Aprril 2, 2013

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.
7008-1830-0004-2646-8614

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: LAMBROS vs. USA, DOCKET NO. 13-1561 (Civil)(8th Cir.)

Dear Clerk:

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

1. PETITIONER LAMBROS' RESPONSE TO "UNITED STATES RESPONSE TO DEFENDANT'S APPLICATION TO FILE SUCCESSIVE SECTION 2255 HABEAS PETITION" - DATED: MARCH 22, 2013.

Please serve the U.S. Attorney via your email court system.

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 **APRIL 2, 2013,** from the U.S. Penitentiary Leavenworth mailroom:

2. Clerk of the Court for the 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 - Defendant,	*	CIVIL CASE NO. 13-1561
vs.	*	United States District Court for the District of Minnesota: INDICTMENT No.'s:
UNITED STATES OF AMERICA,	*	3-76-17; and 3-75-128.
Respondent - Plaintiff	*	AFFIDAVIT FORM

PETITIONER LAMBROS' RESPONSE TO "UNITED STATES RESPONSE TO DEFENDANT'S APPLICATION TO FILE SUCCESSIVE SECTION 2255 HABEAS PETITION" - DATED: MARCH 22, 2013.

Petitioner JOHN GREGORY LAMBROS, Pro Se, (hereinafter "Movant") hereby responds to the United States of America (hereinafter "Govt.") response to this above-entitled action dated March 22, 2013, by Assistant U.S. Attorney Ann M. Anaya.

John Gregory Lambros, declares under the penalty of perjury the following:

1. I am the Petitioner - Movant in this above-entitled action that was filed with this court on or about March 7, 2013. Movant's motion contained a page introduction and 56 numbered paragraphs with exhibits A thru G. See, Rules of Civil Procedure, Rule 10(b) (a party must state its claims or defenses in **NUMBERED PARAGRAPHS**, each limited as far as practicable to a single set of circumstances). Also see, RULE 12 "Applicability of the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure", within "RULES GOVERNING SECTION 2255 PROCEEDINGS FOR THE UNITED STATES DISTRICT COURTS" ("The Federal Rules of Civil Procedure ...., may be applied to a proceeding under these rules.").

2. On or about March 27, 2013, Movant received the Government's response to Movant's application to file a successive section 2255. The Government's response was four (4) pages in length and did not contain any numbered paragraphs.

3. Movant requests this Court to note that the Government RESPONSE **DID NOT** follow the requirements stated within Civil Rules of Civil Procedure, **RULE 8(b)**, as to how any responsive pleading to a federal action must be drafted. The government's nonresponsive language in its response to most of Movant's complaint neither admitted or denied the factual allegations and has resulted in the averments of Movant's action to be DEEMED ADMITTED BY THE GOVERNMENT. Movant requests that this Court proceed on that basis. See, RULE 8(b)'s plain roadmap, as it identifies only three (3) alternatives as available for use in an answer to allegation of a complaint: admit those allegations, to deny them or to state a disclaimer (if it can be made in the objective and subjective good faith demanded by Rule 11) in the express terms of the second sentence of Rule 8(b), which then entitles the pleader to the benefit of a deemed denial. **RULE 8(d)** states that averments in a pleading to which a responsive pleading is required - as is the case in this action - other than those as to the amount of damage, **ARE ADMITTED WHEN NOT DENIED IN THE RESPONSIVE PLEADING.** (On March 13, 2013, Clerk Gans for the Eighth Circuit ORDERED James Lackner, U.S. Attorney's Office to respond to Movant's above-entitled pleading within fourteen (14) days)

4. The Government's answers fall short of the RULE 8(b) standard, as they **DO NOT SPECIFICALLY ADDRESS ANY-NUMBERED PARAGRAPH OF MOVANT'S ACTION.** Again, Movant requests this Court to proceed in this action, as the government has admitted to all the allegations within Movant's §2255. See, RULE 8(d). Movant is proceeding pro se, and his claims are plainly and cogently presented in numbered separate allegations. It is the government's job, and not this Court's, to perform the work called for by Rule 8(b), subject to the obligations set forth in Rule 11.

5. Movant LAMBROS DENIES each and every material allegation contained in the government's March 22, 2013 "RESPONSE", except as herein may be expressed and specifically admitted.

GOVERNMENT'S RESPONSE - PAGE ONE (1):

6. Government attorneys, B. Todd Jones and Ann M. Anaya responded to Movant's above-entitled action and correctly stated that Movant filed "a successive Section 2255 petition in LAMBROS vs. USA, Eighth Circuit Case No. 12-2427". (District Court for the District of Minnesota, Criminal No. 4-89-82) That action was also based on the Supreme Court decisions in LAFLER vs. COOPER, 132 S.Ct. 1376 (2012) and MISSOURI vs. FRYE, 132 S.Ct. 1399 (2012).

7. The Government incorrectly stated "Petitioner challenged his 1989 conviction and thirty (30) year sentence (where he was found guilty by a jury on all four counts) for distribution and conspiracy to distribute more than nine (9) kilograms of cocaine." THIS IS NOT TRUE. Movant Lambros was convicted on **JANUARY 15, 1993**, by a jury on Counts 1, 5, 6, and 8 of the indictment and was sentenced on January 27, 1994, to a **MANDATORY LIFE SENTENCE WITHOUT PAROLE, FOR THE ALLEGED DISTRIBUTION OF SIX (6) KILOGRAMS OF COCAINE - NOT MORE THAN NINE (9) KILOGRAMS OF COCAINE.** On September 8, 1995, this Court vacated sentence of "MANDATORY LIFE WITHOUT PAROLE" and remanded the case for resentencing. See, U.S. vs. LAMBROS, 65 F.3d 698 (8th Cir. 1995).

GOVERNMENT'S RESPONSE - PAGE TWO (2):

8. The Government states that Movant filed this application seeking retroactive application of the Supreme Court decisions in COOPER and FRYE attacking his 1975 and 1976 convictions. This is true.

9. The Government incorrectly stated, "Petitioner asserts that COOPER and FRYE created a new rule of constitutional law, ..." This is not true. Movant clearly stated within paragraph 9 on page 7:

*** "Movant argues that TEAGUE is **INAPPLICABLE**, because **IT IS SIMPLY THE APPLICATION OF AN OLD RULE. FRYE and COOPER DO NOT ANNOUNCE A NEW RULE** and that it is an extension of the rule in STRICKLAND vs. WASHINGTON, 466 U.S. 668 (1984) - requiring effective assistance of counsel -, and that its holding should apply retroactively. ..."

Also see, paragraph 12, page 8:

*** "Movant's research has not found a case that could show how FRYE and COOPER **CAN BE CONSTRUED AS A NEW RULE** not dictated by STRICKLAND. ..... Therefore, FRYE and COOPER applied STRICKLAND to a new set of facts **WITHOUT ESTABLISHING A NEW RULE BECAUSE**, ..."

10. In fact, Movant even requested this court to apply TYLER vs. CAIN, 533 U.S. 656 (2001), stating: (See Paragraphs 13 and 14)

"The TYLER Court explained, however, that "this Court can make a rule **RETROACTIVE OVER THE COURSE OF TWO (2) CASES** ..... Id. at 666."

"Justice O'Connor, who supplied the crucial fifth vote for the majority, wrote a concurring opinion ..... She explained that it is possible for the Court to "make" a case retroactive on collateral review **WITHOUT EXPLICITLY SO STATING**, ... See, 533 U.S. at 668-69."

Movant Lambros believes the Supreme Court made both **LAFLER and FRYE RETROACTIVE** on March 21, 2012, the day the Court offered there rulings on both cases, **AS BOTH CASES WHERE ON HABEAS CORPUS REVIEW AND SUBJECT TO THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996 (AEDPA).** See, MILES vs. MARTEL, 696 F.3d 889, 899-900, and FootNotes 3 & 4 (9th Cir. 2012):

**** ".... By applying this holding in LAFLER, 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.** ...."

See, FOOTNOTE 3. (Also refer to **EXHIBIT A within Movant's March 7, 2013 MOTION)**

11. Again, Movant claimed LAFLER and FRYE are simply the application of an **OLD RULE - AN EXTENSION OF THE RULE IN STRICKLAND vs. WASHINGTON.**

12. **ARGUMENT:** The government states, "Petitioner's claims involve only on subsection (1) [28 U.S.C. 2255] (1) and do not include subsection (2). This is NOT TRUE. The government fails to state that Movant requested a ruling under **TITLE 28 U.S.C. §2255(f)(3), AS THIS SECTION DOES NOT REQUIRE RETROACTIVITY DETERMINATION BY THE SUPREME COURT ITSELF.** Nor does the government respond to Movant's overview of Supreme Court cases as to how the Court determines when a **RULE - OLD or NEW -** should be applied retroactively in criminal cases.

GOVERNMENT'S RESPONSE - PAGE THREE (3):

13. **THE GOVERNMENT STATES THE SAME THING AGAIN - BORING!!!:** "Petitioner's claims are based on what he asserts is a **NEW RULE OF CONSTITUTIONAL LAW** ....., created by COOPER and FRYE, that applies retroactively, Case No. 13-1561, **LAMBROS' APPLICATION AT 1.**" Again, this is not true!!!! How many times must the government repeat the same lie???????? Also, Movant reviewed his March 7, 2013, Motion in this action and **CAN NOT LOCATE "Lambros' application at 1".** Movant is looking at his March 7, 2013 cover letter to this Court and the **"CERTIFICATE OF SERVICE" CLEARLY STATES THE U.S. ATTORNEY RECEIVED THE SAME COPY OF MOVANT'S MOTION THAT THIS COURT RECEIVED. THEREFORE, WHERE IS "LAMBROS' APPLICATION AT 1"????** Movant restates that he claimed LAFLER and FRYE are simply the application of an **"OLD RULE" - NOT A "NEW RULE".**

14. The government states, "Petitioner's request for relief has been foreclosed by this Circuit's recent decision in WILLIAMS vs. U.S., 705 F.3d 293 (8th Cir. January 23, 2013), which held that "neither COOPER nor FRYE announced a **NEW RULE OF CONSTITUTIONAL LAW."** Id. at 294." The government again states a **LIE** by stating "Williams, like Petitioner in our case here, was seeking authorization to file a second section 2255 motion **BASED ON A NEW RULE OF CONSTITUTIONAL LAW** created by COOPER and FRYE. Id." Again, Movant Lambros is requesting this Court to rule that LAFLER and FRYE are simply the application of an **"OLD RULE" - NOT A "NEW RULE".**

15. The government states that this Court's decision in WILLIAMS is consistent with the conclusions reached by other circuit courts of appeals that have addressed the issue - the Ninth, Fifth, Seventh and Eleventh. None of those court have been requested to rule that LAFLER and FRYE are simply the application of an **"OLD RULE"!!!!**

16. Now the government states, "Petitioner does not assert **PRIMA FACIE**

claims based on a new rule of constitutional law, previously unavailable, made retroactive by the Supreme Court to cases on collateral review. Rather, Petitioner's application is based entirely on the assertion that he was denied a newly created rule of constitutional law that applies retroactively, which was rejected by this Court in WILLIAMS." The government is correct in that Movant does not assert a claim **"BASED ON A NEW RULE OF CONSTITUTIONAL LAW,"** - Movant's claim is a simple application of an **"OLD RULE"**, as FRYE and LAFLER announced a type of Sixth Amendment violation **THAT WAS PREVIOUSLY UNAVAILABLE, AND REQUIRES RETROACTIVE APPLICATION TO CASES ON COLLATERAL REVIEW.**

17. Movant Lambros offered **"PRIMA FACIE EVIDENCE"** that other United States Court of Appeals have applied LAFLER and FRYE **"RETROACTIVELY"** within his original filing dated March 7, 2013, paragraphs 15, 16, 17, and 18 on pages 9, 10 and 11. Also see, **EXHIBITS A and B.** Movant cited the following cases:

a. MILES vs. MARTEL, 696 F.3d 899-900, FootNotes 3 and 4 (9th Cir. September 28, 2012);

b. U.S. vs. RAFAEL E. RIVAS-LOPEZ, 678 F.3d 353, 357 and FootNote 23 (5th Cir. April 18, 2012). Please note that this case was finalized when the Supreme Court denied same in 2008, 555 U.S. 860 (2008). Id. at 355. This action was filed as a **§2255.** See, FootNote 4.

c. MERZBACHER vs. SHEARIN, No. 10-7118 (4th Cir., January 25, 2013)(PUBLISHED).

GOVERNMENT'S RESPONSE - PAGE (4):

18. The government's one sentence "CONCLUSION" requests that this court deny Movant's application for leave to file a second or successive section 2255 motion. THIS IS NOT A VALID CONCLUSION AND THIS Court SHOULD GRANT SAME DUE TO THE ABOVE AND MOVANT'S ORIGINAL MARCH 7, 2013 MOTION.

DISCUSSION BY MOVANT JOHN GREGORY LAMBROS

LAFLER AND FRYE APPLIED THE "OLD RULE" OF STRICKLAND TO A NEW SET OF FACTS - THE PLEA-BARGAINING PROCESS - A SUBJECT COVERED BY THE SIXTH AMENDMENT - BUT NOT BEFORE LAFLER AND FRYE!

19. The Sixth Amendment guarantees "[i]n all criminal prosecutions, the accused shall enjoy the right .... to have the Assistance of Counsel for his defense." In 1984 the Supreme Court in STRICKLAND vs. WASHINGTON, 466 U.S. 668 established the standard for ineffective assistance of counsel - the Supreme Court established the constitutional right to **EFFECTIVE** assistance of counsel in POWELL vs. ALABAMA, 53 S.Ct. 55 (1932) - that is a violation of this right. STRICKLAND, 466 U.S. at 688-689. In a pair of decisions handed down on March 21, 2012, LAFLER vs. COOPER, 132 S.Ct. 1376 and MISSOURI vs. FRYE, 132 S.Ct. 1399, **THE SUPREME COURT EXTENDED THE HOLDING IN STRICKLAND TO COVER INEFFECTIVE ASSISTANCE BY DEFENSE COUNSEL IN THE PLEA-BARGAINING PHASE.**

20. In MISSOURI vs. FRYE, Frye's lawyer did not convey the plea offers to Frye, and they expired. Id. at 1404. At issue in this case was whether the constitutional right to counsel extends to the negotiation and consideration of plea offers that lapse or are **REJECTED**. Id. at 1405. Writing for a five-four majority, Justice Anthony M. Kennedy reasoned that the right to counsel extends to the plea-bargaining process because of the "simple reality" that "[n]inety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas." Id. at 1407. Since the criminal justice system is "for the most part a system of pleas, not a system of trials," Id. at 1407 (citing LAFLER, 132 S. St. at 1388) therefore "the negotiation of a plea bargain .... is almost always the critical point for a defendant" Id. at 1407, where the right to counsel should apply.

21. The Court went farther, when Justice Kennedy stated that in order for the benefits of a plea agreement to be realized, "criminal defendants require effective counsel during plea negotiations. Anything less might deny a defendant

effective representation by counsel at the only stage when legal aid and advice would help him." Id. at 1407-08 (citing MASSIAH vs. U.S. 377 U.S. 201, 204 (1964)) Because "[i]n today's criminal justice system ... the **NEGOTIATION** of a plea bargain ... is almost always the critical point for the defendant," id. at 1407 (emphasis added) the Court reasoned that the "inquiry" in this case was "**HOW TO DEFINE THE DUTY AND RESPONSIBILITY OF THE DEFENSE COUNSEL IN THE PLEA BARGAIN PROCESS.**" id. at 1408 (emphasis added).

22. Kennedy immediately acknowledges that "this is a difficult question," because "[t]he art of negotiation is at least as nuanced as the art of trial advocacy" Id. at 1408 and the "[b]argaining is, by its nature, defined to a substantial degree by personal style." Id. at 1408. By explicitly linking bargaining and negotiation to the duties of the counsel during the plea bargaining process however, the Court is stating that its earlier conclusion "that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process ...." Id. at 1407, **APPLIES TO THE NEGOTIATION STAGE OF PLEA BARGAINS, NOT JUST THE COMMUNICATION OF OFFERS TO THE DEFENDANT.**

23. Justice SCALIA, writing for the dissent, explicitly acknowledges the **NEW STEP THIS COURT HAS TAKEN,** that of bringing a constitutional lens to the negotiation of plea bargains. He states that "counsel's plea-bargaining skills .... must now meet a **CONSTITUTIONAL MINIMUM,**" and calls this the **"CONSTITUTIONALIZATION OF THE PLEA-BARGAINING PROCESS."** Id. at 1413 (emphasis added)

24. With FRYE and LAFLER, the Supreme Court for the **FIRST TIME** is bringing some judicial supervision to the plea-bargaining process wholly apart from the process of trial, or even a subsequent plea bargain. **LAFLER WAS THE FIRST CASE TO CONSIDER ERRORS IN THE PLEA-BARGAINING PROCESS EVEN WHEN FOLLOWED BY A FULL AND FAIR TRIAL.** LAFLER, 132 S.Ct. at 1383. FRYE considered the errors of counsel in plea-bargaining, **EVEN WHEN FOLLOWED BY A SUBSEQUENT BARGAIN THAT WAS ACCEPTED.** FRYE, 132 S.Ct. at 1404.

25. The above short overview of LAFLER and FRYE establishes that the Supreme Court has applied an **"OLD RULE"** - STRICKLAND vs. WASHINGTON - to a new set of facts surrounding the plea-bargaining process, thus a new constitutional standard for negotiations. Movant Lambros ends his discussion by quoting Supreme Court Justice Antonin Scalia, who wrote for the four dissenters, who objected to the majoritity's decision on the most basic level. As the dissent states,

a. "The plea-bargaining process is a subject worthy of regulation, since it is the means by which most criminal convictions are obtained. It happens **NOT TO BE, HOWEVER, A SUBJECT COVERED BY THE SIXTH AMENDMENT, WHICH IS CONCERNED NOT WITH THE FAIRNESS OF PLEA BARGAINING BUT WITH THE FAIRNESS OF CONVICTION."** (emphasis added)

See, FRYE, 132 S.Ct. at 1414.

b. "The **COURT TODAY OPENS A WHOLE NEW FIELD OF CONSTITUTIONALIZED CRIMINAL PROCEDURE: PLEA-BARGAINING LAW."**

See, LAFLER, 132 S.Ct. at 1391.

26. In TEAGUE vs. LANE, 489 U.S. 288 (1989) and subsequent cases, the Supreme Court laid out the framework for determining when a **RULE** announced in one of its decisions should be applied **RETROACTIVELY** in criminal cases that are already final on direct review. Under TEAGUE **"AN OLD RULE APPLIES BOTH ON DIRECT AND COLLATERAL REVIEW, ..."** See, WHORTON vs. BOCKTING, 549 U.S. 406, 416 (2007).

27. The Supreme Court did not break new ground, it simply pointed out the errors in the lower courts that prevented them from considering ineffective assistance of counsel claims under STRICKLAND.

CONCLUSION:

28. For all of the foregoing reasons, this Court must authorize a second or successive §2255 motion to vacate Movant's convictions and sentences in indictment numbers: 3-76-17; and 3-75-128.

29. Movant requests this Court to follow the majority in LAFLER vs. COOPER and offer Movant Lambros a remedy that must "NEUTRALIZE THE TAINT" of the constitutional violations. The circumstances require "the prosecution to re-offer the plea proposal."

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

EXECUTED ON: APRIL 2, 2013

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

Website: www.BrazilBoycott.org