July 15, 2003

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CLERK OF THE DISTRICT COURT
708 Warren E. Burger Federal Building
316 North Robert Street
St. Paul, Minnesota 55101
U.S. CERTIFIED MAIL NO. 7001-0320-0005-1598-2401

RE: LAMBROS vs. U.S.A., Civil No. 99-28(DSD)
Criminal No. 4-89-82(5) (DSD)

Dear Clerk:

Attached for **FILING** in the above-entitled action is one (1) original and one (1) copy of:

1. PETITIONER LAMBROS' RESPONSE TO THE GOVERNMENT'S "OPPOSITION OF THE UNITED STATES TO PETITIONER'S MOTION TO VACATE JUDGMENT DUE TO INTERVENING CHANGE IN CONTROLLING LAW." Dated: July 07, 2003.

Please contact me if I have not followed any of the filing rules.

I have mailed copy of the above-entitled motion to the U.S. Attorney's Office.

Thank you in advance for your continued assistance in this matter.

Sincerely,

John G. Lambros, Pro Se

CERTIFICATE OF SERVICE

I declare under the penalty of perjury that a true and correct copy of the above listed document/motion was mailed within a stamped addressed envelope from the USP Leavenworth inmate mailroom on this **15th day of July, 2003,** to:

1. U.S. Attorney's Office, District of Minnesota, 600 U.S. Courthouse, 300 South Fourth Street, Minneapolis, Minnesota 55415

John G. Lambros, Pro Se

1.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

JOHN GREGORY LAMBROS,	*	**CIVIL NO. 99-28 (DSD)**
Petitioner,	*	Criminal No. 4-89-82(5) (DSD)
vs.	*	
UNITED STATES OF AMERICA,	*	**AFFIDAVIT FORM**
Respondent/Defendant.	*	

PETITIONER LAMBROS' RESPONSE TO THE GOVERNMENT'S "OPPOSITION OF THE UNITED STATES TO PETITIONER'S MOTION TO VACATE JUDGMENT DUE TO INTERVENING CHANGE IN CONTROLLING LAW." Dated: July 7, 2003.

COMES NOW, Petitioner JOHN GREGORY LAMBROS, Pro Se, (hereinafter Movant) in response to the government's "OPPOSITION OF THE UNITED STATES TO PETITIONER'S MOTION TO VACATE JUDGMENT DUE TO INTERVENING CHANGE IN CONTROLLING LAW," dated July 07, 2003.

Movant denies each and every allegation stated within the government's OPPOSITION unless specifically addressed herein.

Movant also requests this Court to review RULE EIGHT (8) OF THE RULES OF CIVIL PROCEDURE AS TO THE GOVERNMENT'S RESPONSE, specifically **"FORMS OF DENIAL."** The government offers a somewhat wholesale/general response to Movant's motion, a "general denial" which is intended to cover whole averments and paragraphs. The law dictates that the government **MUST** specify which paragraphs they admit and specifically deny the remainder. Movant numbered each paragraph within his motion and the government DID NOT number the paragraphs within its response nor specifically admit or deny facts and law contained within Movant's motion. See, HAMMERER vs. HUFF, 110 F.2d 113 (1939)(Where petition for writ of habeas corpus alleged that at time of imposition of second sentence for forgery the trial judge was advised of

the deductions for good conduct from first sentence of defendant for forgery and so ruled that the unexpired portion of first sentence should run concurrently with the second sentence and such ALLEGATION WAS NOT DENIED IN RETURN TO THE WRIT, under this rule [Rule 8 FRCP] the ALLEGATION STOOD ADMITTED IN TRIAL COURT.)(emphasis added).

GOVERNMENT'S "PRELIMINARY STATEMENT": (Page 1)

1. The government states "Petitioner John Gregory Lambros has filed a motion to vacate one or more of this Court's previous orders in this case." This is true. Movant Lambros has filed a **RULE 60(b) MOTION UNDER ANY ONE OF THREE SEPARATE SUBSECTIONS - SECTIONS ONE (1), FIVE (5), AND SIX (6)**, due to an intervening change in controlling law.

2. The government states movant's motion should be denied for lack of jurisdiction, as movant's underlying petition has been affirmed by the Eighth Circuit Court of Appeals and the Supreme Court has dened certiorari. The government also states no change of law has occurred to warrant relief to Lambros, even assuming the Court had jurisdiction. This is not true. Movant will address this general overview in the following paragraphs.

GOVERNMENT'S "FACTS": (Page 1 and 2)

3. The government states, "This motion arises out of Lambros' fifth attempt to collaterally attack his 1993 federal conviction for cocaine trafficking." This is not true. Movant is not collaterally attacking his 1993 federal conviction for cocaine trafficking. Movant Lambros has made clear from April 24, 2001, when he initiated this present petition that he was **ONLY CONTESTING THE "INTEGRITY OF THE PROCEEDING THAT RESULTED IN THE DISTRICT COURT'S JUDGMENT" ON FEBRUARY 10, 1997, AT RESENTENCING OF MOVANT LAMBROS BY THE HONORABLE ROBERT G. RENNER.** See, U.S. vs. LAMBROS, 65 F.3d 698 (8th Cir. 1995).

4. The government states, "Lambros filed the present petition on April 24, 2001, styling it as a petition pursuant to **RULE 60(b)(6)** of the Federal Rules of Civil Procedure. He challenged his sentence on the ground that Judge Renner, who presided over Lambros' 1997 resentencing should have recused himself because he is a former U.S. Attorney." This is true. This Court should be aware of how the government is trying to lead it down a split path, as the sentence before stated Lambros is attempting to collaterally attack his 1993 federal conviction. Supreme Court Justice STEVENS, expressing a view not rejected by a majority or any other Supreme Court Justice, clearly provided needed clarification concerning the **AVAILABILITY OF FEDERAL RULE OF CIVIL PROCEDURE 60(b) MOTIONS TO CHALLENGE THE INTEGRITY OF FINAL ORDERS ENTERED IN HABEAS CORPUS PROCEEDINGS.** See, ABDUR'RAHMAN vs. BELL, Warden, 154 L.Ed.2d 501 (December 10, 2002). Justice STEVENS stated,

> "In contrast, a motion for relief under **RULE 60** of Federal Rules of Civil Procedure contests the **INTEGRITY OF THE PROCEEDING THAT RESULTED IN THE DISTRICT COURT'S JUDGMENT."** Id. at 505 (emphasis added)
>
> "In sum, a 'second or successive habeas corpus petition, like all habeas corpus petitions, is meant to remedy constitutional violations (albeit ones which arise out of facts discovered or laws evolved after an initial habeas corpus proceeding), while a **RULE 60(b) MOTION IS DESIGNED TO CURE PROCEDURAL VIOLATIONS IN AN EARLIER PROCEEDING** - here, a habeas corpus proceeding - that raise questions about that **PROCEEDING'S INTEGRITY.** Id. at 505. (emphasis added).

See, ABDUR'RAHMAN, 154 L.Ed.2d 501 (2002).

5. Please note that Justice **STEVENS**, United States Supreme Court Justice also wrote the opinion in LILJEBERG vs. HEALTH SERVICES CORP, 486 US 847, 100 L.Ed.2d 855 (1988), joined by BRENNAN, MARSHALL, BLACKMUN, and KENNEDY, which held that (1) under § 455(a), recusal of a federal judge is **REQUIRED** - even though the judge lacks actual knowledge of the facts indicating the judge's interest or bias in the case - if a reasonable person, knowing all the circumstances would expect that the judge would have such actual knowledge; (2) even though the trustee judge,

due to a temporary lapse of memory, did not have actual knowledge of the university's interest at the time he entered judgment, the judge SHOULD OF KNOWN of his fiduciary interest in the dispute, and there was ample basis in the record to support a CONCLUSION that the judge violated § 455(a) AT THE TIME HE HEARD THE CASE AND ENTERED JUDGMENT, because an objective observer would have questioned the JUDGE'S IMPARTIALITY; **(3) RULE 60(b)(6) RELIEF FROM FINAL JUDGMENT IS NEITHER CATEGORICALLY AVAILABLE NOR CATEGORICALLY UNAVAILABLE FOR ALL VIOLATIONS OF § 455;** ....

6. The government states on page two (2), "In a decision dated July 1, 2002, the Eighth Circuit ruled as follows:

> John Gregory Lambros appeals the District Court's denial of his motion under Federal Rule of Civil Procedure 60(b)(6). For the reasons stated by the District Court, the judgement is affirmed. See, 8th Cir. R. 47(B).

Thus, it is clear that the Eighth Circuit decided Lambros' appeal on the **MERITS**, even though this Court had not granted a certificate of appealability." (emphasis added) **THIS IS NOT TRUE.** On April 11, 2002, Movant Lambros served his April 10, 2002, "MOTION FOR ISSUANCE OF CERTIFICATE OF APPEALABILITY" to the District Court. On May 29, 2002, the District Court, U.S. Senior District Judge David S. Doty, denied Movant Lambros' application for a **CERTIFICATE OF APPEALABILITY.** On or about June 11, 2002, Movant Lambros filed his MOTION FOR ISSUANCE OF CERTIFICATE OF APPEALABILITY to the Eighth Circuit Court of Appeals. On July 1, 2002, the Eighth Circuit ruled on Movant Lambros' June 11, 2002, MOTION FOR ISSUANCE OF CERTIFICATE OF APPEALABILITY. The Eighth Circuit had **NO OTHER MOTION FROM MOVANT LAMBROS TO RULE ON.** Also the United States Supreme Court has clearly stated in MILLER-EL vs. COCKRELL, 154 L.Ed. 2d 931 (2003):

> "Before an appeal may be entertained, a prisoner who was denied relief in the district court **MUST FIRST SEEK AND OBTAIN A COA [Certificate of Appealability] FROM A CIRCUIT JUSTICE OR JUDGE. THIS IS A JURISDICTIONAL PREREQUISITE BECAUSE THE COA STATUTE MANDATES THAT "[U]NLESS A CIRCUIT JUSTICE OR JUDGE ISSUES A CERTIFICATE OF APPEALABILITY, AN**

5.

> **APPEAL MAY NOT BE TAKEN TO THE COURT OF APPEALS ..." § 2253(c)(1). AS A RESULT, UNTIL A COA HAS BEEN ISSUED FEDERAL COURTS OF APPEALS LACK JURISDICTION TO RULE ON THE MERITS OF APPEALS FROM HABEAS PETITIONERS."** (emphasis added)

See, MILLER-EL vs. COCKRELL, 154 L.Ed.2d at 949 (2003).

> "The Court of Appeals, moreover, was incorrect for an even more fundamental reason. Before the issuance of a COA, the Court of Appeals **HAD NO JURISDICTION TO RESOLVE THE MERITS OF PETITIONER'S CONSTITUTIONAL CLAIMS.** ...
>
> As we have said, a COA determination is a **SEPARATE PROCEEDING, ONE DISTINCT FROM THE UNDERLYING MERITS."** (emphasis added)

See, MILLER-EL vs. COCKRELL, 154 L.Ed.2d at 953 (2003).

> "The COA inquiry asks only if the District Court's decision was DEBATABLE."

See, MILLER-EL vs. COCKRELL, 154 L.Ed.2d at 957 (2003).

7. Movant Lambros is requesting this Court to Sanction and remove Assistant U.S. Attorney Jeffrey S. Paulsen from this action for **LYING TO THIS COURT** in stating:

a. "Thus, it is clear that the Eighth Circuit decided Lambros' appeal on the **MERITS**, even though this Court had not granted a certificate of appealability." See, Page 2, Government's Opposition. (emphasis added)

b. "The Eighth Circuit already reviewed this Court's denial of Lambros' Rule 60(b)(6) petition on the **MERITS** and affirmed." (emphasis added) See, Page 3, Government's Opposition.

c. "Granting a certificate of appealability for an appeal that already has been rejected on the **MERITS** would be pointless." (emphasis added) See, Page 3, Government's Opposition.

d. "This case does not help Lambros because the Eighth Circuit resolved Lambros' appeal on the **MERITS**." (emphasis added) See, Page 4, Government's Opposition.

6.

Thus, it is clear that the Eighth Circuit **DID NOT** decide Movant Lambros June 11, 2002, MOTION FOR ISSUANCE OF CERTIFICATE OF APPEALABILITY **ON THE MERITS, AS IT HAD NO JURISDICTION TO RULE ON THE MERITS.** See, Paragraph 6 within this motion. Also, the Eighth Circuit **NEVER STATED THAT THEY DECIDED MOVANT LAMBROS' COA ON THE MERITS.** See, July 1, 2002, ruling by the Eighth Circuit within Paragraph 6 within this motion. Assistant U.S. Attorney Jeffrey S. Paulsen should be sanctioned and removed from this action for **LYING TO THIS COURT.**

8. Movant Lambros will proceed in responding to the frivolous tripe presented within the government's argument.

9. One final note, the government **DID NOT** state that this Court's final ORDER dated March 08, 2002, by Judge David S. Doty stated on page one (1):

> ".... [s]ince the court concludes that it **LACKS JURISDICTION OVER THIS MATTER**, the court will dismiss all of these motions." (emphasis added)

Therefore, if the court says it has **NO JURISDICTION** there is nothing left to the court, because ANY JUDGMENT ON THE **MERITS WILL BE VOID.** See, DELLENBACH vs. HANK, 76 F.3d 820, Head Note 1 (7th Cir. 1996)("Third petition for habeas corpus was not abuse of writ, as previous petitions **WERE NOT DENIED ON THE MERITS;** first petition was dismissed because petitioner had failed to exhaust his state remedies, and second was **DISMISSED FOR WANT OF SUBJECT MATTER JURISDICTION.**") (emphasis added) Neither the District Court or the Eighth Circuit Court of Appeals made a ruling on the **MERITS** of Movant's motion.

GOVERNMENT'S "ARGUMENT": (Pages 3 thru 5)

10. The government states, "Granting a certificate of appealability for an appeal that already has been rejected on the **MERITS** would be pointless." (emphasis added) This is not true. As Movant proved and supported by the rulings of the Supreme Court in paragraph six (6), the Eighth Circuit **DID NOT HAVE JURISDICTION** to rule on the **MERITS** until a certificate of appealability has been issued. See, MILLER-EL, 154 L.Ed.2d at 949 and 953 (2003). Therefore, this court may grant

this Movant's motion to vacate judgment due to intervening change in controlling law.

11. Govt states on page three (3), "Lambros bases this request on an alleged change in the applicable law, but neither of the cases Lambros relies upon supports his requested relief." This is not true. Movant Lambros stated within his May 20, 2003, Motion to vacate under Rule 60(b) - sections (1), (5), and (6) (any one of the three), within paragraph 17 on pages 5 and 6:

> a. "As should be readily apparent by now, underlying Movant Lambros' arguments herein for Rule 60(b) relief is the assumption that MILLER-EL vs. COCKRELL, 154 L.Ed. 2d 931 (February 25, 2003) and BOYD vs. U.S., 304 F.3d 813 **(8th Cir. September 25, 2002)(PER CURIAM)** amount to an intervening change in CONTROLLING LAW." (emphasis added)

Movant finds it very interesting that Assistant U.S. Attorney Jeffery S. Paulsen is making ANOTHER UNTRUE STATEMENT WITH THE INTENT TO DECEIVE THIS COURT, as he denies that Movant relies on the September 25, 2002 **(PER CURIAM)** change in law by the Eighth Circuit in **BOYD vs. U.S., 304 F.3d 813,** (BOYD is not mentioned once in the government's brief):

> b. "In order to **ESTABLISH A UNIFORM PROCEDURE THROUGHOUT THE CIRCUIT,** ...." (emphasis added)

See, BOYD, 304 F.3d at 814.

12. The government states on page four (4): "The first case Lambros relies upon is MILLER-EL vs. COCKRELL, 537 U.S. 322 (2003), in which the Supreme Court held that the standard for issuance of a certificate of appealability is whether the issue is debatable among reasonable jurists. This case does not help Lambros because the Eighth Circuit resolved Lambros' appeal on the **MERITS**. Whether or not this Court used an improper standard for issuance of a certificate of appealability is therefore a moot point. Furthermore, the test enuniciated by the Supreme Court is exactly the same test this Court used in considering Lambros' request for a certificate of appealability in any event." THIS IS NOT TRUE. Again, the Eighth Circuit **DID NOT RESOLVE MOVANT LAMBROS' APPEAL ON THE MERITS,** THE

COURT LACKED **JURISDICTION.** See, MILLER-EL, 154 L.Ed.2d at 949 and 953 (2003). Also, Movant Lambros clearly showed this Court and the Government within his May 20, 2003, Motion how "THE APPLICATION OF MILLER-EL TO THIS ACTION dictated that the district court and the Eighth Circuit should of ordered a **CERTIFICATE OF APPEALABILITY** in Movant's action due to the following case law: .....". See, Paragraph 28. Also see, Paragraphs 29 thru 31. Therefore, the District Court did not use the correct test.

13. The government states on page four (4): "Lambros also relies on Justice Steven's dissent from the denial of certiorari in ABDUR'RAHMAN vs. BELL, 123 S.Ct. 594 (2002)(Per Curiam), in which Justice Stevens discussed under what circumstances a Rule 60(b)(6) petition should be considered to be a successive habeas petition." **THIS IS NOT TRUE.** Again, Assistant U.S. Attorney Jeffery S. Paulsen is making ANOTHER UNTRUE STATEMENT WITH THE INTENT TO DECEIVE THIS COURT. Movant Lambros clearly stated within paragraph 17 on pages 5 and 6 of his May 20, 2003 MOTION that he was relying on the following two (2) cases as an intervening change in controlling law:

a. MILLER-EL vs. COCKRELL, 154 L.Ed.2d 931 (Feb. 25, 2003);

b. BOYD vs. U.S., 304 F.3d 813 (8th Cir. Sept. 25, 2002)(Per Curiam), CERT. DENIED, 155 L.Ed.2d 499 (2003).

Also see, Paragraph 11 on page 7 of this motion.

14. The government states on page five (5): "While Justice Stevens thought that the 60(b) petition was not the functional equivalent of a seccessive habeas petition because it was not a new attack on Abdur'Rahman's conviction or sentence, 123 S.Ct. at 598, his view, whether right or wrong, has no bearing on the present case. Lambros' Rule 60(b)(6) petition, unlike Abdur'Rahman's, was an independent freestanding attack on Lambros' sentence." This is only partially true. The government correctly interprets Justice Stevens thoughts in Abdur'Raham. The government incorrectly states Lambros' Rule 60(b)(6) petition, unlike Abdur Rahaman's, was an independent freestanding attack on Lambros' sentence." Movant

Lambros filed a Rule 60(b)(6) motion to **CURE PROCEDURAL VIOLATIONS AT RESENTENCING**, specifically the violation of Title 28 U.S.C. § 455(a) and § 455(b)(3) by **JUDGE RENNER AND MAGISTRATE JUDGE FRANKLIN LINWOOD NOEL** which disqualifies a federal judge from acting in any proceeding in which the judge's impartiality **"MIGHT REASONABLY BE QUESTIONED,"** recusal is **REQUIRED** - even though a federal judge lacks actual knowledge of the facts indicating the judge's interest or bias in the case - if a reasonable person, knowing all the circumstances, would expect that the judge would have such actual knowledge. See, LILJEBERG vs. HEALTH SERVICES CORP., 100 L.Ed.2d 855, 859 (1988). As of January 20, 2003, sixty-seven (67) United States citizens, knowing all the circumstances, signed a petition to Senator Charles E. Grassley stating:

> "We find ample basis in the official record to conclude that an objective observer would have questioned Judge Renner's impartiality toward Mr. Lambros in his February 10, 1997 ruling, and any rulings thereafter, when Judge Renner had been he responsible U.S. Attorney who investigated, signed indictments in criminal actions, and prosecuted Mr. Lambros in 1975 and 1976. Judge Renner clearly should have recused himself from Mr. Lambros' February 10, 1997 resentencing."

See, **EXHIBIT C**, Movant Lambros' May 20, 2003, MOTION TO VACATE DUE TO INTERVENING CHANGE IN CONTROLLING LAW .... Also see the **PETITION AND SIGNATURES AT: www.PetitionOnline.com/jlambros/petition.html**

Of interest is the fact that the Government has not made a showing of "SPECIAL HARDSHIP" by reason of their reliance on the original RESENTENCING before Judge Renner. See, LILJEBERG, 100 L.Ed.2d at 877-878.

15. Justice STEVENS ruling in ABDUR'RAHMAN vs. BELL, 154 L.Ed.2d 501 (2001) **DO HAVE A BEARING ON THIS ACTION**. On **APRIL 22, 2002**, the United States Supreme Court **GRANTED CERTIORARI** in ABDUR'RAHMAN vs. BELL, #01-9094, as to the limited questions:

> (1) Did the Sixth Circuit err in holding, in square conflict with decisions of this court and other circuits, that **EVERY Fed.Civ.P. 60(b) MOTION CONSTITUTES PROHIBITED "SECOND OR SUCCESSIVE" HABEAS PETITION AS MATTER OF LAW?** (emphasis added)

See, CRIMINAL LAW REPORTER, April 24, 2002, Volume 71, No. 4, Pages 2026 and 2028.

16. On **MAY 29, 2002**, Judge Doty ORDERED Movant Lambros' April 11, 2002, application for **CERTIFICATE OF APPEALABILITY DENIED**. The law is very very clear that when "The United States Supreme Court has **GRANTED CERTIORARI** to review a 'similar' question in another case", that it qualified as an identifiable reason for GRANTING A CERTIFICATE OF APPEALABILITY. See, **EXHIBIT A** within Movant Lambros' May 20, 2003 MOTION (Page 1590 of LIEBMAN, Federal Habeas Practice and Procedure, Fourth Edition 2001, LexisNexis, for sixteen identifiable reasons for granting a certificate of appealability). Therefore, over thirty (30) days before Judge Dody denied Movant Lambros' application for CERTIFICATE OF APPEALABILITY, the Supreme Court had GRANTED CERTIORARI to review a 'similar' question in another case. Movant Lambros should of received a CERTIFICATE OF APPEALABILITY FROM JUDGE DOTY due to the April 22, 2002, granting of CERTIORARI in ABDUR'RAHMAN. Again, Assistant U.S. Attorney Jeffrey S. Paulsen tries to DECEIVE THIS COURT.

CONCLUSION

17. Movant Lambros' May 20, 2003, "MOTION TO VACATE JUDGMENT DUE TO INTERVENING CHANGE IN CONTROLLING LAw UNDER ANY ONE OF THREE SEPARATE SUBSECTIONS OF FEDERAL RULES OF CIVIL PROCEDURE 60(b) - SECTIONS ONE (1), FIVE (5), AND SIX (6)," should be granted.

18. Movant Lambros believes an evidentiary hearing may assist this court as to the alleged facts which, if proved, would entitle Movant to relief and an evidentiary hearing is required to establish the truth of the allegations. An evidentiary hearing is especially necessary in this case as Movant Lambros' adversely determined **RULE 60(b)(6) MOTION** deprived Movant Lambros of a full and fair hearing in tnat: (1) the **MERITS** of the factual disputes were not resolved in a hearing; (2) the district court's factual determination is not supported by the record as a whole and is clearly erroneous; and (3) the fact finding procedure was not adequate to afford a full and fair hearing. See, TOWNSEND vs. SAIN, 372 U.S. 293,

312-315, 9 L.Ed.2d 770, 785-787 (1963); HARRIS vs. PULLEY, 852 F.2d 1546, 1565 (9th Cir. 1988)

19. At every stage in the proceeding, this court must "stop, look, and listen" to determine the impact of changes in the law on the case before it. See, KREMENS vs. BARTLEY, 52 L.Ed.2d 184, 196 (1977)(impact of changes in challenged statute on composition of certified class of plaintiffs).

20. I JOHN GREGORY LAMBROS, declare under the penalty of perjury that the foregoing is true and correct. Title 28 U.S.C.A. §1746.

EXECUTED ON: July 15, 2003

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