LAMBROS vs. U.S.A., Appeal No. 01-2370MN

CERTIFICATE OF SERVICE

I certify under the penalty of perjury that I mailed the following:

a. PETITIONER LAMBROS' RESPONSE TO GOVERNMENTS OPPOSITION. Dated June 18, 2001. Dated June 23, 2001.

and exhibits on this 26th day of June, 2001, from the U.S. Penitentiary Leavenworth Mailroom, to the following individuals via U.S. mail, **FOR FILING IN THIS ACTION:**

1. CLERK
U.S. COURT OF APPEALS FOR THE EIGHTH CIRCUIT
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St. Louis, Missouri 63102
Tel. (314) 244-2400

U.S. CERTIFIED MAIL NO. 7000-0520-0021-3714-2149

FOR FILING: one (1) original and three (3) copies.

2. Jeffrey S. Paulsen
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3. INTERNET RELEASE TO GLOBAL HUMAN RIGHTS GROUPS AND PLACING WITHIN THE BOYCOTT BRAZIL WEBSITE: www.brazilboycott.org

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1.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

JOHN GREGORY LAMBROS,	*	**APPEAL NO. 01-2370MN**
Petitioner,	*	**In Re: Criminal No. 3-75-128, United States District Court for the District of Minnesota - Third Division.**
vs.	*	
UNITED STATES OF AMERICA,	*	**AFFIDAVIT FORM**
Respondent.	*	

PETITIONER LAMBROS' RESPONSE TO GOVERNMENTS OPPOSITION. Dated June 18, 2001.

Petitioner JOHN GREGORY LAMBROS, Pro Se, (hereinafter MOVANT) response to the government's motion dated June 18, 2001, entitled, "OPPOSITION OF THE UNITED STATES TO PETITIONER'S APPLICATION TO FILE SUCCESSIVE SECTION 2255 PETITION."

The following information is being presented under penalty of perjury and is true and correct to the best of this Movant's knowledge:

1. The government is correct in that Movant is filing a successive petition under 28 USC § 2255 challenging **CRIMINAL NO. 3-75-128**, U.S. District Court for the District of Minnesota and rises his claim under APPRENDI vs. NEW JERSEY, 120 SCt. 2348 (2000).

2. The government states that Movant's motion should be denied due to past rulings by this Court. This is not true. As this Movant explained within his MEMORANDUM OF FACT AND LAW, there currently exists a split in the circuits, as to the retroactivity applicable to APPRENDI. See, WEST vs. VAUGHN, 204 F.3d 53, 59 (3rd Cir. 2000) and FLOWERS vs. WALTER, 239 F.3d 1096 (9th Cir. 2001)("The Court of Appeals held, as matters of first impression, that: (1) an express statement of retroactivity by the Supreme Court is **NOT REQUIRED** for a habeas claim to rely on 'a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court' within the meaning of the Antiterrorism and Effective

Death Penalty Act (AEDPA), such that the claim CAN BE PRESENTED IN A SECOND OR SUCCESSIVE HABEAS PETITION, . .") In fact, the government offers this Courts' ruling in ABDULLAH vs. U.S., 240 F.3d 683 (8th Cir. 2001) to support its' position. What this Movant finds interesting in ABDULLAH, at 686:

> "[E]ven assuming the validity of his contention, we decline to authorize a SUCCESSIVE § 2255 proceeding because Abdullah's BAILEY claim is time-barred. AEDPA established a ONE-YEAR GRACE PERIOD, ENDING ON APRIL 24, 1997, in which federal defendants were authorized to file a §2255 motion based on claims existing on the date of its enactment. . . . Consequently, Abdullah had to assert his BAILEY claim prior to April 24, 1997." (emphasis added)

ABDULLAH, 240 F.3d at 686.

3. Therefore, this Movant is filing his SUCCESSIVE § 2255 proceeding in Criminal No. 3-75-128 within the AEDPA established ONE-YEAR GRACE PERIOD, ending June 26, 2001, as to his APPRENDI claim. Movant explained this very clearly within his MEMORANDUM OF FACT AND LAW, pages 1 and 2.

4. The government states that Movant's successive § 2255 should be denied because it constitutes an abuse of the writ, stating: "[L]ambros already has filed a nearly identical motion to file a successive petition raising an APPRENDI claim and this Court already denied it. LAMBROS vs. U.S., No. 01-1954 (8th Cir. June 6, 2001) (copy attached). In fact, this Court denied LAMBROS' previous request to file a successive petition raising an APPRENDI claim on June 6, 2001. The present request to file a successive petition raising an APPRENDI claim was filed the next day, June 7, 2001. Altogether, LAMBROS has now filed at least SIX POST-CONVICTION PETITIONS (OR REQUESTS TO FILE PETITIONS) CHALLENGING HIS CONVICTION. This Court should not be forced to continually entertain these repetitive petitions, and the government should not be forced to respond to them. Because LAMBROS has chosen to abuse the writ, an order should be entered enjoining him from filing any further petitions. E.g. U.S. vs. GREEN, 630 F.2d 566 (8th Cir. 1980)." ASSISTANT U.S. ATTORNEY JEFFREY S. PAULSEN IS NOT TELLING THE TRUTH TO THIS COURT.

5. Facts to assist this Court and the government:

a. ARRAIGNMENT, the initial step of a criminal prosecution, as to **FOUR (4) SEPERATE INDICTMENTS** are the reasons for Movant LAMBROS' four (4) SECOND OR SUCCESSIVE MOTIONS under 28 U.S.C. § 2255, raising claims based on the Supreme Court's decision in APPRENDI. Movant LAMBROS is currently incarcerated on all of the following INDICTMENT NUMBERS from the United States District Court for the District of Minnesota: (1) **Criminal No. 3-75-128**; (2) **Criminal No. 3-76-17**; (3) **Criminal No. 3-76-54**; and (4) **Criminal No. 4-89-82.**

b. On June 6, 2001, this Court entered JUDGMENT in LAMBROS vs. U.S.A., **No. 01-1954.** That judgment was to the United States District Court for the District of Minnesota, **AGENCY CASE NUMBER: 3-76-54, Criminal.**

c. This above-entitled action in LAMBROS vs. USA, **No. 01-237CMR** is from USA vs. LAMBROS, **AGENCY CASE NUMBER: 3-75-128, Criminal.**

d. Movant LAMBROS **IS ONLY RAISING APPRENDI CLAIMS.**

e. Movant LAMBROS clearly stated to this court on pages 13 and 14, **CASE HISTORY,** that Movant filed a direct appeal in this action that was decided and affirmed on November 16, 1976, by the Eighth Circuit Court of Appeals. See, U.S. vs. LAMBROS, 544 F.2d 962 (8th Cir. 1976). Also Movant clearly stated to this Court that Movant filed a motion to vacate his above-entitled action as per Title 28 U.S.C. § 2255, that was denied on or about May 1, 1979, by the Honorable Judge Edward J. Devitt, Chief Judge, District of Minnesota. On January 11, 1980, Movant appealed to the Eighth Circuit Court of Appeals and on January 28, 1980, the Eighth Circuit affirmed the District Court's ruling. See, U.S. vs. LAMBROS, 614 F.2d 179 (8th Cir. 1980).

f. All inmates within the United States Penitentiary Leavenworth have been advised directly or indirectly by PAUL F. WILSON DEFENDERS PROJECT from the University of Kansas, who are on contract to assist as many inmates as possible in filing Title 28 U.S.C. §2255's, that they should file a SECOND or SUCCESSIVE PETION UNDER §2255 **BEFORE** June 26, 2001, to preserve **APPRENDI- BASED CLAIMS.**

g. **FAMM**, Families Against Mandatory Minimums, 1612 K. Street, NW, Suite 1400, Washington, D.C. 20006, via General Counsel MARY PRICE, mailed an **APPRENDI ALERT** to FAMM MEMBERS, stating:

> "[W]e send you this APPRENDI alert on **OUR CONCERN THAT SOME FEDERAL COURTS OF APPEALS WILL CONCLUDE THAT IF THE APPRENDI DECISION IS MADE RETROACTIVE FOR THE PURPOSE OF A SECOND OR SUCCESSIVE PETITION UNDER 28 U.S.C. §2244, THE DATE ON WHICH THE ONE-YEAR STATUTE OF LIMITATIONS TO SEEK HABEAS CORPUS OR §2255 RELIEF EXPIRES WILL BE JUNE 26, 2001.** While we think that outcome is unlikely, it is not out of the question . . . For those of you who have **PREVIOUSLY FILED** a habeas corpus or § 2255 petition that did not raise the **APPRENDI** issue, and you now **THINK APPRENDI APPLIES**, you should consider filing a motion seeking the court's permission to file a **SECOND OR SUCCESSIVE PETITION.** In that way you may preserve the **APPRENDI-BASED CLAIM.** (emphasis added)

EXHIBIT A: (Page one (1) of the FAMM ALERT)

h. **FAMM** also enclosed a sample boiler plate MEMORANDUM IN SUPPORT OF THE DEFENDANT'S APPLICATION FOR LEAVE TO FILE A SECOND MOTION PURSUANT TO 28 USC § 2255 (or 28 U.S.C. § 2244). See, **EXHIBIT B:**

i. **FAMM** also suggests that this Movant request this Court to hold this above-entitled application **IN ABEYANCE** pending the Supreme Court's resolution of when a new rule of constitutional law has been "made retroactive to cases on collateral review by the Supreme Court. The question of when a new rule of constitutional law has been "made retroactively applicable to cases on collateral review" is currently before the Supreme Court. See, **TYLER vs. CAIN**, No. 00-5961, cert. granted, 148 L.Ed.2d 558 (U.S., Dec. 11, 2000)(argued 4/16/01), see 69 Crim.L.Rptr. 2010-11 (April 11, 2001). Because the Supreme Court's decision in **TYLER** may suggest that the statute of limitations for filing motions pursuant to §2255 or habeas corpus motions **RAISING APPRENDI** claims began to run on June 26, 2000, the date APPRENDI was announced, this Movant has filed this Motion before one year from that date.

MOVANT LAMBROS REQUESTS THIS COURT TO SANCTION ASSISTANT U.S. ATTORNEY JEFFREY S. PAULSEN, ATTORNEY ID NUMBER 144332 UNDER A COMBINATION OF RULE 11 AND SECTION 1927:

6. Movant LAMBROS requests this Court to award sanctions to Movant and the Court under Title 28 U.S.C. Section 1927 and the Federal Rules of Civil Procedure, Rule 11, as to ASSISTANT U.S. ATTORNEY JEFFREY S. PAULSEN's, June 18, 2001, OPPOSITION OF THE UNITED STATES TO PETITIONER'S APPLICATION TO FILE SUCCESSIVE SECTION 2255 PETITION.

7. Attorney PAULSEN has requests this Court to enter an ORDER stating that Movant LAMBROS has ABUSED THE WRIT and not allow LAMBROS from filing any further petitions due to some very unclear facts and untruths by Attorney PAULSEN.

8. Attorney PAULSEN wants to play mix and match with four (4) different criminal prosecutions that Movant LAMBROS is currently incarcerated on. See, Paragraph 5(a) in this motion. A petitioner incarcerated under one conviction may file a habeas corpus petition challenging another conviction as long as the sentence on the challenged conviction has not yet been fully served and adds in some way to "the aggregate of the . . . sentences" the petitioner eventually must serve. See, PEYTON vs. ROWE, 391 U.S. 54, 64-65 (1968); and MALENG vs. COOK, 490 U.S. 488, 493 (1989)(dicta)(reaffirming rule of PEYTON and noting its application to situations in which prisoner is subject to more than one sentence in more than one jurisdiction, at least as long as sentence or sentences not yet being served are subject of DETAINER lodged with authorities holding prisoner under sentence being served).

9. Attorney PAULSEN states, "[A]ltogether, LAMBROS has now filed **AT LEAST SIX POST-CONVICTION PETITIONS** (or requests to file petitions) **CHALLENGING HIS CONVICTION.**" This is not true and Attorney PAULSEN has not presented one fact as to the **AT LEAST SIX-CONVICTION PETITIONS** Movant LAMBROS has filed in DISTRICT COURT/ AGENCY NUMBER/INDICTMENT NUMBER: 3-75-128 in the United States District Court for the District of Minnesota, this above-entitled action.

10. Attorney PAULSEN did not submit his June 18, 2001, motion in OPPOSITION in **AFFIDAVIT FORM.**

11. Movant has reviewed MURRAY vs. DELO, 34 F.3d 1367, 1372 (8th Cir. 1994) as to the ABUSE-OF-THE-WRIT DOCTRINE and understands that the government bears the initial burden of pleading abuse of the writ, and, once he or she does so, the petitioner bears the burden of proving that no abuse has occurred. . . . Normally, once the state pleads abuse of the writ as a defense, a court must determine why the issue was not raised in an earlier petition.

12. Attorney PAULSEN only states in his motion of June 18, 2001, "Altogether, LAMBROS has now filed at least six post-conviction petitions (or requests to file petitions) challenging his conviction" Attorney PAULSEN wants this overworked Court to search for facts and exact pleading that Movant LAMBROS has filed **AT LEAST SIX (6) POST-CONVICTION PETITIONS CHALLENGING INDICTMENT NO. 3-75-128 THAT DO NOT EXIST.**

13. Movant LAMBROS now bears the burden, which he thinks he should not have to, in proving that no abuse has occurred. Movant LAMBROS states that his action and motion clearly "**CONTAIN(s)" THE NEW RULE OF CONSTITUTIONAL LAW FIRST "RECOGNIZED BY THE U.S. SUPREME COURT" ON JUNE 26, 2000, IN APPRENDI vs. NEW JERSEY, 530 U.S. 466 (2000).** The issues Movant raises where not previously available. Therefore, there is no need for this Court to waste its' valuable time in determining why the issues Movant raises where not raised in an earlier petition. Also, Movant believes that this Court must apply TEAGUE before considering the merits of the claims. See, GRAHAM vs. COLLINS, 122 LEd.2d 260; Quoting, CASPARI vs. BOHLEN, 127 L.Ed.2d 236, 245 (1994).

STATEMENT OF LAW:

14. **FEDERAL RULE OF CIVIL PROCEDURE 11:** Rule 11 applies only to paper filings and enables a court to order that sanctions be paid to the U.S. Treasury.

A lawyer may violate the objective criteria of Rule 11 in three (3) respects: (1) by failing to make a reasonable inquiry into the **FACTS**; (2) by failing to make a REASONABLE INQUIRY INTO THE **LAW**; (3) by failing to draw the reasonable **CONCLUSIONS** of a "COMPETENT" attorney. See, JACKSON vs. LAW FIRM OF O'HARA, RUBERG, OSBORNE AND TAYLOR, 875 F.2d 1224 (6th Cir. 1989). Alternatively stated, sanctions will lie where: (1) there was no reasonable inquiry into the basis of a pleading or document; (2) there is no chance of success under existing precedent; and (3) there is no reasonable argument to extend, modify or reverse the controlling law. See, EHRLICH vs. HOWE, 848 F.Supp. 482 (S.D.N.Y. 1994). The improper "purpose" provision, "to harass or cause unnecessary delay or needless increase in the cost of litigation," now in **RULE 11(b)(1)**, provides a separate, independent basis for sanctions. See, U.S. vs. RAMIREZ, 162 F.R.D. 253 (D.Puerto Rico 1995). **DUTY OF CANDOR**, FALSE STATEMENTS in writing are, of course, subject to sanctions. See, IN RE KELLY, 808 F.2d 549 (7th Cir. 1986), as are MISLEADING OMISSIONS OF MATERIAL FACT. See, IN RE RONCO, INC., 838 F.2d 212 (7th Cir. 1988). Courts have found support for a duty of candor in the **ABA's Model Rule of Professional Conduct, 3.3.** "A court has a right to expect that counsel will state the controlling law fairly and fully; indeed, unless that is done the court cannot perform its tasks properly. A LAWYER MUST NOT MISSTATE THE LAW, fail to disclose adverse authority (not disclosed by his opponent), or omit facts critical to the rule of law espoused." See, 103 F.R.D. at 127. Liability can exist for a frivolous motion DISMISS or STRIKE. See, TREADWELL vs. KENNEDY, 656 F.Supp. 442 (N.D.Ill. 1987).

15. **TITLE 28 U.S.C., SECTION 1927:** Section 1927 provides that any attorney who "so multiplies the proceedings in any case unreasonably and VEXATIOUSLY, may be required by the court to satisfy personally the excess costs, expenses and attorneys' fees reasonably incurred because of such conduct." Consequently, many courts have relied on Rule 11 or a COMBINATION of Rule 11 and Section 1927. See, IN RE GINTHER, 791 F.2d 1151 (5th Cir. 1986). A finding of

an attorney's BAD FAITH is a predicate to liabilty under Section 1927. Subjective BAD FAITH, however, is not required. Bad faith may include, "an intentional departure from proper conduct," an intent to harass, dilatory tactics, or "a reckless disregard of the duty owed by counsel to the court," see, NEW ALASKA DEV. CORP. vs. GUETSCHOW, 869 F.2d 1298 (9th Cir. 1989), such as ignoring a court order. Therefore, attorneys have been sanctioned under Section 1927 for asserting FRIVOLOUS, BAD FAITH DEFENSES, see, SMIGA vs. DEAN WITTER REYNOLDS, INC., 766 F.2d 698 (2nd Cir. 1985), cert. denied, 89 L.Ed.2d 607 (1986), or for abusing the court's process. All Section 1927 Sanctions are made to opposing party.

CONCLUSION:

16. WHEREFORE, Movant LAMBROS requests this Court to:

a. Hold this above-entitled application **IN ABEYANCE** pending the Supreme Court's resolution of when a new rule of constitutional law has been "made retroactive to cases on collateral review by the Supreme Court. The question of when a new rule of constitutional law has been "made retroactively applicable to cases on collateral review" is currently before the Supeme Court. See, **TYLER vs. CAIN**, No. 00-5961, cert. granted, 148 L.Ed.2d 558 (U.S., Dec. 11, 2000)(argued 4/16/01). Because the Supreme Court's decision in **TYLER** may suggest that the statute of limitations for filing motions pursuant to § 2255 or habeas corpus motions **RAISING APPRENDI CLAIMS** began to run on June 26, 2000, the date APPRENDI was announced, this Movant has filed this above-entitled action before one (1) year from that date.

b. Deny the governments' request to enter an order enjoining this Movant from filing any further petitions in this above-entitled action due to an abuse of the writ, which has never occurred.

c. ORDER Attorney Jeffrey S. Paulsen to offer a written apology to Movant LAMBROS for comparing him to CLOVIS CARL GREEN, 630 F.2d 566 (8th Cir.

1980), as to Movant LAMBROS allegedly filing frivolous and repetitious filings and petitions in cases almost too numerous to count.

d. ORDER SANCTIONS against Assistant U.S. Attorney Jeffrey S. Paulsen, Attorney No. 144332, under Rule 11 and/or Section 1927, or a combination of both.

e. Authorize a SECOND or SUCCESSIVE 28 U.S.C. §2255 and/or vacate and remand Movant's convictions and sentence in Count 43 due to Movant's APPRENDI-BASED CLAIMS.

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

EXECUTED ON: June 23, 2001

Respectfully submitted,

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

Web site: www.brazilboycott.org

June 2001

Dear FAMM member:

We send you this *Apprendi* alert based on our concern that some federal Courts of Appeals will conclude that if the *Apprendi* decision is made retroactive for the purposes of a second or successive petition under 28 U.S.C. § 2244, the date on which the one year statute of limitations to seek habeas corpus or § 2255 relief expires will be June 26, 2001.[1] While we think that outcome is unlikely, it is not out of the question. Therefore, those of you who have not filed your initial habeas corpus or § 2255 petition should do so either on or before June 26, 2001, or on or before the one year deadline for filing an initial habeas corpus or § 2255 petition in your case. An initial habeas corpus or § 2255 petition is filed with the federal district court and should use or follow the forms provided by the clerk's office of that court.[2] For those of you who have previously filed a habeas corpus or § 2255 petition that did not raise the *Apprendi* issue, and you now think *Apprendi* applies, you should consider filing a motion seeking the court's permission to file a second or successive petition. In that way you may preserve the *Apprendi*-based claim.[3] The rest of this letter discusses the Motion to File a Second or Successive Petition.

Procedure: If you previously filed one or more petitions for habeas corpus or § 2255 relief and were denied, and you now wish to file another petition, known as a "second or successive" petition, you must move the United States Court of Appeals with jurisdiction over your case to order the district court to consider your application. 28 U.S.C. § 2244. Second or successive petitions presenting claims not previously presented to the court will be dismissed unless, among other things: "the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2244(b)(2)(A). The applicant must make a prima facie showing that the application satisfies this requirement. (The attached sample legal memorandum discusses this requirement).

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[1] Papers filed by an inmate confined in an institution are timely filed if deposited in the institution's mail system on or before the last day of filing.

[2] Those of you who are state prisoners who have not filed a habeas corpus petition in state court based on the *Apprendi* decision and who have previously filed at least one § 2254 petition in federal court should consider filing your *Apprendi*-based claim in a state habeas corpus petition (relying on the rules of your state court) and then filing by June 26 a motion in federal court (as discussed in this letter) for leave to file a second or successive habeas corpus petition.

[3] Please be advised that we provide this material for your information only and have not reviewed the papers in your case. This information does not constitute a legal opinion as to the merits or advisability of filing such a motion and memorandum in your case, its potential success, or the possibility that in filing the motion it may be denied with prejudice, thus foreclosing future motions to the courts.

SAMPLE

UNITED STATES COURT OF APPEALS
FOR THE _____ CIRCUIT

_____,	:	
Plaintiff,	:	Docket No. _____
v.	:	
_____,	:	
Defendant.	:	

MEMORANDUM IN SUPPORT OF THE DEFENDANT'S APPLICATION FOR LEAVE TO FILE A SECOND MOTION PURSUANT TO 28 U.S.C. § 2255 (OR 28 U.S.C.§ 2244)

The defendant, _____, has filed a protective application with this Court for leave to file a second motion pursuant to 28 U.S.C. § 2255 (OR 28 U.S.C. § 2244) to vacate his conviction and sentence. Rather than seeking a ruling on the application at this time, the defendant requests that this Court hold the defendant's application in abeyance pending the Supreme Court's resolution of when a new rule of constitutional law has been "made retroactive to cases on collateral review by the Supreme Court."

Sections 2244 and 2255 of title 28, U.S. Code, require that a defendant receive authorization from a panel of the appropriate Court of Appeals before he or she may file a second or successive habeas corpus motion or motion to vacate, set aside or correct his sentence. Both sections provide in pertinent part that the Court of Appeals should grant authorization if the defendant's second or successive motion "contain[s] ... a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." Section 2255 also provides a one-year period of limitations for such a filing from:

> the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review.

See also, 28 U S.C § 2244(d)(1)(C).

EXHIBIT B.

In this case, the defendant's motion clearly "contain[s]" the new rule of constitutional law first "recognized by the Supreme Court" on June 26, 2000, in Apprendi v. New Jersey, 530 U.S. 466 (2000), in that it alleges that his sentence exceeds the statutory maximum that would have applied, had the maximum not been enhanced by reference to facts that (YOUR FACTS HERE, FOR EXAMPLE *"were either not charged in the indictment, not found by the jury to have been proved beyond a reasonable doubt (or not established in the plea colloquy), or both."*) What is unclear is whether the new rule of constitutional law announced in Apprendi has been "made retroactive to cases on collateral review by the Supreme Court."

Some Courts of Appeals have held that a new rule of constitutional law is not "made retroactive . . by the Supreme Court" unless and until the Supreme Court explicitly declares it so. See, e.g., In re Tatum, 233 F.3d 857 (5th Cir. 2000) (per curiam); Talbott v. Indiana, 226 F.3d 866, 869 (7th Cir. 2000). Other Courts of Appeals have reasoned that the Supreme Court has "made" a new rule retroactive if the new rule fits the retroactivity criteria established in a prior Supreme Court case, such as Teague v. Lane, 489 U.S. 288 (1989). See e.g., Flowers v. Walter, 239 F.3d 1096 (9th Cir. 2001); West v. Vaughn, 204 F.3d 54 (3d Cir. 2000).

The question of when a new rule of constitutional law has been "made retroactively applicable to cases on collateral review" is currently before the Supreme Court. See Tyler v. Cain, No. 00-5961, cert. granted, 148 L.Ed.2d 558 (U.S., Dec. 11, 2000) (argued 4/16/01), see 69 Crim.L.Rptr. 2010-11 (April 11, 2001). Because the Supreme Court's decision in Tyler may suggest that the statute of limitations for filing motions pursuant to § 2255 or habeas corpus motions raising Apprendi claims began to run on June 26, 2000, the date Apprendi was announced, the defendant filed his motion on or before one year from that date. The defendant's application will have been timely filed, because it was placed in the prison mail system for delivery to this Court on or before June 26, 2001. Once the Supreme Court decides the question of how retroactivity is to be determined, the defendant will file a supplemental memorandum in support of his application for permission to file a second or successive (§ 2255 OR habeas corpus) motion. Until then, the defendant asks the Court to hold his application in abeyance.

Respectfully submitted,

(Signature here)

(Name)

(Address)

EXHIBIT B.

13,