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STATE OF WISCONSIN

CIRCUIT COURT

DANE COUNTY

STATE OF WISCONSIN,

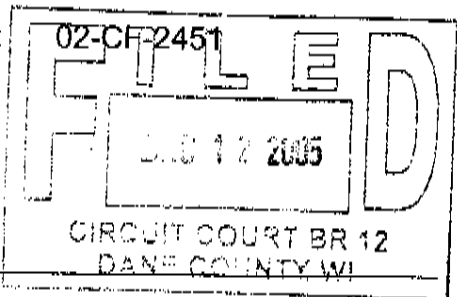
Plaintiff,

v.

CHARLES CHVALA,

Defendant.

Case No.:



DEFENDANT'S MOTION FOR RECUSAL

Defendant, Charles Chvala, by his attorneys, Lawton & Cates, S.C. by James A. Olson, Richard L. Cates, and John C. Carlson, Jr., hereby requests and moves the court that the Honorable David T. Flanagan recuse himself from the instant case. As grounds for this motion, Defendant asserts that a recent letter sent *sua sponte* by your Honor to Assistant District Attorney Kurt Benkley, evidences your Honor's partiality and bias against the Defendant in violation of Wis. Stats. § 757.19(2)(g); in violation of Defendant's due process rights to an impartial and unbiased judge, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution; and in violation of Defendant's common law due process rights. As further support for this motion, a memorandum is submitted herewith.

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STATE OF WISCONSIN

CIRCUIT COURT

DANE COUNTY

STATE OF WISCONSIN,

Plaintiff,

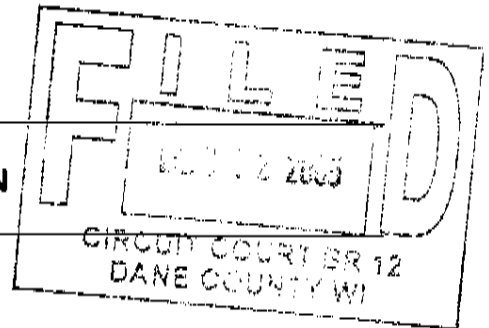
v.

Case No: 02 CF 2451

CHARLES CHVALA,

Defendant.

AFFIDAVIT OF JAMES A. OLSON



STATE OF WISCONSIN)
)
 COUNTY OF DANE)

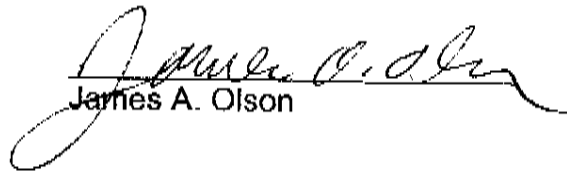
1. I am an attorney with the law firm of Lawton & Cates, S.C. I am admitted before and in good standing with the State of Wisconsin, the United States District Court for the Western District of Wisconsin, the United States District Court for the Eastern District of Wisconsin and the United States Court of Appeals for the Seventh Circuit.

2. I am one of the attorneys retained to represent the Defendant in the above captioned matter.

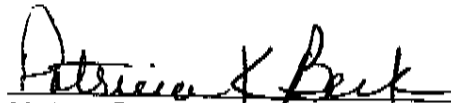
3. I offer this affidavit in support of the Defendant's Motion for Recusal.

4. Attached hereto as Exhibit A is a true and correct copy of correspondence dated December 6, 2005 from Judge Flanagan to ADA Kurt Benkley concerning the issue of restitution by the Defendant.

5. Attached hereto as Exhibit B is a true and correct copy correspondence dated December 9, 2005 from Donald Schneider to Judge Flanagan concerning the history the caucus system in the State of Wisconsin.


James A. Olson

Signed and sworn before me
this 9th day of December 2005.


Notary Public, State of Wisconsin
My Commission Expires: 9-30-07

PATRICIA K. BECK
Notary Public
State of Wisconsin

dr

STATE OF WISCONSIN

CIRCUIT COURT FILED DANE COUNTY

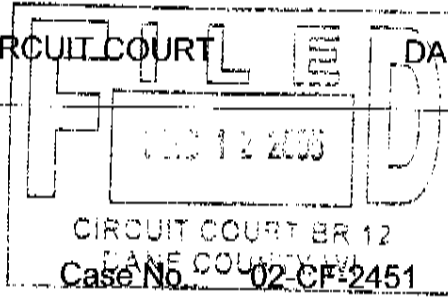
STATE OF WISCONSIN,

Plaintiff,

v.

CHARLES CHVALA,

Defendant.



MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR RECUSAL

INTRODUCTION

Defendant Charles Chvala submits this memorandum in support of his motion for the Honorable David T. Flanagan to recuse himself from the instant case. Defendant so moves, because a recent letter sent *sua sponte* by your Honor to Assistant District Attorney Kurt Benkley, evidences your Honor's partiality and bias against the Defendant in violation of Wis. Stat. § 757.19(2)(g); in violation of Defendant's due process rights to an impartial and unbiased judge, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution; and in violation of Defendant's common law due process rights.

As Defendant's counsel, we submit the instant motion and accompanying memorandum on defendant's behalf in good faith, with the aim of fulfilling our ethical obligation of zealous representation. Our submissions, however, are offered with the trepidation that attends the realization that our client's fate rests in the hands of the very arbiter whose impartiality we challenge. We do not take such a delicate predicament lightly; were it not for a strong conviction underlying our arguments, we would not

venture to make them. We also wish to emphasize, however, that this motion does not seek to question in any way the integrity and expertise that your Honor brings to the bench. Regardless of the Court's disposition of this motion, we hope that it will bear in mind these prefatory remarks in considering our position, and, should your Honor ultimately sentence Charles Chvala, not exact additional punishment for the submission of the instant motion.

FACTS

The facts on which the instant motion is based are undisputed. On December 2, 2005, the State filed its sentencing memorandum with this Court. That memorandum concludes with a persuasive section regarding restitution, which, in its entirety, states:

The State is unable to make a recommendation as to restitution for defendant Chvala's misappropriation of State of Wisconsin resources. At a restitution hearing, the State bears "the burden of demonstrating by the preponderance of the evidence the amount of loss sustained by the victim..." Section 973.20(14)(a), Wis. Stats. ***It is impossible to reasonably determine the amount of state time which SDC employees spent on elections.*** SDC employees all assert they worked long hours during fall election seasons. Some portion of that time was devoted to campaign work and some to legitimate legislative work. ***No employee can state, with any certainty, the exact split. No reliable work records exist to conduct an accounting of the hours of state time which SDC employees spent on campaigning.***

Had this case gone to trial, the prosecution would have focused on SDC employees using the state resources of office space, computers, telephones, fax machines, and graphics printers. The State would not have attempted to account for state time versus personal time spent on campaign work. Under these facts, the State cannot prove a specific restitution figure.

In efforts parallel to the present prosecution, the State is acting to recoup the monies which defendant Chvala unlawfully raised for ICD-Issues. Attorneys representing ICD-Issues agreed to hold these funds in escrow until the prosecution of defendant Chvala was completed. On last accounting, \$448,520.42 remained frozen. The State has now reached an agreement ICD-Issues' attorneys, in principle, wherein ICD-Issues shall forfeit the funds to the state school fund. However, should negotiations founder, the State shall seize and forfeit the ICD-Issues funds under sections 973.075 and 973.076, Wis. Stats.

State's Sentencing Memorandum, Dane Co. Case No. 02CF2451, 12/2/05, (emphasis added).¹

The Defendant's counsel received via facsimile a letter from the Honorable David T. Flanagan, dated December 6, 2005, addressed to ADA Benkley. (Olson Aff., Exhibit A.)² It is this letter that evidences, in our view, its author's partiality and bias against the Defendant. Specific portions of the letter are discussed below, where appropriate.

Recently, Brian Burke was sentenced to six months in jail, because it was stipulated that members of his staff were paid \$75,000.00 by the State of Wisconsin while working on his campaign for Attorney General. The sentencing judge said that this is a simple case. Burke stole \$75,000.00 from the State for use in his campaign.

We are now on the eve of sentencing. The prosecutors acknowledge that they would have been unable to prove similar misappropriations with respect to Chvala, and would not even have tried. Thus, the abuse that led to a six-month sentence in Burke is absent in this case.

The Defendant has agreed to the read in of other counts and therefore admits those crimes. However, he denies that such crimes cost the State any money. The lack of pecuniary loss is supported by caucus employees, including the named by the Court in its letter. The fact that his actions did not cost the State money is a relevant sentencing consideration since it goes to the gravity of the offense.

Don Schneider was the non-partisan Chief Clerk of the Senate from 1977 until recently. The Prosecution as well as the Defendant named him as a witness. Schneider

¹ The *State's Sentencing Memorandum*, Dane Co. Case No. 02CF2451, 12/2/05, is incorporated herein by reference.

² Exhibit A, a true and correct copy of the letter in its entirety, is incorporated herein by reference.

was acutely aware of the activities of all caucus employees; he knew that they amassed huge amounts of compensatory time that permitted them to work on campaigns without cheating the State. His letter to the court states:³

It was common for partisan legislative employees; in particular those in the caucus staffs, to take vacation or use compensatory time off to actively participate in campaigns. The business of the legislature has huge peaks and valleys. During the session, members and staff put in a considerable amount of time each week. However, during the interim, the demands are far less and it was common for staff to take advantage of the lull in activity to take vacation time or use accumulated compensatory time off. Partisan legislative employees are not paid over time. For the most part they were monthly salaried professional employees. Compensation was based on a 40-hour workweek or 2,080 hours per year. The Senate policy provided for appointing authorities to establish the work schedule and to grant compensatory time off for work in excess of 40 hours. The work schedule of some employees, including the caucus staff, resulted in considerable compensatory time off.

Chvala's activities as head of the caucus did not cause the State a pecuniary loss.

ARGUMENT

The legal grounds on which we rely to argue that your Honor must recuse himself are three-fold: (1) Wis. Stat., § 757.19(2)(g), (2) the right to due process as guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution, and (3) the right to due process under the common law.

I. YOUR HONOR MUST RECUSE HIMSELF, BECAUSE THE LETTER AT ISSUE EVIDENCES HIS PARTIALITY AND BIAS IN VIOLATION OF WIS. STAT. § 757.19(2)(G).

Statutory authority for recusal is set forth in Wis. Stat. § 757.19(2). "The situations requiring disqualification under subs. (a) through (f) are objectively measurable." *State v. Carviou*, 154 Wis.2d 641, 646, 454 N.W.2d 562, 564 (Ct. App.

³ An e-mail copy of the letter is attached. (Olson Aff., Ex. B) The original will be forwarded when received.

1990). Those subsections are not at issue herein; rather, defendant relies on the subjective standard set forth in subsection (g):

The situations under which a judge is legally required to recuse himself are discussed in sec. 757.19(2), Stats. Section 757.19(2) provides in part: "(2) Any judge shall disqualify himself or herself from any civil or criminal action or proceeding when one of the following situations occurs: ... (g) When a judge determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner."

Although one might reasonably conclude that whether it "appears" a judge can act in an impartial manner is an objective test, our supreme court has held that the standard for recusal in sec. 757.19(2)(g) is solely subjective.

State v. Carviou, 154 Wis.2d at 645, 454 N.W.2d at 564.

Thus, regardless of the existence in fact of a judge's partiality or bias, and regardless of the strength of any *objective* evidence thereof, the subjective standard set forth in Wis. Stat. § 757.19(2)(g) requires that *the judge* determine "that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner." The Defendant herein can only present his evidence and arguments of your Honor's actual and/or apparent partiality and bias to persuade your Honor as much. Defendant seeks to do so below. If your Honor is persuaded of his own partiality or bias, recusal is mandatory, not discretionary. See Wis. Stat. § 757.19(2)(g) ("Any judge **shall** disqualify himself or herself from any civil or criminal action or proceeding when one of the following situations occurs...").

II. YOUR HONOR MUST RECUSE HIMSELF, BECAUSE THE LETTER AT ISSUE EVIDENCES HIS PARTIALITY AND BIAS IN VIOLATION OF DEFENDANT'S DUE PROCESS RIGHT TO AN IMPARTIAL AND UNBIASED JUDGE, AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

As a separate and independent legal basis for recusal, Defendant also relies on his Fifth Amendment due process right to substitute any judge who is partial or biased.

The test for determining whether such a right has been infringed consists of two parts, one subjective, the other, objective. In *State v. Santana*, 220 Wis.2d 674, 584 N.W.2d 151 (Ct. App. 1998), the court of appeals explained the test as follows:

Santana next claims that Judge Kennedy erred in his decision not to recuse himself when defense counsel brought a motion for substitution of judge at the postconviction hearing. Whether Judge Kennedy was a "neutral and detached magistrate" is a question of constitutional fact which we review *de novo* and without deference to the trial court. See *State v. McBride*, 187 Wis.2d 409, 414, 523 N.W.2d 106, 109 (Ct.App.1994). There is a presumption that a judge is free of bias and prejudice. See *id.* In order to overcome this presumption, the party asserting judicial bias must show by a preponderance of the evidence that the judge is biased or prejudiced. See *id.* at 415, 523 N.W.2d at 109.

In determining whether Judge Kennedy's decision not to recuse himself resulted in bias or prejudice to Santana, we must evaluate the existence of bias in both a subjective and an objective light. See *id.* at 415, 523 N.W.2d at 110. The subjective component is based on the judge's own determination of whether he will be able to act impartially. See *id.* In determining whether this component is satisfied, it is only necessary to examine Judge Kennedy's decision not to recuse himself. See *id.* If he had subjectively believed that he could not act impartially, he would have been required to disqualify himself from the case. Because he did not, we may presume that Judge Kennedy believed himself capable of acting in an impartial manner, and our inquiry into this factor is at an end. See *id.*

Under the objective test, we must determine whether there are objective facts demonstrating that Judge Kennedy was actually biased. See *id.* at 416, 523 N.W.2d at 110. Under this test, Santana is required to show that the judge "in fact treated him unfairly." *Id.*

State v. Santana, 220 Wis.2d 674, 684-685, 584 N.W.2d 151, 156.

A. If Persuaded of His Own Partiality or Bias Under The Subjective Due Process Test, Your Honor Must Recuse Himself.

The subjective prong of the due process test is substantially similar to the subjective test set forth in Wis. Stat. § 757.19(2)(g), and is thus subject to the same paradoxical hurdle of the judge having to admit his own partiality or bias. The best the Defendant can offer, once again, are evidence and arguments of partiality and bias in fact to persuade your Honor of his lack of impartiality. If so persuaded, your Honor must

recuse himself. See *State v. Santana*, 220 Wis.2d at 685, 584 N.W.2d at 156 (“If he [the judge] had subjectively believed that he could not act impartially, he would have been required to disqualify himself from the case.”)

B. Under The Objective Due Process Test, Your Honor Must Recuse Himself.

The contents and timing of the letter in question constitute “objective facts demonstrating that [your Honor is] actually biased” and “show that the judge ‘in fact treated [the defendant] unfairly.’” *State v. Santana*, 220 Wis. 2d at 685, 584 N.W.2d at 156. As such, the letter evidences partiality and bias that violate the Defendant’s Fifth Amendment due process right to an unbiased and impartial judge.

The subject of the letter is restitution – surprisingly – because the State’s Sentencing Statement unequivocally states that it is not recommending restitution, correctly identifies the State’s burden of proof under Wis. Stat. § 973.20(14)(a), and persuasively explains why it cannot meet that burden. The State rightly asserts, *inter alia*, “It is **impossible** to reasonably determine the amount of state time which SDC employees spent on elections”, because “SDC employees all assert they worked long hours during fall election seasons”, “[s]ome portion of that time was devoted to campaign work and some to legitimate legislative work”, and “[n]o reliable work records exist to conduct an accounting of the hours of state time which SDC employees spent on campaigning.” *State’s Sentencing Memorandum*, Dane Co. Case No. 02CF2451, 12/2/05, (emphasis added).

Effectively assuming a *de facto* role of prosecutorial supervision, the Court disregards the State’s prosecutorial discretion not to pursue that which it knows is unsupportable, proceeds to argue against the State’s well-reasoned position, and

instructs the State to submit a "proposal for restitution". Closer examination of the letter is warranted to demonstrate the extent to which the Court has abdicated its role of dispassionate and neutral arbiter and assumed the role of advocate and prosecutor.

The letter begins with a subtle but important misstatement of the State's assessment of the availability and strength of the evidence necessary to support restitution:

The question of restitution must be carefully considered in light of the nature and the scope of the convictions rendered October 25, 2005. The prosecution suggests that it will not be possible for the court to determine reasonably the appropriate amount of restitution because individual employees of the Senate Democratic Caucus ***may not be able*** to state with certainty the exact proportion of state time devoted to partisan campaigning.

(Olson Aff., Ex. A, p. 1) (emphasis added).

The State's actual statements are much stronger:

No employee can state, ***with any certainty***, the exact split. ***No reliable work records exist*** to conduct an accounting of the hours of state time which SDC employees spent on campaigning.

State's Sentencing Memorandum, Dane Co. Case No. 02CF2451, 12/2/05, (emphasis added).

The letter continues with a politely subtle suggestion that the State is misapprehending the proper burden of proof:

Experienced prosecutors are accustomed to the obligation to prove a criminal charge to the highest burden applicable in Wisconsin courts, proof beyond a reasonable doubt. By sharp contrast, the burden of proof that the prosecution must carry as to restitution is the preponderance of the evidence, the lowest burden of proof required in our courts.

(Olson Aff., Ex. A, p. 1)

The State's Sentencing Memorandum belies the court's suggestion that the State is applying an incorrect burden of proof. The State expressly acknowledges, "At a

restitution hearing, the State bears 'the burden of demonstrating by the preponderance of the evidence the amount of loss sustained by the victim...' Section 973.20(14)(a), Wis. Stats." *State's Sentencing Memorandum*, Dane Co. Case No. 02CF2451, 12/2/05.

The Court then provides further argument in support of restitution (and against the interests of the defendant) by offering an analogy to a civil jury instruction and by concluding with the following mandate:

Here, it is undeniable that the public has been seriously injured. A thorough effort to guage that injury is ***required***.

(Olson Aff., Ex. A, p. 1) (emphasis added).

Following this mandate, the Court offers praise of the complaint ("a remarkably comprehensive, detailed account of the offenses charged") and of the State's efforts in drafting it ("an extraordinary investigative effort"), equates allegations in the complaint with evidence ("Looking only to that complaint, that is, looking only to evidence available over three years ago..."), and proceeds to construct a roadmap for the State's use in calculating restitution. (Olson Aff., Ex. A, p. 2).

The letter concludes with more praise of the prosecution and a reprise of the mandate for the State's reconsideration of restitution:

At the very least, this possibility [restitution] ***must be conscientiously explored*** and a full public record be created...

The court is aware of the enormous effort, skill and resources that you, Assistant District Attorney David A. Feiss and the staff of the Office of the Milwaukee District Attorney have committed to this matter for a very significant period of time...

Restitution ***must be carefully evaluated*** even if a serious, fair consideration may prove to be demanding and difficult.

(Olson Aff., Ex. A, p. 3) (emphasis added).

Lastly, absent from the Court's letter is any mention of the substantial funds the State stands to recoup from ICD-Issues, notwithstanding express mention in the State's Sentencing Memorandum:

In efforts parallel to the present prosecution, the State is acting to recoup the monies which defendant Chvala unlawfully raised for ICD-Issues. Attorneys representing ICD-Issues agreed to hold these funds in escrow until the prosecution of defendant Chvala was completed. On last accounting, \$448,520.42 remained frozen. The State has now reached an agreement ICD-Issues' attorneys, in principle, wherein ICD-Issues shall forfeit the funds to the state school fund. However, should negotiations founder, the State shall seize and forfeit the ICD-Issues funds under sections 973.075 and 973.076, Wis. Stats.

State's Sentencing Memorandum, Dane Co. Case No. 02CF2451, 12/2/05.

In light of the State's legitimate exercise of prosecutorial discretion not to recommend restitution; the consensus between both parties that the State cannot meet its burden of proof; the Court's presentation of *argument* for restitution, a position contrary to the Defendant's interests and espoused by neither party's counsel; and the Court's emphatic conclusions that the State *must* reconsider submitting a restitution proposal, no reasonable person could conclude an absence of actual and apparent bias and partiality against the Defendant. The Court is exercising prosecutorial discretion.

Instructive in this regard is *In re United States of America*, 345 F.3d 450 (7th Cir. 2003). In that case, the defendant police officer (Bitsky) allegedly assaulted an arrestee, then tried to induce another officer to write a false arrest report justifying the officer's use of force, and threatened still another officer to prevent her from informing on him. The offending officer was charged with one count of a deprivation of civil rights under color of law and two counts of obstruction of justice. A plea bargain was negotiated between the parties, under which the defendant would plead guilty to the obstruction-of-justice count, while the civil-rights count would be dismissed. The district

court, Judge Shabaz presiding, rejected the plea agreement, because he believed that the single count of conviction under the plea agreement did not reflect the gravity of the defendant's actual offense. Notwithstanding the absence of a plea agreement to protect him, the defendant pled guilty. Judge Shabaz accepted his plea and gave him the maximum sentence allowable by law. Subsequently, the government moved to dismiss the two remaining counts. The district court dismissed the remaining obstruction-of-justice count, but refused to dismiss the civil-rights count, opting, instead, to appoint a private lawyer to prosecute it. The government then requested that the Seventh Circuit court of appeals issue a writ of mandamus ordering the district judge to dismiss the remaining count and rescinding the appointment of the special prosecutor. The court of appeals granted the requested relief. In so doing, the court stated in relevant part:

"A judge in our system does not have the authority to tell prosecutors which crimes to prosecute or when to prosecute them."

In re United States of America, 345 F.3d at 452, quoting *United States v. Giannattasio*, 979 F.2d 98, 100 (7th Cir.1992).

* * * * *

In refusing to dismiss the civil rights count against Bitsky, the district judge was telling the government which crimes to prosecute, and, as these were not crimes against the judiciary, in doing so he stepped outside the boundaries of his authorized powers. See also *United States v. Martin, supra*, 287 F.3d at 623; *United States v. Jacobo-Zavala*, 241 F.3d 1009, 1014 (8th Cir.2001); *United States v. Garcia-Valenzuela*, 232 F.3d 1003, 1007-08 (9th Cir.2000); *United States v. Smith*, 55 F.3d 157, 159 (4th Cir.1995).

In re United States of America, 345 F.3d at 452.

* * * * *

The government wants to dismiss the civil rights count with prejudice, and that is what Bitsky wants as well. The district judge simply disagrees with the Justice Department's exercise of prosecutorial discretion. As he explained in his response to the petition for mandamus, he thinks the government has

exaggerated the risk of losing at trial: "the evidence was strong and conviction extremely likely." *The judge thus is playing U.S. Attorney*. It is no doubt a position that he could fill with distinction, but it is occupied by another person.

In re United States of America, 345 F.3d at 453 (emphasis added).

The court gave the reason why the a court must avoid the role of a prosecutor:

Paradoxically, the plenary prosecutorial power of the executive branch safeguards liberty, for, in conjunction with the plenary legislative power of Congress, it assures that no one can be convicted of a crime without the concurrence of all three branches (again, criminal contempt of judicial orders constitutes a limited exception). When a judge assumes the power to prosecute, the number shrinks to two. *Id.* at 454.

Although the procedural posture of *In re United States of America* differs from the instant case, the similarities between the cases are strong.

III. YOUR HONOR MUST RECUSE HIMSELF, BECAUSE THE LETTER AT ISSUE EVIDENCES HIS PARTIALITY AND BIAS IN VIOLATION OF DEFENDANT'S COMMON LAW DUE PROCESS RIGHTS.


The bias and partiality detailed above also violates the Defendant's common law due process rights. Wisconsin law "recognizes common law as well as constitutional concepts of due process and fair play." *Marris v. City of Cedarburg*, 176 Wis. 2d 14, 25 n.7, 498 N.W.2d 842, 847, n.7 (1993). These concepts include the right to have matters decided by an impartial decision-maker. *Marris*, 176 Wis. 2d at 24, 498 N.W.2d at 847. Moreover, "due process and fair play can be violated 'when there is bias or unfairness in fact[, or when] ... the risk of bias is impermissibly high.'" *Marris v. City of Cedarburg*, 176 Wis.2d at 25, 498 N.W.2d at 847 (brackets in original), quoting *Guthrie v. Wisconsin Employment Relations Commission*, 111 Wis. 2d 447, 454, 331 N.W.2d 331 (1983). The same arguments set forth above to show actual bias apply with even greater force to reveal an impermissibly high *risk* of bias, a lesser standard.

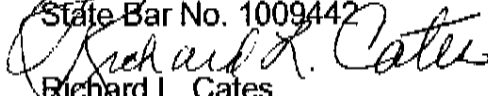
CONCLUSION

We request that the court thoughtfully consider the instant motion and memorandum in the spirit in which they are offered, grant the requested recusal, and grant any further relief consistent with recusal that the Court deems necessary or appropriate.

Dated this 9th day of December 2005.

BY: LAWTON & CATES, S.C.



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