November 25, 2003

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CLERK OF THE COURT
District of Minnesota
U.S. Federal Courthouse
316 North Robert Street
St. Paul, Minnesota 55101
U.S. CERTIFIED MAIL NO. 7001-0320-0005-1598-1947

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

Dear Clerk:

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

1. NOTICE OF APPEAL. Dated: November 25, 2003;

2. MOTION FOR ISSUANCE OF CERTIFICATE OF APPEALABILITY. Dated: November 25, 2003.

Thanking you in advance for your assistance in this matter.

Happy ~~Holi~~days,

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 two (2) documents/motions were mailed within a stamped addressed envelope from the USP Leavenworth MailRoom on this **25th DAY OF NOVEMBER, 2003,** to:

a. CLERK OF THE COURT AS ADDRESSED ABOVE;

b. U.S. Attorney's Office, District of Minnesota, U.S. Federal Courthouse, Suite 600, 300 South 4th Street, Minneapolis, Minnesota 55415.

John Gregory Lambros, Pro Se

1. Fwd Et

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

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

NOTICE OF APPEAL

Notice is hereby given that JOHN GREGORY LAMBROS, Defendant/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 November 06, 2003, pursuant to Fed. R. Civ. P. 59(e)

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

EXECUTED ON: **NOVEMBER 25, 2003**

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Leavenworth, Kansas 66048-1000 USA
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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

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

MOTION FOR ISSUANCE OF CERTIFICATE OF APPEALABILITY

Now comes Defendant, John Gregory Lambros, Pro Se, (hereinafter Movant) and moves this Honorable Court pursuant to Title 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." As the Second Circuit explained: "To begin with, the plain text of §2253(c)(1) would seem to make the COA requirement applicable here. There is no question that the denial of a **RULE 60(b) MOTION** in non-habeas cases is a 'final order' for purposes of appeal." See, GONZALEZ vs. SECRETARY FOR DEPT. OF CORRECTIONS, 317 F.3d 1308, 1311-12 (11th Cir. 2003)("Five of the six circuits that have addressed that issue in published opinions have concluded that a **COA** is required either for the appeal from the denial of all habeas-related **RULE 60(b) MOTIONS,** or at least for the appeal from the denial of true **RULE 60(b) MOTIONS.** See, ... ZEITVOGEL vs. BOWERSOX, 103 F.3d 56, 57 (**8th Cir.** 1996).

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

1. Movant Lambros is filing his MOTION FOR ISSUANCE OF CERTIFICATE OF APPEALABILITY in a timely fashion, as per the Court's October 23, 2003, ORDER and this Court's November 06, 2003 ORDER, pursuant to Fed. R. Civ. P. 59(e) to alter or amend the court's order of October 23, 2003.

3.

2. The Supreme Court recently provided guidance to this Court on the question of how an application for a COA is to be addressed in MILLER-EL vs. COCKRELL, 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.")

3. Therefore, this Court must issue a CERTIFICATE OF APPEALABILTIY if Movant lambros presents a question of "DEBATABILTY" 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 rationale 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 incorporates here all of his already-filed briefs and responses, pursuant to Federal Rules of Civil Procedure 10(c), within this action.

5.

STATEMENT OF THE CASE

6. On or about May 20, 2003, Movant Lambros filed his "MOTION TO VACATE JUDGMENT DUE TO INTERVENING CHANGE OF 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).**"

7. Movant clearly stated within his May 20, 2003, motion, "As should be readily apparent by now, underlying Movant Lambros' arguments herein for Rule 60(b) relief is the assumption 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) amount to an intervening change in CONTROLLING LAW." See, Pages five and six, Paragraph 17.

8. Movant reviewed this Court's [Judge Doty's] ORDERS dated:

a. March 08, 2002, in which it stated, "Although petitioner purports to bring this motion under Rule 60(b)(6) of the Federal Rules of Civil Procedure, the court concludes that it **MUST** be treated as a petition pursuant to 28 U.S.C. § 2255 since Lambros is attempting to collaterally attack his conviction and sentence. See, BOLDER vs. ARMONTROUT, 983 F.2d 98, 99 (8th Cir. 1993); BLAIR vs. ARMONTROUT, 976 F.2d 1130, 1134 (8th Cir. 1992)." (emphasis added). This Court **DID NOT** apply the precedent of the Eighth Circuit Court of Appeals **AFTER** it ruled on BOULDER and BLAIR. See, HOOD vs. U.S., 342 F.3d 861, 864 (8th Cir. 2003) (The District Court, however, is bound, as are we, to apply the precedent of this Circuit). The Eighth Circuit clearly stated "**NEITHER BOLDER NOR BLAIR MANDATES THAT ALL RULE 60(b) MOTIONS IN HABEAS CASES BE TREATED AS SUBSEQUENT HABEAS PETITIONS.** We do not rule out the possibility that a habeas case may present circumstances in which a Rule 60(b) motion might properly be examined as such rather than as a subsequent habeas petition." See, GUINAN vs. DELO, 5 F.d 313, 316 **(8th Cir. 1993)** (emphasis added). See, **EXHIBIT B.** (GUINAN, 5 F.3d at 316)

6.

b. May 29, 2002, ORDER, as to Movant lambros' April 11, 2002, application for **CERTIFICATE OF APPEALABILITY**, which was DENIED. Judge Doty restated that the Court lacked jurisdiction due to the holdings in BLAIR and BOLDER.

c. On or about June 11, 2002, Movant Lambros filed his MOTION FOR ISSUANCE OF CERTIFICATE OF APPEALABILITY TO THE EIGHTH CIRCUIT COURT OF APPEALS, which was denied on July 1, 2002 by the Eighth Circuit for the reasons stated within the district court's March 8, 2002 and May 29, 2002, ORDERS.

9. A review of the above ORDERS by this Court clearly alone raises some debate as to whether this court applied a too demanding a standard, one distinct from the underlying merits, when full consideration to the substantial evidence Movant Lambros put forth in support of the prima facie case, violations of Title 28 U.S.C.A. § 455 by District Court Judge Robert G. Renner, pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure.

10. **THIS COURT DID NOT CONDUCT A HEARING AT WHICH THERE WOULD BE FULL DISCLOSURE ON RECORD OF BASIS FOR DISQUALIFICATION IN ACCORDANCE WITH TITLE 28 U.S.C.A. § 455(a, e).** This Court was bound to apply the precedent of the Eighth Circuit 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 EMPLOYEES RETIREMENT SYSTEM, 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. (emphasis added) 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 requirements, which its plain language, legislative history, and the case

law tell us must be strictly construed. Id. 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 CONDUCTING 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). See, **EXHIBIT C.** (BARKSDALE, 853 F.2d at 1359, 1361, 1362)

11. "[I]t is critically important in a case of this kind to identify the facts that might reasonably cause an objective observer to question [a judge's] impartiality." LILJEBERG, 486 U.S. at 865, 108 S.Ct. at 2205. Special emphasis should be placed on identifying those facts material to our §455(a) analysis." See, e.g., id. at 865-67, 108 S.Ct. at 2205-06.

12. Judge Robert G. Renner was initially presented with Movant Lambros' Rule 60(b)(6) Motion to Vacate all Judgements by Judge Renner pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure for violations of Title 28 U.S.C.A. §455. Judge Renner reassigned Movant Lambros' motion to Chief Judge Rosenbaum who ordered the government to respond. Movant Lambros filed a motion for disclosure of documents filed by U.S. Judge Robert G. Renner on or about October 29, 2001, **TO NO AVAIL.**

13. Judge Robert G. Renner should have conducted a **FULL HEARING INTO HIS OWN POSSIBLE BIAS OR DISQUALIFIED HIMSELF FROM MOVANT LAMBROS' CASE ON FEBRUARY 10, 1997**, the day Judge Renner resentenced Movant Lambros. Judge Renner has never made any factual findings in this action. Title 28 U.S.C. §455 is directed to the judge, rather than the parties, and is **SELF-ENFORCING** on the part of the judge [Judge Renner]. Moreover, section 455 includes no provision for referral of the question of recusal to another judge; if the judge sitting on a case is aware of grounds for recusal under section 455, **THAT JUDGE HAS A DUTY TO RECUSE HIMSELF OR HERSELF.** See, U.S. vs. SIBLA, 624 F.2d 864, 868 (9th Cir. 1980); IN RE DREXEL BURNHAM LAMBERT INC., 861 F.2d 1307, 1312 (2nd Cir. 1988) (Discretion is confided in the district judge in the first instance to determine whether to disqualify himself. ... The reasons for this are plain. The judge presiding over a case is in the best position to appreciate the implications of those matters alleged in a recusal motion.).

14. Chief Judge James M. Rosenbaum did not develop a "FULL ... RECORD OF THE BASIS FOR DISQUALIFICATION" in accordance with **TITLE 28 U.S.C.A. §455(e)**, as required by the Eighth Circuit. See Paragraph Ten (10) on page five (5).

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. See, MILLER-EL vs. COCKRELL, 154 L.Ed.2d 931 (February 25, 2003).**

15. The District Court used the incorrect and/or too demanding a

standard in evaluating Movant Lambros' request for the issuance fo a certificate of appealability on May 29, 2002. Judge Doty ORDERED Movant Lambros' April 11, 2002, application for COA and motion to appeal DENIED on the **MERITS**, without holding a **HEARING** which there would be full disclosure on record of basis for disqualification in accordance with **TITLE 28 U.S.C.A. § 455(a, e).** See, IN RE KANSAS PUBLIC EMPLOYEES RETIREMENT SYSTEM, 85 F.3d 1353, 1359 **(8th Cir. 1996);** MORGAN vs. CLARKE, 296 F.3d 638, 648 **(8th Cir. 2002);** BARKSDALE vs. EMERICK, 853 F.2d 1359, 1361-1363 (6th Cir. 1988). Please refer to paragraph ten (10) within this motion.

16. The district court should not have ruled on the **MERITS**, as there was no disclosure "on the record" and therefore no properly obtained "waiver," as required by Title 28 U.S.C.A. **§ 455(e).** Only **AFTER** conducting a hearing in which there is "full disclosure on the record of the basis for disqualification," can the district consider the waiver and recusal issues and adjudication of Movant's case on the **MERITS.** Movant Lambros was entitled to the decision of a judge's eligibility to preside. See, BARKSDALE, 853 F.2d at 1362.

17. This Court denied Movant Motion for a COA, finding that Movant failed to demonstrate that "the issues deserve[d] further proceedings," on May 29, 2002. This Court restated same on October 23, 2003, within it ORDER. See, Page 2 and 3, October 23, 2003, ORDER. Movant requested this Court to vacate the May 29, 2002, ORDER, due to the U.S. Supreme Court's ruling in MILLER-EL vs. CORKRELL, 154 L.Ed.2d 931 (2003), intervening change in law as to the standards applied for the issuance of a certificate of appealability (COA).

18. Movant has offered an overview of the Supreme Court guidance on the application for a COA in MILLER-EL within Paragraphs two (2), three (3), and four (4) of this motion. This Court did not follow the controlling standards when it issued the May 29, 2002, ORDER nor its ORDER dated October 23, 2003, and November 06, 2003.

19. This Court must issue a CERTIFICATE OF APPEALABILITY, as Movant clearly

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 "show that reasonable jurist 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.")

20. The question in short, **"DID THIS COURT COMPLY WITH TITLE 28 U.S.C.A. §§ 455(a) AND 455(e), WHEN IT DID NOT CONDUCT A HEARING AT WHICH THERE WOULD BE FULL DISCLOSURE ON RECORD OF BASIS FOR DISQUALIFICATION?"**

21. 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. The foregoing cases illustrate that other jurists have in fact come to a different conclusion, on precisely the same facts.

CONCLUSION

22. For all of the above-stated reasons, Movant Lambros requests that this Court issue a "CERTIFICATE OF APPEALABILITY" to Movant.

23. 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: November 25, 2003

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11.

FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE

Fourth Edition

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New York University School of Law

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Columbia University School of Law

Volume 2

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EXHIBIT A.

12.

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

13.

EXHIBIT A.

(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).

14.

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]

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[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.

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EXHIBIT A.

(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

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[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* § 20.3e (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

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EXHIBIT A.

that Guinan was competent to stand trial. According to O'Connor's evaluation, however, Guinan has mild to moderate organic brain damage dating back to before the time of the murder. This brain damage impairs Guinan's "ability to think in a logical organized fashion or plan and anticipate in a logical fashion rapidly." Transcript of Rule 60(b) Hearing at 44. According to O'Connor, "[i]n a prison fight or similar stressful situation, Mr. Guinan's reaction would have been to act without thinking." Affidavit of William A. O'Connor at 2 (Jan. 26, 1993) (filed with Guinan's motion to alter or amend). O'Connor also stated that he believed that at the time of the murder Guinan "was incapable of considering the taking of another's life with a cool and deliberate state of mind." *Id.*

The District Court treated Guinan's Rule 60(b) motion as a second habeas petition. It found that Guinan's claims were barred under the rules applicable to successive petitions and denied the motion. Guinan then filed a motion under Rule 59(e) asking the District Court to alter or amend its judgment. The District Court denied the motion. Guinan appeals from the denial of his Rule 60(b) motion.

II.

[1] Guinan argues that the trial court erred in treating his Rule 60(b) motion as a second habeas petition. We disagree. Rule 60(b) allows a court to relieve a party from a final judgment in certain circumstances, including the case in which the party discovers evidence after trial that could not have been discovered earlier by the exercise of due diligence. Fed.R.Civ.P. 60(b)(2). At least twice previously, however, we have held that a Rule 60(b) motion seeking relief from the denial of a habeas petition was properly treated as a second habeas petition. *Bolder v. Armontrout*, 983 F.2d 98, 99 (8th Cir. 1992), *cert. denied*, — U.S. —, 113 S.Ct. 1070, 122 L.Ed.2d 497 (1993); *Blair v. Armontrout*, 976 F.2d 1130, 1134 (8th Cir. 1992), *cert. denied*, — U.S. —, 113 S.Ct. 2357, 124 L.Ed.2d 265 (1993).

Guinan correctly points out that neither *Bolder* nor *Blair* mandates that all Rule 60(b) motions in habeas cases be treated as subsequent habeas petitions. We do not rule out the possibility that a habeas case may present circumstances in which a Rule 60(b) motion might properly be examined as such rather than as a subsequent habeas petition. This, however, is not such a case. Guinan's motion was based on new evidence: O'Connor's evaluation of Guinan's mental status. The motion was brought on January 2, 1991, some nineteen months after the District Court's judgment denying Guinan's habeas petition. Thus the motion was untimely under Rule 60(b). *See* Fed.R.Civ.P. 60(b) (providing that motions brought on the basis of newly discovered evidence shall be brought "not more than one year after the judgment").

The case on which Guinan relies is inapposite. *Landano v. Rafferty*, 126 F.R.D. 627 (D.N.J.1989), *rev'd on other grounds*, 897 F.2d 661 (3d Cir.), *cert. denied*, 498 U.S. 811, 111 S.Ct. 46, 112 L.Ed.2d 23 (1990). In that case, Landano brought a Rule 60(b) motion more than a year after the district court's initial judgment denying habeas was entered. The motion was based on newly discovered exculpatory evidence, which the government previously had failed to provide to Landano in violation of Landano's constitutional rights. The court held that Landano's motion was not based only on newly discovered evidence, and granted Landano relief under the catchall provision of Rule 60(b)(6), which allows relief for "any other reason justifying relief" and is not subject to the one-year time limit applicable to motions based on newly discovered evidence.

In the case before us no constitutional violation akin to that in *Landano* prevented the discovery of the new evidence. To be sure, the District Court selected the experts who examined Guinan in the original habeas proceeding, but that was its prerogative. Guinan was not foreclosed from obtaining O'Connor's evaluation during the original habeas proceeding. Guinan's Rule 60(b) motion based on nothing more than O'Connor's evaluation was subject to the one-year time limit; because the motion was untimely, it was not eligible for consideration under Rule 60(b). For this reason alone, the trial court correctly treated the motion as a second habeas

EXHIBIT B.

Vernon BARKSDALE, individually and as Personal Representative of the Estate of Edmond Barksdale, Deceased, Plaintiff–Appellant,

v.

Dr. Myron EMERICK and Dr. Karl Emerick, individually and in their capacities as medical doctors for the Macomb County Jail; Donald Amboyer, individually and in his representative capacity as Jail Administrator for the Macomb County Jail; William Hackel, individually and in his representative capacity as Sheriff for the County of Macomb; the County of Macomb, a governmental entity of the State of Michigan; and Mary Jones and Shirley Bels, individually and in their representative capacities as Medical Corrections Officers, jointly and severally, Defendants–Appellees.

No. 87–1181.

United States Court of Appeals,
Sixth Circuit.

Argued April 25, 1988.

Decided Aug. 12, 1988.

Action was brought against medical doctors for jail, jail administrator, county sheriff, county, and medical corrections officers, after jail inmate was transported to hospital, but lapsed into coma and died as result of status asthmaticus, alleging deliberate indifference to serious medical needs in violation of Eighth Amendment under the civil rights statute, as well as pendent state law claims sounding in tort and contract. The United States District Court for the Eastern District of Michigan, Zatkoff, J., dismissed the case, plaintiff moved for recusal and for rehearing or reconsideration, and the District Court denied those motions. Plaintiff appealed. The Court of Appeals, Merritt, Circuit Judge, held that District Court had not complied with statutory procedure for waiver of statutorily mandated disqualification of judge in proceeding in which his impartiality might reasonably be questioned, and cause would accordingly be demanded for hearing.

Vacated and remanded.

Contie, Senior Circuit Judge, filed dissenting opinion.

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District court did not comply with statutory requirements for waiver of statutorily mandated disqualification of judge in proceeding in which his impartiality might reasonably be questioned—that waiver may be accepted provided it is proceeded by full disclosure on record of basis for disqualification, and cause would accordingly be remanded for hearing at which there would be full disclosure on record of basis for disqualification and reconsideration of waiver and recusal issues, with reconsideration of merits of case thereafter; critical factual dispute existed as to what disclosure judge made to counsel at pretrial conference. 28 U.S.C.A. § 455(a, e).

Mark Granzotto (argued), Detroit, Mich., James M. Prahler, Bloom, Prahler & Kavanaugh, Livonia, Mich., for plaintiff-appellant.

Christine D. Oldani (argued), Fred Brochert, Brian J. Doren, James G. Gross (argued), Detroit, Mich., for defendants-appellees.

Before MERRITT and KENNEDY, Circuit Judges; and CONTIE, Senior Circuit Judge.

MERRITT, Circuit Judge.

Plaintiff appeals from the District Court's order of dismissal, order denying appellant's motion for rehearing or reconsideration, and order denying appellant's motion to disqualify. Because the District Court failed to comply with procedural rules concerning disqualification, we vacate the judgment and remand this case for further proceedings.

From February 1983 through June 1983, twenty-year-old Edmond Barksdale was a periodic resident of the Macomb County Jail. During this time, he suffered from

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issue in favor of a "duty to sit". Such a concept has been criticized by legal writers and witnesses at the hearings were unanimously of the opinion that elimination of this "duty to sit" would enhance public confidence in the impartiality of the judicial system.

While the proposed legislation would remove the "duty to sit" concept of present law, a cautionary note is in order. No judge, of course, has a duty to sit where his impartiality might be reasonably questioned. However, the new test should not be used by judges to avoid sitting on difficult or controversial cases.

At the same time, in assessing the reasonableness of a challenge to his impartiality, each judge must be alert to avoid the possibility that those who would question his impartiality are in fact seeking to avoid the consequences of his expected adverse decision. Disqualification for lack of impartiality must have a *reasonable* basis. Nothing in this proposed legislation should be read to warrant the transformation of a litigant's fear that a judge may decide a question against him into a "reasonable fear" that the judge will not be impartial. Litigants ought not have to face a judge where there is a reasonable question of impartiality, but they are not entitled to judges of their own choice.

Finally, while the proposed legislation would adopt an objective test, it is not designed to alter the standard of appellate review on disqualification issues. The issue of disqualification is a sensitive question of assessing all the facts and circumstances in order to determine whether the failure to disqualify was an abuse of sound judicial discretion.

H.R.Rep. No. 1453, 93d Cong.2d Sess. 4–5, *reprinted in* 1974 U.S.Code Cong. & Admin.News 6351, 6354–55 (emphasis original).

In the instant case, appellant filed a motion for recusal on February 5, 1987, ten days after the entry of dismissal. The motion recited that the District Judge had "previously acknowledged that it is personally acquainted with" two defendants, Hackel and Amboyer, and that within "the last week, Plaintiff's counsel has learned that the son of [Sheriff Hackel] is a law clerk to this Court." [1] The District Court's order denying the motion for recusal reads in full:

> The Court having disclosed to counsel that one of its law clerks was related to a Defendant party herein at the July 8, 1986 status conference and counsel having voiced no objections and the Court further having insured that the subject clerk was to have no contact whatsoever with this matter, Plaintiff's belated Motion to Disqualify is DENIED.

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 a full disclosure on the record* of the basis for disqualification.

(Emphasis added.) 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 requirements, which its plain language, legislative history, and the case law tell us must be strictly construed. *See, e.g., United States*

1. The motion asserted as authority for the first proposition the "Affidavit of James Prahler," plaintiff's counsel below and in this Court, and as authority for the second proposition, "Affidavit of Patti M. Tremel," a secretary in his law office. Tremel's affidavit recites that on January 27 or 28 she called the District Judge's chambers, asked to speak to the law clerk, was told he was not there but that his name was Bill Hackel and, upon further inquiry, that he was the son of Sheriff Hackel. The affidavit of Mr. Prahler is neither docketed nor contained in the record and thus apparently was never filed. At oral argument, much was made of the absence of any sworn statement or other evidence in the record that would contradict the District Judge's later recollection of his disclosure at the status conference, thus raising difficult questions regarding the showing a party seeking disqualification under § 455(a) must make either in the trial court or on appeal. Because we dispose below in text of the recusal issue on the narrow ground that the waiver requirement of § 455(e) was not met, we need not reach these other issues.

EXHIBIT C.

v. Murphy, 768 F.2d 1518, 1538–39 (7th Cir.1985), *cert. denied*, 475 U.S. 1012, 106 S.Ct. 1188, 89 L.Ed.2d 304 (1986); *Portashnick v. Port City Construction Co.*, 609 F.2d 1101, 1114–15 (5th Cir.) (dicta), *cert. denied*, 449 U.S. 820, 101 S.Ct. 78, 66 L.Ed. 2d 22 (1980). 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).

Our view of the procedure to be followed in dealing with issues under § 455 is reinforced by the Supreme Court's recent decision in *Liljeberg v. Health Services Acquisition Corp.*, — U.S. —— 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988), applying § 455 strictly and holding that § 455 should "in proper cases, be applied retroactively" in order "to rectify an oversight and to take the steps necessary to maintain public confidence in the impartiality of the judiciary." *Id.* at ——, 108 S.Ct. at 2203. The fact that one of the members of the judge's small staff in chambers is the son of one of the litigants in a case, although not a *per se* basis for disqualification, deserves careful consideration. The judge states that he disclosed his acquaintanceship with that litigant, 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).

We do not agree with the dissent that *Sierra Club v. Simkins Industries, Inc.*, 847 F.2d 1109 (4th Cir.1988) is in point. In *Simkins*, there were no factual issues remaining to be developed on the recusal question; the facts concerning the trial judge's former membership in the Sierra Club were undisputed. By contrast, here we have a critical factual dispute: exactly what disclosure did the District Judge make to counsel at the pretrial conference—only that he was "personally acquainted" with two defendants in the case, as plaintiff's counsel asserted, or that his law clerk was the son of one of those defendants, as the District Judge later recalled. 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. v. Liljeberg*, 796 F.2d 796, 798 (5th Cir.1986), *aff'd*, — U.S. ——, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988).

After conducting 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. The litigant is entitled to the decision of a judge eligible to preside. Therefore, after properly considering the issues under § 455, and making findings and conclusions thereon, the District Judge below, or if he be recused, another District Judge to whom the case may be transferred, shall reconsider the merits of the case.

CONTIE, Senior Circuit Judge, dissenting.

The majority in my opinion incorrectly holds that the district court failed to comply with the procedural rules concerning recusal under 28 U.S.C. § 455. Additionally, although I believe that the district court possibly failed to comply with procedural rules concerning summary judgment, the record as a whole read in the light most favorable to appellant in my opinion raises genuine issues of material fact concerning the deliberate indifference of appellees Drs. Myron and Karl Emerick, Mary Jones, and Shirley Bels to the medical needs of decedent Edmond Barksdale. I would affirm the district court's judgment as it relates to the remainder of the appellees but vacate the judgment as it relates to Drs. Myron and Karl Emerick, Mary Jones, and Shirley Bels and remand this case for further proceedings. Accordingly, I dissent.

I.

The majority holds that it is obvious that the district court failed to comply with section 455(e)'s disclosure and waiver requirements. This holding is indisputable. It is,

EXHIBIT C.