

November 5, 2012

John Gregory Lambros
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U.S. Penitentiary Leavenworth
P.O. Box 1000
Leavenworth, Kansas 66048-1000
USA

U.S. CERTIFIED MAIL NO.
7010-0290-0003-5485-4424

CLERK OF THE COURT
U.S. Court of Appeals for the Eighth Circuit
Thomas F. Eagleton U.S. Courthouse
111 South 10th Street, Room 24.329
St. Louis, Missouri 63102
Tel. (314) 244-2400
Website: www.ca8.uscourts.gov

RE: JOHN GREGORY LAMBROS vs. USA, No. 12-2427

Dear Clerk:

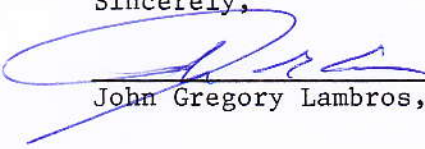
Attached for FILING in the above-entitled action is copy of my:

1. "MOTION FOR RECUSAL OF CIRCUIT COURT JUDGE DIANA MURPHY FROM THE JUDGMENT IN THIS ABOVE-ENTITLED ACTION PURSUANT TO TITLE 28 USC §§ 455 et al." Dated: November 5, 2012.
2. "PETITION FOR REHEARING (FRAP 40) WITH A SUGGESTION FOR PETITION FOR REHEARING EN BANC (FRAP 35)". Dated: November 5, 2012.

Please serve the U.S. Attorney copy of this motion via ELECTRONIC MAIL.

Thank you in advance for your continued support in this matter.

Sincerely,

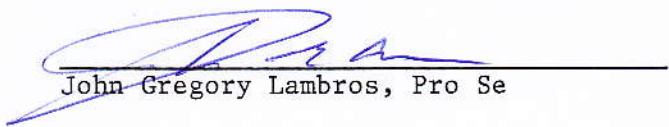


John Gregory Lambros, Pro Se

CERTIFICATE OF SERVICE

I JOHN GREGORY LAMBROS certify that I mailed a copy of the above-entitled two (2) motions within a stamped envelop with the correct postage to the following parties on **NOVEMBER 5, 2012**, from the U.S. Penitentiary Leavenworth Mailroom:

3. Clerk, U.S. Court of Appeals for the Eighth Circuit, as addressed above.



John Gregory Lambros, Pro Se

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JOHN GREGORY LAMBROS, *
Petitioner - Movant, * CASE NO. 12-2427
vs. * DISTRICT COURT FOR THE DISTRICT OF
MINNESOTA - Criminal No. 4-89-82(05)
UNITED STATES OF AMERICA, *
Respondent. * AFFIDAVIT FORM

MOTION FOR RECUSAL OF CIRCUIT COURT JUDGE DIANA
MURPHY FROM THE JUDGMENT IN THIS ABOVE-ENTITLED
ACTION PURSUANT TO TITLE 28 U.S.C. §§ 455 et al.

COMES NOW the Petitioner - Movant, JOHN GREGORY LAMBROS, appearing pro se, hereby submits this "MOTION FOR RECUSAL" for the removal of Circuit Court Judge DIANA MURPHY from this action, pursuant to Title 28 U.S.C. §455(a), §455(b)(1) and §455(b)(3), as Judge Diana Murphy was the District Court Judge that originally conducted the trial and sentencing of Movant Lambros in this action. See, USA vs. LAMBROS, 65 F.3d 698 (8th Cir. 1995).

This motion is filed in a timely manner, because Movant Lambros did not know Circuit Judge Diana Murphy was sitting on the panel in this above-entitled action until Movant received this Court's "JUDGMENT" dated October 24, 2012, which stated this action was ruled on by Circuit Judges "MURPHY, SMITH, BENTON".

Movant has offered an argument as to the above within "PETITION FOR REHEARING with a suggestion for PETITION FOR REHEARING EN BANC", that is being filed with this motion and requests the argument to be incorporated herein.

Movant Lambros requests that this Court vacate the judgment in this action and assign Movant's petition for authorization to file a successive habeas §2255 application to a NEW PANAL OF JUDGES, as Circuit Court Judge Murphy may of

improperly shared her personal knowledge of Movant's history with Circuit Court Judges SMITH and BENTON.

This Court has held that due process requires that a judge possess neither actual nor apparent bias. See, BANNISTER vs. DELO, 100 F.3d 610, 614 (8th Cir. 1996) (whether judge's impartiality might reasonably be questioned by average person on street who knows all relevant facts). The Third Circuit offered an opinion exactly on point in CLEMMONS vs. WOLFE, 377 F.3d 322, 328 (3rd Cir. 2004):

"...., the case before us raises the latter issue and the passage of time cannot overcome a reasonable person's doubts about a JUDGE'S IMPARTIALITY IN JUDGING HIS OR HER OWN WORKS."
(emphasis added)

and held that due process was violated because the judge who had heard the case in state court failed to SUA SPONTE recuse himself from hearing federal habeas petition challenging that trial and conviction:

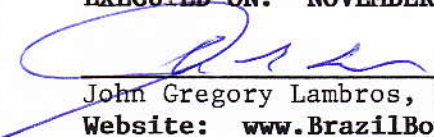
"...., we now exercise our supervisory power to require that each federal district court judge in this circuit recuse himself or herself from participating in a 28 USC §2254 habeas corpus petition of a defendant raising any issue concerning the trial or conviction over which that judge presided in his or her former capacity as a state court judge. We thus shall vacate the District Court's decision to deny Clemmons' habeas petition for appointment of counsel and we will remand with instructions that the case be assigned to a different district court judge."
(emphasis added)

See, CLEMMONS vs. WOLFE, 377 F.3d at 329.

CONCLUSION:

Movant believes Judge DJANA MURPHY should of recused herself from this action, as a reasonable person would doubt her impartiality in judging her own work. For all of the above reasons this Movant requests this action to be reheard by a new panal of judges. The foregoing is true and correct. Title 28 USC §1746.

EXECUTED ON: NOVEMBER 5, 2012


John Gregory Lambros, U.S. Penitentiary Leavenworth, POB 1000, Leavenworth, Kansas
Website: www.BrazilBoycott.org

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JOHN GREGORY LAMBROS,	*	
	*	CASE NO. 12-2427
Petitioner - Movant,	*	
vs.	*	DISTRICT COURT FOR THE DISTRICT OF
	*	MINNESOTA - Criminal No. 4-89-82(05)
UNITED STATES OF AMERICA,	*	
	*	<u>AFFIDAVIT FORM</u>
Respondent.	*	

PETITION FOR REHEARING (FRAP 40)
WITH A SUGGESTION FOR
PETITION FOR REHEARING EN BANC (FRAP 35)

COMES NOW the PETITIONER - MOVANT, JOHN GREGORY LAMBROS, appearing pro se, hereby submits, pursuant to F.R.A.P. 40 and F.R.A.P. 35, the following PETITION FOR REHEARING with a suggestion for PETITION FOR REHEARING EN BANC.

1. SUMMARY OF THE ISSUES

ISSUE I:

WHETHER CIRCUIT COURT JUDGE DIANA MURPHY SHOULD OF RECUSED HERSELF FROM THE JUDGMENT IN THIS ACTION WHEN SHE HAD ORIGINALLY CONDUCTED THE TRIAL AND SENTENCING OF MOVANT LAMBROS WHEN SHE WAS A DISTRICT COURT JUDGE?

In movant's judgment, the panel of Circuit Court Judges allowed Circuit Court Judge Diana Murphy to review Movant's 28 U.S.C. §2255 on appeal, when she conducted the trial and sentencing of Movant Lambros when she was a District Court Judge in the District of Minnesota. Movant relies on the recusal statute 28 U.S.C. §455 et al.

ISSUE II:

WHETHER THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DENIED MOVANT LAMBROS DUE PROCESS WHEN IT REFUSED TO OFFER AN OPINION AS TO THE RETROACTIVE STATUS OF THE NEW U.S. SUPREME COURT CASES MISSOURI vs. FRYE, 132 S. Ct. 1399 (March 21, 2012) AND LAFLEER vs. COOPER, 132 S. Ct. 1376 (March 21, 2012) - AFTER MOVANT MADE A "PRIMA FACIE SHOWING THAT FRYE AND LAFLEER" ARE RETROACTIVE TO HABEAS CORPUS MOTIONS BY ANOTHER U.S. COURT OF APPEALS.

In Movant's judgment, the panel overlooked the October 17, 2012, Supplemental Motion Movant filed to this Court that offered the September 28, 2012, published opinion by the U.S. Court of Appeals for the Ninth Circuit, TYRONE W. MILES vs. MICHAEL MARTEL, WARDEN, No. 10-15633, which held FRYE and LAFLEER apply RETROACTIVELY.

2. ARGUMENTS

ISSUE I:

WHETHER CIRCUIT COURT JUDGE DJANA MURPHY SHOULD OF RECUSED HERSELF FROM THE JUDGMENT IN THIS ACTION WHEN SHE HAD ORIGINALLY CONDUCTED THE TRIAL AND SENTENCING OF MOVANT LAMBROS WHEN SHE WAS A DISTRICT COURT JUDGE?

This panel's decision to allow Circuit Court Judge Diana Murphy to rule on Movant "SECOND OR SUCCESSIVE MOTION PURSUANT TO 28 U.S.C. §2255(f)(3) and §2255(h)(2)" does not appear to be allowable within the recusal statute, 28 U.S.C. §455(a); §455(b)(1); and §455(b)(3), as Judge Murphy was the District Court Judge that originally conducted the trial and sentencing of Movant Lambros in this action. See, USA vs. LAMBROS, 65 F.3d 698 (8th Cir. 1995).

Movant Lambros requests that this Court vacate the judgment in this

action and assign Movant's petition for authorization to file a successive habeas (§2255) application to a new panel of judges, as Circuit Court Judge Murphy may of improperly shared her personal knowledge of Movant's history with Circuit Court Judges SMITH and BENTON.

The goal of 28 U.S.C. §455(a), which disqualifies judges from acting in proceedings in which his/her impartiality might reasonably be questioned, is to avoid even appearance of partiality. See, LILJEBERG vs. HEALTH SERVICES ACQUISITION CORP., 100 L. Ed. 2d 855 (1988).

Movant Lambros requests that this court grant a rehearing.

ISSUE II:

WHETHER THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DENIED MOVANT LAMBROS DUE PROCESS WHEN IT REFUSED TO OFFER AN OPINION AS TO THE RETROACTIVE STATUS OF THE NEW U.S. SUPREME COURT CASES MISSOURI vs. FRYE, 132 S. Ct. 1399 (March 21, 2012) AND LAFLEER vs. COOPER, 132 S. Ct. 1376 (March 21, 2012) - AFTER MOVANT LAMBROS MADE A "PRIMA FACIE SHOWING THAT FRYE AND LAFLEER" ARE RETROACTIVE TO HABEAS CORPUS MOTIONS BY ANOTHER U.S. COURT OF APPEALS.

On July 23, 2012, United States Attorney B. Todd Jones and Assistant United States Attorney Ann M. Anaya, submitted a response in this action, as to Movant Lambros' request to file a successive Section 2255 Habeas Petition. The United States Attorney's Office for the District of Minnesota specifically requested that this court:

"Accordingly, this Court should deny Lambros' request for leave to file a second or successive habeas corpus motion BECAUSE HE CANNOT MAKE A PRIMA FACIE SHOWING THAT FRYE AND LAFLEER CONSTITUTE 'A NEW RULE OF CONSTITUTIONAL LAW, MADE RETROACTIVE TO CASES ON COLLATERAL REVIEW BY THE SUPREME COURT, THAT WAS PREVIOUSLY UN-AVAILABLE.'" (emphasis added)

"To deter hundreds of similar applicants from burdening this Court with numerous successive § 2255 applications based on FRYE AND LAFLEER, and to avoid the need for the Government to brief and this Court

to consider the same issue repeatedly, **THE UNITED STATES RESPECTFULLY REQUESTS THAT THIS COURT DISMISS THIS SUCCESSIVE §2255 APPLICATION IN A PRECEDENTIAL OPINION. FOR ALL THE FOREGOING REASONS, THE UNITED STATES RESPECTFULLY REQUESTS THAT THIS COURT ISSUE A PRECEDENTIAL OPINION DENYING LAMBROS' APPLICATION TO FILE A SECOND OR SUCCESSIVE § 2255 MOTION.**" (emphasis added)

See, Page 10 of "United States Response to Defendant's Application to File Successive Section 2255 Habeas Petition", dated July 23, 2012.

On October 17, 2012, Movant Lambros filed [Prisoner Mail Box Rule] a SUPPLEMENTAL MOTION to inform this Court of the September 28, 2012, published opinion by the United States Court of Appeals for the Ninth Circuit, TYRONE W. MILES vs. MICHAEL MARTEL, WARDEN, No. 10-15633, which held that LAFLEER vs. COOPER and MISSOURI vs. FRYE apply RETROACTIVELY:

Footnote 3:

"In LAFLEER, the Court held that STRICKLAND is appropriate 'clearly established federal law' to apply to claims of ineffective assistance of counsel in plea bargaining, even when the claim relates to a foregone plea. See, LAFLEER, 132 S.Ct. at 1384. **BY APPLYING THIS HOLDING IN LAFLEER, A HABEAS PETITION SUBJECT TO AEDPA, THE COURT NECESSARILY IMPLIED THAT THIS HOLDING APPLIES TO HABEAS PETITIONERS WHOSE CASES ARE ALREADY FINAL ON DIRECT REVIEW; i.e. THAT THE HOLDING APPLIES RETROACTIVELY. ...**" (emphasis added)

See, Page 11917 within U.S. Court of Appeals for the Ninth Circuit published OPINION.

EXHIBIT A. (October 17, 2012, Cover letter from Movant to this Court that contained that above-entitled "SUPPLEMENTAL MOTION". Please note that this motion was mailed via U.S. Certified Mail.)

II(A): PRIMA FACIE SHOWING - TITLE 28 U.S.C. §2244(b)(3)(C).

BLACK'S LAW DICTIONARY - Sixth Edition, defines "PRIMA FACIE EVIDENCE"

"Evidence good and sufficient on its face. Such evidence as, in the judgment of the law, is sufficient to establish a given fact, or the group or chain of facts constituting the party's claim or defense, and which if not rebutted or contradicted, will remain sufficient. Evidence which, if unexplained or uncontradicted, is sufficient to sustain a judgment in favor of the issue which it supports, but which

may be contradicted by other evidence."

The Seventh Circuit stated that in considering applications under 28 U.S.C. §2255 for permission to file SECOND OR SUCCESSIVE MOTIONS, the court of appeals should use §2244 standard and thus insist only on prima facie showing of motion's adequacy, i.e., sufficient showing of possible merit to warrant fuller exploration by district court. See, BENNETT vs. USA, 119 F.3d 468 (7th Cir. 1997).

The Fifth Circuit stated that in the context of determining whether to grant application for permission to file SUCCESSIVE PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2244(b)(3)(C), Court of Appeals views definition of PRIMA FACIE SHOWING as simply sufficient showing of possible merit to warrant fuller exploration by district court; if in light of documents submitted with application it appears reasonably likely that application satisfies stringent requirement for filing of second or successive petition, court of appeals shall grant the application. See, IN RE MORRIS, 328 F.3d 739 (5th Cir. 2003).

Finally, the Fourth Circuit stated in the context of 28 U.S.C. § 2244(b), by "prima facie showing" the court understands simply sufficient showing of possible merit to warrant fuller exploration by district court; if in light of documents submitted with pri-filing authorization motion it appears reasonably likely that motion satisfies stringent requirements for filing of SECOND OR SUCCESSIVE PETITION, court shall grant motion. See, IN RE WILLIAMS, 330 F.3d 277, 281-282 (4th Cir. 2003).

Movant Lambros made a "PRIMA FACIE SHOWING" on October 17, 2012, when he filed a "SUPPLEMENTAL MOTION" offering the September 28, 2012 published opinion by the U.S. Court of Appeals for the Ninth Circuit, MILES vs. MARTEL, No. 10-15633 which held LAFLEER vs. COOPER and MISSOURI vs. FRYE, apply RETROACTIVELY to habeas petitioners whose cases are already final on direct review.

II(B): DUTY OF THIS COURT TO INDICATE BASIS FOR DETERMINATION AND STATE IT CONCLUSIONS OF LAW SO OTHER COURT'S MAY KNOW DEFINITELY WHAT GROUNDS FOR RELIEF HAVE BEEN CONSIDERED

On October 24, 2012, this Court issued a JUDGMENT in this action, by Circuit Court Judges MURPHY, SMITH, and BENION, which stated:

"The petition for authorization to file a successive habeas application in the district court is DENIED. Mandate shall issue forthwith." (emphasis added)

See, EXHIBIT B.

This Court did not offer any reasons for the denial of Movant's Motion

for leave to file a second or successive § 2255. This is in conflict with other

circuit courts.

The Seventh Circuit has stated, in view of 28 U.S.C. §2244, it is more

important than ever before that courts in hearing habeas corpus matter MAKE FINDINGS

OF FACT AND STATE ITS CONCLUSIONS OF LAW so that another judge or court may know

definitely what grounds for relief have been considered. See, TUCKER vs. HOWARD,

177 F.2d 494 (7th Cir. 1949).

The D.C. Circuit has stated, it is IMPERATIVE THAT DENIAL, either of leave

to file petition for a writ of habeas corpus, or the DENIAL OF WRIT ITSELF, BE

ACCOMPANIED BY AN EXPRESSION OF REASONS FOR DENIAL EITHER BY INFORMAL MEMORANDUM,

BY RECITAL IN AN ORDER, OR BY FINDINGS. See, TATEM vs. USA, 275 F.2d 894 (DC Cir.

1960).

TITLE 28 U.S.C. § 2255: The second paragraph within the statute states:

"Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, DETERMINE THE ISSUES AND MAKE FINDINGS OF FACT AND CONCLUSIONS OF LAW WITH RESPECT THERETO. . . ." (emphasis added)

Second or successive motions pursuant to 28 U.S.C. § 2255 need not be

entertained unless it raises questions not previously presented and determined;

such motions may be dismissed without a hearing if it fails to raise substantial

factual or legal questions. See, STEPHENS vs. USA, 341 F.2d 100 (10th Cir. 1965).

This Circuit has held by a panel of judges that included a panel member of this JUDGMENT - Judge Diana Murphy - "a prisoner is entitled to an evidentiary hearing on a section 2255 motion unless the motion, files and records of the case conclusively show that the prisoner is not entitled to relief. 28 U.S.C. §2255". See, ENGELEN vs. USA, 68 F.3d 238, 240-241 (8th Cir. 1995).

Movant believes this court has the same responsibility as a district court, as to the denial of Movant's right to file a petition for a writ of habeas corpus, as to the impact of a denial with NO FINDING OF FACTS AND CONCLUSIONS OF LAW. This court is not fulfilling its responsibility of review in this action. Therefore, Movant believes it is imperative that denial either of leave to file his petition, or denial of the writ itself, **BE ACCOMPANIED BY AN EXPRESSION OF THE REASONS FOR THE DENIAL EITHER BY INFORMAL MEMORANDUM, BY RECITAL IN AN ORDER, OR BY FINDINGS IS NEEDED AND REQUESTED BY MOVANT.** See, VON MOLIKE vs. GILLIES, 332 U.S. 708 (1948); WHITE vs. RAGEN, 324 U.S. 760, 765-766 (1945). See also, WOOD vs. HOWARD, 157 F.2d 807 (7th Cir. 1946); BARRON & HOTZOFF, Federal Practice and Procedure, § 1123 at page 814 (1950).

This Court's JUDGMENT denying Movant's petition for a second and successive writ of habeas corpus should be reversed, with this panel making a finding of fact and conclusions of law herein, which includes the question of whether the INTERVENING CHANGE IN THE LAW WITHIN MISSOURI vs FRYE AND LAFLEER vs. COOPER IS RETROACTIVE IN THIS CIRCUIT, AS PER THE REQUEST OF THE U.S. ATTORNEY.

In short, this Movant has met the required burden of showing that the ends of justice would be served by a redetermination of the grounds asserted.

III: CONCLUSION

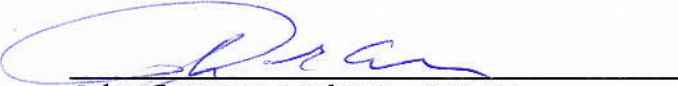
Movant believes a miscarriage of justice has occurred within this action, as Panel member Circuit Judge Diana Murphy was the District Court judge that held the trial and sentencing of Movant in this action. This Court held in DYAS vs.

LOCKHART, 705 F.2d 993, 997-998 (8th Cir. 1983)(On remand from appeal of denial of habeas corpus relief, case will be assigned to judge other than JUDGE WHO PRESIDED ON PRISONER'S HABEAS CORPUS PETITION SINCE SUCH JUDGE WAS STATE APPELLATE COURT JUDGE AT TIME OF PETITIONER'S DIRECT APPEAL WITHIN STATE SYSTEM.)

For the above stated reasons this Movant requests a rehearing on the issues presented.

I declare under penalty of perjury that the foregoing is true and correct pursuant to Title 28 U.S.C. Section 1746.

EXECUTED ON: NOVEMBER 5, 2012



John Gregory Lambros, Pro Se
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U.S. Penitentiary Leavenworth
P.O. Box 1000
Leavenworth, Kansas 66048-1000
USA

Website: www.BrazilBoycott.org

October 17, 2012

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

U.S. CERTIFIED MAIL NO.
7010-0290-0003-5485-4349

CLERK OF THE COURT
U.S. Court of Appeals for the Eighth Circuit
Thomas F. Eagleton U.S. Courthouse
111 South 10th Street, Room 24.329
St. Louis, Missouri 63102
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Website: www.ca8.uscourts.gov

RE: JOHN GREGORY LAMBROS vs. USA, No. 12-2427

Dear Clerk:

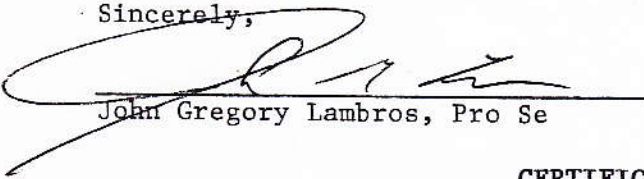
Attached for FILING in the above-entitled action is copy of my:

1. "SUPPLEMENTAL MOTION TO INFORM COURT OF NEW RELEVANT PUBLISHED HOLDING THAT CONTAINS PERSUASIVE VALUE ON THE ONLY ISSUE IN THIS ACTION - U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT APPLY LAFLER vs. COOPER, 132 S. Ct. 1376 (2012) AND MISSOURI vs. FRYE, 132 S. Ct. 1399 (2012) RETROACTIVELY."

Please serve the U.S. Attorney copy of this motion via **ELECTRONIC MAIL**.

Thank you in advance for your continued support in this matter.

Sincerely,


John Gregory Lambros, Pro Se

CERTIFICATE OF SERVICE

I JOHN GREGORY LAMBROS certify that I mailed a copy of the above-entitled motion within a stamped envelop with the correct postage to the following parties on OCTOBER 17, 2012 from the U.S. Penitentiary Leavenworth mailroom:

2. Clerk, U.S. Court of Appeals for the Eighth Circuit, as addressed above.


John Gregory Lambros, Pro Se

EXHIBIT A.

FILE
OK

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 12-2427

John Gregory Lambros

Petitioner

v.

United States of America

Respondent

Appeal from U.S. District Court for the District of Minnesota - Minneapolis

JUDGMENT

Before MURPHY, SMITH, BENTON, Circuit Judges.

The petition for authorization to file a successive habeas application in the district court is denied. Mandate shall issue forthwith.

October 24, 2012

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans