UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 10-2487, 10-3580

UNITED STATES OF AMERICA

Plaintiff- Appellee,

v.

SHOLOM RUBASHKIN

Defendant- Appellant.

APPEAL FROM THE U.S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA
HON. LINDA R. READE

PETITION FOR PANEL REHEARING OR REHEARING EN BANC

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FED. R. APP. P. 35(b) STATEMENT OF COUNSEL

Pursuant to Fed. R. App. P. 35(b), I express a belief, based upon a reasoned and studied professional judgment, that the panel decision conflicts with decisions of the United States Supreme Court and this Court and/or presents questions of exceptional importance as follows:

- The panel held that a defendant seeking a new trial based on newly discovered evidence under Fed. R. Crim. P. 33 may prevail only if he demonstrates that the evidence "probably will result in an acquittal" on retrial – even if the evidence bears on the integrity of the first trial rather than the defendant's innocence. This holding is in conflict with the United States Supreme Court's decision in *United States v. Agurs,* 427 U.S. 97 (1976), this Court's ruling in *United States v. LaFuente,* 991 F.2d 1406 (8th Cir. 1993), and the law of various other circuits.

- This case presents a question of exceptional – and frequently repeated – importance regarding sentencing procedure: Whether a sentencing judge can comply with 18 U.S.C. § 3553 without addressing a nonfrivolous argument advanced by the defendant in support of a lower sentence. In affirming the district court's sentence, despite that court's failure to address Mr. Rubashkin's argument about unwarranted sentence disparity, the panel apparently followed a

rule of this Circuit that is in conflict with the majority of circuits to have addressed the question.

- The panel decision on the substantive reasonableness of Mr. Rubashkin's sentence conflicts with *United States v. Kane*, 639 F.3d 1121 (8th Cir. 2011). In this case, the panel confined its substantive reasonableness review to determining whether the *district court* had weighed the factors to be considered under 18 U.S.C. § 3553(a). In *Kane*, this Court, while giving the district court considerable deference, *itself* weighed the § 3553(a) factors to determine whether the district court's determination was within a zone of reasonableness. These methodologies are irreconcilable.

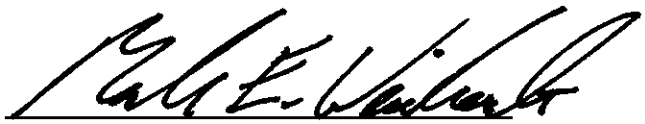

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Others:

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COURSE OF PROCEEDINGS AND DISPOSITION BELOW

1. On July 16, 2009, a grand jury in the Northern District of Iowa returned a Seventh Superseding Indictment (the "Indictment") against Mr. Rubashkin alleging that he committed a variety of financial and immigration offenses as the general manager of a kosher slaughterhouse, Agriprocessors, Inc. ("Agriprocessors"), owned by his father. App. 4-60. From October 13 to November 12, 2009, Mr. Rubashkin stood trial on the financial crimes charged in

the Indictment.[1] The jury found Mr. Rubashkin guilty of bank fraud, making false statements to a bank, mail and wire fraud, money laundering, and violating an order of the Secretary of Agriculture. The district court subsequently imposed a sentence of 27 years imprisonment. The sentence, while at the bottom of the Guidelines range, exceeded the government's requested sentence of 25 years.

2. After trial, Mr. Rubashkin obtained documents through a Freedom of Information Act (FOIA) lawsuit evidencing that the district judge met extensively with prosecutors and law enforcement agents to plan the immigration raid that led to the charges against him. Mr. Rubashkin moved for a new trial under Fed. R. Crim. P. 33. The district court denied the motion without a hearing.

3. Mr. Rubashkin appealed his conviction and his sentence to this Court. The panel affirmed on all issues. *United States v. Rubashkin*, __ F.3d __, 2011 WL 4104922 (8th Cir. Sep. 16, 2011). As pertains to the issues raised in this Petition, the panel ruled that (i) Mr. Rubashkin's new trial motion failed because he had not shown that he would probably be acquitted in a retrial, (ii) the district court did not commit procedural error by failing to respond to Mr. Rubashkin's

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[1] Before the grand jury returned the Indictment, the district court severed the financial and immigration offenses for separate trials.

argument that his sentence created unwarranted disparities, and (iii) the district court's sentence was not substantively unreasonable.

REASONS FOR GRANTING THE PETITION

I. THE PANEL ERRED IN REJECTING MR. RUBASHKIN'S NEW TRIAL REQUEST.

Mr. Rubashkin filed a motion for a new trial under Fed. R. Crim. P. 33 arguing that the district judge should have recused herself from the case. The district court denied the motion, in part, on the grounds that the newly discovered evidence "would not lead to an acquittal in the event he were retried." Add. 159. The panel affirmed on the same basis. Slip op. at 10. That erroneous decision warrants reexamination.

Rule 33 provides a mechanism for a criminal defendant to bring to the district court's attention "newly discovered evidence" bearing on a conviction. Such evidence can take two forms – evidence that the defendant is factually innocent of the offense or evidence of a legal defect in the prosecution. *See Holmes v. United States*, 284 F.2d 716, 719 (4th Cir. 1960). When a defendant presents newly discovered evidence, Rule 33 empowers the district court to grant a retrial "if the interest of justice so requires." Fed. R. Crim. P. 33(a). In a series of cases in which defendants invoked new evidence of their factual innocence, this Court crafted a four-part test for Rule 33 motions:

> (1) the evidence must have been unknown or unavailable to the defendant at the time of trial; (2) the defendant must have been duly diligent in attempting to uncover it; (3) the newly discovered evidence must be material; and (4) the newly discovered evidence must be such that its emergence probably will result in an acquittal upon retrial.

United States v. Baker, 479 F.3d 574, 577 (8th Cir. 2007) (quotation omitted).

On appeal, Mr. Rubashkin argued that because his Rule 33 motion was premised on evidence bearing on the fairness of his trial, rather than his factual innocence, the fourth *Baker* element – "probable acquittal" – does not apply. Rejecting Mr. Rubashkin's argument, the panel ruled that *Baker's* probable acquittal requirement applies to *all* Rule 33 motions, even those based on new evidence of a legal defect in the conviction. Thus, after *Rubashkin*, in this Circuit newly discovered evidence of a legal defect is grounds for a new trial only if correcting the defect "probably will result in an acquittal." Slip op. at 10. This extension of the probable acquittal element is contrary to Supreme Court precedent, the law in other federal circuits, and even a prior decision of this Court.

First, the panel's holding cannot be reconciled with *United States v. Agurs*, 427 U.S. 97 (1976), where the Supreme Court explicitly rejected a probable acquittal requirement for Rule 33 motions based on the government's failure to disclose evidence. *Id.* at 111 ("[T]he defendant should not have to satisfy the severe burden of demonstrating the newly discovered evidence probably would

have resulted in acquittal."). At a minimum, *Agurs* shows that the panel went too far in declaring that the probable acquittal rule applies to *all* Rule 33 motions.

The panel's rule is also inconsistent with "hornbook" law and with the law applied by other United States Courts of Appeals. In discussing Rule 33, the leading treatise on federal procedure declares: "[N]ewly 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." 3 Wright & Welling, Federal Practice and Procedure § 583, at 448 (4th ed. 2011). In *Holmes*, moreover, the Fourth Circuit granted a new trial based on improper contacts with a juror and did not require evidence of probable acquittal. The Fourth Circuit explained that while a defendant must show probable acquittal "[w]hen the newly discovered evidence bears upon the substantive issue of guilt," a "different set of standards" applies to new evidence bearing "upon the integrity of the earlier trial." 284 F.2d at 720; *see also United States v. Agnew*, 147 Fed. Appx. 347 (4th Cir. 2005) (applying *Holmes*). The Fifth Circuit in *Richardson v. United States*, 360 F.2d 366, 369 (5th Cir. 1966), granted a new trial because of a conversation between a witness and a juror. The Tenth Circuit in *Rubenstein v. United States*, 227 F.2d 638, 642 (10th Cir. 1955), treated a motion alleging that prospective jurors had been questioned

by government agents as a "motion for a new trial on the ground of newly discovered evidence."[2]

The panel's extension of the probable acquittal requirement also conflicts with *United States v. LaFuente*, 991 F.2d 1406 (8th Cir. 1993), where a defendant sought a new trial based on numerous pieces of new evidence, some of which went to innocence and some of which went to the fairness of his trial. The court noted the probable acquittal standard and, with respect to the evidence of innocence, applied it. But on the defendant's allegation that a key witness attended an *ex parte* meeting with the prosecutor and judge, the Court remanded the case so that the district court could determine whether the defendant's "due process right to a fair trial was violated." *Id.* at 1409. The order for remand in *LaFuente* cannot be squared with the panel's holding in this case.

Beyond these intra- and extra-Circuit conflicts, the panel's application of the probable acquittal requirement is bad policy. When a defendant bases a new trial

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[2] The panel purported to distinguish *Holmes* and other cases cited by Mr. Rubashkin on the grounds that the legal defects alleged therein pertained to the integrity of the jury's verdict, while the defect asserted by Mr. Rubashkin does not. Setting aside that the panel ignored what the other courts actually said about their rulings, the distinction makes no difference under the panel's logic. The panel's holding, after all, requires a defendant to show probable acquittal, not that new evidence pertains to the verdict's integrity.

motion on evidence of innocence, the requirement is sensible. Unless the defendant's new evidence would likely change the verdict, retrial serves no useful purpose. But when a defendant files a new trial motion based on evidence of a legal defect in the conviction, retrial serves the critical function of ensuring the appearance, and reality, of a fair judicial process.

The panel thus erred in applying a probable acquittal requirement to Mr. Rubashkin's new trial motion. That error is magnified by the nature of the legal defect that Mr. Rubashkin alleges – that the district judge's coordination with government agents and prosecutors left him without an unbiased trial judge. Judicial bias can manifest itself in ways that evade detection, much less appellate scrutiny. Indeed, that is why judicial bias is deemed "structural error" and not subject to harmless error analysis. *See Rose v. Clark*, 478 U.S. 570, 577 (1986); *see also Brecht v. Abrahamson*, 507 U.S. 619, 629 (1993) (explaining that error is deemed structural where it cannot "be quantitatively assessed in the context of other evidence presented in order to determine [the effect it had on the trial]." (quotation omitted)). The panel's ruling nonetheless forces a Rule 33 movant to prove that he would probably be acquitted with a different judge. Given the inherent opacity of judicial bias, that is an impossible task.

The practical effect of the panel's ruling is thus to withdraw judicial bias from the scope of Rule 33. That means that if a convicted defendant obtains a videotape showing his trial judge taking a bribe from the government's lead witness, he will, for all practical purposes, be unable to secure a new trial under Rule 33. Neither logic nor – until the panel's decision – law support that result.[3]

II. THE PANEL ERRED IN HOLDING THAT THE DISTRICT COURT COMPLIED WITH 18 U.S.C. § 3553.

18 U.S.C. § 3553(a) requires that a district court "consider" seven factors when imposing a sentence. Relatedly, 18 U.S.C. § 3553(c) requires a sentencing judge to "state in open court the reasons for [the] imposition of [a] particular sentence." In *Rita v. United States*, 551 U.S. 338 (2007), the Supreme Court explained that to comply with these obligations, "[w]here the defendant or prosecutor presents nonfrivolous reasons for imposing" a sentence different than

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[3] The "probable acquittal" rule was the panel's primary holding on Mr. Rubashkin's Rule 33 motion. Because that holding was dispositive of the issue, and thus has clear precedential effect, the panel's subsequent discussion of the motion, slip op. at 11-12, does not mitigate the need for en banc reexamination of this case. It bears noting, however, that the panel's ruling that there was "no evidence that the district court's decision to remain on the case prejudiced Rubashkin's verdict," slip op. at 12, erroneously invoked a harmless error analysis on an issue, judicial recusal, that is not subject to harmless error analysis.

that selected by the judge, "the judge will normally . . . explain why he has rejected those arguments." *Id.* at 357.

In *Rita's* wake, the federal circuits have split over whether a district court must respond to each nonfrivolous sentencing argument advanced by a defendant. A majority of circuits to address the issue hold that "[w]hen a defendant raises a particular[, nonfrivolous] argument in seeking a lower sentence, the record must reflect both that the district judge considered the defendant's argument and that the judge explained the basis for rejecting it." *United States v. Gapinsko*, 561 F.3d 467, 474 (6th Cir. 2009) (quotation omitted); *see also United States v. Ausburn*, 502 F.3d 313, 329 (3d Cir. 2007); *United States v. Carter*, 564 F.3d 325, 328 (4th Cir. 2009); *United States v. Mandragon-Santiago*, 564 F.3d 357, 362 (5th Cir. 2009); *United States v. Miranda*, 505 F.3d 785, 796 (7th Cir. 2007). This Court has taken a different tack, holding that "not every reasonable argument advanced by a defendant requires a specific rejoinder by the judge." *United States v. Gray*, 533 F.3d 942, 944 (8th Cir. 2008).[4]

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[4] The Tenth Circuit allows district courts to disregard arguments when imposing within-Guidelines sentences. *See United States v. Lente*, 647 F.3d 1021, 1034-35 (10th Cir. 2011). The Ninth Circuit has issued published opinions on both sides of this split. *Compare United States v. Ressam*, 629 F.3d 793, 826 (9th Cir. 2010) *with United States v. Carter*, 560 F.3d 1107, 1119 (9th Cir. 2009).

Although *Gray* is not cited in the panel's decision, it is necessary to the holding. 18 U.S.C. § 3553(a)(6) requires district courts to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct" during sentencing. Below, Mr. Rubashkin argued that a within-Guidelines sentence in this case creates unwarranted disparities vis-à-vis other Agriprocessors-related defendants and defendants in other financial crime matters. In his appeal, Mr. Rubashkin contended that the district court committed procedural error when it failed to respond to this argument. Finding the district court's § 3553(a) analysis adequate, the panel rejected Mr. Rubashkin's argument. The record in this case, however, is unambiguous: The district court never explained why it rejected the argument. The panel's ruling thus makes sense only if *Gray* is correct; that is, the panel was right *only if* a sentencing judge may ignore a defendant's nonfrivolous § 3553(a) argument.

Gray, however, was wrongly decided, and en banc consideration is necessary to correct the error it introduced in this Circuit's sentencing jurisprudence. *Gray* invoked Justice Stevens' *Rita* concurrence, but it should have looked to the *Rita* majority's description of the sentencing process. As the Fifth Circuit explained in *Mondragon-Santiago*, *Rita* approved the sentencing process

because the district court acknowledged and summarized the defendant's arguments. 654 F.3d at 362 (quotation omitted). Contrary to *Gray*, the district court in *Rita* did not ignore a nonfrivolous § 3553(a) argument.

Beyond *Gray*'s misreading of *Rita*, the rule it announced is misguided as a matter of sentencing policy. In *United States v. Wallace*, the Sixth Circuit explained why it is essential that sentencing judges respond to nonfrivolous arguments:

> Expressly articulating the grounds for rejecting the particular claims raised by a defendant, at least with respect to a defendant's nonfrivolous arguments, promotes several critical goals: (1) it provides the defendant with a clear understanding of the basis for his or her sentence; (2) it allows the public to understand the rationale underlying the chosen sentence; and (3) it helps this Court avoid the difficulties of parsing the sentencing transcript when determining whether the district court in fact considered the defendant's arguments.

597 F.3d 794, 804 (6th Cir. 2010) (citations and quotation omitted). The Ninth Circuit, moreover, notes that a district court's failure to "address specific arguments that are tethered to a relevant § 3553(a) factor" can hinder the appellate court's "review of the reasonableness of a sentence." *Ressam*, 629 F.3d at 826 (quotation omitted).

Statistics from the Sentencing Commission show that Mr. Rubashkin's sentence more than doubles the average sentence received by fraud offenders who

caused losses over $20 million, did not cooperate with the government, and took their cases to trial. Yet to this day, Mr. Rubashkin does not know why the district court rejected his unwarranted disparity argument. Nor, for that matter, can this Court consider the district court's reasoning on unwarranted disparity in conducting its substantive reasonableness review. Procedural error is thus clear. Because *Gray* erroneously stands in the way of a finding of procedural error, and because it is contrary to *Rita* and a majority of the circuits to address the issue, the en banc Court should reject it.[5]

III. THE PANEL INCORRECTLY REVIEWED MR. RUBASHKIN'S SENTENCE FOR SUBSTANTIVE UNREASONABLENESS.

The 27-year prison term the district court imposed upon Mr. Rubashkin, a 51-year old first-time nonviolent offender, is a functional life sentence. On appeal, Mr. Rubashkin argued that the sentence is substantively unreasonable under *Gall v. United States*, 552 U.S. 38 (2007), and its progeny. In support, Mr. Rubashkin

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[5] To the extent that the panel's ruling is understood as holding that the district court *did* adequately explain its reason for rejecting Mr. Rubashkin's unwarranted disparity argument, its decision is plainly inconsistent with the record. While the district court discussed the bases for a downward departure or variance presented in Mr. Rubashkin's Amended Motion for Downward Department and/or Variance (Dkt. No. 896), it ignored the unwarranted disparity argument, which was raised in Mr. Rubashkin's Amended Sentencing Memorandum (Dkt. No. 895). To the extent it ruled that the district court "explicitly discussed" the unwarranted disparity argument, slip op. at 31, the panel should thus grant rehearing under Fed. R. App. P. 40 to correct its error.

relied primarily on the following factors, each of which is a legitimate sentencing consideration under 18 U.S.C. § 3553(a):

- The predominant motive for Mr. Rubashkin's crimes was to keep afloat a failing family business. Unlike most fraud offenders, Mr. Rubashkin did not quest for personal fortune.

- Mr. Rubashkin had no trace of criminal or even civil wrongdoing in his past.

- Mr. Rubashkin's record of charity with his time, home, and money was "legendary." App. 250. Indeed, even government witnesses characterized him as a "good person," "warm-hearted," and "kind." App. 65, 72, 95-96.

- Mr. Rubashkin and his wife, Leah, have ten children, one of whom is severely autistic.

- Mr. Rubashkin poses no recidivism risk.

- Mr. Rubashkin's sentence was roughly eight times longer than the 41-month sentences the district court imposed on two co-conspirators in Agriprocessors' financial department whose actions were essential to the fraud charged here.

The panel rejected Mr. Rubashkin's substantive unreasonableness arguments in two dismissive paragraphs. Slip op. at 31. It employed a methodology that effectively skips substantive reasonableness review entirely and conflicts with *United States v. Kane*, 639 F.3d 1121 (8th Cir. 2011). In *Kane*, a divided panel held that a ten year in a sexual abuse case was unreasonably lenient. *Kane* and *Rubashkin* conflict not because they reach different dispositions, but because they

employ incompatible *methodologies* of reviewing sentences for substantive reasonableness.

In *Kane*, the majority framed the substantive reasonableness question as whether the district court's sentence was "the product of unreasonable weighing decisions." *Kane*, 639 F.3d at 1136. To answer that question, the panel independently weighed the § 3553(a) factors. *Id.* at 1136-37. Its purpose was not to determine the sentence it would have imposed in the first instance, but to evaluate whether the district court's weighing decision fell within a permissible range. *Kane's* substantive review methodology thus calls for panels to independently weigh the § 3553(a) factors to determine the reasonableness of the district court's sentence.

In *Rubashkin*, by contrast, the panel addressed some of Mr. Rubashkin's particular § 3553(a) arguments, but did not itself weigh the § 3553(a) factors. Instead, the panel rejected Mr. Rubashkin's challenge on the grounds that the *district court* had weighed the factors. Slip op. at 31. *Rubashkin's* substantive review methodology thus calls for panels to examine only whether the district court weighed the § 3553(a) factors.

The *Kane* and *Rubashkin* substantive reasonableness review methodologies conflict. This Court should decide en banc whether the appellate court's duty ends

once it has determined that the district court weighed the § 3553(a) factors, or whether the appellate panel must determine, based on its own weighing, whether the district court landed within a range of reasonableness. How panels in this Circuit should review sentences for substantive reasonableness is surely a subject of exceptional importance. Unlike the *Kane* methodology, moreover, which is consistent with the appellate review standards set forth in *Gall* and *Rita*, the *Rubashkin* methodology makes substantive review identical to, and duplicative of, procedural review. The en banc Court should accordingly adopt *Kane's* methodology.

CONCLUSION

For the foregoing reasons, the Petition for Panel Rehearing or Rehearing En Banc should be granted.[6]

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[6] Given the space limitations imposed by Fed. R. App. P. 35 and 40, Mr. Rubashkin cannot address the panel's erroneous affirmance of his money laundering convictions. Because Mr. Rubashkin did not engage in financial transactions designed to promote or conceal the proceeds of unlawful activity, the panel should have reversed those convictions. If the Court grants en banc review or panel rehearing, it should reexamine the money laundering convictions.

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CERTIFICATE OF SERVICE

I hereby certify that on October 11, 2011, the following party was served through CM/ECF.

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