

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

IN RE: DOUGLAS T. LAKE, PETITIONER

(UNITED STATES

v.

DAVID C. WITTIG AND
DOUGLAS T. LAKE, DEFENDANTS.)

No. 03-CR-40142-JAR

PETITION FOR WRIT OF MANDAMUS TO THE UNITED
STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

Edward J.M. Little
HUGHES HUBBARD & REED LLP
One Battery Park Plaza
New York, NY 10004-1482
Telephone: (212) 837-6000
Telecopy: (212) 422-4726

J. Nick Badgerow
SPENCER FANE BRITT & BROWNE LLP
9401 Indian Creek Parkway
40 Corporate Woods, Suite 700
Overland Park, KS 66210
Telephone: (913) 327-5134
Telecopy: (913) 345-0736

Attorneys for Petitioner Douglas T. Lake

ORAL ARGUMENT REQUESTED

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UNITED STATES COURT OF APPEALS
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IN RE DOUGLAS T. LAKE,
Petitioner.

No.:

**PETITION FOR
MANDAMUS**

Petitioner Douglas T. Lake hereby applies, pursuant to 28 U.S.C. § 1651(a) and Rule 21(a) of the Federal Rules of Appellate Procedure, for a writ of mandamus to the United States District Court for the District of Kansas, Julie A. Robinson, J. (“the District Court” or “Judge Robinson”) directing the District Court to recuse itself from all future proceedings in *United States of America v. David C. Wittig and Douglas T. Lake*, Case No. 03-40142-01/02-JAR (“the Action”), and to vacate its Memorandum Order dated April 4, 2005 (“the Order”) denying Mr. Lake and his co-defendant David C. Wittig’s motions for recusal under 28 U.S.C. § 455(a).¹

¹ Mr. Wittig previously submitted his separate petition for mandamus regarding the same Order. We respectfully request that the two petitions be consolidated and, based on our discussions with Court staff and for the convenience of the Court, we respectfully refer herein to Mr. Wittig’s Appendix (Volumes I (001-318) and II (319-455)) as well as to Mr. Lake’s own Appendix. The latter contains only those documents or transcript pages not contained in the Wittig Appendix volumes. We paginate Mr. Lake’s Appendix starting with page 456.

I. ORDERS AND FINDINGS BELOW

Mr. Lake and David C. Wittig were charged with violating and conspiring to violate various federal statutes in a 40-count indictment relating to their alleged “looting” of Westar Energy Inc. (“Westar”) by obtaining various forms of executive compensation from the Company. Both men entered not guilty pleas and thereafter Judge Robinson presided over an 11-week trial, which ended in a mistrial after the jury failed to reach a verdict on most charges.

At a post-trial status conference held on January 4, 2005, Judge Robinson suddenly exploded with scathing, on-the-record condemnations of defense counsel. She characterized defense counsel’s conduct during the first trial as, among other things, “contemptuous,” “unethical,” “offensive,” “disgusting,” and repeatedly violative of “[d]uties of honesty, candor, and fairness.”

The District Court conceded that the trial transcript would largely fail to reflect either the misconduct, or her objections to it. Nevertheless, based on her unrecorded observations, Judge Robinson proceeded to attack the character and motives of Mr. Lake’s defense team. Among many other shocking assertions, Judge Robinson compared one of Mr. Lake’s primary defense attorneys, Christopher M. Wilson, to mass murderer Charles Manson, and permanently barred him from further participation in the trial. She asserted that Mr. Lake’s lead attorney, 30-year trial veteran and former federal prosecutor Edward J.M. Little,

had “the demeanor of someone . . . getting ready to punch somebody” during the first trial. She threatened to “kick Mr. Little out” of the second trial “like I wanted to” during the first trial, and replace him with one of his inexperienced associates who, in her view, “billed millions of dollars” doing nothing but “sit[ting] around and watch[ing]” the first trial. She accused a female attorney for Mr. Wittig of unprintable misconduct, alluding only to Paula Junghans’ allegedly inappropriate wardrobe and the “offensive” way she seated herself in front of the jury.

In response to these and other findings, the District Court announced a series of restrictions to be imposed against defense counsel during the second trial, including the placement of court security officers around defense counsel table.

Judge Robinson concluded the January 4th proceeding by rejecting defense counsel’s renewed request to interview the jury, and precluding defense counsel from objecting or even responding to her statements and rulings, characterizing such responses as “denials and platitudes and insincere whatever[s].” Any such responses, Judge Robinson said, “are going to fall on deaf ears.”

In February 2005, Mr. Lake and Mr. Wittig filed separate motions to recuse Judge Robinson under 28 U.S.C. § 455(a) based on the appearance of bias and deep-seated antagonism evident in the unexpected criticism unleashed by the District Court.

On April 4, 2005, shortly after hearing oral argument on the recusal motions, the District Court filed a two-part, 47-page written Memorandum Order denying the motions for recusal, repeating her condemnations of defense counsel, and following through on her threat to attempt to humiliate defense counsel if they challenged her by further discussing the “utterly despicable and disgraceful” behavior of Mr. Wittig’s counsel. Judge Robinson then formalized the restrictions to be imposed against defense counsel during the retrial of the Action.

It should be noted that this petition discusses the District Court’s findings of alleged defense counsel misconduct at some length. This is not because those purported findings are relevant to the section 455(a) recusal analysis. As discussed below, because that analysis turns on the “appearance” of bias, not the existence of bias, the accuracy or inaccuracy of the District Court’s allegations is irrelevant. Nonetheless, the District Court having relied on these purported findings in disposing of the recusal motions (erroneously, in our view), they do merit discussion here. This is particularly so because, as demonstrated below, these “findings” – and the justification for the District Court’s decision denying recusal – are largely inaccurate or otherwise without record support. More importantly, the District Court’s conduct in entering the findings as it did and publishing them has demonstrated the “appearance of bias” that requires recusal under the relevant statute and case law.

II. RELIEF SOUGHT

Mr. Lake respectfully requests a writ of mandamus directing Judge Robinson to recuse herself from any further proceedings in the Action, and to vacate her Memorandum Order of April 4, 2005 denying Mr. Lake's motion for recusal.

III. ISSUE PRESENTED

Whether a reasonable observer would conclude that Judge Robinson appears to have deep-seated antagonism toward counsel for Mr. Lake – and thus Mr. Lake himself – such that she must be recused from further proceedings in this Action pursuant to 28 U.S.C. § 455(a).

IV. FACTS NECESSARY TO UNDERSTAND THE ISSUES

Douglas T. Lake is the former Executive Vice President and Chief Strategic Officer of Westar, a utility company based in Topeka, Kansas. In July 2004, Mr. Lake and former President and CEO David C. Wittig were charged in a 40-count superseding indictment with (1) conspiracy (18 U.S.C. § 371); (2) circumvention of internal controls (15 U.S.C. §§ 78m(b)(5) and 78ff); (3) wire fraud relating to Westar proxy statements and annual reports (18 U.S.C. §§ 2 and 1343); and (4) money laundering (18 U.S.C. §§ 2 and 1957).

Judge Robinson presided over the trial against Messrs. Lake and Wittig, which opened with *voir dire* on October 12, 2004, and ended in a mistrial on December 20, 2004. On February 18, 2005, Mr. Lake filed a motion to recuse

Judge Robinson under 28 U.S.C. § 455(a) based on an appearance of bias and antagonism suggested by her treatment of defense counsel, primarily during a court proceeding on January 4, 2005. On April 4, 2005, Judge Robinson heard oral argument on the motions and, shortly thereafter, entered a 47-page Memorandum Order declining to recuse herself. These relevant trial and post-trial events are described in chronological order below.²

A. October 12-19, 2004: Voir Dire and Opening Statements

Voir dire started on October 12, 2004 and proceeded without incident for the Lake team over the next week. Mr. Little's limited *voir dire* on behalf of Mr. Lake was not interrupted by a single government objection, or a single complaint from the District Court.

Opening statements were delivered on October 19, 2004. Mr. Little presented Mr. Lake's opening statement, again without incident.

B. October 22-27, 2004: The District Court Warns Government and Certain Defense Counsel

At the outset of trial, on October 22 and again on October 27, the District Court noted in retrospect that it had observed inappropriate behavior on the part of

² We are mindful of the Court's need for brevity in this and all applications for relief. Given the extraordinary issues underlying this motion, the length of the District Court's Order, and the important constitutional rights implicated, a somewhat lengthy discussion is required here. We apologize in advance for that, and endeavor below to keep this discussion as brief as possible. Where possible, we respectfully refer this Court to the accompanying affidavits of lead counsel Edward J.M. Little ("Little Aff."), local counsel F. James Robinson, Jr. ("Robinson Aff."), and Washburn University law professor Michael Kaye ("Kaye Aff.") for more details about trial conduct and the events at issue.

certain government counsel and defense counsel, and asked that it be stopped. App. 630-31 and 651. Mr. Little in response apologized but noted for the record that he did not believe certain members of his defense team were responsible for the behavior, and invited the District Court to bring any future misconduct to his attention as it happened, so that he could immediately respond to and address the allegation. The District Court responded that “I will do you the favor . . . if I see any other inappropriate behavior, I’ll bring it to your attention if that will make you feel better.” App. 652-53.

From that moment until the close of evidence six weeks later, the District Court did not once complain to Mr. Little about any alleged misconduct on the part of his associates. Evidence closed on December 6, 2004.

C. December 6, 2004: Defense Counsel Suddenly Berated

On December 6, 2004 – after the close of evidence and six uneventful weeks of trial – the District Court excused the jury and held a charging conference. While one of Mr. Lake’s lawyers was addressing a proposed charge, the District Court interrupted her, turned to Lake counsel Christopher Wilson in an accusatory tone, and asked “is there a problem?” After Mr. Wilson responded with confusion and an attempt at self-deprecation (“I have lots of problems”), the District Court suddenly announced, notwithstanding that it never said a single word to Mr. Wilson about any allegedly improper behavior during trial, that Mr. Wilson

“exhibit[s] some really disrespectful behavior,” and that she had “witnessed it for weeks.” App. 494-95.³

This exchange was followed by a break and two hours of jury instructions. Immediately after the charge, the prosecutor moved for an order that, during closing arguments, only the attorney giving the summation and local counsel be permitted at counsel table. The District Court immediately seized upon the request and issued the first in a series of angry, emotional condemnations of defense counsel for both Mr. Wittig and Mr. Lake:

THE DISTRICT COURT: Well, I couldn't agree more, Mr. Hathaway, with your characterization of the behaviors that have gone on in this trial, almost exclusively by the defense counsel and people at their table. And I have done everything I can to stop this. It was unbelievably consistent throughout *voir dire* that this kind of activity was going on. Fortunately, we were doing individual *voir dire*, and usually it wasn't done in front of the jurors. Almost never.

If this were a civil case, there are some counsel sitting in this courtroom that would have been cited in contempt and would have been thrown out of this case, frankly. Because I myself have never in my life seen people conduct themselves the way that you, Mr. Little, have; that way that Mr. Wilson has.

App. 497-99.

The District Court asserted that Mr. Wilson had behaved “very disruptive[ly],” “throughout the trial” and “glar[ed]” at the Court with “a cold, intimidating stare” and with “sheer hostility.” App. 498-501.

³ Additional details about this incident are attested to in the Little and Robinson affidavits. See App. 456-85 and 486-88.

The trial record reflects none of these after-the-fact observations by the District Court. Neither the government nor the District Court complained of or objected to anything done by Mr. Lake's trial team during *voir dire*. The District Court never once admonished Mr. Wilson about any perceived disrespect during the two months of trial that preceded December 6th.⁴ Nor did the District Court ever indicate that it was observing behavior for which defense counsel might be "thrown out of th[e] case." The District Court's claim that "I have done everything I can to stop it" is also belied by the trial record, which reveals only a few scattered complaints about the conduct of defense counsel, and almost none during the final six weeks of trial.

The District Court also discussed and made negative assumptions about an incident in which Mr. Wilson had a casual chat with a court security officer – in plain view of counsel for the government and defense counsel – while waiting for the Judge to take the bench after a recess. Without witnessing or investigating the incident or questioning Mr. Wilson, the District Court misstated events and suggested that Mr. Wilson had snuck into the courtroom alone during a recess to

⁴ Indeed, with respect to Mr. Wilson, not only did the District Court fail to make any comment about his alleged misbehavior, but the District Court also claimed that it was the only one to see it, saying that Mr. Wilson was "smart enough and slick enough to do a lot of this ugly hostile looks and smirks and mumbling under his breath directed to the Court without any of the rest of you noticing it." App. 503-04 (emphasis added).

review the private notes of the District Court and its staff, and strongly implied that he breached rules of ethical conduct:

[THE DISTRICT COURT]: What was he doing? Why would he get anywhere near their work papers? That concerns me. I would be equally concerned if I got the notion that any counsel in this case on a recess was cruising by a table trying to look and see what's on somebody else's table. That's not in any rulebook. That's not in any casebook. That's not something you teach in law school. That just common human experience that you don't behave that way. That's invasion of privacy.

App. 503.

Based on Judge Robinson's unconfirmed (and incorrect) assumptions about this incident, as well as its retroactive characterizations of Mr. Wilson's trial conduct, she barred him from the courtroom. Mr. Wilson was the second most senior, experienced and knowledgeable attorney on Mr. Lake's defense team.

D. December 7-21, 2004: Deliberations and Mistrial

Jury deliberations began the day after Mr. Wilson was barred from the courtroom and continued for two weeks. On December 20, 2004, the jury announced that it was permanently deadlocked on all but the money laundering counts of the indictment. A mistrial was declared on all counts against both defendants the same day. Before the jurors were dismissed, defense counsel requested leave to interview them. The District Court denied the request without explanation. It was later revealed that the District Court itself interviewed the jury for two hours, without providing defense counsel notice that it was going to

conduct such an interview or an opportunity to request the presence of a court reporter as was their right under the Court Reporter's Act, 28 U.S.C. § 753(b) .

E. January 4, 2005: The Post-Trial Conference

At a January 4, 2005 post-trial conference, the District Court's anger at defense counsel was even more evident. App. 012-090. As described in one press report, Judge Robinson "slammed the door upon entering the courtroom" and, "her voice trembling with emotion," proceeded to "rage" at defense counsel during a "45-minute verbal fusillade" that "came without noticeable provocation." App. 137-38. Judge Robinson's tirade against defense counsel included character condemnations, allegations of ethical violations, and one-sided restrictions that would later form the basis of separate recusal motions from Mr. Lake and Mr. Wittig.

The District Court conceded at the conference that it had not contemporaneously objected to much of the alleged trial misconduct:

[T]here were many many instances of defense counsel acting in ways in which I should have cited them in contempt. Frankly, I regret that I did not.

App. 043-044.

The District Court admitted that its attempts to stop the misconduct might also not be reflected in the trial record:

. . . I tried a lot of lesser responses such as first nonverbal indicators such as frowning and other things, body language. That didn't work.

App. 044.

The District Court further claimed that, although the misconduct occurred “on almost a daily basis,” much of it would not be reflected in the record because it too was often nonverbal:

The record will reflect some of it. It can't reflect all of it because some of the behaviors were nonverbal.

Id.

The District Court conceded that in still other instances it made no attempt to make a record of the misconduct, call it to counsel's attention, or stop it:

Some of them I did not make a record contemporaneously with because, frankly, we would have still been in the trial.

Id.

To fill this gap in the trial record, the District Court announced that it had interviewed the jurors, and that every juror echoed the District Court's unrecorded trial observations of defense counsel's “offensive,” “disrespectful” and “contemptuous” conduct. The District Court had offered no opportunity for counsel to attend or request court reporter, and had no transcript made of the lengthy interview. Yet Judge Robinson freely summarized these jurors' alleged observations for the record:

As counsel know, I talked to the jurors after the trial. And I spent some time with them. I think it might have been an hour and a half or two hours even. . . . [I]n private the jurors told me a lot of things. And

most of the time was spent, and this was at their initiation, not mine, in their telling me things that troubled them about the lawyers' behavior. And although these 12 people could not agree on a verdict, they understood a lot of things. . . . And they spent some considerable time, and this is something they all agreed on, relating to me how disrespectful they thought defense counsel were; how they felt disrespected as a jury, how they felt the judge was disrespected; how they felt the process was disrespected; how they felt that defense counsel were condescending to them. They repeatedly characterized the behavior as offensive. They were talking about body language; they were talking about attitude, demeanor, words, tone of voice. . . . And the jurors asked me if I thought that – and they specifically said Mr. Little and Ms. Junghans – if I thought that Mr. Little and Ms. Junghans thought the jury was stupid and would be influenced – these are words of the jurors – stupid and influenced by this behavior. . . . But they mentioned a lot of various sensitive things that they thought were offensive and things some of which I did not see. . . . But clearly, the sense among the jury, and certainly among the Court and its staff, was that defense counsels' conduct was contemptuous and out of line and disrespectful.

App. 045-049. No additional specifics were given.

Next, the District Court condemned the character, integrity and trial conduct of the attorneys on both defense teams. Without specifics, Judge Robinson labeled Mr. Lake's defense attorneys as "contemptuous," "disrespectful," "offensive," "condescending," "out of line," and "disruptive." She claimed they violated "[d]uties of honesty, candor, and fairness . . . again and again." App. 333-43. She accused Mr. Little of breaching codes of trial conduct "on an hourly basis." App. 078.

In response to these previously unrecorded observations, the District Court announced a series of restrictions against defense counsel to be imposed

immediately or during retrial. First, the District Court announced that certain “controls” would be put in place to shorten the duration of the trial by half. App. 041. The District Court made clear that these controls were in response to misconduct by defense counsel, but it declined to provide specific examples.⁵

The District Court then took action against Mr. Lake’s defense team by permanently barring Christopher Wilson from her courtroom, threatening to remove Mr. Little for any perceived slights to the District Court at the second trial, and threatening to require inexperienced, junior associates to take over the trial if and when Mr. Little was removed from the case. App. 056-058.

In making these immediate and threatened rulings, Judge Robinson’s antagonism toward Mr. Lake’s defense team was palpable. The District Court compared Mr. Wilson, whom she never once complained about until the December 6th oral argument, to an infamous mass murderer:

That man will never appear in my courtroom again [H]e would sit over there, repeatedly sneer at me and mutter things under his breath. At least make lip movements as if he was. When we’d be up

⁵ Controls announced included: precluding counsel at the second trial from asking any questions during *voir dire* (App. 065)(notwithstanding that Mr. Little conducted an unobjectionable *voir dire* at the first trial); precluding counsel from reviewing jury questionnaires prior to *voir dire* (App. 065)(notwithstanding the complete absence of any allegations that counsel improperly used these questionnaires at the first trial and the crucial role such questionnaires play in the process); and possibly placing artificial time limitations on cross examinations (App. 081)(notwithstanding that Mr. Little’s examinations of witnesses accounted for 2,122 pages of the transcript, while Mr. Hathaway’s examinations consumed 2,434 pages).

here at the bench, he would stare me down as if he were Charles Manson or something.

App. 051-052.

The District Court claimed that lead Lake attorney Edward J. M. Little, a former Assistant U.S. Attorney with 30 unblemished years of trial experience, had “the demeanor of someone . . . getting ready to punch somebody” during the first trial. App. 067. Judge Robinson added that Mr. Little inappropriately “argued” with the District Court’s rulings, and threatened to remove him from the case should he do so at the second trial:

But let me say this. Next time if I see these kinds of behaviors that I'm going to describe, that I have described repeatedly in the last trial's record, if I see them in you all again, I am going to cite you in contempt. And I don't care, Mr. Little, that you're the lead counsel. I don't care that you're the one that examined all the witnesses. I'll cite you in contempt and your role in the trial will be over. . . . And the last time I was a little bit troubled about kicking Mr. Little out like I wanted to because he was clearly the lead attorney. . . . But that's not going to trouble me at all next time.

App. 052-053.

Judge Robinson put Mr. Lake’s junior attorneys on notice that each of them should be ready to assume the defense of the trial in the event she summarily removed Mr. Little from the case as she did Mr. Wilson, without regard to the associates’ experience or knowledge of the case:

. . . I'm placing every lawyer who has entered an appearance on behalf of Mr. Wittig and Mr. Lake, with, of course, the exception of Mr. Wilson, I'm placing all of you on notice that all of you and each of

you better be ready to try any aspect of this case come May 9th. . . . [A]nybody who has been admitted in this case – and I will go through the names – better be prepared. And if that means they're going to be here on May 9th or not, they better be prepared. And if they're not here and I have to recess in order that they be here the next day to start back up, we'll do that. Whatever it takes.

App. 053-056.

The District Court then publicly questioned the necessity of work performed, and reasonableness of the legal fees charged by members of Mr. Lake's defense team, notwithstanding that pending before the District Court was a renewed government motion to freeze payment of those fees:

And then from the Hughes Hubbard & Reed firm, these are the lawyers that are admitted to date and will be expected to be ready. They have not withdrawn. They have not been allowed to withdraw. And I will say if I think that you all are trying to avoid all of this by having people attempt to withdraw their appearance, won't happen. They're in the case. They've been billing millions of dollars together. And from my standpoint, you know, you bill a lot of money; you sit around and you watch a trial; next time maybe you get to try the case.

App. 057.

The District Court announced that it would respond to "disruptive behavior that went on at defense counsel table," by placing court security officers near defense counsel table during the second trial. App. 065. It also barred Mr. Little from communicating with the government's lead counsel, even during the second trial:

You shall not approach Mr. Hathaway nor do anything that might come anywhere close to him so that we can possibly avoid what the

jury thought they were observing that one day, the potential for an altercation in the courtroom because of Mr. Little approaching Mr. Hathaway.

App. 070-071.⁶

Finally, Judge Robinson alluded to certain “utterly despicable and disgraceful” misconduct alleged by the jurors against Mr. Wittig’s counsel, Paula Junghans. App. 075. Judge Robinson said she could not describe the conduct “in open court” but that “the jury was very offended” and that it related to “her behavior and her dress.” App. 075-76. Judge Robinson added that the allegation was “so troubling” that she did not want to detail it, but that she would publicize it if challenged:

And as I would expect, based on past conduct, if I’m challenged and my credibility is challenged, then I will lay it out in an order that we’ll publish.

App. 076.⁷

The District Court then went further, specifically precluding counsel from responding in any way:

I don’t want any response to anything that I’ve just said. I’ve made a record repeatedly. And I will tell you that the old adage “actions speak louder than words” comes to mind. And all of the denials and

⁶ Although Mr. Hathaway was included in the scope of this Order, the Court made it apparent that the restriction, like all the restrictions imposed by the Court during the January 4th hearing, was caused by Mr. Little’s conduct.

⁷ As discussed *infra*, Judge Robinson later did publish the allegation in the Court’s Order, adding a presumption that Ms. Junghans’ alleged conduct was intentional, and directions as to how and where she must sit in relation to the jury at the retrial.

platitudes and insincere whatever are going to fall on deaf ears because you will recall that I experienced these things for 11 weeks, and I know what I experienced.

App. 082.

Judge Robinson closed the January 4th session by denying the renewed request of Mr. Wittig's local counsel, Jeff Morris, to interview the jurors in light of the District Court's reliance on their observations. App. 087 ("I don't think it's necessary for you all to talk to the jurors. I've given you what they've given me."). Even after Mr. Morris suggested imposing limits on juror contact ("[P]erhaps if you wanted to limit the inquiry to something where myself and Mr. Hathaway are the only two people that call the jurors, or we call them together, I'm willing to accept any condition that you want to impose"), the District Court refused to permit the defense to have any communication with the jurors under any circumstances. App. 089.

F. Defendants File Separate Motions For Recusal

On February 18, 2005, Mr. Lake filed a motion to recuse under 28 U.S.C. § 455(a) based on the appearance of bias and deep-seated antagonism displayed by Judge Robinson. See Memorandum of Law in Support of Defendant Lake's Motion to Recuse at App. 507-60. Mr. Lake noted that the governing statute, by focusing on the appearance of bias, did not require, and indeed was designed to avoid, a factual dispute over whether an actual bias existed. App. 526. This

obviated any need to challenge the allegations of misconduct made by the District Court after Mr. Lake avoided conviction following the first trial.

Mr. Lake argued that the appearance of bias and antagonism had been created by (i) the manner in which the District Court's criticisms of defense counsel had been conveyed (*e.g.*, without a contemporaneous record being made, and through summaries of the District Court's *ex parte* interview of jurors), (ii) the District Court's character assassinations of defense counsel (*e.g.*, the comparison to Charles Manson, the suggestion of violent tendencies in Mr. Little, and the allegations of innumerable yet unspecified instances of trial misconduct), and (iii) the punishing restrictions announced for the second trial (*e.g.*, the barring of Mr. Wilson, the placement of court security officers near defense table, the threats to require junior associates to handle the trial). App. 507-42. Mr. Lake supported his claim that an appearance of bias had been created by, *inter alia*, citing newspapers accounts of the trial commenting on the District Court's anger. App. 523-24.

G. April 4, 2005: Memorandum Order Denies Recusal

On April 4, 2005, the District Court entertained oral arguments on the recusal motions and stated that it was taking them "under advisement." App. 366-455. Shortly after the lawyers left the courthouse, Judge Robinson entered a 47-page memorandum Order denying recusal and formalizing many of the restrictions announced and threatened on January 4, 2005. The Order was quickly posted on

the District Court's website and provided to Westlaw, which in turn published it at 2005 WL 758606 (D. Kansas April 4, 2005). App. 319-65.

The Order begins with a lengthy "Recap of Events Transpiring Since the Last Trial, Including Misconduct of Defense Counsel," made necessary, according to the District Court, "[b]ecause defendants have not accurately summarized the conduct of defense counsel during the prior trial, nor the Court's response to this inappropriate conduct" App. 322. This recap has numerous subsections with titles purporting to summarize defense counsel misconduct, such as "Disorderly and Disruptive Behavior During Voir Dire" (App. 323); "Disorderly and Disruptive Behavior During Trial" (App. 326); "Overt Hostility and Disrespect Directed at the Court and Court Staff" (App. 334); and "Disrespect for The Court's Rulings and The Court's Role in Controlling Order and Presentation of Evidence." App. 336. As discussed below, the "examples" of this alleged misconduct cited in the Order do not remotely justify the characterizations given them by the District Court.

In a subsequent "Analysis of Defendants' Motion to Recuse," Judge Robinson reframed section 455(a)'s "appearance of bias" standard from whether a reasonable observer would question the District Court's impartiality (the correct standard), to an "actual bias" standard the defendants never argued. App. 343.

The District Court in its Order did not address the issue of whether it might *appear* biased or deeply antagonistic to a reasonable observer.

Instead, the District Court selectively addressed and defended as an “attempt to maintain decorum” some of the statements and actions underlying defendants’ recusal motions. App. 346. Judge Robinson avoided any discussion of her prior statements that most demonstrate her deep-seated antagonism. Thus, nowhere in the Order did Judge Robinson discuss her comparison of Mr. Wilson to Charles Manson, her claim that Mr. Little “had the demeanor of someone . . . getting ready to punch someone,” her assertion that Mr. Little breached codes of trial conduct “on an hourly basis,” her uncorroborated and incorrect assumption that Mr. Wilson violated the privacy of her staff by attempting to view their notes during a break in violation of “common human experience,” her assertion that Lake associates were sitting around billing millions of dollars, her threats to “kick Mr. Little out” of the second trial “like I wanted to” during the first trial, her barring of defense counsel from interviewing jurors (notwithstanding rampant citation to juror observations to bolster her unrecorded trial observations), her refusal to allow defense counsel to even respond to her accusations, or her admission that defense counsel’s “denials and platitudes and insincere whatever are going to fall on deaf ears.” The District Court apparently believed that these extraordinary statements can be justified as attempts to maintain courtroom decorum. They cannot, and the District Court’s

reaction reflects a deep-seated and unacceptable antagonism that, regrettably, requires the District Court's recusal.

We discuss the three sections of the District Court's Order below.

1. **The District Court's "Recap" of Alleged Misconduct**

Throughout the 47-page Order, Judge Robinson characterized defense counsel's trial conduct in the most scathing terms imaginable. *See, e.g.*, App. 327 ("Edward Little . . . engage[d] in repeating instances of misconduct"); App. 327 ("defense counsel continued to blatantly disrespect the Court's rulings"); App. 328 (accusing Mr. Little of "abusive conduct"); App. 329 ("the defense persisted in childish, inappropriate, unprofessional, uncivil, and even unethical behavior"); App. 331 (Mr. Little "was openly defiant of the Court"); App. 331 (Mr. Little "berated the Court, yelled at the Court and challenged the Court's impartiality"); App. 331 ("repeated unprofessional conduct"); App. 333 (Mr. Little engaged in "episodic bouts of contemptuous behavior"); App. 333 (noting "defense counsel's disrespectful, unprofessional behavior").

Given the seriousness of these charges, and the District Court's statement that this misconduct occurred nearly "on an hourly basis," one would expect that the Court would have provided numerous, specific and unequivocal examples from the record of both the misconduct and the District Court's objections to the misconduct. That is not the case.

Judge Robinson conceded at the outset of the Order that the trial record does not reflect the allegedly extensive misconduct of defense counsel or her objections to the alleged misconduct. Judge Robinson offered many explanations for the record's failure to support her inflammatory charges. See, e.g., App. 323 ("To attempt to so list every instance of unethical behavior would be nearly impossible given the voluminous record of the first trial and the prolific instances of misconduct"); id. ("other improper conduct . . . are difficult to explain...") App. 323 n.14 ("the Court does not wish to rehash the evidence presented during the last trial, as the prior trial is history ..."); App. 327 ("The instances are too many to catalogue"); App. 324 ("Had the Court realized that potential jurors were also perceiving such inappropriate behavior, the Court would have reprimanded counsel and taken other corrective measures immediately"); App. 328 ("the Court's role is not one of a 'playground monitor'"); App. 330 ("The Court tried nonverbal conduct, such as frowning at counsel to attempt to register disapproval without words. That did not work."); App. 331 ("the Court's admonishments were not always contemporaneous with the observed behavior . . . because counsel's misconduct was frequent, and the Court was often focused on the numerous evidentiary objections"); App. 331 ("[H]ad the Court stopped the trial to admonish counsel out of the jury's presence for each observed incident, the trial might have taken twice as long as it did"); App. 333 ("The record often does not reflect the

Court making a record of what she observed . . .; rather the Court's immediate concern was to calm Mr. Little down and keep the peace"); App. 329 ("Had the Court been sitting in the jury box . . . the Court would have taken measures to thwart [the] conduct").⁸

Nevertheless, the District Court purported at the outset of the Order to provide "a summary of some of the most egregious conduct," including purported record examples of the alleged misconduct. We address those examples separately below.

a. Alleged *Voir Dire* Misconduct

The trial record shows that neither the government nor the District Court complained once during *voir dire* of any inappropriate behavior on the part of Mr. Lake's counsel. Nevertheless, the District Court alleged in its Order that Mr. Lake's counsel "laughed, snickered and made comments in the background," and specifically charged two junior associates on Mr. Lake's team with this misconduct. App. 323. This allegation is based in large part on an anonymous, unverified letter to the government purporting to be from a jury panel member:

⁸ Respectfully, the District Court's explanation for its failure to contemporaneously object to perceived trial misconduct is difficult to understand. Just as one example, Judge Robinson states that she did not want to stop trial, or prejudice defendants, by admonishing counsel in front of the jury. That does not explain why the record does not reflect admonishments prior to the commencement of Court each day, at the end of the day, or out of the jury's presence during one of the regular breaks in the trial.

Much of this unprofessional behavior occurred among the associate attorneys, Jason Masimore and Shawn McEnnis, representing defendant Lake. Indeed, this behavior was so egregious that it moved a potential juror to write a letter about the conduct, citing his *or her* concern that such conduct “might prejudice what [the jury] hear[s] from witnesses.” The individual stated that while being questioned during voir dire, he or she observed “negative expressions including sneers and glares directed at [him or her] from members of defense team in the background.” The referenced defense team members “in the background” presumably refers to the associate attorneys sitting at the back of defendant Lake’s table . . .”

App. 323-24 (underlining added; italics in original).

Judge Robinson’s interpretation of this email bears close scrutiny, as it exemplifies the appearance of bias and antagonism on which the recusal motion and this petition are based. Judge Robinson assumed the truth of an anonymous hearsay allegation, contained in a redacted email, from an unidentified alleged prospective juror. That alone is remarkable, but she then added the admitted *presumption* that this anonymous source was referring to two specific junior associates.

To make matters worse, Judge Robinson in her Opinion *twice* incorrectly asserted that counsel for both defendants had been admonished during *voir dire* for misconduct. See App. 323 n.15 (“although the Court . . . warned counsel to stop the behavior during voir dire”); App. 330 (“As mentioned previously, during voir dire, when [Wittig counsel] Mr. Hoffinger violated the Court’s restrictions . . . this Court called *all counsel* into chambers . . . and admonished them off the record . . .

to stop acting unprofessionally”)(emphasis added). That is simply untrue, as Judge Robinson herself admitted to J. Nick Badgerow, counsel to Mr. Lake, during oral argument on April 4th, right before the Court issued its Order:

THE DISTRICT COURT: You are aware of the in chambers conference that I had with counsel I believe the second day, or maybe it was the first day of voir dire, where I didn't make a record because I trusted officers of the Court would conduct themselves professionally, and with a strong admonishment in chambers to stop doing what they were doing You weren't there so I'm not sure you're aware of that.

MR. BADGEROW: I am aware of that, Your Honor, and I'm aware that that wasn't directed to Mr. Little or Mr. Little's team.

THE DISTRICT COURT: It was. It was directed to them.

MR. BADGEROW: Okay. Thank you. . . . I think there were references in your January 4 hearing to the opening statement. And the record, again, does not reflect any objections nor any orders about that as well.

THE DISTRICT COURT: I correct myself. The in chambers admonishment went to [Wittig counsel] Mr. Hoffinger's conduct at that particular point. You're correct.

App. 375-76 (emphasis added).

Despite this admission, the District Court's factual mistake appears twice in the published Order, and is part of its public citation against two associates whom the District Court did not admonish at the time.

That the allegation is wrong is beside the point. For purposes of the petition, Judge Robinson's decision to mar the reputations of two young associates in a

published order, based on presumptions, admitted factual mistakes and plain hearsay, demonstrates a fatal judicial antagonism requiring recusal. And, as the accompanying affidavits indicate, the associates identified by the District Court (Jason Masimore and Shawn McEnnis) were never observed engaging in the gross misbehavior described by the District Court.⁹

b. The Alleged Misconduct of Ms. Junghans

Judge Robinson's next allegation of misconduct in the Order is even more surprising and, we must say, shocking. On the basis of comments from unnamed jurors purportedly relayed to her in their *ex parte*, off-the-record discussion, Judge Robinson asserted in her Opinion that Mr. Wittig's counsel, Paula Junghans, committed unprintable acts at trial. See Order at App. 329 ("The jury's description Ms. Junghans' [unspecified] conduct would offend almost anyone's sensibilities. . . . It was Ms. Junghans' behavior, chiefly the manner in which she sat throughout the trial, that so concerned the jury.") (footnote omitted). The District Court asserts that the jurors believed the conduct was "not inadvertent or unconscious" but "intentional, designed to distract them." App. 329. In response to this alleged conduct, the District Court's decision specifies where and how Ms. Junghans must sit at retrial. App. 330.

⁹ See Little Aff., ¶ 15 (App. 463-64); Robinson Aff., ¶ 5 (App. 486-88).

Ms. Junghans is a partner at DLA Piper Rudnick Gray Cary LLP, and a former Deputy Assistant Attorney General and Acting Assistant Attorney General of the Tax Division of the United States of Department of Justice. She has an unblemished professional reputation.

Judge Robinson did not investigate the alleged conduct, despite admitting that she “did not see” it. App. 329. She afforded Ms. Junghans no opportunity to respond to or defend against the claim. She precluded counsel from speaking with the source of the allegation (the jury), and threatened to “publish” the allegation if the account was challenged. App. 076. Judge Robinson in her Order now has followed through on her threat, having placed her Order on the District Court’s website and provided it to West Publishing Company for publication on its website.¹⁰

Once again, Judge Robinson simply accepted the jurors’ alleged observations at face value, including the absurd presumption that the conduct was done *purposefully*. This unjustified judicial act betrays an undeniable appearance of hostility toward counsel. Indeed, it is difficult to conceive of an action more suggestive of hostility toward a lawyer.

¹⁰ See www.ksd.uscourts.gov/opinions/10341420/02-345.pdf; 2005 WL 758606.

c. Allegedly Excessive Requests for Bench Conferences

The District Court next accused Mr. Lake's defense team, principally Mr. Little, of "abusing their use of bench conferences." App. 327. The District Court claimed that "there were too many bench conferences to catalogue," that "defense counsel sought a bench conference for the *vast majority* of their evidentiary objections," and that "the number and frequency of bench conferences disrupted the presentation of evidence." App. 327, 336. To curb these alleged abuses, the District Court imposed restrictions on the availability of bench conferences at the second trial.

Notwithstanding that a request to be heard outside the presence of the jury hardly seems like an "egregious" example of misconduct that would justify the District Court's condemnations of defense counsel, the trial record again does not bear out the District Court's factual allegations. A review of the transcript shows that counsel for both defendants requested a combined total of approximately 64 bench conferences, and objected approximately 395 times in 11 weeks of trial. This is a bench conference request rate of approximately 16%, obviously not a "vast majority." Indeed, Mr. Little only requested 29 bench conferences in total, compared to 12 requested by the prosecutor and 52 initiated by the District Court itself. Little Aff. ¶ 18 (App. 465).

The District Court also attacked the manner in which bench conferences were requested, characterizing the requests as “demands” which exhibited a “[d]isrespect for the Court’s rulings and the Court’s role in controlling the order and presentation of the evidence.” App. 336. Again, the record fails to reflect anything that could be characterized as a “demand” for a bench conference. Mr. Little in each instance asked the District Court in a “courteous, respectful manner by saying, for example “Your Honor, may we approach?”. or “Your Honor, may we be heard on this?” Little Aff., ¶ 20 (App. 465-66). Moreover, we could not find a single instance in the record of the District Court’s denial of a request to approach the bench, notwithstanding the District Court’s obvious authority to do so if it felt counsel was abusing the privilege.

d. Contemptuous Business Record Argument

Another example cited in the Order of Mr. Little’s “Disrespect for the Court’s Rulings and the Court’s Role in Controlling Order and Presentation of Evidence,” is his allegedly excessive argument over the particular use of business records admitted into evidence. App. 336-37. In making this point, the District Court observed that “in their latest round of pretrial motions, the defense for the first time raises an objection that utilizing the 902(11) procedure offends their right to confront witnesses, pursuant to the Supreme Court’s decision in Crawford v. Washington, 541 U.S. 36 (2004).” App. 336 n.39. The District Court also noted:

Ironically, defense counsel did not admit documents by calling the custodian of the documents. The defense instead embraced the manner in which the government presented its evidence, which defense counsel had earlier challenged as improper, by seeking the admission of documents pursuant to Rule 902(11). Defense counsel then used these documents to cross-examine government witnesses and to examine their own witnesses.

App. 337.

Again, the record does not support the District Court's recollection: Mr. Lake's counsel *did* object on Confrontation Clause grounds to the authentication of business records through the use of Rule 902(11) of the Federal Rules of Evidence during the first trial.¹¹

Moreover, defendants may seek admission of evidence under Federal Rule of Evidence 902(11) even though the government may not, as the Sixth Amendment does not provide the government a right to confront witnesses. Thus, there was nothing "ironic" about Mr. Little's Rule 902 objection, as the rule itself recognizes this distinction. The District Court's criticism of counsel on this point is especially unwarranted, given the fact that it has before it a fully briefed motion to bar Rule 902(11) certifications but has not yet ruled on that motion.

Finally, the citations made to the record by the District Court do not support the accusation that Mr. Little showed contempt when he allegedly "continued to

¹¹ Mr. Little objected to the "violation of my client's constitutional right to have witnesses confronted. And when the government is, as it's doing, going beyond basic authentication and not putting a witness on the stand that can be cross-examined on the document, it's violating that right." See App. 617.

raise such objections” after the District Court’s rulings. Here is one of those examples:

MR. LITTLE: Judge –

THE DISTRICT COURT: I’ve ruled, Counsel.

MR. LITTLE: I’m not going to –

THE DISTRICT COURT: I’m not hearing additional arguments.

MR. LITTLE: No, I’m not. May I speak? I’m making a motion for the Court to give a limine instruction that Exhibit 34-C is not admitted as against Mr. Lake and not admitted as evidence of a conspiracy because it predated his hiring and his involvement and charges specified in the indictment. That’s all I’m asking for is a limine instruction.

THE DISTRICT COURT: Any objection?

MR. HATHAWAY: No, Your Honor.

THE DISTRICT COURT: All right. Bring the jury in.

App. 385.

e. Allegedly False Accusation Against Mr. Hathaway

The District Court accused Mr. Little of making a false accusation by claiming that Mr. Hathaway was “bullying” him in the courtroom, making the factual finding that the prosecutor “was not engaging in any conduct that could reasonably be perceived as ‘bullying.’” App. 337-40. Actually, Mr. Little did not allege that the prosecutor was “bullying” him. He claimed that in the middle of his

argument Mr. Hathaway got up and was “stand[ing] there in a threatening way.” App. 338.

Regardless, in recounting and interpreting the incident, Judge Robinson again drew the worst inferences against defense counsel in order to make the “false accusation” finding. This time, she presumes that Mr. Little was not actually feeling threatened by Mr. Hathaway, apparently based on her subjective belief that he should not have felt threatened.

As set forth in detail in his accompanying affidavit, however, Mr. Little was feeling threatened by the prosecutor on this occasion, and for good reason. See App. 476-81. Mr. Hathaway did not merely stand up. He approached the lectern where Mr. Little was arguing. App. 477. Mr. Hathaway did not sit back down until the District Court insistently ordered him to. App. 477. Indeed, at the time of the incident, the District Court apparently agreed that Mr. Hathaway should not have been standing, firmly admonishing him: “I want you to sit down, I want you to sit down.” App. 675.

Mr. Hathaway is such a intimidating presence that one Court observer even commented on his appearance:

Rich Hathaway is a guy I'd want on my side, inside or outside a courtroom. . . . He's a big, burly guy with a crew cut and cowboy boots, and he smiles as frequently as presidential candidates visit Kansas. I don't know whether Hathaway is as mean as he looks, but I'm guessing most of the defendants he's grilled on the witness stand would say yes.

App. 598-599.

Indeed, the District Court made the factual finding that Mr. Little lied when he claimed to have felt threatened notwithstanding its investigation into a courtroom incident in which Mr. Hathaway yelled at Mr. Little in a “loud and antagonistic way.” App. 723.¹² Nevertheless, the District Court in its Order once again draws all inferences against defense counsel. In this case, Mr. Little did feel threatened, and his courtroom accusation was not “false,” as, most respectfully, the District Court mistakenly characterizes it.

f. Alleged Overt Hostility and Disrespect to District Court

The District Court in its Opinion expanded on its criticism of Christopher Wilson and reaffirms its decision to bar him from the courtroom permanently. Mr. Wilson was the second chair on Mr. Lake’s defense team. As with each of the attorneys Judge Robinson publicly named and described as disrespectful and contemptuous, Mr. Wilson had never been sanctioned for unethical or unprofessional conduct at any time during his career, nor had this District Court admonished or warned him about disrespectful conduct at any time prior to December 6, when it barred him from the courtroom.

¹² The Court was also informed of an incident, also attested to in Mr. Little’s accompanying affidavit, in which Mr. Hathaway rushed toward Mr. Little in a menacing manner during a break in the trial, prompting Mr. Wittig’s attorney to step in front of the prosecutor to prevent him from reaching Mr. Little. App. 487.

The incident leading to Mr. Wilson's ouster occurred at the end of the trial, as another counsel was discussing proposed jury instructions with Judge Robinson. Judge Robinson suddenly interrupted counsel, turned to Mr. Wilson and asked him in an angry and accusatory tone, "Is there a problem, Mr. Wilson? Is there a problem?" App. 494. As attested to in the accompanying affidavits of Mr. Little and local counsel James Robinson, everyone was stunned by the District Court's question as Mr. Wilson had simply been sitting, exhausted and quiet at counsel table. Based on Mr. Wilson's self-deprecating response ("I have lots of problems"), (App. 495) about which Judge Robinson again presumed the worst (that he meant "problems" with the District Court), and his alleged disrespectful conduct over the prior several weeks of trial, she barred Mr. Wilson from the courtroom and gave neither him nor other counsel the opportunity to be heard.¹³

Noticeably absent from the Order is any discussion or defense of the District Court's furious comments on January 4 comparing Mr. Wilson to mass murderer Charles Manson, or its unfounded accusation that Mr. Wilson was attempting to view the notes of her staff during a break (based on the District Court's presumption that Mr. Wilson was doing more than conversing with a court security

¹³ There are other details of the incident described in the Order which are challenged in the accompanying affidavits, such as the District Court's claim that "Mr. Wilson immediately vaulted out of his chair, causing other counsel to grab his arm." See App. 474. According to the affidavit of local counsel James Robinson, Mr. Wilson rose in the normal manner one does when addressed by the Court. App. 617.

officer). Nor does the Order reference the District Court's strong character assassination of Mr. Wilson based on that false charge. See App. 502-503 ("That's just common human experience that you don't behave that way. That's invasion of privacy"). The District Court simply ignores those statements as if they were never uttered, and justifies its removal of Mr. Wilson from the trial team based on its unrecorded trial observations.

g. Alleged Interruptions, Arguments and Defiance

In various sections of the Order, Judge Robinson took aim at Mr. Little's litigation style and, under various labels, accuses him of unethical and contemptuous behavior. She provides examples of the claimed most egregious conduct, which we address below and which Mr. Little discusses in greater detail in his affidavit. See Little Aff., ¶¶ 17-28 (App 464-73).

Before addressing the District Court's examples, we respectfully note that these are apparently the most egregious examples of conduct the District Court could find, designed to justify condemnations of counsel the likes of which is rarely seen inside a federal courtroom. Yet, even if such conduct did occur as the District Court alleged – and we respectfully submit that it did not – it does not merit the harsh and apparently biased language employed by the District Court.

Mr. Little was defending at trial a client charged with multiple violations of complex federal statutes. His client's alleged co-conspirator, Mr. Wittig, had a

prior conviction for various federal crimes in an unrelated bank fraud case and was therefore unlikely to testify in his own behalf¹⁴ and would not be taking the stand. Mr. Lake, in contrast, would be taking the stand. The alleged victim of the alleged crime, Westar, spent \$9 million having a major international law firm investigate the facts purportedly underlying the charges. The prosecutor was anxious to introduce into evidence the conclusions reached by that internal investigation. If convicted on all counts, Mr. Little's client would possibly have spent the rest of his life in prison. This was the biggest corporate crime case in Kansas history, and the media were watching closely. A change of venue had already been ordered because the public interest in the case was so great. In short, the stakes, the pressure, and the complexity of this case could not be greater. It is in that context that Judge Robinson provides her examples of Mr. Little's purported misconduct.

The District Court first asserted that Mr. Little "engage[d] in repeated instances of misconduct," and provides record cites in footnote 22 of the Order. App. 327. Footnote 22, however, does not include a single example of Mr. Little's actions, but instead cites entirely to *complaints* leveled by Mr. Hathaway during the trial. App. 327. The District Court simply *adopts* Mr. Hathaway's allegations against Mr. Little as truth. By contrast, the District Court not only reflexively

¹⁴ Mr. Wittig's prior conviction in that matter (United States v. Weidner) is the subject of an appeal pending before this Court.

rejects as false Mr. Little's similar allegations about Mr. Hathaway, but cites them as further evidence of Mr. Little's contempt.¹⁵

As examples of Mr. Little "repeatedly interrupt[ing] the Court when it made rulings, and repeatedly continu[ing] to argue with the Court after it had ruled," the District Court offers record citations in footnotes 23 and 24. App. 327. We urge this Court to review the transcript of these citations (attached at App. 621-624, 627-628, 692-694), and Mr. Little's discussion of them, because the citations once again do not support Judge Robinson's harsh characterizations.

In the second footnote 23 citation, the District Court indicated that certain notes of a conference call might be admissible as "co-conspirator statements." Counsel for the defendants and the District Court had a back-and-forth discussion about the admissibility of these notes, and Mr. Little rightfully attempted to clarify for the District Court that the people on the phone call were not alleged co-conspirators. See App. 621-624. There was no improper argument during this exchange.

The third footnote 23 example was an instance in which Mr. Little purportedly "refus[ed] to accept the Court's ruling at a bench conference and accusing the Court of cutting him off." App. 327. Mr. Little merely asked to be

¹⁵ See, e.g., App. 328 ("Time and again . . . defense counsel would respond by accusing the prosecutor of interrupting them").

heard on a crucial point, and contrary to the District Court's characterization, was the model of respect in doing so, notwithstanding Mr. Hathaway's attempts to interrupt:

MR. LITTLE: Judge, could I just say one thing? I apologize. I'm not trying to be short with you. I think we're all very tired. This always happens at the end of the government's case. Everyone is very anxious. We're very concerned about these reports coming in. And I think there are a lot of problems with them, and we're very upset about it. Primarily because this is a case about a fraud in the company, and it's turned into a tax case. Because those numbers are really tax rates. There's no substantive tax count. We can talk about it later, but I'm just trying to explain.

MR. HATHAWAY: Your Honor –

THE DISTRICT COURT: Wait, wait, Mr. Hathaway, please.

MR. LITTLE: I'm just trying to explain why I'm very nervous and very tense. And I think the temperature has been raised. I don't mean any disrespect to Your Honor.

THE DISTRICT COURT: All right.

MR. LITTLE: I absolutely don't. And if I seem short or anxious, it's because of that. I know you're trying to conduct the trial in an expeditious way. And I know these things cause delays. And I know you weren't deliberately trying to shut me down. It's just that sometimes these objections get ruled on so quickly I don't get a chance to speak and I get nervous and I try to be heard. I'm not suggesting you're trying to shut me down. And I sincerely apologize if I've conveyed that to you. I'm just trying to be heard. That's all. And I'm very sorry.

THE DISTRICT COURT: All right. And, you know, my only point, Counsel, with all of you is that some of these objections do need to be ruled quickly on, whether you like it or not. But if you tell me that you want to make a proffer, I'm going to allow you to do that. I just

don't like any suggestion that I, you know, refuse to hear somebody and I'm shutting somebody down.

App. 692-694.

Again, the District Court apparently cited this bench conference because it is one of the more egregious examples of Mr. Little's supposed contemptuous conduct. When read in full, it shows just the opposite.

The same is true of the District Court's third example from footnote 23 of the Order, cited as an example of "Little raising a new objection after Court had completed the ruling." App. 327. As the actual transcript reveals and Mr. Little attests, however, he raised a "new" objection only because he did not want to interrupt the District Court's response to his first objection. Again, he was very respectful in recording his objection:

MR. LITTLE: Your Honor, I have a second objection I would like to state for the record.

THE DISTRICT COURT: Mr. Little, if you have objections, you need to state them before I rule. . .

MR. LITTLE: I tried to –

THE DISTRICT COURT: No, you did not.

MR. LITTLE: I didn't want to interrupt you, Your Honor.

App. 702-703.

The record citation in footnote 24, which the District Court characterized as an example of Mr. Little "continu[ing] to argue with the Court after it had ruled,"

shows only the following exchange with the District Court during Mr. Little's direct examination of his client:

THE DISTRICT COURT: ... I have ruled and I am done ruling. I don't need to hear any more argument.

(THEREUPON, the following proceedings were had in the presence and hearing of the jury and the defendants)

MR. LITTLE: Excuse me, Your Honor. Can I speak to Mr. Lake to make sure we comport with the Court's ruling?

THE DISTRICT COURT: That's a good idea. We'll take about a ten minute break.

App. 714. Obviously, Judge Robinson is correct in citing this as an example of a definitive ruling, but not that Mr. Little "continued to argue" the ruling. Mr. Little sought only to *comply* with the District Court's ruling.

Judge Robinson made much of an incident where she asserts that Mr. Little purportedly refused to answer the District Court's question. App. 332-33. Again, the remainder of the colloquy undermines any claim that Mr. Little was being contemptuous or disrespectful. In this instance, it shows that the back-and-forth between Mr. Little and the District Court was because of a miscommunication, not contempt. The following picks up where the District Court's quotation leaves off:

MR. LITTLE: Let me complete my sentence, then. What I was about to say was that the Court – I don't want to have Mr. Lake say that the subpoena's about Capital City [the subject of Mr. Wittig's conviction in the prior case]. I'm not trying to cause a mistrial. I'm not trying to hurt Mr. Wittig or do anything that's improper. If the Court takes judicial notice, so that Mr. Lake doesn't have to speak to it, that the

subpoena in July had nothing to do with planes, it does not mention Westar, and it does not mention planes, then we can solve the problem.

THE DISTRICT COURT: Okay. I agree. It would have been nice if we would have started this discussion on that basis.

MR. LITTLE: I was trying to get there, Your Honor.

THE DISTRICT COURT: Well, I didn't see it coming at all. All right.

App. 709-710.

As the transcript indicates, Mr. Little was trying to answer the District Court's question with a solution to a difficult evidentiary issue. The District Court ended up agreeing with his suggestion, yet a truncated version of this exchange appears in the Order to evidence Mr. Little's purported contemptuous conduct.

The remaining citations and examples largely relate to instances in which the District Court felt that Mr. Little continued to argue a point after the District Court had ruled, or indicated that it wished to hear no more arguments. We cannot say that Mr. Little never attempted to clarify or preserve a point after Judge Robinson wished to hear no further argument, but it certainly was never done in a contemptuous way or unethical manner. Indeed, there were numerous times the District Court changed its ruling based on Mr. Little's objections. See, e.g., App. 634-640 (after hearsay objection was sustained by the District Court, both parties presented arguments on the point, with the District Court finally allowing the

evidence in). See App. 643-646; 656; 659-662; 663-664; 667-669; 672; 682-683; 727-729.

In any event, the record citations offered by the District Court do not support its scathing condemnations of Mr. Little's behavior. What they do show, we respectfully submit, is the District Court's bias in finding professional advocacy on the part of defense counsel to be disrespectful and contemptuous.

Perhaps most tellingly, the District Court's characterizations of Mr. Little, while unfounded and exaggerated, stand in stark contrast to its characterizations of Mr. Hathaway. See, e.g., App. 333 ("Mr. Hathaway was not engaging in contemptuous, disrespectful conduct."). Yet the record is filled with instances in which Mr. Hathaway commits the same transgressions for which Mr. Little is maligned by the District Court. Here, for example, is an example of Mr. Hathaway continuing to argue with the District Court after a ruling:

THE DISTRICT COURT: I don't know, I will sustain right now.

MR. HATHAWAY: Well, I'm not sure I understand. The objection is because it's a draft?

THE DISTRICT COURT: It's a draft. And she has certified that it's – it's a business record. You need to establish some foundation that it was part of an ongoing negotiation or it was kept for some reason.

MR. HATHAWAY: Well –

THE DISTRICT COURT: In other words, you're not offering this as a final agreement.

MS. JUNGHANS: Judge, this witness doesn't know.

MR. HATHAWAY: Well, there was no final agreement because the evidence will show through other witnesses that Mr. Lake – excuse me, Mr. Wittig basically led Mr. Hayes along. Our theory is –

THE DISTRICT COURT: Well, let me stop you.

MR. HATHAWAY: Hear me out.

App. 730-731. See also App. 649-650. (“THE DISTRICT COURT: Mr Hathaway made a comment that was within the hearing of the jury. He was sitting close to the jury box. I cautioned him about that”); 651 (“THE DISTRICT COURT: “...I told Mr. Hathaway to cut it out”); 649 (“THE DISTRICT COURT: I don't want any speaking objections. . . . And there have been many times that . . . both sides were doing that. And I'm irritated with both sides for doing that.”); 679 (“[W]hen Mr. Hathaway does something that is unprofessional and – and an objection is made, I have every right to point out that he's not the only one that's been acting inappropriately, because that's the truth.”).

We do not point this out to suggest that these are examples of contemptuous behavior on the part of Mr. Hathaway. They are not. But notwithstanding the actual trial transcript showing similar behavior on both sides, in the eyes of the District Court, it is only Mr. Little's conduct which is unethical, disrespectful and contemptuous, while Mr. Hathaway's is not. The *appearance* of bias is undeniable.

h. District Court's Defense of Its Jury Interview

Notwithstanding that Judge Robinson precluded counsel from interviewing the jurors under any conditions whatsoever, she relentlessly cites her summary of their alleged observations to bolster her acrimonious, after-the-fact characterizations of defense counsel's allegedly contemptuous, unprofessional and unethical behavior.

The weak and, respectfully, baseless examples from the record of defense counsel's alleged misconduct only make the District Court's reliance on these observations more striking. The number of times Judge Robinson cited to the jury to fill in the record's silence is nothing short of remarkable. The use of unrecorded, un-cross-examined, subjective conclusions from an *ex parte* jury interview to supply these deficiencies in the record fuels further the appearance of partiality and bias on the part of the Court. See, e.g., App. 328 ("as the jurors reported to the Court after the mistrial had been declared..."); App. 328 ("[t]his was not lost on the jury, the Court learned, in talking to them after the mistrial"); App. 329 ("the jury described conduct by defense counsel . . . that the Court did not see"); App. 329 ("had the Court seen the conduct the jury described"); App. 329 ("[t]he jury's description of [defense counsel's] conduct would offend almost anyone's sensibilities. . ."); App. 329 ("the jury advised the Court that this conduct distracted them, offended them and insulted their intelligence"); App. 329

("[i]t was [defense counsel's] behavior, chiefly the manner in which she sat throughout the trial, that so concerned the jury"); ("the jurors were quite vocal and insistent that this conduct was not inadvertent or unconscious. Rather, based on their observations over ten weeks of trial, they considered [the] conduct intentional, designed to distract them.") App. 329-30 ("the Court perceived that the other jurors agreed, for they nodded their heads in assent as their fellow jurors described this particular conduct . . . as well as the previously catalogued conduct of the other defense counsel"); App. 330 ("the jury had a full view of her body and manner of sitting"); App. 333 ("The jury's observations of defense counsel's disrespectful, unprofessional behavior are also consistent with the Court's observations"); App. 334 ("the jury clearly ascertained that defense counsel had acted inappropriately..."); App. 334 ("Mr. Wilson also exhibited disrespect for the jury, something the Court was not aware of until its post-trial visit with the jurors"); App. 335 ("The jury observed this behavior."); App. 340-41 ("in light of the egregious conduct of counsel . . . some of the egregious conduct catalogued above was apparent to the jury"); App. 341 ("counsel's disrespectful, antagonistic, manipulative conduct was readily apparent to the jury"); *id.* ("During the Court's post-trial visit with the jurors, they expressed their uniform disenchantment with behavior that they perceived as disrespectful to both the Court and the jury"); *id.* (the jurors observed that "[d]efense counsel's conduct was not professional or

respectful”); id. (jurors found that “[d]efense counsel acted childish and played games” and said “we’re [the jury] smarter than that”); id. (jurors said that “[d]efense counsel stomped around after the judge ruled on something”); id. (jurors commented that “Mr. Wilson acted hateful and obnoxious”); id. (“[t]he jury perceived that he was demonstrating his lack of respect for them”); id. (jurors said that “Ms. Junghans wore short skirts, did not sit behind the table, and sat with her body positioned directly toward the jury, in a manner that was offensive and disrespectful.”); id. at App. 342 (“Defense counsel treated the jury like they were stupid”); id. (jurors observed that “Mr. Hoffinger pretended to be asleep at times, as if the evidence meant nothing.”); id. (“The jury did not appreciate defense counsel making facial expressions because the jury was smart enough to see through such theatrics”); id. (jurors commented that “[e]very time the Court ruled against Mr. Little, ‘he pouted and acted like why are you doing this to me?’”); App. 346 (“The Court’s post-trial discussion with the jury merely confirmed that the jurors too observed improper conduct”); id. (“in a few instances, the jury observed misconduct that the Court did not observe”); App. 350 (“the jurors felt compelled to express their dissatisfaction with the conduct of defense counsel”).

In light of Judge Robinson’s remarkable reliance on the jurors’ off-the-record observations to justify her attacks on defense counsel, her attempt in the Order to downplay the significance of her interview is unconvincing. The District

Court claimed that she merely “met with the jury at the conclusion of defendants’ first trial to thank them for their time and service,” and notes the “iron[y]” of defense counsel’s claim that her post-trial discussion violated § 15-4.3(b) of the ABA Standards for Criminal Justice. “Nothing in section 15-4.3,” Judge Robinson argued, “prohibits the Court from meeting with jurors to thank them for their service.” App. 350-51.

That may be true, but the violation alleged was not the meeting itself, but rather Judge Robinson’s not allowing defense counsel to be present and her failure to have a record made of the exchange. Section 15-4.3(b) absolutely does prohibit that, as the provision clearly states as directly quoted in the Order:

After the conclusion of the trial and the completion of the jurors’ service, the District Court may engage in discussions with the jurors. Such discussions should occur only on the record and in open District Court with counsel having the opportunity to be present.

App. 351 (emphasis added).

The District Court *did* violate this provision, having excluded counsel from its *ex parte* interview, and having failed to make a record of the two-hour conversation. Moreover, the District Court did not provide counsel with any opportunity to request that the exchange be recorded, as was their right under statute: “Each session of the Court and every other proceeding designated by rule or order of the Court or by one of the judges shall be recorded verbatim. . . . Proceedings to be recorded under this section include . . . such other

proceedings . . . as may be requested by any party to the proceeding.” 28 U.S.C. § 753(b). If defense counsel had known that the District Court was going to interview the jurors for two hours, after it denied counsel the opportunity to speak to them themselves, they surely would have asked that a record be made. Given Judge Robinson’s subsequent use of her unrecorded jury interview to bolster her unrecorded trial observations, about defense counsel’s unrecorded misconduct, the importance of these provisions could hardly be clearer.

2. The District Court’s Recusal Analysis

The District Court’s analysis of the recusal motions, as noted above, avoids any discussion of whether the District Court might *appear* to be impartial, the touchstone under 28 U.S.C. § 455(a). Rather, the District Court framed the issue as a challenge to the District Court’s authority. In so doing, it impermissibly alters the governing standard such that *actual bias* must be shown:

Essentially, defense counsel, who are apparently still unchastened for their misconduct and disrespect to the jury, the Court and the judicial system, argue that this Court *is not fair and impartial* because it called defense counsel’s conduct offensive and despicable. The defendants now *challenge the Court’s authority to exercise discipline and maintain order and decorum* with a motion for recusal, arguing that this Court’s statement during the January 4, 2005 hearing that it would not hesitate to cite counsel in contempt for future contemptuous conduct, renders it incapable of presiding over the next trial.

App. 343 (emphasis added).

Judge Robinson then briefly discussed some of her statements and actions upon which the recusal motions are based, concluding that each is an “attempt to maintain decorum in the District Courtroom and rebuke attorneys for unethical conduct [that] simply may not form the basis for recusal.” App. 346.

But in reaching that conclusion, a conclusion which, again, avoids the legally dispositive *appearance* issue, the District Court ignored its most inflammatory condemnations of defense counsel, condemnations which far exceed “routine trial administration efforts, and ordinary admonishments . . . to counsel.” Liteky v. United States, 510 U.S. 540, 556 (1994). The Order contains no mention of Judge Robinson’s comparison of Mr. Wilson to Charles Manson, her claim that Mr. Little “had the demeanor of someone . . . getting ready to punch someone,” her assertion that Mr. Little breached codes of trial conduct “on an hourly basis,” her uncorroborated claim that Mr. Wilson violated the privacy of her staff by attempting to view their notes in violation of “common human experience,” her assertion that Lake associates were sitting around billing millions of dollars, the “regret” she felt at not holding Mr. Little in contempt, her threats to “kick Mr. Little out” of the second trial “like I wanted to” during the first trial, or her threat to require inexperienced junior associates to assume the defense of Mr. Lake if she carried through on that threat.

The District Court did address certain third-party evidence submitted in support of recusal, but unlike its wholesale adoption of third-party evidence supportive of her observations, e.g., the redacted e-mail from an anonymous alleged perspective juror, the District Court categorically rejected third-party information undermining her observations. App. 347 (“We cannot adopt a per se rule holding that when someone claims to see smoke, we must find that there is fire. That which is seen is sometimes merely a smokescreen”)(quoting United States v. Bayless, 201 F.3d 116 (2d Cir. 2000)).

For example, defendants submitted accounts from local newspaper coverage to demonstrate that reasonable observers regarded the District Court as extremely antagonistic towards defense counsel. The District Court dismissed that evidence:

Defendants’ reliance on the Kansas City Star newspaper article is misplaced for several reasons. First, it is not evidence. Second, a newspaper article authored by a reporter, who could not be fully informed about the nature, incidence or severity of counsel’s violations of Court orders, and disruptiveness of the Court process, is simply not persuasive evidence. . . . Third, this newspaper article is not a truthful, objective account of what occurred at the January 4, 2005 hearing, but rather contains the type of information which the Court should ignore.

Order at App. 347-48. See also App. 348-49 (noting that a report’s description of her “trembling” voice, the “verbal fusillade” or her “rag[ing]” at defense attorneys “does not at all represent the tone, words or tenor” of the status conference).

By contrast, newspaper accounts which do not mention Judge Robinson's apparent bias were embraced by the District Court as truthful. App. 348-49 (citing The Topeka Capital Journal's account of the January 5, 2005 session which, the District Court asserted, "apparently did not perceive the Court to have engaged in the conduct described by the Kansas City Star reporter").¹⁶

Similarly, even though Judge Robinson admitted on the record to having an *ex parte* conversation during trial with a juror (App. 722-23) whose brother is a lawyer (App. 609-10), she dismissed the account of a third party about an argument she allegedly had with a juror with a lawyer-brother (about a point of law the District Court ruled upon) as "anonymous," "double hearsay" and "false." App. 353. This stands in stark contrast to the District Court's embrace of the anonymous, redacted, hearsay e-mail of the unidentified potential juror that Judge Robinson relied on to disparage the conduct of Lake associates Masimore and McEnnis. App. 323-24 (noting that Masimore's and McEnnis' "behavior was so egregious that it moved a potential juror to write a letter about that conduct, citing

¹⁶ The District Court made no mention of the fact that The Topeka Capital Journal's story quotes a Washburn University Law Professor who asserted that Judge Robinson appeared at the January 4 hearing to be attempting to "muzzle these lawyers." App. 151-52. On another occasion, the Topeka Capital Journal witnessed the Court cutting off Mr. Little – one of the things this Court now cites as contemptuous conduct on Mr. Little's part. See App. 552 ("On Friday, Little stood up to object to one of prosecutor Richard Hathaway's questions, and Robinson overruled him before he could state his objection"). These accounts were all brought to the Court's attention in the motions to recuse, but Judge Robinson chose to dismiss the press accounts noting her apparent anger as "not a truthful, objective account of what occurred. . . ." App. 348.

his or her concern,” and concluding that the anonymous letter’s “referenced defense team members . . . presumably refers” to Masimore and McEnnis).

Finally, in discussing this anonymous letter, the District Court repeats the government’s mistaken claim, in opposition to recusal, that Mr. Little had been told to stay away from Mr. Hathaway as of December 3, 2005. See App. 353 (“As addressed above, the Court had previously ordered Mr. Little to refrain from approaching or contacting Mr. Hathaway”). Again, Judge Robinson’s criticism of counsel is grounded on a factual error. The record does reflect the District Court’s admission that Mr. Hathaway *requested* such an order (possibly in an *ex parte* communication since there is no record of this), but the record confirms that Mr. Little was not told to stay away from Mr. Hathaway as of December 3rd. See App. 724 (District Court makes a reference to “Mr. Hathaway asking me to order Mr. Little not to” approach him); App. 215 (District Court stating “But – *and you’d asked for this order before*, but I’m going to put in the order itself that Mr. Little shall not and you shall not, Mr. Hathaway, the two of you shall not have any direct contact inside or outside of the courtroom”)(emphasis added).

Apparently both the government and the District Court incorrectly believed that Mr. Hathaway’s request had been reduced to an actual order. It had not. Yet it was on the basis of this non-existent “order” not to approach Mr. Hathaway (apparently made in response to multiple “requests” which were not made in the

presence of defense counsel) that the District Court in its Order blames Mr. Little for the near “fist fight” observed by the jurors on December 3, 2005.

In truth, this near “fist fight” incident did not happen “[d]espite the Court’s warning to Mr. Little and Mr. Hathaway to refrain from approaching each other,” as the District Court incorrectly recounts. App. 353. The incident occurred when Mr. Little properly approached Mr. Hathaway, who “immediately threw up his hand and told Mr. Little to stay away from him.” App. 353. Operating under her inaccurate factual recollection, Judge Robinson missed this point and turned it against Mr. Little and in favor of Mr. Hathaway, who, in Judge Robinson’s eyes was always “professional and respectful.” App. 333.

3. The District Court’s Restrictions on Retrial

In response to defense counsel’s allegedly contemptuous, disrespectful, disgusting and unethical behavior, the District Court in its Order followed through on its promise to impose a series of restrictions for retrial. These include: precluding Mr. Wilson from participating in retrial; barring Mr. Little from communicating in any way with Mr. Hathaway; stationing of court security officers in the courtroom to discourage defense counsel misconduct; and directing where Ms. Junghans must sit at counsel table. The District Court also imposed rules on how objections may be made, and when bench conferences can be held. App. 355-65.

V. REASONS WHY THE WRIT SHOULD BE GRANTED

The writ should be granted because (A) mandamus is appropriate in this case, and (B) Judge Robinson has displayed an appearance of deep-seated antagonism toward, and bias against, Mr. Lake's defense team such that her impartiality might reasonably be questioned under 28 U.S.C. § 455(a).

A. Mandamus Is Appropriate in This Case

Section 1651(a) of Title 28 authorizes the District Court to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." Such writs are employed "to confine an inferior Court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." Mallard v. U.S. District Court, 490 U.S. 296, 308 (1989) (quoting Roche v. Evaporated Milk Assn., 319 U.S. 21, 26 (1943)). The writ may issue on a showing that the petitioner (1) has "a clear and undisputable right to relief" (based on a demonstration of a clear abuse of discretion, or conduct by the District Court amounting to a usurpation of judicial authority), and (2) lacks "adequate alternative means to obtain the relief" sought. Nichols v. Alley, 71 F.3d 347, 350 (10th Cir. 1995).

A writ "is an appropriate vehicle by which to challenge a District Court's denial of a recusal motion." Id. (granting the recusal writ under 28 U.S.C. § 455(a) because "[p]ublic respect for the judiciary demands this result.") (quoting

United States v. Jordan, 49 F.3d 152, 157 (5th Cir. 1995)). See also In re Bennett, 283 B.R. 308, 311, 321 (10th Cir. 2002); In re American Ready Mix, Inc., 14 F.3d 1497, 1499 (10th Cir.), cert. denied sub nom. Lopez v. Behles, Trustee, 513 U.S. 818 (1994); United States v. Cooley, 1 F.3d 985, 996 n.9 (10th Cir. 1993) (same).

Here, that standard for issuance of a writ is met. Judge Robinson abused her discretion in denying Mr. Lake's motion for recusal, and Mr. Lake has no other means to obtain the right to a trial before a District Court with no apparent bias or antagonism against him.

B. Judge Robinson Must Be Recused Under § 455(a) Because She Displays Such An Appearance of Deep-Seated Antagonism Toward, and Bias Against, Mr. Lake's Defense Team That Her Impartiality May Reasonably Be Questioned.

Subsection (a) of 28 U.S.C. § 455 provides that a federal judicial officer “shall disqualify [her]self in any proceeding in which h[er] impartiality might reasonably be questioned.” The recusal statute is designed to promote public confidence in the judicial process, and to protect a defendant's constitutional right to have the trial presided over by a neutral and detached judge. See Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 858 n.7 (1988)(discussing the Congressional motivation of promoting public confidence in the integrity of the judicial process); In re Murchison, 349 U.S. 133, 136 (1955)(“A fair trial in a fair tribunal is a basic requirement of due process. . . . [O]ur system of law has always endeavored to prevent even the probability of unfairness”). See also Nichols, 71

F.3d at 351 (“The goal of section 455(a) is to avoid even the appearance of partiality.”)(quoting Liljeberg, 486 U.S. at 860); United States v. Greenspan, 26 F.3d 1001, 1007 (10th Cir. 1994)(“Congress has mandated that justice must not only be impartial, but also that it must reasonably be perceived to be impartial.”)(citing 28 U.S.C. § 455(a)).

Section 455(a) requires recusal where “sufficient factual grounds exist to cause an objective observer reasonably to question the judge’s impartiality.” Cooley, 1 F.3d at 992 (citations omitted). “The test in this [C]ircuit is whether a reasonable person, knowing all the relevant facts, would harbor doubts about the judge’s impartiality.” Id. at 993 (citations and internal quotations omitted). Actual bias is not required; it is the *appearance* of bias that is dispositive. Liteky v. United States, 510 U.S. 540, 553 n.2 (“The judge does not have to be subjectively biased or prejudiced, so long as he *appears* to be so”)(emphasis in original); Bryce v. Episcopal Church, 289 F.3d 648, 659 (10th Cir. 2002)(“The trial judge must recuse himself when there is the appearance of bias, regardless of whether there is actual bias.”)(citation omitted).

The District Court’s impartiality is judged from an objective standpoint (“in the opinion of a reasonable person”), not the judge’s subjective belief (“in the opinion of the judge involved”). “[K]nowledge of all the facts implies only knowledge of those that are objectively ascertainable. The term cannot . . . extend

to what happens in the judge's chambers or to [her] actual virtue because, were that so, the test would be not the appearance of impartiality but the absence of actual prejudice." Hall v. Small Business Admin., 695 F.2d 175, 179 (5th Cir. 1983).¹⁷

Bias that originates in the case itself is grounds for recusal where the judge's opinions "*display a deep-seated favoritism or antagonism as to make fair judgment impossible.*" Liteky, 510 U.S. at 555 (emphasis added). See also id. at 557-58 ("§ 455(a) is triggered by an attitude or state of mind so resistant to fair and dispassionate inquiry as to cause a party, the public, or a reviewing court to have reasonable grounds to question the neutral and objective character of a judge's rulings or findings.") (Kennedy, J., concurring). St. Anthony Hosp. v. U.S. Dep't of Health and Human Services, 309 F.3d 680, 711 (10th Cir. 2002) ("A favorable or *unfavorable predisposition* can also deserve to be characterized as "bias" or "prejudice" because, even though it springs from the facts adduced or the events occurring at trial, it is so extreme as to display clear inability to render fair judgment.") (quoting Liteky, 510 U.S. at 551) (emphasis added). Finally, "[i]f the issue of . . . disqualification is a close one, the judge must be recused." 12 James

¹⁷ The legislative history states that § 455(a) "sets up an objective standard, rather than the subjective standard This general standard is designed to promote public confidence in the impartiality of the judicial process by saying, in effect, if there is a reasonable factual basis for doubting the judge's impartiality, [she] should disqualify [herself] and let another judge preside over the case." H.R. Rep. No. 93-1453 (1974), *reprinted in*, 1974 U.S.C.C.A.N. 6351, 6354-55.

Wm. Moore, Moore's Federal Practice – Civil § 63.21[5] (3d ed. 2005). See also Bryce, 289 F.3d at 659.

In the instant case, Judge Robinson's harshly expressed condemnations of counsel and repeated threats to remove them from the case betray an undeniable, fatal appearance of antagonism and bias requiring her recusal. A review of the record makes that clear.

On December 6, 2004, Judge Robinson exploded at Christopher Wilson, Mr. Lake's second most knowledgeable and experienced attorney, who up until that point had never once been admonished by the District Court or otherwise cited for any misbehavior during the trial. Judge Robinson claimed that she had "never in [her] life seen people conduct themselves" so disrespectfully and strongly implied, incorrectly, that Mr. Wilson had attempted to review the notes of her staff members during a break. She then barred him from the courtroom without affording him an opportunity to respond.

At a status conference on January 4, 2005, Judge Robinson raged at defense counsel, lashing out at them for nearly an hour with wholesale condemnations of their character, ethics and professionalism. Judge Robinson variously labeled the defense attorneys contemptuous, disrespectful, disgusting, offensive, condescending, out of line, and disruptive. She claimed they repeatedly violated duties of honesty, candor, and fairness. She accused Mr. Little of breaching codes

of trial conduct on an hourly basis. She expressed regret that she did not hold him in contempt.

Judge Robinson went on at the January 4th status conference to compare Mr. Wilson to mass murderer Charles Manson. She suggested that Mr. Little, an experienced and well-respected lawyer and former federal prosecutor, looked like he was about to assault someone at the first trial. She suggested that much of Mr. Little's defense team did nothing but sit around and bill their client to watch the trial. Judge Robinson accused Ms. Junghans, also a former federal prosecutor, of purposefully engaging in lewd acts toward the jury, and she threatened to publish the details of the accusation, even while admitting she herself had not seen the alleged offensive conduct.

Judge Robinson confirmed her earlier courtroom bar imposed against Mr. Wilson. She warned that Mr. Little's cross-examinations, and the trial itself, would be artificially shortened at retrial. She barred Mr. Little from approaching or communicating with Mr. Hathaway. She said that court security officers would be stationed near defense counsel tables during the second trial. She threatened to bar Mr. Little from the second trial should he "argue" with the District Court's rulings, and promised that she would require his inexperienced junior lawyers to carry on the defense if he was "kicked out."

Judge Robinson leveled these accusations and imposed these restrictions at the January 4th status conference notwithstanding her admission that, for the most part, neither the alleged misconduct nor her objections to it are fully reflected in the trial record. She attempted to fill those gaps in the record by purporting to speak for the jurors, whom she admitted interviewing for two hours after trial in off-the-record, *ex parte* discussions. Judge Robinson claimed that their observations exactly mirrored hers in all respects, but refused defense counsels' request to interview the jurors, even under the strictest limitations.

Judge Robinson finished her tirade on January 4, 2005 by specifically prohibiting defense counsel from objecting or otherwise responding to her assertions, saying such responses would "fall on deaf ears." App. 059, 082. She further made a clear threat to retaliate if they took any action in response by publishing a written opinion: "[I]f I am challenged and my credibility is challenged, then I'll lay it out in an order that we'll publish." App. 076.

The District Court followed through on its threat when it denied the defendants' recusal motions and issued its Order of April 4, 2005, which it had placed on the District Court's website and given to West Publishing Company for publication. The Order and its immediate publication are proof positive of the District Court's deep-seated antagonism against the defense. In 47 disparaging pages, the District Court repeats, expands upon, and attempts to rationalize its

scathing criticism of defense counsel. The Order identifies and publicizes findings of contemptuous and unethical behavior against six specific defense attorneys, while simultaneously clearing the prosecutor of any misconduct. These findings are based on Judge Robinson's mistaken recollections, negative presumptions, factual errors and reliance upon hearsay accusations of anonymous third parties.

Judge Robinson in the Order accuses defense counsel of repeated misconduct, and of engaging in behavior described as abusive, childish, inappropriate, unprofessional, uncivil, contemptuous, disrespectful, openly defiant, and unethical. She admits the trial record will not fully reflect either the misconduct or her objections to it but claims over and over that the jurors agree with her characterizations and observations. As an advocate might do, the District Court rejects the evidence controverting her conclusions as scurrilous, unreliable or false, while evidence supporting her claims is embraced as true, regardless of its reliability or even its availability to the parties and the record or its inadmissibility.

Among the factual errors contained in the Order are: the District Court's claim that she admonished all defense counsel in her chambers during voir dire; that defense counsel requested a bench conference for the "vast majority" of their evidentiary objections; that Mr. Little did not object on Confrontation Clause grounds to the admission of certain documents; and that she directed Mr. Little prior to December 3, 2004 not to physically approach Mr. Hathaway.

Among negative assumptions Judge Robinson makes against defense counsel are: that a redacted email from an unidentified alleged perspective juror was authentic; that the reference in that letter to disruptions from unspecified counsel must have been to two specific junior attorneys on Mr. Lake's defense team; that Mr. Wittig's counsel Paula Junghans *intentionally* did something inappropriate to distract jurors while seated at defense table; that Mr. Little did not feel threatened when Mr. Hathaway stood nearby in the courtroom as Mr. Little addressed the District Court; and that a confrontation which started when Mr. Hathaway yelled at Mr. Little was Mr. Little's fault.

The record citations offered by Judge Robinson as evidence of the alleged most egregious misconduct by defense counsel do not justify the District Court's disparagement. For example, purported instances of Mr. Little improperly "arguing" with and interrupting the District Court, when reviewed in full, show Mr. Little being professional and respectful toward Judge Robinson.

The analysis within the Order also betrays an appearance of antagonism and bias. Judge Robinson first characterizes the recusal motions as a "challenge" to her authority, and as evidence that defense counsel remains "unchastened" by their misconduct. While the District Court acknowledges that Section 455(a) mandates recusal for judges who "might appear" to a reasonable observer to be partial, or to hold a deep-seated antagonism against a party or his counsel, it then does not apply

that standard but, in an effort to defend its own conduct, makes factual findings that it itself was not actually biased.

Judge Robinson, in justifying its condemnation of counsel, does not attempt to defend the more inflammatory language and threats used at the January 4th conference. These, we respectfully submit, are more probative of the District court's attitude to the defense. They include: her claim that Mr. Little "had the demeanor of someone . . . getting ready to punch someone"; her comparing Mr. Wilson to Charles Manson; her claim that he violated the privacy of her staff; her assertion that Hughes Hubbard associates were sitting around billing millions of dollars; her threats to "kick Mr. Little out" of the second trial; her refusal to allow defense counsel to interview jurors, even under strict limitations; her warning to defense counsel that they had better not respond to her accusations; her admission that defense counsel's "denials and platitudes and insincere whatevers" would "fall on deaf ears"; and her vindictive publication of the Order, containing scathing criticism of counsel.

In the present case, there simply is no question: "sufficient factual grounds exist to cause an objective observer reasonably to question the judge's impartiality." Cooley, 1 F.3d at 992. As we have noted many times, recusal does not require a finding of actual bias, nor is actual bias implied by a finding that recusal is necessary:

[N]o doubt some judges, even though not biased or prejudiced, have denied motions for a new judge simply because of a feeling that to grant the motion would be construed to be an admission of the non-existent ground for disqualification. This motivation, we feel, should never deter a judge from granting the motion if the over-all administration of justice, and the needs of the particular litigation, are improved thereby. This is the same basic policy which precludes the entering of a compromise and settlement as being considered an admission of liability.

Action Realty Co. v. Will, 427 F.2d 843, 845 (7th Cir. 1970).

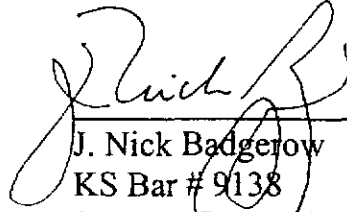
Contrary to the District Court's assertion, we do not seek to challenge the District Court's authority through this motion. Nor does Mr. Lake or his defense team intend any disrespect to Judge Robinson. We seek only to enforce Mr. Lake's constitutional and statutory right to a criminal trial free of even the appearance of a partial judge.

As this District Court stated in United States v. Ritter, 540 F.2d 459, 464 (10th Cir.), cert. denied sub nom. Olson Farms, Inc. v. United States, 429 U.S. 951 (1976), cases must be "tried with the impartiality that litigants have a right to expect in a United States District Court," and recusal can therefore be ordered without "questioning either the integrity or sincerity of the judge." Recusal is a "practical action which seeks to avoid stress, trouble and complications in the upcoming trial." Id. We seek nothing more than that.

VI. CONCLUSION

For the foregoing reasons, and for the reasons set forth in the accompanying affidavits of Edward J.M. Little, F. James Robinson, Jr., and Michael Kaye, petitioner-defendant Lake respectfully requests this Court pursuant to 28 U.S.C. § 1651(a) and Rule 21(a) of the Federal Rules of Appellate Procedure to issue a writ of mandamus to the District Court directing it to permanently recuse itself from all future proceedings in *United States of America v. David C. Wittig and Douglas T. Lake*, Case No. 03-40142-01/02-JAR, and to vacate its Memorandum Order dated April 4, 2005.

Respectfully submitted,



J. Nick Badgerow

KS Bar # 9138

Spencer Fane Britt & Browne LLP

9401 Indian Creek Parkway

40 Corporate Woods, Suite 700

Overland Park, KS 66210

Telephone: (913) 327-5134

Facsimile: (913) 345-0736

Edward J.M. Little

Hughes Hubbard & Reed LLP

One Battery Park Plaza

New York, NY 10004

Telephone: (212) 837-6000

Facsimile: (212) 422-4726

Counsel for Petitioner Douglas T. Lake

CERTIFICATE OF SERVICE


I hereby certify that a copy of the above and foregoing was served this 25th day of April, 2005 by sending via U.S. Mail, two copies to:

Hon. Julie A. Robinson
United States District Court
District of Kansas
405 United States Courthouse
444 S.E. Quincy Street
Topeka, Kansas 66683

Richard L. Hathaway
Senior Litigation Counsel
United States Attorney's Office
444 S.E. Quincy Street
Topeka, KS 66683-3592

Jeffrey D. Morris, Esq.
Berkowitz Stanton Brandt Williams & Shaw LLP
4121 West 83rd Street, Suite 259
Prairie Village, Kansas 66208

Earl J. Silbert, Esq.
DLA Piper Rudnick Gray Cary US LLP
1200 19th Street, N.W.
Washington, D.C. 20036-2412



Edward J.M. Little