FEBRUARY 26, 2013

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

U.S. CERTIFIED MAIL NO.
7008-1830-0004-2646-8515

CLERK OF THE COURT
U.S. District Court
500 State Ave.
Kansas City, Kansas 66101
Tel. (913) 735-2200

RE: FILING OF WRIT OF HABEAS CORPUS and/or WRIT OF AUDITA QUERELA

Dear Clerk:

Attached for **FILING** is copy of my:

1. PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN FEDERAL CUSTODY - Title 28 U.S.C. §2241; and/or

   WRIT OF AUDITA QUERELA - UNDER THE "ALL WRITS ACT", - Title 28 U.S.C. §1651, U.S. vs. MORGAN, 74 S.Ct. 247, 249-253 & FN. 4 (1954); USA vs. SILVA, 423 FED. APPX. 809, & FN. 2 (10th Cir. 2011), Citing - U.S. vs. MILLER, 599 F.3d 484, 487-488 (5th Cir. 2010)(Collecting Cases). **DATED: FEBRUARY 26, 2013.**

2. **INDEX AND EXHIBIT FOR ABOVE WRIT. - Exhibits A thru K. DATED: February 26, 2013.**

   PLEASE NOTE: The above exhibits are eached stapled individually and labeled "EXHIBIT A", etc. on the first page of each EXHIBIT.

As per your telephone conversation with an associate of mine, he will telephone you as soon as I receive confirmation of your receipt of this mailing and pay the $5.00 fee via credit card.

I have attached a copy of the first page of the above writ and request that you file and docket number same and return for my file.

Thank you for your assistance in this most important matter.

Sincerely,

John Gregory Lambros, Pro Se

CERTIFICATE OF SERVICE

I JOHN GREGORY LAMBROS certify that I mailed a copy of the above-entitled writs/ motions within a stamped envelop with correct postage to the following parties on **FEBRUARY 26, 2013**, from the U.S. Penitentiary Leavenworth MAILROOM:
3. U.S. Clerk of the Court, as addressed above.

John Gregory Lambros, Pro Se

1.

JOHN GREGORY LAMBROS, Pro Se
Reg. No. 00436-124
U.S. Penitentiary Leavenworth
P.O. Box 1000
Leavenworth, Kansas 66048-1000 USA

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

JOHN GREGORY LAMBROS, Petitioner, vs. CLAUDE MAYE, Warden for U.S. Penitentiary Leavenworth, Respondent.	*	CIVIL DOCKET NUMBER: CASE NUMBER: 5:13-cv-03034-RDR RELATED CASE: JOHN GREGORY LAMBROS vs. USA, Docket No. 12-2427, U.S. Court of Appeals for the Eighth Circuit (2012). AFFIDAVIT FORM

PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN FEDERAL CUSTODY - TITLE 28 U.S.C. §2241;

AND/OR

WRIT OF AUDITA QUERELA - UNDER THE "ALL WRITS ACT", - TITLE 28 U.S.C. §1651(a), U.S. vs. MORGAN, 74 S. Ct. 247, 249-253 & FN. 4 (1954); USA vs. SILVA, 423 FED. APPX. 809, & FN. 2 (10th Cir. 2011), Citing - U.S. vs. MILLER, 599 F.3d 484, 487-488 (5th Cir. 2010)(Collecting Cases).

COMES NOW the Petitioner (hereinafter MOVANT), JOHN GREGORY LAMBROS, and hereby moves this Honorable Court for leave to file a "PETITION FOR WRIT OF HABEAS CORPUS" **and/or** "WRIT OF AUDITA QUERELA", by a prisoner in federal custody.

This motion is 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

2.

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 them 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, and requires **RETROACTIVE APPLICATION TO CASES ON COLLATERAL REVIEW.**

I. TIMELINESS OF THIS MOTION

1. Movant Lambros argues that the Supreme Court recognized a new right in deciding MISSOURI and LAFLER, and seeks relief pursuant to same. Title 28 U.S.C. §2255(f)(3) states that the one year limitations period begins on "the date on which the right asserted was initially recognized by the Supreme Court." The Supreme Court has clarified that the statute means what it says and rejects the argument that §2255(f)(3)'s limitations period should start when the right asserted is made retroactive. DODD vs. U.S., 545 U.S. 353, 162 L.Ed. 2d 343 (2005). The United States Supreme Court decided MISSOURI and LAFLER on March 21, 2012. Therefore, this motion is timely.

2. Title 28 U.S.C. §2255 is "INADEQUATE AND/OR INEFFECTIVE". See, USA vs. GUERRERO, 415 FED. APPX. 858, 859 (10th Cir. 2011). On or about June 8, 2012, Movant LAMBROS filed a "MOTION FOR LEAVE TO FILE SECOND OR SUCCESSIVE MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE UNDER 28 U.S.C. §2255(f)(3) and §2255(h)(2) BY A PRISONER IN FEDERAL CUSTODY AND MEMORANDUM FOR FACT AND LAW IN SUPPORT OF SAME". Movant Lambros requested the same issues raised within this motion. See, JOHN GREGORY LAMBROS vs. USA, No. 12-2427, U.S. Court of Appeals for the Eighth

3.

Circuit (2012). See, **EXHIBIT B.** Movant Lambros requests this Court to incorporate all filing from his "SECOND OR SUCCESSIVE §2255" in this action, as all pleadings, U.S. Government responses and Eighth Circuit ORDERS and JUDGMENTS are attached as **EXHIBITS B THRU I.** See, Fed. R. Civ. P. 10(c), U.S. ex rel RILEY vs. ST. LUKE'S EPISCOPAL HOSP., 355 F.3d 370, 375 (5th Cir. 2004).

3. **JULY 23, 2012:** The U.S. Attorney for the State of Minnesota responded, as directed by the Eighth Circuit, to Movant Lambros' "SECOND OR SUCCESSIVE §2255", stating:

> "Accordingly, this Court should deny Lambros' request for leave to file a second or successive habeas corpus motion because he cannot make a prima facie showing that FRYE and LAFLER constitute "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable."
>
> **CONCLUSION**
>
> To deter hundreds of similar applicants from burdening this Court with numerous successive §2255 applications based on **FRYE** and **LAFLER**, and to avoid the need for the Government to brief and this Court to consider the same issue repeatedly, the United States respectfully requests that this Court dismiss this successive §2255 application in a **PRECEDENTIAL OPINION.** For all the foregoing reasons, the United States respectfully requests that this Court issue a **PRECEDENTIAL OPINION** denying Lambros' application to file a second or successive §2255 motion." (emphasis added)

***

See, **EXHIBIT C.** (Page 10 of response)

4. **AUGUST 13, 2012:** Movant Lambros responded to the July 23, 2012, RESPONSE by the U.S. Attorney. Movant Lambros clearly denies the allegations of the U.S. Attorney that he does not meet the criteria for filing a successive §2255. Movant again informs the U.S. Attorney and the Eighth Circuit that **FRYE and LAFLER** 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. Movant Lambros only has to show that his attorney failed to communicate plea offers **OR FAILED TO GIVE COMPETENT COUNSEL REGARDING A PLEA OFFER.** Movant proved this due to the Eighth Circuits ORDER in U.S. vs. LAMBROS, 65 F.3d 698 (8th Cir. 1995), which **VACATED MOVANT'S "MANDATORY LIFE SENTENCE WITHOUT PAROLE"**

4.

BECAUSE THE SENTENCE WAS NOT LEGAL AT THE TIME OF THE CRIME CHARGED WITHIN THE INDICTMENT. Both PLEA PROPOSALS by the U.S. Government - November 16, 1992 and December 10, 1992 - clearly stated that the only sentence Movant Lambros could receive for Count One (1) was a **MANDATORY TERM OR IMPRISONMENT OF LIFE WITHOUT PAROLE.** Movant Lambros also informed the Eight Circuit that:

> a. An **ILLEGAL SENTENCE CONSTITUTES "A MISCARRIAGE OF JUSTICE"** and may be appealed despite the existence of an otherwise valid waiver. See, U.S. vs. ANDIS, 333 F.3d 886, 890 - 893 (8th Cir. 2003)(en banc). ("a sentence is illegal when it is not authorized by law ..." Id. at 892.)

Also of interest is the fact that Movant Lambros qualifies for the **"ACTUAL INNOCENCE" EXCEPTION.** See, BAYLESS vs. USA, 14 F.3d 410 (8th Cir. 1993):

> "Bayless was sentenced under the wrong statute. See, JONES vs. ARKANSAS, 929 F.2d 375, 381 (8th Cir. 1991) (applying procedural default's **ACTUAL INNOCENCE EXCEPTION TO DEFENDANT SENTENCED UNDER AN INAPPLICABLE STATUTE**)." (emphasis added)

The BAYLESS case is exactly like Movant Lambros', as "The district court found BAYLESS'S participation in the conspiracy ended in September 1986, before §841(b)(1)(B) was amended. Because the sentencing court had erroneously believed it could not sentence BAYLESS to a parolable term, the district court granted BAYLESS'S §2255 motion in part." Id. at 410.

See, **EXHIBIT D.**

5. **OCTOBER 17, 2012:** Movant Lambros filed a a supplemental motion to inform the Eighth Circuit of a new relevant published holding by the U.S. Court of Appeals for the Ninth Circuit that applied LAFLER vs. COOPER and MISSOURI vs. FRYE, **RETROACTIVELY.** See, TYRONE W. MILES vs. MICHAEL MARTEL, **WARDEN,** No. 10-15633,

*** **696 F.3d 889, 899-900, and FN. 3 & 4 (9th Cir. September 28, 2012):**

> "This case fits squarely between LAFLER and FRYE. As in LAFLER, a habeas case subject to AEDPA like this one, 'the favorable plea offer was reported to the client but, on advice of counsel, was rejected.' LAFLER, 132 S.Ct. at

5.

1383. (Footnote 3) And like FRYE, 'after the [plea] offer lapsed the defendant still pleaded guilty, but on more severe terms.' Id. (Footnote 4)"

Footnote 3:

"In LAFLER, the Court held that STRICKLAND is appropriate 'clearly established federal law' to apply to claims of ineffective assistance of counsel in plea bargaining, even when the claim relates to a foregone plea. See, LAFLER, 132 S.Ct. at 1384. **BY APPLYING THIS HOLDING IN LAFLER, A HABEAS PETITION SUBJECT TO AEDPA, THE COURT NECESSARILY IMPLIED THAT THIS HOLDING APPLIES TO HABEAS PETITIONERS WHOSE CASES ARE ALREADY FINAL ON DIRECT REVIEW; i.e. THAT THE HOLDING APPLIES RETROACTIVELY.** ...." (emphasis added)

***

See, MILES vs. MARTEL, 696 at 899-900, and Footnote 3.

Movant Lambros clearly stated in paragraph 2 of his October 17, 2012 motion, "Movant Lambros has made a **"PRIMA FACIE SHOWING THAT FRYE and LAFLER" IS RETROACTIVE** to habeas corpus motions subject to the AEDPA ...."

See, **EXHIBIT E.**

6. **OCTOBER 24, 2012:** The U.S. Court of Appeals for the Eighth Circuit filed "JUDGMENT" in this action and stated:

"The petition for authorization to file a successive habeas application in the district court is **DENIED.** Mandate shall issue forthwith."

See, **EXHIBIT F.**

7. **NOVEMBER 5, 2012:** Movant filed two (2) motions with the U.S. Court of Appeals for the Eighth Circuit:

a. MOTION FOR **RECUSAL** OF CIRCUIT COURT JUDGE MURPHY ...;

b. PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC.

To summarize each of the above motion briefly - Circuit Court Judge Diana Murphy who was one to 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.** See, USA vs. LAMBROS, 65 F.3d 698 (8th Cir. 1995). As to Movant Lambros' request for a **REHEARING,** Movant Lambros clearly pointed out that he:

6.

c. Made a **PRIMA FACIE SHOWING**, as per the requirements of Title 28 U.S.C. **§2244(b)(3)(C)**, by offering MILES vs. MARTEL, 696 F.3d 889, 899-900, and Footnotes 3 & 4 (9th Cir. September 28, 2012), that **FRYE and LAFLER ARE RETROACTIVE.** See, IN RE MORRIS, 328 F.3d 739 (5th Cir. 2003) -

"The Fifth Circuit stated that in the context of determining whether to grant an application for permission to file **SUCCESSIVE PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2244(b)(3)(C)**, Court of Appeals views definition of **PRIMA FACIE SHOWING** as simply sufficient showing of possible merit to warrant fuller exploration by district court; if in light of documents submitted with application it appears reasonably likely that application satisfies stringent requirement for filing of **SECOND OR SUCCESSIVE PETITION**, court of appeals shall grant the application." Also see, BENNETT vs. USA, 119 F.3d 468 (7th Cir. 1997)(For permission to file SECOND OR SUCCESSIVE MOTIONS, the court of appeals should use §2244 standard and thus insist only on prima facie showing of motion's adequacy, i.e., sufficient showing of possible merit to warrant fuller exploration by district court.)

d. **EIGHT CIRCUIT DID NOT MAKE FINDINGS OF FACT AND STATE ITS CONCLUSIONS OF LAW:** As stated above and proved in the Eighth Circuits October 24, 2012, "JUDGMENT", the court only states that Movant Lambros' petition to "file a successive habeas application ..... is **DENIED.**" Therefore, the Court did not offer any reasons for the **DENIAL** of Movant's motion. **THIS IS IN CONFLICT WITH OTHER CIRCUIT COURTS.** See, TUCKER vs. HOWARD, 177 F.2d 494 (7th Cir. 1949) (In view of 28 USC §2244, it is more important than ever before that court in hearing habeas corpus matter **MAKE FINDINGS OF FACT AND STATE ITS CONCLUSIONS OF LAW** so that another judge or court may know definitely what grounds for relief have been considered.) Also see, TATEM vs. USA, 275 F.2d 894 (DC Cir. 1960)(Imperative

*** that denial either of leave to file petition for a writ of habeas

corpus, or the **DENIAL OF WRIT ITSELF, BE ACCOMPANIED BY AN EXPRESSION OF REASONS FOR DENIAL EITHER BY INFORMAL MEMORANDUM, BY RECITAL IN AN ORDER, OR BY FINDINGS.**)

e. **TITLE 28 U.S.C. §2255:** The second paragraph within the statute states:

*** "Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause **NOTICE THEREOF TO BE SERVED UPON THE UNITED STATES ATTORNEY**, grant a prompt hearing thereon, **DETERMINE THE ISSUES AND MAKE FINDINGS OF FACT AND CONCLUSIONS OF LAW WITH RESPECT THERETO.** ...." (emphasis added)

Movant Lambros believes that the above clearly proves the remedy set out in § 2255

*** is **INADEQUATE AND/OR INEFFECTIVE**, as the Eighth Circuit **DID NOT** accompany the denial of his SUCCESSIVE PETITION FOR WRIT OF HABEAS CORPUS **BY AN EXPRESSION OF THE REASONS FOR THE DENIAL BY INFORMAL MEMORANDUM, BY RECITAL IN AN ORDER, OR BY FINDINGS, WHEN MOVANT CLEARLY OFFERED "PRIMA FACIE EVIDENCE" AND THE U.S. ATTORNEY REQUESTED A "PRECEDENTIAL OPINION" FROM THE COURT** - "The U.S. respectfully requests that this Court dismiss this successive §2255 application in a **PRECEDENTIAL OPINION.**"

See, **EXHIBIT G.**

8. **NOVEMBER 9, 2012:** Clerk Gans, 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. See, **EXHIBIT H.**

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

II. CASE HISTORY:

10. Movant offers USA vs. LAMBROS, 404 F.3d 1034 (8th Cir. 2005), **EXHIBIT A** - as the Eighth Circuit offers an excellent overview of Lambros'

1993 jury conviction, direct appeal, resentencing and subsequent §2255 motions - with legal citing to cases.

11. **EXHIBIT B:** Movant offers this Court the "CASE HISTORY" contained within Movant's June 8, 2012, "MOTION FOR LEAVE TO FILE SECOND OR SUCCESSIVE ..... §2255 ...". See, Pages 9 thru 19 (Paragraphs 15 thru 53)

III. 28 U.S.C. §2255 - "INADEQUATE AND/OR INEFFECTIVE"

12. Movant incorporates paragraphs 2 thru 9 above and restates same.

13. The Eighth Circuit Court of Appeals denied Movant's request for a SECOND OR SUCCESSIVE §2255 without making a finding of fact and stating its conclusions of law, as required by 28 U.S.C. §2244(b)(3)(C) and §2255, after Movant made a "PRIMA FACIE SHOWING" that FRYE and LAFLER have been applied RETROACTIVELY. Also, the U.S. Attorney requested a "PRECEDENTIAL OPINION" to no avail.

14. In fact, Movant's request for the RECUSAL of Circuit Court Judge Diana Murphy - the District Court Judge that oversaw Movant's trial and sentencing in this action in 1993 - was denied.

15. Lastly, Movant's could not petition the Eight Circuit for a petition for rehearing or writ of certiorari. See, Paragraph 8 above.

16. The Tenth Circuit Court of Appeals has stated "We note only a few circumstances suggested by courts of appeals as rendering §2255 inadequate or ineffective:

a. abolition of the original sentencing court;

b. **THE SENTENCING COURT'S REFUSAL TO CONSIDER,** or

c. inordinate delay in considering, the §2255; and the

d. inability of a single sentencing court to grant complete relief when sentences have been imposed by multiple courts."

See, SINES vs. WILNER, 609 F.3d 1070, 1073-1074 (10th Cir. 2010).

17. Movant Lambros suggests that the Eighth Circuit **"REFUSED TO CONSIDER"** Movant's request for a Second or Successive §2255, due to the above stated facts and law.

18. Movant Lambros has established that the remedy provided in §2255 was inadequate or ineffective and requests that this Court allow Movant to proceed under Title 28 U.S.C. §2241 and/or WRIT OF AUDITA QUERELA in this action.

IV. ARGUMENTS

IV(A). MOVANT LAMBROS RECEIVED INCORRECT INFORMATION FROM THE U.S. ATTORNEY AND HIS ATTORNEY AS TO THE MAXIMUM, MINIMUM AND MANDATORY TERM OF IMPRISONMENT OF LIFE WITHOUT PAROLE SENTENCES HE COULD RECEIVE DURING PLEA AGREEMENT NEGOTIATIONS. - MOVANT PROCEEDED TO TRIAL AND WAS SENTENCED TO ILLEGAL SENTENCE OF MANDATORY LIFE WITHOUT PAROLE THAT WAS VACATED DURING DIRECT APPEAL. See, U.S. vs. LAMBROS, 65 F.3d 698 (8th Cir. 1995). - MOVANT HAS PREVAILED ON THE CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL DUE TO THE EIGHTH CIRCUIT VACATING HIS ILLEGAL SENTENCE.

19. **NOVEMBER 16, 1992:** On November 16, 1992, U.S. Attorney Heffelfinger and Assistant U.S. Attorney Peterson mailed Movant Lambros' Attorney Charles Faulkner a copy of the government's **"PLEA AGREEMENT AND SENTENCING GUIDELINES RECOMMENDATIONS"**, that was valid until November 23, 1992. The PLEA AGREEMENT stated the following facts as to Movant Lambros' indictment that contained charges against Movant within Counts 1, 5, 6, and 8:

a. Count One (1): Conviction carries a **MANDATORY TERM OF IMPRISONMENT OF LIFE WITHOUT PAROLE.**

b. Counts 5, 6, and 8: Conviction carries maximum potential penalty of **LIFE IMPRISONMENT WITHOUT PAROLE.**

See, **EXHIBIT B** , (Paragraphs 15 thru 23, Pages 9 thru 13. The plea agreement is attached as an EXHIBIT to this EXHIBIT)

20. **DECEMBER 10, 1992:** On December 10, 1992, U.S. Attorney Heffelfinger and U.S. Assistant Attorney Peterson mailed Movant Lambros' Attorney Charles Faulkner a copy of a **"REVISED PLEA PROPOSAL BASED UPON OUR NUMEROUS PLEA CONVERSATIONS",** that was valid until December 15, 1992. The "REVISED PLEA PROPOSAL" stated the following facts as to the minimum, maximum and MANDATORY sentences Movant could receive on Counts 1, 5, 6, and 8:

a. COUNT ONE (1): **IF 21 USC §851 IS FILED,** the conviction carries a **MANDATORY TERM OF LIFE IMPRISONMENT WITHOUT PAROLE.**

b. COUNTS 5, 6, and 8: Conviction carries statutory minimum of 10-years and maximum penalty of **LIFE IMPRISONMENT WITHOUT PAROLE. Please Note this is if 21 USC §851 IS FILED.**

IF 21 U.S.C. §851 IS NOT FILED BY THE GOVERNMENT THE "REVISED PLEA PROPOSAL" STATES:

c. COUNT ONE (1): Maximum term of life without parole.**(Min. 10-Yr.)**

d. COUNTS 5, 6, and 8: Statutory minimum of 5-years and maximum penalty of 40-years without parole.

See, **EXHIBIT C.** Page 3 of U.S. RESPONSE TO DEFENDANT'S APPLICATION ... - **Attachment 3.)**

21. On January 27, 1994, Movant Lambros was sentenced to the following terms of imprisonment after a jury found him guilty of Counts 1, 5, 6 and 8:

a. COUNT 1: Mandatory life without parole.

b. COUNT 5: 120 months without parole.

c. COUNT 6: 120 months without parole.

d. COUNT 8: 360 months without parole.

22. **SEPTEMBER 8, 1995:** The U.S. Court of Appeals for the Eighth Circuit **VACATED** Count One (1) "MANDATORY LIFE WITHOUT PAROLE" sentence and remanded the case for resentencing on that count. See, U.S. vs. LAMBROS, 65 F.3d 698 (8th Cir. 1995). The Court held that under the Ex Post Facto Doctrine, the MANDATORY LIFE WITHOUT PAROLE SENTENCE MUST BE VACATED, AS IT WAS IMPOSED UNDER THE VERSION

11.

OF THE STATUTE NOT IN PLACE AT THE TIME OF THE CONSPIRACY. Therefore, proof that Movant Lambros was given ineffective assistance of counsel, as the Court, U.S. Attorney and Movant's attorney gave Movant incorrect advise as to the maximum sentence he could receive during plea bargaining on Count One (1).

WHAT ARE THE CORRECT STATUTORY MAXIMUM AND MINIMUM SENTENCES MOVANT COULD OF RECEIVED?

23. First it is necessary for Movant to inform this Court as to the exact dates Counts 1, 5, 6 and 8 occurred so we may revisit Title 21 U.S.C. §§ 846 and 841, as those versions dictated statutory law for sentences possible on those dates of Movants alleged crimes:

a. Count 1: Conspiracy to distribute in excess of 5-kilograms of cocaine from January 1983 thru February 1988, in violation of 21 U.S.C. 846.

b. Count 5: Intent to possess two (2) kilograms of cocaine on July 8, 1987; in violation of 21 U.S.C. §841**(b)(1)(B).** Maximum penalty of 30-years with "REPEAT OFFENDER PROVISION" and 15-years without the filed §851.

c. Count 6: Intent to possess two (2) kilograms of cocaine on October 23, 1987; in violation of Title 21 U.S.C. §841**(b)(1)(B).** Maximum penalty of 30-years with "REPEAT OFFENDER PROVISION" and 15-years without filed §851.

d. Count 8: Intent to possess two (2) kilograms of cocaine on December 22, 1987; in violation of Title 21 U.S.C. § 841**(b)(1)(B).** Maximum penalty of 30-years with "REPEAT OFFENDER PROVISION" and 15-years without filed §851.

See, **EXHIBIT B** (Please refer to Page 11, Paragraph 20 that refers to EXHIBIT A of that Exhibit - 2002 LexisNexus Lawyers Ed., Title 21 U.S.C. Section 841, HISTORY, ANCILLARY LAWS and DIRECTIVES)

TITLE 21 U.S.C. § 846 - DRUG CONSPIRACY: (Count One (1) Movant's INDICTMENT)

24. **BEFORE NOVEMBER 18, 1988:** Title 21 U.S.C. § 846 - the drug conspiracy statute stated:

a. **FORBIDS A MANDATORY MINIMUM SENTENCE.**

b. ".... imprisonment or fine or both which **MAY NOT EXCEED THE MAXIMUM PUNISHMENT PRESCRIBED FOR THE OFFENSE, THE COMMISSION OF WHICH WAS THE OBJECT OF THE ATTEMPT OR CONSPIRACY."** (emphasis added)

See, **EXHIBIT J.** (USA vs. McNEESE, 901 F.2d 585, 602-603 (7th Cir. 1990); and copy of Title 21 U.S.C. § 846, **BEFORE and AFTER November 18, 1988)**

*** 25. **FIFTEEN (15) YEARS WAS THE MAXIMUM SENTENCE MOVANT LAMBROS COULD OF RECEIVED ON COUNT ONE (1) IF THE GOVERNMENT DID NOT FILE "INFORMATION UNDER TITLE 21 U.S.C. § 851":** As stated above, the December 10, 1992 "PLEA AGREEMENT ..." from the government clearly stated that "Conviction on the **COUNT 1 CHARGE [conspiracy]**, however, would trigger a maximum term of imprisonment of life without parole, **A MANDATORY MINIMUM OF TEN (10) YEARS WITHOUT PAROLE, ..."** See, **EXHIBIT C, Attachment 3.** A review USA vs. McNEESE, 901 F.2d 585, 603 (7th Cir. 1990), clearly states:

**** "If the court had sentenced the defendants pursuant to the penalty provisions applicable to **§ 846,** it would have been required under BIFULCO to **EXCLUDE A MANDATORY MINIMUM PENALTY**, but could have imposed a sentence of **"A TERM OF IMPRISONMENT OF NOT MORE THAN FIFTEEN (15) YEARS"** in addition to a fine." (emphasis added)

See, **EXHIBIT J.**

Please note that the conspiracy within USA vs. McNEESE occurred from on or about **AUGUST 1986 THRU APRIL 28, 1987:**

"The affidavit reported that kilogram-size packaging materials with **COCAINE RESIDUE** were found in the garbage left outside Conwell's residence on March 31 and April 28, 1987."

See, USA vs. McNEESE, 901 F.2d at 589 (Background information)

26. Movant Lambros was also given incorrect information as to the sentences he could receive on Counts 5, 6, and 8.

CONCLUSION:

27. Movant Lambros' attorney was ineffective during the plea offer, as he did not possess an understanding of the **STATUTORY LAW** and guidelines about possible sentences Movant Lambros could receive. Movant Lambros was prejudiced and his Sixth Amendment right to effective assistance of counsel was violated.

28. WHEREFORE, as per MISSOURI vs. FRYE and LAFLER vs. COOPER, Movant Lambros respectfully requests this court to vacate Counts 1, 5, 6, and 8 due to Movant's attorney being ineffective during PLEA BARGAINING. Movant believes the U.S. Attorney must re-extend the plea offer to Movant.

IV(B). MOVANT LAMBROS IS REQUESTING THIS COURT TO ISSUE A "PRECEDENTIAL OPINION" APPLYING MISSOURI vs. FRYE AND LAFLER vs. COOPER RETROACTIVELY TO SUCCESSIVE OR SECOND HABEAS CORPUS MOTIONS.

29. MISSOURI vs. FRYE, was on HABEAS CORPUS REVIEW, when the Supreme Court reviewed same, thus the Court applied it RETROACTIVE.

30. LAFLER vs. COOPER, was on HABEAS CORPUS REVIEW, when the Supreme Court reviewed same, pursuant to 28 U.S.C. §2254 and subject to the Anti-terrorism and Effective Death Penalty Act of 1996 (AEDPA), thus retroactive.

TEAGUE vs. LANE, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989):

31. 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, 416,127 S.Ct. 1173, 167 L.Ed.2d 1 (2007) (quoting GRIFFITH vs. KENTUCKY, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987). A **NEW RULE** may "appl[y] retroactively in a collateral proceeding only if (1) the rule is substantive or (2) the rule is a 'watershed rul[e] of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." Id. (quoting SAFFLE vs. PARKS, 494 U.S. 484, 495, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990) (quoting in turn TEAGUE vs. LANE, 489 U.S. 288, 311 (1989)(plurality opinion)(internal quotations omitted)).

32. If this Court concludes that the Supreme Court has announced an **OLD RULE, THIS MOTION APPLIES RETROACTIVELY;** however, if the **RULE IS NEW,** this Court must then consider whether one of the two (2) exceptions applies to make this motion retroactive. See, WHORTON, 549 U.S. at 416.

33. Movant LAMBROS argues that TEAGUE is inapplicable, because **IT IS SIMPLY THE APPLICATION OF AN OLD RULE.** FRYE and COOPER do not announce a new rule and that it is an **EXTENSION OF** the rule in STRICKLAND vs. WASHINGTON, 466 U.S. 668 (1984) - requiring effective assistance of counsel -, and that its holding should apply retroactively. The Supreme Court's conclusion is FRYE and COOPER is OPPOSITE THE HOLDING OF EVERY FEDERAL CIRCUIT COURT TO HAVE ADDRESS THE ISSUE. Therefore, the Supreme Court held that plea bargaining is a "CRITICAL STAGE" at which the SIXTH AMENDMENT GUARANTEES THE DEFENDANT THE RIGHT TO EFFECTIVE COUNSEL. The Supreme Court concluded that STRICKLAND applies to advice regarding plea bargaining.

THE EXTENSION OF AN OLD RULE:

34. In highlighting the importance of the right to effective

assistance of counsel at the plea-bargaining stage, the Supreme Court recognized plea bargaining as a "CRITICAL STAGE" at which the **SIXTH AMENDMENT** guarantees a defendant the right to counsel. **THE SUPREME COURT HAS NEVER RECOGNIZED A CONSTITUTIONAL RIGHT TO PLEA BARGAINING.** Justice Kennedy held that the **SIXTH AMENDMENT GUARANTEES THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL DURING PLEA BARGAINING.** In his opinions in FRYE and COOPER, Justice Kennedy held that the minimum standards set forth in STRICKLAND vs. WASHINGTON, also apply to plea bargaining.

35. The Supreme Court did not break new ground, it simply pointed out the errors in the lower courts that prevented them from considering ineffective assistance of counsel claims under STRICKLAND. The Supreme Court found that the lower courts' impermissibly removed advice regarding plea bargaining from the ambit of the SIXTH AMENDMENT RIGHT TO COUNSEL.

36. Movant LAMBROS' research has not found a case that could show how FRYE and COOPER can be construed as a new rule not dictated by STRICKLAND. The Supreme Court has noted that "the STRICKLAND test provides sufficient guidance for resolving virtually all ineffective-assistance-of-counsel claims," and Movant Lambros requests this Court find STRICKLAND has provided such guidance in FRYE and COOPER. See, WILLIAMS vs. TAYLOR, 529 U.S. 362, 391, 120 S.Ct. 1495, 146 L.Ed.2d 389, 416 (2000). Therefore, FRYE and COOPER applied STRICKLAND to a new set of facts without establishing a new rule because, the Supreme Court merely cited to professional standards and expectations and identified competent counsel's duty in accordance thereof. Movant LAMBROS again requests this Court to find FRYE and COOPER apply retroactively.

TYLER vs. CAIN, 533 U.S. 656, 121 S.Ct. 2478, 150 L.Ed.2d 632 (2001):

37. 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.

38. 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, 150 L.Ed.2d at 646-47. 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, 150 L.Ed.2d at 646-647.

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

CONCLUSION:

40. Movant requests this Court to issue a "PRECEDENTIAL OPINION" applying MISSOURI vs. FRYE and LAFLER vs. COOPER retroactive to successive or

second habeas corpus motions.

41. WHEREFORE, as per MISSOURI vs. FRYE and LAFLER vs. COOPER, Movant Lambros respectfully requests this Court to vacate Counts 1, 5, 6, and 8 due to Movant's attorney being ineffective during PLEA BARGAINING. Movant believes the U.S. Attorney must re-extend the plea offer to Movant.

V. MOVANT LAMBROS REQUESTS AN EVIDENTIARY HEARING:

42. Movant Lambros believes he is entitled to an evidentiary hearing in this action and requests same. "A § 2255 motion can be dismissed without a hearing if (1) the petitioner's allegations, accepted as true, would not entitle him to relief, or (2) the allegations cannot be accepted as true because they are contradicted by the record, inherently incredible, or conclusions rather than statement of facts." See, CARDENAS-CELESTINO vs. U.S., 552 F.Supp. 2d 962, 968 (W.D. Mo. 2008)(citing SANDERS vs. U.S., 341 F.3d 720, 721 (8th Cir. 2003)). In other words, a petitioner is "entitled to a hearing on a § 2255 motion 'unless the motions, files, and record conclusively show' that the defendant is not entitled to relief." See, U.S. vs. REGENOS, 405 F.3d 691, 694 (8th Cir. 2005) (quoting KOSKELA vs. U.S., 235 F.3d 1148, 1149 (8th Cir. 2001)). In this case, Movant Lambros' allegations are PROVEN FACTS and can be accepted as true, as the record is attached as exhibits.

VI. ADDITIONAL CASES SUPPORTING RETROACTIVE APPLICATION OF MISSOURI vs. FRYE AND LAFLER vs. COOPER:

43. MILES vs. MARTEL, 696 F.3d 889, 899-900, and Footnotes 3 & 4 (9th Cir. September 28, 2012). See, Paragraph 5, Pages 4 and 5 within this motion, **"BY APPLYING THIS HOLDING IN LAFLER, A HABEAS PETITION SUBJECT TO AEDPA, THE COURT**

NECESSARILY IMPLIED THAT THIS HOLDING APPLIES TO HABEAS PETITIONERS WHOSE CASES

*** **ARE ALREADY FINAL ON DIRECT REVIEW; i.e. THAT THE HOLDING APPLIES RETROACTIVELY.**

....." (emphasis added) Id. Footnote 3.

44. MERZBACHER vs. SHEARIN, No. 10-7118 (4th Cir. January 25, 2013) (PUBLISHED) Please note that this case was downloaded from the internet and has not been given page numbers within the Fourth Circuit. MERZBACHER was sentenced to four (4) life sentences by the State of Maryland in 1995. On direct appeal, the Court of Special Appeals affirmed in an unreported opinion. The Court of appeals granted certiorari and then affirmed. In 1998, MERZBACHER petitioned for post-conviction relief in state court alleging that **HIS TRIAL LAWYERS DENIED HIM EFFECTIVE ASSISTANCE OF COUNSEL IN FAILING TO NOTIFY HIM OF, AND COUNSEL HIM ABOUT, A PRE-TRIAL PLEA OFFER.** The state court refused to grant him post-conviction relief. MERZBACHER then petitioned for a writ of habeas corpus in FEDERAL COURT, which was granted, pursuant to 28 U.S.C. §2254, on July 30, 2010. The State of Maryland filed a timely appeal. The Fourth Circuit started its evaluation of this case by

*** citing to MISSOURI vs. FRYE and LAFLER vs. COOPER, stating:

> "The Sixth Amendment right to the assistance of counsel during criminal proceedings extends to the **PLEA-BARGAINING PROCESS.** See, MISSOURI vs. FRYE, ... Thus, criminal defendants are "entitled to the effective assistance of competent counsel" during that process. LAFLER vs. COOPER, ..." (emphasis added) Id. at 10.

SECTION IV: (page 15)

> "To show prejudice from ineffective assistance of counsel in a case involving a **PLEA OFFER,** petitioners must demonstrate a reasonable probability that (1) "they would have accepted the earlier plea offer had they been afforded effective assistance
> *** of counsel," and (2) "the plea ...." **FRYE, 132 S.Ct. at 1409; accord LAFLER, 132 S.Ct. at 1385."** (emphasis added)
>
> The state court most certainly did not follow this precise language in its findings. **(It could not have done so for the**
> *** **Supreme Court did not issue FRYE and LAFLER until will after the state court had ruled.)** But, the state court did make find-
> *** ings relevant to both elements of the **FRYE** prejudice test. **WE CONSIDER, IN TURN, ITS FINDINGS WITH RESPECT TO EACH OF THOSE TWO (2) ELEMENTS."** (emphasis added)

THIS LAST SENTENCE PROVES THE COURT APPLIED FRYE AND LAFLER RETROACTIVELY!!

19.

See, EXHIBIT K. (MERZBACHER vs. SHEARIN, No. 10-7118 (4th Cir. January 25, 2013, Pages 1 and 15.)

45. U.S. vs. RAFAEL E. RIVAS-LOPEZ, 678 F.3d 353, 357 and Footnote 23 (5th Cir. April 18, 2012). The Court vacated Movant's sentence due to ineffective assistance of counsel when his attorney overestimated his sentence exposure under a pro-offered plea due to the holdings in MISSOURI vs. FRYE and LAFLER vs. COOPER. This action was filed as a § **2255 MOTION** raising claims of ineffective assistance of counsel.

VII. CONCLUSION:

46. For all the foregoing reasons, this Court must authorize relief pursuant this "WRIT OF HABEAS CORPUS" and/or "WRIT OF AUDITA QUERELA" and vacate Movant's convictions and sentences in Counts 1, 5, 6, and 8.

47. Movant requests this Court to follow the majority in LAFLER vs. COOPER and offer Movant Lambros a remedy that must "NEUTRALIZE THE TAINT" of the constitutional violations from the imposition of an illegal sentence that constituted a "MISCARRIAGE OF JUSTICE". See, U.S. vs. ANDIS, 333 F.3d 886, 890 (8th Cir. 2003) (en banc). The circumstances require "the prosecution to re-offer the plea-proposal."

48. 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: FEBRUARY 26, 2013.

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

JOHN GREGORY LAMBROS, Pro Se
Reg. No. 00436-124
U.S. Penitentiary Leavenworth
P.O. Box 1000
Leavenworth, Kansas 66048-1000 USA

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

JOHN GREGORY LAMBROS, Petitioner, vs. CLAUDE MAYE, Warden U.S. Penitentiary Leavenworth, Respondent.	*	CIVIL DOCKET NUMBER: CASE NUMBER: 5:13-cv-03034-RDR RELATED CASE: JOHN GREGORY LAMBROS vs. USA, Docket No. 12-2427, U.S. Court of Appeals for for the Eighth Circuit. AFFIDAVIT FORM

INDEX AND EXHIBITS

FOR

PETITION FOR WRIT OF HABEAS CORPUS
BY A PERSON IN FEDERAL CUSTODY - TITLE 28 U.S.C. §2241

AND/OR

WRIT OF AUDITA QUERELA - UNDER THE "ALL WRITS ACT", TITLE 28 U.S.C. §1651(a), U.S. vs. MORGAN, 74 S. Ct. 247, 249-253 & FN. 4 (1954); USA vs. SILVA, 423 FED. APPX. 809, & FN. 2 (10th Cir. 2011), Citing - U.S. vs. MILLER, 599 F.3d 484, 487-488 (5th Cir. 2010)(Collecting cases).

COMES NOW the Petitioner (hereinafter Movant), JOHN GREGORY LAMBROS, and hereby requests this Court to incorporate the affidavits and exhibits attached to this "INDEX AND EXHIBITS", as part of Movant's WRIT OF HABEAS CORPUS and/or WRIT OF AUDITA QUERELA, in deciding whether facts alleged state a claim. See,

21.

Fed. R. Civ. P. 10(c), U.S. ex rel RILEY vs. ST. LUKE'S EPISCOPAL HOSP., 355 F.3d 370, 375 (5th Cir. 2004).

The following exhibits where filed within JOHN GREGORY LAMBROS vs. USA, No. 12-2427, U.S. Court of Appeals for the Eighth Circuit (2012), except for EXHIBIT A:

EXHIBIT A: U.S. vs. LAMBROS, 404 F.3d 1034 (8th Cir. 2005).

EXHIBIT B: June 8, 2012, "MOTION FOR LEAVE TO FILE SECOND OR SUCCESSIVE MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE UNDER 28 U.S.C. §2255(h)(2) BY A PRISONER IN FEDERAL CUSTODY AND MEMORANDUM OF FACT AND LAW IN SUPPORT OF SAME."

EXHIBIT C: July 23, 2012, "UNITED STATES RESPONSE TO DEFENDANTS APPLICATION TO FILE SUCCESSIVE SECTION 2255 HABEAS PETITION."

EXHIBIT D: August 13, 2012, "MOVANT LAMBROS' RESPONSE TO "UNITED STATES RESPONSE TO DEFENDANT'S APPLICATION TO FILE SUCCESSIVE SECTION 2255 HABEAS PETITION" - DATED: JULY 23, 2012."

EXHIBIT E: October 17, 2012, "SUPPLEMENTAL MOTION TO INFORM COURT OF NEW RELEVANT PUBLISHED HOLDING THAT CONTAINS PERSUASIVE VALUE ON THE ONLY ISSUE IN THIS ACTION - U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT APPLY LAFLER vs. COOPER, 132 S. Ct. 1376 (2012) AND MISSOURI vs. FRYE, 132 S. Ct. 1399 (2012) RETROACTIVELY."

EXHIBIT F: October 24, 2012, "JUDGMENT", LAMBROS VS. USA, NO. 12-2427, U.S. COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

EXHIBIT G: November 5, 2012, Please note two motions were included in this filing:

a) "MOTION FOR RECUSAL OF CIRCUIT COURT JUDGE DIANA MURPHY FROM THE JUDGMENT IN THIS ABOVE-ENTITLED ACTION PURSUANT TO TITLE 28 U.S.C. §§ 455 et al."

22.

b) "PETITION FOR A REHEARING (FRAP 40) WITH A SUGGESTION FOR PETITION FOR REHEARING EN BANC (FRAP 35)."

EXHIBIT H: November 9, 2012, Letter to Lambros from clerk of court stating pleading is not appealable.

EXHIBIT I: November 29, 2012, "ORDER", Motion for recusal denied.

EXHIBIT J: USA vs. McNEESE, 901 F.2d 585, 602-603 (7th Cir. 1990).

The foregoing is true and correct. Title 28 USC §1746.

EXHIBIT K: MERZBACHER vs. SHEARIN, No. 10-7118 (4th Cir. January 25, 2013 - Pages 1 and 15.)

EXECUTED ON:

February 26, 2013

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

23.