October 17, 2012

John Gregory Lambros
Reg. NO. 00436-124
U.S. Penitentiary Leavenworth
P.O. Box 1000
Leavenworth, Kansas 66048-1000
USA

U.S. CERTIFIED MAIL NO.
7010-0290-0003-5485-4349

CLERK OF THE COURT
U.S. Court of Appeals for the Eighth Circuit
Thomas F. Eagleton U.S. Courthouse
111 South 10th Street, Room 24.329
St. Louis, Missouri 63102
Tel. (314) 244-2400
Website: www.ca8.uscourts.gov

RE: JOHN GREGORY LAMBROS vs. USA, No. 12-2427

Dear Clerk:

Attached for **FILING** in the above-entitled action is copy of my:

1. "SUPPLEMENTAL MOTION TO INFORM COURT OF NEW RELEVANT PUBLISHED HOLDING THAT CONTAINS PERSUASIVE VALUE ON THE ONLY ISSUE IN THIS ACTION - U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT APPLY LAFLER vs. COOPER, 132 S. Ct. 1376 (2012) AND MISSOURI vs. FRYE, 132 S. Ct. 1399 (2012) RETROACTIVELY."

Please serve the U.S. Attorney copy of this motion via **ELECTRONIC MAIL.**

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

Sincerely,

John Gregory Lambros, Pro Se

CERTIFICATE OF SERVICE

I JOHN GREGORY LAMBROS certify that I mailed a copy of the above-entitled motion within a stamped envelop with the correct postage to the following parties on **OCTOBER 17, 2012** from the U.S. Penitentiary Leavenworth mailroom:

2. Clerk, U.S. Court of Appeals for the Eighth Circuit, as addressed above.

John Gregory Lambros, Pro Se

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JOHN GREGORY LAMBROS,	*	
		CASE NO. 12-2427
Petitioner - Movant,	*	
vs.	*	DISTRICT COURT FOR THE DISTRICT OF MINNESOTA - Criminal No. 4-89-82
UNITED STATES OF AMERICA,	*	
Respondent.	*	AFFIDAVIT FORM

SUPPLEMENTAL MOTION TO INFORM COURT OF NEW RELEVANT PUBLISHED HOLDING THAT CONTAINS PERSUASIVE VALUE ON THE ONLY ISSUE IN THIS ACTION - U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT APPLY LAFLER vs. COOPER, 132 S. Ct. 1376 (2012) AND MISSOURI vs. FRYE, 132 S. Ct. 1399 (2012) RETROACTIVELY.

Petitioner JOHN GREGORY LAMBROS, Pro Se, (hereinafter "Movant") would like to share the September 28, 2012, published opinion by the United States Court of Appeals for the Ninth Circuit, TYRONE W. MILES vs. MICHAEL MARTEL, WARDEN, No. 10-15633, which held that LAFLER vs. COOPER and MISSOURI vs. FRYE apply **RETROACTIVELY:**

> "This case fits squarely between LAFLER and FRYE. As in LAFLER, a habeas case subject to AEDPA like this one, 'the favorable plea offer was reported to the client but, on advice of counsel, was rejected.' LAFLER, 132 S. Ct. at 1383. (Footnote 3) And like FRYE, 'after the [plea] offer lapsed the defendant still pleaded guilty, but on more severe terms.' Id. (Footnote 4)"

Footnote 3:

> "In LAFLER, the Court held that STRICKLAND is appropriate 'clearly established federal law' to apply to claims of ineffective assistance of counsel in plea bargaining, even when the claim relates to a foregone plea. See, LAFLER, 132 S.Ct. at 1384. **BY APPLYING THIS HOLDING IN LAFLER, A HABEAS PETITION SUBJECT TO AEDPA, THE COURT NECESSARILY IMPLIED THAT THIS HOLDING APPLIES TO HABEAS PETITIONERS WHOSE CASES ARE ALREADY FINAL ON DIRECT REVIEW; i.e. THAT THE HOLDING APPLIES RETROACTIVELY. ..."** (emphasis added)

See, MILES vs. MARTEL, No. 10-15633 (9th Cir., September 28, 2012)(page 11917 within OPINION of U.S. Court of Appeals Ninth Circuit "PUBLICATION"

ALSO SEE ATTACHED: EXHIBIT A (Pages 11903, 11906, 11907, and 11917.)

The Ninth Circuit held in MILES vs. MARTEL, "Following the United States Supreme Court's recent decisions in LAFLER v. COOPER and MISSOURI v. FRYE, we reverse the district court's denial of Mile's petition for habeas corpus and remand to the district court to hold an evidentiary hearing on Mile's claims." Id. at 11907.

FACTS:

1. July 23, 2012, within the "UNITED STATES RESPONSE TO DEFENDANT'S APPLICATION TO FILE SUCCESSIVE SECTION 2255 HABEAS PETITION", in this above-entitled action, the government stated the following to this Court:

   a. Page 8: "The only Court of Appeals to have examined whether LAFLER or FRYE apply retroactively held they do not." This is not true.

   b. Page 10: "Accordingly, this Court should deny Lambros' request for leave to file a second or successive habeas corpus motion because he cannot make a prima facie showing that FRYE and LAFLER constitute 'a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable."

2. Movant Lambros has made a "PRIMA FACIE SHOWING THAT FRYE and LAFLER" is retroactive to habeas corpus motions subject to the AEDPA (Antiterrorism and Effective Death Penalty Act of 1996) and the U.S. Court of Appeals for the Ninth Circuit has supported same within MILES vs. MARTEL. See, Page 11917, FN 3, attached ("By applying this holding in LAFLER, a habeas petition subject to AEDPA, the Court [U.S. Supreme Court] necessarily implied that this holding applies to

habeas petitioners whose cases are already final on direct review, i.e. **THAT THE HOLDING APPLIES RETROACTIVELY.**" (emphasis added)

3. Movant Lambros August 10, 2012, "... Response to United States Response to Defendant's Application to File Successive Section 2255 Habeas Petition", offered additional cases that have applied LAFLER and FRYE retroactively. See, pages 17, 18 and 19, Paragraph 27(a) thru (d).

CONCLUSION:

4. Movant Lambros incorporates Rule 10(c) of the Federal Rules of Civil Procedure and incorporates all filing within this motion that have been filed in this above-entitled action.

5. For all the foregoing reasons, Movant requests this Court to vacate Movant's convictions and sentences in Counts 1, 5, 6, and 8.

6. I declare under penalty of perjury that the foregoing is true and correct pursuant to Title 28 U.S.C. Section 1746.

EXECUTED ON: October 17, 2012

John Gregory Lambros, Pro Se
Reg. No. 00436-124
U.S. Penitentiary Leavenworth
P.O. Box 1000
Leavenworth, Kansas 66048-1000
USA

Website: www.BrazilBoycott.org

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TYRONE W. MILES,
Petitioner-Appellant,

v.

MICHAEL MARTEL, Warden,
Respondent-Appellee.

No. 10-15633

D.C. No.
1:08-cv-01002-JF

OPINION

Appeal from the United States District Court
for the Eastern District of California
Jeremy D. Fogel, District Judge, Presiding

Argued and Submitted February 15, 2012
Submission Vacated February 21, 2012
Resubmitted September 28, 2012
San Francisco, California

Filed September 28, 2012

Before: Procter Hug, Jr., Betty B. Fletcher, and
Richard A. Paez, Circuit Judges.

Opinion by Judge B. Fletcher

COUNSEL

Michael S. Romano (argued), Susannah J. Karlson (Certified Law Student), Mills Legal Clinic of Stanford Law School, Stanford, California, for the petitioner-appellant.

Kamala D. Harris, Attorney General of California; Michael P. Farrell, Senior Assistant Attorney General; Brian G. Smiley, Supervising Deputy Attorney General; David Andrew Eldridge (argued), Deputy Attorney General, Office of the California Attorney General, Sacramento, California, for the respondent-appellee.

OPINION

B. FLETCHER, Circuit Judge:

"[C]riminal justice today is for the most part a system of pleas, not a system of trials. . . . [T]he right to adequate assistance of counsel cannot be defined or enforced without taking account of the central role plea bargaining plays in securing convictions and determining sentences." *Lafler v. Cooper*, 132 S. Ct. 1376, 1388 (2012). Because of "[t]he reality [ ] that plea bargains have become so central to the administration of the criminal justice system . . . ," *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012), the Supreme Court recently recognized that the Sixth Amendment right to counsel "extends to the plea-bargaining process. During plea negotiations defendants are entitled to the effective assistance of competent counsel." *Lafler*, 132 S. Ct. at 1384 (internal citations and quotation marks omitted); *see also Frye*, 132 S. Ct. at 1407.

Petitioner-Appellant Tyrone Wayland Miles ("Miles") claims that he received ineffective assistance of counsel during plea-bargaining process. He alleges that counsel advised him to reject a plea offer of six years' imprisonment without

alerting him that he was being charged with a crime that would qualify as a "third strike" under California law. He later entered an open plea and was sentenced to a three strikes sentence of twenty-five years to life in prison. Without granting an evidentiary hearing, the California Supreme Court summarily denied his state petition for a writ of habeas corpus. Following the United States Supreme Court's recent decisions in *Lafler v. Cooper* and *Missouri v. Frye*, we reverse the district court's denial of Miles's petition for habeas corpus and remand to the district court to hold an evidentiary hearing on Miles's claims.

I

Miles grew up in Hanford, California. He is a Navy veteran who deployed to the Persian Gulf three times, including during Operation Desert Storm. He married and had his first child while in the Navy. During that time, however, Miles began to exhibit signs of depression, anxiety, and substance abuse. He received an honorable discharge and returned with his family to Hanford, where his substance abuse and depression worsened. As a result of his drug addiction and erratic behavior, Miles's wife left him and returned with their child to her family in Virginia.

In 1993, while Miles was under the influence of drugs and alcohol, some of his friends asked him to act as a lookout while they robbed a store. Five days later, Miles acted as a lookout to a second robbery. The police caught Miles, and he was charged for his involvement in the robberies together, under the same case number. Miles pled guilty and served three years in prison.

After his release from prison, Miles moved back home to Hanford and lived next door to his parents. He worked various jobs and had two more children with his girlfriend. Miles also remained addicted to methamphetamine and committed several minor criminal offenses. Miles's substance abuse

> sel. Defendants must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, . . . [and] that the end result of the criminal process would have been more favorable . . . .

Id. at 1409. The Court remanded to the state court for it to determine if Frye could show prejudice, especially in light of his intervening arrest for the same offense while the current charges and plea offer were pending. *Id.* at 1411.

C

This case fits squarely between *Lafler* and *Frye*. As in *Lafler*, a habeas case subject to AEDPA like this one, "the favorable plea offer was reported to the client but, on advice of counsel, was rejected." *Lafler*, 132 S. Ct. at 1383.[3] And like *Frye*, "after the [plea] offer lapsed the defendant still pleaded guilty, but on more severe terms." *Id.*[4] Applying clearly estab-

[3]In *Lafler*, the Court held that *Strickland* is the appropriate "clearly established federal law" to apply to claims of ineffective assistance of counsel in plea bargaining, even when the claim relates to a foregone plea. *See Lafler*, 132 S. Ct. at 1384. By applying this holding in *Lafler*, a habeas petition subject to AEDPA, the Court necessarily implied that this holding applies to habeas petitioners whose cases are already final on direct review; *i.e.* that the holding applies retroactively. This holding is also consistent with our prior circuit precedent that applied *Strickland* in the plea-bargaining context. *See, e.g.*, *Nunes*, 350 F.3d at 1051-53 (applying *Strickland* to a foregone plea bargain); *Turner v. Calderon*, 281 F.3d 851, 879-80 (9th Cir. 2002) (citing *Strickland and Hill v. Lockhart*, 474 U.S. 52 (1985)); *United States v. Blaylock*, 20 F.3d 1458, 1465-66 (9th Cir. 1994)

[4]The district court, ruling without the benefit of *Lafler* and *Frye*, rejected Miles's habeas claim based on a lack of constitutional infirmity in his subsequent guilty plea. But based on *Lafler* and *Frye*, neither a trial free of constitutional flaw nor a voluntary and intelligent guilty plea "wipes clean any deficient performance by defense counsel during plea bargaining." *Lafler*, 132 S. Ct. at 1388 (discussing a subsequent trial); *see Frye*, 132 S. Ct. at 1405-08 (discussing the application of *Strickland* where the defendant subsequently pleads guilty to less favorable terms).