

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

THOMAS JOSEPH PETTERS — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Thomas Joseph Petters
(Your Name)
Reg. Number 14170-041
U.S. Penitentiary
Post Office Box 1000
(Address)

Leavenworth, Kansas 66048
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

QUESTION I. Whether a duty exist to disclose the direct familia relationship of Judge Kyle and Attorney Richard Kyle, Jr. (his son), who was/is the lead attorney in the white collar section, and shareholder (equity partner) of the law firm that advised defendant and other defendants in all business decisions of Petters companies during the period of the fraud that ultimately resulted in Petters conviction in violation of his Fifth and Sixth Amendment Rights guaranteed by the Constitution?

QUESTION II. Whether the direct familia relationship of Judge Kyle and his son Richard Kyle, Jr. who had a personal interest in the law firm, was the lead attorney in the white collar section and shareholder (equity partner) of the law firm which was assessed a penalty of \$ 13.5 million for breaches of duty and trust involving Petter's companies, reaches the point where any normal person might reasonably question Judge Kyle's impartiality under 28 USC § 455(a) in violation of his Fifth and Sixth Amendment Rights guaranteed by the Constitution?

QUESTION III. Whether the direct familia relationship between Judge Kyle and his son, Richard Kyle, Jr., who was/is the lead attorney in the white collar section, and shareholder (equity partner) of the law firm that reached a settlement in the amount of \$ 13.5 million in lieu of court action involving breaches of duty and trust fulfills the standard of § 455(b)(5)(iii) "...a person within the third degree of relationship...Is known by the judge to have an interest that could be substantially affected by the outcome..." or violates "code of Conduct for United States Judges" canon 3(C)(1)(d)(iii) in violation of his Fifth and Sixth Amendment Rights guaranteed by the Constitution?

See Following Page

QUESTION IV. Whether in chambers altering of the indictment by removal of the named charged "defendant companies" represented by the law firm in which Judge Kyle's son Richard Kyle, Jr., the lead attorney in the white collar crime section, was/is an attorney having a direct interest in, being a shareholder (equity partner) of the law firm, is an amendment to the indictment which renders the indictment void, or is a breach of judiciary duty and responsibilities by Judge Kyle and the government's attorney that results in violation of his Fifth and Sixth Amendment Rights guaranteed by the Constitution, requiring dismissal of the indictment and conviction of Petters?

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States court of appeals appears at Appendix A to this petition as is reported at 2015 U.S. App. LEXIS 339, Rehearing denied 01-08-2015. Appeal # 14-1840.

The opinion of the United States district court appears as Appendix B to this petition as is reported at 2014 U.S. Dist. LEXIS 16294, case number 0:13-cv-01110-RHK, 12-05-2013, and 59(e) 02-10-2014, Southern District of Minn.

JURISDICTION

The date on which the United States Court of Appeals decided my federal case was

A timely Petition for Rehearing and Rehearing en banc was denied by the United States Court of Appeals on 01-08-2015.

This Petition for Certiorari is timely filed within the 90 day period.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTIONAL:

Fifth Amendment Right to indictment by Grand Jury (unaltered),
and Due Process of Law.

Sixth Amendment Right to have impartial jury, to have compulsory
process for obtaining witnesses and to have Assistance of Counsel
for his defense.

Fourteenth Amendment Right to equal treatment under the law.

STATUTORY:

Title 28 U.S.C. § 144

Title 28 U.S.C. § 455

Title 28 U.S.C. § 455(a)

Title 28 U.S.C. § 455(b)

Title 28 U.S.C. § 455(b)(5)(iii)

STATEMENT OF THE CASE

On or about the 10th day of May, 2013, attorney Steven J. Meshbeshier filed a motion to vacate or set aside pursuant to 28 U.S.C. § 2255 for Thomas Joseph Petters. Relief was subsequently denied on the section 2255 motion on the 5th day of December, 2013.

On the 5th day of December, 2013, the court denied the motion pursuant to § 2255, opinion by the Honorable Richard H. Kyle.

On or about the 30th day of December, 2013, a motion was filed pursuant to Title 28 U.S.C. § 455(a), § 455(b)(5)(i) and § 455(b)(5)(iii), to recuse Judge Kyle, and a motion to alter or amend judgment of the Court's Opinion and Order.

Both the Motion to recuse and the 59(e) motion were denied on the 10 day of February, 2014. A motion to amend or alter that judgment pursuant to 59(e) was filed on the 3rd day of March, 2014.

That Motion under 59(e) was denied by Judge Kyle on the 11th day of March, 2014.

Timely Notice of Appeal was filed

REASONS FOR GRANTING THE WRIT

QUESTION I.

Whether a duty exist to disclose the direct familia relationship of Judge Kyle and Attorney Richard Kyle, Jr. (his son), who was/is the lead attorney in the white collar section, and shareholder (equity partner) of the law firm that advised defendant and other defendants in all business decisions of Petters companies during the period of the fraud that ultimately resulted in Petters conviction in violation of his Fifth and Sixth Amendment Rights guaranteed by the Constitution?

ARGUMENT

This Defendant was unaware that Fredrickson & Byron, P.A. the law firm that represented his companies for several years, and advised in all legal matters relating to those companies, included a partner Richard Kyle, Jr. who was the lead white collar crime attorney, and also the son of Judge Kyle, who was presiding over the Defendant's trial. However, Judge Kyle knew of the direct relationship and chose not to inform the defense, nor to disqualify himself from the case. United States v. Fazio, 487 F.3d 646, 653 (8th Cir. 2007) and Ins v. Pangilinan, 486 US 875, 100 L.Ed.2d 882, 108 S.Ct 2271 (1988).

This law firm pulled back upon Defendant's arrest and said they could not represent him any further due to a conflict, which was their culpability in representing Defendant's companies. The

law firm paid out 13.5 million in matters related to this case for breaches of duty and trust involving Defendant Petters companies. *SCA Servs., Inc. v. Morgan*, 557 F.2d 110, 115 (7th Cir. 1977)(per curium)(while § 455(a) enunciates the appearance of bias as the general judicial recusal standard, no examples of such an appearance were provided in the congressional debates); *CF. Jones v. Luebbers*, 395 F.3d 1005 (8th Cir. 2004)("Although clearly established, [the appearance] standard is inherently vague") and The hypothetical reasonable person under § 455 must be someone outside the judicial system. See *In re Mason*, 916 F.2d 384 (7th Cir. 1990); *United States v. Jordan*, 49 F.3d 152 (5th Cir. 1995); *United States v. Mitchell*, 690 F.3d 137.,

This direct relationship of Judge Kyle (presiding) and his son (lead white collar crime attorney) of firm representing the Defendant Companies listed on the face of the indictment was known to Judge Kyle, while unknown to the Defendant. The duty pursuant to Canon 3C of the Code of Judicial Conduct in conjunction with laws or court rules specifying judicial conduct should have resulted in Judge Kyle's own disqualification from the case. The fact that this Defendant was not aware of the relationship and potential conflict until after the trial, rendered impossible any motion to disqualify in a timely manner. *State v. Montgomery*, 2011 Iowa App. LEXIS 331, *17 (2011) and *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 US 888, 100 L.Ed.2d 896, 108 S.Ct. 2218 (1988).

Judicial impartiality is a necessary element of justice.

Judges are expected to be, above all, impartial arbiters so that legal disputes are decided according to the law, free from influence of personal interest, bias, or prejudice. This precise influence, bias, or prejudice may have first raised its head in the judge's chambers, when the prosecution and Judge Kyle removed from the face of the indictment, the Defendant Companies that had been directly represented and advised by Fredrikson & Byron, the law firm to which Judge Kyle's son, Richard Kyle, Jr. was a partner attorney, shareholder (equity partner), and lead white collar crime attorney. *United States v. Tucker*, 78 F.3d 1313, 1325 (8th Cir. 1996); *Morrison v. United States*, 486 US 1306, 100 L.Ed.2d 594, 108 S.Ct 1837 (1988)

Defendant Petters without knowledge of the direct relationship between Judge Kyle and the law firm that advised in all Petters company matters, was unable to file timely motions or affidavits under Title 28 U.S.C. §144, or Title 28 U.S.C. §455(a) and §455(b). Yet Judge Kyle who was aware, and failed to disqualify himself, then proceeded to remove defendant companies from the face of the indictment, defendant companies which were represented by and advised by Fredrikson & Byron, P.A., the sole firm responsible for handling all Petters companies, personal and business legal matters throughout the time set forth in the joint-defendant indictment issued by the Grand Jury. *United States v. Tucker*, 78 F.3d 1313, 1325 (8th Cir. 1996); *Lucas v. Townsend*, 486 US 1301, 100 L.Ed.2d 589, 108 S.Ct 1763 (1988);

Fredrikson & Byron, P.A. subsequently settled a "clawback

suit" for 13.5 million dollars, resulting from the representation of Petters and his various businesses, to include the defendant companies Judge Kyle removed from the indictment. The companies that the firm which Judge Kyle's son, Fredrikson & Byron, P.A.'s white collar crime lead attorney Richard Kyle, Jr., was an active attorney, shareholder (equity partner) of, companies which Judge Kyle removed from the face of the indictment as defendant companies.

Judge Kyle should have disqualified himself.

See attached as (Exhibit A), the declaration of Mr. Richard Flamm, one of the foremost authorities on the subject of judicial impartiality and disqualification.

See attached as (Exhibit B), the "Complaint of Judicial Misconduct or Disability-April 15, 2014" formally filed by the Reverend Colin Akehurst.

See attached as (Exhibit C), the declaration of Jennifer C. Graf, attorney at law, well documented educator or professor at School of Law, award winning educator and serving in many advisory positions concerning the law.

See attached as (Exhibit D) declaration of Defendant Thomas Joseph Petters.

See attached as (Exhibit E) transcript of in chambers alteration of indictment.

QUESTION II.

Whether the direct familia relationship of Judge Kyle and his son Richard Kyle, Jr. who had a personal interest in the law firm, was the lead attorney in the white collar crime section and shareholder (equity partner) of the law firm which paid a clawback settlement in the amount of \$ 13.5 million for breaches of duty and trust involving Petter's companies, reaches the point where any normal person might reasonably question Judge Kyle's impartiality under 28 U.S.C. § 455(a) and is a violation of Defendant's Fifth and Sixth Amendment Rights guarantee of due process under the Constitution?

ARGUMENT

Title 28 U.S.C. § 455(a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

The qualifying words of command in the above statute are "of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.", and Canon 3 of the model code require a judge to recuse in any case where their "impartiality might reasonably be questioned".

The key ingredient in a § 455(a) recusal case is avoidance of the appearance of impropriety, judged by whether the average person on the street might question the judge's impartiality. See *United States v. Fazio*, 487 F.3d 646, 653 (8th Cir. 2007);

State v. Montgomery, 2011 Iowa App. LEXIS 331, *17 (2011); Durhan v. Neopolitan, 875 F.2d 91 (7th Cir. 1989)' United States v. Tucker, 78 F.3d 1313, 1325 (8th Cir. 1996); SCA Servs., Inc. v. Morgan, 557 F.2d 110, 115 (7th Cir. 1977); Cf. Jones v. Luebbers, 395 F.3d 1005 (8th Cir. 2004) and Muhammad v. Rubia, 2009 U.S. Dist. LEXIS 12307, *6 (N.D. Cal. 2009)("[I hold] no bias or prejudice against the plaintiff herein, Nevertheless, as a reasonable person might conclude that the facts alleged by plaintiff create an appearance of bias or prejudice, the Court, in an abundance of caution, will...")

Clearly, these rules suffer from ambiguity, however, impartiality might reasonably be questioned by any person who knows that a judge has even the most tenuous relationship to any person involved in a case in any manner. Here, the judge's son, a blood relative, who is directly connected to the firm of Fredrikson & Byron, P.A., which advised this Defendant in all matters relative to the defendant and defendant companies, and who had a financial interest as a shareholder (equity partner) of the law firm which paid a clawback settlement in the amount of \$ 13.5 million for breaches of duty and trust involving Petters and defendant companies, reaches the point where any normal person might reasonably question Judge Kyle's impartiality, yet Judge Kyle made findings to the contrary. A 13.5 million settlement is clearly a sizeable interest in or loss for the law firm which Judge Kyle's son has a financial interest. SCA Servs., Inc. v. Morgan, 557 F.2d 110, 115 (7th Cir. 1977)(per curium)(while \$

455(a) enunciates the appearance of bias as the general judicial recusal standard, no examples of such an appearance were provided in the congressional debates); *CF. Jones v. Luebbers*, 395 F.3d 1005 (8th Cir. 2004)("Although clearly established, [the appearance] standard is inherently vague") and The hypothetical reasonable person under § 455 must be someone outside the judicial system. See *In re Mason*, 916 F.2d 384 (7th Cir. 1990); *United States v. Jordan*, 49 F.3d 152 (5th Cir. 1995); *United States v. Mitchell*, 690 F.3d 137.,

Judicial impartiality is a necessary element of justice. Judges are expected to be, above all, impartial arbiters, free of any influence of personal interest, bias, or prejudice. This principle is affirmed by the American Bar Association Model Code of Judicial Conduct, stating that judges must perform their official duties impartially and are disqualified from presiding over any case in which their impartiality might reasonably be questioned.

Title 28 U.S.C. § 455(a) requires such disqualification in any matter "in which his impartiality might reasonably be questioned." by any reasonable person. Even though the rules fail to give adequate guidance, the 13.5 million clawback settlement by the law firm in which Judge Kyle's son Richard Kyle Jr. was a partner-shareholder and the lead White Collar Crime attorney, does not amount to a "de minimis" or "an insignificant interest that could not raise reasonable question as to a judge's impartiality."

See Supreme Court Annotation, 100 L.Ed.2d 594, quoting *Ins v. Pangilinan*, 486 US 875, 100 L.Ed.2d 882, 108 S.Ct 2271 (1988); *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 US 888, 100 L.Ed.2d 896, 108 S.Ct 2218 (1988); *Lucas v. Townsend*, 486 US 1301, 100 L.Ed.2d 589, 108 S.Ct 1763 (1988); *Morrison v. United States*, 486 US 1306, 100 L.Ed.2d 594, 108 S.Ct 1837 (1988).

The fact that Judge Kyle (in chambers) with the government's prosecuting attorney, removed the "Defendant Companies" from the face of the indictment is enough to demonstrate a lack of impartiality. Those companies that they removed were represented and advised by Fredrikson & Byron, P.A., and were involved in the clawback settlement for \$ 13.5 million. The removal of the defendant companies from the indictment was a amendment of the indictment to remove companies which the law firm Fredrikson & Byron, P.A. advised. See Argument IV and Exhibit E attached.

Defendant Petters without knowledge of the direct relationship between Judge Kyle and the law firm that advised in all Petters company matters, was unable to file timely motions or affidavits under Title 28 U.S.C. §144, or Title 28 U.S.C. §455(a) and §455(b). Yet Judge Kyle who was aware, and failed to disqualify himself, then proceeded to remove defendant companies from the face of the indictment, defendant companies which were represented by and advised by Fredrikson & Byron, P.A., the sole firm responsible for handling all Petters companies, personal and business legal matters throughout the time set forth in the

joint-defendant indictment issued by the Grand Jury.

The law of disqualification remains unsettled. The appearance of justice and public confidence in the system are very much required to maintain the systems integrity, and its ability to have every dispute heard by an impartial judge. Confidence can not exist where the judge in question decides whether to disqualify or not. What bias judge would disqualify where that bias could be put to his advantage with impunity? Clearly, the disqualification was required in this case, and the failure to disqualify is tantamount to an exercise of bias in and of itself.

See attached as (Exhibit A), the declaration of Mr. Richard Flamm, one of the foremost authorities on the subject of judicial impartiality and disqualification.

See attached as (Exhibit B), the "Complaint of Judicial Misconduct or Disability-April 15, 2014" formally filed by the Reverend Colin Akehurst.

See attached as (Exhibit C), the declaration of Jennifer C. Graf, attorney at law, well documented educator or professor at School of Law, award winning educator and serving in many advisory positions concerning the law.

See attached as (Exhibit D) declaration of Defendant Thomas Joseph Petters.

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QUESTION III.

Whether the direct familia relationship between Judge Kyle and his son, Richard Kyle, Jr., who was/is the lead attorney in the white collar section, and shareholder (equity partner) of the law firm that reached a settlement in the amount of \$ 13.5 million in lieu of court action involving breaches of duty and trust fulfills the standard of § 455(b)(5)(iii) "...a person within the third degree of relationship...Is known by the judge to have an interest that could be substantially affected by the outcome..." or violates "code of Conduct for United States Judges" canon 3(C)(1)(d)(iii) in violation of his Fifth, Sixth and Eighth Amendment Rights guaranteed by the Constitution?

Argument

The direct relationship of Judge Kyle (presiding) and his son (lead white collar crime attorney) of firm representing the Defendant Companies listed on the face of the indictment was known to Judge Kyle, while unknown to the Defendant. The duty pursuant to Canon 3C of the Code of Judicial Conduct in conjunction with laws or court rules specifying judicial conduct should have resulted in Judge Kyle's own disqualification from the case. The fact that this Defendant was not aware of the relationship and potential conflict until after the trial, rendered impossible any motion to disqualify in a timely manner.

In Title 28 USC § 455(b)(5)(iii), it states in pertinent part, "(b) He shall also disqualify himself in the following

circumstances: (5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person: (iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;"

Without question, the relationship between Judge Kyle and his son Richard Kyle Jr., is within the (5) "third degree of relationship" under Title 28 U.S.C. § 455(b)(5)(iii), and that Judge Kyle's son Richard Kyle, Jr., has financial (iii) "interest that could be substantially affected by the proceeding" and as an equity partner, shareholder and the lead attorney in the white collar section of the law firm of Fredrikson & Byron, P.A. (b) "He shall ... disqualify himself". *Morrison v. United States*, 486 US 1306, 100 L.Ed.2d 594, 108 S.Ct 1837 (1988) and *United States v. Fazio*, 487 F.3d 646, 653 (8th Cir. 2007).

This Defendant was unaware that Fredrickson & Byron, P.A. the law firm that represented his companies for several years, and advised in all legal matters relating to those companies, included a partner Richard Kyle, Jr. who was the lead white collar crime attorney, and also the son of Judge Kyle, who was presiding over the Defendant's trial. However, Judge Kyle knew of the direct relationship and chose not to inform the defense, nor to disqualify himself from the case.

This law firm pulled back upon Defendant's arrest and said they could not represent him any further due to a conflict, which was their culpability in representing Defendant's companies. The

law firm paid out 13.5 million in matters related to this case for breaches of duty and trust involving Defendant Petters companies.

Said third degree of relationship in and of itself is enough to cause doubt of Judge Kyle's impartiality, however, coupled with the substantial loss by settlement in the amount of \$ 13.5 million to Fredrikson & Byron, P.A., the law firm to which Judge Kyle's son, Richard Kyle, Jr. is a shareholder (equity partner) and lead white collar crime attorney, it becomes clear that bias exist, impartiality can not be relied upon, and the judge should have disqualified himself as a result. The \$ 13.5 million clawback settlement is a substantial loss to the firm, one to which a person within the third degree of relationship, the judges son, has a personal interest, is a partner and shareholder of. *State v. Montgomery*, 2011 Iowa App. LEXIS 331, *17 (2011) and *Lucas v. Townsend*, 486 US 1301, 100 L.Ed.2d 589, 108 S.Ct 1763 (1988).

The operative word of command is "He shall ... disqualify himself...", which is not discretionary in nature, but a mandatory command. *Muhammad v. Rubia*, 2009 U.S. Dist. LEXIS 12307, *6 (N.D. Cal. 2009)("[I hold] no bias or prejudice against the plaintiff herein, Nevertheless, as a reasonable person might conclude that the facts alleged by plaintiff create an appearance of bias or prejudice, the Court, in an abundance of caution, will..."); Cf. *Jones v. Luebbbers*, 395 F.3d 1005 (8th Cir. 2004); *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 US 888,

100 L.Ed.2d 896, 108 S.Ct 2218 (1988); SCA Servs., Inc. v. Morgan, 557 F.2d 110, 115 (7th Cir. 1977); United States v. Tucker, 78 F.3d 1313, 1325 (8th Cir. 1996); Durhan v. Neopolitan, 875 F.2d 91 (7th Cir. 1989); Ins v. Pangilinan, 486 US 875, 100 L.Ed.2d 882, 108 S.Ct 2271 (1988) and Lucas v. Townsend, 486 US 1301, 100 L.Ed.2d 589, 108 S.Ct 1763 (1988).

Defendant Petters without knowledge of the direct relationship between Judge Kyle and the law firm that advised in all Petters company matters, was unable to file timely motions or affidavits under Title 28 U.S.C. §144, or Title 28 U.S.C. §455(a) and §455(b). Yet Judge Kyle who was aware, and failed to disqualify himself, then proceeded to remove defendant companies from the face of the indictment, defendant companies which were represented by and advised by Fredrikson & Byron, P.A., the sole firm responsible for handling all Petters companies, personal and business legal matters throughout the time set forth in the joint-defendant indictment issued by the Grand Jury. United States v. Agosto, 675 F.2d 965 (8th Cir. 1982)(any doubt is to be resolved in favor of disqualification). There is a presumption of disqualification. See In re Chevron USA, Inc., 121 F.3d 163, 165 (5th Cir. 1997); United States v. Kelly, 888 F.2d 732, 744 (11th Cir. 1989).

See attached as (Exhibit A), the declaration of Mr. Richard Flamm, one of the foremost authorities on the subject of judicial impartiality and disqualification.

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See attached as (Exhibit D) declaration of Defendant Thomas Joseph Petters.

See attached as (Exhibit E) transcript of in chambers alteration of indictment.

QUESTION IV.

Whether in chambers altering of the indictment by removal of the named charged "defendant companies" represented by the law firm in which Judge Kyle's son Richard Kyle, Jr., the lead attorney in the white collar crime section, was/is an attorney having a direct interest in, being a shareholder (equity partner) of the law firm, is an amendment to the indictment which renders the indictment void, or is a breach of judiciary duty and responsibilities by Judge Kyle and the government's attorney that results in violation of his Fifth, Sixth and Eighth Amendment Rights guaranteed by the Constitution, requiring dismissal of the indictment and conviction of Petters?

Argument

Judicial impartiality is a necessary element of justice. Judges are expected to be, above all, impartial arbiters so that legal disputes are decided according to the law, free from influence of personal interest, bias, or prejudice. This precise influence, bias, or prejudice may have first raised its head in the judge's chambers, when the prosecution and Judge Kyle removed from the face of the indictment, the Defendant Companies that had been directly represented and advised by Fredrikson & Byron, the law firm to which Judge Kyle's son, Richard Kyle, Jr. was a partner attorney, shareholder (equity partner), and lead white collar crime attorney.

(The Jury)

"Why is PGW and PCI both stated in the indictment?" (Page 3493, Line 16-17)

(Mr. Dixon)

"Well we have amended the indictment, all of us in the context of trying to redact out the companies that are defendants" Page 3496, Line 1-4)

(Mr. Hopeman)

"The only entity that can amend an indictment is the United States Grand Jury. We cannot amend it and the court cannot amend it" (Page 3496, Line 10,11,12)

(Judge Kyle)

"Well the indictment that went to the jury, however, does not show anybody but Mr. Petters as a defendant. And we can't change that. That's what we submitted. That was an agreement of all parties." (Page 3496, Line 13-17)

(Judge Kyle)

"But there is no answer to this question is there?" (Page 3497, Line 17-18)

(Mr. Marti)

"And I think the safe answer for the court is just to say refer them back to the instructions that the court has already given them and refer back

to their recollection of what the evidence is in the case" (Page 3502, Line 17-20)

(Judge Kyle)

"but I don't want to ask them what they really meant by it either, I'm not going to do that" (Page 3503, Line 3-5)

(Mr. Engh)

"Our argument is that they are critical statements and critical inferences in the indictment that's false" (Page 3503, Line 13-16)

(Judge Kyle)

"Well where is the indictment? Do we have that? Is this the redacted one?" (Page 3503, Line 17-18)

(Judge Kyle)

"And I don't think there is an answer to this question, a nice, neat, clean answer that is both accurate and not objectionable by one side or the other" (Page 3505, Line 23-25)

(Judge Kyle)

"They are not going to like it (the answer), but they will forget about it" (Page 3508, Line 23-24)

(Judge Kyle)

"Is anybody concerned about what to tell the press out there with us in here?" (Page 3508, Line 21-22)

(Mr. Hopeman)

"I'm concerned about what to tell them and not having to lie to them (referring to the media waiting outside the door) I don't want to lie to them" (Page 3508, Line 23-24)

Defendant Petters with no knowledge of a direct relationship between Judge Kyle and the law firm that advised in all Petters company matters, through the judge's son Richard Kyle, Jr. was unable to file timely motions or affidavits under Title 28 U.S.C. §144, or Title 28 U.S.C. §455(a) and §455(b). Yet Judge Kyle who was aware, and failed to disqualify himself, then proceeded to remove defendant companies from the face of the indictment, defendant companies which were represented by and advised by Fredrikson & Byron, P.A., the sole firm responsible for handling all Petters companies, personal and business legal matters throughout the time set forth in the joint-defendant indictment issued by the Grand Jury.

This altering of the indictment removing defendants had in all likelihood affected the jury outcome, and Petters 5th 6th and 8th amendment rights. *SCA Servs., Inc. v. Morgan*, 557 F.2d 110, 115 (7th Cir. 1977)(per curium)(while § 455(a) enunciates the appearance of bias as the general judicial recusal standard, no examples of such an appearance were provided in the congressional debates); *CF. Jones v. Luebbers*, 395 F.3d 1005 (8th Cir. 2004)("Although clearly established, [the appearance] standard is inherently vague") and The hypothetical reasonable person under §

455 must be someone outside the judicial system. See *In re Mason*, 916 F.2d 384 (7th Cir. 1990); *United States v. Jordan*, 49 F.3d 152 (5th Cir. 1995); *United States v. Mitchell*, 690 F.3d 137; *United States v. Agosto*, 675 F.2d 965 (8th Cir. 1982)(any doubt is to be resolved in favor of disqualification). There is a presumption of disqualification. See *In re Chevron USA, Inc.*, 121 F.3d 163, 165 (5th Cir. 1997); *United States v. Kelly*, 888 F.2d 732, 744 (11th Cir. 1989); *Ins v. Pangilinan*, 486 US 875, 100 L.Ed.2d 882, 108 S.Ct 2271 (1988); *United States v. Fazio*, 487 F.3d 646, 653 (8th Cir.2007); *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 US 888, 100 L.Ed.2d 896, 108 S.Ct 2218 (1988); *State v. Montgomery*, 2011 Iowa App. LEXIS 331, *17 (2011); *Lucas v. Townsend*, 486 US 1301, 100 L.Ed.2d 589, 108 S.Ct 1763 (1988); *Durhan v. Neopolitan*, 875 F.2d 91 (7th Cir. 1989); *Morrison v. United States*, 486 US 1306, 100 L.Ed.2d 594, 108 S.Ct 1837 (1988); *United States v. Tucker*, 78 F.3d 1313, 1325 (8th Cir. 1996); *SCA Servs., Inc. v. Morgan*, 557 F.2d 110, 115 (7th Cir. 1977); Cf. *Jones v. Luebbers*, 395 F.3d 1005 (8th Cir. 2004); *Muhammad v. Rubia*, 2009 U.S. Dist. LEXIS 12307, *6 (N.D. Cal. 2009)("[I hold] no bias or prejudice against the plaintiff herein, Nevertheless, as a reasonable person might conclude that the facts alleged by plaintiff create an appearance of bias or prejudice, the Court, in an abundance of caution, will...")

See attached as (Exhibit A), the declaration of Mr. Richard Flamm, one of the foremost authorities on the subject of judicial

impartiality and disqualification.

See attached as (Exhibit B), the "Complaint of Judicial Misconduct or Disability-April 15, 2014" formally filed by the Reverend.

See attached as (Exhibit C), the declaration of Jennifer C. Graf, attorney at law, well documented educator or professor at School of Law, award winning educator and serving in many advisory positions concerning the law.

See attached as (Exhibit D) declaration of Defendant Thomas Joseph Petters.

See attached as (Exhibit E) transcript of in chambers alteration of indictment.

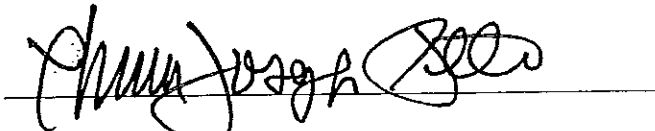
CONCLUSION

The various courts and circuits are hopelessly split on the subject of a judge's recusal, obligations, and remedies.

As a result of the obvious bias, perceived bias, and the alteration of the indictment outside the Grand Jury, Petters Constitutional Rights under the 5th, 6th and 8th amendments, which denied Petters due process and a fair trial. Remand for a further proceedings would be needed to correct these wrongs.

The petition for writ of certiorari should be granted.

Respectfully submitted on this 2nd day of April, 2015.



Thomas Joseph Petters
Reg. No. 14170-041
U.S. Penitentiary
Post Office Box 1000
Leavenworth, Kansas 66048

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Thomas Joseph Petters — PETITIONER
(Your Name)

VS.

United States of America — RESPONDENT(S)

PROOF OF SERVICE

I, Thomas Joseph Petters, do swear or declare that on this date, April 2, 2015, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

U.S. Attorney, U.S. District Courthouse, 300 So. Fourth St.,
Minneapolis, MN 55415 and Solicitor General of the United States
Flag Bldg. Suite #570, Washington, D.C. 20530-0001

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 2, 2015


(Signature)

Thomas Joseph Petters Appellant v. United States of America Appellee
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT
2015 U.S. App. LEXIS 339
No: 14-1840
January 08, 2015, Decided

Notice:

Decision text below is the first available text from the court; it has not been editorially reviewed by LexisNexis. Publisher's editorial review, including Headnotes, Case Summary, Shepard's analysis or any amendments will be added in accordance with LexisNexis editorial guidelines.

Opinion

Appeal from U.S. District Court for the District of Minnesota - Minneapolis (0:13-cv-01110-RHK)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

January 08, 2015

Order Entered at the Direction of the Court: Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

United States of America,

Plaintiff,

Crim. No. 08-364 (RHK)

Civ. No. 13-1110 (RHK)

**MEMORANDUM OPINION
AND ORDER**

v.

Thomas Joseph Petters,

Defendant.

John R. Marti, Acting United States Attorney, Timothy C. Rank, Assistant United States Attorney, Minneapolis, Minnesota, for the Government.

Steven J. Meshbesh, Kevin M. Gregorius, Adam T. Johnson, Meshbesh & Associates, PA, Minneapolis, Minnesota, for Defendant.

In 2009, following a four-week trial and a week of deliberations, a jury convicted Defendant Thomas Joseph Petters of 20 counts of fraud, conspiracy, and money laundering, concluding he had spearheaded a massive Ponzi scheme for nearly two decades. This Court later sentenced him to 50 years' imprisonment. He appealed, and the Eighth Circuit affirmed both his conviction and sentence; his subsequent petition for a writ of *certiorari* was denied by the United States Supreme Court.

Staring into an abyss of nearly 15,000 days of incarceration, Petters has tried to pull off one final con. He now seeks relief from this Court under 28 U.S.C. § 2255,⁹ arguing that his trial lawyers – all three of them – failed to inform him of an alleged

Amend Div R

Government plea offer that would have capped his sentence at 30 years. His Motion has been fully briefed, the Court held an evidentiary hearing on October 23, 2013, at which Petters testified, and the parties have now submitted post-hearing memoranda. The following constitutes the Court's findings of fact and conclusions of law and explains why the Motion will be denied.

BACKGROUND

The factual background underlying Petters's crimes is only marginally relevant and need not be repeated in detail here. See United States v. Petters, 663 F.3d 375 (8th Cir. 2011). Suffice it to say, law-enforcement officers executed search warrants at his businesses on September 24, 2008, after an insider went to the FBI to report that he was running a multi-billion-dollar Ponzi scheme. Approximately one week later, Petters was charged by criminal complaint with fraud and related crimes and arrested. The complaint alleged that billions of dollars had been lost in the scheme; accordingly, the United States Sentencing Guidelines suggested a very substantial sentence, possibly including life imprisonment, if Petters were convicted of the crimes charged.

Petters retained counsel quickly following execution of the search warrants, employing the services of attorney Jon Hopeman, a seasoned criminal-defense lawyer who spent more than a decade as an Assistant United States Attorney in this District. Hopeman was assisted initially by a partner at his firm, Eric Riensche, and later by attorney Paul Engh, another highly experienced criminal defense lawyer in the Twin Cities.

On October 5, 2008, Assistant United States Attorney John Marti spoke with Hopeman by telephone to discuss the case. It is undisputed that during their conversation, Marti informed Hopeman the Government was willing to agree to a sentence capped at 30 years if Petters would plead guilty to some unspecified charges. This (so-called) offer was never reduced to writing, nor was there any discussion regarding the factual basis for a guilty plea. Marti later reiterated the proposed 30-year sentencing cap at a face-to-face meeting with Hopeman on December 17, 2008, approximately two weeks after Petters was indicted, and at other times before trial commenced in October 2009.

It is this alleged “offer” that lies at the heart of the instant Motion. According to Petters, “[a]t no time during the pretrial, trial, presentencing or sentencing stages of my case did Mr. Hopeman communicate the Government’s offer to me.” (Petters Aff. (Doc. No. 579-6) ¶ 3.) And he contends that had he known of the offer, he would have accepted it and pleaded guilty. (*Id.* ¶ 4.) Of course, he did not do so, and he mounted a spirited defense at trial, including taking the witness stand and repeatedly denying he was aware of any fraud being committed. The jury ultimately did not agree and convicted him of all 20 counts with which he was charged.

Petters now contends that his lawyers’ failure to communicate the Government’s 30-year sentencing cap constituted ineffective assistance of counsel, entitling him to relief from the 50-year sentence imposed by the Court.¹

¹ Petters only seeks relief from his *sentence*; indeed, as discussed in more detail below, he must acknowledge his guilt in order to be successful here.

STANDARD OF DECISION

In order to obtain relief under 28 U.S.C. § 2255, a federal prisoner must show that his “sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack.” A motion under § 2255 “may not do service for an appeal.” United States v. Frady, 456 U.S. 152, 165 (1982). Rather, relief “is reserved for transgressions of constitutional rights and for a narrow range of injuries that could not have been raised on direct appeal and, if uncorrected, would result in a complete miscarriage of justice.” United States v. Apfel, 97 F.3d 1074, 1076 (8th Cir. 1996).

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to effective assistance of counsel, e.g., Chesney v. United States, 367 F.3d 1055, 1058 (8th Cir. 2004), and generally speaking, allegations that trial counsel were ineffective fall within the “narrow range” of matters that may be raised in a § 2255 proceeding. See, e.g., United States v. McAdory, 501 F.3d 868, 872 (8th Cir. 2007). Such claims are governed by the two-part test enunciated in Strickland v. Washington, 466 U.S. 668 (1984), under which a defendant must show (1) his attorney’s performance was deficient and (2) the deficiency prejudiced him. Id. at 687. As for the first prong, a defendant can show deficient performance only if his counsel’s conduct “fell below an objective standard of reasonableness.” Id. at 688. As for the second prong, a defendant must establish “a reasonable probability that, but for counsel’s unprofessional errors, the

result of the proceeding would have been different.” Id. at 694. The defendant bears the burden of proof on each issue. Id. at 687.

The right to effective assistance of counsel extends to plea negotiations, see, e.g., Hill v. Lockhart, 474 U.S. 52, 57 (1985), and requires counsel “to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused.” Missouri v. Frye, ___ U.S. ___, 132 S. Ct. 1399, 1408-09 (2012) (citations omitted). The failure to communicate a formal plea offer before it expires satisfies Strickland’s “deficient performance” prong. Id. at 1409. But Strickland also requires prejudice, and “[t]o show prejudice from ineffective assistance of counsel where a plea offer has lapsed . . . , [a] defendant[] must demonstrate a reasonable probability [he] would have accepted the earlier plea offer.” Id.

ANALYSIS

Petters’s argument rests upon three legs: (1) the Government extended him a formal plea offer; (2) defense counsel failed to communicate that offer before trial; and (3) he was prejudiced because he would have accepted the offer and pleaded guilty, thereby receiving (at most) a 30-year sentence. All three legs of Petters’s argument must pass muster in order for him to be entitled to relief, yet for the reasons that follow, *none* has merit.

I. There was no formal plea offer

In Frye, the Supreme Court cautioned that allegations of uncommunicated plea offers are easily fabricated after-the-fact. 132 S. Ct. at 1408-09. The Court emphasized, therefore, that ineffective assistance may arise only when *formal* plea offers have not

been communicated to defendants. “[T]he fact of a formal offer means that its terms and its processing can be documented so that what took place in the negotiation process becomes more clear if some later inquiry turns on the conduct of earlier pretrial negotiations.” Id. at 1409.

Here, there was no written offer from the Government, but rather only oral communications between counsel. While no hard-and-fast rule exists, Frye made clear that the presence of a writing is a crucial fact when determining whether a formal plea offer has been tendered by the Government. See also, e.g., Davidson v. United States, No. 4:11CV1370, 2013 WL 1946206, at *5 (E.D. Mo. May 9, 2013) (finding no formal plea offer “in light of the absence of any documentation of this alleged deal”).

Moreover, the only “term” of the so-called “offer” was a 30-year sentencing cap. There was no discussion of the charges to which Petters would plead guilty,² no discussion of the factual basis for such a guilty plea, and no discussion of the amount of restitution to be ordered or which of Petters’s assets would be subject to forfeiture – often contentious subjects in fraud cases. Simply put, there was no discussion of a myriad of issues typically part of plea agreements.

The Supreme Court has recognized that plea agreements “are essentially contracts.” Puckett v. United States, 556 U.S. 129, 137 (2009). And in order for a contractual offer to exist, it must contain “sufficiently definite terms to enable [a] factfinder to interpret and apply them.” Neb. Beef, Ltd. v. Wells Fargo Bus. Credit, Inc., 470

² Indeed, at the time the putative “offer” was first communicated, Petters had not yet been indicted.

F.3d 1249, 1251 (8th Cir. 2006). In the absence of any discussion of the charges to which Petters would acknowledge guilt, the factual basis for a plea, or restitution or forfeiture issues, the terms here were not sufficiently definite to constitute a “formal plea offer.” See, e.g., Merzbacher v. Shearin, 706 F.3d 356, 369-70 (4th Cir. 2013) (where prosecution’s offer “finalized only one leg of a putative plea agreement, the length of sentence[,] and did not finalize the other legs,” no formal plea offer was made; reversing grant of habeas relief for ineffective assistance due to failure to communicate offer); Fanaro v. Pineda, No. 2:10-CV-1002, 2013 WL 6175620, at *5, 12 (S.D. Ohio Nov. 22, 2013) (Report & Recommendation of King, M.J.) (no formal plea offer from “very general” telephone conversation in which prosecutor offered four-year sentence and restitution in exchange for guilty plea, as the “offer was never reduced to writing and the parties never discussed which, if any, of the charges pending against Petitioner would be dismissed should Petitioner plead guilty and agree to a sentence of four years’ imprisonment and an order of restitution in some unspecified amount”); United States v. Waters, Civ. A. No. 13-115, 2013 WL 3949092, at *8 (E.D. Pa. July 31, 2013) (“While we have been unable to find any authority defining the requisite elements of a formal plea offer, it is clear that an oral discussion of the sentencing range for a possible plea agreement that does not include an agreement on the charges to which the defendant will plead guilty and the facts that he will admit, does not constitute a formal plea offer.”).

Petters directs the Court’s attention to two cases in an attempt to show the Government tendered a formal plea offer here. Neither is persuasive.

He first cites Wanatee v. Ault, 101 F. Supp. 2d 1189 (N.D. Iowa 2000). (Def. Reply Mem. (Doc. No. 597) at 8-10.) There, the court did, in fact, find that an oral offer allowing the defendant to plead guilty to a lesser charge was a “formal plea offer.” But Wanatee is distinguishable from the circumstances here for two key reasons. First, unlike in this case, the specific charge to which the defendant would plead guilty (second-degree murder) *was agreed to by counsel*. 101 F. Supp. 2d at 1202. As noted above, “agreement on the charges to which the defendant will plead guilty” is a key factor when determining whether a “formal plea offer” was made. Waters, 2013 WL 3949092, at *8. Second, and more importantly, the prosecution in Wanatee implicitly *conceded* that a formal plea offer had been extended to the defendant. 101 F. Supp. 2d at 1202 (noting the prosecution had nowhere “object[ed] to the *existence* of a plea offer”) (emphasis in original). Obviously, that is not true here.

The second case Petters cites is United States v. Strother, 509 F. App’x 571 (8th Cir. 2013) (*per curiam*). (Def. Post-Hr’g Mem. (Doc. No. 626) at 2.) There, the Assistant United States Attorney (AUSA) and defense counsel had “occasionally discussed whether Strother would plead guilty,” and in response to a request, the AUSA e-mailed defense counsel his estimate of Strother’s sentencing guidelines if Strother pleaded guilty. 509 F. App’x at 573. Strother later proceeded to trial and was convicted; he then sought habeas relief, arguing his attorney had failed to communicate the AUSA’s “offer” to him. The district court rejected that assertion after concluding that the “offer” was, in fact, made known to him, and the Eighth Circuit affirmed. According to Petters,

however, the Eighth Circuit “seem[s] to have accepted that the Government’s cursory e-mail constituted a formal offer.” (Def. Post-Hr’g Mem. (Doc. No. 626) at 2.)

Petters is wrong. Strother was based entirely on the fact that the AUSA’s e-mail *had been disclosed to the defendant*. The Eighth Circuit *expressly declined* to decide whether the e-mail was, in fact, a “formal plea offer” under Frye. 509 F. App’x at 575 n.2 (“We assume without deciding that the . . . e-mail constituted a formal plea offer.”).

II. The alleged “offer” was communicated to Petters

Even if the Government’s proposal of a 30-year sentencing cap constituted a “formal plea offer,” the evidence conclusively establishes that counsel repeatedly informed Petters of the Government’s proposal.

At the outset, it is noteworthy that the primary evidentiary support for Petters’s claim is his own self-serving testimony. But in the Court’s view that testimony is entitled to no weight; for the reasons that follow, the Court concludes that Petters is simply lying in a desperate attempt to save his own skin. The Court is not so easily fooled.

As noted above, Petters first averred, in an Affidavit filed with his Motion, that “at no time during the pretrial, trial, presentencing or sentencing stages of my case did Mr. Hopeman communicate the Government’s offer to me.” (Petters Aff. (Doc. No. 579-6) ¶ 3.) He claimed, instead, that he found out about the (alleged) offer only “during the pendency of [his] direct appeal.” (Id. ¶ 2.) Yet, he contradicted himself in an Affidavit filed with his Reply Memorandum, barely two months later, in which he averred that he was “made aware of [the] offer . . . of a 30-year cap . . . *immediately following [his] trial and conviction.*” (Petters Aff. (Doc. No. 597-5) ¶ 3 (emphasis added); see also id. (“After

the verdict was read and entered, I was taken to a holding cell by the U.S. Marshalls [*sic*]. Mr. Hopeman came to visit me in the holding cell and stated, ‘Well, we had to go to trial [as] we could only get you a 30-year minimum deal.’”).) This contradiction provides reason enough for the Court to conclude Petters is dissembling, but the record contains far more to bolster that conclusion.

Most compelling are the consistent, forceful assertions of all of Petters’s attorneys that they repeatedly communicated the proposed 30-year cap to him:

- “Between October and December 2008, even though Mr. Petters was in custody, the FBI and the IRS brought Mr. Petters to the U.S. Attorney’s Office numerous times for meetings with my partner Eric Riensche and me. . . . I repeatedly discussed the government’s proposed 30-year cap of imprisonment with Mr. Petters during these meetings.” (Hopeman Decl. (Doc. No. 591-1) ¶ 20.)
- “On October 27, 2008, I met with Mr. Petters and Mr. Riensche, in a private meeting at the U.S. Attorney’s Office. . . . We discussed the government’s proposal of a 30-year cap with Mr. Petters at [that] meeting.” (*Id.* ¶ 22.)
- “I repeatedly discussed the government’s proposed 30-year cap of imprisonment with Mr. Petters.” (*Id.* ¶ 43.)
- “Mr. Engh and I informed Mr. Petters that the government’s only proposal remained a cap of 30 years in prison in exchange for a guilty plea and that the government was not interested in his cooperation.” (*Id.* ¶ 62.)
- “We conveyed this 30-year proposal to Mr. Petters. He rejected it again.” (*Id.* ¶ 74.)
- “I had two telephone conversations with Mr. Petters on October 18, 2009, two telephone conversations with Mr. Petters on October 19, 2009, and three telephone conversations with Mr. Petters on October 20, 2009. . . . I am sure that during most of these telephone conversations with Mr. Petters, I discussed the . . . 30-year proposal that the government persisted in making.” (*Id.* ¶ 75.)

- “I specifically discussed [at an August 19, 2009, meeting] the status of the plea negotiations with Mr. Petters, including, but not limited to, how the government would not come off the thirty-year cap.” (Engh Decl. (Doc. No. 591-2) ¶ 4; see also id. ¶ 3 (adopting Hopeman’s assertions above).)
- “There is no question what the Government’s offer was, and no question that Mr. Hopeman and I provided it to Mr. Petters on numerous occasions (both together and alone), and no question he rejected it.” (Id. ¶ 8.)
- “[T]he core allegation of the § 2255 motion – i.e., that Mr. Hopeman failed to communicate the government’s proposed 30-year cap of imprisonment to Mr. Petters – is not accurate. Mr. Hopeman did, in fact, communicate this to Mr. Petters beginning in early October 2008, and continuing afterwards to trial. This was my recollection when I first learned of the theory propounded in the § 2255 Motion – even without having the benefit of reviewing any notes or records at all. My initial recollection has been confirmed after having reviewed certain of my own notes, as well as . . . exhibits from the defense file [], all of which refreshed my recollection.” (Riensch Decl. (Doc. No. 591-3) ¶ 5.)
- “[T]he Hopeman Declaration accord[s] with my recollection of events relating to the potential plea agreement in October, November, and December of 2008. That is, Mr. Hopeman communicated the Plea Offer to Mr. Petters during this time.” (Id. ¶ 6.)

Each attorney testified consistently at the evidentiary hearing, and the Court was able to observe their demeanor and appearance in the courtroom. The Court finds their testimony was both sincere and credible. It is also corroborated by the copious notes and memoranda prepared by Hopeman. (See, e.g., Hopeman Decl. (Doc. No. 591-1) ¶ 44 & Ex. 15 (agenda for 12/12/08 meeting with Petters included “Conv. w. John Marti” and “Plea agreement”); id. ¶ 52 & Ex. 18 (describing 7/6/09 meeting with Petters: “discussion with Marti regarding potential plea deal discussed”).)³

³ True, as Petters pointed out at the hearing, Hopeman’s detailed notes nowhere *expressly state* that the Government’s proposed 30-year cap was communicated to him. (See 10/23/13 Hr’g Tr. at 206-07.) But as the old saying goes, context is everything, and in the Court’s view Hopeman’s

More importantly, as Hopeman noted in his Declaration, there simply would have been no “ethical, legal, tactical, or practical reason not to communicate” the Government’s alleged “offer” to Petters. (*Id.* ¶ 87.) Nor is there any obvious (or rational) reason for Hopeman to have lied in the contemporaneous notes he prepared of his meetings with Petters. And it would strain logic to the extreme to conclude that well-versed criminal defense lawyers would ignore their long-established ethical obligations and keep Petters out of the loop. *See, e.g.*, Minn. R. Prof’l Conduct 1.4, cmt. 2 (“[A] lawyer who receives from opposing counsel . . . a proffered plea bargain in a criminal case must promptly inform the client of its substance.”).⁴

Petters, of course, testified at the evidentiary hearing, and the Court had the opportunity to observe his demeanor and appearance in the courtroom also. Though not captured on the written transcript, Petters’s testimony was, in the Court’s view, deliberate, measured, and calculated. He seemed to be a man putting on a show, willing to say or do anything – including shedding crocodile tears – to obtain a reduction of the lengthy sentence imposed by this Court. He was also fidgety, cagey, and evasive, with his testimony frequently punctuated by lengthy pauses – again not captured in the

notes make quite clear that he did, in fact, convey the Government’s “offer” to Petters. This is evident from the notes’ frequent references to Petters imploring his lawyers to obtain a *better* deal from the Government (in the range of 5-20 years’ imprisonment) before he would plead guilty. (*See, e.g.*, Hopeman Decl. (Doc. No. 591-1) ¶¶ 24, 26-28, 31, 33-34, 49, 52, 54, 59-62, 64-66, 71-72 & Exs. 3-5, 7-8, 17-19, 21, 24.)

⁴ Petters intimates that Hopeman did not communicate the Government’s “offer” because of “personal pride,” citing a January 30, 2009 memorandum drafted by Hopeman. (Def. Mem. (Doc. No. 579) at 2.) But Petters contorts the memorandum’s text – Hopeman wrote that he would not “*advise* Mr. Petters *to plead guilty* to a 30 year cap,” not that he would not (or did not) *inform* Petters of the cap. (Doc. No. 579-4 (emphases added).)

transcript – during which he appeared to be trying to conceive answers most helpful to his cause. In fact, at one point he engineered a complete about-face, going from acknowledging his guilt for the underlying fraud to denying that he intended to defraud anyone. (See 10/23/13 Hr’g Tr. at 36 (“Q. Now, you admit today that you’re guilty of orchestrating really an enormous fraud scheme, correct? A. Yes.”); id. at 74 (Petters: “And I would tell you today that I most definitely did not intend to defraud anybody. . . . Did I intend to defraud anybody? No, I did not.”).) However, when counsel for the Government made clear that Petters could not obtain relief here without acknowledging his guilt, he reversed course again, admitting that he did, in fact, act with intent to defraud. (Id. at 76 (“Q. Did you intend to defraud your investors? A. Yes.”).)

The foregoing covers mere snippets of Petters’s time on the witness stand, but it undergirds an inescapable truth: his testimony is unworthy of any credence. In the Court’s view, there is simply no reason to believe his claim that his lawyers never informed him of the Government’s proposed 30-year sentencing cap before trial. Indeed, the *only* believable portions of his testimony at the hearing were his admissions that he is guilty of the crimes for which he was convicted, lied to thousands of people over more than a decade while orchestrating a massive Ponzi scheme, and then lied repeatedly to this Court at trial while under oath – in the clear hope of avoiding his just desserts.

Besides his own testimony, Petters attempts to buttress his claim with two additional pieces of evidence. Neither aids his cause, however.

The first is a statement contained in a memorandum drafted by Hopeman in January 2009. There, Hopeman described a meeting with Petters on December 10, 2008,

at which he informed Petters “that we had received no plea offer from the government, despite the fact that some weeks ago, after [a] November proffer session, John Marti told me that he would be making an offer.” (Doc. No. 579-3.) Petters argues this clearly shows Hopeman never mentioned the 30-year cap, but he asks the Court to cross a bridge too far by taking this statement out of context, ignoring the clause “after [a] November proffer session.” In the Court’s view, the only fair reading of this statement is that following a November meeting with the Government, Hopeman had expected, but had not received, a *better* offer than the 30-year cap the Government had already suggested. (See Hopeman Decl. (Doc. No. 591-1) ¶ 43 (“I repeatedly discussed the [G]overnment’s proposed 30-year cap of imprisonment with Mr. Petters [and] then tried to get a better deal from the [G]overnment in November 2008. I was unsuccessful; even though I understood [the Government] would be providing us with another plea offer after the November 2008 meeting, [it] never did make such an offer. Thus, on December 10, 2008, I informed Mr. Petters that we had received no plea offer from the [G]overnment despite the fact that . . . I believed [it] would be making a proposal to us that included a cap of imprisonment less than the[] already-proposed 30-year cap.”); see also 10/23/13 Hr’g Tr. at 150-53, 163-64, 168-72, 178-82 (testifying to the same effect at the evidentiary hearing).) This is consistent with the references in Hopeman’s notes that Petters wanted him to obtain a deal from the Government for 5-20 years in prison. (See also Def. Reply Mem. (Doc. No. 597) at 11 (noting that Petters “specifically told trial counsel he would plead guilty in exchange for a 5-20 year sentence”).)

The second piece of evidence is an Affidavit from Shauna Kieffer, a young attorney who took interest in Petters's case shortly after being introduced to his brother through a coworker. According to her Affidavit, Kieffer had lunch with Hopeman in June 2012, nearly three years after Petters's trial, at which time he informed her "something to the effect of '30 years wasn't really an offer,'" so he "did not communicate it to [] Petters." (Kieffer Aff. (Doc. No. 579-5) ¶ 4.)

Suffice it to say, Kieffer's testimony at the hearing scuttles Petters's reliance on this statement. Kieffer testified, credibly in the Court's view, that she had misunderstood what Hopeman had told her: upon reviewing his files, it became clear to her that what he meant was "yes, he met with John Marti; and, yes, he thought the 30-year offer was ridiculous; and that he wouldn't tell [Petters] to *plea* to that offer. But [he did not] say that he didn't *communicate* that offer." (10/23/13 Hr'g Tr. at 137 (emphases added).)

For all of these reasons, the Court rejects Petters's claim that he was not informed of the Government's "offer" until after his trial had concluded.

III. Petters would not have accepted

Even assuming *arguendo* the proposed 30-year sentencing cap had been a "formal plea offer" and that it was not communicated, Petters still would not be entitled to relief. And this is because he cannot show "prejudice" under Strickland, as he has failed to "demonstrate a reasonable probability [he] would have accepted the . . . offer" and pleaded guilty. Frye, 132 S. Ct. at 1409. Indeed, this final "leg" of Petters's argument is perhaps the most problematic for him, because he has repeatedly attempted to avoid ownership of the massive fraud he spearheaded.

Before the Court may accept a guilty plea from a defendant, it must find there exists a factual basis for the plea. See Fed. R. Crim. P. 11(b)(3). Here, that would have required Petters to acknowledge that he acted with intent to defraud and/or conspired with others to do so. But Petters maintained his innocence through trial and testified at length before the jury that he was completely unaware of the fraud taking place around him. He continued pressing this claim long after he was convicted, including in media interviews from prison in 2012 in which he forcefully denied knowingly defrauding anyone. (See Doc. No. 591-5 through 591-7.) As set forth above, Petters even attempted to evade responsibility at the evidentiary hearing, asserting that he would “tell you today that [he] most definitely did not intend to defraud anybody.” (10/23/13 Hr’g Tr. at 74.) Only after the Government made clear that he could not obtain relief without acknowledging his guilt did he finally change his tune. Hence, the Court simply does not believe he would have been ready, willing, or able to stand up in open court in 2009 and acknowledge for all the world his responsibility for the fraud with which he was charged. (See also Def. Post-Hr’g Mem. (Doc. No. 626) at 6 (“conced[ing]” that Petters “often expressed reticence about the possibility of pleading guilty”).) As the Eighth Circuit has stated, a “defendant who maintains his innocence at all the stages of his criminal prosecution and shows no indication that he would be willing to admit his guilt undermines his later § 2255 claim that he would have pleaded guilty if only he had received better advice from his lawyer.” Sanders v. United States, 341 F.3d 720, 723 (8th Cir. 2003).

Hopeman's notes paint the same picture. Though they show a man vacillating between defiance and resignation, they repeatedly indicate that Petters would not accept responsibility for his crimes. This is perhaps best summarized in a single paragraph in Hopeman's Declaration:

For most of the time I represented Mr. Petters, he had little to no interest in pleading guilty to any crime. However, there were interludes when he expressed some interest in reaching an agreement with the government with respect to his criminal case. I note that even during these interludes, however, Mr. Petters never admitted any "guilt" to me in the traditional sense of the word, that is, he never admitted to committing conduct that constituted a crime. Instead, Mr. Petters' view of "guilt," as I understood him, related, at most, to his willful blindness, or deliberate ignorance, of facts, or his failure to adequately supervise those that committed crimes. *He never acknowledged personal responsibility for committing a crime to me.*

(Doc. No. 591-1 ¶ 17 (emphasis added); accord, e.g., id. ¶¶ 26-27, 31-32, 37, 57, 69.)

Moreover, even during those occasional "interludes" in which Petters expressed some willingness to plead guilty, he indicated he would do so only in exchange for a term of imprisonment no greater than 20 years. (See supra at 14 & note 3.) There is no reason to believe he would have taken the Government's 30-year deal.

Petters's assertions, in his Affidavit and at the evidentiary hearing, that he would have accepted a plea offer do not change the calculus. In the Eighth Circuit, in order to obtain relief for ineffective assistance, a defendant "must present some credible, non-conclusory evidence that he would have pled guilty had he been [] advised" of a potential plea agreement. Engelen v. United States, 68 F.3d 238, 241 (8th Cir. 1995). For the reasons set forth above, the record here is devoid of such evidence. See also, e.g., Sanders, 341 F.3d at 723 (court properly rejects ineffective-assistance claim based on

assertion defendant would have accepted government's plea offer where it is "inherently incredible in light of the record").

For all of these reasons, Petters's ineffective-assistance claim fails. He cannot show counsel rendered deficient performance under Strickland because he has failed to demonstrate either that a formal plea offer was made or that the so-called offer was not communicated to him. And he cannot show prejudice under Strickland because he has failed to demonstrate that he would have accepted the alleged deal before trial.

IV. Petters's sentence was not constitutionally infirm.

In addition to ineffective assistance, Petters also contends in his Motion that his 50-year sentence violated the Eighth Amendment's prohibition on cruel and unusual punishment because it was "disproportionate to the crime[s] of conviction." (Def. Mem. (Doc. No. 579) at 8.) The Court will put aside the Government's argument that this claim has been procedurally defaulted⁵ because it is easily dispatched on the merits. See Barrett v. Acevedo, 169 F.3d 1155, 1162 (8th Cir. 1999) (*en banc*) ("Although the procedural bar issue should ordinarily be resolved first, judicial economy sometimes dictates reaching the merits if the merits are easily resolvable against a petitioner while the procedural bar issues are complicated.").

⁵ As noted above, a § 2255 Motion "may not do service for an appeal," Frady, 456 U.S. at 165, and accordingly claims that could have been brought on direct appeal but were not – such as Petters's Eighth Amendment claim here – are procedurally defaulted unless the movant can show "(1) cause for the default and actual prejudice or (2) actual innocence." United States v. Moss, 252 F.3d 993, 1001 (8th Cir. 2001). Petters asserts ineffective assistance of appellate counsel as cause for his default here, claiming that the Eighth Amendment issue was directed to this Court's attention at sentencing but inexplicably omitted from his appeal. (Def. Reply Mem. (Doc. No. 597) at 12-13.)

Petters is indeed correct that the Constitution's prohibition on cruel and unusual punishments includes a "narrow proportionality principle" that "prohibits . . . sentences that are disproportionate to the crime committed." Ewing v. California, 538 U.S. 11, 20, 22 (2003). But as noted in Harmelin v. Michigan, "[t]he Eighth Amendment does not require *strict* proportionality between crime and sentence. Rather, it forbids only *extreme* sentences that are *grossly disproportionate* to the crime." 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring in part and concurring in the judgment) (emphases added) (internal quotation marks and citations omitted); accord Ewing, 538 U.S. at 23-24 (adopting Justice Kennedy's formulation of proportionality). Hence, successful challenges to the proportionality of particular sentences are "exceedingly rare." United States v. Weis, 487 F.3d 1148, 1153 (8th Cir. 2007) (quoting Harmelin, 501 U.S. at 1001). This is not one such "exceedingly rare" case.

In Harmelin, the Supreme Court affirmed a life sentence without parole for a first-time offender possessing less than one kilogram of cocaine. If a life sentence was appropriate in Harmelin, it is difficult to conceive how the sentence imposed in this case was "grossly disproportionate." Petters was convicted of 20 separate felony offenses. The scale of his crimes was enormous; the Ponzi scheme, which he conceived and spearheaded, resulted in massive financial losses by hundreds if not thousands of victims, some of whom testified they lost every penny they had. Countless lives were ruined or substantially disrupted. The sheer size and scope of the fraud and Petters's role therein resulted in an advisory Sentencing Guidelines range of life imprisonment, which was necessarily reduced to 335 years in prison, the sum of the statutory maximum penalties

for his crimes. Petters, of course, received far less. The Court perceives no constitutional infirmity under these facts.

Engaging in a purely mathematical exercise, Petters points to the sentences imposed in other fraud causes, utilizing a ratio of the losses there and here to argue his sentence was unlawful. (See, e.g., Def. Post-Hr'g Mem. (Doc. No. 626) at 10 (discussing Allen Stanford: "Stanford was ordered to serve 110 years in prison, or more than double Defendant Petters' sentence[,] even though the loss [there was] seven times greater than the . . . loss in the instant case. Defendant Petters' proportionate sentence, in comparison, would be approximately 15 and one-half years.")) But the amount of loss caused by a crime is only one factor considered by the Court at sentencing – the number of victims, the defendant's role in the offense, the need to deter recidivism, the defendant's prior criminal history, and a host of other factors all come into play. See generally 18 U.S.C. § 3553(a). In other words, each case is unique and must stand on its own facts, and mathematical precision between sentences, even in "comparable" cases, is neither achievable nor necessary. See United States v. Myers, 503 F.3d 676, 686 (8th Cir. 2007) ("A sentence is not unreasonable simply because it creates some disparity between sentences."). Simply put, the Court concludes Petters's 50-year sentence did not flout the Eighth Amendment.

V. No Certificate of Appealability will issue

For these reasons, Petters's claims fail. The Court anticipates, however, that he will seek appellate review of this Order. To appeal a final order in a proceeding under § 2255, a defendant must obtain a Certificate of Appealability. 28 U.S.C.

§ 2253(c)(1)(B). A district court cannot grant a Certificate of Appealability unless the defendant “has made a *substantial showing* of the denial of a constitutional right.” *Id.* § 2253(c)(2) (emphasis added); accord, e.g., Williams v. United States, 452 F.3d 1009, 1014 (8th Cir. 2006). A Certificate of Appealability will not issue simply because an appeal might be pursued in good faith, raising non-frivolous issues. See Kramer v. Kemma, 21 F.3d 305, 307 (8th Cir. 1994) (“Good faith and lack of frivolousness, without more, do not serve as a sufficient bases for issuance of a certificate under 28 U.S.C. § 2253.”). Rather, the movant must show that the issues are “debatable among reasonable jurists,” that different courts “could resolve the issues differently,” or that the issues otherwise “deserve further proceedings.” Cox v. Norris, 133 F.3d 565, 569 (8th Cir. 1997).

The Court concludes that Petters cannot meet this exacting standard here. His claims have been fully addressed and lack merit; the Court does not believe they are “debatable among reasonable jurists.” *Id.* at 568. Petters has not shown sufficient reason to believe that any other court – including the Eighth Circuit – would decide this case any differently than it was decided here. And, he has not identified, and the Court cannot independently discern, anything novel, noteworthy, or worrisome about his case warranting appellate review.

CONCLUSION

Like so many before it, this great American tragedy, in which money was lost, lives were ruined, and more than a dozen people have been sent to prison, has come to an end. Petters’s last-ditch attempt to escape just punishment for his crimes does not hold

water; he received constitutionally effective counsel and his sentence was not unlawful.

He is entitled to neither relief nor sympathy from this Court.

Based on the foregoing, and all the files, records, and proceedings herein, **IT IS ORDERED** that Petters's Motion (Doc. No. 578) is **DENIED**. The Court further **DECLINES** to issue a Certificate of Appealability.

LET JUDGMENT BE ENTERED ACCORDINGLY in Civil No. 13-1110.

Date: December 5, 2013

s/Richard H. Kyle
RICHARD H. KYLE
United States District Judge

DECLARATION OF
Richard E. Flamm

I, Richard E. Flamm, declare:

1. I am an attorney at law, duly licensed to practice before many courts, including the United States Supreme Court.
2. I have been a practicing attorney for three decades, and have had my own practice since 1995, in which I concentrate exclusively on matters of judicial and legal ethics.
3. I am often asked to testify as an expert witness regarding matters of legal and judicial ethics. Typically this testimony is by way of affidavit, but I have also been qualified to testify as an expert at court hearings and trials. In December of 2009, I testified before a House Judiciary subcommittee regarding matters of judicial disqualification.
4. I have taught Professional Responsibility as an Adjunct Professor at both the University at Berkeley and Golden Gate University in San Francisco. In addition, I have frequently lectured on the subjects of recusal and disqualification; including addressing the plenary session of the American Judicature Society's 2011 National College on Judicial Conduct and Ethics in Chicago, and the Judicial Section of the Alaska Bar Association in Juneau in 2012.
5. My first treatise, *Judicial Disqualification: Recusal and Disqualification of Judges* - originally published by Little, Brown & Company of Boston in 1996, and now in its Second Edition - has been relied on by a host of federal courts; including the Eighth Circuit Court of Appeals. See, e.g., *Fletcher v. Conoco Pipe Line Co.*, 323 F.3d 661, 665 (8th Cir. 2003). The book has also been cited by the highest courts of a great many states. See, e.g., *Whitacre Inv. Co. v. State*, 113 Nev. 1101, 1116 at n.6 (Nev. 1997), *Springer, J.* (referring to the undersigned as the "leading authority on judicial disqualification.")
6. In 2003 I published a treatise on *Lawyer Disqualification: Conflicts of Interest and Other Bases* (Banks & Jordan Law Publishing Co., 2003). See, e.g., *Edelstein v. Optimus Corp.*, 8:10-cv-00061-JFB-FG3, 2010 U.S. Dist. LEXIS 108351, at *8 (D.Neb. Sept. 24, 2010). I have also authored articles on judicial and lawyer disqualification, which have appeared in many law reviews and periodicals. Most recently, "The History of Judicial Disqualification in America," was featured in the latest edition (Summer, 2013) of the ABA Judge's Journal.
7. From 2000 until 2002, I served as Chair of the San Francisco Bar Association's Legal Ethics Committee. I have also served as a member of the advisory Council for the American Bar Association's Commission on Evaluation of Rules of Professional Conduct ("Ethics 2000"), as Chair of Alameda County Bar Association's Ethics Committee.
8. I am informed and believe that Judge Kyle's son was a partner in the law firm of Fredrickson & Byron, P.A. ("F&B") at the time the firm handled all of defendant/appellant Petters business legal needs. I am further informed and believe that F&B subsequently settled a "clawback suit" for 13.5 million as a direct consequence of its representation of Petters companies.
9. Mr. Petters does not bear the burden of proving that Judge Kyle was biased against him -- a judge is required to recuse himself if any reasonable person might question the court's ability to be impartial. It is my opinion that a reasonable person might question whether Judge Kyle could preside impartially over a criminal case involving Mr. Petters, given that F&B not only represented Mr. Petters companies, but suffered a substantial financial loss as a result.

I declare under penalty of perjury under the laws of the United States and the State of California that the foregoing is true and correct.

Executed on this 1st day of December 2014, in Berkeley, California.

Richard E. Flamm

Exhibit A

Complaint of Judicial Misconduct or Disability – April 15, 2014

Statement of Facts: On November 24th, 2009 at approximately 1:10pm, an in-chambers conversation took place at United States District Court, District of Minnesota, between members of the Court, including the Honorable Judge Richard H. Kyle, United States Attorneys John R. Marti, Joseph T. Dixon III, and Timothy C. Rank, as well as counsel for the defendant Thomas J. Petters, including Jon M. Hopeman, Eric J. Riensche, and Paul C. Engh. Case number: 08 CR 364 (RHK/JJK). Also present was Court Reporter Carla R. Bebault, who transcribed the conversations cited within the following pages.

In this conversation, the United States Attorney Joseph T. Dixon III blatantly admits, (see transcript page 3496 – lines 1-7, lines 13-17), with the Court's endorsement (see transcript page 3503 – lines 17-19), that the grand jury indictment used to convict Thomas J. Petters, BOP 14170-041 was altered and amended by the United States Attorney's Office, the Court and its members. Attorney Jon Hopeman then points out that there were no plea agreements for defendants PCI or PGW (see transcript page 3496 – lines 18-23), and yet there were plea agreements drafted and signed on September 9, 2010, approximately 9 months after Mr. Petters' conviction (see page 12 of both PGW and PCI plea agreements). The pleas were in response to the 16-page superseding grand jury indictment, which was previously amended to 11 pages for Mr. Petters' trial, including the removal of two defendants PCI and PGW. Mr. Petters' receiver Douglas A. Kelley signed off guilty as the defendant, thereby temporarily ratifying the seizure of all properties included in the receivership. The redacted and amended 11-page indictment that was given to Mr. Petters' jury was never filed with the Federal Court. This seems especially suspect, as the Petters jury had a question pertaining to the substance of the indictment that was submitted, a question that was obviously circumvented by the Court (see transcript page 3498 – lines 3-10, 3505 – lines 13-22).

The alteration or amendment of a grand jury indictment is disallowed and illicit, according to the United States Department of Justice - Criminal Resource Manual [236]; which states:

The general rule is that indictments cannot be amended in substance. "An amendment to an indictment occurs when the charging terms of an indictment are altered." *United States v. Cancelliere*, 69 F.3d 1116, 1121 (11th Cir. 1995). This follows from the fundamental distinction between the information and the indictment (see this Manual at 235) which must be returned by a grand jury. If the indictment could be changed by the court or by the prosecutor, then it would no longer be the indictment returned by the grand jury. Indeed, in *Russell v. United States*, 369 U.S. 749, 769 (1962), the Court pointed out that a consequence of amending the indictment is that the defendant "could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him." "Thus, the Fifth Amendment forbids amendment of an indictment by the Court, whether actual or constructive." *United States v. Wacker*, 72 F.3d 1453, 1474 (10th Cir. 1995), *petition for cert. filed*, (Jun. 10, 1996)(No. 95-9284).

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The core summary of this complaint against the Honorable Richard H. Kyle is that the illicit amendment of a grand jury indictment did indeed take place, according to the repeated declarations of United States Attorney Joseph T. Dixon III (see transcript page 3496 – lines 1-7, lines 13-17), and that the Court approval of this disregard of Department of Justice protocol is unconstitutional, and potentially a criminal act, for all parties who knowingly and willfully amend a grand jury indictment.

1) Honorable Richard H. Kyle was aware of the jury's concern and confusion with the absence of two of the three defendants from the indictment, which were removed from the 16-page superseding indictment. This left an 11-page version that was never filed with the Federal Court. (see transcript page 3493 – lines 13-22, also see jury question and judicial response).

2) Honorable Richard H. Kyle was aware of the amendment of a grand jury indictment in the case [08 CR 364 (RHK/JJK)], as well as the potential ramifications of moving forward with a defective indictment (see transcript page 3496 – lines 13-23). He displays obvious hesitation as he reasons out the ramifications of moving forward (see transcript page 3498 – lines 3-10).

3) Honorable Richard H. Kyle was aware of the redaction of the defendants PCI and PGW, in spite of their corporate personhood in the eyes of the United States Federal Court, and their being named defendants in the case. He admits that the indictment that they are citing is not the 16-page superseding indictment from the grand jury, but rather a copy that is referred to as 11-pages via a press release. (Transcript 3503 – lines 17-19, quote: St. Paul Pioneer Press – 11/25/10: "*Kyle referred them back to the 11-page indictment...*", as well as indicated by the absence of an officially filed, redacted and amended indictment with the Federal Court). Honorable Richard H. Kyle also presided over the subsequent trial and plea agreements of PCI and PGW (see the case number on both the PCI and PGW plea agreements [08 364 (2) (RHK/AJB) and 08 364 (3) (RHK/AJB)], so he was well aware of the reversion back to the legitimate 16-page superseding grand jury indictment, after using the defective 11-page indictment version, to convict Mr. Petters.

4) Honorable Richard H. Kyle recognized that the redaction of two defendants from the indictment changed the substance of the meaning of the references to PCI and PGW within the amended indictment (see transcript page 3504 – lines 1-3, 7-9, 12, 15).

5) Both the United States Attorney Joseph T. Dixon III and the Honorable Richard H. Kyle conclude that if they directly respond to the jury's question, the jury's answer will be biased toward the case for the defense, thereby prejudicing the evidence against Mr. Petters, as well as violating his Fifth Amendment rights (see transcript page 3505 – lines 13-22).

6) Honorable Richard H. Kyle realizes the ramifications of disregarding the fact that PCI and PGW are indeed also on trial as co-defendants in this case, according to the 16-page legitimate grand jury indictment. To disregard two of the three defendants in this

case is completely disregarding the substance of the defendant's actual being, as well as the intentions of the grand jury at the time the indictment was handed down (see transcript page 3506 – lines 1-10).

7) The Honorable Richard H. Kyle's comment about the jury's potential response is inappropriate, and suggests a potential undue influence on the jury, as to possibly gain a particular conclusion or outcome (see transcript 3508 – lines 6-7).

DECLARATION OF

Jennifer C. Graf

I, Jennifer C. Graf, declare:

1. I am an attorney at law, licensed to practice by the States of California and New Mexico, currently residing in Florida.
2. I have been a licensed attorney since 2001 with more than eighteen years experience helping businesses improve by streamlining their processes.
3. From 2002-2003, I oversaw the Manhattan office for a Litigation Technology Division of a nationally recognized global business advisory firm.
4. From 2003-2005, I was a Criminal Prosecutor and Aide to the Grand Jury as an Assistant District Attorney for the Second Judicial District of New Mexico. I aided the Grand Jury in fulfilling its constitutional requirements. I tried more than 250 cases and managed more than 400 felony cases. I taught magistrates, judges, and attorneys trial strategies and the law for driving while intoxicated cases.
5. From 2003-2005, I was a founding Board Member for a nonprofit dedicated to helping educate businesses about the financial benefits of employing people with disabilities. The organization received numerous awards including the United States Department of Labor's Recognition of Excellence.
6. In 2004, I was chosen as "Face of the Prosecutor" for a nationally distributed Mothers Against Drunk Driving training video, which educated volunteers on legal jargon, courtroom etiquette, and complex legal and courtroom issues to improve the accuracy of the data collected for national studies.
7. In 2005, I was nominated by District Court Judge Michael Kavanaugh and subsequently elected by the Department of Transportation National Highway Traffic Safety Administration to be the sole New Mexico Special Prosecutor charged with training effective case management and litigation techniques for driving while intoxicated cases.
8. In 2006, I developed, presented, and helped managed the United States focused litigation strategy for a multinational conglomerate with annual revenue over 200 billion dollars.
9. From 2006-2014, as a trusted advisor, I worked with outside counsel to develop and manage litigation strategy projects, my first of which saved a client an anticipated \$1.5 million in discovery costs.
10. From 2006-2015, I conducted more than 50 presentations for law firm partners, associates, librarians, staff, and members of the community on litigation strategy, early case assessment, utilization of legal and non-legal tools, and effective communication skills including point of view, listening, and questioning techniques.
11. In 2011, I was a Guest Professor at School of Law, Universidad Autónoma del Estado de Morelos, Cuernavaca, Morelos, Mexico.
12. I am informed and believe that Judge Richard Kyle Sr.'s son, Richard Kyle Jr., was a shareholder and the lead White Collar Crime attorney in the law firm of Fredrickson & Byron,

P.A. ("F&B"). F&B was the sole firm responsible for handling all Petters personal legal and business legal matters, during all the times stated in the joint-Defendant indictment issued by the Grand Jury in the Petters case. I am further informed and believe that F&B subsequently settled a "clawback suit" for 13.5 million dollars as a direct consequence of its representation of Petters and his companies, to which Richard Kyle Jr. was an interested party.

13. I am informed and believe, based on recorded admissions of Judge Richard Kyle Sr., that he sua sponte, without legal authority or precedence, invalidated a joint-defendant indictment by whiting out the joint-defendants names from the Grand Jury approved joint-defendant indictment. Judge Richard Kyle Sr. provided his whited out indictment to the trial jury for deliberations, as so stated by Judge Richard Kyle Sr. on the record.

14. In my opinion a reasonable person should question Judge Richard Kyle Sr.'s impartiality and hence the court's ability to be impartial when determining criminal liability in this case. Judge Richard Kyle Sr.'s reputation and his son's reputation were at stake and therefore Judge Richard Kyle Sr. was required to recuse himself in this case.

I declare under penalty of perjury under the laws of the United States and the State of Florida that the foregoing is true and correct.

Executed on this 5th day of March, 2015, in Port Orange, Florida.

A handwritten signature in black ink, appearing to be "H. C. G." with a stylized flourish at the end.

Declaration of
Thomas J. Petters

I, Thomas J. Petters, make the following statements upon the basis of my own personal knowledge of said facts;

1. Three days after my companies were raided I sought legal assistance from the law firm of Fredrikson & Byron.

2. Fredrikson & Byron declined stating that there could be a conflict of interest since they represented myself and the defendant companies under indictment.

3. I had used Fredrikson & Byron for all my personal and business legal matters for the span of 16 years.

4. I became aware late in the year 2010 after I had arrived at the United States Penitentiary Leavenworth, of the fact that Richard Kyle, Jr. was a partner shareholder in the law firm Fredrikson & Byron, was the lead white collar crime attorney, and was the son of Richard Kyle, Sr., the federal judge in my prosecution.

5. I became aware late in the year 2011, that my trial Judge, Richard Kyle, Sr. had deleted two defendants from the face of the indictment.

6. I was informed that such deletion from the indictment was in fact an amendment to that document, and required following federal rules and procedures, that were not followed.

7. I was informed that the indictment viewed by the jury had been altered in chambers without the Grand Jury being involved.

8. I became aware of the fact of a \$ 13.5 million settlement entered into on behalf of the law firm of Fredrikson & Byron in regard to representation of Petters companies for breeches of duty and trust.

9. I believe that the \$ 13.5 million settlement amounts to a substantial interest to any partner of the law firm of

Exhibit D

Fredrikson & Byron, to include Attorney/partner/shareholder Richard Kyle, Jr., the son of my trial judge, Richard Kyle, Sr.

10. I asked appeal counsel to raise the disqualification of Judge Kyle in my appeal. He failed to do so.

11. I asked my counsel for the section 2255 motion to present the issue of disqualification of Judge Kyle, and counsel failed to do so.

This declaration being executed on the 30th day of March, 2015, I declare, certify, verify and state under penalty of perjury that the foregoing is true and correct.



Thomas J. Petters

P R O C E E D I N G S

IN CHAMBERS

1
2
3
4 THE COURT: I've got the court reporter here. And
5 I don't know whether we have to put it all on. Let's put it
6 on. Just note the appearances. I'm here, Judge Kyle.
7 Marc, court reporter, Deb Siebrecht are here in chambers.

8 And for the Government, by telephone?

9 MR. MARTI: Joe Dixon and John Marti are here.

10 THE COURT: For the Defendant?

11 MR. HOPEMAN: John Hopeman, Paul Engh, Eric
12 Riensche.

13 THE COURT: Okay. We've got two things to take
14 up. Let's take up the question from the jurors, which I
15 think Marc has at least read to you, if not faxed to you.
16 And just so the record is clear, let me say it again. "Why
17 is PGW and PCI both stated in the indictment." There is no
18 question mark after that, but drops down two lines. There's
19 another phrase starts: "Isn't PGW the umbrella company for
20 Polaroid, Sun Country, etcetera." And signed somebody
21 Close -- Cross I think it is. I assume he or she is the
22 foreperson.

23 I don't know whether anybody wants to weigh in on
24 that in terms of what you think the response should be. In
25 my view, the PGW and PCI are listed in the indictment

1 because they are part of the background facts in the case.
2 And I don't know what the -- with respect to whether that
3 second portion here is a question, isn't PGW the umbrella
4 company for Polaroid, I would say that they are going to
5 have to rely upon their recollection of the evidence and to
6 resolve that if it needs to be resolved, something to that
7 effect. But I'll be happy to hear from counsel. Let's
8 start with the Government. Joe?

9 MR. DIXON: Your Honor. Your Honor, you're
10 correct that it's obviously part of the background of the
11 case. I think the relevant instruction is 6A, which
12 provides what the indictment is, and says that all the
13 details alleged need not be proven; but I think it important
14 to convey that this is basically a background for the
15 overall scheme.

16 MR. HOPEMAN: I'm sorry, the background for what?

17 MR. DIXON: The overall scheme.

18 THE COURT: Well, I don't think I would use the
19 words "overall scheme". I would just say background for the
20 indictment or for the case or something like that.

21 Mr. Hopeman, what's your view on it?

22 MR. HOPEMAN: My view on it, your Honor, first of
23 all, is that the second question cannot be answered without
24 Mr. Petters first being aware of it and being given an
25 opportunity to talk to his lawyers about it because it's a

1 question that involves the facts. And I have just -- I
2 wrote a brief on this a number of years ago and I believe
3 that's the law. The jury doesn't have to be called in, but
4 I think Mr. Petters needs to be made aware of the question.
5 So I don't think we can proceed any further without having
6 him in Court and us there and his hearing the counsel.

7 THE COURT: Well, when are you going to do that?

8 MR. HOPEMAN: Beg your pardon?

9 THE COURT: When are you going to do that?

10 MR. HOPEMAN: I would like to do it right now.

11 THE COURT: That's fine. I don't have any problem
12 with that.

13 MR. HOPEMAN: Here is my position on the other two
14 questions that the jury has asked. As to the first
15 question, I believe that the Court should say the indictment
16 should be read in accordance with its plain meaning. I
17 think to do otherwise would be a comment on the meaning of
18 the indictment and it risks improperly amending the
19 indictment if the Court does so.

20 As for the second question, I think they should be
21 told simply to rely on their own recollection as to how much
22 the companies relate to each other. That's our position.

23 THE COURT: Okay.

24 Mr. Dixon or Mr. Marti, do you have any response
25 to that?

1 MR. DIXON: Well, we've amended the indictment,
2 all of us, in the context of trying to redact out the
3 companies that are Defendants, and that has to be considered
4 here. So the reality is that we have amended it and some of
5 it was done with the Defendant's request in terms of
6 redacting it to account for the fact that the two companies
7 which are named Defendants are not part of this case.

8 MR. HOPEMAN: Well, in my view that is not an
9 amendment. That's, at best, that's a mere variance which
10 might be proper. The only entity that can amend an
11 indictment is the United States Grand Jury. We can't amend
12 it and the Court can't amend it.

13 THE COURT: Well, the indictment that went to the
14 jury, however, does not show anybody but Mr. Petters as a
15 Defendant. And we can't change that. That's what we
16 submitted. That was the agreement of the parties to submit
17 it in that form.

18 MR. HOPEMAN: Yes, I understand that. However,
19 there's language in the indictment that they are inquiring
20 about which I believe is the same language that Mr. Engh
21 pointed out at the beginning of this closing argument which
22 is that as for PGW and PCI, there were no deals. And I
23 think that's what the inquiry is about.

24 THE COURT: I have no idea what the inquiry is
25 about. I don't -- I mean, I could also conclude that maybe

1 the inquiry is about because we have capped letters on the
2 Defendant and capped letters on these two Defendants as they
3 are described in the -- in those first opening paragraphs of
4 the indictment as redacted. Now, maybe we would have been
5 better off to not have capped the letters on the two
6 corporations and just left the Defendant capped, maybe it
7 couldn't -- I don't know. But --

8 MR. DIXON: Judge, your point that the companies
9 are included, as are other folks, as background to the
10 charges is exactly the point there. That is the function of
11 the companies at this point. They are background.

12 MR. HOPEMAN: Our view is that they are far more
13 than mere background. And our view is that it's very
14 significant that this question has been asked by the jury
15 and it seems to show that they are deliberating on an
16 argument that we made in our closing argument.

17 THE COURT: But there's no answer to this
18 question, is there?

19 MR. HOPEMAN: I think the answer to them should be
20 the indictment should be read in accordance with its plain
21 meaning.

22 MR. DIXON: Judge, the Government would request
23 that you read to the jury that it is not necessary that the
24 Government prove all of the details alleged in the
25 indictment concerning the precise nature and purpose of the

1 scheme.

2 MR. HOPEMAN: We would object to that.

3 THE COURT: I don't think I'm going to read that.
4 I think it's a -- I think I got to be as bland about this as
5 possible. And -- because I don't know what it is they want.
6 I don't know why they are asking the question; and the
7 Defendant may have one view and the Government may have
8 another, and maybe I have a third. I can't get into that.
9 We have to take this question as it's written and -- well,
10 okay.

11 MR. HOPEMAN: May we run over and get Mr. Petters
12 quickly in the courtroom?

13 THE COURT: Do you want him in the courtroom with
14 the media there, too?

15 MR. HOPEMAN: I don't have a problem with that,
16 Judge. I just -- I mean, I suppose the alternative is for
17 us to go visit him in his cell, which we're willing to do,
18 and then put the question to him and see if he has any
19 suggestions for us, which he's entitled to make on a
20 question of fact. This is as to the second question they
21 have asked now, and then we can report back to the Court
22 either by coming to chambers or by telephone.

23 THE COURT: Why don't you come up to chambers if
24 you can do that. Are where are the Government? Are you in
25 St. Paul in the building?

1 MR. DIXON: We are.

2 MR. HOPEMAN: We'll go see him in his cell and
3 then we'll come up to chambers.

4 THE COURT: Let me just cover -- well, that's on
5 your motion for an additional instruction. I guess we'll
6 take that up when we come up here.

7 MR. HOPEMAN: All right. We'll bring that along.

8 THE COURT: And why don't we assume you can get
9 this done in 20 minutes or something like that.

10 MR. HOPEMAN: It will take three minutes once I
11 get there. It will take me 20 minutes to reach chambers.

12 THE COURT: As I say, we'll plan to convene here
13 about 10 to 2:00.

14 MR. DIXON: Very good.

15 THE COURT: Thank you.

16 (Recess taken from 1:19 to 1:37 p.m.)

17 THE COURT: We're here with all of the counsel for
18 the Defendant and the Government. And I'm here, as is Marc
19 Betinsky and Carla, the court reporter, and we've got two
20 issues. But let's start with the first and that's the
21 question that we got from the jurors which I'll attach to
22 this transcript, but it basically states: "Why is PGW and
23 PCI both stated in the indictment." There is no question
24 mark after that. But then it drops down to the second
25 question, at least I construe it as a question: "Isn't PGW --"

1 the umbrella company for Polaroid, Sun Country, etcetera."
2 And it's signed -- I guess that's Cross. Whoever it is,
3 it's signed by the foreperson.

4 So -- and we had a brief discussion with -- the
5 Court did with counsel by telephone maybe 20 minutes ago,
6 and it was adjourned so that the defense counsel could talk
7 with Mr. Petters who is in custody here in this building,
8 and I guess that's been accomplished.

9 MR. HOPEMAN: It has, your Honor. We just spoke
10 to him in the Marshal's cell and he had the opportunity to
11 give us input as to what answer should be given to both
12 questions, and his input did not change my view that I
13 stated in our last conference a few minutes ago.

14 THE COURT: Do you want to state it again?

15 MR. HOPEMAN: Yes. Our view, your Honor, is that
16 the first question should be answered as follows:

17 "The indictment should be read in accordance with
18 its plain meaning." We think it would be improper for the
19 Court to comment on the meaning of an indictment and that it
20 risks improper amendment of the indictment to do otherwise.

21 As for the second question that the jury asked, we
22 think the answer should be: "Rely on your own recollection
23 as to how the companies relates to each other." We don't
24 think that the Court should do anything more than that. And
25 we think to do anything more than that would be an improper

1 comment on the evidence.

2 THE COURT: Who from the Government?

3 MR. MARTI: I'll speak. With respect to the first
4 question, I think the Court should just refer the jury to
5 its prior instructions. If there is an inference to be
6 drawn from this, your prior instructions already addressed
7 this issue and that's in instruction 6A. If they are
8 looking at to interpret the indictment and to how they are
9 supposed to use the indictment in their deliberations, in
10 instruction 6A you gave them that guidance.

11 And basically that's the instruction that we
12 discussed on the telephone that Mr. Hopeman objected to and
13 I believe your objection is also noted on the record in the
14 charge conference. And it basically states on the second
15 page of 6A, "It is not necessary that the Government prove
16 all the details alleged in the indictment concerning the
17 precise nature and purpose of the scheme. That the alleged
18 scheme actually succeed in defrauding anyone or the use of
19 mailings or interstate communications." That's an accurate
20 statement of the law.

21 THE COURT: Well, it's an accurate statement of
22 the law but I don't think it's a response to the question
23 they have asked.

24 MR. MARTI: Then I think the right response would
25 be to refer the jury back to the instructions. And with

1 respect to the second question, I think it's fair just to
2 say refer them back to the recollection of what the evidence
3 is.

4 THE COURT: What was yours again, Jon, just the
5 first part of it?

6 MR. DIXON: "The indictment should be read in
7 accordance with its plain meaning."

8 MR. HOPEMAN: Yes. Thank you, Mr. Dixon. That is
9 what I propose. And I think that what Mr. Marti's
10 suggestion presumes is that the jury is asking a question
11 that it is not asking necessarily.

12 THE COURT: I agree. What's the response to
13 Mr. Hopeman's proposal?

14 MR. MARTI: Well, there's also a presumption in
15 that response. That the indictment should be read in its
16 plain meaning, trying to interpret what the intent of the
17 question is. And I think the safe answer for the Court is
18 just to say to refer them back to the instructions that the
19 Court has already given them and refer them back to their
20 recollection of what the evidence is in the case.

21 THE COURT: Well, they are not asking -- it seems
22 to me they are not asking -- they are not asking who PGW and
23 PCI are and what they are doing there. They are just saying
24 why are they there or why are they stated. It's like a lot
25 of questions from jurors. Hard to get into jurors' minds.

1 what they had in mind when they are asking the question. I
2 don't know if they are asking why are they both stated or
3 why are they in there at all and what it is. But I don't
4 want to ask them what they really mean by it, either. I'm
5 not going to do that.

6 What we said initially when we were on the phone
7 is that -- and I gather nobody thinks it's a good one, but
8 those are both stated in the indictment because they are
9 part of the background of the case. You don't think they
10 are stated? You're shaking your head.

11 MR. ENGH: Well, you can't say that. You can't
12 comment on your interpretation of the indictment and whether
13 these are background statements or not. Our argument is
14 that they are critical statements and critical inferences in
15 the indictment that's false. And so for you to say that
16 it's merely background is incorrect, in my view.

17 THE COURT: Well, where is the indictment? Do we
18 have that? Is this the redacted one?

19 MR. DIXON: Yep.

20 THE COURT: I am assuming that -- well, I guess I
21 don't know whether they are talking about -- we don't know
22 whether they are referencing why they are sitting there in
23 paragraphs 1 or 2, or I assume they are referenced elsewhere
24 in here from time to time.

25 MR. HOPEMAN: They are.

1 THE COURT: You got to mention them in the
2 indictment, but I guess I don't know what we say as to what
3 the purpose is.

4 MR. ENGH: Well, they are mentioned in paragraph 5
5 is my memory.

6 MR. HOPEMAN: And elsewhere.

7 THE COURT: I'm sure they are mentioned elsewhere.
8 As I say, paragraphs 5, PCI and its agents and PGW, and it
9 alleges made numerous false, etcetera, etcetera.

10 MR. ENGH: And the rest of it is that there were
11 no real deals.

12 THE COURT: But they are mentioned throughout.

13 MR. HOPEMAN: We think they are mentioned as more
14 than background.

15 THE COURT: Background --

16 MR. HOPEMAN: And that it would not be proper to
17 tell them that.

18 THE COURT: Well, we don't know why they are
19 actually mentioned in there.

20 MR. HOPEMAN: We don't know why they are asking.

21 THE COURT: Yeah.

22 MR. HOPEMAN: So in my view, as you suggested
23 earlier, some bland answer should do. I don't think they
24 are asking a legal question that can be answered by the
25 instructions.

1 MR. RANK: That's not relevant.

2 MR. HOPEMAN: I couldn't hear you.

3 MR. RANK: I said then it's not relevant.

4 THE COURT: What isn't relevant? The questions?

5 MR. RANK: Yeah, if the instructions don't cover
6 it.

7 THE COURT: If I don't tell them.

8 MR. RANK: You can refer them back to the
9 questions.

10 MR. DIXON: Judge, their answer gives undue focus
11 and weight on the indictment as an instrument in our view.

12 THE COURT: Okay.

13 MR. DIXON: And I agree with your assertion
14 earlier which is this is background. They don't like that,
15 I understand that. I think the only real option we have is
16 just to simply say -- refer them back to the instructions,
17 which is not particularly responsive to their question; but
18 if we actually respond to their question, they are not going
19 to like the answer.

20 THE COURT: And you're not going to like their
21 answer.

22 MR. DIXON: I'm not going to like their answer.

23 THE COURT: And I don't think there is an answer
24 to this question, a nice neat, clean answer that is both
25 accurate and not objectionable by one side or the other.

1 MR. HOPEMAN: Well, I think they are asking a
2 question about the meaning of the indictment. Why is PGW
3 and PCI both stated in the indictment. That's a question
4 about the meaning of the indictment.

5 MR. DIXON: The answer is they were charged as
6 Defendants in the indictment, and they are not to consider
7 that.

8 MR. MARTI: And it's only the Defendant that is on
9 trial.

10 THE COURT: That gets --

11 MR. MARTI: Which goes further than I think we
12 want to go.

13 MR. BETINSKY: You couldn't write this indictment
14 without referencing them somehow.

15 THE COURT: I agree with that.

16 MR. MARTI: Whether they are stated or not in the
17 indictment, it doesn't relate to an essential element of the
18 offense charged.

19 THE COURT: I don't know what they want. That's
20 what I can't figure out. I don't have any idea what they
21 are looking for.

22 MR. DIXON: I think any responsive answer to their
23 question will be deemed by one side or another as weighted.

24 THE COURT: Yeah, I think so. That's what I'm
25 hearing. But I got to say something to them.

1 MR. DIXON: That's why I think the answer is to
2 just refer to the indictment. Refer to the instructions.

3 THE COURT: Indictment and the instructions
4 concerning it or not reference it. That doesn't tell them
5 anything. I don't think it helps anybody. Well, that's the
6 direction that I'm headed, but let me hear from the
7 Defendants.

8 Ms. Siebrecht, what do you think?

9 MS. SIEBRECHT: I think it would have been easier
10 to have it in open court.

11 THE COURT: Why isn't it in open court?

12 MR. HOPEMAN: They saw us coming in and they were
13 on us like fat on a father-in-law.

14 MR. BETINSKY: First time ever in a transcript for
15 that.

16 THE COURT: It's a question of law we're talking
17 about. I don't think we have to be out in the courtroom.
18 Anybody think we should go out there and have a discussion?
19 But before we do, we better figure out what to say.

20 MR. HOPEMAN: Well, what did I just say a minute
21 ago that I thought was a good answer?

22 THE COURT: Yeah, I know what was it.

23 MR. BETINSKY: You referred back to the
24 instruction.

25 THE COURT: I think you said you would refer them

1 back to the indictment and the instructions.

2 MR. HOPEMAN: I think that's what the Court just
3 said.

4 THE COURT: Anybody have any problem with that?

5 MR. DIXON: I don't.

6 THE COURT: They are not going to like it but they
7 will forget about it.

8 MR. HOPEMAN: Well, I have a problem with it for
9 the reasons stated earlier.

10 THE COURT: Well, I'm going to put that back to
11 them and --

12 MR. HOPEMAN: I need to say the magic words I
13 object.

14 THE COURT: Noted.

15 The second question, which I don't know there
16 seems to be any real disagreement on it: "In response to
17 your second question, you must rely upon your own
18 recollection of the evidence and answer any questions."

19 MR. HOPEMAN: Defense agrees.

20 MR. DIXON: No objection.

21 THE COURT: Is anybody concerned about the press
22 out there with us in here?

23 MR. HOPEMAN: I'm concerned about what to tell
24 them and not having to lie to them. I don't want to lie to
25 them.

1 THE COURT: We'll get them the answer to the
2 question. I think they are entitled to that.

3 MR. HOPEMAN: My concern was they asked us -- we
4 said we're just going to see Mr. Petters and then another
5 one said, "Does the jury have a question? Is there a note?"
6 And I said, "Well, we don't know." So I sort of didn't tell
7 the truth.

8 THE COURT: Well, once I get this finalized, I'll
9 hand this back to the jury with the question attached to it
10 so it becomes one document and we can hand that out to them.

11 MR. HOPEMAN: Okay. That would be fine.

12 THE COURT: Now, there's another issue that the
13 Defendant has filed a motion for additional instructions on
14 pretrial publicity to the jurors, and cites a number of
15 articles or blogs. I don't know what you call those.

16 MR. HOPEMAN: They are ads.

17 THE COURT: Ads that appeared in the Minneapolis
18 paper.

19 MR. HOPEMAN: That appeared in the last two days.

20 THE COURT: Either I don't read the Minneapolis
21 paper carefully enough, but I didn't see them. And the
22 Government responded to that.

23 MR. MARTI: We don't object to the Court's giving
24 its cautionary instruction with respect to the jury going
25 into a recess; and we think that the instruction that the

1 Judge gave at the outset is appropriate.

2 THE COURT: I got a copy of what I said at the
3 outset right after -- who made the opening statement --
4 right after your statement. I went on to say telling the
5 jurors we were a little bit later than we thought. Tomorrow
6 we'll start at 9 o'clock. Then I say: Let me just cover a
7 couple of matters as you head out the first time away from
8 the trial. First, these are sort of the do nots. You
9 should not discuss the case either amongst yourselves or
10 with anyone else during the course of the trial, and that
11 includes reading or posting the comments on social media
12 such as Twitter, MySpace, Facebook, and the like.

13 In fairness to the parties in this case, you
14 should keep an open mind throughout the trial, reaching your
15 conclusion only after your final deliberations, all the
16 evidence is in, you've heard the attorneys' summations and
17 my instructions as to the law, and only after you have had
18 an opportunity to discuss the case with each other in the
19 jury room.

20 Second, you should not permit anybody to talk with
21 you about the case, no interaction with any participants,
22 you shouldn't read about the case in the newspapers or
23 listen to any television or radio broadcast. There has been
24 publicity. It will probably continue.

25 No independent investigation. Neighbors and

1 friends are going to find out about the fact that you're
2 going to be on the jury. I ask you not to talk with them
3 about it. Tell them why you shouldn't do it.

4 So I don't know what else I can say except to
5 repeat it.

6 MR. HOPEMAN: I have two suggestions to add to
7 that. We would like all of that said again that the Court
8 just recited. We would also like them told that they
9 shouldn't be going on the Internet or using social
10 networking sites to find out about the case or the lawyers
11 or anything else.

12 And we also would like them told that over the
13 Thanksgiving holiday in particular they should resist
14 efforts, the inevitable efforts by people to talk to them
15 about the case, particularly their friends and families.
16 Because I think they are going to be under tremendous
17 pressure, the background is -- we've had a full courtroom
18 every day in this case. We have had an overflow courtroom,
19 which I have never heard of having in this district before,
20 and we've had a second overflow courtroom now.

21 There's been intense public interest in the case
22 and I fear that that's going to extend to the jurors and
23 involve people trying to reach out to them. We're getting
24 all kinds of crazy calls in our office. People calling me
25 and telling me they have information about some of the

1 Government's witnesses who are framing Mr. Petters, and they
2 are the same witnesses who are stalking the caller. You
3 know, that kind of crazy stuff.

4 And so I just think because they are under this
5 kind of pressure, it would really -- it would really firm up
6 their resolve if you told them to be careful.

7 THE COURT: Well, I don't have any problem doing
8 it. But the context -- I guess the question is where? But
9 before we get to that, the context that I would like to
10 approach it is to say that you know you're now going to be
11 gone for the first time for a total of five days, and during
12 that period of time, because it's a holiday, you're going to
13 run into friends and neighbors and you're likely to have
14 people that are going to want to talk about it, find out
15 about your experience, etcetera, etcetera. You got to
16 resist that. I would like to have some natural way of
17 getting into the discussion with them other than to say
18 there's been some stuff in the Minneapolis paper, which are
19 the attachments to your motion.

20 MR. HOPEMAN: I don't think you need to say that.
21 I think you need to say what you just recited into the
22 record plus a couple more things.

23 THE COURT: Okay.

24 MR. HOPEMAN: That's all.

25 THE COURT: Now, what is your view as to -- either

1 side, where that should be done? I could go into the jury
2 room with the reporter and say that in there. I can do it
3 out in the courtroom. If we do it out in the courtroom,
4 what it's going to do is it's going to produce another
5 reason for a story in the paper.

6 MR. HOPEMAN: Yes.

7 THE COURT: On the other hand, we also have a
8 public trial here.

9 MR. HOPEMAN: Well, I think our view is you can do
10 it in the jury room as long as there's a record. We would
11 like to know what to tell them when we go out. I should
12 just tell them that there's this note from the jury and it's
13 been answered and here it is.

14 THE COURT: You can tell them that the judge is
15 simply going to caution the jurors about reading, listening
16 to, interaction with the people. Do any of you have any
17 problem with that?

18 MR. DIXON: I don't have any problem with what
19 Mr. Hopeman proposes.

20 As far as the question and answer, are you going
21 to put it on ECF? In terms of filing, here is the question,
22 here is the Court's response. That way everyone has
23 complete access to it.

24 MR. BETINSKY: That's what we usually do. It will
25 get -- the foreperson's name will get redacted off.

1 THE COURT: They don't have to redact it off. I
2 can't read it.

3 MR. DIXON: You can type it.

4 MR. BETINSKY: They scan it in.

5 MR. HOPEMAN: Are you going to take out the
6 foreperson's name?

7 MR. BETINSKY: Usually it's the name and it gets
8 blacked out.

9 MR. DIXON: I think that would be prudent.

10 MR. BETINSKY: We always do that.

11 THE COURT: Okay. Anything else we need to cover?

12 MR. HOPEMAN: So we may retreat and tell them that
13 it's going to be on ECF?

14 MS. SIEBRECHT: I told them that I would give them
15 a copy if there's questions and answers.

16 THE COURT: Judge Siebrecht will hold a press
17 conference. I understand you're getting the heat.

18 MR. DIXON: Are they back on Monday, 9 o'clock?

19 THE COURT: Don't you think so? When do you want
20 them back?

21 MR. DIXON: Tomorrow.

22 MR. BETINSKY: We have already been down that
23 road.

24 MS. SIEBRECHT: Are you in your office?

25 THE COURT: In case you folks don't know it, the

1 reason I was told by one of them is a couple of the jurors ..
2 had made arrangements, based upon the representations that I
3 had made, which I assumed would be the case if they weren't
4 going to come back, if you want to know this, we fed them
5 Savoy Pizza.

6 MR. HOPEMAN: I think we object to that. I think
7 you should patronize young Gray's place.

8 THE COURT: We'll have Earl bring it over.
9 Anything else I should be thinking about?

10 MR. HOPEMAN: No.

11 MR. DIXON: No.

12 (Recess taken at 2:02 p.m.)

13 (4:17 p.m.)

14

15 IN JURY ROOM - COUNSEL AND DEFENDANT NOT PRESENT

16

17 THE COURT: I just want to give you some
18 additional instructions just as you're heading out so the
19 record is clear on it. This is going to be the first time
20 that you're gone for an extended period of time and you're
21 going to be home for a holiday, which means family, friends,
22 others that you're going to run into.

23 There's been a lot of publicity about the case.

24 Hopefully you have not read about it. It has been around,

25 so I suspect that those that you do run into are going to be

1 well aware of what's been going on and they are going to
2 know because they know that you are participating as jurors
3 in the case. It's important that you avoid extended -- to
4 the extent you can avoid it -- any discussions with them.
5 They are going to want to know such things as what's going
6 on, what's happening, what do you think about this witness,
7 that witness, have you read this and read that in the paper.
8 And you have obviously got to have some social relationships
9 which you don't want to say it's none of your business, but
10 in a gentle sort of way that's what you really should be
11 saying. That you're under -- took an oath, etcetera, and
12 the judge is instructing you not to discuss the case in any
13 manner.

14 And it's important because this case has gotten,
15 as you can tell from the number of people that we had in the
16 courtroom over the last couple of days, that they weren't
17 there to listen to me giving the final charge, I can assure
18 you of that. So there's going to be some interest. They
19 are real interested.

20 And you should also avoid, and I think I said this
21 at the outset, getting on the Internet, anything like that,
22 trying to do any kind of independent research on Mr. Petters
23 or his companies or any aspect of the case or any lawyers or
24 that sort of thing. That should be avoided.

25 I also told you at the beginning to avoid any of

1. the Twittering and blogging and all that sort of thing. I
2. can't emphasize it enough because not only have you agreed
3. that you would follow my instructions, but this is really
4. one of them, but the likelihood if you have any discussions
5. with somebody about the case, of that person someplace along
6. the line telling their neighbor that they just talked to
7. Charlie who is on the jury and Charlie says this and then
8. it's back. And the next thing we know we have a real issue
9. that is here which might require this case to be retried or
10. something like that.

11. That's just an additional reason for not doing
12. that. It's very difficult, as we all know, to tell
13. something to somebody and be sure that it's just going to
14. stay right where it is. So the best thing is just to avoid
15. it.

16. Your own -- I told you earlier about publicity in
17. the paper. Again, you should avoid listening, viewing if
18. it's on television, on the radio. I guess that's really
19. about it.

20. So you've got five days on your own. Keep your
21. own counsel. That's really what it amounts to. And, again,
22. you got to be careful. You don't want to irritate neighbors
23. and family members by saying I can't talk about it, but you
24. really shouldn't. But even the generic discussions get to
25. be very tricky about that. One thing leads to another.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
CRIMINAL NO. 08-364 (RHK/AJB)

UNITED STATES OF AMERICA,)	SUPERSEDING INDICTMENT
)	
Plaintiff,)	(18 U.S.C. § 1341)
)	(18 U.S.C. § 1343)
v.)	(18 U.S.C. § 371)
)	(18 U.S.C. § 1956)
1. THOMAS JOSEPH PETTERS,)	(18 U.S.C. § 1957)
)	(18 U.S.C. § 2)
2. PETTERS COMPANY, INC., and)	
)	
3. PETTERS GROUP WORLDWIDE,)	
LLC,)	
)	
Defendants.)	

A true printed copy in 16 sheet(s)
of the electronic record filed on 6/3/09
in the United States District Court
for the District of Minnesota.

CERTIFIED, 12/26, 2013
RICHARD D. SLETTEN
Deputy Clerk

THE UNITED STATES GRAND JURY CHARGES THAT: BY:

INTRODUCTION

1. Defendant THOMAS JOSEPH PETTERS is a resident of Minnesota.
2. Defendant PETTERS COMPANY, INC. (PCI) is a Minnesota corporation with its headquarters and operations located in Minnesota. PETTERS is the sole owner and president of PCI.
3. Defendant PETTERS GROUP WORLDWIDE, LLC (PGW) is a Delaware limited liability corporation with its headquarters and operations principally located in Minnesota. PETTERS is the sole owner, Chairman, and Chief Executive Officer of PGW.

THE FRAUD SCHEME AND ARTIFICE

4. From at least in or about 1995 and continuing through in or about September 2008, in the State and District of Minnesota and elsewhere, the defendants,

SCANNED

JUN 03 2009

U.S. DISTRICT COURT ST. PAUL

JUN 03 2009

FILED
RICHARD D. SLETTEN, CLERK
JUDGMENT ENTD
DEPUTY CLERK

U.S. v. Thomas Joseph Petters, et al.

Criminal No. 08-364 (RHK/AJB)

of Counts 15 through 20 and the property listed in Paragraph 26.

28. If any of the above-described forfeitable property is unavailable for forfeiture, the United States intends to seek the forfeiture of substitute property as provided for in Title 21, United States Code, Section 853(p), as incorporated by Title 18, United States Code, Section 982(b)(1) and by Title 28, United States Code, Section 2461(c).

29. All in violation of Title 18, United States Code, Sections 2, 371, 981(a)(1)(C), 982(a)(1), 1341, 1343, 1956(a)(1)(B)(i), 1956(h) and 1957.

A TRUE BILL

UNITED STATES ATTORNEY

FOREPERSON