August 30, 2005

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CLERK OF THE COURT
United States Court of Appeals for the Eighth Circuit
24.329 Thomas F. Eagleton United States Courthouse
111 South Tenth Street
St. Louis, MO 63102-1116
U.S. CERTIFIED MAIL NO. 7002-2410-0001-3729-4345

RE: U.S. DISTRICT COURT FOR THE DISTRICT OF MINNESOTA - LAMBROS vs. USA,
Court/Agency Numbers: Criminal No. 4-89-82(5)(DSD)
Civil No. - No Number Assigned

Dear Clerk:

Attached for **FILING** is one (1) original and three (3) copies of the following:

1. MOTION FOR ISSUANCE OF CERTIFICATE OF APPEALABILITY (COA) BY THE EIGHTH CIRCUIT COURT OF APPEALS. Dated: August 30, 2005.

Thank you for your assistance in this matter.

Sincerely,

John Gregory Lambros, Pro Se

CERTIFICATE OF SERVICE

I declare under the penalty of perjury that a true and correct copy of the above document/motion was mailed within a stamped addressed envelope from the USP Leavenworth legalmail box/room on this **30th DAY of AUGUST, 2005, to:**

1. The clerk of the Eighth Circuit Court of Appeals as addressed above;
2. Jeffrey S. Paulsen, Attorney; Office of the U.S. Attorney, 600 U.S. Courthouse, 300 South Fourth Street, Minneapolis, Minnesota 55415.

John Gregory Lambros, Pro Se

1.

copy

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JOHN GREGORY LAMBROS,	*	**APPEAL NO.** 05-3383
Petitioner,	*	U.S. DISTRICT COURT FOR THE DISTRICT OF MINNESOTA - Court/Agency Numbers:
vs.	*	Criminal No. 4-89-82(5)(DSD);
UNITED STATES OF AMERICA,	*	Civil No.: No Number Assigned
Respondent.	*	**AFFIDAVIT FORM**

MOTION FOR ISSUANCE OF CERTIFICATE OF APPEALABILITY (COA) BY THE EIGHTH CIRCUIT COURT OF APPEALS

NOW COMES the Petitioner/Appellant, JOHN GREGORY LAMBROS, Pro Se, (hereinafter Movant) and requests this Honorable Court for the issuance of a Certificate of Appealability to uphold the U.S. Supreme Court's decision in **CASTRO vs. U.S., 157 L.Ed.2d 778 (2003).** Movant is requesting authorization to file his first §2255 motion.

On August 16, 2005, the U.S. District Court for the District of Minnesota "found no merit in defendant's [Lambros'] Rule 60(b) and Rule 59(e) motions," and determined that Movant Lambros had not made a "substantial showing of the denial of a constitutional right as required by 28 U.S.C. § 2253(c)(2)," thus denying Movant Lambros' application for a certificate of appealability (hereinafter COA). See, ORDER, dated August 16, 2005.

In support hereof, the following facts are asserted in affidavit form:

1. Movant is filing this motion for issuance of a certificate of appealability (COA) in a timely fashion, as per the District Court's denial of his COA on August 16, 2005. Movant filed a NOTICE OF APPEAL with the District Court on or about July 28, 2005 (MailBox Rule) the same day Movant filed his COA with the District Court. This Court received copy of the NOTICE OF APPEAL on or about August

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1, 2005, from Clerk Sletten via mail.

2. Movant incorporates and restates his attached July 28, 2005, "MOTION FOR ISSUANCE OF CERTIFICATE OF APPEALABILTY," that was filed with the U.S. District Court for the District of Minnesota. See, **EXHIBIT A.**

3. Movant also requests this court to hear, review, and incorporate the full record that was developed within the district court. Movant Lambros filed (MailBox Rule) a MOTION FOR TRANSMISSION OF THE DISTRICT COURT'S FULL RECORD TO THE EIGHTH CIRCUIT COURT OF APPEALS with the District Court clerk on August 23, 2005. See, RULE 24(c), FRAP.

4. STANDARD OF ADJUDICATION NOT FOLLOWED BY THE DISTRICT COURT: This Court has ruled that the District Court may issue a COA if Movant's claims present "substantial showing of the denial of a constitutional right," which has been described as a "modest standard." RANDOLPH vs. KEMNA, 276 F.3d 401, 403 n.1 (8th Cir. 2002)(quoting NOEL vs. NORRIS, 194 F.Supp.2d 893, 933 (E.D.Ark. 2002)(emphasis added). The Supreme Court has interpreted the "substantial showing" requirement of § 2253(c) as follows:

> "Where a district court has rejected the constitutional claims on the **MERITS**, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong ...." (emphasis added)

See, NOEL vs. NORRIS, 194 F.Supp.2d 893, 933 (E.D.Ark. 2002). The District Court stated within the August 16, 2005, ORDER, that it "FOUND **NO MERIT** in defendant's Rule 60(b) and 59(e) motions." Movant Lambros has clearly presented questions of "DEBATABILITY" regarding the resolution of his COA. See, MILLER-EL vs. COCKRELL, 123 S.Ct. 1029, 1039 (2003)(Under the controlling standard, a petitioner must "sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner **OR** that the issues presented were 'adequate to deserve encouragement to proceed further.")(emphasis added); (noting that "a COA determination is a separate proceeding, **ONE DISTINCT FROM THE**

UNDERLYING MERITS") Id. at 1042 (emphasis added), MILLER-EL, 154 L.Ed.2d at 953. (The Court of Appeals should have inquired whether a "substantial showing of the denial of a constitutional right" had been proved. Deciding the substance of an appeal in what should only be a threshold inquiry undermines the concept of a COA. The question is the debatability of the underlying constitutional claim, not the resolution of that debate) Id. at 953.

VIOLATION OF CONSTITUTIONAL LAW
WARRANTING APPELLATE REVIEW

5. The district court rendered an order denying Movant Lambros' Rule 60(b) filing requesting relief from a federal drug conviction - where Movant Lambros' motion for a new trial and sentencing relief pursuant to Rule 33 of the Federal Rules of Criminal Procedure had been recharacterized by a Federal District Court as a motion for relief under 28 USC § 2255 during **RESENTENCING** on February 10, 1997, due to the ORDER of this Court in U.S. vs. LAMBROS, 65 F.3d 698 (8th Cir. 1995), which restricted Movant's right to file second or successive petitions under § 2255. Movant's PRO SE Rule 33 Motions where recharacterized as Movant's first § 2255 motion for purposes of applying § 2255's "second or successive" provision. The RESENTENCING district court did not warn Movant that the recharacterization would subject subsequent § 2255 motions to the law's "second or successive" restrictions, nor provide Movant with an opportunity to withdraw, or to amend the Rule 33 motions. Movant objected to the district court's recharacterization of the Rule 33 motions into his first § 2255 filing. See, FEBRUARY 10, 1997, RESENTENCING TRANSCRIPTS:

a. "The defendant has informally suggested that these motions be considered under Federal Rules of Criminal Procedure 33, ..." "Therefore with the exception of certain preliminary matters, defendant's **MOTIONS WILL BE TREATED AS ARISING UNDER 28 UNITED STATES CODE, SECTION 2255, AND SUBJECT TO THE STATUTE** - -

4.

- - - I AM SORRY - - -." See, Pages 4 and 5 of RESENTENCING TRANSCRIPT. (emphasis added)

b. "Your Honor, when you were speaking now, **YOU SAID THAT ALL THE MOTION THAT ARE FILED TO DATE ARE BEING CONSTRUED UNDER § 2255?** THE COURT: **THAT'S WHAT I SAID, YES. OKAY. AND YOU ARE SAYING NONE OF THEM ARE UNDER RULE 33?** THE COURT: **YES."** (emphasis added) See, Pages 19 and 20 of RESENTENCING TRANSCRIPT.

c. "So I believe all the motions are **VALID RULE 33 MOTIONS, AND I WOULD LIKE TO CONTINUE UNDER THAT - - UNDER THOSE PRETENSES.** Is it proper for me to ask you to reconsider that at this point in time or no? THE COURT: I assume you have asked me that. If that's what you want to place of record, I recognize that as being your position." (emphasis added) See, Pages 20 of the RESENTENCING TRANSCRIPT.

6. Movant Lambros filed what he considered his first § 2255 that was considered a successive § 2255 motion after his February 10, 1997 RESENTENCING.

7. On December 15, 2003, the U.S. Supreme Court promulgated a new procedure to be followed by the district court's if they desire to recharacterize Rule 33 motions to count against a litigant as his first 28 USC § 2255 motion in later litigation. See, CASTRO vs. U.S., 157 L.Ed.2d 778 (2003)(District Court can not recharacterize pro se litigant's motion as a first motion for postconviction relief under § 2255 unless the court warns the litigant that the recharacterization meant that any subsequent § 2255 motion would be subject to §2255's restrictions on "second or successive" motions, and provide the litigant an opportunity to withdraw the motion or to amend it so it contains all the §2255 claims that the litigant believes that he has.)

8. The district court, in its order, makes several erroneous findings. Enumerating them clearly shows that Movant Lambros is entitled to relief pursuant to the constitutional laws of the United States:

a. "The court found no merit in defendant's Rule 60(b) and

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59(e) motions ..."

b. "Therefore, the court determines that defendant has not made a 'substantial showing of the denial of a constitutional right' as required by 28 USC § 2253(c)(2). .... certificate of appealability is denied. See, ORDER, August 16, 2005.

9. The district court has inhibited this Movant's right to petition for a WRIT OF HABEAS CORPUS, a right that is embodied within the United States Constitution, Art. I, §9, cl. 2, yet, this is just what has happened in this case. *** See, U.S. vs. HAYMAN, 342 U.S. 205, 209 (1952) (".... precluding resort to habeas corpus as amounting to an unconstitutional 'suspension' of the writ of habeas corpus as to respondent," because "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const., Art. I,9, cl.2.) See footnote 5, 342 U.S. at 209.

10. This Court stated in KINDER vs. BOWERSOX, 272 F.3d 532, 538 Fn. 5 (8th Cir. 2001), "Because of the gravity of Kinder's situation, however, we will assume, as to the claimed trial error where NO CONSTITUTIONAL RIGHT IS PLAINLY IMPLICATED, that Kinder is alleging violations of his PROCEDURAL DUE PROCESS RIGHT TO A FAIR TRIAL. See, U.S. Const. amend. XIV, § 1." (emphasis added)

11. The Supreme Court has stated "statutorily based" claims make "a substantial showing of the denial of a constitutional right," and granted an application for certificate of appealability. See, HOHN vs. U.S., 141 L.Ed.2d 242 (1998)("The Government now found itself in agreement with Hohn, saying his claim was, in fact, constitutional in nature.") Id. at 252. Also see, HOHN vs. U.S., 262 F.3d 811, 814-15 (8th Cir. 2001).

12. This court ruled in MORALES vs. U.S., 304 F.3d 764, 765 (8th Cir. 2002), "We hold that before a district court may reclassify a pro se litigant's pleading as a § 2255 motion, it must warn him of the consequences of the reclassification and allow him an opportunity to withdraw his pleading."

13. Movant's prior habeas applications have been dismissed by the district court and the Eighth Circuit for lack of subject matter jurisdiction, there was no decision on the merits. Dismissal of a matter for lack of subject matter jurisdiction is not considered a dismissal on the merits. The rationale behind this rule is that if a court does not have jurisdiction over a case, it does not have the power to address the merits of a case. See, WARD vs. WOLFENBARGER, 323 F.Supp.2d 818, 826 (E.D.Mich. 2004). Therefore, Movant states that he has been convicted pursuant to UNCONSTITUTIONAL PROCEEDINGS and has lost his right to have a single petition for habeas corpus adjudicated, solely by reason of the district court having RECHARACTERIZED his Rule 33 motions at RESENTENCING as one brought under § 2255.

14. The district court denied Movant basic right to relief embodied within the constitution itself, **Art. I, §9, cl.2,** a right that Congress itself is powerless to circumvent unless the People themselves amend or rewrite the Constitution, by recharacterizing Movant's Rule 33 motions as a motion for relief under § 2255.

15. Movant Lambros has made a substantial showing of a denial of a constitutional right, See, MILLER-EL vs. COCKRELL, 154 L.Ed.2d at 953 ("Deciding the substance of an appeal in what should only be a threshold inquiry undermines the concept of a COA. The question is the debatability of the underlying constitutional claim, not the resolution of that debate."), an **UNCONSTITUTIONAL SUSPENSION OF THE WRIT OF HABEAS CORPUS.** See, HABEAS CORPUS-SUSPENSION, 135 L.Ed.2d 1169 (1996).

REASONS FOR GRANTING THE CERTIFICATE

16. Again, Movant Lambros incorporates and restates the following three (3) issues within his July 28, 2005, "MOTION FOR ISSUANCE OF CERTIFICATE OF APPEALABILITY," that was filed with the District Court. See, **EXHIBIT A.** Movant also incorporates the full record that was developed within the district court and the February 10, 1997 resentencing of Lambros due to this court's ruling in U.S.

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vs. LAMBROS, 65 F.3d 698 (8th Cir. 1995).

17. Reasonable jurists could differ with, or would find debatable or wrong, the district court's denial of relief on the following claims:

a. **ISSUE ONE (1):** CLEARLY CASTRO vs. UNITED STATES, 157 L.Ed. 2d 778 (2003) APPLIES TO PRO SE LITIGANTS WHO ARE REPRESENTED BY COUNSEL.

b. **ISSUE TWO (2):** CLEARLY CASTRO vs. UNITED STATES, 157 L.Ed. 2d 778 (2003) APPLIES RETROACTIVELY.

c. **ISSUE THREE (3):** CLEARLY MOVANT LAMBROS' RULE 60(b) MOTION IS NOT THE EQUIVALENT OF A SUCCESSIVE HABEAS PETITION AND CAN BE RULED UPON BY THE DISTRICT COURT WITHOUT PRECERTIFICATION BY THE EIGHTH CIRCUIT.

CONCLUSION

18. At this juncture, Movant Lambros believes he has beared the burden of persuading this court that another reasonable jurist could debate and come to a different conclusion as to the above stated issues and violation(s) of constitutional law warranting appellate review. The foregoing case law illustrated within Movant's pleadings prove other jurists have in fact come to a different conclusion on precisely the same facts.

19. For all of the above-stated and incorporated reasons, Movant Lambros requests this court to issue a "CERTIFICATE OF APPEALABILITY" to Movant and appoint Movant an attorney.

20. I, JOHN GREGORY LAMBROS, declare under the penalty of perjury that the foregoing is true and correct. See, Title 28 USCA § 1746.

EXECUTED ON: AUGUST 30, 2005

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