July 11, 2002

John Gregory Lambros
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CLERK
U.S. Court of Appeals for the Eighth Circuit
Thomas F. Eagleton Court House
Room 24.329
111 South 10th Street
St. Louis, Missouri 63102
U.S. CERTIFIED MAIL NO. 7001-0320-0005-1583-3062

RE: #02-2026, USA vs. LAMBROS
District of Minnesota Court/AGency No.'s: Civil No. 99-28 (DSD)
Criminal No. 4-89-82(5)(DSD)

Dear Clerk:

Attached for **FILING** in the above-entitled action is the following document:

a. **PETITION FOR REHEARING (FRAP 40) WITH A SUGGESTION FOR REHEARING EN BANC** (FRAP 35). Dated: **July 11, 2002**

Please find five (5) copies of the above, as per Rule 40A for the Eighth Circuit.

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

Sincerely,

John Gregory Lambros, Pro Se

CERTIFICATE OF SERVICE

I declare under the penalty of perjury that a true and correct copy of the above listed document/motion was **mail** within a stampted addressed envelope from the USP Leavenworth Mailroom on this **11th day of July, 2002, to:**

1. U.S. Attorney's Office, District of Minnesota, U.S. Federal CourtHouse, Suite 600, 300 South 4th Street, Minneapolis, Minnesota 55415.
2. CLERK, U.S. Court of Appeals for the Eighth Circuit as addressed above.

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> "After carefully reviewing the petitioner's request, and for the **SAME REASONS** that this court denied petitioner's previous motion, the court concludes that petitioner has failed to meet the requisite showing for this court to issue a certificate of appealability." See, May 29, 2002, ORDER by Judge Doty, page 2. (emphasis added)

2. This court should grant a rehearing or in the alternative a rehearing en banc as a material matter of law and fact was overlooked in deciding this case, and which, had it been given consideration, would probably have brought about a different result. See, BOARD vs. BROWN & ROOT, INC, 206 F.2d 73 (8th Cir. 1953)

3. This Court's opinion is in conflict with identifiable reasons for granting a certificate of appealability, as the United States Supreme Court has **GRANTED CERTIORARI** to review the **"SAME QUESTION"** in another case on April 22, 2002, in ABDUR'RAHMAN vs. BELL, WARDEN, #01-9094, as to the following questions:

> a. Did the Sixth Circuit err in holding, in square conflict with decision of this court and other circuits, **THAT EVERY FED.R.CIV.P. 60(b) MOTION CONSTITUTES PROHIBITED "SECOND OR SUCCESSIVE" HABEAS PETITION AS MATTER OF LAW?** (emphasis added)
>
> b. Does court of appeals abuse its discretion in refusing to permit consideration of vital intervening legal development when failure to do so precludes habeas petitioner from ever receiving any adjudication of his claims on merits?

EXHIBIT A: (CRIMINAL LAW REPORTER, April 24, 2002, Volume 71, No. 4, Pages 2026 and 2028)

FACTS

4. From 1969 thru 1977, Robert C. Renner held the position of U.S. Attorney in Minnesota, during which time he indicted and prosecuted Appellant in three (3) criminal proceedings, as per his statutory duty, Title 28 U.S.C. §547, as other attorneys within his office are only assistants, 28 U.S.C. §§ 542 and 543. See, U.S. vs. ARNPRIESTER, 37 F.3d 466, 467 (9th Cir. 1994). U.S. Attorney Renner personally signed two (2) of the indictments against Appellant.

5. On March 24, 1976, U.S. Attorney Renner indicted Appellant in Criminal File No. CR-3-76-17 for violations of Title 18 U.S.C. Sections 111 and 114. Defendant was illegally indicted and sentenced on June 21, 1976, as the crime **DID NOT** occur on federal property. U.S. Attorney Renner **FALSIFIED DOCUMENTS** to the U.S. Court of Appeals for the Eighth Circuit, stating that Appellant Lambros was indicted and plead guilty to violations of Title 18 U.S.C. 111 and 1114, **not 114 as stated in the indictment**. See, U.S. vs. LAMBROS, 614 F.2d 179, 180 (8th Cir. 1980). U.S. Attorney Renner used illegal indictment CR-3-76-17 to leverage a negotiated plea of guilty from Appellant on unrelated charges. See, U.S. vs. LAMBROS, 544 F.2d 962 (8th Cir. 1976). **EXHIBIT B:** (February 15, 2002, John Gregory Lambros' FILING OF COMPLAINT against Minnesota Attorneys PETER J. THOMPSON, JOSEPH T. WALBRAN, and **ROBERT G. RENNER,** to Edward J. Cleary, Director of the Office of Lawyers Professional Responsibility, St. Paul, Minnesota).

6. On February 10, 1997, the now Honorable Robert G. Renner RESENTENCED Appellant LAMBROS, as per the ORDER of this Court, to an **ENHANCED SENTENCE** based on the three (3) criminal indictments he indicted Appellant on in 1975 and 1976, including ILLEGAL INDICTMENT CR-3-76-17. See, U.S. vs. LAMBROS, 65 F.3d 698 (8th Cir. 1995).

7. On or about April 24, 2001, Appellant Lambros filed his "MOTION TO VACATE ALL JUDGMENTS AND ORDERS BY UNITED STATES DISTRICT COURT JUDGE ROBERT G. RENNER PURSUANT TO **RULE 60(b)(6) OF THE FEDERAL RULES OF CIVIL PROCEDURE FOR VIOLATIONS OF TITLE 28 U.S.C.A. § 455,"** as per the direction of LILJEBERG vs. HEALTH SERVICES CORP., 486 U.S. 847, 100 L.Ed.2d 855, 108 S.Ct. 2194 (1988)(Rule **60(b)(6) relief from final judgment** is neither categorically available nor categorically unavailable for all violations of **§455** . . . . a court, in making such a determination, must continuously bear in mind that, in order to perform its function in the best way, JUSTICE MUST SATISFY THE APPEARANCE OF JUSTICE; . . .) LILJEBERG, 100 L.Ed2d at 856-57.

8. On March 08, 2002, Judge Doty, ORDERED that Appellant Lambros' **Rule 60(b)(6)** be created as a petition pursuant to 28 U.S.C. §2255, quoting BOLDER vs. ARMONTROUT, 983 F.2d 98, 99 (8th Cir. 1993); BLAIR vs. ARMONTROUT, 976 F.2d 1130, 1134 (8th Cir. 1992).

9. This court, the Eighth Circuit, currently holds that Rule 60(b)(6) motions are the functional equivalent of a second petition for a writ of habeas corpus. See, BOLDER and BLAIR. The Second Circuit Court of Appeals has **REVIEWED** and **DISAGREED** with this Court's rulings in BOLDER and BLAIR in RODRIGUEZ vs. MITCHELL, 252 F.3d 191, 198-200 and fn. 2 on page 200 (2nd Cir. 2001).

10. On **April 22, 2002**, the U.S. Supreme Court **GRANTED CERTIORARI** on the question, "Did the Sixth Circuit err in holding, in square conflict with decision of this court and other circuits, **THAT EVERY FED.R.CIV.P. 60(b) MOTION CONSTITUTES PROHIBITED "SECOND OR SUCCESSIVE" HABEAS PETITION AS MATTER OF LAW?"** See, ABDUR'RAHMAN vs. BELL, WARDEN, #01-9094, EXHIBIT A.

11. On May 29, 2002, Judge Doty, ORDERED that Appellant Lambros' application for certificate of appealability be DENIED, for the same reasons that the District Court outlined and ordered within the March 08, 2002, ORDER.

12. On July 1, 2002, this Court, the Eighth Circuit, affirmed the judgment of the district court for the reasons stated within the district court's March 08, 2002 and May 29, 2002, ORDERS.

ARGUMENT

I. **THE PANEL OVERLOOKED OR MISAPPREHENDED THE PROPER STANDARD OF REVIEW WHEN THE UNITED STATES SUPREME COURT HAS ALREADY GRANTED CERTIORARI IN OTHER CASE RAISING THE SAME CONSTITUTIONAL QUESTION, INDICATING THAT THE CONSTITUTIONAL QUESTION THE CERTIFICATE APPLICANT HAS PRESENTED IS "SUBSTANTIAL."**

13. The panel's decision in denying Appellant's claim is in conflict

with identifiable reasons for granting a certificate of appealability, "The United States Supreme Court has granted certiorari to review a "similar" question in another case." See, LIEBMAN, Federal Habeas Practice and Procedure, Second Ed., 1994, at pages 1079-1082. (collected cases.)

14. On April 22, 2002, the U.S. Supreme Court GRANTED CERTIORARI on the question, "Did the Sixth Circuit err in holding, in square conflict with decision of this court and other circuits, **THAT EVERY FED.R.CIV.P. 60(b) MOTION CONSTITUTES PROHIBITED "SECOND OR SUCCESSIVE" HABEAS PETITION AS MATTER OF LAW?"**

15. Also, the Second Circuit Court of Appeals is in square conflict with this court and has stated same within RODRIGUEZ vs. MITCHELL, 252 F.3d 191, 198-200, and fn. 2 on page 200 (2nd Cir. 2001)("We now rule that a motion under **Rule 60(b)** to vacate a judgment denying habeas **IS NOT** a second or successive habeas petition and should therefore be treated as any other motion under **RULE 60(b).**" Id. at 198).

16. Therefore, the district court erred and this panel overlooked and erred in holding, in square conflict with the second circuit and the United States Supreme Court, that every Fed.R.Civ.P. **60(b)(6)** motion constitutes prohibited "second or successive" habeas petition as matter of law. See, BLAIR vs. ARMONTROUT, 976 F.2d 1130, 1134 (**8th Cir.** 1992)(holding that a "**Rule 60(b)(6)** motion [i]s the functional equivalent of a second petition for a writ of habeas corpus"). Quoting, RODRIGUEZ vs. MITCHELL, 252 F.3d 191, 200 fn. 2 (2nd Cir. 2001).

17. Because the above conflict was not addressed by this Panel, this Court should GRANT REHEARING with a suggestion for REHEARING EN BANC.

STANDARD OF ADJUDICATION

18. In BAREFOOT vs. ESTELLE, the Supreme Court held that the standard for granting a certificate of probable cause is whether the applicant has presented a non-frivolous question, one which "jurists of reason" could debate:

> In requiring a "question of some substance", or a "substantial showing of denial of [a] federal right", obviously the petitioner need not show that he should prevail on the merits. He has already failed in that endeavor. Rather, he must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are "adequate to deserve encouragement to proceed further." [463 U.S. at 893 (internal citations omitted).]

19. Doubts about whether to issue a certificate should be **RESOLVED IN FAVOR OF THE APPELLANT**. See FULLER vs JOHNSON, 114 F.3d 491, 495 (5th Cir. 1997); BUXTON vs. COLLINS, 925 F.2d 816, 819 (5th Cir.), cert. denied 498 U.S. 1128 (1991).

20. Grant or denial of a certificate of appealabilty is not discretionary; if the movant has made the showing required in BAREFOOT and codified in AEDPA, the certificate must issue. See, LOZADA vs. DEEDS, 112 L.Ed.2d 956, 498 U.S. 430, 432 (1991)(reviewing the denial of a certificate of probable cause by a court of appeals)("The order of the Court of Appeals did not cite or ANALYZE this line of authority as reflected in Estes, which had been decided before the Ninth Circuit issues its ruling." (emphasis added) Id. LOZADA, 112 L.Ed.2d at 961).

21. In SLACK vs. McDANIEL, 529 U.S. 473, 484, 146 L.Ed.2d 542, 554-555 (2000), the Supreme Court has more recently summarized the test for granting a certificate of appealability (COA), and has applied it to situations - such as the ground for relief in this case - in which a denial of relief is based on an asserted failure of Appellant and/or his/her counsel to adhere to procedural rules:

> "Where 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.
>
> The issue becomes somewhat more complicated where, as here, the district court dismisses the petition based on **PROCEDURAL GROUNDS**. We hold as follows: When the district court denies a habeas petition on **PROCEDURAL GROUNDS** without reaching

7.

> the prisoner's underlying constitutional claim, a **COA SHOULD ISSUE** when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its **PROCEDURAL RULING.**" (emphasis added)

22. Appellant Lambros has clearly met the standard of adjudication set by the U.S. Supreme Court in granting his certificate of appealability (COA), as the jurists of reason that have found Judge Dody's PROCEDURAL RULING and this Court's holding in BLAIR vs. ARMONTROUT, 976 F.2d 1130, 1134 (8th Cir. 1992)("Rule 60(b)(6) motion [i]s the functional equivalent of a second petition for a writ of habeas corpus"), debatable. See, ABDUR'RAHMAN vs. BELL, WARDEN, #01-9094, Exhibit A, U.S. Supreme Court GRANTED CERTIORARI on April 22, 2002, on the very same question; and RODRIGUEZ vs. MITCHELL, 252 F.3d 191, 198-200, and fn. 2 on page 200 (2nd Cir. 2001)("We now rule that a motion under **RULE 60(b)** to vacate a judgment denying habeas IS NOT a second or successive habeas petiton and should therefore be treated as any other motion under **RULE 60(b).**" id. at 198).

CONCLUSION

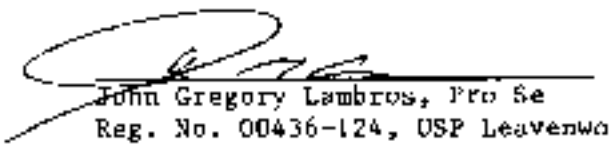
23. For the above stated reasons the Appellant requests a REHEARING with a suggestion for REHEARING EN BANC on the issues presented.

UNSWORN DECLARATION UNDER PENALTY OF PERJURY

24. I declare under penalty of perjury that the foregoing is true and correct. Title 28 U.S.C.A. §1746.

EXECUTED ON: July 11, 2002

Respectfully submitted,



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