August 28, 2013

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U.S. CERTIFIED MAIL
7008-1830-0004-2648-8179

ELISABETH A. SHUMAKER
Clerk of the Court for the Tenth Circuit
1823 Stout Street
Denver, Colorado 80257
Tel. (303) 844-3157

RE: No. 13-3159, LAMBROS vs. CLAUDE MAYE, WARDEN
U.S. DISTRICT CT OF KANSAS, No. 13-3034-RDR

Dear Elisabeth A. Shumaker:

Attached for filing in the above-entitled criminal matter is copy of my:

1. APPELLANT'S COMBINED OPENING BRIEF AND APPLICATION FOR A CERTIFICATE OF APPEALABILITY. **Dated: August 28, 2013.**

I have mailed copy to the Respondent - Appellee - Claude Maye, Warden, et al.

Thank you in advance for your continued assistance 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 **August 28, 2013** from the U.S. Penitentiary Leavenworth inmate mailroom:

2. U.S. Court of Appeals for the Tenth Circuit - Clerk, as addressed above;
3. Claude Maye, Warden, U.S. Penitentiary Leavenworth, 1300 Metropolitan Ave., Leavenworth, Kansas 66048-1000.

John Gregory Lambros, Pro Se

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JOHN GREGORY LAMBROS

Petitioner - Appellant,

v.

CLAUDE MAYE, WARDEN,
USP-Leavenworth, et al.,

Respondent - Appellee.

Case No. 13-3159

U.S. District Court for the District of Kansas, No. 13-3034-RDR

Appellant's Combined Opening Brief and Application for a Certificate of Appealability

INSTRUCTIONS TO LITIGANTS PROCEEDING WITHOUT COUNSEL

The court will accept a completed copy of this form as a combined opening brief and application for a certificate of appealability. You may attach additional pages as needed. In the alternative, you may prepare your own combined opening brief and application for a certificate of appealability.

Your combined opening brief and application for a certificate of appealability must include all the arguments you intend to make on appeal. Citations to legal authorities (cases, statutes, etc.) are encouraged but not required. The purpose of an appeal is to determine if the district court erred in its decision-making based on the arguments, pleadings, and evidence that were submitted to that court. This court generally does not consider new evidence and will base its decision on the existing district court record. **Because you are proceeding without an attorney, the record of proceedings from the district court has been or will be transmitted to this court from the district court where your case was heard. You are not required to attach district court documents to your combined opening brief and application for a certificate of appealability.**

If the district court did not issue an order granting a certificate of appealability on an issue or issues you wish to raise with this court on appeal, you must show you are entitled to a certificate of appealability. To do so, you must make a "substantial showing of the denial of a constitutional right." Miller-El v. Cockrell, 537 U.S. 322, 336 (2003). This generally requires a "showing that reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." 28 U.S.C. § 2253(c); Slack v. McDaniel, 529 U.S. 473, 484 (2000).

Regardless of the form used, the combined opening brief and application for a certificate of appealability cannot exceed 30 pages in length unless you certify that it contains no more than 14,000 words. If the total number of pages you submit exceeds 30, you must count the number of words in the document and certify that word count. The form for providing certification is on the last page of this document. If the combined opening brief and application for a certificate of appealability is over 30 pages in length and the word count has not been certified, or if the word count exceeds 14,000, your combined opening brief and application for a certificate of appealability will not be filed and your appeal is subject to dismissal.

Whether you use this form or your own for your combined opening brief and application for a certificate of appealability, you must send a copy of the document to this court by placing it in the mail on or before the due date. If the document is being mailed using a prison mail system, you must affirm under the penalty for perjury the date the document was placed, first class postage prepaid, in the prison mail system. *See* Fed. R. App. P. 25(a)(2)(C). One copy of the combined opening brief and application for a certificate of appealability to this court is sufficient. You must also mail a copy of the document to the attorney representing the appellee (the respondent or government in the district court proceedings).

On the last page of this form, you will find two subsections that must be filled out and signed. We advise you to complete that page and attach it to the end of your own combined opening brief and application for a certificate of appealability if you elect not to use this form.

The appellee is not obligated to respond to your combined brief and application for a certificate of appealability. 10th Cir. R. 22.1(B). **It is not a default or concession in any way if the appellee does not respond.** If the appellee does respond, or is ordered to, you may file a reply brief. Otherwise, your combined opening brief and application for a certificate of appealability is the only brief the court will consider.

The court disfavors motions for extensions of time to file briefs. 10th Cir. R. 27.4(A). If you must file a motion asking for an extension of time, file it well in advance of the due date. If the court grants you an extension of time to file your combined brief and application for a certificate of appealability and the order designates the extension as final, you risk your appeal being dismissed for failure to prosecute if you nevertheless ask for additional time again.

Unless the district court granted you leave to proceed on appeal *in forma pauperis*, you were directed by this court to either pay the filing fee for this appeal or alternatively, to file a motion with this court asking leave to proceed *in forma pauperis*. You must also comply fully with those directives before the court will consider your appeal.

APPELLANT'S COMBINED OPENING BRIEF
AND APPLICATION FOR A CERTIFICATE OF APPEALABILITY

I. Statement of the Case. (Briefly summarize the events that took place in the district court. For example, identify when you filed your habeas application and any significant motions and orders that were entered.)

1. **FEBRUARY 28, 2013:** Movant Lambros filed a "WRIT OF HABEAS CORPUS, 28 U.S.C. §2241; **AND/OR** "WRIT OF AUDITA QUERELA, under the "ALL WRITS ACT", 28 U.S.C. §1651(a), with the Clerk of the Court for the U.S. District Court for the District of Kansas.

2. The above-entitled writ(s) where brought due to the U.S. Supreme Court's rulings that strengthens rights to counsel during plea bargaining. On March 21, 2012, the U.S. Supreme Court handed down two (2) decisions that expanded the opportunities for defendants to overturn their convictions on the basis of POST-CONVICTION CLAIMS that their attorneys did an unreasonably poor job during plea negotiations. Defendants who can show that their attorney's failed to communicate plea offers or failed to give competent counsel regarding a plea offer can get a lower sentence or have the prosecutor re-extend the plea offer, even if the defendants received a fair trial after they rejected the offer, the court makes clear. See, MISSOURI vs. FRYE, 132 S.Ct. 1399; 182 L.Ed.2d 379 (March 21, 2012) and LAFLER vs. COOPER, 132 S.Ct. 1376; 182 L.Ed.2d 398 (March 21, 2012). MISSOURI and LAFLER announced a type of Sixth Amendment violation that was previously unavailable, FRYE, 132 S.Ct. at 1413-1414 "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.", and requires RETROACTIVE APPLICATION TO CASES ON COLLATERAL REVIEW.

3. The above motion was filed in a timely fashion as per the one (1) year limitation period, "the date on which the right asserted was initially recognized by the Supreme Court." 28 USC §2255(f)(3). DODD vs. U.S., 545 U.S. 353 (2005).

4. As will be developed later in this motion, Movant was NEVER given an opportunity to file a 28 U.S.C. §2255, as to the issue of ineffective assistance of counsel claims, due to his resentencing on February 10, 1997 on Count One (1), as to the incorrect information and illegal sentence of MANDATORY LIFE WITHOUT PAROLE, that was overturned by the Eighth Circuit on direct appeal - U.S. vs. LAMBROS, 65 F.3d 698 (8th Cir. 1995). The Eighth Circuit and this Circuit both agree an illegal sentence constitutes "A MISCARRIAGE OF JUSTICE", U.S. vs. ANDIS, 333 F.3d 886, 890-893 (8th Cir. 2003)(en banc) and also qualifies for the "ACTUAL INNOCENCE" exception. See, BAYLESS vs. USA, 14 F.3d 410 (8th Cir. 1993).

5. **MAY 17, 2013:** The Honorable Judge Richard D. Rogers responded to Movant's February 28, 2013 filing with his "MEMORANDUM AND ORDER". The Court dismissed Movant's petition for "LACK OF JURISDICTION." The Court incorrect stated that Movant's "pro se petition for writ of habeas corpus was filed pursuant to 28 U.S.C. §2241 by ..." - when in fact it was filed pursuant both 28 U.S.C. **§1651(a) and/or §2241.**

6. **JUNE 5, 2013:** Movant filed a "MOTION TO ALTER OR AMEND OF THE COURT'S 'MEMORANDUM AND ORDER' filed May 17, 2013, pursuant to Rule 59(e) of the Federal Rules of Civil Procedure."

7. **JULY 1, 2013:** The Court issued an "ORDER" stating that Movant's action was dismissed and all relief was denied ... May 17, 2013." "Having considered the [Rule 59(e)] motion, the court finds that it fails to state grounds for relief."

8. **DENIAL OF CERTIFICATE OF APPEALABILITY:** The Court stated on page 8 of the July 1, 2013 "ORDER" "Several Circuit Courts have held that a certificate of appealability is required under these circumstances. Thus, to the extent that one may be required, the Court finds that petitioner has made no 'substantial showing of the denial of a constitutional right' with respect to an appeal of either the order of dismissal or this order denying this motion."

5.

II. Prior proceedings. (Identify any prior state, federal, or administrative proceedings in which you also sought relief from the conviction and sentence in this appeal.)

II(a): CASE HISTORY:

9. Movant Lambros offers USA vs. LAMBROS, 404 F.3d 1034 (8th Cir. 2005). The Eighth Circuit offers an excellent overview of Lambros' 1993 jury trial conviction, direct appeal, resentencing and subsequent §2255 motions - with legal citing to cases.

10. A brief summary of the above that includes important dates:

a. January 27, 1994, Movant was sentenced on Counts 1, 5, 6, and 8 by the district court after a jury trial.

b. **September 8, 1995,** Eighth Circuit Court of Appeals **VACATED Count One (1)** - the MANDATORY LIFE WITHOUT PAROLE sentence.

c. **WRIT OF CERTIORARI** was filed for **Counts 5, 6, and 8.**

d. **WRIT OF CERTIORARI WAS DENIED** on **Counts 5, 6, and 8 on January 16, 1996,** as to the Eighth Circuit ruling in U.S. vs. vs. LAMBROS, 65 F.3d 698 (8th Cir. 1995). See, LAMBROS vs. USA, 516 U.S. 1082 (January 16, 1996).

e. **FEBRUARY 10, 1997,** Movant Lambros RESENTENCED on **Count One (1).** Movant's attorney **REFUSED** to raise an ineffective assistance of counsel claim against Movant's trial attorney as to his illegal sentence of MANDATORY LIFE WITHOUT PAROLE. As this Court understands, the Eight Circuit does not allow ineffective assistance of counsel claims on direct appeal. See, USA vs. HAWKINS, 78 F.3d 348, 351-352 (8th Cir. 1995):

> "Accordingly, we have declined to 'consider an ineffective assistance claim on **DIRECT APPEAL** if the claim has not been presented to the district court so that a proper factual record can be made."

Movant does not believe an ineffective assistance claim can be

raised at RESENTENCING of Count One (1), as Movant was being sentenced as if he had never been sentenced before - De Novo - anew. Thus, Movant was denied the right to raise an ineffective assistance claim on direct appeal for his RESENTENCING.

f. **SEPTEMBER 2, 1997,** the Eighth Circuit **DENIED** Movant Lambros' **DIRECT APPEAL AS TO HIS RESENTENCING ON COUNT ONE (1).** PLEASE NOTE: Movant Lambros was not allowed to raise an ineffective assistance of counsel claim on direct appeal. See, USA vs. LAMBROS, 124 F.3d 209.

11. **April 18, 1997,** Movant filed his first Habeas Corpus petition under 28 U.S.C. §2255. This §2255 motion could only attack **COUNTS 5, 6, and 8,** as Movant Lambros **WAS ON DIRECT APPEAL FROM RESENTENCING ON COUNT ONE (1).** Please recall that the Eighth Circuit DENIED Movant Lambros' direct appeal on **COUNT ONE (1)** on **September 2, 1997.** See, USA vs. LAMBROS, 124 F.3d 209 (8th Cir. Sept. 2, 1997). The district court denied Movant's April 18, 1997, §2255 as a SECOND AND SUCCESSIVE §2255. See, USA vs. LAMBROS, 404 F.3d 1034, 1035 (8th Cir. 2005).

12. **JANUARY 12, 1998,** the U.S. Supreme Court DENIED Movant Lambros' writ of certiorari as to his **RESENTENCING** direct appeal on Count One (1) on February 10, 1997. See, LAMBROS vs. USA, 522 U.S. 1065; 139 L.Ed.2d 669 (January 12, 1998) (Denial of USA vs. LAMBROS, 124 F.3d 209 (8th Cir. 1997).

13. **JANUARY 2, 1999,** Movant Lambros filed his **FIRST** §2255 motion **REGARDING HIS FEBRUARY 10, 1997 - RESENTENCING.** The District Court DENIED Movant's §2255, as a SECOND AND SUCCESSIVE PETITION. See, USA vs. LAMBROS, 404 F.3d at 1035.

14. The above **TIME-LINE** clearly proves Movant Lambros was never given the opportunity to file a HABEAS CORPUS PETITION under 28 U.S.C. §2255 on **COUNT ONE (1).** The law within the Eighth and Tenth Circuit does not allow a defendant to file a §2255 while an **APPEAL FROM CONVICTION IS PENDING:**

> "'Ordinarily resort cannot be had to 28 USC §2255 or habeas corpus while an appeal from conviction is pending.' MASTERS vs. EIDE,

353 F.2d 517, 518 (8th Cir. 1965). A motion attacking a federal criminal sentence pursuant to 28 USC §2255 is **PREMATURE WHEN FILED DURING THE PENDENCY OF THE DIRECT APPEAL OF THAT SAME CRIMINAL SENTENCE.** See, U.S. vs. JAGIM, 978 F.2d 1032, 1042 (8th Cir. 1992, cert. denied sub nom. ZIEBARTH vs. USA, 508 US 952, 113 S. Ct. 2447, 124 L.Ed.2d 664 (1993)('Because Ziebarth filed this motion while **HIS DIRECT APPEAL WAS PENDING BEFORE THIS COURT, THE DISTRICT COURT PROPERLY DISMISSED THE SECTION 2255 MOTION AS PREMATURELY FILED.')** This is still the rule in this circuit. See, BLADE vs. USA, No. 07-3493, 266 Fed. Appx. 499, at *1 (8th cir. Feb. 26, 2008)('While his direct appeal was pending, Blade filed a 28 USC §2255 motion, which he sought to amend several times, and which was dismissed by the district court as being prematurely filed. This court summarily affirmed the dismissal but amended the dismissal to be without prejudice.')." (emphasis added)

See, USA vs. BREWER, 2010 U.S. District Court for the W. District of Arkansas, LEXIS 49878.

"Although there is no jurisdictional barrier to a district court entertaining a §2255 motion while a direct appeal is pending, **A COURT SHOULD ONLY DO SO IN EXTRAORDINALY CIRCUMSTANCES GIVEN THE POTENTIAL FOR CONFLICT WITH THE DIRECT APPEAL.** See, USA vs. OUTEN, 286 F.3d 622, 632 (2nd Cir. 2002); DeRANGO vs. USA, 864 F.2d 520, 522 (7th Cir. 1988); USA vs. TAYLOR, 648 F.2d 565, 572 (9th Cir. 1981); WOMACK vs. USA, 395 F.2d 630, 631 (D.C. Cir. 1968); **MASTERS vs. EIDE, 353 F.2d 517, 518 (8th Cir. 1965);** ....."

See, ESQUIVEL vs. USA, 2009 U.S. District LEXIS 113751, for the Eastern District of Missouri (December 7, 2009).

"See also **RULE 5,** Rules Governing Section 2255 Proceedings for the United States District Court, 1976 Advisory Comm. Note (observing that 'the courts have held that **[a §2255] MOTION** is **INAPPROPRIATE** if the Movant is simultaneously appealing the decision' and citing MASTERS vs. EIDE, 353 F.2d 517 (8th Cir. 1965)" (emphasis added)

See, USA vs. JORDAN, 2007 U.S. District LEXIS 38507, District of Nebraska (May 25, 2007)

THE TENTH CIRCUIT HOLDS: USA vs. COOK, 997 F.2d 1312, 1319 (10th Cir. 1993)

***

"The district court in this case **IMPROPERLY CHARACTERIZED DEFENDANT'S §2255 MOTION AS HIS SECOND MOTION. IT IS HIS FIRST 2255 MOTION.** Although Defendant filed a motion styled 'writ of habeas corpus and/or **MOTION FOR NEW TRIAL AND/OR MOTION TO DISMISS,'** which apparently was **CONSTRUED BY THE DISTRICT COURT TO BE HIS FIRST 2255 MOTION,** he filed the motion on April 3, 1990, approximately a year and a half **BEFORE WE DECIDED DEFENDANT'S DIRECT APPEAL.** See, COOK, 949 F.2d 289.

***

Absent extraordinary circumstances, the orderly administration of criminal justice PRECLUDES A DISTRICT COURT FROM CONSIDERING
*** a 2255 motion while review of the direct appeal is still pending. See Rules Governing 2255 Proceedings, **RULE 5,** advisory committee note; see also, USA vs. GORDON, 634 F.2d 638, 638-39 (1st Cir. 1980); USA vs. DAVIS, 604 F.2d 474, 484 (7th Cir. 1979); ....
*** **MASTERS vs. EIDE, 353 F.2d 517 (8th Cir. 1965). WE THEREFORE, CONCLUDE THAT WHEN THE DISTRICT COURT CONSIDERED DEFENDANT'S APRIL 3, 1990 MOTION, IT DID SO ONLY AS A MOTION FOR A NEW TRIAL AND MOTION TO DISMISS, AND NOT A HABEAS PETITION OR 2255 MOTION."** (emphasis added)

COOK, 997 F.2d at 1318-19.

15. Movant Lambros' RESENTENCING was on February 10, 1997 for **COUNT ONE (1)** and his DIRECT APPEAL for resentencing was denied on September 2, 1997. Therefore, the district court was not allowed to IMPROPERLY CHARACTERIZE any motions Movant filed at his February 10, 1997 RESENTENCING as a §2255 motion for **COUNT ONE (1).**

** 16. Movant Lambros has never been granted a §2255 motion for Count One (1), as the Court denied same as a SECOND AND SUCCESSIVE PETITION. See, paragraph 13 above.

17. Movant Lambros believes that this Court has jurisdiction to rule, as it did in USA vs. COOK, that Movant's **January 2, 1999** §2255 motion was incorrectly denied by the District court as a SECOND AND SUCCESSIVE PETITION and Movant Lambros should be offered his first §2255, as to his February 10, 1997 RESENTENCING on Count One (1). Therefore, Movant Lambros' June 8, 2012 "MOTION FOR LEAVE TO FILE A SECOND OR SUCCESSIVE §2255, as to the issues raised within this action - MISSOURI vs. FRYE and LAFLER vs. COOPER - **WAS NOT A SECOND OR SUCCESSIVE MOTION AS PER THE COURT'S RULING AND CLEARLY PROVES MOVANT'S TITLE 28 U.S.C. §2255 IS "INADEQUATE AND/OR INEFFECTIVE".** See, LAMBROS vs. USA, No. 12-2427 (8th Cir. 2012)

EIGHTH CIRCUIT RELATED CASE IN THIS ACTION: LAMBROS vs. USA, No. 12-2427 (8th Cir. 2012

18. **JUNE 8, 2012:** Movant filed a SECOND OR SUCCESSIVE MOTION under §2255, as to his counsel failing to give him competent counsel regarding a plea

offer, as to the maximum illegal sentence he received after a jury trial - MANDATORY LIFE WITHOUT PAROLE. See, MISSOURI vs. FRYE and LAFLER vs. COOPER, (March 21, 2012). MISSOURI and LAFLER announced a type of Sixth Amendment violation that was previously unavailable, and requires retroactive application to cases on collateral review.

19. **JULY 23, 2012:** The United States responded to Movant's application to file a successive section 2255. The government admitted Movant was sentenced to an illegal sentence on Count One (1) and cites U.S. vs. LAMBROS, 65 F.3d 698 (8th Cir. 1995) and offers copy of the PLEA OFFER mailed to Movant's attorney on **DECEMBER 10, 1992.** Movant offered copy of the government's **NOVEMBER 16, 1992 PLEA OFFER** within his June 8, 2012 motion. Both PLEA OFFERS state that the only sentence Movant could receive on Count One (1) was a MANDATORY LIFE WITHOUT PAROLE, the sentence Movant received at sentencing for Count One (1).

20. **AUGUST 13, 2012:** Movant Lambros responds to government's response, informing that Movant qualifies for the exemptions of **"A MISCARRIAGE OF JUSTICE"** - U.S. vs. ANDIS, 333 F.3d 886, 890-893 (8th Cir. 2003) - and **"ACTUAL INNOCENCE EXCEPTION"** - BAYLESS vs. USA, 14 F.3d 410 (8th Cir. 1993), due to the illegal sentence Movant was advised of during plea bargaining by his attorney and the U.S. Attorney.

21. **OCTOBER 17, 2012:** Movant filed a supplemental motion offering the Ninth Circuit case that applied LAFLER and FRYE **RETROACTIVELY.** See, MILES vs. MARTEL, 696 F.3d 889, 899-900, and **FOOTNOTE 3 and 4** (9th Cir. 2012) ("By applying this holding in LAFLER, a habeas petiton 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 .....**" Id. Footnote 3. (emphasis added) Therefore, Movant made a "PRIMA FACIE SHOWING THAT FRYE and LAFLER ARE RETROACTIVE TO HABEAS CORPUS MOTIONS SUBJECT TO THE AEDPA."

22. **OCTOBER 24, 2012:** The Eighth Circuit filed "JUDGMENT" in this action, "The petition for authorization to file a successive habeas application in the district court is **DENIED.** ..."

23. **NOVEMBER 5, 2012:** Movant filed two (2) motions with the Eighth Circuit:

a. Motion for **RECUSAL OF CIRCUIT COURT JUDGE MURPHY;**

b. Petition for Rehearing with suggestion for Rehearing in Banc.

In brief, Circuit Court Judge Diana Murphy - who was one of the three judges on the October 24, 2012 "JUDGMENT", was the District Court Judge that originally conducted the trial and sentencing of Movant Lambros in this action. Movant Lambros clearly pointed out within his request for a REHEARING that he had made a "PRIMA FACIE SHOWING" and that the Eighth Circuit did not make a finding of facts and state its conclusions of law, citing cases to support same. Also, Movant pointed out that the second paragraph within 28 USC §2255 states that the court is required to "determine the issues and make findings of fact and conclusions of law with respect thereto."

24. **NOVEMBER 9, 2012:** Clerk Gans, Clerk of the Eighth Circuit, letter to Movant Lambros stating his petition for rehearing received on November 8, 2012 WILL NOT move forward and no action will be taken, as second or successive §2255 applications shall not be appealable and not subject to a writ of certiorari.

25. **NOVEMBER 29, 2012:** **"ORDER"** from the Eighth Circuit stating "The motion of the appellant for **RECUSAL IS DENIED."**

*** 26. **PLAIN ERROR:** Both the Third and Seventh Circuit Court of Appeals agree that violations of **Title 28 U.S.C. §47,** that provides that "no judge shall hear or determine an appeal from the decision of a case or issue tried by him," is an **ERROR SO SERIOUS AS TO CONSTITUTE PLAIN ERROR. THIS IS EXACTLY THE CASE WITH MOVANT LAMBROS, AS JUDGE DIANA MURPHY WAS THE JUDGE THAT CONDUCTED THE JURY TRIAL IN THIS ACTION IN JANUARY 1993,** USA vs. LAMBROS, 65 F.3d 698 (8th Cir. 1995), **AND WAS ONE (1) OF THE THREE (3) JUDGE PANEL THAT DENIED THE "JUDGMENT" ON OCTOBER 24, 2012.**

*** 27. **INADEQUATE AND/OR INEFFECTIVE:** The above violation of Title 28 U.S.C. §47, by Judge Diana Murphy clearly proves the remedy set out in §2255 is **INADEQUATE AND/OR INEFFECTIVE.**

28. **EXHIBIT A: CRIMINAL LAW REPORTER, August 1, 2013, Vol. 93, No. 18,**

Pages 614 and 615. The CLR offers an overview of WEDDINGTON vs. ZATECKY, 7th Cir., No. 11-3303, August 1, 2013. "A federal judge who, in her former capacity as a state court judge, had presided over a defendant's trial on state criminal charges **MUST RECUSE HERSELF** in subsequent federal habeas corpus proceedings involving closely related state charges." The Court cited violations of 28 U.S.C. **§§ 47 and 455(a).**

> "**Appearance of Partiality.** In an opinion by Judge John Daniel Tinder, the Seventh Circuit agreed with the Third circuit [CLEMMONS vs. WOLFE, 377 F.3d 322 (3rd Cir. 2004)] that the principles underlying **Section 47 apply any time a judge sits on a case, regardless of whether it is direct review or habeas. THEREFORE, THE DISTRICT JUDGE IN THIS CASE SHOULD HAVE RECUSED HERSELF, IT HELD."**
>
> "The CLEMMONS court found the **ERROR TO BE SO SERIOUS AS TO CONSTITUTE PLAIN ERROR**, ..."

Id. at 615.

III. Statement of Facts Relevant to the Issues Present for Review. (State the facts necessary and relevant to understanding the legal issues you seek to raise on appeal).

III(a): "MEMORANDUM AND ORDER" BY JUDGE ROGERS - MAY 17, 2013:

29. Judge Rogers states "the court finds that petitioner fails to show that his §2255 remedy was inadequate or ineffective and, as a result, dismisses this petition for lack of jurisdiction." See, Page 1 of May 17, 2013 "MEMORANDUM AND ORDER". The Court also stated, "It is petitioner's burden to show that the §2255 remedy is inadequate or ineffective, and the §2255 remedy has been found to be inadequate or ineffective in only 'extremely limited circumstances." CARAVALHO vs. PUGH, 177 F.3d 1177, 1178 (10th Cir. 1999)." See, page 6.

30. Judge Rogers also stated that even if he had authority under §2241, [jurisdiction], he would reject Movant's **FRYE/LAFLER CLAIMS** based upon the persuasive reasoning and precedent in recent Tenth Circuit opinions, citing **In Re GRAHAM**, 714 F.3d 1181 (10th Cir. April 23, 2013). See, Pages 9 and 10.

31. This Court stated in **IN RE GRAHAM**, 714 F.3d 1181, 1183:

> "'any doubt as to whether Frye and Lafler announced **NEW RULES** is eliminated because the Court decided these cases in the **POST CONVICTION CONTEXT**.' .... Lafler recognized that for a federal court to grant habeas relief, the state court's decision must be contrary to or an unreasonable application of clearly established federal law, and it held that the state court's failure to apply Strickland was contrary to clearly established federal law. See, LAFLER, 132 S.Ct. at 1390; ..... **But where the law is clearly established, then the rule 'MUST BY DEFINITION, HAVE BEEN AN OLD RULE,' NOT A NEW ONE.** ...." (emphasis added)

***

32. Judge Rogers also stated, "The Tenth Circuit recently discussed a situation similar to that of petitioner's: See, Page 11.

> "The issue on appeal is whether Mr. Sines had an adequate and effective remedy under §2255. .... We are not persuaded. A district court's erroneous decision on a §2255 motion does not render the §2255 remedy inadequate or ineffective. **AFTER ALL, THE DECISION COULD BE APPEALED.** ...."

See, SINES vs. WILNER, 609 F.3d 1070, 1072-74 (10th Cir. 2010).

33. Judge Rogers stated on pages 12 and 13, "It plainly appears that Mr. Lambros has resorted to all the remedies available to him for challenging his federal convictions and sentences. In PROST vs. ANDERSON, 636 F.3d 578 (10th Cir. 2011) the Tenth Circuit meticulously described the range of available remedies:

> "..... Congress has chosen to afford every federal prisoner the opportunity to **LAUNCH AT LEAST ONE (1) COLLATERAL ATTACK TO ANY ASPECT OF HIS CONVICTION OR SENTENCE** .....
>
> But Congress didn't stop there. If a prisoner's **INITIAL §2255 COLLATERAL ATTACK FAILS, ... CONGRESS HAS INDICATED THAT IT WILL SOMETIMES ALLOW A PRISONER TO BRING A SECOND OR SUCCESSIVE ATTACK.**
>
> Yet, even here Congress has provided an out. A prisoner who can't satisfy §2255(h)'s conditions for a **SECOND OR SUCCESSIVE MOTION** may obviate §2255 altogether if he can show that 'the remedy by motion' provided by §2255 is itself '**INADEQATE OR INEFFECTIVE TO TEST THE LEGALITY OF HIS DETENTION.**' 28 U.S.C. §2255(e). In these '**EXTREMELY LIMITED CIRCUMSTANCES,**' (citation omitted), a prisoner MAY BRING A **SECOND OR SUCCESSIVE ATTACK** on his conviction or sentence under 28 U.S.C. §2241, **WITHOUT REFERENCE TO §2255(h)'s RESTRICTIONS.** ...."

***

***

See, PROST, 636 F.3d at 583-84.

"The Court in PROST then meticulously set forth a relatively

simple test for when the 'savings clause' applies, and their underlying rationale:

*** The relevant ... measure, we hold, is **WHETHER A PETITIONER'S ARGUMENT CHALLENGING THE LEGALITY OF HIS DETETION COULD HAVE BEEN TESTED IN AN INITIAL §2255 MOTION.** If the answer is yes, then the petitioner may not resort to the savings clause and §2241 ....

.... Section 2255(e) expressly distinguishes between the terms remedy and relief, ... Here again, the clause emphasizes its **CONCERN WITH ENSURING THE PRISONER AN OPPORTUNITY OR CHANCE TO TEST HIS ARGUMENT. ...., but the savings clause is satisfied so long as the petitoner had an OPPORTUNITY TO BRING AND TEST HIS CLAIM."** (emphasis added)

See, PROST, at 584-87.

34. Judge Rogers again quotes PROST, stating:

".... To invoke the savings clause. there must be something about the initial §2255 procedure that itself is **INADEQUATE OR INEFFECTIVE FOR TESTING A CHALLENGE TO DETENTION ....."**

See, PROST, at 588-90.

35. In conclusion, Judge Rogers state: See, Page 16.

".... the court finds that Mr. Lambros fails to establish that his §2255 remedy was **INADEQUATE OR INEFFECTIVE.** Consequently, he has failed to establish that this court has jurisdiction to hear his challenges to this convictions and sentences under §2241."

III(b): "ORDER" BY JUDGE ROGERS - July 1, 2013:

36. Judge Rogers states: See, Page 3 and 4.

"In his motion, Mr. Lambros states that the Court was correct in finding it lacked jurisdiction under 28 U.S.C. §2241, but then argues the court erred by failing to find

*** that it **HAD JURISDICTION 'PURSUANT TO THE WRIT OF AUDITA QUERELA' under the ALL WRITS ACT, 28 U.S.C. §1651(a). THIS ARGUMENT HAS NO MERIT."**

"Second, petitioner's assertion that this court had jurisdiction under **§1651 UTTERLY LACKED LEGAL MERIT FOR THE SAME REASON AND MORE AS HIS ASSERTION OF JURISDICTION UNDER §2241."**

37. Page 8, "As a result, this court could not consider petitioner's claim(s) on the merits. ..... for lack of jurisdiction."

IV. **Statement of Issues and Arguments.** (Identify each instance in which you think the district court was wrong and provide arguments as to why you think error occurred, keeping in mind the legal standard for granting a certificate of appealability. Wherever possible, cite authorities that support your claims. You may argue, for example, that the district court applied the law incorrectly, that the district court erred in its recitation or understanding of the facts, that the district failed to consider some important argument that you raised with that court, or any other claims of error that you think warrants a different outcome.)

IV(a). FIRST ISSUE. Claim of error and arguments:

WHETHER THE DISTRICT COURT ERRORED IN RULING THAT MOVANT LAMBROS WAS GIVEN A "FAIR AND FULL OPPORTUNITY" TO AT LEAST ONE (1) COLLATERAL ATTACK - 28 U.S.C. §2255 - FOR COUNT ONE (1) OF HIS INDICTMENT?

38. As this Court ruled in PROST vs. ANDERSON, 636 F.3d 578, 583 (10th Cir. 2011), "..., in 28 U.S.C. Congress has chosen to afford every federal prisoner the opportunity to launch **AT LEAST ONE (1) COLLATERAL ATTACK TO ANY ASPECT OF HIS CONVICTION OR SENTENCE**. .... But Congress didn't stop there. If a prisoner's initial §2255 collateral attack fails, ... Congress has indicated that it will sometimes allow a prisoner to bring a second or successive attack." Id. at 583.

39. TIMING OF 28 U.S.C. §2255: The federal courts require an exhaustion of appellate remedies requirement onto section 2255, be creating and enforceing two rules regarding the relative timing of direct appeal and section 2255 proceedings. First, in a rule designed to ensure that section 2255 proceedings will not develop into a substitute for direct appeal, the courts generally apply a "procedural default" rule barring section 2255 relief on claims that the movant could have, but did not, raise on appeal. POOR THUNDER vs. U.S., 810 F.2d 817, 823 (8th Cir. 1987)(section 2255 motions are no substitute for an appeal) By definition, this procedural bar is not applicable to claims that could not have been raised on direct appeal, **SUCH AS INEFFECTIVE ASSISTANCE OF COUNSEL**, [FRYE & LAFLER ineffective assistance of counsel claims] because they require the development of a factual

record or are not discoverable until after appeal. See, MASSARO vs. U.S., 538 U.S. 500 (2003)(convicted federal defendant to first bring ineffective assistance of counsel claims in collateral proceedings under 28 U.S.C. §2255, regardless of whether defendant could have raised claim on direct appeal.) Second, most federal courts refuse to entertain §2255 motions **DURING THE PENDENCY OF AN APPEAL**. See, MASTERS vs. EIDE, 353 F.2d 517, 518 (8th Cir. 1965); USA vs. BREWER, 2010 U.S. District Ct. LEXIS 49878 - W. Dist. Arkansas (listing cases). This Circuit also agrees with the Eighth Circuit. See, USA vs. COOK, 997 F.2d 1312, 1318-19 (10th Cir. 1993). As this Court stated in COOK, a fundamental miscarriage of justice would result if the district court improperly characterized defendant's §2255 motion as his second motion. Id. 1318-19.

40. The term "FAIR AND FULL OPPORTUNITY" arises under the 4th Amendment exclusionary rule used by state prisoners. Movant Lambros would like to highlight the terms settled applications as it would apply to Movant if he was a state prisoner:

> a. The state provided no corrective procedure at all to redress claims of the sort Movant has raised. See, WILLETT vs. LOCKHART, 37 F.3d 1265, 1273 (8th Cir. 1994)(en banc).
>
> b. The state provides no "reasonable method of inquiry into relevant questions of fact and law.'" See, CONROY vs. BOMBARD, 426 F. Supp. 97, 109 (S.D.N.Y. 1976).
>
> c. [E]ven where the state provides [a facially adequate] process, [if] the defendant is **PRECLUDED FROM UTILIZING IT** by reason of an unconscionable breakdown in that process," MARKHAM vs. SMITH, 2001 U.S. App. LEXIS 9391, at *8 (6th Cir. May 8, 2001), the requisite opportunity for FULL AND FAIR LITIGATION IS ABSENT. STEPHENS vs. ATTORNEY GENERAL, 23 F.3d 248, 249 (9th Cir. 1994).

THE FOLLOWING FACTS EXIST:

41. Movant Lambros incorporates and restates paragraphs 9 thru 17 above.

42. Again, Movant's January 2, 1999 - **FIRST §2255 MOTION ON COUNT ONE (1)** - as to his February 10, 1997 RESENTENCING ON COUNT ONE (1), was denied

as a second and successive petition for **COUNT ONE (1).** This was due to Movant's Rule 33 Motions, that was approved by Movant's attorney before RESENTENCING, being considered as a §2255 motion for Counts 5, 6 and 8, not Count One (1) - on February 10, 1997.

43. Movant's RESENTENCING on February 10, 1997 on **Count One (1)** and his direct appeal as to his RESENTENCING, that was denied on September 2, 1997, proves that Movant was NEVER given a "FAIR AND FULL OPPORTUNITY" to at least one collateral attack - 28 U.S.C. §2255 - for Count One (1) of his indictment, as required by Congress. Movant's writ of certiorari as to his RESENTENCING direct appeal on Count One (1) was denied on **January 12, 1998.** See, LAMBROS vs. USA, 522 U.S. 1065 (1998).

CONCLUSION:

44. Movant was never given an opportunity to raise an ineffective assistance of counsel claim regarding his **COUNT ONE (1) ILLEGAL SENTENCE AFTER RESENTENCING ON FEBRUARY 10, 1997,** as the district court and the appeals court never allowed Movant his first collateral attack via 28 U.S.C. §2255, as to same.

45. Movant has met the burden of showing that the §2255 remedy in this action was "INADEQUATE OR INEFFECTIVE", within this Court's reasoning of "extremely limited circumstances", thus "ensuring the prisoner an opportunity or chance to test his argument" "in an initial §2255 motion". See, PROST vs. ANDERSON, 636 F.3d 578, 584-87 (10th Cir. 2011).

46. Movant requests this Court to issue a "PRECEDENTIAL OPINION" applying MISSOURI vs. FRYE and LAFLER vs. COOPER retroactive to Movant's initial §2255 on Count One (1) and/or to his successive or second habeas corpus motion.

47. WHEREFORE, as per MISSOURI and LAFLER, Movant requests this court to vacate Count 1 due to Movant's attorney being ineffective during PLEA BARGAINING. The U.S. Attorney must re-extend the plea offer to Movant.

IV(b). SECOND ISSUE. Claim of error and supporting arguments:

WHETHER "PLAIN ERROR" - VIOLATIONS OF TITLE 28 U.S.C. §§ 47 AND 455(a) - MEETS THE BURDEN OF SHOWING THAT THE §2255 REMEDY IN THIS ACTION WAS "INADEQUATE OR INEFFECTIVE", WITHIN THIS COURT'S REASONING OF "EXTREMELY LIMITED CIRCUMSTANCES", THUS "ENSURING THE PRISONER AN OPPORTUNITY OR CHANCE TO TEST HIS ARGUMENT" ?

48. On or about January 1993, Chief District Court Judge Diana Murphy was the judge that conducted the jury trial of Movant Lambros in this action. See, USA vs. LAMBROS, 65 F.3d 698 (8th Cir. 1995).

49. On January 27, 1994, Judge Murphy sentenced Movant on Counts 1, 5, 6, and 8, in this action, to an ILLEGAL SENTENCE OF MANDATORY LIFE WITHOUT PAROLE on Count One (1). Therefore, Movant's illegal sentence **ERROR CONSTITUTES BOTH:**

a. **MISCARRIAGE OF JUSTICE:** See, U.S. vs. ANDIS, 333 F.3d 886, 890-893 (8th Cir. 2003); and

b. **ACTUAL INNOCENCE:** See, BAYLESS vs. USA, 14 F.3d 410 (8th Cir. 1993).

50. On September 8, 1995, the Eighth Circuit Court of Appeals VACATED Count One (1) - MANDATORY LIFE WITHOUT PAROLE - as being an illegal sentence. See, LAMBROS, 65 F.3d 698 (8th Cir. 1995).

51. **JUNE 8, 2012:** Movant Lambros filed a SECOND OR SUCCESSIVE motion under §2255, as to his counsel giving him incorrect advice during **TWO (2) DIFFERENT PLEA BARGAINING OFFERS**, as to the maximum illegal sentences he could receive. See, MISSOURI vs. FRYE and LAFLER vs. COOPER. See, LAMBROS vs. USA, No. 12-2427 (8th Cir. 2012).

52. **OCTOBER 24, 2012:** The Eighth Circuit Court of Appeals Judges **MURPHY, SMITH, and BENTON** denied Movant's petition for authorization to file a successive habeas application in the district court. Circuit Judge **MURPHY, is DIANA MURPHY**, the same Chief District Court Judge that conducted the jury trial

and sentencing of Movant Lambros in this action.

53. **EXHIBIT B.** October 24, 2012 "JUDGMENT" by Circuit Judges **MURPHY**, SMITH and BENTON, in LAMBROS vs. USA, No. 12-2427 (8th Cir. 2012).

54. Movant Lambros incorporates and restates paragraphs 1 thru 53 above.

PLAIN ERROR VIOLATIONS BY CIRCUIT JUDGE DIANA MURPHY:

55. **TITLE 28 U.S.C. §47:** This statute states "No judge shall hear or determine an appeal from the decision of a case or issue tried by him."

56. The October 24, 2012 "JUDGMENT" clearly states "Appeal from U.S. District Court for the District of Minnesota - Minneapolis". See, **EXHIBIT B.**

57. **TITLE 28 U.S.C. §455(a):** This statute states "any ... judge ... shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

58. WEDDINGTON vs. ZATECKY, 7th Cir., No. 11-3303, August 1, 2013. The Seventh Circuit stated that a federal district court judge who, in her former capacity as a state court judge, had presided over a defendant's trial on state criminal charges MUST RECUSE HERSELF in subsequent federal habeas corpus proceedings involving closely related state charges. See, **EXHIBIT A.** (Criminal Law Reporter, August 1, 2013, pages 614-15.) The Court cited in support: RUSSELL vs. LANE, 890 F.2d 947 (7th Cir. 1989); RICE vs. McKENZIE, 581 F.2d 1114 (4th Cir. 1978); CLEMMONS vs. WOLFE, 377 F.3d 322 (3rd Cir. 2004)(Court found the **ERROR TO BE SO SERIOUS AS TO CONSTITUTE "PLAIN ERROR"**, reasoning that "a federal judge sitting in review of the propriety of the state proceedings conducted by the judge .... seriously affected the fairness and public reputation of the judicial proceedings."

59. Judge Tinder, in his opinion in WEDDINGTON, the Seventh Circuit agreed with the Third Circuit - CLEMMONS - that the principles underlying **SECTION 47** APPLY ANY TIME A JUDGE SITS ON A CASE, REGARDLESS OF WHETHER IT IS DIRECT REVIEW OR

HABEAS. Therefore, the district judge in this case should have recused herself, it held.

60. **"PLAIN ERROR"** is invoked to prevent a MISCARRIAGE OF JUSTICE or to PRESERVE THE INTEGRITY AND THE REPUTATION OF THE JUDICIAL PROCESS. See, U.S. vs. OLANO, 507 U.S. 725, 736 (1993).

61. In OLANO, the Supreme Court defined limitations on a reviewing court's authority to correct "PLAIN ERROR". OLANO, 507 U.S. at 730-36. First, there must be an actual error and not merely a waiver of rights. Id. at 732. Second, the error must be plain in that it is "clear" or "obvious" under current law. Id. at 734. Third, the "PLAIN ERROR" must "affect substantial rights." Id. at 735. Finally, the Court noted that even if the forfeited error is plain and affected substantial rights, the reviewing court is not required to order correction. Id. at 735-36. Rather the discretion to correct the error should be employed only in those cases "'in which a MISCARRIAGE OF JUSTICE would otherwise result.'" Id. at 736 (quoting U.S. vs. YOUNG, 470 U.S. 1, 15 (1985)). This means that the error must "seriously affect the fairness, integrity or public reputation of judicial proceedings." Id. (internal quotation omitted). See, U.S. vs. KEYS, 133 F.3d 1282, 1286 (9th Cir.)(en banc)(applying standard), amended by 143 F.3d 479 (9th Cir. 1998).

62. This Court has "discretion under Rule 52(b) to correct plain error, ..., U.S. vs. OLANO, 507 U.S. 725, 732 (1993), using a four-part inquiry." See, U.S. vs. TURRIETTA, 2012 U.S. App. LEXIS 18364 (10th Cir. 2012).

CONCLUSION:

63. Circuit Court Judge DIANA MURPHY committed an error so serious as to constitute "PLAIN ERROR", for sitting in review of a trial and sentencing she conducted. The error seriously affected the fairness and public reputation of the judicial proceedings.

64. Movant has met the burden of showing that the §2255 remedy

in this action was "inadequate or ineffective", within this court's reasoning of "extremely limited circumstances", thus "ensuring the prisoner an opportunity or chance to test his argument". See, PROST, 636 F.3d 578, 584-87 (10th Cir. 2011).

65. Movant requests this Court to apply FRYE and COOPER retroactive to Movant's initial §2255 on Count One (1) and/or to his second or successive habeas corpus motion.

66. WHEREFORE, as per FRYE and COOPER, Movant requests this court to vacate Count One (1) due to Movant's attorney being ineffective during PLEA BARGAINING. The U.S. Attorney must re-extend the plea offer to Movant.

IV(c). THIRD ISSUE. Claim of error and supporting arguments:

WHETHER THE "WRIT OF AUDITA QUERELA" - THE ALL WRITS ACT, 28 U.S.C. §1651(a) - FILLS A GAP IN THE FEDERAL POST-CONVICTION REMEDIAL SCHEME DUE TO THE LIMITATIONS PERIOD OF ONE (1) YEAR - DODD vs. U.S.A., 545 U.S. 353, 359 (2005) - WHEN THE U.S. SUPREME COURT INITIALLY RECOGNIZES A NEWLY CREATED RIGHT AND DOES NOT MAKE SOME EXPLICIT STATEMENT REGARDING RETROACTIVITY TO CASES ON COLLATERAL REVIEW ?

67. On March 21, 2012, the U.S. Supreme Court handed down two (2) decisions that expanded the opportunities for defendants to overturn their convictions on the basis of POST-CONVICTION CLAIMS - INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS - that their attorneys did an unreasonable poor job during plea negotiations. See, LAFLER and FRYE.

68. On June 20, 2005, the U.S. Supreme Court stated that "'all motions' under §2255, initial motions as well as second or successive one.", must be filed within a one (1) year limitation period for federal prisoner's motion for relief from sentence under 28 U.S.C. §2255 on basis of newly recognized right held to begin when right recognized, rather than when right made retroactive. See, DODD vs. USA, 545 U.S. 353, 359 (2005).

69. **JUNE 8, 2012,** Movant filed a second or successive §2255 in this action, that was denied without reason on October 24, 2012.

70. **FEBRUARY 28, 2013,** Movant filed a petition for writ pursuant to 28 U.S.C. §§ 1651(a) and/or 2241, within this action. On July 1, 2013, Judge Rogers denied same for lack of jurisdiction. The court stated "this court could not consider petitioner's claim(s) on the merits." Also, the Court stated that it denied in forma pauperis status for purpose of this appeal and denied "CERTIFICATE OF APPEALABILITY", in this action.

LAW:

71. DODD vs. U.S., 545 U.S. 353, 359 (2005), instructs us that a prisoner only has one (1) year to file - **UNDER 28 U.S.C. §2255** - for relief from a sentence on a newly recognized right by the Supreme Court. This includes "all motions" under §2255, initial motions as well as second or successive ones. Id. at 359. The 1-year date starts on "the date which the right asserted was initially recognized by the Supreme Court." Id. at 358. As the Court pointed out, a prisoner who files a **SECOND OR SUCCESSIVE MOTION [§2255]** seeking to take advantage of a new rule of constitutional law **WILL BE TIME BARRED** except in the rare case in which the Supreme Court announces a new rule of constitutional law and **MAKES IT RETROACTIVE WITHIN ONE (1) YEAR.** Id. at 359. The Court clearly admits that §2255 restricts federal prisoners' ability to file second or successive motions.

72. This Court holds that a prisoner can reach 28 U.S.C. §2241's judge-made equitable doctrine for excusing late-blossoming arguments **ONLY** if he first meets antecedent statutory requirements Congress prescribed in **28 U.S.C. §2255(e)'s SAVINGS CLAUSE.** See, PROST vs. ANDERSON, 636 F.3d 578, 580 (10th Cir. 2011). Therefore, the **ONE (1) YEAR TIME LIMITATION APPLIES TO §2241 MOTIONS.** See, WOOTEN vs. CAULEY, (2009, ED. Ky.) 2009 US Dist. LEXIS 106921. (§2241 was **TIME-BARRED** under §2255(f)(3), being more than one (1) year after SANTOS decision was issued).

73. This Court reviews the denial of a Coram Nobis or **AUDITA QUERELA** - Common Law Writs - questions of law de novo, but review the district court's decision to deny the writ for an abuse of discretion. U.S. vs. THODY, 460 Fed. Appx. 776, 778 (10th Cir. 2012). "Common law writs such as these are extraordinary remedies that are appropriate only in compelling circumstances. UNITED STATES vs. DENEDO, 556 U.S. 904, 129 S.Ct. 2213, 2224, 173 L.Ed. 2d 1235 (2009)." Id. at 778.

74. In THODY, this court stated the **STANDARD THAT MUST BE MET TO USE THE WRIT OF AUDITA QUERELA - 28 U.S.C. §1651(a):** See, THODY, at 778:

> "Petitions relying on these writs [**Audita Querela & Coram Nobis**] must meet a number of requirements before they can use them. For example, petitoners must demonstrate due diligence in bringing their claims, that other remedies are unavailable or inadequate, and that the underlying trial
> ***
> error was fundamental, meaning the error resulted in a **COMPLETE MISCARRIAGE OF JUSTICE.** U.S. vs. MORGAN, 346 U.S. 502, 511-12 (1954); EMBREY vs. U.S., 240 F. App'x. 791, 793-94 (10th Cir. 2007). Further, 'a prisoner may not challenge a sentence or conviction for which he is currently in custody through a **WRIT OF CORAM NOBIS.**' U.S. vs. TORRES, 282 F.3d 1241, 1245 (10th Cir. 2002)." (emphasis added)

THODY, at 778.

75. The Supreme Court in U.S. vs. DENEDO stated that the **"ALL WRITS ACT"** was limited to "extraordinary" cases presenting circumstances compelling it use **"TO ACHIEVE JUSTICE".** DENEDO, 173 L.Ed. 2d at 1244 (2009)(quoting U.S. vs. MORGAN, 346 U.S. 502, 511 (1954). In federal courts the authority to grant a writ of coram nobis is conferred by the **ALL WRITS ACT,** which permits "courts established by Act of Congress" to issue **"ALL WRITS NECESSARY OR APPROPRIATE IN AID OF THEIR RESPECTIVE JURISDICTION."** 28 U.S.C. §1651(a). Id. at 1244. "Any rationale confining the writ to technical errors, however, has been superseded; for in its modern iteration corom nobis is broader than its common-law predecessor. This is confirmed by our opinion in MORGAN. In that case we found that the writ of coram nobis can issue to redress a fundamental error, **THERE A DEPRIVATION OF COUNSEL IN VIOLATION OF THE SIXTH AMENDMENT,** [ineffective assistance of counsel] as opposed to mere technical errors. 346 U.S., at 513, 98 L.Ed. 248 (1954)" (emphasis added) Id. at 1244.

76. This Court clearly explainted that "Writs of **AUDITA QUERELA and CORAM NOBIS 'ARE SIMILAR, BUT NOT IDENTICAL.'** ... Usually, a writ of coram nobis is used 'to attack a judgment that was infirm [at the time it issued], for reasons that later came to light.' By contrast, a **WRIT OF AUDITA QUERELA** is used to challenge 'a judgment that was correct at the time rendered but which is rendered infirm by matters which arise after its rendition.' .... Like these courts, we assume for purposes of this case only that **A PRISONER MAY SEEK A WRIT OF AUDITA QUERELA UNDER THE ALL WRITS ACT."** See, U.S. vs. TORRES, 282 F.3d 1241, 1245 Foot-Note 6 (10th Cir. 2002)(emphasis added)

77. The Tenth Circuit, to the best of this Movant's research, has assumed, **WITHOUT DECIDING,** a prisoner may seek a **WRIT OF AUDITA QUERELA UNDER THE ALL WRITS ACT TO CHALLENGE AN OTHERWISE FINAL CONVICTION.** See, TORRES, 282 F.3d at 1245 FN 6. See, U.S. vs. SILVA, 423 Fed. Appx. 809, 810 FN. 2 (10th Cir. 2011).

QUESTION: "WHETHER A PARTICULAR FEDERAL RULE WILL APPLY RETROACTIVELY IS, IN A VERY REAL WAY, A CHOICE BETWEEN NEW AND OLD LAW." See, DANFORTH vs. MINNESOTA, 169 L. Ed. 2d 859, 888-889 (2008).

78. In DANFORTH, the Supreme Court stated: Id. at 888-889.

> "The Majority explains that when we announce a new rule of law, we are not 'creating the law', but rather 'declaring what the law already is."
>
> "The point may lead to the conclusion that nonretroactivity of our decisions is improper - the position the Court has adopted in both criminal and civil cases on direct review - but everyone agrees that full retroactivity is not required on collateral review. **IT NECESSARILY FOLLOWS THAT WE MUST CHOOSE WHETHER "NEW" OR "OLD" LAW APPLIES TO A PARTICULAR CATEGORY OF CASES."** (emphasis added)
>
> "Suppose, for example, that a defendant, whose conviction became final before we announced our decision in CRAWFORD vs. WASHINGTON, 541 U.S. 36 (2004), argues (**correctly**) on **COLLATERAL REVIEW** that he was convicted in violation of both CRAWFORD and OHIO vs. ROBERTS, 448 U.S. 56 (1980), the case that CRAWFORD overturned. Under our decision in WHORTON vs. BOCKTING, 549 U.S. 406 (2007), the **"NEW"** rule announced in CRAWFORD **WOULD NOT APPLY RETROACTIVELY TO THE DEFENDANT.** But I take it to be uncontroversial that the defendant would nevertheless get the benefit of the **"OLD" RULE** of ROBERTS,

***

> even under the view that the rule not only is but always has been an incorrect reading of the Constitution. .... **Thus, the question whether a particular federal rule will apply RETROACTIVELY is, in a very real way, a choice between NEW and OLD LAW. The issue in this case is who should decide."** (emphasis added)
>
> "Indeed, when the question is what federal rule of decision from this Court should apply to a particular case, **NO COURT BUT THIS ONE-WHICH HAS THE ULTIMATE AUTHORITY 'TO SAY WHAT THE LAW IS,' ... - SHOULD HAVE FINAL SAY OVER THE ANSWER."** (emphasis added)

79. The Supreme Court clearly informs us in DANFORTH "the question whether a particular federal rule will apply RETROACTIVELY is, ..., a choice between NEW and OLD LAW." and the Supreme Court "should have final say over the answer." Therefore, a legal question that cannot be raised and brought pursuant to any other post-conviction remedy AFTER FINAL JUDGMENT, to the U.S. Supreme Court due to 28 U.S.C. §2255(h) "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable" and 28 U.S.C. §2244(b)(3)(E) the denial of authorization to file a second and successive §2255 - "shall not be appealable and shall not be the subject of a **PETITION FOR REHEARING OR FOR A WRIT OF CERTIORARI.**" See, IN RE GRAHAM, 714 F.3d 1181, 1182-83 (10th Cir. 2013).

CONCLUSION:

80. Movant Lambros requests this Court to **DECIDE SQUARLY** that a prisoner may seek a Writ of Audita Querela due to the gap in the system of Federal post-conviction remedies, U.S. vs. MORGAN, 74 S.Ct. 247, 249-53 & FN. 4 (1954), created by DODD vs. U.S., 545 U.S. 353, 359 (2005) one (1) year time-barr to file for relief on a newly recognized right by the U.S. Supreme Court.

81. The Writ of Audita Querela provides a continuation of litigation AFTER FINAL JUDGMENT to achieve justice by allowing a prisoner to question the U.S. Supreme Court - the ultimate authority to say what the law is - whether a federal rule - a choice between NEW and OLD LAW - will apply RETROACTIVELY.

82. Movant Lambros illegal sentence of mandatory life without parole, was a "deprivation of counsel in violation of the Sixth Amendment" - ineffective assistance of counsel during plea bargaining - the exact same issue that the Supreme Court stated the "ALL WRITS ACT", 28 U.S.C. §1651(a), was designed for. See, DENEDO, 173 L.Ed. 2d at 1244.

83. Movant Lambros' has met the STANDARD for 28 U.S.C. §1651(a), set by this Court in U.S. vs. THODY, 460 Fed. Appx. 776, 778 (10th Cir. 2012) - see paragraph 74 above - as he has demonstrated due diligence in bringing his claim, that other remedies are unavailable or inadequate, and that the underlying plea bargain and trial sentencing resulted in a COMPLETE MISCARRIAGE OF JUSTICE. See, U.S. vs. ANDIS, 333 F.3d 886, 890-893 (8th Cir. 2003)(illegal sentence due to ineffective assistance of counsel).

IV(d). FOURTH ISSUE. Claim of error and supporting arguments:

WHETHER THE TENTH CIRCUIT COURT OF APPEALS CONCLUDES THAT THE SUPREME COURT ANNOUNCED AN "OLD RULE" AND/OR APPLIED THE REASONING OF TYLER vs. CAIN, 533 U.S. 656 (2001), AS TO APPLYING LAFLER vs. COOPER AND MISSOURI vs. FRYE RETROACTIVELY TO CRIMINAL CASES ALREADY FINAL ON DIRECT REVIEW ?

84. On April 23, 2013, this Court ruled that LAFLER and FRYE are an application of the Sixth Amendment right to counsel, as defined in STRICKLAND. Accordingly, LAFLER and FRYE **ARE NOT "NEW RULES" BECAUSE THEY WERE DICTATED BY STRICKLAND.** "Moreover, 'any doubt as to whether FRYE and LAFLER announced **NEW RULES** is eliminated because the Court decided these cases in the **POST CONVICTION CONTEXT.**'"

> "But where the law is clearly extablished, then the rule 'must, by definition, have been an **OLD RULE,' NOT A NEW ONE.** PEREZ, 682 F.3d at 933; see also HARE, 688 F.3d at 879." (emphasis added)

See, IN RE GRAHAM, 714 F.3d 1181, 1182-83 (April 23, 2013).

85. As this Court knows, the Sixth Amendment guarantees "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense." STRICKLAND vs. WASHINGTON, 466 U.S. 668 (1984). Both LAFLER and FRYE - the PREMISE of this action - the Supreme Court extended the holding in STRICKLAND to **COVER INEFFECTIVE ASSISTANCE BY DEFENSE COUNSEL IN THE PLEA-BARGAINING PHASE.** Justice Antonin Scalia wrote for the four dissenters, who objected to the majority's decision on the most basic level. As the dissent states, "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."** See. FRYE, 132 S.Ct. at 1413-1414.

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86. Justice Scalia, writing for the dissenters in COOPER, stated "the Court today opens a whole new field of constitutionalized criminal procedure: plea-bargaining law." See, COOPER, 132 S.Ct. at 1391.

87. The Supreme Court has NEVER BEFORE brought judicial supervision to the **PLEA-BARGAINING PROCESS**, a 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. Justice Kennedy stated:

> "The initial question is whether the constitutional right to counsel extends to the negotiation and consideration of plea offers that lapse or are rejected. If there is a right to effective assistance with respect to those offers, ..." (emphasis added)

See, FRYE, 132 S.Ct. at 1404.

"OLD RULE" or "NEW RULE" - TEAGUE vs. LANE, 489 U.S. 288 (1989):

88. TEAGUE 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,** but a **NEW RULE** is generally applicable only to cases that are still on direct review." See, WHORTON vs. BOCKTING, 549 U.S. 406, 416 (2007).

89. If this Court concludes that the Supreme Court has announced an **"OLD RULE"** in LAFLER and FRYE - as it did IN RE GRAHAM, 714 F.3d at 1182-83 - this motion applies RETROACTIVELY; however, if the RULE IS NEW, this Court must consider whether one of the two (2) exceptions applies to make this motion retroactive. See, WHORTON, 549 U.S. at 416.

90. Movant Lambros argues that TEAGUE is inapplicable, because LAFLER and FRYE are SIMPLY THE APPLICATION OF AN "OLD RULE". FRYE and LAFLER do not announce a new rule and are only **EXTENSIONS OF** the rule in STRICKLAND vs. WASHINGTON. The Supreme Court's conclusion in FRYE and LAFLER is opposite the holdings of every federal circuit court to have address the issue, as "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." See, FRYE, 132 S.Ct. at 1413-1414. (emphasis added)

91. The Supreme Court also stated in YATES vs. AIKEN, 98 L.Ed. 2d 546, 549 (1988):

> "When a decision of the United States Supreme Court has merely applied settled precedents to **NEW AND DIFFERENT FACTUAL SITUATIONS,** no real question arises as to whether the later decision should **APPLY RETROSPECTIVELY;** in such cases, it is a foregone conclusion that the rule of the later case applies in earlier cases, because the later decision has not in fact altered that rule in any way."

DID THE U.S. SUPREME COURT MAKE FRYE AND LAFLER RETROACTIVE WITHOUT EXPLICITLY SO STATING ? See, TYLER vs. CAIN, 533 U.S. 656 (2001).

92. In TYLER, the Supreme Court explained that a case is "made retroactive to cases on collateral review by the Supreme Court" for purposes of the statutory limitations on second or successive habeas petitions if and "only if this Court has held that the new rule is retroactively applicable to cases on collateral review." Id. at 662. The TYLER Court explained, however, that "this Court can make a rule retroactive **OVER THE COURSE OF TWO (2) CASES** ... Multiple cases can render a new rule retroactive .... if the holding in those cases **NECESSARILY DICTATE RETROACTIVITY OF THE NEW RULE.**" Id. at 666. Movant believes that FRYE made LAFLER retroactive or LAFLER made FRYE retroactive.

93. Justice O'Connor, who supplied the crucial fifth vote for the majority, wrote a concurring opinion, and her reasoning adds to the understanding of the impact of TYLER. She explains that it is possible for the Court to **"MAKE"** a case retroactive on collateral review WITHOUT EXPLICITLY SO STATING, as long as the Court's holdings "logically permit no other conclusion than that the rule is retroactive." See, 533 U.S. at 668-69. For example, Justice O'Connor explained that:

> "If we hold in Case One that a particular type of rule applies retroactively to cases on collateral review and hold in Case Two that a given rule is of that particular type, then it necessarily follows that the given rule applies retroactively to cases on collateral review. In such circumstances, we can be said to have 'made' the given rule retroactive to cases on collateral review."

Justice O'Connor qualified this approach by explaining that"

> "The relationship between the conclusion that a new rule is retroactive and the holdings that 'make' this rule retroactive, however, must be strictly logical - - i.e., the holdings must dictate the conclusion and not merely provide principles from which one may conclude that the rule applies retroactively."

TYLER vs. CAIN, 533 U.S. at 668-669.

94. Justice O'Connor would apply the Court's ruling in TYLER to FRYE and LAFLER, as the Court's holdings "logically permit[s] no other conclusion than that the rule is retroactive.".

CONCLUSION:

95. Movant offer one last quote from Justice Scalia, explicitly acknowledging the new step the 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 "constitution-alization of the plea-bargaining process." See, FRYE, 132 S.Ct. at 1412-1413. (emphasis added)

96. Before LAFLER and FRYE decisions, counsel's plea-bargaining skills would not have been considered constitutionally suspect.

97. Movant requests this Court to conclude that the Supreme Court announced an "OLD RULE" and/or applied the reasoning of TYLER vs. CAIN, as to applying LAFLER and FRYE retroactive to criminal cases already final on direct review.

98. Movant also requests that his Court request the Supreme Court to validate there conclusion that LAFLER and FRYE are retroactive.

V. RELIEF REQUESTED. (State what you are asking this court to do).

99. **FIRST ISSUE:** Pages 12 thru 14, paragraphs 38 thru 47. Movant incorporates and restates his "CONCLUSION" - paragraphs 44 thru 47, as to his relief requested.

100. **SECOND ISSUE:** Pages 15 thru 18, paragraphs 48 thru 66. Movant incorporates and restates his "CONCLUSION" - paragraphs 63 thru 66, as to his relief requested.

101. **THIRD ISSUE:** Pages 18 thru 23, paragraphs 67 thru 83. Movant incorporates and restates his "CONCLUSION" - paragraphs 80 thru 83, as to his relief requested.

102. **FOURTH ISSUE:** Pages 23 thru 27, paragraphs 84 thru 98. Movant incorporates and restates his "CONCLUSION" - paragraphs 95 thru 98, as to his relief requested.

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

EXECUTED ON: August 28, 2013.

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FILL OUT AND SIGN EACH OF THE FOLLOWING TWO SECTIONS

==========

I affirm under the penalty for perjury that I placed this Appellant's Combined Opening Brief and Application for a Certificate of Appealability with first-class postage prepaid in the prison mail system or, if I was not incarcerated, in the United States Mail, addressed to the Clerk of the U.S. Court of Appeals for the Tenth Circuit, 1823 Stout St., Denver, CO 80257. In addition, I hereby certify that a copy of this form was placed with first-class postage prepaid in the prison mail system or, if I was not incarcerated, in the United States Mail, addressed to:

CLAUDE MAYE, Warden, USP Leavenworth, 1300 Metropolitan Ave., Leavenworth, Kansas 66048

(identify the name and address of the opposing governmental attorney)

on the following date:

August	28,	2013	_____
month	day	year	signature

John Gregory Lambros

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I certify that the total number of pages I am submitting as my Appellant's Combined Opening Brief and Application for a Certificate of Appealability is 30 pages or less or alternatively, if the total number of pages exceeds 30, I certify that I have counted the number of words and the total is **N/A**, which is less than 14,000. I understand that if my Appellant's Combined Opening Brief and Application for a Certificate of Appealability exceeds 14,000 words, my brief may be stricken and the appeal dismissed.

August	28,	2013	_____
month	day	year	signature

John Gregory Lambros

on the state for failing to provide the defense with witness interview notes before trial.

"Needless to say, contemporaneous notes of a defendant's own statements to law enforcement officers should rank even higher on the scale of importance than witness interview notes," the court said.

It was reversible error not to grant the defense request for an adverse-inference instruction because the destruction of the notes allowed the state to present a sanitized version of the interrogation, the court found.

Handwritten Notes. The defendant was arrested after he allegedly struck and killed his wife while driving the family minivan.

At the police station, an investigator conducted what the state referred to as a "pre-interview," in which he asked the defendant a number of open-ended questions and took handwritten notes. This discussion lasted a little over two hours.

The investigator then turned on a tape recorder and used the notes to conduct a 15-minute interrogation. According to the court, the investigator asked a series of leading questions to which the defendant responded with "mostly damning, monosyllabic answers."

At trial, the state introduced the tape recording and had the investigator summarize what was said in the more lengthy "pre-interview." He did not testify from his notes, however, because he had destroyed them more than a year after the indictment. Instead, he referred to a typewritten final report into which he had purportedly incorporated the notes.

The defense asked the trial court to instruct the jury that it could draw an adverse inference from the investigator's destruction of his notes. The prosecutor objected, arguing that New Jersey caselaw did not require police officers to preserve their notes and that the defense lawyers never requested that the state preserve the notes.

The court refused to give the charge, and the defendant was convicted of murder and attempting to leave the scene of a fatal motor vehicle accident.

'Open File' System. The intermediate appellate court reversed the conviction, concluding that the state had an obligation to preserve the notes and that its failure to do so entitled the defendant to an adverse-inference charge.

On appeal to the state high court, the state conceded that *State v. W.B.*, 17 A.3d 187, 89 CrL 166 (N.J. 2011), stands for the proposition that notes of witness statements compiled into final reports must be retained and disclosed by the prosecutor. However, it argued that *W.B.* should not be applied retroactively and reiterated its claim that the defense needed to ask for the notes if it wanted them preserved for trial.

The court rebuffed both arguments.

To begin with, the state's obligation to preserve interview notes was an established discovery rule at the time the defendant was charged, the court pointed out. New Jersey uses an open-file system that grants a defendant an automatic right to discovery, it noted, citing N.J. R. Crim. P. 3:13-3 and 3:9-1(a). The obligation is triggered without a specific request, it said.

The notes here fell well within the realm of discoverable material that the prosecutor was required to make available to the defense, the court decided. Rule 3:13-3(c)(2) and (c)(7) expressly require the state to allow a defendant to inspect and copy records of his or her own statements "and a summary of any admissions or declarations against penal interest."

The court also noted that it has long disapproved of the practice of not making witness interview notes available, citing *State v. Marshall*, 586 A.2d 85 (N.J. 1991), where it imposed sanctions on the state for its failure to provide the defense with witness interview notes before trial.

Withholding the notes of a defendant's own statements to law enforcement officers is even more serious, the court said.

'Neat and Coherent Narrative.' The danger created by an investigator who destroys his contemporaneous interview notes is self-evident, the court said. "The words in the interview notes were filtered through an investigator who, understandably, had developed a distinct view of the case," it observed.

"By destroying his notes, [Investigator] Dando made himself the sole judge of what actually was contained in his contemporaneous notes" and made it possible to present to the jury "a neat and coherent narrative of the events," the court said.

Turning to the question of sanctions, the court found that an adverse-inference charge fell within the range of appropriate responses. Rule 3:13-3(g) grants a trial court a broad range of options, including a continuance or delay during trial, exclusion of the evidence, or "such other order as it deems appropriate," it noted.

Failure to give the instruction here was clearly an error capable of producing an unjust result because there was a realistic chance that the contemporaneous notes would have helped defense counsel undermine the investigator's testimony and the integrity of the tape-recorded statement, the court said. Indeed, much of the direct evidence of the defendant's intent and state of mind came from the investigator's testimony about the unrecorded pre-interview interrogation, it noted.

The investigator's credibility was a critical factor in determining whether the defendant was guilty of murder or some lesser offense, the court added. "We cannot say that such a charge would not have altered the outcome of the jury's verdict," it concluded.

Nancy A. Hulett, of the Middlesex County Prosecutor's Office, New Brunswick, N.J., argued for the state. Marcia H. Blum, of the New Jersey Public Defender's Office, Trenton, N.J., argued for the defendant. Michael J. Williams argued for the New Jersey Attorney General's Office, Trenton, appearing in the case as amicus curiae.

BY LANCE J. ROGERS

Full text at http://www.bloomberglaw.com/public/document/State_v_Dabas_No_A109_September_Term_2011_069498_2013_BL_200998_N

Judges

Habeas Petitioner's State Trial Judge Can't Preside Over His Federal Petition

A federal district judge who, in her former capacity as a state court judge, had presided over a defendant's trial on state criminal charges must recuse herself in subsequent federal habeas corpus proceedings involving closely related state charges, the U.S.

CRL ISSN 0011-1341

EXHIBIT A.

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Court of Appeals for the Seventh Circuit held Aug. 1. (*Weddington v. Zatecky*, 7th Cir., No. 11-3303, 8/1/13)

In state court, the petitioner was convicted of severed charges in two trials. He claimed he was denied effective assistance of trial and appellate counsel at his second trial. His federal habeas case was assigned to a district judge who, prior to joining the federal bench, had presided over the first of his state trials.

The judge concluded that the petition was time-barred and that the petitioner had procedurally defaulted his claims. She accordingly dismissed the petition.

"[The district judge] effectively would be reviewing an issue and matter over which she had already passed judgment as a state court judge."

JUDGE JOHN DANIEL TINDER

Under 28 U.S.C. § 455(a), "any. . . judge . . . shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." In this context, impressions are as important as reality, and an appearance of partiality is enough to trigger a duty to recuse.

A statute that applies to direct appeals rather than habeas proceedings, 28 U.S.C. § 47, provides that "no judge shall hear or determine an appeal from the decision of a case or issue tried by him."

In *Clemmons v. Wolfe*, 377 F.3d 322, 75 CrL 526 (3d Cir. 2004), the Third Circuit cited the need to avoid an appearance of partiality when it held that a federal district judge should have recused himself from hearing federal habeas corpus proceedings that attacked a state conviction resulting from a trial over which he had presided when he was a state court judge. The Third Circuit cited Section 47 and said there is no reason the same rules should not apply in the habeas context.

Similarly, in *Russell v. Lane*, 890 F.2d 947 (7th Cir. 1989), the Seventh Circuit held that a petitioner's habeas claims should not have been heard by a district judge who had been a member of the panel of the state appellate court that had affirmed the petitioner's conviction. In *Rice v. McKenzie*, 581 F.2d 1114 (4th Cir. 1978), the Fourth Circuit said a federal district judge who had formerly presided as the chief justice of the state supreme court that reviewed the defendant's claim could not consider those claims on habeas review.

Appearance of Partiality. In an opinion by Judge John Daniel Tinder, the Seventh Circuit agreed with the Third Circuit that the principles underlying Section 47 apply any time a judge sits on a case, regardless of whether it is direct review or habeas. Therefore, the district judge in this case should have recused herself, it held.

The *Clemmons* court found the error to be so serious as to constitute plain error, reasoning that "a federal judge sitting in review of the propriety of the state proceedings conducted by that judge . . . seriously affects the fairness and public reputation of the judicial proceedings." In fact, the Third Circuit adopted a broad prohibition, saying a district judge must recuse him or herself from participating in habeas review of "any issue concerning the trial or conviction over which the judge presided in his or her former capacity as a state court judge."

The Seventh Circuit concurred, noting that a federal court's review of state proceedings on habeas review is similar to appellate review and that, here, the district judge "effectively would be reviewing an issue and matter over which she had already passed judgment as a state court judge."

The court rebuffed the state's argument that the dismissal of the petition on procedural grounds has any bearing on whether the judge should recuse. It conceded that the judge's ruling in state court was the subject of only minor references in a long habeas petition and that, given the nature of the grounds for dismissal, the judge may not have even realized that the claims raised any issue concerning a trial over which she had presided in the past. Further, the petitioner failed to call the judge's attention to the potential recusal issue. Nonetheless, Section 455(a) by its terms requires a judge to disqualify herself "in any proceeding in which [her] impartiality might reasonably be questioned," and the court said, "This requirement is not limited to particular issues within that proceeding."

A review of the claims on their merits might require the judge to review the proceedings in the second trial involving a suppression motion aimed at the same stop and search as the one involved in a suppression motion on which she ruled, the court noted. "This could seriously affect the fairness and public reputation of the judicial proceedings and create an appearance of impropriety," it concluded.

The case had to be remanded anyway, so the court ordered that it be sent to a different district judge.

Daniel W. Werly, of Foley & Lardner LLP, Chicago, argued for the petitioner. Henry A. Flores Jr., of the Indiana Attorney General's Office, Indianapolis, argued for the state.

BY ALISA A. JOHNSON

Full text at http://www.bloomberglaw.com/public/document/Anthony_Weddington_v_Dushan_Zatecky_Docket_No_1103303_7th_Cir_Oct

Prosecutors

Prosecutors' Ethical Disclosure Duty Is No Greater Than What Brady Requires

Prosecutors' ethical obligation to disclose exculpatory evidence to defendants is no broader than the constitutional standards that apply under *Brady v. Maryland*, 373 U.S. 83 (1963), the Wisconsin Supreme Court declared July 31 in a disciplinary proceeding. (*In re Riek*, Wis., No. 2011AP1049-D, 7/23/13)

The ruling addresses a question that has divided authorities: whether the lawyer conduct rule that governs prosecutors' disclosure obligations imposes stricter requirements than the "constitutional minimums" the U.S. Supreme Court established in *Brady*.

The Wisconsin Office of Lawyer Regulation urged the state's high court to hold that the professional duty is broader than the legal one. The court declined that invitation.

EXHIBIT A.

34.

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

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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

EXHIBIT B.

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