



U.S. Department of Justice

United States Attorney
District of Minnesota

600 United States Courthouse
300 South Fourth Street
Minneapolis, MN 55415
www.usdoj.gov/usao/mn

(612)664-5600

November 3, 2004

Richard Sletten, Clerk
United States District Court
202 U.S. Courthouse
300 South Fourth Street
Minneapolis, MN 55415

Re: John Gregory Lambros v. United States of America
Criminal No. 4-89-82(5) (DSD)

Dear Mr. Sletten:

Enclosed for filing, please find an original of the Motion of the United States for Late Filing and the Opposition of the United States to Petitioner's Motion to Vacate February 10, 1997 Judgment, in the above-referenced case. Two copies have been provided to Judge Doty's chambers.

Petitioner is also being served by copy of this letter and its enclosures.

Sincerely,

THOMAS B. HEFFELFINGER
United States Attorney

A handwritten signature in cursive script, appearing to read "Jeffrey S. Paulsen".

BY: JEFFREY S. PAULSEN
Assistant U.S. Attorney
Attorney ID Number 144332

JSP:ama

Enclosure

cc: John G. Lambros
Registration No. 00436-124
U.S. Penitentiary Leavenworth
PO Box 1000
Leavenworth, KS 66048-1000

1.

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

JOHN GREGORY LAMBROS,)
)
) Petitioner,)
)
) v.) OPPOSITION OF THE UNITED STATES
) TO PETITIONER'S MOTION TO
) VACATE FEBRUARY 10, 1997
) JUDGMENT
 UNITED STATES OF AMERICA,)
)
) Respondent.)

Petitioner John Gregory Lambros is serving a 30-year sentence for drug trafficking offenses. He has filed a motion under Rule 60(b) of the Federal Rules of Civil Procedure to vacate his February 10, 1997 resentencing judgment. It is not entirely clear what relief he seeks. If he is directly attacking the sentence that was imposed on February 10, 1997, his petition fails to clearly say so. Rather, the petition seems to challenge Judge Renner's treatment of some motions Lambros brought at the time of resentencing as claims brought under 28 U.S.C. § 2255. Lambros may be seeking to have that part of the resentencing judgment vacated so that, in Lambros' mind, there would be no impediment to him now filing an initial petition under 28 U.S.C. § 2255 challenging his conviction and sentence. The government will discuss these two possible interpretations of Lambros' petition in turn.

I. IF LAMBROS IS ATTACKING HIS SENTENCE, HIS PETITION IS SUCCESSIVE AND HAS NOT BEEN AUTHORIZED

If the present petition is viewed as an attack on Lambros' February 10, 1997 sentence as such, it must be denied as a successive section 2255 petition for which no Court of Appeals

authorization has been obtained. 28 U.S.C. § 2255 (final paragraph). It does not matter that Lambros has styled this petition as a Rule 60(b) motion rather than a petition under 28 U.S.C. § 2255. The Eighth Circuit has consistently held that inmates may not bypass the limitations on successive habeas petitions by the simple expedient of creative labeling. United States v. Patton, 309 F.3d 1093, 1094 (8th Cir. 2002). Thus, to the extent the present petition attacks the sentence Lambros is serving, it should be summarily denied for failure to obtain Court of Appeals authorization.

II. IF LAMBROS IS MERELY CHALLENGING THE RE-CHARACTERIZATION OF HIS RULE 33 MOTION, THE PETITION FAILS BECAUSE CASTRO IS INAPPLICABLE

If the present petition is construed simply as an attempt to vacate the portion of the February 10, 1997 resentencing judgment that construed Lambros' Rule 33 claims as a section 2255 petition, the petition also should be denied for several reasons. At the time of Lambros' February 10, 1997 resentencing, Lambros filed a number of motions, purportedly under Rule 33 of the Federal Rules of Criminal Procedure. Finding that the motions would be untimely under Rule 33, Judge Renner decided to follow existing case law and treat the motions as a petition under 28 U.S.C. § 2255. T. Resent. at 4-5. The Court told Lambros and his attorney on the record that the motions would be so treated. T. Resent. at 5. Lambros' attorney did not object. Lambros himself said that he would prefer

to have the motions considered under Rule 33, but did not actually object to the recharacterization. T. Resent. at 20. Lambros never appealed the treatment of his motions as a section 2255 petition.

Lambros now relies on the Supreme Court's decision in Castro v. United States, 540 U.S. 375 (2003), to challenge Judge Renner's recharacterization of his motions. Castro held that a district court may not "recharacterize a pro se litigant's motion as the litigant's first § 2255 motion unless the court informs that litigant of its intent to recharacterize, warns the litigant that the recharacterization will subject subsequent section 2255 motions to the law's 'second or successive' restrictions, and provides the litigant an opportunity to withdraw, or to amend, the filing." 540 U.S. at 789; see also Morales v. United States, 304 F.3d 764, 767 (8th Cir. 2002) (same).

Castro does not help Lambros for two reasons. First, Castro applies only to pro se petitioners. Lambros was not pro se at the time of the February 10, 1997 resentencing. He was represented by attorney Colia Ceisel, an experienced criminal defense attorney. Although Lambros apparently filed the motions in question on his own, his attorney knew about them and was there to advise Lambros about the ramifications of Judge Renner's treatment of the motions as a section 2255 petition. Castro created a rule designed to protect pro se petitioners who might not otherwise be aware of the

ramifications of recharacterization. It does not apply to represented petitioners.

Second, Castro does not help Lambros because there is no indication that the Supreme Court intended it to apply retroactively to petitions that were recharacterized long before Castro was decided. In general, procedural changes in the law are applied prospectively only. E.g., Nelson v. United States, 184 F.3d 953, 954 (8th Cir. 1999) (procedural rule of Old Chief v. United States not retroactive). For example, when the Third Circuit created a Castro-type notice requirement for recharacterizing prisoner petitions, it explicitly made its decision prospective only. United States v. Miller, 197 F.3d 644, 652 (3d Cir. 1999). While Lambros relies on a contrary Seventh Circuit case, Williams v. United States, 366 F.3d 438 (7th Cir. 2004) (per curiam), that per curiam decision contains no analysis of the issue and is not binding on this Court.

III. DENIAL OF THE PRESENT PETITION DOES NOT PREJUDICE LAMBROS

A holding that Lambros is bound by the recharacterization of his 1997 motions as a section 2255 petition would not prejudice Lambros. The alleged adverse consequence from recharacterization is that, when Lambros subsequently filed a section 2255 petition on April 21, 1997, it was treated as a successive petition rather than as an initial petition. Order, 5/1/97 (Attachment A). Judge Renner dismissed it because Lambros had not obtained permission

from the Court of Appeals to file a second section 2255 petition. Id. However, Judge Renner was then called upon to rule on Lambros' request for a certificate of appealability. In denying a certificate of appealability, Judge Renner noted that the issues raised in the April 1997 section 2255 petition were the same as the issues raised in the re-characterized motions filed at the time of resentencing in February 1997, which were found to be lacking in any merit. Order, 9/30/97 (Attachment B). Since Lambros' April 1997 petition contained only meritless issues that already had been ruled upon in February 1997, there was no harm in treating it as a successive petition rather than an initial petition. The result was the same either way.


IV. CONCLUSION

For the foregoing reasons, Lambros' present motion to vacate Judge Renner's February 10, 1997 resentencing judgment should be denied.

Respectfully submitted,

Dated: November 3, 2004

THOMAS B. HEFFELFINGER
United States Attorney


BY: JEFFREY S. PAULSEN
Assistant U.S. Attorney
Attorney ID Number 144332

U.S. Atty

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

John Gregory Lambros,

Petitioner,

v.

Criminal No. 4-89-82(5)

Civ. No. 97-942

(RGR)

United States of America,

Respondent.

John Gregory Lambros, pro se.

ORDER

The extensive procedural history of this action is recited in this Court's Order dated February 19, 1997. At that time, the Court considered and rejected essentially all of the claims Petitioner raises by this motion made pursuant to 28 U.S.C. § 2255. The Order additionally provided that the claims decided therein were being considered under § 2255, owing to the unusual procedural posture of Petitioner's claims. Accordingly, the Court considers the present motion to be a second or successive motion within the meaning of 28 U.S.C. § 2255. That statute requires this petition to be certified by the Eighth Circuit to contain either outcome-determinative, newly-discovered evidence, or a new rule of constitutional law made retroactively applicable to collateral challenges by the Supreme Court. 28 U.S.C. § 2255(4). A review of the docket indicates that Petitioner has failed to comply with this requirement. Alternatively, if the Court is not correct in determining this to be second or successive petition, the Court finds that it is without merit for the reasons stated in its February 19, 1997 Order.

The petition is dismissed.

Dated: ^{MAY} ~~April~~ 1, 1997



Robert G. Renner, Senior Judge
United States District Court

MAY 0 1 1997

FILED
FRANCIS E. DOSAL, CLERK
JUDGMENT ENTD.
DEPUTY CLERK

7.

H.S. Avey

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

JOHN GREGORY LAMBROS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

)
)
)
)
)
)
)

Criminal No. 4-89-82(05)
Civil No. 97-942
ORDER

JOHN GREGORY LAMBROS, *pro se.*

ORDER

John Gregory Lambros was convicted of drug trafficking offenses including conspiracy to distribute cocaine. Subsequently, the Eighth Circuit Court of Appeals affirmed all convictions, but vacated the life sentence imposed on Count I and remanded for resentencing. The Court of Appeals found that while a life sentence was permissible, it was not mandatory as the sentencing Court had believed. On February 19, 1997, this Court resentenced Lambros.¹

Shortly before his resentencing, Lambros filed numerous motions which he characterized as arising under Fed. R. Crim. P. 33. This Court construed those motions under 28 U.S.C. § 2255. Had the Court considered the motions as Lambros had preferred, under Rule 33, it would have dismissed them as untimely. Instead, the Court resolved the motions under § 2255 because the claims Lambros raised constituted collateral challenges to convictions for which he was

¹ On September 2, 1997, the Eighth Circuit Court of Appeals affirmed the judgment imposing the new sentence on Count I.

S.

FILED 9-30-97
FRANCIS E. DOSAL, CLERK
JUDGMENT ENTD. _____
DEPUTY CLERK _____

incarcerated or for which incarceration was imminent (on Count I).² In its resentencing memorandum of February 19, 1997, the Court found that Lambros's arguments lacked merit and denied the motions.

On April 21, 1997, Lambros filed a motion pursuant to § 2255. On May 1, 1997, the Court denied the motion as a successive petition for which the required certification had not been obtained, and because it raised the same issues previously determined by the Court on February 19, 1997, to be without merit. On July 31, 1997, the Court denied petitioner's motions for reconsideration and for leave to amend. Presently before the Court is Lambros's motion for issuance of a certificate of appealability.

When Lambros filed the § 2255 motion in April, this Court deemed it successive and did not construe it as a request for a certificate of appealability. At that time this Court believed that certificates of appealability could only issue from the Court of Appeals. Subsequently, The Eighth Circuit Court of Appeals held in Tiedeman v. Benson, 1997 WL 437181 (8th Cir.), that district court judges have authority to issue certificates of appealability.

If the Court had considered Lambros's April motion as a request for certificate of appealability, it would have denied the motion. A certificate of appealability is warranted only if the petitioner makes a "substantial showing of a denial of a constitutional right." Id.; 28 U.S.C. § 2253. This Court had already determined the issues raised in the April motion on the merits and found no claims rising to the level of a constitutional violation. See Resentencing Memorandum, February 19, 1997. Accordingly, Lambros's present motion for a certificate of appealability,

² The Court agreed with the view expressed in U.S. v. DiBernardo, 880 F.2d 1216, 1226 (11th Cir. 1989).

which the Court construes as relating to the motions filed in February and construed under § 2255, is DENIED.³

Dated: September 30, 1997.



Robert G. Renner
United States District Court

³ The § 2255 motion filed by Lambros on April 21, 1997, after his resentencing, is a successive petition. As this Court stated in its order of May 1, 1997, a second or successive petition must be certified by the Court of Appeals to contain either outcome-determinative, newly-discovered evidence, or a new rule of constitutional law made retroactively applicable by the Supreme Court to collateral challenges. See 28 U.S.C. § 2255.