JULY 28, 2005

John Gregory Lambros
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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

1.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

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

NOTICE OF APPEAL

Notice is hereby given that JOHN GREGORY LAMBROS, Petitioner/Movant, in the above-entitled matter, appeals to the United States Court of Appeals for the Eighth Circuit from the FINAL ORDER entered in this action on July 11, 2005, pursuant to Fed. R. Civ. P. 59(e).

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

EXECUTED ON: JULY 28, 2005.

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

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

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

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-

RELL, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003). The Supreme Court's opinion in MILLER-EL makes clear that whether to grant a COA is intended to be a preliminary inquiry, undertaken before full consideration of the petitioner's claims. MILLER-EL, 123 S.Ct. at 1039 (noting that the "threshold [COA] inquiry does not require full consideration of the factual or legal bases adduced in support of the claims"); Id. at 1040 (noting that "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")(emphasis added); Id. at 1042 (noting that "a COA determination is a separate proceeding, **ONE DISTINCT FROM THE UNDERLYING MERITS**")(emphasis added); Id. at 1046-47 (Scalia J., concurring)(noting that it is erroneous for a court of appeals to deny a COA only after consideration of the applicant's entitlement to habeas relief on the merits). Indeed, such "full consideration" in the course of the COA inquiry is forbidden by §2253(c). Id. at 1039 ("When a court of appeals side steps [the COA] 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.") (emphasis added).

3. Therefore, this Court must issue a CERTIFICATE OF APPEALABILITY if Movant Lambros presents a question of "DEBATABILITY" regarding the resolution of this petition. See, MILLER-EL vs. COCKRELL, 123 S.Ct. 1029, 1039 (2003) (Under the controlling standard, a petitioner must "sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner **OR** that the issues presented were 'adequate to deserve encouragement to proceed further.'")(emphasis added).

4. Among the identifiable reasons for granting a CERTIFICATE OF APPEALABILITY, are the following:

(a) The United States Supreme Court has granted certiorari to review a "similar" question in another case;

(b) The Supreme Court or the relevant circuit court has identified the question as open, unresolved, or a matter of disagreement among different circuit courts;

(c) At least one Supreme Court Justice, expressing a view not rejected by a majority, has found merit in the claim;

(d) The Court of appeals has decided to hear a claim en banc similar to a claim presented in the current appeal;

(e) The relevant circuit court or another district court in the district (or, possibly, elsewhere) has granted a probable cause certificate based on the same or a similar issue;

(f) The same or a similar issue is pending on appeal in the circuit in another case;

(g) The legal question presented by the petitioner has never before been decided by the circuit court;

(h) There is a split on the question among different panels or different district judges in the same circuit;

(i) The same or similar issue has been resolved favorably to a petitioner by a state court, a district judge in another district, or a panel in another circuit;

(j) The issue has been the subject of differing or dissenting views among the state court judges who previously adjudicated the claim in the petitioner's or another case;

(k) The district court applied a novel interpretation of the law or decided complex or substantial issues when adjudicating a claim;

(l) The legal or factual retionale for the district court's ruling is unclear;

(m) The district court decision or prior adverse circuit rulings relied upon case law that has been questioned or undermined by more recent decisions of the circuit or Supreme Court;

(n) The proper adjudication of the claim may require additional evidentiary development;

(o) A reasonable doubt exists as to whether the district court fully and fairly adjudicated the matter, given the actions of the district court or the state or the possible incompetence of petitioner's counsel;

(p) The severity of the penalty, in conjunction with other factors, prevents a conclusion that the claims are frivolous.

See, Liebman & Hertz, Federal Habeas Corpus Practice and Procedure, Fourth Edition, CR 2001, at pages 1590-1593. (collected cases) **See, EXHIBIT A.**

5. Movant Lambros incorporates here all of his already-filed briefs and responses, pursuant to Federal Rules of Civil Procedure 10(c), within this action.

PERTINENT FACTS IN THIS ACTION:

6. On September 07, 2004, Movant Lambros filed a "MOTION TO VACATE

FEBRUARY 10, 1997, JUDGMENT DUE TO **INTERVENING CHANGE IN CONTROLLING LAW, CASTRO vs. UNITED STATES, 157 L.Ed.2d 778 (December 15, 2003),** UNDER ANY ONE OF THREE SEPARATE SUBSECTIONS OF FEDERAL RULES OF CIVIL PROCEDURE **60(b)** - SECTIONS ONE (1), FIVE (5), AND SIX (6)."

7. On February 10, 1997, Judge Renner RESENTENCED Movant Lambros due to the decision in U.S. vs. LAMBROS, 65 F.3d 698 (8th Cir. 1995). Movant filed motions BEFORE resentencing to be considered at RESENTENCING. All motions filed by Movant Lambros where to be considered under Federal Rules of Criminal Procedure, **RULE 33** at resentencing. This Court [Judge David S. Doty] agreed as to same in the February 23, 2004, ORDER in USA vs. LAMBROS, Civil No. 99-28(DSD), Criminal No. 4-89-82(5)(DSD/FLN), on page two (2), Footnote three:

> Defendant's [Lambros'] **FIRST** collateral attack purportedly sought relief pursuant to **Fed. R. Crim. P. 33, BUT WAS CONSTRUED AS A §2255 MOTION.**

8. The February 10, 1997, sentencing transcripts stated:

a. "The defendant has informally suggested that these motions be considered under Federal Rule of Criminal **PROCEDURE 33** as, ..." "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 - - - .**" See, Pages 4 and 5 of RESENTENCING TRANSCRIPT.

b. "Your Honor, when you were speaking now, **YOU SAID THAT ALL THE MOTIONS THAT ARE FILED TO DATE ARE BEING CONSIDERED UNDER 2255?** THE COURT: **THAT'S WHAT I SAID, YES. OKAY. AND YOU ARE SAYING NONE OF THEM ARE UNDER RULE 33?** THE COURT: **YES.**" See, PAGES 19 and 20 of RESENTENCING TRANSCRIPT.

c. "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? 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 RESENTENCING TRANSCRIPT.

9. Movant Lambros' attorney at resentencing on February 10, 1997, Attorney Colia F. Ceisel, stated to Movant Lambros that he would be able to file another Title 28 USC §2255. This was not a true statement by Attorney Ceisel.

10. Movant Lambros has never filed a Title 28 USC Section 2255 that has not been considered a "SUCCESSIVE §2255 MOTION."

11. Attorney Ceisel would not raise issues Movant Lambros requested on his appeal for resentencing on February 10, 1997, **NOR ISSUES THE COURT STATED WOULD BE RAISED ON APPEAL:**

> "THE DEFENDANT: Okay. And regarding the General Verdict, on which element - -
>
> THE COURT: That's a matter of argument **THAT YOU WILL RAISE WITH THE COURT OF APPEALS IF THERE IS AN APPEAL."** (emphasis added)

See, RESENTENCING TRANSCRIPT, Page 64.

12. Movant Lambros **DID NOT WAIVE HIS RIGHT TO ARGUE INEFFECTIVE ASSISTANCE OF COUNSEL INVOLVING THE FEBRUARY 10, 1997 RESENTENCING OR HIS ORIGINAL SENTENCING.** "That, of course, is the 'customary procedure for challenging the effectiveness of defense counsel in a federal criminal trial,' because 'such a claim **CANNOT** be advanced without the development of facts outside the original record." See, U.S. vs. NUNEZ, 223 F.3d 956, 959 (9th Cir. 2000); also see, U.S. vs. GRAY, 464 F.2d 632, 634 n.1 **(8th Cir. 1972)**("The allegations of ineffective assistance of counsel, raised by the defendant in his **PRO SE BRIEF, ARE NOT PROPERLY BEFORE THE COURT AT THIS TIME.** An adequate post-conviction procedure is **AFFORDED BY 28 USC §2255** for developing a factual record to support these allegations, if they can be so supported. The procedure obviates the deciding of the issues without opportunity for all parties to unfold the facts.").

13. **FEDERAL COURTS DO NOT ENTERTAIN §2255 MOTION DURING PENDENCY OF AN APPEAL:** Movant Lambros' Rule 33 Motion could not legally be converted into a §2255 motion at **RESENTENCING**, as Movant was still on direct appeal. Attorney

Ceisel filed a direct appeal to Movant Lambros' resentencing on February 10, 1997. See, 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, ...), cert. denied, 475 US 1011 (1986); U.S. vs. GORDON, 634 F.2d 638 (1st Cir. 1980) (same); SOSA vs. U.S., 550 F.2d 244, 246 (5th Cir. 1977)("In absence of extraordinary circumstances, orderly administration of criminal justice precludes a district court from considering a MOTION TO VACATE JUDGMENT of conviction while review of the direct appeal is still pending." GORDON, 634 F.2d 638); U.S. vs. THOMPSON, 972 F.2d 201, 204 **(8th Cir. 1992)**("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."). "The writ of habeas corpus will not be allowed to do service for an appeal." SUNAL vs. LARGE, 332 US 174, 178, 67 S.Ct. 1588, 1590, 91 L.Ed.2d 1982 (1947). Quoting, SOSA, at 246.

14. Clearly, the district court "extinguish[ed] the petitioner's [Lambros'] one clear chance at habeas relief under the AEDPA" without Movant Lambros' consent, when it converted Movant Lambros **RULE 33 MOTIONS** in his first §2255 at the February 10, 1997, RESENTENCING. See, RAINERI vs. U.S., 233 F.3d 96, 100 (1st Cir. 2000)("The petitioner's original motion was not premised upon section 2255 at all, but, rather, upon **RULES 33 and 35.** Having dictated the terms of engagement, the petitioner was entitled to have his motion decided as he had framed it." Id. at 100)

15. Attorney Ceisel instructed Movant Lambros that he could not file a Pro Se Brief as to his February 10, 1997 RESENTENCING to challenge issues that occurred at RESENTENCING. See, HOGGARD vs. PURKETT, 29 F.3d 469, 472 **(8th Cir. 1994)**("Generally, it is Eighth Circuit policy to refuse to consider pro se filings when a party is represented by counsel.") Attorney Ceisel refused to argue the recharacterization of Movant Lambros' Rule 33 Motions into his first §2255. Therefore Movant Lambros was denied one fair shot at habeas review that Congress intended that he have. The United States Supreme Court has stressed:

"[d]ismissal of a **FIRST** federal habeas petition is a

> particularly serious matter, for the dismissal **DENIES THE PETITIONER THE PROTECTION OF THE GREAT WRIT ENTIRELY**, risking injury to an important interest in human liberty."

See, LONCHAR vs. THOMAS, 517 U.S. 314, 324 (1996); see also SLACK vs. McDANIEL, 529 U.S. 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 congression intent -- of his valuable right to **ONE FULL ROUND OF FEDERAL HABEAS REVIEW."** (emphasis added) See, GONZALEZ vs. CROSBY, No. 04-6432, Decided June 23, 2005, U.S. Supreme Court, Page 13 of 19 on www.findlaw.com.

16. On September 06, 2002, the **EIGHTH CIRCUIT** ruled in MORALES vs. U.S., 304 F.3d 764, 767 (8th Cir. 2002):

> "When a district court intents to reclassify a pro se litigant's pleading as a § 2255 motion, it must do two things. First, the court must warn the litigant of the restrictions on second or successive motions, and of the one-year limitations period, set forth in 28 U.S.C. 2255. Second, the court must provide him an opportunity either to consent to the reclassification or to withdraw his motion. Because the district court did not provide Morales with this information and an **OPPORTUNITY TO CHOOSE WHICH COURSE OF ACTION TO TAKE, THIS CASE MUST BE REMANDED SO MORALES MAY DECIDE WHETHER TO CONSENT TO RECLASSIFICATION OR TO WITHDRAW HIS MOTION."** (emphasis added)

On February 10, 1997, the RESENTENCING COURT did not allow Movant Lambros an **OPPORTUNITY TO CHOOSE** which course of action to take, when it erred by failing to provide Lambros a warning when it reclassified his **RULE 33 MOTIONS INTO A §2255.**

17. On December 15, 2003, the United States Supreme Court held in CASTRO vs. U.S., 157 L.Ed.2d 778 (2003): "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 fo the required warning, the prisoner's **1994 MOTION [RULE 33 MOTION]** could not be considered a first §2255 motion. (3) Thus, the prisoner's **1997 MOTION COULD NOT CONSIDERED "SECOND OR SUCCESSIVE" FOR §2255 PURPOSES."**

18. **RETROACTIVE APPLICATION OF CASTRO vs. U.S., 157 L.Ed.2d 778 (2003):** Justice BREYER stated in the opinion of the CASTRO court: "Moreover, this Court's 'supervisory power' determinations normally apply, like other judicial decisions, **RETROACTIVELY**, at least to the case in which the determination was made." CASTRO, at 788. The Seventh Circuit gave CASTRO **RETROACTIVE APPLICATION ON APRIL 22, 2004,** as the Seventh Circuit dismissed as UNNECESSARY an application for leave to commence a successive collateral attack AFTER being denied collateral relief under §2255 **OVER TWO (2) YEARS EARLIER, UNDER CASTRO.** 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)** "..., we find that the district court's sua sponte recharacterization of his § 3582 motion as a § 2241 petition was improper. Accordingly, the **JUDGMENT** of the district court is Vacated and the case Remanded to give Simon an opportunity to decline to have his §3582 motion converted into a §2241 petition." **NOTE:** Simon filed his §3582 motion in **1996, FOUR (4) YEARS AFTER HIS §2255 WAS FILED AND DENIED IN 1991.** Id. at 140. The Second Circuit stated, "For the Supreme Court has stated, 'the very point of the warning is to help the pro se litigant understand not only (1) whether he should withdraw or amend his motion, but also (2) whether he should contest the recharacterization, say, on appeal.' See, **CASTRO, 124 S.Ct. at 793."** Id. at 145.

19. **ORDER - November 16, 2004 - JUDGE DOTY:** Judge Doty responded to Movant Lambros' September 7, 2004, MOTION TO VACATE DUE TO INTERVENING CHANGE IN LAW UNDER **RULE 60(b)** on November 15, 2004, filed on November 16, 2004, stating "for the following reasons stated, defendant's [Lambros'] motion is denied." The reason offered by Judge Doty where:

"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 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, 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." (emphasis added)

20. On November 23, 2004, Movant Lambros filed the following:

a. Motion to Alter or Amend Judgment Pursuant to **RULE 59(e)** of the Federal Rules of Civil Procedure;

b. Motion for Appointment of Counsel;

c. Motion for Production of Records;

d. Movant Lambros' TRAVERSE RESPONSE to Government's OPPOSITION.

21. On July 11, 2005, Judge Doty's **ORDER** denied Movant Lambros':

a. Motion to Alter and Amend, stating "The court finds no reason to depart from its earlier ruling. Therefore, defendant's motion is denied." See, Page 1 of ORDER.

b. Motion to Clarify that Defendant was Proceeding Pro Se. The Court stated, "Therefore, defendant did not appear pro se. His motion to clarify is denied." See, Page 2 of ORDER.

c. Motion for Relief from Judgment. **THE COURT HAS A PROBLEM HERE AS I DID NOT RAISE AN ARGUMENT PURSUANT TO CRAWFORD vs. WASHINGTON, 158 L.Ed. 2d 177 (2004) IN THIS ACTION.** I've only raised an argument pursuant to **CASTRO**. Please check your records as there was a filing as to **CRAWFORD** but not is this action. Did you get your wordprocessing records/files mixed-up?????????

11.

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.

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

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

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FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE

Fourth Edition

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EXHIBIT A.

19.

The factors justifying a district judge's — or, failing that, the court of appeals's or Supreme Court's — issuance of a probable cause certificate are too numerous to catalogue comprehensively, particularly given that only a tiny percentage of cases in which a certificate issued resulted in written opinions explaining that result.[63] Obviously, issues of fact or law that the district court itself found to be close, difficult, of first impression, subject to conflicting outcomes, or simply a matter of judgment beyond simple deduction from applicable legal precepts provide sufficient "substance" to require a certificate.[64] So, too, appellate judges should grant a certificate if they have, or if they believe a majority of their colleagues would have, a reasonable doubt about the validity of the lower court decision under the appropriate standard of review. Although a matter may be well-settled adversely to the petitioner in the relevant district court or court of appeals, the fact that other coequal or higher courts have reached conflicting views suffices to require the certification of an appeal.[65] Among other identifiable reasons for granting a certificate are the following:

(1) The United States Supreme Court has granted *certiorari* to review a "similar" question in another case.[66]

specific certification of appealability). *But see* Barber v. Scully, 731 F.2d 1073, 1075 (2d Cir. 1984) (authorizing district courts to limit issues certified for appeal); Vicaretti v. Henderson, 645 F.2d 100, 101-03 (2d Cir. 1980) (same).

[63] Former Appellate Rule 22(b) required that reasons be provided only when the certificate of probable course is denied. *See* Herrera v. Payne, 673 F.2d 307, 308 (10th Cir. 1982), *cert. denied*, 469 U.S. 936 (1984). In regard to grants of probable cause certificates by appellate courts or judges, see *infra* notes 99-107.

[64] *See Barefoot, supra*, 463 U.S. at 894 (certificate should issue if claims are not "squarely foreclosed by statute, rule, or authoritative court decision or ... lacking any factual bases in the record"); Baldwin v. Maggio, 704 F.2d 1325, 1326-27 (5th Cir. 1983), *cert. denied*, 467 U.S. 1220 (1984); Alexander v. Harris, 595 F.2d 87, 91 (2d Cir. 1979) (*per curiam*) (fact that district court conducted evidentiary hearing reveals that issues raised are substantial).

[65] *See, e.g.*, Lynce v. Mathis, 519 U.S. 433, 436 (1997) (discussed *infra* note 67); *infra* notes 66-75 and accompanying text.

[66] Ford v. Strickland, 696 F.2d 804, 807 (11th Cir.) (*per curiam*) (*en banc*), *cert. denied*, 464 U.S. 865 (1983). *See, e.g.*, Autry v. Estelle, 464 U.S. 1301, 1302 (1983) (White, Circuit Justice, in chambers); Graham v. Lynaugh, 854 F.2d 715, 717, 723 (5th Cir. 1988), *vac'd & remanded on other grounds*, 492 U.S. 915 (1989); Selvage v. Lynaugh, 842 F.2d 89, 94 n.2 (5th Cir. 1988), *vac'd & remanded on other grounds sub nom.* Selvage v. Collins, 494 U.S. 108 (1990); Wingo v. Blackburn, 783 F.2d 1046, 1052 (5th Cir. 1986); Rault v. Louisiana, 774 F.2d 675, 677 (5th Cir. 1985), *cert. denied*, 476 U.S. 1178 (1986) (*per curiam*); Berry v. King, 765 F.2d 451, 455-56 (5th Cir. 1985), *cert. denied*, 476 U.S. 1164 (1986); Narcisse v. Maggio, 725 F.2d 969, 969-70 (5th Cir. 1984) (*per curiam*); Williams v. King, 719 F.2d 730, 733 (5th Cir.), *cert. denied*, 464 U.S. 1027 (1983). *But cf.* Bell v. Lynaugh, 858 F.2d 978, 984 (5th Cir. 1988), *cert. denied*, 492 U.S. 925 (1989) (court need "not grant stays of execution simply because the Supreme Court has granted certiorari on an issue pertaining to the death penalty which is raised by subsequent petitioners"); Thomas v. Wainwright, 788 F.2d 684, 688-89 (11th Cir.) (*per curiam*), *cert. denied*, 475 U.S. 1113

(2) The Supreme Court or the relevant circuit court has identified the question as open, unresolved, or a matter of disagreement among different circuit courts.[67]

(3) At least one Supreme Court Justice, expressing a view not rejected by a majority, has found merit in the claim.[68]

(4) The court of appeals has decided to hear a claim *en banc* similar to a claim presented in the current appeal.[69]

(1986) (denying certificate and stay in successive petition case because grant of *certiorari* on issue similar to that in petitioner's case does not assure automatic stay in successive petition cases); Jones v. Smith, 786 F.2d 1011, 1012 (11th Cir.), *cert. dismissed*, 475 U.S. 1105 (1986) (similar); Bowden v. Kemp, 774 F.2d 1494 (11th Cir. 1985), *cert. denied*, 476 U.S. 1164 (1986) (similar). Notwithstanding *Thomas v. Wainwright*, *Jones v. Smith*, and *Bowden v. Kemp*, *supra*, all of which are distinguishable as successive petition cases (*see supra* Chapter 28), the fact that the law of the circuit clearly rejects the petitioner's claim does not "squarely foreclose" the claim "'by ... *authoritative* court decision'" as long as the Supreme Court — either by granting *certiorari* or otherwise — indicates that the issue is open. *Barefoot*, *supra*, 463 U.S. at 894. *Cf.* Bowden v. Kemp, 474 U.S. 891 (1985) (two days after 11th Circuit denied certificate of probable cause and stay, Supreme Court grants stay pending disposition of Bowden's *certiorari* petition presenting question on which Court recently granted *certiorari*). The grant of a certificate of probable cause need not compel the court of appeals to give other than summary consideration to issues it previously has determined adversely; but neither should the denial of a certificate deprive the Supreme Court of the ability to resolve issues that the high court considers substantial. *See Autry v. Estelle*, *supra*; *Graham v. Lynaugh*, *supra*; *Selvage v. Lynaugh*, *supra*; *Wingo v. Blackburn*, *supra*; *Rault v. Louisiana*, *supra*; *Berry v. King*, *supra* (all denying relief on claim long rejected by circuit but granting stays of execution and of mandate — essentially certificates of probable cause to seek *certiorari* — because Supreme Court granted *certiorari* on issue; lower court decisions in *Graham* and *Selvage* thereafter vacated by Supreme Court on basis of Court's decision in case in which *certiorari* had been granted).

That the Supreme Court previously *denied certiorari* review on a claim is not a judgment that the claim lacks substance. *See, e.g.*, Willie v. Maggio, 737 F.2d 1372, 1377 n.2 (5th Cir.), *cert. denied*, 469 U.S. 1002 (1984); Ritter v. Smith, 726 F.2d 1505, 1511 n.16 (11th Cir.), *cert. denied*, 469 U.S. 869 (1984); Amsterdam, *supra* note 59, at 54-56 (collecting cases in which Supreme Court denied *certiorari* on issues identical to ones on which it subsequently granted review and relief); *supra* note 59 & *infra* § 38.2c n.50 (cases in which prior *certiorari* denials and executions preceded Supreme Court's eventual grant of *certiorari* and relief on issue raised in earlier cases); *supra* § 6.4c nn.24-25 and accompanying text.

[67] *See, e.g.*, *Lynce v. Mathis*, *supra*, 519 U.S. at 436 (although district court and court of appeals denied certificate of probable cause to appeal based on insubstantiality of claim under circuit precedent, Supreme Court grants *certiorari* based on conflicting decision of different circuit (thus, implicitly, certifying appealability), and, upon review, grants habeas corpus relief). *See also supra* note 66.

[68] Consider, for example, Justice White's concurring opinion in Lockett v. Ohio, 438 U.S. 586 (1978) (White, J., concurring and dissenting), which became the law in Enmund v. Florida, 458 U.S. 782 (1982).

[69] *See* Stephens v. Kemp, 464 U.S. 1027, 1028 (1983).

EXHIBIT A.

(5) The relevant circuit court or another district court in the district (or, possibly, elsewhere) has granted a probable cause certificate based on the same or a similar issue.[70]

(6) The same or a similar issue is pending on appeal in the circuit in another case.[71]

(7) The legal question presented by the petitioner has never before been decided by the circuit court.[72]

(8) There is a split on the question among different panels or different district judges in the same circuit.[73]

(9) The same or similar issue has been resolved favorably to a petitioner by a state court, a district judge in another district, or a panel in another circuit.[74]

(10) The issue has been the subject of differing or dissenting views among the state court judges who previously adjudicated the claim in the petitioner's or another case.[75]

[70] *See, e.g.*, Ford v. Strickland, 734 F.2d 538, 543 (11th Cir.) (*per curiam*), *aff'd sub nom.* Wainwright v. Ford, 467 U.S. 1220 (1984) (*mem.*).

[71] *See, e.g.*, Goode v. Wainwright, 670 F.2d 941, 942 (11th Cir. 1982) (cited approvingly in *Barefoot, supra*, 463 U.S. at 893).

[72] Houston v. Lack, 487 U.S. 266, 269 (1988) (discussing lower court's grant of probable cause certificate based on "'question of first impression' in the jurisdiction"). *See also* Julius v. Jones, 875 F.2d 1520, 1525-26 (11th Cir.), *cert. denied*, 493 U.S. 900 (1989) (certificate of probable cause granted because state courts had refused to reach merits of petitioner's *Brady* claim and district court felt that petitioner should not be executed until some other court besides itself reviewed merits of claim).

[73] *See Barefoot, supra*, 463 U.S. at 893 n.4 (probable cause certificate should issue on claims "'debatable among jurists of reason'" (quoting Gordon v. Willis, 516 F. Supp. 911, 913 (N.D. Ga. 1980)). Although not quite as clear as situations in which the Supreme Court explicitly has identified an issue as substantial, the situations discussed here and *infra* text accompanying notes 74-75 are ones singled out by the Supreme Court Rules as sufficiently substantial to warrant *certiorari*. *See* S. Ct. R. 10; *infra* § 39.2d. Even if the circuit court has rejected an issue, that is, the district or circuit judges faced with a probable cause application should consider whether the Supreme Court nonetheless might grant *certiorari* on the issue. *See supra* note 66.

[74] *See, e.g.*, Lozada v. Deeds, 498 U.S. 430, 431-32 (1991) (*per curiam*) ("Court of Appeals erred in denying [petitioner] ... a certificate of probable cause because under the standards set forth in *Barefoot* ... [petitioner] made a substantial showing that he was denied the right to effective assistance of counsel"; although district court concluded that "petitioner had not shown prejudice under the *Strickland* test," authority in other circuits demonstrates that this "issue ... could be resolved in a different manner" because "at least two Courts of Appeals have presumed prejudice in this situation"). *See also* Guti v. INS, 908 F.2d 495 (9th Cir. 1990) (finding of frivolousness under section 1915(d) could not be made because "there is no controlling authority" on issue and "there is some authority [from another circuit] to support the plaintiff's position"); *supra* note 73.

[75] *See supra* notes 73-74 and accompanying text.

(11) The district court applied a novel interpretation of the law or decided complex or substantial issues when adjudicating a claim.

(12) The legal or factual rationale for the district court's ruling is unclear.[76]

(13) The district court decision or prior adverse circuit rulings relied upon caselaw that has been questioned or undermined by more recent decisions of the circuit or Supreme Court.[77]

(14) The proper adjudication of the claim may require additional evidentiary development.[78]

(15) A reasonable doubt exists as to whether the district court fully and fairly adjudicated the matter, given the actions of the district court or the state or the possible incompetence of petitioner's counsel.[79]

(16) The severity of the penalty, in conjunction with other factors, prevents a conclusion that the claims are frivolous.[80]

Procedure, timing, form, filing. Former Appellate Rule 22(b), which continues to govern non-AEDPA cases, sets out the procedure for applying for a probable cause certificate. The petitioner first should apply to the district judge whose decision the petitioner seeks to appeal.[81] The superseded statute and rule (as continues to be true of the amended statute and rule) do not specify when the petitioner should file the probable-cause application.[82] As long as a timely notice

[76] *Cf. supra* note 54 (collecting cases in which district court dismissed petition summarily as frivolous and then granted certificate of probable cause to appeal).

[77] *See* Fleming v. Kemp, 794 F.2d 1478 (11th Cir. 1986).

[78] *See, e.g.*, Smith v. Wainwright, 737 F.2d 1036, 1037 (11th Cir. 1984) (certificate granted because "district court refused to hold an evidentiary hearing to develop the true factual setting in which this claim must be judged"); Ford v. Strickland, 734 F.2d 538, 543 (11th Cir.) (*per curiam*), *aff'd sub nom.* Wainwright v. Ford, 467 U.S. 1220 (1984) (*mem.*) ("evidence and legal precedent upon which [petitioner] relies" were not previously available); Narcisse v. Maggio, 725 F.2d 969 (5th Cir. 1984) (*per curiam*); Mattheson v. Maggio, 714 F.2d 362, 365 (5th Cir. 1983) (*per curiam*) (probable cause certificate cannot be withheld in capital case, given doubts about evidentiary and legal status of petitioner's claims caused by counsel's failures not attributable to petitioner).

[79] *See supra* § 20.3c (full and fair adjudication).

[80] *See* authority cited *supra* note 59.

[81] *Id. See* Fabian v. Reed, 707 F.2d 147, 148 (5th Cir. 1983) (court of appeals "will not make the initial determination of whether a certificate of probable cause should be granted").

[82] *See, e.g.*, Tinsley v. Borg, 895 F.2d 520, 523 (9th Cir. 1990), *cert. denied*, 498 U.S. 1091 (1991) (order of filing notice of appeal and application for certificate of probable cause to appeal is not specified in statute and rules, and timing of probable cause application should not be cause for dismissal if notice of appeal is timely; petitioner preferably should file application for certificate of probable cause simultaneously with, or soon after, notice of appeal (following Latelle v. Jackson, 817 F.2d 12, 13 (2d Cir. 1987), *cert. denied*, 484 U.S. 1010 (1988))); Wilson v. O'Leary, 895 F.2d 378, 382 & n.* (7th Cir. 1990) ("Section 2253 does not set a time limit on obtaining a certificate of probable cause," but certificate of probable cause typically is requested and granted after filing of notice of appeal, hence filing of notice does not deprive district court of jurisdiction to rule on

EXHIBIT A.