

COPY

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA  
Criminal No. 4-89-82(5)  
Civil No. 99-28(RGR)

JOHN GREGORY LAMBROS,	)	
	)	
Petitioner,	)	
	)	
v.	)	OPPOSITION OF THE UNITED STATES
	)	TO PETITIONER'S MOTION TO
UNITED STATES OF AMERICA,	)	VACATE ALL JUDGMENTS AND
	)	ORDERS
	)	
Respondent.	)	

Petitioner John Gregory Lambros, who was convicted after a jury trial in 1993 of drug trafficking offenses, has filed a pro se "Motion to Vacate All Judgments and Orders by United States District Court Judge Robert G. Renner Pursuant to Rule 60(b)(6)". Judge Renner did not preside over Lambros' trial or original sentencing (Judge Murphy did), but did re-sentence Lambros following a limited remand from the Eighth Circuit. Lambros alleges that all of Judge Renner's orders should be vacated because Judge Renner was the United States Attorney for the District of Minnesota 20 years earlier when Lambros was convicted in a different federal case. Petition at 2-3.

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 v. Armontrout, 983 F.2d 98 (8th Cir. 1993); Blair v. Armontrout, 976 F.2d 1130, 1134 (8th Cir. 1992); United States v. 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.

STATEMENT OF FACTS

Petitioner John Gregory Lambros was convicted after a jury trial in 1993 of several counts of cocaine trafficking. Because Lambros has two prior felony drug convictions, the District Court (Judge Diana Murphy) initially sentenced him to a mandatory life sentence of imprisonment. 21 U.S.C. § 841(b)(1)(A).

Lambros appealed his mandatory life sentence to the Eighth Circuit. The Eighth Circuit vacated the mandatory life sentence on the ground that Lambros' criminal conduct occurred prior to the enactment of the mandatory life sentencing provision. United States v. Lambros, 65 F.3d 698, 700 (8th Cir. 1995), cert. denied 116 S.Ct. 796 (1996). The Eighth Circuit affirmed Lambros' conviction in all other respects and remanded for re-sentencing.

By the time of re-sentencing in early 1997, the case had been re-assigned from Judge Murphy to Judge Renner. At re-sentencing, the guideline range was correctly computed without objection to be 360 months - life imprisonment. The government requested a sentence of 360 months. The District Court then imposed a sentence of 360 months. The Eighth Circuit subsequently affirmed the re-sentencing in an unpublished opinion. Exhibit 1.

### HISTORY OF SECTION 2255 PETITIONS

The present petition is Lambros' fifth post-conviction collateral attack on his conviction and sentence. The first such petition was filed at the time of his re-sentencing. See Exhibit 2 at 2. Although styled as a motion pursuant to Federal Rule of Criminal Procedure 33, the District Court construed the petition as a habeas corpus petition and denied it. Id.

Lambros' second petition was filed on April 18, 1997. The District Court denied it as successive or, alternatively, as without merit. Id.

Lambros' third petition was filed on January 7, 1999. Docket Number 222. The District Court dismissed it for lack of jurisdiction because Lambros had not obtained authorization from the Eighth Circuit to file a successive petition. Exhibit 2. The Eighth Circuit affirmed the dismissal of the third petition in an unpublished order. Exhibit 3.

Lambros' fourth petition was filed in the Eighth Circuit on June 29, 2001 as a motion for leave to file a second or a successive section 2255 petition. Exhibit 4 (cover page). The fourth petition is based on Apprendi v. New Jersey, 120 S.Ct. 2348 (2000). The Eighth Circuit has not yet ruled on that petition.

### ARGUMENT

As shown above, this is Lambros' fifth section 2255 petition (or equivalent). As such, Lambros may not file it directly in this

Court. Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), a federal prisoner must obtain certification from the appropriate court of appeals, prior to filing the petition in district court, that his second or successive section 2255 petition relies on either:

- 1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
- 2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

28 U.S.C. § 2255.

The Eighth Circuit has held that this prior certification rule is "absolute." Boykin v. United States, 2000 WL 1610732 (8th Cir. 2000) (per curiam) (unpublished) (copy attached as Exhibit 5). "Prisoners may not evade the statutory [certification] requirement by simply filing a second or successive § 2255 motion in the district court." Id. When a prisoner fails to comply with the certification requirement, the district court "lack[s] the power and authority to entertain [the] motion." Id.; see also United States v. Allen, 157 F.3d 661, 664 (9th Cir. 1998); Nelson v. United States, 115 F.3d 136 (2d Cir. 1997).

In this case, it is undisputed that Lambros has not even attempted to comply with section 2255's certification requirement, but instead has filed this successive petition directly in the

district court. Accordingly, this Court lacks jurisdiction and the petition must be summarily dismissed.

It should be noted that, even if Lambros were to apply to the Eighth Circuit for permission to file a successive petition based on an alleged conflict of interest on the part of Judge Renner, such permission would not be granted. Lambros' claim does not fit either of the two criteria set forth above for a successive petition. As to the first criterion, the fact that Judge Renner previously was the United States Attorney for the District of Minnesota hardly constitutes newly discovered evidence. Even if it did, it is not the type of evidence that would have produced an acquittal at trial. Judge Renner did not preside over Lambros' trial, Judge Murphy did. Judge Renner entered the case only at the time of re-sentencing, several years after Lambros' conviction.

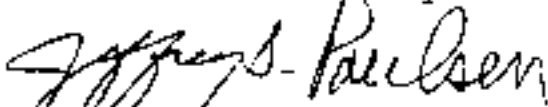
As to the second criterion, Lambros' conflict of interest claim obviously does not rely on a new rule of constitutional law made retroactive by the Supreme Court to cases on collateral review.

For the foregoing reasons, Lambros' successive petition should be summarily dismissed.

Respectfully submitted,

Dated: October 19, 2001

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