LAMBROS vs. U.S., Appeal No. 01-2703,
District Ct. No. 3-76-17, Dist. of Minn.

CERTIFICATE OF SERVICE

I certify under the penalty of perjury that I mailed the following:

a. PETITIONER LAMBROS' RESPONSE TO OPPOSITION OF THE UNITED STATES TO PETITIONER'S APPLICATION TO FILE SUCCESSIVE SECTION 2255 PETITION, DATED JULY 10, 2001. This Document is Dated: JULY 17, 2001.

on this 18th DAY OF JULY, 2001, from the U.S. Penitentiary Leavenworth mailroom, to the following individuals via U.S. Mail FOR FILING IN THIS ACTION:

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3. INTERNET RELEASE TO GLOBAL HUMAN RIGHTS GROUPS AND BOYCOTT BRAZIL SUPPORTERS

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JOHN GREGORY LAMBROS,	*	
Petitioner/Appellant,	*	CIVIL APPEAL NO. 01-2703
vs.	*	RE: CRIMINAL NO. 3-76-17, U.S. District
UNITED STATES OF AMERICA,	*	Court for the District of Minnesota.
Respondent/Appellee.	*	AFFIDAVIT FORM.

PETITIONER LAMBROS' RESPONSE TO OPPOSITION OF THE UNITED STATES TO PETITIONER'S APPLICATION TO FILE SUCCESSIVE SECTION 2255 PETITION, DATED JULY 10, 2001.

Petitioner JOHN GREGORY LAMBROS, Pro Se, (hereinafter MOVANT) response to the government's motion dated July 10, 2001, entitled, "OPPOSITION OF THE UNITED STATES TO PETITIONER'S APPLICATION TO FILE SUCCESSIVE SECTION 2255 PETITION."

Movant denies each and every material allegation contained in the above entitled pleading by the government dated July 10, 2001, except as hereinafter may be expressed and specifically admitted.

The following information is being presented under penalty of perjury and is true and correct to the best of this Movant's knowledge:

1. The government is correct in that Movant is filing a successive petition under 28 U.S.C. §2255 raising claims based on APPRENDI vs. NEW JERSEY, 120 S.Ct. 2348 (2000).

2. PLEASE NOTE that the government INCORRECTLY CITES APPRENDI, 120 U.S. 2348 (2000).

3. The government requests this court to deny this Movant's request to file a successive section 2255 petition because this court has held the Supreme Court has not made APPRENDI retroactive to cases on collateral review.

4. The government fails to state that the THIRD CIRCUIT has held that a new Supreme Court Case may be made retroactively applicable to cases on collateral review, and therefore relief may be had on a second or successive §2255 motion under §2255, if the case falls within one of the TEAGUE exceptions. See, WEST vs. VAUGHN, 204 F.3d 53, 59 (3rd Cir. 2000). Also, the NINTH CIRCUIT has held that, "[a]n express statement of retroactivity by the Supreme Court is not required for a habeas claim to rely on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court" within the meaning of the Antiterrorism and Effective Death Penalty Act (AEDPA), such that the claim can be presented in a SECOND OR SUCCESSIVE HABEAS PETITION." See, FLOWERS vs. WALTER, 239 F.3d 1096 (9th Cir. 2001).

TYLER vs. CAIN, Case No. 00-5961, Decided June 28, 2001 by the U.S. Supreme Court

5. The government DID NOT address the U.S. Supreme Court finding in TYLER vs. CAIN, Case No. 00-5961, decided June 28, 2001, within its' response dated July 10, 2001.

6. The Supreme Court reviewed the requirements for retroactivity in some great detail in TYLER. This Movant believes the Court concluded that a case can be made retroactive, if the Supreme Court says that it is retroactive, OR IF it specifically applies the matter retroactively. The Court found that neither a SPECIFIC STATEMENT, nor a SPECIFIC APPLICATION of CAGE had been made retroactive, therefore the lower courts in TYLER did not have the authority to apply CAGE retroactively. The Court however did not decide whether CAGE should be applied retroactively, they limited their holding by saying that the issue of whether CAGE should be applied retroactively was not before them.

7. Movant also believes that FOOT NOTE 3 in TYLER vs. CAIN is very instructive as to AEDPA requirements: "[T]his requirement differs from the one that applicants must satisfy in order to obtain permission from the COURTS OF APPEALS to file a second or successive petition. As noted above, a COURT OF APPEALS may

AUTHORIZE such a filing only if it determines that the applicant makes a "PRIMA FACIE SHOWING" that the application satisfies the statutory standard. §2244(b)(3)(C). But to survive dismissal in district court, the applicant must "sho[w]" that the claim satisfies the standard." See, TYLER, Foot Note 3.

8. Movant believes that he has satisfied the standard of making a "PRIMA FACIE SHOWING" to this Court.

9. Movant DOES NOT have access to the over fifty (50) cases REMANDED by the United States Supreme Court as to violations of APPRENDI vs. NEW JERSEY, 120 S.Ct. 2348 (2000), to determine if the Supreme Court HAS made a SPECIFIC APPLICATION or SPECIFIC STATEMENT as to retroactivity.

10. Movant offered this Court an overview of RIVERS vs. ROADWAY EXPRESS, 128 L.Ed.2d 274, 278, Head Note 9a, 9b (1994), on page 11 of his MEMORANDUM OF FACT AND LAW, as to the Supreme Courts' view on the RETROACTIVE APPLICATION of a JUDICIAL INTERPRETATION OF AN EXISTING STATUTE. The Supreme Court held:

> "9a, 9b. A judicial construction of a STATUTE is an AUTHORITATIVE STATEMENT OF WHAT THE STATUTE MEANT BEFORE AS WELL AS AFTER THE DECISION of the case giving rise to that construction; . . . BUT WHEN THE UNITED STATES SUPREME COURT CONSTRUES A STATUTE, THE SUPREME COURT IS EXPLAINING ITS UNDERSTANDING OF WHAT THE STATUTE HAS MEANT CONTINUOUSLY SINCE THE DATE WHEN THE STATUTE BECAME LAW; in statutory cases, the Supreme Court has NO AUTHORITY to depart from the congressional command setting the EFFECTIVE DATE OF A LAW THAT CONGRESS HAS ENACTED."

11. Also RIVERS at 289, stated:

> "It is this Court's responsibility to say what a statute means, and once the court has spoken, it is the duty of other courts to respect that understanding of the governing rule of law. A judicial construction of a STATUTE is an authoritative statement of what the STATUTE MEANT BEFORE AS WELL AS AFTER THE DECISION OF THE CASE GIVING RISE TO THAT CONSTRUCTION."

12. This Movant is VERY CONCERNED as to this court's position as to the AEDPA ONE-YEAR GRACE PERIOD in authorizing a SUCCESSIVE §2255. This problem occurred when pro se litigants filed and court's defaulted there BAILEY/HOUSLEY

arguments. See, BAILEY vs. U.S., 133 L.Ed.2d 472 (1995) and BOUSLEY vs. U.S., 140 L.Ed.2d 828 (1998). This can be proven by reviewing the SECOND CIRCUIT decision in a case discussing BAILEY vs. U.S., that the ONE (1) YEAR BEGAN to run when BAILEY was decided (not when it was applied retroactively in BOUSLEY vs. U.S.). See, TRIESTMAN vs. U.S., 124 F.3d 361, 371 and n.13 (2nd Cir. 1997). This court recently stated in ABDULLAH vs. U.S., 240 F.3d 683, 686 (8th Cir. 2001), when this court stated, "[E]ven assuming the validity of his contention, we decline to authorize a SUCCESSIVE §2255 proceeding because ABDULLAH'S BAILEY claim is TIME-BARRED. AEDPA establishes a ONE-YEAR GRACE PERIOD, ENDING ON APRIL 24, 1997, in which federal defendants were authorized to file a §2255 motion based on claims existing on the date of its enactment . . . Consequently, ABDULLAH had to assert his BAILEY claim PRIOR TO APRIL 24, 1997." (emphasis added). See, ABDULLAH, 240 F.3d at 686.

13. This Movant requests this Court to review U.S. vs. SMITH, 241 F.3d 545 (7th Cir. 2001) as to the United States Supreme Court making a SPECIFIC APPLICATION OF RETROACTIVITY to APPRENDI vs. NEW JERSEY, 120 S.Ct. 2348 (2000). In SMITH the U.S. Supreme Court REMANDED Smith's case after the Seventh Circuit affirmed his drug conspiracy on DIRECT APPEAL due to a motion filed for resentencing under Title 18 U.S.C. §3582(c). The U.S. Supreme Court cite for remand is, SMITH vs. U.S., No. 00-5198, 148 L.Ed.2d 270 (2000). The Seventh Circuit stated, "[F]or a fourth time we consider arguments presented by Anthony Smith. The first time the case was here, on direct appeal from his conviction, we rejected most of his contentions but remanded for inquiry into the possibility of juror prejudice. . . The district court rejected Smith's position on remand, and we affirmed in an unpublished order. . . In April 1996 Smith began the current round of proceedings by filing a motion for resentencing under 18 U.S.C. §3582(c), contending that a retroactive change in the Sentencing Guidelines required a reduction in his sentence. . . . BUT AFTER ISSUING APPRENDI vs. NEW JERSEY, 120 S.Ct. 2348 (2000), THE SUPREME COURT REMANDED SMITH'S CASE TO US FOR FURTHER CONSIDERATION."

CONCLUSION:

14. This Movant is requesting this Court to review the above legal logic that is confusing at times to this Movant, when the totality of all logic offered in court citings surrounding the retroactivity of APPRENDI.

15. Therefore, as per the reading of TYLER vs. CAIN, this Movant believes that this court has the duty to determine that this Movant has made a "PRIMA FACIE SHOWING" to satisfy the statutory standard to file a second or successive §2255 petition.

16. If this Court does not choose to give RETROACTIVE APPLICATION of this Movant's request to file a second or successive §2255, this Movant is requesting this Court to hold this above-entitled application IN ABEYANCE pending the Supreme Court's resolution of when APPRENDI will be made retroactive to cases on collateral review. This rational should conserve the resources of this Court.

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

EXECUTED ON: JULY 17, 2001.

Respectfully submitted,

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