to both Rule 33 and § 2255 and subsequently denied the motion. Later, in 1997, Castro filed his first self-styled § 2255 habeas petition, alleging that he failed to receive effective assistance of counsel in violation of the Sixth Amendment. The district court concluded that the petition was successive and dismissed it due to his failure to meet the particular requirements imposed by the amendments to § 2255 regarding successive petitions.

On appeal, the Court of Appeals for the Eleventh Circuit vacated the district court's finding and ruled that, "Whether a petitioner's initial post-conviction motion was filed before or after the AEDPA's effective date or whether the district court's re-characterization of that motion was *sua sponte* or upon the government's motion, a district court's re-characterization of a petitioner's initial post-conviction motion will not be considered a 'first' habeas petition for AEDPA purposes unless the petitioner is given notice of the consequences of such re-characterization." Furthermore, the court noted, "Requiring the district court to ensure that a petitioner realizes the ramifications of a court's decision to convert his post-conviction motion is an appropriate means of apprizing all defendants of the circumstances that may impair or preserve their right to habeas review."

The Eleventh Circuit's decision relied heavily upon similar holding in sister circuits like ***Raineri v. United States***, 233 F.3d 96 (1st Cir. 2000); ***United States v. Miller***, 197 F.3d 644 (3rd Cir. 1999); and ***Adams v. United States***, 155 F.3d 582 (2nd Cir. 1998). Applying those opinions, the Eleventh Circuit in ***Castro*** noted that the critical factor was whether Castro knew the consequences of the district court's decision to re-characterize his motion. According to the court, "much like the same as the litigants in ***Adams***, ***Miller***, ***Henderson***, and ***Raineri***, there was no protocol in place to ensure that O'Ryan Castro had such knowledge . . . It is therefore probable, not just possible, to conclude that he would have mounted a much stronger campaign to defeat the district court's recasting of his Rule 33 motion if he was aware that his subsequent § 2255 petition would face nearly insurmountable scrutiny."

One of the cases relied upon in Castro was the First Circuit's decision in ***Raineri v. United States***, 233 F.3d 96 (1st Cir. 2000). In 1993, Bruce Raineri was sentenced to a ten-year term of incarceration for conspiring to obstruct commerce by robbery involving force or violence, using or carrying a firearm in connection with the conspiracy, and being a felon in possession of a firearm. In 1998, Raineri, acting *pro se*, filed what he termed a "Motion for Correction of Sentence and/or New Trial." He brought the motion pursuant to Fed. R. Crim. P. Rule 35 and/or 33. Finding Rules 33 and 35 inapplicable, the district judge, acting sua sponte, re-characterized Raineri's motion as an application for post-conviction relief under 28 U.S.C. § 2255. Then in 1997 Raineri, still appearing *pro se*, filed a motion under § 2255 to vacate, set aside, or correct sentence. In 1999, however, another district judge ruled that the recasted 1998 motion counted as a habeas petition for AEDPA purposes, and that therefore the pending petition was a second or successive petition under the statute.

On appeal, the Court of Appeals for the First Circuit, relying as the *Castro* Court did on the *Adams* and *Miller* decisions, concluded that, "the district court erred in deeming the current pleading a 'second or successive' habeas petition." In so holding, the court frankly stated, "Let us be perfectly clear. We do not doubt that the district court, in re-characterizing the petitioner's pleading, was endeavoring to treat a *pro se* litigant fairly. We applaud that solicitude. But, because the court act *sua sponte* and without any advance notice to the petitioner, we cannot treat the earlier pleading as a 'first' habeas petition for AEDPA purposes." Thus the First Circuit held, "when a district court, acting *sua sponte*, converts a post-conviction motion filed under some other statute into a section 2255 petition without notice and an opportunity to be heard (or in the alternative, the pleader's consent), the re-characterized motion ordinarily will not count as a 'first' habeas petition sufficient to trigger AEDPA's gatekeeping requirement."

The First Circuit's holding in ***Raineri*** nearly mirrors the substance of the Eleventh Circuit's opinion in ***Castro***. Both Circuits were also disinclined to adopt the more broadly sweeping

requirements established in ***Adams*** and ***Miller***. Though ***Adams*** and ***Miller***, like ***Castro*** and ***Raineri***, declined to consider re-characterized motions as successive, the Second and Third Circuits placed specific and stringent demands upon judges, virtually preventing them from re-characterizing motions in any circumstance. The First Circuit felt those broad rules burden the district courts with a new protocol that does not ameliorate the central problem, and further noted that "there are times, even after AEDPA, when re-characterization will be to a *pro se* litigant's benefit, or in the interests of justice, or otherwise plainly warranted." Even so, the decisions in ***Castro***, ***Raineri***, ***Adams***, and ***Miller*** collectively represent the opinion in almost all Circuits that re-characterized post-convictions motions will not be deemed successive for AEDPA purposes. Indeed, only one Circuit had held otherwise, and as the fore-mentioned cases note, that position is probably untenable at this point, and likely to be reversed in time.

The only Circuit which has held re-characterized motions to be successive was also the first Circuit to address the issue. In ***Tolliver v. United States***, 97 F.3d 89 (5th Cir. 1996), the Fifth Circuit denied a petitioner's motion for authorization to file a successive § 2255 motion. Sylvester Tolliver was convicted in 1993 of using or carrying a firearm in relation to a drug crime. In 1998, Tolliver filed a motion to dismiss his conviction. Over Tolliver's objections, the district court construed his motion as a § 2255 motion and granted relief. Tolliver then sought authorization, as required under AEDPA, to file a successive § 2255 motion since his earlier petition had been re-characterized as such and thus barred him from filing a second post-conviction motion. In response, the Fifth Circuit stated, "While Tolliver objected to the district court's construing it as a § 2255 motion, there is nothing else it could be. Consequently, Tolliver has exercised his first § 2255 motion . . ." In addition, the court denied Tolliver's request for authorization to file a successive § 2255 motion.

The ***Tolliver*** case stands as the single exception among the Circuits that otherwise deem re-characterized motions insufficient to count as successive for AEDPA purposes. The decision has come under fire from its sister circuits, and the anomaly is most likely attributable to the fact that ***Tolliver*** was the first case to address the issue.

As noted in ***Castro***, ***Tolliver*** was decided two years before ***Adams*** and almost immediately after AEDPA's enactment. The Third Circuit in ***Miller*** further suggested that the Fifth Circuit may have decided the case differently had it had the benefit of the Second Circuit's discussion in ***Adams***, a sound argument since every Circuit to decide the issue since ***Tolliver*** has been so persuaded. Perhaps the most scathing criticism of the ***Tolliver*** holding, however, comes in ***Raineri***, where the First Circuit deemed the ruling "a perverse result" where "a judge who strives to balance the scales of justice by construing *pro se* prisoner pleadings liberally risks precluding the pleader from any opportunity to litigate potentially meritorious claims." Thus, despite the Fifth Circuit exception, almost any Circuit Court addressing the issue, perhaps including the Fifth Circuit, would now hold that re-characterized post-conviction motions are not rendered "second or successive" for AEDPA purposes.

This rule, as applied to re-characterized post-conviction motions, is with some variation almost uniformly accepted in all American Circuits. If you or your client have a similar issue, please feel free to contact NLPA for a current analysis of the law in your Circuit.

ANOTHER NLPA VICTORY

RECENT SENTENCING ASSISTANCE AGAIN PROVES HELPFUL

It is not always easy or prudent to publicly announce our successes. Each day, each week, and each month, we are successful with some cases in which we are involved. Though our website outlines some of our successful cases, we use this vehicle to spotlight recent victories.

This past month, NLPA was asked by local counsel to assist in the sentencing of a defendant in the Eastern District of North Carolina. The defendant, who for obvious reasons will remain nameless, was charged with conspiracy to possess with intent to distribute ecstacy. Although the indictment listed only one count, the defendant was facing a maximum of twenty years and a $1,000,000 fine.

Represented by Thomas Goolsby of the Currin Law Firm, the defendant was looking at a calculated base offense level due to the amount of drugs of Level 28. When adjustments for acceptance of responsibility and specific offense characteristics were calculated, the defendant was