May 20, 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. 7001-1140-0000-3228-3800

RE: LAMBROS vs. U.S., CIVIL NO. 99-28(DSD)
CRIMINAL NO. 4-89-82(5)(DSD)

Dear Clerk:

Attached for **FILING** in the above entitled action, Civil No. 99-28, is one original and one copy of:

1. 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, FIVE, AND SIX. Dated: May 20, 2003.

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

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

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

Sincerely,

John Gregory 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 Mailroom on this **20th day of May, 2003,** to:

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

John Gregory Lambros, Pro Se

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**
Defendant.	*	

MOTION TO VACATE JUDGEMENT DUE TO INTERVENING CHANGE IN CONTROLLING LAW UNDER ANY ONE OF THREE SEPARATE SUB-SECTIONS OF FEDERAL RULES OF CIVIL PROCEDURE 60(b) - SECTIONS ONE, FIVE, AND SIX.

NOW COMES Petitioner, JOHN GREGORY LAMBROS, Pro Se, (hereinafter Movant) and requests this Court to VACATE this court's judgments and/or the Eighth Circuit Court of Appeals judgment in this action dated:

a. March 08, 2002, District Court ORDER, "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);

b. May 29, 2002, District Court ORDER, "Therefore, based on a review of the file, record, and proceedings herein, IT IS HEREBY ORDERED that petitioner's application for CERTIFICATE OF APPEALABILITY and motion for leave to appeal is denied." (emphasis added);

c. July 1, 2002, Eighth Circuit Court of Appeals ORDER, "John Gregory Lambros appeals the district court's denial of his motion under Federal

Rules of Civil Procedure 60(b)(6). For the reasons stated by the district court, the judgment is affirmed. See 8th Cir.R. 47B." Movant believes this ORDER was a response from Movant's June 10, 2002, "MOTION FOR ISSUANCE OF CERTIFICATE OF APPEALABILITY BY THE EIGHTH CIRCUIT COURT OF APPEALS." 8th Cir. File No. 02-2026.;

d. August 22, 2002, Eighth Circuit Court of Appeals ORDER, "The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied." 8th Cir. File No. 02-2026.;

as controlling authority has since made a contrary decision of law applicable to the issues within this action. The following intervening change in controlling law occurred:

e. September 25, 2002, BOYD vs. U.S., 304 F.3d 813 (8th Cir. 2002) (PER CURIAM), Circuit Judges BOWMAN, BEAM, and BYE.;

f. February 25, 2003, MILLER-EL vs. COCKRELL, 154 L.Ed.2d 931 (U.S. Supreme Court 2003)("The COA denial is the subject of our decision." Id. at 943);

The United States Supreme Court issued its' FINAL ORDER in this action on April 21, 2003, LAMBROS vs. U.S., File No. 02-7346.

The Eighth Circuit and other court have stated "A CHANGE IN THE LAW CAN IN APPROPRIATE CIRCUMSTANCES BE THE BASIS FOR RULE 60(b) RELIEF." See, BENSON vs. ARMONTROUT, 767 F.2d 454, 455 (8th Cir. 1985); COX vs. WYRICK, 873 F.2d 200, Head Note 1 (8th Cir. 1989); BEN HUR CONST. CO. vs. GOODWIN, 116 F.R.D. 281, affirmed 855 F.2d 859 (8th Cir. 1988)(Decision of the Supreme Court of the U.S. **OR U.S. COURT OF APPEALS** may provide extraordinary circumstances for granting relief from judgment under Rule 60(b)(6) due to change in law); BRADLEY vs. RICHMOND SCHOOL BOARD, 416 U.S. 696, 714, 40 L.Ed.2d 476, 489-490 (1974)(Court has duty to apply supervening rule of law despite its prior decisions to the contrary when the new legal rule is valid and applicable to the issues of the case.); and THE SCHOONER PEGGY, 5 U.S. (1 Cranch) 103, 2 L.Ed. 49 (1801)(A court will apply the new rule even if it was announced while the case is on appeal.).

I. **BACKGROUND:**

1. On April 13, 2001, filed April 24, 2001, Movant filed a "MOTION TO VACATE ALL JUDGMENTS AND ORDERS BY DISTRICT COURT JUDGE ROBERT G. RENNER PURSUANT TO RULE 60(b)(6) OF THE FEDERAL RULES OF CIVIL PROCEDURE FOR VIOLATIONS OF TITLE 28 U.S.C.A. § 455." See, LILJEBERG vs. HEALTH SERVICES CORP., 100 L.Ed.2d 855 (1988).

2. Movant has alleged and proved Judge Robert G. Renner held the position of U.S. Attorney in Minnesota during 1969 thru 1977, during which time he indicted and prosecuted Movant Lambros on three (3) criminal indictments, as per his statutory duty, Title 28 U.S.C. §547, as other attorneys within his office are only assistants, Title 28 U.S.C. §§ 542 and 543. See, U.S. vs. ARNPRIESTER, 37 F.3d 466, 467 (9th Cir. 1994). U.S. Attorney Renner personally signed two (2) of the indictments against Movant Lambros.

3. On February 10, 1997, the now Honorable Robert G. Renner RESENTENCED Movant Lambros, as per the order of the Eighth Circuit on charges Movant was indicted on in May 1989, Criminal File No. 4-89-82(5), District of Minnesota, to an **ENHANCED SENTENCE** based on the three (3) criminal indictments he indicted Movant Lambros on in 1975 and 1976.

4. On March 08, 2002, Judge Doty, ORDERED Movant Lambros' **RULE 60(b)(6)** filing in this action to be treated as a petition pursuant of 28 U.S.C. §2255. Judge Doty was **FORCED AND ENFORCING** the well-settled law within the District of Minnesota and the Eighth Circuit Court of Appeals, that states, "He appeals the district court's denial of his Fed.R.Civ.P. **60(b)(6)** motion. We have treated the Rule **60(b)** pleading as the equivalent of a second petition for a writ of habeas corpus. See, BLAIR vs. ARMONTROUT, 976 F.2d 1130 (8th Cir. 1992). See, BOLDER vs. ARMONTROUT, 983 F.2d 98, 99 (8th Cir. 1992).

5. On April 11, 2002, Movant filed his **MOTION FOR ISSUANCE OF CERTIFICATE OF APPEALABILITY**, Notice of Appeal, and Motion for Leave to File A Petition for a Writ of Mandamus and/or Direct Appeal to the District Court in this

action.

6. On **April 22, 2002,** the United States Supreme Court **GRANTED CERTIORARI** in ABDUR'RAHMAN vs. BELL, Warden, #01-9094, limited to Questions 1 and 2:

> (1) Did the Sixth Circuit err in holding, in square conflict with decisons 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?**
>
> (2) Does court of appeals abuse its discretion in refusing to permit consideration of vital intervening legal development when failure to do so precludes habeas petitioner from ever receiving any adjudication of his claims on merits?

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

7. On May 29, 2002, Judge Doty ORDERED Movant Lambros' April 11, 2002, application for **CERTIFICATE OF APPEALABILITY** and motion for leave to appeal **DENIED.** Judge Doty restated that the Court lacked jurisdiction due to the holdings in BLAIR and BOLDER. The Eighth Circuit closed the door for Judge Doty to rule on the merits of Movant's claims, as "a **Rule 60(b)(6)** motion is the equivalent of a successive habeas corpus petition." See, BOLDER and BLAIR. Also see, RODRIGUEZ vs. MITCHELL, 252 F.3d 191, 198-200 and footnote 2 on page 200 (2nd Cir. 2001)(We are aware that the majority of circuit courts that have held a **RULE 60(b) MOTION** to vacate a judgment denying habeas either **MUST** or may be treated as a second or successive habeas petition. These courts, however, have offered little explanation in support of their reasoning. Their opinions depend largely on conclusory statements and citations to one another. Fn. 2 (....BLAIR vs. ARMONSTROUT, 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 writ of habeas corpus.) In our view, better reasons support the conclusion that a **RULE 60(b) MOTION** to vacate a judgment denying habeas is not a second petition under §2244(b)." RODRIGUEZ, at 199-200.

8. On or about June 11, 2002, Movant Lambros filed his MOTION FOR ISSUANCE OF CERTIFICATE OF APPEALABILITY to the Eighth Circuit Court of Appeals.

Movant Lambros informed the Eighth Circuit Court of Appeals as to the **APRIL 22, 2002**, United States Supreme Court grant of certiorari on the **VERY SAME QUESTION** Movant Lambros was denied on within the District Court, "that every Fed.R.Civ.P. **60(b) motion** constitutes prohibited 'second or successive' habeas petition as matter of law." See, ABDUR'RAHMAN vs. BELL, Warden, #01-9094. (Paragraph Six (6) within this motion).

9. On July 1, 2002, the Eighth Circuit, affirmed the judgment of the district court for the reasons stated within the district court's March 8, 2002 and May 29, 2002, ORDERS.

10. On August 22, 2002, the Eighth Circuit issued an ORDER denying Movant Lambros' Petition for Rehearing and for Rehearing En Banc.

11. On September 25, 2002, the Eighth Circuit **PER CURIAM** ruled on BOYD vs. U.S., 304 F.3d 813 (8th Cir. 2002).

12. On or about November 1, 2002, Movant filed a PETITION FOR A WRIT OF CERTIORARI in this action.

13. On February 24, 2003, the U.S. Supreme Court DENIED Movant Lambros Petition For A Writ of Certiorari in this action.

14. On **FEBRUARY 25, 2003**, the U.S. Supreme Court **DECIDED MILLER-EL vs. COCKRELL, 154 L.Ed.2d 931 (2003).**

15. On or about March 13, 2003, Movant Lambros filed his PETITION FOR REHEARING to the U.S. Supreme Court in this action, as to the February 24, 2003, denial.

16. On April 21, 2003, the U.S. Supreme Court DENIED Movant Lambros' PETITION FOR REHEARING.

II. INTERVENING CHANGE IN CONTROLLING LAW?

17. 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. Sept. 25, 2002)(PER CURIAM) amount to an intervening change in CONTROLLING LAW.

A. MILLER-EL vs. COCKRELL, 154 L.Ed.2d 931 (February 25, 2003)

18. On certiorari, Justice Kennedy, delivered the opinion of the Court and stated, "The COA [certificate of appealability] denial is the subject of our decision. At issue here are the standards AEDPA imposes before a court of appeals may issue a COA to review a denial of habeas relief in the district court. . . . we reiterate that a prisoner seeking a COA need only demonstrate 'a substantial showing of the denial of a constitutional right. ... A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." Id. at 943 and 944. "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." Id. at 949. (emphasis added)

19. Justice Kennedy furthere stated, "We look to the District Court's application of AEDPA to petitioner's constitutional claims and ask whether that resolution was debatable amongst jurists of reason. This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claim. In fact, THE STATUTE FORBIDS IT. When a court of appeals side steps this process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction." Id. at 950. (emphasis added). "As we stated in SLACK, "[w]here a district court rejects the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Id. at 950 and 951.

20. In MILLER-EL the Supreme Court concluded that the "District Court

DID NOT give full consideration to the substantial evidence petitioner put forth in support of the prima facie case. Instead, it accepted without question the state court's evaluation of the demeanor of the prosecutor and jurors in petitioner's trial. The Court of Appeals evaluated Miller-El's application for a COA in the same way. .... THIS WAS TOO DEMANDING A STANDARD ON MORE THAN ONE LEVEL. .... As we have said, a COA determination is a separate proceeding, one distinct from the underlying merits. .... In this case, the statistical evidence **ALONE** raises some debate as to whether the prosecution acted with a race-based reason when striking prospective jurors." Id. at 953.

21. Justice Kennedy concludes his decision by stating, "The COA inquiry asks only if the District Court's decision was DEBATABLE." Id. at 957.

B. APPLICATION OF MILLER-EL TO THIS ACTION:

22. Both the District Court and the Eighth Circuit Court of Appeals used the incorrect and/or too demanding a standard in evaluating Movant Lambros' COA.

23. Among the identifiable reasons for granting a COA are the following:

(a) The United States Supreme Court has granted certiorari to review a "similar" question in another case;

(b) The Supreme Court or the relevant circuit court has identified the question as open, unresolved, or a matter of disagreement amount different circuit courts;

(c) At least one Supreme Court Justice, expressing a view not rejected by a majority, has found merit in the claim;

See, LIEBMAN, Federal Habeas Practice and Procedure, Fourth Edition 2001, LexisNexis, Pages 1590 thru 1593, for sixteen identifiable reasons, attached. **EXHIBIT A.**

24. As stated earlier, Judge Dody ruled on March 08, 2002, that Movant Lambros' Rule 60(b)(6) motion for violations of Title 28 U.S.C.A. §455 **MUST** be

treated as a petition pursuant to 28 U.S.C. §2255 due to the holding in BOLDER and BLAIR. "We are aware that the majority of circuit courts that have held 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, fn. 2).

25. On May 29, 2002, Judge Doty stated in his order, "After carefully reviewing petitioner's request, and for the same reasons that this court denied petitioner's previous motion, the court concludes that petitioner has failed to meet the requisite showing for this court to issue a **CERTIFICATE OF APPEALABILITY.** Therefore, based on a review of the file, record, and proceedings herein, **IT IS HEREBY ORDERED** that petitioner's application of **CERTIFICATE OF APPEALABILITY** and motion for leave to appeal is denied." (emphasis added).

26. On July 1, 2002, the Eighth Circuit **DENIED** Movant Lambros **CERTIFICATE OF APPEALABILITY** "For the reasons stated by the district court, the judgment is affirmed."

27. On August 22, 2002, the Eighth Circuit again **DENIED** Movant Lambros' **CERTIFICATE OF APPEALABILITY.** "The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied." See, Eighth Circuit File Number 02-2026.

28. **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:

a. LILJEBERG vs. HEALTH SERVICES CORP., 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** . . . 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; . . ." Id. at 856-857. (emphasis added).

b. On April 22, 2002, the United States Supreme Court **GRANTED CERTIORARI** on ABDUR'RAHMAN vs. BELL, Warden, #01-9094, limited to the questions:

> (1) Did the 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?**
>
> (2) Does court of appeals abuse its discretion in refusing to permit consideration of vital intervening legal development when failure to do so precludes habeas petitioner from ever receiving an adjudication of his claims on merits?

c. On September 25, 2002, the Eighth Circuit **(PER CURIAM) "ESTABLISHED A UNIFORM PROCESS THROUGHOUT THE CIRCUIT"** (emphasis added) in BOYD vs. U.S., 304 F.3d 813 (8th Cir. 2002) as to Rule 60(b) motions. The court 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 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." (emphasis added). Id. at 814.

d. On December 10, 2002, in ABDUR'RAHMAN vs. BELL, Warden, 154 L.Ed.2d 501 (2002)(Per Curiam) the Supreme Court dismissed the writ of certiorari as improvidently granted. **JUSTICE STEVENS, dissenting in a separate opinion stated:**

> "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."** Id. at 501 (emphasis added)

"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." Id. at 507. (emphasis added)

"This, in order to resolve both the jurisdictional issues and the questions presented in the certiorari petition, it is necessary to identify the difference, if any, between a **RULE 60(b) AND A SECOND OR SUCCESSIVE HABEAS CORPUS APPLICATION.**" Id. at 505. (emphasis added)

"Referring to the difference between a Rule 60(b) motion and a "second or successive" habeas corpus petition. **JUDGE TJOFLAT** wrote: 'The distinction lies in the harm each is designed to cure. A 'second or successive' habeas corpus petition, as discussed above, is meant to address two specific types of constitutional claims by prisoners: (1) claims that 'rel[y] on a new rule of constitutional law,' and (2) claims that rely on a rule of constitutional law and are based on evidence that 'could not have been discovered previously through the exercise of due diligence' and would **ESTABLISH THE PETITIONER'S FACTUAL INNOCENCE.**" Id. at 505. (emphasis added)

"'In contrast, a motion for relief under **RULE 60** of the 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)

"**JUDGE TJOFLAT'S** reasoning is fully consistent with this Court's decisions in STEWART vs. MARTINEZ-VILLAREAL, 523 U.S. 637, 140 L.Ed.2d 849, 118 S.Ct. 1618 (1998), and SLACK vs. McDANIEL, 529 US 473, 146 L.Ed.2d 542, 120 S. Ct. 1595 (2000)." Id. at 506.

See, ABDUR'RAHMAN vs. BELL, Warden, 154 L.Ed.2d 501 (2002), **EXHIBIT B.**

29. When applying **JUDGE TJOFLAT'S** reasoning to Movant Lambros' MOTION TO VACATE ALL JUDGMENTS AND ORDERS BY DISTRICT COURT JUDGE ROBERT G. RENNER PURSUANT TO **RULE 60(b)(6) OF THE FEDERAL RULES OF CIVIL PROCEDURE FOR VIOLATIONS**

//.

OF TITLE 28 U.S.C.A. §455, it is clear that Movant Lambros:

a. Is only **"CONTESTING THE INTEGRITY OF THE PROCEEDING THAT RESULTED IN THE DISTRICT COURT'S JUDGMENT."** Therefore, plainly within the relief under **RULE 60:**

b. Movant Lambros never attempted to establish his factual innocence within his April 13, 2001, filed April 24, 2001, motion pursuant to RULE 60(b)(6), which identifies a **SECOND OR SUCCESSIVE HABEAS CORPUS APPLICATION.**

30. Therefore, U.S. Supreme Court Justice **STEVENS** has clearly educated and resolved the difference in this action, as Movant Lambros was only contesting the February 10, 1997 RESENTENCING of Movant by the now Honorable Robert G. Renner. See, ABDUR'RAHMAN, 154 L.Ed.2d 501 (2002), **EXHIBIT B.**

31. Movant Lambros believes he has showed a mark change in the applicable law and now it is necessary to determine whether any of the three (3) clauses of Rule 60(b) are the proper procedural vehicle for this particular motion.

III. RULE 60(b):

32. Movant is requesting this court to review the following procedural issue of whether a change in law is remediable under any of the three (3) subsections of Rule 60(b), which this Movant relies. Movant first claims that a change in law constitutes a **"MISTAKE"** within the meaning of Rule 60(b)(1). Therefore, to correct that mistake and remove the judgment(s) previously entered herein. Second, after MILLER-EL and BOYD, it is no longer equitable that the judgment in this action have prospective application and Movant is entitled to relief from judgment under Rule 60(b)(5). Lastly, in the event that this court finds that relief from judgment is not appropriate under either subsection one or subsection five of Rule 60(b), Movant invokes subsection six of that Rule which allows for relief from operation of a final judgment for "any other reason[.]" See, Fed.R.Civ.P. 60(b)(6).

33. Movant knows, Rule 60(b)(6) **ONLY** applies if the reasons offered for relief from judgment are **NOT** covered under the more specific provisions of Rule 60(b)(1) thru (5). See, LILJEBERG vs. HEALTH SERV. ACQUISITION CORP. 100 L.Ed.2d 855, 874-75 and n. 11. Based upon the mutual exclusivity doctrine, this court must first consider whether either Rule 60(b)(1) or Rule 60(b)(5) governs this Motion.

A. RULE 60(b)(1) — "MISTAKE"

34. Movant believes that Rule 60(b)(1) may be utilized by the court to remedy the change in controlling law in this action. Rule 60 does not independently define "mistake," but that word "can easily be interpreted to encompass errors in law." See, KEVIN PARKER, Note, RELIEF FROM FINAL JUDGMENT UNDER RULE 60(b)(1) DUE TO JUDICIAL ERRORS OF LAW, 83 Mich. L.Rev. 1571, 1572 (1985)("Judicial Errors"). "Errors in law," in turn, have been held to include disregarding a change in controlling law. See, id. at 1576 (citing, SCHILDHAUS vs. MOE, 335 F.2d 529 (2nd Cir. 1964). Courts are split as to whether Rule 60(b)(1) is the proper procedural vehicle when a party is claiming an intervening change in controlling law. In TARKINGTON vs. U.S. LINES CO., 222 F.2d 358, 359 (2nd Cir. 1955), the Second Circuit held that when the Supreme Court rendered a decision, eleven days after entry of judgment, which "conflict[ed] with the case on which the trial judge relied in directing a verdict, th[at] ... judge should have treated plaintiff's motion as [one] under Fed. Rules Civ. Proc. rule 60(b) ...., to correct the mistake."

B. RULE 60(b)(5) — "PROSPECTIVE APPLICATION"

35. The two requirements for obtaining relief from final judgment under Rule 60(b)(5) are that (1) the judgment has prospective application and (2) it is no longer equitable that it should so operate. See, 7 J. Moore & J. Lucas,

Moore's Federal Practice 60.26[4] (2nd ed. 1982).

36. This Court's ORDER'S on March 08, 2002 and May 29, 2002, **DID NOT OFFER A FINAL JUDGMENT ON THE MERITS OF MOVANT'S ACTION, "WHETHER DISTRICT COURT JUDGE ROBERT G. RENNER VIOLATED TITLE 28 U.S.C.A. § 455 WHEN HE RESENTENCED JOHN GREGORY LAMBROS ON FEBRUARY 10, 1997."** Movant understands that "A final judgment on the **MERITS** of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. See, COMMISSIONER vs. SUNNER, 333 U.S. 591, 597, 68 S.Ct. 715, 719, 92 L.Ed. 898 (1948).

37. The Fifth Circuit in KIRKSEY vs. CITY OF JACKSON, 714 F.2d 42, 43 (5th Cir. 1983) indicated that Rule 60(b)(5) relief may be justified if the law changes subsequent to the initial decision and if the parties would be bound by the previous judgment by res judicata: "If a dismissal would bar a new and independent action between the same parties based on the same claims ... then it would have 'prospective application' by virtue of the continuing effect of the bar."

C. RULE 60(b)(6) — "EXTRAORDINARY CIRCUMSTANCES"

38. Rule 60(b)(6) provides for relief from final judgment where there is "any other reason justifying relief from the operation of the judgment." Rule 60(b)(6) "confers broad discretion on the trial court to grant relief when 'appropriate to **ACCOMPLISH JUSTICE**.'" (emphasis added) INTERNATIONAL CONTROLS CORP. vs. VESCO, 556 F.2d 665, 668 n. 2 (2nd Cir. 1977), cert. denied 54 L.Ed.2d 758 (1978) (quotations omitted) and KLAPPROTT vs. U.S., 335 U.S. 601, 615 (1949). "It is 'properly invoked where there are extraordinary circumstances,' [citations omitted] or where the judgment may work an EXTREME AND UNDUE HARDSHIP, [citations omitted] and 'should be liberally construed when SUBSTANTIAL JUSTICE WILL THUS BE SERVED'". See, MATARESE vs. LeFEVRE, 801 F.2d 98, 106 (2nd Cir. 1986), cert. denied 94 L.Ed.2d 523 (1987):

> "A postjudgment change in law having retroactive application may, in special circumstances, **CONSTITUTE**

AN EXTRAORDINARY CIRCUMSTANCE WARRANTING VACATION OF A JUDGMENT."

See, MATARESE, 801 F.2d 98, 106, citing, inter alia, PIERCE vs. COOK & CO., 518 F.2d 720 (10th Cir. 1975), cert. denied 47 L.Ed.2d 89 (1976); McGRATH vs. POTASH, 199 F.2d 166 (D.C.Cir. 1952); see also, ADLER vs. BERG HARMON ASSOC., 790 F.Supp. 1235, 1245 n.10 (S.D.N.Y. 1992).

39. Of great importance is the Second Circuit's statement in MATARESE vs. LeFEVRE, 801 F.2d 98, 106 (1986):

> "We think it particularly appropriate for the district court to **ENTERTAIN A RULE 60(b)(6) MOTION ON GROUNDS OF A RETROACTIVE CHANGE OF LAW IN THE CONTEXT OF A HABEAS CORPUS PROCEEDING, IN WHICH "[C]ONVENTIONAL NOTIONS OF FINALITY OF LITIGATION HAVE NO PLACE."** SANDERS vs. U.S., 373 U.S. 1, 8, 83 S.Ct. 1068, 1073, 10 L.Ed.2d 148 (1963); id. at 17, 83 S.Ct. at 1078 (court has discretion to grant a hearing on a successive petition for habeas corpus upon a showing that there has been an intervening change in the law)."

40. EXTRAORDINARY CIRCUMSTANCES: Movant Lambros' action is exactly the same as presented in LILJEBERG vs. HEALTH SERVICES CORP., 100 L.Ed.2d 855 (1988), as to violations of § 455(a) and § 455(b)(3) by a judge. In fact, this Court can only conclude that the basis for relief in this action is **"EXTRAORDINARY"** and far surpasses the facts that existed and used by the U.S. Supreme Court in LILJEBERG, to establish the **"EXTRAORDINARY CIRCUMSTANCES"** required to bring Movant's motion within the "other reason" language, **"BECAUSE AN OBJECTIVE OBSERVER WOULD HAVE [and has] QUESTIONED THE JUDGE'S [Judge Renner] IMPARTIALITY. See, EXHIBIT C** (January 20, 2003, "PETITION FOR THE UNITED STATES SENATE COMMITTEE ON THE JUDICIARY TO INVESTIGATE U.S. SENIOR DISTRICT COURT JUDGE **ROBERT G. RENNER**, DISTRICT OF MINNESOTA, AS TO HIS BREACH OF PUBLIC TRUST AND ABUSE OF JUDICIAL POWER." The petition has sixty-seven (67) signatures by United States Citizens who clearly state:

> **"JUDGE RENNER CLEARLY SHOULD HAVE RECUSED HIMSELF FROM MR. LAMBROS' FEBRUARY 10, 1997 RESENTENCING."**

See, EXHIBIT C.

41. The Supreme Court in LILJEBERG listed the following reasons as **SUFFICIENT UNDER RULE 60(b)(6) TO JUSTIFY "EXTRAORDINARY CIRCUMSTANCES:"**

a. the judge committed a violation of §455(a) which was neither insubstantial nor excusable;

b. a willingness to enforce §455(a) may prevent an injustice in some future case;

c. the merits of the underlying litigation suggests that there is a greater risk of unfairness in upholding the judgment than in allowing a new judge to take a fresh look;

d. no showing of special hardship by reason of reliance upon the judgment by plaintiff or defendant;

e. entire delay in this litigation is attributable to the judge's inexcusable failure to disqualify himself;

f. the administration of justice should reasonably appear to be disinterested, as well as be so in fact.

LILJEBERG vs. HEALTH SERVICES CORP, 100 L.Ed.2d 855, 860-861 (1988).

42. The Eighth Circuit stated that a "Change in law having retroactive application may, in appropriate circumstances, provide basis for granting relief under Rule 60(b). See, COX vs. WYRICK, 873 F.2d 200, 201 (8th Cir. 1989). Also see, BENSON vs. ARMONTROUT, 767 F.2d 454, 455 (8th Cir. 1985).

CONCLUSION

43. This Court has jurisdiction to pursue a Rule 60(b) motion to reopen this case that had been reviewed on appeal. See, STANDARD OIL CO. vs. U.S., 50 L.Ed.2d 21 (1976). In that case, the Supreme Court made clear that a party wishing to pursue a Rule 60(b) motion to reopen a case that had been reviewed on appeal was not required to obtain leave of the appellate court or a withdrawal of the appellate court's mandate before proceeding in the district court. The Court

reasoned that the district judge would not be flouting the existing mandate by acting on the motion since the appellate decision related only "to the record and issues then before the court, and [did] not purport to deal with possible later events." Id. at 23.

44. Movant is only requesting this court to follow in the steps of the United States Supreme Court's decision on February 25, 2003, MILLER-EL vs. COCKRELL, 154 L.Ed.2d 931, and grant Movant Lambros a **CERTIFICATE OF APPEALABILITY** (COA) in this action, as Movant clearly satified the COA standard by demonstrating that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further. Justice Kennedy stated, "As we have said, a COA determination is a separate proceeding, one distinct from the underlying merits." Id. at 953. "The COA inquiry asks **ONLY** if the **DISTRICT COURT'S** decision was **DEBATABLE**." Id. at 957 (emphasis added). Please refer to paragraph 28 in this motion for a listing of legal cases to support the application of MILLER-EL.

45. At every stage in the proceedings, 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).

46. Movant respectfully requests this court to vacate judgment due to an 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).

47. 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: **MAY 20, 2003**

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The factors justifying a district judge's — or, failing that, the court of appeals's or Supreme Court's — issuance of a probable cause certificate are too numerous to catalogue comprehensively, particularly given that only a tiny percentage of cases in which a certificate issued resulted in written opinions explaining that result.[63] Obviously, issues of fact or law that the district court itself found to be close, difficult, of first impression, subject to conflicting outcomes, or simply a matter of judgment beyond simple deduction from applicable legal precepts provide sufficient "substance" to require a certificate.[64] So, too, appellate judges should grant a certificate if they have, or if they believe a majority of their colleagues would have, a reasonable doubt about the validity of the lower court decision under the appropriate standard of review. Although a matter may be well-settled adversely to the petitioner in the relevant district court or court of appeals, the fact that other coequal or higher courts have reached conflicting views suffices to require the certification of an appeal.[65] Among other identifiable reasons for granting a certificate are the following:

(1) The United States Supreme Court has granted *certiorari* to review a "similar" question in another case.[66]

specific certification of appealability). *But see* Barber v. Scully, 731 F.2d 1073, 1075 (2d Cir. 1984) (authorizing district courts to limit issues certified for appeal); Vicaretti v. Henderson, 645 F.2d 100, 101-03 (2d Cir. 1980) (same).

[63] Former Appellate Rule 22(b) required that reasons be provided only when the certificate of probable course is denied. *See* Herrera v. Payne, 673 F.2d 307, 308 (10th Cir. 1982), *cert. denied*, 469 U.S. 936 (1984). In regard to grants of probable cause certificates by appellate courts or judges, see *infra* notes 99-107.

[64] *See Barefoot, supra*, 463 U.S. at 894 (certificate should issue if claims are not "squarely foreclosed by statute, rule, or authoritative court decision or ... lacking any factual bases in the record"); Baldwin v. Maggio, 704 F.2d 1325, 1326-27 (5th Cir. 1983), *cert. denied*, 467 U.S. 1220 (1984); Alexander v. Harris, 595 F.2d 87, 91 (2d Cir. 1979) (*per curiam*) (fact that district court conducted evidentiary hearing reveals that issues raised are substantial).

[65] *See, e.g.*, Lynce v. Mathis, 519 U.S. 433, 436 (1997) (discussed *infra* note 67); *infra* notes 66-75 and accompanying text.

[66] Ford v. Strickland, 696 F.2d 804, 807 (11th Cir.) (*per curiam*) (*en banc*), *cert. denied*, 464 U.S. 865 (1983). *See, e.g.*, Autry v. Estelle, 464 U.S. 1301, 1302 (1983) (White, Circuit Justice, in chambers); Graham v. Lynaugh, 854 F.2d 715, 717, 723 (5th Cir. 1988), *vac'd & remanded on other grounds*, 492 U.S. 915 (1989); Selvage v. Lynaugh, 842 F.2d 89, 94 n.2 (5th Cir. 1988), *vac'd & remanded on other grounds sub nom.* Selvage v. Collins, 494 U.S. 108 (1990); Wingo v. Blackburn, 783 F.2d 1046, 1052 (5th Cir. 1986); Rault v. Louisiana, 774 F.2d 675, 677 (5th Cir. 1985), *cert. denied*, 476 U.S. 1178 (1986) (*per curiam*); Berry v. King, 765 F.2d 451, 455-56 (5th Cir. 1985), *cert. denied*, 476 U.S. 1164 (1986); Narcisse v. Maggio, 725 F.2d 969, 969-70 (5th Cir. 1984) (*per curiam*); Williams v. King, 719 F.2d 730, 733 (5th Cir.), *cert. denied*, 464 U.S. 1027 (1983). *But cf.* Bell v. Lynaugh, 858 F.2d 978, 984 (5th Cir. 1988), *cert. denied*, 492 U.S. 925 (1989) (court need "not grant stays of execution simply because the Supreme Court has granted certiorari on an issue pertaining to the death penalty which is raised by subsequent petitioners"); Thomas v. Wainwright, 788 F.2d 684, 688-89 (11th Cir.) (*per curiam*), *cert. denied*, 475 U.S. 1113

EXHIBIT A. 18.

(2) The Supreme Court or the relevant circuit court has identified the question as open, unresolved, or a matter of disagreement among different circuit courts.[67]

(3) At least one Supreme Court Justice, expressing a view not rejected by a majority, has found merit in the claim.[68]

(4) The court of appeals has decided to hear a claim *en banc* similar to a claim presented in the current appeal.[69]

(1986) (denying certificate and stay in successive petition case because grant of *certiorari* on issue similar to that in petitioner's case does not assure automatic stay in successive petition cases); Jones v. Smith, 786 F.2d 1011, 1012 (11th Cir.), *cert. dismissed*, 475 U.S. 1105 (1986) (similar); Bowden v. Kemp, 774 F.2d 1494 (11th Cir. 1985), *cert. denied*, 476 U.S. 1164 (1986) (similar). Notwithstanding *Thomas v. Wainwright*, *Jones v. Smith*, and *Bowden v. Kemp*, *supra*, all of which are distinguishable as successive petition cases (*see supra* Chapter 28), the fact that the law of the circuit clearly rejects the petitioner's claim does not "squarely foreclose" the claim "'by ... *authoritative* court decision"' as long as the Supreme Court — either by granting *certiorari* or otherwise — indicates that the issue is open. *Barefoot*, *supra*, 463 U.S. at 894. *Cf.* Bowden v. Kemp, 474 U.S. 891 (1985) (two days after 11th Circuit denied certificate of probable cause and stay, Supreme Court grants stay pending disposition of Bowden's *certiorari* petition presenting question on which Court recently granted *certiorari*). The grant of a certificate of probable cause need not compel the court of appeals to give other than summary consideration to issues it previously has determined adversely; but neither should the denial of a certificate deprive the Supreme Court of the ability to resolve issues that the high court considers substantial. *See Autry v. Estelle*, *supra*; *Graham v. Lynaugh*, *supra*; *Selvage v. Lynaugh*, *supra*; *Wingo v. Blackburn*, *supra*; *Rault v. Louisiana*, *supra*; *Berry v. King*, *supra* (all denying relief on claim long rejected by circuit but granting stays of execution and of mandate — essentially certificates of probable cause to seek *certiorari* — because Supreme Court granted *certiorari* on issue; lower court decisions in *Graham* and *Selvage* thereafter vacated by Supreme Court on basis of Court's decision in case in which *certiorari* had been granted).

That the Supreme Court previously *denied certiorari* review on a claim is not a judgment that the claim lacks substance. *See, e.g.*, Willie v. Maggio, 737 F.2d 1372, 1377 n.2 (5th Cir.), *cert. denied*, 469 U.S. 1002 (1984); Ritter v. Smith, 726 F.2d 1505, 1511 n.16 (11th Cir.), *cert. denied*, 469 U.S. 869 (1984); Amsterdam, *supra* note 59, at 54-56 (collecting cases in which Supreme Court denied *certiorari* on issues identical to ones on which it subsequently granted review and relief); *supra* note 59 & *infra* § 38.2c n.50 (cases in which prior *certiorari* denials and executions preceded Supreme Court's eventual grant of *certiorari* and relief on issue raised in earlier cases); *supra* § 6.4c nn.24-25 and accompanying text.

[67] *See, e.g.*, *Lynce v. Mathis*, *supra*, 519 U.S. at 436 (although district court and court of appeals denied certificate of probable cause to appeal based on insubstantiality of claim under circuit precedent, Supreme Court grants *certiorari* based on conflicting decision of different circuit (thus, implicitly, certifying appealability), and, upon review, grants habeas corpus relief). *See also supra* note 66.

[68] Consider, for example, Justice White's concurring opinion in Lockett v. Ohio, 438 U.S. 586 (1978) (White, J., concurring and dissenting), which became the law in Enmund v. Florida, 458 U.S. 782 (1982).

[69] *See* Stephens v. Kemp, 464 U.S. 1027, 1028 (1983).

EXHIBIT A.

19.

(5) The relevant circuit court or another district court in the district (or, possibly, elsewhere) has granted a probable cause certificate based on the same or a similar issue.[70]

(6) The same or a similar issue is pending on appeal in the circuit in another case.[71]

(7) The legal question presented by the petitioner has never before been decided by the circuit court.[72]

(8) There is a split on the question among different panels or different district judges in the same circuit.[73]

(9) The same or similar issue has been resolved favorably to a petitioner by a state court, a district judge in another district, or a panel in another circuit.[74]

(10) The issue has been the subject of differing or dissenting views among the state court judges who previously adjudicated the claim in the petitioner's or another case.[75]

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[70] *See, e.g.*, Ford v. Strickland, 734 F.2d 538, 543 (11th Cir.) (*per curiam*), *aff'd sub nom.* Wainwright v. Ford, 467 U.S. 1220 (1984) (*mem.*).

[71] *See, e.g.*, Goode v. Wainwright, 670 F.2d 941, 942 (11th Cir. 1982) (cited approvingly in *Barefoot*, *supra*, 463 U.S. at 893).

[72] Houston v. Lack, 487 U.S. 266, 269 (1988) (discussing lower court's grant of probable cause certificate based on "'question of first impression' in the jurisdiction"). *See also* Julius v. Jones, 875 F.2d 1520, 1525-26 (11th Cir.), *cert. denied*, 493 U.S. 900 (1989) (certificate of probable cause granted because state courts had refused to reach merits of petitioner's *Brady* claim and district court felt that petitioner should not be executed until some other court besides itself reviewed merits of claim).

[73] *See Barefoot*, *supra*, 463 U.S. at 893 n.4 (probable cause certificate should issue on claims "'debatable among jurists of reason"' (quoting Gordon v. Willis, 516 F. Supp. 911, 913 (N.D. Ga. 1980)). Although not quite as clear as situations in which the Supreme Court explicitly has identified an issue as substantial, the situations discussed here and *infra* text accompanying notes 74-75 are ones singled out by the Supreme Court Rules as sufficiently substantial to warrant *certiorari*. *See* S. CT. R. 10; *infra* § 39.2d. Even if the circuit court has rejected an issue, that is, the district or circuit judges faced with a probable cause application should consider whether the Supreme Court nonetheless might grant *certiorari* on the issue. *See supra* note 66.

[74] *See, e.g.*, Lozada v. Deeds, 498 U.S. 430, 431-32 (1991) (*per curiam*) ("Court of Appeals erred in denying [petitioner] ... a certificate of probable cause because under the standards set forth in *Barefoot* ... [petitioner] made a substantial showing that he was denied the right to effective assistance of counsel"; although district court concluded that "petitioner had not shown prejudice under the *Strickland* test," authority in other circuits demonstrates that this "issue ... could be resolved in a different manner" because "at least two Courts of Appeals have presumed prejudice in this situation"). *See also* Guti v. INS, 908 F.2d 495 (9th Cir. 1990) (finding of frivolousness under section 1915(d) could not be made because "there is no controlling authority" on issue and "there is some authority [from another circuit] to support the plaintiff's position"); *supra* note 73.

[75] *See supra* notes 73-74 and accompanying text.

EXHIBIT A.

20.

(11) The district court applied a novel interpretation of the law or decided complex or substantial issues when adjudicating a claim.
(12) The legal or factual rationale for the district court's ruling is unclear.[76]
(13) The district court decision or prior adverse circuit rulings relied upon caselaw that has been questioned or undermined by more recent decisions of the circuit or Supreme Court.[77]
(14) The proper adjudication of the claim may require additional evidentiary development.[78]
(15) A reasonable doubt exists as to whether the district court fully and fairly adjudicated the matter, given the actions of the district court or the state or the possible incompetence of petitioner's counsel.[79]
(16) The severity of the penalty, in conjunction with other factors, prevents a conclusion that the claims are frivolous.[80]

Procedure, timing, form, filing. Former Appellate Rule 22(b), which continues to govern non-AEDPA cases, sets out the procedure for applying for a probable cause certificate. The petitioner first should apply to the district judge whose decision the petitioner seeks to appeal.[81] The superseded statute and rule (as continues to be true of the amended statute and rule) do not specify when the petitioner should file the probable-cause application.[82] As long as a timely notice

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[76] *Cf. supra* note 54 (collecting cases in which district court dismissed petition summarily as frivolous and then granted certificate of probable cause to appeal).

[77] *See* Fleming v. Kemp, 794 F.2d 1478 (11th Cir. 1986).

[78] *See, e.g.*, Smith v. Wainwright, 737 F.2d 1036, 1037 (11th Cir. 1984) (certificate granted because "district court refused to hold an evidentiary hearing to develop the true factual setting in which this claim must be judged"); Ford v. Strickland, 734 F.2d 538, 543 (11th Cir.) (*per curiam*), *aff'd sub nom.* Wainwright v. Ford, 467 U.S. 1220 (1984) (*mem.*) ("evidence and legal precedent upon which [petitioner] relies" were not previously available); Narcisse v. Maggio, 725 F.2d 969 (5th Cir. 1984) (*per curiam*); Mattheson v. Maggio, 714 F.2d 362, 365 (5th Cir. 1983) (*per curiam*) (probable cause certificate cannot be withheld in capital case, given doubts about evidentiary and legal status of petitioner's claims caused by counsel's failures not attributable to petitioner).

[79] *See supra* § 20.3e (full and fair adjudication).

[80] *See* authority cited *supra* note 59.

[81] *Id. See* Fabian v. Reed, 707 F.2d 147, 148 (5th Cir. 1983) (court of appeals "will not make the initial determination of whether a certificate of probable cause should be granted").

[82] *See, e.g.*, Tinsley v. Borg, 895 F.2d 520, 523 (9th Cir. 1990), *cert. denied*, 498 U.S. 1091 (1991) (order of filing notice of appeal and application for certificate of probable cause to appeal is not specified in statute and rules, and timing of probable cause application should not be cause for dismissal if notice of appeal is timely; petitioner preferably should file application for certificate of probable cause simultaneously with, or soon after, notice of appeal (following Latelle v. Jackson, 817 F.2d 12, 13 (2d Cir. 1987), *cert. denied*, 484 U.S. 1010 (1988))); Wilson v. O'Leary, 895 F.2d 378, 382 & n.* (7th Cir. 1990) ("Section 2253 does not set a time limit on obtaining a certificate of probable cause," but certificate of probable cause typically is requested and granted after filing of notice of appeal, hence filing of notice does not deprive district court of jurisdiction to rule on

EXHIBIT A. 21.

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ABU-ALI ABDUR'RAHMAN, Petitioner

v

RICKY BELL, WARDEN

537 US —, 154 L Ed 2d 501, 123 S Ct —

[No. 01-9094]

Argued November 6, 2002. Decided December 10, 2002.

APPEARANCES OF COUNSEL ARGUING CASE

James S. Liebman argued the cause for petitioner.

Paul G. Summers argued the cause for respondent.

Paul J. Zidlicky argued the cause for Alabama, et al., as amici curiae, by special leave of court.

Per Curiam.

The writ of certiorari is dismissed as improvidently granted.

Same case below, 2002 US App LEXIS 2520.

SEPARATE OPINION

Justice **Stevens**, dissenting.

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.[1] 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.

1. On October 24, 2002, just two weeks before oral argument, the Court entered an order directing the parties to file supplemental briefs addressing these two questions: "Did the Sixth Circuit have jurisdiction to review the District Court's order, dated November 27, 2001, transferring petitioner's Rule 60(b) motion to the Sixth Circuit pursuant to 28 USC § 1631 [28 USCS § 1631]? Does this Court have jurisdiction to review the Sixth Circuit's order, dated February 11, 2002, denying leave to file a second habeas corpus petition?" *Post*, p ——, 154 L Ed 2d 367, 123 S Ct 476.

EXHIBIT B.

22.

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I

In 1988 the Tennessee Supreme Court affirmed petitioner's conviction and his death sentence. His attempts to obtain postconviction relief in the state court system were unsuccessful. In 1996 he filed an application for a writ of habeas corpus in the Federal District Court advancing several constitutional claims, two of which raised difficult questions. The first challenged the competency of his trial counsel and the second made serious allegations of prosecutorial misconduct. After hearing extensive evidence on both claims, on April 8, 1998, the District Court entered an order granting relief on the first claim, but holding that the second was procedurally barred because it had not been fully exhausted in the state courts. *Abdur'Rahman* v *Bell*, 999 F Supp 1073 (MD Tenn 1998). The procedural bar resulted from petitioner's failure to ask the Supreme Court of Tennessee to review the lower state courts' refusal to grant relief on the prosecutorial misconduct claim. *Id.*, at 1080-1083.

The District Court's ruling that the claim had not been fully exhausted appeared to be correct under Sixth Circuit precedent[2] and it was consistent with this Court's later holding in *O'Sullivan* v *Boerckel*, 526 US 838, 144 L Ed 2d 1, 119 S Ct 1728 (1999). In response to our decision in *O'Sullivan*, however, the Tennessee Supreme Court on June 28, 2001, adopted a new rule that changed the legal landscape. See In re: Order Establishing Rule 39, Rules of the Supreme Court of Tennessee: Exhaustion of Remedies. App. 278. That new rule made it perfectly clear that the District Court's procedural bar holding was, in fact, erroneous.[3]

The warden appealed from the District Court's order granting the writ, but petitioner did not appeal the ruling that his prosecutorial misconduct claim was procedurally barred. The Court of Appeals set aside the District Court's grant of relief to petitioner, 226 F3d 696 (CA6 2000), and we denied his petition for certiorari on October 9, 2001, 534 US 970, 151 L Ed 2d 294, 122 S Ct 386. The proceedings that were thereafter initiated raised the questions the Court now refuses to decide.

On November 2, 2001, petitioner filed a motion, pursuant to Rule 60(b) of the Federal Rules of Civil Proce-

2. See *Silverburg* v *Evitts*, 993 F2d 124 (CA6 1993). Other Circuits had held that the exhaustion requirement may be satisfied without seeking discretionary review in a State's highest court. See, *e.g.*, *Dolny* v *Erickson*, 32 F3d 381 (CA8 1994); *Boerckel* v *O'Sullivan*, 135 F3d 1194 (CA7 1998).

3. Tennessee Supreme Court Rule 39 reads, in relevant part: "In all appeals from criminal convictions or post-conviction relief matters from and after July 1, 1967, a litigant shall not be required to petition for rehearing or to file an application for permission to appeal to the Supreme Court of Tennessee following an adverse decision of the Court of Criminal Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error. Rather, when the claim has been presented to the Court of Criminal Appeals or the Supreme Court, and relief has been denied, the litigant shall be deemed to have exhausted all available state remedies available for that claim." This type of action by the Tennessee Court was anticipated—indeed, invited—by the concurring opinion in *O'Sullivan* v *Boerckel*, 526 US 838, 849-850, 144 L Ed 2d 1, 119 S Ct 1728 (1999) (opinion of Souter, J.).

EXHIBIT B.

23.

dure,[4] seeking relief from the District Court judgment entered on April 8, 1998. The motion did not assert any new constitutional claims and did not rely on any newly discovered evidence. It merely asked the District Court to set aside its 1998 order terminating the habeas corpus proceeding and to decide the merits of the prosecutorial misconduct claim that had been held to be procedurally barred. The motion relied on the ground that the Tennessee Supreme Court's new Rule 39 demonstrated that the District Court's procedural bar ruling had been based on a mistaken premise.

Relying on Sixth Circuit precedent,[5] on November 27, 2001, the District Court entered an order that: (1) characterized the motion as a "second or successive habeas corpus application" governed by 28 USC § 2244 [28 USCS § 2244]; (2) held that the District Court was therefore without jurisdiction to decide the motion;[6] and (3) transferred the case to the Court of Appeals pursuant to § 1631.[7]

Petitioner sought review of that order in both the District Court and the Court of Appeals. In the District Court, petitioner filed a notice of appeal and requested a certificate of appealability. See Civil Docket for Case #: 96-CV-380, *reprinted in* App. 11. In the Court of Appeals, petitioner filed the notice of appeal, again sought a certificate of appealability, and moved the court to consolidate the appeal of the District Court's Rule 60(b) ruling with his pre-existing appeal of his original federal habeas petition. *Id.*, at 28. On January 18, 2002, the Court of Appeals entered an order that en-

4. Federal Rule of Civil Procedure 60(b) provides, in part: "On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment . . . upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken."

5. *McQueen* v *Scroggy*, 99 F3d 1302, 1335 (CA6 1996) ("We agree with those circuits that have held that a Rule 60(b) motion is the practical equivalent of a successive habeas corpus petition . . .")

6. Title 28 USC § 2244(b)(ii)(3)(A) [28 USCS § 2244(b)(ii)(3)(A)] provides: "Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application."

7. Section 1631 provides: "Whenever a civil action is filed in a court as defined in section 610 of this title or an appeal, including a petition for review of administrative action, is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred." Under Sixth Circuit precedent, a district court presented with a "second or successive" habeas application must transfer it to the Court of Appeals pursuant to that section. See *In re Sims*, 111 F3d 45 (CA6 1997).

EXHIBIT B.

24.

7

dorsed the District Court's disposition of the 60(b) motion, specifically including its characterization of the motion as a successive habeas petition. Nos. 98-6568/6569, 01-6504 (CA6), p 2, App. 35, 36. In that order the Court of Appeals stated that the "district court properly found that a Rule 60(b) motion is the equivalent of a successive habeas corpus petition," and then held that Abdur'Rahman's petition did not satisfy the gateway criteria set forth in § 2244(b)(2) for the filing of such a petition. *Ibid.* It concluded that "all relief requested to this panel is denied." *Id.*, at 37. In a second order, entered on February 11, 2002, Nos. 98-6568/6569, 01-6504 (CA6), App. 38, the Court of Appeals referred to additional filings by petitioner and denied them all.[8]

Thereafter we stayed petitioner's execution and granted his petition for certiorari to review the Court of Appeals' disposition of his Rule 60(b) motion.[9] 535 US 1016, 152 L Ed 2d 620, 122 S Ct 1605 (2002).

II

The answer to the jurisdictional questions that we asked the parties to address depends on whether the motion that petitioner filed on November 2, 2001, was properly styled as a Rule 60(b) motion, or was actually an application to file a second or successive habeas corpus petition, as the Court of Appeals held. If it was the latter, petitioner clearly failed to follow the procedure specified in 28 USC § 2244(b)(3)(A) [28 USCS § 2244(b)(3)(A)].[10] On the other hand, it is clear that if the motion was a valid Rule 60(b) filing, the Court of Appeals had jurisdiction to review the District Court's denial of relief—either because that denial was a final order from which petitioner filed a timely appeal, or because the District Court had transferred the matter to the Court of Appeals pursuant to § 1631.[11] In either event the issue was properly before the Court of Appeals, and—since the jurisdictional bar in § 2244(b)(3)(E) does not apply to Rule 60(b) motions—we certainly have jurisdiction to review the orders that the Court of Appeals

8. One paragraph in that order reads as follows: "The order construing an ostensible Rule 60(b) motion as an application for leave to file a second habeas corpus petition . . . is not an appealable order in No. 01-6504, which is therefore DISMISSED for lack of jurisdiction." App. 39.

9. The two questions presented in the certiorari petition read as follows: "1. Whether the Sixth Circuit erred in holding, in square conflict with decisions of this Court and of other circuits, that every Rule 60(b) Motion constitutes a prohibited 'second or successive' habeas petition as a matter of law.

"2. Whether a court of appeals abuses its discretion in refusing to permit consideration of a vital intervening legal development when the failure to do so precludes a habeas petitioner from ever receiving any adjudication of his claims on the merits." Pet. for Cert.

10. Section 2244(b)(3)(A) provides: "Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application." Petitioner filed no such motion.

11. It is of particular importance that petitioner filed his notice of appeal in both the Court of Appeals and the District Court. Regardless of whether the District Court's transfer order divested that court of jurisdiction to conduct further proceedings, petitioner challenged the specific characterization of his 60(b) motion before the two possible courts that could hear his claim.

EXHIBIT B.

25.

8

entered on January 18 and February 11, 2002. Thus, in order to resolve both the jurisdictional issues and the questions presented in the certiorari petition, it is necessary to identify the difference, if any, between a Rule 60(b) motion and a second or successive habeas corpus application.

As Judge Tjoflat explained in a recent opinion addressing that precise issue, the difference is defined by the relief that the applicant seeks. Is he seeking relief from a federal court's final order entered in a habeas proceeding on one or more of the grounds set forth in Rule 60(b), or is he seeking relief from a state court's judgment of conviction on the basis of a new constitutional claim? Referring to the difference between a Rule 60(b) motion and a "second or successive" habeas corpus petition, Judge Tjoflat wrote:

> "The distinction lies in the harm each is designed to cure. A 'second or successive' habeas corpus petition, as discussed above, is meant to address two specific types of constitutional claims by prisoners: (1) claims that 'rel[y] on a new rule of constitutional law,' and (2) claims that rely on a rule of constitutional law and are based on evidence that 'could not have been discovered previously through the exercise of due diligence' and would establish the petitioner's factual innocence. 28 USC § 2244(b)(3)(A) [28 USCS § 2244(b)(3)(A)]. Neither of these types of claims challenges the district court's previous denial of relief under 28 USC § 2254 [28 USCS § 2254]. Instead, each alleges that the contextual circumstances of the proceeding have changed so much that the petitioner's conviction or sentence now runs afoul of the Constitution.
>
> "In contrast, a motion for relief under Rule 60 of the Federal Rules of Civil Procedure contests the integrity of the proceeding that resulted in the district court's judgment.
>
> . . . . . .
>
> "When a habeas corpus petitioner moves for relief under, for example, Rule 60(b)(3), he is impugning the integrity of the district court's judgment rejecting his petition on the ground that the State obtained the judgment by fraud. Asserting this claim is quite different from contending, as the petitioner would in a successive habeas corpus petition, that his conviction or sentence was obtained 'in violation of the Constitution or laws or treaties of the United States.' 28 USC § 2254(a) [28 USCS § 2254(a)].
>
> "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.
>
> . . . . . .
>
> "As a final note, I would add that this rule is not just consistent with case law, but it also comports with the fair and equitable administration of justice. If, for example, a death row inmate could show that the State indeed committed fraud upon the district court dur-

ing his habeas corpus proceeding, it would be a miscarriage of justice if we turned a blind eye to such abuse of the judicial process. Nevertheless, this is the result that would occur if habeas corpus petitioners' Rule 60(b) motions were always considered 'second or successive' habeas corpus petitions. After all, a claim of prosecutorial fraud does not rely on 'a new rule of constitutional law' and may not 'establish by clear and convincing evidence that . . . no reasonable factfinder would have found the applicant guilty of the underlying offense.' 28 USC § 2244(b)(2) [28 USCS § 2244(b)(2)]. It is a claim that nonetheless must be recognized." *Mobley* v *Head*, 306 F3d 1096, 1100-1105 (CA11 2002) (dissenting opinion).

* Judge Tjoflat's reasoning is fully consistent with this Court's decisions in *Stewart* v *Martinez-Villareal*, 523 US 637, 140 L Ed 2d 849, 118 S Ct 1618 (1998), and *Slack* v *McDaniel*, 529 US 473, 146 L Ed 2d 542, 120 S Ct 1595 (2000). Applying that reasoning to the present case, it is perfectly clear that the petitioner *filed* a proper Rule 60(b) motion. (Whether it should have been granted is a different question.) The motion did not purport to set forth the basis for a second or successive challenge to the state-court judgment of conviction. It did, however, seek relief from the final order entered by the federal court in the habeas proceeding, and it relied on grounds that are either directly or indirectly identified in Rule 60(b) as possible bases for such relief. Essentially it submitted that the "changes in the . . . legal landscape," *Agostini* v *Felton*, 521 US 203, 215, 138 L Ed 2d 391, 117 S Ct 1997 (1997), effected by Tennessee's new rule demonstrated that the District Court's procedural bar ruling rested on a mistaken premise. In petitioner's view, that mistake constituted a "reason justifying relief from the operation of the judgment" within the meaning of Rule 60(b)(6). Whether one ultimately agrees or disagrees with that submission, it had sufficient arguable merit to persuade at least four Members of this Court to grant his certiorari petition.

III

In the District Court petitioner filed a comprehensive memorandum supporting his submission that his Rule 60(b) motion should be granted. App. 171-267. He has argued that the evidence already presented to the court proves that the prosecutor was guilty of serious misconduct; that affidavits executed by eight members of the jury that sentenced him to death establish that they would have not voted in favor of the death penalty if they had known the facts that the prosecutor improperly withheld or concealed from them; and that it is inequitable to allow an erroneous procedural ruling to deprive him of a ruling on the merits. In this Court, a brief filed by former prosecutors as *amici curiae* urges us to address the misconduct claim, stressing the importance of condemning the conduct disclosed by the record.[12] Arguably it would be appropriate for us to do so in order to answer the second question presented in the certiorari petition. In my opinion, however, correct procedure requires that the merits of the Rule 60(b) motion be addressed in the first instance by the District Court.

The District Court has already

12. See Brief for Former Prosecutors James F. Neal et al. as *Amici Curiae* 24.

EXHIBIT B. 27.

10

heard the extensive evidence relevant to the prosecutorial misconduct claim, as well as the evidence that persuaded both the Tennessee appellate court and two federal courts that petitioner's trial counsel was ineffective (relief was denied on this claim based on a conclusion that counsel's ineffectiveness did not affect the outcome of the trial). That court is, therefore, in the best position to evaluate the equitable considerations that may be taken into account in ruling on a Rule 60(b) motion. Moreover, simply as a matter of orderly procedure, the court in which the motion was properly filed is the one that should first evaluate its merits.

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. The "federalism" concerns that motivated this Court's misguided decisions in *Coleman* v *Thompson,* 501 US 722, 115 L Ed 2d 640, 111 S Ct 2546 (1991),[13] and *O'Sullivan* v *Boerckel,* 526 US 838, 144 L Ed 2d 1, 119 S Ct 1728 (1999), do not even arguably support the Sixth Circuit's disposition of petitioner's motion. I would therefore vacate the orders that that court entered on January 18 and February 11, 2002, and remand the case to that court with instructions to direct the District Court to rule on the merits of the 60(b) motion.

13. "This is a case about federalism." 501 US, at 726, 115 L Ed 2d 640, 111 S Ct 2546.

28.

PETITION FOR THE UNITED STATES SENATE COMMITTEE ON THE JUDICIARY TO INVESTIGATE U.S. SENIOR DISTRICT COURT JUDGE ROBERT G. RENNER, DISTRICT OF MINNESOTA, AS TO HIS BREACH OF PUBLIC TRUST AND ABUSE OF JUDICIAL POWER.

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To: Senator Charles E. Grassley

We, the undersigned citizens of these United States, urgently call upon you to investigate and present your findings to the Committee on the Judiciary as to the breach of public trust and abuse of judicial power committed by U.S. District Court Judge Robert G. Renner, District of Minnesota, regarding his extrajudicial bias towards John Gregory Lambros.

On August 9, 2002, Mr. Lambros mailed a two page letter and eighty one page affidavit (including exhibits) to your office outlining the illegal actions of Judge Renner from 1975 to present. Also, on March 20, 2002, Mr. Lambros mailed an addendum to his August 2001 letter and affidavit to your office. The addendum offered additional information and proof, along with court documents, concerning the conduct of Judge Renner. Both the August 9, 2001 and the March 20, 2002 documents are available for review and downloading via Mr. Lambros' web site, "BOYCOTT BRAZIL:" www.brazilboycott.org

Judge Renner was the U.S. Attorney in 1976 who illegally indicted Mr. Lambros for an assault on federal property that never occurred, and then Mr. Renner falsified sentencing documents in this case to state that Mr. Lambros was indicted, pled guilty to, and was sentenced for murder. On February 10, 1997, Judge Renner used the illegal March 24, 1976 indictment/ conviction to increase Mr. Lambros' current federal sentence and purposely and maliciously misinterpreted the domestic laws of Brazil under which Mr. Lambros was governed, due to Mr. Lambros' extradition from Brazil to the United States.

The United States Supreme Court made clear, in an opinion by Stevens, J., joined by Brennan, Marshall, Blackmun., and Kennedy, JJ., that "Justice must satisfy the appearance of justice," under Title 28 U.S.C. S 455(a), which provides, in relevant part: "(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned. (b) He shall also disqualify himself in the following circumstances: (3) Where he has served in government employment and in such capacity participated as counsel, advisor or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy." See, LILJEBERG vs. HEALTH SERVICES CORP., 486 U.S. 847, 100 L.Ed.2d 855, 108 S.Ct. 2194 (1988).

We find ample basis in the official record to conclude that an objective observer would have

EXHIBIT C.

29.

12

questioned Judge Renner's impartiality toward Mr. Lambros in his February 10, 1997 ruling, and any rulings thereafter, when Judge Renner had been the 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.

The time has come to rectify this oversight and to take the necessary steps to maintain public confidence in the impartiality of our judiciary. May justice prevail and attempt to heal the wounds of Mr. Lambros and his family members.

Sincerely,

The Undersigned

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PETITION FOR THE UNITED STATES SENATE COMMITTEE ON THE JUDICIARY TO INVESTIGATE U.S. SENIOR DISTRICT COURT JUDGE ROBERT G. RENNER, DISTRICT OF MINNESOTA, AS TO HIS BREACH OF PUBLIC TRUST AND ABUSE OF JUDICIAL POWER.

We endorse the PETITION FOR THE UNITED STATES SENATE COMMITTEE ON THE JUDICIARY TO INVESTIGATE U.S. SENIOR DISTRICT COURT JUDGE ROBERT G. RENNER, DISTRICT OF MINNESOTA, AS TO HIS BREACH OF PUBLIC TRUST AND ABUSE OF JUDICIAL POWER. Petition to Senator Charles E. Grassley.

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15.	Lincoln Douglas Jeanes	
14.	Charles Randell Greer	
13.	Douglas W. Thompson	
12.	James B. Harmon	
11.	Charles B. Nabors	
10.	Johnny A. Privett	
9.	George Kalomeris	
8.	John G. Lambros	
7.	Roland A. Hazelton	
6.	Steve Chase	
5.	Johnnie ray flaugher	
4.	Carole Guest	
3.	Ryan McReynolds	
2.	steve davis	
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	Name	Comments
67.	Lisa Cornell	
66.	john f. wells	
65.	Joshua Cornelius	
64.	TANYA	
63.	BOB HARTLEY	
62.	Rita	
61.	mark cain	
60.	Lavergne Chramosta	Power to the people! why is it "Corporate America" has to decide for us?
59.	Brian Lee Fisk	This is not acceptable
58.	Jean-Charles CABANEL	
57.	Buendia-Aulet Gabriel	
56.	Justin Holmes	
55.	Noe Amaya	
54.	Tyson Dunn	
53.	Andrea Wells	
52.	Justin Micheau	
51.	Philip Ratzsch	
50.	Adam Dunko	
49.	Sage Lara	I hope justice will prevail
48.	Sheila Marie Reynolds	If justice is to prevail, then it must exist in all our endeavours...
47.	Lorie Ann Jeanes	Hey John, the Brazillian Secret Police trashed my apartment and asked about you. Tell Dave and George "Hi". - Dewey, Cheetum & Howe
46.	BILL G. AMANATIDIS	
45.	Dave Donahue	SCREW YOU, BRAZIL!
44.	Jon Burek	
43.	Joseph Eugene Kennedy	
42.	Jodie Lynn Summers	I am a criminal justice major in West Virginia. I am currently researching a paper on corruption within the criminal justice system. I have been overwhelmed by what I have found. I believe it is time to take a stand against this very thing. I admire the courage of those of you who refuse to stop fighting for justice. I intend to fight the good fight and I am glad to see that I am not alone in this fight. BRAVO!!!!!!!!!!!!!!!!!!!!
41.	Jon Dziadon	Please look into this matter.
40.	Dwayne B. Cooper	
39.	David T. Rhodes	
38.	Todd Vassell	
37.	Tony Emery	
36.	Ronny V. Green	
35.	Theodore Tiger	
34.	Jimmy E. Ennis	
33.	Thomas J. Bartello	
32.	Richard C. Herrin	
31.	Michael S. Lancellotti	
30.	David S. Mack	
29.	Samuel R. Queen	
28.	Horace Barnes	
27.	Michael J. Powell	
26.	Euka W. Wadlington	
25.	Henry Borelli	
24.	Compton D. Jones	
23.	Ron Simmat	

33.

EXHIBIT C.

16