U.S. Department of Justice

United States Attorney
District of Minnesota

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April 20, 2005

Mr. Michael Gans, Clerk
U.S. Court of Appeals
for the Eighth Circuit
Clerks office
500 Federal Building
316 North Robert Street
St. Paul, MN 55101

Re: John Gregory Lambros v. United States of America
Eighth Circuit No. 05-1992

Dear Mr. Gans:

Enclosed please find an original and three copies of the Opposition of the United States to Petitioner's Application for Permission to File a Second or Successive Petition under 28 U.S.C. § 2255.

Petitioner is also being served by copy of this letter and its enclosures.

Respectfully submitted,

THOMAS B. HEFFELFINGER
United States Attorney

Jeffrey S. Paulsen

BY: JEFFREY S. PAULSEN
Assistant U.S. Attorney
Attorney ID Number 144332

JSP:ama

Enclosures

cc: John G. Lambros
Registration No. 00436-124
U.S. Penitentiary Leavenworth
PO Box 1000
Leavenworth, KS 66048-1000

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
NO. 05-1992

JOHN GREGORY LAMBROS, Petitioner, v. UNITED STATES OF AMERICA, Respondent.	)	OPPOSITION OF THE UNITED STATES TO PETITIONER'S APPLICATION FOR PERMISSION TO FILE A SECOND OR SUCCESSIVE PETITION UNDER 28 U.S.C. § 2255

Petitioner John Gregory Lambros has filed a motion purportedly under Rule 60(b) of the Federal Rules of Civil Procedure seeking relief based on the Supreme Court's decision in Crawford v. Washington, 541 U.S. 36 (2004). By letter dated April 12, 2005, the Eighth Circuit Clerk of Court characterized the motion as an application for permission to file a successive habeas petition and directed the government to respond within 15 days. Because Crawford has not been made retroactive to cases on collateral review, the application should be denied.

It is undisputed that the present motion would constitute a successive section 2255 petition. Lambros has filed or attempted to file numerous section 2255 petitions in the past. This Court last denied one of Lambros' applications to file a successive petition on November 13, 2001 (Apprendi petition).

Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), a federal prisoner must obtain certification from the appropriate court of appeals, prior to filing the petition in

district court, that his second or successive section 2255 petition relies on either:

> 1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
>
> 2) 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. § 2255.

Lambros does not allege the existence of any newly discovered evidence. Thus, his petition would have to fall under the second prong set forth above; namely a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable. Importantly, only the Supreme Court itself can make a new rule of constitutional law retroactive to cases on collateral review. Tyler v. Cain, 533 U.S. 656, 663 (2001).

Lambros bases his application on the Supreme Court's decision in Crawford v. Washington, 541 U.S. 36, 59, 68 (2004), in which the Supreme Court held that "testimonial" hearsay is inadmissible against a criminal defendant at trial unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant.

Crawford does not provide a basis for Lambros's successive section 2255 petition because the Supreme Court has not made

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Crawford retroactive to cases on collateral review. See Evans v. Luebbers, 371 F.3d 438, 444 (8th Cir. 2004).

Even if Crawford were retroactive to cases on collateral review, it still would not help Lambros. Lambros first complains that testimonial hearsay statements were used in the grand jury. But Crawford applies only to the use of testimonial hearsay at trial, not in the grand jury. He next appears to claim that some hearsay came out at trial during his own lawyer's cross-examination of a government witness. From the transcripts attached to Lambros' motion, it appears that his counsel attempted to elicit from an officer some out-of-court statements that would be helpful to Lambros. It is not even clear that these were testimonial statements.

For the foregoing reasons, Lambros' application to file a successive section 2255 petition should be denied.

Respectfully submitted,

Dated: April 20, 2005

THOMAS B. HEFFELFINGER
United States Attorney

BY: JEFFREY S. PAULSEN
Assistant U.S. Attorney
Attorney ID Number 144332

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