March 16, 2004

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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. 7003-2260-0000-2455-3803

Appeal No. 04-1559

RE: LAMBROS vs. USA, CIVIL NO. 99-28(DSD) "District of Minnesota"
CRIMINAL NO. 4-89-82(5)(DSD)

Dear Clerk:

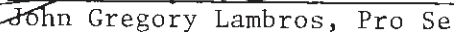
Attached for filing in the above-entitled action is the following document:

a. "MOTION FOR ISSUANCE OF CERTIFICATE OF APPEALABILITY BY THE EIGHTH CIRCUIT COURT OF APPEALS." Dated: March 16, 2004

Please find one (1) original and three (3) copies.

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

Sincerely,

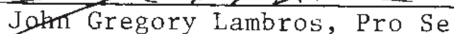


John Gregory Lambros, Pro Se

CERTIFICATE OF SERVICE

I declare under the penalty of perjury that a true and correct copy of the above listed document/motion was mailed within a stamped addressed envelop from the USP Leavenworth Mailroom on this **16th DAY OF MARCH, 2004,** to:

1. Clerk, U.S. Court of Appeals for Eighth Circuit, as addressed above;
2. U.S. Attorney's Office, District of Minnesota, 600 U.S. Courthouse, 300 South Fourth Street, Minneapolis, Minnesota 55415.



John Gregory Lambros, Pro Se

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JOHN GREGORY LAMBROS,	*	**APPEAL NO.** 04-1559
Petitioner - Appellant,	*	District of Minnesota No.'s Criminal No. 4-89-82(5)(DSD/FLN)
vs.	*	Civil No. 99-28(DSD)
UNITED STATES OF AMERICA,	*	AFFIDAVIT FORM
Respondent - Appellee	*	

MOTION FOR ISSUANCE OF CERTIFICATE OF APPEALABILITY BY THE EIGHTH CIRCUIT COURT OF APPEALS

NOW COMES the Petitioner - Appellant, John Gregory Lambros, Pro-Se (hereinafter Movant) and requests this Honorable Court pursuant to Title 28 U.S.C. §2253, TIEDMAN vs. BENSON, 122 F.3d 518 (8th Cir. 1997), for the issuance of a Certificate of Appealability (hereinafter COA), as the District of Minnesota Court ruled, pro forma on February 23, 2004, that the court would not grant such a COA, as to Movant's May 20, 2003, "MOTION TO VACATE JUDGMENT DUE TO INTERVENING CHANGE IN CONTROLLING LAW UNDER ANY ONE OF THREE SEPARATE SUBSECTIONS OF FEDERAL RULES OF CIVIL PROCEDURE 60(b) - SECTIONS ONE (1), FIVE (5), AND SIX (6)."

The District Court errored in holding that MILLER-EL vs. COCKRELL, 154 L.Ed. 2d 931 (February 25, 2003) and BOYD vs. U.S., 304 F.3d 813 (8th Cir., Sept. 25, 2002) (PER CURIAM), **DO NOT** amount to an intervening change in CONTROLLING LAW. See, October 23, 2003, ORDER, Pages 6 and 7, "Because the court finds no intervening change of law requiring it to vacate its dismissal of defendant's purported Rule 60(b) motion or its denial of defendant's motion for COA, the present motion is denied." (emphasis added).

As this Court understands from the Supreme Court's ruling in MILLER-EL, "a COA determination is a separate proceeding, one distinct from the underlying merits" Id. 123 S.Ct. 1029, 1047-47. The Court further made clear that the

"threshold [COA] inquiry does not require full consideration of the factual or legal bases adduced in support of the claims". Id. 123 S.Ct. at 1039. Therefore, the District Court must issue a CERTIFICATE OF APPEALABILITY (COA) if Movant LAMBROS presents a question of "DEBATABILTY" regarding the resolution of his petiton. See, MILLER-EL, 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." Id. 123 S.Ct. at 1039.

A review of the District Court's ORDER's in this action clearly raises debate as to the too demanding a standard applied in this action, when the District Court **DID NOT** conduct a hearing at which there would be full disclosure on record of basis for disqualification of judge in accordance with Title 28 U.S.C.A. §455 (a, e). The Court was bound to apply the precedent of this Eighth Circuit Court of Appeals, "Unlike objections under §455(b), §455(a) objections can be waived **AFTER** a court gives full disclosure of the grounds for disqualification. 28 U.S.C. §455(e)." See, IN RE KANSAS PUBLIC EMPLOYEE RETIREMENT SYSTEMS, 85 F.3d 1353, 1359 (8th Cir. 1996); MORGAN vs. CLARKE, 296 F.3d 638, 648 (8th Cir. 2002)("To that end, Congress permitted parties to waive such ground for disqualification **AFTER FULL DISCLOSURE ON THE RECORD.** 28 U.S.C. §455(e).")(emphasis added). Also see, BARKSDALE vs. EMERICK, 853 F.2d 1359, 1361-1363 (6th Cir. 1988) ("Section 455(e) provides in pertinent part: Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by full disclosure on the record of the basis for disqualification. There is no disclosure "on the record" and therefore no properly obtained "waiver." It is obvious that the District Court did not comply with this subsection's disclosure and waiver requirement, which its plain language, legislative history, and the case law tell us must be strictly construed. BARKSDALE, at 1361. Our holding is confined to the waiver issue. Lacking a full record, or appropriate findings and conclusions, we express no opinion on the necessity for recusal of the District Court under §455(a). Id. at 1362. The judge states that he disclosed his acquaintanceship

with that ligigant, but we have no information regarding its extent. Plaintiff should be given the opportunity to develop a "FULL ... RECORD OF THE BASIS FOR DISQUALIFICATION" in accordance with §455(e). (emphasis added) Id. at 1362. Lacking a full record on which to decide the §455(a) and §455(e) issues, we remand for supplementation and clarification of the record - a step for which there is ample precedent. See, HEALTH SERVICES ACQUISITION CORP. vs. LILJEBERG, 796 F.2d 796, 798 (5th Cir. 1986), aff'd, 100 L.Ed.2d 855 (1988)("On remand, a **HEARING** based solely on documentary evidence was held before another judge.") Id. at 1362. After conduncting a hearing in which there is "full disclosure on the record of the basis for disqualification," the Court below should consider the waiver and recusal issues. These issues concerning the propriety of the action of the District Judge in adjudicating the case **LOGICALLY PRECEDE THE ADJUDICATION OF THE CASE ON THE MERITS**." Id. at 1362) (emphasis added).

APPELLANT HAS MADE A SUBSTANTIAL SHOWING OF A DENIAL OF A CONSTITUTIONAL RIGHT:

1. The Supreme Court in CHAPMAN vs. CALIFORNIA, 17 L.Ed.2d 705, 710 (1967) stated that an impartial judge is a constitutional right so basic to a fair trial that its infraction can never be treated as harmless error. Quoting, TUMEY vs. OHIO, 273 US 510, 71 L.Ed. 749 (1927). See, CHAPMAN, 17 L.Ed.2d at 710, n.8.

2. The District Court's filed ORDER, dated February 23, 2004, as to the denial of Movant's COA application, stated "Finally, for the reasons stated in the Court's orders of March 8, 2002, May 23, 2002, October 23, 2003, and November 6, 2003, defendant has not made a "substantial showing of the denial of a constitutional right" or presented an issue about which "'reasonable jurists could debate.'" 28 U.S.C. §2253(c)(2); MILLER-EL vs. COCKRELL, 537 U.S. 322, 336 (2003) (quoting SLACK vs. McDANIEL, 529 U.S. 473, 484 (2000)." (emphasis added).

3. Movant LAMBROS' April 13, 2001, filed April 24, 2001, "MOTION TO VACATE ALL JUDGMENTS AND ORDERS BY U.S. 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. SECTION 455**", and all filings within this action, clearly stated that Movant LAMBROS was questioning the impartiality of U.S. District Court Judge Robert G. RENNER, as to violations of Title 28 U.S.C.A. §455.

4. **PURPOSE OF TITLE 28 U.S.C.A. SECTION 455:** "Clearly, the goal of the judicial disqualification statute is to foster the appearance of IMPARTIALITY." See, POTASHNICK vs. PORT CITY CONST. CO., 609 F.2d 1101, 1111 (5th Cir. 1980); PARKER vs. CONNORS STEEL CO., 855 F.2d 1510, 1523 (11th Cir. 1988)("Inherent in §455(a)'s requirement that a judge disqualify himself if his IMPARTIALITY might reasonably be questioned is the principle that our system of "justice must satisfy the appearance of justice."); CHITIMACHA TRIBE OF LOUISIANA vs. HARRY L. LAWS CO., 690 F.2d 1157, 1165 (5th Cir. 1982)("The goal of §455 is to foster IMPARTIALITY by requiring even its appearance."). As stated above, the Supreme Court in CHAPMAN vs. CALIFORNIA, at 710 and 710 n.8, "Although our prior cases have indicated that there are **SOME CONSTITUTIONAL RIGHTS SO BASIS TO A FAIR TRIAL** that their infraction can never be treated as harmless error, ..." Id. at 710; here this decision refers to foot-note 8, which itself contains an important case reference, which is TUMEY vs. OHIO, 273 US 510, 71 L.Ed. 749, 47 S.Ct. 437, 50 ALR 1243 (**IMPARTIAL JUDGE**). (emphasis added)". Therefore, Movant LAMBROS has made a "SUBSTANTIAL SHOWING OF THE DENIAL OF A CONSTITUTIONAL RIGHT" by invoking Title 28 U.S.C.A. Section 455 (**a,e**), and the District Court **NOT COMPLYING** with **SECTION 455(e)** disclosure and waiver requirement, which its plain language, legislative history, and the case law tell us must be strictly construed. THERE IS **NO DISCLOSURE** "ON THE RECORD" AND THEREFORE NO PROPERLY OBTAINED "WAIVER". See, BARKSDALE vs. EMERICK, 853 F.2d 1359, 1361-63 (6th Cir. 1988).

THE MERITS OF THIS UNDERLYING ACTION HAVE NEVER BEEN RULED ON: §455(e)

5. **NO HEARING WAS CONDUCTED IN THIS ACTION:** Only after conducting a hearing in which there is "full disclosure on the record of the basis for disqual-

ification," the Court below should consider the waiver and recusal issues. These issues concerning the propriety of the action of the District Judge in adjudicating the case LOGICALLY PRECEDE THE ADJUDICATION OF THE CASE ON THE **MERITS**. Movant LAMBROS was never given the opportunity to develop a "full ... record of the basis for disqualification" in accordance with Title 28 U.S.C.A. Section 455(e). Therefore, no court has ever considered the **MERITS OF THIS CASE**. See, BARKSDALE vs. EMERICK, 853 F.2d 1359, 1362 (6th Cir. 1988).

6. Factual issues remain to be developed on the recusal question in this action; the facts concerning District Court Judge Robert G. Renner's former employment as U.S. Attorney when he illegally indicted and prosecuted Movant Lambros, and what disclosures did District Court Judge Robert G. Renner make to Movant's counsel and other individuals. Lacking a full record on which to decide the §455(a) and §455(e) issues, this Court must grant a COA and remand for supplementation and clarification of the record - a step for which there is ample precedent. See, HEALTH SERVICES ACQUISITION CORP. vs. LILJEBERG, 796 F.2d 796, 798 (5th Cir. 1986), aff'd, 100 L.Ed.2d 855 (1988)("On remand, a **HEARING** based solely on documentary evidence was held before another judge.")(emphasis added).

MOVANT LAMBROS IS CONTESTING THE INTEGRITY OF THE RESENTENCING PROCEEDING IN WHICH JUDGE ROBERT G. RENNER PRESIDED:

7. Justice STEVEN offered his opinion as to the distinction between a **RULE 60(b) MOTION** and a "second or successive" habeas corpus petiton:

> "In sum, a 'second or successive' habeas corpus petiton, like all habeas corpus petitions, is meant to remedy constitutional violations (albeit ones which arise out of facts discovered or laws evolved after an initial habeas corpus proceeding), while a **RULE 60(b) MOTION** is designed to **CURE PROCEDURAL VIOLATIONS IN AN EARLIER PROCEEDING** - here, a habeas corpus proceeding - that raise questions about that proceeding's integrity.

See, ABDUR'RAHMAN vs. BELL, 154 L.Ed.2d 501, 505 (2002). (emphasis added)

8. The Eleventh Circuit states, "A **60(b) MOTION**, however, seeks to vacate a federal judgment based on MATTERS THAT AFFECTED THE INTEGRITY OF THE PRO-

CEEDING. A PROPER 60(b) MOTION will contain an argument that a court should relieve a party from a final judgment or order for one of the reasons enumerated in the rule. See, LAZO vs. U.S., 314 F.3d 571, 573 (11th Cir. 2002)(emphasis added)

9. The Supreme Court held that "(3) **RULE 60(b)(6) RELIEF** from a final judgment is neither categorically available nor categorically unavailable for **ALL VIOLATIONS OF §455**;" See, LILJEBERG vs. HEALTH SERVICES CORP., 100 L.Ed.2d 855 (1988) (emphasis added).

10. Movant Lambros filed his April 24, 2001, Motion to vacate all judgments and orders by Judge Renner pursuant to **RULE 60(b)(6) TO CURE PROCEDURAL VIOLATIONS AT HIS RESENTENCING**, that raised questions about that proceeding's integrity. Movant Lambros has continually stated same, while the District Court wants to label his Rule 60(b)(6) motion as a 'second or successive' habeas corpus petition.

DISTRICT COURT CONCLUDES MOVANT'S RULE 60(b) IS A SUCCESSIVE §2255 MOTION:

11. The District Court concluded that Movant LAMBROS' Rule 60(b)(6) Motion is a successive §2255 motion. Because the District Court construed Movant's Rule 60(b)(6) motion as the functional equivalent of a successive §2255 motion, Movant LAMBROS' believes he must obtain a COA prior to appealing the denial of his motion. Section 2253(c)(1)(B) states that an appeal may not be taken from a final order in a proceeding under §2255 unless a judge issues a COA. Title 28 U.S.C. 2253(c). Under these circumstances, a district court order denying a successive §2255 motion is "a final order in a proceeding under section 2255" and therefore a COA is a necessary prerequisite to appealing the denial of the **60(b) MOTION**. Title 28 U.S.C. 2253(c)(1)(B). See, LAZO vs. U.S., 314 F.3d 571, 573-575 (11th Cir. 2002).

12. The District Court does not appear to understand the above logic, as the Court's ORDER of February 20, 2004, filed February 23, 2004, Pages 4 and 5, stated: "There are several reasons why defendant's request **[COA]** must be denied. First, defendant **[LAMBORS]** now acknowledges that the past two cycles of Rule 60(b)

and related motions were in fact disguised successive §2255 motion. Defendant states that he "moves this Honorable Court pursuant to 28 U.S.C. §2253(c)(1) which requires a Certificate of Appealability (COA) before an appeal may be taken from 'the final order in a habeas corpus proceeding.' ... That admission is fatal, because this court lacks jurisdiction over successive §2255 motions brought without authorization from the circuit court. ..." Movant LAMBROS believes the logic set forth by the Eleventh Circuit is correct in LAZO vs. U.S.. Also, Movant is a **PRISONER IN CUSTODY** trying to **CURE A PROCEDURAL VIOLATION IN AN EARLIER PROCEEDING**, based on matters that affected the integrity of the proceeding. The Supreme Court pointed out in ANDREWS vs. U.S., 373 US 334, 338, 10 L.Ed.2d 383, 387 (1963), "adjudication upon the underlying merits of claims is not hampered by reliance upon the titles petitioners put upon their documents." The Eleventh Circuit referred of ANDREWS when it stated, "That Jordan mislabeled his petition, however, is not fatal to his claims. Federal courts have long recognized that hey have an obligation to look behind the label of a motion filed by a **PRO SE INMATE** and determine whether the motion is, in effect, cognizable under a different remedial statutory framework." (emphasis added) See, U.S. vs. JORDAN, 915 F.2d 622, 624-625 (11th Cir. 1990); SANDERS vs. U.S., 113 F.3d 184, 187 (11th Cir. 1997)("Third, we have a duty of "liberally construe [a **PRO SE LITIGANT'S**] assertions to discern whether jurisdiction to consider his motion can be founded on a legally justifiable base." ... See also, HAINES vs. KERNER, 404 US 519, 520, 30 L.Ed.2d 652 (1972)(noting that **PRO SE** pleadings should be held "to less stringent standards than formal pleadings drafted by lawyers."); LAZO vs. U.S., 314 F.3d 571, 573 fn. 2 (11th Cir. 2002)("District courts have an obligation to look behind the label of a **PRO SE INMATE'S** motion to determine whether the motion is cognizable under a **DIFFERENT REMEDIAL STATUTORY FRAMEWORK**.")(emphasis added).

13. Therefore, in LAZO vs. U.S., which involved a federal prisoner, the panel held that if the Rule 60(b) motion is functionally equivalent to a Section 2255 motion, the prisoner may not appeal from the denial of the Rule 60(b) motion without first obtaining a certificate of appealability (COA).

ISSUE MOVANT SEEKS TO PRESENT ON APPEAL/COA

14. Movant LAMBROS incorporates and restates his attached November 25, 2003, "MOTION FOR ISSUANCE OF CERTIFICATE OF APPEALABILITY," that was filed with the United States District Court for the District of Minnesota. See, **EXHIBIT A.**

15. Movant LAMBROS also requests this court to hear, review, and incorporate the full record that was developed within the District Court. Movant requested the Clerk of the District Court to certify and transmit the full record to this court on March 06, 2004.

ISSUE ONE (1):

WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION BY NOT GIVING FULL CONSIDERATION AND FULL DISCLOSURE OF THE GROUNDS FOR DISQUALIFICATION ON THE RECORD (HEARING) TO MOVANT LAMBROS' CLAIMS FOR VIOLATIONS OF TITLE 28 U.S.C.A. §§ 455(a), 455(b)(3), AND 455(e), AS REQUIRED UNDER THE INTERVENING STANDARD AND CHANGE IN CONTROLLING LAW FOR ISSUANCE OF CERTIFICATE OF APPEALABILITY (COA). See, MILLER-EL vs. COCKRELL, 154 L.Ed. 2d 931 (February 25, 2003).

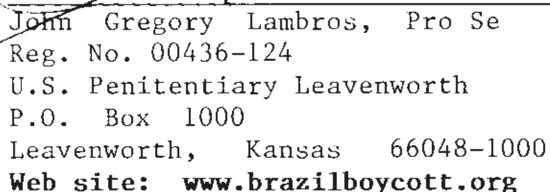
CONCLUSION

16. Movant LAMBROS requests this Court to issue a COA, as Movant has made a substantial showing of the denial of a constitutional right. To meet what the Ninth Circuit has referred to as this "modest standard," see CHARLES vs. HICKMAN, 228 F.3d 981, 982 n.1 (9th Cir. 2000), this Movant "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." BAREFOOT vs. ESTELLE, 463 U.S. 880, 893 n.1, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983). Quoting, RANDOLPH vs. KEMNA, 276 F.3d 401, 403 n.1 (8th Cir. 2002).

17. This Court has demonstrated that the issues are debatable among jurists of reason; that a court could resolve the issues in a different manner and that the questions are adequate to deserve encouragement to proceed further, when it stated, "Unlike objections under §455(b), §455(a) objections can be waived after a court gives full disclosure of the grounds for disqualification. 28 U.S.C. § 455(e)." (emphasis added). See, IN RE KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM, 85 F.3d 1353, 1359 (8th Cir. 1996). This Court also stated, "Subsection §455(e) provides that a § 455(b) conflict cannot be waived." Id. at 1359. (emphasis added); MORAN vs. CLARKE, 296 F.3d 638, 648 (8th Cir. 2002).

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

EXECUTED ON: **MARCH 16, 2004**



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NOTICE **NOTICE** **NOTICE** **NOTICE**

EXHIBIT A of this March 16, 2004 document entitled, "MOTION FOR ISSUANCE OF CERTIFICATE OF APPEALABILITY BY THE EIGHTH CIRCUIT COURT OF APPEALS," is available for downloading on the BOYCOTT BRAZIL web site: www.brazilboycott.org and entitled, "November 25, 2003, Lambros' "NOTICE OF APPEAL" and "MOTION FOR ISSUANCE OF CERTIFICATE OF APPEALABILITY," USA vs. LAMBROS, Civil No. 99-28(DSD), Criminal No. 4-89-82(5)(DSD/FLN)."

THANK YOU!

EXHIBIT A.