UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 14-1840

THOMAS JOSEPH PETTERS,	)	
Petitioner/Appellant,	)	
v.	)	Dist. Ct. # 0:13-cv-01110-RHK
UNITED STATES OF AMERICA,	)	Dist. of Minnesota - Minneapolis
Respondent/Appellee.	)	

PETITION FOR REHEARING PURSUANT TO RULE 40
AND REHEARING IN BANC PURSUANT TO RULE 35 APPELLATE PROCEDURE

COMES NOW, Petitioner -Appellant Thomas Joseph Petters, hereinafter Petters, to Respectfully move this Honorable Court for Rehearing and/or Rehearing In banc pursuant to rules of Appellate Procedure 40 and 35 respectively. In support of this timely motion, Petters sets forth the following facts and reasons for which petition should be granted.

1. The recusal rest upon the district court making findings that he is not bias nor could any reasonable person believe he might be bias in this matter. However, case law and the statute containing no analogous requirement of bias under § 455(a), brings into doubt the district judges ability to decide what another person might reasonably believe.

2. This would result in the "actual bias" requirement finding a foothold in § 455(a) where no such showing or finding exist.

3. The test is whether a reasonable person with knowledge of the facts would question a judge's impartiality, not whether the movant has produced a showing of actual bias.

4. The district court judge's son is a partner in the law firm that represented Petters companies, the same companies that the judge removed from the face of the indictment.

5. The law firm of Fredrikson & Byron, P.A., which Judge Kyle's son was a partner, and which is where the judge's son works on a daily basis, was involved in a law suit in regard to that firms representation of Petters business, and the firm, although without admitting guilt, made a settlement in a clawback suit in the amount of $ 13.5 Million, to Plaintiff's suit for breach of judiciary duty, breach of contract, breach of fiduciary duty, aiding & abetting fraud, conspiracy, legal malpractice and unjust enrichment. And at present there exist a potential for class-action claim that would exceed $ 1 Billion in damages.

6. Judge Kyle's claim that his son's interest could not be affected in that the argument was a Hypothetical House of Cards, has proven wrong. $ 13.5 Million in settlement for damages would in any reasonable person's belief cause them to think that there exist a potential for bias or partiality. That is all that is required to recuse, yet Judge Kyle seems to have missed that gorilla at the breakfast table.

7. Congress acknowledged the conflict between § 455(a) and (b), yet the primary purpose of the amendments was to enact a comprehensive law that would promote confidence in the judiciary by elimination of a possible appearance of impropriety. See **Durhan v. Neopolitan,** 875 F.2d 91 (7th Cir.1989); and **United States v. Tucker,** 78 F.3d 1313, 1325 (8th Cir.1996)(455(a)'was designed to promote public confidence in the integrity of the judicial process by replacing the subjective 'in his opinion' standard with an objective test')(citation omitted). Judge Kyle used the "in his opinion" test in the decision not to recuse. This clearly flies in the face of the intent of Congress, and does not result in public confidence in the judicial system.

8. State courts in some jurisdictions have said that the "test is whether a reasonable person with knowledge of the facts would question a judge's impartiality." **State v. Mongomery,** 2011 Iowa App. LEXIS 331, *17 (2011), because the purpose of 455(a) was to enhance public confidence in the judicial system, and a federal judge is expected to disqualify if a reasonable person would question the ability to be impartial, or might do so.

9. The simple loss of $ 13.5 million would seem not to cause one to think the judge <u>might</u> be impartial in respect to his son's losses and potential future losses? This fact alone would result in astronomical doubt by any person with knowledge of such facts.

<u>Argument</u>

10. It must be clear to the court that when Judge Kyle made findings that he could not possibly be doubted to be impartial, was a manifest error in the application of the law, as "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.", is unambiguous in the fact that recusal is required where any <u>reasonable</u> <u>person</u> <u>might</u> <u>question</u> the <u>impartiality</u>. The facts set forth in the first **9.** paragraphs above clearly and impartially set forth the fact that impartiality might be questioned by any reasonable person. **United States v. Fazio,** 487 F.3d 646, 653 (8th Cir. 2007) "the key ingredient in a § 455(a) recusal case is avoidance of the appearance of impropriety, as judged by whether the average person on the street might question the judge's impartiality."

11. Here, Mr. Richard Flamm, one of the foremost authorities on the subject has grave doubts as to Judge Kyle's impartiality. This Defendant has grave doubts as the the judge's impartiality, and many others as well. In fact, the only person who seems to believe that this "Hypothetical House of Cards"

fails to cause doubt as to Judge Kyle's impartiality, is Judge Kyle himself. While Congress neglected to spell out precisely how a court is to determine whether a reasonable person might question a judge's impartiality, common sense would suffice here. See **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").

12. Simply put, the "appearance" standard does not contemplate a judge who is subjectively convinced of his ability to preside impartially, refusing to disqualify where an average person <u>might</u> question his ability to be impartial in the matter at hand.

13. Whether recusal is required is determined by an objective test that considering what a reaonable person might believe, not a subjective test considering what the judge in question felt about his ability to rule without bias. Therefore, in a situation where a reasonable person might question the judge's ability to be impartial, he must recuse himself even if he subjectively knows that he has no bias. See, e.g., **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 will..."). That judge recused in an abundance of caution, even though he knew himself that he had no bias. Judge Kyle failed to recuse even though there is much for a reasonable person to doubt in his ability to be impartial. One <u>might</u> conclude bias or lack of ability to be impartial.

14. This Defendant/Apnellant/Petitioner "Petters" is convinced that defense counsel should have moved for recusal from the beginning of the case. It became clear that the appearance of bias exist where Judge Kyle's son was a partner in the law firm involved in all of Petters business transactions and decisions. Defense counsel dropped the ball and was constitutionally ineffective in the failure to address this in a timely manner. This all amounts to a denial of due process which is reversible per se, and all of Judge Kyle's rhetoric in support of his own self found righteousness, there exist clear and equivocal doubt as to his ability to be impartial. A reasonable person would have doubt of his ability to be impartial. Just what a reasonable person might think cannot be viewed through the lens of a litigant or the challenged judge, and it cannot be determined from the perspective of an appellate court. This is so because "it is essential to hold in mind that these outside observers are less inclined to credit judges' impartiality and mental discipline than the judiciary itself will be." **In re Mason,** 916 F.2D 384, 386 (7TH CIR. 1990). See also **United States v. Jordan,** 49 F.3d 152, 156-157 (5th Cir. 1995)("Judges who are asked to recuse themselves are reluctant to impugn their own standards. Likewise, judges sitting in review of others do not like to cast aspersions...we are mindful that an observer of out judicial system is less likely to credit judges' impartiality than the judiciary.") Stated simply, "[t]he hypothetical reasonable person under § 455(a) must be someone outside the judicial system." See **United States v. Mitchell,** 690 F.3d 137, 157 n.9 (3rd Cir. 2012) quoting **In re Kensington Int'l,** 368 F.3d 289, 303 (3rd Cir. 2004).

15. Problems arise in determining precisely what such a reasonable person would think, **Roberts v. Ace Hardware, Inc.,** 515 F.Supp. 29, 30 (N.D. Ohio 1981)(it "is not as easy as the Congress and the Court of Appeals seem to think...").

In the context of a § 2255 Motion

16. Section 455(a) motions are not speculative or hypothetical, as a reasonable person not only "might" but almost certainly would have at least some doubts as to the Court's ability to impartiality in presiding over defendant's §2255 motion. Petters is a person, and not only might, but does have strong doubts as to Judge Kyle's ability to be impartial towards his § 2255 motion and everything before it, from the alteration of the indictment, and preventing Petters from obtaining witnesses and even preventing important impeachment questioning as to government witness, coupled with his son's partnership and employment in the law firm that handled all Petters companies.

17. See **United States v. Agosto,** 675 F.2d 965, 970 (8th Cir. 1982) "in the disqualification situation, any doubt is to be resolved in favor of disqualification." In the instant case, no such caution was considered at all, but the biased judge simply justified himself by finding no possible way a person could or might believe impartiality exist. Quite a self-serving finding, if I do say so myself.

18. The Eighth Circuit judges have often referred § 2255 motions to judges who did not preside at trial. See, e.g., **Holloway v. United States,** 960 F.2d 1348, 1350 (8th Cir.1992)(Judge Limbaugh "referred Holloway's § 2255 motion and motions for discovery, appointment of counsel, and an evidentiary hearing to a magistrate pursuant to 28 U.S.C. §636(b)(1)(B), at *18-19 (N.D. Iowa Jan. 29, 2010)("Ross's § 2255 Motion was eventually assigned to the undersigned, even though Judge Piersol had been the trial and sentencing judge")).

19. One of Congress's express purposes in enacting those amendments to §455, was to do away with the "duty to sit" rationale for staying on cases in

situations where a judge's impartiality might reasonably be questioned. See, e.g., **United States v. Sciarra,** 851 F.2d 621, 634 n.27 (3rd Cir. 1988)(in imposing a duty on judges to disqualify themselves under appropriate circumstances, § 455(a) explicitly sought to eradicate the duty to sit presumption).

20. Eighth Circuit Judge Arnold pointed out that, "[u]ntil 1974, the standard for disqualification in cases such as this - involving no personal interest on the judge's part - was subjective. A judge had to withdraw from a case when 'in his opinion' it would be improper to sit...The statute now contains an objective standard - in effect, whether a reasonable neutral observer with knowledge of all the facts of record would question the judge's impartiality. The amendment to the statute also removed the concept of a 'duty to sit,' which had been accepted law under the old statute." **Little Rock Sch. Dist. v. Pulaski Cty.,** 902 F.2d 1289, 1290 (8th Cir. 1990)(citation omitted), cert. denied sub nom. **Ark. State Bd. of Ed. v. Little Rock Sch. Dist.,** 109 S.Ct. 177.

21. Under the amended standard the "duty to sit" doctrine was displaced by a "presumption of disqualification;". See, e.g., **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, e.g., **In re Boston's Children First,** 244 F.3d 164, 167 (1st Cir. 2001)(a court "should exercise its discretion with the understanding that, if the question...is [close], the balance tips in favor of recusal"); **Nichols v. Alley,** 71 F.3d 347, 352 (10th Cir. 1995); State ex rel. **Heitkamp v. Family Life Servs., Inc.,** 2000ND 166, 616 N.W.2d 826, 843 (2000), and **Veneklase v. City of Fargo,** 236 F.3d 899, 901 (8th Cir. 2000), quoting Richard E. Flamm, **Judicial Disqualification - Recusal and Disqualification of Judges 144(1996).**

22. Clearly, Judge Kyle's self-serving findings of no reasonable person could possibly believe he might be impartial, flies in the face of **due process**. The Supreme Court has spoken to this subject, holding long ago that a "fair trial in a fair tribunal is a basic requirement of due process." **In re Murchison,** 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed.942 (1955). "Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness." Id.; cf. **Minstretta v. United States,** 488 U.S. 361, 407, 109 S.Ct. 647, 102 L?Ed.2d 714 (1989)("The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship.").

23. "The Due Process Clause of the Fourteenth Amendment extablishes a constitutional floor, not a uniform standard," for a judicial bias claim. **Bracy v. Gramley,** 520 U.S. 899, 904, 117 S.Ct. 1793, 138 L.Ed.2d 97 (1997). While most claims of judicial bias are resolved "by common law, statute, or the professional standards of the bench and bar," the "floor established by the Due Process Clause clearly requires a 'fair trial in a fair tribunal' before a judge with no actual bias..." Id. at 904-05 (quoting **Withrow v. Larkin,** 421 U.S. 35, 46, 95 S.Ct. 1456, 43 L.Ed.2d 712(1975)). The standard has been amended by the implementation of § 455(a), where Congress made it clear that even the shadow that may remain in any reasonable person's mind as to impartiality requires recusal. That shadow here is long and dark, therein creating a probability of unfairness, even though the risk of unfairness has no mechanical or static definition. It cannot be defined with precision because circumstances and relationships must be considered.

24. Judge Kyle's findings that no reasonable person would find cause to recuse or doubt impartiality, without a hearing to allow the presentation of evidence, and findings of legitimate doubt is without appropriate due process, and should be remanded.

Standard of Review

Section 2255 (Certificate of Appealability - The Standard of review for Certificate of Appealability rest upon the fact that any jurist of reason could reach a different decision.

Clearly a jurist of reason could and most likely would have reached a different outcome in Petters § 2255 Motion, as counsel on direct appeal refused to raise the recusal issue as instructed to do. Counsel would not raise the recusal issue on appeal, and informed Petters that the issue would be properly presented on § 2255 motion, and informed Petters that attempting to raise the issue pro se would simply block him from presenting it on the § 2255, and still would not be allowed on appeal because he had representation. Thus pro se motions were improper to put before the court. Many of the strongest issues tied to the recusal that did not result. Therefore, counsel was factually ineffective in the failure to present the issues, and in the wrongful advice that the issues were appropriate for § 2255 rather than direct appeal.

Nations v. United States, 14 F.2d 507 (8th Cir. 1926)(Affidavit was timely where, although defendant had known of facts concerning prejudice for some time, defendant had been dissuaded by counsel from making affidavit until the day before trial), see also **Morris v. United States,** 26 F.2d 444, 449 (8th Cir. 1928); **United States v. IBM,** 475 F.Supp. 1372, 1377 (S.D. N.Y. 1979), affirmed 688 F.2d 923 (2nd Cir. 1980).

Mandamus - Standard of review is whether the district court exceeded the "sphere of its discretionary power". See **Sperry Rand Corp. v. Larson,** 554 F.2d 868 @871-72 (8th Cir. 1977) (quoting **Will v. United States**, 389 U.S. 90, 104, 19 L.Ed.2d 305, 88 S.Ct. 269 (1967).

Standard for recusal

§455. Disqualification of justice, judge, or magistrate judge

(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.

Judge Kyle clearly abused his discretion in finding that no reasonable person could fail to be confident in his impartiality and nonpartisanship of the judge. Where, as here, Judge Kyle's son, Attorney Richard H. Kyle Jr. not only worked at the law firm that handled all of Petters legal work, but was further a partner in that firm, and as such stood to suffer a substantial loss in suits and settlements resulting from Petters trial and business losses. Moreover, the fact is that the firm in which his son is a partner did loose 13.5 million in settlement regarding the wrongful participation of the law firm suit, and stands to suffer much higher losses in future class actions suits.

Judge Kyle failed to apply the proper standard and failed to properly attribute the intent of the law. This Honorable Court should have reviewed the recusal issue in depth, and made appropriate findings in regard to the failure to recuse, instead of simply denying a certificate of appealability. Many things that Judge Kyle did were bias and show a lack of ability to be impartial in this case.

a. In the matter of government witness Larry Reynolds who the defense discovered was in the witness protection, and that his real name was Reservitz, where Judge Kyle would not let the defense question the government witness on cross-examination about prior bad acts and a series of telling lies in the past, which would have been impeachment. Further, it would have brought out the false testimony in Petters trial. This abuse of discretion resulted from the bias of Judge Kyle.

b. Judge Kyle and the Prosecutor in chambers decided to amend the indictment by removing Petters two companies, because if those companies had

been found no guilty by the jury, the assets already taken by the government, would have to be returned, and Petters may well have been either found not guilty, or much less guilty at trial.

c. When asked about this by the jury, the court would not clarify the change in the indictment.

d. When the connection to the Judge's son was brought up, Judge Kyle simply sought to justify his involvement beyond the requisites of the law, and without due process being addressed.

Petters need not prove actual bias to establish a due process violation, just an intolerable risk of bias. **Aetna Life Ins. Co. v. Lavoie,** 475 U.S. 813, 825, 106 S.Ct. 1580, 89 L.Ed.2d 823 (1986); see also **Caperton,** 556 U.S. at 883 ("[T]he Due Process Clause has been implemented by objective standards that do not require proof of actual bias:)(citing **Lavoie,** 475 U.S. at 825; **Mayberry v. Pennsylvania,** 400 U.S. at 455, 465-66 (1971); **Tumey,** 273 U.S. at 532). Thus, we must ask whether under a realistic appraisal of psychological tendencies and human weakness, the judge's interest poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.

Should Judge Kyle pass muster in the above paragraph, then this court must turn to:

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d. When the connection to the Judge's son was brought up, Judge Kyle simply sought to justify his involvement beyond the requisites of the law, and without due process being addressed.

Petters need not prove actual bias to establish a due process violation, just an intolerable risk of bias, or that a reasonable person **might** reasonably question his impartiality. The above should resolve that question in favor of recusal, and the Certificate of Appealability should issue and the Mandamus should be granted, the matter remanded to the lower court for further proceedings.

Due Process mandates a "stringent rule" that may sometimes require recusal of judges "who have no actual bias and who would do their very best to weigh the scales of justice equally" if there exists a "probability of unfairness." **In re Murchison,** 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955). But the risk of unfairness has no mechanical or static definition. It "cannot be defined with precision" because "[c]ircumstances and relationships must be considered." Id.

Non-pecuniary conflicts "that tempt adjudicators to disregard neutrality"

also offend due process. A judge must withdraw where he acts as part of the accusatory process, or becomes embroiled in a running, bitter controversy, or becomes so enmeshed in matters involving a litigant as to make it appropriate for another judge to sit. See **Johnson v. Mississippi,** 403 U.S. 212, 215-16, 91 S.Ct. 1778, 29 L.Ed.2d 423 (1971).

Having catalogued the Supreme Court's clearly established judicial bias jurisprudence and being mindful of the § 455(a) requirement that a judge recuse if a reasonable person <u>might</u> perceive the lack of impartiality, and being mindful of the limitations AEDPA places on the courts, this court must determine whether the lower court erred in denying Petters's judicial bias or recusal claim. A presumption of correctness may not be relied upon, and this court must afford only such deference as a reasonable person <u>might</u> find, knowing all the facts, and not being a part of the judiciary. The lower court's fact finding process does not survive the intrinsic review pursuant to AEDPA's "unreasonable determination" clause. See **Taylor,** 366 F.3d at 1000. The lower court's findings and decision is a fundamentally flawed fact-finding process, to the extent it constitutes a process, must fail the intrinsic review.

Judge Kyle did not hold an evidentiary hearing or provide another mechanism for Petters to develop evidence in support of his claim, despite his conclusion the Petters offered no factual evidence to support his allegations. It should be noted that the listed wrongs would in and of themselves be enough for a reasonable person to doubt the impartiality of Judge Kyle.

Where the lower court makes factual findings without an evidentiary hearing or other opportunity for the petitioner to develop and present evidence, the fact-finding process itself is deficient and not entitled to deference, and it should be noted that Judge Kyle uses terms such as "at this

juncture", currently", "makes several puzzling arguments", "contains manifest error of law", "argument is meritless" and "undersigned simply fails to understand how any of these matters suggests partiality or bias". Each of these are simply terms to avoid the facts. §455(a) does not require proof that is irrefutable, but simply cause for a reasonable persons to doubt impartiality on the part of the judge. Section 455 has no explicit timeliness requirement.

Moreover, the plea denial rest upon "no formal plea offer", but when and what is a formal plea offer? When the government makes a verbal offer is it without validity? It should be considered a formal plea offer if it was offered.

Petters asserts that a verbal plea offer is formal, and that Judge Kyle's findings are contrary to law, self-justifying, meritless, manifest errors of law, that have so infected his decision/ruling, and manifest some defect in the integrity of the federal habeas proceeding itself.

Respectfully submitted on this 1 day of ~~November~~ Dec, 2014.

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U.S. Penitentiary
Post Office Box 1000
Leavenworth, Kansas 66048

SEE ATTACHED EXHIBIT
FLAMM AFFIDAVIT

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 judical disqualification.)

6. In 2003 I published a treatise on **Lawyer Disqualification: Conflicts of Interest and Other Bases** (Banks & Jordan Law Publishing Co., 2003). Se, 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 Judical 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