UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 10-2487, 10-3580

UNITED STATES OF AMERICA

Plaintiff-Appellee,

v.

SHOLOM RUBASHKIN

Defendant-Appellant.

ON APPEAL FROM THE U.S. DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
(HON. LINDA R. READE)

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SUMMARY AND STATEMENT REGARDING ORAL ARGUMENT

Sholom Rubashkin, the former manager of a family-owned kosher meat-packing plant in Postville, Iowa, was arrested approximately six months after a highly publicized May 2008 raid on the plant by Immigration and Customs Enforcement ("ICE"). He was found guilty after a one-month jury trial in late 2009 on allegations in a Seventh Superseding Indictment that he had committed a number of financial offenses by inflating the value of collateral for the draws taken by the business on a line of credit with a St. Louis bank. Mr. Rubashkin, who is now 51 years old, was sentenced by District Judge Linda R. Reade to a 27-year term of imprisonment, which was 2 years longer than the prosecution's request.

Months after the jury's verdict, the government produced ICE e-mails and memoranda that reported pre-raid meetings that the United States Attorney's Office had with Judge Reade to discuss various aspects of the raid. These meetings had not been disclosed to Mr. Rubashkin's trial counsel. Leading ethics experts have opined that Judge Reade should, on account of these meetings, have been recused.

The legal issues concerning (1) the fairness of Mr. Rubashkin's trial and sentence and (2) the pre-raid conduct of the judge and the prosecutors and its effect on the trial are novel and difficult, and they warrant oral argument of 30 minutes to each side.

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JURISDICTIONAL STATEMENT

The District Court's jurisdiction over this criminal case rests on 18 U.S.C. § 3231. This Court's jurisdiction rests on 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the trial judge's off-the-record consultations and meetings with prosecutors and other law enforcement personnel planning the immigration raid that led to Appellant's prosecution created an appearance of partiality, should have been disclosed to Appellant's trial counsel, and warranted the judge's recusal.

Most Apposite Cases:

Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847 (1988)

Moran v. Clarke, 296 F.3d 638 (8th Cir. 2002)

United States v. Amico, 486 F.3d 764 (2d Cir. 2007)

United States v. Earley, 746 F.2d 412 (8th Cir. 1984)

Most Apposite Statutory Provision: 28 U.S.C. § 455(a)

2. Whether Appellant's trial on financial offenses was improperly prejudiced by the admission of substantial prosecution proof concerning immigration law offenses that the trial judge, in granting severance of trials, had held would be too likely to "spill over" and prejudice a jury considering the financial charges, particularly where (a) the prejudice could have been prevented by trying the immigration charges first, (b) the prejudice was aggravated by the improper exclusion of defense evidence that tended to negate Appellant's guilt on the immigration allegations, and (c) the jury was improperly instructed on the

intent required to find Appellant guilty of fraud in representing that the company was in compliance with the immigration laws.

Most Apposite Cases:

United States v. Weir, 757 F.2d 668 (8th Cir. 1978)

United States v. Taglione, 546 F.2d 194 (5th Cir. 1977)

Taylor v. Singletary, 122 F.3d 1390 (11th Cir. 1997)

United States v. Pereyra-Gabino, 563 F.3d 322 (8th Cir. 2009)

3. Whether, under *United States v. Santos*, a judgment of acquittal should have been entered on the money laundering charges on the grounds (a) that the jury found in special interrogatories that the alleged money laundering transactions "did not involve profits" and (b) that the funds that were allegedly "laundered" were not "proceeds" of an unlawful activity under *Santos*.

Most Apposite Cases:

United States v. Santos, 553 U.S. 507 (2008)

Garland v. Roy, 615 F.3d 391 (5th Cir. 2010)

United States v. Moreland, 604 F.3d 1058 (9th Cir. 2010)

United States v. Hall, 613 F.3d 249 (D.C. Cir. 2010)

Most Apposite Statute: 18 U.S.C. § 1956(a)(1)

4. Whether the 27-year term of imprisonment imposed by the trial judge on a 51-year-old non-violent first-time offender with a compelling family situation who had an extraordinary history of charity and who was motivated not by greed but by the need to maintain the family business was unlawful because (a) the judge erroneously increased the offense level because of invalid money laundering charges and erroneously calculated the "loss" attributable to Appellant's offense under the Sentencing Guidelines, (b) the judge failed to apply the standards prescribed by 18 U.S.C. § 3553(a), and (c) the sentence was so severe as to be substantively unreasonable.

Most Apposite Cases:

Gall v. United States, 552 U.S. 38 (2007)

Kok v. United States, 17 F.3d 247 (8th Cir. 1994)

United States v. Berger, 473 F.3d 1080 (9th Cir. 2007)

United States v. Spero, 382 F.3d 803 (8th Cir. 2004)

Most Apposite Statute: 18 U.S.C. § 3553(a)

STATEMENT OF THE CASE

Mr. Sholom Rubashkin stood trial between October 13 and November 12, 2009 on 91 financial-offense counts of a Seventh Superseding Indictment. The jury found him guilty on 86 counts. He was immediately remanded to custody and is currently serving his sentence of imprisonment. On June 22, 2010, Appellant was sentenced to serve 27 years' imprisonment followed by 5 years of supervised release, and ordered to pay restitution totaling $26,852,152.51. [Addendum ("Add.") 144]

On August 5, 2010, Appellant filed a motion for a new trial on grounds of newly discovered evidence under Rule 33 of the Federal Rules of Criminal Procedure. He requested that the motion be transferred to another judge, that discovery be held, and that an evidentiary hearing be conducted. The District Court denied the Rule 33 motion and other requested relief on October 27, 2010.

These are consolidated appeals from the judgment of conviction and the denial of the motion for a new trial.

STATEMENT OF THE FACTS

1. Aaron Rubashkin Founds Agriprocessors.

Agriprocessors, Inc., a kosher slaughtering and meat-production company, was founded and wholly owned by Aaron Rubashkin, a Russian immigrant and the father of the Defendant-Appellant, Sholom Rubashkin. [Dkt. No. 898 (hereinafter

"Trial Tr."), at 22:93-97; 26:26]. Aaron Rubashkin began his career as a butcher with a small operation in New York, but in 1987 he purchased a long-shuttered plant in the town of Postville, Iowa. [Trial Tr. 22:94-96] He refurbished and opened the plant, originally assisted by about sixty employees. [Trial Tr. 22:105] Over the years, the operation grew considerably, and by 2008 it employed approximately 1000 workers in numerous departments. [Appellant's Appendix ("App.") 5] Agriprocessors also operated facilities in Florida, New York, and Nebraska. [Trial Tr. 26:30]

2. Rubashkin Family Members Manage Agriprocessors.

Sholom Rubashkin, one of Aaron's nine children, received only a limited secular education, graduating from eighth-grade. [Trial Tr. 26:3-5] He then received rabbinical ordination. [Trial Tr. 26:5-6] Mr. Rubashkin has been married for nearly thirty years, and with his wife has ten children, including an autistic son named Moishe. [Trial Tr. 26:6; Sentencing Tr. 118[1]] Appellant began his career by helping at his parents' businesses, but soon left to be a teacher with a Jewish outreach organization. [Trial Tr. 26:7-8] However, Appellant's father pressured him to leave that vocation and return to help the family business. [Trial Tr. 26:8-

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[1] The sentencing transcripts can be found at Dkt. Nos. 936-1 and 937, but are consecutively paginated.

10] He never received any formal training in business or in accounting. [Trial Tr. 26:27]

Other members of the Rubashkin family were also involved in the business. There was little hierarchy in the management, other than an understanding that Aaron Rubashkin was the ultimate decision-maker. [Trial Tr. 21:121-122; 22:218] Aaron initially hired some professionals, including an experienced manager named Donald Hunt. Hunt died in 2003, and nobody was hired to replace him. [Trial Tr. 26:25-26] Management duties were divided among the Rubashkin family members (including Sholom, brother Heshy, brother Joseph, sister Gittel, and brother-in-law Yossi) and a few other employees. [Trial Tr. 22:93; 26:17] Appellant's brother Heshy was in charge of sales and production in Postville, while Appellant concentrated on other matters including financing, public relations, and legal matters. [Trial Tr. 21:122, 143, 171] There were differences between the two brothers, as Heshy sought to expand operations while Appellant wanted to cut spending and reach a stable financial position. [Trial Tr. 21:130-131, 135-136; 26:32] Due in part to these differences, Appellant almost never attended the company's weekly management meetings at which strategic decisions were made. [Trial Tr. 21:130-131]

3. Employees Manage the Finances.

For over a decade, Agriprocessors' financial statements were prepared and kept in order by Yomtov Bensasson, known as Toby, and his brother-in-law, Mitchel Meltzer, who had been a certified public accountant. [Trial Tr. 11:14-17; 16:4, 6, 19-20] Meltzer was responsible for the general ledger, maintaining the balance sheets, reconciling accounts receivable, and preparing documentation for lenders. [Trial Tr. 16:19-23] He reported to Bensasson, who was the controller of the company and managed the accounting division. [Trial Tr. 11:14-17]

4. A Revolving Line of Credit is Established.

In 1999, in order to meet the cash-flow needs inherent in the meat-packing industry, Agriprocessors obtained a revolving line of credit from First Bank Business Capital, Inc. ("FBBC"), a subsidiary of St. Louis-based First Bank. FBBC focused on commercial loans, including riskier "asset-backed" loans. [Trial Tr. 6:5-8; 7:5-8] The loan was subject to a "cap" and was secured by Agriprocessors' inventory and accounts receivable. Agriprocessors was entitled to draw on the "cap" up to 50% of inventory and 85% of accounts receivable (as defined in the loan agreement). [Trial Tr. 7:9-15] The "cap" started at about $18 million, but was gradually increased to $35 million in September 2007. [Trial Tr. 6:24; 7:8, 97-98]

Agriprocessors borrowed against the FBBC line of credit each business day. [Trial Tr. 7:16] In the morning, Bensasson would sign and send to FBBC a statement showing the total value of inventory and accounts receivable and calculating what Agriprocessors could draw against the cap that day. [Trial Tr. 7:14-19; 11:63-64] FBBC would verify the statements and wire the requested funds to Agriprocessors' main account at Citizens State Bank. [Trial Tr. 6:98-99; 7:41; 11:31-32] As Agriprocessors received payments from customers against accounts receivable, those payments were directed to a bank account known as the "sweep" or "depository" account, held at Decorah Bank in trust for FBBC. [Trial Tr. 6:106; 7:19-23]

Agriprocessors paid interest on the draws it had made on the loan on a regular basis. Until the events described below, it never missed an interest payment. [Trial Tr. 6:53] Evidence at trial established that the total interest paid to FBBC on the loan during its life was at least $13.5 million, and may have been as much as $21 million. [Trial Tr. 7:85] FBBC never demanded audited financial statements from Agriprocessors. Instead, its agents conducted periodic "field examinations." [Trial Tr. 23:37-40]

5. Agriprocessors is Raided in May 2008.

On May 12, 2008, the Immigration and Customs Enforcement Agency ("ICE") launched a raid on Agriprocessors' Postville plant. Rumors of the raid had

been circulating prior to that date. [Trial Tr. 26:39] Agriprocessors retained the law firm of Baker & McKenzie, that had negotiated with ICE and with the United States Attorney in the Eastern District of Texas to avoid a raid on another meat-packing plant. The Baker attorney proposed in a letter that Agriprocessors would cooperate with the authorities in terminating the employment of undocumented aliens, as the intended target of the Texas raid had done. [Def. Ex. 6158; Trial Tr. 18:47-48] Neither ICE nor the United States Attorney did "anything to respond" to that letter. [Trial Tr. 18:51] ICE dispatched approximately 600 agents, accompanied by a Blackhawk helicopter, to raid the plant. [Trial Tr. 18:49] ICE agents arrested 389 allegedly undocumented workers, mostly of Hispanic origin. [Trial Tr. 19:10-11]

Evidence at trial established that ICE had *twice* unsuccessfully attempted to have an undercover agent obtain employment at Agriprocessors using false documents. [Trial Tr. 24:42-46] He was rejected first because he had no Social Security card. [Trial Tr. 24:42-44] He returned with false Social Security and permanent-resident cards, both provided by ICE. Agriprocessors rejected him again because his documents were false. [Trial Tr. 24:44-46] ICE then provided him with legally valid documents, and he was finally employed. [Trial Tr. 24:46-50] Evidence at trial also established that Agriprocessors frequently turned away

applicants for employment on the ground that their proffered paperwork was false. [Trial Tr. 18:96, 214; 24:47]

An ICE agent testified at trial that the quality of false documents in the black market is constantly improving, and the agency struggles to prevent fraud. [Trial Tr. 18:39-40, 46-47] Agriprocessors had received from the government a number of so-called "no-match letters" indicating that Social Security numbers provided by some of Agriprocessors' employees did not match their names. These "no-match letters" also warned, however, that taking adverse action against employees solely on the basis of the no-match letters was illegal. [Trial Tr. 18:62, 73-74]

6. The ICE Raid Destroys Agriprocessors.

The ICE raid devastated the Postville plant. Operations never again were close to their pre-raid levels. FBBC nonetheless continued to lend money to Agriprocessors under its line of credit. This arrangement followed a meeting during which Sholom Rubashkin "basically said that the company had complied with the law." [Trial Tr. 7:55, 59, 107-108, 112] FBBC had known before the raid that Agriprocessors had received no-match letters, but it did not conduct any investigation or even ask what responsive action Agriprocessors had taken. [Trial Tr. 23:29-34]

Several months later, in late October 2008, FBBC called the loan after learning that Agriprocessors had not promptly deposited all customer payments

into the "sweep account." [Trial Tr. 7:70-79] On October 30, 2008, FBBC filed a civil suit against Agriprocessors and against Aaron and Sholom Rubashkin for their personal guaranties on the bank loan. The bank's losses were alleged to be approximately $21 million. [Trial Tr. 6:69-71; 7:95-96; App. 179a] Appellant subsequently provided an asset that settled FBBC's claim on his guaranty. On November 4, 2008, Agriprocessors filed for bankruptcy protection, and a trustee was thereafter appointed. [App. 12]

7. Appellant is Arrested, Re-Arrested, and Indicted Seven Times.

Sholom Rubashkin was arrested for the first time on October 30, 2008, on a complaint charging him with immigration-related crimes. [Dkt. No. 199 at 2-3] He was released on severe bail conditions that, to our knowledge, have never been demanded of an employer charged with an immigration violation – a $1 million bond and an ankle bracelet with electronic monitoring. [Dkt. No. 199 at 2] On November 14, 2008, Appellant was arrested again, this time on bank-fraud charges. [Dkt. No. 199 at 3] The new charges alleged that he had inflated the value of the collateral for the FBBC loan and falsely certified to the bank that Agriprocessors was complying with all laws even though the company was employing undocumented aliens. [Dkt. No. 94-2 at 14-15] The prosecutors opposed release on bail and claimed that since Appellant was Jewish there was a risk he would flee to Israel and could not be brought back because of Israel's "Law

of Return." [Dkt. No. 199 at 14] The magistrate judge denied bail [Dkt. No. 164] and Appellant remained in jail for 76 days until the district judge reversed that decision. [Dkt. No. 199 at 10-17]

In reversing the magistrate judge, the district court emphasized that Mr. Rubashkin's "involvement in the community extends beyond Agriprocessors, Inc. to local religious and educational institutions," many of which he had personally "founded." The court also cited Appellant's "history of leadership and charity" and observed that the community's support for him – which included offers by individuals to pledge their home equity as security for his release – was "unprecedented." [Dkt. No. 199 at 12]

Prosecutors secured a series of superseding indictments that ballooned the number of charges against Appellant, as reflected in the following table:

First Indictment	November 13, 2008	3 Counts
Second Superseding Indictment	November 20, 2008	12 Counts
Third Superseding Indictment	December 11, 2008	12 Counts
Fourth Superseding Indictment	January 15, 2009	97 Counts
Fifth Superseding Indictment	March 31, 2009	78 Counts
Sixth Superseding Indictment	May 14, 2009	142 Counts
Seventh Superseding Indictment	July 16, 2009	163 Counts

[Dkt Nos. 80, 94, 150, 177, 413, 464, 544 (App. 4-60)]

The seventh superseding indictment included 14 counts of bank fraud (18 U.S.C. § 1344); 24 counts of making false statements to a bank (18 U.S.C. § 1014); 14 counts of wire fraud (18 U.S.C. § 1343); 9 counts of mail fraud (18 U.S.C. § 1341); and 10 counts of money laundering (18 U.S.C. § 1956). All of these related to a single alleged scheme to defraud FBBC by misrepresenting the value of collateral held by Agriprocessors and falsely certifying that the company was in compliance with all federal and state laws. [App. 29-56] Each of the separate counts alleged single transmissions and communications in execution of the same scheme. [App. 29-56] The indictment also included 72 counts alleging the harboring of illegal immigrants and participation in document fraud (18 U.S.C. §§ 371, 1324, 1546) [App. 12-29]; and 20 counts of willfully violating an order of the Secretary of Agriculture in violation of 7 U.S.C. § 195 – a statute *never* before criminally enforced in its nearly century-long existence. [App. 56-59]

8. The Judge Severs the Immigration Counts and Transfers Venue.

On June 25, 2009, the district judge severed the immigration law charges from the financial charges. [Add. 10-32] The court explained that "severance is necessary to preserve the rights of Defendants Rubashkin and Agriprocessors to a fair trial." [Add. 26] Notwithstanding a "strong presumption in the law in favor of joinder and against severance," the court concluded that trying the immigration and financial counts in a single proceeding "would prevent a jury from making a

reliable judgment about the guilt or innocence" of the accused. [Add. 26-27] On July 6, 2009, over defense objection that evidence of immigration law violations would taint the bank-fraud trial if it were held first, the judge granted the prosecutors' request that the financial charges be tried first. [Add. 34; Dkt. No. 528]

Substantial local publicity and media attention surrounded this prosecution, which was initially brought in Cedar Rapids, Iowa, which is in the same part of the state as the Agriprocessors plant. The district court initially denied a motion for a change of venue on account of prejudicial publicity [Dkt Nos. 398, 513], but after the judge reviewed jury questionnaires she determined that "prejudice from pretrial publicity in this action is so extensive and corrupting that it may presume unfairness of a constitutional magnitude." [Dkt. No. 656 at 5] The completed jury questionnaires demonstrated "that the prodigious amount of negative pretrial publicity has caused the vast majority of potential jurors to develop and maintain a pervasive, strong bias against" Mr. Rubashkin and Agriprocessors. [Dkt. No. 656 at 5] The court therefore ordered that the trial be moved to Sioux Falls, South Dakota. [Dkt. No. 656 at 5]

9. Appellant is Tried on the Financial Charges.

Mr. Rubashkin was tried before a jury between October 13 and November 12, 2009. The heart of the prosecution's financial case was that

Agriprocessors had misrepresented the value of the collateral for the FBBC loans (in order to be able to make larger draws within its line of credit) in two ways: (1) by creating invoices that did not reflect actual sales, and (2) by channeling some customer payments toward its own cash needs and not depositing them immediately into the "sweep account." [App. 31-35; Trial Tr. 11:50-60, 86-97; 13:33-47] The diverted funds ultimately were transferred from Agriprocessors to the sweep account, sometimes directly from Agriprocessors' accounts and sometimes by being routed through bank accounts of a kosher grocery store in Postville ("Kosher Community Grocery" or "KCG") and a Postville school providing Jewish education ("Torah Education" or "TE"). [Trial Tr. 11:97-98; 13:60-78]

These two methods of inflating Agriprocessors' accounts receivable were the basis for all the bank-fraud, wire-fraud, and mail-fraud counts, and all but one of the false-statement counts.[2] [App. 31-38, 40-54] The ultimate transfer of the diverted funds back to the First Bank "sweep account" – designed to *repay* the bank loans – formed the basis for the money laundering counts. [App. 54-56]

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[2] The final false-statement count was premised on the alleged, post-raid representation by Appellant to First Bank that Agriprocessors had "basically" complied with the law. [App. 39]

The prosecution also presented an alternative fraud theory: The loan agreement contained boilerplate certifications that Agriprocessors was not "in violation of any law, statute, regulation, ordinance, judgment, order, or decree applicable to [the] borrower which violation would in any respect materially and adversely affect the collateral, . . . or such borrower's property, business, operations, or condition, financial or otherwise." [Trial Tr. 7:23-24; App. 10-11] These certifications were allegedly false because Appellant knew that Agriprocessors was violating federal laws against harboring illegal aliens. [App. 30]

Over repeated defense objections and requests for a mistrial, [Trial Tr. 18:119-133; 19:83-88; 20:130-131], the prosecution presented almost three trial days of evidence and witnesses to support the immigration-based fraud theory. [Trial Tr. 18:21-232; 19:4-160; 20:15-111] This evidence included testimony about a covert meeting, near a barn on the Agriprocessors premises, between Mr. Rubashkin and the manager of the beef-kill division of Agriprocessors during the week before the raid. Although none of the prosecution's witnesses actually heard this conversation, the prosecution argued to the jury that it concerned a scheme to pay for the purchase of fraudulent documents in anticipation of the ICE raid. [App. 84-87, 98- 106g, 136-38]

In order to satisfy the jury that Appellant had not believed Agriprocessors was violating the law against harboring illegal aliens, the defense sought to present testimony that attorneys had been advising Agriprocessors and the Appellant on immigration issues, including one lawyer who was an expert on immigration documentation and was actually present at the plant on the day of the raid in order to review the authenticity of employees' documentation. [Trial Tr. 24:73-104; App. 116-124] The attorney-client privilege, assertedly held and not waived at the time of trial by Agriprocessors' bankruptcy trustee, protected the *content* of the lawyers' advice. [Trial Tr. 24:67-72] But the district court declared that *all* testimony by the attorneys was irrelevant and excluded it even though it breached no privilege. [App. 112-115, 125-127] Hence, the expert who had been present in Postville to review employees' documentation was not allowed to testify that he was present even though proof of his presence would not have divulged any client confidences. [App. 125-127]

The prosecution also presented evidence that Agriprocessors had occasionally paid cattle suppliers after the strict time limits established by the Packers and Stockyards Act ("PSA"), which had been incorporated into a consent order between Agriprocessors and the Secretary of Agriculture. Violation of such an order is a criminal offense under the literal terms of the PSA. [App. 56-59; Trial Tr. 15:188-190; 17:130-140] It was undisputed that all cattle suppliers had

been paid by Agriprocessors; the company's only error was paying late. The longest delay in payment was eleven days. [Trial Tr. 15:211; 18:18-19]

The jury acquitted Appellant on five counts of willfully violating an order of the Secretary of Agriculture, and convicted on the rest of the charges. [Dkt. No. 736] In interrogatories relating to the money laundering counts, the jury found that the predicate transactions "did not involve profits" of any criminal activities. [App. 143-172]

10. Mr. Rubashkin Is Sentenced to 27 Years' Imprisonment.

A sentencing hearing took place on April 28 and 29, 2010. Prosecutors had received only a single victim-impact form, despite having mailed them out to many other individuals. [App. 182] Only two victim-impact statements were presented in court, both from representatives of the cattle-supply cooperative that claimed it had lost interest of less than $4000 by being paid late. [App. 209-214] Numerous witnesses testified in support of a lenient sentence for Mr. Rubashkin, attesting to his honesty, his charity and generosity, his relationship with his children, and his importance to his community. [App. 189-200, 205-208, 215-227, 230-233] Hundreds of letters were sent to the court by those whose lives had been enhanced by Mr. Rubashkin – even including competitors in the kosher meat industry. [Dkt. No. 895 at 7-12] When it appeared from the prosecution's initial recommendation that it was suggesting life imprisonment, six former United States Attorneys

General and seventeen high-ranking former federal prosecutors and high-ranking Department of Justice officials signed a letter to the court declaring that they "cannot fathom how truly sound and sensible sentencing rules could call for a life sentence – or anything close to it – for Mr. Rubashkin, a 51-year-old, first-time, non-violent offender whose case involves many mitigating factors and whose personal history and extraordinary family circumstances suggest that a sentence of a modest number of years could and would be more than sufficient to serve any and all applicable sentencing purposes." [App. 255-267]

The prosecution ultimately recommended a sentence of 25 years' imprisonment. [Sentencing Tr. 560] The defense suggested a prison term of not more than 6 years. [Sentencing Tr. 563] The district court ordered that Appellant be imprisoned for 27 years, two *more* than the prosecutors had requested. [Add. 143] The judge agreed with the prosecution that the "actual loss" was approximately $27 million, including the full sum the bank said it lost on the loan. [Add. 109-110, 117-121] The prosecution represented that the bank had lost $27 million even though the bank itself had claimed in its civil lawsuit that its loss was only about $21 million. [App. 179a Sentencing Tr. 66] The court determined the sentence entirely on the basis of the United States Sentencing Guidelines, making no post-Guideline adjustment based on the sentencing factors enumerated in 18 U.S.C. § 3553(a). [Add. 136-143]

Specifically, the judge refused to modify the Guidelines calculation even though Appellant had acted not out of greed but to keep his family's business afloat and to save the jobs of the plant's employees. The court explicitly imposed its sentence "[n]o matter [Rubashkin's] motive." [Add. 141] The court also ignored the defense contention that a lengthy prison term would create drastic unwarranted sentencing disparities with similarly situated defendants, and it rejected defense requests for downward departures or variances to account for Mr. Rubashkin's renowned charity or his special relationship with his disabled son. [Add. 139-143]

11. Appellant Discovers New Evidence.

On August 5, 2010, Mr. Rubashkin's counsel filed a motion for a new trial pursuant to Rule 33(b)(1) of the Federal Rules of Criminal Procedure. [Dkt. No. 942] The motion was based on newly discovered evidence, obtained through an earlier-filed lawsuit under the Freedom of Information Act (FOIA), showing that the presiding trial judge had been meeting and communicating *ex parte* with ICE and the United States Attorney's Office for at least six months prior to the May 2008 raid.

Internal government memoranda reported that *ex parte* communications began as early as October 10, 2007, on which date prosecutors gave Judge Reade "a briefing regarding the number of criminal prosecutions that they intend[ed] to

pursue relative to this investigation." [App. 268] Later that month, the prosecutors discussed with Judge Reade possible dates for the raid, to see what would "meet[] her scheduling needs." [App. 271] Ultimately, a "date for the operation was set by the availability of the courts." [App. 304]

ICE memoranda and emails reported additional pre-raid meetings between Judge Reade and the United States Attorney's office. [App. 276-282, 308-309] At one meeting attended -- at the judge's request -- by other law-enforcement personnel, the judge stated that she was "willing to support the operation in any way possible, to include staffing and scheduling." [App. 276] During a meeting attended by Judge Reade held on March 17, 2008, the participants discussed "an overview of charging strategies, numbers of anticipated arrests and prosecutions, logistics, the movement of detainees, and other issues related to the CVJ investigation and operation." [App. 278] Approximately five weeks before the raid the judge "requested a briefing on how the operation will be conducted" and directed the United States Attorney to provide her with a "final gameplan" by a certain deadline. [App. 280-282] One ICE e-mail describes Judge Reade as a "stakeholder" in the raid. [App. 308]

Neither Judge Reade nor the prosecutors notified Appellant's trial counsel of the judge's extensive pre-raid meetings with the United States Attorney's Office. [Dkt. No. 942-1 at 20] Two nationally respected experts in judicial and legal

ethics submitted affidavits concluding that the conduct described in the ICE memoranda constituted serious ethical misconduct on the part of the judge and the prosecution team. [App. 312-334] The defense requested discovery in the event that the new documents were not themselves sufficient to warrant a new trial. [Dkt. No. 942-1 at 20-21] The defense also requested that Judge Reade transfer the new-trial motion to a disinterested judge for resolution. [Dkt. No. 942-1 at 22] The prosecution resisted the motion and the defense's ancillary requests. [Dkt. No. 950]

On October 27, 2010, Judge Reade denied the motion for a new trial, along with the requests to transfer it for decision to another judge and for discovery. The denial rested on the papers; no oral argument or evidentiary hearing was held. [Add. 146-165] The appeal from that denial has been consolidated by this Court with the initial appeal from the judgment of conviction.

SUMMARY OF ARGUMENT

The foregoing history of this criminal prosecution demonstrates that, from beginning to end, the case against Sholom Rubashkin has been pursued by the federal prosecutors with unprecedented aggressiveness. To our knowledge, in no prior federal criminal prosecution based on immigration-law and bank-fraud allegations

(1) Has an accused charged with harboring illegal aliens been required to post a $1 million dollar bail and released only with an electronically monitored ankle bracelet;

(2) Has an accused been arrested on a charge that he committed bank fraud by signing a loan agreement that was allegedly false because of a violation of a "compliance-with-all-laws" provision;

(3) Has an accused been imprisoned for any time, much less 76 days, because he is Jewish and Israel has a "Law of Return;"

(4) Has an accused been subjected to seven superseding indictments;

(5) Has an accused been charged with a criminal violation of the Packers and Stockyards Act of 1921;

(6) Has a nonviolent first-time offender who misrepresented the value of collateral been sentenced to what is, effectively, life imprisonment; and

(7) Has an accused who made no attempt to flee while being investigated as a "target," complied meticulously with all conditions of pretrial release, and offered conditions of release that would have made him a prisoner in his own home been denied release pending sentencing on the grounds that he is a flight risk.

With these appeals, Mr. Rubashkin is seeking from this Court the balance and proportion that a judge traditionally provides in adversary litigation. Whatever motives the prosecution may have had in pursuing him with such extraordinary zeal through arrests and indictments, the Appellant trusted that the open court process would result in a fair disposition of the accusations made against him and that in an open jury trial the prosecutors' excesses would be fairly tempered by the presiding judge so that justice would prevail.

His experience in the Iowa state courts proved that this confidence was valid. State prosecutors filed 9,311 misdemeanor counts against him in *State v. Rubashkin*, District Court Allamakee County, Case No. SMCR009342, where he proceeded to trial before an impartial judge and a jury. He was acquitted on all the counts that remained after the state prosecutors voluntarily dismissed more than 99 percent of the charges.

In the federal trial that is the subject of these appeals the presiding judge made many questionable and prejudicial rulings. Appellant's trial counsel objected to many rulings that appeared to tilt the federal trial against Mr. Rubashkin,

culminating in the jury verdict and the startling prison sentence imposed by the judge.

There was no obvious reason for the judge's apparent failure to act as the impartial arbiter contemplated by the federal criminal process – until many months after the federal trial. It was then discovered, from documents that the government had kept from the defense, that the trial judge had participated frequently, as early as six months before the raid, in meetings with prosecutors and law enforcement personnel who were planning the raid on Agriprocessors. One document even described the trial judge as a "stakeholder" in the raid. Neither she nor the prosecutors had disclosed the details of this collaboration and their off-the-record meetings to Mr. Rubashkin's trial counsel.

This pre-raid association explains, we believe, why this case has lacked the balance and proportion that the federal judicial system expects federal district judges to provide in criminal trials. The offenses with which Mr. Rubashkin was charged – permitting illegal aliens to be employed at the meat-packing plant and overstating the value of the collateral for his bank loan in order to be able to take larger draws – did not call for the drastic measures and punishments that the prosecutors sought to administer to him. But it was simply human nature that a federal judge who so extensively participated in the planning of the raid – a judge whose commitment to the law enforcement goal was demonstrated by her repeated

demand for a "final gameplan" on the raid – would be unable to exercise the restraining influence on the prosecutors with whom she had worked in the preparation and planning of the Agriprocessors raid in order to provide a fair trial to Sholom Rubashkin.

1. Appellant's first ground for reversing the judgment of conviction addresses this fundamental flaw in the conduct of his trial. If this Court agrees that under 28 U.S.C. § 455(a) Judge Reade was disqualified from presiding at Mr. Rubashkin's trial because of her meetings and off-the-record discussions with the prosecutors before the May 2008 raid – meetings that were not disclosed, as they should have been, to defense counsel – it need not reach any of the other major issues presented on these appeals.

The recusal mandated by Section 455(a) is required whether or not a judge is found to be subjectively biased in favor of, or against, one party in litigation. Cases of the Supreme Court and of this Court have held that the test is whether an "average person on the street" would "harbor doubts about the judge's impartiality." Judge Reade's repeated meetings with prosecutors to discuss the impending raid raise such "doubts" because (1) they were *ex parte* meetings, (2) extrajudicial information may have been conveyed, (3) they created an appearance of "excessive coziness" between them, and (4) no disclosure of the meetings was made by the judge or the prosecutors.

Leading national authorities on judicial and legal ethics – the Chairman of the ABA Committee on revising the Code of Judicial Conduct and an N.Y.U. law professor – have declared that what was done in this case amounted to judicial and legal misconduct and was a violation of Section 455(a). And the judge's own defense of her conduct in her order denying the motion for a new trial failed to respond to the facts stated in the ICE memoranda that refuted her assertion that she was only engaged in "logistical cooperation" in her discussions with the prosecutors.

Finally, if the evidence heretofore presented does not, in and of itself, warrant the grant of a new trial before a different judge, it at least requires that the motion be transferred for decision to another judge, that discovery be conducted, and that an evidentiary hearing be held.

2. Appellant's second ground for reversal pertains to the permissibility of permitting lurid evidence of alleged harboring of illegal aliens to be introduced at Mr. Rubashkin's bank-fraud trial. The trial judge correctly held that proof of immigration-law violations would "spill over" onto the charges of financial crimes and that the jury would be unable to segregate the charges if they were tried together. Nonetheless, almost three of ten trial days in which the prosecution's evidence was presented were devoted to dramatic testimony regarding allegations violations of the immigration laws.

This error was aggravated when the trial judge denied the defense a full opportunity to rebut the immigration allegations by demonstrating that experts in immigration law had been retained and were even occupied in checking the authenticity of employees' documentation when the raid occurred. In addition, the jury instruction regarding violation of the immigration laws made "spill over" even more likely by permitting the jury to conclude that Appellant had fraudulently denied violations of law when he only "recklessly disregarded" the presence of illegal aliens on Agriprocessors' work force.

3. Appellant's third ground for reversal of the conviction derives from the Supreme Court's decision in *United States v. Santos*, 553 U.S. 507 (2008), which held that a transaction involving funds that are not "profits" of an illegal activity cannot, in circumstances like this case, violate the money laundering statute, 18 U.S.C. § 1956(a)(1). In an answer to special interrogatories, the jury said that the funds allegedly laundered "did not involve profits obtained from the commission of a specified unlawful activity." This finding required the entry of a judgment of acquittal pursuant to the Supreme Court's plurality opinion in the *Santos* case. And an application of the rationale of Justice Stevens' concurrence in *Santos* requires acquittal on the facts of this case.

4. The outrageously severe sentence imposed on Mr. Rubashkin by Judge Reade must be reversed because the improper money laundering convictions

added to Mr. Rubashkin's offense level and because the trial judge failed to calculate "loss" correctly under the Sentencing Guidelines. Instead of determining precisely how large an extra draw Agriprocessors was able to take because of inflated invoices, the district judge accepted the proposition that the bank's loss was the full unrecovered value of the loan. This result conflicts with decisions of this and other federal Courts of Appeals and with the rationale of the "loss" provision in the Sentencing Guidelines.

Judge Reade also erroneously ignored considerations that are prescribed by Section 3553(a). Appellant's motive was not greed, he had a stellar history of good deeds and contributions to his community, and his presence at home is indispensable for the welfare of his 16-year-old autistic son. When viewed in the context of other federal sentences imposed on defendants who have committed similar offenses, it is clear that there is an enormous disparity between the sentence imposed on Sholom Rubashkin and sentences of other nonviolent white-collar offenders who did much greater harm to the public. Mr. Rubashkin's sentence was thus both procedurally flawed and substantively unreasonable under Section 3553(a).

ARGUMENT

I. THE TRIAL JUDGE'S FREQUENT UNDISCLOSED PRE-RAID MEETINGS WITH THE PROSECUTORS REQUIRE A NEW TRIAL OR, AT MINIMUM, A REMAND FOR PROPER PROCEEDINGS.

Eight months after Appellant's trial the government began turning over to the defense thousands of pages of documents that had been sought by Appellant's counsel in a FOIA lawsuit initiated in February 2009. These documents revealed that Judge Reade, who presided over the trial and imposed sentence, had frequently met and communicated *ex parte* with the United States Attorney's Office during six months prior to the immigration raid on Agriprocessors' Postville plant. Neither the judge nor the prosecutors had informed the defense of the extent or nature of these meetings and communications.

Appellant is entitled to a new trial based upon these belatedly disclosed documents. Judge Reade was obligated either to recuse herself or to disclose these meetings to trial counsel so they could move for recusal. The prosecutors engaged in misconduct by participating in secret unrecorded meetings with the judge and failing to disclose these *ex parte* contacts to their adversaries. At the least, the district court should have transferred Mr. Rubashkin's motion for a new trial to another district judge for decision and authorized discovery and an evidentiary hearing in order to create a complete factual record.

The district court's order denying the Rule 33 motion summarily rejected

Appellant's factual and legal contentions and did not address critical factual questions. Judge Reade failed to explain (1) why she did not notify defense counsel that she had multiple *ex parte* meetings and contacts with the prosecutors; (2) why those communications were not transcribed; (3) why the *ex parte* meetings were held with some frequency – apparently "weekly" in the last weeks before the raid; (4) what exactly Judge Reade was told by the prosecutors when they "briefed" her "regarding the ongoing investigation"; (5) what "charging strategies" were discussed in her presence; (6) what report was given to her by the United States Attorney's Office in response to her *sua sponte* request for a "final gameplan" and "a briefing on how the operation will be conducted"; (7) why the court's administrative personnel were incapable of dealing, without her personal involvement, with the "logistical" issues regarding the location of the trials of arrested employees; and (8) why she presided at the Appellant's criminal trial rather than assigning the case to a judge who had not participated in the prosecutors' pre-raid planning. Her order denying the new trial motion left these critical questions unanswered, and it must, therefore, be reversed. Even if Appellant does not obtain a new trial at this juncture, this Court must, at minimum, assign this matter on remand to a different judge who will conduct appropriate proceedings to adjudicate Appellant's new trial motion.

A. Judge Reade's Frequent *Ex Parte* Meetings With the Prosecutors Created the Appearance of Partiality That Requires a Trial Judge's Recusal.

The newly discovered ICE memoranda and emails recite facts that obligated Judge Reade to recuse herself from the criminal case against the Appellant. Section 455(a) of the Judicial Code (Title 28) requires a judge to disqualify herself "in any proceeding in which [her] impartiality might reasonably be questioned." This statute implements the principle that "what matters is not the reality of bias or prejudice but its appearance." *Liteky v. United States*, 510 U.S. 540, 548 (1994); *see also White v. Nat'l Football League*, 585 F.3d 1129, 1138 (8th Cir. 2009) (holding that, under Section 455(a), "the existence of actual bias is irrelevant"). The law is designed "to promote public confidence in the integrity of the judicial process." *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 860 (1988).

In applying Section 455(a), this Court has given its language a practical interpretation. "The question is 'whether the judge's impartiality might reasonably be questioned by the average person on the street who knows all the relevant facts of a case.'" *United States v. Dehghani*, 550 F.3d 716, 721 (8th Cir. 2008) (quoting *Moran v. Clarke*, 296 F.3d 638, 648 (8th Cir. 2002) (en banc)); *see also United States v. Beale*, 574 F.3d 512, 519 (8th Cir. 2009). The "average person on the street" test does not require that average person to be convinced of the judge's partiality to warrant recusal. Rather, recusal is required even if a reasonable person

"would harbor doubts about the judge's impartiality." *Sentis Group, Inc. v. Shell Oil Co.*, 559 F.3d 888, 905 (8th Cir. 2009) (internal quotation marks omitted).

The "doubts" that require recusal may arise in a number of circumstances. *First*, recusal is warranted when there have been *ex parte* contacts between the judge and one party to the case. "[N]ot only is it a gross breach of the appearance of justice when the defendant's principal adversary is given private access to the ear of the court, it is a dangerous procedure." *Haller v. Robbins*, 409 F.2d 857, 859 (1st Cir. 1969). This Court has recognized that this "breach of the appearance of justice" is particularly egregious when the adversary is a prosecutor, with the full weight of the government behind him. *See United States v. Earley*, 746 F.2d 412, 416 (8th Cir. 1984) (observing that "*ex parte* communication between a trial court and government counsel '[i]n addition to raising questions of due process . . . involve[s] a breach of legal and judicial ethics'" (quoting 8B Moore's Federal Practice ¶ 43.03 [2] (1983))). "There is concern not just with the danger that the trial judge may form an opinion as to the truth of the evidence before it may be answered and challenged, but also with the 'insidious' nature of a court-prosecutor relationship which would allow such *ex parte* disclosures." 746 F.2d at 416 (citation omitted).

Second, if a judge learns facts about the case from extrajudicial sources, the integrity of the adversarial process is undermined. That is why courts have insisted

on recusal when judges communicated, off the record, with individuals associated with the case. *E.g.*, *United States v. Craven*, 239 F.3d 91, 102-03 (1st Cir. 2001); *Edgar v. K.L.*, 93 F.3d 256, 259-62 (7th Cir. 1996) (per curiam). "When a judge receives information that does not enter the record, the reliability of that information may not be tested through the adversary process." *Craven*, 239 F.3d at 103. This Court, too, has strongly condemned such interactions. *E.g.*, *Gentile v. Mo. Dep't of Corrs. & Human Res.*, 986 F.2d 214, 217 (8th Cir. 1993); *Ryan v. Clarke*, 387 F.3d 785, 793 (8th Cir. 2004).

Third, an appearance of partiality is created when the judge appears to be invested in the case based on extrajudicial interests or associations. Symbolic or apparent association between the judge and the prosecution creates doubts about the judge's fairness. *See United States v. Arnpriester*, 37 F.3d 466, 467 (9th Cir. 1994); *cf. United States v. Bauer*, 19 F.3d 409, 414 (8th Cir. 1994). Likewise, recusal may be necessary if the judge is "excessively cozy" with someone (even a witness) on one side of the case. *Edgar*, 93 F.3d at 260; *see also Moran*, 296 F.3d at 649. And if the judge appears to have given "advice" or "assistance" to the prosecution, especially *ex parte*, courts have long demanded recusal. *See, e.g.*, *Schmidt v. United States*, 115 F.2d 394, 397-98 (6th Cir. 1940).

Fourth, an appearance of partiality is reinforced when a judge fails to disclose evidence suggesting bias. In *Liljeberg*, the Supreme Court enumerated

facts "that might reasonably cause an objective observer to question [the judge's] impartiality." *Liljeberg*, 486 U.S. at 865. The Court noted that when the judge ruled on a motion to vacate based upon judicial bias, he "gave three reasons for denying the motion, but still did not acknowledge that he had known about the University's interest both shortly before and shortly after the trial." 486 U.S. at 867 (footnote omitted). The Court emphasized the importance of prompt and complete disclosure. "A full disclosure at that time [after trial] would have completely removed any basis for questioning the judge's impartiality and would have made it possible for a different judge to decide whether the interests – and appearance – of justice would have been served by a retrial." 486 U.S. at 866.

This Court has similarly condemned the failure to disclose facts potentially relevant to recusal. In *Moran*, the trial judge had a social relationship with one of the parties. That itself was cause for concern. But this Court, sitting en banc, found "particularly worrisome the district court's failure to disclose this conflict himself." *Moran*, 296 F.3d at 649. The court accordingly vacated and remanded "with the suggestion that [the district court] revisit and more thoroughly consider and respond to Moran's recusal request." 296 F.3d at 649. The ABA's Model Code of Judicial Conduct also requires a judge to "disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification." Rule 2.11, cmt. [5]

(2007).

These four themes coalesce in this case. *First*, it is undisputed that Judge Reade communicated *ex parte* with both the United States Attorney's Office and the ICE officers who were investigating (and would ultimately raid) the plant that was, according to the government, under Appellant's direction. These communications concerned the raid that led to Appellant's prosecution.

Second, at these meetings Judge Reade was updated on the status of the investigation. She was privy to "information that [did] not enter the record" and therefore "may not be tested through the adversary process." *Craven*, 239 F.3d at 103. Because these meetings were off-the-record and were not transcribed, they were "extrajudicial." *Edgar*, 93 F.3d at 259; *see also Jones v. Luebbers*, 359 F.3d 1005, 1013 (8th Cir. 2004) (noting that where allegations of bias arise from "closed proceedings that evade outside review, the appearance of impartiality [sic] is great, application of the rule is simple, and due process may require disqualification").

Third, the repeated *ex parte* meetings between the judge and the prosecutors suggest that they had become "excessively cozy" (*Edgar*, 93 F.3d at 260) and were working in tandem. Judge Reade's reported promise to "support the operation in any way possible" would certainly give a "reasonable person . . . a justified doubt as to [her] impartiality." *United States v. Cooley*, 1 F.3d 985, 995 (10th Cir. 1993). Her actions "created the appearance that the judge had become an active

participant in bringing law and order to bear . . . rather than remaining as a detached adjudicator." 1 F.3d at 995.

Fourth, Judge Reade had multiple opportunities to disclose the facts surrounding her role in the raid but she took none of them. To the contrary, in an opinion rejecting a recusal motion in the prosecution of a supervisor at the Agriprocessors plant, Judge Reade minimized her participation, misrepresenting it as, at most, "logistical cooperation" and no different from what typically goes on in multiple-defendant cases. Order at 5-6, *United States v. De La Rosa-Loera*, No. 08-CR-1313 (N.D. Iowa Aug. 13, 2008). When Judge Reade set a deadline for any recusal motion, she again failed to disclose the frequent meetings with prosecutors described in the belatedly disclosed ICE memoranda. As in *Liljeberg*, the judge's unwillingness to acknowledge the facts is additional evidence that the appearance of impartiality required by federal law was not served by Judge Reade's conduct of the trial. *See Liljeberg*, 486 U.S. at 865-67.

Attorney Mark Harrison, who served between 2004 and 2007 as Chair of the ABA Commission to Revise the Model Code of Judicial Conduct and is a nationally recognized expert on judicial ethics, concluded that by engaging in undisclosed and untranscribed *ex parte* contacts with prosecutors and failing to disclose these contacts to the defense Judge Reade violated both Section 455(a) and the Model Code of Judicial Conduct. [App. 318-322] Mr. Harrison opined

that such misbehavior cannot be excused simply by reference to alleged "logistical" needs. [App. 321]

If a trial judge presides at a defendant's trial although she should have recused herself under Section 455(a), the resulting conviction must be reversed on appeal. *See, e.g.*, *United States v. Amico*, 486 F.3d 764 (2d Cir. 2007); *United States v. Bremers*, 195 F.3d 221 (5th Cir. 1999); *Cooley*, 1 F.3d 985; *United States v. Kelly*, 888 F.2d 732 (11th Cir. 1989).

Judge Reade was obligated to recuse herself from the criminal case against the Appellant. Because she failed to do so, well-established law mandates that Appellant's convictions must be vacated and a new trial ordered.

B. The Prosecutors' Pre-Raid Untranscribed *Ex Parte* Meetings With the Trial Judge Constituted Misconduct That Requires Reversal of the Conviction.

The prosecutors committed misconduct when they engaged in unrecorded, extrajudicial communications concerning the prospective raid with the judge and failed to disclose these communications to defense counsel.

Prosecutorial misconduct is a ground for granting a new trial. *See, e.g.*, *United States v. Francis*, 170 F.3d 546 (6th Cir. 1999); *United States v. LaFuente*, 991 F.2d 1406, 1411-13 (8th Cir. 1993); *United States v. Eyster*, 948 F.2d 1196 (11th Cir. 1991). This is especially true when the misconduct concerns the government's violation of a duty to disclose. *See United States v. White*, 492 F.3d

380, 408-13 (6th Cir. 2007); *United States v. Duke*, 50 F.3d 571, 576-78 (8th Cir. 1995); *United States v. Alexander*, 748 F.2d 185, 191-94 (4th Cir. 1984).

Much of the caselaw relating to *ex parte* contacts with judges concerns the recusal of the judges, not the conduct of the attorneys. But Professor Stephen Gillers of the New York University School of Law, a nationally recognized expert on professional ethics and author of the most recent edition of the leading casebook on the topic, opined in an affidavit that the prosecutors in this case violated ethics rules governing the conduct of lawyers. [App. 324-334]

First, the prosecutors "should not have participated in any discussion or communication with the Chief Judge that touched on 'strategies' or 'the ongoing investigation' or 'other issues related to the CVJ investigation and operation.'" [App. 331] If it was necessary for the prosecutor to communicate with Judge Reade personally to obtain her approval for conducting trials at a location outside of the Courthouse, additional "logistical" arrangements could and should have been made with the district court's administrative personnel. [App. 331] *Second*, the prosecutors should have created a "detailed record," through transcription by court reporters if necessary, of "all communications with the Chief Judge." [App. 331] Defense counsel and the courts – including this one – would then have been able to determine what was discussed. *Third*, the prosecutors breached their professional obligations by failing to disclose to defense counsel the details and

substance of all their private interactions with Judge Reade. [App. 331] This duty to disclose "find its roots in the defendant's constitutional rights" [App. 332], just like the duty to disclose exculpatory material recognized in *Brady v. Maryland*, 373 U.S. 83 (1963).

Appellant's convictions must be vacated and a new trial ordered because of the prosecutorial misconduct that has tainted this case.

C. The District Judge's Grounds for Denying Relief Under Rule 33 Are Erroneous.

Judge Reade denied the new-trial motion on the papers without even hearing argument from counsel. She gave three reasons for denial of the motion: (1) that the newly discovered evidence did not relate to the Appellant's guilt or innocence; (2) that the evidence on which the motion rested was not newly discovered; and (3) that, on the merits, there was no legal ground for recusal. None of these stated justifications has merit.

1. Newly discovered evidence need not relate to guilt or innocence to warrant a new trial.

Judge Reade asserted that no relief was warranted under Rule 33 because "Defendant fails to point to anything in the memoranda which would be admissible on any issue relating to the Financial Crimes of which Defendant was convicted, tend to exculpate him or have any bearing on his guilt whatsoever." [Add. 154-155; *see also* Add. 156 (the new evidence "has no bearing on any of the issues

raised at Defendant's trial on the Financial Counts" and the new evidence would not "lead to an acquittal")] These statements rest on a fundamental error of law.

Rule 33 of the Federal Rules of Criminal Procedure prescribes that a new trial should be granted "if the interest of justice so requires" and includes newly discovered evidence as a ground. Courts have long recognized that "[t]his evidence need not relate only to the question of innocence but may be probative of another issue of law." *United States v. Beasley*, 582 F.2d 337, 339 (5th Cir. 1978) (per curiam); *see also United States v. Campa*, 459 F.3d 1121, 1151 (11th Cir. 2006) (en banc) (prosecutorial misconduct); *United States v. Ugalde*, 861 F.2d 802, 809 (5th Cir. 1988) (Brady violation). The leading treatise agrees. *See* Wright, King & Klein, *Federal Practice & Procedure: Criminal 3d* § 557, at 568 (2004).

If the district court were correct in concluding that a defendant must produce new evidence that tends to exculpate him in order to obtain a new trial, a motion under Rule 33 could not succeed if a defendant established that there had been improper communications with a juror. Yet the Fourth Circuit granted a new trial under just such circumstances in *Holmes v. United States*, 284 F.2d 716, 720 (4th Cir. 1960). Nor would an improper failure by a trial judge to recuse himself or herself on grounds known to the defense be a basis for a Rule 33 motion. But courts have frequently considered, on the merits, Rule 33 motions premised on this ground if they are based on newly discovered evidence. *See, e.g.*, *United States v.*

Conforte, 624 F.2d 869, 879-82 (9th Cir. 1980); *United States v. Elso*, 2010 U.S. App. LEXIS 2618 (11th Cir. Feb. 8, 2010) (unpub.); *United States v. Venable*, 233 F. App'x 313, 315-16 (4th Cir. 2007) (per curiam) (unpub.).

Judge Reade acknowledged these precedents and sought unsuccessfully to distinguish them. *Holmes* was assertedly different because it concerned potential impact on the jury's verdict. [Add. 159] But the newly discovered evidence in *Holmes* did not relate to the defendant's guilt or innocence. Indeed, reversal in this case follows *a fortiori* from the precedent of *Holmes*: One off-hand remark to a juror is far less likely to affect a verdict than that a month-long trial before a judge who may be partial. As for *Conforte*, *Elso*, and *Venable*, the district court *acknowledged* that they "stand for the proposition that a court can consider a motion for a new trial based on evidence that the presiding judge should have recused." [Add. 160]

A new trial may be granted under Rule 33 on newly discovered evidence, whether it bears upon "the substantive issue of guilt" or "the integrity of the earlier trial." *Holmes*, 284 F.2d at 720. The determinative question in the context of a recusal claim is whether recusal would have been required. *Conforte*, *Elso*, and *Venable* make that clear. Since the ICE documents provided substantial grounds for concluding that there was an appearance of partiality, Judge Reade was required to grant the motion under the *Liljeberg* standard.

2. The ICE documents were newly discovered and were not cumulative.

Judge Reade asserted that the documents produced belatedly in response to Appellant's FOIA request were only "newly available" and not "newly discovered." [Add. 154-156] But the e-mails and memoranda were in the government's possession and were kept from the defense until after Appellant's trial. This Court held in *United States v. Librach*, 602 F.2d 165, 166 (8th Cir. 1979), that a new trial might be granted under Rule 33 "based on new evidence that he had uncovered by means of an action brought under the Freedom of Information Act (FOIA)." *See also Ruiz v. United States*, 221 F. Supp. 2d 66, 76-77 (D. Mass. 2002) (denying new trial only because FOIA lawsuit had not been timely filed).

The district court relied on cases in which testimony that the defendant knew of before trial, but which he did not present at trial, was claimed to be "newly discovered." *See United States v. Turns*, 198 F.3d 584, 586-88 (6th Cir. 2000) (testimony from defendant's sister, which she had refused, for personal reasons, to provide at trial); *United States v. Lofton*, 333 F.3d 874, 875-76 (8th Cir. 2003) (testimony from co-defendant who did not volunteer to testify until after trial); *United States v. Offutt*, 736 F.2d 1199, 1202 (8th Cir. 1984) (testimony from co-defendant who had actually "offered to testify on Appellant's behalf at trial"). In such circumstances – when the defendant knows, at the time of trial, both the

identity of a witness and the content of the witness' possible testimony - the evidence is not "newly discovered" even if it first becomes "newly available" after trial. But in Appellant's case, neither he nor his counsel had any idea that ICE documents would describe a series of pre-raid meetings between Judge Reade and the prosecutors. These were documents that the Appellant could not access. To the contrary, the precedents affirm that the "key to deciding whether evidence is 'newly discovered' or only 'newly available' is to ascertain when the defendant found out about the information at issue." *Turns*, 198 F.3d at 587. It is undisputed that the Appellant "found out" about the ICE documents months after his trial.

Nor was the evidence just "cumulative" of previously available facts. It demonstrated much more than had been alleged or acknowledged by Judge Reade in the related *De La Rosa-Loera* litigation. [Add. 155-157] The very flimsy disclosure that Judge Reade had some advance knowledge of the raid in order to engage in "logistical cooperation" did not remotely suggest her repeated meetings with prosecutors and other law-enforcement personnel or the subjects discussed during these meetings. Order at 5, *De La Rosa-Loera*, No. 08-CR-1313 (N.D. Iowa Aug. 13, 2008). The most telling facts about the pre-raid *ex parte* contacts were exposed *only* by the ICE documents.

The ICE memoranda demonstrate a level of involvement that far exceeded "logistical cooperation." Some of the most significant evidence is:

- Emails that relate that Judge Reade ordered prosecutors to provide a "final gameplan" and a "briefing on how the operation will be conducted" – orders that bespeak a managerial role, not one of "logistical" support. [App. 280-282]

- Documents that show that Judge Reade attended meetings at which participants discussed "an overview of charging strategies," a topic that can hardly be characterized as "logistical cooperation." [App. 278-279]

- Emails that report that Judge Reade told a gathering of law-enforcement officials that she would "support the operation in any way possible," a commitment that extends well beyond "logistical cooperation." [App. 276-277]

Defense counsel attested in affidavits that had they known the facts revealed by the ICE materials, they would have moved to recuse Judge Reade. [Dkt. No. 942-2 at 3; Dkt. No. 942-3 at 5] Consequently, the motion was properly based on newly discovered evidence, and that evidence was not cumulative.

3. The district judge failed to rebut the facts that created an appearance of partiality.

Judge Reade did not address the statements in the ICE memoranda and e-mails that, if true, would have required her recusal and disqualified her from presiding at Appellant's trial. Her recitation of the facts that she believed to be relevant covered a total of two pages. [Add. 163-164] She denied having "perform[ed] any functions that fall within the executive branch" and denied being told before the raid where the raid "would occur." [Add. 164] She also denied having "express[ed] personal support" for the raid or visiting the Cattle Congress,

which was the location where the arrested employees were detained and where their trials were held. [Add. 164] Some of these denials contradict statements in the ICE documents and raise issues of credibility. [*See, e.g.*, App. 302 (noting that Cattle Congress site was "surveyed by the Chief Judge")] Judge Reade declared that she had only such knowledge as "was specifically tailored to ensuring that the court could gather the necessary resources to guarantee arrestees their rights." [Add. 164] She acknowledged providing her vacation schedule but justified that communication on the ground that she "is the only district judge in the eastern part of the district that handles felony criminal matters." [Add. 164]

The ICE documents reported other conduct on Judge Reade's part that she ignored in her order denying the Rule 33 motion. That conduct would have great significance to an evaluation of her impartiality by the "average person on the street." This is so even if a finder-of-fact were to credit her assertion that she did not know that the raid was directed at Agriprocessors' Postville plant or that Appellant "was or could be a target of the enforcement action." [Add. 164] There is, for example, no explanation whatsoever for the judge's repeated request made to the United States Attorney's Office for a "final gameplan" of the raid and a "briefing on how the operation will be conducted." Indeed, there is no hint of what she was told by a supervisory Assistant United States Attorney at a meeting scheduled for April 4, 2008, when he was to respond to her requests for a

"gameplan" and a "briefing."

Nor did Judge Reade explain her presence and participation at a meeting held on March 17, 2008, attended by various law-enforcement personnel, including the Office of the United States Attorney, at which "the parties discussed *an overview of charging strategies*, numbers of anticipated arrests and prosecutions, logistics, the movement of detainees, *and other issues related to the CVJ investigation and operation*." [App. 278 (emphasis added)] That meeting ended with an agreement that "[t]he next meeting with the Court will be set for the first week of April." [App. 278]

Judge Reade did not explain why the "specifically tailored" information she was given to enable her to perform a possible judicial function – *i.e.*, to "gather the necessary resources" to guarantee the rights of the arrestees – required "a weekly operations/planning meeting with ICE/RAC [REDACTED] Chief Judge, AUSA, and USMS," as reflected in an ICE e-mail of April 11, 2008. [App. 309] Indeed, there is no explanation for the frequency of her meetings with the Office of the United States Attorney or any description of what they discussed.

Judge Reade's summary of the facts she believed relevant also failed to discuss her role in a meeting held at 1:30 pm on January 28, 2008 – three-and-one-half months before the raid. The meeting had many attendees, "as requested by the Judge." [App. 276] These attendees included law enforcement personnel who had

no conceivable relation to the limited "logistical" function that Judge Reade insists was her only interest. According to the ICE memorandum, Judge Reade was not equivocal at this meeting with regard to the raid. She "*made it clear*" that she was "willing to support the operation in *any way possible*, to include staffing and scheduling." [App. 276]

The judge denied, in her order of October 27, 2010, "express[ing] personal support" for the raid. But that denial does not rebut the "appearance of partiality" that apparently was produced by her statement of January 25, 2008. The perception of what she said is, in this context, even more important than her precise words. To the ICE participant who attended the meeting, her message was "clear," and it covered "support . . . in any way possible." An "average person on the street" would surely have reason to question the impartiality of a judge whose statement to law-enforcement personnel, gathered at her "request," expressed such strong support for a raid on premises managed by Appellant.

These details – not addressed by the district judge – were summarized in the affidavits of two of the country's leading ethics experts. The Chairman of the American Bar Association's Commission To Review the Model Code of Judicial Conduct concluded "that the conduct of Chief Judge Reade violated several provisions of the Code of Conduct and 28 U.S.C. § 455(a), applicable to federal judges." [App. 318] The nation's leading academic expert on legal ethics

concluded, in a detailed sworn declaration, that the prosecutors "violated rules governing ex parte contact with the judge" and committed "misconduct" in meeting with Judge Reade, failing to record their conversations, and not disclosing these meetings to defense counsel. [App. 325, 330-333]

Judge Reade's denial of the Rule 33 motion addressed neither the details of her own misconduct nor those of the prosecutors. Her unilateral defense and dismissal of the motion were erroneous. The Appellant is entitled to a new trial before a judge who would not be recused under Section 455(a).

D. At a Minimum, the New Trial Motion Should Have Been Transferred to Another District Judge Who May Direct Discovery and Conduct an Evidentiary Hearing.

The newly discovered evidence raised sufficient questions about the propriety of Judge Reade's and the prosecutors' conduct to require consideration by a different judge, discovery, and an evidentiary hearing. Judge Reade declined to authorize even this narrow relief, blithely asserting that there is "nothing to discover" and that additional proceedings would be a "useless waste of time." [Add. 165] At the very least, a remand is necessary in order to create a complete evidentiary record.

Since the Rule 33 motion alleged judicial misconduct and a leading national authority supported the Appellant's contention that the judge's meetings with prosecutors amounted to misconduct, Judge Reade should have transferred

consideration of the motion to another district judge. *Ellis v. United States*, 313 F.3d 636, 641-42 (1st Cir. 2002); *Levitt v. Univ. of Texas at El Paso*, 847 F.2d 221, 226 (5th Cir. 1988).

Moreover, evidentiary hearings are often appropriate to resolve issues raised by motions under Rule 33. *See Librach*, 602 F.2d at 167; *United States v. Cardarella*, 588 F.2d 1204, 1205 (8th Cir. 1978) (per curiam). Such a hearing should be held where the "admissible evidence presented by petitioner, if accepted as true, would warrant relief as a matter of law." *United States v. Velarde*, 485 F.3d 553, 560 (10th Cir. 2007). This Court remanded for an evidentiary hearing in *LaFuente*, 991 F.2d 1406, because the defendant had raised a "serious allegation" that, "without her attorney present," a witness had "attended *ex parte* chambers conferences between the government and the district court." 991 F.2d at 1408-09.

District courts should authorize discovery on motions under Rule 33 if the defendant "is able to make a showing that further investigation under the court's subpoena power very likely would lead to the discovery" of evidence to support a new trial. *Velarde*, 485 F.3d 560. Improper failure to order such discovery results in vacatur and remand. *See id.*; *United States v. Dansker*, 565 F.2d 1262, 1265-66 (3d Cir. 1977); *United States v. Wolfson*, 413 F.2d 804, 808 (2d Cir. 1969) ("[W]hen possible exculpatory evidence not known by a defendant to exist at the time of trial is later shown to have then been in the government's hands and the

information necessary to develop fully the exculpatory nature of the evidence must be obtained from government sources it might be improper for a district judge to deny a motion for discovery when coupled with a timely motion for a new trial.").

Further clarification of the nature of the *ex parte* pre-raid meetings and resolution of what transpired at these untranscribed meetings could only be obtained from participants at the meetings. The failure of the district court to authorize *any* discovery or to hold an evidentiary hearing requires reversal of the order denying the Rule 33 motion.

II. APPELLANT WAS DENIED A FAIR TRIAL ON THE FRAUD CHARGES BY THE ADMISSION OF PREJUDICIAL EVIDENCE OF IMMIGRATION LAW VIOLATIONS AND EXCLUSION OF PROOF REBUTTING SUCH EVIDENCE.

The Seventh Superseding Indictment alleged 91 counts of financial crimes and 72 counts of immigration-related crimes. Appellant's counsel moved to sever the trial of the immigration offenses from the trial of the financial offenses. The district court granted the requested severance, finding that Mr. Rubashkin could not receive a fair trial in a unified proceeding. [Add. 10-32]

Over Appellant's objection, the district court held the trial on financial charges first.[3] But instead of excluding in that trial the evidence of immigration law violations that motivated her severance ruling, Judge Reade effectively

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[3] The trial on the immigration charges never occurred, and the government later dismissed those charges without prejudice. [Dkt. No. 746]

nullified that ruling and allowed the prosecutors to place before the jury nearly three days of lurid testimony regarding illegal aliens employed at the Postville plant. The stated justification for this injection of incendiary evidence concerning illegal employees was that Appellant committed fraud on the bank by certifying in boilerplate language in the loan agreement that Agriprocessors was not "in violation of any law" when he allegedly knew that it was in fact harboring illegal aliens. [App. 29-30, 37-39, 50, 52-53 (¶¶ 33, 35, 49, 50, 53, 60, 61, 66, 67)]

The district court erred in permitting much incendiary evidence of immigration law violations to be presented to the jury determining Appellant's guilt of alleged financial offenses. After severance of the trials, that prejudicial result could have been prevented if the court had not acceded to the prosecution's request to try the financial crimes trial first. Reversing the sequence of trials would have avoided the prejudice caused by the admission of extensive, inflammatory, and unfairly prejudicial evidence of immigration law violations. The district court not only permitted the prosecution to present prejudicial evidence of immigration law violations but excluded proffered defense evidence that refuted the intent element of those charges, and the court incorrectly instructed the jury that the Appellant could be guilty of fraud if he "recklessly disregarded" the presence of undocumented workers at Agriprocessors.

A. The District Court Correctly Severed the Trial of the Immigration Violations From the Trial of the Financial Crimes.

The district court found that a "single, unified proceeding would 'appear[] to prejudice'" the defendant for two reasons. [Add. 26 (quoting Fed. R. Crim. P. 14(a))] *First,* the court found that given the number of different counts and crimes, "a jury would be 'unable to compartmentalize the evidence'" and it held that this was "the archetypal case in which relief under Rule 14 is warranted." [Add. 28 (quoting *United States v. Agofsky*, 20 F.3d 866, 871 (8th Cir. 1994))] The court observed that the indictment "encompasses a wide array of distinct alleged conduct by different actors . . . [that] involves immigration-related offenses, financial crimes, and violation of orders of the United States Secretary of Agriculture. . . . The alleged financial crimes are obviously complex. However, even the immigration-related offenses, which in some other cases may be somewhat routine, are complicated in this case." [Add. 28]

Second, the court found that trying the disparate charges together posed a serious risk of "prejudicial spillover." The judge's "professional judgment based upon decades of experience as a defense attorney, prosecutor and trial judge [was] that, notwithstanding limiting instructions, there would remain a real and concrete danger that the jury might cumulate the evidence as to the various counts." [Add. 30]

The district court's ruling was correct. Judge Learned Hand explained the concern regarding cumulative evidence: "There is indeed always a danger when several crimes are tried together, that the jury may use the evidence cumulatively; that is, that, although so much as would be admissible upon any one of the charges might not have persuaded them of the accused's guilt, the sum of it will convince them as to all." *United States v. Lotsch*, 102 F.2d 35, 36 (2d Cir. 1939). As this Court said in *United States v. Davis*, 103 F.3d 660, 676 (8th Cir. 1996): "Prejudice may result from a possibility that the jury might use evidence of one crime to infer guilt on the other or that the jury might cumulate the evidence to find guilt on all crimes when it would not have found guilt if the crimes were considered separately."

Because they are fact intensive, trial judges' rulings on such severance issues are reviewed for abuse of discretion and accorded substantial deference. *See United States v. Al-Esawi*, 560 F.3d 888, 891 (8th Cir. 2009). Judge Reade's severance ruling is entitled to this deference.

B. Extensive, Prejudicial, and Lurid Evidence of Harboring Aliens Was Presented to The Jury in the Financial Crimes Trial.

Evidence of immigration law violations was introduced in the bank-fraud trial to support the prosecution's claim that Appellant had "defrauded" FBBC because one clause in the lengthy credit agreement certified that Agriprocessors was not in violation of "any law, statute, regulation, ordinance, judgment, order, or

decree" that would adversely affect the company's collateral, "property, business, operations, or condition, financial or otherwise." [Trial Tr. 7:23-24] The prosecution claimed that every time Agriprocessors requested an advance of funds pursuant to its line of credit – often a daily occurrence – the company re-affirmed the covenants in its credit agreement, including this compliance-with-all-laws representation.

Under Rule 403 of the Federal Rules of Evidence, a district court should "exclude otherwise relevant evidence 'if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.'" *United States v. Mahasin*, 442 F.3d 687, 690 (8th Cir. 2006) (quoting Rule 403). The term "unfair prejudice" in a criminal case "speaks to the capacity of some concededly relevant evidence to lure the fact finder into declaring guilt on a ground different from proof specific to the offense charged." *Old Chief v. United States*, 519 U.S. 172, 180 (1997). "'Unfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *Id.* (quoting Committee Notes to Rule 403).

Judge Reade essentially made the required Rule 403 evaluation when she ruled, in granting a severance, that extensive evidence of immigration law

violations "would prevent a jury from making a reliable judgment about [Mr. Rubashkin's] guilt or innocence" on the financial crimes allegations. [Add. 27] She found there was "a real and concrete danger" of the jury's misuse of the immigration evidence. [Add. 30] Exclusion of extensive immigration evidence was necessary, she said, "to preserve the rights of Defendant[] Rubashkin … to a fair trial." [Add. 26]

To be sure, the indictment alleged that Appellant had defrauded the bank by certifying Agriprocessors' compliance with all laws. But it is a startlingly attenuated legal theory of criminal liability to find an accused is guilty of bank fraud if he knows of some violation of law – no matter how distant from the considerations that actually enter into the credit arrangement. Even minor and commercially irrelevant legal violations would thus be converted into serious felony offenses. Federal courts of appeals have warned against reliance on this legal theory when it has been invoked as a basis for civil liability under the False Claims Act. They have held that the theory applies only if the assurance of compliance with the law is a specific condition for the receipt of federal funds. *See Rodriguez v. Our Lady of Lourdes*, 552 F.2d 297, 304 (3rd Cir. 2009) (theory applies only if "payment of the federal funds was in some way conditioned on compliance with those regulations"); *Mikes v. Straus*, 274 F.3d 687, 699 (2nd Cir. 2001); *United States ex rel. Siewick v. Jamieson Science and Engineering, Inc.*,

214 F.3d 1372, 1376 (D.C. Cir. 2000); *United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1266-67 (9th Cir. 1996). There can be no claim in this case that FBBC loaned funds to Agriprocessors *because* it complied with the immigration laws or other federal statutes. Indeed, the bank continued to lend money to Agriprocessors for months after it was raided and 389 undocumented aliens employed at its plant were arrested and pleaded guilty. [Trial Tr. 7:106-107] Even before the raid the bank paid no heed to Agriprocessors' receipt of numerous "no-match letters." [Trial Tr. 23:29-34]

Although the probative value of harboring aliens was minimally probative of the bank-fraud charges, the proof was extraordinarily and unfairly prejudicial:

First, the volume of evidence relating to immigration violations was disproportionate to its role in the case. The prosecution took ten trial days to present its case. Nearly three days were devoted to evidence of immigration violations. [Trial Tr. 18:21-232; 19:1-160; 20:1-111]

The prosecution called seven witnesses to testify about alleged immigration law violations. They included (1) an ICE agent who testified extensively about document fraud, illegal immigration, and the recognition of false documents training he had given to an Agriprocessors' human resources employee [Trial Tr. 18:21-67], (2) two Agriprocessors human resources employees who testified about "no-match letters" that Agriprocessors had received, conversations they had with

Appellant about the illegal-workers problem, and a side-payroll that Mr. Rubashkin allegedly used in order to hire workers with bad documents without attracting internal attention [Trial Tr. 18:67-232; 19:4-21, 31-149]; and (3) two Hispanic Agriprocessors employees who testified (a) that they were hired after using false documents, (b) that many workers at the plant had entered the country illegally, and (c) that false documents had been obtained using $4,500 in cash solicited from the Appellant. [Trial Tr. 19:149-160; 20:15-97] This evidence made the allegations relating to immigration law violations a "trial within a trial." Presenting all these witnesses in support of the prosecution's false-certification theory was overkill that should have been prevented by the trial judge under Rule 403.

Second, the prosecutors presented particularly inflammatory and lurid evidence in support of their immigration law allegations. The jury heard testimony regarding a separate "Hunt payroll" that had been instituted to comply with religious prohibitions against paying employees for work performed on the Jewish Sabbath. The prosecutors claimed that the "Hunt payroll" was used to hire undocumented workers who had been turned away by the company's human resources staff. [App. 76-83] In addition, the jury was allowed to hear incendiary testimony of the two Hispanic witnesses regarding a meeting Appellant had with an Agriprocessors manager "behind a barn" at the Postville plant during the week

before the raid. [App. 84-87; 98-106g] Neither trial witness heard the allegedly incriminating conversation, but the government asked the jury to infer that a $4,500 payment made by Appellant after the meeting was intended to purchase fake documents for some employees. [App. 136-138]

The "Hunt payroll" actually served an important religious function [App. 73-75, 88-94]; and the $4,500 payment was part of a charitable-loan program (the "pop fund") instituted to provide employees of Agriprocessors who needed cash with temporary loans. [Trial Tr. 19:51-54; App. 107-111, 128]

By contrast, the government's evidence relating to Mr. Rubashkin's alleged financial offenses was bland. It consisted of commercial documents such as invoices, bills of lading, accounts-receivable reports, aging summaries, loan agreements, and advance requests, and testimony describing the transactions reflected in those documents.

The prosecutors knew that the evidence regarding immigration violations would overshadow the proof relating to alleged bank fraud. That is why the prosecution's summation disproportionately emphasized the immigration evidence. [*See, e.g.,* App. 131 ("We're talking about hundreds and hundreds and hundreds of current employees working under bad documents. And the defendant knows about this starting in at least May of 2005."); App. 133-134 ("[A]nd they were putting these folks on the Hunt payroll. Okay. Remember the Hunt payroll I-9s? All

right. About 86 employees with the bad IDs, okay, that the defendant says, 'Come in after hours and put them on the Hunt payroll. Don't tell Elizabeth Billmeyer about it.'"); App. 136 ("Remember, first, he meets with Brent Beebe out by the barns. Okay. Carlos told you about it. Laura Althouse told you about it. Defendant meets with Brent Beebe, and they have one of those conversations that nobody can hear.")]

The jury surely paid more attention to, and was influenced more by, sensational testimony regarding a meeting "behind a barn" and a payroll diverted from its obscure religious origin than by documents and technical testimony describing the financial offenses on which Appellant was standing trial. That is precisely why the district court initially separated the charges. That is also why it was error to permit the prosecution to divert the jury's attention with proof that was pertinent to immigration law violations but that had exceedingly limited relevance to the bank-fraud case.

While giving appropriate deference to a trial court's evidentiary rulings, this Court has not hesitated to reverse criminal convictions where they were obtained with the use of unfairly prejudicial evidence of limited probative value. Particularly instructive is *United States v. Weir*, 575 F.2d 668 (8th Cir. 1978). The district court in *Weir*, "at one point in the trial had determined that the 'other crimes' evidence should be excluded because the danger of prejudice outweighed

its probative value." *Weir*, 575 F.2d at 670. But pressed by persistent prosecutors, the judge "changed his ruling on the admissibility" of the evidence. 575 F.2d at 671. This Court "agree[d] with the district court's original assessment" and reversed the conviction. 575 F.2d at 671. *See also United States v. Blake*, 107 F.3d 651, 652 (8th Cir. 1997) ("[T]he record of Blake's prior convictions was enough to lure jurors into 'a sequence of bad character reasoning' on the companion charge ..."); *United States v. Harvey*, 845 F.2d 760, 762-63 (8th Cir. 1988) (unfairly prejudicial effect of "uncharged drug activities" outweighed probative value of such evidence in a tax conspiracy prosecution).

C. The Trial Judge Erroneously Excluded Defense Evidence Refuting the Allegation That Appellant Knowingly Misled the Bank.

Not only was the prosecution erroneously permitted to introduce inflammatory evidence of immigration law violations, but the defense was improperly denied the opportunity to rebut the prosecution's proof on this issue. The court refused to permit the defense to call two experienced employment/immigration attorneys who had been retained by Agriprocessors for advice relating to the "no-match letters" and the undocumented worker problems, which were familiar issues in meat-packing plants. Mr. Rubashkin presented extensive offers of proof from those attorneys, who were employed by one of Iowa's largest law firms, Nyemaster, Goode, West, Hansell & O'Brien, P.C.

Indeed, one of those attorneys, who had been retained earlier, was actually present at Agriprocessors on the day of the raid. [Trial Tr. 24:60-130] In fact, Appellant himself was precluded in his own testimony from making *any reference* to the fact that Agriprocessors had employed counsel to assist with immigration issues. [Trial Tr. 26:33-36, 52-53]

The fact that Agriprocessors had retained expert immigration counsel supported Appellant's good faith, demonstrated a lack of "recklessness" on his part, and rebutted the claim that Mr. Rubashkin knowingly lied to the bank about the status of alien workers. Nonetheless, the district court refused to admit the evidence, invoking Federal Rules of Evidence 401, 402, and 403. [App. 112-115, 125-127] The court ruled that allowing the testimony of Jay Eaton, one of the two Nyemaster Goode attorneys Mr. Rubashkin proposed to call, was irrelevant because it would "mislead the jury into thinking that because Agriprocessors hired Mr. Eaton and his firm, that somehow reflects on Mr. Rubashkin's criminal intent." [App. 113-114] The court went on: "[I]t's clear that . . . the purpose of calling Mr. Eaton . . . is to suggest that by Agriprocessors hiring a very respected attorney and a very respected law firm, that Mr. Rubashkin . . . could not possibly have criminal intent, and that just doesn't follow." [App. 115] The court made similar findings with respect to Neal Westin, the attorney who had been retained

specifically to review the documentation of the Agriprocessors employees. [App. 125-127]

The court was wrong. The fact that Agriprocessors had engaged immigration counsel *did* make it less likely that the Appellant recklessly disregarded the immigration status of Agriprocessors' workers. As the Fifth Circuit ruled when it reversed a criminal conviction in *United States v. Taglione*, 546 F.2d 194 (5th Cir. 1977), evidence of a person's communication with an attorney "which [is] probative of [the defendant's] state of mind" is admissible, even in the absence of a full blown advice of counsel defense. *Taglione*, 546 F.2d at 200; *see also United States v. Kent*, 531 F.3d 642, 651 (8th Cir. 2008) ("Evidence is relevant if it will have any tendency to make the existence of any fact of consequence more or less probable than it would be without the evidence."). Retaining competent counsel may not, by itself, prove lack of criminal intent, but evidence need not be conclusive to be relevant. *United States v. Giovannetti*, 919 F.2d 1223, 1226 (7th Cir. 1990) (Posner, J.) ("[T]his is just to say that the evidence was not conclusive with regard to Janis's knowledge; it was relevant, however, and therefore admissible.").

D. The District Court Erred in Scheduling the Financial Trial Before the Immigration Trial.

After it had determined to sever the trial of the immigration charges from the bank-fraud charges, the district court had to decide which case to try first.

Appellant's counsel urged the court to schedule the immigration case first because the immigration issues could be tried without involving evidence of alleged financial crimes. [Add. 33; Dkt. No. 528] The district judge accepted the prosecutors' proposal that the financial crimes charges be tried first. [Add. 34]

Although the sequence of trials is also committed to the district court's discretion, a district court must select a sequence that will not prejudice the defendant. *See Taylor v. Singletary*, 122 F.3d 1390, 1392-93 (11th Cir. 1997) ("In determining the sequence of trials, however, judicial economy must yield to the defendant's right to a fair trial.").

The district court's decision to begin with the trial of financial crimes guaranteed that the first trial would contain extensive evidence of *both* financial and immigration crimes because of the government's alternative fraud theory that Appellant lied in certifying that Agriprocessors was in compliance with all laws. If the immigration trial had been held first, the evidence in the two trials would not have overlapped. The first trial would have conclusively determined Mr. Rubashkin's immigration culpability. Had he been acquitted, the government would have been collaterally estopped from contending in a second trial that Appellant had violated the immigration laws. See *United States v. Howe*, 590 F.3d 552, 556 (8th Cir. 2009). If Appellant had been convicted of violating the immigration laws, his guilt of immigration offenses would have been stipulated.

To determine whether a trial sequence will unfairly prejudice a defendant, courts look to the standards of Fed. R. Crim. P. 14(a) regarding prejudicial joinder. *Taylor*, 122 F.3d at 1393; *Byrd v. Wainwright*, 428 F.2d 1017, 1021-22 (5th Cir. 1970). Here, however, the district judge failed to make so much as a passing reference to Rule 14(a), even though in her severance ruling *she had already done the Rule 14(a) analysis* that should have dictated her parallel trial sequence decision. The judge instead declared that delaying the immigration trial would give a co-defendant, Brent Beebe (who was not charged with financial crimes), "more time to prepare for trial without continuing the trial yet again." [Add. 34] Beebe had been under indictment, however, since November 20, 2008, and was named in only seventeen counts of the Sixth Superseding Indictment.

The district court's ruling thus subjected the Appellant to much prejudicial evidence relating to immigration law offenses during his financial fraud trial merely to give a co-defendant extra trial preparation time. But the district court thereafter continued the trial date [Dkt. 655] and granted Beebe's motion to sever his trial from Appellant. [Dkt. 676] Thus, Beebe's concerns were separately alleviated, and no countervailing interest whatsoever supported the district court's decision on trial sequence. By ignoring the governing legal standard and prejudicing Appellant with no offsetting justification, the district court plainly abused its discretion.

E. The Final Instructions to The Jury Regarding the Immigration Law Violations Aggravated the "Spillover."

Under the prosecution's legal theory, Appellant committed fraud on the bank only if Agriprocessors' representation that it was in compliance with all laws and regulations was, in the Appellant's mind, *knowingly* and *intentionally* false. The district court's jury instructions permitted the jury to find Appellant guilty by a standard that was far less demanding than a knowing and intentional state of mind. Rather than telling the jury that harboring illegal aliens would be relevant to the alleged bank fraud only if Appellant subjectively believed Agriprocessors was violating the law (8 U.S.C. § 1324) and deliberately lied, Judge Reade instructed the jury as if Appellant were standing trial on an illegal harboring of aliens charge. Had Agriprocessors or Appellant been tried for violating 8 U.S.C. § 1324(a)(1)(A)(iii), it might have been sufficient for the prosecution to prove that the accused "recklessly disregarded" the presence of illegal aliens in his employ. But the "reckless disregard" state of mind was not enough to make Appellant guilty of defrauding the bank, which required the higher "knowing and intentional" falsity.

The district court instructed the jury as follows:

> To assist you in determining whether someone violated the law by harboring undocumented aliens, you are advised that the offense of harboring an illegal alien has four essential elements, which are:
>
> One, one or more individuals was an alien;

> Two, one or more of the aliens entered or remained in the United States unlawfully;
>
> Three, the defendant knew, *or recklessly disregarded* the fact, that one or more aliens was not lawfully in the United States; and
>
> Four, the defendant concealed, harbored or shielded one or more aliens from detection.

[App. 141 (emphasis added)]

The prosecutor's closing argument emphasized the looser "reckless disregard" mental state:

> In deciding whether or not there was a knowing harboring of undocumented aliens, remember, you -- you can either know or recklessly -- recklessly disregard the fact that one or more aliens were not present [sic] in the United States, okay. So when the defendant takes the stand and he says, "Well, I didn't know for sure that they were undocumented or not," that is not the test. Did you know or are you recklessly disregarding that some of these people might be undocumented aliens?

[App. 139-140]

"Reckless disregard" is not the state of mind required to convict an accused of the fraud offenses charged in Appellant's indictment (18 U.S.C. §§ 1014, 1341, 1343, 1343). Federal fraud statutes require proof of *deliberate* false representations. *United States v. Ponec*, 163 F.3d 486, 489 (8th Cir. 1998) (to prove liability for bank fraud "the government needed to prove that Mr. Ponec deliberately made false representations to the bank. Otherwise, there would be no scheme or artifice to defraud."); *United States v. Sue*, 586 F.2d 70, 72 n.2 (8th Cir. 1978); *United States v. Anderson*, 570 F.3d 1025, 1030 (8th Cir. 2009).

Although 8 U.S.C. § 1324(a)(1)(A)(iii) allows an accused to be found guilty *of that offense* if he acts with "reckless disregard," the same is not true of the fraud charges made against the Appellant. Hence the jury instruction erroneously permitted the jury to find Appellant guilty even if his representation was not deliberately false.

The jury instruction also misstated the allegation made in the Seventh Superseding Indictment. The indictment did not allege that Agriprocessors or the Appellant had "recklessly disregarded" the presence of illegal aliens in the Postville work force; it alleged that they had *actual knowledge* of the employment of illegal aliens. [*See e.g.*, App. 29-30, ¶ 33 ("[D]efendants AGRIPROCESSORS and RUBASHKIN *knowingly* harbored and conspired to harbor undocumented alien workers ..."); ¶ 35 ("[A]s defendant RUBASHKIN well *knew*, Defendant AGRIPROCESSORS ... was *knowingly* harboring undocumented aliens.") (emphasis added); App. 37, 39, 50, 52-53 (¶¶ 49, 50, 53, 60, 61, 66, 67) (same).]

By changing the mental state required for a conviction from that required by the indictment, the district court's "reckless disregard" instruction constructively amended the indictment in violation of the Fifth Amendment's constitutional guarantee. *United States v. Adams*, 604 F.3d 596, 599 (8th Cir. 2010); *United States v. Collins*, 350 F.3d 773, 775 (8th Cir. 2003) (quoting *United States v. Griffin*, 215 F.3d 866, 869 (8th Cir. 2000)). "When an indictment is modified in

this matter, the defendant's Fifth Amendment right to be charged by a grand jury has been violated, resulting in reversible error." *Id.* Based on this record and the trial judge's erroneous instruction, the Appellant was convicted "of an offense different from ... the offense[] charged in the indictment." *United States v. Whirlwind Soldier*, 499 F.3d 862, 870 (8th Cir. 2007). *See United States v. Cancelliere*, 69 F.3d 1116, 1120-22 (11th Cir. 1996) (reversing conviction on constructive amendment grounds where indictment alleged that defendant acted knowingly and willfully but district court's instruction prescribed a lesser standard).

Finally, the harboring jury instruction was erroneous even as a definition of the elements required to find an accused guilty of violating 8 U.S.C. § 1324. This Court recently applied that criminal statute and held that a conviction could not be upheld if there was no proof that the accused had either actual knowledge or reckless disregard of the illegal-alien status *of a particular individual*. *United States v. Pereyra-Gabino*, 563 F.3d 322 (8th Cir. 2009).

The trial judge's instruction in this case failed to prescribe this essential element of the offense. It did not direct the jury to consider whether any particular alien had been unlawfully harbored. Nor was there any requirement under Instruction No. 19 (quoted above) that the same particular alien satisfy the four enumerated elements of the offense, as this Court prescribed in *Pereyra-Gabino*.

The instruction thus suffered from the exact same defect that this Court found to be reversible error in *Pereyra-Gabino*. *Pereyra-Gabino*, 563 F.3d at 328-329.

III. THE MONEY LAUNDERING CONVICTIONS MUST BE VACATED.

Mr. Rubashkin was also convicted on ten counts (Counts 62-71) of money laundering in violation of 18 U.S.C. § 1956(a)(1). His sentence was substantially longer because of the money laundering convictions than it would have been without them. The money laundering convictions raised Mr. Rubashkin's offense level under the Sentencing Guidelines four levels beyond what it would have been for bank fraud. [Add. 124-27] This had the effect of raising the low end of Mr. Rubashkin's ultimate guideline calculation by almost ten years, from 210 months to 324 months. [Add. 136]; U.S.S.G. Ch. 5 Pt. A.

The federal offense of money laundering applies to financial transactions involving "proceeds" of "specified unlawful activity." The defense moved for a judgment of acquittal at the close of the government's case on the ground that the funds that were allegedly "laundered" were not "proceeds" of unlawful activity. [Dkt. No. 721-1 at 23-27; Trial Tr. 21:78-82] The defense renewed its motion after the close of all evidence. [Dkt. No. 747-1 at 4-6; Trial Tr. 25:44-45] The prosecutors argued that the allegedly money laundered funds were "proceeds" and "profits" [Trial Tr. 25:48] The district judge agreed with the prosecutors, both

before the case went to the jury and after the jury returned the verdict with its special interrogatories. [Add. 74-75]

The money laundering allegations related to specified transfers of funds from Agriprocessors to FBBC's "sweep account." The funds in question were customer payments that should have been deposited to the "sweep account" immediately upon receipt, but were temporarily diverted so that Agriprocessors could use the funds while it drew the maximum amount available on the basis of its "outstanding receivables." Since the diversion of these funds resulted in an inflated figure for "receivables" (which were collateral for the loan), the prosecution maintained that the diversion was part of a bank-fraud scheme. The indictment also alleged that the repayment of the diverted funds into the bank's "sweep account" constituted money laundering.

Section 1956(a)(1) would, however, be violated only if the funds deposited to the "sweep account" were "proceeds" of the alleged fraud. The indictment alleged that the transfers were designed "to hide the improper diversion of customer checks" by depositing funds in a way that made them "look like customer payments." [App. 32-33]

In *United States v. Santos*, 553 U.S. 507 (2008), a plurality of the Court held that "proceeds" means "profits." The jury here expressly found in its answers to interrogatories that the diverted funds deposited to the "sweep account" were not

"profits" of criminal activity. Moreover, the deposits of the diverted funds were not in fact deposits of "proceeds" under any fair reading of the Supreme Court's precedents construing the money laundering statute.

A. The Jury's Verdict Mandates a Judgment of Acquittal Under the Plurality Opinion in *Santos*.

The defendants in *Santos* operated an illegal lottery. They were convicted of money laundering for engaging in bank transactions with collected funds to pay lottery winners and employees. 553 U.S. at 509-10. Justice Scalia, writing for a four-Justice plurality, concluded that Section 1956(a)(1) is violated only if the defined financial transaction involves *profits* of specified unlawful activity. *Santos*, 553 U.S. at 514. The Supreme Court plurality held that the payments to winners and employees were costs of the lottery, not profits. Hence the defendants' money laundering convictions had to be vacated. 553 U.S. at 524.

In this case the jury's answers to the interrogatories relating to the money laundering counts are dispositive under the Supreme Court's plurality opinion in *Santos*. The jury determined that the "specified unlawful activity" in the transactions described in Counts 62-71 (Counts 134-143 of the Seventh Superseding Indictment) "did not involve profits obtained from the commission of a specified unlawful activity." [App. 143-172] According to the view expressed by four Supreme Court justices, this jury's verdict that the transactions "did not involve profits" required the entry of a judgment of acquittal for the Appellant on

all the money laundering counts.

B. A Judgment of Acquittal Is Also Required Under the Rationale of Justice Stevens' Concurrence.

This Court has noted that the "Justice Stevens' concurrence provides the narrowest holding" in the *Santos* case and that it is therefore dispositive. *United States v. Spencer*, 592 F.3d 866, 879 n.4 (8th Cir. 2010). Justice Stevens concurred in the judgment in *Santos*, providing the controlling fifth vote. He agreed with the plurality that with respect to the underlying unlawful activity at issue in that case – running an illegal gambling operation – "proceeds" of the unlawful activity did not include payments to winners and employees. *Santos*, 553 U.S. at 528.

Justice Stevens' opinion was based on what he called the "merger problem." When the alleged money laundering transaction is an inherent part of an underlying offense, a defendant would be punished twice (and more severely) for the same conduct if his use of funds is also deemed to be money laundering. For example, paying winners of an illegal lottery is both a necessary part of the offense and a transaction involving "receipts." Justice Stevens believed that punishing twice for the same offense is too "perverse" to reflect Congress' intent in enacting the money laundering statute. 553 U.S. at 528 n.7.

Justice Stevens held that "proceeds" could be defined more broadly if no "perverse" merger problem results. 553 U.S. at 528 n.7; *see also United States v. Van Alstyne*, 584 F.3d 803, 814 (9th Cir. 2009) (describing "the holding that

commanded five votes in *Santos* as . . . that 'proceeds' means 'profits' where viewing 'proceeds' as 'receipts' would present a 'merger' problem"); *Garland v. Roy*, 615 F.3d 391, 402 (5th Cir. 2010).[4]

The plurality in *Santos* recognized that "[g]enerally speaking, any specified unlawful activity, an episode of which includes transactions which are not elements of the offense and in which a participant passes receipts on to someone else, would merge with money laundering." *Santos*, 553 U.S. at 516. The predicate transactions for Mr. Rubashkin's "money laundering" were, in fact, merely "episode[s]" of the alleged fraud, in which he "passe[d] receipts on to someone else." Thus, the two crimes "merged."

The decisions in *Garland* and *Van Alstyne* applied the rationale of Justice Stevens' *Santos* concurrence. According to the reasoning adopted by the Fifth and Ninth Circuits, Justice Stevens would find the Appellant not guilty of money laundering. *Garland* involved the payment of alleged "returns" to early investors in a "pyramid scheme." *Garland*, 615 F.3d at 395-96. The Fifth Circuit explained

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[4] Justice Stevens also expressly agreed with the *Santos* dissenters that legislative history made clear that "Congress intended the term 'proceeds' to include gross revenues from the sale of contraband and the operation of organized crime syndicates involving such sales." *Santos*, 553 U.S. at 525-26 (Stevens, J., concurring in the judgment). Accordingly, this Court has held that the "profits" definition of the Supreme Court plurality opinion "does not apply in the drug context," *Spencer*, 592 F.3d at 879. This case, by contrast, does not involve drugs or the sale of other contraband.

that because the same transaction was used to prove both the underlying unlawful activity (securities fraud) and the money laundering, the two "potentially 'merged.'" 615 F.3d at 404. The Ninth Circuit followed a similar approach in *Van Alstyne*, reversing convictions on money laundering charges growing out of a Ponzi scheme. "[I]ssuing distribution checks that supposedly represented generous returns on [the] victims' investment was a central component of the 'scheme to defraud'" because it "inspired investors to send more money." *Van Alstyne*, 584 F.3d at 815. The alleged predicate transactions were needed for the scheme to "be at all successful." 584 F.3d at 815. Hence the principal offense "merged" with the money laundering charge.

Other cases provide additional examples of the interplay between fraud and money laundering. *See, e.g.*, *United States v. Moreland*, 622 F.3d 1147, 1166 (9th Cir. 2010) (predicate transactions were "central to carrying out the [fraudulent] scheme's objective of encouraging further investment" and therefore "raise[d] the same merger problem condemned in *Santos*"); *cf. United States v. Ha*, 2010 U.S. App. LEXIS 15663, at *4 (9th Cir. July 28, 2010) (transactions were "entirely distinct from the transactions underlying the mail fraud convictions" and therefore did not merge).

As in *Van Alstyne*, *Garland*, and *Moreland*, the money laundering convictions here merged with the underlying fraud convictions. The predicate

transactions were a "central component" of the alleged scheme to defraud and were essential in order to make that scheme "at all successful." The indictment explained that inflating the accounts receivable took two steps: diverting customer payments and then repaying FBBC's sweep account in a way that made the transfers resemble direct customer payments. [App. 32-33] These transfers were thus essential to the overall fraudulent scheme. As with payments made to investors in the cited cases, the transactions here were part of the alleged fraud, not "entirely distinct" from the fraud. Charging Appellant with money laundering created a "merger problem," raising the specter that Appellant would be punished twice for the same basic conduct.

C. The District Judge Erroneously Relied on the Sixth Circuit's Opinion in the *Kratt* Case.

The district judge cited only the Sixth Circuit's opinion in *United States v. Kratt*, 579 F.3d 558, 561 (6th Cir. 2009), in denying Mr. Rubashkin's request for a judgment of acquittal on the money laundering counts. [Add. 74-75] In the district court's view, the "merger problem" that motivated Justice Stevens is never present if the predicate offense is bank fraud or making false statements because any merger of the crimes would not "radically increase[]" the maximum applicable sentence. [Add. at 75 (quoting *Kratt*, 579 F.3d at 563) (quotation marks omitted)]

This reasoning misapprehends Justice Stevens' rationale, as explained by the Fifth Circuit in *Garland*:

> Justice Stevens did not state that the defendant needed to suffer a harsh increase in his sentence in order for "proceeds" to be defined as "profits." He wrote that the fifteen-year increase in the Santos's sentences made the merger in *Santos* "particularly unfair," but the particular sentence was just a symptom of the unfairness of the merger problem that his opinion was crafted to avoid.

Garland, 615 F.3d at 404. Justice Stevens' point was that allowing a component of one offense to be punished as money laundering "is in practical effect tantamount to double jeopardy." *Santos*, 553 U.S. at 527. That insight has force whenever a "merger problem" exists (as it does here), and it is not limited to cases involving predicate offenses carrying less severe maximum penalties than Section 1956 authorizes.

Courts have in fact applied Justice Stevens' rationale to reverse money laundering convictions premised upon transactions involving gross receipts of fraud crimes, even though the latter carry longer maximum prison terms than does money laundering. *Moreland*, 622 F.3d 1147; *Van Alstyne*, 584 F.3d 803; *see also United States v. Aljabri*, 363 F. App'x 403, 406 (7th Cir. 2010).

In any event, the money laundering convictions in this case did have the "perverse" consequence of increasing – indeed, radically increasing – the otherwise-applicable sentence. As this Court has observed, "the base offense level for money laundering is much higher than the base offense level for fraud." *United States v. Shoff*, 151 F.3d 889, 891 (8th Cir. 1998). Appellant's Sentencing Guideline offense level was increased by four levels because of the money

laundering convictions. This was more than the two-level increase in *Santos* itself. *Santos*, 553 U.S. at 527 n.6 (Stevens, J., concurring in the judgment). Given that the district judge purported to hew strictly to the Sentencing Guidelines in this case, there is good reason to believe that Mr. Rubashkin suffered a nearly ten-year increase in his sentence by virtue of the *Santos* error. The money laundering convictions and the sentence must, therefore, be vacated and the case remanded.

D. Even Before *Santos*, a Judgment of Acquittal Was Required on the Facts of this Case.

Whatever the proper understanding of *Santos*, acquittal was required in this case because of an independent principle that courts recognized before *Santos* and have continued to apply since that decision. The payments from Agriprocessors to FBBC's "sweep account" did not involve "proceeds" of criminal activity because those transfers were part of the alleged scheme that yielded the fraud proceeds, not a distinct effort to cleanse the scheme's proceeds.

A transaction involving "proceeds" of unlawful activity must be distinct from that activity. The money laundering statutes proscribe actions taken with the proceeds of crime, "not the anterior criminal conduct that yielded the funds allegedly laundered." *United States v. Cabrales*, 524 U.S. 1, 7 (1998). The transactions involving proceeds "cannot be the same as the illegal activity which produces the proceeds." *United States v. Castellini*, 392 F.3d 35, 47 (1st Cir. 2004); *see also United States v. Mankarious*, 151 F.3d 694, 705 (7th Cir. 1998)

(noting agreement between Tenth and Eleventh Circuits that: "[M]oney laundering criminalizes a transaction in proceeds, not the transaction that creates the proceeds"). This Court has recognized that same basic principle. *United States v. Phythian*, 529 F.3d 807, 813 (8th Cir. 2008) ("Money laundering '[p]roceeds' are funds obtained from prior, separate criminal activity.'" (quoting *United States v. Savage*, 67 F.3d 1435, 1441 (9th Cir. 1995))).

The D.C. Circuit's recent decision in *United States v. Hall*, 613 F.3d 249 (D.C. Cir. 2010), illustrates the principle. The predicate transactions charged in that case "made the bank fraud successful" and were described in the fraud portion of the indictment as "a necessary element to complete the bank fraud." *Hall*, 613 F.3d at 254. The court of appeals therefore reversed the money laundering conviction because the transactions were insufficiently "separate and distinct from the underlying offense that generated the money to be laundered." 613 F.3d at 254-255.

As in *Hall*, the transactions in this case were described in the fraud portion of the indictment and were meant to facilitate the bank fraud, not to hide its proceeds (which, deriving from a loan for a lawful business, did not need to be hidden). "Having carried out a fraud of which concealment was an integral part," the Appellant "cannot be charged with the same concealment a second time, as if it

were the sort of independent manipulation of the proceeds required for money laundering." *United States v. Adefehinti*, 510 F.3d 319, 324 (D.C. Cir. 2007).

IV. THE DISTRICT COURT'S ERRORS OF COMMISSION AND OMISSION REQUIRE THAT APPELLANT'S SENTENCE BE VACATED.

Sholom Rubashkin is a first-time, nonviolent offender whose criminal conduct, unlike that of many white collar defendants, was not designed to support an opulent lifestyle. His offenses relate to his role in the mismanagement of a business owned by his father that provided an essential service – supplying kosher meat – to people who shared his family's religious beliefs. That unselfish motivation emerged even from the testimony of prosecution witnesses during the trial. [App. 67-72, 95-97] In his 51 years, Mr. Rubashkin had never previously been charged with or convicted of *any* crime other than state court misdemeanor charges associated with the Agriprocessors raid, charges for which Mr. Rubashkin was acquitted by a jury.

Despite these considerations, the district court sentenced Mr. Rubashkin to a prison term of *27 years*, a longer sentence than that requested by the government. This staggering and vindictive punishment effectively amounts to a life sentence for this father of 10 children. It is also reversible error for multiple reasons.

The Supreme Court has directed that a district court "should begin all sentencing proceedings by correctly calculating the applicable Guidelines range."

Gall v. United States, 552 U.S. 38, 49 (2007). The court must thereafter "consider all of the [18 U.S.C.] § 3553(a) factors to determine whether they support the sentence requested by a party," and in doing so "may not presume that the Guidelines range is reasonable" but must undertake "an individualized assessment based on the facts presented." 552 U.S. at 49-50.

On appeal this Court "must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence." 552 U.S. at 51. After evaluating the sentence for procedural error, this Court "should then consider the substantive reasonableness of the sentence . . . tak[ing] into account the totality of the circumstances . . ." 522 U.S. at 51.

The district court committed error in every phase of the forgoing sentencing analysis. Mr. Rubashkin's sentence should be vacated and this case should be remanded for resentencing. That resentencing should be conducted by a different judge, free from the apparent animus that motivated the sentencing decision here.

A. The District Court Erroneously Calculated Mr. Rubashkin's Offense Level Under the Sentencing Guidelines.

The district court found Mr. Rubashkin's offense level to be 41. [Add. 136] Two errors in the Guideline computation added six unwarranted levels to Mr.

Rubashkin's offense level. These errors had the effect of nearly doubling Mr. Rubashkin's Guideline range, from a range of 168-210 months to a range of 324-405 months. (His 27-year sentence is 324 months.)

1. Mr. Rubashkin should have no levels added for money laundering.

Appellant was improperly convicted of money laundering for the reasons stated at pp. 67 - 77, *supra*. Four levels were erroneously added to his Guideline calculation because of the money laundering convictions. [Add. 124-127]

2. The district court erroneously calculated the "loss" caused by Appellant's conduct.

The Sentencing Guidelines direct courts in fraud cases to calculate the "reasonably foreseeable pecuniary harm" caused by a defendant's conduct. U.S.S.G. § 2B1.1 cmt. 3(A)(i). An error in computing the "loss" amount can skew the defendant's Guidelines range and significantly impact his sentence. Hence such an error requires vacatur of the sentence and further sentencing proceedings in the district court. *See United States v. Hartstein*, 500 F.3d 790, 800 (8th Cir. 2007); *United States v. Staples*, 410 F.3d 484, 491-492 (8th Cir. 2005).

In this case, the district judge used the entire unpaid balance on the FBBC loan to Agriprocessors as the "loss" figure. The district court's loss figure was

nearly $27 million, producing an increase in Appellant's base offense level of 22 levels. [Add. 114, 120-121]; U.S.S.G. § 2B1.1(b)(1)(L).[5]

The precedents in this Court and in other Circuits establish that (as logic suggests) the total unpaid balance on the FBBC loan was not the loss caused by Appellant's criminal conduct. For sentencing purposes, the actual loss to the bank attributable to the fraud was the amount loaned to Agriprocessors *because of* the false inflation of collateral values. Testimony of the government's own witness shows that only about $12 million – less than half of the total loss that FBBC claimed to have suffered – was drawn on the line of credit as a result of the false inflation of collateral values. The bank's inability to collect additional amounts provided under the Agriprocessors line of credit was independent of the charged fraud. Such amounts at most constitute "consequential" losses that do not enter into the Guidelines calculation.

Section 1B1.3(a)(3) of the Guidelines provides that a defendant's sentencing range depends on "all harm that *resulted from* [his] acts or omissions." (Emphasis supplied.) Courts uniformly understand that provision to "establish[] a causation requirement." *See, e.g., United States v. Hicks*, 217 F.3d 1038, 1048 (9th Cir.

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[5] FBBC sold a portion of its interest in its Agriprocessors' loan to another bank. Consequently, the district court divided the loss between the two banks. [Add. 102-103]

2000); (collecting cases). In particular, [t]o calculate the sentencing range for a fraud case, we need to determine the amount of loss caused by the fraud." *Staples*, 410 F.3d at 490.[6]

Where, as here, the crime is the fraudulent inducement of draws on an existing line of credit, the maximum actual loss caused by the fraud is the total of the funds advanced as a result of the fraudulent statements, not the entire loan balance. In *United States v. Miller*, 588 F.3d 560 (8th Cir. 2009), this Court quoted and reaffirmed that principle, which it first articulated in *Kok v. United States*, 17 F.3d 247, 250 (8th Cir. 1994): "[T]he measure of the loss . . . is the difference between the amount of credit the bank extended based on the false representations and the amount of credit the bank would have extended had it known the company's true financial condition." *Miller*, 588 F.3d at 566; *see also United States v. Carter*, 412 F.3d 864, 869 (8th Cir. 2005).[7]

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[6] The Guidelines provide that the higher of "actual" or "intended" loss governs. U.S.S.G. § 2B1.1 cmt. 3(A). In this case, the parties and the district court agreed that actual loss was the appropriate measure. [Add. 113]

[7] Both *Kok* and *Carter* involved the calculation of "intended loss" because in both cases the banks were able to recover all of the funds. The formula employed in those cases was designed to capture the *maximum possible loss* from the fraud, which constitutes the "intended loss" unless the defendant's subjective intent was to repay the victim. *See United States v. Anderson*, 68 F.3d 1050, 1054-55 (8th Cir. 1995). Hence, it necessarily also serves as the upper limit on the *actual* loss attributable to the fraud.

Other Circuits have also confronted cases, like this one, where the defendants fraudulently inflated collateral values in order to borrow additional funds on existing revolving loans. *See United States v. Berger*, 473 F.3d 1080, 1106 (9th Cir. 2007); *United States v. Carboni*, 204 F.3d 39, 42 (2d Cir. 2000). In neither of these cases did the sentencing court calculate the "loss" as the entire unpaid balance of the bank loan. Each court focused on the discrete additional sums lent in reliance upon the fraudulent representations at issue.

In *Berger*, "the district court focused only on the amount of loss attributable to the falsified Borrowing Certificates." *Berger*, 473 F.3d at 1107 (emphasis in original). The Ninth Circuit affirmed the conclusion that the loss attributable to the defendant was the extra amount loaned by virtue of the fraud. Likewise, in *Carboni*, the district court "focused on two flagrant misstatements" and added the loan amounts that were (or could have been) advanced based on the specific misrepresentations of collateral value. *Carboni*, 204 F.3d at 46. They totaled $195,840, a fraction of the loan balance, which was $574,230. 204 F.3d at 46. The Second Circuit affirmed this part of the district court's sentencing analysis.

These authorities confirm a basic economic reality. If a borrower falsifies collateral in order to induce an increased loan, the maximum possible loss caused by that fraud is the additional amount advanced as a result of the falsification.

Because the value of the collateral supporting the bank loan was inflated, Agriprocessors was able to draw more funds on its line of credit than it should have drawn. [Add. 108 ("As a result of Defendant's fraud, FBBC loaned funds to Agriprocessors well in excess of the 85% eligibility formula provided in the loan agreements.")] The fraud only exposed the bank to the potential loss of that added draw. Agriprocessors' ultimate inability to repay the balance of the loan may have been due to any number of factors, such as deteriorating market conditions, bad business planning, or poor management by the bankruptcy trustee.[8] It was not, however, caused by the fraud.

Using the figures supplied by the prosecution's own witness at sentencing, it is clear that the amount Agriprocessors was able to draw as a result of the inflated collateral was far less than the $27 million attributed to Mr. Rubashkin by the district court, and less than the $20 million cut-off in the Guidelines. *See* U.S.S.G. § 2B1.1(b)(1)(L). Agent Van Gent testified that, to his knowledge, Agriprocessors' accounts receivable were inflated by approximately $10 - $12

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[8] In fact, there was testimony establishing that the shortfall on the balance of the loan was caused in no small part by, among other things, the trustee's insistence that no member of the Rubashkin family be involved in the new management of the company [App. 178-179, 241-242]; the trustee's refusal to seriously consider an offer to purchase the company for $22 million [App. 183-188]; and the trustee's mishandling and destruction of frozen inventory that had been valued at $11 million at the time of default, and certified by FBBC as worth $15 million just a few months earlier. [App. 173-177, 201-204, 236-240]

million. [App. 173, 181] That figure was accepted by the district judge, who said that Mr. Rubashkin "was causing FBBC to loan against approximately $10 million in fake invoices." [Add. 116] Van Gent also estimated that about $2 million in customer payments was diverted, thus boosting the accounts-receivable totals by that sum.[9] [App. 181] FBBC advanced funds to Agriprocessors at a rate of 85% of eligible accounts receivable. Consequently, even the largest estimate of the fraud proposed by the government ($14 million) translates into approximately $12 million in excessive draws.

Hence the maximum loss suffered by the bank by virtue of the fraud charged in the indictment did not exceed $12 million, less than half of the amount attributed to the Appellant by the district court and well below the Guidelines' $20 million cut-off. The offense level under the Guidelines should, therefore, have been increased by 20 levels for the amount of the loss, not by 22 levels.

The district court misunderstood and mischaracterized the defense's causation argument, and misapplied basic principles of sentencing law in so doing. First, the court treated the defense argument as a request for an "offset" against the loss. In her sentencing memorandum, the judge quoted the government's

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[9] Although the "burden of proving the extent of the loss falls on the Government," *United States v. Wells*, 127 F.3d 739, 745 (8th Cir. 1997), the Government did not provide any more specific evidence about the total sum of diverted customer payments (or the manipulation of stated inventory values).

statement that Mr. Rubashkin "appears to want full credit for the face value of all actual accounts receivable which supported the loan – regardless of their actual value to the victim[] banks upon liquidation." [Add. 119] The court rejected this argument because, in "offsetting the amount of actual loss," only amounts actually recovered from the disposition of collateral are credited. [Add. 119]

Appellant was not, however, arguing that the loss amount should be reduced, or offset, by funds that the bank should have recovered from the legitimate collateral. Defense counsel's proper and correct contention was that the funds lent in reliance upon legitimate collateral were not losses caused by the alleged fraud, whether or not FBBC was ultimately able to collect them.

The government induced this error by citing "offset" cases to the district judge. *E.g.*, *United States v. Parish*, 565 F.3d 528 (8th Cir. 2009). Those cases stand for the proposition that if the defendant has initially obtained a loan by fraud, (*e.g.*, 565 F.3d at 531), any money lost by the lender has been caused by the fraud because in its absence there would presumably have been no loan at all. In such cases, it is appropriate to offset the loss by any value that the lender is able to recover from any collateral, to accurately capture the actual loss caused by the loan. *See* 565 F.3d at 535. But if the loan was lawfully originated, and false statements were only later used to draw additional amounts against that lawful loan, then loss of the full amount of the loan is not the result of any criminal act.

Other Circuits have recognized that distinction. "[T]he inquiry to determine loss must focus on the amount of loss *related to the false statement*." *United States v. Wilson*, 980 F.2d 259, 262 (4th Cir. 1992) (emphasis added). It was "[c]ritical" in *Wilson* that "at the time the loan applications were made and approved, no offense had been committed." 980 F.2d at 262. The loan balance was, accordingly, reduced to reflect not only the value recovered from collateral, but also the amounts the bank would have lost anyway, "had the statement not been false." 980 F.2d at 262; *see also United States v. Copus*, 110 F.3d 1529, 1535 (10th Cir. 1997). The loan balance is "an easy figure to latch onto in computing" loss, "but the real question is whether the government proved . . . that the entire loan balance was the *correct* loss figure." *United States v. Berheide*, 421 F.3d 538, 541 (7th Cir. 2005) (emphasis in original).

The court also reasoned that the entire unpaid loan balance was the "loss" attributable to the Appellant's conduct because the fraud allegedly led to the bankruptcy of Agriprocessors. [Add. 116] That cannot be so. To be sure, the bankruptcy hindered the bank in its capacity to recover the legitimate accounts receivable and other collateral. [Add. 116 (criticizing defense for "disregard[ing] the general effect a bankruptcy has on the value of assets of the estate")]. But such "consequential" losses are not included as "loss" by the Guidelines.

Loss "does not encompass every harm resulting from a crime, no matter how attenuated the causal link." *United States v. Simpson*, 538 F.3d 459, 464 (6th Cir. 2008). The loss must be "directly caused by the fraud." *United States v. Daddona*, 34 F.3d 163, 172 (3d Cir. 1994). Judge Posner explained that sweeping more broadly would turn sentencing "into a tort or contract suit." *United States v. Marlatt*, 24 F.3d 1005, 1007 (7th Cir. 1994). As a result, losses that "were consequences, perhaps even foreseeable consequences, of the fraud, but were not the thing actually taken," do not count. 24 F.3d at 1007.

In any event, the evidence showed that draws based on inflated receivables were made only when Agriprocessors needed funds in order to cover its immediate costs and could not obtain them elsewhere. [Trial Tr. 11:42-57] The fraudulent loans allowed the company to stay afloat, but they no more caused the bankruptcy than a life-support machine causes the death of the patient when it is disconnected. *Cf. United States v. Diamond*, 969 F.2d 961, 966-67 (10th Cir. 1992) (pointing out that defendant's false statements did not cause insolvency but merely postponed it).

B. The District Court Failed To Consider the Statutory Factors Prescribed by Section 3553(A).

Resentencing is also required for the independent reason that the district judge "fail[ed] to consider the § 3553(a) factors." *Gall*, 552 U.S. at 51. She particularly ignored: (1) Mr. Rubashkin's motive, and (2) the egregious sentencing

disparities between his prison term of nearly three decades and the far shorter terms imposed by other federal courts for far more serious offenses.

These are failures that amount to an abuse of discretion and require vacatur under *Gall* and this Court's precedents. *See United States v. Feemster*, 572 F.3d 455, 461 (8th Cir. 2009) (en banc) ("A district court abuses its discretion when it (1) '*fails to consider a relevant factor that should have received significant weight*'; (2) 'gives significant weight to an improper or irrelevant factor'; or (3) 'considers only the appropriate factors but in weighing those factors commits a clear error of judgment.'") (emphasis added) (quoting *United States v. Kane*, 552 F.3d 748, 752 (8th Cir. 2009). This Court has remanded for resentencing when it has determined that Section 3553(a) factors were inadequately considered. *See, e.g.*, *United States v. Chase*, 560 F.3d 828, 831 (8th Cir. 2009) (remanding because district court, Reade, J. did not weigh defendant's "advanced age, prior military service, health issues, and employment history" or his "lack of criminal history").

1. Motive.

One of the principal factors enumerated by Section 3553(a) – the "nature and circumstances of the offense" – required the judge to consider the motivation for the Appellant's conduct. Mr. Rubashkin's principal motive was "to keep his father's company going, and continue its mission of providing Kosher food to Jews," which he saw as a "religious calling." [Dkt. No. 895 at 7, 9; *see also* Dkt

No. 896 at 8-10] Although the sentencing judge implicitly accepted "that [Mr. Rubashkin's] offenses of conviction were not motivated out of a sense of personal greed, but rather, out of a sense of duty to maintain his family business and for religious purposes," she held that this fact was irrelevant. [Add. 141] In the court's own words, "[n]o matter Defendant's motive," he committed the crimes, and so "this is not a basis to vary downward." [Add. 141] That simplistic, mechanical view is wrong as a matter of law.

A defendant's reason for committing a crime is plainly a "circumstance[] of the offense" within the meaning of Section 3553(a). The Supreme Court has instructed that a "defendant's motive for committing the offense" is an "important factor" for sentencing judges to consider "in determining what sentence to impose on a convicted defendant." *Wisconsin v. Mitchell*, 508 U.S. 476, 485 (1993). As Justice O'Connor explained, "a defendant's motive for committing the criminal offense" is a "factor that has *always* been considered by sentencing courts to bear on punishment." *Apprendi v. New Jersey*, 530 U.S. 466, 553 (2000) (O'Connor, J. dissenting) (emphasis added). One of the leading treatises likewise explains: "Motives are most relevant when the trial judge sets the defendant's sentence, and it is not uncommon for a defendant to receive a minimum sentence because he was acting with good motives, or a rather high sentence because of his bad motives." 1 W. LaFave & A. Scott, *Substantive Criminal Law* § 3.6(b), at 324 (1986).

Since *United States v. Booker*, 543 U.S. 220 (2005), and its progeny, courts have recognized that defendants' motives are highly relevant to the Section 3553(a) analysis. This Court, for example, affirmed a modest upward variance in part on the basis that the defendant's financial crimes were "motivated by greed" in *United States v. Beasley*, 355 F. App'x. 78, 80 (8th Cir. 2009). *See also United States v. Connors*, No. 06-189, 2007 U.S. Dist. LEXIS 74904, at *10 (E.D. Pa. Oct. 9, 2007) (imposing a sentence more than 50% below the Guidelines range because the defendant "did not directly obtain the millions of dollars in fraud proceeds, and . . . his conduct was essentially motivated by a desire to save the company and to save the jobs of its employees").

This accords with basic notions of fair punishment. The district judge was obliged to consider why Mr. Rubashkin acted as he did. Accordingly, this Court should remand the case for resentencing by a judge who will take *all* of the relevant § 3553(a) factors into account. *Cf. Chase*, 560 F.3d at 831 (remanding when Judge Reade said she did not "see any basis to vary downward" even though defendant raised multiple "factual bases that would warrant a downward variance").

2. Unwarranted disparities.

Section 3553(a)(6) directs sentencing courts to consider the "need to avoid unwarranted sentence disparities between defendants with similar records who

have been found guilty of similar conduct." But the district court totally ignored the disparities noted by Mr. Rubashkin and, in this regard, committed reversible error.

Two specific cases cited by Mr. Rubashkin's counsel involved defendants *more* culpable than Mr. Rubashkin who received dramatically shorter sentences. [Dkt. No. 895 at 47-49] In *United States v. Turkcan*, an officer of First Bank was sentenced to only a year and a day in prison for his fraud, which caused a loss to the bank – the very same bank as here – of about $25 million. No. 4:08-CR-428, Dkt. Nos. 32, 38, 52 (E.D. Mo.). In *United States v. Gieseker*, a woman who operated a Ponzi scheme that defrauded farmers out of approximately $27 million and spent the money on herself and her hobbies, was sentenced to only 9 years in prison. No. 4:09-CR-460, Dkt. Nos. 58, 71 (E.D. Mo.). Mr. Rubashkin's sentence was three times longer than Ms. Gieseker's and 27 times longer than Mr. Turkcan's, despite the roughly similar loss figures.

Appellant's sentence was greater than even the 24-year sentence given to Jeffrey Skilling, who was convicted on multiple charges relating to the collapse of Enron Corporation; the 20-year sentence of Marc Dreier, who operated a massive investment fraud scheme; and the 25-year sentence of Bernard Ebbers, who was the CEO of WorldCom and was convicted on multiple fraud charges relating to the collapse of that company. [Dkt. No. 895 at 48-49]. These are among the worst

illustrations of crimes of greed in recent years. Mr. Rubashkin's counsel maintained correctly that his crime in overstating security for a bank loan cannot fairly be compared to theirs. [Dkt. No. 895 at 48-49]

The district court failed totally to respond to this argument. The sentencing judge's memorandum did not mention the disparities created by a 27-year sentence, much less justify them or explain how they could be anything other than "unwarranted." [Add. 139-143]

This Court has confirmed that "[u]nwarranted sentencing disparities among federal defendants" must be considered during sentencing, "both before and after *Booker*." *United States v. Jeremiah*, 446 F.3d 805, 808 (8th Cir. 2006) (citing § 3553(a)(6)). This Court requires that it "must be clear from the record that the district court actually considered the § 3553(a) factors in determining the sentence." *Feemster*, 572 F.3d at 461. Here the opposite is clear – the district court ignored § 3553(a)(6).

In *United States v. Lazenby*, 439 F.3d 928, 934 (8th Cir. 2006), this Court vacated two sentences of similar defendants, citing the unwarranted disparities that they created. Notably, this Court reversed and remanded the greater sentence, even though it was at the bottom of the Guideline range. *Lazenby*, 439 F.3d at 934. The same course is appropriate here. *See United States v. Smith*, 573 F.3d 639, 660-62

(8th Cir. 2009) (vacating where district court believed it lacked authority to vary on basis of disparities).

C. A 27-Year Term of Imprisonment Is Substantively Unreasonable for a First-Time Non-Violent 51-Year-Old Defendant.

The Supreme Court has also ordered federal courts of appeals to "consider the substantive reasonableness of the sentence" imposed upon a defendant by a district judge. *Gall*, 552 U.S. at 51. This inquiry centers on the statutory factors under §§ 3553(a)(1) and (a)(2), including: "the nature and circumstances of the offense," "the history and characteristics of the defendant," and the need for the sentence to reflect various goals of sentencing, such as to deter future crime and "to protect the public from further crimes of the defendant."

A 27-year term of imprisonment for Mr. Rubashkin is plainly unreasonable under these sentencing factors for at least the following reasons:

First, Mr. Rubashkin's offenses were non-violent. *See United States v. Thomas*, 498 F.3d 336, 339-41 (6th Cir. 2007) (vacating where sentencing court should have considered argument that offense was "relatively nonviolent").

Second, Mr. Rubashkin's principal motives were, as discussed at pp. 88-89, *supra*, to keep a struggling family business afloat, to provide for the religious needs of co-religionists, and to retain jobs of his employees, not to exalt his personal lifestyle. [App. 234-235] He restored the diverted funds, paid timely interest, and intended to repay all loans. *See United States v. Milne*, 384 F. Supp.

2d 1309, 1310-11 (E.D. Wis. 2005) (considering that defendant "did not take the bank's money out of greed or a desire to live a lavish lifestyle" but rather "misguidedly tried to keep a sinking business afloat").

Third, the fraud for which Mr. Rubashkin was convicted was committed in the operation of an otherwise lawful business. *Cf. United States v. Whatley*, 133 F.3d 601, 606 (8th Cir. 1998) (considering that "the defendants' business was a conspiracy to commit wire fraud").

Fourth, Mr. Rubashkin has no prior criminal history of any kind. *See Chase*, 560 F.3d at 831 (remanding in part because "Chase's lack of criminal history, even though already taken into account in calculating his advisory guideline range, could nevertheless have formed the basis for a variance")

Fifth, Mr. Rubashkin's life has been otherwise exemplary, and his record of charitable activities extraordinary. The large quantity of letters to the court, and the grassroots support reflected on websites such as www.justiceforsholom.org, attested not only to his generous contributions to the needy and to the community at large, but also to his special acts of personal kindness. [Dkt. No. 896 at 10-14] By way of example, as to the former:

- The Chairman of the Crown Heights Jewish Community Council wrote that Mr. Rubashkin's "unparalleled generosity and kindness" included "paying tuition for children to attend religious schools" and "mentoring at-risk youth." [App. 243]

- Agudath Israel of America wrote of appellant's "remarkable devotion to charitable causes, which has led him to provide generous support to countless needy individuals" – "Jews and Gentiles; local, national and international." [App. 248]

- Even the CEO of Agriprocessors' main competitor submitted a letter to the court, attesting that Mr. Rubashkin's "charitable endeavors, of both pocketbook and deed, are legendary." [App. 250]

As to the latter:

- One letter recounted how appellant had invited its author, at the time an ill single-mother, to live with his family until her life was back on track. [App. 252-254]

- A single-mother neighbor of the Rubashkins from their time in Minnesota wrote of their "legendary" generosity, which in her case meant helping to pay for the Bar-Mitzvah celebrations of her sons and privately providing her with a monthly stipend. [App. 244]

- A witness testified about how, when he was going through a divorce, his daughter "wanted to go somewhere where she would feel safe, and she stayed with the Rubashkins for a while." [App. 198a]

- Mrs. Rubashkin testified that the couple had "about 25 or 30 adopted children from throughout the years of people that have lived in our houses." [App. 231]

These exceptional acts of charity and kindness warranted serious consideration in the sentencing calculus. *See United States v. Woods*, 159 F.3d 1132, 1136-37 (8th Cir. 1998) (affirming downward departure because of defendant's "exceptional" acts of charity, including bringing "two troubled young women" into her home).

Notably, even the *prosecution's* witnesses acknowledged Mr. Rubashkin's kindness and good character. "He was a good person," according to one employee

of Agriprocessors, with a reputation for charity. [App. 65] The outside executive who took the helm of Agriprocessors after the immigration raid called Mr. Rubashkin "a very honest and forthright individual." [App. 66] Other employees agreed that appellant was "generous" and "warm-hearted" [App. 95-96]; that he was hardworking and treated them "fairly" [App. 70-71]; that he was "kind" and "dedicated" and treated employees well. [App. 72]

Sixth, Mr. Rubashkin has a wife and ten children, many of whom still depend on him, including an autistic son, Moishe, whose development requires personal interaction with his father. Extensive testimony established the special relationship between Appellant and Moishe – a "very special bond," according to a director at the Autism Treatment Center of America. [Dkt. No. 896-1 at 13; *see also* Dkt. No. 896 at 14-19; App. 190-191, 207-208, 224-229] Medical professionals explained to the court that Appellant's detention had caused Moishe to "deteriorate[] and regress[]" [Dkt. No. 896-1 at 11], and Mrs. Rubashkin confirmed the same during her sentencing testimony. [App. 228-229]

Judicial precedents, including decisions of this Court, hold that these unique family and personal circumstances ought to be given substantial weight at sentencing. *See, e.g., United States v. Spero*, 382 F.3d 803, 805 (8th Cir. 2004) (affirming eight-level downward departure because defendant was "indispensable" to development of his disabled son); *United States v. Haversat*, 22 F.3d 790, 797

(8th Cir. 1994) (finding "truly exceptional family circumstances" sufficient to warrant downward departure due to defendant's role in caring for a wife with "severe psychiatric problems"); *see also United States v. Sclamo*, 997 F.2d 970, 972-74 (1st Cir. 1993) (approving downward departure where defendant had "special and crucially important relationship" with stepson who suffered from attention deficit hyperactivity disorder and that "condition will deteriorate if defendant is incarcerated"). Indeed, in *United States v. Gaskill*, 991 F.2d 82, 83-84, 86 (3d Cir. 1993), the court vacated and remanded for resentencing because the district court had refused to depart downward in the face of evidence that the defendant played an important role in caring for his mentally ill wife.

Seventh, Mr. Rubashkin poses no risk of recidivism, especially in light of his intent to return to teaching, his prior career and true passion. [App. 235] *See United States v. Hubbard*, 369 F. Supp. 2d 146, 154 (D. Mass. 2005) (reasoning that an "essentially life extinguishing" sentence would be unreasonable where defendant "will offer no danger to the community" upon release).

Given these uncontested facts, a sentence of 27 years is so staggeringly severe as to be unjustifiable, and well beyond acceptable bounds of discretion.

Nor do the Sentencing Guidelines justify such a sentence. Courts and commentators have observed that in fraud cases, the Guidelines' intense focus on the "amount of loss" overwhelms the calculation, eclipsing other relevant factors.

See United States v. Mohammed, 315 F. Supp. 2d 354, 357 (S.D.N.Y. 2003) ("[A]cross a wide range of diverse types of schemes and thefts, the amount of the loss . . . may be a less accurate proxy for the seriousness of the offense."); Ellen S. Podgor, *The Challenge of White Collar Sentencing*, 97 J. Crim. L. & Criminology 731, 752-58 (2007).

The Second Circuit recently vacated a within-Guidelines sentence as substantively unreasonable because, it observed, certain Guidelines, "unless applied with great care, can lead to unreasonable sentences." *United States v. Dorvee*, 616 F.3d 174, 184 (2d Cir. 2010). That warning is particularly apt with respect to the loss-warped fraud Guideline, application of which had precisely that condemned consequence in this case. As in *Dorvee*, vacatur of the resulting unreasonable sentence is required here.

D. Re-Sentencing Should Be Before a Different Judge in Light of Judge Reade's Expressed Commitment to the Same Sentence Regardless of the Legal Standard.

The district judge said in her sentencing order that, even if she had "erred" in calculating Appellant's Guidelines range, she would impose the same sentence. [Add. 143 n.18] Even more troubling, the court insinuated that it would impose a *higher* sentence, by "vary[ing] upward to take into account additional criminal conduct" alleged in the dismissed – but essentially tried anyway – immigration charges. [Add. 143] These preemptive refusals to take seriously a remand for

resentencing require that a retrial or resentencing take place before a different district judge – one with an open mind and a willingness to abide by this Court's mandate.[10]

This Court and others have remanded criminal proceedings to new trial judges. The power to do so is conferred by 28 U.S.C. § 2106, and this Court exercises that power when necessary for the resentencing to "be just under the circumstances." *United States v. Rogers*, 448 F.3d 1033, 1035 (8th Cir. 2006). To meet that standard, future sentencing of Mr. Rubashkin should be decided before a judge who has not predetermined the result. Indeed, this Court has granted such relief on weaker facts. *See, e.g., United States v. Pepper*, 518 F.3d 949, 953 (8th Cir. 2008), *appeal after remand*, 570 F.3d 958 (8th Cir. 2009), *cert. granted*, 130 S. Ct. 3499 (2010) (citing comments made by the judge that indicated he would be reluctant to engage in resentencing if the initial sentence were vacated); *United States v. Mosley*, 505 F.3d 804, 812 (8th Cir. 2007) (remanding to new judge because prosecutors had requested of the initial judge a higher sentence than had

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[10] The government may argue that the district court's preemptive remarks constitute an alternative sentence that renders any Guidelines error here harmless. That is not the case. Instead, the district court's remarks are the sort of "blanket statement" that is "intended to cover any and all potential guidelines calculation errors." This Court has repeatedly held such statements to be "insufficient to demonstrate harmless error." *Sun Bear v. United States*, 611 F.3d 925, 931 (8th Cir. 2010) (quoting *United States v. Icaza*, 492 F.3d 967, 971 (8th Cir. 2007)).

been agreed upon in plea agreement). The practice of other circuits is in accord. *See, e.g., United States v. Martin*, 455 F.2d 1227, 1242 (11th Cir. 2006) (reassigning case for resentencing because of indications that "'the original judge would have difficulty putting his previous views and findings aside'") (quoting *United States v. Torkington*, 874 F.2d 1441, 1447 (11th Cir. 1989) (per curiam)); *In re Ellis*, 356 F.3d 1198, 1211 (9th Cir. 2004) (en banc) (granting reassignment because the judge "has read the presentence report and has expressed strong views on its contents"); *United States v. Campo*, 140 F.3d 415, 420 (2d Cir. 1998) ("[T]he appearance of impartiality would best be preserved by reassignment of this case.").

CONCLUSION

For the foregoing reasons, the judgment of conviction should be vacated with directions to enter judgment for Appellant on the money laundering counts and to otherwise grant Appellant a new trial. Alternatively, the order denying Appellant's motion for new trial should be vacated and the case should be remanded for further proceedings on that motion before a different judge. Further alternatively, the sentence should be vacated and the case remanded for re-sentencing before a different judge.

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CERTIFICATE OF TYPE-VOLUME COMPLIANCE

I hereby certify that Appellant's brief, which was prepared using Microsoft Word 2007, contains 23,851 words in 14 point Times New Roman type with serifs. I also certify that this brief has been scanned for, and is free of viruses.

/s/ Nicholas E. Vallorani

CERTIFICATE OF FILING

I hereby certify that on January 3, 2011, I filed the foregoing through the Eighth Circuit Court of Appeals CM/ECF filing system.

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CERTIFICATE OF SERVICE

I hereby certify that on January 3, 2011, the following party was served through CM/ECF.

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