March 13, 2003

John Gregory Lambros
Reg. No. 00436-124
U.S. Penitentiary Leavenworth
P.O. Box 1000
Leavenworth, Kansas 66048-1000 USA
Web site: www.brazilboycott.org

OFFICE OF THE CLERK
Supreme Court of the United States
One First Street, N.E.
Washington, D.C. 20543-0001
Tel. No. (202) 479-3011
U.S. CERTIFIED MAIL NO. 7001-0320-0005-1597-7124

RE: LAMBROS vs. USA, Case No. 02-7346 - PETITION FOR REHEARING

Dear Clerk:

Attached for filing is one copy of my PETITION FOR REHEARING (as per Rule 12.2 - inmate confined in institution-no lawyer).

FORMA PAUPERIS completed form is attached to this cover letter.

CERTIFICATE OF JOHN GREGORY LAMBROS UNREPRESENTED BY COUNSEL, as per Rule 44.2, is located AFTER page seven (7) within my Petition for Rehearing.

PROOF OF SERVICE, is located AFTER my Certificate of John Gregory Lambros unrepresented by counsel, as per Rule 29.

Hopefully I've followed Rule 44 completely, as to this PETITION FOR REHEARING.

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

Sincerely,

John Gregory Lambros, Pro Se

c:
Office of the Solicitor General, U.S. Dept. Of Justice, Room 5614, 950 Pennsylvania Ave., N.W., Washington, D.C. 20530-0001. Attn: Michael Chertoff, Asst. Attorney General.

File

1.
OR FILE

CASE NO. 02 - 7346

IN THE SUPREME COURT OF THE UNITED STATES

JOHN GREGORY LAMBROS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR REHEARING

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

QUESTION PRESENTED

DID THE EIGHTH CIRCUIT ERR IN HOLDING, IN SQUARE CONFLICT WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS, THAT EVERY FEDERAL RULE OF CIVIL PROCEDURE 60(b)(6) MOTION CONSTITUTES PROHIBITED "SECOND OR SUCCESSIVE" HABEAS PETITION AS A MATTER OF LAW? **

**** Note:** On April 22, 2002, this Court granted certiorari to review the above question in ABU-ALI ABDUR'RAHMAN vs. RICKY BELL, WARDEN, No. 01-9094:

> (1) Did Sixth Circuit err in holding, in square conflict with decisions of this court and other circuits, that every Fed.R.Civ.P. 60(b) motion constitutes prohibited "second or successive" habeas petition as matter of law?

On December 10, 2002, this Court, Per Curiam, dismissed ABU-ALI ARDUR'RAHMAN vs. RICKY BELL, WARDEN, No. 01-9094, 154 L.Ed.2d 501, stating, "The writ of certiorari is dismissed as improvidently granted." JUSTICE STEVENS, dissenting, stating:

> "The Court's decision to dismiss the writ of certiorari as improvidently granted presumably is motivated, at least in part, by the view that the jurisdictional issues presented by this case do not admit of an easy resolution. I do not share that view. Moreover, I believe we have an obligation to provide needed clarification concerning an important issue that has generated confusion among the federal courts, namely, the availability of Federal Rule of Civil Procedure 60(b) motions to challenge the integrity of final orders entered in habeas corpus proceedings. I therefore respectfully dissent from the Court's disposition of the case ..."

CASE NO. 02 - 7346

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PETITION FOR REHEARING

OPINION BELOW

This Court entered the order denying Petitioner Lambros' writ of certiorari on February 24, 2003. See, APPENDIX A.

JURISDICTION

This Court has jurisdiction under the Rules of the Supreme Court of the United States, Rule 44.

STATEMENT

Petitioner LAMBROS, Pro Se, is requesting this Court to grant this petition for rehearing, vacate the February 24, 2003 order denying certiorari,

4.

grant the petition for certiorari, and reverse the judgment of the Eighth Circuit Court of Appeals due to a subsequent decision of the Eighth Circuit Court of Appeals having expressed a view of overriding importance to the administration of justice. Therefore, an "intervening circumstance of a substantial or controlling effect or to other substantial grounds not previously presented" to this court, that can be labeled a new principle of law in establishing a uniform procedure throughout the Eighth Circuit in dealing with purported Rule 60(b) motions following the dismissal of habeas petitions. See, BOYD vs. U.S., 304 F.3d 813 (PER CURIAM)(8th Cir. September 25, 2002).

JOHN GREGORY LAMBROS, declares under the penalty of perjury:

1. On August 22, 2002, the United States Court of Appeals for the Eighth Circuit, No. 02-2026, issues an order denying Petitioner's "Petition for Rehearing En Banc," in this action. See, APPENDIX A, in Petition For A Writ Of Certiorari in this action.

2. On March 07, 2003, Petitioner filed with the Clerk of this Court a "Motion To The Honorable Supreme Court Justice CLARENCE THOMAS, As Circuit Justice, To Suspend A Previous Order Of The Supreme Court Denying Certiorari, Pending Action On The Petitioner's Petition For Rehearing."

3. On March 08, 2003, Prisoner Law Clerk Brian E. Ratigan, United States Penitentiary Leavenworth, informed Petitioner for the first time that the Eighth Circuit OPENED THE DOOR in dealing with the merits of Rule 60(b) motions following the dismissal of habeas petitions in BOYD vs. U.S., 304 F.3d 813 (PER CURIAM)(8th Cir. September 25, 2002). See, APPENDIX B.

4. March 08, 2003, was the first time Petitioner Lambros reviewed BOYD vs. U.S., 304 F.3d 813. The Solicitor General, Counsel of Record, Theodore B. Olsen, did not cite BOYD vs. U.S., 304 F.3d 813, within the "Brief For The United States In Opposition," dated January 13, 2003, within this action. Rule 15, Supreme Court Rules, as to "Briefs in Opposition" strictly

states, "In addition to presenting other arguments for denying the petition, the brief in opposition should address any perceived misstatement of fact or LAW in the petition that bears on what issues properly would be before the Court if certiorari were granted. Counsel is admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition. ..." Petitoner believes the government should of informed this Court and Petitioner of the ruling in BOYD that established "a uniform procedure throughout the Circuit, ..., in dealing with purported Rule 60(b) motions following the dismissal of habeas petition, .." BOYD, at 814.

ARGUMENT

WHETHER AN OPINION BY A THREE (3) JUDGE PANEL, PER CURIAM, BY THE EIGHTH CIRCUIT, QUALIFIES AS "AN INTERVENING CIRCUMSTANCE OF A SUBSTANTIAL OR CONTROLLING EFFECT OR TO OTHER SUBSTANTIAL GROUNDS NOT PREVIOUSLY PRESENTED."

5. On August 22, 2002, the Eighth Circuit denied Petitioner's "Petition for Rehearing En Banc," in this action. The Eighth Circuit had held, the District Court had enforced, and other circuit courts have stated, "We are aware that the majority of circuit courts that have considered this issue have held that a Rule 60(b) motion to vacate a judgment denying habeas either MUST or may be treated as a second or successive habeas petition." See, RODRIGUEZ vs. MITCHELL, 252 F.3d 191, 199-200 (2nd Cir. 2001) (Citing, BLAIR vs. ARMONTROUT, 976 F.2d 1130, 1134 (8th Cir. 1992)(holding that a "Rule 60(b)(6) motion [i]s the functional equivalent of a second petition for a writ of habeas corpus." Id. at 200 n.2)

6. On March 08, 2002, District Judge Tunheim, "for Judge Doty", for reason unclear, stated the court lacked jurisdiction over Petitoner's Rule

6.

60(b)(6) motion, as to violations of Title 28 U.S.C.A. §§ 455(a) and 455(b)(3), under the standards established by this court in LILJEBERG vs. HEALTH SERVICES CORP., 486 US 847, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988)("Rule 60(b)(6) relief from final judgment is neither categorically available nor categorically unavailable for all violations of §455; (4) in determining whether a judgment should be vacated for a violation of §455, it is appropriate to consider (a) the risk of injustice to the parties in the particular case, (b) the risk that the denial of relief will produce injustice in other cases, and (c) the risk of undermining the public's confidence in the judicial process; (5) a court, in making such a determination, must continuously bear in mind that, in order to perform its function in the best way, justice must satisfy the appearance of justice; ..."):

> "Although petitioner purports to bring this motion under Rule 60(b)(6) of the Federal Rules of Civil Procedure, the court concludes that it **MUST** be treated as a petition pursuant to 28 U.S.C. §2255 since Lambros is attempting to collaterally attack his conviction and sentence. See BOLDER vs. ARMONTROUT, 983 F.2d 98, 99 (8th Cir. 1993); BLAIR vs. ARMONTROUT, 976 F.2d 1130, 1134 (8th Cir. 1992)." (emphasis added)

See, APPENDIX D, Page 3, Petition For A Writ Of Certiorari (March 08, 2002, Order)

7. Petitioner believes that Judge Tunheim, "for Judge Dody," believed that he was **REQUIRED/MUST** treat **ALL** Rule 60(b)(6) motions as second or successive habeas petitions, as Rule 60(b)(6) motions where filed in both BOLDER and BLAIR. Petitioner Lambros' belief is enforced by the Second Circuits' review of BLAIR in RODRIGUEZ vs. MITCHELL, 252 F.3d 191, 199-200 & n.2 (2nd Cir. 2001)("the majority of circuit courts that have considered this issue have held that a Rule 60(b) motion to vacate a judgment denying habeas **EITHER MUST OR MAY** be treated as a second or successive habeas petition.)

8. Judge Tunheim, "for Judge Dody," did not "employ a procedure .... and then conducts a brief initial inquiry to determine whether the allegations in the Rule 60(b) motion in fact amounts to a second or successive collateral

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attack under either 28 U.S.C. § 2255 or § 2254." See, BOYD vs. U.S., 304 F.3d 813, 814 (8th Cir. September 25, 2002).

9. Judge Tunheim did not hold any type of inquiry, discovery, or evidentiary hearing on the merits of petitioners' Rule 60(b)(6) motion as to the violations of 28 U.S.C.A. §§ 455(a) and 455(b)(3) by United States Senior District Court Judge Robert G. Renner and United States Magistrate Judge Franklin Linwood Noel. The government did not deny the issues and facts as to Magistrate Noel in there January 13, 2003, reponse brief in opposition.

10. "Scienter is not an element of a violation of §455(a)." See, LILJEBERG, 100 L.Ed.2d at 872. Also this Court stated, "There need not be a draconian remedy for every violation of §455(a). It would be equally wrong, however, to adopt an absolute prohibition AGAINST ANY RELIEF in cases involving forgetful judges." See, LILJEBERG, at 874.

11. This Court and Congress required Judge Tunheim and/or Judge Doty to "identify the facts that might reasonably cause an objective observer to question Judge [Renner and Noel's] impartiality." See, LILJEBERG, at 875 (The very purpose of §455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible. See S.Rep. No. 93-419, at 5; HR Rep. No. 93-1453, at 5.")

CONCLUSION

12. The District Court and the Eighth Circuit had/have established (before and/or after BOYD) an absolute prohibition against any relief in cases involving violations of §455(a) and §455(b)(3) AFTER dismissal of habeas petition, raised within a Rule 60(b)(6) motion, as per the standard established in LILJEBERG, as §455(a) claims do not fit either of the two criteria set forth in 28 U.S.C. §2255 as providing a basis for permitting the filing of a successive petition.

13. As illustrated in LILJEBERG, it was the silence by Judge Renner

and Magistrate Judge Noel that deprived Petitioner Lambros of a basis for making a timely motion for new hearings and resentencing and also deprived Petitioner of an issue on direct appeal for resentencing. These facts create precisely the kind of appearance of impropriety that §455(a) was intended to prevent. The violation is neither insubstantial nor excusable.

14. If we focus on fairness to Petitioner Lambros, there is a greater risk of unfairness in upholding this current action than there is in allowing a new judge to take a fresh look at the issues. Moreover, the government has not made a showing of special hardship by allowing Petitioner to be resentenced by a new judge. "The guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as be so in fact." LILJEBERG, at 878.

15. Petitioner believes that the subsequent September 25, 2002, PER CURIAM, ruling before the Eighth Circuit Court of Appeals in BOYD vs. U.S., 304 F.3d 813, which stated:

> "In order to establish a uniform procedure throughout the Circuit, we encourage district courts, in dealing with purported Rule 60(b) motions following the dismissal of habeas petitions, to employ a procedure whereby the district files the purported Rule 60(b) motion and then conducts a brief initial inquiry to determine whether the allegations in the Rule 60(b) motion in fact amount to a second or successive collateral attack under either 28 U.S.C. §2255 or §2254. ..." Id. at 814.

expresses a view of overriding importance to the administration of justice and meets this courts' requirement as an "intervening circumstance of a substantial or controlling effect or to other substantial grounds not previously presented" to this court in granting Petitioner's question:

> "DID THE EIGHTH CIRCUIT ERR IN HOLDING, IN SQUARE CONFLICT WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS, THAT EVERY FEDERAL RULE OF CIVIL PROCEDURE 60(b)(6) MOTION CONSTITUTES PROHIBITED "SECOND OR SUCCESSIVE" HABEAS PETITION AS A MATTER OF LAW?

16. The ruling in BOYD proves beyond a doubt that some district court judges within the Eighth Circuit believed EVERY Rule 60(b)(6) motion filed AFTER dismissal of habeas petition, amounted to second or successive collateral attacks for correction of state or federal sentences. U.S. District Court Judge Stephen N. Limbaugh, Eastern District of Missouri, had REFUSED TO FILE Willie E. Boyd's Rule 60(b)(6) motion. BOYD, at 813.

17. There remains time to rectify the consequences of the misunderstanding before they become fatal in undermining the public's confidence in the judicial process, as "justice must satisfy the appearance of justice." LILJEBERG, 486 US at 864. This Court should instruct the courts below to do so.

18. Justice STEVENS has also reinforced the granting of Petitioner Lambros question, "Moreover, I believe we have an obligation to provide needed clarification concerning an important issue that has generated confusion among the federal courts, namely, the availability of Federal Rule of Civil Procedure 60(b) motions to challenge the integrity of final orders entered in habeas corpus proceedings. .... Whether one ultimately agrees or disagrees with that submission, it had sufficient arguable merit to persuade a least four members of this court to grant certiorari petition. ... The Court of Appeals for the Sixth Circuit plainly erred when it characterized petitioner's Rule 60(b) motion as an application for a second or successive habeas petition and denied relief for that reason." ABU-ALI ABDUR'RAHMAN, 154 L.Ed.2d 501 (2002).

19. 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: **March 13, 2003**

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

10.

CASE NO. 02 - 7346

IN THE SUPREME COURT OF THE UNITED STATES

JOHN GREGORY LAMBROS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

CERTIFICATE OF JOHN GREGORY LAMBROS UNREPRESENTED BY COUNSEL

AFFIDAVIT FORM

Petitioner LAMBROS, Pro Se, states that the attached PETITION FOR REHEARING is presented in good faith and not for delay and is restricted to the grounds specified in Rule 44.2

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: March 13, 2003

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

11.

CASE NO. 02 - 7346

IN THE SUPREME COURT OF THE UNITED STATES

JOHN GREGORY LAMBROS, Petitioner,

vs.

UNITED STATES OF AMERICA, Respondent.

PROOF OF SERVICE

I, John Gregory Lambros, do swear or declare that on this date, **MARCH 13, 2003,** as required by Supreme Court Rule 29 I have served the enclosed **PETITION FOR REHEARING**, dated March 13, 2003, on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States Penitentiary Leavenworth Legal Mail-box/room properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

1. Office of the Clerk, Supreme Court of the United States, One First Street, N.E., Washington, D.C. 20543-0001; U.S. Certified Mail No. **7001-0320-0005-1597-7124;**

2. Michael Chertoff, Assistant Attorney General, Office of the Solicitor General, U.S. Department of Justice, Room 5614, 950 Pennsylvania Ave., N.W., Washington, D.C. 20530-0001.

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED ON: **March 13, 2003**

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

12.

INDEX OF APPENDICES

APPENDIX A: February 24, 2003, Notification from the Clerk of the Supreme Court of the United States, as to Petition for a writ of certiorari being denied in LAMBROS vs. U.S., No. 02-7346.

APPENDIX B: Copy of BOYD vs. U.S., 304 F.3d 813 (Per Curiam) (8th Cir., September 25, 2002).

A P P E N D I X

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

February 24, 2003

Mr. John G. Lambros
Reg. No. 00436-124
P.O. Box 1000
Leavenworth, KS 66048-1000

Re: John G. Lambros
v. United States
No. 02-7346

Dear Mr. Lambros:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

William K. Suter

William K. Suter, Clerk

APPENDIX A.

14.

lieved Seiner had shot him. Although Drenon's belief was mistaken, the mistaken belief was reasonable. Seiner's mother contends there is a genuine issue of material fact about whether Drenon's actions were reasonable because Drenon's deposition testimony shows the situation in the cellar was not "tense, uncertain, and escalating," Drenon did not see Seiner with a gun, Drenon had police training to prevent him from firing his gun in exciting or distracting situations, and Drenon just reacted. Regardless of these facts, however, Drenon had been shot and an objective officer in Drenon's place would reasonably believe Seiner had done it. Drenon did not see Seiner holding a gun, but Drenon could not see Seiner's left arm and Fowler said Seiner was holding something. Seiner was known to be armed and dangerous, and Drenon was facing Seiner when he was shot in the face. Because Drenon's mistaken belief that Seiner had shot him was objectively reasonable, it was objectively reasonable for Drenon to shoot Seiner.

[8–11] Seiner's mother also asserts the district court erroneously granted summary judgment to Drenon on her state law claims. She contends Drenon is not immune under the official immunity doctrine because the doctrine only applies to negligence claims, not to wrongful death claims. "The official immunity doctrine provides that public officials acting within the scope of their authority are not liable in tort for injuries arising from their discretionary acts or omissions." *DaVee v. Mathis*, 812 S.W.2d 816, 827 (Mo.Ct.App.1991). Contrary to Seiner's mother's contention, the doctrine applies to wrongful death cases. *See Miller v. Smith*, 921 S.W.2d 39, 44–45 (Mo.Ct.App.1996). Further, an officer is performing a discretionary rather than a ministerial act, and thus is protected by official immunity, when he executes a warrant, draws and fires a weapon, *Bachmann v. Welby*, 860 S.W.2d 31, 33 (Mo.Ct.App. 1993), or draws and points a weapon at a suspect, *Miller*, 921 S.W.2d at 46. We conclude official immunity protects Drenon from state tort liability under state law for the shooting.

In sum, because there is no genuine issue of material fact about whether a reasonable officer in Drenon's position could have believed the shooting was lawful, Drenon is qualifiedly immune from liability on the § 1983 claim. Official immunity protects Drenon from state tort liability on the remaining claims. We thus affirm the district court's grant of summary judgment to Drenon.

Willie E. BOYD, Appellant,

v.

UNITED STATES of America, Appellee.

No. 02–1848.

United States Court of Appeals, Eighth Circuit.

Submitted: July 9, 2002.

Filed: Sept. 25, 2002.

Appeal was taken from order of the United States District Court for the Eastern District of Missouri, Stephen N. Limbaugh, J., in habeas proceeding. The Court of Appeals, per curiam, held that district court was required to file petitioner's motion to obtain relief from judgment or order based on mistake, inadvertence, excusable neglect, newly discovered evidence, or

fraud, after dismissal of habeas petition, and then conduct brief initial inquiry to determine whether petitioner's allegations under motion amounted to second or successive collateral attack for correction of state or federal sentence and, if so, dismiss it, or transfer it to Court of Appeals, for petitioner's failure to obtain authorization from the Court of Appeals.

Ordered accordingly.

Habeas Corpus ⇐802, 898(1), 899

District court was required to file petitioner's motion to obtain relief from judgment or order based on mistake, inadvertence, excusable neglect, newly discovered evidence, or fraud, after dismissal of his habeas petition, and then conduct brief initial inquiry to determine whether petitioner's allegations under motion amounted to second or successive collateral attack for correction of state or federal sentence, and, if so, dismiss it, or transfer it to Court of Appeals, for petitioner's failure to obtain authorization from the Court of Appeals. 28 U.S.C.A. §§ 2244(b)(3), 2254, 2255; Fed. Rules Civ.Proc.Rule 60(b), 28 U.S.C.A.

Willie E. Boyd, pro se.

Mary Jane Lyle, argued, Asst. U.S. Attorney, St. Louis, MO, for appellee.

Before BOWMAN, BEAM, and BYE, Circuit Judges.

PER CURIAM.

Willie Boyd's petition for panel rehearing having been granted, we return the matter to the District Court with directions to file and then dismiss Mr. Boyd's motion under Rule 60(b)(6) of the Federal Rules of Civil Procedure because it is, on its face, a second or successive 28 U.S.C. § 2255 petition, *see Mathenia v. Delo*, 99 F.3d 1476, 1480 (8th Cir.1996), *cert. denied*, *Mathenia v. Bowersox*, 521 U.S. 1123, 117 S.Ct. 2518, 138 L.Ed.2d 1020 (1997), that we have not previously authorized and do not now authorize, our authorization being a prerequisite under 28 U.S.C. § 2244(b)(3) (2000) to the filing of a second or successive habeas petition.

In order to establish a uniform procedure throughout the Circuit, we encourage district courts, in dealing with purported Rule 60(b) motions following the dismissal of habeas petitions, to employ a procedure whereby the district court files the purported Rule 60(b) motion and then conducts a brief initial inquiry to determine whether the allegations in the Rule 60(b) motion in fact amount to a second or successive collateral attack under either 28 U.S.C. § 2255 or § 2254. If the district court determines the Rule 60(b) motion is actually a second or successive habeas petition, the district court should dismiss it for failure to obtain authorization from the Court of Appeals or, in its discretion, may transfer the purported Rule 60(b) motion to the Court of Appeals. Depending on which course of action the district court chooses, the petitioner may either appeal the dismissal of the purported Rule 60(b) motion or, if the district court has elected to transfer the purported 60(b) motion to the Court of Appeals, await the action of the Court of Appeals.

KEY NUMBER SYSTEM

16.