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

MEMORANDUM OF LAW
IN SUPPORT OF DEFENDANT'S MOTION FOR A NEW TRIAL

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INTRODUCTION

On May 12, 2008, the Immigration and Customs Enforcement Agency ("ICE") conducted a massive raid on the premises of Agriprocessors, Inc., in Postville, Iowa. The following morning, federal judicial proceedings relating to more than 300 undocumented aliens arrested in that raid were begun in nearby Waterloo, Iowa. It was obvious from the fact that the United States District Court sat in temporary space in Waterloo rather than in its Cedar Rapids courthouse that some prior logistical arrangements had been made with the District Court to enable the criminal cases against the undocumented aliens to be processed so promptly. Indeed, Chief District Judge Linda Reade stated in September 2008 in a written opinion that she engaged in purportedly limited "logistical cooperation" with law-enforcement authorities in order to provide attorneys and interpreters for the arrested aliens and to conduct their trials in Waterloo.

But that was *all* she said. And that was all that was known to defendant Sholom Rubashkin, who (as the raid's primary individual target in Agriprocessors' management) was subsequently criminally charged and was tried, with Judge Reade presiding, in a highly contentious jury trial. It is also all that Mr. Rubashkin and his lawyers knew when they appeared before Judge Reade at a sentencing hearing held on April 28 and 29, 2010, and when, on June 21, 2010, Judge Reade pronounced a sentence of 27 years' imprisonment—two years *more* than the prosecutors had urged—on Mr. Rubashkin.

Eight months after the close of Rubashkin's trial, his counsel first discovered that Judge Reade had in fact participated in many *ex parte* pre-raid planning meetings with ICE officials and with members of the U.S. Attorney's Office. Her meetings with law-enforcement officials began in October 2007—more than half a year before the raid—and, according to memoranda of the ICE agents, the discussions covered operational and strategic topics that went far beyond the "logistical cooperation" that Judge Reade has heretofore disclosed. Heavy redactions have been

made to the ICE memoranda and e-mails produced in 2010 pursuant to the Freedom of Information Act lawsuit filed by Mr. Rubashkin's attorneys in February 2009. What can be learned from the redacted memoranda about Judge Reade's participation in the planning of the raid on Agriprocessors may be only the tip of the iceberg. But even this tip is sufficient for an objective observer to doubt the perception of impartiality prescribed by 28 U.S.C. § 455(a).

The redacted documents, described in greater detail in the Declaration of Nathan Lewin and in this Memorandum of Law, report much more than Judge Reade's acknowledgment of the "logistical cooperation" that may have been necessary to conduct prompt proceedings against aliens arrested in the raid. They detail, among other things, how Judge Reade personally participated in a series of meetings with ICE officials and the U.S. Attorney's Office during which she was briefed on "the ongoing investigation" and the raid. They show that the raid appears to have been timed to comport with her vacation schedule, and that she and the prosecutors together "surveyed" the location where detainees would be held and their trials conducted. They report Judge Reade's expressed personal commitment "to support the operation in any way possible." They describe how meetings in which Judge Reade personally participated covered "an overview of charging strategies" to follow the raid. And they recount how Judge Reade demanded *sua sponte* from the prosecutors "a final gameplan in two weeks" and a "briefing on how the operation will be conducted."

All of this occurred at *ex parte* meetings that Judge Reade attended with Mr. Rubashkin's principal litigation adversary—the government prosecutors. Yet Judge Reade never disclosed her attendance at, and active personal participation in, these meetings, either to Mr. Rubashkin or to his counsel, despite numerous opportunities to do so. To the contrary, she wrote an opinion rejecting a minor defendant's recusal request in which she appears to have consciously avoided

mentioning the *ex parte* meetings she had with the law-enforcement team that planned the raid and in which she asserted that her only participation consisted of mere "logistical cooperation."

In light of these newly discovered facts, a reasonable objective observer would have to be skeptical of Judge Reade's impartiality in the criminal prosecution of the principal individual target of the raid. A new trial, before a different judge, must therefore be ordered. If there is any doubt on this score, ICE should be ordered to provide a full file of unredacted memoranda to the defense, and appropriate discovery should be ordered, including depositions of (a) Judge Reade, (b) involved personnel of the United States Attorney's Office, (c) involved ICE personnel, and (d) all participants in the pre-raid meetings at issue, and disclosure of the U.S. Attorney's records of any pre-raid meetings with Judge Reade.

THE *EX PARTE* MEETINGS DISCLOSED BY THE DOCUMENTS

In response to an action filed under the Freedom of Information Act ("FOIA") in February 2009, ICE turned over to Mr. Rubashkin's counsel on March 31, April 15, May 19, June 18, and July 15, 2010, highly redacted pages of documents relating to the planning of the raid on the Agriprocessors plant. Some unredacted passages in the documents reported discussions with Judge Reade of details in the planning for the raid and the anticipated prosecutions. These documents had never been seen by Mr. Rubashkin or any of his counsel, and their contents have resulted in the filing of this motion for a new trial.

(1) October 10, 2007—<u>The US Attorney's Office Gives Judge Reade a "Briefing"</u>— <u>*Lewin Declaration Exhibit 2*</u>—Communications between prosecutors and Chief Judge Reade apparently began more than six months before the planned raid. A memorandum dated October 12, 2007, reported a meeting of October 10, 2007, during which prosecutors provided Judge Reade "a briefing regarding the number of criminal prosecutions that they intend to pursue relative to this investigation."

(2) October 16, 2007—Judge Reade Provides Her Travel Schedule—*Lewin Declaration Exhibit 3*—A memorandum dated October 17, 2007, refers to prosecutors again stating that they had been in touch with Judge Reade in order to brief her "regarding the ongoing investigation." Judge Reade advised that she would be out of the country during all of February and half of March 2008. This information was relevant only if Judge Reade and the prosecutors understood that she would preside at trials resulting from the raid. (Other e-mails (*Lewin Decl. Ex. 14*) confirm that the "date for the operation was set by the availability of the courts.")

(3) October 30, 2007—A May 2008 Date for the Raid Is Cleared with Judge Reade—*Lewin Declaration Exhibit 4*—A memorandum dated October 30, 2007, described another meeting at which prosecutors discussed clearing with Judge Reade possible dates for the raid. The memorandum states that the date of May 11, 2008, was "discuss[ed] . . . with the Chief US District Judge to see if that meets her scheduling needs."

(4) November 2007—The District Court Agrees To Conduct "Judicial Proceedings" at the National Cattle Congress—*Lewin Declaration Exhibit 5*—A memorandum dated November 14, 2007, confirmed that "[c]ommunication" had occurred "between the United States Attorney's Office and the United States District Court for the Northern District of Iowa" as early as November 2007 about the possibility of holding judicial proceedings that would follow the planned raid at the location in Waterloo known as the "National Cattle Congress." Another undated memorandum (*Lewin Decl. Ex.13*) reported that Judge Reade and the United States Attorney's Office "surveyed" and approved this location. Remaining "logistical cooperation" could, one supposes, have been handled by the District Court's administrative staff and would not have required the personal participation of Chief Judge Reade.

(5) January 28, 2008—Judge Reade Requests a Meeting at Which She Is "Updated" on "Potential Trials" and States Her "Support [for] the Operation"—*Lewin Declaration Exhibit 6*—An ICE memorandum dated January 28, 2008, reported a meeting "requested by the Judge" at which there were "many attendees" from various federal law-enforcement agencies involved in the planned raid. At that meeting, "[t]he 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 [it was] willing to support the operation in any way possible, to include staffing and scheduling."

(6) March 17, 2008—Judge Reade Participates in a Discussion of the "Overview of Charging Strategies" and "Other Issues Related to the [Agriprocessors] Investigation" — *Lewin Declaration Exhibit 7*—An ICE memorandum dated March 17, 2008, described a meeting that took place on March 17, 2008, again including Chief Judge Reade and the U.S. Attorney's Office, during which "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 memorandum says that "[t]he next meeting with the Court will be set for the first week of April." No unredacted document describes any later meeting of Judge Reade with ICE.

(7) April 4, 2008—Judge Reade's Deadline for Submission to Her of "a Final Gameplan" and "a Briefing on How the Operation Will Be Conducted"—*Lewin Declaration Exhibits 8 and 9*—ICE e-mails dated March 20, 2008, and March 31, 2008, describe plans for a meeting between First Assistant United States Attorney Richard Murphy and Judge Reade scheduled for April 4, 2008. Judge Reade is reported to have "requested a briefing on how the operation will be conducted" and set April 4 as the date for "a final gameplan." The redacted

documents do not disclose the "gameplan" or what Assistant United States Attorney Murphy said to Judge Reade in their *ex parte* meeting of April 4, 2008.

(8) Mr. Rubashkin's Prominence in the Pre-Raid ICE Materials—*Lewin Declaration Exhibits 10 and 11*—The disclosed ICE records make clear that Mr. Rubashkin was, during the same pre-raid planning period that encompassed the *ex parte* communications with Judge Reade, the primary individual focus of the investigation. In a power-point presentation describing the planned raid that bears a March 12, 2008, date—which may well have been displayed during the meeting of March 17—ICE identified Mr. Rubashkin as the "Vice-President of the company," and noted its belief "that one or more company officials may have knowledge of criminal conduct on the part of the company and may even be culpable themselves." And in a separate pre-raid memorandum, ICE explained that on the day of the raid, it would "execute a criminal arrest warrant" against a "corporate official." Mr. Rubashkin was not ultimately arrested on the day of the raid, but he is the only "corporate official" who ever was arrested, and therefore was probably the subject of that memorandum. (Mr. Rubashkin was also the only member of his family to be individually identified in the affidavit that formed the basis for the raid warrant.)

ARGUMENT

I.

JUDGE READE'S ACTIVE PARTICIPATION IN LAW-ENFORCEMENT'S PLANNING AND PREPARATION FOR THE AGRIPROCESSORS RAID REQUIRED HER RECUSAL

Under the recusal standards set forth by 28 U.S.C. § 455(a), a judge must disqualify himself or herself "in any proceeding in which his impartiality might reasonably be questioned." Section 455(a) is a "catchall" provision, implementing 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). The goal of the provision is "to promote public confidence in the integrity of the judicial

process." *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 860 (1988). "Section 455(a) establishes an objective standard, and the existence of actual bias is irrelevant." *White v. Nat'l Football League*, 585 F.3d 1129, 1138 (8th Cir. 2009).

The Eighth Circuit has, in its most recent decisions on the subject, given the language of § 455(a) 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).

If a judge who has presided at a defendant's trial should have recused himself or herself under § 455(a), the resulting conviction must be reversed. The Second, Fifth, Tenth, and Eleventh Circuits have vacated convictions on this ground. *E.g.*, *United States v. Amico*, 486 F.3d 764 (2d Cir. 2007); *United States v. Bremers*, 195 F.3d 221 (5th Cir. 1999); *United States v. Cooley*, 1 F.3d 985 (10th Cir. 1993); *United States v. Kelly*, 888 F.2d 732 (11th Cir. 1989).

In implementing the "average person on the street" test, the Eighth Circuit does not require the average person to be *convinced* of the judge's partiality in order to warrant recusal. Rather, recusal is required 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) (emphasis added) (internal quotation marks omitted).

Courts have recognized several circumstances in which this standard is satisfied and recusal is required. *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). That breach is all the more egregious when that adversary is a prosecutor, with the weight and credibility of government office behind him. The Eighth Circuit has recognized these dangers, holding in *United States v. Earley*, 746 F.2d 412, 416 (8th Cir. 1984), 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." *Id.* (citation omitted).

Second, if a judge learns facts about the case from extrajudicial sources—whether through *ex parte* communication or otherwise—the integrity of the adversarial trial process is severely undermined. That is why courts have insisted on recusal when judges communicated, off the record, with witnesses or appointed experts. *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). "The reason is obvious: most *ex parte* contacts between a trial judge and another participant in the proceedings risk harm, and *ex parte* communications with key witnesses (such as court-appointed experts) are no exception. To the contrary, such *ex parte* contacts can create situations pregnant with problematic possibilities." *Craven*, 239 F.3d at 102. Eighth Circuit case law therefore strongly condemns 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); *see also Craven*, 239 F.3d at 103 ("When a judge receives information that does not enter the record, the reliability of that information may not be tested through the adversary process.").

Third, when the judge is somehow invested in the case—or appears to be so—based on extrajudicial interests or associations, there can be no appearance of impartiality. Symbolic or apparent association between the judge and the prosecution creates doubts about the judge's impartiality. *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 involved on one side in the case—even with a witness. *Edgar*, 93 F.3d at 260; *see also Moran*, 296 F.3d at 649. And, where 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 considered whether a district judge ought to have recused himself upon learning, shortly before trial, of his fiduciary interest in the litigation. In answering in the affirmative, the Court enumerated four facts "that might reasonably cause an objective observer to question [the judge's] impartiality." 486 U.S. at 865. One probative fact was 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 interest both shortly before and shortly after the trial." *Id.* at 867 (footnote omitted). The Court emphasized the importance of prompt disclosure of all potentially relevant facts. "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." *Id.* at 866.

The Eighth Circuit has similarly condemned the failure to disclose facts that are potentially relevant to recusal. In *Moran*, the judge had a social relationship with one of the

parties to the case. That itself was cause for concern. But the en banc court found "particularly worrisome the district court's failure to disclose this conflict himself." 296 F.3d at 649. In light of that association and non-disclosure, the court vacated the district court decision and remanded "with the suggestion that it revisit and more thoroughly consider and respond to Moran's recusal request." *Id.* 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 U.S. Attorney's Office and the ICE officers who were investigating (and would ultimately raid) the plant that, according to the memoranda, was under the direction of Mr. Rubashkin. These communications focused on the raid that led to Mr. Rubashkin's prosecution and touched upon the merits of the eventual criminal cases, including "charging strategies" to be pursued by the prosecution.

Second, at these meetings Judge Reade was updated on the status of the investigation concerning Mr. Rubashkin and his plant. 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. That these meetings were off-the-record, not transcribed, means they were "extrajudicial." *Edgar*, 93 F.3d at 259. In *Jones v. Luebbers*, 359 F.3d 1005 (8th Cir. 2004), the Eighth Circuit noted that where allegations of bias arise from "closed proceedings that evade outside review, the appearance of impartiality is great, application of the rule is simple, and due process may require disqualification." *Id.* at 1013. The ICE documents suggest that Mr. Rubashkin was the principal corporate executive targeted by the raid, and that law-enforcement personnel even contemplated arresting him on the day of the raid. *Lewin Decl. Exs. 10, 11, and 12*. This

information may have been communicated to Judge Reade during the "overview" or "briefings" she was given.

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 promise to "support the operation in any way possible" would certainly give a "reasonable person . . . a justified doubt as to [her] impartiality." *Cooley,* 1 F.3d at 995. 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." *Id.*

Fourth, Judge Reade had multiple opportunities to disclose all of the facts surrounding her role in the planning and investigation of Mr. Rubashkin's plant. She took none of them. To the contrary, in an opinion she wrote rejecting a recusal motion in a related case involving Martin De La Rosa-Loera, 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); *Lewin Decl. Ex. 18*. When Judge Reade discussed with counsel the scheduling of a possible recusal motion, she again neglected to disclose the frequent and active participation shown by the ICE memoranda. *Lewin Decl. Ex. 18.* As in *Liljeberg*, the reluctance—even when responding to a recusal request—to acknowledge the facts is an additional piece of evidence leading an objective observer to question whether the appearance of impartiality required by federal law has been satisfied. *See Liljeberg*, 486 U.S. at 865-67.

None of the recent Eighth Circuit opinions affirming the denial of recusal motions—including those cited by Judge Reade in her *De La Rosa-Loera* order—involve remotely similar

facts. These cases principally concern motions premised upon *judicial* conduct on the record, such as comments made during court proceedings (*e.g.*, *Am. Prairie Constr. Co. v. Hoich*, 594 F.3d 1015, 1022 (8th Cir. 2010); *United States v. Burnette*, 518 F.3d 942, 945 (8th Cir. 2008); *United States v. Denton*, 434 F.3d 1104, 1111 (8th Cir. 2006)), or the judge's adverse rulings (*e.g.*, *United States v. Oaks*, 606 F.3d 530, 537 (8th Cir. 2010); *United States v. Aldridge*, 561 F.3d 759, 764-65 (8th Cir. 2009); *Dossett v. First State Bank*, 399 F.3d 940, 953 (8th Cir. 2005)). *None* of the recent Eighth Circuit cases involved *ex parte* communications concerning the case between the judge and a litigant; *none* involved a pattern of many extrajudicial briefings by executive officials; and *none* involved repeated failure to disclose highly relevant facts bearing upon possible recusal.

II.

JUDGE READE'S PARTICIPATION IN MEETINGS PLANNING THE RAID SUBSTANTIALLY EXCEEDED "LOGISTICAL COOPERATION"

In her opinion rejecting recusal in the *De La Rosa-Loera* case, Judge Reade represented that her involvement in the Agriprocessors matter had been limited to "logistical cooperation" with the authorities, as opposed to "collusion or involvement in the executive function of pursuing prosecution." Order at 5, *De La Rosa-Loera*, No. 08-CR-1313 (N.D. Iowa Aug. 13, 2008); *Lewin Decl. Ex. 18*. Had Judge Reade in fact limited her role to approval of the ministerial steps needed to make it possible to conduct fair trials of undocumented alien workers apprehended on May 12, 2008, there might be insufficient grounds for her recusal from the trial of criminal charges against Mr. Rubashkin. But the newly discovered ICE memoranda demonstrate a level of involvement that far exceeded such "logistical cooperation," delving deep into the "executive function of pursuing prosecution," which was plainly impermissible for a federal judicial officer.

A. Judge Reade Engaged in *Ex Parte* Contacts Much Earlier Than Required for "Logistical Cooperation."

The United States Attorney's Office enlisted Judge Reade's involvement in October 2007, when the planning for the Agriprocessors raid was in its infancy. According to the report given to ICE by that Office, prosecutors provided her with a "briefing" of the planned raid. Had she been viewed as a neutral and unbiased judicial officer, such early consultation and "briefing" would have been neither necessary nor appropriate. The "logistics" of the arrests and prosecutions should have been planned by the law-enforcement team, and Judge Reade could have been consulted for purely "logistical" assistance much closer in time to the raid.

B. Judge Reade Engaged in a More Managerial Role Than Needed for "Logistical Cooperation."

The ICE memoranda establish that Judge Reade assumed a commanding role with regard to many aspects of the planned raid. The date of the raid was selected for her convenience to meet her "scheduling needs" and she joined the United States Attorney's Office in surveying and approving the National Cattle Congress as the site for detention and trials. The United States Attorney's Office was also directed by her, apparently at her own initiative, to provide a "final gameplan" and a "briefing on how the operation will be conducted." Orders and reports of this kind are appropriate for military commanders in the field, not for a judicial officer whose role is limited to providing "logistical" assistance.

C. The Subjects Discussed by Law-Enforcement Personnel With Judge Reade Exceeded the Needs of "Logistical Cooperation."

In arranging a site for multiple trials, a chief judge may have to learn projected numbers and dates, but there is no apparent reason why the judge must be briefed in advance about the specific targets of the investigation, the relevant facts, or the expected charges. (Nor is it clear

why the court's administrative staff cannot handle purely logistical matters once the judge agrees to conduct judicial proceedings outside the United States Courthouse.) Yet according to the ICE memoranda, Judge Reade was briefed on all of these substantive topics, and meetings she attended covered subjects including "an overview of charging strategies." Nothing could be more quintessentially executive or prosecutorial—or farther from mere logistics—than "charging strategies." Judge Reade was thus a party, according to the memoranda, to a wider range of subjects than "logistics."

D. Judge Reade's Expressed Approval of the Raid Exceeded "Logistical Cooperation."

The ICE memoranda quote Judge Reade as expressing more than mere willingness to engage in "logistical cooperation." She committed in January 2008—four months before the raid itself—to "support the operation *in any way possible*." (Emphasis added.) Her approval of the raid and her interest in its success, beyond its logistics, were also demonstrated by her *sua sponte* directive, as the date of the raid loomed closer, that she be given a "final gameplan" and a "briefing on how the operation will be conducted."

III.

JUDGE READE'S SUBSTANTIAL PRE-RAID PARTICIPATION WAS CONCEALED FROM THE HOUSE JUDICIARY SUBCOMMITTEE

Mr. Rubashkin's trial counsel were not put on notice of Judge Reade's extensive personal participation in planning the raid by information given on July 24, 2008, at a House Judiciary Subcommittee Hearing. In fact, the testimony of representatives of the Department of Justice and ICE at the subcommittee's hearing conveyed the impression that Judge Reade was negligibly involved in any pre-raid planning. *Immigration Raids: Postville and Beyond: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Security, and International Law of the H. Comm. on the Judiciary*, 110th Cong. (2008).

The chairwoman of the subcommittee, Rep. Zoe Lofgren, noted that the subcommittee had "asked the U.S. attorney in Iowa Mr. Dummermuth to attend this hearing," and that it was "disappointing" that the United States Attorney, "who we asked to attend," had not appeared at the hearing. She then asked Deborah J. Rhodes, a Senior Associate Deputy Attorney General who had been sent to testify in place of the United States Attorney, "what information was provided by the Department of Justice, Department of Labor, Department of Homeland Security—any or all of them—to the Federal court in Iowa. This was planned for a long time. When was the connection made with the court, and what measures were taken to ensure that the court's view of the cases would not be affected and that judicial neutrality would not be compromised?"

Ms. Rhodes never responded to the Congresswoman's questions as to "when" the "connection" was made with the court or "what measures were taken" to ensure the court's neutrality. Her response, which she qualified as being her "understanding," was the following (*Lewin Decl. Ex. 15*, p. 64):

> Ms. RHODES: My understanding – primarily for logistical reasons. That is not unusual. If there is going to be an enforcement operation that is going to bring a large number of cases to the court, it is not uncommon to give the court a head's up on that.

The following colloquy concluded the testimony regarding the District Court's involvement (*id.*):

> Ms. LOFGREN: So Judge Reade would have been contacted in advance? I am not making a value judgment, I am just trying to find out what happened.
>
> Ms. RHODES: That is correct.

Whether this was a fully truthful and honest response to Congresswoman Lofgren's question is, of course, a matter for the subcommittee to determine. But there can be no doubt that the Department of Justice's statement that Judge Reade had merely been given a "head's up" was not a disclosure to any defense counsel that, beginning in October 2007, the Office of the United States Attorney had participated in several meetings with Judge Reade in which Judge Reade was given briefings and "updates" on various substantive matters such as "the number of criminal prosecutions" and "an overview of charging strategies." Nor did Ms. Rhodes tell Congresswoman Lofgren that Judge Reade's travel schedule was discussed so that the raid would meet her "scheduling needs" or that Judge Reade had expressed her willingness "to support the operation in any way possible." Ms. Rhodes' testimony also did not disclose that Judge Reade had directed that a little more than a month before the raid, the United States Attorney's Office provide her with "a briefing on how the operation will be conducted" and a "final gameplan." Ms. Rhodes' prepared statement and the prepared statement of ICE official Marcy Forman (*Lewin Decl. Ex. 15*) fail to mention any pre-raid involvement whatever by the District Court.

IV.

THIS MOTION IS TIMELY UNDER FEDERAL RULE OF CRIMINAL PROCEDURE 33

This motion for a new trial is timely because it is based upon newly discovered evidence that became available to defense counsel only after Mr. Rubashkin had been found guilty. Prior to that time it was not available and could not have been discovered through the exercise of diligence.

Rule 33 of the Federal Rules of Criminal Procedure authorizes a defendant to move for a new trial on grounds of newly discovered evidence "within 3 years after the verdict or finding of

guilty." Evidence is newly discovered if it "could not have been discovered with due diligence at a time early enough to form the basis for a timely motion at or before trial." *United States v. Conforte*, 624 F.2d 869, 879 (9th Cir. 1980).[1]

In *United States v. Librach*, 602 F.2d 165 (8th Cir. 1979), the Eighth Circuit held that a defendant could obtain a new trial under Rule 33 "based on new evidence that [the defendant] had uncovered by means of an action brought under the Freedom of Information Act (FOIA)." *Id.* at 166. In this case, Mr. Rubashkin's counsel discovered the pattern of *ex parte* meetings between Judge Reade, the U.S. Attorney's Office, and the ICE agents responsible for the investigation into Mr. Rubashkin's plant months after the jury's verdict, when the Government began turning over documents in response to Mr. Rubashkin's FOIA lawsuit. The FOIA request was first made in February 2009, many months *before* Mr. Rubashkin's trial. Hence these facts distinguish this case from those in which courts have faulted defendants for submitting FOIA requests after final judgment. *E.g.*, *Ruiz v. United States*, 221 F. Supp. 2d 66, 76-77 (D. Mass. 2002). Although requested well before Mr. Rubashkin's trial, the evidence could not have been discovered by defense counsel with due diligence before trial because it was not revealed by the Government until well after trial. In July 2010, defense counsel came across the material evidencing the theretofore concealed *ex parte* meetings. The instant motion was promptly prepared and filed.

When the possibility of a recusal motion was discussed with Mr. Rubashkin's counsel in a telephonic scheduling hearing, Judge Reade set a deadline for filing such a motion without

[1] The newly discovered evidence may bear "upon the substantive issue of guilt," *or* "upon the integrity of the earlier trial." *Holmes v. United States*, 284 F.2d 716, 720 (4th Cir. 1960). In a number of cases, courts have considered new-trial motions based upon newly discovered evidence that the trial judge was obligated to recuse himself. *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 Fed. App'x 313, 315-16 (4th Cir. 2007) (unpub.); *cf. Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 850 (1988) (affirming vacatur of final judgment, pursuant to Fed. R. Civ. Proc. 60(b), because of new evidence establishing a violation of § 455).

making any disclosure. *See* Hearing Tr. of December 9, 2008, at 32-35; *Lewin Decl. Ex.16*. This silence violated her obligation 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." ABA Model Code of Judicial Conduct, Rule 2.11, cmt. [5] (2007).

Based on Judge Reade's *De La Rosa-Loera* opinion and the absence of any other disclosure by Judge Reade or the Assistant United States Attorney, Mr. Rubashkin's counsel reasonably determined not to file a recusal motion. *Cook Decl. ¶14*; *Brown Decl. ¶15*. The newly discovered evidence demonstrates that Judge Reade's opinion was misleading, and that neither she nor the prosecutor made the full disclosure required to permit counsel to decide whether to file a recusal motion.

V.

IF THE ICE MEMORANDA ARE NOT DEEMED SUFFICIENT TO HAVE REQUIRED RECUSAL, FURTHER DISCOVERY SHOULD BE ORDERED

The newly discovered evidence itself warrants a new trial for Mr. Rubashkin before a different judge. Alternatively, it raises sufficient questions about the propriety of Judge Reade's conduct to require additional discovery and an evidentiary hearing. District courts may hold evidentiary hearings in connection with motions for a new trial under Rule 33. *See Librach*, 602 F.2d at 167; *United States v. Cardarella*, 588 F.2d 1204, 1205 (8th Cir. 1978). It is proper to hold such a hearing 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). In *United States v. LaFuente*, 991 F.2d 1406 (8th Cir. 1993), for example, the court remanded for an evidentiary hearing on the defendant's new trial motion where he had raised a "serious allegation" that a witness, "without her attorney present, attended *ex parte* chambers conferences between the government and the district court." *Id.* at 1408-09.

District courts are also empowered to authorize discovery in connection with motions for new trial under Rule 33, and they must do so where 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 at 560. In *Velarde*, the Tenth Circuit reversed the district court's denial of a Rule 33 motion, finding that the court had erred in refusing to grant discovery. *Id.* And the Second Circuit in *United States v. Wolfson*, 413 F.2d 804, 808 (2d Cir. 1969), recognized that "when 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." *See also United States v. Dansker*, 565 F.2d 1262, 1265-66 (3d Cir. 1977).

Mr. Rubashkin's motion for new trial *should* be granted on the basis of facts that are established by the documents recently revealed to defense counsel. But if the documents, standing alone, are not sufficient, a new trial surely *cannot* be denied without further investigation into the *ex parte* meetings revealed by the newly discovered material. In order to clarify exactly what transpired at these untranscribed meetings, the testimony of the participants—including the trial judge, the prosecutors, and the immigration officers—will be necessary. Only the participants have any idea what took place on those occasions. Therefore, if a new trial is not granted based upon this written motion and accompanying affidavits and exhibits, Mr. Rubashkin requests appropriate discovery from these individuals and a full evidentiary hearing at which to evaluate the pertinent facts.

VI.

THIS MOTION SHOULD BE REFERRED FOR DECISION TO A DISINTERESTED JUDGE

In light of the circumstances, public confidence in the judicial system requires that this motion be referred for decision to a disinterested federal district judge.

Although a district judge has authority to decide a recusal motion without referring it to another judge, referral is appropriate if the facts alleged in the motion state a viable claim under § 455. The Fifth Circuit has said that in such circumstances, "a disinterested judge must decide what the facts are." *Levitt v. Univ. of Texas at El Paso*, 847 F.2d 221, 226 (5th Cir. 1988); *see also Ellis v. United States*, 313 F.3d 636, 642 (1st Cir. 2002).

This motion alleges that Judge Reade acted improperly by participating in repeated *ex parte* meetings with the U.S. Attorney's Office and that she concealed this impropriety by failing to disclose those meetings or their content to counsel for Mr. Rubashkin at any time during the criminal proceedings. Hence she is not "sufficiently distanced from the fray as to permit an objective consideration of the evidence." *In re United States*, 158 F.3d 26, 37 n.10 (1st Cir. 1998) (Torruella, C.J., dissenting). A "disinterested judge" should determine the facts and rule accordingly.

CONCLUSION

For the foregoing reasons, this motion for new trial pursuant to Rule 33(b)(1) of the Federal Rules of Criminal Procedure should be granted. Appropriate discovery and an evidentiary hearing to further determine relevant facts should be held if the currently available evidence is deemed insufficient to warrant immediate relief. A neutral and disinterested federal judge should be assigned to determine this motion.

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The undersigned certifies that the foregoing instrument was served upon the parties to this action by serving a copy upon each of the attorneys listed below on **August 5, 2010**, by CM/ECF.

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