

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA**

UNITED STATES OF AMERICA,

v.

SHOLOM RUBASHKIN,

Defendant.

Civil Action No. 2:08-CR-1324 LLR

DECLARATION OF NATHAN LEWIN

NATHAN LEWIN declares under penalty of perjury:

1. I am a partner at Lewin & Lewin, LLP, and a member of the District of Columbia and New York Bars. I am also a member of the Bar of the United States Court of Appeals for the Eighth Circuit.

2. I am lead appellate counsel for Sholom Rubashkin, the defendant in this case, and I submit this Declaration in support of his Motion Under Rule 33(b)(1) of the Federal Rules of Criminal Procedure for a New Trial Based on Newly Discovered Evidence.

3. In my capacity as appellate counsel, I reviewed on July 12, 16, and 22, 2010, e-mailed documents and CDs that were produced to trial counsel for my client by the government in *Rubashkin v. United States Department of Immigration and Customs Enforcement*, N.D. Iowa Case No. 2:09-cv-01034-JSS, a case seeking records regarding the immigration raid conducted on the premises of Agriprocessors in Postville, Iowa, on May 12, 2008. The government e-mailed and provided a hardcopy to trial counsel for my client its first supplemental release on March 31, 2010. Subsequent supplements were produced on CDs marked “2nd Supplemental Response,” “ICE FOIA 09-1408 Agriprocessors 3rd Supplemental Release,” “Agriprocessors 4th Supplemental Release,”

and “09-FOIA-1408 Agriprocessors Final Supplemental Release,” and were provided to trial counsel for Mr. Rubashkin, Guy R. Cook, Esq., on April 15, May 10, June 18, and July 15, 2010. Copies of the letters to trial counsel producing the documents are Exhibit 1 to this Declaration. Much of the text in documents produced was redacted and the text blacked out.

4. On the CD marked “ICE FOIA 09-1408 Agriprocessors 3rd Supplemental Release,” I found a memorandum dated October 12, 2007, from a Special Agent whose name was redacted reporting on a meeting held on October 10, 2007, with the United States Attorney for the Northern District of Iowa and the First Assistant/Criminal Division Chief. A copy of that memorandum is Exhibit 2 to this Declaration.

5. The following sentences appear in Exhibit 2:

The United States Attorney’s Office (USAO) affirmed that they intend to prosecute each criminal offender in addition to the target company Agriprocessors if possible. At this time the USAO believes that criminal prosecutions will number in the hundreds.

The USAO advised that they had met with Chief United States District Court Judge Linda Reade and had provided her with a briefing regarding the number of criminal prosecutions that they intend to pursue relative to this investigation.

6. On the CD marked “ICE FOIA 09-1408 Agriprocessors 3rd Supplemental Release,” I found a memorandum dated October 17, 2007, from a Special Agent whose name was redacted. A copy of that memorandum is Exhibit 3 to this Declaration.

7. Exhibit 3 reports on a meeting of October 16, 2007, between ICE Special Agent in Charge Claude Arnold and the United States Attorney and First Assistant/Criminal Chief for the Northern District of Iowa. It includes the following sentences:

The USAO further reaffirmed that they intend to pursue and criminally prosecute any and all offences developed through the ongoing criminal investigation.

The USAO also stated that they have briefed Chief United States District Court Judge Linda Reade regarding the ongoing investigation and their expectation that it is anticipated to result in several hundred criminal arrests and subsequent criminal prosecutions within the judicial boundaries of the Northern District of Iowa. . . . Judge Reade further advised that she would be out of the country and unavailable for all of February and half of March 2008.

8. On the CD marked “ICE FOIA 09-1408 Agriprocessors 3rd Supplemental Release,” I found a memorandum dated October 30, 2007, from a Special Agent whose name is redacted. A copy of that memorandum, as redacted, is Exhibit 4 to this Declaration.

9. Exhibit 4 reports on a “scheduled weekly meeting” that the case agent and co-case agent had with the Office of the United States Attorney. It includes the following sentences:

The USAO was presented the information regarding a possible enforcement action date for the week of May 11, 2008. The USAO did not appear to have any issues with this date and discuss the dates with the Chief US District Court Judge to see if that meets her scheduling needs.

10. On the CD marked “No. 2 of 4, 2nd Supplemental Response,” I found a memorandum dated November 2007 from the ICE Special Agent in Charge, Claude P. Arnold. A copy of that memorandum is Exhibit 5 to this Declaration.

11. The following sentence appears in Exhibit 5:

Communication between the United States Attorney’s Office and the United States District Court for the Northern District of Iowa has revealed that the District Court is willing to conduct judicial proceedings at the National Cattle Congress facility during the scheduled time period.

12. It appears from Exhibits 2 through 5 that as early as October 2007 – approximately seven months before the raid on Agriprocessors – Chief Judge Linda Reade personally participated in discussions with the Office of the United States Attorney regarding the planned ICE raid on the Agriprocessors plant and that Chief Judge Reade had been “briefed” on “the number of criminal prosecutions” that the United States Attorney’s Office intended to pursue and the “expectation” regarding criminal arrests and criminal prosecutions. It also appears from these Exhibits that the date of the planned raid was selected to meet Judge Reade’s “scheduling needs” and not to conflict with her plans for foreign travel.

13. On the CD marked “ICE FOIA 09-1408 Agriprocessors 3rd Supplemental Release,” I found a series of memoranda from ICE Special Agent in Charge Claude Arnold describing the preparations for the ICE raid on Agriprocessors planned for May 2008.

14. A copy of a memorandum dated January 28, 2008, is Exhibit 6 to this Declaration.

15. Exhibit 6 contains the following paragraphs:

At 1:30 local time a meeting was held with the Chief District Judge. There were many attendees at the meeting as requested by the Judge. The attendees included the Judge, the clerk of the court, USMS, Probation, USAO, and ICE. The Judge was updated on the process of the Cattle Congress as well as discussions about numbers, potential trials, IT issues for the court, and logistics. The Court made it clear that they were willing to support the operation in any way possible, to include staffing and scheduling.

The U.S. District Court Judge asked that one concern be relayed to ICE HQ. She has asked that ICE/GSA enter into a contract with the Cattle Congress as soon as possible so that she can continue to hold the court’s schedule for that time frame. Again, she was very supportive of operating

at an offsite location but just wants to make sure we get it locked in as soon as possible.

16. It appears from that paragraph that in January 2008 – approximately three-and-one-half months before the ICE raid on Agriprocessors – Chief Judge Linda Reade participated in law-enforcement planning meetings regarding the ICE raid that was to be conducted on Agriprocessors in May 2008.

17. The January 28, 2008, memorandum states that Judge Reade was informed during the meeting about “the process with the Cattle Congress as well as discussions about numbers, potential trials, IT issues for the court, and logistics.”

18. I also found a memorandum dated March 17, 2008, from the ICE Special Agent in Charge on the CD marked “ICE FOIA 09-1408 Agriprocessors 3rd Supplemental Release.” A copy of that memorandum is Exhibit 7 to this Declaration.

19. Exhibit 7 contains the following paragraph:

On March 17, 2008, RAC Cedar Rapids met with the USAO, U.S. Probation, the USMS, and the United States District Court staff to include the U.S. Magistrate Judge and U.S. Chief District Court Judge. 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. The Chief District Court Judge requested that ICE and/or USMS ensures that the detainees take showers and are wearing clothing that is not contaminated when appearing in court. The next meeting with the Court will be set for the first week of April.

20. It appears from that paragraph that in March 2008 – approximately one-and-one-half months before the ICE raid on Agriprocessors – Chief Judge Linda Reade participated in a planning meeting among federal law-enforcement personnel regarding the planned raid.

21. According to the earlier report of the Special Agent in Charge, Chief Judge Reade had assured those present at the meeting, which included ICE and the Office of the United States Attorney, that she was “willing to support the operation in any way possible.”

22. According to Exhibit 7, Chief Judge Reade was present during discussions about “charging strategies, numbers of anticipated arrests and prosecutions, logistics, the movement of detainees, and other issues related to the CVJ investigation and operation” during the meeting she attended on March 17, 2008.

23. I also found on the CD marked “09-FOIA-1408 Agriprocessors Final Supplemental Release” an e-mail dated March 31, 2008, from Marcy Forman to Julie L. Myers, John P. Torres, and various persons whose names are redacted providing a summary of a meeting held on that date on the Agriprocessors case. A copy of that e-mail is Exhibit 8 to this Declaration.

24. An e-mail included in Exhibit 8 that summarizes the meeting of March 31, 2008, contains the following sentences:

The first Assistant for the Northern District Rich Murphy indicated that he has a meeting this Friday (April 4) with the Chief Judge who has requested a briefing on how the operation will be conducted. Murphy has requested an operation plan from ICE by COB Wednesday so that he can incorporate it into his presentation.

25. I also found on the CD marked “09-FOIA-1408 Agriprocessors Final Supplemental Release” an e-mail dated March 20, 2008, on the subject of “N/IA Meeting (USMS, ICE)” sent from and to individuals whose names have been redacted. A copy of that e-mail is Exhibit 9 to this Declaration.

26. Exhibit 9 contains the following text:

The Chief Judge has indicated she wants a final gameplan in two weeks (April 4). That said, the USAO needs to know what the USMS and ICE are going to do by March 28. At this meeting, we need to figure out our gameplan for processing/housing/transportation/manpower.

27. On the CD marked “Agriprocessors 4th Supplemental Release,” I found an ICE power-point presentation dated March 12, 2008. A copy of relevant pages from the presentation is Exhibit 10 to this Declaration.

28. One slide in Exhibit 10 has the following information:

Agriprocessors, Inc. opened in Postville, Iowa in 1987 and is owned by Abraham (Aaron Rubashkin). The Vice-President of the company is Aaron’s son, Sholom Rubashkin.

29. Another slide in Exhibit 10 is titled “Historical Information” and lists the following prejudicial and inflammatory allegations regarding Agriprocessors:

- 2004 – Undercover PETA video recorded at Agriprocessors, Inc. with accusations of inhumane slaughtering
- 2004 – City of Postville, Iowa fined \$100,000 for violations of the Clean Water Act caused by Agriprocessors, Inc.
- 2006 – USDA declared that Agriprocessors, Inc. had “engaged in acts of inhumane slaughter”
- 2006 – OSHA issued six citations to Agriprocessors, Inc.
- 2007 – Additional PETA video recorded with complaints filed with the USDA
- 2007 – Employees at Agriprocessors, Inc. walked out fearing Immigration issues due to the no-match Social Security letters sent to the company

30. It appears from the power-point presentation that Sholom Rubashkin was the only identified company official of Agriprocessors, and that ICE represented to viewers of the power-point presentation that Agriprocessors had committed inhumane slaughter, violations of the Clean Water Act, and OSHA violations. If Judge Reade was shown the

power-point presentation in her meeting of March 17, 2008, this prejudicial identification of Mr. Rubashkin and the prejudicial allegations were presented to her on an *ex parte* basis.

33. On the CD marked “09-FOIA-1408 Agriprocessors Final Supplemental Release,” I found duplicate e-mails addressed to Marcy Forman on April 2, 2008 – with the sender’s name redacted – that provided “the latest information we have on the CVJ operation.” A copy of this e-mail is Exhibit 11 to this Declaration.

34. Exhibit 11 states:

The morning of May 12, 2008, ICE will serve a criminal search warrant on the company and execute a criminal arrest warrant for the corporate official.

35. On the CD marked “09-FOIA-1408 Agriprocessors Final Supplemental Release,” I also found an e-mail with the sender’s and recipient’s names redacted. The e-mail forwarded a “CVJ Exec Summary.” A copy of this e-mail is Exhibit 12 to this Declaration.

36. The “CVJ Exec Summary” includes the following sentence:

The morning of May 12, 2008, ICE will serve a criminal search warrant on the company and execute a criminal arrest warrant for the corporate official.

37. It appears from Exhibits 11 and 12 that ICE planned to arrest “a corporate official” – *i.e.*, Sholom Rubashkin – when it executed the raid. This prejudicial information may have been communicated to Judge Reade in her pre-raid *ex parte* meetings with officials of ICE and the U.S. Attorney’s Office.

38. On the CD marked “Agriprocessors 4th Supplemental Release” I also found an undated ICE memorandum from Marcy M. Forman to Assistant Secretary Julie L.

Myers on the subject of “Operation Cedar Valley Junction Processing Location.” A copy of that memorandum is Exhibit 13 to this Declaration.

39. Exhibit 13 contains the following paragraph:

Finally, a site the National Cattle Congress in Waterloo, Iowa was identified that appears to meet all necessary requirements to include space and security requirements. In addition, this site was surveyed by the Chief Judge and the USAO who concurred that this site will meet their requirements.

40. On the CD marked “09-FOIA-1408 Agriprocessors Final Supplemental Release,” I found an e-mail to Marcy Forman dated February 14, 2008 – with the sender’s name redacted – that discussed how the date of the operation was chosen. A copy of the e-mail is Exhibit 14.

41. Exhibit 14 reads:

The date for the operation was set by the availability of the courts, not by ICE and is the first dates that the District Courts could go.

42. It can be inferred from Exhibit 14 that Judge Reade intended to preside over trials that resulted from the May 2008 raid.

43. I also reviewed the record of a Hearing held on July 24, 2008, before the Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law of the Committee on the Judiciary of the House of Representatives, 110th Cong., 2d Sess. (“Immigration Raids: Postville and Beyond”). Pages 37-61, 64, 181-184 of that Hearing record are attached to this Declaration as Exhibit 15.

44. In the prepared statements given to the Subcommittee by representatives of the Department of Justice and the Office of Immigration and Customs Enforcement there is absolutely no mention of any participation by the District Court in the planning or preparations for the raid held on May 12, 2008.

45. In response to a question asked by the Chairwoman of the Subcommittee regarding the participation of the District Judge, the Department of Justice representative said that Judge Reade was given a “head’s up.” The fact that Judge Reade met on several occasions with representatives of the Office of the United States Attorney, that she was “updated” on “potential trials,” that she heard an “overview of charging strategies,” that she stated that she was “willing to support the operation in any way possible,” and that she requested “a briefing on how the operation will be conducted” was not disclosed to the Subcommittee. Nor did the government witnesses at the Hearing disclose that the date of the raid was selected to satisfy Judge Reade’s “scheduling needs” or that she “surveyed” the Waterloo location together with the United States Attorney’s Office.

46. Promptly on discovering Judge Reade’s participation in law-enforcement planning meetings many months before the May 2008 raid on Agriprocessors, I contacted Mr. Rubashkin’s trial counsel, Guy Cook, Esq., and F. Montgomery Brown, Esq., to inquire of them whether they had ever been told by either (1) Judge Reade or (2) any representative of the Office of the United States Attorney that Judge Reade had actively participated in meetings of law-enforcement personnel months before the May 2008 raid during which the plans for the raid were discussed. Both attorneys told me that they had never been informed by Judge Reade or by the Office of the United States Attorney of Judge Reade’s participation in such meetings.

47. Both attorneys informed me that had they been told or otherwise learned of Judge Reade’s participation in such meetings as shown by the Exhibits to this Declaration, they would have moved under 28 U.S.C. § 455(a) within the time prescribed

by Judge Reade for the recusal of Judge Reade from any criminal prosecution of Sholom Rubashkin following the raid of May 2008.

48. Judge Reade told both attorneys during a telephonic status conference held on December 9, 2008, that their deadline for filing a recusal motion on behalf of Mr. Rubashkin was January 30, 2009. A copy of the relevant transcript is Exhibit 16 to this Declaration and a copy of the Scheduling Order is Exhibit 17 to this Declaration. Neither Judge Reade nor any representative of the Office of the United States Attorney disclosed to either trial attorney prior to imposing the deadline for filing a recusal motion that Judge Reade had participated in law-enforcement meetings with the United States Attorney and representatives of ICE during which (a) the date of the raid was arranged to meet her “scheduling needs,” (b) she was informed of the intended criminal prosecutions, (c) she was told “charging strategies, numbers of anticipated arrests and prosecutions . . . and other issues related to the CVJ investigation and operation,” and (d) she expressed “support [for] the operation in any way possible.”

49. Both trial attorneys advised me that in determining not to move for the recusal of Judge Reade in January 2009 on the basis of information they had at the time, they relied on the published representations made by Judge Reade regarding her limited role in the proceedings following the May 2008 raid contained in her Order of September 29, 2008, in *United States v. De La Rosa-Loera*, No. 08-CR-1313-LRR. A copy of that Order is Exhibit 18 to this Declaration.

50. Exhibit 18 discusses only Judge Reade’s involvement and participation in the “Waterloo cases” – *i.e.*, the criminal prosecutions of more than 300 illegal aliens who were apprehended as employees in the Agriprocessors plant. Mr. De La Rosa-Loera

challenged Judge Reade's appearance of impartiality in his case because she had allegedly participated in "conveyor-belt justice" in the "Waterloo cases." Judge Reade stated in the Order that is Exhibit 18 that her "involvement in the Waterloo cases does not require recusal from Defendant's case" under Section 455(a). She said that "the average person on the street" would not "reasonably question [her] impartiality" as a result of the "Waterloo cases" because she "learned very little about Defendant and his situation from the Waterloo cases and has not formed any opinion about his sentence."

51. Judge Reade stated in Exhibit 18 that "an average person on the street who knows all the facts about [her] involvement in the Waterloo cases would not reasonably question [her] impartiality in presiding over Defendant's case" because "Defendant repeatedly confuses logistical cooperation with collusion or involvement in the executive function of pursuing prosecution." Judge Reade did not, in her Order, set out "all the facts" regarding her "involvement" in the ICE raid on the Agriprocessors plant. She described what she **did not do** with regard to the "Waterloo cases" – *i.e.*, that she did not "decide whether to criminally charge the defendants in the Waterloo cases or pre-approve the parties' binding plea agreements." She went on to say that her participation "was no different than [in] other multiple-defendant cases" in which judges "routinely approve search warrants, decide where and when hearings will be held, conduct initial appearances, preside over arraignments and examine plea agreements – after they are fully negotiated – to determine if they are reasonable." Judge Reade asserted in the Order that is Exhibit 18 that her "logistical cooperation" extended only to "ensur[ing] that the defendants in the Waterloo cases were afforded all their rights under the Constitution and the laws of the United States" so that each defendant would have "access to an attorney

and an interpreter” and that “checklists and pattern proceedings transcripts” would be available.

52. At no point in her Order of September 29, 2008 (Exhibit 18), did Judge Reade disclose or imply in any way that she had participated many months before the raid in law-enforcement meetings discussing details of the planned raid on Agriprocessors. Nor did she disclose in her Order of September 29, 2008, that in those meetings she had been briefed on “the process of the Cattle Congress as well as discussions about numbers, potential trials, IT issues for the court, and logistics,” that she had been given “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,” or that she had told law-enforcement personnel that the court was “willing to support the operation in any way possible, to include staffing and scheduling.”

53. Had she disclosed this extensive participation many months before the May 2008 raid, an “average person on the street” knowing these facts would have reasonably questioned her impartiality in presiding over the criminal trial of Sholom Rubashkin, the principal individual charged with having control over the operations of the plant that was raided and alleged to have known and been responsible for the hiring of illegal aliens at that plant. Sholom Rubashkin was the only member of the Rubashkin family who was identified by name in the 57-page affidavit on which the warrant for the raid was issued, and he was described as the “Vice-President” and registered agent of the corporation.

54. Judge Reade had an obligation under the Code of Judicial Conduct to disclose to counsel any facts bearing on her possible recusal or disqualification. “A judge should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for the disqualification.” ABA Code of Judicial Conduct Rule 2.11, cmt. [5] (2007). She made no such disclosure before the deadline she imposed for the filing of a recusal motion or at any time during the trial of Mr. Rubashkin or since that trial.

55. No one from the Office of the United States Attorney for the Northern District of Iowa advised Mr. Rubashkin’s trial counsel that Judge Reade had discussed the potential raid of Agriprocessors with the Office of the United States Attorney in October 2007. Nor did anyone from the Office of the United States Attorney advise Mr. Rubashkin’s trial counsel that Judge Reade had personally attended meetings on January 28, 2008, and on March 17, 2008, of law-enforcement personnel planning for the Agriprocessors raid. Nor did anyone advise Mr. Rubashkin’s trial counsel that at these meetings ICE personnel had told Judge Reade “the anticipated number of arrests and prosecutions,” that strategy was discussed with her or in her presence at these meetings, and that she had assured the law-enforcement personnel on January 28, 2008, of her “willing[ness] to support the operation in any way possible, to include staffing and scheduling.”

56. Had such disclosures been made to Mr. Rubashkin’s trial counsel, they would have moved before the January 30, 2009, deadline to recuse Judge Reade from presiding over any prosecution of Mr. Rubashkin. In these circumstances, any objective observer or

“person on the street” would have questioned Judge Reade’s impartiality with regard to Mr. Rubashkin’s guilt or innocence, and she would have been recused as a matter of law.

Pursuant to 28 U.S.C. 1746 I hereby declare under penalty of perjury that the foregoing is true and correct.

Dated: August 4, 2010

A handwritten signature in blue ink, appearing to read "Nathan Lewin", written over a horizontal line.

Nathan Lewin