June 5, 2013

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U.S. CERTIFIED MAIL NO.
7008-1830-0004-2648-7769

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

RE: LAMBROS vs. MAYE, No. 13-3034-RDR

Dear Clerk:

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

1. MOTION TO ALTER OR AMEND JUDGMENT OF THIS COURT'S "MEMORANDUM AND ORDER" FILED MAY 17, 2013, PURSUANT TO RULE 59(e) OF THE FEDERAL RULES OF CIVIL PROCEDURE. **Dated: June 5, 2013.**

If possible, please return a filed stamped copy of the first page of the above-entitled motion for my file.

Thank you for your continued 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 motion within a stamped envelop with correct postage to the following parties on **JUNE 5, 2013,** from the U.S. Penitentiary Leavenworth MAILROOM:

2. U.S. Clerk of the Court, as addressed above.

John Gregory Lambros, Pro Se

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

JOHN GREGORY LAMBROS, Petitioner,	*	DOCKET NO. 13-3034-RDR
vs.	*	AFFIDAVIT FORM
CLAUDE MAYE, Warden, U.S.P. Leavenworth, et al., Respondents.	*	

MOTION TO ALTER OR AMEND JUDGMENT OF THIS COURT'S "MEMORANDUM AND ORDER" FILED MAY 17, 2013, PURSUANT TO RULE 59(e) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

COMES NOW, Petitioner JOHN GREGORY LAMBROS, Pro Se, (hereinafter Movant) offering his MOTION TO ALTER OR AMEND JUDGMENT OF THIS COURT'S "MEMORANDUM AND ORDER" filed on May 17, 2013, pursuant to Rule 59(e) of the Federal Rules of Civil Procedure.

STANDARD OF REVIEW:

1. Rule 59(e) of the Federal Rules of Civil Procedure serves to allow a district court to rectify its own mistakes immediately following the entry of judgment. WHITE vs. NEW HAMSHIRE DEPT. OF EMPLOYMENT SEC., 71 L.Ed.2d 325 (1982). Moreover, the timely filing of a motion under Rule 59(e) gives this Court jurisdiction to amend the judgment for **ANY REASON**, and this Court is not limited to the grounds contained in this motion in granting relief. VARLEY vs. TAMPAX INC., 855 F.2d 696 (10th Cir. 1988). In addition, a motion under Rule 59(e) **SUSPENDS** the finality of the judgment for purposes of appeal. VAUGHTER vs. EASTERN AIR LINES INC., 817 F.2d 685 (11th Cir. 1987).

2. HABEAS CORPUS: Motions to reconsider 28 USC §2255 ruling is available, and it is to be treated as FRCP 59(e) motion filed within 10 days of entry of challenged order. **[28 days, as amended in 2009]** See, U.S. vs. CLARK,

984 F.2d 31 (2nd Cir. 1993). Also, criminal cases that have applied FRCP 59(e) include: U.S. vs. SIMS, 252 F.Supp. 2d 1255, 1260-61 (D. NM 2003); U.S. vs. THOMPSON, 125 F.Supp. 2d 1297 (D. Kan. 2000); U.S. vs. HECTOR, 368 F.Supp. 2d 1060 (CD Cal. 2005).

FACTS:

3. On February 28, 2013, this Court FILED Movant Lambros' :

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

b. **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).

See, **EXHIBIT A.** (Page One (1) of FILED STAMPED COPY)

4. On February 28, 2013, this Court FILED Movant Lambros' "INDEX AND EXHIBITS" for his WRITS OF HABEAS CORPUS **AND/OR** WRIT OF AUDITA QUERELA. See, **EXHIBIT B.** (Page one (1) of "INDEX AND EXHIBITS")

5. On May 17, 2013, the Honorable U.S. District Judge Richard D. Rogers issued a seventeen (17) page "MEMORANDUM AND ORDER" as to Movant's writs. Judge Rogers stated on page one (1) the following overview of facts:

a. Movant filed a writ of habeas corpus pursuant to 28 U.S.C. §2241 and paid his filing fee.

b. Movant seeks to challenge his federal conviction under §2241 in this district in which he is incarcerated after failing to obtain relief from the sentencing court in another federal district.

c. Judge Rogers considered Movant's petition togeather with the 155 pages of attached exhibits and court opinions.

d. Judge Rogers stated "... 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."

6. Judge Rogers also stated within his closing paragraph on page 16 of his "MEMORANDUM AND ORDER":

a. "..., the court finds 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 his convictions and sentences under §2241."

b. "Finally, the court hereby certifies, pursuant to 28 U.S.C. §1951(a)(3), that any appeal from this ORDER would not be taken in good faith, and therefore in forma pauperis status is denied for the purpose of appeal."

7. Movant Lambros does not agree with the Honorable Judge Rogers.

ARGUMENT BY MOVANT LAMBROS TO ALTER OR AMEND THE JUDGMENT - "MEMORANDUM & ORDER'

8. Judge Rogers is correct when he stated this Court did not have jurisdiction in this matter under **Title 28 U.S.C. §2241 - WRIT OF HABEAS CORPUS.** The Court correctly stated on page 7 of the "MEMORANDUM AND ORDER""

> "However, the §2241 petition does not ordinarily encompass claims of unlawful detention based on the conviction or sentence of a federal prisoner. The Tenth Circuit has explained the difference between the two statutory provisions. 'A 28 U.S.C. §2255 petition attacks the legality of detention, and must be filed in the district that imposed the sentence.' ..... By contrast, the §2241 petition 'attacks the execution of a sentence rather than its validity." McIntosh vs. U.S. U.S. PAROLE COM'n, 115 F.3d 809, 811-12 (10th Cir. 1997)."

9. This Court **DOES HAVE JURISDICTION PURSUANT TO THE "WRIT OF AUDITA QUERELA,** under the "All Writs Act" - pursuant to Title 28 U.S.C. §1651(a). Movant filed February 28, 2013 motion under both 28 U.S.C. 2241 **AND/OR 28 U.S.C. §1651(a).** This Court never stated Movant Lambros requested his claims to be

evaluated and reviewed under the **WRIT OF AUDITA QUERELA.** Also, this Court did not conclude that Movant's writ of **AUDITA QUERELA** is available here within the Court's "MEMORANDUM AND ORDER". In fact, this court never mentioned the writ of **AUDITA QUERELA** within the "MEMORANDUM AND ORDER". Therefore, the Court never once stated that Movant's petition filed pursuant to Title 28 U.S.C. §1651(a) - writ of Audita Querela lacked jurisdiction. Movant Lambros believes this Court has jurisdiction in this matter under the writ of Audita Querela.

10. The Tenth Circuit clearly stated that the writ of audita querela are extraordinary remedies that are appropriate only in compelling circumstances that meet a number of requirements. "For example, petitioners 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. USA, 240 F. App'x 791, 793-94 (10th Cir. 2007)." See, U.S. vs. THODY, 460 Fed. Appx. 776 (10th Cir. 2012).

11. Movant Lambros clearly proved to this Court that he was offered two (2) written plea offers by the government and forwarded by his attorney that contained incorrect information as to illegal sentences Movant could receive for Count one (1) within his indictment. In fact, Movant was sentenced to an 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 has held that 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.) See, Movant's original petition filed on February 28, 2013, Pages 3 and 4, paragraph 4.

12. Movant also 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)

BAYLESS, 14 F.3d at 411.

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.

13. This Court - Honorable Judge RICHARD D. ROGERS - stated in USA vs. RANSOM, 985 F.Supp. 1017 (D. Kan. 1997):

"Defendant moved under 28 USC §2241 **AND** pursuant to a writ of coram nobis to vacate part of his sentence ... Defendant contended that his plea was not knowing and intelligently entered, that it lacked a factual basis, and that he was denied effective assistance of counsel. Where defendant's first motion for postconviction relief under 28 USC §2255 was denied based on the law in affect at the time, which the United States Supreme Court refected in a subsequent case involving another party, **DEFENDANT COULD**

**** **OBTAIN ANOTHER REVIEW OF HIS SENTENCE UNDER 28 USC §2241 OR BY A WRIT OF CORAM NOBIS [All Writs Act, 28 USC 1651(a)]"**

See, "PROCEDURAL POSTURE", by Matthew Bender & Company, LexisNexis Group.

"Citing a Tenth Circuit opinion that a remedy under 2241 may exist for an invalid judgment if a motion under §2255 was inadequate or ineffective the court concluded that the Tenth Circuit would allow a remedy under §2241 because of the inadequacy of §2255, and that **RELIEF COULD BE JUSTIFIED VIA A WRIT OF CORAM NOBIS."**

See, "OVERVIEW", by Matthew Bender & Company, LexisNexis Group.

"Defendant also asks for relief under a **WRIT OF CORAM NOBIS.** The Tenth Circuit has stated that a writ of coram nobis **"IS AVAILABLE ONLY TO CORRECT ERRORS RESULTING**

**** **IN A COMPLETE MISCARRIAGE OF JUSTICE, OR UNDER CIRCUMSTANCES COMPELLING SUCH ACTION TO ACHIEVE JUSTICE."** U.S. vs. BUSTILLOS, 31 F.3d 931, 934 (10 Cir. 1994) citing U.S. vs. WILLIAMSON, 806 F.2d 216, 222 (10th Cir. 1986). The Third Circuit has stated: "Use of the writ is appropriate to **CORRECT ERRORS FOR WHICH THERE WAS NO REMEDY AVAILABLE AT THE TIME OF TRIAL AND WHERE SOUND REASONS' EXIST FOR FAILING TO SEEK RELIEF EARLIER."** (emphasis added)

U.S. vs. STONEMAN, 870 F.2d 102, 106 (3rd Cir. 1989)."

See, U.S. vs. RANSOM, 985 F. Supp. at 1019.

14. Therefore, the above legal cites from the Eighth Circuit clearly states that the illegal sentence Movant Lambros received - MANDATORY LIFE WITHOUT PAROLE - was not possible and vacated Movant's sentence. Lambros, 65 F.3d at 700. Additionally the Eighth Circuit has held an **ILLEGAL SENTENCE CONSTITUTES "A MIS-CARRIAGE OF JUSTICE"**, ANDIS, 333 F.3d at 890-893 (en banc)("a sentence is illegal when it is not authorized by law ...) and the **"ACTUAL INNOCENCE EXCEPTION"** applies when a person is sentenced under the wrong and/or inapplicable statute. See, BAYLESS, 14 F.3d at 411. Also, the Tenth Circuit and this Court clearly allow the **"ALL WRITS ACT", Title 28 U.S.C. §1651(a)** to "correct errors resulting in a complete **MISCARRIAGE OF JUSTICE, OR UNDER CIRCUMSTANCES COMPELLING SUCH ACTION TO ACHIEVE JUSTICE". See**, RANSOM, 985 F.Supp. at 1019, citing BUSTILLOS, 31 F.3d at 934.

INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS CAN NOT BE FILED ON DIRECT APPEAL:

15. 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 vs. COOPER, 132 S.Ct. 1376 (2012) and MISSOURI vs. FRYE, 132 S.Ct. 1399 (2012), - the PREMISE of this above-entitled 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. FRYE never argued that he was not guilty of the offense to which he pleaded guilty. His conviction was fair, even though he might have hoped for a more favorable resolution of the case. Movant Lambros, like FRYE, is not arguing that he is not guilty of the offense, a jury found Movant guilty.

16. In LAFLER vs. COOPER, Anthony Cooper was offered three (3) plea bargains that Cooper did not accept when his lawyer convinced him that the prosecution would not be able to establish intent to murder the victim. COOPER ended up **GOING TO TRIAL** and given a sentence three times what he would of received if he would of accepted the plea offer. Using the analytic structure established in FRYE and STRICKLAND, the Supreme Court held that **COUNSEL'S ADVICE CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL.** COOPER went to trial. He did not argue that he received

**** an unfair trial. **RATHER, HE RELIED ON A YET-TO-BE-RECOGNIZED RIGHT TO ACCEPT A PLEA BARGAIN.**

17. Writing for the dissenters, JUSTICE SCALIA, stated "the Court today opens a whole new field of constitutionalized criminal procedure: plea-bargaining law." (emphasis added) COOPER, 132 S.Ct. at 1391.

A. MOVANT LAMBROS' ILLEGAL SENTENCE WAS VACATED ON DIRECT APPEAL.

18. Movant Lambros' ILLEGAL SENTENCE was vacated on direct appeal by the Eighth Circuit. LAMBROS, 65 F.3d at 700 (1995)

B. MOVANT LAMBROS' ATTORNEY WAS NOT ALLOWED TO RAISE AN "INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM" ON DIRECT APPEAL:

19. The Eight Circuit does not allow ineffective assistance of counsel claims on direct appeal. See, U.S. 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." U.S. vs. LOGAN, 49 F.3d 352, 361 (8th Cir. 1995) (quoting U.S. vs. KENYON, 7 F.3d 783, 785 (8th Cir. 1993). In LOGAN, we declined to address an ineffective assistance claim on direct appeal despite the defendant's contention that no factual findings needed to be made by the district court. Id. at 361. ..." (emphasis added)

RESENTENCING OF MOVANT LAMBROS DUE TO ILLEGAL SENTENCE - FEBRUARY 10, 1997:

A. LAMBROS NOT ALLOWED TO RAISE "INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS"

20. Movant Lambros clearly stated within his original filing of this action, See, **EXHIBIT B**, Page 14, 15 and 16 - paragraphs 28, 29, 30 and 31, that he filed motions at resentencing pursuant to **FEDERAL RULES OF CRIMINAL PROCEDURE 33.** The Motions filed where not intended **OR LABELED TITLE 28 U.S.C. §2255 MOTIONS.** The sentencing Court reclassified Movant Lambros' Rule 33 Motions as his first

*** **§2255. Therefore, Movant Lambros was never given an opportunity to raise an INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM REGARDING HIS ILLEGAL SENTENCE.**

21. The U.S. Supreme Court held that "Federal District Court's intending to **RECHARACTERIZE** pro se litigant's motion as first motion for post-conviction relief under **28 U.S.C. §2255 held REQUIRED** (1) to notify litigant of intended RECHARACTERIZATION and its consquences, and (2) to provide opportunity to withdraw or amend motion. See, CASTRO vs. USA, 540 U.S. 375 (2003). Please note that in 1994 CASTRO - a federal prisoner - attacked his federal drug conviction by filing a "MOTION FOR A NEW TRIAL UNDER **RULE 33 OF THE RULES OF CRIMINAL PROCEDURE." THE EXACT SAME TYPE OF MOTION MOVANT LAMBROS FILED TO NO-AVAIL.** What is important here is the fact that the Supreme Court held:

***

a. "Because of the absence of the required warning, the prisoner's 1994 motion **COULD NOT BE CONSIDERED A FIRST § 2255 MOTION.**"

b. "Thus, **THE PRISONER'S 1997 MOTION COULD NOT BE CONSIDERED 'SECOND OR SUCCESSIVE' FOR §2255 PURPOSES.**"

SUMMARY OF FACTS TO ASSIST THIS COURT AND THIS MOVANT - I WENT TO FAST!!

22. Movant apologizes to this Court, as he is assuming this Court understands the progressions of Movant's case:

a. January 27, 1994, Movant was sentenced on Count 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. 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). INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS CAN NOT BE RAISED.**

f. **SEPTEMBER 2, 1997,** the Eighth Circuit **DENIED** Movant

*** Lambros' **DIRECT APPEAL as to his RESENTENCING ON COUNT 1. PLEASE NOTE: INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS CAN NOT BE FILED ON DIRECT APPEAL.** See, USA vs. LAMBROS, 124 F.3d 209.

23. **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 1.** Please recall that the Eighth Circuit DENIED Movant Lambros' direct appeal on Count 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).

24. **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.

25. The above **TIME-LINE** clearly proves that 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 SAME!**

26. When Movant Lambros was **RESENTENCED ON FEBRUARY 10, 1997 ON COUNT ONE (1),** Movant could not raise any INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS, as Movant was being sentenced as if he had never been sentenced before - De Novo - anew - on Count One (1). As stated in paragraph 19 above, the Eighth Circuit does not allow "INEFFECTIVE ASSISTANCE OF COUNSEL" claims pending direct appeal. See, HAWKINS, 78 F.3d at 351-352 (8th Cir. 1995).

PENDENCY OF APPEAL - NO EXTRAORDINARY CIRCUMSTANCES:

27. Both the Tenth and Eighth Circuit have clearly stated that:

> "'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 EXTRAORDINARY 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 Courts, 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. Dist. 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 AS A HABEAS PETITION OR 2255 MOTION."** (emphasis added)

COOK, 997 F.2d at 1318-1319.

28. The above clearly proves that both the Eighth and Tenth Circuit do not allow a §2255 motion to be filed **BEFORE THE DIRECT APPEAL IS DECIDED.** Movant's case is exactly like USA vs. COOK when the Tenth Circuit vacated the district court's ruling in COOK, as the district court IMPROPERLY CHARACTERIZED his motion(s) as a second §2255, when the motion was filed **BEFORE THE TENTH CIRCUIT DECIDED HIS DIRECT APPEAL.**

29. 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 as a §2255 motion as to Count One (1).

30. Movant Lambros has never been **GRANTED A §2255 MOTION ON COUNT ONE (1).** See, paragraph 24 above. As the Court denied same as a SECOND AND SUCCESSIVE PETITION.

31. This Court offered the correct time-line of the above events within page two (2) of the "MEMORANDUM AND ORDER", that was offered in more detail within paragraphs 22 thru 26 above:

> "'On remand, Lambros filed multiple new trial motions pursuant to Fed.R.Crim.P. 33,' which the district court treated as '**A SINGLE §2255 MOTION AND DENIED ALL THE CLAIMS.**' Id. **THUS, PETITIONER'S INITIAL §2255 MOTION WAS DENIED BY THE SENTENCING COURT IN 1997.** In the meantime, 'Lambros appealed the 360-month prison term **[Count 1]** to which he was resentenced," and the Eighth Circuit affirmed. See, Id. (citing U.S. vs. LAMBROS, 124 F.3d 209 (8th Cir. 1997) (unpublished), cert. denied, 522 U.S. 1065 (1998)."(emphasis added)

*** See, "MEMORANDUM AND ORDER", page 2.

Movant believes this Court overlooked the fact that Movant Lambros has never been offered a §2255 motion for **COUNT 1**, as extraordinary circumstances did not exist for the district court to improperly characterize Movant Lambros **RULE 33 MOTIONS** into a §2255 motion for Count One (1), **BEFORE MOVANT'S DIRECT APPEAL WAS DECIDED ON SEPTEMBER 2, 1997.** Also, Movant Lambros was never given the opportunity to raise an **INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM REGARDING HIS ILLEGAL SENTENCE ON COUNT ONE (1), AS THE EIGHTH CIRCUIT DOES NOT ALLOW SAME ON DIRECT APPEAL.** USA vs. HAWKINS, 78 F.3d 348, 351-352 (8th Cir. 1995).

EXCERPTS FROM THIS COURT'S "MEMORANDUM AND ORDER" MOVANT LAMBROS WOULD LIKE THIS COURT TO RECONSIDER:

32. Page 4 of "MEMORANDUM AND ORDER" hereinafter "M & O", this court stated:

> "Petitioner's arguments are not always clearly presented or consistent with each other or the cases he cites. See, FootNote 3:
>
> > 'For example, he argues that the two recent Supreme Court cases upon which he relies 'announced a type of Sixth Amendment violation that was previously unavailable and thus require[] retroactive application to cases on collateral review' while acknowledging that they announced an extension of STRICKLAND rather than a new rule."

33. As Movant stated within paragraph 15 above, the Supreme Court extended the holding in STRICKLAND to **COVER INEFFECTIVE ASSISTANCE BY DEFENSE COUNSEL IN THE PLEA-BARGAINING PHASE.** Justice Scalia stated:

> "The plea-bargaining process is a subject worthy of regulation, since it is the means 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."** (emphasis added)

See, FRYE, 132 S.Ct. at 1413-1414.

34. The Supreme Court has NEVER BEFORE brought judicial supvision 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.

FRYE AND LAFLER DID NOT ANNOUNCE A "NEW RULE":

35. Movant Lambros clearly stated within his February 28, 2013 initial petition that FRYE and LAFLER **IS SIMPLY THE APPLICATION OF AN "OLD RULE", AN EXTENSION OF THE RULE IN STRICKLAND vs. WASHINGTON,** 466 U.S.668 (1984). See, pages 13, 14, 15 and 16.

36. This Court has not addressed the application of an "OLD RULE" within the MEMORANDUM AND ORDER".

37. The Supreme Court stated in DANFORTH vs. MINNESOTA, 169 L.Ed. 2d 859, 888-889 (2008):

"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.' .... It necessarily follows that we must choose whether **'NEW' OR 'OLD' LAW APPLIES TO A PARTICULAR CATEGORY OF CASES.** 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 v. ROBERTS, 448 U.S. 56 (1980), the case that CRAWFORD overruled. Under our decision in **WHORTON v. BOCKTING**, 549 U.S. 406 (2007), the **'NEW' RULE** announced in CRAWFORD would not apply retroactively to the 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.** See, e.g., YATES, 484 U.S. at 218, 98 L.Ed. 2d 546 (1988). **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)

See, DANFORTH, 169 L.Ed. 2d at 888.

38. 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."

39. Movant Lambros requests this Court to rule that FRYE and LAFLER are RETROACTIVE, an application of an "OLD RULE" - an extension of the rule in STRICKLAND v. WASHINGTON.

40. **Page 11 of "M & O"**, this Court stated "However, Mr. Lambros completely ignores that the sentencing court's, or the appropriate appellate court's, refusal to consider claims that are second and successive or untimely, has clearly been held not to establish that the §2255 remedy was inadequate or ineffecive. The Tenth Circuit recently discussed a situation similar to that of petitioner's: See, SINES vs. WILNER, 609 F.3d 1070, 1072-74 (10th Cir. 2010)

> "The issue on appeal is whether Mr. Sines had an adequate and effective remedy under §2255 ..."

Movant Lambros has clearly addressed this question above, proving Movant was never offered a correct chance to file a §2255 motion as to **COUNT ONE (1).**

41. **Page 12 of "M & O"**, this Court stated, "It plainly appears that Mr. Lambros has resorted to all the remedies available to him for challenging his federal convictions and sentences. In PROST, the Tenth Circuit meticulously described the range of available remedies: See, PROST, 636 F.3d at 583-84.

> "Even though a criminal conviction is generally said to be 'final' after it is tested through trial and appeal, ... **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. ...**"

Movant Lambros again requests this Court to allow him to **"LAUNCH AT LEAST ONE (1) COLLATERAL ATTACK TO ANY ASPECT OF HIS CONVICTION OR SENTENCE" - ON COUNT ONE (1), DUE TO HIS RESENTENCING ON COUNT 1 ON FEBRUARY 10, 1997.**

42. **Page 13 of "M & O"**, this Court stated, "The Court is PROST meticulously set forth a relatively simple test for when the **"SAVINGS CLAUSE"** applies, and their underlying rationale: See, PROST, 636 F.3d at 584-87.

*** The relevant . . . measure, we hold, is **WHETHER A PETITIONER'S ARGUMENT CHALLENGING THE LEGALITY OF HIS DETENTION 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....."

Again, as Movant has proved to this court above and summarized in paragraph 31, Movant **NEVER RECEIVED A §2255 MOTION ATTACKING COUNT ONE (1).**

> "... to invoke the **SAVINGS CLAUSE**, it must 'also appear [] that the remedy by motion is inadequate or ineffective.' **HERE AGAIN, THE CLAUSE EMPHASIZES ITS CONCERN WITH ENSURING THE PRISONER AN OPPORTUNITY OR CHANCE TO TEST HIS ARGUMENT.**"

43. **Page 14 of "M & O"**, this Court stated:

*** "In this case, as in PROST, Mr. Lambros alleges no fact to **DISPUTE THAT HIS INITIAL §2255 MOTION WAS 'UP TO THE JOB OF TESTING THE QUESTION' OF WHETHER HIS CONVICTION SHOULD BE OVERTURNED BECAUSE HE WAS PROVIDED ERRONEOUS SENTENCING INFORMATION DURING PLEA PROCEEDINGS.** ....., he alleges no facts indicating that those claims were not considered. ..."

As stated above, and summarized in paragraph 31, Movant **NEVER RECEIVED A §2255 MOTION TO ATTACK COUNT ONE (1) - DURING OR AFTER RESENTENCING ON FEBRUARY 10, 1997.**

44. **Page 15 of "M & O"**, this Court stated, "Like Mr. Prost, Mr. Lambros obviously believes that 'a federal prisoner should have recourse to §2241 through the **SAVINGS CLAUSE** any time he can demonstrate that his **INITIAL §2255**

*** **PROCEEDING FINISHED BEFORE THE SUPREME COURT ANNOUNCED A NEW (INTERPRETATION) THAT WOULD LIKELY UNDO HIS CONVICTION,'** and that 'he should be excused for failing to bring a 'novel' argument for relief that the Supreme Court hadn't yet approved ...'

> 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 ....**
>
> **** ..... The §2255 remedial vehicle was fully available and amply sufficient to test the argument, whether or not Mr. Prost thought to raise it. And that is all the **SAVINGS CLAUSE REQUIRES."**

See, PROST, 636 F.3d at 588-90. (emphasis added)

Movant Lambros states again for the record, a **§2255 MOTION WAS NOT AVAILABLE TO HIM TO ATTACK COUNT ONE (1) - DURING OR AFTER RESENTENCING ON FEBRUARY 10, 1997.** Therefore, Movant Lambros' case is not like PROST.

This Court states that Movant believes he should be excused for ".... failing to bring a '**NOVEL**' argument for relief ...". For this Court's information, it was this Movant that researched the law here at United States Penitentiary Leavenworth, after he was sentenced to a term of "**MANDATORY LIFE WITHOUT PAROLE**", and discovered that Title 21 U.S.C. §846 was not amended November 1, 1987 **BUT** November 1, 1988, and informed the attorney's representing Movant on direct appeal. As stated above, the issue presented on direct appeal simple argued Movant Lambros was **ACTUALLY INNOCENT OF COUNT ONE (1), AS HE WAS SENTENCED UNDER THE WRONG AND/ OR INAPPLICABLE STATUTE.** Movant Lambros' attorney's on direct appeal **COULD NOT** raise **INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS.** See, U.S. vs. HAWKINS, 78 F.3d 348, 351-352 (8th Cir. 1995). Therefore, Movant Lambros has never been allowed to raise INEFFECTIVE ASSISTANCE COUNSEL CLAIMS on Count One (1), the illegal sentence that Movant's attorney advised him of being correct.

45. Movant Lambros requested his attorney at resentencing to raise

the issue with the court that Movant Lambros believes that he was prejudiced when he was offered incorrect information during plea bargaining and that Movant believes he should be sentenced the same as similarly situated co-conspirators within his indictment and would of been offered the same sentences if offered the correct information the other co-conspirators had been offered. **PLEASE NOTE:** Movant Lambros was arrested and brought into the United States approximately **SEVEN (7) YEARS AFTER THE LEADER OF THE CONSPIRACY WAS ARRESTED.** The leader of the conspiracy **RECEIVED A FOUR (4) YEAR SENTENCE.** Also, the leader of the conspiracy was an attorney that had served prison time for drug smuggling and had a "SIMILAR RECORD" as Movant **BUT WAS FOUND GUILTY OF DISTRIBUTION OF OVER 100 KILOS OF COCAINE AND 1,000's OF POUNDS OF MARIJUANA.** Movant Lambros was only found guilty of allegedly purchasing six (6) kilos of cocaine. See, USA vs. FRAUSTO, 636 F.3d 992, 997 (8th Cir. 2011)(listing cases).

46. The leader of the conspiracy was offered the correct information as to Title 21 U.S.C. §846 **NOT CONTAINING A "MANDATORY LIFE SENTENCE WITHOUT PAROLE" - MOVANT WAS NOT.**

47. The above proves that Movant did not fail to request a **"NOVEL"** issue/argument for relief at resentencing, it was Movant's attorney that did not push the issue.

48. Using the analytic structure of **STRICKLAND,** no court in the United States would not hold that Movant's counsel's advice constituted ineffective assistance of counsel, for not understanding that 21 USC §846 did not allow a MANDATORY LIFE SENTENCE WITHOUT PAROLE, at the time of Movant's crimes. Second, but for Movant Lambros' counsel's deficient performance, there was a reasonable probability that Movant and the trial court would have accepted the guilty plea, the U.S. Attorney Offered. The only issue that may be **NOVEL** would be the exact remedy - how could Movant Lambros be made whole. Movant believes if he would of been able to file an ineffective assistance of counsel claim and been able to file one (1) §2255 motion as to Count One (1), he would of been offered a new plea bargain.

49. In LAFLER vs. COOPER, the Supreme Court addressed the question of how COOPER could be made whole and the Court held that the proper remedy was to order the state to **REOFFER THE PLEA BARGAIN.**

50. **Page 16 of "M & O",** this Court states, "Having considered all petitioner's allegations and complaints together with the relevant legal authority, the court finds that Mr. Lambros fails to establish that his §2255 remedy was inadequate or ineffective. Consequently, he has filed to establish that this court has jurisdiction to hear his challenges to his convictions and sentences under §2241." Again Movant does not agree and incorporates the above.

51. This court also certified, pursuant to 28 U.S.C. §1951(a)(3), that any appeal from it "M & O" would not be taken in good faith, and therefore in forma pauperis status is denied for the purpose of appeal. Movant does not agree. Movant believes this court made a typo - "28 U.S.C. §1951(a)(3)" which should of read 28 U.S.C. §1915(a)(3).

52. Movant believes this court is attempting to deter and preclude him from appealing, as this Court believes this petition is "FRIVOLOUS LITIGATION". The above clearly proves Movant is not filing "FRIVOLOUS LITIGATION" and requests this Court to retract its certification, pursuant to 28 U.S.C. 1915(a)(3).

CONCLUSION:

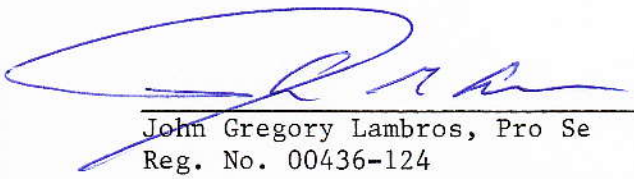
53. For all the foregoing reasons, Movant believes this Court's May 17, 2013 "MEMORANDUM AND ORDER" resulted in clear legal error.

54. Movant again requests relief pursuant to his "WRIT OF HABEAS CORPUS" and/or "WRIT OF AUDITA QUERELA" that would allow this Court jurisdiction to vacate Movant's convictions and sentences in Counts 1, 5, 6, and 8.

55. Movant respectfully requests this Cuort to alter and amend its "MEMORANDUM AND ORDER".

56. 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: JUNE 5, 2013.



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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

JOHN GREGORY LAMBROS,

Petitioner,

vs.

CLAUDE MAYE, Warden for U.S. Penitentiary Leavenworth,

Respondent.

CASE NUMBER: 13-3034-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

EXHIBIT A.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

JOHN GREGORY LAMBROS, Petitioner, vs. CLAUDE MAYE, Warden U.S. Penitentiary Leavenworth, Respondent.	*	CASE NUMBER: _____ 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,

EXHIBIT B.