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

UNITED STATES OF AMERICA, v. SHOLOM RUBASHKIN, Defendant.	Criminal No. 2:08-CR-1324 LLR **REPLY MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR A NEW TRIAL**

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INTRODUCTION

The Government finally and belatedly acknowledges what the United States Attorney's Office and Judge Reade have concealed from defense counsel ever since Mr. Rubashkin was indicted and Judge Reade assumed control of his case—*i.e.*, that there were numerous private meetings between the U.S. Attorney's Office and Judge Reade, occasionally attended by other law-enforcement officials, in preparation for the Agriprocessors raid. The Government's Memorandum strenuously defends the need for Judge Reade's involvement in planning phases of the raid, without explaining why these purportedly "logistical" duties had to be approved and handled by the judge personally rather than by the District Court's administrative personnel. Moreover, whatever the supposed need for these meetings, the Government fails to justify *concealing* them until now.

If, as the Government now contends, Judge Reade's personal participation in the pre-raid planning through meetings with the prosecutors was totally innocuous, with no possible impact on Judge Reade's appearance of impartiality, why were details of these meetings not laid bare before Mr. Rubashkin's defense attorneys when they were told in December 2008 that they had until the end of January 2009 to file a recusal motion? Mr. Rubashkin's trial attorneys have submitted affidavits attesting that had they known of these meetings, they would surely have moved to recuse Judge Reade pursuant to 28 U.S.C. § 455(a).

Notwithstanding the long and detailed 40-page Memorandum of Law and the nearly 400 pages of exhibits filed in support of the Government's resistance to the Rule 33 Motion, neither Mr. Rubashkin nor the public knows, with any specificity whatsoever, (1) how many meetings the U.S. Attorney's Office had during the six months before the Agriprocessors raid with the judge who tried Mr. Rubashkin—the individual whom the prosecution claimed was in charge at Agriprocessors; (2) what the precise subjects of discussion were during the meetings; or (3) what

Judge Reade said, heard, or saw during the meetings that might, in the mind of the "average person on the street," reflect on her partiality or impartiality in the criminal proceedings against Sholom Rubashkin. Nor does Assistant U.S. Attorney Murphy—apparently the principal representative of the U.S. Attorney's Office present at these meetings—disclose whether he or Judge Reade initiated the meetings, or explain why the meeting of April 4, 2008, was called at her request or why she directed that she be given a "final gameplan" for the raid.

Mr. Rubashkin submitted his Motion and Affidavits, along with the Government's Resistance, to nationally recognized experts in the ethics of (1) judges and (2) prosecutors and private counsel. Their responses are attached as Exhibits 6 and 7 to this Reply. Their conclusions—summarized below—are that Judge Reade violated the American Bar Association's Code of Judicial Conduct in four distinct respects, and that the prosecutors involved violated the Iowa Rules of Professional Conduct and rules applicable to prosecutors generally in several important ways. As a consequence of these violations—which plainly affected the fairness of Mr. Rubashkin's trial by depriving him of an impartial judge—Mr. Rubashkin is entitled to a new trial.

ARGUMENT

I.

THIS MOTION IS PROCEDURALLY PROPER.

The Government first contends that Mr. Rubashkin's new-trial motion represents an improper invocation of Rule 33. In support of that argument, the Government cites and quotes *United States v. Gianakos*, 415 F.3d 912, 927 (8th Cir. 2005), which prescribes five criteria for a new-trial motion. In fact, each of those criteria is satisfied in this case:

(1) New Evidence: The ICE documents describing the meetings between Judge Reade and the U.S. Attorney's Office were not discovered until July 2010—eight months after Mr. Rubashkin's trial. *See* pp. 6-9, *infra*.

(2) Due Diligence: Mr. Rubashkin's trial counsel were not guilty of a "lack of due diligence" because they made timely requests for the ICE documentation that described preparations for the raid. They even had to initiate a lawsuit in order to obtain the documents that revealed the improper consultations between prosecutors and the judge.

(3) Non-Cumulative: The evidence of the *ex parte* meetings was not "merely cumulative or impeaching." Counsel acknowledged in their affidavits that they knew that Judge Reade had played a minor "logistical" role in moving the location of the courthouse and arranging, shortly before the raid, for counsel to represent the arrestees preparing for the raid. But they had absolutely no idea that she had met with substantial frequency with the prosecutors and had been a participant at meetings where subjects other than the location of potential trials were discussed.

(4) Materiality: The evidence of Judge Reade's *ex parte* meetings was highly material to determining whether (in the words of the Eighth Circuit) an "average person on the street" (*Moran v. Clarke*, 296 F.3d 638, 648 (8th Cir. 2002) (en banc)) would believe her to be impartial—and whether she was in fact unbiased or was affected by her role in, and "support" for, the raid on Agriprocessors.[1]

[1] It is difficult to credit the Government's suggestion that Judge Reade was totally unaware of the target of the immigration raid. For one thing, the Agriprocessors plant is located only some 75 miles from the National Cattle Congress that Judge Reade personally visited to determine whether it would be a suitable location to hold judicial proceedings. For another, the "Executive Summary" that is described in a Government email as the document that "will satisfy Richard Murphy's requirement to brief the judge" expressly names "Agriprocessors, Inc. located in Postville, Iowa" as the "kosher and non-kosher meat processing plant" that is the target of the raid. *See* Exh. 1 to Declaration of Alyza D. Lewin ("Lewin Decl.").

(5) Different Result: Applying the legal standards under Section 455(a), the evidence of Judge Reade's *ex parte* meetings with the prosecutors is likely to produce a determination that Judge Reade was ineligible to preside at Mr. Rubashkin's trial.

To the extent that the Government suggests that new-trial motions under Rule 33 may only be premised on newly discovered evidence of *substantive innocence*, that is plainly wrong. It is well settled that "newly discovered evidence need not relate only to the question of guilt or innocence, but may be factual evidence that is probative of another controlling issue of law." Wright, King & Klein, *Federal Practice & Procedure: Criminal 3d* § 557, at 568. Indeed, new-trial motions may be based on newly discovered evidence that bears upon the "integrity of the earlier trial" rather than upon the "the substantive issue of guilt." *Holmes v. United States*, 284 F.2d 716, 720 (4th Cir. 1960).

The Government attempts unsuccessfully to distinguish *Holmes* on the ground that it involved new evidence relating not to a potential judicial recusal but rather to an improper statement made to a juror by a deputy marshal. However, the need for a new trial here follows *a fortiori* from *Holmes*. There is far less likelihood that a verdict was improperly affected by one remark—however prejudicial—made to a juror by a deputy marshal than that a month-long trial was improperly affected by the rulings of a judge who was either actually partial or whose conduct before trial gave rise to an appearance of partiality.

Other federal Courts of Appeals have considered new-trial motions premised upon new evidence that the trial judge should have recused himself under Section 455. These include *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.); and *United States v. Venable*, 233 Fed. App'x 313, 315-16 (4th Cir. 2007) (unpub.). The Government does not even attempt to

distinguish those cases. Nor does it offer even a single case in which any court held that a new-trial motion cannot be based upon a newly discovered violation of Section 455.

There is no merit to the extraordinary proposition asserted by the Government that even if Judge Reade should have been recused because of an appearance of partiality, Mr. Rubashkin must now "show . . . actual impact on the jury's verdict" or some "other manner of actual prejudice." Gov't Mem., at 13. No case has required such a showing in order to reverse a judgment in a case where the trial judge unlawfully presided. To the contrary, in *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988), the Supreme Court did not hesitate to vacate the judgment below once it concluded that the judge should have disqualified himself from the case, even though the request was made only in a post-judgment motion under Rule 60(b) of the Federal Rules of Civil Procedure. The Court did not demand a showing of actual prejudice or impact on the verdict. Instead, it emphasized that the "purpose of § 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible," 486 U.S. at 865, which means that judgments must be reversed even if there was no showing of actual prejudice. Reversal is required in such cases in order to demonstrate to the public the integrity of the system.

In any event, Judge Reade issued many discretionary rulings throughout the trial that harmed the defense and that are only grounds for reversal if the trial judge's discretion was abused. Her rulings on motions in limine that affected the evidence heard by the jury are, under Eighth Circuit standards, grounds for reversing the conviction only if discretion was abused. *United States v. Beck*, 557 F.3d 619, 622 (8th Cir. 2009); *United States v. Littrell*, 439 F.3d 875, 884 (8th Cir. 2006). The same abuse-of-discretion standard applies to Judge Reade's rulings on particular jury instructions. *See United States v. Brede*, 477 F.3d 642, 643 (8th Cir. 2007). The

most notable illustration of a ruling that may be viewed as discretionary but that severely prejudiced Mr. Rubashkin was Judge Reade's trial ruling permitting admission of highly inflammatory evidence regarding immigration violations but excluding testimony refuting that evidence (which resulted in motions for mistrial by defense counsel).

Finally, apart from all of her trial rulings, Judge Reade also presided over Mr. Rubashkin's sentencing, and imposed a term of imprisonment that was shockingly long for a first-time, non-violent offender—longer even than the sentence recommended by the *prosecutors*. The sentencing determination, like the various trial rulings discussed above, is also largely discretionary. *See Gall v. United States*, 552 U.S. 38 (2007). In light of the pervasive control and discretionary authority exercised by trial judges, it makes no sense whatever to condition a new trial, if the first has been held before a biased or seemingly partial judge, on a demonstration that her rulings were actually prejudicial. That is why no court has required such a showing.

II.

THIS MOTION IS TIMELY.

The Government also objects that Mr. Rubashkin's motion is too late, because its factual basis either was known, or should have been known, by counsel prior to trial. That objection mischaracterizes the record.

As defense counsel have attested, they were *not* aware of either the frequency or the content of the communications and contacts between Judge Reade and law enforcement. To the contrary, they were affirmatively misled about the extent of those interactions, which is why they did not file a recusal motion before trial. Counsel have sworn that had they known the details exposed by the subsequent FOIA production—none of which was available to them before Mr.

Rubashkin's trial and most of which came to light only after his sentencing—they would have moved to recuse Judge Reade.

The very fragmentary pretrial disclosures of Judge Reade's advance knowledge of the raid—on which the Government relies for its assertion that relevant facts "were known, or through due diligence should have been known" (Gov't Mem., at 15)—did not remotely suggest the intimate involvement in detail and the support she expressed as shown in the belatedly produced ICE memoranda. A close review of the record reveals that the most salient facts about the pre-raid contacts with the judge were exposed *only* by the FOIA documentation.

The Government's Memorandum details the state of the record prior to the release of the FOIA documents. It reduces to three sources of information. First, an article was published in which Judge Reade acknowledged that she was "advised informally" that an operation was being planned, though "not given any details." In the quoted passage, Judge Reade explains that she talked with her fellow judges about how to prepare for the expected influx of cases. Second, during a congressional hearing, an official from the Department of Justice stated that Judge Reade had been "contacted in advance" about the raid. And third, Judge Reade wrote an opinion rejecting a recusal motion in the *De La Rosa-Loera* litigation, in which she confessed only to "logistical cooperation" with ICE.

None of these (indirect) disclosures captured the extent or the nature of the collaboration between Judge Reade and the U.S. Attorney's Office, as revealed by the new evidence. Given the sheer number of meetings involving the judge, it is not credible that no "details" were discussed. Generalities do not require frequent meetings beginning months prior to the raid. Generalities do not require special briefings or "gameplans." Contrary to the account in the news article, Judge Reade did not simply talk to "fellow judges" about how to plan for the cases.

Rather, she talked to executive officials, prosecutors, and representatives of ICE—a different situation altogether. Further, the "logistical cooperation" catchphrase from *De La Rosa-Loera* is misleading, as explained in Mr. Rubashkin's initial Memorandum of Law, because it does not reflect the extent of the cooperation; the judge's hands-on management, including demanding a "final gameplan" and "briefing"; the discussion of "charging strategies," a purely prosecutorial matter; or Judge Reade's frank expressions of approval of the planned enforcement action.

Not only did the facts revealed by the FOIA documents and set forth in the Rule 33 Motion go well beyond the scope of counsel's prior knowledge (actual or constructive), indications of the extent of Judge Reade's participation in the planning of the raid actually continue to expand as more of the ICE documents become available and are scrutinized. The Affidavit of Alyza D. Lewin that is Exhibit 1 to this Reply specifies additional excerpts from the most recently disclosed ICE documents that reveal more troubling details concerning Judge Reade's meetings with prosecutors, which were unknown when the Rule 33 Motion was filed. For example, in one recently discovered email from the U.S. Attorney's Office, Judge Reade is impliedly described as a "stakeholder" in the raid. Lewin Decl., Exh. 2. That description is anathema to a system of justice in which judges are impartial and independent of the executive branch. In another email, executive officials make reference to "weekly" meetings that included Judge Reade. Lewin Decl., Exh. 3. This suggests a level of collaboration beyond even what the Government admitted to in its Memorandum. Yet another series of emails indicates that "draft orders" were apparently among the matters discussed with Judge Reade at the weekly meetings. Lewin Decl., Exh. 4. It is not clear from the documents what these orders concerned, but it is surely unusual, if not improper, for a court order to be reviewed in advance of its issuance with

prosecutors and other law-enforcement personnel. The Government's Memorandum says nothing about *any* orders being discussed with Judge Reade prior to the raid.

As shown above, the evidence discussed in the Rule 33 Motion could not have been anticipated based on the few scattered and misleading details that were part of the public record prior to Mr. Rubashkin's trial and sentencing. And surely, given that new evidence of the unprecedented collaboration between the prosecutors and Judge Reade *continues* to be discovered, the Government's insistence that nothing in the FOIA documents should have come as a surprise to Mr. Rubashkin's counsel simply cannot be taken seriously.

III.

THE GOVERNMENT'S JUSTIFICATION OF JUDGE READE'S CONDUCT IS NEITHER FACTUALLY NOR LEGALLY SUFFICIENT.

A. Factual Insufficiency—The Government attempts in vain to provide an innocent explanation for each of the meetings that the unredacted portions of the ICE documents reveal Judge Reade held with the prosecutors. But it only creates more questions than it resolves.

While the Government globally denies that it shared with the judge details of potential evidence or prosecutorial strategy, neither the Government's Memorandum nor the affidavit of Assistant United States Attorney Murphy describes what *was* discussed at the meetings or why it was necessary to have so many meetings with Judge Reade personally in order to make the purportedly necessary and supposedly logistical arrangements. Indeed, Assistant United States Attorney Murphy's affidavit is remarkably silent on the number of meetings he had with Judge Reade to discuss "logistics"; where the meetings were held; how long they took; what was said during the meetings; or why the meetings with the judge were necessary. His affidavit reports only on what was allegedly *not* discussed in Judge Reade's presence. Hence the current record is factually insufficient to warrant denying the Rule 33 Motion.

The Government further fails to explain (1) why Judge Reade failed to advise defense counsel of her *ex parte* meetings with the prosecutors; (2) why the prosecutors failed to notify defense counsel of Judge Reade's *ex parte* meetings with the prosecutors; (3) why the *ex parte* meetings were held with such great frequency; (4) what Judge Reade was told by the prosecutors when they "briefed" her on October 17, 2007, "regarding the ongoing investigation" and why Judge Reade expressed "full support for the initiative"; (5) why Judge Reade was briefed on "charging strategies" on March 17, 2008; (6) what report was given to Judge Reade by the Office of the United States Attorney in response to her *sua sponte* direction that she be given, on April 4, 2008, a "final gameplan" and "a briefing on how the operation will be conducted"; and also (7) why Judge Reade determined to preside at Mr. Rubashkin's trial rather than simply assign that trial to a judge who had not participated, as she had, in pre-raid planning.

Even more fundamental and glaring is the Government's inadequate justification of the prosecutors' recourse to Judge Reade and her willingness to attend so many pre-raid meetings and to take charge by directing that she be given a "final gameplan." Notwithstanding Assistant United States Attorney Murphy's enumeration of the "number of concerns" that were presented "for the court" by "an operation of this scope" (Murphy Aff. ¶ 6), it appears that an even larger number of Spanish-speaking aliens were arrested in an immigration raid conducted just three months later *without* similar judicial participation. As shown by Exhibits 2 and 3 to this Reply, ICE arrested almost 600 employees in a raid on Howard Industries, Inc., in Laurel, Mississippi. Approximately 475 arrestees were, according to news accounts, incarcerated in an ICE restraining facility until they were brought to trial. It does not appear that any federal judge was called on by the local United States Attorney to participate in pre-raid planning, even though the same enumerated "concerns" could have been cited due to the large number of potential arrestees

who spoke only Spanish and were separated from their families. Unlike their Iowa counterparts, the Mississippi federal prosecutors obviously did not think it appropriate or necessary to conduct *ex parte* meetings with a federal judge who would try the targets of a planned raid.[2]

In its futile efforts to invoke *some* precedent for the extraordinary joint pre-raid cooperation between prosecutor and judge shown by this record, the Government cites 1996 proceedings in temporary courthouses in Charles City, Iowa, and in Waterloo, Iowa, when Circuit Judge Michael J. Melloy was District Judge and Stephen J. Rapp was the United States Attorney. Murphy Aff., n.1. The Government can point only to the relocation of the court after the two 1996 worksite raids. It does not contend—and it is unimaginable—that the facts behind those relocations would show the kind of constant and repeated participation, expression of judicial "support" for the raid, or judicial request for a "final gameplan" that are shown on this record. Mr. Rubashkin's trial counsel acknowledged that they knew what was known by all interested members of the local bar—that Judge Reade had approved relocation of the court prior to the raid. That much mirrors the 1996 experience. But they did not know that what surely did not happen in 1996—prosecutors and judge collaborating to plan the raid—occurred here.

B. Legal Insufficiency—Even with respect to their *conceded* conduct, the actions of the prosecutors and the judge patently violated the governing ethical directives of the Code of Judicial Conduct and the ethical duties of prosecutors. Exhibits 6 and 7 to this Reply are affidavits of two of the nation's leading experts on judicial ethics and on the ethics of attorneys: Mark I. Harrison and Professor Stephen Gillers. Each concludes, after reviewing the filings and

[2] Nor did the Mississippi federal prosecutors treat the employer of the illegal aliens with the severity that the Iowa prosecutors exhibited towards Mr. Rubashkin. Exhibits 4 and 5 indicate that the only federal criminal prosecution brought as a result of the Howard Industries raid resulted in a guilty plea to one conspiracy count by a human resources manager who remains free on bail pending sentencing.

affidavits of Mr. Rubashkin and the Government alike, that serious ethical misconduct occurred on the part of the judge and the prosecution team.

1. Mark I. Harrison

Mark Harrison, a licensed attorney since 1961, is an expert on judicial ethics. Most recently, Mr. Harrison was Chair of the ABA Commission to Revise the Model Code of Judicial Conduct. He served in that role from 2004 until 2007, and the revisions to the Model Code proposed by his Commission were unanimously adopted by the ABA's House of Delegates in February 2007. Among other things, he has taught Legal Ethics courses at the Colleges of Law at both the University of Arizona and Arizona State University. He has also served as Special Counsel to the Arizona Commission on Judicial Conduct. *See* Harrison Aff. ¶¶ 1-4.

In order to render his professional judgment about the conduct that transpired in this case, Mr. Harrison reviewed Mr. Rubashkin's Motion and the Government's Resistance, along with all accompanying affidavits and exhibits. Harrison Aff. ¶ 7. He concludes 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." *Id.* ¶ 9. In particular, Mr. Harrison concludes that Judge Reade violated ethical duties: (i) by "initiating and/or authorizing and participating in numerous *ex parte* meetings with prosecutors and other law-enforcement personnel in connection with an impending matter," *id.* ¶ 10(a) (footnote omitted); (ii) by failing to ensure that a "complete record" of the meetings was prepared, *id.* ¶ 10(b); (iii) by failing to disclose the "nature, substance, and extent" of the communications to all parties "at the earliest practicable time" such that a motion to recuse could have been made, *id.* ¶ 10(c); and (iv) by failing to disqualify herself from the criminal case against Mr. Rubashkin, despite her numerous *ex parte* contacts with the prosecution and law enforcement as they were planning the raid that resulted in Mr. Rubashkin's arrest and indictment, *id.* ¶ 10(d).

With respect to the Government's claim that logistical necessities forced its hand, Mr. Harrison concludes that such matters "do not negate the prohibition against *ex parte* communications or justify such communications." Harrison Aff. ¶ 9(t). They surely cannot excuse either the failure to keep an accurate record of the communications or the failure to promptly disclose them to affected parties at the earliest practicable time. *Id.*

2. Stephen Gillers

Professor Stephen Gillers teaches at the New York University School of Law, and is an expert on legal ethics, which he has taught for over thirty years. Among other things, he is the author of the most recent edition of the leading casebook on the topic, *Regulation of Lawyers: Problems of Law and Ethics*. Professor Gillers also lectures regularly about professional ethics at ABA and state bar events, and is active with the ABA's Center for Professional Responsibility. *See* Gillers Aff. ¶ 1.

Like Mr. Harrison, Professor Gillers reviewed the Government's filings, and credited any specific declarations made in the affidavit of Assistant U.S. Attorney Murphy. Gillers Aff. ¶ 5. Nonetheless, he concludes that the prosecutors violated ethics rules in three distinct ways.

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.'" Gillers Aff. ¶ 23(a). In Professor Gillers' view, the relevant ethics rules require that any necessary logistical arrangements should have been made through contact with the District Court's administrative personnel, and the judge's approval should have been sought only where absolutely essential. *Id.* ¶ 23(b).

Second, the prosecutors should have created a "detailed record," including through transcription by court reporters if necessary, of "all communications with the Chief Judge." Gillers Aff. ¶ 23(c). Such a record would have ensured that defense counsel could later

determine what went on and act as appropriate to protect Mr. Rubashkin's rights to a fair trial. Importantly, this failure distinguishes the situation in which a judge reviews and signs a warrant, because in those cases a full record is necessarily preserved. *See* Gov't Mem., at 37.

Third, Professor Gillers concludes that the prosecutors breached their professional obligations under the Iowa Rules of Professional Conduct by failing to disclose to defense counsel "(a) the date and duration of all communications with the Chief Judge; (b) the identities of those present; and (c) the substance in detail of the communications." Gillers Aff. ¶ 23(d). He explains that the duty to disclose in this case "find its roots in the defendant's constitutional rights," *id.* ¶ 23(f), just like the duty to disclose exculpatory factual material recognized by the Supreme Court in *Brady v. Maryland*, 373 U.S. 83, (1963). It does not matter in the slightest that the prosecutors may have believed that the material was not enough to warrant recusal, because that is "not a decision for the government lawyer to make." Gillers Aff. ¶ 23(g).

In sum, two leading experts on judicial and legal ethics have reviewed the Government's response to Mr. Rubashkin's new-trial motion and found it wanting as a matter of law. Their careful analysis confirms that Judge Reade and the U.S. Attorney's Office acted improperly in connection with this matter. Mr. Rubashkin is therefore entitled to a new trial, with the benefit of full disclosure and with a presiding judge untainted by *ex parte* communications.

IV.

A NEW TRIAL IS REQUIRED WHETHER OR NOT THE JUDGE KNEW AGRIPROCESSORS WAS THE TARGET OR HAD HEARD SHOLOM RUBASHKIN'S NAME.

The Government argues that Judge Reade's participation in the planning of the immigration raid on Agriprocessors did not disqualify her from presiding over the criminal case against Sholom Rubashkin because she was not told the name of the business that was to be raided or Mr. Rubashkin's name. That is neither credible nor legally correct.

As to the factual premise, it is very difficult to credit the assertion by the Government that the judge was ignorant of the target of the raid. *See* n.1, *supra*. Only the judge's own testimony could support a conclusion that she was oblivious to the raid's obvious target, located in her own judicial district.

But, in any event, Judge Reade's subjective lack of knowledge—even if proved—is irrelevant. The controlling issue is whether the "average person on the street" would believe that a judge who participated for more than six months in planning an immigration raid would be impartial in the criminal proceeding against the alleged principal manager of the business that was raided. There can be little doubt that an ordinary observer would harbor serious doubts about the ability of a judge to try a case impartially under these circumstances. The raid is, after all, not worth its extensive planning and expensive execution if the primary corporate official who was allegedly involved in hiring illegal aliens is not ultimately found guilty and punished. And, whether or not Judge Reade knew *before* the raid that its target was Agriprocessors and its manager was Mr. Rubashkin, she obviously learned as much *after* the raid. That is just as damaging, because Judge Reade would then have been able to link those identities to whatever facts she had learned or biases she had developed over the course of the six-month collaboration with the U.S. Attorney's Office and ICE.

V.

FULLY UNREDACTED DOCUMENTS SHOULD BE PROVIDED, DISCOVERY SHOULD BE PERMITTED, AN EVIDENTIARY HEARING SHOULD BE HELD, AND A JUDGE FROM A DISTANT DISTRICT SHOULD BE ASSIGNED.

The Government resists not only the substance of Mr. Rubashkin's Rule 33 Motion, but also the ancillary requests made in that submission. But the Government's Memorandum and

affidavit only reinforce the need for unredacted documents; for discovery and an evidentiary hearing; and for the transfer of this motion.

As described above, there are many issues that the Government does not adequately address. Defense counsel requires further detail about the extent of the *ex parte* communications (the Government does not even say how many times the judge interacted off-the-record with the prosecutors or with ICE); further detail about *who else* was involved in the communications (again, the Government does not specify); further detail about the *content* of those private communications to Judge Reade (the Government says only what was *not* said, but does not answer what *was* said); and further detail about what Judge Reade *herself* said during initiation of these contacts and during the meetings themselves.

To help resolve these questions, the Government must produce unredacted versions of the FOIA documents. More crucially, discovery must be afforded. There is no question that the Court *can* authorize discovery in connection with a motion under Rule 33, and indeed *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 relevant evidence. *United States v. Velarde*, 485 F.3d 553, 560 (10th Cir. 2007). Here, given the many questions raised by the FOIA documents and the Government's woefully incomplete responses thereto, such investigation is clearly warranted. Similarly, an evidentiary hearing must be held before ruling on this motion. *See United States v. LaFuente*, 991 F.2d 1406, 1408-09 (8th Cir. 1993).

The Government's Memorandum also confirms the need to transfer this motion for adjudication to another judge, one from outside this district. Assistant United States Attorney Murphy's affidavit states that he engaged in communications not only with Judge Reade, but also with "other Northern District of Iowa federal judges." Murphy Aff. ¶ 3. The affidavit also

says that information about the raid had to be conveyed to Judge Reade so that a "sufficient number of judges" could be prepared for the prosecutions expected to follow. *Id.* ¶ 3. That statement suggests that other judges in the district may have been similarly tainted by pre-raid engagement with the investigation and raid planning. This makes it imperative that Mr. Rubashkin's Rule 33 Motion be transferred not just to another judge, but to another judge in another district, to ensure that the motion is adjudicated by one who is "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).

CONCLUSION

For the foregoing reasons, this motion for new trial pursuant to Rule 33 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, from a distant district, should be assigned to determine this motion.

Dated: September 8, 2010

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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 **September 8, 2010**, by CM/ECF.

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