

CERTIFICATE OF SERVICE

LAMBROS vs. U.S.A., CIVIL NO. 99-CV-28 (Judge Rosenbaum): Criminal No.
4-89-CR-82(5)


FOR FILING:

I hereby state under the penalty of perjury that a true and correct copy of the following:

- a. PETITIONER LAMBROS' RESPONSE TO OCTOBER 19, 2001, "OPPOSITION OF THE UNITED STATES TO PETITIONER'S MOTION TO VACATE ALL JUDGMENTS AND ORDERS." Dated: November 9, 2001.
- b. Exhibit packages: A; B; C; and D. All Dated: November 9, 2001.

was served on the following this 13th day of November, 2001, via U.S. Mail through the U.S. Penitentiary Leavenworth mailroom/legal mailbox, to:

1. CLERK OF THE COURT
District of Minnesota
U.S. Federal Courthouse
316 North Robert Street
St. Paul, Minnesota 55101
U.S. CERTIFIED MAIL NO. 7001-0320-0003-3596-6636 - RETURN RECEIPT REQUESTED
One (1) original and one (1) copy for FILING.
2. U.S. Attorney's Office
District of Minnesota
U.S. Federal Courthouse, Suite 600
300 South 4th Street
Minneapolis, Minnesota 55415
3. INTERNET RELEASE TO ALL "BOYCOTT BRAZIL" SUPPORTERS AND HUMAN RIGHTS GROUPS GLOBALLY FOR REVIEW, COMMENT, AND RELEASE. Web site: www.brazilboycott.org
4. Lambros family members.



John Gregory Lambros
Reg. No. 00436-124
U.S. Penitentiary Leavenworth
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Leavenworth, Kansas 66048-1000 USA
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1. E2
fill

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

JOHN GREGORY LAMBROS, *

Petitioner, *

vs. *

UNITED STATES OF AMERICA, *

Respondent, *

CIVIL FILE NO. 99-28 (RGR)

Criminal File No. 4-89-82(05)

AFFIDAVIT FORM

JAMES M. ROSENBAUM, U.S. District Chief Judge.

PETITIONER LAMBROS' RESPONSE TO OCTOBER 19, 2001,
"OPPOSITION OF THE UNITED STATES TO PETITIONER'S
MOTION TO VACATE ALL JUDGMENTS AND ORDERS."

COMES NOW, Petitioner JOHN GREGORY LAMBROS, Pro Se, (hereinafter MOVANT) in the above-entitled action, stating in AFFIDAVIT FORM, opposition to the October 19, 2001, "OPPOSITION OF THE UNITED STATES TO PETITIONER'S MOTION TO VACATE ALL JUDGMENTS AND ORDERS."

JOHN GREGORY LAMBROS declares under penalty of perjury:

1. Movant LAMBROS denies each and every material allegation contained in the above-entitled pleading dated October 19, 2001, by Jeffrey S. Paulsen, Asst. U.S. Attorney and Thomas B. Heffelfinger, U.S. Attorney, except as hereinafter may be expressed and specifically admitted.

2. The governments' OPPOSITION dated October 19, 2001, states this Court lacks jurisdiction and requests this Court to summarily dismiss Movant's action. The government further supports this argument in one (1) paragraph on page one (1) and two (2), by stating:

"Although Lambros' motion purports to be brought under Rule 60(b)(6) of the Federal Rules of Civil Procedure, it must be treated as a petition pursuant to 28 U.S.C. § 2255 in that Lambros is collaterally attacking his conviction and sentence. E.g., BOLDER vs. ARMONTROUT, 983 F.2d 98 (8th Cir. 1993); BLAIR vs. ARMONTROUT, 976 F.2d 1130, 1134 (8th Cir. 1992); U.S. vs. ARNOLD, 2001 WL 435648 (D.Minn. 2001). As shown below, because this is a successive section 2255 petition for which Lambros has not obtained Court of Appeals permission to file, this Court lacks jurisdiction and the petition should be summarily dismissed."

THE GOVERNMENT FAILS TO UNDERSTAND THE LAW IT QUOTES TO THIS COURT:

3. The government quotes BOLDER vs. ARMONTROUT, 983 F.2d 98 (8th Cir. 1993). First, BOLDER is a State of Missouri prisoner that is under a sentence of death for a murder at the Missouri State Penitentiary and is appealing the district court's denial of his Fed.R.Civ.P. Rule 60(b)(6) pleading. The Court states the pleading is being treated as the equivalent of a second petition for a writ of habeas corpus, and references BLAIR vs. ARMONTROUT, 976 F.2d 1130, 1134 (8th Cir. 1992)

4. Movant reviewed BLAIR vs. ARMONTROUT, 976 F.2d 1130 (8th Cir. 1992). The case clearly states BLAIR appealed from an order of the district court denying habeas corpus relief under 28 U.S.C. §2254 (1988), and his motion for relief from judgment under Fed.R.Civ.P. 60(b)(6). The district court denied BLAIR'S claims as successive because the claims were raised in BLAIR'S first habeas petition, and thus, procedurally barred. The Eighth Circuit offered little or no explanation in support of their reasoning. Their opinion depends largely on conclusory statements and citation to the Eleventh Circuit.

WHETHER A RULE 60(b) MOTION IS A SECOND OR SUCCESSIVE PETITION:

5. On June 6, 2001, the Second Circuit Court of Appeals reviewed the Eighth Circuit Court of Appeals decision in BLAIR vs. ARMONTROUT, 976 F.2d 1130 (8th Cir. 1992) and DISAGREED WITH THEIR HOLDING. See, RODRIGUEZ vs. MITCHELL, 252 F.3d 191, 199-200 and fn.2 (2nd Cir. 2001). RODRIGUEZ, at 198, held "We now rule that a motion under Rule 60(b) to vacate a judgment denying habeas is not a second or successive habeas petition and should therefore be treated as any other motion under Rule 60(b)." The Second Circuit further stated in RODRIGUEZ:

"We are aware that the majority of circuit courts that have considered this issue have held that a Rule 60(b) motion to vacate a judgment denying habeas either must or may be treated as a second or successive habeas petition. 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 offers an overview of cases the court reviewed including BLAIR] 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)."

See, RODRIGUEZ vs. MITCHELL, 252 F.3d 191, 199-200 (2nd Cir. 2001).

WHETHER A RULE 60(b)(6) FRCP MOTION MAY BE AFFECTED BY CONVERSION OR RECHARACTERIZATION:

6. Movant objects to the governments request to have his "MOTION TO VACATE ALL JUDGMENTS AND ORDERS BY UNITED STATES 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" be treated as a petition pursuant to 28 U.S.C. § 2255.

7. The Supreme Court clearly addressed this question when it decided that relief is available under Rule 60(b) when violations of Title 28 U.S.C.S. §455, disqualifies a federal judge, when the violation is not discovered until after the judgment has become final. See, LILJEBERG vs. HEALTH SERVICES CORP., 100 L.Ed.2d 855 (1988). The LILJEBERG court stated:

"Section 455 does not, on its own, authorize the reopening of closed litigation. However, as respondent and Court of Appeals recognized, Federal Rule of Civil Procedure 60(b) provides a procedure whereby, in appropriate cases, a party may be relieved of a final judgment. In particular, Rule 60(b)(6), upon which respondent relies, grants federal courts broad authority to relieve a party from a final judgment "upon such terms as are just," provided that the motion is made within a reasonable time and is not premised on one of the grounds for relief enumerated in clauses (b)(1) through (b)(5).

. . . .

Rule 60(b)(6) relief is accordingly neither categorically available nor categorically unavailable for ALL §455(a) VIOLATIONS. We conclude that in determining whether a judgment should be vacated for a violation of §455(a), it is appropriate to consider the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, the risk of undermining the public's confidence in the judicial process. We must continuously bear in mind that "to perform its high function in the best way 'justice must satisfy the appearance of justice.'"

The problem however, is that people who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of judges. The very purpose of §455 is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible. See, S. Rep. No. 93-419, at 5; HR Rep No. 93-1451, at 5. (emphasis added)

Quoting, LILJEBERG vs. HEALTH SERVICES CORP., 100 L.Ed.2d 855, 874-875 (1988)

8. The Second Circuit has held that "[A]t least until it is decided whether a movant's right to bring a future petition to vacate sentence can be affected by a CONVERSION OR RECHARACTERIZATION of a motion made under some other rule as being under the statute providing for motions to vacate, district courts should not undertake such RECHARACTERIZATION unless (a) the movant, with knowledge of the potential adverse consequences of such recharacterization, agrees to have the motion so RECHARACTERIZED, or (b) the court finds that, notwithstanding its designation, the motion should be considered a motion to vacate because of the nature of the relief sought, and offers the movant the opportunity to withdraw the motion rather than have it so recharacterized. 28 USCA § 2255; Fed.Rules Cr.Proc.Rule 12(b)(2), 18 USCA." See, ADAMS vs. U.S., 155 F.3d 582, Head Note 1 (2nd Cir. 1998) (Pro Se Defendant filed and invoked Fed.R.Crim.P. 12(b)(2) within a motion that the District Court construed pursuant to 28 USC § 2255). See also, U.S. vs. DITTRICH, Criminal No. 95-68, IN THE U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA, ORDER dated and filed December 8, 1998, by U.S. Judge Charles R. Wolle, who stated on page 4 & 5. "[I] agree that the Anti-terrorism and Effective Death Penalty Act of 1996 (AEDPA) casts a new light upon the district court's practice of RECHARACTERIZING a pro se litigant's motion under some other provision [Rule 13] as a section § 2255 motion. This previously harmless practice may now be harmful to a litigant because the AEDPA limits the courts ability to hear SECOND OR SUCCESSIVE §2255 MOTIONS. Dittrich's motion for a new trial [Rule 33] SHOULD NOT HAVE BEEN TREATED AS A SECTION 2255 MOTION and therefore should not have been subject to a certificate of appealability."

9. In the Southern District of Florida, the District Court allowed the filing and authorization of a Federal Rule of Civil Procedure 60(b)(6) Motion following convictions of defendants who moved for new trial on grounds that judge should have REFUSED HIMSELF, 28 USCA § 455, due to the judge's past service as the Director of the United States Marshals Service and investigation into his role in conspiracy to take bribes. The defendant motion for a new trial was granted under Fed.R.C.Pro. 60(b)(6). See, U.S. vs. GARRUDO, 869 F.Supp. 1574 (S.D.Fla. 1994).

10. Movant again OBJECTS to the governments request to have his motion under Rule 60(b)(6) to be treated as a petition pursuant to 28 USC § 2255, as the Supreme Court has directed all such relief of violations of Title 28 USCS § 455, to be filed under Federal Rules of Civil Procedure 60(b)(6).

SHOULD MOVANT LAMBROS BE FREE TO MOVE FOR RELIEF BASED ON ERRORS THAT TRANSPIRED IN THE COURSE OF RESENTENCING?

11. In February of 1997, United States District Judge ROBERT G. REHNER, resentenced Movant LAMBROS on Count One (1), as per the Eighth Circuit Court of Appeals ORDER in this criminal action. See, U.S. vs. LAMBROS, 65 F.3d 698 (8th Cir. 1995).

12. Movant was RESENTENCED DE BOWO by Judge REHNER. See, U.S. vs. MALDONADO, 996 F.2d 598, 599 (2nd Cir. 1993) ("[W]hen a sentence has been vacated, the defendant is placed in the same position as if he had never been sentenced.") cf. U.S. vs. STRACHAN, No. 93-30004, 1994, WL 32637 (when sentence is vacated and remanded, remand "WIPED THE SLATE CLEAN AND THE DISTRICT COURT WAS REQUIRED TO SENTENCE FROM SCRATCH ON A TABULA RASA."), quoting, U.S. vs. DeRIGGI, 893 F.Supp. 171, 178-79 (E.D.N.Y. 1995).

13. Under "SENTENCING PACKAGE DOCTRINE," which is usually on direct appeal, RESENTENCING is allowed on ALL COUNTS following reversal of ONE on direct appeal when multicount conviction produces aggregate sentence or "sentencing package." See, U.S. vs. DAVIS, 112 F.3d 118, 119, Head Note 3 (3rd Cir. 1997); See also,

THAYER vs. U.S., 937 F.Supp. 662, 665-66 (E.D.Mich. 1996) (applying SENTENCING PACKAGE DOCTRINE to RESENTENCING under § 2255), DAVIS, 112 F.3d at 123.

14. If motion to vacate sentence results in RESENTENCING, prisoner is free, under Antiterrorism and Effective Death Penalty Act, to move for further relief based on errors that transpired in course of resentencing. See, PRATT vs. U.S., 129 F.3d 54, 55 Head Note 13 (1st Cir. 1997).

ATTORNEY COLIA F. GEISEL DID NOT INFORM MOVANT LAMBROS AT RESENTENCING ON FEBRUARY 10, 1997, THAT U.S. DISTRICT COURT JUDGE ROBERT G. RENNER WAS THE U.S. ATTORNEY FOR MINNEAPOLIS, MINNESOTA FROM 1969 THRU 1977, WHO INVESTIGATED AND SIGNED CRIMINAL INDICTMENTS FOR THE ARREST AND CONVICTION OF MOVANT LAMBROS.

15. Prior to the imposition of RESENTENCING, the court's probation officer conducted an investigation of Movant LAMBROS and reported to the COURT pursuant to RULE 32(b) of the Federal Rules of Criminal Procedure, Movant's PRIOR CRIMINAL HISTORY/RECORD. This investigation was contained within Movant's PRESENTENCE INVESTIGATION REPORT (PSI) and was disclosed to the U.S. Attorney and Movant's counsel Colia F. Geisel at least thirty-five (35) days before the February 10, 1997, RESENTENCING. See, U.S. vs. PETTY, 80 F.3d 1384, 1387-88 (9th Cir. 1996) (resentencing required because court failed to ensure that defendant and counsel had adequate time to read and discuss PSI; failure to do so is not harmless error).

16. Movant's PRESENTENCE INVESTIGATION REPORT (PSI) stated Movant's prior convictions:

- a. CR-3-75-128, with judgment entered on June 21, 1976;
- b. CR-3-76-17, with judgment entered on June 21, 1976;
- c. CR-3-76-54, with judgment entered on March 7, 1977.

Therefore, Movant's attorney Colia F. Geisel, U.S. Assistant Attorney Douglas Peterson and Judge RENNER knew that Judge RENNER prosecuted Movant LAMBROS for all of his prior convictions, as Judge RENNER was the U.S. Attorney for the District of Minnesota from 1969 thru 1977.

17. Attorney Colia F. Geisel represented Movant LAMBROS during his direct appeal from his original trial and sentencing. Therefore, Attorney Geisel was furnished the **FULL TRANSCRIPT/FULL RECORD** to enable her to determine whether plain error occurred during Movant's trial and sentencing. See, HARDY vs. U.S., 11 L.Ed.2d 331 (1964)(It was held that the duties of the attorney appointed by the Court of Appeals could not be discharged unless he obtained the **ENTIRE TRANSCRIPT**)

18. The ABA STANDARDS FOR CRIMINAL JUSTICE, 4-8.1 (The Defense Function) (3rd ed. 1993), prescribes the minimum duties for Attorney Geisel in preparing for Movant's **RESENTENCING** on February 10, 1997. Attorney Geisel was under the duty to:

- a. become familiar with all available sentencing alternatives, including the practical consequences of each, and with community or other facilities that may be of assistance in devising an appropriate sentencing plan;
- b. **INVESTIGATE THE PARTICULAR JUDGE'S SENTENCING PRACTICES;**
- c. fully explain to the client the "consequences of the various dispositions available," as well as "the nature of the presentence investigation process, [] in particular the significance of statements made by the accused" during that investigation;
- d. **SEEK TO VERIFY ALL INFORMATION CONTAINED IN THE PRESENTENCE REPORT, AND "BE PREPARED TO SUPPLEMENT OR CHALLENGE IT IF NECESSARY";**
- e. "present to the court any ground which will assist in reaching a proper disposition favorable to the accused," including any favorable information **NOT CONTAINED IN THE PRESENTENCE REPORT;**

Careful discussions of counsel's responsibilities at sentencing (including discussions of the ABA Standards) may be found in U.S. vs. GREEN, 680 F.2d 183, 191-205 (C.A.D.C. 1982)(Bazelon, J., dissenting) and U.S. vs. PINKNEY, 551 F.2d 1241, 1248-51 (D.C. Cir. 1976).

UNITED STATES JUDGE ROBERT G. RENNER SIGNED TWO (2) OF MOVANT LAMBROS' PRIOR CONVICTION INDICTMENTS WHEN HE WAS A U.S. ATTORNEY IN 1976.

19. United States Judge Robert G. Renner **SIGNED** two (2) of Movant LAMBROS' past criminal indictments in 1976 when he was the U.S. Attorney for the District of Minnesota. On February 10, 1997, Judge RENNER used Criminal Indictments:

a. CR-3-75-128. INDICTMENT filed on February 23, 1976. See, EXHIBIT A (Movant LAMBROS' JUNE 02, 2001, "MOTION FOR LEAVE TO FILE A SECOND OR SUCCESSIVE MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE UNDER 28 U.S.C. § 2255 BY A PRISONER IN FEDERAL CUSTODY" and "MOVANT'S MEMORANDUM OF FACT AND LAW IN SUPPORT OF (AFFIDAVIT FORM) MOTION FOR LEAVE TO FILE A SECOND OR SUCCESSIVE MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE UNDER 28 U.S.C. § 2255 BY A PRISONER IN FEDERAL CUSTODY." Exhibit A within the MEMORANDUM OF FACT AND LAW.

b. CR-3-76-17. INDICTMENT filed on March 24, 1976. See, EXHIBIT B. (Movant LAMBROS' June 08, 2001, "MOTION FOR LEAVE TO FILE A SECOND OR SUCCESSIVE MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE UNDER 28 U.S.C. § 2255 BY A PRISONER IN FEDERAL CUSTODY" and "MOVANT'S MEMORANDUM OF FACTS AND LAW IN SUPPORT OF (AFFIDAVIT FORM) MOTION FOR LEAVE TO FILE A SECOND OR SUCCESSIVE MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE UNDER 28 U.S.C. § 2255 BY A PRISONER IN FEDERAL CUSTODY." Exhibit A within the MEMORANDUM OF FACTS AND LAW.

20. United States Judge Robert G. Renner was the U.S. Attorney for the District of Minnesota on September 14, 1976, when Movant LAMBROS was indicted on INDICTMENT No. CR-3-76-54, District of Minnesota. Judge Renner did not sign this indictment as U.S. Attorney, as he requested an Assistant U.S. Attorney to sign the indictment in the space provided for the signature of U.S. Attorney Robert G. Renner. See, EXHIBIT C. (Movant LAMBROS' April 06, 2001, "MOTION FOR LEAVE TO FILE A SECOND OR SUCCESSIVE MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE UNDER 28 U.S.C. §2255 BY A PRISONER IN FEDERAL CUSTODY" and "MOVANT'S MEMORANDUM OF FACT AND LAW IN SUPPORT OF (AFFIDAVIT FORM) MOTION FOR LEAVE TO FILE A SECOND OR SUCCESSIVE MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE UNDER 28 U.S.C. §2255 BY A PRISONER IN FEDERAL CUSTODY." Exhibit A within the MEMORANDUM OF FACTS AND LAW.

U.S. ATTORNEY ROBERT G. RENNER RESPONDED FOR THE GOVERNMENT ON OCTOBER 15, 1976, WHEN MOVANT APPEALED PRIOR CONVICTIONS TO APPEALS COURT.

21. On or about October 15, 1976, U.S. Attorney Robert G. Renner was

ON BRIEF in U.S. vs. LAMBROS, 544 F.2d 962, 963 (8th Cir. 1976), as to Movant LAMBROS' direct appeal to CRIMINAL INDICTMENTS:

- a. CR-3-75-128;
- b. CR-3-76-17.

U.S. ATTORNEY ROBERT G. RENNER DELIBERATELY PERVERTED THE WILL OF THE GRAND JURIES IN 1976 WHEN HE DID NOT PRESENT THE CORRECT PARTICULAR ELEMENTS OF THE STATUTES MOVANT LAMBROS WAS CONVICTED OF.

22. U.S. Attorney Robert G. Renner, who drafted and/or approved the drafting of Movant's prior conviction INDICTMENTS:

- a. CR-3-75-128;
- b. CR-3-76-17;
- c. CR-3-76-54.

in 1976, deliberately perverted the grand juries will in the above three (3) criminal indictments, as Movant LAMBROS was indicted illegally, as attested to by the accurate claims of intent by the grand jury within the four corners of the indictments. As the grand jury focused upon each particular element and determined which particular fact and element should be included in the ultimate accusations within the above-entitled indictments for that offense. Rule 6 required the grand jury as a body to pass on the actual TERMS of Movant LAMBROS' indictments. (12 grand jury members) See, GAITHER vs. U.S., 413 F.2d 1061, 1071 (District of Columbia, 1969)(We are impelled to this conclusion largely by the constitutional principals of BAIN, STIRONE, and RUSSELL, which emphasize the right of the accused to be tried on an indictment which has in each material particular been approved by a grand jury.).

23. ESSENTIAL ELEMENTS OF THE CRIME CHARGED IN THE INDICTMENT: For an INDICTMENT to be sufficient, it must allege EACH MATERIAL ELEMENT of the offense; if it does not, it fails to charge that offense. This requirement stems directly from one of the central purposes of an INDICTMENT, to ensure that the GRAND JURY

FINDS PROBABLE CAUSE THAT THE DEFENDANT HAS COMMITTED EACH ELEMENT OF THE OFFENSE,
HENCE JUSTIFYING A TRIAL, AS REQUIRED BY THE FIFTH AMENDMENT. See, U.S. vs. CABRERA-
TERAN, 168 F.3d 141, 143 (5th Cir. 1999) (An INDICTMENT's failure to charge an
offense constitutes a JURISDICTIONAL DEFECT. Because an indictment is jurisdictional,
defendants at any time may raise an objection to the INDICTMENT based on failure to
charge an offense, and the defect is "not waived by a guilty plea." Id. at 143)(The
INDICTMENT ensures that the GRAND JURY has had the opportunity to review EVIDENCE
supporting, and find sufficient cause to charge a defendant with, EACH ELEMENT OF
OFFENSE BEFORE THE COURT MAY ENTERTAIN PROSECUTION. Only the appearance in the
indictment of ALL of the offense's ELEMENTS meets this requirement. Id. at 145)

24. The EIGHTH CIRCUIT stated that the failure of the INDICTMENT to
charge that the defendant acted KNOWINGLY, UNLAWFULLY, and WILLFULLY was fatally
defective to the government's prosecution. Therefore, the Court held that the
indictment was legally insufficient to comply with the GRAND JURY CLAUSE OF THE FIFTH
AMENDMENT. See, U.S. vs. DENMON, 483 F.2d 1093 (8th Cir. 1973)("The omission of an
ESSENTIAL ELEMENT of the offense from the indictment is matter of substance and not
form and MISSING ELEMENTS CANNOT PROPERLY BE IMPLIED OR INFERRED FROM OTHER ELEMENTS
AND ALLEGATIONS OF THE INDICTMENT." DENMON, 483 F.2d 1093, Head Note 6.) Also see,
U.S. vs. CAMP, 541 F.2d 737, 739-40 (8th Cir. 1976); HAMLING vs. U.S., 41 L.Ed.2d
590 (1974); U.S. vs. MILLER, 774 F.2d 883, 884-85 (8th Cir. 1985)("[T]he INDICTMENT
contained no assurance that the GRAND JURY deliberated on the ELEMENTS of any part-
icular offense." Id. at 885); U.S. vs. ZANGGER, 848 F.2d 923, 925 (8th Cir. 1988);
U.S. vs. MOSS, 252 F.3d 993, 1005 (8th Cir. 2001)("Rather, an INDICTMENT that omits
an ELEMENT OF A CRIME is structurally deficient and provides no lawful basis for
bringing anyone to trial. Failure to include an ESSENTIAL ELEMENT IN A FEDERAL
INDICTMENT warrants relief even if the government later proves the omitted element
at trial." Id. at 1005). U.S. vs. OLSON, 262 F.3d 795 (8th Cir. 2001).

MISSING ELEMENTS IN 1976 INDICTMENTS

CRIMINAL INDICTMENT NO. 3-75-128.

25. Criminal INDICTMENT No. 3-75-128, filed on February 23, 1976, was a forty-four (44) count indictment which named Movant LAMBROS in Counts 1, 41, 42, 43, & 44. The February 23, 1976, INDICTMENT did not contain the words **POSSESSED** and **INTENT** in Count One (1) of the INDICTMENT, as to violations of Title 21 U.S.C. §§ 841(a)(1); 846; 952(a); 960(a)(1); and 963. See, EXHIBIT A (Page 14 thru 25). The words **POSSESSED** and **INTENT** are **NECESSARY ELEMENTS TO SUSTAIN A CONVICTION** in Count One (1).

CRIMINAL INDICTMENT NO. 3-76-17.

26. Criminal INDICTMENT No. 3-76-17, filed on March 24, 1976, was a two (2) count INDICTMENT which named Movant LAMBROS in Counts 1 & 2. The March 24, 1976, INDICTMENT did not contain the words **WILLFULLY, INTENTIONALLY, SPECIAL MARITIME AND TERRITORIAL JURISDICTION OF THE UNITED STATES AND/OR STATE THE EXACT LOCATION THE FEDERAL CRIME OCCURRED WITHIN THE INDICTMENT, INTENT TO TORTURE, MAIM, DISFIGURE, CUT, BITE, SLITS THE NOSE, EAR, or LIP, CUTS OUT or DISABLES THE TONGUE, PUTS OUT or DESTROYS AN EYE, CUTS OFF or DISABLES A LIMB or ANY MEMBER OF ANOTHER PERSON, THROWS or POURS UPON ANOTHER PERSON ANY SCALDING WATER, CORROSIVE ACID, or CAUSTIC SUBSTANCE** in Counts One and Two of the INDICTMENT, as to violations of Title 18, U.S.C., Sections 111 and 114. See, EXHIBIT B (Pages 15 thru 26). The above listed words are **NECESSARY ELEMENTS TO SUSTAIN A CONVICTION** in Counts One and Two.

CRIMINAL INDICTMENT NO. 3-76-54.

27. Criminal INDICTMENT No. 3-76-54, filed on September 14, 1976, was a seven (7) count INDICTMENT which named Movant LAMBROS in Counts 1, 2, 3, 4, 5, & 7. On February 15, 1977, a jury found Movant LAMBROS guilty on Counts 4, 5, & 7

of the INDICTMENT. See, U.S. vs. LAMBROS, 564 F.2d 26, 27 (8th Cir. 1977). The September 14, 1976, INDICTMENT did not contain the word INTENT within Count Seven (7), nor the word POSSESSION within Counts 4, 5, and 7, as to violations of Title 21, U.S.C., Section 841(a)(1) and 846. See, EXHIBIT C (Pages 19 thru 23). The words INTENT and POSSESSION are NECESSARY ELEMENTS TO SUSTAIN A CONVICTION.

U.S. DISTRICT COURT JUDGE RENNER RESENTENCED MOVANT LAMBROS ON FEBRUARY 10, 1997, ON COCAINE NOT MARIJUANA CHARGES. THE JURY RENDERED A GENERAL VERDICT. JUDGE RENNER SHOULD OF SENTENCED MOVANT LAMBROS TO A MARIJUANA CHARGE.

CRIMINAL INDICTMENT NO. 4-89-82.

28. Movant LAMBROS was resentenced by U.S. Federal Judge Robert Renner on February 10, 1997, on Count One of Criminal Indictment No. 4-89-82 on Cocaine charges when the petit jury did not make a SPECIAL FINDING as to the alleged type of drug Movant was convicted of, "MARIJUANA, COCAINE, and/or an unspecified amount of a CONTROLLED SUBSTANCE." Movant LAMBROS admitted to the receipt of MARIJUANA to the petit jury and the court. Therefore, Judge Renner could only sentence Movant LAMBROS to MARIJUANA not COCAINE. See, U.S. vs. NICHOLSON, 231 F.3d 445, 446, 448, 449, 454, and 455 (8th Cir. 2000)(REHEARING DENIED). (We held in U.S. vs. NATTIER, that, where a JURY renders a GENERAL VERDICT that may rest on any of several alternative factual findings, the court "should sentence the defendant on the ALTERNATIVE THAT YIELDS A LOWER SENTENCING RANGE." Id. at 454).

29. Movant LAMBROS was resentenced by Judge Renner on February 10, 1997, on Count One of Criminal Indictment No. 4-89-82 to an amount of a controlled substance that was not proved beyond a reasonable doubt by a petit jury.

30. Movant offers supporting evidence in affidavit form as to the legal theory and supporting documents for paragraphs 28 and 29 in EXHIBIT D. ("MOTION FOR LEAVE TO FILE A SECOND OR SUCCESSIVE MOTION TO VACATE, SET ASIDE OR

CORRECT SENTENCE UNDER 28 U.S.C. § 2255 BY A PRISONER IN FEDERAL CUSTODY. Dated: June 18, 2001" and "MOVANT'S MEMORANDUM OF FACT AND LAW IN SUPPORT OF (AFFIDAVIT FORM) MOTION FOR LEAVE TO FILE A SECOND OR SUCCESSIVE MOTION TO VAGATE, SET ASIDE OR CORRECT SENTENCE UNDER 28 U.S.C. § 2255 BY A PRISONER IN FEDERAL CUSTODY. Dated: June 18, 2001:") The legal theory for PARAGRAPH 28 is offered within pages 16 thru 26 in the June 18, 2001, MEMORANDUM OF FACT AND LAW. The legal theory for PARAGRAPH 29 is offered within pages 26 thru 30 in the June 18, 2001, MEMORANDUM OF FACT AND LAW.

RETROACTIVE DISQUALIFICATION OF U.S. DISTRICT COURT JUDGE ROBERT G. REHNER UNDER § 455(a).

31. The U.S. Supreme Court held in LILJEBERG vs. HEALTH SERVICES CORP., 100 L.Ed.2d 855 (1988), the following facts as to the RETROACTIVE application of Rule 60(b)(6) to apply § 455(a) retroactively:

a. "Under 28 USCS § 455(a), which disqualifies a federal judge from acting in any proceeding in which the judge's impartiality 'might reasonably be questioned,' RECUSAL IS REQUIRED -- even though a federal judge lacks actual knowledge of the facts indicating the judge's interest or bias in the case -- if a reasonable person, KNOWING ALL THE CIRCUMSTANCES, would expect that the judge would have such actual knowledge, because . . . (5) to the extent that § 455 CAN BE APPLIED RETROACTIVELY, after a judge has become aware of the disqualifying facts, the judge is not called upon to perform an impossible feat, but to rectify an oversight, and thus to conclude that § 455(a) has been violated." See, LILJEBERG, at 859. (emphasis added)

b. ". . . But to the extent the provision can also, in proper cases, BE APPLIED RETROACTIVELY, the judge is not called upon to perform an impossible feat. Rather, he is called upon to rectify an oversight and to take the steps necessary to maintain public confidence in the impartiality of the judiciary. If he concludes that 'HIS IMPARTIALITY MIGHT REASONABLY BE QUESTIONED,' then he should also find that the statute has been violated. This is certainly not an impossible task. . . . Accordingly, even though his failure to disqualify himself was the product of a TEMPORARY LAPSE OF MEMORY, it was nevertheless a plain violation of the terms of the statute." See, LILJEBERG, at 873. (emphasis added)

c. DISSENTING SEPARATE OPINION by Chief Judge REHNQUIST, with whom Justice WHITE and Justice SCALIA join. "Despite this factual determination, reached after a public hearing on the subject, the

Court nevertheless concludes that "public confidence in the impartiality of the judiciary" COMPELS RETROACTIVE DISQUALIFICATION OF JUDGE COLLINS UNDER § 455." See, LILJEBERG, at 880. (emphasis added)

d. DISSERTING OPINION CONTINUED: "For even if one accepts the Court's proposition that § 455 PERMITS DISQUALIFICATION ON THE BASIS OF A JUDGE'S CONSTRUCTIVE KNOWLEDGE, RULE 60(b)(6) SHOULD NOT BE USED IN THIS CASE TO APPLY § 455(a) RETROACTIVELY TO JUDGE COLLINS' PARTICIPATION IN THE LAWSUIT." See, LILJEBERG, at 880. (emphasis added)

CONCLUSION:

32. Movant LAMBROS has offered a brief overview of the record in this action against Judge RENNER and Chief Magistrate Judge Franklin Linwood NOEL as to violations of Title 28 U.S.C.A. §§ 455(a) and 455(b)(3).

33. Movant LAMBROS believes the judge's IMPARTIALITY "MIGHT REASONABLY BE QUESTIONED."

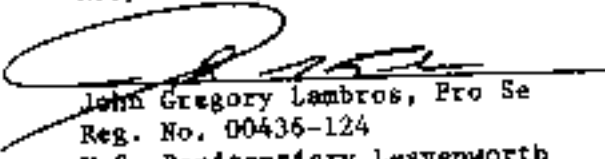
34. Movant LAMBROS is requesting this Court to develop the FULL RECORD in this action, so as to meet the requirements set by the Eighth Circuit Court of Appeals. See, IN RE FEDERAL SKYWALK CASES, 680 F.2d 1175, 1176 Head Note 8 (8th Cir. 1982) ("Claim of bias of judge must be evaluated in the light of the full record, not simply in the light of an isolated incident. 28 USCA § 455(a))

35. Movant requests this Court to deny the governments request to summarily dismiss this action due to lack of jurisdiction.

36. All declarations within this document and EXHIBITS attached are under the penalty of perjury and true and correct, as per Title 28 USC § 1746.

EXECUTED ON: November 9, 2001

Respectfully submitted,


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EXHIBIT

INDEX

1. **EXHIBIT A:** "MOTION FOR LEAVE TO FILE A SECOND OR SUCCESSIVE MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE UNDER 28 U.S.C. § 2255 BY A PRISONER IN FEDERAL CUSTODY. Dated: June 02, 2001" and "MOVANT'S MEMORANDUM OF FACT AND LAW IN SUPPORT OF (AFFIDAVIT FORM) MOTION FOR LEAVE TO FILE A SECOND OR SECESSIVE MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE UNDER 28 U.S.C. § 2255 BY A PRISONER IN FEDERAL CUSTODY. Dated: June 02, 2001." This action addresses **INDICTMENT No. 3-75-128.**


2. **EXHIBIT B:** "MOTION FOR LEAVE TO FILE A SECOND OR SUCCESSIVE MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE UNDER 28 U.S.C. §2255 BY A PRISONER IN FEDERAL CUSTODY. Dated: June 08, 2001." and "MOVANT'S MEMORANDUM OF FACTS AND LAW IN SUPPORT OF (AFFIDAVIT FORM) MOTION FOR LEAVE TO FILE A SECOND OR SUCCESSIVE MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE UNDER 28 U.S.C. §2255 BY A PRISONER IN FEDERAL CUSTODY. Dated: June 08, 2001." This action addresses **INDICTMENT No. 3-76-17.**

3. **EXHIBIT C:** "MOTION FOR LEAVE TO FILE A SECOND OR SUCCESSIVE MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE UNDER 28 U.S.C. §2255 BY A PRISONER IN FEDERAL CUSTODY. Dated: April 06, 2001." and "MOVANT'S MEMORANDUM OF FACT AND LAW IN SUPPORT OF (AFFIDAVIT FORM) MOTION FOR LEAVE TO FILE A SECOND OR SUCCESSIVE MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE UNDER 28 U.S.C. §2255 BY A PRISONER IN FEDERAL CUSTODY. Dated: April 06, 2001." This action addresses **INDICTMENT No. 3-76-54.**

4. **EXHIBIT D:** "MOTION FOR LEAVE TO FILE A SECOND OR SUCCESSIVE MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE UNDER 28 U.S.C. §2255 BY A PRISONER IN FEDERAL CUSTODY. Dated: June 18, 2001." and "MOVANT'S MEMORANDUM OF FACT AND LAW IN SUPPORT OF (AFFIDAVIT FORM) MOTION FOR LEAVE TO FILE A SECOND OR SUCCESSIVE MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE UNDER 28 U.S.C. §2255 BY A PRISONER IN FEDERAL CUSTODY. Dated: June 18, 2001." This action addresses **INDICTMENT No. 4-89-82.**

I JOHN GREGORY LAMBROS declare under penalty of perjury that the foregoing indexed EXHIBITS are attached to this action and are true and correct, pursuant to Title 28, U.S.C.A., Section 1746.

EXECUTED ON: November 09, 2001


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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

JOHN GREGORY LAMBROS, *
Petitioner, * CIVIL FILE NO. 99-28 (RGR)
*
vs. * Criminal File No. 4-89-82(05)
*
UNITED STATES OF AMERICA, * JAMES H. ROSENBAUM, U.S. District Chief Judge.
*
Respondent. * AFFIDAVIT FORM.

EXHIBIT A.

PETITIONER LAMBROS' RESPONSE TO OCTOBER 19, 2001
"OPPOSITION OF THE UNITED STATES TO PETITIONER'S
MOTION TO VACATE ALL JUDGMENTS AND ORDERS."

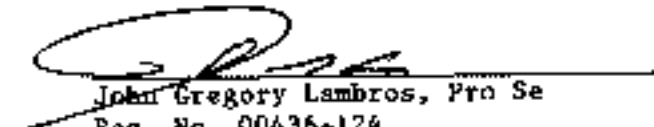
The attached EXHIBIT references the District of Minnesota Criminal
INDICTMENT in U.S. vs. LAMBROS:

CR-3-75-128

I JOHN GREGORY LAMBROS declare under penalty of perjury that the
attached EXHIBIT is true and correct pursuant to Title 28 U.S.C.A. Section 1746.

EXECUTED ON: November 09, 2001

Respectfully submitted,


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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

JOHN GREGORY LAMBROS, *
Petitioner, * CIVIL FILE NO. 99-25 (RGR)
vs. * Criminal File No. 4-89-82(05)
*
UNITED STATES OF AMERICA, * JAMES M. ROSENBAUM, U.S. District Chief Judge.
Respondent. * AFFIDAVIT FORM.

EXHIBIT B.

PETITIONER LAMBROS' RESPONSE TO OCTOBER 19, 2001
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INDICTMENT in U.S. vs. LAMBROS:

CR-3-76-17.

I JOHN GREGORY LAMBROS declare under penalty of perjury that the
attached EXHIBIT is true and correct pursuant to Title 28 U.S.C.A. Section 1746.

EXECUTED ON: November 09, 2001

Respectfully submitted.


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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

JOHN GREGORY LAMBROS, *
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vs. * Criminal File No. 4-89-82(05)
*
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Respondent. * AFFIDAVIT FORM.

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CR-3-76-54.

I JOHN GREGORY LAMBROS declare under penalty of perjury that the
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EXECUTED ON: November 09, 2001

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

JOHN GREGORY LAMBROS, *
Petitioner, * CIVIL FILE NO. 99-28 (RGR)
vs. * Criminal File No. 4-89-82(05)
*
UNITED STATES OF AMERICA, * JAMES M. ROSENBAUM, U.S. District Chief Judge.
Respondent. * AFFIDAVIT FORM.

EXHIBIT D.

PETITIONER LAMBROS' RESPONSE TO OCTOBER 19, 2001
"OPPOSITION OF THE UNITED STATES TO PETITIONER'S
MOTION TO VACATE ALL JUDGMENTS AND ORDERS."

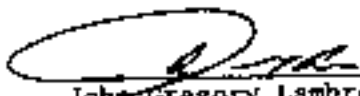
The attached EXHIBIT references the District of Minnesota Criminal
INDICTMENT in U.S. vs. LAMBROS:

CR-4-89-82.

I JOHN GREGORY LAMBROS declare under penalty of perjury that the
attached EXHIBIT is true and correct pursuant to Title 28 U.S.C.A. Section 1746.

EXECUTED ON: November 09, 2001

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