NOVEMBER 9, 2005

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CLERK OF THE COURT
U.S. Court of Appeals for the Eighth Circuit
24.329 Thomas F. Eagleton U.S. Courthouse
111 South Tenth Street
St. Louis, MO 63102-1116
U.S. CERTIFIED MAIL NO. 7002-2410-0001-3729-9722

RE: USA vs. LAMBROS, Appeal No. 05-3383

Dear Clerk:

Attached for filing is one (1) original and five (5) copies, as per FRAP 40, of the following:

1. PETITION FOR REHEARING AND/OR PETITION FOR REHEARING EN BANC. FRAP 40. **Dated: November 09, 2005.**

Thank you in advance for your 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 document/motion was mailed within a stamped addressed envelope from the USP Leavenworth legal mailbox on this **9th DAY OF NOVEMBER, 2005, to:**

1. The clerk of the court, as addressed above;
2. Jeffrey S. Paulsen, Attorney; Office of the U.S. Attorney, 600 U.S. Courthouse, 300 South Fourth Street, Minneapolis, Minnesota 55415.

John Gregory Lambros, Pro Se

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA,	*	**APPEAL NO. 05-3383**
Appellee,	*	U.S. DISTRICT COURT FOR THE DISTRICT OF MINNESOTA - Court/Agency Numbers:
vs.	*	Criminal No. 4-89-82(5)(DSD);
JOHN GREGORY LAMBROS,	*	Civil No.: No Number Assigned.
Appellant.	*	**AFFIDAVIT FORM**

PETITION FOR REHEARING AND/OR PETITION FOR REHEARING EN BANC. FRAP 40.

NOW COMES the Appellant, JOHN GREGORY LAMBROS, Pro Se, (hereinafter Movant) and requests this Honorable Court for a Petition for Rehearing and/or Petition for Rehearing En Banc for the issuance of a Certificate of Appealability, that was denied by Circuit Judges Riley, Fagg, and Gruender on November 1, 2005, in this above entitled action.

Movant Lambros believes that a Certificate of Appealabilty is justified as issues of fact and law that the district court found to be close, difficult, of first impression, subject to conflicting outcomes, and simply a matter of judgment beyond simple deduction from applicable legal precepts provide sufficient "substance" to require a Certificate of Appealability, when the district court stated **CASTRO vs. U.S., 157 L.Ed.2d 778 (2003)** did not apply to Movant because he was not a pro se litigant, even though Movant filed the Rule 33 Motions Pro Se:

> "At defendant's re-sentencing hearing on February 10, 1997, the district court did recharacterize defendant's purported Rule 33 motions as a § 2255 motion. However, defendant was not a pro se litigant, but rather was represented by attorney Colia Ceisel at the re-sentencing. "[B]ecause he was represented by counsel and thus in the same position as other litigants who rely on their attorney's," defendant was not entitled to a legal explanation from the court. BURGS v. JOHNSON COUNTY, 79 F.3d 701, 702 (8th Cir. 1996) (Supreme Court holding

2.

that a pro se prisoner's notice of appeal is timely filed upon delivery to prison authorities does not apply to prisoner represented by counsel, even though prisoner filed notice pro se). The CASTRO rule does not apply to defendant." (emphasis added)

EXHIBIT A: November 15, 2004, Filed November 16, 2004, **ORDER** by Judge Doty in this action, Page 3.

Movant also believes that the Honorable Circuit Judges Riley, Fagg, and Gruender should grant a Certificate of Appealability 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 this Movant in the district court or this court, the fact that other COEQUALS or higher courts have REACHED CONFLICTING VIEWS suffices to require the certificate of an appeal. See, LYNCE vs. MATHIS, 519 U.S. 433, 436 (1997)(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).

The following issues have been resolved favorably to other petitioner's in other circuits for granting a certificate of appealability. Movant requests this court to also resolve the following issues favorably to Movant.

I. THE DISTRICT COURT DECISION AND/OR PRIOR ADVERSE CIRCUIT RULING RELIED UPON CASELAW THAT HAS BEEN QUESTIONED AND UNDERMINED BY MORE RECENT DECISIONS OF OTHER CIRCUITS.

1. Judge Doty cited BURGS vs. JOHNSON COUNTY, 79 F.3d 701, 702 (8th Cir. 1996), See EXHIBIT A, as his authority in stating CASTRO vs. U.S. does not apply to Movant Lambros, as Movant was represented by an attorney.

2. An intervening change in the law has occurred that mandates this

court's reconsideration in its rulings in BURGS vs. JOHNSON. The following facts exist:

a. In February 1996, this court decided BURGS vs. JOHNSON, and cited U.S. vs. KIMBERLIN, 898 F.2d 1262, 1265 (7th Cir.), cert. denied, 112 L.Ed.2d 417 (1990), in support of the fact HOUSTON vs. LACK, 101 L.Ed.2d 245 (1988) (HOUSTON) only applies to prisoner's unrepreseted by attorney's. See, **EXHIBIT B.**

b. In May 2004, the Seventh Circuit overruled its decision in U.S. vs. KIMBERLIN in U.S. vs. CRAIG, 368 F.3d 738 (7th Cir. 2004), See, **EXHIBIT C.** when it stated:

> "As we said in U.S. vs. KIMBERLIN, 898 F.2d 1262, 1265 (7th Cir. 1990), a prisoner who has the assistance of counsel need only pick up the phone. ..... Yet KIMBERLIN addressed the status of the mailbox rule when it was a matter of common law, having been invented in HOUSTON vs. LACK, ... Rule 4 was rewritten in 1993 (and revised in 1998) not only to make the mailbox rule official but also to impose some limits."
>
> "Today the mailbox rule depends on Rule 4(c), not on how KIMBERLIN understood HOUSTON. Rule 4(c) applies to "an inmate confined in an institution". Craig meets that description. A **court ought not pencil "UNREPRESENTED"** or any extra word into the text of Rule 4(c), which as written is neither incoherent nor absurd. Craig therefore is entitled to use the mailbox rule. Accord, U.S. vs. MOORE, 24 F.3d 624, 626 n.3 (4th Cir. 1994).

See, U.S. vs. CRAIG, 368 F.3d 738, 740 (7th Cir. 2004)

3. This Court's ruling in BURGS vs. JOHNSON addressed F.R.A.P. RULE 4(a), 28 U.S.C.A. in February 1996. Rule 4 was rewritten in 1993 (and revised in 1998). See, U.S. vs. CRAIG, 368 F.3d. at 740; U.S. vs. MOORE, 24 F.3d 624, 626 n.3 (4th Cir. 1994). See, **EXHIBIT D.**(U.S. vs. MOORE, 24 F.3d 624 (4th Cir. 1994).

> "Likewise, there is little justification for limiting HOUSTON's applicability to situations where the prisoner **IS NOT REPRESENTED BY COUNSEL."** (emphasis added)

See, MOORE, 24 F.3d at 625.

> "We are aware that the Seventh Circuit has addressed

> **THIS PRECISE ISSUE AND REACHED THE OPPOSITE CONCLUSION.** U.S. vs. KIMBERLIN, 898 F.2d 1262 (7th Cir.), cert. denied, 489 US 1990). Though the KIMBERLIN court seemed to assume that HOUSTON would be applicable in the criminal context, it nevertheless distinguished HOUSTON on the ground that KIMBERLIN, though filing his notice of appeal from prison, was represented by counsel. (emphasis added).
>
> We believe that our sister circuit has interpreted HOUSTON too narrowly. **THE SUPREME COURT DID NOT EXPRESSLY LIMIT HOUSTON'S APPLICATION TO CASES INVOLVING UNREPRESENTED PRISONERS,** and the Seventh circuit apparently did not consider the possibility that even represented prisoners might be prevented from timely communications with counsel. (emphasis added)
>
> We therefore hold that HOUSTON governs all notices of appeal filed by prisoners in a criminal proceeding, without regard to whether they are represented by counsel. There is simply no good reason to hold otherwise.

See. U.S. vs. MOORE, 24 F.3d at 626 (4th Cir. 1994) **EXHIBIT D.**

> The new rule clearly applies to criminal cases, AND DOES NOT DISTINGUISH BETWEEN REPRESENTED PRISONERS AND THOSE ACTING PRO SE. (emphasis added)

See, U.S. vs. MOORE, 24 F.3d at 626 Fn. 3 **EXHIBIT D.**

4. SUMMARY: The foregoing cases illustrate that:

a. BURGS vs. JOHNSON, (1996) has been underminded, as RULE 4 was rewritten in 1993 and revised in 1998. BURGS addressed the filing of a timely notice of appeal and "whether HOUSTON vs. LACK, ... applies to an appellant who was represented by counsel in the district court."

b. BURGS vs. JOHNSON, does not address petitioner's that file timely Rule 33 Motions with the Court who are represented by counsel.

c. BURGS vs. JOHNSON, does not states "defendant was not entitled to a legal explanation from the court." See, November 15, 2004, ORDER, by Judge Dody, Page 3, **EXHIBIT A.** The district court did not offer case law to support this statement and/or decision.

d. There is little justification for limiting CASTRO vs. U.S., 157 L.Ed.2d 778 (2003) applicability to situations where the pro se litigant and/or prisoner isn't represented by counsel. The Supreme Court did not expressly limit CASTRO vs. U.S., application to cases involving unrepresented prisoners and/or pro se litigants.

other jurists have in fact come to a different conclusion and that a reasonable doubt exists as to whether the the district court fully and fairly adjudicated the matter. Movant Lambros requests this Court to issue a COA in this issue.

II. CASTRO vs. UNITED STATES, 157 L.Ed.2d 778 (2003) APPLIES RETROACTIVELY.

5. The district court did not state CASTRO was not retroactive. The government stated within its opposition dated November 3, 2004, that CASTRO was not retroactive and stated, "While Lambros relies on a contrary Seventh Circuit case, WILLIAMS vs. U.S., 366 F.3d 438 (7th Cir. 2004)(per curiam), that per curiam decision contains no anlaysis of the issue and is not binding on this Court."

6. Movant Lambros states that both the Seventh and Second Circuit have applied CASTRO retroactively. See, WILLIAMS vs. U.S., 366 F.3d 438, 439 (7th Cir. 2004)(per curiam); also see, SIMON vs. U.S., 359 F.3d 139 (2nd Cir. 2004). See, July 28, 2005, "MOTION FOR ISSUANCE OF CERTIFICATE OF APPEALABILITY," Page 8, Paragraph 18, to the U.S. District Court for the District of Minnesota in this action.

7. The foregoing cases illustrate that other jurists have in fact come to a different conclusion, on precisely the same facts. Movant Lambros requests this court to issue a COA to Movant on this issue.

III. THE DISTRICT COURT APPLIED A NOVEL INTERPRETATION OF LAW IN DENYING APPELLANT LAMBROS THE PROTECTION TO THE GREAT WRIT "HABEAS CORPUS, TITLE 28 U.S.C. § 2255", AS EMBODIED

WITHIN THE CONSTITUTION ITSELF, ART. I, § 9, cl.2, WHEN IT RECHARACTERIZED APPELLANT LAMBROS' RULE 33 MOTIONS AS A MOTION FOR RELIEF UNDER 28 U.S.C. § 2255, WHICH RESTRICTED APPELLANT'S RIGHT TO FILE SECOND OR SUCCESSIVE PETITIONS UNDER § 2255.

8. The district court has denied this Appellant his right to petition for a WRIT OF HABEAS CORPUS, Title 28 U.S.C. §2255, a right that is embodied within the United States Constitution, Art. I, §9, cl. 2, when the RESENTENCING court on February 10, 1997, recharacterized Appellant's RULE 33 Motions as his first motion for postconviction relief under 28 U.S.C. §2255, and did not provide Appellant an opportunity to withdraw or amend his motion. See, CASTRO vs. U.S., 157 L.Ed.2d 778 (2003).

9. On August 16, 2005, the district stated that Appellant Lambros had not made a substantial showing of the denial of a constitutional right and that the court found no merit in Appellant Lambros request to:

a. not allow Appellant Lambros' 1997 RULE 33 MOTIONS be considered his first Title 28 U.S.C. § 2255.

due to the U.S. Supreme Court ruling in CASTRO vs. U.S..

10. The district court "extinguish[ed] the petitioner's [Lambros] **ONE CLEAR CHANCE AT HABEAS RELIEF** under the AEDPA" without Appellant Lambros' consent. See, RAINERI vs. U.S., 233 F.3d 96, 100 (1st Cir. 2000) ("The Petitioner's original motion was not premised upon section 2255 at all, but rather, upon RULES 33 and 35. Having dictated the terms of engagement, the petitioner was entitled to have his motion decided as he had framed it." Id. at 100). On September 6, 2002, this Court stated in MORALES vs. U.S., 304 F.3d 764, 767 (8th Cir. 2002):

> "When a district court intents to reclassify a pro se litigant's pleading as a §2255 motion, it must do two things. ..... Because the district court did not provide Morales with this information and an opportunity to choose which course of action to take, this case must be remanded so Morales may decide whether to consent to reclassification or to withdraw his motion."

11. The district court on February 10, 1997, undermined this Court's circuit ruling in allowing a motion under §2255, Appellant's RULE 33 Motion converted/ recharacterized as a §2255, at RESENTENCING, when the district court knew that Appellant was filing a direct appeal as to issues raised at the February 10, 1997 RESENTENCING. See. U.S. vs. THOMPSON, 972 F.2d 201, 204 (8th Cir. 1992) ("Claims of ineffective assistance of counsel generally may not be raised on direct appeal, but rather are to be first presented in the district court pursuant to §2255."); U.S. vs. ESPOSITO, 771 F.2d 283, 288 (7th Cir. 1985) ("A motion under §2255 is ordinarily improper during the pendency of a direct appeal from a conviction, ...) "The writ of habeas corpus will not be allowed to do service for an appeal." See, SUNAL vs. LARGE, 91 L.Ed. 1982 (1947), Quoting: SOSA vs. U.S., 550 F.2d 244, 246 (5th Cir. 1977)(collecting cases).

12. Appellant Lambros' attorney did file a direct appeal as to the February 10, 1997 RESENTENCING. Therefore, a motion under §2255 was improper during the pendency of the direct appeal.

13. "The writ of habeas corpus plays a vital rule in protecting constitutional rights." See, SLACK vs. McDANIEL, 146 L.Ed.2d 542, 554 (2000) Also, the right to petition for a WRIT OF HABEAS CORPUS, Title 28 U.S.C. §2255 is embodied with the U.S. Constition, Art. I, §9, cl.2. Section 2255 provides for relief where the sentence was imposed (1) in violation of constitutional laws of the United States; (2) where the court was without jurisdiction to impose the Petitioner's sentence; (3) where the sentence was in excess of the maximum authorized by law; and (4) where the sentence is otherwise subject to collatateral attack. See, HILL vs. U.S., 7 L.Ed. 2d 417, 420 (1962). Appellant Lambros was denied his valuable right to **ONE FULL ROUND OF FEDERAL HABEAS REVIEW.**

14. The U.S. Attorney's Office can hardly claim a legitimate interest in the finality of Appellant Lambros' judgment, as the U.S. Attorney has experienced a windfall, while Appellant has been deprived - contrary to congressional intent and

the U.S. Supreme Court's decision in CASTRO vs. U.S., 157 L.Ed.2d 778 (2003).

15. Appellant only seeks to challenge the legality of the imposition of his sentences by the district court pursuant to Section 2255, due to:

a. Claims of ineffective assistance of counsel;

that he was denied. Appellant Lambros was never allowed to raise claims of ineffective assistance of counsel after his counsel appealed his sentencing.

16. Appellant Lambros requests this court to issue a COA on this issue.

CONCLUSION

17. For all of the above-stated reasons, Appellant Lambros requests this Honorable Court for a Petition for Rehearing and/or Petition for Rehearing En Banc for the issuance of a Certificate of Appealability, that was denied on on November 1, 2005, in this action.

18. I JOHN GREGORY LAMBROS, declare under the penalty of perjury that the foregoing is true and correct. See, Title 28 USCA § 1746.

EXECUTED: November 09, 2005.

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Criminal No. 4-89-82(5)(DSD)

United States of America,

Plaintiff,

v. **ORDER**

John Gregory Lambros,

Defendant.

This matter is before the court upon the motion of defendant John Gregory Lambros to vacate a judgment due to intervening change in controlling law. After a review of the file, record and proceedings in the matter and for the reasons stated, defendant's motion is denied.

BACKGROUND

On January 27, 1994, defendant was sentenced to a term of life imprisonment, along with concurrent terms of 120 and 360 months on the other counts of conviction. On February 10, 1997, defendant was re-sentenced by Senior United States District Judge Robert G. Renner to a term of 360 months imprisonment. Defendant subsequently filed various motions to vacate the judgment and on several occasions unsuccessfully sought relief from the sentence pursuant to 28 U.S.C. § 2255. Defendant's first collateral attack purportedly sought relief pursuant to Rule 33 of the Federal Rules

FILED NOV 16 2004
JUDGE
DEPUTY CLERK

EXHIBIT A.

(280)

of Criminal Procedure, but was construed as a § 2255 motion. Defendant's second attempt was denied both as a successive § 2255 motion and for want of merit. Defendant's third attempt was denied for lack of jurisdiction, because defendant had failed to obtain permission from the court of appeals to file a successive habeas petition, as required by 28 U.S.C. § 2255.[1]

Defendant now moves the court to vacate the February 1997 judgment[2] due to an alleged intervening change in the law. Defendant also requests permission to file an initial § 2255 motion.

DISCUSSION

Defendant argues that a recent United States Supreme Court holding requires this court to vacate Judge Renner's February 1997 judgment and allow defendant to file an initial § 2255 motion. The Supreme Court held that when a district court recharacterizes a pro

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[1] Defendant has since moved (1) to vacate all judgments and orders by Judge Robert G. Renner pursuant to Fed. R. Civ. P. 60(b)(6), (2) for a certificate of appealability ("COA") of the dismissal of the purported Rule 60(b) motion, (3) to vacate the judgment denying his Rule 60(b) motion due to alleged intervening changes in the law, (4) to alter or amend the order refusing to vacate, pursuant to Fed. R. Civ. P. 59 and (5) for a certificate of appealability ("COA") of the dismissal of the second Rule 60(b) motion.

[2] It is unclear whether defendant requests the court to vacate the re-sentencing judgment or the denial of his Rule 33 motions. However, as described herein, the alleged change in law does not apply to defendant, so no basis exists for either form of relief.

EXHIBIT A.

se litigant's motion as a first § 2255 motion, the court must (1) notify the litigant of its intent to recharacterize, (2) warn the litigant that such recharacterization will subject any subsequent § 2255 motion to the "second or successive" restriction and (3) provide the litigant the opportunity to withdraw or amend the motion. Castro v. United States, 124 S. Ct. 786, 792 (2003). At defendant's re-sentencing hearing on February 10, 1997, the district court did recharacterize defendant's purported Rule 33 motions as a § 2255 motion.[3] However, defendant was not a pro se litigant, but rather was represented by attorney Colia Ceisel at the re-sentencing. "[B]ecause he was represented by counsel and thus in the same position as other litigants who rely on their attorneys," defendant was not entitled to a legal explanation from the court. Burgs v. Johnson County, 79 F.3d 701, 702 (8th Cir. 1996) (Supreme Court holding that a pro se prisoner's notice of appeal is timely filed upon delivery to prison authorities does not apply to prisoner represented by counsel, even though prisoner filed notice pro se). The Castro rule therefore does not apply to defendant.

[3] The court reasoned that rather than dismiss defendant's motions as untimely or not directly related to the proceedings, it could address the merits of the motions pursuant to § 2255.

EXHIBIT A.

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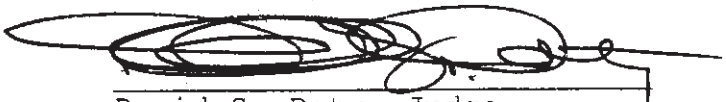
CONCLUSION

Accordingly, **IT IS HEREBY ORDERED** that defendant's motion to vacate judgment due to intervening change in controlling law [Docket No. 275] is denied.

Dated: November 15th, 2004



David S. Doty, Judge
United States District Court

EXHIBIT A.

13.

firmed in part, reversed in part and remanded to the district court for further proceedings consistent with this opinion.

Nathanial L. BURGS, Appellant,

v.

JOHNSON COUNTY, IOWA; Bob Carpenter, Johnson County Sheriff Department; Johnson County Jail; Sgt. Wagner, Johnson County Jail Administrator; 3 Unknown Female Control Room Operators; Sue Koshatra, Johnson County Deputy Sheriff; Deputy Sheriff Richardson, Johnson County; Hipple, Johnson County Deputy Sheriff; David Bell, Deputy Sheriff Johnson County; Dr. Bozek, County Coroner; Bell, Johnson County Deputy Sheriff; Robert Carpenter; Sue Koshatka, Appellees.

No. 95–1658.

United States Court of Appeals,
Eighth Circuit.

Submitted Jan. 5, 1996.

Decided Feb. 29, 1996.

Prisoner brought civil rights action against multiple defendants, including county, and county jail. The United States District Court for the Southern District of Iowa, Harold D. Vietor, J., granted summary judgment for defendants. Plaintiff appealed. The Court of Appeals held that plaintiff's pro se filing of motion did not exempt plaintiff from time limit for filing appeal.

Dismissed.

1. Federal Courts ⇐667

Prisoner's pro se filing of notice of appeal was not timely filed upon delivery to prison authorities for forwarding to court, rather than upon receipt by clerk, since prisoner was represented by counsel at trial, and so was subject to same requirements as other litigants who rely on their attorneys to file timely notice of appeal. F.R.A.P.Rule 4(a), 28 U.S.C.A.

2. Federal Courts ⇐668

Timely notice of appeal is mandatory and jurisdictional. F.R.A.P.Rule 4(a), 28 U.S.C.A.

Appeal from the United States District Court for the Southern District of Iowa; Harold Vietor, Judge.

Patricia M. Hulting, Des Moines, IA, for appellant.

J. Patrick White, Iowa City, IA, for appellee.

Before McMILLIAN, WOLLMAN and LOKEN, Circuit Judges.

PER CURIAM.

Iowa inmate Nathanial Burgs appeals the district court's [1] grant of summary judgment to the county and its jail officials in his 42 U.S.C. § 1983 action. We dismiss this appeal for lack of jurisdiction.

Burgs's allegations arose out of incidents occurring while Burgs was held in Johnson County Jail as a pretrial detainee and parole violator. Both parties moved for summary judgment. The district court, accepting Burgs's facts as true, granted defendants' motion for summary judgment and denied Burgs's motion. The district court's order was entered on January 25, 1995.

[1] The record indicates that the final order and judgment were mailed to Burgs's counsel. On February 27, three days after the filing deadline had passed, Burgs filed pro se a notice of appeal and request for appointment of counsel, which was signed and dated February 22. Burgs stated in his notice of appeal that he did not receive from his attorney notice of the January 23 judgment until February 22.

1. The Honorable Harold D. Vietor, United States District Judge for the Southern District of Iowa.

14.

We granted Burgs's motion for appointment of counsel, appointed the same counsel as represented Burgs below, and directed the parties to "include in their briefs consideration of jurisdictional issues, namely whether *Houston v. Lack*, 487 U.S. 266, 108 S.Ct. 2379, 101 L.Ed.2d 245 (1988) (*Houston*), and *Hamm v. Moore*, 984 F.2d 890 (8th Cir.1992), apply to an appellant who was represented by counsel in the district court, and whether appellant Burgs's notice of appeal was timely filed."

In *Houston*, the Supreme Court held that a pro se prisoner's notice of appeal is timely filed upon delivery to prison authorities for forwarding to the court. 487 U.S. at 276, 108 S.Ct. at 2385. The Court's decision was premised on the plight of an inmate who proceeded pro se in the district court, lost, and then sought to appeal without the benefit of counsel. The Court explained that "the moment at which *pro se* prisoners necessarily lose control over and contact with their notices of appeal is at delivery to prison authorities, not receipt by the clerk." *Id.* at 275, 108 S.Ct. at 2384. We conclude that Burgs is not entitled to the benefit of *Houston* because he was represented by counsel and thus in the same position as other litigants who rely on their attorneys to file a timely notice of appeal. *See United States v. Kimberlin*, 898 F.2d 1262, 1265 (7th Cir.), *cert. denied*, 498 U.S. 969, 111 S.Ct. 434, 112 L.Ed.2d 417 (1990).

[2] A timely notice of appeal is mandatory and jurisdictional. *See Vogelsang v. Patterson Dental Co.*, 904 F.2d 427, 429 (8th Cir.1990). Without the benefit of *Houston*, Burgs's notice of appeal was untimely filed. *See* Fed.R.App.P. 4(a); *Campbell v. White*, 721 F.2d 644, 645–46 (8th Cir.1983) (notice of appeal filed two days late still untimely; untimely notice of appeal cannot serve as a motion for extension of time to file appeal). Accordingly, we dismiss. *See* 8th Cir.R. 47A(a).

Jeffrey K. RAGLAND, Appellant,

v.

Thomas E. HUNDLEY, Warden, Fort Madison Penitentiary, Appellee.

No. 95–1260.

United States Court of Appeals, Eighth Circuit.

Submitted Nov. 13, 1995.

Decided March 20, 1996.

Petitioner sought writ of habeas corpus. The United States District Court for the Southern District of Iowa, Ronald E. Longstaff, J., denied writ and petitioner appealed. The Court of Appeals, Beam, Circuit Judge, held that: (1) petitioner's felony-murder conviction in which underlying felony, willful injury, was integral part of homicide did not violate double jeopardy; (2) since petitioner was convicted of only one offense, felony-murder, no merger doctrine issue arose under Iowa's statutory merger doctrine; (3) petitioner's conviction for felony-murder did not implicate due process concerns; (4) jury instructions did not mislead jury as would support violation of due process; (5) felony murderers are not a suspect class within class of murderers as would support equal protection violation.

Affirmed.

1. Double Jeopardy ⇐150(2)

Habeas corpus petitioner's felony-murder conviction in which underlying felony, willful injury, was integral part of homicide did not violate double jeopardy as petitioner was only convicted of one crime, felony-murder. U.S.C.A. Const.Amend. 5.

2. Double Jeopardy ⇐150(2)

Double jeopardy is not implicated even when state pursues convictions and punishment for both underlying felony and felony-murder, so long as petitioner is prosecuted for both offenses in one trial and state legis-

EXHIBIT B.

entered." Fed. R.App. P. 4(a)(4)(B)(i). *See also United States v. Powers*, 168 F.3d 943, 947–48 (7th Cir.1999); *Otis v. City of Chicago*, 29 F.3d 1159, 1166 (7th Cir.1994); 16A Wright et al., Federal Practice & Procedure, § 3950.5 at 221 (3d ed.1999).

[6–10] Nevertheless, until a notice of appeal becomes effective, this court lacks jurisdiction. As we noted in *Florian*, 294 F.3d at 829, this sort of jurisdictional defect should be identified as early as possible—ideally before a case proceeds to briefing—so that the appeal may be dismissed. Such an order of dismissal should reflect that the appeal is dismissed as premature and that, although no further notice of appeal is necessary, the appeal cannot be perfected until the disposition of the motion pending in the district court. Once the motion has been decided, the district court should provide notice to the court of appeals. We shall then be able to verify that the judgment is final, that the notice of appeal has become effective and that appellate jurisdiction has vested. Any new issues raised or old issues resolved by the disposition of the post-judgment motion may then be brought to this court's attention, either by the filing of a timely amended notice of appeal or as a motion to withdraw or strike the appeal. *See* Fed. R.App. P. 4(a)(4)(B)(ii); Advisory Committee Notes to Fed. R.App. P. 4, 1993 Amendment, Note to Paragraph (a)(4), ¶¶ 3–4; *see also Life Plus Int'l v. Brown*, 317 F.3d 799, 804–05 (8th Cir.2003); *United Computer Sys., Inc. v. AT & T Corp.*, 298 F.3d 756, 761 (9th Cir.2002); *Miles v. Gen. Motors Corp.*, 262 F.3d 720, 722–23 (8th Cir.2001).

[11] If, as here, the premature notice of appeal is not discovered until significant judicial and attorney resources have been expended, the court of appeals may choose to stay the appeal until the motion is decided. *See Florian*, 294 F.3d at 829; *Webb v. Clyde L. Choate Mental Health & Dev. Ctr.*, 230 F.3d 991, 995 (7th Cir.2000); *see also Life Plus Int'l*, 317 F.3d at 804; *Union Pac. R.R. Co. v. Greentree Transp. Trucking Co.*, 293 F.3d 120, 124 (3d Cir. 2002); *United States v. McGlory*, 202 F.3d 664, 668 (3d Cir.2000) (en banc). The decision to proceed in this manner is discretionary, *see Simmons v. Reliance Standard Life Ins. Co. of Tex.*, 310 F.3d 865, 870 (5th Cir.2002) (dismissing premature appeal after briefing); *Miller v. Marriott Int'l, Inc.*, 300 F.3d 1061, 1065 (9th Cir. 2002) (same); *Square D Co.*, 107 F.3d at 450–51 (same).

[12] We choose in this case to stay the appeal. In order to prevent this appeal from languishing on the appellate docket, we also order the parties to provide periodic updates every three months concerning the status of the pending motion.

It is so ordered.

UNITED STATES of America, Plaintiff–Appellee,

v.

Kenneth N. CRAIG, Defendant–Appellant.

No. 03–2424.

United States Court of Appeals, Seventh Circuit.

Argued April 20, 2004.

Decided May 13, 2004.

Background: Defendant was convicted on guilty plea in the United States District Court for the Eastern District of Wiscon-

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Holding: The
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Dismissed.

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sin, Charles N. Clevert, J., of being felon in possession of firearm, and filed pro se notice of appeal.

Holding: The Court of Appeals, Easterbrook, Circuit Judge, held that defendant's failure to comply with mailbox rule by failing to aver that first-class postage for his notice of appeal had been prepaid could not take advantage of rule.

Dismissed.

1. **Time** ⇐3

Federal mailbox rule does not depend on whether prisoner is represented or unrepresented, but rather on whether prisoner meets conditions of governing rule. F.R.A.P.Rule 4(c), 28 U.S.C.A.

2. **Criminal Law** ⇐1081(4.1)

Federal prison inmate who failed to comply with mailbox rule by failing to aver that first-class postage for his notice of appeal had been prepaid could not take advantage of rule. F.R.A.P.Rule 4(c), 28 U.S.C.A.

Michelle L. Jacobs (argued), Office of the United States Attorney, Milwaukee, WI, for Plaintiff–Appellee.

Pamela Pepper (argued), Milwaukee, WI, for Defendant–Appellant.

Before EASTERBROOK, EVANS, and WILLIAMS, Circuit Judges.

EASTERBROOK, Circuit Judge.

Charged with possessing a firearm despite being a convicted felon, see 18 U.S.C. § 922(g), Kenneth Craig pleaded guilty and was sentenced to 57 months' imprisonment. At the conclusion of sentencing, Craig announced that he did not want to appeal. Just in case, however, the judge told Craig that his lawyer would continue to represent him through the period allowed for appeal and would file a notice at his request. Craig said that he understood.

The judgment was entered on March 12, 2003, so the time for appeal expired on March 26. See Fed. R.App. P. 4(b)(1)(A)(i), 26(a). On April 8 a notice of appeal, signed by Craig personally, arrived at the district court. When we directed the parties to address the question whether the appeal is timely, Craig's lawyer asked the district judge for a 30–day extension under Rule 4(b)(4). The application represented that Craig had changed his mind while in prison and then prepared and mailed a notice on his own because he thought that his lawyer would no longer represent him. The district court denied this motion, ruling that changing one's mind after the time for appeal has expired is not "good cause" for an extension, and that Craig is in no position to plead ignorance in light of the information furnished in open court.

Despite this ruling, Craig has bombarded us with additional statements and affidavits in an effort to show an entitlement to an appellate decision. The latest asserts that he put the notice of appeal in the prison mail system on March 20, while time remained, and that he acted *pro se* not because of any misunderstanding but because he feared that he would not be able to reach counsel by phone before the time for appeal expired. We directed the parties to brief the jurisdictional question along with the merits—which we need not reach.

Having told the district judge that he changed his mind and mailed his notice after the time for appeal expired, Craig now tells us that he appealed in time after all-if he really did deposit the notice on March 20 and if he is entitled to the

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benefit of the "mailbox rule" for prisoners. See Fed. R.App. P. 4(c). We doubt that a litigant who says one thing to the district judge in an effort to get an extension of time should be allowed to advance an inconsistent view of the facts after the district judge says no. Perhaps these seemingly divergent assertions could be reconciled on the ground that Craig wrongly thought that the time expired before March 20 because he does not understand how the federal rules calculate time. Sentencing took place on March 6, but the clock does not start until a judgment is entered on the docket, and when the time is 10 days or fewer intermediate weekends and holidays are excluded. Thus "10 days" ran from March 6 to March 26, while a layperson might have supposed that the time expired on March 16. It does not matter. We may suppose that things happened exactly as Craig now says—notice deposited in the prison mail system on March 20 but delayed in transit to the district court. That is not enough to make the appeal timely.

[1] The United States contends that the appeal is late because the mailbox rule applies only if the prisoner is unrepresented. As we said in *United States v. Kimberlin*, 898 F.2d 1262, 1265 (7th Cir.1990), a prisoner who has the assistance of counsel need only pick up the phone. Craig did not try that route, and the United States contends that he therefore cannot take advantage of the mailbox rule. Yet *Kimberlin* addressed the status of the mailbox rule when it was a matter of common law, having been invented in *Houston v. Lack*, 487 U.S. 266, 108 S.Ct. 2379, 101 L.Ed.2d 245 (1988). Rule 4 was rewritten in 1993 (and revised in 1998) not only to make the mailbox rule official but also to impose some limits. Rule 4(c)(1) requires a prisoner to use a legal-mail system if the prison has one. (This provides verification of the date on which the notice was dispatched.) If the prison lacks such a system: "Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid." *Ibid.*

Today the mailbox rule depends on Rule 4(c), not on how *Kimberlin* understood *Houston*. Rule 4(c) applies to "an inmate confined in an institution". Craig meets that description. A court ought not pencil "unrepresented" or any extra word into the text of Rule 4(c), which as written is neither incoherent nor absurd. Craig therefore is entitled to use the mailbox rule. Accord, *United States v. Moore*, 24 F.3d 624, 626 n. 3 (4th Cir.1994).

[2] Still, to get its benefit he had to comply with it, and he did not—not when he filed the appeal, and not in the ensuing year. His affidavit states that he deposited the notice in the prison mail system on March 20, 2003, but not that he prepaid first-class postage. Rule 4(c)(1) requires the declaration to state only two things; 50% is not enough. The postage requirement is important: mail bearing a stamp gets going, but an unstamped document may linger. Perhaps that is exactly what happened: Craig may have dropped an unstamped notice of appeal into the prison mail system, and it took a while to get him to add an envelope and stamp (or to debit his prison trust account for one). The mailbox rule countenances *some* delay, but not the additional delay that is inevitable if prisoners try to save 37¢ plus the cost of an envelope. Rule 4(c)(1) is clearly written; any literate prisoner can understand it (and Craig is literate). Respect for the text of Rule 4(c) means that represented prisoners can use the opportunity it creates; respect for the text equally means that prisoners must use that opportunity

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in the way the rule specifies. If we were authorized to revise the rule (which we are not), we would be more likely to interpolate "unrepresented" in front of "inmate" than to delete the phrase "and state that first-class postage has been prepaid."

Craig's notice of appeal was untimely, and his appeal is dismissed.

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

GENERAL TEAMSTERS UNION LOCAL 662, Respondent.

No. 03–3699.

United States Court of Appeals, Seventh Circuit.

Argued April 15, 2004.

Decided May 13, 2004.

Background: National Labor Relations Board (NLRB) sought enforcement of its finding that union local had committed unfair labor practice by refusing to execute contract negotiated with employer.

Holdings: The Court of Appeals, Flaum, Circuit Judge, held that:

(1) union committed unfair labor practice by reaching handshake agreement on contract that included quid pro quo provisions, then submitting contract to its members for ratification while instructing members that they were not voting on those provisions, then refusing to execute those provisions after ratification, and

(2) union representatives' signed waivers were not conditions precedent to validity of quid pro quo provision calling for representatives' resignations and pledges not to hold office in future.

Enforcement granted.

1. Labor and Employment ⇐1880

In reviewing order of National Labor Relations Board (NLRB), Court of Appeals gives substantial deference to NLRB's findings of fact, upholding such findings if supported by substantial evidence.

2. Labor and Employment ⇐1878

In reviewing order of National Labor Relations Board (NLRB), Court of Appeals gives substantial deference to NLRB's conclusions of law, upholding such conclusions unless they are irrational or inconsistent with NLRA. National Labor Relations Act, § 1 et seq., 29 U.S.C.A. § 151 et seq.

3. Labor and Employment ⇐1799

Whether employer and union have reached agreement, thus invoking duty to execute contract under NLRA, is factual question to be decided by National Labor Relations Board (NLRB). National Labor Relations Act, § 8(d), 29 U.S.C.A. §158(d).

4. Labor and Employment ⇐1495

Union committed unfair labor practice by reaching handshake agreement with employer on contract that included two quid pro quo provisions concerning retention of strikers/crossovers, then submitting contract to its members for ratification while instructing members that they were not voting on quid pro quo provisions, then refusing to execute those provisions of ratified contract on ground that "condition precedent" of ratification had not been met as to those provisions; even assuming that ratification was condition precedent to contract, ratification was on terms previously

We are of opinion and hold that the two-prong inquiry is appropriate under section 2P1.1(b)(3). In determining whether Morgantown FCI is non-secure, we are faced with a record that describes Morgantown FCI as a minimum-security prison with a four foot high perimeter fence and perimeter road that inmates are warned not to cross. Morgantown FCI was described as being a more secure facility than a federal prison camp, and contained a pretrial unit and a detention facility for inmates. Sparse as this description is, it is sufficient to determine that Morgantown FCI fits squarely within the Guidelines' definition of secure facility because it has a significant physical restraint in the form of a physical perimeter barrier which is a fence, even though that fence is only four feet high.

Having decided that Morgantown FCI is a secure facility, we need not consider the second prong of the test, that is whether it is similar to a community correction center, community treatment center, or half-way house.[5]

Accordingly, the defendant's convictions and sentence are

AFFIRMED.

UNITED STATES of America, Plaintiff–Appellee,

v.

Brian Lee MOORE, a/k/a Mr. B, Defendant–Appellant (Two Cases).

Nos. 92–5042, 93–5316.

United States Court of Appeals, Fourth Circuit.

Argued Dec. 10, 1993.

Decided May 24, 1994.

Defendant was convicted of various drug offenses and sentenced to 63 months' imprisonment. The United States District Court for the Southern District of West Virginia, Robert J. Staker, J., denied defendant's motion to file notice of appeal within excusable neglect period and, on remand, determined that notice was not deemed filed when it was presented to prison authorities. Defendant appealed. The Court of Appeals, K.K. Hall, Circuit Judge, held that notice of appeal in criminal matter was deemed filed by inmate when it was delivered to prison officials, though inmate was represented by counsel.

Vacated and remanded.

Criminal Law ⇐1081(4.1)

Rule that inmate's notice of appeal is deemed filed upon its delivery to prison authorities, adopted by Supreme Court in civil suit involving inmate representing himself, also governs all notices of appeal filed by prisoners in criminal proceedings, without regard to whether prisoners are represented by counsel. F.R.A.P.Rule 4(b), 28 U.S.C.A.

ARGUED: Dale Allen Buck, Jackson & Kelly, Martinsburg, WV, for appellant. Michael L. Keller, Asst. U.S. Atty., Charleston, WV, for appellee. **ON BRIEF:** Michael W. Carey, U.S. Atty., Paul A. Billups, Asst. U.S. Atty., Charleston, WV, for appellee.

Before RUSSELL and HALL, Circuit Judges, and KEELEY, United States District Judge for the Northern District of West Virginia, sitting by designation.

Vacated and remanded by published opinion. Judge K.K. HALL wrote the opinion, in which Judge RUSSELL and District Judge KEELEY joined.

OPINION

K.K. HALL, Circuit Judge:

Brian Lee Moore was convicted of various drug offenses and sentenced to 63 months

5. We note, however, that the courts comparing federal prison camps to community-based facilities have determined that they are not similar. See *supra* at n. 4.

imprisonment. The district court entered the judgment order on October 8, 1991. Under Fed.R.App.P. 4(b), Moore had ten days, until October 18, to file a notice of appeal as of right. Upon a showing of excusable neglect, Moore could have filed an effective notice of appeal as late as November 18.[1]

On November 20, the district court received from Moore, then imprisoned at the Federal Prison Camp in Ashland, Kentucky, and represented by the federal public defender's office, a notice of appeal and a motion to file it within the excusable neglect period. Though Moore alleged that he handed the documents over to the prison authorities for mailing on November 12, the district court denied Moore's motion, holding that even if Moore could demonstrate excusable neglect, the notice could not have been considered filed until it reached the district court—two days too late.

Moore appealed (No. 92–5042), and we remanded to the district court for it to determine whether *Houston v. Lack*, 487 U.S. 266, 108 S.Ct. 2379, 101 L.Ed.2d 245 (1988), applied to allow Moore's notice to be deemed filed upon its delivery to the prison authorities.[2] The district court held that *Houston*, which involved a prisoner representing himself in civil litigation, is inapplicable in a criminal proceeding where the prisoner is represented by counsel. Moore also appealed that order (No. 93–5316). Because we believe that *Houston* applies whenever a prisoner attempts to file a notice of appeal in a criminal case, we now vacate both orders on appeal and remand the case once more to the district court so that it may determine whether Moore's failure to file his notice of appeal within the initial ten-day period was the result of excusable neglect.

I.

We note first that there is no reasonable basis for limiting the application of *Houston* to civil actions. *Houston* itself was premised upon fairness; indeed, the theme runs throughout Justice Brennan's majority opinion. If *Houston* stands for nothing else, it stands for the principle that it is unfair to permit a prisoner's freedom to ultimately hinge on either the diligence or the good faith of his custodians. The mechanism for obtaining that freedom—whether habeas petition or direct appeal—makes no difference.

We have previously extended the rule in *Houston* to govern complaints in civil rights actions mailed from prison just prior to the running of the limitations period. *Lewis v. Richmond City Police Dep't*, 947 F.2d 733 (4th Cir.1991). It would indeed be perverse to hold that *Houston* applies to maintain an action for civil damages, but does not apply when a prisoner's freedom is at stake.

II.

Likewise, there is little justification for limiting *Houston*'s applicability to situations where the prisoner is not represented by counsel. Though *Houston* itself involved an unrepresented prisoner, the majority acknowledged that "[t]he situation of prisoners seeking to appeal without the aid of counsel is unique." *Houston*, 487 U.S. at 270, 108 S.Ct. at 2382. We note that whenever a prisoner attempts to file a notice of appeal from prison he is acting "without the aid of counsel," even if he is "represented" in a passive sense. The same concerns are present in either case. If, as we have supposed, it is possible that prison officials could choose to delay a prisoner's attempt to communicate with the courts, it is just as possible that they could choose to delay his access to counsel.

The government has expressed its concern that the rule we adopt today, because it applies only to incarcerated appellants, accords them an unfair advantage over those appellants fortunate enough to remain free on bond pending appeal. We disagree. This decision in no way abridges the appellate rights of non-incarcerated appellants. Requiring the clerk of a district court to wait a

1. Rule 4(b) provides, where excusable neglect is shown, a thirty day extension from the end of the initial ten-day period. Thus, Moore would have had to note his appeal by November 17, but, because that date fell on a Sunday, the deadline extended to November 18. *See* Fed.R.App.P. 26(a).

2. In *Houston*, the Supreme Court held a prisoner's notice of appeal from a judgment dismissing his habeas corpus petition to have been filed upon its delivery to prison officials.

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few extra days before receiving a notice of appeal from an incarcerated appellant, whether represented or not, does not offend our notion of fairness; we do not doubt that those appellants so situated would gladly trade those few extra days for the opportunity to timely deliver their notices in person.

III.

We are aware that the Seventh Circuit has addressed this precise issue and reached the opposite conclusion. *See United States v. Kimberlin*, 898 F.2d 1262 (7th Cir.), *cert. denied*, 498 U.S. 969, 111 S.Ct. 434, 112 L.Ed.2d 417 (1990). Though the *Kimberlin* court seemed to assume that *Houston* would be applicable in the criminal context, it nevertheless distinguished *Houston* on the ground that Kimberlin, though filing his notice of appeal from prison, was represented by counsel.

We believe that our sister circuit has interpreted *Houston* too narrowly. The Supreme Court did not expressly limit *Houston*'s application to cases involving unrepresented prisoners, and the Seventh Circuit apparently did not consider the possibility that even represented prisoners might be prevented from timely communicating with counsel.

We therefore hold that *Houston* governs all notices of appeal filed by prisoners in a criminal proceeding, without regard to whether they are represented by counsel. There is simply no good reason to hold otherwise.[3]

The district court's orders finding that Moore's notice of appeal was outside the excusable neglect period and that *Houston v. Lack* is inapplicable to Moore's case are vacated, and the case is remanded to the district court, which shall conduct a hearing to determine whether Moore's failure to meet the initial noticing deadline was the result of excusable neglect.[4]

VACATED AND REMANDED.

Karen SCHULTZ, Plaintiff–Appellant,

v.

G. William BUTCHER, III; Edward H. Maass; "The Spirit of Mount Vernon"; Spirit Cruises, Incorporated, Defendants–Appellees.

Karen SCHULTZ, Plaintiff–Appellee,

v.

"The SPIRIT OF MOUNT VERNON"; Spirit Cruises, Incorporated, Defendants–Appellants,

G. William Butcher, III; Edward H. Maass, Defendants–Appellees.

Nos. 93–1202, 93–1229.

United States Court of Appeals, Fourth Circuit.

Argued Feb. 9, 1994.

Decided May 24, 1994.

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3. Our holding is consistent with the Supreme Court's recent amendment of Fed.R.App.P. 4 to include a new subsection (c), addressing inmate appeals. It reads, in pertinent part:

> If an inmate confined in an institution files a notice of appeal in either a civil case or a criminal case, the notice of appeal is timely filed if it is deposited in the institution's internal mail system on or before the last day for filing. Timely filing may be shown by a notarized statement or by a declaration (in compliance with 28 U.S.C. § 1746) setting forth the date of deposit and stating that first-class postage has been prepaid....

The new rule clearly applies to criminal cases, and does not distinguish between represented prisoners and those acting *pro se*. As the Advisory Committee intended the rule to be, in essence, a codification of *Houston*, *see* Note to subdivision (c), we are confident that our interpretation of *Houston* is the correct one.

4. Moore claimed initially that he had not been informed of his right to appeal. The district court reviewed the sentencing transcript and, after determining that both Moore and his counsel had indeed been so informed, decided that Moore had not demonstrated excusable neglect. Moore admitted after this case was first remanded that he knew he had a right to appeal, and even instructed his attorney to file a notice, but that the attorney failed to follow through. Upon second remand, the district court must determine whether Moore's new assertions have a basis in fact and, if so, whether the facts as determined constitute excusable neglect.

EXHIBIT D.