Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

March 9, 2006

Mr. John Gregory Lambros
Prisoner ID 00436-124
U.S. Penitentiary Leavenworth
P.O. Box 1000
Leavenworth, KS 66047-1000

Re: John Gregory Lambros
v. United States
No. 05-9611

Dear Mr. Lambros:

The petition for a writ of certiorari in the above entitled case was filed on March 2, 2006 and placed on the docket March 9, 2006 as No. 05-9611.

A form is enclosed for notifying opposing counsel that the case was docketed.

Sincerely,

William K. Suter, Clerk

by

Gail Johnson
Case Analyst

Enclosures

February 28, 2006

John Gregory Lambros
Reg. No. 00436-124
U.S. Penitentiary Leavenworth
P.O. Box 1000
Leavenworth, Kansas 66048-1000

CLERK
1 First Street, N.E.
Supreme Court of the United States
Washington, D.C. 20543
U.S. CERTIFIED MAIL NO. 7002-2410-0001-3730-0657

Dear Clerk:

Attached for **FILING** is one (1) original of the following documents:

1. MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS;

2. AFFIDAVIT AND DECLARATION IN SUPPORT OF THE MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS;

3. PETITION FOR A WRIT OF CERTIORARI;

4. PROOF OF SERVICE.

Please note that I am an inmate confined in an institution and not represented by counsel.

Thank you in advance for your consideration 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 documents/motions where mailed within a stamped addressed envelope from the U.S.P. Leavenworth Mailroom on this **28th DAY OF FEBRUARY, 2006,** to:

1. Clerk, U.S. Supreme Court, as addressed above;
2. Office of the Solicitor General, U.S. Department of Justice, Room 5614, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001.

John Gregory Lambros, Pro Se

No. 05-9611

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2005 - 2006

JOHN GREGORY LAMBROS — PETITIONER

(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT - No. 05-3383

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

JOHN GREGORY LAMBROS, Pro Se

(Your Name)

Reg. No. 00436-124, U.S. Penitentiary Leavenworth

P.O. BOX 1000

(Address)

Leavenworth, Kansas 66048-1000

(City, State, Zip Code)

No Phone - Web site: www.brazilboycott.org

(Phone Number)

QUESTION PRESENTED

Whether the Eighth Circuit Court of Appeals erred, in square conflict with decisions of this Court and other Circuits, by summarily affirming the district court's dismissal of this pro se action requesting a Certificate of Appealability (COA) pursuant to Title 28 U.S.C. § 2253(c)(2) where:

(1) The court of appeals failed to apply any of the considerations set out by this Court in Castro v. U.S., 157 L.Ed.2d 778 (2003), when the district court recharacterized a pro se motion under Rule 33 of the Federal Rules of Criminal Procedure as a first motion for postconviction relief under § 2255 absent of the required warnings, to determine whether such a dismissal precludes an unconstitutional suspension of the Writ of Habeas Corpus, as embodied within the U.S. Constitution, Art. 1, § 9, cl. 2.

(2) The district court and court of appeals abused their discretion by failing to apply the threshold standard of adjudication in granting a Certificate of Appealability as entitled in Miller-El. v. Cockrell, 123 S.Ct. 1029 (2003), and whether;

(3) The application of the question of "DEBATABILITY" regarding the Miller-El considerations to the action supports a determination that the action requires the certification of an appeal.

LIST OF PARTIES

[xx] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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Questions Presented: **Whether the Eighth Circuit Court of Appeals erred, in square conflict with decisions of this Court and other Circuits, by summarily affirming the district court's dismissal of this Pro Se action requesting a Certificate of Appealability (COA) pursuant to Title 28 U.S.C. § 2253(c)(2) where:** ..... 15.

Question Number One (1):

THE COURT OF APPEALS FAILED TO APPLY ANY OF THE CONSIDERATIONS SET OUT BY THIS COURT IN CASTRO vs. U.S., 157 L.Ed.2d 778 (2003), WHEN THE DISTRICT COURT RECHARACTERIZED A PRO SE MOTION UNDER RULE 33 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE AS A FIRST MOTION FOR POSTCONVICTION RELIEF UNDER § 2255 ABSENT OF THE REQUIRED WARNINGS, TO DETERMINE WHETHER SUCH A DISMISSAL PRE-CLUDES AN UNCONSTITUTIONAL SUSPENSION OF THE WRIT OF HABEAS CORPUS, AS EMBODIED WITHIN THE U.S. CONSTITUTION, ART. I, § 9, cl. 2? ..... 15.

Question Number Two (2):

THE DISTRICT COURT AND COURT OF APPEALS ABUSED THEIR DISCRETION

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PUBLICATIONS:

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[XX] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A. to the petition and is the November 01, 2005, denial of Certificate of Appealability.

[ ] reported at _____; or, (Eighth Circuit No. 05-3383)
[ ] has been designated for publication but is not yet reported; or,
[XX] is unpublished.

The opinion of the United States district court appears at Appendix B,C,D to the petition and is : Appendix B is August 16, 2005, Denial of COA; Appendix C is July 11, 2005, Order denying various motions; Appendix D is November 15, 2004, ORDER denying Rule 60(b) Motion.

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[XX] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[XX] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was November 01, 2005.

[ ] No petition for rehearing was timely filed in my case.

[XX] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: December 15, 2005, and a copy of the order denying rehearing appears at Appendix E.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

15.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following constitutional and statutory provisions:

a. U.S. Constitution, Article I, Section 9, clause 2, "The Privilege of the Writ of Habeas Corpus shall not be suspended, ...";

b. U.S. Constitution, Amendment VI;

c. Title 28 U.S.C. § 2253(c)(2);

d. Title 28 U.S.C. § 2255.

16.

STATEMENT OF THE CASE

1. This case involves the failure of the district court and the Eighth Ciruit Court of Appeals to apply any of the considerations set out by this Court in CASTRO vs. U.S., 157 L.Ed.2d 778 (2003), when the district court recharacterized Petitioners' Pro Se motions under Rule 33 of the Federal Rules of Criminal Procedure as a first motion for postconviction relief under § 2255, absent of the required warnings.

2. RETROACTIVE APPLICATION OF CASTRO vs. U.S.: The open question in the Circuit as to whether CASTRO applies RETROACTIVELY was not addressed by the courts, an issue which must be resolved prior to any consideration of such a claim on the merits. See, CASPARI vs. BOHLEN, 127 L.Ed.2d 236, 245 (1994)("But if the State does argue that the defendant seeks the benefit of a new rule of constitutional law, the court must apply TEAGUE [TEAGUE vs. LANE, 103 L.Ed.2d 334 (1989)] before considering the merits of the claim.")(emphasis added) Also see, November 3, 2004, "OPPOSITION OF U.S. ..." by Jeffrey Paulsen, Asst. U.S. Attorney, Page 4, "Second, CASTRO does not help Lambros because there is no indication that the Supreme Court intended it to apply retroactively to petitions that were re-characterized long before CASTRO was decided." Petitioner requested both the district and circuit court to grant a certificate of appealability (COA) as to the application of retroactivity in CASTRO, as other circuits have applied CASTRO retroactively.

3. Petitioner Lambros was indicted in May 1989 of multiple counts stemming from a cocaine conspiracy, U.S. vs. LAMBROS, Criminal File No. 4-89-82(5), District of Minnesota.

4. Petitioner was arrested in May 1991 and convicted of all four counts in January 1993. Petitioner received concurrent sentences on life without

parole on Count I, ten years each of Counts II and III, and thirty years on Count VI. Senior District Court Judge Diana E. Murphy conducted the trial and sentencing.

5. On September 8, 1995, the United States Court of Appeals for the Eighth Circuit vacated and remanded on Count I, the life sentence without parole. See, U.S. vs. LAMBROS, 65 F.3d 698 (8th Cir. 1995).

6. Petitioner was appointed counsel to represent him at re-sentencing on January 17, 1996. See, APPENDIX F. (Docket Sheet entry 143)

7. Petitioner was re-sentenced on February 10, 1997, by District Court Judge Robert Renner. See, APPENDIX F. (Docket Sheet entry 188)

8. Between September 8, 1995 and February 10, 1997, a period of about eighteen (18) months, Petitioner offered for filing to the Clerk of the District Court forty (40) Pro Se Motions, letters and other documents.

9. The Clerk of the Court filed each of Petitioner's Pro Se Motions, letters and other documents. Each of said filingf appear on the docket sheet of the District Court, docket sheet entries 136 through 184, in Case No Cr. 4-89-82(5). See, APPENDIX F.

10. Petitoner's appointed attorney DID NOT help in the preparation of any of said forty filings, nor did Petitioner's attorney offer any type of WARNING OR ADVISE AS TO RISKS associated with the filing of said forty filings. Seventeen (17) of these Pro Se filings were denominated "motions" by the Clerk of the Court. Eleven (11) of these forty filings were docketed as "letters." The remaining twelve (12) of these Pro Se filings were variously named by the Clerk of the Court. All forty, motions/letters/etc., were filed and Judge Renner DID NOT instruct the Clerk to not file any of these forty documents. The docket sheet proves that appointed counsel never once attempted to resubmit, withdraw, augment, or in any other way address these forty Pro Se submissions by Petitioner Lambros. Judge Renner never instructed the Clerk to RETURN any of Petitioner Lambros' Pro Se submissions to Petitioner Lambros.

18.

11. Petitioner Lambros' re-sentencing attorney was not appointed by the Court to represent Petitioner within § 2255 Habeas Corpus proceedings and could not represent Petitioner without Petitioner's approval. Petitioner did not give permission to his attorney to represent him within § 2255 proceedings, as the attorney could not raise a claim of "INEFFECTIVE ASSISTANCE" against herself. A claim of "INEFFECTIVE ASSISTANCE" with regard to an issue is "DISTINCT" from any claim concerning the underlying issue itself, "both in nature and in the requisite elements of proof." See, KIMMELMAN vs. MORRISON, 91 L.Ed.2d 305, 318-319 (1986); MOLINA vs. RISON, 886 F.2d 1124, 1130 (9th Cir. 1989). Ineffective assistance claims are not to be raised on direct appeal, but presented pursuant to § 2255. See, U.S. vs. THOMPSON, 972 F.2d 201, 204 (8th Cir. 1992); U.S. vs. BROWN, 183 F.3d 740, 743 (8th Cir. 1999).

12. On February 10, 1997, the Honorable Robert G. Renner re-sentenced Petitioner. The February 10, 1997, RESENTENCING TRANSCRIPTS clearly state:

> "Despite the limited nature of these proceedings, the defendant has interposed numerous motions and supporting papers requesting relief from resentencing. ..... The defendant has informally suggested that these motions be considered under **Federal Rule of Criminal Procedure 33** as, quote, new trial, end quote, motions. .... Therefore, with the exception of certain preliminary matters, defendant's motions will be treated as arising under **28 United States Code, Section 2255**, and subject to the statute - - - I am sorry - - - the strictures of that statute." (emphasis added)

See, Pages 4 and 5 of February 10, 1997, RESENTENCING TRANSCRIPTS.

> "Your Honor, when you were speaking now, you said that **ALL THE MOTIONS** that are filed to date are being considered under **§ 2255?"** (emphasis added) [By: Petitioner Lambros]
>
> "THE COURT: That's what I said, Yes."
>
> "Okay. And you are saying none of them are under **RULE 33?**" (emphasis added)
>
> "THE COURT: Yes."
>
> "Okay. I would like to read from you **RULE 33**, and again I would like to reemphasize the interest of justice facet of

> **RULE 33**, which I believe this Court is denying me the due process of, and a motion for a new trial based on the grounds of newly discovered evidence may be made only before or within two years after - - the key word - - final judgment. Today is the final judgment, your Honor. So I believe all the motions are valid **RULE 33** Motions, and I would like to continue under that - - under those pretenses. Is it proper for me to ask you to **RECONSIDER** that at this point in time or no? (emphasis added)
>
> THE COURT: I assume you have asked me that. If that's what you want to place of record, I recognize that as being your position."

See, Pages 19 and 20 of February 10, 1997, RESENTENCING TRANSCRIPTS.

13. The Honorable Judge Renner, speaking sua sponte, decides that Petitioner Lambros is proceeding Pro Se as to the motions and supporting papers filed by Petitioner, when the Court announces:

> "... **the defendant shall be permitted to address the court regarding its (sic) various motions.** At the conclusion, the Government shall be allowed sufficient time to respond. The **PARTIES** shall not exceed one-half hour to present **their arguments.** Defendant's attorney, Colia Ceisel, shall be allowed to address the court at the conclusion of the Government's remarks." (emphasis added)

See, Page 7 of February 10, 1997, RESENTENCING TRANSCRIPTS. Again, Petitioner Lambros' attorney was not appointed to represent him within § 2255 proceedings. Judge Renner clearly stated that Petitioner Lambros was a **"PARTIES"** [Party] to the various motions and gave him one-half hour to present his arguments.

14. Petitioner Lambros is found addressing the February 10, 1997, re-sentencing court on forty-three (43) pages of the transcripts and Petitioner's attorney is found addressing the re-sentencing Court on twenty (20) pages of the transcripts. Petitioner Lambros fills 809 lines of the re-sentencing transcript, while Petitioner's attorney fills only 236 lines of transcript. The transcript and the words of the District Court decides Petitioner is proceeding PRO SE as

to the motions filed, "... the defendant shall be permitted to address the court regarding its (sic) various motions." (Page 7, Re-sentencing Transcripts) "**Its**" is referring to Petitioner Lambros.

15. Petitioner Lambros and Petitioner's attorney came to the February 10, 1997, re-sentencing hearing ignorant of the Court's decision to purportedly convert Petitioner's PRO SE motions and documents into a § 2255 Habeas Corpus. No notice was filed by the government or the Court as to there intent to recharacterize Petitioner Lambros' PRO SE Rule 33 Motions to a § 2255.

16. Petitioner Lambros could not know all of his § 2255 Habeas Corpus issues until the conclusion of the February 10, 1997, re-sentencing hearing, direct appeal of the re-sentencing hearing, and the Writ of Certiorari pursued by appointed counsel, generating § 2255 issues. The nature of these § 2255 issues were in the FUTURE when the District Court recharacterized the Rule 33 Motions into a § 2255 Motion.

17. Petitioner Lambros' attorney informed him after the February 10, 1997, re-sentencing that he would be able to file another Title 28 U.S.C. Section 2255. This was false information by Petitioner's attorney. In fact, Petitioner's attorney would not [refused] raise issues Petitioner Lambros requested within his appeal from re-sentencing on February 10, 1997, nor issues the Court INSTRUCTED Petitioner's attorney to raise - general jury verdict issue. See, Page 64, February 10, 1997, RESENTENCING TRANSCRIPT, "THE COURT: That's a matter of argument that you will raise with the Court of Appeals if there is an appeal."

18. Petitioner Lambros' attorney would not raise the recharacterization of Petitioner's Rule 33 Motions into a § 2255 within the direct appeal of the February 10, 1997 re-sentencing, stating she was not appointed to represent Petitioner within § 2255 proceedings. On September 2, 1997, the Eighth Circuit Court of Appeals affirmed the judgment imposing the new sentence on Count I, the February 10, 1997, re-sentencing.

19. On April 21, 1997, Petitioner filed his first § 2255 Motion with the district court. On May 1, 1997 the district court denied the § 2255 motion as a successive petition for which the required certification had not been obtained. On July 31, 1997, the district court denied Petitioner's motion for reconsideration and for leave to amend.

20. The Eighth Circuit offers an excellent overview of the history of Petitioner Lambros' case, including the Rule 33 Motion recharacterization into a single § 2255 through the two (2) subsequent § 2255's filed by Petitioner Lambros that were dismissed by the district court because the Eighth Circuit had not authorized their filings. See, U.S. vs. LAMBROS, 404 F.3d 1034, 1035 (8th Cir. 2005). See, APPENDIX G.

21. On December 15, 2003, this Court **"PROMULGATES A NEW PROCEDURE"** [CASTRO, at 789] to be followed if a district court desires to recharacterize motions, Rule 33, to count against a PRO SE litigant as a first § 2255 motion in later litigation. Therefore, protecting the right of the great writ of habeas corpus, as embodied within the constitution itself, Art. I, § 9, cl. 2. CASTRO vs. U.S., 157 L.Ed.2d 778 (2003), which held:

> (1) A District Court could not recharacterize a pro se litigant's motion as a first motion for postconviction relief under § 2255, unless the court (a) notified the litigant that the court intended to recharacterize the pleading, (b) warned the litigant that this recharacterization meant that any subsequent § 2255 motion would be subject to § 2255's restrictions on "second or successive" motions, and (c) provided the litigant an opportunity to withdraw the motion or to amend it so that it contained all the § 2255 claims that the litigant believed that the litigant had.
>
> (2) Because of the absence of the required warnings, the prisoner's 1994 motion could not be considered a first § 2255 motion.
>
> (3) Thus, the prisoner's 1997 motion could not be considered "second or successive" for § 2255 purposes.

CASTRO, 157 L.Ed.2d at 779.

22. On September 07, 2004, Petitioner Lambros filed a "Motion to Vacate February 10, 1997, Judgment Due to Intervening Change in Controlling Law, CASTRO vs. U.S., 157 L.Ed.2d 778 (2003), Under Any One of Three Separate Subsections of Federal Rules of Civil Procedure 60(b) - Sections One (1), Five (5), and Six (6)." Petitioner offered the above information to the District Court.

23. On November 03, 2004, the Government responded to Petitioner's September 7, 2004 Motion admitting, "At the time of Lambros' February 10, 1997, resentencing, Lambros filed a number of motions, purportedly under Rule 33 of the Federal Rules of Criminal Procedure. Finding that the motions would be untimely under Rule 33, Judge Renner decided to follow existing case law and treat the motion as a petition under 28 U.S.C. § 2255." Also, the Government stated that CASTRO does not help Petitioner for two reasons: (a) CASTRO only applies to PRO SE petitioners, "Although Lambros apparently filed the motions in question on his own, his attorney knew about them and was there to advise Lambros about the ramifications of Judge Renner's treatment of the motions as a section 2255 petition." (b) "CASTRO does not help Lambros because there is no indication that the Supreme Court intended it to apply **RETROACTIVELY** ... While Lambros relies on a contrary Seventh Circuit case, WILLIAMS vs. U.S., 366 F.3d 438 (7th Cir. 2004) (per curiam), that per curiam decision contains no analysis of the issue and is not binding on this Court." (emphasis added)

24. The government argued in its November 3, 2004 "OPPOSITION", as quoted in the above paragraph, that **"NONRETROACTIVITY BARRED THE RELIEF SOUGHT BY PETITIONER LAMBROS."** (emphasis added) This Court has clearly stated that **RETROACTIVITY** issue must be resolved prior to any consideration of such a claim on the merits, if the government argues that the defendant seeks the benefit of a new rule of constitutional law, the court must apply TEAGUE before considering the merits of the claim. See, CASPARI vs. BOHLEN, 127 L.Ed.2d 236, 245 (1994).

25. On November 15, 2004, filed November 16, 2004, the district court issued an ORDER denying Petitioner Lambros' September 07, 2004, Motion to Vacate due to this Court's ruling in CASTRO. See, APPENDIX D. The District Court stated on page three (3) of its ORDER:

> "At defendant's re-sentencing hearing on February 10, 1997, the district court did recharacterize defendant's purported Rule 33 motions as a § 2255 motion. However, defendant was not a pro se litigant, but rather was represented by attorney Colia Ceisel at the re-sentencing. '[B]ecause he was represented by counsel and thus in the same position as other litigants who rely on their attorneys,' defendant was not entitled to a legal explanation from the court. BURGS vs. JOHNSON COUNTY, 79 F.3d 701, 702 (8th Cir. 1996) (Supreme Court holding that a pro se prisoner's notice of appeal is timely filed upon delivery to prison authorities does not apply to prisoner represented by counsel, even though prisoner filed notice pro se). The CASTRO rule therefore does not apply to defendant."

Judge Doty did not address the open question as to whether CASTRO applies **RETROACTIVELY**, an issue which must be resolved prior to any consideration of such a claim on the merits. See, CASPARI vs. BOHLEN, 127 L.Ed.2d 236, 245 (1994). Also see, Paragraph 24 (Government argued retroactivity in OPPOSITION)

26. On July 28, 2005, Petitioner Lambros filed his Notice of Appeal and Motion For Issuance of Certificate of Appealability (COA) to the District Court. Petitioner Lambros offered excellent reasons for the court to grant a COA:

a. BURGS vs. JOHNSON COUNTY, is invalid law, as the Seventh Circuit overruled U.S. vs. KIMBERLIN, 898 F.2d 1262, 1265 (7th Cir. 1990) in U.S. vs. CRAIG, 368 F.3d 738, 740 (7th Cir. 2004), the case the Eighth Circuit relied on in its decision in BURGS. "A court ought not pencil 'unrepresented' or any extra word into the text of Rule 4(c), ..." See, CRAIG, 368 F.3d at 740. The Fourth Circuit also reached the opposite conclusion of the Eighth Circuit's holding in BURGS when it stated, "The Supreme Court did not expressly limit HOUSTON'S application to cases involving **UNREPRESENTED PRISONERS**, and the Seventh

Circuit apparently did not consider the possibility that even **REPRESENTED PRISONERS** might be prevented from timely communicating with counsel." (emphasis added) See, U.S. vs. MOORE, 24 F.3d 624, 626 (4th Cir. 1994)("We are aware that the Seventh Circuit has addressed this precise issue and reached the opposite conclusion. See, U.S. vs. KIMBERLIN, 898 F.2d 1262 ...." Id. at 626)

b. Other Circuit Court's have ruled and applied CASTRO **RETROACTIVELY.** See, WILLIAMS vs. U.S., 366 F.3d 438, 439 (7th Cir. 2004); SIMON vs. U.S., 359 F.3d 139 (2nd Cir. 2004). Also see, September 06, 2005 ruling by Third Circuit IN RE WAGNER, 421 F.3d 275 (3rd Cir. 275 (3rd Cir. 2005). See, APPENDIX H.

27. On August 16, 2005, the district court issued an ORDER denying Petitioner Lambros' application for a certificate of appealability (COA). See, APPENDIX B. Judge Doty clearly stated "The court found **NO MERIT** in defendant's Rule 60(b) and Rule 59(e) motions filed in September and November 2004, respectively. Therefore, the court determines that the defendant has not made a 'substantial showing of the denial of a constitutional right' as required by 28 U.S.C. § 2253 (c)(2)." (emphasis added) The Court clearly stated, **"NO MERIT."** The Court did not apply the rule of TEAGUE vs. LANE, 103 L.Ed.2d 334 (1989) as to the new procedural rule introduced by this Court in CASTRO, applying **RETROACTIVELY.** TEAGUE carved out an exception for "'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." See, SAFFLE vs. PARKS, 494 U.S. 484, 494-495, 108 L.Ed.2d 415, 429 (1990)(quoting TEAGUE, 489 U.S. at 311). New Procedural rules that qualify under this exception are retroactively applicable and can be raised through a timely Rule 60(b) Motion. This Court has never expressly held that TEAGUE applies to Rule 60(b) Motions, thus an open question. The district court was **"OBLIGATED TO APPLY THE TEAGUE RULE TO THE DEFENDANT'S [Petitioner Lambros'] CLAIM."**, as the Government argued that CASTRO was not **RETROACTIVE.** See, CASPARI vs. BOHLEN, 127 L.Ed.2d 236, 245

(1994)(emphasis added) ("But if the State does argue that the defendant seeks the benefit of a new rule of constitutional law, the court **MUST** apply TEAGUE **BEFORE CONSIDERING THE MERITS OF THE CLAIM."** CASPARI, 127 L.Ed.2d at 245) (emphasis added) PLEASE NOTE: Of interest, is the fact Judge Doty granted a certificate of appealability on July 19, 2004 in U.S. vs. STOLTZ, 325 F.Supp 2d 982, 990-991 (D.Minn. July 19, 2004), as to the RETROACTIVITY in BLAKELY vs. WASHINGTON, 159 L.Ed.2d 403 (2004). Also see, LOHR vs. U.S., 336 F.Supp. 2d 930, 933-934 (D.Minn. September 7, 2004)("Thus, whether Petitioner can even allege a BLAKELY claim is a threshold issue which **MUST BE RESOLVED PRIOR TO ANY CONSIDERATION OF SUCH A CLAIM ON THE MERITS.")** (emphasis added).

28. On August 30, 2005, Petitioner Lambros submitted his Motion for Issuance of Certificate of Appealability to the Eighth Circuit Court of Appeals, outlining how the district court has inhibited Petitioner's right to petition for a WRIT OF HABEAS CORPUS, a right that is embodied within the United States Constitution, Art. I, § 9, cl. 2. Petitioner Lambros again stated reasonable jurist could differ, or would find debatable or wrong the district court's denial of the following claims:

a. CASTRO applies to Pro Se litigants who are represented by counsel;

b. CASTRO applies RETROACTIVELY;

c. Rule 60(b) Motions are not the equivalent of a successive habeas petition and can be ruled upon by the District Court without precertification by the Eighth Circuit.

29. On November 01, 2005, the U.S. Court of Appeals for the Eighth Circuit entered JUDGMENT denying Petitioner Lambros' application for a certificate of appealability (COA). See, APPENDIX A.

30. On November 9, 2005, Petitioner filed for "REHEARING" that was denied on December 15, 2005. See, APPENDIX E. The court of appeals did not articulate standards, criteria or procedures in there rulings.

REASONS FOR GRANTING THE PETITION

Certiorari should be granted to clarify once and for all, the criteria, if any, that must be applied to distinguish between represented and unrepresented prisoners who file PRO SE motions with the district court that are recharacterized as a first motion for postconviction relief under § 2255, absent of the required warnings, as required in CASTRO vs. U.S., 157 L.Ed.2d 778 (2003).

Also, clarification as to the application of the rule of TEAGUE vs. LANE, 103 L.Ed.2d 334 (1989), in governing CASTRO, as this Court stated "The Court promulgates a new procedure to be followed if the district court desires the recharacterized motion to count against the pro se litigant as a first § 2255 motion in later litigation." CASTRO, 157 L.Ed.2d at 789 (Justice Scalia and Thomas, Separate Opinion) TEAGUE by its terms applies only to procedural rules. See, BOUSLEY vs. U.S., 140 L.Ed.2d 828, 838 (1998). This Court has accordingly stated that it is the TEAGUE doctrine that constrains the application of Rule 60(b) in habeas cases. AGOSTINI vs. FELTON, 521 U.S. 203, 239, 138 L.Ed.2d 391, 424 (1997) ("Intervening developments in the law by themselves rarely constitute the extraordinary circumstances required for relief under Rule 60(b)(6), the only remaining avenue for relief on this basis from judgment lacking any prospective component. See, 12 J. Moore et al., Moore's Federal Practice § 60.48[5][b], p. 60-181 (3rd Ed. 1997)(collecting cases)"(emphasis added). Cf. BROWDER vs. DIRECTOR, 434 U.S. 257, 54 L.Ed.2d 521 (1978) (expressly holding that Fed.R.Civ.P. 52 and 59 apply on habeas and suggesting that Rule 60(b) applies as well). Both the district court and the circuit court refused to address the "threshold matter" of retroactivity under TEAGUE, which must be addressed "before considering the merits of [a] claim." CASPARI vs. BOHLEN, 127 L.Ed.2d 236, 245 (1994).

No meaningful explanation for the dismissal of this action was provided by any court at any level in this case, as the court of appeals' decision ignores rewritten and revised law without regard to whether a prisoner is represented by counsel. This Court did not expressly limit CASTRO'S application to cases involving unrepresented prisoners.

The need to clarify the law in the application of CASTRO vs. U.S., requires that the Court grant the petition in this case.

ARGUMENT

WHETHER THE EIGHTH CIRCUIT COURT OF APPEALS ERRED, IN SQUARE CONFLICT WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS, BY SUMMARILY AFFIRMING THE DISTRICT COURT'S DISMISSAL OF THIS PRO SE ACTION REQUESTING A CERTIFICATE OF APPEALABILITY (COA) PURSUANT TO TITLE 28 U.S.C. § 2253(c)(2) WHERE:

I. THE COURT OF APPEALS FAILED TO APPLY ANY OF THE CONSIDERATIONS SET OUT BY THIS COURT IN CASTRO vs. U.S., 157 L.Ed.2d 778 (2003), WHEN THE DISTRICT COURT RECHARACTERIZED A PRO SE MOTION UNDER RULE 33 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE AS A FIRST MOTION FOR POSTCONVICTION RELIEF UNDER § 2255 ABSENT OF THE REQUIRED WARNINGS, TO DETERMINE WHETHER SUCH A DISMISSAL PRECLUDES AN UNCONSTITUTIONAL SUSPENSION OF THE WRIT OF HABEAS CORPUS, AS EMBODIED WITHIN THE U.S. CONSTITUTION, ART. I, § 9, cl. 2 ?

1. The record clearly establishes the following facts that precluded Petitioner Lambros his right to petition for a WRIT OF HABEAS CORPUS, Title 28 U.S.C. § 2255, a right that is embodied within the United States Constitution, Art. I, § 9, cl. 2:

a. "At defendant's [Lambros'] re-sentencing hearing on

February 10, 1997, the district court did recharacterize defendant's purported Rule 33 motions as a § 2255." See, ORDER, November 16, 2004, Page 3. APPENDIX D. (By: Judge Doty)

b. "CASTRO does not help Lambros for two reasons. First CASTRO applies only to pro se petitioners. Lambros was not pro se at the time of the February 10, 1997 resentencing. He was represented by attorney Colia Ceisel, an experienced criminal defense attorney. **ALTHOUGH LAMBROS APPARENTLY FILED THE MOTIONS IN QUESTION ON HIS OWN,** his attorney knew about them and was there to advise Lambros about the ramification of Judge Renner's treatment of the motions as a section 2255 petition. ..... Second, CASTRO does not ..... apply retroactively ...." (emphasis added) See, November 03, 2004, "OPPOSITION OF THE U.S. TO PETITIONER'S MOTION TO VACATE FEBRUARY 10, 1997 JUDGMENT," Pages 3 and 4.

c. "Shortly before his resentencing, Lambros filed numerous motions which he characterized as arising under Fed.R.Crim.P. 33. This Court construed those motions under 28 U.S.C. § 2255. Had the Court considered the motions as Lambros had preferred, under Rule 33, it would have dismissed them as untimely." (emphasis added) See, September 30, 1997, ORDER by Judge Robert G. Renner who re-sentenced Petitioner Lambros on February 10, 1997. APPENDIX I.

2. On February 10, 1997, the Honorable Judge Robert Renner did not apply the precedent of the Eighth Circuit Court of Appeals in U.S. vs. CORNELIUS, 968 F.2d 703, 705 (8th Cir. 1992), in which he was bound to hear **"RELEVANT EVIDENCE ON REMAND:"**

> "Once a sentence has been vacated or a finding related to sentencing has been reversed and the case has been remanded for resentencing, the district court can hear **ANY RELEVANT EVIDENCE ON THAT ISSUE THAT IT COULD HAVE HEARD AT THE FIRST HEARING."** (emphasis added)

Therefore, the Court erred when it recharacterized Petitioner Lambros' Rule 33 Motions, letters, and various documents into Petitioners' first § 2255, at re-

sentencing. Judge Renner admits within his September 30, 1997, ORDER, "Had the Court considered the motions as Lambros had preferred, under Rule 33, it would have dismissed them as **UNTIMELY**." Id. at Page 1, APPENDIX I. (emphasis added) Judge Renner was bound by Circuit Court precedent to "hear any relevant evidence on that issue that it could have heard at the first hearing." CORNELIUS, 968 F.2d at 705 (8th Cir. 1992). (emphasis added)

3. In fact, this Court has held that the double jeopardy clause does not bar re-sentencing on counts which were affirmed on appeal, when the sentences on the other counts have been vacated. See, PENNSYLVANIA vs. GOLDHAMMER, 88 L.Ed.2d 183 (1985). Therefore, ANY RELEVANT EVIDENCE presented to the re-sentencing court on February 10, 1997, could of affected ALL counts Petitioner was sentenced on and Petitioner could of been re-sentenced on ALL counts if relevant evidence required the Court to do same. See, FEDERAL SENTENCING AND FORFEITURE GUIDE, Third Edition, Volume I, Page 1, by Attorney HAINES, COLE, and WOLL. Also see, U.S. vs. MORENO-HERNANDEZ, 48 F.3d 1112 (9th Cir. 1995); U.S. vs. CATERINO, 29 F.3d 1390 (9th Cir. 1994)(court was free to consider entire sentencing package).

4. Petitioner filed relevant and timely Rule 33 motions, letters, and affidavits, as per the above stated law. The district court was incorrect as to its theory the motions where "untimely."

5. Petitioner Lambros was acting PRO SE: Petitioner Lambros filed all Rule 33 Motions, legal documents, affidavits, forty (40) filings in all, with the clerk, without the assistance of his court appointed attorney. Petitioner's attorney never offered any type of warning(s) or advise as to risks associated with the filing of the forty (40) "motions." See, Docket Sheet entries 136 thru 184. APPENDIX F. Neither the Court nor Petitioner's counsel advised Petitioner that he could not file PRO SE motions, legal documents and affidavits. Therefore, the Court and Petitioner's counsel **WAIVED** all rights to challenge Petitioner's PRO SE filings. See, JOHNSON vs. ZERBST, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023 (1938)("A waiver is ordinarily an intentional relinquishment or abandonment of

a known right or privilege.") Quoting, NEARY vs. U.S., 998 F.2d 563, 565 (8th Cir. 1993).

6. The District Court and Petitioner's attorney where bound by the the Eighth Circuit rulings as to PRO SE motions filed by represented parties. The Court has held:

a. "A district court has no obligation to entertain PRO SE motions filed by a represented party." See, U.S. vs. AGOFSKY, 20 F.3d 866, 872 (8th Cir. 1994) ... Quoting, ABDULLAH vs. U.S., 240 F.3d 683, 686 (8th Cir. 2001).

b. "In addition, the district court undertook the proper step of forwarding the motion to Abdullah's attorney, thereby giving him notice of the potential basis for relief if he was not already aware of it." ABDULLAH, at 686. (emphasis added)

c. "Noting that a represented party must file pleadings through his attorney, the district court denied the motion without consideration of its contents and instructed the clerk to return the motion to Abdullah's attorney of record." ABDULLAH, 240 F.3d at 685-686. (emphasis added)

d. "It is Eighth Circuit policy not to consider PRO SE filings when appellant is represented by counsel." See, U.S. vs. SCHENK, 983 F.2d 876, 878 fn. 3 (8th Cir. 1993) (listing cases) (Schenk filed a PRO SE motion to file a supplemental brief raising new issues.) (emphasis added)

Therefore, Petitioner Lambros' February 10, 1997, re-sentencing had a PRO SE component and status before, during, and after the February 10, 1997 re-sentencing, as all of Petitioner Lambros' motions where not rejected and filed by the Clerk and the Court permitted Petitioner to address and argue his motions during re-sentencing for thirty (30) minutes. See, RE-SENTENCING TRANSCRIPTS, February 10, 1997, Page 7.

7. This Petitioner relies upon CASTRO vs. U.S., 157 L.Ed.2d 778, 124 S.Ct. 786 (2003). In CASTRO, this Court held that a federal district court

cannot sua sponte recharacterize a PRO SE litigant's motion as a first § 2255 motion unless it informs the litigant of the consequences of the recharacterization, thereby giving the litigant the opportunity to contest the recharacterization, or to withdraw or amend the motion. This Court enforced the CASTRO ruling in PLILER vs. FORD, 159 L.Ed.2d 338, 349 (2004), by stating:

> "CASTRO dealt with a District Court, of its own volition, taking away a petitioner's desired route - namely, a Federal Rule of Criminal Procedure 33 motion - and transforming it against his will, into a § 2255 motion .... ("Recharacterization .... requires a court deliberately to override the PRO SE litigant's choice of procedural vehicle for his claim.") We recognize that although this practice is often used to help PRO SE petitioners, it could also harm them. .... Because of these competing considerations, we reasoned that the warning would "help the PRO SE litigant understand ... whether he should withdraw or amend his motion [and] whether he should **CONTEST** the recharacterization."

See, PLILER vs. FORD, 159 L.Ed.2d 338, 349-350 (2004). (emphasis added)

8. In PLILER this Court remanded for further proceedings "given the Court of Appeals' concern that respondent **HAD BEEN AFFIRMATIVELY MISLED QUITE APART FROM THE DISTRICT COURT'S FAILURE TO GIVE THE TWO WARNINGS.**" (emphasis added) PLILER involved a Federal District Court's failure to give warnings pursuant to ROSE vs. LUNDY, 71 L.Ed.2d 379 (1982).

9. **WAIVER:** Petitioner Lambros never stated to the district court that he **WAIVED** his right to argue ineffective assistance of counsel involving the February 10, 1997 resentencing and/or any trial issues and sentencing issues from 1993, within a Title 28 U.S.C. § 2255. Therefore, it has been impossible for Petitioner to raise issues within a § 2255 that occurred during the February 10, 1997, re-sentencing and direct appeal of the re-sentencing, nor issues that occurred at his original 1993 - 1994 trial, sentencing and appeal. "Claims of ineffective assistance of counsel generally may not be raised on direct appeal, but rather

are to be first presented in the district court pursuant to § 2255." See, U.S. vs. THOMPSON, 972 F.2d 201, 204 (8th Cir. 1992); U.S. vs. ESPOSITO, 771 F.2d 283, 288 (7th Cir. 1985) ("A motion under § 2255 is ordinarily improper during the pendency of a direct appeal from a conviction."); U.S. vs. BROWN, 183 F.3d 740, 743 (8th Cir. 1999). A claim of "ineffective assistance" with regard to an issue is "distinct" from any claim concerning the underlying issue itself, "both in nature and in the requisite elements of proof." See, KIMMELMAN vs. MORRISON, 91 L.Ed.2d 305, 318-319 (1986); MOLINA vs. RISON, 886 F.2d 1124, 1130 (9th Cir. 1989). Petitioner Lambros' current sentences where imposed **"OUTSIDE THE STATUTORY MAXIMUM."** Also, Petitioner was not fully informed by his attorney nor the court as to the consequences of waiving his one clear full round of Federal Habeas Review - § 2255. Thus, any waiver the district court believes occured, was not KNOWING AND VOLUNTARY, as Petitioner Lambros' **COUNSEL** was ineffective in allowing Petitioner to waive his rights to a § 2255. See, U.S. vs. STEARNS, 68 F.3d 328, 330 (9th Cir. 1995); U.S. vs. PRICE, 95 F.3d 364, 369 (5th Cir. 1996). Therefore, the ineffective assistance claim as to the WAIVER would have to be brought in a § 2255 motion, since it relied on evidence outside the record, thus impossible for Petitioner to raise. Claims of ineffective assistance of counsel can always be raised in a § 2255 regardless of a WAIVER of § 2255 rights. See, U.S. vs. ATTAR, 38 F.3d 727, 731-733 (4th Cir. 1994); U.S. vs. BARAMDYKA, 95 F.3d 840, 844 (9th Cir. 1996)(waiver of appellate rights does not foreclose raising ineffective assistance of counsel claims in a § 2255 motion). Petitioner Lambros' attorney was clearly ineffective, as she did not:

a. Contest the recharacterization of Petitioner's Rule 33 Motions, letters, and affidavits at re-sentencing nor appeal; thus

b. Lacking notice of the consequences of a recharacterization.

Petitioner Lambros believes his relationship with counsel was like Judas repres-

enting Jesus. Petitioner Lambros did not have knowledge of the potential adverse consequences of the district court's recharacterization and did not agree to have his Rule 33 motions recharacterized. Again, Petitioner's attorney was clearly ineffective for not advising Petitioner as to the consequences of the recharacterization and requesting the district court to withdraw all of Petitioner's motions rather than have them recharacterized.

10. **CLOSING THE DOOR:** The District Court closed the door - extinguishing Petitioner Lambros' - **ONE CLEAR FULL ROUND OF FEDERAL HABEAS REVIEW** - when the court recharacterized Petitioner's Rule 33 Motions as his first motion for post conviction relief under 28 U.S.C. § 2255, and did not provide Petitioner an opportunity to withdraw or amend his motions. See, CASTRO vs. U.S., 157 L.Ed. 2d 778 (2003). The district court denied Petitioner Lambros his right to one full round for a Writ of Habeas Corpus, a right that is embodied within the United States Constitution, Art. I, § 9, cl. 2, as Petitioner was not informed by the district court nor his appointed attorney that Petitioner's PRO SE Rule 33 Motion(s) recharacterized as a first motion for postconviction relief under § 2255 meant:

(a) that any subsequent § 2255 motion would be subject to § 2255's restrictions on "second or successive" motions; nor

(b) Petitioner Lambros would be prevented from filing ALL the § 2255 claims that he believed he had.

11. Even assuming Petitioner Lambros could waive error arising from the district court, government, and/or his attorney FAILURE to offer the "required warnings," as required in CASTRO, before recharacterization of Rule 33 motions into Petitioner's first §2255, Petitioner's waiver was not "EFFECTIVE" waiver where neither the trial judge nor defense attorney advised Petitioner of the "required warnings", as required in CASTRO. Therefore, Petitioner's waiver was INEFFECTIVE, an error that may only be remedied under § 2255, both because Petitioner's counsel was ineffective in permitting him to waive his right to his

one clear full round of Habeas review when the court recharacterized Petitioner's Rule 33 Motions, letters, and affidavits as his first motion for post conviction relief under § 2255 without providing Petitioner an opportunity to withdraw or amend his motions and in not appealing same, and also because § 2255 expressly makes relief available if "the sentence was in excess of the maximum authorized by law." Petitioner was denied his first § 2255. See, NEARY vs. U.S., 998 F.2d 563, 565-566 (8th Cir. 1993) ("Therefore, even if Neary could waive the govenment's failure to comply with § 851 - a question we do not decide - his waiver was ineffective.").

12. In sum, the summary affirmance of the district court's judgment clearly conflicts with this Court's direction in CASTRO.

II. THE DISTRICT COURT AND COURT OF APPEALS ABUSED THEIR DISCRETION BY FAILING TO APPLY THE THRESHOLD STANDARD OF ADJUDICATION IN GRANTING A CERTIFICATE OF APPEALABILITY (COA) AS ENTITLED IN MILLER-EL vs. COCKRELL, 123 S.Ct. 1029 (2003).

13. The District Court denied Petitioner Lambros' request for a certificate of appealability (COA) on August 16, 2005, stating, "The court found no **MERIT** in defendant's Rule 60(b) and Rule 59(e) motions filed in September and November 2004, respectively. Therefore, the court determines that defendant has not made a "substantial showing of the denial of a constitutional right" as required by 28 U.S.C. § 2253(c)(2)." (emphasis added) See, APPENDIX B. The Eighth Circuit Court of Appeals also denied Petitioner's request for a certificate of appealability (COA) on November 1, 2005. See, APPENDIX A.

14. Petitioner Lambros' claim was, in fact, constitutional in

nature, Section 2255 was not intended to impinge upon prisoners' rights of collateral attack upon their convictions, thus, "in precluding resort to habeas corpus, amounted to an UNCONSTITUTIONAL "suspension" of the writ of habeas corpus." "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it." U.S. Const., Art. I, § 9, cl. 2. See, U.S. vs. HAYMAN, 342 U.S. 205 (1952).

15. The **"SUBJECT"** of Petitioner Lambros' review is the district court's refusal to recognize that Petitioner Lambros has never been allowed to file **HIS FIRST § 2255 MOTION**, thus one full round of federal habeas review. This is exactly what occurred in CASTRO, "The 'subject' of Castro's petition is not the Court of Appeals 'denial of authorization.' It is the lower courts' refusal to recognize that this 2255 motion is his first, not his second. That is a very different question." See, CASTRO vs. U.S., 157 L.Ed.2d at 786.

16. In fact, Petitioner Lambros' claim can be considered STATUTORILY BASED, whether Petitioner's Rule 33 Motions where Petitioner's first Title 28 U.S.C. § 2255 motion for postconviction relief. Therefore, Petitioner Lambros has presented a claim constitution in nature. This Court has stated "statutorily based" claims make "a substantial showing of the denial of a constitutional right, and granted an application for certificate of appealability (COA). See, HOHN vs. U.S., 141 L.Ed.2d 242, 252 (1998). Also see, HOHN vs. U.S., 262 F.3d 811, 814-815 (8th Cir. 2001)(Supreme Court vacated denial of COA by Eighth Circuit because claim was constitutional in nature).

17. Petitioner Lambros also believes that his claims could be considered as violations of his "PROCEDURAL DUE PROCESS RIGHT TO A FAIR TRIAL." See, U.S. Const. Amend. XIV, § 1. See also, KINDER vs. BOWERSOX, 272 F.3d 532, 538 Fn. 5 (8th Cir. 2001). The Eighth Circuit used the above language to meet the requirements of a certificate of appealability (COA), 28 USC § 2253(c)(2).

18. The district court and the Court of Appeals for the Eighth Circuit rejected Petitioner Lambros' constitutional claim(s) on the **MERITS**, before addressing the retroactivity of CASTRO, a threshold matter which must be addressed "before considering the merits of the claim," CASPARI vs. BOHLEN, 127 L.Ed.2d 236, 245 (1994), as the district court stated:

> "At defendant's re-sentencing hearing on February 10, 1997, the district court did recharacterize defendant's purported Rule 33 motions as a § 2255 motion. However, defendant was not a pro se litigant, but rather was represented by attorney Colia Ceisel at re-sentencing." .... The **CASTRO** rule therefore does not apply to defendant." (emphasis added)

See, APPENDIX D, Page 3. (November 15, 2004, Filed November 16, 2004, ORDER)

> "This matter is before the court upon defendant's application for a certificate of appealability. The court found no **MERIT** in defendant's Rule 60(b) and Rule 59(e) motion filed in September and November 2004, respectively. .... defendant's application for a certificate of appealability is denied." (emphasis added)

See, APPENDIX B. (August 16, 2005, ORDER, by Judge Doty)

19. This Court stated in SLACK vs. McDANEIL, 146 L.Ed.2d 542 (2000) and again stated in MILLER-EL vs. COCKRELL, 154 L.Ed.2d 931 (2003), "[w]here a district court has rejected, the constitutional claims on the **MERITS**, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." MILLER-EL, at 950-951. (emphasis added)

20. This Court also stated, "It is consistent with § 2253 that a COA will issue in some instances where there is no certainty of ultimate relief." "We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." See, MILLER-EL, at 950.

37.

21. The Eighth Cirucit Court of Appeals has stated in this action, as per the standards outlined in MILLER-EL, Petitioner Lambros has not presented a question that is DEBATABLE. Again, neither the district court or the court of appeals has made a ruling as to **WHETHER CASTRO APPLIES RETROACTIVELY**, an issue which must be resolved before considering the CASTRO claim on the merits.

WHY HAS THE DISTRICT COURT APPLIED THE ISSUE OF RETROACTIVITY TO OTHER CASES FIRST BEFORE CONSIDERATION OF THE MERITS IN GRANTING COA?

22. The Honorable Judge Doty, the same judge that denied Petitioner Lambros his COA in this action, granted a certificate of appealability (COA) in U.S. vs. STOLTZ, 325 F.Supp.2d 982, 990-991 (D.Minn., July 19, 2004), over one (1) year before Petitioner was denied his COA, to the question:

> "a. Does the decision of the Supreme Court of the United States in BLAKELY vs. WASHINGTON, ... 159 L.Ed.2d 403 (2004), apply **RETROACTIVELY TO COLLATERAL REVIEW OF A CONVICTION OR SENTENCE?"** (emphasis added)

In STOLTZ Judge Doty stated that the RETROACTIVITY met the substantial showing of the denial of a constitutional right within 28 U.S.C. § 2253(c)(2). See, STOLTZ, 325 F.Supp.2d at 990. Also, the Honorable Judge Davis, District of Minnesota agreed with Judge Doty and issued a certificate of appealability (COA) on the same question in LOHR vs. U.S., 336 F.Supp.2d 930, 933-934 (D.Minn. 2004), when he clearly stated **RETROACTIVITY MUST BE RESOLVED PRIOR TO CONSIDERING THE MERITS** and granted a COA on the issue. The court stated:

> "B. Petitioner's Request for a COA ...
>
> 2. Petitioner's BLAKELY Claim
>
> **[4]** Petitioner also seeks to argue a claim pursuant to the Supreme Court's recent ruling in BLAKELY vs. WASHINGTON, ... 159 L.Ed.2d 403 (2004). Petitioner DOES NOT elaborate as to what his claim is, but at this stage it is probably not necessary to know what exactly Petitioner is alleging. **RATHER, IT IS ENOUGH**

> **TO NOTE THAT THERE IS AN OPEN QUESTION IN THIS CIRCUIT, AS TO WHETHER BLAKELY APPLIES RETROACTIVELY TO CONVICTIONS AND SENTENCES ON COLLATERAL REVIEW.** U.S. vs. STOLTZ, 325 F.Supp.2d 982 (D.Minn. 2004). **THUS, WHETHER PETITIONER CAN EVEN ALLEGE A BLAKELY CLAIM IS A THRESHOLD ISSUE WHICH MUST BE RESOLVED PRIOR TO ANY CONSIDERATION OF SUCH A CLAIM ON THE MERITS."** (emphasis added)

LOHR, 336 F.Supp.2d at 933 (COA granted on question of law as to RETROACTIVITY) The Eighth Circuit has also allowed the granting of a certificate of appealability (COA) by the District Court to address questions regarding the RETROACTIVITY of RING vs. ARIZONA, 153 L.Ed.2d 556 (2002). RING announced a "new procedural rule.." and the Supreme Court applied the test set out in TEAGUE vs. LANE to decide if RING was retroactive. See, NUNLEY vs. BOWERSOX, 394 F.3d 1079, 1080 (8th Cir.2005).

23. Petitioner Lambros presented the following three (3) issues to the district court and the court of appeals within his certificate of appealability:

> **a. ISSUE ONE (1):** CLEARLY CASTRO vs. U.S., 157 L.Ed.2d 778 (2003) APPLIES TO PRO SE LITIGANTS WHO ARE REPRESENTED BY COUNSEL.

See, July 28, 2005, MOTION FOR COA TO DISTRICT COURT, Page 10; August 30, 2005, MOTION FOR COA TO EIGHTH CIRCUIT COURT OF APPEALS, Page 7.

> **b. ISSUE TWO (2):** CLEARLY CASTRO vs. U.S., 157 L.Ed.2d 778 (2003) **APPLIES RETROACTIVELY.**

See, July 28, 2005, MOTION FOR COA TO DISTRICT COURT, Page 13; August 30, 2005, MOTION FOR COA TO EIGHTH CIRCUIT COURT OF APPEALS, Page 7.

> **c. ISSUE THREE (3):** CLEARLY MOVANT LAMBROS' RULE 60(b) MOTION IS NOT THE EQUIVALENT OF A SUCCESSIVE HABEAS PETITION AND CAN BE RULED UPON BY THE DISTRICT COURT WITHOUT PRE-CERTIFICATION BY THE EIGHT CIRUCIT.

See, July 28, 2005, MOTION FOR COA TO DISTRICT COURT, Page 14; August 30, 2005, MOTION FOR COA TO EIGHTH CIRCUIT COURT OF APPEALS, Page 7. Also see, **APPENDIX J,** (July 28, 2005, Petitioner's Motion for issuance of COA, Pages 1, 10, 11, 12, 13, 14, 15, and 16).

24. In sum, the courts' failed to apply the threshold standard of adjudication in granting Petitioner his COA, as entitled in MILLER-EL.

39.

III. **THE APPLICATION OF THE QUESTION OF "DEBATABILITY" REGARDING THE MILLER-EL CONSIDERATIONS TO THE ACTION SUPPORTS A DETERMINATION THAT THE ACTION REQUIRES THE CERTIFICATION OF AN APPEAL.**

25. This Court made clear in MILLER-EL that whether to grant a COA is intended to be a preliminary inquiry, undertaken before full consideration of the Petitioner's claims. MILLER-EL, 154 L.Ed.2d at 950 (noting that the "threshold [COA] inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it. When the court of appeals sidesteps this process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction.) Id. at 950. (emphasis added)

26. Justice SCALIA, with whom Justice THOMAS joined, clearly stated in CASTRO "The Court promulgates a new procedure to be followed if the district court desires the recharacterized motion to count against ...." CASTRO, 157 L.Ed.2d at 789. (emphasis added)

27. In general, new rules of criminal procedure apply retroactively only in cases which are on direct appeal at the time the rule is announced. See, GRIFFITH vs. KENTUCKY, 93 L.Ed.2d 649 (1978). A new rule is not to be applied retroactively on collateral review unless the rule falls within one of two narrow exceptions: (a) the new rule places certain kinds of primary conduct beyond the power of the criminal lawmaking authority to proscribe, or (b) the new rule requires the observance of "those procedures that .... are implicit in the concept of ordered liberty." TEAGUE vs. LANE, 103 L.Ed.2d 334, 352-356 (1989).

28. The Honorable Judge Doty, clearly stated in U.S. vs. MURPHY, 109 F.Supp.2d 1059, 1063 (D.Minn. 2000), "The applicability of APPRENDI to drug cases raises the question of question of whether this court must **RETROACTIVELY APPLY THE NEW RULE** to defendant's case. ..... **RETROACTIVITY** under TEAGUE is a 'threshold

matter' which must be addressed **'before considering the merits of [a] claim.'** CASPARI vs. BOHLEM, 510 U.S. 383, 389 (1994)." "In this case, although APPRENDI had not yet been decided at the time the government submitted its brief, the government's argument against the **RETROACTIVE** application of JONES logically extends to APPRENDI and therefore **MUST BE ADDRESSED AT THE OUTSET.**" Id. MURPHY, 109 F.Supp.2d at 1063 and 1063 Fn. 2. (emphasis added)

29. Both the District Court and the Court of Appeals should of granted Petitioner Lambros a COA as to the open question in the circuit as to whether CASTRO applies RETROACTIVELY, an issue which must be resolved prior to any consideration of such a claim on the merits. See, U.S. vs. STOLTZ, 325 F. Supp.2d 982, 991 (D.Minn. 2004); LOHR vs. U.S., 336 F.Supp.2d 930, 933-934 (D. Minn. 2004). Both cases granted COA using the same legal standard.

30. The requirement that this Petitioner received effective assistance of counsel at his February 10, 1997 re-sentencing is constitutionally mandated. U.S. CONST. AMEND. VI; REECE vs. GEORGIA, 350 US 85, 90 (1955)("The effective assistance of counsel ... is a constitutional requirement of due process of law."); McMANN vs. RICHARDSON, 397 US 759, 771 & n.14 (1970)("The right to counsel is the right to effective assistance of counsel."). Counsel's failure to act on behalf of the client's best interest deprives the client of effective assistance of counsel. See, U.S. vs. BARBOUR, 813 F.2d 1232, 1234 (D.C. Cir. 1987). Therefore, it is clearly "DEBATABLE" that CASTRO applies to PRO SE litigants who are **MISLED** by represented counsel who fail to give warnings or advise of the risks associated with filing Rule 33 Motions, PRO SE, when the District Court recharacterized the motions as first motion for postconviction relief under Title 28 U.S.C. § 2255 without warning Petitioner that the recharacterization meant that **ANY** subsuquent § 2255 would be subject to § 2255's restrictions on "second or successive" motions, nor provide this Petitioner an opportunity to withdraw his PRO SE motions or amend them to contain all the § 2255 claims that

this Petitioner believed he had. In this case at bar, Petitioner was denied his right to file his first § 2255 to raise his claim of ineffective assistance of counsel as to the February 10, 1997 re-sentencing, as to counsel's failure to act on behalf of Petitioner's best interest.

CONCLUSION

31. Petitioner Lambros' case truly is extraordinary. Not only are the inequities exceptional, but the circumstances - judicial ambush - as Petitioner Lambros' PRO SE Motions filed before his re-sentencing where recharacterized as Petitioner's first § 2255 without warning as required by CASTRO.

32. There remains time to rectify the consequences of the misunderstanding before they become fatal in undermining the public's confidence in the judicial process, as "justice must satisfy the appearance of justice." LILJEBERG vs. HEALTH SERVICES CORP., 486 US 847, 864 (1988). This Court should instruct the Courts below to do so.

33. For the foregoing reasons, certiorari should be granted.

Executed on: **February 28, 2006**

Respectfully submitted,

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

Web site: www.brazilboycott.org

No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2005 - 2006

JOHN GREGORY LAMBROS — PETITIONER
(Your Name)

VS.

UNITED STATES OF AMERICA — RESPONDENT(S)

PROOF OF SERVICE

I, John Gregory Lambros, do swear or declare that on this date, February 28, 20 06, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

OFFICE OF THE SOLICITOR GENERAL
U.S. DEPARTMENT OF JUSTICE, Room 5614
950 Pennsylvania AVenue, N.W.
Washington, DC 20530-0001

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 28, 20 06

(Signature)

John Gregory Lambros

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INDEX OF APPENDICES

APPENDIX A: **November 01, 2005,** U.S. Court of Appeals for the Eighth Circuit, USA vs. LAMBROS, No. 05-3383, JUDGMENT denying Lambros' application for a certificate of appealability (COA).

APPENDIX B: **August 16, 2005,** U.S. District Court for the District of Minnesota, USA vs. LAMBROS, Criminal No. 4-89-82(5)(DSD), ORDER denying Lambros request for a certificate of appealability (COA). The Court stated, "...defendant has not made a 'substantial showing of the denial of a constitutional right' as required by 28 U.S.C. § 2253(c)(2)."

APPENDIX C: **July 11, 2005,** U.S. District Court for the District of Minnesota, USA vs. LAMBROS, Criminal No. 4-89-82(5)(DSD), ORDER denying Lambros' various motions filed.

APPENDIX D: **November 15, 2004, Filed November 16, 2004,** U.S. District Court for the District of Minnesota, USA vs. LAMBROS, Criminal No. 4-89-82(5)(DSD), ORDER denying Lambros' motion to vacate judgment due to intervening change in a controlling law, CASTRO vs. U.S.A., 124 S.Ct. 786 (2003).

APPENDIX E: **December 15, 2005,** United States Court of Appeals for the Eighth Circuit, USA vs. LAMBROS, No. 05-3383, ORDER DENYING PETITION FOR REHEARING AND FOR REHEARING EN BANC.

APPENDIX F. **CRIMINAL DOCKET SHEET,** U.S. vs. JOHN GREGORY LAMBROS, Criminal File No. 4-89-82(5), District of Minnesota, Pages 12 through 17, Docket Entries 132 through 212. (October 14, 1994 thru August 28, 1997)

APPENDIX G: **U.S. vs. LAMBROS, 404 F.3d 1034, 1035 (8th Cir. 2005).** Page 1035 offers an excellent overview of the history of Lambros' case.

APPENDIX H: **December 6, 2005,** letter from Petitioner Lambros to Eighth Circuit Court of Appeals in USA vs. LAMBROS, Appeal No. 05-3383. Petitioner offers "Citation of Supplemental Authority, FRAP 28(j)". See, IN RE WAGNER, 421 F.3d 275 (3rd Cir. 2005).

APPENDIX I: **September 30, 1997, ORDER,** in LAMBROS vs. USA, 4-89-82(5) Criminal; Civil No. 97-942. Order by the Honorable Robert G. Renner who re-sentenced Petitioner Lambros on February 10, 1997.

INDEX OF APPENDICES

(Continued)

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 05-3383

United States of America, *
*
Appellee, *
* Appeal from the United States
v. * District Court for the
* District of Minnesota
John Gregory Lambros, *
*
Appellant. *

Before RILEY, FAGG, and GRUENDER, Circuit Judges

JUDGMENT

Appellant's motion for relief from judgment is hereby denied.

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed.

(5361-010199)

November 1, 2005

Order Entered at the Direction of the Court:

Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

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

United States of America,

Plaintiff,

v. **ORDER**

John Gregory Lambros,

Defendant.

This matter is before the court upon defendant's application for a certificate of appealability.

The court found no merit in defendant's Rule 60(b) and Rule 59(e) motions filed in September and November 2004, respectively. Therefore, the court determines that defendant has not made a "substantial showing of the denial of a constitutional right" as required by 28 U.S.C. § 2253(c)(2). Accordingly, **IT IS HEREBY ORDERED** that defendant's application for a certificate of appealability [Doc. No. 293] is denied.

Dated: August 16, 2005

David S. Doty, Judge
United States District Court

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APPENDIX B.

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

United States of America,

Plaintiff,

v. **ORDER**

John Gregory Lambros,

Defendant.

This matter is before the court upon defendant's motions to stay, for appointment of counsel, for production of records, to clarify that defendant was proceeding pro se on February 10, 1997, to alter or amend the court's order dated November 15, 2004 and for relief from judgment due to a change in controlling law. After a review of the file, record and proceedings in the matter and for the reasons stated, defendant's motions are denied.

I. Motion to Alter or Amend

On November 15, 2004, the court denied defendant's motion "to vacate February 10, 1997, judgment due to intervening change in controlling law." In support of his motion to amend the court's order, defendant repeats the legal arguments already presented to the court in his original motion for relief from judgment. The court finds no reason to depart from its earlier ruling. Therefore, defendant's motion is denied.

II. Motion to Clarify that Defendant was Proceeding Pro Se

Defendant argues that he proceeded pro se during his re-sentencing hearing on February 10, 1997. However, defendant admits, and the record shows, that he "appeared in this District Court with his appointed counsel on February 10, 1997, for re-sentencing." (Def.'s Mot. Clarify, Doc. No. 286, at 2.) Therefore, defendant did not appear pro se. His motion to clarify is denied.

III. Motion for Relief from Judgment

Defendant argues that he is entitled to relief from judgment pursuant to Rule 60(b) "due to intervening change in controlling law, Crawford v. Washington, 158 L. Ed. 2d 177 (March 8, 2004)."

Defendant does not state what judgment or order he seeks relief from, but his reference to allegedly unconstitutional trial proceedings indicates that his motion is a collateral challenge to a federal conviction or sentence. His motion is therefore patently a successive motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255. United States v. Lloyd, 398 F.3d 978, 979-80 (7th Cir. 2005) (filing his motion under § 2255 if substantively within section regardless whether captioned "motion for a new trial, arrest of judgment, mandamus, prohibition, coram nobis, coram vobis, audita querela, certiorari, capias, habeas corpus, ejectment, quare impedit, bill of review, writ of error, or an application for a Get-Out-of-Jail-Card"). Therefore, his motion

APPENDIX C.

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is subject to summary dismissal. See Boyd v. United States, 304 F.3d 813, 814 (8th Cir. 2002) (court should dismiss Rule 60(b) motion construed as successive habeas petition for failure to obtain authorization from court of appeals).[1]

CONCLUSION

Accordingly, **IT IS HEREBY ORDERED** that:

1. Defendant's motion to stay [Doc. No. 281] is denied as moot.

2. Defendant's motion to alter or amend [Doc. No. 283] is denied.

3. Defendant's motion for appointment of counsel [Doc. No. 284] is denied as moot.

4. Defendant's motion for production of records [Doc. No. 285] is denied as moot.

5. Defendant's motion to clarify [Doc. No. 286] is denied.

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[1] Defendant argues that a change in the law warrants relief pursuant to Rule 60(b), citing numerous Eighth Circuit and Supreme Court opinions. However, most of the cases he cites pre-date the Antiterrorism and Effective Death Penalty Act of 1996, which established the limitation on second or successive habeas corpus applications. See 28 U.S.C. § 2255. Furthermore, the language defendant cites from Gonzalez v. Secretary for Department of Corrections, 366 F.3d 1253, 1309 (11th Cir. 2004), appears in a dissenting opinion and does not support his position. See id. at 1309 n. 42 (Tjoflat, J., specially concurring in part and dissenting in part) (Rule 60(b) does not apply to all attacks based upon change in law, but rather those based upon "integrity of a district court's habeas judgment").

APPENDIX C.

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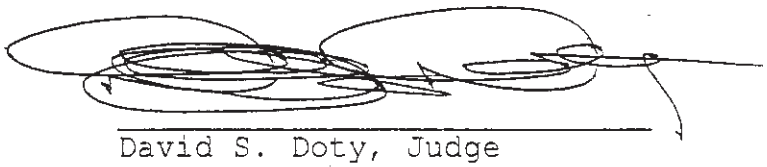
6. Defendant's motion for relief from judgment or order [Doc. No. 287] is dismissed.

Dated: July 11, 2005



David S. Doty, Judge
United States District Court

APPENDIX C.

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

United States of America,

Plaintiff,

v. **ORDER**

John Gregory Lambros,

Defendant.

This matter is before the court upon the motion of defendant John Gregory Lambros to vacate a judgment due to intervening change in controlling law. After a review of the file, record and proceedings in the matter and for the reasons stated, defendant's motion is denied.

BACKGROUND

On January 27, 1994, defendant was sentenced to a term of life imprisonment, along with concurrent terms of 120 and 360 months on the other counts of conviction. On February 10, 1997, defendant was re-sentenced by Senior United States District Judge Robert G. Renner to a term of 360 months imprisonment. Defendant subsequently filed various motions to vacate the judgment and on several occasions unsuccessfully sought relief from the sentence pursuant to 28 U.S.C. § 2255. Defendant's first collateral attack purportedly sought relief pursuant to Rule 33 of the Federal Rules

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of Criminal Procedure, but was construed as a § 2255 motion. Defendant's second attempt was denied both as a successive § 2255 motion and for want of merit. Defendant's third attempt was denied for lack of jurisdiction, because defendant had failed to obtain permission from the court of appeals to file a successive habeas petition, as required by 28 U.S.C. § 2255.[1]

Defendant now moves the court to vacate the February 1997 judgment[2] due to an alleged intervening change in the law. Defendant also requests permission to file an initial § 2255 motion.

DISCUSSION

Defendant argues that a recent United States Supreme Court holding requires this court to vacate Judge Renner's February 1997 judgment and allow defendant to file an initial § 2255 motion. The Supreme Court held that when a district court recharacterizes a pro

---

[1] Defendant has since moved (1) to vacate all judgments and orders by Judge Robert G. Renner pursuant to Fed. R. Civ. P. 60(b)(6), (2) for a certificate of appealability ("COA") of the dismissal of the purported Rule 60(b) motion, (3) to vacate the judgment denying his Rule 60(b) motion due to alleged intervening changes in the law, (4) to alter or amend the order refusing to vacate, pursuant to Fed. R. Civ. P. 59 and (5) for a certificate of appealability ("COA") of the dismissal of the second Rule 60(b) motion.

[2] It is unclear whether defendant requests the court to vacate the re-sentencing judgment or the denial of his Rule 33 motions. However, as described herein, the alleged change in law does not apply to defendant, so no basis exists for either form of relief.

se litigant's motion as a first § 2255 motion, the court must (1) notify the litigant of its intent to recharacterize, (2) warn the litigant that such recharacterization will subject any subsequent § 2255 motion to the "second or successive" restriction and (3) provide the litigant the opportunity to withdraw or amend the motion. Castro v. United States, 124 S. Ct. 786, 792 (2003). At defendant's re-sentencing hearing on February 10, 1997, the district court did recharacterize defendant's purported Rule 33 motions as a § 2255 motion.[3] However, defendant was not a pro se litigant, but rather was represented by attorney Colia Ceisel at the re-sentencing. "[B]ecause he was represented by counsel and thus in the same position as other litigants who rely on their attorneys," defendant was not entitled to a legal explanation from the court. Burgs v. Johnson County, 79 F.3d 701, 702 (8th Cir. 1996) (Supreme Court holding that a pro se prisoner's notice of appeal is timely filed upon delivery to prison authorities does not apply to prisoner represented by counsel, even though prisoner filed notice pro se). The Castro rule therefore does not apply to defendant.

[3] The court reasoned that rather than dismiss defendant's motions as untimely or not directly related to the proceedings, it could address the merits of the motions pursuant to § 2255.

APPENDIX D.

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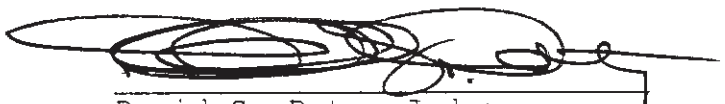
CONCLUSION

Accordingly, **IT IS HEREBY ORDERED** that defendant's motion to vacate judgment due to intervening change in controlling law [Docket No. 275] is denied.

Dated: November 15, 2004



David S. Doty, Judge
United States District Court

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APPENDIX D.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 05-3383

United States of America,	*	
	*	
Appellee,	*	
	*	Order Denying Petition for
vs.	*	Rehearing and for Rehearing
	*	En Banc
John Gregory Lambros,	*	
	*	
Appellant.	*	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

(5128-010199)

December 15, 2005

Order Entered at the Direction of the Court:

Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX E.

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AO 256
(Rev. 2/86)

CRIMINAL DOCKET - U.S. District Court

PO ☐ 0864 | 4 | Assigned 6412 (Disp./Sentence)
Misd. ☐
Felony ☒ | District | Off | Judge/Magistr.

☐ WRIT ☐ JUVENILE ☐ ALIAS*
OFFENSE ON INDEX CARD ▶

U.S. VS. • (LAST, FIRST, MIDDLE) LAMBROS, JOHN GREGORY

Case Filed Mo.	Day	Yr.	Docket No.	Def.
05	17	89	00082	05

No. of Def's ▶ U.S. MAG. CASE NO. ▶

I. CHARGES

U.S. TITLE/SECTION	OFFENSES CHARGED	ORIGINAL COUNTS	DISM. NG
21 846	Conspiracy to possess w/intent to distribute cocaine a a Schedule II controlled drug substance. Ct. I	1	
21 841(a)(1)(b)(1)(B); 18 2(a)	Aiding & abetting; possession w/intent to distribute cocaine, a Schedule II controlled drug substance. Cts. 5, 6 & 8	3	
18 1952(a)(3)(b)(1)	Interstate transportation to promote unlawful drug activity. Ct. 9	1	
		SUPERSEDING COUNTS ▶	

II. KEY DATE

INTERVAL ONE — KEY DATE — EARLIEST OF: ☐ arrest ☐ sum'ns ☐ custody ☐ appears—on complaint

END ONE AND/OR BEGIN TWO (OR RESTART PERIOD TO TRIAL) — KEY DATE 5-17-89 — APPLICABLE: ☒ Indictment filed/unsealed ☐ consent to Magr. trial on complaint ☐ Information ☐ Felony-W/waiver

KEY DATE — a) ☐ 1st appears on pending charge /R40 b) ☐ Receive file R20/21 c) ☐ Supsdg: ☐ Ind't ☐ Inf d) ☐ Order New trial e) ☐ Remand f) ☐ G/P Withdrawn

END INTERVAL TWO — KEY DATE — APPLICABLE: ☐ Dismissal ☐ Pled guilty (☐ After N.G. ☐ After nolo) ☐ Nolo (☐ After N.G. ☐ After nolo) ☐ Trial (voir dire) began ☐ Jury ☐ N.J.

1st appears with or waives counsel	ARRAIGNMENT	1st Trial Ended	RE-TRIAL	2nd Trial Began	DISPOSITION DATE	SENTENCE DATE	☐ PTD ☐ Nolle ☐ Pros.	FINAL CHARGES DISMISSED ☐ or S.T. grounds ☐ W.P. ☐ WOP (☐ on def motion ☐ on gov't motion)

III. MAGISTRATE

		DATE	INITIAL/NO.
Search Warrant	Issued		
	Return		
Summons	Issued		
	Served		
Arrest Warrant Issued			
COMPLAINT ▶			
Date of Arrest	OFFENSE (In Complaint)		

INITIAL APPEARANCE DATE ▶ — INITIAL/NO.

PRELIMINARY EXAMINATION OR REMOVAL HEARING — Date Scheduled ▶ — Date Held ▶

☐ WAIVED ☐ NOT WAIVED — Tape Number

☐ INTERVENING INDICTMENT

OUTCOME:
☐ DISMISSED
☐ HELD FOR GJ OR OTHER PROCEEDING IN THIS DISTRICT
☐ HELD FOR GJ OR OTHER PROCEEDING IN DISTRICT BELOW

Show last names and suffix numbers of other defendants on same indictment/information:
Pebbles (1), Amero (2), Berine (3), Angelo (4), Lemon (6)

RULE 20 ☐ 21 ☐ 40 ☐ In ☐ Out ☐

ATTORNEYS

U.S. Attorney or Asst.
Douglas R. Peterson

Defense: 1 ☒ CJA. 2 ☐ Ret. 3 ☐ Waived. 4 ☐ Self. 5 ☐ Non / Other. 6 ☐ PD. 7 ☐ CD

IV. NAMES & ADDRESSES OF ATTORNEYS, SURETIES, ETC.

Charles Faulkner
Suite 500
701 Fourth Avenue South
Minneapolis, Mn. 55415

For re-sentencing
Colia Ceisel
Ste 500 46 E 4th St
St. Paul, MN 55101

John Lambros
~~Anoka County Jail~~
~~325 East Jackson Street~~
~~Anoka, MN 55303~~
Reg No 00436-124
PO Box 1000
Leavenworth, KS 66048-1000

4/21/97 2255 filed
John Gregory Lambros
#00436-124
USP
P. O. Box 1000
Leavenworth, KS 66048-1000

BAIL • RELEASE

PRE-INDICTMENT
Release Date
☐ Bail Denied ☐ Fugitive ☐ Pers. Rec. ☐ PSA
AMOUNT SET $
Date Set
☐ Bail Not Made
Date Bond Made
Conditions: ☐ 10% Dep. ☐ Surety Bnd ☐ Collateral ☐ 3rd Prty ☐ Other

POST-INDICTMENT
Release Date
☐ Bail Denied ☐ Fugitive ☐ Pers. Rec. ☐ PSA
AMOUNT SET $
Date Set
☐ Bail Not Made
Date Bond Made
Conditions: ☐ 10% Dep. ☐ Surety Bnd ☐ Collateral ☐ 3rd Prty ☐ Other

APPEALS FEE PAYMENTS

FINE AND RESTITUTION PAYMENTS — ☒ Docket Entries Begin On Reverse Side

DATE	RECEIPT NUMBER	C.D. NUMBER	DATE	RECEIPT NUMBER	C.D. NUMBER

APPENDIX F.

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DEM - RGR

DATE	PROCEEDINGS (continued) (Document No.)	V. EXCLUDABLE DELAY (a)	(b)	(c)	(d)
10-14-94	132) TRANSCRIPT OF COMPETENCY HEARING held on 9/20/92 before Mag. Judge Franklin L. Noel (Bruce R. Tiffany-Reporter) (Separate)				
10-27-94	133) TRANSCRIPT OF HEARING ON 1/8/93 before Magistrate Judge J. Earl Cudd (Dawn M. Sampson-Reporter) (Separate)				
10-5-95	134) CERTIFIED COPY OF OPINION FROM EIGHTH CIRCUIT USCA (Wollman) (Ross) (Norris Sheppard Arnold) filed 9/8/95 that the sentence of the district court imposed on count 1 is vacated and remanded for resentencing				
	135) CERTIFIED COPY OF JUDGMENT FROM EIGHTH CIRCUIT USCA that the sentence of the district court imposed on count 1 is vacated and remanded for resentencing; in all other respects the convictions and sentences are affirmed - MANDATE ISSUED 10/2/95 (cc: all counsel) (1 pg) Assigned to Senior Judge Robert G. Renner				
10-16-95	136) AFFIDAVIT of Samuel Haywood Myles regarding re-sentencing of John Gregory Lambros (4 pgs)				
	137) AFFIDAVIT of John H. Bond regarding re-sentencing of John Gregory Lambros (4 pgs)				
10-18-95	138) EXHIBITS filed by John Gregory Lambros regarding re-sentencing (1+ pgs)				
10-23-95	139) EXHIBITS filed by John Gregory Lambros regarding re-sentencing (8 pgs)				
	140) EXHIBITS filed by John Gregory Lambros regarding re-sentencing (11 pgs)				
11-6-95	141) MOTION by John Gregory Lambros for enlargement of time for re-sentencing (11 pgs)				
12-20-95	142) NOITCE of filing petition for certiorari as to John Gregory Lambros (1 pg)				
1-17-96	143) CJA Form 20 Copy 4 (Appointment of Counsel) appointing Colia Ceisel to represent John G. Lambrose for re-sentencing (1 pg)				
1-25-96	144) MEMORANDUM FROM THE U. S. COURT OF APPEALS that an Order of the U. S. Supreme Court has been filed denying certiorari in this case. (1pg)				
2-15-96	145) RE-SENTENCING issues to be raised before re-sentencing of John Gregory Lambros in U. S. vs. John G. Lambros, (submitted by deft, addressed to his attorney Colia Ceisel) (10pgs)				
3-4-96	146) INFORMATION/DOCUMENTS for the Courts consideration during the re-sentencing of John Gregory Lambros, submitted by deft (41pgs)				

APPENDIX F.

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Interval (per Section II) | Start Date / End Date | Ltr. Code | Total Days

DATE	PROCEEDINGS (continued) (Document No.)	V. EXCLUDABLE DELAY (a) (b) (c) (d)
3-18-96	147) MOTION by John Lambros to bar past criminal offenses in the re-sentencing, that will be used to enhance current sentence and place dft in a career offender status due to double jeopardy challenges (18 pgs)	
4-3-96	148) NOTICE OF PAYMENT IN FULL RECEIVED, $200.00 spec assmnt	
4-05-96	149) NEWLY DISCOVERED INFORMATION AS TO THE OBSTRUCTION OF JUSTICE AND PROSECUTIONAL MISCONDUCT BY MINNESOTA U. S. ASSISTANT ATTORNEY DOUGLAS RAY PETERSON submitted by deft Lambros (18pgs)	
5-9-96	150) PETITION by John Lambros for evidentiary hearing and clarification as to cause of arrest in Brazil on 5/17/91 to determine if prison time in Brazil counts towards count 1 in resentencing or towards parole violation (4+ pgs)	
5-17-96	151) MOTION by John Lambros to vacate denial of federal benefits in count 1 of resentencing (4 pgs)	
6-17-96	152) MOTION by John Lambros to order polygraph testing and questioning of U.S. Department of State and U.S. Department of Justice (13+ pgs)	
	153) LETTER from Colia Ceisel requesting psychiatric evaluation of John Lambros (1 pg)	
	154) AFFIDAVIT of Colia Ceisel (4 pgs)	
	155) ORDER (RGR/6/13/96) that Dr. William Logan be admitted to Leavenworth for the purposes of conducting a psychiatric exam of John Lambros (cc: all counsel,BOP) (1 pg)	
6-27-96	156) LETTER by John Gregory Lambros re re-sentencing (2 pgs)	
6-28-96	157) LETTER by John Gregory Lambros re re-sentencing (8 pgs)	
7-5-96	158) MOTION by John Lambrose for prelminary injunction (4 pgs)	
7-8-96	159) LETTER from John Lambros re re-sentencing (33 pgs)	
	160) LETTER from John Lambros re re-sentencing (7 pgs)	
7-11-96	161) MOTION by John Lambros requesting Court to order Margaret Murphy, U.S. Dept. of State General Counsel, U.S. Embassy in Brasillia, Brazil, to show cause why sheshould not be punished for contempt (5 pgs)	
7-11-96	162) LETTER from John Lambros re re-sentencing (7 pgs)	
7-22-96	163) LETTER from John Lambros re re-sentencing (4 pgs)	
8-1-96	164) LETTER from John Lambrose re re-sentencing (8 pgs)	
8-5-96	165) LETTER from John Lambrose re re-sentencing (2 pgs)	

59.

Interval (per Section II) | Start Date / End Date | Ltr. Code | Total Days

DATE	PROCEEDINGS (continued) (Document No.)	V. EXCLUDABLE DELAY (a)	(b)	(c)	(d)
8-19-96	166) MOTION by John Gregory Lambros requesting the interview and subpoena of Julianne McKinney and Harland Girard (14 pgs)				
9-3-96	167) MOTION by John Lambros for determination of status on count 1 before resentencing (11 pgs)				
9-9-96	168) MOTION by John Lambros for evidentiary hearing as to the willful and knowing conspiracy by AUSA Douglas Peterson and individuals as to the violation of fraud, false statements perury and false declarations before a court or grand jury (16 pgs)				
9-16-96	169) MOTION by John Lambros requesting "totality of the circumstances" test for the determining whetherthe BOP Program Statement No. 5100.00 applies (4 pgs)				
9-23-96	170) LETTER from John Lambros to Clerk of Court dated 8/20/96 (7 pgs)				
	171) MOTION by John Lambros requesting evidentiary hearing as to defense counsel's failure to conduct pretrial investigation thus ineffective assistance of counsel as to the torture and forced implantation of Lambros in Brazil (3 pgs)				
	172) MOTION by John Lambros requesting evidentiary hearing as to the use of dft Lambros' previous arrest and confinement in jail having no connection with or relation to count 1 being offered to the jury that is against the Rules of Evidence 28 USC 404 (2 pgs)				
9-24-96	173) MOTION by John Lambros requesting finding as to the unconsitutional extradition treaty bewteen the USA and Brazil so as tocomply with Rule 32(b)(2) and 32(c)(1) in the preparation of the PSI (6 pgs)				
10-1-96	174) ORDER (RGR) that the BOP shall cause such boxes as Dft shall designate as "legal materials" to be transported to Dft's resentencing hearing (cc: all counsel,BOP,USM) (1 pg)				
10-2-96	175) MOTION by John Lambros re transportation of legal materail for use at his sentencing hearing (1 pg)				
10-7-96	176) ADMISSIBLE EVIDENCE by John Lambros as to radiopaque objects within the skull of John Lambros for competency hearing and resentencing (4 pgs)				
11-12-96	177) Subpoena of expert witnesses John St. Clair Akwei, Texe Marrs, Whitley Streiber, Norman Carl Rabin and Catholic Cardeal Dom Jose Freiero Falcao for the competency hearing and the resentencing of John Gregory Lambros (17 pgs)				

APPENDIX F.

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Interval (per Section II) | Start Date / End Date | Ltr. Code | Total Days

DATE	PROCEEDINGS (continued) (Document No.)	V. EXCLUDABLE DELAY (a)	(b)	(c)	(d)
11-18-96	178) MOTION by John Lambros to vacate count 1 due to the Court's, US Atty and dft's counsel influence on dft Lambros' decision not to plead nolo contendere or plead guilty (5 pgs)				
11-20-96	179) LETTER from John Labros to AUSA re resentencing, newly discovered information re US Army "depatterning/ grid rooms" known as the "box" or "white room" (2 pgs)				
	180) LETTER from John Lambros to his atty and PO re resentencing and the preparation of PSI (7 pgs)				
12-09-96	181) NOTICE from John Lambros that resentencing on Count 1 will be illegally imposed unless he is eligible for parole under 18 U.S.C. 4205(b)(1) and entitled to good-time and work-time credits under 4161 & 4162 (3pgs)				
12-23-96	182) MOTION by John Lambros requesting reversal of Count 1 due to Margaret Murphy not obeying the January 11, 1993 subpoena of Judge D. Murphy to testify and supply documents in the trial of deft John Gregory Lambros (4pgs)				
1-24-97	183) LETTER REQUEST by deft to Judge Renner requesting the Court hold hearing to determine compentence for resentencing (5pgs+attachments-Ltr fr Colia F. Ceisel, Branded by the Security Police, Savages, Science and Citations of brain-computer technology, Electrical Stimulation of the Human Brain) (Separate)				
1-30-97	184) MOTION FOR A NEW TRIAL ON COUNT I by deft (6pgs)				
2-6-97	185) POSITION of dft with respect to sentencing factors (3 pgs)				
2-7-97	186) MOTION by deft for sentencing outside the applicable guideline range (2pgs)				
	187) REQUEST OF DEFT to allow his parents to address the Court regarding competency (2pgs)				
2-10-97	188) MINUTES (Judge Robert G. Renner) Resentencing as to John Gregory Lambros of count 1 only; custody of BOP for 360 months without parole as to count 1; count 1 is to be served concurrently with sentences in counts 2, 3 and 4; supevised release for 8 years; $50 spec assmnt; all other conditions set forth in the original sentence imposed on 1/27/94 remain in effect; remanded to USM; motion for new trial and downward departure denied (1 pg)				
2-11-97	189) Copy of MEMO from Atty Jeffrey L. Orren to Atty Colia Ceisel re competency of John G. Lambros (4 pgs)				
	190) LETTER from William S. Logan, M.D. to Atty Colia Ceisel re competency of John G. Lambros (1 pg)				
	191) LETTER from William S. Logan, M.D. to Atty Colia Ceisel re competency of John G. Lambros (15 pgs)				

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Interval (per Section II) | Start Date / End Date | Ltr. Code | Total Days

DATE	PROCEEDINGS (continued) (Document No.)	V. EXCLUDABLE DELAY (a)	(b)	(c)	(d)
2-11-97	192) LETTER from Atty Timothy Roberts to Atty Colia Ceisel re medical condition of John G. Lambros (4 pgs)				
	193) AMENDED JUDGMENT in a Criminal Case as to John Gregory Lambros (Senior Judge Robert G. Renner) (copies distr'd) (4 pgs)				
2-12-97	194) LETTER TO JUDGE RENNER from deft Lambros (2pgs)				
2-19-97	195) RESENTENCING MEMORANDUM (Judge Renner) (copies dist'd) (11pgs)				
2/20/97	196) NOTICE OF APPEAL to the 8th Circuit USCA byr John Lambros from Judge Renner's 2/11/97 amended judgment. (3pgs) rb (cc: all counsel)				
2/20/97	---) Notification to the 8th Circuit that 2 certified copies of all pleadings being appealed were sent.				
3-20-97	197) TRANSCRIPT of Proceedings on 2/10/97 before Judge Robert G. Renner (Court Reporter: Barbara J. Eggerth, Ray J. Lerschen & Associates) (separate)				
3-31-97	198)DESIGNATED CLERK'S RECORD as to John Gregory Lambros (1+ pgs)				
04/21/97	199) Deft's pro se motion for appointment of counse. 2pgs				
	200) Deft's pro se motion to vacate set, aside, or correct sentence. (cc: AUSA, Civl Clerk) 1pg				
	Civil #97-942 RGR assigned for statistical purposes only.				
	201) Deft's pro se memorandum in support of 28:2255 motion. (cc:AUSA & Civil-Clerk) 96pgs				
	Original file forwarded to Judge Renner				
5/2/97	202) SUPPLEMENTAL CLERK'S RECORD as to John Gregory Lambros Forwarded three copies plus updated docket sheets to 8th Circuit.				
5/1/97	203) ORDER (RGR) that statute requires this petition be certified by the Eighth Circuit to contain either outcome-determinative, newly-discovered evidence, or a new rule of constitutional law made retroactively applicable to collateral challenges by the Supreme Court. 28USC2255(4). A review of the docket indicates that Petitioner has failed to comply with this requirement. Alternatively, if the Court is not correct in determining this to be second or successive petition, the Court finds that it is without merit for the reasons stated in its February 19, 1997 Order. (cc: USA, deft) (1pg)				

APPENDIX F.

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Interval (per Section II) | Start Date / End Date | Ltr. Code | Total Days

DATE	PROCEEDINGS (continued) (Document No.)	V. EXCLUDABLE DELAY (a) (b) (c) (d)
5-08-97	204) COPY OF "NOTICE OF DEFAULT" in John Gregory Lambros (Lien Claimant) vs. Federative Republic of Brazil, et al (Lien Debtors) by deft John Gregory Lambros (15pgs)	
5-12-97	205) MOTION FOR RECONSIDERATION AND ALTER AND AMEND RULE 59(e) by deft John Gregory Lambros (13pgs)	
6-04-97	206) AMENDED JUDGMENT returned executed on 3/3/97 & deft delvd to USP at Leavenworth, KS (4pgs)	
6-23-97	207) COPY OF DEMAND FOR PAYMENT, Addendum to Lien, in Commerical Lien Not a Lis Pendens Lien by deft Lambros (10pgs)	
7-7-97	208) MOTION by John Gregory Lambros to amend 2255 motion under Fed.R.Civ.P. 15(a) (3 pgs)	
7-14-97	209) ADDENDUM TO AMENDMENT of 2255 motion by deft (5pgs)	
8-01-97	210) ORDER (RGR/7/31/97) that Petitioner's present motions for reconsideration and leave to amend are DENIED. In addition, the petitioner's extraneous filings are DENIED. (1pg) (cc: counsel)	
8-28-97	211) NOTICE OF APPEAL by deft to Eighth Circuit Court of Appeals from the final judgment entered in this cause on 8/1/97 by Judge Renner (1pg)	
	DELIVERED TWO CERTIFIED AND ONE UNCERTIFIED COPIES OF Notice of Appeal, Order and docket entries to the Eighth Circuit Court of Appeals (files not sent at this time)	
8-28-97	212) MOTION FOR ISSUANCE OF CERTIFICATE OF APPEALABILITY/ PROBABLE CAUSE (12pgs) (forwarded to Judge Renner)	

63.

Interval (per Section II) | Start Date / End Date | Ltr. Code | Total Days

3. **Criminal Law** ⇐1668(1)
Habeas Corpus ⇐894.1

Inmates may not bypass the authorization requirement for filing a second or successive motion to vacate or habeas petition by purporting to invoke some other procedure. 28 U.S.C.A. §§ 2244(b)(3), 2254, 2255.

4. **Criminal Law** ⇐1073
Habeas Corpus ⇐818

A certificate of appealability (COA) is required to appeal the denial of any motion that effectively or ultimately seeks habeas corpus relief or the grant of a motion to vacate. 28 U.S.C.A. §§ 2253(c), 2254, 2255.

5. **Criminal Law** ⇐1668(3)

Defendant's motion to alter or amend judgment, seeking to amend an order denying a motion for relief from judgment, which sought relief from the denial of a motion to vacate, was required to be construed as a successive motion to vacate, requiring authorization from the Court of Appeals, since it ultimately sought to resurrect the denial of the prior motion to vacate. 28 U.S.C.A. § 2255; Fed.Rules Civ.Proc.Rules 59(e), 60(b), 28 U.S.C.A.

John Gregory Lambros, pro se.

Jeffrey S. Paulsen, Assistant U.S. Attorney, of Minneapolis, Minnesota, for appellee.

Before BYE, McMILLIAN, and MELLOY, Circuit Judges.

PER CURIAM.

Federal prisoner John Gregory Lambros appeals the district court's[1] order denying his Fed.R.Civ.P. 59(e) motion to alter or amend the district court's order denying his Fed.R.Civ.P. 60(b) challenge to the denial of a previous Rule 60(b) motion. In that previous Rule 60(b) motion, Lambros challenged the 1997 denial of his 28 U.S.C. § 2255 motion attacking his drug convictions. For the reasons stated below, we dismiss the appeal.

In 1993, a jury convicted Lambros of four cocaine-related offenses, including a conspiracy count. On appeal, this court vacated the sentence on the conspiracy count, remanded for resentencing on that count, and affirmed the conviction in all other respects. *See United States v. Lambros*, 65 F.3d 698 (8th Cir.1995), *cert. denied*, 516 U.S. 1082, 116 S.Ct. 796, 133 L.Ed.2d 744 (1996). On remand, Lambros filed multiple new trial motions pursuant to Fed.R.Crim.P. 33. The district court treated the new trial motions as a single § 2255 motion and denied all the claims. Lambros appealed the 360–month prison term to which he was resentenced. This court affirmed. *See United States v. Lambros*, No. 97–1553, 1997 WL 538013 (8th Cir. Sept.2, 1997) (unpublished per curiam), *cert. denied*, 522 U.S. 1065, 118 S.Ct. 731, 139 L.Ed.2d 669 (1998). Two subsequent § 2255 motions filed by Lambros were dismissed by the district court because this court had not authorized their filing. *See* 28 U.S.C. §§ 2255 and 2244.

In 2001, Lambros filed a Rule 60(b) motion to vacate all of the previous judgments of the district court related to the denial of habeas relief. Construing the motion as a successive application for § 2255 relief, the district court denied relief because Lambros had not received authorization to file another § 2255 motion. This court affirmed. *See United States v. Lambros*, 40 Fed.Appx. 316 (8th Cir.2002) (unpublished per curiam), *cert. denied*, 537 U.S. 1195, 123 S.Ct. 1255, 154 L.Ed.2d 1032 (2003).

1. The Honorable David S. Doty, United States District Judge for the District of Minnesota.

December 6, 2005

John Gregory Lambros
Reg. No. 00436-124
U.S. Penitentiary Leavenworth
P.O. Box 1000
Leavenworth, Kansas 66048-1000

CLERK OF THE COURT
U.S. Court of Appeals for the Eighth Circuit
24.329 Thomas F. Eagleton U.S. CourtHouse
111 South Tenth Street
St. Louis, MO. 63102-1116
U.S. CERTIFIED MAIL NO. 7002-2410-0001-3729-9166

RE: USA vs. LAMBROS, Appeal No. 05-3383 - FRAP 28(j) - CITATION OF SUPPLEMENTAL AUTHORITY.

Dear Clerk of the Court:

As per FRAP 28(j) "Citation of Supplemental Authority" and this Court's IOP-III-I(2), I am requesting to call the Court's attention to an intervening case that was decided by the U.S. Court of Appeals for the Third Circuit on September 06, 2005, that has just become available to the U.S.P. Leavenworth Library due to new clerical inmates within the law library:

IN RE WAGNER, 421 F.3d 275 (3rd Cir. 2005)

REASONS FOR SUPPLEMENTAL CITATION:

On Page 5 of Lambros' "PETITION FOR REHEARING AND/OR PETITION FOR REHEARING EN BANC," filed on November 9, 2005, Lambros raised the following issue:

II. CASTRO vs. U.S., 157 L.Ed.2d 778 (2003) APPLIES RETROACTIVELY

The Third Circuit applied CASTRO vs. U.S., RETROACTIVELY within IN RE WAGNER, 421 F.3d 275 (2005):

> "Over the past decade [April 1995 thru 2001], Wagner has filed four motions in the District Court for post-conviction relief. The District Court denied Wagner's first two motions on the merits. This Court affirmed. However under CASTRO, neither of these documents are properly viewed as motions under §2255." Id. at 278.
>
> "... we hold that Wagner is entitled to file a motion pursuant to §2255. Accordingly, the District Court's order denying Wagner's Third and Fourth Motion as second or successive § 2255 motions are vacated." Id. at 278.

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APPENDIX H.

See, EXHIBIT A (Time line of four (4) motions filed by Wagner, IN RE WAGNER, 421 F.3d 275 (3rd Cir. 2005)

Thank you in advance for directing this letter to Circuit Judges Riley, Fagg, and Gruender.

Respectfully submitted,

John Gregory Lambros, Pro Se

CERTIFICATE OF SERVICE

I declare under the penalty of perjury that a true and correct copy of this letter was mailed within a stamped addressed envelope from the USP Leavenworth legal mail-box or mailroom on this **6th DAY OF DECEMBER, 2005, to:**

1. The Clerk of the Court, as addressed above. One (1) original and five (5) copies;

2. Jeffrey S. Paulsen, Attorney; Office of the U.S. Attorney, 600 U.S. Courthouse, 300 South Fourth Street, Minneapolis, Minnesota 55415.

John Gregory Lambros, Pro Se

66.

PROCEDURAL TIME LINE OF MOTIONS FILED IN:

IN RE WAGNER, 421 F.3d 275 (3rd Cir. 2005)

1. WAGNER sentenced on February 28, 1994.

2. No direct appeal filed by WAGNER.

3. **FIRST MOTION:** WAGNER filed his first motion in late 1994 or early 1995. It is unclear as to the statute the first motion was filed under. The District Court denied WAGNER's first motion on the merits on April 24, 1995. On July 24, 1996, the Third Circuit affirmed the denial.

4. **SECOND MOTION:** WAGNER filed a Rule 60(b)(6) Motion in October 1996, and the District Court RECHARACTERIZED the motion under 28 USC § 2255. The District Court denied the motion on the merits on October 31, 1996.

5. **THIRD MOTION:** WAGNER filed a Title 28 USC § 2255 motion on May 6, 1997. The District Court denied, no date offered. On September 18, 1997, the Third Circuit entered an order denying a certificate of appealability.

6. **FOURTH MOTION:** WAGNER filed a 28 USC §2255 in 2001. No date offered. District Court denied.

7. **INSTANT PROCEEDING:** WAGNER filed under 28 USC §2244 to the Third Circuit Court of Appeals, on October 2003. WAGNER requested the impact of the U.S. Supreme Court decision, CASTRO vs. U.S., 157 L.Ed.2d 778 (2003), as to the filing of the above four (4) motions.

8. The Third Circuit held: The First and Second motion can not be properly viewed as motions under § 2255, due to CASTRO. WAGNER's Third Motion was not a second § 2255 and his Fourth Motion was not a successive § 2255 motion.

9. The Third Circuit has applied CASTRO **RETROACTIVELY** in this action.

John Gregory Lambros, Pro Se
Date: December 6, 2005
Reg. No. 00436-124
U.S. Penitentiary Leavenworth
P.O. Box 1000
Leavenworth, Kansas 66048-1000

6 X.

EXHIBIT A

APPENDIX H.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

JOHN GREGORY LAMBROS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Criminal No. 4-89-82(05)
Civil No. 97-942
ORDER

JOHN GREGORY LAMBROS, *pro se*.

ORDER

John Gregory Lambros was convicted of drug trafficking offenses including conspiracy to distribute cocaine. Subsequently, the Eighth Circuit Court of Appeals affirmed all convictions, but vacated the life sentence imposed on Count I and remanded for resentencing. The Court of Appeals found that while a life sentence was permissible, it was not mandatory as the sentencing Court had believed. On February 19, 1997, this Court resentenced Lambros.[1]

Shortly before his resentencing, Lambros filed numerous motions which he characterized as arising under Fed. R. Crim. P. 33. This Court construed those motions under 28 U.S.C. § 2255. Had the Court considered the motions as Lambros had preferred, under Rule 33, it would have dismissed them as untimely. Instead, the Court resolved the motions under § 2255 because the claims Lambros raised constituted collateral challenges to convictions for which he was

[1] On September 2, 1997, the Eighth Circuit Court of Appeals affirmed the judgment imposing the new sentence on Count I.

FILED 9-30-97
FRANCIS E. DOSAL, CLERK
JUDGMENT ENTD.
DEPUTY CLERK

APPENDIX I.

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incarcerated or for which incarceration was imminent (on Count I).[2] In its resentencing memorandum of February 19, 1997, the Court found that Lambros's arguments lacked merit and denied the motions.

On April 21, 1997, Lambros filed a motion pursuant to § 2255. On May 1, 1997, the Court denied the motion as a successive petition for which the required certification had not been obtained, and because it raised the same issues previously determined by the Court on February 19, 1997, to be without merit. On July 31, 1997, the Court denied petitioner's motions for reconsideration and for leave to amend. Presently before the Court is Lambros's motion for issuance of a certificate of appealability.

When Lambros filed the § 2255 motion in April, this Court deemed it successive and did not construe it as a request for a certificate of appealability. At that time this Court believed that certificates of appealability could only issue from the Court of Appeals. Subsequently, The Eighth Circuit Court of Appeals held in Tiedeman v. Benson, 1997 WL 437181 (8th Cir.), that district court judges have authority to issue certificates of appealability.

If the Court had considered Lambros's April motion as a request for certificate of appealability, it would have denied the motion. A certificate of appealability is warranted only if the petitioner makes a "substantial showing of a denial of a constitutional right." Id.; 28 U.S.C. § 2253. This Court had already determined the issues raised in the April motion on the merits and found no claims rising to the level of a constitutional violation. See Resentencing Memorandum, February 19, 1997. Accordingly, Lambros's present motion for a certificate of appealability,

---

[2] The Court agreed with the view expressed in U.S. v. DiBernardo, 880 F.2d 1216, 1226 (11th Cir. 1989).

which the Court construes as relating to the motions filed in February and construed under § 2255, is DENIED.[3]

Dated: September 30, 1997.

Robert G. Renner
United States District Court

[3] The § 2255 motion filed by Lambros on April 21, 1997, after his resentencing, is a successive petition. As this Court stated in its order of May 1, 1997, a second or successive petition must be certified by the Court of Appeals to contain either outcome-determinative, newly-discovered evidence, or a new rule of constitutional law made retroactively applicable by the Supreme Court to collateral challenges. See 28 U.S.C. § 2255.

JULY 28, 2005

John Gregory Lambros
Reg. No. 00436-124
U.S. Penitentiary Leavenworth
P.O. Box 1000
Leavenworth, Kansas 66048-1000 USA
Web site: www.brazilboycott.org

CLERK OF THE COURT
United States District Court
202 U.S. Courthouse
300 South Fourth Street
Minneapolis, Minnesota 55415
U.S. CERTIFIED MAIL NO. 7002-2410-0001-3729-6349

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

Dear Clerk:

Attached for **FILING** in the above-entitled action is one (1) original and one (1) copy of:

1. NOTICE OF APPEAL, dated July 28, 2005;

2. MOTION FOR ISSUANCE OF CERTIFICATE OF APPEALABILITY, dated July 28, 2005.

I have mailed copy of the above motions to the U.S. Attorney's Office.

Thank you in advance for your continued assistance in this matter, I am .....

Sincerely yours,

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 documents/motions were mailed within a stamped addressed envelope from the USP Leavenworth legal-mail box/room on this **28th DAY OF JULY, 2005,** to:

1. Jeffrey S. Paulsen, Attorney; Office of the U.S. Attorney, 600 U.S. Courthouse, 300 South Fourth STreet, Minneapolis, Minnesota 55415;

2. The Clerk of the District Court, as addressed above.

John Gregory Lambros, Pro Se

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APPENDIX J.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

JOHN GREGORY LAMBROS,	*	**CRIMINAL NO. 4-89-82(5)(DSD)**
Petitioner,	*	
vs.	*	**Civil No. NO NUMBER ASSIGNED**
UNITED STATES OF AMERICA,	*	
Respondent.	*	**AFFIDAVIT FORM.**

MOTION FOR ISSUANCE OF CERTIFICATE OF APPEALABILITY

Now comes Petitioner/Movant, JOHN GREGORY LAMBROS, Pro Se, (hereinafter Movant) and moves this Honorable Court pursuant to Title 28 USC 2253(c)(1)(B) and/ or an order denying a **RULE 60(b)** motion, which requires a Certificate of Appealability (COA) before an appeal may be taken from the "final order." See, U.S. vs. LAMBROS, 404 F.3d 1034, 1036 (8th Cir. 2005).

In support hereof, the following facts are asserted in affidavit form:

1. Movant JOHN GREGORY LAMBROS is filing this MOTION FOR ISSUANCE OF CERTIFICATE OF APPEALABILITY in a timely fashion, as per the Court's November 15, 2004, filed November 16, 2004, ORDER, that denied Movant's motion to vacate the February 10, 1997, judgement due to the intervening change in controlling law, **CASTRO vs. U.S., 157 L.Ed.2d 778** (December 15, 2003), and the Court's ORDER, that denied Movant's November 23, 2004, MOTION TO ALTER OR AMEND JUDGMENT PURSUANT TO RULE 59(e) OF THE FEDERAL RULES OF CIVIL PROCEDURE, dated July 11, 2005, by the Honorable Judge David S. Doty.

STANDARD OF ADJUDICATION

2. The Supreme Court recently provided guidelines to this Court on the question of how an application for a COA is to be addressed in MILLER-EL vs. COCK-

APPENDIX J.

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REASONS FOR GRANTING THE CERTIFICATE

ISSUE ONE (1):

REASONABLE JURISTS COULD DIFFER WITH, OR WOULD FIND DEBATABLE OR WRONG, THIS COURT'S DENIAL OF RELIEF ON THE MOVANT'S CLAIM:

CLEARLY CASTRO vs. UNITED STATES, 157 L.Ed.2d 778 (2003) APPLIES TO PRO SE LITIGANTS WHO ARE REPRESENTED BY COUNSEL

22. On November 15, 2004, filed on November 16, 2004, this Court's ORDER stated that the CASTRO rule "does not" apply to Movant Lambros' because he was represented by an attorney:

> "At defendant's resentencing hearing on February 10, 1997, the district court did recharacterize defendant's purported Rule 33 motion as a §2255 motion. However, defendant was not a pro se litigant, but rather was represented by attorney Colia Ceisel at the re-sentencing. '[B]ecause he was represented by counsel and thus in the same position as other litigants who rely on their attorney's,' defendant was not entitled to a legal explanation from the court. BURGS vs. JOHNSON COUNTY, 79 F.3d 701, 702 **(8th Cir. 1996)**(Supreme Court holding that a pro se prisoner's notice of appeal is timely filed upon delivery to prison authorities does not apply to prisoner represented by counsel, even though prisoner filed notice pro se). The CASTRO rule does not apply to defendant."

See, Page 3 of ORDER.

23. Judge Doty cited BURGS vs. JOHNSON COUNTY as his authority in stating the CASTRO does not apply to Movant Lambros because he was represented by counsel. BURGS **IS NOT** good law anymore, as the Eighth Circuit stated:

> "We conclude that Burgs is not entitled to the benefit of HOUSTON because he was represented by counsel and thus in the same position as other litigants who rely on their attorneys to file a timely notice of appeal. **See, U.S. vs. KIMBERLIN**, 898 F.2d 1262, 1265 **(7th Cir.)** cert. denied, 112 L.Ed.2d 417 (1990)" Id. at 702.

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24. The Seventh Circuit **OVERTURNED** its ruling in U.S. vs. KIMBERLIN, 898 F.2d 1262, 1265 (7th Cir. 1990) in U.S. vs. CRAIG, 368 F.3d 738 (7th Cir. 2004), when it stated:

> "The U.S. contends that the appeal is late because the mailbox rule **APPLIES ONLY IF THE PRISONER IS UNREPRESENTED.** As we said in **U.S. vs. KIMBERLIN,** 898 F.2d 1262, 1265 (7th Cir. 1990), a prisoner who has the assistance of counsel need only pick up the phone. Craig did not try this route, and the U.S. contends that he therefore cannot take advantage of the mailbox rule. Yet **KIMBERLIN** addressed the status of the **MAILBOX RULE** when it was a matter of **COMMON LAW,** having been invented in **HOUSTON vs. LACK,** 487 U.S. 266 (1988). **RULE 4 WAS REWRITTEN IN 1993 (AND REVISED IN 1998)** not only to make the mailbox rule official but also to impose some limits."
>
> "Today the mailbox rule depends on Rule 4(c), not on how **KIMBERLIN** understood **HOUSTON.** Rule 4(c) applies to "an inmate confined in an institution." Craig meets that description. **A COURT OUGHT NOT PENCIL "UNREPRESENTED" OR ANY EXTRA WORD INTO THE TEXT OF RULE 4(c), WHICH AS WRITTEN IS NEITHER INCOHERENT NOR ABSURD.** .... Accord, U.S. vs. MOORE, 24 F.3d 624, 626 n.3 (4th Cir. **1994).** (emphasis added)

See, U.S. vs. CRAIG, 368 F.3d at 740 (7th Cir. 2004).

25. The Fourth Circuit does not agree with this Court's ORDER filed November 16, 2004 and confirmed on July 11, 2005, as per Movant Lambros' **RULE 59(e),** when the Fourth Circuit held in U.S. vs. MOORE, 24 F.3d 624 (4th Cir. 1994):

> "We note first that there is no reasonable basis for limiting the application of **HOUSTON** to civil cases. **HOUSTON** itself was premised upon fairness; indeed, the theme runs throughout Justice Brennan's majority opinion. If **HOUSTON** stands for noting else, it stands for the principle that it is unfair to permit a prisoner's freedom to ultimately hinge on either the diligence or the good faith of his custodians."

See, MOORE, 24 F.3d at 625.

> "Likewise, there is little justification for limiting **HOUSTON'S** applicability to situations where the prisoner is not represented by counsel" (emphasis added)

See, MOORE, 24 F.3d at 625.

> "We are aware that the Seventh Circuit has **ADDRESSED THIS PRECISE ISSUE AND REACHED THE OPPOSITE CONCLUSION. U.S. vs. KIMBERLIN,** 898 F.2d 1262 (7th Cir.), cert. denied, 489 US

969 (1990). Though the **KIMBERLIN** court seemed to **ASSUME** that **HOUSTON** would be applicable in the criminal context, it nevertheless distinguished **HOUSTON** on the ground that **KIMBERLIN**, though filing his notice of appeal from prison, **WAS REPRESENTED BY COUNSEL**. (emphasis added)

*** We believe that our sister circuit has interpreted **HOUSTON TOO NARROWLY. THE SUPREME COURT DID NOT EXPRESSLY LIMIT HOUSTON'S APPLICATION TO CASES INVOLVING UNREPRESENTED PRISONERS**, and the Seventh Circuit apparently did not consider the possibility that even represented prisoners might be prevented from timely communicating with counsel. (emphasis added)

We therefore hold that **HOUSTON** governs all notices of appeal filed by prisoners in a criminal proceeding, **WITHOUT REGARD TO WHETHER THEY ARE REPRESENTED BY COUNSEL. THERE IS SIMPLY NO GOOD REASON TO HOLD OTHERWISE.**

See, U.S. vs. MOORE, 24 F.3d at 626 (4th Cir. 1994).

The new rule clearly applies to criminal cases, **AND DOES NOT DISTINGUISH BETWEEN REPRESENTED PRISONERS AND THOSE ACTING PRO SE.**

See, U.S. vs. MOORE, 24 F.3d at 626 fn. 3 (4thCir. 1994).

26. Therefore, both the Seventh and Fourth Circuit have addressed the precise issue and reached the opposite conclusion of this court, when it cited BURGS vs. JOHNSON COUNTY, 79 F.3d 701, 702 (8th Cir. 1996), as authority to state, "The CASTRO rule does not apply to defendant [Lambros]." Movant Lambros qualifies for a granting of his Certificate of Appealability. See, Paragraph 4(i) and (m) this motion.

27. At this juncture, Movant Lambros does not bear the burden of persuading the court to change its mind, only of persuading it that another reasonable jurist could debate and come to a different conclusion as to Movant Lambros' above presented issue. The foregoing cases illustrate that other jurists have in fact come to a different conclusion, on precisely the same facts. Movant requests this Court to issue a COA to Movant on this issue.

ISSUE TWO (2):

REASONABLE JURISTS COULD DIFFER WITH, OR WOULD FIND DEBATABLE OR WRONG, THIS COURT'S DENIAL OF RELIEF ON THE MOVANT'S CLAIM:

CLEARLY CASTRO vs. UNITED STATES, 157 L.Ed.2d 778 (2003) APPLIES RETROACTIVELY.

28. This Court did not state that CASTRO was not retroactive. The government stated within its OPPOSITION dated November 3, 2004, that CASTRO was not retroactive and stating, "While Lambros relies on a contrary Seventh Circuit case, WILLIAMS vs. U.S., 366 F.3d 438 (7th Cir. 2004)(per curiam), that per curiam decision contains no anlaysis of the issue and is not binding on this Court."

29. Movant Lambros again states that both the Seventh and Second Circuit have applied CASTRO retroactively. See, WILLIAMS vs. U.S., 366 F.3d 438, 439 (7th Cir. 2004)(per curiam); also see, SIMON vs. U.S., 359 F.3d 139 (2nd Cir. 2004). Please refer to paragraph eighteen (18) within this motion, Page 8.

30. At this juncture, Movant Lambros does not bear the burden of persuading the court to change its mind, only of persuading it that another reasonable jurist could debate and come to a different conclusion as to Movant Lambros' above presented issue. The foregoing cases illustrate that other jurists have in fact come to a different conclusion, on precisely the same facts. Movant Lambros requests this court to issue a COA to Movant on this issue.

31. This court has applied new Supreme Court decisions retroactively, thus this court has the jurisdiction to hold CASTRO retroactive. See, U.S. vs. MURPHY, 109 F.Supp.2d 1059 (D.Minn. 2000)(Honorable District Court Judge Doty) "The District Court, Doty, J., held that: (1) Supreme Court decision in APPRENDI vs. NEW JERSEY, holding that a jury finding is required on any fact which increases the statutory maximum penalty, **WAS RETROACTIVELY APPLICABLE**; ..." (emphasis added)

ISSUE THREE (3):

REASONABLE JURISTS COULD DIFFER WITH, OR WOULD FIND DEBATABLE OR WRONG, THIS COURT'S DENIAL OF RELIEF ON THE MOVANT'S CLAIM:

CLEARLY MOVANT LAMBROS' RULE 60(b) MOTION IS NOT THE EQUIVALENT OF A SECCESSIVE HABEAS PETITION AND CAN BE RULED UPON BY THE DISTRICT COURT WITHOUT PRECERTIFICATION BY THE EIGHTH CIRCUIT.

32. In both of this Court's ORDERS, November 16, 2004 and July 11, 2005, this court did not expressly state that Movant's Rule 60(b) motion raising CASTRO vs. U.S., was being construed as a successive habeas petiton for failure to obtain authorization from the Eighth Circuit. **THE PROBLEM:** In this Court's July 11, 2005 ORDER, pages two (2) and three (3) is that this court states Movant is arguing **CRAWFORD vs WASHINGTON,** 158 L.Ed.2d 177 (2004). This Movant for some reason is currently arguing his CRAWFORD vs. WASHINGTON issue in the Eighth Circuit after the Eighth Circuit ordered the government to respond and Movant responded to the government. This issue should be infront of this court. Clerks at both the Eighth Circuit and the District Court have been contacted as to this problem to no avail.

33. This Movant has filed his Rule 60(b) motion within one (1) year of the Supreme Court's decision in CASTRO vs. U.S. and believes the District Court is the relevant court to decide the retroactivity question and preserve Movant Lambros' "... opportunity to obtain vacatur of a judgment that is void for lack of subject-matter jurisdiction--a consideration just as valid in habeas cases as in any other, since absence of jurisdiction altogeather deprives a federal court of the power to adjudicate the rights of the parties." See, GONZALEZ vs. CROSBY, No. 04-6432 (June 23, 2005, U.S. Supreme Court)(Part II(B)) **PLEASE NOTE:** The U.S. Supreme Court stated that the GONZALEZ vs. CROSBY **ONLY APPLIES** to habeas

77.

proceedings under 28 U.S.C. §2254, which governs federal habeas relief for prisoners **CONVICTED IN STATE COURT**. See, GONZALEZ, at FootNote 3.

34. The Supreme Court **PROMULGATED A NEW PROCEDURE** to be followed if the district court desired to recharacterize **RULE 33 MOTIONS** into the pro se litigants first 28 USC §2255 motion in later litigation. See, CASTRO vs. U.S., 157 L.Ed.2d at 789. Justice Stevens with whom Justice Souter joined, stated within there dissent in GONZALEZ:

> "correct procedure requires that the merits of the Rule 60(b) motion be addressed in the first instance by the District Court." ABDUR'RAHMAN, 537 U.S. at 97.
>
> At least in some circumstances, a supervening change in AEDPA procedural law can be the kind of "extraordinary circumstanc[e]" ACKERMANN vs. U.S., 340 US 193, 199 (1950), that constitutes a "reason justifying relief from the operation of the judgment" within the meaning of Rule 60(b)(6).
>
> Unfortunately, the Court underestimates the significance of the fact that petitioner was **EFFECTIVELY SHUT OUT OF FEDERAL COURT** -- without any adjudication of the merits of his claims -- **BECAUSE OF A PROCEDURAL RULING THAT WAS LATER SHOWN TO BE FLATLY MISTAKEN**. As we have stressed, "[d] ismissal of a **FIRST FEDERAL HABEAS PETITION IS A PARTICULARLY SERIOUS MATTER**, for that dismissal denies the petitioner the protection of the **GREAT WRIT ENTIRELY, RISKING INJURY TO AN IMPORTANT INTEREST IN HUMAN LIBERTY**." LONCHAR vs. THOMAS, 517 US 314, 324 (1996); see also, SLACK vs. McDANIEL, 529 US 473, 483 (2000)("The writ of habeas corpus plays a vital role in protecting constitutional rights"). When a habeas petition has been **DISMISSED ON A CLEARLY DEFECTIVE PROCEDURAL GROUND**, the State can hardly claim a legitimate interest in the **FINALITY OF THAT JUDGMENT**. Indeed, the State has experienced a windfall, while the state prisoner has been deprived -- contrary to congressional intent -- of his valuable right to **ONE FULL ROUND OF FEDERAL HABEAS REVIEW**. (emphasis added)

See, GONZALEZ, Justice STEVENS, with whom Justice SOUTER joins, dissenting.

35. **THE DISTRICT COURT DID NOT HAVE SUBJECT-MATTER JURISDICTION WHEN IT CONVERTED MOVANT LAMBROS' RULE 33 MOTIONS INTO HIS FIRST §2255:** As this court understands, Federal Courts **DO NOT** entertain §2255 motions during pendency

of an appeal. Movant's attorney Colia Ceisel filed a direct appeal after the February 10, 1997 RESENTENCING where Judge Renner converted Movant Lambros' Rule 33 Motions into his first §2255 without Movant's permission. See, U.S. vs. THOMPSON, 972 F.2d 201, 204 (8th Cir. 1992)("Claims of ineffective assistance of counsel may not be raised on direct appeal,"); "The writ of habeas corpus will not be allowed to do service for an appeal." SUNAL vs. LARGE, 332 U.S. 174, 178 (1947). Movant Lambros restates and incorporates the following paragraphs from this Motion, Paragraphs 12, 13, 14 and 15.

36. Movant Lambros is clearly attacking the integrity of the court when it converted Movant's Rule 33 motions into his first §2255 on February 10, 1997 during RESENTENCING. Therefore, Movant Lambros' Rule 60(b) motion is not the equivalent of a successive habeas petition, as it is NOT attacking Movant's own conduct or his attorney's omissions. See. GONZALEZ, at FootNote 5.

37. At this juncture, Movant Lambros does not bear the burden of persuading the court to change its mind, only of persuading it that another reasonable jurist could debate and come to a different conclusion as to Movant Lambros' above presented issue. The foregoing cases illustrate that other jurists have in fact come to a different conclusion, on precisely the same facts. Movant Lambros requests this court to issue a COA to Movant on this issue.

CONCLUSION

38. For all of the above-stated reasons, Movant Lambros requests that this Court issue a "CERTIFICATE OF APPEALABILITY" to Movant Lambros, as per the above stated three (3) issues.

39. I JOHN GREGORY LAMBROS, declare under the penalty of perjury that the foregoing is true and correct. See, Title 28 USCA § 1746.

EXECUTED ON: JULY 28, 2005

79.

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