March 21, 2014

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

CLERK OF THE COURT
U.S. District Court
Warren E. Burger Fed. Bldg.
316 North Robert Street
St. Paul, Minnesota
U.S. CERTIFIED MAIL NO. 7008-1830-0004-2648-9398

RE: USA vs. PETTERS, Civil No. 13-1110 (RHK)
Criminal NO. 08-364 (RHK)

Dear Clerk:

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

1. NOTICE OF APPEAL. Dated: March 18, 2014.

2. MOTION FOR ISSUANCE OF CERTIFICATE OF APPEALABILITY. Dated: March 18, 2014.

If possible, please return a filed stamped copy of the first page on the above-entitled motions for my files.

Thank you for your continued assistance in this most important matter.

Sincerely,

Thomas J. Petters, Pro Se

CERTIFICATE OF SERVICE

I THOMAS J. PETTERS certify that I mailed a copy of the above-entitled motions within a stamped envelop with the correct postage to the following parties on **MARCH 21, 2014,** from the U.S. Penitentiary Leavenworth Legal mailroom for inmates to:

3. Clerk of the Court, as addressed above.
4. U.S. Attorney, 300 South 4th Street, 600 US Courthouse, Minneapolis, Minnesota.

Thomas J. Petters, Pro Se

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

UNITED STATES OF AMERICA,	*	
Plaintiff,	*	CRIMINAL NO. 08-364 (RHK)
vs.	*	CIVIL NO. 13-1110 (RHK)
THOMAS JOSEPH PETTERS,	*	AFFIDAVIT FORM
Defendant.	*	

NOTICE OF APPEAL

COMES NOW, Plaintiff THOMAS JOSEPH PETTERS, Pro Se, (Hereinafter Movant) giving NOTICE in the above-entitled matter, appeals to the United States Court of Appeals for the Eighth Circuit, when the final judgment is entered in this action. The following facts exist in this action:

1. Movant Petters filed a timely Motion to Alter or Amend Judgment under Fed. R. Civ. P. 59(e) on December 30, 2013. The District Court responded on February 10, 2014.

2 Movant Petters is filing his "MOTION FOR ISSUANCE OF CERTIFICATE OF APPEALABILITY", dated March 18, 2014, on or about March 21, 2014.

3. Notice of Appeals must be filed within 60 days from the entry of the final order. Fed. R. App. P. 4(a)(1)(B).

CONCLUSION

4. Based on the foregoing, Movant respectfully requests this court to file this Notice of Appeal and grant the attached COA, as Movant is seeking to appeal his §2255 proceeding. 28 USC §2253(c)(1)(B); Fed. R. App. P. 22(b)(1).

5. I THOMAS JOSEPH PETTERS, declare under the penalty of perjury that the forgoing is true and correct. See, Title 28 USC §1746.

EXECUTED ON: March 18, 2014

THOMAS JOSEPH PETTERS, Pro Se

John Gregory Lambros, JailHouse Lawy

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MINNESOTA

UNITED STATES OF AMERICA,	*	
		Criminal No. 08-364 (RHK)
Plaintiff,	*	
		Civil No. 13-1110 (RHK)
vs.	*	
THOMAS JOSEPH PETTERS,	*	**AFFIDAVIT FORM**
Defendant.	*	

MOTION FOR ISSUANCE OF CERTIFICATE OF APPEALABILITY

COMES NOW, Defendant THOMAS JOSEPH PETTERS, Pro Se, (hereinafter Movant) with the assistance of his JailHouse Lawyer John Gregory Lambros, MUNZ vs. NIX, 908 F.2d 267, 268 FootNote 3 (8th Cir. 1990)(JailHouse Lawyer has standing to assert rights of inmates who need help); BEAR vs. KAUTZKY, 305 F.3d 802, 805 (8th Cir. 2002), and moves this Honorable Court for the issuance of a CERTIFICATE OF APPEALABILITY (COA), pursuant the District Court's "MEMORANDUM OPINION AND ORDER" issued on February 10, 2014 (Doc. No. 637), by United States District Judge Richard H. Kyle, in this above-entitled action, which stated: See, Pages 4 and 5.

> "His §2255 Motion rested 'upon three (3) legs: (1) the Government extended [him] a formal 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,' and **ALL THREE** had to pass muster in order for him to obtain relief. PETTERS, 2013 WL 6328544, at 3. The Motion was denied because NONE of the three legs withstood scrutiny. Hence, even if the Court had erred in concluding Defendant was required to show he would have pleaded guilty (as opposed to **NOLO CONTENDERE**), he has not undermined the Court's conclusion that (1) no formal plea offer existed and (2) all plea discussions were communicated to him. Relief from the denial of his §2255 Motion is therefore unwarranted." (emphasis added)

See, Pages 4 and 5 of "MEMORANDUM OPINION AND ORDER", February 10, 2014.

JURISDICTIONAL STATEMENT

1. Movant Petters filed a timely Motion to Alter or Amend Judgment under Fed. R. Civ. P. 59(e) on December 30, 2013. This Court responded on February 10, 2014.

2. Rule 59(e) motion tolls the time to appeal. See, Fed. R. App. P. 4(a)(4)(A)(iv). The time for filing an appeal begins to run anew from the date this Court rules on the motion. Also, an appeal from the denial of a Rule 59(e) motion BRINGS UP THE ENTIRE UNDERLYING JUDGMENT FOR REVIEW. See, FOMAN vs. DAVIS, 371 U.S. 178, 181-82 (1962).

3. NOTICE OF APPEAL must be filed within 60 days from the entry of final order, because the U.S. is a party in a section 2255 proceeding. Fed. R. App. P. 4(a)(1)(B). Movant has attached a NOTICE OF APPEAL to this COA.

4. "CERTIFICATE OF APPEALABILITY: Prisoners seeking to appeal a §2255 proceeding must also obtain a "COA" either from the district court or the court of appeals. 28 U.S.C. §2253(c)(1)(B); Fed. R. App. P. 22(b)(1).

5. An application for a COA must be first considered by the district court. See, Fed. R. App. P. 22(b)(1). See, U.S. vs. MITCHELL, 216 F.3d 1126, 1129-30 (D.C. Cir. 2000)(collecting cases). If this Court denies Movant's COA as to some or all issues, Movant is requesting a COA on those issues from the Court of Appeals. Movant understands he receives two (2) bites at the apple, one with this Court, and if that is unsuccessful, he gets one before a circuit judge. See, JONES vs. U.S., 224 F.3d 1251, 1255 (11th Cir. 2000).

STATEMENT OF THE CASE

6. In December 2008, a federal grand jury returned an indictment against Movant PETTERS, PCI and PGW on charges of mail fraud, wire fraud, money laundering, and conspiracy to commit the same offenses. A "SUPERSEDING INDICTMENT"

was issued by the grand jury on **JUNE 3, 2009**, that expanded the existing charges against the same defendants. The trial court redacted the indictment to exclude defendants PCI and PGW illegally after the close of trial. Movant Petters was convicted of the twenty charges against him and sentenced to fifty (50) years' imprisonment. The appeal from Movant Petters trial was denied. See, U.S. vs. PETTERS, 663 F.3d 375 (8th Cir. 2011). The Supreme Court denied Movant Petters appeal.

7. On or about May 10, 2013, Movant Petters attorney Steven J. Meshbesher filed a motion to vacate or set aside sentence pursuant to 28 U.S.C. §2255. Attorney Meshbesher raised two (2) grounds:

a. Ineffective assistance of counsel in failing to notify Movant Petters of the Government's plea offer; and

b. The sentence imposed being cruel and unusual insofar as it is disproportinate to the crimes of conviction.

8. This Court held an evidentiary hearing on October 23, 2013.

9. The Honorable Richard H. Kyle DENIED Movant Petters §2255 on December 5, 2013.

10. December 30, 2013: Movant Petters filed the following motions dated December 28, 2013 in this action:

a. Motion to Disqualify the Honorable Judge Richard Kyle in in this action. Defendant Petters requested recusal of Judge Kyle, pursuant to 28 U.S.C. §§§ 455(a), 455(b)(5)(i), and 455(b)(5)(iii). Defendant Petters was prejudiced. See, Doc. No. 631.

b. Motion to alter or amend judgment of this Court's "MEMORANDUM OPINION AND ORDER" filed December 5, 2013, pursuant to Rule 59(e) of the Federal Rule of Civil Procedure. See, Doc. 630.

11. The government responded to Movant Petters motions filed on December 30, 2013 on January 8, 2014. See, Doc. No. 633.

12. January 15, 2014, Movant Petters RESPONDED to the government and also filed a "MOTION FOR BAIL".

13. February 10, 2014, the Honorable Richard H. Kyle issued his

"MEMORANDUM OPINION AND ORDER", as to Movant Petters "MOTION TO ALTER AND AMEND JUDGMENT PURSUANT TO RULE 59(e) (Doc. No. 630) **AND** "**Separately moves the undersigned to RECUSE HIMSELF [Motion] (Doc. 631).**"

STANDARD OF ADJUDICATION

14. Unlike an appeal, this application does not raise the question whether this Court erred, clearly erred, or abused it discretion as to any of the reasons this Movant advances for granting a certificate of appealability (COA). As Movant demonstrates in this section of the application, his burden is substantially lighter: it is not to show that the memorandum and order denying relief was necessarily wrong, but only to show that it is not necessarily right. This Court's function is therefore not to review what it has done in its order and memorandum but to ask what some other reasonable court - any other reasonable court - might do.

15. The Supreme Court provided guidance to this Court on the question of how an application for a COA is to be addressed in MILLER-EL vs. COCKRELL, 123 S.Ct. 1029, 154 L.Ed. 2d 931 (2003). The Supreme Court's opinion in MILLER-EL makes clear that whether to grant a COA is intended to be a preliminary inquiry, undertaken **BEFORE** full consideration of the petitioner's claims. MILLER-EL, 123 S. Ct. at 1039 (noting that the "threshold [COA] inquiry does not require full consideration of the factual or legal bases adduced in support of the claims"); id. at 1040 (noting that "a claim can be debatable even though every jurist of reason might agree, **AFTER THE COA HAS BEEN GRANTED AND THE CASE HAS RECEIVED FULL CONSIDERATION,** that petitioner will not prevail")(emphasis added); id. at 1042 (noting that "a COA determination is a separate proceeding, **ONE DISTINCT FROM THE UNDERLYING MERITS**")(emphasis added); id. at 1046-47 (Scalia J., concurring)(noting that it is erroneous for a court of appeals to deny a COA aonly after consideration

of the applicant's entitlement to habeas relief on the merits). Indeed, such "full consideration" in the course of the COA inquiry is forbidden by §2253(c). Id. at 1039 ("When a court of appeals side steps [the COA] process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction.")

16. Movant believes he is raising a "SUBSTANTIAL QUESTION(s)" about the procedural ruling of the District Court on February 10, 2014, as the correctness of it under the law as it now stands is debatable among jurists of reason. See, SLACK vs. McDANIEL, 529 U.S. 473, 484 (2000). Movant's contention about the procedural ruling against him has not been foreclosed by a binding decision from the Supreme Court or Circuit Court's that is on point.

17. The District Court rejected Movant's constitutional claims on the **MERITS**, the showing required to satisfy §2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. See, MILLER-EL, 154 L. Ed. 2d 931, 950-951 (2003).

18. Therefore, this Court must issue a CERTIFICATE OF APPEALABILITY (COA) if Movant presents a question of **"DEBATABILITY"** regarding the resolution of this petition. See, MILLER-EL vs. COCKRELL, 123 S.Ct. 1029, 1039 (2003) (under the controlling standard, a petition must "sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner **OR** that the issues presented were 'adequate to deserve encouragement to proceed further.'")(emphasis added).

19. Among the identifiable legal reasons for granting a CERTIFICATE OF APPEALABILITY are the following:

(a) The Supreme Court has granted certiorari to review a "similar" question in another case;

(b) The U.S. Supreme Court or the relevant circuit court has identified the question as open, unresolved, or a matter of disagreement among different circuit courts;

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(c) At least one (1) Supreme Court Justice, expressed a view not rejected by a majority, has found merit in the claim;

(d) The Court of appeals has decided to hear a claim en banc similar to a claim presented in the current appeal;

(e) The relevant circuit court or another district court in the district (or, possibly, elsewhere) has granted a probable cause certificate based on the same or a similar issue;

(f) The same or similar issue is pending on appeal in the circuit in another case;

(g) The legal question presented by the petitioner has never been decided by the circuit court;

(h) There is a split on the question among different panels or different district judges in the same circuit;

(i) The same or similar issue has been resolved favorably to a petitioner by a state court, a district judge in another district, or a panel in another circuit;

(j) The issue has been the subject of differing or dissenting views among the state court judges who previously adjudicated the claim in the petitioner's or another case;

(k) The district court applied a novel interpretation of the law or decided complex or substantial issues when adjudicating a claim;

(l) The legal or factual rationale for the district court's ruling is unclear;

(m) The district court decision or prior adverse circuit rulings relied upon case law that has been questioned or undermined by more recent decisions of the circuit or Supreme Court;

(n) The proper adjudication of the claim may require additional evidentiary development;

(o) A reasonable doubt exists as to whether the district court fully and fairly adjudicated the matter, given the actions of the district court or the state or the possible incompetence of petitioner's counsel;

(p) The severity of the penalty, in conjunction with other factors, prevents a conclusion that the claims are frivolous.

See, Liebman & Hertz, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE, Fourth Edition CR 2001, at pages 1590-1593 (collecting cases)

20. Movant Petters incorporates here all of his already-filed briefs and responses, pursuant to Federal Rules of Civil Procedure, Rule 10(c), within this action.

REASONS FOR GRANTING THE CERTIFICATE (COA)

ISSUE/GROUND ONE (1):

REASONABLE JURISTS COULD DIFFER WITH, OR WOULD FIND DEBATABLE OR WRONG, THE DISTRICT COURT'S DENIAL OF RELIEF ON MOVANT PETTERS CLAIM THAT "DEFENDANT PETTERS' FORMER ATTORNEY, JON HOPEMAN, PROVIDED CONSTITUTIONALLY DEFICIENT COUNSEL WHEN HE FAILED TO COMMUNICATE A PLEA OFFER TO DEFENDANT PETTERS PRIOR TO TRIAL."

21. During the process of filings Movant Thomas Petters §2255, the above claim has been taken out of context by the government, the court and the recollection of Movant Petters, as to the time frame of Movant Petters' attorneys failing to communicate a plea offer to Movant prior to trial. A quick review of the "MEMORANDUM IN SUPPORT OF MOTION TO VACATE OR SET ASIDE SENTENCE AND FOR NEW SENTENCING HEARING IN ACCORDANCE WITH 28 U.S.C. §2255", dated May 10, 2013, and signed by Attorney Steven J. Meshbesher, page 5, verifies the above claim.

22. Movant's attorney stated correctly that the U.S. Supreme Court had addressed this precise issue for the first time in MISSOURI vs. FRYE, 132 S.Ct. 1399, 182 L.Ed. 2d 379 (2012).

INEFFECTIVE ASSISTANCE OF COUNSEL:

23. The above question presented within Movant's §2255 was brought due to the U.S. Supreme Court's ruling that strengthens rights to counsel during plea bargaining. On March 21, 2012, the U.S. Supreme Court handed down two (2) decisions that expanded the opportunities for defendants to overturn their convictions on the basis of POST-CONVICTION CLAIMS that their attorneys did an unreasonably poor job during plea negotiations. Defendants who can show that their

attorney's failed to communicate plea offers or failed to give competent counsel regarding a plea offer can get a lower sentence or have the prosecutor re-extend the plea offer, even if the defendant received a fair trial after they rejected the offer, the Supreme Court made clear. See, MISSOURI vs. FRYE, 132 S.Ct. 1399; 182 L.Ed.2d 379 (2012) and LAFLER vs. COOPER, 132 S.Ct. 1376; 182 L.Ed.2d 398 (2012). MISSOURI and LAFLER announced a type of Sixth Amendment violation that was previously unavailable. The Court clearly stated in LAFLER that the Sixth Amendment requires effective assistance of counsel at critical states of criminal proceedings, a right that extends to the plea-bargaining process.

24. The lessons of FRYE and COOPER seem simple on their face: **DEFENSE COUNSEL MUST CONVEY ALL PLEA OFFERS TO A CLIENT AND THEN PROVIDE ADEQUATE ADVICE AS TO WHETHER TO ACCEPT SUCH OFFERS.**

25. The Supreme Court stated, "claims of ineffective assistance of counsel in the plea-bargaining context are governed by the two-part test set forth in STRICKLAND vs. WASHINGTON, 466 U.S. 668 (1984)": (1) that defense counsel had been ineffective; and (2) that there was resulting prejudice. FRYE, at 1405. It *** then held as a general rule, defense counsel has a duty to communicate formal plea offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused. FRYE, at 1408. Because this was not done in FRYE, defense counsel did not render effective assistance of counsel as required by the Constitution. FRYE, at 1408.

*** 26. **THE SUPREME COURT COULD OF LIMITED ITSELF TO THIS NARROW CONCLUSION** - that not communicating a **FORMAL PLEA-BARGAINING OFFER** with an *** expiration date was ineffective assistance - **THE COURT EXPLICITLY WENT FARTHER THAN THIS.** Writing for the majority, Justice Kennedy stated that in order for the *** benefits of a plea agreement to be realized, **"CRIMINAL DEFENDANTS REQUIRE EFFECTIVE COUNSEL DURING PLEA NEGOTIATIONS. ANYTHING LESS MIGHT DENY A DEFENDANT EFFECTIVE REPRESENTATION BY COUNSEL AT THE ONLY STAGE WHEN LEGAL AID AND ADVICE WOULD HELP HIM."** FRYE, at 1407-1408 (citing MASSIAH vs. U.S., 377 U.S. 201, 204 (1964).

Because "[i]n today's criminal justice system ... the **NEGOTIATION OF A PLEA BARGAIN** ... is almost always the critical point for the defendant," FRYE, at 1407. the *** Court reasoned that the "**INQUIRY**" in this case was "**HOW TO DEFINE THE DUTY AND RESPONSIBILITY OF THE DEFENSE COUNSEL IN THE PLEA BARGAIN PROCESS.**" FRYE, at 1408.

27. By explicitly linking **BARGAINING** and **NEGOTIATION** to the duties of counsel during the **PLEA BARGAINING PROCESS** however, the Court is stating that its earlier conclusion "that defense counsel have responsibilities in the plea bargain process, reponsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process ..." FRYE, at *** 1407. **APPLIES TO THE NEGOTIATION STAGE OF PLEA BARGAINS**, not just the communication of offers to the defendant.

28. Justice Scalia, writing for the dissent, explicitly acknowledges the **NEW STEP** the Court has taken, that of bringing a constitutional lens to the **NEGOTIATION OF PLEA BARGAINS.** He states that "counsel's **PLEA BARGAINING SKILLS ... MUST NOW MEET A CONSTITUTIONAL MINIMUM,**" and calls this the "**CONSTITUTIONALIZATION OF THE PLEA-BARGAINING PROCESS.**" FRYE, at 1412-1413. He worries, however, that these new constitutional standards will be had to define, since "it will not be so clear that counsel's plea-bargaining skills .... are adequate." FRYE, at 1412-1413.

29. The Court states that the FRYE case does not present the "necessity or occasion to **DEFINE THE DUTIES OF DEFENSE COUNSEL IN THESE RESPECTS,**" FRYE, at 1408. to fully vindicate the right of effective counsel in plea-bargaining, **THESE STANDARDS WILL HAVE TO BE DETERMINED BY THE LOWER COURTS, ON A CASE-BY-CASE BASIS.**

STANDARDS OF PROFESSIONALLY COMPETENT ASSISTANCE OF COUNSEL:

30. In adopting the two-part test from STRICKLAND vs. WASHINGTON to apply to the negotiations of **PLEA-BARGAINING**, the Supreme Court has required the lower courts to determine standards for the first part of the STRICKLAND test -

namely, what actions are "outside the wide range of professionally competent assistance." STRICKLAND, 466 U.S. at 690. This is done, according to STRICKLAND, by referring to "reasonableness under **PREVAILING PROFESSIONAL NORMS**." STRICKLAND, at 688. There are several sources that a Court must look at to determine what competent assistance of counsel looks like in a **PLEA NEGOTIATION CONTEXT**.

ABA STANDARDS

31. The Supreme Court acknowledged in FRYE, "[t]hough the standard for counsel's performance is not determined solely by reference to codified standards of professional practice, these standards can be important guides." FRYE, at 1408.

*** **IT WAS ON THIS BASIS, IN FACT, THAT THE SUPREME COURT HELD THAT DEFENSE COUNSEL HAD THE DUTY TO COMMUNICATE THE OFFER FROM THE PROSECUTION TO HIS CLIENT.** FRYE, at 1408. Following this model, this Court has several different standards to consult to determine the proper "range of professionally competent assistance" in the plea-bargaining context.

MODEL RULES OF PROFESSIONAL CONDUCT

32. First and foremost, the Model Rules of Professional Conduct can be referred to in all cases regarding attorney misconduct. These Rules also form the basis for most if not all of the state bar professional standards for attorneys. Looking at the Model Rules (and the associated state statutes), courts can find general standards that will be appropriate to determine the scope of appropriate attorney conduct in the **PLEA-BARGAINING CONTEXT**. In fact, the Model Rules have been consulted in other Supreme Court cases applying STRICKLAND standard. See, e.g., WIGGINS vs. SMITH, 539 U.S. 510, 524 (2003).

33. **STATE OF MINNESOTA RULES OF PROFESSIONAL CONDUCT - RULE 1.4:** Rule 1.4 of the Rules of Professional Conduct requires that an attorney shall "promptly inform the client of any decision or circumstance with respect to which

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the client's informed consent ... is required." See, Rule 1.4(a)(1), MPRC. Also see, "It is the undoubted duty of an attorney to communicate to his client **WHATEVER INFORMATION HE OBTAINS THAT MAY AFFECT THE INTEREST OF HIS CLIENT IN RESPECT TO THE MATTERS ENTRUSTED TO HIM."** STAR CTRS, INC. vs. FAEGRE & BENSON, LLP, 644 N.W.2d 72, 77 (Minn. 2002)(quoting, SELOVER vs. HEDWALL, 149 Minn. 302, 184 N.W. 180, 181 (1921). JailHouse Lawyer Lambros believes full disclosure under Rule 1.4 includes a full analysis of **ALL NEGOTIATION STAGES OF PLEA BARGAINS MOVANT PETTERS ATTORNEYS HAD WITH THE GOVERNMENT - NOT JUST FORMAL OFFERS.**

34. **FIDUCIARY DUTY:** In RICE vs. PERL, 320 N.W.2d 407 (Minn. 1982), the **MINNESOTA SUPREME COURT** said that an attorney has a fiduciary duty to the attorney's client. There are essentially three (3) elements of that fiduciary duty; to represent the client with undivided loyalty; to preserve client's confidence; and to **DISCLOSE ANY MATERIAL MATTERS BEARING ON THE REPRESENTATION.** Id. at 410. Rice states that a client is reasonably entitled to receive such information before making a major decision in the case, **SUCH AS SETTLEMENT. [Plea bargain?]** Id. at 411. RICE relies on the general common law of fiduciary duty. These same FIDUCIARY DUTIES are articulated in **MINN. R. OF PROF. CONDUCT 1.4, 1.7(a) and 1.7(b).**

ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION

35. The AMERICAN BAR ASSOCIATION'S influential "STANDARDS FOR CRIMINAL JUSTICE", which addresses both prosecution and defense functions represent a consensus view of all segments of the criminal justice community about what good, professional practice is and should be. The SUPREME COURT has used these Standards extensively in determining STRICKLAND ineffectiveness. ROMPILLA vs. BEARD, 545 U.S. 374 (2005)(ROMPILLA cited to ABA standards on eight (8) occasions as evidence that trial counsel's efforts were below the constitutional floor). Justice Kennedy claimed in his dissent, the Court has treated these guidelines **"AS IF THEY WERE BINDING STATUTORY TEXT."** ROMPILLA, at 400.

36. ABA STANDARDS contain **SPECIFIC GUIDELINES FOR PLEA-BARGAINING FOR DEFENSE ATTORNEYS.** See, Standard 4-6.2.

ABA STANDARDS FOR CRIMINAL JUSTICE PLEAS OF GUILTY

37. The ABA's STANDARDS FOR CRIMINAL JUSTICE PLEAS OF GUILTY (1999), expands on the Criminal Justice standards above by more specifically discussing the procedures of a court taking a plea of guilty as well as the **PRACTICE OF NEGOTIATING BETWEEN PROSECUTORS AND DEFENSE COUNSEL.** Standard 13-3.2 adresses the responsibilities of defense counsel in the plea context.

ATTORNEY-CLIENT COMMUNICATIONS REGARDING PLEA NEGOTIATIONS

38. "In conducting discussions with the prosecutor the lawyer should keep the **ACCUSED ADVISED OF DEVELOPMENTS AT ALL TIMES AND ALL PROPOSALS MADE BY THE PROSECUTOR SHOULD BE COMMUNICATED PROMPTLY TO THE ACCUSED ...."** See, ABA STANDARDS FOR CRIMINAL JUSTICE, Standard **4-6.2(a)(2nd ed. 1980 and 1986 Supp.).** Also see, JOHNSON vs. DUCKWORTH, 793 F.2d 898, 901 (7th Cir. 1986); HEMETEK vs. U.S., 2012 U.S. Dist. LEXIS 126610 (W.V. Dist. Ct. **2012)**("Second, defense counsel is obligated **TO PROMPTLY COMMUNICATE AND EXPLAIN TO THE ACCUSED ALL SIGNIFICANT PLEA PROPOSALS MADE BY THE PROSECUTOR.'** ABA STANDARDS FOR CRIMINAL JUSTICE, Prosecution Function and Defense Function, Standard **4-6.2(b) (3rd Ed. 1993)."**

*** **STATEMENT OF FACTS:**

39. **A BRIEF SUMMARY OF EVENTS FROM SEPTEMBER 24, 2008 THRU JUNE 3, 2009:**

a. **SEARCH WARRANT:** September 24, 2008 of Movant's company;

b. **CRIMINAL COMPLAINT: Approximately October 2, 2008;**

c. **MOVANT PETTERS ARRESTED:** October 3, 2008;

d. **GOVERNMENT PLEA OFFER:** October 5, 2008;

e. **INDICTMENT:** December 1, 2008;

f. **SUPERSEDING INDICTMENT:** June 3, 2009.

40. Judge Kyle correctly stated within his December 5, 2013, "MEMORANDUM OPINION AND ORDER":

*** "On **October 5, 2008,** Assistant U.S. Attorney John Marti spoke with Hopeman [Movant's Attorney] 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 (2) weeks after Petters was indicted, and at other times before trial commenced in **October 2009."** (emphasis added)

"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.' ... And he contends that had he known of the offer, he would have accepted it and pleaded guilty. 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. **FootNote 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."** (emphasis added)

See, "MEMORANDUM OPINION AND ORDER", December 5, 2013, Page 3.

41. **JUDGE KYLE STATES "THERE WAS NO FORMAL PLEA OFFER":** On Pages 5 thru 9 of his December 5, 2013, ORDER states "ineffective assistance may arise **ONLY WHEN A FORMAL PLEA OFFERS HAVE NOT BEEN COMMUNICATED TO DEFENDANTS." THIS IS NOT TRUE.** Movant restates paragraphs 26, 27, 28 and 29 above. Specifically, Paragraph 26:

"The Supreme Court could of limited itself to this narrow

*** conclusion - **THAT NOT COMMUNICATING A FORMAL PLEA-BARGAIN OFFER WITH AN EXPIRATION DATE WAS INEFFECTIVE ASSISTANCE - THE COURT EXPLICITLY WENT FARTHER THAN THIS.** .... Justice Kennedy stated that in order for the benefits of a plea agreement to be realized, **"CRIMINAL DEFENDANTS REQUIRE EFFECTIVE COUNSEL DURING PLEA NEGOTIATIONS. ANYTHING LESS MIGHT DENY A DEFENDANT EFFECTIVE REPRESENTATION BY COUNSEL AT THE ONLY STAGE WHEN LEGAL AID AND ADVICE WOULD HELP HIM."** FRYE, at 1407-1408 (citing MASSIAH vs. U.S., 377 U.S. 201, 204 (1964).

42. Judge Kyle correctly stated that the Government did not offer Movant's Attorney the **PLEA NEGOTIATION OF OCTOBER 5, 2008 IN WRITTEN FORM - ONLY OVER THE TELEPHONE. IN FACT, TWO (2) TELEPHONE COMMUNICATIONS OCCURRED BETWEEN JON HOPEMAN AND JOHN MARTI ON OCTOBER 5, 2008.**

43. During the second telephone conversation, U.S. Assistant Attorney John Marti **"REITERATED HIS OFFER OF A 30-YEAR CAP.** He stated that he wanted to meet tonight to show us the evidence that he intended to put on at the detention hearing." See, **EXHIBIT B.**

44. **MOVANT PETTERS ATTORNEY FAILED TO PUT THE TWO (2) OCTOBER 5, 2008 "PLEA OFFERS OF 30-YEAR CAP" IN "WRITING" AND/OR "ON THE RECORD":** This Circuit, the Eighth Circuit Court of Appeals, addressed this issue of **FAILURE TO PUT "AGREEMENT IN WRITING".** The Court stated that trial counsel's failure to put an **ORAL AGREEMENT** that two (2) polygraph tests that defendant passed were to be admitted into evidence constituted **INEFFECTIVE ASSISTANCE OF COUNSEL.** Movant Petters attorney did not inform him of the 30-year cap offer nor place same in writing. See, HOUSTON vs. LOCKHART, 982 F.2d 1246 (8th Cir. 1993). Also see, BETANCOURT VS. WILLIS, 814 F.2d 1546 (11th Cir. 1987)(trial counsel's failure to MEMORIALIZE ALLEGED SENTENCE REDUCTION, either by letter, affidavit or otherwise based on counsel's representation to defendant that judge had agreed to reduce defendant's sentence **AFTER PLEA,** constituted ineffective assistance of counsel.).

45. **WITHHOLDING INFORMATION:** Attorney Jon Hopeman **WITHHELD** the oral plea offers by U.S. Assistant Attorney Marti on **OCTOBER 5, 2008.** Attorney Hopeman's own **DECEMBER 10, 2008 "MEMORANDUM"** as to his conference with Movant Petters proves same.

*** "I also **INFORMED MR. PETTERS IN OUR MEETING THAT WE HAD RECEIVED NO PLEA OFFER FROM THE GOVERNMENT,** despite the fact that some weeks ago, after our November proffer session, John Marti told me that he would be making an offer."

See, EXHIBIT C. (January 30, 2009, MEMORANDUM, Regarding December 10, 2008 - Conference with Tom Petters, From John Hopeman)

46. **OVER 60-DAYS FROM OCTOBER 5, 2008 TO DECEMBER 10, 2008:** Movant Petters attorney Jon Hopeman's own "MEMORANDUMS" verify that he did not inform Movant PETTERS of the **PLEA NEGOTIATIONS ON OCTOBER 5, 2009 - 30-YEAR CAP.** See, U.S. vs. SANDERSON, 595 F.2d 1021 (5th Cir. 1979)(Trial counsel's MISREPRESENTATION OF MATERIAL FACTS, **WITHHOLDING INFORMATION,** and exerted pressure on defendant to induce a guilty plea, constitutes ineffective assistance and required an evidentiary hearing to resolve claim).

JUDGE KYLE STATES "THE ALLEGED 'OFFER' WAS COMMUNICATED TO PETTERS":

47. Judge Kyle states on pages 9 thru 15, that he rejects Movant Petters claim that he was not informed of the "GOVERNMENT'S OFFER" until after his trial had concluded. See, Page 15 of December 5, 2013 "MEMORANDUM OPINION AND ORDER."

48. Judge Kyle states "Most compelling are the consistent, forceful **ASSERTIONS** of all of Petter's attorneys that they repeatly communicated the proposed 30-year cap to him:

a. "Between October and December 2008, ... I **REPEATEDLY DISCUSSED THE GOVERNMENT'S PROPOSED 30-YEAR CAP OF IMPRISONMENT WITH MR. PETTERS DURING THESE MEETINGS."** (Hopeman Decl. (Doc. No. 591-1)

b. "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)

c. "I repeatedly discussed the government's **PROPOSED 30-YEAR CAP OF IMPRISONMENT WITH MR. PETTERS."** (Id. ¶43)

See, EXHIBIT E. (Pages 1, 10, 11, of December 5, 2013, "MEMORANDUM OPINION AND ORDER")

DECLARATION OF JON M. HOPEMAN
FILED JUNE 3, 2013 - DOCUMENT 591-1

49. The 100 page "DECLARATION OF JON M. HOPEMAN" was referred to by Judge Kyle within **EXHIBIT E.** Movant PETTERS believes that the "DECLARATION" is very **"SELF-SERVING", TRYING TO ALTER FACTS WITHIN "MEMORANDUMS"** from Attorney Hopeman on stationary from his law firm "FELHABER LARSON FENLON & VOGT". Paragraph 52 of the "DECLARATION" states:

*** "52. In late **DECEMBER 2008, WHEN IT BECAME CLEAR TO ME THAT THE CASE WOULD MOST LIKELY NOT SETTLE [NO MORE PLEA NEGOTIATIONS], I HIRED PAUL ENGH TO ASSIST ME AS CO-TRIAL ATTORNEY ON THE CASE.** From late December 2008, Mr. Engh, Mr. Riensche, and I began to earnestly **PREPARE FOR TRIAL.** ...."

See, EXHIBIT F. (DECLARATION OF JON M. HOPEMAN, Filed June 3, 2013, Doc. 591-1)

50. A summary from Jon Hopeman's "DECLARATION" shows an interesting progression as to alleged "PLEA NEGOTIATIONS" that took place between Attorney Hopeman and U.S. Assistant Attorney **Marti and HOW THOSE "PLEA NEGOTIATIONS" WERE ALLEGEDLY SHARED WITH MOVANT PETTERS:** See, **EXHIBIT E.**

*** a. **December 17, 2008:** "Mr. Marti **WOULD NOT BUDGE FROM HIS ALREADY-PROPOSED 30-YEAR CAP OF IMPRISONMENT, AND HE WAS NOT INTERESTED IN ANY COUNTEROFFER MR. PETTERS MIGHT MAKE WITH RESPECT TO THE TERM OF IMPRISONMENT."** See, Paragraph 50.

b. **JULY 16, 2009:** "... notes I made during a meeting that Mr. Engh and I had with Mr. Petters on July 16, 2009 in the Elk River jail. ....."

"Paul's discussion with **Marti REGARDING POTENTIAL PLEA DISCUSSED."**

"Paul - figure out your bottom line -"

"Paul says only thing will work is 10-20. 5 is a non-starter."

"85% rule explained."

*** **"... If I was gonna take a deal - I WOULD PLEAD NO CONTEST OR NOLO CONTENDERE."**

NUMBERS OFFERED TO PETTERS: 85% of 20-YEARS EQUALS 17-YEARS. (this is the amount of prison time someone receives if given a 20-year sentence)

See, Paragraph 52, within **EXHIBIT F.**

51. **INTERESTING OBSERVATIONS:** On December 17, 2008, U.S. Assistant Attorney MARTI **"WOULD NOT BUDGE FROM HIS ALREADY-PROPOSED 30-YEAR CAP OF IMPRISONMENT AND WAS NOT INTERESTED IN ANY COUNTEROFFER FROM MR. PETTERS ..."** See, Paragraph 50 . On **JULY 16, 2009** Movant Petters attorney **PAUL ENGH ALLEGEDLY RECEIVED A "POTENTIAL PLEA" FROM MR. MARTI FOR 10 to 20-YEARS.** Remember Attorney Hopeman clearly stated within his "DECLARATION" that "In late **December 2008, when it became clear to me that the case would most likely not settle, .."** Why would the government **"BUDGE" FROM 30-YEARS?** Something is not correct! See, Paragraph 52 ("for 10 to 20-years")

52. Legal publication support the theory that the **BEST PLEA OFFERS WILL BE GIVEN AT OR NEAR THE DEFENDANT'S ARRAIGNMENT.** For Movant Petters this was on or about **OCTOBER 5, 2008,** the day Judge Kyle clearly states "Marti informed Hopeman the Government was willing to agree to a sentence capped at 30-years ..". See, Page 3 of December 5, 2013 "MEMORANDUM OPINION AND ORDER". See, CRIMINAL DEFENSE TECHNIQUES, by Alison and Leslie Garfield, Chapter 13 - NEGOTIATING A PLEA, §13.02, Preliminary Concerns Before Negotiating, (1)(b) Initial Discussions with the Prosecution. Also see, THE CRIMINAL PRACTICE INSTITUTE PRACTICE MANUAL, 2005-2006, Chapter 6 - Guilty Pleas and Plea Bargaining, §(1)(B) - The Plea Bargaining Process:

> "Although the U.S. Attorney's Office may extend a **PRE-INDICTMENT OFFER AT PRESENTMENT** or prior to preliminary hearing in non-drug felony cases, ..."
>
> "Having a specific proposal in mind will facilitate **PRE-INDICTMENT DISCUSSIONS."**
>
> *** "Although succeeding offers tend to be **LESS FAVORABLE, PRE-INDICTMENT OFFERS MAY BE RENEWED IF ADDITIONAL INFORMATION CAUSES THE GOVERNMENT TO REAPPRAISE THE STRENGTH OF ITS POSITION.** If counsel reasonably anticipates that the government's case **WILL NOT WEAKEN APPRECIABLY OVER TIME AND TRIAL IS NOT IN THE CLIENTS BEST INTEREST, COUNSEL SHOULD THINK CAREFULLY BEFORE LETTING A PLEA OFFER EXPIRE."**
>
> "Under certain circumstances a prosecutor may **REINDICT THE DEFENDANT** on more serious charges if the defendant does not accept the plea offer"

ATTORNEY HOPEMAN'S "MEMORANDUMS" PROVE MOVANT PETTERS RECEIVED NO PLEA OFFER BEFORE DECEMBER 17, 2008

53. **EXHIBIT A:** October 28, 2008, "MEMORANDUM" from Attorney Hopeman, regarding October 5, 2008, telephone conference with John Marti.

> "He stated that the government was willing to agree to a 30 year cap, leaving the amount of loss open, or stipulating to the amount of loss. He stated that he was not offering a 5K."

54. **EXHIBIT B:** October 28, 2008, "MEMORANDUM" from Attorney Hopeman, regarding October 5, 2008, **"SECOND"** telephone conference with John Marti.

> "Mr. Marti reiterated his offer of a 30-year cap. He stated that he wanted to meet tonight to show us the evidence that he intended to put on at the detention hearing."

55. **EXHIBIT C:** January 30, 2009, "MEMORANDUM" from Attorney Hopeman, regarding **December 10, 2008 - CONFERENCE WITH TOM PETTERS.**

*** "I also informed Mr. Petters in our meeting that **WE HAD RECEIVED NO PLEA OFFER FROM THE GOVERNMENT**, despite the fact that some weeks ago, **AFTER OUR NOVEMBER PROFFER SESSION, JOHN MARTI TOLD ME THAT HE WOULD BE MAKING AN OFFER."**

56. **EXHIBIT D:** January 30, 2009, "MEMORANDUM" from Attorney Hopeman, regarding **December 17, 2008 - MEETING WITH JOHN MARTI.**

> "I asked Mr. Marti whether there was anything wrong with Mr. Petters proffer delivered in late November. He stated that there was nothing wrong with the proffer, **it was just that the government already had all of the information that Mr. Petters could provide.** He also stated that the U.S. Attorney's Office was taking a very hard position with Mr. Petters, considering him one of the most significant white collar criminals in the history of the district."

> "I told Mr. Marti I wanted an offer from the government. He stated that the offer was a **30 YEAR CAP, WITH THE GUIDELINES CALCULATIONS TO REMAIL OPEN."**

> "I told Mr. Marti that as a matter of personal pride, **I DID NOT BELIEVE THAT I COULD ADVISE MR. PETTERS TO PLEAD GUILTY TO A 30 YEAR CAP.** I stated that this suggested that 30 years was an appropriate sentence. **I TOLD HIM THAT MY PROFESSIONAL INTEGRITY WOULD NOT ALLOW ME TO DO THIS."**

57. Judge Kyle ends his overview of "THE ALLEGED 'OFFER' WAS COMMUNICATED TO PETTERS", by stating on page 15:

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

*** **THIS WAS NOT THE QUESTION PRESENTED WITHIN MOVANT PETTERS §2255!!!**

58. Attorney Steven J. Meshbesher, clearly stated within Movant Petters May 10, 2013, "MEMORANDUM IN SUPPORT OF MOTION TO VACATE OR SET ASIDE SENTENCE AND FOR NEW SENTENCE HEARING IN ACCORDANCE WITH 28 U.S.C. 2255", **THAT THE QUESTION PRESENTED WAS:**

> "Defendant Petters' former attorney, Jon Hopeman, provided constitutionally deficient counsel when he **FAILED TO COMMUNICATE A PLEA OFFER TO DEFENDANT PETTERS PRIOR TO TRIAL."**

See, Page 5. **EXHIBIT G.** (Pages 1 and 5, of May 10, 2013, 28 USC §2255)

59. **DEFINITION OF THE WORD "PRIOR":** Preceding in time or order. See, BLACK'S LAW DICTIONARY, Eighth Edition.

*** 60. Movant Petters believes the Court did not address the question presented within his §2255. A CERTIFICATE OF APPEALABILITY SHOULD ISSUE ON THIS OVERSIGHT ALONE.

JUDGE KYLE STATES "PETTERS WOULD NOT HAVE ACCEPTED [PLEA OFFER]":

61. Judge Kyle states on pages 15 thru 18, that "And he cannot show prejudice under STRICKLAND because he has failed to demonstrate that he would have accepted the alleged deal before trial." See, Page 18. Some of the facts that Attorney Hopeman did not explain to Movant Petters before

*** **JULY 16, 2009 WAS:**

a. Movant Petters did not have to **ADMIT GUILT TO THE CHARGES;** Rule 11(a)(1) of the Federal Rules of Criminal Procedure, states a defendant may plead not guilty, guilty or **NOLO CONTENDERE.** By pleading guilty, a defendant

admits all elements of the charged crime. See, U.S. vs. BROCE, 488 U.S. 563, 570 (1988). By **PLEADING "NOLO CONTENDERE", A DEFENDANT DOES NOT ADMIT GUILT TO THE CHARGED OFFENSE,** but the plea has the same effect at sentencing as a guilty plea. See, HUDSON vs. U.S., 272 U.S. 451, 457 (1926); OLSEN vs. CORREIRO, 189 F.3d 52, 68 (1st Cir. 1999).

62. Judge Kyle stated within his December 5, 2013, ORDER that Movant Petters would have needed to **"AND PLEADED GUILTY."** See, Page 15. Also see, Page 16:

> "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."**

63. The PREJUDICE required by the Sixth Amendment and STRICKLAND to establish ineffective asssitance of counsel and confirmed in LAFLER, which stated the simple fact of a higher sentence **AFTER TRIAL** is sufficient to DEMONSTRATE PREJUDICE, See, LAFLER, 132 S.Ct. at 1387 ("[P]rejudice can be shown if **LOSS OF PLEA OPPORTUNITY LED TO A TRIAL IN A CONVICTION OF MORE SERIOUS CHARGES OR THE IMPOSITION OF A MORE SEVERE SENTENCE.")** This is exactly the case here, as Movant Petters attorneys did not advise him of all plea offers and the fact he could of plead **"NOLO CONTENDERE".**

64. Movant Petters had legitimate reasons to continue to maintain his innocence and plead **NOLO CONTENDERE** in this action. Movant's attorney did not request the government to pursue a plea offer so Movant Petters would be allowed to plead **"NOLO CONTENDERE" and/or explain to Movant the rules governing the "PLEA BARGAINING SYSTEM".** Again, the record contains no evidence that Movant's attorney gave constitutionally adequate advice on Movant's option of pleading **"NOLO CONTENDERE".** In fact, Movant Petters clearly advised both Attorney Paul Engh and Jon Hopeman on **July 16, 2009, "... if I was gonna take a deal - I WOULD PLEAD NO CONTEST OR NOLO CONTENDERE."** See, **EXHIBIT F. (Page 20) Why didn't Movant's attorney's ask the government for a "NOLO CONTENDERE" PLEA?**

65. Movant Petters would of accepted the governments plea if given constitutionally adequate advice during PLEA NEGOTIATIONS.

SUMMARY OF THE ABOVE:

66. Movant has clearly proved that Judge Kyle used the incorrect standard when he stated that "ineffective assistance may arise **ONLY WHEN A FORMAL PLEA OFFER HAVE BEEN COMMUNICATED TO DEFENDANTS."** Movant proved this is not true by citing FRYE, at 1407-1408. See, paragraph 41 above.

67. Movant also proved that his Attorney's plea discussions with the U.S. Attorney did not conform to the proper "range of professional competent assistance" in the plea-bargaining context. Movant offered several of the different standards that this court must consider and examples of how his attorney's actions violated the standards.

68. Judge Kyle's conclusion offered within his February 10, 2014, "MEMORANDUM OPINION AND ORDER", to Movant Rule 59(e), page 5, clearly presents a question of "DEBATABILITY":

> "Hence, even if the Court had erred in concluding Defendant was requried to show he would have pleaded guilty (as opposed to **NOLO CONTENDERE**), he has not undermined the Court's conclusion that (1) no formal plea offer existed and (2) all plea discussions were communicated to him. Relief from the denial of his §2255 Motion is therefore unwarranted."

See, Page 5, "MEMORANDUM OPINION AND ORDER", February 10, 2014.

CONCLUSION:

69. This Court must consider issuing a Certificate of Appealability, as Movant Petters clearly presents a question of "DEBATABILITY" regarding the resolution of the above ISSUE/GROUND ONE (1). See, MILLER-EL vs. COCKRELL, 123 S.Ct. 1029, 1039 (2003).

70. At this juncture, Movant Petters believes the above facts and

law has supported and persuaded this Court that another reasonable jurist could debate and come to a different conclusion. The foregoing cases illustrate that jurists have in fact come to a different conclusion, on precisely the same facts.

ISSUE/GROUND TWO (2):

REASONABLE JURISTS COULD DIFFER WITH, OR WOULD FIND DEBATABLE OR WRONG, THE DISTRICT COURT'S DENIAL OF RELIEF ON MOVANT PETTERS CLAIM THAT "DEFENDANT PETTERS' SENTENCE IS UNCONSTITUTIONALLY CRUEL AND UNUSUAL INSOFAR AS IT IS DISPROPORTIONATE TO THE CRIMES OF CONVICTION".

71. Judge Kyle correctly stated Movant's question within the December 5, 2013, "MEMORANDUM OPINION AND ORDER", pages 18 thru 20, "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."

72. Judge Kyle addressed the merits of Movant claim, by stating "Hence, successful challenges to the proportionality of particular sentences are 'exceedingly rare.' This is not one such 'exceedingly rare' case." The Court also stated, "The sheer size and scope of the fraud and Petters' 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 the crimes. Petters, of course, received far less." "Simply put, the Court concludes Petters' 50-year sentence did not flout the Eighth Amendment."

73. Movant's §2255 clearly stated, "Defendant Petters' sentence of 50 years, for an offense involving an estimated $900 million in losses to victims, *** is grossly disproportionate to any person similarly situated and is therefore both cruel and unusual."

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74. Examples of accomplices and/or co-conspirators convicted within

*** this action and sentences they received **AFTER PLEADING GUILTY**:

a. LARRY REYNOLDS: Reynolds was sentenced to 130 months;

b. DEANNA COLEMAN: Coleman was sentenced to 1 year & 1 day;

c. ROBERT D. WHITE: White was sentenced to 5 years;

d. GREG BELL: Bell was sentenced to 5 years;

e. JAMES WEHMHOFF: Wehmhoff was sentenced to home detention;

f. FRANK VENNES: Vennes was sentenced to 15 years;

g. BRUCE PREVOST: Prevost was sentenced to 7 years;

h. MICHELLE PALM: Palm was sentenced to probation; and

i. JIM FRY: **FRY WENT TO TRIAL AND WAS SENTENCED TO 17½ YEARS.**

*** **MOVANT PETTERS' WAS PUNISHED FOR EXERCISING HIS RIGHT TO STAND TRIAL:**

75. Movant Petters received a more severe sentence then his co-conspirators when he exercised his right to stand trial. **DISPARITY EXISTED** between the 50 year sentence Movant Petters received and those of Movant's co-conspirators which did not exceed 15 years for those who plead guilty and 17½ years for the only one that went to trial. The sentencing judge - Judge Kyle - did not offer an explanation during sentencing proceedings as to the substantial disparity in sentences imposed upon different individuals for engaging in the same and/or more severe criminal activity. See, U.S. vs. CAPRIOLA, 537 F.2d 319, 320-321 (9th Cir. 1976); U.S. vs. BISCHEL, 61 F.3d 1429, 1437 (9th Cir. 1995).

76. **FEDERAL SENTENCING GUIDELINES**: U.S.S.G. § 1B1.3(a), Title 18 U.S.C.A., the RELEVANT CONDUCT SENTENCING GUIDELINE provision directs a sentencing

*** court to sentence a defendant for **UNCHARGED CONDUCT GERMANE TO THE CHARGED-OFFENSE** by authorizing it to consider events before, during, and after the offense conduct. See, U.S. vs. JONES, 313 F.3d 1019, 1022-1023 (7th Cir. 2002). Also see, U.S. vs. PUGH, 25 F.3d 669, 676-677 (**8th Cir. 1994**)("... he also was convicted of one count

of **CONSPIRACY**, an offense that **NECESSARILY INCLUDES** quantities other than the 2.91 grams attributable to the four distribution counts." Therefore, the district court **MUST CONSIDER** conduct for which he is convicted **AND HIS OTHER RELEVANT CONDUCT**. See, U.S.S.G. § 1B1.3(a)(1).)

LEGAL CASES TO SUPPORT THE ABOVE:

77. U.S. vs. CAPRIOLA, 537 F.2d 319, 320-321 (9th Cir.)(Rehearing and Rehearing En Banc Denied 1976)(If more severe sentence is imposed on defendant because he has exercised his right to stand trial, his constitutional rights have been infringed)(Sentencing Judge must record explanation why there is a substantial disparity in sentences imposed upon different individuals for engaging in the same criminal activity. Id. at 321).

78. U.S. vs. MONROE, 943 F.2d 1007, 1017-1018 (9th Cir. 1991)("We have since limited CAPRIOLA to situations in which the defendant's constitutional right to stand trial is implicated. Id. at 1018).

79. U.S. Vs. BOSHELL, 952 F.2d 1101, 1107-1109 (9th Cir. 1991) (case remanded for a statement explaining how much, if any, departure is justified based on the disire to equalize the co-defendant's sentences.).

80. U.S. vs. BISCHELL, 61 F.3d 1429, 1437 (9th Cir. 1995)(same).

81. U.S. vs. THOMPSON, 51 F.3d 122, 126-127 **(8th Cir. 1995)**(same).

SUMMARY OF THE ABOVE:

82. Movant Petters was prejudiced when he exercised his CONSTITUTIONAL RIGHT TO STAND TRIAL, as Movant Petters received a longer sentence than persons equally positioned within the conspiracy.

CONCLUSION:

83. This Court must consider issuing a Certificate of Appealability

as Movant Petters clearly presents a question of "DEBATABILITY" regarding the resolution of the above ISSUE/GROUND TWO (2). See, MILLER-EL vs. COCKRELL, 123 S.Ct. 1029, 1039 (2003).

84. At this juncture, Movant Petters believes the above facts and law has supported and persuaded this Court that another reasonable jurist could debate and come to a different conclusion. The foregoing cases illustrate that jurists have in fact come to a different concludion, on precisely the same facts.

RELIEF:

85. For all the above-stated reasons, Movant Petters requests that this Court issue a "CERTIFICATE OF APPEALABILITY" to Movant on all of the above issues/grounds presented.

86. I THOMAS JOSEPH PETTERS, declare under the penalty of perjury that the foregoing is true and correct. See, Title 28 U.S.C. §1746.

EXECUTED ON: March 18, 2014.

THOMAS JOSEPH PETTERS, Pro Se
Reg. No. 14170-041
U.S. Penitentiary Leavenworth
P.O. Box 1000
Leavenworth, Kansas 66048-1000

BY: John Gregory Lambros, JailHouse Lawyer
Reg. No. 00436-124
U.S. Penitentiary Leavenworth
P.O. Box 1000
Leavenworth, Kansas 66048-1000
Website: www.Lambros.Name

ADDITIONAL EXHIBIT:

EXHIBIT H: (July 8, 2013, "DEFENDANT'S REPLY IN OPPOSITION TO GOVERNMENT'S RESPONSE", by Movant Petters Attorney Steven J. Meshbesher)

*** **PLEASE NOTE, EXHIBIT H, contains the following "MEMORANDUM's" from Attorney Jon Hopeman, as to topics discussed during "CONFERENCES WITH TOM PETTERS IN THE U.S. ATTORNEY'S OFFICE", on the following dates:**

a. OCTOBER 27, 2008; (See, Exhibit A)
b. November 7, 2008; (See, Exhibit B)
c. November 7, 2008; (See, Exhibit C)
d. December 12, 2008; (See, Exhibit D)
e. AFFIDAVIT OF MOVANT PETTERS; (See, Exhibit E)

***** **WHY DON'T ANY OF THESE "MEMORANDUMS" STATE ONE (1) WORD ABOUT A "PLEA OFFER"!?!** *****

Felhaber Larson Fenlon & Vogt

A Professional Association – Attorneys at Law

MEMORANDUM

TO: Thomas J. Petters File

FROM: Jon Hopeman

DATE: October 28, 2008

RE: October 5, 2008 – Telephone Conference with John Marti

Our File No: 24634.001

On October 5, 2008, John Marti told me that Mr. Petters was abusing prescription drugs, using narcotics, losing tens of millions of dollars at gambling, and was a sex addict engaged in multiple prostitution experiences. The money laundering may be 25 billion. He stated that the government was willing to agree to a 30 year cap, leaving the amount of loss open, or stipulating to the amount of loss. He stated that he was not offering a 5K.

EXHIBIT A.

Felhaber Larson
Fenlon & Vogt

A Professional Association – Attorneys at Law

MEMORANDUM

TO: Thomas J. Petters File

FROM: Jon Hopeman

DATE: October 28, 2008

RE: October 5, 2008 – Telephone Conference with John Marti

Our File No: 24634.001

On October 5, 2008, I received a telephone call from John Marti. Mr. Marti reiterated his offer of a 30 year cap. He stated that he wanted to meet tonight to show us the evidence that he intended to put on at the detention hearing.

EXHIBIT B.

Felhaber Larson
Fenlon & Vogt

A Professional Association – Attorneys at Law

MEMORANDUM

TO: Petters File

FROM: Jon Hopeman

DATE: January 30, 2009

RE: December 10, 2008 - Conference with Tom Petters

Our File No: 24634.001

On December 10, 2008, I met with Mr. Petters in the U.S. Attorney's Office.

We discussed the defense theory of the case.

Mr. Petters stated that he did not run the day to day operations of the company. He stated that a few years ago he paid Bob White $6 million dollars to leave Petters Company, Inc. as an employee. However, White continued to run PCI day to day with Coleman.

Mr. Petters stated that there will be little documentary evidence of requests for advice from Mr. Petters by Coleman and White.

Mr. Petters stated that he had no time to make decisions, any decisions the past two years. He stated he did not even go to the Sun Country or Polaroid board meetings for the past two years.

Mr. Petters stated that he later learned that Coleman and White had formed a company called Onkka Funding to siphon money out of PCI.

I asked Mr. Petters why Bob White owned 1% of PCI. Mr. Petters stated that he believed that this was a way to give Tom Petters confidence in its legitimacy. To give him the impression that White would be overseeing it as part of something that he owned. He stated that he felt if White owned part of it he could turn it over to White and it would be in good care.

A witness named Stuart Cohn can document that White said that he would blackmail Petters. He told this to Stuart Cohn at the time that Tom Petters acquired Polaroid. Cohn hated Bob White. Stuart Cohn sent Mr. Petters and e-mail at the time of his arrest. Mr. Petters stated that he was working on purchasing Circuit City in a deal with Stuart Cohn.

EXHIBIT C.

Mr. Petters stated that a gloss on the defense was that no one of the investors ever came to him and stated that they checked with Walmart or another retailer and learned that there were no goods. Had this happened, he would have addressed the problem much earlier.

Part of the defense theme should be, according to Mr. Petters, that Coleman "tasted champagne and no longer liked beer. I liked her and trusted her."

Mr. Petters stated that if he did not care about the creditors, he would have bankrupted the whole enterprise months before the search warrants.

I asked Mr. Petters why he didn't turn White and Coleman in. He stated that he chose to believe that they were giving sufficient information to Wehmhoff and others to right the ship.

I also informed Mr. Petters in our meeting that we had received no plea offer from the government, despite the fact that some weeks ago, after our November proffer session, John Marti told me that he would be making an offer.

EXHIBIT C.

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Felhaber Larson Fenlon & Vogt

A Professional Association – Attorneys at Law

MEMORANDUM

TO: Petters File

FROM: Jon Hopeman

DATE: January 30, 2009

RE: December 17, 2008 – Meeting with John Marti

Our File No: 24634.001

On December 17, 2008, I met with John Marti in the skyway at Caribou coffee shop.

I asked Mr. Marti whether there was anything wrong with Mr. Petters' proffer delivered in late November. He stated that there was nothing wrong with the proffer, it was just that the government already had all of the information that Mr. Petters could provide. He also stated that the U.S. Attorney's Office was taking a very hard position with Mr. Petters, considering him one of the most significant white collar criminals in the history of the district.

I then made a long recitation to Mr. Marti of all of the cooperation that Mr. Petters had given the government since late September. I told him that in my view we did not get anything for it. I told him that Mr. Petters was in no better a situation than if I had fought the government tooth and nail at every turn. I told him that I was very suspicious about the fact that Mr. Petters was getting a different judge than all of the other defendants.

Mr. Marti did not respond to my claim that Mr. Petters' cooperation had not yielded anything. He did not disagree with that statement either. He told me that the government did not know why we drew Judge Kyle when everyone else drew Judge Magnuson.

I told Mr. Marti I wanted an offer from the government. He stated that the offer was a 30 year cap, with the guidelines calculations to remain open. I told Mr. Marti I wanted him to release Mr. Petters either now, or if he plead guilty, at that time. Mr. Marti stated that there was a lot of resistance in the U.S. Attorney's Office to the idea of releasing Mr. Petters. He acknowledged that he had told me back in October after Mr. Petters' arrest that if Mr. Petters plead guilty, Mr. Petters could approach the judge about release.

EXHIBIT D.

I told Mr. Marti that as a matter of personal pride, I did not believe that I could advise Mr. Petters to plead guilty to a 30 year cap. I stated that this suggested that 30 years was an appropriate sentence. I told him that my professional integrity would not allow me to do this.

EXHIBIT D.

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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. Meshbesher, Kevin M. Gregorius, Adam T. Johnson, Meshbesher & 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, arguing that his trial lawyers – all three of them – failed to inform him of an alleged

EXHIBIT E.

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- "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." (Riensche 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

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.)

EXHIBIT E.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
No. 08-CR-364 (RHK/AJB)

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DECLARATION OF JON M. HOPEMAN

THOMAS JOSEPH PETTERS,

Defendant.

Pursuant to this Court's Orders dated May 13, 2013 (Dkt. 581), May 16, 2013 (Dkt. 583), and May 20, 2013 (Dkt. 590), I, Jon M. Hopeman, declare the following:

I. My Background

1. I am an attorney at law and have been licensed to practice in the Minnesota state and federal courts since October of 1976. I have practiced law in Minnesota continuously since then.

2. From 1976 to 1983, I was a full-time clinical teacher at the University of Minnesota Law School. Among the courses I taught in 1982 and 1983 was a survey course called Professional Responsibility. This course covered, among other subjects, the obligation of a criminal defense lawyer to communicate fully with the client, especially with respect to plea offers, as the decision to plead guilty is exclusively reserved to the criminal defendant, not the attorney.

3. I was an Assistant United States Attorney in Minneapolis from 1983 to 1994. I prosecuted numerous offenses. Since leaving the United States Attorney's

hire add'l attorney to get him released?

wants to see his kids + folks.

I will pledge every damn thing I own to get out of here.

47. This note shows that as of December 15, 2008, Mr. Petters wanted me to know he would pledge all his assets to get released. He wanted me to hire another attorney to try to secure his release. As I describe more thoroughly below, I hired Mr. Engh shortly after this conversation.

48. As documented in Exhibit D to Mr. Petters' May 10, 2013 Memorandum, on December 17, 2008, I discussed the government's proposed 30-year cap of imprisonment again with Mr. Marti. I did tell Mr. Marti that as a matter of personal pride I could not advise Mr. Petters to plead guilty to a 30-year cap. In my view, pleading guilty to a 30-year cap would suggest that 30 years was an appropriate sentence. I felt that this was too much time. I informed Mr. Marti that my professional integrity would not allow me to recommend such an offer to Mr. Petters. However, I did discuss the government's proposed 30-year cap of imprisonment with Mr. Petters on numerous occasions.

49. Attached as Exhibit 17 are my handwritten preparation notes which I made before the meeting with Mr. Marti on December 17, 2008, which is also described in my dictated memo attached to Mr. Petters' May 10, 2013 § 2255 Petition as Exhibit D. These handwritten notes provide additional detail not contained in the dictated memorandum, Exhibit D. These notes read in pertinent part as follows:

* * *

EXHIBIT F. 38

What I want

is an offer

if you want me to get him to make an offer, I will try.

* * *

per Tom: tell Marti a Sgt. came up to him + said Wehmhoff gets another judge.

: I did want to fuck over Bob White b/c he fucked up a lot of people

50. As these handwritten notes show, I told Mr. Marti, among many other things, that I wanted an offer from the government that included a cap of imprisonment less than 30 years, and if they would not make an offer, I wanted to know if the government wanted Mr. Petters to make a counteroffer. Mr. Marti would not budge from his already-proposed 30-year cap of imprisonment, and he was not interested in any counteroffer Mr. Petters might make with respect to the term of imprisonment. The last note quoted above shows that I had a specific discussion with Mr. Petters about this agenda, and he added his own two items. Again, I made Mr. Petters fully aware of all of my messages to the government, and of all their messages to me.

51. As of January 2009, the government stopped bringing Mr. Petters to the courthouse to meet with me. I resumed meeting with him in the Sherburne County jail where he was detained.

52. In late December 2008, when it became clear to me that the case would most likely not settle, I hired Paul Engh to assist me as a co-trial attorney on the case. From late December 2008, Mr. Engh, Mr. Riensche, and I began to earnestly prepare for

EXHIBIT F.

trial. By July 2009, we had a better understanding of Mr. Petters' exposure. By then we understood that there was a strong chance that he would be convicted. We conveyed this message to him repeatedly. We had a number of detailed discussions with him about whether he should plead guilty. One of these discussions was on July 16, 2009. Attached as Exhibit 18 are three pages of notes I made during a meeting that Mr. Engh and I had with Mr. Petters on July 16, 2009 in the Elk River jail. I have redacted the parts that remain privileged. Since my handwriting is not the best, here is what these notes say:

7/16/09 – Tom Petters/Engh/JMH @ Elk River

Paul's discussion with Marti regarding potential plea discussed.

* * *

I'll do 5-15.

* * *

I will –

1. Give up all I own.

2. Go through checks from other guys – help receiver locate assets.

* * *

I will offer 5 years – I am the fighter from hell – you should say if I am willing to capture 'em and go after hedges

* * *

Paul – figure out your bottom line –

Paul says only thing will work is 10-20. 5 is a non-starter.

85% rule explained.

EXHIBIT F.

40

* * *

Cries – part of me rather do life than admit something I didn't do –

When I say "I was just kidding" (I'm really guilty) I have to live w. daughter and sons – if I was gonna take a deal – I would plead no contest or nolo contendere.

Integrity

* * *

Paul – nice to have an out date.

"I'll sleep on it."

I want time on a bracelet with my family.

I want an opportunity to help the government.

Request meeting w. Docherty – if I help 'em get big $ - private

* * *

20
.85
10
160
17.0 6 mo halfway house 1 yr. CD treatment

53. This note shows that Mr. Engh discussed some of the terms of a potential plea agreement with Mr. Marti a short time before July 16, 2009.

54. Mr. Petters stated to us on July 16, 2008 that he was willing to agree to 5-15 years and would give up all he owned and would help the receiver locate missing assets. Mr. Petters then said in this conversation that he would offer to do five years and, to earn it, he was willing to cooperate with the government in going after the hedge funds, that is, his creditors.

EXHIBIT F.

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

United States of America,

Plaintiff,

vs.

File No. 08-CR-00364 (RHK/AJB)

MEMORANDUM IN SUPPORT OF MOTION TO VACATE OR SET ASIDE SENTENCE AND FOR NEW SENTENCING HEARING IN ACCORDANCE WITH 28 U.S.C. 2255

Thomas Joseph Petters,

Defendant.

FACTS

On October 2, 2008, a Complaint was filed in the U.S. District Court for the District of generally alleging Defendant Thomas Petters' complicity in a fraud scheme. The next day, on October 3, 2008, the Government requested by Motion that Defendant Petters be arrested/detained, and that a detention hearing be continued for a period of three days. The Court entered an Order for Temporary Detention on October that same day and Defendant Petters was taken into custody.

On October 5, 2008, Defendant Petters' attorney, Jon Hopeman, spoke via telephone with Assistant U.S. Attorney John Marti. Mr. Marti informed Mr. Hopeman that the Government would offer Defendant Petters a 30-year sentencing cap in exchange for his plea of guilty, with the amount of alleged loss to remain open and without any motion for downward departure on the part of the Government in accordance with section 5K of

EXHIBIT G.

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ARGUMENT

I. Defendant Petters received ineffective assistance of counsel.

A defendant has been deprived of their Sixth Amendment right to effective assistance of counsel when "counsel's representation fell below an objective standard of reasonableness" and the poor performance prejudiced their defense.[10] Defendant Petters' former attorney, Jon Hopeman, provided constitutionally deficient counsel when he failed to communicate a plea offer to Defendant Petters prior to trial. In the case of Missouri v. Frye[11], accepted for review and decided well after Defendant Petters' conviction and during the pendency of his direct appeal, the U.S. Supreme Court addressed this precise issue for the first time. Specifically, the Court stated as follows:

> The State's contentions are neither illogical nor without some persuasive force, yet they do not suffice to overcome a simple reality. Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas. ... The reality is that plea bargains have become so central to the administration of the criminal justice system that **defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages**. Because ours "is for the most part a system of pleas, not a system of trials," ... it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process. "To a large extent ... **horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long.** That is what plea bargaining is. It is not some adjunct to the criminal justice system; **it *is* the criminal justice system.**"[12]

As for the first prong of the Strickland test, the Court ruled that, as a general rule, defense counsel has an affirmative duty to communicate formal offers for settlement from the prosecution to the accused defendant. If defense counsel fails to do so either entirely or before a time-limit for acceptance has lapsed, the defendant has received

10 Strickland v. Washington, 466 U.S. 668, 687-88 (1984).
11 Missouri v. Frye, 132 S.Ct. 1399, 182 2.L.Ed.2d 379 (2012).
12 Id. at 1407 (internal citations omitted) (emphasis added).

EXHIBIT G.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

United States of America,

Plaintiff,

vs.

File No. 08-CR-00364 (RHK/AJB)

DEFENDANT'S REPLY IN OPPOSITION TO GOVERNMENT'S RESPONSE

Thomas Joseph Petters,

Defendant.

The Government's argument in opposition to Defendant Petters' Motion to Vacate or Set Aside Sentence is, essentially, as follows: 1) All plea overtures extended by the Government were communicated to Defendant Petters by defense counsel (negating the ineffective assistance prong of the *Strickland* test); 2) The Government did not extend a formal offer to Defendant Petters or his defense counsel (negating the prong of prejudice)[1]; 3) Defendant Petters never would have accepted the plea offer but was intent on going to trial (further negating the prong of prejudice)[2]; and 4) Defendant Petters' Eighth Amendment claim is both legally insufficient and procedurally precluded.

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1 Government's Response In Opposition to Defendant's Motion to Vacate or Set Aside Sentence Pursuant to 28 U.S.C. § 2255 (Government's Response), pages 14-15.
2 Id., pages 16-19.

EXHIBIT H.

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ARGUMENT

A. Defendant Petters was never informed about the Government's offer of a 30-year sentencing cap.

The initial dispute in this case seems to be the question of whether or not Defendant Petters was informed of the Government's offer of a 30-year sentencing cap. In rebuttal of Defendant Petters' assertion (as buttressed by an independent affidavit from Shauna Kieffer), the Government relies primarily on a Declaration of Jon Hopeman (with 40 attached exhibits) and the additional Declarations of Paul Engh, Eric Reinsche and William O'Keefe.[3] The latter three of those Declarations are largely nonsubstantive and merely parrot the assertion(s) made by Mr. Hopeman that he discussed the 30-year cap with Defendant Petters on several occasions, without providing any specificity.[4] The meat of the Government's argument in this respect is contained in Mr. Hopeman's Declaration.

Mr. Hopeman states that he specifically informed Defendant Petters of the offer for a 30-year cap on four dates: October 27, 2008, November 7, 2008, December 10, 2008, December 12, 2008 and July 20, 2009.[5] As for October 27, 2008, Mr. Hopeman provides no documentation or support for his claim. His internal memorandum regarding that meeting makes no reference of any discussion regarding a 30-year cap.[6] As for November 7, 2008, Mr. Hopeman has provided a heavily redacted copy of handwritten

3 Government's Response, Exhibits 2, 3 and 4.
4 It should be noted that the Government qualifies Mr. Petters first Affidavit as containing no more than a "self-serving bare bones assertion" (See Government's Response, page 18), while it simultaneously provides at least three such Declarations to support it's own argument.
5 Government's Response, Exhibit 1, pages 6, 9, and 16.
6 See Memo dated November 10, 2008, Attached as Exhibit A.

EXHIBIT H.

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notes from a meeting that occurred with Mr. Petters at the U.S. Attorney's Office.[7] In particular, Mr. Hopeman claims that, at the November 7th meeting, Mr. Petters provided information regarding three individuals "that he wanted me to present to the government in exchange for a better deal than the 30-year cap that the government had proposed."[8] Nowhere in the handwritten notes is there any indication that the Government's offer had been discussed or even mentioned.[9] Further, two highly detailed internal memoranda regarding that same meeting (likely created with assistance of the hand-written notes) also contain no mention of a 30-year cap. Rather, the meeting centered on Defendant Petters' provision of information to Mr. Hopeman following Mr. Hopeman's question of "what it was that he brought to the government's table to assist in the prosecution of others"[10] The meeting was not focused on obtaining a better deal per se, but was focused on "what it is that he [Petters] could bring to the table to make himself useful to the government."[11]

As for December 10, 2008, Mr. Hopeman attempts to explain a memo regarding that meeting in which he states that "I also informed Mr. Petters in our meeting that we had received no plea offer from the government...."[12] In particular, Mr. Hopeman suggests that when he said "no plea offer" he was referring to a theoretical offer he had expected the Government to make (but which never materialized) following a November proffer meeting.[13] This post-hoc, self-serving explanation is blatantly contradicted by the

7 Government's Response, Exhibit 1, pages 7 and 42-47.
8 Id. at page 9.
9 Id. atExhibit 1 pages 42-47.
10 See Memo dated November 10, 2008, Attached as Exhibit B.
11 See Memo dated November 17, 2008, Attached as Exhibit C.
12 Government's Response, page 15; also see Defendant's Memo, Exhibit C.
13 Government's Response, Exhibit 1, pages 15-16.

EXHIBIT H.

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black and white evidence. If such were true, we would expect Mr. Hopeman's internal memo to read that "no new offer" had been made, or that the Government "had not yet made a better offer than 30 years."

As for the December 12, 2008 meeting, Mr. Hopeman states unequivocally that "I discussed the government's proposed plea agreement with Mr. Petters, including the government's proposed 30-year cap of imprisonment."[14] In support, Mr. Hopeman has attached another highly redacted copy of handwritten notes which he refers to as an "agenda" for the December 12th meeting. That single page, redacted note does mention a "plea agreement."[15] But simply because Mr. Hopeman wrote out an agenda for the meeting does not mean he followed the agenda to a tee or specifically discussed the Government's offer. His far more detailed internal memorandum regarding that meeting makes no mention that the offer was discussed or even raised. Instead, it appears that Mr. Hopeman and Defendant Petters discussed a number of things such as "rings on the insurance schedule", Deanna Coleman's divorce records, Robin Anderson and the Bob White Company. But there is no indication that the Government's offer was discussed or made known to Mr. Petters.[16]

The Declaration goes on to say that Mr. Hopeman discussed the "proposed 30-year cap of imprisonment with Mr. Petters on numerous occasions", though very little (if any) specificity regarding these occasions is provided.[17] For instance, Mr. Hopeman states that both he and Mr. Engh "informed Mr. Petters that the government's only

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14 Id. at 16.
15 Id. at 61.
16 See Memo dated January 30, 2009, Attached as Exhibit D.
17 See, e.g., Government's Response, Exhibit 1, page 17

EXHIBIT H.

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proposal remained a cap of 30 years in prison", but is vague as to how or when that conversation occurred.[18] On July 20, 2009, Mr. Hopeman states that he and Mr. Engh met with Defendant Petters at the Sherburne County Jail, during which Defendant Petters suggested a deal of 15-20 years.[19] He then states that "[t]his 15-to-20 years offer was conveyed to the government at some point by Mr. Engh", and that they informed Defendant Petters "that the government's only proposal remained a cap of 30 years in prison ...."[20] It is wholly unclear whether this alleged relay of the Government's offer was made the same day (July 20, 2009) or later at an unspecified date. But Mr. Hopeman's own heavily redacted handwritten notes from that meeting make no mention of any discussion regarding the 30-year offer.[21]

In short, Mr. Hopeman's Declaration often contradicts his own detailed internal memoranda and serves merely as an attempt to save face. It is flatly contradicted not only by Mr. Petters' original affidavit, but also by the affidavit of Shauna Kieffer.[22] Further, Defendant Petters has provided undersigned counsel with a more detailed affidavit describing the circumstances under which he first learned of the Government's offer. Defendant Petters affirms that the very first time the 30-year cap was even raised was during a meeting in the U.S. Marshall's holding cell immediately following his trial and conviction. After the verdict was read and entered, he was visited by Mr. Hopeman in the holding cell at which time Mr. Hopeman stated "Well, we had to go to trial we could only

18 Id., page 23.
19 Id., page 22.
20 Id., page 23.
21 Id., page 68.
22 Defendant's Memo, Exhibits E and F.

EXHIBIT H.

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get you a 30-year minimum deal."[23] Defendant Petters states that Mr. Hopeman did not elaborate regarding the 30-year deal, and further affirms that prior to trial he had never been informed of the Government's offer.[24] Defendant Petters also states he did not ask Mr. Hopeman to elaborate or provide any documentation regarding the offer at that time, though he did ask much later in 2012 during the pendency of his direct appeal.[25] The Government's insistence that a handwritten letter dated June 10, 2012 from Defendant Petters to Mr. Hopeman "clearly establishes" that Defendant Petters was aware of the offer prior to trial is laughable.[26] The evidence demonstrates quite the opposite. At a minimum, there is a genuine issue of fact to be litigated and determined in a setting where the interested parties are subject to sworn testimony and cross-examination, and during which the Court can make an assessment as to the veracity of the claims.

B. The Government did tender a formal offer for a 30-year sentencing cap.

The Government concedes that Asst. U.S. Attorney John Marti had at least three discussions with Mr. Jon Hopeman during which the Government extended an offer of a 30-year sentencing cap. Those specific communications were made on October 5, 2008 and December 17, 2008.[27] The Government nonetheless disputes that the offer was ever formally made, arguing that other than "preliminary plea proposals … [t]here was no agreement concerning the charges, the factual basis … relevant conduct, guideline range stipulations, potential fines … or the other myriad issues that are resolved

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23 See Affidavit of Thomas Petters, Attached as Exhibit E, page 1.
24 Id., pages 1-2.
25 Id., page 2.
26 Government's Response, page 13.
27 Government's Response at page 3, citing Defendant's Memo Exhibits A, B and D.

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before a formal plea agreement is offered."[28] The Government cites to two cases for the general proposition that no prejudice exists if no formal offer is extended: Missouri v. Frye, and Kingsberry v. United States.[29] While both cases do generally stand for that exact proposition, the matter is not as simple as the Government would have the Court believe and neither case is specifically dispositive of the instant matter.

The Frye case, of course, forms the general basis of Defendant Petters' argument: that the failure of counsel to inform the accused of a plea offer prior to trial is ineffective assistance of counsel. In Frye, the prosecution sent two letters to defense counsel offering either a 3-year sentence, stayed for a term of probation, in exchange to a plea to the felony offense of driving with a revoked license with a recommendation for a 10-day jail sentence as a condition of probation or, alternatively, to reduce the felony to a misdemeanor with a 90-day jail sentence in exchange for a plea.[30] Defense counsel did not communicate the offers to the defendant and the offers expired. Nothing in the decision indicates that any standard, specific terms (total length of probation time, other terms/conditions of probation beyond executed jail time, financial penalties, etc.), guideline calculations or factual bases were spelled out in the written offer(s). Indeed, unlike the instant case where AUSA Marti communicated the offer of a 30-year cap **three times**, the prosecuting attorney in Frye seemingly sent defense counsel one simple letter. The Frye Court did not discuss or elaborate as to particularly how or why the offer was "formal".

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28 Id. at page 15.
29 Id. at page 15, citing Missouri v. Frye, 132 S.Ct. 1399, 1408 (2012), and Kingsberry v. United States, 202 F.3d 1030, 1032 (8th Cir. 2000).
30 Frye, 132 S.Ct. at 1404.

EXHIBIT H.

5°

In Kingsberry, the defendant alleged that an offer was made and communicated to him but that his trial counsel failed to adequately advise him during the process (with regard to his status as a career offender, among other things).[31] The government and trial counsel claimed that no formal offer materialized, while the defendant alleged an offer of a five-year sentence in exchange for a guilty plea and cooperation, while a separate affidavit of his wife alleged a fifteen-year sentence without cooperation.[32] In essence, Kingsberry involves a situation where intial proffer sessions completely broke down when the government determined that the defendant was being untruthful. As a result, both the government and defense counsel denied that any offers had ever been extended.[33] Kingsberry's motion for relief pursuant to 28 U.S.C. § 2255 was therefore denied without a hearing, although one dissenting judge on the appellate panel disagreed and opined that Kingsberry was at least entitled to an evidentiary hearing based on the competing affidavits.[34]

Compare both of those cases, then, with the case of Wanatee v. Ault.[35] In Wanatee, among other issues, District Court for the Northern District of Iowa considered a petition for habeas corpus alleging ineffective assistance of counsel. Among the specific issues considered was the question of whether or not a formal offer had ever been extended to the defendant. The District Court found in the affirmative, holding as follows:

> It is undisputed that there was no written offer of a plea agreement and that no written plea agreement was ever prepared or executed. ... Nevertheless, it is clear from the record that Wanatee's trial counsel initiated plea discussions shortly after Wanatee was arrested by asking the

31 Kingsberry, 202 F.2d at 1031-32.
32 Id. at 1031 and 1033; also see Kingsberry, Arnold, J. dissenting, at page 1034.
33 Id. at pages 1031-32.
34 Id. at 1031; Kingsberry, Arnold J., dissenting, at 1033.
35 Wanatee v. Ault, 101 F.Supp.2d 1189 (N.D. Iowa, 2000).

EXHIBIT H.

> prosecutor in charge for a plea offer, and that an oral plea offer – under which Wanatee would be allowed to plead guilty to second degree murder if he cooperated adequately with the prosecution – was then made by the prosecutor, with a deadline for acceptance before the trial information was filed. ... What is also clear ... is that, based on their long working relationship and mutual understanding of a "shorthand" negotiation process, trial counsel and the prosecutor both understood that the plea agreement, even if accepted by Wanatee, was contingent upon Wanatee providing sufficiently useful cooperation, or the offer would be "withdrawn."
>
> ...
>
> This negotiation process is different from that employed in *Kingsberry*. In *Kingsberry*, the defendant first made a proffer of information in an attempt to initiate plea negotiations, the government found the proffer inadequate, and the court found that the government had made no formal offer in response to the defendant's proffer of information. ... In Wanatee's case, on the other hand, the acceptance of the government's plea offer by the defendant would have preceded the defendant's proffer of information, even though the agreement offered was contingent upon the government's conclusion that Wanatee's subsequent proffer was adequate, or the plea offer would be "withdrawn."
>
> ...
>
> In this case, the court finds that the prosecutor undoubtedly made a plea offer to Wanatee to plead guilty to second degree murder, albeit an offer contingent upon Wanatee providing adequate "cooperation". Therefore, the initial requirement of *Kingsberry*, "that to establish ... prejudice, the petitioner must begin by proving that a plea agreement was formally offered by the government,", ... has been satisfied in Wanatee's case.[36]

In short, the prosecution in Wanatee made a verbal offer allowing for a plea to a reduced charge of second degree-murder (as opposed to first-degree murder) in exchange for cooperation. There is no indication from the record that any details beyond those basic elements were discussed (or agreed to) by the prosecution and defense counsel, nor is there any indication that the prosecution ever suggested or offered any further detail. The similar is true in the instant case. Mr. Marti offered a 30-year sentencing cap twice in the same day shortly

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36 Id. at 1202-1203.

EXHIBIT H.

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following Defendant Petters' arrest.[37] Mr. Hopeman then specifically asked Mr. Marti for a better offer two and a half months later, and Mr. Marti repeated that the Government would only offer a 30-year sentencing cap.[38] Mr. Hopeman is a seasoned criminal defense attorney with a long history of a working relationship with the U.S. Attorney's Office. Indeed, he spent eleven years working as an Assistant U.S. Attorney in this same district. Likewise, Mr. Marti is a highly experienced Assistant U.S. Attorney. Both knew what was at stake.

The absent minutiae to which the Government cites as proof that no formal plea offer was made[39] are legally irrelevant in this situation. No court has yet required that every possible element or contingency be hammered out and agreed upon before a "formal offer" is made, nor should they. The Wanatee case, in conjunction with the Kingsberry and Frye cases, clearly demonstrate that a formal offer **was** extended to Defendant Petters' trial counsel and, as such, prejudice has been shown.

C. Defendant Petters would have accepted the Government's offer.

The Government next argues that Defendant Petters was not prejudiced by trial counsel's ineffectiveness because he continuously denied guilt throughout the pretrial and trial stages and because he "has offered nothing to support his claim that he would have pled guilty" other than his affidavit to that effect.[40] The Government relies to a large extent on the case of Engelen v. United States for the

37 See Memorandum in Support of Motion to Vacate or Set Aside Sentence and for New Sentencing Hearing in Accordance with 28 U.S.C. § 2255 (Defendant's Memo), Exhibits A and B.
38 Id., Exhibit D.
39 Government's Response, page 15.
40 Id. at 17-18.

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proposition that to show prejudice requires proof of objective, non-conclusory evidence that Defendant Petters would have accepted the Government's offer had he been aware of it.[41] The Government is correct insofar as the court in Engelen did reach that holding. However, their interpretation of the facts in Engelen as compared to the instant case is somewhat skewed. The Government notes that, in Engelen, "the record [was] completely barren of any evidence that Engelen would have acknowledged his guilt prior to trial."[42] But, unlike Defendant Petters, "Engelen made no direct assertion that he would have pled guilty if his trial counsel had provided him with additional information concerning the risks of going to trial."[43] Defendant Petters has made that direct assertion.

Beyond that, the Government's own submission is littered with examples demonstrating what can best be described as Defendant Petters' swinging emotions with regard to the choice of proceeding to trial or pleading guilty. For example, Mr. Hopeman listened to a recorded phone call between Defendant Petters and Dean Vlahos made on October 12, 2008, during which Defendant Petters said "I'm going to have to plead guilty to something or I'm going to be here the rest of my life."[44] On multiple occasions Defendant Petters specifically told trial counsel he would plead guilty in exchange for a 5-20 year sentence.[45] On July 20, 2009, Defendant Petters told Mr. Hopeman "I want to spare my family a trial – my daughter watched my bro get murdered – it matters to me what Jenny

41 Id., citing Engelen v. United States, 68 F.3d 238, 241 (8th Cir. 1995).
42 Government's Response, page 17, quoting Engelen, 68 F.3d at 241.
43 Engelen, 68 F.3d at 241.
44 Government's Response, Exhibit 1, page 6.
45 Id., pages 11, 23, 24. While this is not evidence specifically that Defendant would have accepted the 30-year sentencing cap, it is evidence of his willingness to plead guilty in exchange for something.

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thinks, what his sons think, more than getting out of prison."[46] Finally, there are Defendant Petters' own statements made at sentencing, to the effect that, to the best of his knowledge, the Government had not offered him any choice except to proceed to trial.[47]

The record here is not completely barren of objective evidence as was the case in Engelen, but is perhaps best described as demonstrative of Defendant Petters' conflicting emotions. The only objective evidence that speaks directly to the question of whether Defendant Petters would have accepted the offer had he known of its existence prior to trial is his own affidavit. There is more present here than in Engelen, and there is even more present than in the case of Burt v. Titlow, currently pending before the U.S. Supreme Court.[48]

D. Defendant Petters' Eighth Amendment claim is not procedurally precluded.

The Government correctly argues that, generally, the collateral Attack afforded by 28 U.S.C. § 2255 does not serve as a substitute for direct appeal.[49] Claims not raised on direct appeal may not be attacked collaterally unless the defendant can either demonstrate cause and prejudice or actual innocence.[50] The prejudice suffered has already been argued and established.[51] When compared to many similarly situated defendants, Defendant Petters' sentence is disproportionately harsh. As for the issue of cause, it is certainly no

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46 Id., pages 22, 69.
47 Transcript of Sentencing Hearing dated April 9, 2010 (Document 431), page 34.
48 Burt v. Titlow, No. 12-414, 133 S.Ct. 1457 (Mem) (February 25, 2013), reviewing the question of whether a the defendant's subjective testimony, standing alone, is sufficient to establish prejudice.
49 Government's Response, page 19, citing Thunder v. United States, 810 F.2d 817, 821 (8th Cir. 1987).
50 United States v. Frady, 456, 152, 170 (1982) and Bousley v. United States, 523 U.S. 614, 620-23 (1988).
51 See Defendant's Memo, pages 8-10.

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small matter that Defendant Petters' trial defense team was also responsible for his appeal. The Notice of Appeal was filed by Mr. Reinsche, the appellate briefs were prepared by Mr. Reinsche and Mr. Engh, and the arguments were conducted by Mr. Hopeman. This is telling because this same defense team did raise the issue of proportionality at sentencing.[52] The cause, in this case, is ineffective assistance insofar as appellate counsel was deficient in failing to raise the issue on direct appeal they specifically preserved at sentencing. This particular failure, under these circumstances, certainly falls below the objective standard of reasonableness against which counsel is to be measured.[53] The Court may properly consider Defendant Petters' Eighth Amendment claim.

52 See Defendant's Position With Respect To Sentencing (Document #390), pages 21-23.
53 See, e.g., Strickland v. Washington, 466 U.S. 668, 669 (1984).

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CONCLUSION

For all the forgoing reasons, and for all the reasons previously set forth in Defendant's original Memorandum in support of this motion, the requested relief should be granted.

Respectfully submitted,

MESHBESHER & ASSOCIATES, PA

By: s/ Steven J. Meshbesher

Steven J. Meshbesher
Attorney I.D. No. 127413
Kevin M. Gregorius
Attorney I.D. No. 0328315
Attorneys for the Defendant
225 Lumber Exchange Building
10 South Fifth Street
Minneapolis, Minnesota 55402
Telephone: (612) 332-2000

Dated: July 8, 2013

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Felhaber Larson Fenlon & Vogt

A Professional Association – Attorneys at Law

MEMORANDUM

TO: Thomas Petters File

FROM: Jon Hopeman

DATE: November 10, 2008

RE: October 27, 2008 – Conference with Tom Petters at U.S. Attorney's Office

Our File No: 24634.001

On October 27, 2008, Eric Riensche and I met with Tom Petters at the U.S. Attorney's office. We reviewed logs of telephone calls that Mr. Petters had placed from the jail to assorted relatives and friends. We also reviewed FBI 302s which the government divulged to us.

At the conclusion of the review, I told Mr. Petters that I was thinking of quitting his case because he has not listened to my advice. Even though he is detained because of a stupid telephone conference he had with Bob White, he has continued to make stupid telephone calls from the jail and to say stupid things, making it very difficult to defend him.

I was blunt, direct, and quite profane with Mr. Petters. I told him he could have any attorney he wanted to. I told him I was not going to be his attorney unless he listened to me. I left the meeting for twenty minutes telling Mr. Petters that I had to cool off.

When I returned to the meeting, I told Mr. Petters that our interview was over for the day and that we would meet the following day on October 28.

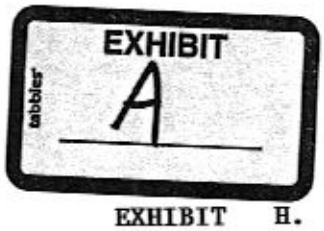

EXHIBIT H.

Felhaber Larson Fenlon & Vogt

A Professional Association – Attorneys at Law

MEMORANDUM

TO: Thomas Petters File

FROM: Jon Hopeman

DATE: November 10, 2008

RE: November 7, 2008 – Conference with Tom Petters

Our File No: 24634.001

On November 7, 2008, Mr. Petters and I met with Eric Riensche in the U.S. Attorney's office.

I asked him what it was that he brought to the government's table to assist in the prosecution of others.

This was one of the more productive sessions we have had.

Mr. Petters stated that he had lots of conversations with Frank Vennes in the past ten months beginning in November of 2007. He informed Vennes that payments on his receivables were late, which Vennes already knew because he was not receiving payments. He stated that Vennes wanted to believe that everything was alright. Vennes had a very idealistic outlook even when things were bad. Mr. Petters stated he is not all that aware of who Vennes' investors were, but he knows that Vennes was panicked and told Mr. Petters repeatedly that if his investors "blew up" then he and Tom Petters would be in jail. He said that Tom Petters did not want to be in the newspaper with Frank Vennes. He said that if things blew up Tom Petters should take the fall because Frank Vennes was going to get a pardon. He stated that Tom Petters should take the hit and that he would look out for Tom Petters and his family later. Vennes repeatedly said "if it's going to go down, let me know." Mr. Petters told Vennes that he suspected that White was committing a fraud. Vennes said to him "is it a little paper manufacturing company?" This conversation occurred two weeks before the raid in Mr. Petters' house. Mr. Vennes drove to the house in an older Oldsmobile or Pontiac in good condition. He had an elderly couple with him who remained in the car.

For the last 10 months, Mr. Petters was months behind in payments and hundreds of millions of dollars behind.

In the past 30 days, Bruce Prevost told him that he was very concerned that Frank Vennes, a convicted felon, was in the middle of this. Vennes knowingly told Palm Beach to tell their investors that everything was ok when it was not.

Vennes informed Mr. Petters (and this conversation is not on the undercover tapes) that Palm Beach borrowed $300,000,000 illegally for him. They have committed fraud upon their investors because they borrowed the money to patch the dike or the hole in the dam. Vennes was concerned that the auditors would quit and that everyone would go to jail. Vennes basically stated that Palm Beach lied to everyone for PCI and Petters.

Numerous times Mr. Petters told Mr. Vennes there was a problem with the receivables.

Mr. Petters told Mr. Vennes that he was going send his portfolio to Fortress to be bought out. Fortress declined because Vennes was a convicted felon. Vennes however continued to tell people that Fortress would buy him out, even after he knew they would not. Vennes was more concerned about the hedge fund in Florida being a problem than the individual investors.

Mr. Petters informed Vennes that he planned to go to Walmart.

Vennes had a real expressed fear of the hedge fund in Florida blowing up and of lawyers and accountants being called in and everything going to hell.

Mr. Petters call Bruce Prevost a day or two after the raid. Prevost was very concerned about why the government would release the search warrant affidavit (this was on the eve of its being released). Prevost told Mr. Petters that he employed the government but not to release the search warrant because they would destroy innocent companies and individuals if they did.

Mr. Petters also knows that Frank Vennes set up Fidelis. It was started with seed capital from Frank Vennes. It was a vehicle to attract investors. It was a non-profit so as to take advantage of the tax laws.

Vennes told Mr. Petters he should have his companies in Florida and not in Minnesota for tax advantage. Vennes donated millions of dollars for tax reasons.

Vennes had a 3% fee he charged the hedge funds that no one knew about. When Tom Petters signed the notes, there was a separate piece of paper through which Vennes collected a 3% fee. Vennes used to get this fee from Bell and Sabes. Vennes stated when things got really bad, that he was going to give up his commissions for awhile.

The last few weeks before the FBI raid, Mr. Petters gave Vennes $350,000 in a form of a loan so he could make his house and car payments.

Mr. Vennes is meticulously strategic. He dots his I's and crosses his T's. He is meticulous about not making mistakes. He is 51 years old.

Mr. Petters went on a slight digression and suggested that we talk to J.P. Bailey of Gottex because Bailey does not like any of the hedge funds.

We then talked about Greg Bell. Bell and Vennes were together in the beginning. Bell stayed at Vennes' house. Something then happened between Bell and John Fry at Arrowhead. This dispute may also have involved Brad Dennis.

Bell asked Mr. Petters for monies from any source. He was getting payments that were not really payments. Bell sent money to Petters which Petters immediately sent back to him making it look like Bell had return on an investment. An individual from Blue Capital in London was in Chicago. Mr. Petters owned Ubid a public company. This was at a board meeting. Greg Bell and Tom Petters knew that Bell's fund was upside down. They made the London investor feel good about being invested with Greg Bell.

Bell had an investor called Pentagon which had been shot down by the British SEC. Pentagon had been demanding money back from Bell for months. Bell had to raise $90,000,000 to get it back to Pentagon. Bell stated that if anyone found out he was unable to make this payment it would blow up his fund. Bell informed Tom Petters that he had received no payments from Tom Petters for 9 months. This surprised Tom Petters. This was at the end of July or so. It was at this time that Bell explained his redemption period. He stated that he needed to get more payments in. If he did not, his bank would call his loan. He stated that if the bank knew what was going on, he would be in trouble.

Three months before this in the presence of Camille Chee-awai, Bell told Mr. Petters that Mr. Petters had $350,000,000 equity in Bell's fund. Bell called Sandy Indahl and asked for the financial statements of Thousand Lakes. He then stated that she was doing the financial statements of Thousand Lakes wrong and Bell changed the financial statements. Mr. Petters had never seen this financial statement before. He stated that the $350,000,000 should be carried as equity. Sandy Indahl was carrying it differently. Bell redid the financial statement to show the $350,000,000 as an asset. This "equity" was "bullshit." For years, Mr. Petters had never had $350,000,000 in equity in Bell's fund. The only time Tom took advantage of this was when Thane Ritchie asked him for information about Bell's fund and he said that he had $350,000,000 in equity in that fund. Bell was thus showing his investors that Petters had put $350,000,000 in his fund.

Mr. Petters remembered that Mr. Bell had some kind of balloon payment due in 2002.

Mr. Petters said "Bell built a house of cards based on us telling him stories."

Mr. Petters did not profit from Bell. Bell gave big donations to his son's foundation.

Bell came to Palm Beach and visited Mr. Petters and White. They got him a reservation at the Four Seasons. This was in March or April. Camille Chee-awai was there. Bell asked them for more collateral.

White visited two or three times this last winter with Vennes without telling Mr. Petters.

Bell flew to Minnesota several times seeking answers. He stated that his fund did not have payments for nine months. Later he said that his fund had not received payments for 12 months.

Mr. Petters told Bell lots of times that he suspected fraud.

Bell told Mr. Petters that BJ's Wholesale owed him $525,000,000 in accounts receivable. This was absurd because Mr. Petters knew that this was more than BJ's total outstanding debt. Bell said this to him in April or May. White had sent Bell a letter from BJ's.

We talked a bit about James Fry. Fry was in trouble because did not reserve for a European tax in Arrowhead. Gottex was suing Fry. Fry needed money. Fry was going to give two vintage airplanes for security. Don Aron, telephone (713) 963-8300 of Aron Companies, the premier loan shark in the United States, used to lend money at 30%. Aron has a contract that he did to lend money to Fry.

Fry, Bell, and Acorn had a falling out. Brad Dennis, (612) 414-5455, has a lot of dirt on these guys.

We then talked about Thane Ritchie. Ritchie is really smart. He got in trouble with the SEC and paid $40,000,000 to end that investigation. Thane also has an insurance company that has problems in Florida. That company has lots of board meetings in the Cayman Islands. Thane does not fly on scheduled planes. Rather, he uses Net Jets which fly at chartered hours so his movements cannot be tracked. Thane has also told him to send text messages rather than e-mails because they cannot be tracked as well. Thane told him that the feds had tried to kill him a bunch of times. Thane Ritchie told him emphatically that if Ritchie's banks find out the condition of his fund, there would be hell to pay. He told Thane Ritchie that he would never pledge PCI collateral. Ritchie did not care. In recent weeks, Ritchie became like a rabid dog. He was an investor in Bell's fund. He was an original investor who put in $70,000,000. Mr. Petters stated that he has a hard time believing that Ritchie does not know that Bell's fund is infirm.

Felhaber Larson Fenlon & Vogt

A Professional Association – Attorneys at Law

MEMORANDUM

TO: Thomas Petters File

FROM: Jon Hopeman

DATE: November 17, 2008

RE: November 7, 2008 - Conference with Tom Petters in U.S. Attorney's Office

Our File No: 24634.001

Mr. Petters and I and Eric Riensche met in a conference room at the U.S. Attorney's Office on November 7, 2008.

I told Mr. Petters that I needed to speak to him about what it is that he could bring to the table to make himself useful to the government.

We began with Frank Vennes. Mr. Petters has had lots of conversations with Vennes since November of 2007. They talked many times about why the payments to Petters, Inc., and in turn from Petters, Inc. to the hedge funds were late. They also talked about Vennes' concerns about White.

Vennes wanted to believe that the purchase orders were real. He had a very idealistic outlook even when things were bad. Mr. Petters is not all that aware of who Frank Vennes' investors were but Vennes repeatedly said during this time that he was afraid his investors would "blow up" and that he and Tom Petters would be in jail. Vennes was panicked during this time. He said a number of times that Tom Petters did not want to be in the newspaper with Frank Vennes. He also said that Tom Petters should take the fall because Frank Vennes was going to get a pardon. Vennes stated that Petters should take the hit and Vennes would look out for Petters later, meaning he would take care of Tom Petters and his family financially. Vennes repeatedly said to Mr. Petters "if it is going to go down, let me know." Mr. Petters advised Vennes that he suspected that White was committing fraud. Vennes said "is it a little paper manufacturing company?" This was two weeks before the raid on September 24. Right before this conversation which occurred at Mr. Petters' house, Vennes had arrived in an old Oldsmobile or Pontiac vintage 1970s or 1980s and he had an elderly couple with him. The couple did not come into the house and was not present for the conversation.

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At the time of this conversation, Mr. Petters was months behind in his payments to Vennes' hedge funds and hundreds of millions of dollars in arrears.

Mr. Petters recalls that in the last 30 days before the raid, Mr. Prevost of Palm Springs Financial stated that he was very concerned about Vennes, a convicted felon, being involved.

Mr. Petters stated that Vennes knowingly told Palm Beach to tell their investors that everything was ok with Petters, Inc., while Vennes in truth knew that everything was not ok.

A conversation between Mr. Petters and Vennes which is not on tape occurred when Vennes said that Palm Beach had borrowed $300,000,000 illegally to cover Mr. Petters. Mr. Petters stated they were committing fraud because the borrowed the money to patch the dike, or the hole in the dam. Vennes also said that the auditors would quit and that Vennes and Petters would go to jail. Vennes also stated that the Palm Beach guys would go to jail too. Vennes said that Palm Beach had lied to everyone for PCI and Petters and Petters should therefore fix it any way he could.

Mr. Petters told Mr. Vennes numerous times in the period after November of 2007 that he believed there was a problem with his receivables and told him he thought it might be fraud.

Another way in which Mr. Vennes defrauded his investors is that Mr. Petters advised Mr. Vennes that he was going to send Vennes' portfolio to Fortress Bank to be bought out. At some point, Mr. Petters advised Mr. Vennes that Fortress Bank had refused to do the buyout. Vennes continued to tell his investors that Fortress was going to buy him out, long after he knew it was not true.

Mr. Petters observed that the Palm Beach hedge fund was more Vennes' concern than any individual investors were.

At one point, Mr. Petters told Mr. Vennes that he planned to go to Walmart to check on the validity of the receivables.

Vennes' big fear was that the hedge fund in Florida would "blow up." He kept saying that he lawyers and the accountants would then get involved and everything would collapse.

Palm Beach was very concerned about whether the government would release the search warrant affidavit after the raid. Mr. Petters spoke with Bruce Prevost on the telephone a day or two after the raid on September 24. Prevost asked why the government would release the affidavit. He told Mr. Petters that he had implored the government not to because doing so would destroy innocent companies.

Mr. Petters stated the Vennes set up Fidelis, which was started with seed capital from Frank Vennes. It was a vehicle to attract investors. Mr. Vennes stated that he was using it as a charity for tax advantage. Mr. Vennes told Mr. Petters he should have all of his companies in Florida and not in Minnesota for tax advantages. Mr. Vennes donated millions of dollars for tax breaks.

Mr. Petters also knows that Vennes had a 3% fee that he charged that no one knew about. When Mr. Petters signed the notes, there was a separate piece of paper in which Vennes preserved a right to collect a fee. Vennes used to collect this fee from Greg Bell and Sabes.

When problems with the receivables developed, Vennes advised that he was giving up his commissions for awhile.

Mr. Petters gave Vennes a $350,000 loan in the last few weeks before the search warrant because Vennes was unable to make his house and car payments.

Vennes was a very meticulous person. He thinks strategically. He dots his I's and crosses his T's. He is meticulous about not making mistakes. He is 51 years old.

We then went to the subject of Greg Bell. Bell and Vennes were together in the beginning. Bell stayed at Vennes' house.

Mr. Petters knows that some disagreement occurred among Bell, Jim Fry at Arrowhead, and Brad Dennis. He does not know the details.

Bell would ask Mr. Petters to get him money no matter how. Thus, he was getting payments that were not really payments. Mr. Petters remembers meeting with a fellow from Blue Capital in London. The meeting occurred in Chicago. Greg Bell was there. Mr. Petters owned Ubid which was a public company. They were at a board of directors meeting. At this time, Bell and Petters knew that Bell's fund was upside down. Nevertheless, they made the gentlemen from Blue Capital feel good about having been invested with Bell.

Bell had an investor called Pentagon which had been shut down by the British SEC. Pentagon asked for money back from Bell for months and months. Bell had to raise $90,000,000 to pay back Pentagon. Bell advised Mr. Petters that if anyone found out about Petters' receivables being late it would blow up his whole fund. Late in the game, Bell told Mr. Petters he had received no payments for 9 months. Mr. Petters was shocked to hear this and said "what?" This was at the end of July or so. Then Bell explained his redemption period to Mr. Petters. If he could not get more payments in, he feared that his bank would call his loan if the bank knew what was going on.

Approximately March of 2008, in the presence of Camille Chee-awai, Bell told Mr. Petters that Mr. Petters had $350,000,000 in his fund. This was news to Mr. Petters. In this context, Bell called Sandy Indahl and asked her for the financial statements for Thousand Lakes, which was the Petters entity to which Bell was lending money. He looked at her financial statements on Thousand Lakes, which Mr. Petters had never seen before, and stated that Indahl was doing it the wrong way. Bell stated that the $350,000,000 should be carried as equity. Bell then redid the financial statement to show that the $350,000,000 was an asset. According to Mr. Petters, this "equity" was nonsense. He had never had $350,000,000 in equity in Bell's fund. Mr. Petters never used this "asset" except once. When Thane Ritchie asked Mr. Petters about it, Mr. Petters stated that Bell had told Mr. Petters he had $350,000,000 in equity in Bell's fund. Bell was showing the investors that Mr. Petters had $350,000,000 in equity in his fund. Mr. Petters knew that Bell had a balloon payment of some kind due in 2002.

Mr. Petters told Bell in February of 2008 that he suspected there was fraud involved in the slow paying receivables. Mr. Petters stated that Bell built a house of cards based on Mr. Petters telling him stories.

Mr. Petters said he never profited from his loans from Bell. Bell did give big donations to Mr. Petters' son's foundation.

Bell came to Palm Beach and visited Mr. Petters and Bob White. They got Bell a reservation at the Four Seasons. This was in March or April. Camille Chee-awai was there. Bell asked for collateral.

White flew two or three times during this past winter to see Mr. Vennes without telling Mr. Petters.

Bell flew to Minnesota several times seeking answers. At one point, as noted above, he told Mr. Petters that his fund had not received payments for 9 months. Later, he told Mr. Petters that his fund had not received payments for 12 months.

After Mr. Petters found out that Bell had not received money for 9 months, he told Bell many times that there was fraud involved in the receivables.

Bell told his investors that BJ's Wholesale owed him $525,000,000 in accounts receivable. This was more than BJ's total outstanding debt. This was an absurd thing to tell his shareholders. Mr. Bell told Mr. Petters this in April or May. White sent Bell a fake letter from BJ's.

We then spoke about James Fry. Fry got in trouble because he did not reserve for European tax in the Arrowhead fund. Gottex was suing Fry. Fry needed money. Fry wanted to give two vintage airplanes to get a loan. Don Aron, who can be reached at (713) 963-8300, one of the premier loan sharks in the United States, used to lend money at 30%. Aron and Fry entered a contract for Fry to borrow money from Aron.

Fry, Bell, and Marlon Quan at Acorn had some kind of falling out. Brad Dennis, who can be reached at (612) 414-5455 has a lot of dirt on these guys.

We then spoke about Thane Ritchie. Ritchie is really smart.

Ritchie got in trouble with the SEC. He paid $40,000,000 to end the investigation. Ritchie also has an insurance company that has had problems in the state of Florida. That company has lots of board meetings in the Caymans. Ritchie does not like to fly on scheduled airplanes. He uses Net Jets, a company which has chartered flights, so that his movements will not be tracked. Thane Ritchie also told Mr. Petters to send text messages and not e-mails. Mr. Ritchie told Mr. Petters that the feds had tried to kill him a bunch of times.

Mr. Ritchie told Mr. Petters emphatically that if his banks found out the condition of his fund, he would get sued for fraud. Mr. Petters told Thane Ritchie he would never use PCI's collateral and Ritchie didn't care.

Toward the end, Ritchie became like a "rapid dog."

Ritchie is an investor in Bell's fund. He originally put $70,000,000 into Bell's fund. Mr. Petters stated that he has a hard time believing that Ritchie would not know that Bell's fund was upside down.

All of the hedge funds had Gottex as an investor. The reason is that they all knew that Epsilon had Gottex as an original investor in that fund.

Felhaber Larson Fenlon & Vogt

A Professional Association – Attorneys at Law

MEMORANDUM

TO: Petters File

FROM: Jon Hopeman

DATE: January 30, 2009

RE: December 12, 2008 – Conference with Tom Petters at U.S. Attorney's Office

Our File No: 24634.001

On December 12, 2008, I met with Mr. Petters at the U.S. Attorney's Office.

We had a discussion about rings on the insurance schedule. He stated that he had been engaged to a Sandy Swenson. She had given his engagement ring back to him. He had it taken apart. One stone was used to make a ring for Tracy Mixon. Two stones from it were made into posts at Naomi Baer's father's jewelry store. Naomi Baer is married to David Baer, a company attorney. Mr. Petters paid $120,000 for this engagement ring which he purchased from Frank Vennes. It is listed twice on the insurance schedule.

Mr. Petters stated by way of investigation, we should get Coleman's divorce records. He stated we should also investigate Robin Anderson, White's wife. He also stated that he remembers White being thrown in jail and kept in jail in North Dakota for a couple days for some incident involving the Bob White company. We should try to get information about this.

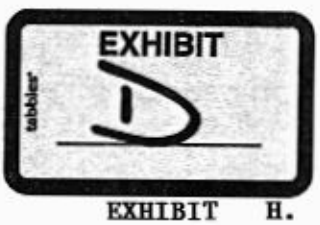

EXHIBIT H.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

United States of America,

Plaintiff,

vs.

File No. 08-CR-00364 (RHK/AJB)

AFFIDAVIT OF THOMAS PETTERS

Thomas Joseph Petters,

Defendant.

Your affiant, Thomas Petters, having first been sworn states the following:

1. My name is Thomas Joseph Petters. I am the defendant in the above-referenced case. My birthdate is July 11, 1957.
2. I have reviewed the Government's pleading(s) in this case, specifically including the Declaration of Jon Hopeman.
3. The very first time I was made aware of an offer (of any kind) of a 30-year cap was immediately following my trial and conviction. After the verdict was read and entered, I was taken to a holding cell by the U.S. Marshalls. Mr. Hopeman came to visit me in the holding cell and stated "Well, we had to go to trial we could only get you a 30-year minimum deal."
4. Mr. Hopeman did not elaborate as to how or when this "30-year deal" was offered or discussed. He did express his opinion that it would have been "bad" to throw myself at the mercy of the court with only a 30-year deal.

5. Prior to this conversation, neither Mr. Hopeman nor any other member of my defense team informed me of any offer of any sort from the Government involving a 30-year cap on sentencing.

6. I did not ask Mr. Hopeman at that time to elaborate or provide any documentation regarding the offer of a 30-year cap on sentencing. I only asked for such documentation and/or detail much later during the pendency of my direct appeal in 2012.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

Thomas Petters

Subscribed and sworn to before me

this _____ day of _____, 2013.

_____

Notary Public

AUTHORIZED BY THE ACT OF JULY 7, 1955 TO ADMINISTER OATHS (18 USC, 4004)

Unit Mgr
USP Leavenworth
7-3-2013

EXHIBIT H.

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