IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN DIVISION

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| SHOLOM RUBASHKIN,<br><br>Petitioner,<br><br>v.<br><br>UNITED STATES OF AMERICA,<br><br>Respondent. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | No. C13-1028-LRR<br>No. CR08-1324-LRR<br><br>**REPLY BRIEF IN SUPPORT OF MOTION TO RECUSE CHIEF UNITED STATES DISTRICT COURT JUDGE LINDA R. READE** |

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## Introduction

The government's Resistance fails to untangle the web of factual and legal problems arising from the Presiding Judge's personal involvement in, knowledge of, and connection to disputed events in the case. The Resistance essentially confirms that the adjudication of this matter will require the Presiding Judge, if not recused, to evaluate the accuracy and sufficiency of her own disclosures and statements regarding her involvement in pre-raid activities; determine the nature and effect of her *ex parte* communications with the USAO-NDIA before trial and again before Petitioner's sentencing hearing; and determine whether to reopen a criminal case that was clouded by an apparent disqualifying conflict of interest never addressed on the record. The federal recusal statute, 28 U.S.C. § 455, requires recusal in these circumstances.

First, the Resistance offers nothing to change the fact that the pleadings establish a factual dispute regarding whether the government disclosed the full extent of the Presiding Judge's involvement in the Agriprocessors raid and whether that involvement exceeded permissible boundaries under the due process clause. If the government believed some legal obstacle existed to Petitioner pursuing this claim – e.g., that it had already been raised and lost on appeal – the government could have and presumably would have moved to dismiss, thus rendering any factual dispute moot. The government did not do so. The adjudication of Ground Two therefore requires findings regarding the extent and nature of the Presiding Judge's involvement in the raid—matters of which the Presiding Judge has personal knowledge.

The government's position on the pre-sentencing *ex parte* communications makes matters worse. The government refuses to turn over the communications at issue but nonetheless baldly asserts that they do not shed any light on the merits of Ground Two. The government and

Presiding Judge both know whether this assertion is true. Petitioner can only make an educated guess. The government's position therefore demonstrates the Presiding Judge has personal knowledge of disputed evidentiary facts for purposes of § 455(b)(1) and confirms that the Presiding Judge will have to decide whether to put her own extrajudicial statements at issue. Section 455 is designed to protect judges and litigants from exactly this situation.

Equally unavailing is the government's attempt to sweep the Bradshaw Fowler situation under the rug. Given (1) the substantial overlap between the criminal case and the bankruptcy proceedings; (2) the criminal forfeiture allegations against the assets of Petitioner and Agriprocessors; and (3) the fact that a law firm representing a bankrupt debtor gets paid only if there are sufficient assets in the estate post-forfeiture, the Presiding Judge appears to have had a disqualifying conflict of interest under Section 455(b)(4) until Agriprocessors was dismissed from the criminal case, and likely continued to have a disqualifying conflict through sentencing. Moreover, the government surely was aware of the conflict given the depth of its involvement in both the criminal and bankruptcy proceedings, its intentional use of criminal forfeiture as a tool in the bankruptcy court, and its direct communications with Bradshaw Fowler attorneys. Yet the government criticizes *Petitioner* for not bringing the matter to the Court's attention sooner and argues that any conflict has been waived and no longer matters. The government ignores the fact that a conflict can only be waived when full disclosures are made on the record. It also fails to recognize the concern a reasonable observer might have about whether a judge would be tempted in such a situation to summarily dismiss the 2255 petition rather than reopen a chapter clouded by the conflict, particularly given that an attorney at the Bradshaw Fowler firm continues to provide assistance to Petitioner.

For these reasons, and others discussed below, the Resistance falls short of overcoming the myriad reasons why recusal is necessary under § 455(a) and (b). Petitioner respectfully submits that recusal is the only way to ensure the adjudication of this matter before a judge whose actions, statements, and relationships are not squarely at issue.

**Supplemental Facts Regarding Pre-Sentencing Ex Parte Communications**

Since filing his motion to recuse, Petitioner has received a partial response from the FBI to a FOIA request for documents relating to the pre-sentencing threat investigation. Although incomplete, the newly-obtained documents reveal the following:

The first allegedly threatening communication was sent on January 21, 2010. (Supp. App.[1] 631.) The following day, an FBI Special Agent contacted the USAO-NDIA regarding the matter. (Id.) However, on February 1, 2010, an Assistant United States Attorney from the Southern District of Iowa (the "USAO-SDIA") responded to the FBI. (Id.) Thus, presumably, the USAO-NDIA was recused from the matter between January 22 and February 1. The AUSA from the USAO-SDIA "agreed [with the FBI] that no physical threats were present in the emails sent to Judge Reade" but also agreed "the writer of the emails should be determined to see if other emails with legitimate threats from the same author were present in other emails." (Id.)

On March 5, 2010, FBI agents from New York interviewed the author of one of the communications. (Supp. App. 636.) "Based upon interview and observation, it did not appear that [redacted] has any present or future intent to travel to Iowa. Further, [redacted] indicated she will not communicate with Judge Reade in this manner again." (Id.) (redactions in original)

[1] Petitioner is attaching a Supplemental Appendix ("Supp. App.") to this Reply containing the FOIA. The Supplemental Appendix continues the numbering from the original Appendix.

The documents obtained by Petitioner do not indicate further activity in March or April. Nonetheless, the USAO-NDIA did not disclose the matter to Petitioner's trial counsel until April 23, 2010. (App. 95-96.)

## Argument

### I. THE GOVERNMENT'S RESISTANCE IGNORES THE CURRENT STATE OF THE PLEADINGS, ARGUES THAT PETITIONER SOMEHOW "KNOWINGLY" WAIVED SOMETHING DESPITE THE GOVERNMENT'S ONGOING REFUSAL TO DISCLOSE THE FACTS, AND OTHERWISE FAILS TO RESOLVE ONGOING PROBLEMS UNDER 28 U.S.C. § 455(a) AND (b).

#### *A. The Issues in Petitioner's Motion to Recuse Have Not Been Previously Decided and Are Not Law of the Case.*

In Ground Two of his § 2255 Petition, Petitioner alleges the government withheld material information regarding its pre-raid communications with the Presiding Judge. Petitioner alleges the government's withholding of this information violated *Brady v. Maryland*, 397 U.S. 742 (1970), and his due process rights, thus warranting relief under § 2255. Petitioner alleges – with unambiguous support from affidavits from his trial counsel – that his decision not to seek recusal in January 2009 was based on his mistaken belief that the Presiding Judge's involvement in the pre-raid meetings had been fully disclosed in the order denying recusal in *United States v. De La Rosa-Loera*, No. 08-CR-1313-LRR. *See* Memorandum in Support of Motion to Vacate at pp. 6-7 and Exhibits 2 and 3 (Dkt. No. 3). The affidavits state that counsel did not have "any inkling of the nature and extent that Judge Reade had participated in planning meetings with law-enforcement personnel from Immigrations and Customs Enforcement ("ICE") and from the Office of the United States Attorney from October of 2007 through April of 2008." Affidavit of Attorney F. Montgomery Brown at ¶ 12 (Dkt. No. 3-4.) Further, "[h]ad we been fully informed of Judge Reade's involvement in the May 2008 raid, there is no question we would have moved

to recuse." Affidavit of Attorney Guy R. Cook at ¶ 14 (Dkt. No. 3-5.); *see also Schledwitz v. United States*, 169 F.3d 1003, 1016-17 (6th Cir. 1999) (affidavits from trial attorneys indicating that undisclosed evidence would have "radically altered their trial strategy" was significant in analysis of whether government misconduct justified relief under § 2255).

The government did not move to dismiss Ground Two of the § 2255 Petition. Instead, it alleged as a factual matter that Petitioner "was well aware of all such information [relating to pre-raid communications] through discovery, the public record, and otherwise, in advance of trial." Government's Answer to Motion Under 28 U.S.C. § 2255 at 5-6 (Dkt. No. 6). The government also "denies any alleged lack of information caused movant's trial counsel to fail to make a timely motion for recusal of the trial judge" and alleges that "such a motion would have been properly denied and such denial would have been sustained on appeal." *Id.* at 6.

The government's Resistance to the Motion to Recuse fails to acknowledge that its own pleading creates a factual dispute with the Presiding Judge at the center. Petitioner alleges, with factual support, that he would have moved for recusal had he been fully informed of the Presiding Judge's involvement in the pre-raid activities. The government denies this and alleges counsel was already fully informed. The Court therefore is placed in the position of having to determine whether the *De La Rosa-Loera* ruling and other publicly-available information as of December 2008 fully described the extent of the Presiding Judge's involvement in the pre-raid activities. In other words, if not recused, the Presiding Judge will have to make a credibility determination about whether her own statements were sufficient to disclose the extent of her involvement in the raid, or whether, as Petitioner's trial attorneys state, the information was incomplete. It will, in essence, be her word against theirs. *See Dziurgot v. Luther*, 897 F.2d

1222, 1227 (1st Cir. 1990) (remanding § 2255 proceeding to different judge where original judge would have been forced to evaluate the correctness of his own determination regarding the voluntariness of a defendant's waiver of rights); *Halliday v. United States*, 380 F. 270, 272 (1st Cir. 1967) (requiring new judge to hear § 2255 case rather than having original judge "take new evidence and, in effect, review the correctness of his own determination").

The government's professed certainty that this is the same issue as the one addressed by the Eighth Circuit Court of Appeals on direct review flies in the face of its failure to move to dismiss Ground Two at the outset. If the issues truly were identical, there would be no reason for the government not to seek dismissal. *See*, *e.g.*, *Sun Bear v. United States*, 644 F.3d 700, 702 (8th Cir. 2011) (en banc) ("With rare exceptions, § 2255 may not be used to relitigate matters decided on direct appeal.").

The government's decision not to move to dismiss Ground Two was likely motivated by the reality that the issue raised in Ground Two is different than the issue raised on direct appeal. On direct appeal, the Eighth Circuit stated – in apparent dicta – that Petitioner "did not make a timely recusal motion after he learned through court documents filed in the related case of *De La Rose-Loera* that the district court had attended logistical meetings with federal agencies." *United States v. Rubashkin*, 655 F.3d 849, 858 (8th Cir. 2011).[2] Nothing in this sentence indicates the

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[2] Given the Eighth Circuit's holding that a defendant can prevail on a Rule 33 motion only by showing that newly-discovered evidence "probably will result in acquittal," and Petitioner's admission that he could not satisfy that element, the Court had no need to address the issue of timeliness of the recusal motion. *See Rubashkin*, 655 F.3d at 858. The discussion of that issue is therefore dicta. *See*, *e.g.*, *United States v. Carruth*, 418 F.3d 900, 903 (8th Cir. 2005) (discussion of issues not necessary to the holding of the case is *dicta*). "The doctrine [of law of the case] applies only to actual decisions—not dicta—in prior stages of the case." *United States v. Bloate*, 655 F.3d 750, 755 (8th Cir. 2011); *see also United States v. Montoya,* 979 F.2d 136, 138 (8th

Eighth Circuit's agreement with the government's position that Petitioner's trial counsel already knew everything there was to know about the Presiding Judge's involvement in the planning for the raid when they declined to file a recusal motion in January 2009, nor does it explain *why* trial counsel might have been operating without complete information. Those issues remain in dispute.[3]

Petitioner's 2255 Petition squarely raises the question of *why* trial counsel failed to file the recusal motion sooner. It is therefore no different than any other post conviction review petition alleging that government misconduct prevented an issue from being properly and timely raised. *See*, *e.g.*, *Banks v. Dretke*, 540 U.S. 668, 691-98 (2004). It is well established in § 2255 cases that those issues are not procedurally defaulted, provided, of course, the petitioner can prove the government misconduct. *Id.* The fact that an appellate court upholds a conviction on sufficiency of the evidence, for example, does not foreclose a 2255 petitioner from alleging later that the government withheld material exculpatory evidence that would have changed the outcome. *See*, *e.g.*, *Schledwitz*, 169 F.3d at 1016-17 (reversing dismissal of § 2255 petition and vacating conviction where petitioner alleged government misconduct in failing to produce impeachment material). The same principle applies here—Petitioner deserves the opportunity to litigate the reason for his trial counsel's failure to move for recusal sooner, including, specifically, whether government misconduct is to blame.

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Cir.1992) (statement in prior panel opinion was not the law of the case where the court was considering and deciding a different issue).

[3] The fact that Petitioner supports Ground Two with sworn affidavits from his trial counsel helps to demonstrate the significance of this conflict. This is not a situation where he is using mere speculation or innuendo to suggest his entitlement to relief.

Litigating the "why" question also places the Presiding Judge's personal knowledge at issue in a way that implicates 28 U.S.C. § 455(b)(1), which was not addressed in the Eighth Circuit's opinion on direct review. In particular, the Eighth Circuit did not adopt the government's argument that all personal knowledge obtained by the Presiding Judge prior to the raid arose in her "judicial capacity." Thus, a disputed issue remains regarding whether the Presiding Judge's involvement extended beyond permissible judicial boundaries. *See In re Murchison*, 349 U.S. 133, 138-39 (1955) (due process violated where judge essentially investigated the matter himself then presided at trial). The adjudication of that issue will require findings of facts regarding the Presiding Judge's own words, actions, and impressions—findings which should be made by a different judge. *See id.*; *see also Halliday*, 380 F.2d at 27.

Finally, as the government reluctantly acknowledges, the instant recusal motion raises other issues not addressed by the Eighth Circuit on direct appeal, including the pre-sentencing *ex parte* communications, the Bradshaw Fowler issue, and the attorney conflict issue. "Law of the case applies only to issues actually decided, either implicitly or explicitly, in the prior stages of a case." *Roth v. Sawyer-Cleator Lumber Co.*, 61 F.3d 599, 602 (8th Cir. 1995). The Eighth Circuit never decided, implicitly or explicitly, that Petitioner failed to raise the Presiding Judge's pre-sentencing *ex parte* communications or the Bradshaw Fowler connection as grounds for recusal in a timely manner, nor could it have done so. Those issues implicate not just the appearance of partiality under § 455(a), but also the possibility of non-waivable, disqualifying conflicts under § 455(b), which the Eighth Circuit never addressed. The timeliness of a recusal motion raising these issues for the first time is not "law of the case."

*B. Petitioner Has Not Waived the Ability to Raise the Pre-Sentencing Ex Parte Communications or the Bradshaw Fowler Connection As Grounds for Recusal.*

The government's waiver argument fares no better than its position on law of the case. Section 455(e) – which the government declines to mention – states that waiver of an appearance of impropriety issue under § 455(a) may occur only when "it is preceded by a full disclosure on the record of the basis for disqualification." The disclosure and waiver requirements of § 455(e) "must be strictly construed." *Barksdale v. Emerick*, 853 F.2d 1359, 1361 (6th Cir. 1988).

As the affidavits from Petitioner's trial counsel demonstrate, there is, at a minimum, a factual dispute about whether a "full disclosure on the record" ever occurred regarding the Presiding Judge's involvement in the raid. *See id.* (remanding for reconsideration of recusal issue in light of factual dispute regarding sufficiency of district court judge's disclosures). Moreover, it is undisputed that the government has never produced the pre-sentencing *ex parte* communications between the USAO-NDIA and Presiding Judge, and thus there clearly has been no "full disclosure on the record" on that issue. Nor does the government point to any "full disclosure on the record" regarding the fact that Petitioner was a major client of the Presiding Judge's husband's law firm in bankruptcy proceedings that were closely intertwined with his criminal case. Petitioner therefore did not waive the right to raise appearance of impropriety issues under § 455(a) arising out of those conflicts. *See Fletcher v. Conoco Pipe Line Co.*, 323 F.3d 661, 664 (8th Cir. 2003) (finding no waiver of an appearance of impropriety issue where the conflict issue was not disclosed on the record); *Barksdale*, 853 F.2d at 1361 ("There is no disclosure 'on the record' and therefore no properly obtained 'waiver.' It is obvious that the District Court did not comply with this subsection's disclosure and waiver requirements, which its plain language, legislative history, and the case law tell us must be strictly construed.").

Nor has Petitioner waived the right to raise recusal issues under § 455(b). Indeed, he could not waive § 455(b) conflicts even if he tried. "No justice, judge, or magistrate judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b)." 28 U.S.C. § 455(e). The government's waiver argument is inconsistent with the plain language of the recusal statute and has no merit.

The cases cited by the government are not to the contrary. In *United States v. Mathison*, 157 F.3d 541, 545 (8th Cir. 1998), the defendant already had full information about the event that might have warranted recusal at the time he declined to file a motion Similarly, the parties already were fully-informed at the time they declined to seek recusal in *In re Kansas Public Employee Retirement Sys.*, 85 F.3d 1353 (8th Cir. 1996), *United States v. Hill*, No. 03 C 4196, 2004 WL 2064622 (N.D. Ill. Sept. 13, 2004), *United States v. Petters*, No. 13-1110 (RHK), 2014 WL 521014 at *3 (D. Minn. Feb. 10, 2014), or *Jones v. United States*, 3:12-cv-599, 2013 WL 392600 (M.D. Tenn. Jan. 30, 2013). *Jones* is particularly revealing. The petitioner in that case offered no reason for her failure to raise the recusal issue during the original case or appeal. *Id.* at *10. Here, by contrast, Petitioner alleges that government misconduct caused his failure to raise the recusal matter sooner. He supports his allegation with affidavits from his trial attorneys and is in the midst of litigating the matter—i.e., this case. He has not waived this issue.

Finally, contrary to the government's position, Petitioner is not trying to "undo the history of his case" by using a motion to recuse a "strategic weapon." (Resistance at 3.) "An action under 28 U.S.C. s 2255 is a separate proceeding, independent of the original criminal case." *Andrews v. United States*, 373 U.S. 334, 338 (1963). Thus, this 2255 proceeding has no "history." It is a new case. Petitioner filed this recusal motion in the early stages of his 2255

proceeding and before any substantive rulings had been entered. It would be timely even if it raised no new issues (which, of course, it does). *See Downing v. Goldman Phipps PLLC*, No. 4:13CV206CDP, 2013 WL 1991495 at * 2 and fn. 4 (E.D. Mo. May 13, 2013) (finding recusal motion timely in newly-filed case despite arising from comments made years earlier in older, consolidated case involving the same parties).

*C. The Government's Continuing Refusal to Turn Over the Secret Pre-Sentencing Ex Parte Communications Proves That Petitioner's Motion Is Timely and Makes Recusal Even More Necessary.*

1. <u>The Government's Timeliness Argument Fails Because Its Half-Disclosure Regarding the Pre-Sentencing *Ex Parte* Communications in April 2010 Was Insufficient to Advise Petitioner of the Grounds for Recusal.</u>

As with other facts supporting recusal, the government argues the pre-sentencing *ex parte* communications have not been raised in a timely manner. This argument presumes (1) the government's April 23, 2010, disclosure was sufficient to inform Petitioner of the grounds for recusal; or (2) to the extent the disclosure was not sufficient, the government had no obligation to provide additional information unless Petitioner's trial counsel asked for it.

Both presumptions are false. The April 23, 2010, email appears to have been a carefully-crafted "half-disclosure" designed to allow the government to later argue waiver (which, of course, it is now doing) without actually telling Petitioner or his counsel what they needed to know. The government all but confirms the incomplete nature of its disclosure by criticizing Petitioner for having to speculate about what the *ex parte* communications entailed. *See* Resistance at pp. 46-47 (describing Petitioner's argument as "purely speculative"). Petitioner would not have to speculate if the government had simply turned over the communications in the first place. *Cf. Edgar v. K.L.*, 93 F.3d 256, 258 (7th Cir. 1996) (criticizing district court judge for

refusing to disclose substance of *ex parte* communications with experts, which forced the court of appeals to draw inferences from bits and pieces of available information).

The Resistance also confirms that the half-disclosure succeeded in confusing Petitioner and his counsel. Based on the absence of any apparent reason why the Presiding Judge would need to communicate with the USAO-NDIA about an investigation from which the USAO-NDIA was recused, Petitioner assumed the Presiding Judge was reaching out to that office for support and assistance. The Resistance suggests otherwise, and implies that the Presiding Judge was dissatisfied with the USAO-NDIA regarding the progress of the investigation. (Resistance at 32-33). If so, this raises far more problems than it settles. A reasonable observer might even wonder if the Presiding Judge's frustration with the USAO-NDIA on a matter related to Petitioner's case contributed to her decision shortly thereafter to impose a longer sentence on Petitioner than the USAO-NDIA requested. *See United States v. Jordan*, 49 F.3d 152, 159-60 (5th Cir. 1990) (fact that presiding judge sentenced a first-time offender to serve 300 months in prison for non-violent crimes contributed to appearance of impropriety under § 455(a) and required reversal and remand for new sentencing under different judge).

The documents recently obtained by Petitioner through his FOIA request cast further doubt on the accuracy of the government's April 23, 2010 disclosure. The April 23 email said the Presiding Judge "expressed concern . . . about the progress of these investigations." The FOIA documents, however, although incomplete, suggest there was no investigation "in progress" at all; rather, law enforcement agents appear to have concluded more than one month prior to April 23 that the communications in question were not threats and the author had no intention of traveling to Iowa or causing harm to the Presiding Judge. The April 23, 2010

"disclosure" email therefore appears to have been designed to discourage follow up requests for information by implying the investigation was ongoing and still shrouded in some level of secrecy, when in reality it had reached a stopping point.

Contrary to the government's position in the Resistance, the possibility that the Presiding Judge was frustrated with the USAO-NDIA on the threat matter does not mean the pre-sentencing *ex parte* communications have no bearing on Ground Two of the § 2255 Petition. Petitioner's concern since receiving the FOIA information in 2010 has been that the Presiding Judge's arguable status as a "stakeholder" in the Agriprocessors raid that preceded his arrest and trial made her ill-suited to sit in judgment over him in connection with that matter. Indeed, a reasonable observer almost certainly would worry that a stakeholder would feel a vested interest in making sure the matter was carried through to what that person believed was the appropriate resolution. *See In re Murchison*, 349 U.S. at 137 ('Having been a part of that [investigative] process, a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused."); *In re U.S.*, 572 F.3d 301, 310-11 (7th Cir. 2009) (requiring recusal where presiding judge appeared to have a "personal stake" in the matter that might lead to him advocating for his desired result rather than acting as a neutral arbiter). If, immediately prior to the sentencing of the person identified by the government as being most culpable for the immigration offenses and related fraud offenses, the stakeholder perceived the government to be "going soft" on the matter, it certainly raises concerns that the stakeholder would respond by

going above and beyond what the government requested for punishment. *See id.*; *see also Jordan*, 49 F.3d at 159-60.[4]

Nothing in the Resistance assuages these concerns. The government asserts (with, naturally, no citation to the actual *ex parte* communications) that the threat investigation was "wholly separate" from Petitioner's case. Resistance at 33.[5] What this means is far from clear. While it is true that Petitioner was not prosecuted for threatening a federal judge, the Presiding Judge may have believed he was responsible for the alleged threats and felt a temptation to punish him. Alternatively, she may have viewed the threats as evidence that Petitioner and his supporters did not have adequate respect for the law, and thus a long sentence was necessary to reinforce that message. Either way, the adjudication of Ground Two of the § 2255 Petition requires the pre-raid *ex parte* communications to be viewed in conjunction with the pre-sentencing *ex parte* communications to determine whether the appearance of impropriety reached a level not tolerated under the Constitution. *See United States v. Amico*, 486 F.3d 764, 775-76 (2d Cir. 2007) (recusal required on the basis of the "cumulative effect" of events); *Kyles v. Whitley*, 514 U.S. 419, 436 (1995) (materiality of suppressed evidence is "considered

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[4] As noted in his opening brief, Petitioner expects the Presiding Judge would dispute the characterization of herself as a "stakeholder" in the law enforcement initiative. He further understands the facts may ultimately vindicate her and show that her sentence was not motivated by any improper considerations. However, Petitioner did not invent the word "stakeholder" or come up with the idea of applying it to the Presiding Judge. An *Assistant United States Attorney* described her in that way. (App. 41.)

[5] The FOIA documents recently received by Petitioner expose the fallacy of the government's description of the threat investigation as "wholly separate" from Petitioner's criminal case. The FBI considered Petitioner's case and the alleged threats to be so closely connected that it titled the investigation "THREATS TO LINDA READE, DISTRICT COURT JUDGE, NORTHERN DISTRICT OF IOWA, MORDECHAI RUBASHKIN TRIAL." (Supp. App. 629.)

collectively, not item by item"); *Schledwitz*, 169 F.3d at 1013 (granting 2255 relief even though "[t]aken individually, none of the above evidence would appear to raise a 'reasonable probability' that [petitioner] was denied a fair trial").

The new FOIA documents reinforce the appearance of partiality. Law enforcement agents appear to have concluded by early March 2010 that the emails in question, although distasteful, were not threats. (Supp. App. 636.) The Presiding Judge, however, apparently felt otherwise, as evidenced by her decision to express concern to the USAO-NDIA about the investigation sometime before April 23, 2010.[6] It is easy to understand why the target of an inappropriate communication might perceive a threat where disinterested observers would not. From a recusal standpoint, however, this difference in perception is exactly the problem. If a judge cannot evaluate matters relating to a case in a neutral and disinterested fashion, the judge should not preside. *See United States v. Greenspan*, 26 F.3d 1001, 1007 (10th Cir. 1994) ("The judge obviously took the threat very seriously . . . Under such circumstances, it is obvious to us that a reasonable person could question the judge's impartiality. Even if this judge were one of those remarkable individuals who could ignore the personal implications of such a threat, the public reasonably could doubt his ability to do so.").

In light of the government's ongoing refusal to disclose the *ex parte* communications, Petitioner has not waived the right to pursue this matter. Partial disclosures are not sufficient to satisfy the government's *Brady* and due process obligations. In *Benn v. Lambert*, 283 F.3d 1040

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[6] The April 23, 2010, email from government counsel stated that the Presiding Judge had "recently" contacted the USAO-NDIA. Petitioner does not know what the government means by "recently" but presumes the *ex parte* communication occurred subsequent to law enforcement's conclusion in early March that the emails did not contain threats.

(9th Cir. 2002), for example, the prosecution provided summaries of expert arson reports rather than the reports themselves. The summaries omitted exculpatory information and implied the defendant's culpability for the offense. *Id.* at 1060, 1062. The Ninth Circuit affirmed the grant of post-conviction relief over the government's argument that the defendant could have discovered the exculpatory information by interviewing the experts. *Id.* at 1061.

Similarly, in *Grant v. Alldredge*, 498 F.2d 376, 379-80 (2d Cir. 1974), the government disclosed prior to trial that one of the eyewitnesses to a bank robbery was unable to identify a photograph of the defendant as the bank robber. The government failed to mention, however, that the witness identified someone *else* as the robber. *Id.* The Second Circuit reversed the district court's denial of post-conviction relief, holding that the prosecution's "half disclosure" of the identification information was "grossly unsatisfactory." *Id.* at 382; *see also Gonzalez v. United States*, 12 CIV 5226 JSR, 2013 WL 2350434 at *9-10 (S.D. N.Y. May 23, 2013) ("[T]he incompleteness of the pre-trial disclosures 'removes [the] *Brady* claim from the realm of pure speculation' and weighs in favor of allowing at least some discovery.").

The same conclusion is appropriate here. Petitioner could not have waived the right to pursue the threat matter unless the government fully disclosed the *ex parte* communications in the first place, which it did not. Nor can the government revive its waiver argument by arguing that Petitioner's trial counsel should have done more to follow up on the April 23, 2010, email. It is well-established that "[u]nder *Brady* and its progeny, the government has an affirmative duty to disclose favorable evidence known to it, even if no specific disclosure request is made by the defense." *Leka v. Portuondo*, 257 F.3d 89, 99-100 (2d Cir. 2001); *see also Kyles*, 514 U.S. at 433 (favorable evidence must be disclosed regardless of whether the defense requests it). The

government has no right to shift the burden to Petitioner's trial counsel to request material information relating to the integrity of the proceeding. *Id.*

In any event, the timing and nature of the government's half-disclosure of the pre-sentencing communications surely contributed to trial counsel's failure to pursue the matter. Although the FBI concluded by early March that there were no actual threats and the author did not intend to travel to Iowa, the government did not disclose the matter to Petitioner's counsel until April 23, 2010 – just five days before sentencing. This delay is totally unexplained and flies in the face of the recognition by the Eighth Circuit and other courts that a threat might, in appropriate circumstances, create a bias problem under the due process clause and § 455. *See United States v. Gamboa*, 439 F.3d 796, 817 (8th Cir. 2006) (threat against judge "may in some cases raise a sufficient question concerning bias on the part of that judge"); *Greenspan*, 26 F.3d at 1006 (10th Cir. 1994) (reversing and remanding for new sentencing before different judge in light of appearance of bias stemming from threat). Petitioner's trial counsel cannot be faulted for their response to the eleventh-hour half-disclosure. *See Leka*, 257 F.3d at 101 ("[T]he prosecution is in no position to fault the defense for cutting corners when the prosecution itself created the hasty and disorderly conditions in which the defense was forced to conduct its essential business."). Instead, the burden of explaining the non-disclosure must stay where it always lies – with the government.

2. The Government Fails in Its Disingenuous Attempt to Criticize Petitioner For Trying to Infer the Content of Communications the Government Refuses to Produce.

The government's position on the pre-sentencing *ex parte* communications is disingenuous. The government refuses to allow Petitioner to see those communications, yet

argues that Petitioner knowingly waived the right to raise them as a basis for recusal. "A waiver occurs when a party with full knowledge of material facts, does something which is inconsistent with the right or his intention to rely on that right." *Heating & Air Specialists, Inc. v. Jones*, 180 F.3d 923, 936 (8th Cir. 1999) (internal punctuation omitted). The government's refusal to produce the communications in and of itself demonstrates that Petitioner does not have the "full knowledge" necessary to permit a finding of waiver. *See University Commons-Urbana, Ltd. v. Universal Constructors, In.*, 304 F.3d 1331, 1340-41 (11th Cir. 2002) (party did not waive right to contest arbitrator's impartiality where it did not "kn[ow] the extensive nature of [the arbitrator's] previous and concurrent interactions with the [other side's] lawyers").

To make matters worse, when Petitioner tries to use the limited information available to him to surmise what those communications entail – specifically, when he draws inferences from the government's assertion of a concurrent conflict of interest against his counsel – the government criticizes him for that, too. *See* Resistance at 46-47. The government argues, in particular, that Petitioner is making "purely speculative" arguments about whether the contents of the secret communications will help his § 2255 case. *Id.*

But for the fact that Petitioner is serving a 27-year prison sentence, the government's position would be laughable. It refuses to turn over information to Petitioner, then turns around and criticizes him for speculating about what that information might include. In *Edgar,* 93 F.3d at 258, the Seventh Circuit recognized that a party – or, in that case, the court of appeals itself – cannot be faulted for trying to surmise facts by inference when an adversary or judge refuses to disclose what really happened. The district court judge in *Edgar* refused to disclose the substance of *ex parte* meetings between himself and several experts on account of "judicial

privilege." *Id.* This prompted the court of appeals to state: "[t]o invoke a privilege is therefore to confess that the discussions covered the substance of potential testimony and the conduct of the litigation-and if this is not so in fact, it is nonetheless what we must assume, because no evidence in the record undermines the inferences naturally to be drawn from the outline for the September 7 meeting." *Id.*

Petitioner finds himself in the same position. Given the government's refusal to produce the pre-sentencing communications, Petitioner had no choice but to try to draw inferences about the substance of those communications from the government's interactions with his counsel on the conflict issue. *See id.* Specifically, Petitioner recognized that a conflict would arise under Iowa R. Prof. Conduct 32.1.7(a)(2) only if there was "'a significant risk' that counsel's representation of one client 'will be materially limited by [his] responsibilities to [the former] client.'" *Bottoms v. Stapleton*, 706 N.W.2d 411, 416 (Iowa 2005). The only way a "significant risk" would arise is if something occurred during the threat investigation that would now be materially helpful to Petitioner's 2255 case. *See STAR Centers, Inc. v. Faegre & Benson*, 644 N.W. 2d 72, 77-78 (Minn. 2002) (granting summary judgment in favor of law firm on breach of fiduciary duty claim where information allegedly withheld from client was not "material").

The government's Resistance comes nowhere close to refuting Petitioner's logic; instead, its primary goal appears to be to obfuscate the issue. The words "significant risk" do not appear anywhere in the government's lengthy brief despite being the crucial phrase in Rule 32:1.7(a)(2) for determining whether a concurrent conflict exists. In fact, the Resistance does not mention Rule 32:1.7(a)(2) at all, even though the letter from government counsel to Petitioner's counsel identifies the purported conflict as arising under that rule. *See* App. 596 ("[I]t appears to the

government that your continuing representation of Mr. Rubashkin creates a conflict under Iowa Rule 32:1.7(a).”). The government thus leaves unanswered the crucial question of how, exactly, there could be a “significant risk” that counsel’s representation of Petitioner will be limited by his obligations to the United States if nothing occurred during the threat investigation that would be helpful to Petitioner.

Rather than answer this question, the government vaguely argues that counsel has an obligation not to reveal client information. (Resistance at 47.) Although true, this misses the point. Every former Assistant United States Attorney – indeed, every attorney, *period* – has an obligation under Rule 32:1.6 not to reveal client information. But this obligation does not result in a concurrent conflict of interest in every new case the attorney handles. The government, for example, surely does not require an on-the-record conflict waiver from every former AUSA in every case. Rather, a concurrent conflict arises only when something confidential from the prior representation would be helpful in the new representation, thus causing the attorney to feel a pull between two competing ethical obligations. Iowa R. Prof. Conduct 32:1.7(a).

Here, although counsel is not aware of anything from his prior employment as an AUSA that would be helpful to Petitioner’s case beyond what was disclosed in the government’s April 23, 2010 email, the only logical conclusion one can reach from the government’s assertion of a concurrent conflict of interest is that there is, in fact, something more out there. Were the situation otherwise, the government would have no reason to raise the conflict issue. For this

reason, and others, Petitioner intends to seek discovery on the matter of the pre-sentencing communications.[7]

In light of Petitioner's inevitable discovery motion, the government's refusal to produce the secret communications is self-destructive to its position on recusal. In any other scenario in which the government refused to turn something over, Petitioner would turn to the Court for relief by seeking leave to take discovery. Here, however, absent recusal, the request for discovery will be directed to the very person whose extrajudicial statements and conduct will have to be produced and analyzed. This creates problems under both § 455(a) and § 455(b)(1). *See Greenspan*, 26 F.3d at 1006 (holding that communications regarding a threat against the judge are extrajudicial).

The government fails to solve the problem with its argument that the secret communications were made in the Presiding Judge's "judicial capacity" and therefore are not *ex parte*. (Resistance at 30.) The government's position, in essence, is that courts should apply a

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[7] Petitioner does not know what to make of the government's position that the attorney conflict issue "does not require any determination by the Court" and thus is not an additional ground for recusal. Resistance at 46. The government's insistence on raising the matter to the Court's attention in the first place strongly suggests it wanted the Court to address the conflict in some way or another. (App. 594-97.) Indeed, in the two cases cited by the government for the proposition that it was "prudent to inform the Court regarding the conflict issue" (Resistance at 46), the purpose of raising the matter to the district court's attention was to allow the district court to "conduct[] an inquiry and, if it was required, take[] further action." *United States v. Stantini*, 85 F.3d 9, 13 (2d Cir. 1996); *accord Ciak v. United States*, 59 F.3d 296, 306 n.8 (2d Cir. 1995) (prosecutor should have asked the district court to make an inquiry regarding a possible conflict in the defendant's representation). Here, the government essentially argues that it insisted on raising the matter to the Court's attention so that nothing would be done about it.

To the extent the government hoped or anticipated the Court might address the conflict matter *sua sponte*, Petitioner continues to believe it provides an additional basis for recusal in light of the Presiding Judge's personal involvement in the subject matter of the alleged conflict.

"but for" test to determine whether communications are made in a judicial capacity. *See id.* ("Judge Reade's expression of concern regarding law enforcement's response to the communications would not have occurred but for her role as a judge."). The government cites no authority for this proposition, and for good reason. The consequences of such an argument are staggering. Suppose, for example, a defense attorney offers a bribe to a judge in exchange for the judge dismissing an indictment. By the government's logic, the conversation would not be considered *ex parte* because it "would not have occurred but for her role as a judge." This is clearly not the law. In *Edgar*, 93 F.3d at 257-59, for example, the Seventh Circuit held that information obtained by a district court judge during secret *ex parte* meetings in chambers with experts amounted to "personal knowledge" requiring disqualification under § 455(b)(1) even though the meetings would not have occurred but for his role as a judge.

*D. The Government's Cavalier Attitude Toward the Bradshaw Fowler Situation Belies the Seriousness of the Disqualifying Conflict That Appears to Have Existed During Petitioner's Criminal Case and That Continues to Affect This Proceeding.*

The government argues timeliness yet again in connection with the Bradshaw Fowler problem. In the process, the government fails to appreciate the seriousness of the original conflict and the ongoing appearance of impropriety problems that remain in this proceeding. Indeed, the government almost completely ignores the undisputed facts that (1) the bankruptcy and criminal cases were heavily intertwined, to the point where the first government witness at Petitioner's criminal trial worked for the bankruptcy trustee; (2) Bradshaw Fowler attorneys had dozens of privileged conversations and emails with Petitioner's criminal defense counsel regarding "strategy" and other matters during his criminal case, including a meeting to discuss the "bankruptcy implications" of the Presiding Judge's sentencing decision; (3) roughly 25% of

the attorneys at the Bradshaw Fowler firm billed time on the Rubashkin matters, as well as two law clerks and four legal assistants; and (4) the Bankruptcy Court ultimately approved more than $250,000 in payments to Bradshaw Fowler.[8] These are not attenuated matters under § 455.

With respect to the ongoing appearance of impropriety arising from the Bradshaw Fowler situation, the government's first problem is its failure to recognize that the Presiding Judge appears to have had a disqualifying conflict of interest under § 455(b)(4) during the original criminal case. A law firm representing a debtor in bankruptcy will only receive payment if there are sufficient funds in the debtor's estate to pay administrative expenses. *See In re Kids Creek Partners, L.P.*, 219 B.R. 1020, 1022 (Bankr. N.D. Ill. 1998); *In re Manchester Hides, Inc.*, 32 B.R. 629, 631 (Bankr. N.D. Iowa 1983). The government's forfeiture allegations against Agriprocessors and Petitioner threatened to reduce or even completely eliminate the assets available for payment to the Bradshaw Fowler firm and other creditors. The Presiding Judge's orders dismissing Agriprocessors from the criminal case (Crim. Dkt. Nos. 654, 746) therefore helped to ensure sufficient assets would exist in Rubashkin-related entities to allow Bradshaw Fowler to be paid for its work. *See SCA Servs., Inc. v. Morgan*, 557 F.2d 110, 116 (7th Cir. 1977) (recusal required where judge's brother's law firm was likely to earn "substantial legal fees" from matter); *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1113 (5th Cir. 1980)

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[8] Closer inspection of bankruptcy court filings reveal other noticeable conflict issues. For example, according to a declaration filed by the Bradshaw Fowler firm in the Nevel Properties bankruptcy proceeding, the firm received pre-petition legal fees from the Pidion Shvuyim Fund for the benefit of Sholom Rubashkin. This Fund was intended primarily to provide for Petitioner's criminal defense. Thus, depending on the Bradshaw Fowler partnership structure and fee-sharing arrangements, it is wholly possible that the Presiding Judge's husband received money from Petitioner's legal defense fund.

(recusal required under § 455(b)(5)(iii) where the judge's decision had the potential to affect the financial interest of his father in a law firm). In other words, Bradshaw Fowler was essentially working on a contingency basis, with the Presiding Judge having the ability to affect that contingency. *See id.*

The government argues that such a conflict would work in Petitioner's favor, and thus is not the type of conflict that might warrant recusal. (Resistance at 40.) In making this argument, the government disregards *Pashaian v. Eccelston Properties, Ltd.*, 88 F.3d 77, 83 (2d Cir. 1996), cited in Petitioner's opening brief, which squarely rejects the argument that a party in whose favor the conflict allegedly works lacks standing to raise it.

Although this disqualifying conflict does not appear to exist any longer, it retains relevance to this proceeding. The Seventh Circuit, for example, granted a writ of mandamus and ordered a district court judge to recuse himself from a case that was closely connected to a prior case on which the judge's son worked while an intern in the U.S. Attorney's Office. *Matter of Hatcher*, 150 F.3d 631, 638 (7th Cir. 1998). The Court explained that "[o]utside observers have no way of knowing how much information the judge's son acquired about [the current case] while working on the [prior] case." *Id.*

The same logic counsels in favor of recusal here. Given the size of the representation of Rubashkin entities for the Bradshaw Fowler firm – with roughly 25% of the firm's attorneys billing time to the matter – it is difficult, if not impossible, to imagine that the Presiding Judge's husband did not learn privileged or confidential information about those entities and Petitioner. Petitioner was, after all, identified as the "primary liaison" with the Bradshaw Fowler firm on bankruptcy matters. (App. 251.) Because "[o]utside observers have no way of knowing how

much information the [Presiding Judge's husband] acquired about [Petitioner's case]," *Hatcher*, 150 F.3d at 638, recusal is necessary to avoid ongoing appearance of impropriety concerns.[9]

The appearance problem is reinforced by the continuing involvement of the Bradshaw Fowler firm in assisting Petitioner in this § 2255 case. Petitioner's counsel has now had multiple conversations and traded numerous emails with a Bradshaw Fowler attorney regarding a number of key issues in this case, including the intra-company relationship between Cottonballs, Best Value, Nevel, and Agriprocessors; interactions with Paula Roby and other attorneys for the Agriprocessors Trustee; and the effect of the government's forfeiture allegations on the bankruptcy proceedings. In one particularly revealing example, Bradshaw Fowler provided a memorandum and other research to Petitioner's 2255 counsel regarding the scope and limits of the government's forfeiture power during bankruptcy proceedings. This issue lies at the heart of Ground One of the 2255 Petition and demonstrates why the Bradshaw Fowler conflict from the original criminal case continues to affect this post-conviction review proceeding.

## II. ALTHOUGH THE COURT SHOULD REJECT THE GOVERNMENT'S INVITATION TO ADDRESS THE MERITS OF PETITIONER'S 2255 PETITION IN DECIDING THIS RECUSAL MOTION, THE GOVERNMENT'S POSITION ON THE MERITS IS, IN ANY EVENT, INCORRECT.

A recurring theme in the government's Resistance is that Petitioner ultimately will lose his § 2255 case without an evidentiary hearing, and thus the Court need not trouble itself with any conflicts that might arise along the way. *See*, *e.g.*, Resistance at 39-40 (asserting that the Presiding Judge will not be a material witness because Petitioner is not entitled to a hearing on

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[9] At least one appellate court has even held that the existence of a disqualifying conflict renders all subsequent matters in the case null and void, even if the conflict was not raised to the judge's attention. *Mixon v. United States*, 620 F.2d 486, 487 (5th Cir. 1980).

Ground Two). The government's position is as mistaken on the law and facts as it is premature. Both Ground One and Ground Two involve glaring factual conflicts that must be resolved with an evidentiary hearing.

Ground One revolves around the effect of the government's involvement in the Agriprocessors bankruptcy proceeding on Petitioner's loss amount in his criminal case. *See* § 2255 Memorandum at Ground One (Dkt. No. 3-1.) This involvement included, among other things, the government's decision in late 2008 and early 2009 to use the threat of forfeiture to punish members of the Rubashkin family whom the government chose not to charge criminally. Petitioner alleges – with support from affidavits – that the government informed prospective buyers of the Agriprocessors business that the government would exercise its criminal forfeiture rights (which would not be affected by a sale in bankruptcy) if any member of the Rubashkin family was involved in the management or ownership of the post-bankruptcy business. Unsurprisingly, this threat scared off prospective buyers of the business and drove down the bankruptcy sales price, thus, in turn, increasing Petitioner's loss amount and Guidelines range.[10]

When Petitioner presented evidence of the "No Rubashkin Edict" at sentencing, the government responded by having witnesses testify that no such restriction existed. For example,

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[10] The government's Resistance uses a verbal sleight-of-hand to downplay the significance of the conflict. The Resistance suggests that Petitioner's position is that the government imposed the No Rubashkin Edict as a specific condition of the bankruptcy sale terms. *See* Resistance at 13. In reality, Petitioner's argument is not so narrow. Whether the No Rubashkin Edict was a specific condition of the bankruptcy sale or merely an informal threat, the facts remain that: (1) the government had the power to forfeit Agriprocessors' assets even after a bankruptcy sale; (2) the government wielded that power by imposing restrictions on the involvement of members of the Rubashkin family in management or ownership of the business; (3) the government's threats depressed the sales price of the assets; and (4) the depressed sales price caused Petitioner's loss amount and Sentencing Guidelines range to increase.

the government presented testimony from Paula Roby, counsel for the Agriprocessors trustee, that the USAO-NDIA told one potential buyer, Eli Soglowek, that the future involvement of Rubashkins in the business was "not a deal breaker." The Court credited the testimony of Ms. Roby over contrary testimony of witnesses offered by Petitioner.

In Ground One, Petitioner alleges the government witnesses provided false testimony. He supports this position with, among other things, an affidavit from one of the very buyers, Mr. Soglowek, at issue in the government's testimony. Soglowek's affidavit directly contradicts the government's sentencing testimony regarding what occurred at a meeting between himself and representatives of the USAO-NDIA. Moreover, because government attorneys were present at the meeting in question – indeed, their own words are at issue – the government clearly would have been aware of the falsity of the testimony. Petitioner has therefore raised precisely the type of issue for which an evidentiary hearing is not just permitted, but *required*. *See*, *e.g.*, *Koskela v. United States,* 235 F.3d 1148, 1149 (8th Cir.2001) (holding the district court abused its discretion in not holding an evidentiary hearing on a § 2255 claim of failure to call alibi witnesses, because the record before the district court "contained sharply conflicting evidence").

There is an equally glaring conflict in Ground Two. The government alleges, primarily with citations to the Presiding Judge's Rule 33 Order, that Petitioner's counsel had full information about the Presiding Judge's pre-raid communications with the government prior to his trial. Petitioner alleges otherwise on the basis of affidavits from his lead trial counsel, both of whom state they were not aware of the extent of the Presiding Judge's involvement in pre-raid matters until receiving responses to FOIA requests in Summer 2010. Like Ground One, this factual conflict necessitates an evidentiary hearing. *See Koskela*, 235 F.3d at 1149.

The need for an evidentiary hearing on Ground Two is especially strong in light of the absence of any transcribed records of the government's *ex parte* communications with the Presiding Judge and the government's continuing reliance on certain factual assertions that conflict with other evidence in the record or fall short of addressing the real issues in dispute. For example, the government asserts that the Presiding Judge was not informed of the target of the investigation. Even if true, the Presiding Judge surely would have figured it out the moment the indictment was returned, and thus any *ex parte* information she obtained would create just as much of a conflict as if she had known Agriprocessors was the target all along.

The government unsuccessfully attempts to avoid this problem by arguing the Presiding Judge acquired knowledge only through the performance of "judicial functions." This argument presumes the very facts in dispute in Ground Two. Petitioner alleges, based on credible information from ICE memoranda and documents, that the Presiding Judge was involved in discussions about "charging strategies" and other substantive matters prior to Petitioner's indictment and trial. (Dkt. No. 3-2 at 49; App. 25.) Further, Petitioner alleges the Presiding Judge's involvement was so substantial that law enforcement agents began to perceive her as part of the prosecution team; hence the reference to the Presiding Judge as a "stakeholder." (App. 41.) Such involvement, if proven, would exceed judicial boundaries and therefore not be part of carrying out the Presiding Judge's "judicial functions." *See In re Murchison*, 349 U.S. at 138-39. Rather, it may mean Petitioner's trial was tainted by a structural error. *See Neder v. United States*, 527 U.S. 1, 8-9 (1999) (structural errors "deprive defendants of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence ... and no criminal punishment may be regarded as fundamentally fair"). The

government cannot avoid this possibility by characterizing the Presiding Judge's involvement as limited to "judicial functions" before Petitioner has even had the opportunity to prove otherwise.

The government also tries to escape the Ground Two conflict by arguing that it fails as a matter of law because *Brady v. Maryland* does not require the government to disclose the nature or substance of its *ex parte* communications with the trial judge. (Resistance at 39.) This position is both alarming and incorrect. It is alarming because, if taken to its logical conclusion, it would mean the government has no obligation to make disclosures to the defendant even if the government knows a judge or juror harbors actual bias against the defendant or the proceeding suffers from some other structural error.

Fortunately, this is not the law. It is well-established that the government must disclose any information in its possession that might indicate partiality on the part of a judge or juror or some other structural error in the proceeding. In *Williams v. Taylor*, 529 U.S. 420, 442 (2000), for example, the Supreme Court ordered an evidentiary hearing in a post-conviction review proceeding where the prosecutor failed to disclose his alleged knowledge that a prospective juror responded falsely to *voir dire* questions. The Court held that the petitioner should have the opportunity at a hearing to establish that the government's nondisclosure violated his right to a fair trial. *Id.* Similarly, in *Smith v. Phillips*, 455 U.S. 209, 219-21 (1982), the Supreme Court analogized the government's duty to disclose information about juror partiality to the government's *Brady* obligations.

In light of *Williams* and *Phillips*, the government's reliance on the strict definition of *Brady* in arguing that Ground Two will fail is incorrect. At most, the government has established that Petitioner misidentified *Brady* as the source of his due process right to be informed of

structural errors in the proceeding.[11] Even if true, this does not mean Ground Two fails as a matter of law. *See Dodd v. United States*, 614 F.3d 512, 515 (8th Cir. 2010) (2255 petitioner may raise new legal theories if they arise out of the same set of facts as the original claims). At a minimum, Petitioner is entitled to litigate the merits and have the glaring conflict addressed in an evidentiary hearing. Because this hearing will revolve around the Presiding Judge's actions and statements, and because the Presiding may have to be a material witness, recusal is appropriate under §§ 455(a)(1), (b)(1), and (b)(5).

**Conclusion**

The Presiding Judge, if not recused, will have to evaluate the accuracy and sufficiency of her own disclosures and statements; determine the effect of her own *ex parte* communications; and otherwise make decisions about her own actions in the context of a case she likely was disqualified from hearing in the first place. Nothing in the Resistance overcomes the questions that a reasonable observer would have about impartiality in these circumstances. Recusal is therefore required.

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[11] Petitioner does not concede this point. The analysis in *Phillips*, 455 U.S. at 219-21, suggests that the government's failure to disclose structural defects in the proceeding is, in essence, a *Brady* violation.

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PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon the parties to this action by serving a copy upon each of the attorneys listed below on April 21, 2014 by

| | | | |
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| ☐ | U.S. Mail | ☐ | FAX |
| ☐ | Hand Delivered | ☐ | Electronic Mail |
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