No. 11-1203

In the Supreme Court of the United States

SHOLOM RUBASHKIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
LANNY A. BREUER
Assistant Attorney General
DANIEL S. GOODMAN
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the district court abused its discretion in denying petitioner's motion for a new trial based on allegedly newly discovered evidence that the trial judge should have recused herself because her "impartiality might reasonably be questioned," 28 U.S.C. 455(a), when petitioner's evidence failed to show any effect on the integrity of the jury's verdict.

2. Whether the district court, which held a two-day sentencing hearing and issued a lengthy sentencing memorandum, adequately explained petitioner's sentence at the bottom of the advisory Guidelines range.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-40) is reported at 655 F.3d 849. The order of the district court denying petitioner's motion for a new trial (Pet. App. 43-68) is not reported but is available at 2010 WL 4362455. The district court's sentencing memorandum (Pet. App. 69-135) is reported at 718 F. Supp. 2d 953.

JURISDICTION

The judgment of the court of appeals was entered on September 16, 2011. A petition for rehearing was denied on November 3, 2011 (Pet. App. 41-42). On January 18, 2012, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including April 2, 2012, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial, petitioner was convicted on 14 counts of bank fraud, in violation of 18 U.S.C. 1344; 24 counts of filing false statements and reports to a bank, in violation of 18 U.S.C. 1014; 14 counts of wire fraud, in violation of 18 U.S.C. 1343; nine counts of mail fraud, in violation of 18 U.S.C. 1341; ten counts of money laundering, in violation of 18 U.S.C. 1956(a)(1)(A)(i) and (B)(i); and 15 counts of willfully violating an order of the Secretary of Agriculture, in violation of 7 U.S.C. 195. The district court sentenced petitioner to a total of 324 months of imprisonment, to be followed by five years of supervised release. Pet. App. 69-135. The court of appeals affirmed. *Id.* at 1-40.

1. Petitioner is the former Vice President and manager of Agriprocessors, Inc. (Agriprocessors), a kosher meatpacking company in Postville, Iowa. Under petitioner's direction, Agriprocessors employees artificially inflated the company's accounts receivable in order to increase the company's borrowing ability under a revolving bank loan. Specifically, petitioner directed employees to create false invoices and bills of lading, as well as to divert customer payments away from the correct bank account. In addition, petitioner directed that funds from Agriprocessors' operating account (which included proceeds from the bank under the loan agreement) be deposited into other accounts controlled by petitioner. Checks from those other accounts were then written to Agriprocessors, thereby creating the impression that genuine customer payments were being used to pay down Agriprocessors' bank loan. Agriprocessors eventually filed for bankruptcy. See Pet. App. 2-5, 75-78, 81-84.

2. The majority of the employees at Agriprocessors were undocumented immigrants. Pet. App. 4. In May 2008, Immigration and Customs Enforcement (ICE) conducted a worksite enforcement action at the plant, resulting in the arrest and conviction of more than 300 workers for immigration-related offenses. *Id.* at 4-5, 46-47. ICE had begun planning that enforcement action many months earlier, in consultation with the United States Attorney's Office (USAO) and other entities. *Id.* at 47. In October 2007, the USAO informed Chief Judge Reade of the United States District Court for the Northern District of Iowa that law enforcement expected to arrest several hundred individuals for immigration-related felony offenses. *Id.* at 47 & n.4. Chief Judge Reade is the only district judge with chambers in the eastern side of the district who handles criminal felony matters. *Id.* at 47 n.5. The USAO therefore inquired about her schedule, but it did not provide her with the location of the enforcement action or the identity of the intended targets. *Id.* at 47-48.

When it became clear that the enforcement action was going forward, Chief Judge Reade arranged to bring several federal district court judges to the Northern District of Iowa to assist with processing the defendants. Pet. App. 48. More broadly, Chief Judge Reade needed to ensure "that a sufficient number of judges, court-appointed attorneys and interpreters would be available and that the court would be able to function efficiently at an off-site location." *Ibid.* Petitioner's counsel acknowledged during the post-trial proceedings that "no court could move off-site with its personnel, over thirty interpreters from outside the district, defense attorneys and technology without significant advance planning." *Id.* at 49; see *id.* at 9 ("[T]he chief

judge met with ICE and USAO personnel before the surprise action at the plant to discuss the need for judges, interpreters, defense counsel, and detention facilities to handle hundreds of expected arrestees.").

After the raid, the district court's pre-enforcement action planning became public in various articles and letters, some of which criticized the court's involvement. Pet. App. 49. That led a defendant in a related case, Martin De La Rosa-Loera, to move for Chief Judge Reade's recusal pursuant to 28 U.S.C. 455(a), which requires recusal from any proceeding in which a judge's "impartiality might reasonably be questioned." See *United States* v. *De La Rosa-Loera*, No. 2:08-cr-1313 Docket entry No. 30 (N.D. Iowa Aug. 13, 2008); see also Pet. App. 50. Chief Judge Reade denied that motion, explaining that the pre-enforcement action planning was "logistical in nature" and "any and all preparation was conducted pursuant to her role as Chief Judge of the Northern District of Iowa." Pet. App. 50. Petitioner's trial counsel was aware of De La Rosa-Loera's recusal motion and the district court's order denying that motion, but counsel did not move for recusal or ask the court to supply details about the nature of the pre-enforcement action planning. *Id.* at 6, 50.

3. Petitioner was charged with dozens of financial and immigration crimes stemming from the government's enforcement action and subsequent investigation of Agriprocessors. Pet. App. 69-71. The district court granted petitioner's motion for separate trials on the financial and immigration counts. *Id.* at 71. In November 2009, after a four-week trial on the financial counts, petitioner was convicted on 86 of the 91 counts. *Id.* at 71-72. The district court subsequently granted the gov-

ernment's motion to dismiss the immigration counts. *Id.* at 72.

4. In August 2010, petitioner filed a motion for new trial pursuant to Federal Rule of Criminal Procedure 33(b)(1), which authorizes such a motion "grounded on newly discovered evidence * * * filed within 3 years after the verdict or finding of guilty." Petitioner alleged that he had procured "newly discovered evidence" showing that Chief Judge Reade had been required to recuse herself under 28 U.S.C. 455(a). That evidence consisted of ICE memoranda that petitioner had obtained through a request pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. 552, concerning the planning of the enforcement action at the Agriprocessors plant. See Pet. App. 51. According to petitioner, the ICE memoranda showed "operational and strategic" discussions "that went far beyond" logistical cooperation and that were "sufficient for an objective observer to doubt the perception of impartiality prescribed by 28 U.S.C. § 455(a)." 2:08-cr-1324 Doc. No. 942-1, at 3-4 (N.D. Iowa Aug. 5, 2010) (Doc. No.).

In October 2010, the district court denied petitioner's motion for a new trial. Pet. App. 43-68. The court first applied a five-prong test for assessing a Rule 33 motion based on newly discovered evidence. *Id.* at 51-52 (citing *United States* v. *Womack*, 191 F.3d 879, 886 (8th Cir. 1999)). The court assumed without deciding that petitioner had been diligent in attempting to obtain the ICE memoranda, *id.* at 57, but it held that petitioner could not satisfy the remaining four prongs for relief. The court focused on the absence of any actual new evidence, because "despite [petitioner's] best efforts to characterize the ICE [m]emoranda as revealing conduct by the [court] that was purposefully concealed and therefore

deceitful," those memoranda "simply confirm all of the court's prior representations that the [court's] pre-enforcement action involvement was logistical in nature." *Id.* at 56-57. Considering the remaining three factors, the court found that the alleged new evidence was cumulative of information that petitioner knew before trial, was not material to the issues at petitioner's trial on the financial counts, and for that reason would not probably produce an acquittal upon retrial. *Id.* at 58-59.

In the alternative, the district court addressed and rejected petitioner's recusal request on the merits. Pet. App. 61-67. The court held that the request for recusal was untimely because petitioner "knew long before trial that USAO and law enforcement agencies contacted the [court] prior to the enforcement action" and yet petitioner "chose not to file a motion to recuse." *Id.* at 62. In any event, the court held, petitioner's recusal request was "baseless" because "[a]n average person on the street, privy to all the facts of this case, would presume that the Chief Judge of a district court must perform certain duties to ensure that court proceedings are efficient and afford all constitutional guarantees to defendants. That is precisely what the [court] did in relation to the enforcement action." *Id.* at 64. The court explained its involvement in logistical planning and specifically noted that it "did not express personal support for or policy agreement with the enforcement action." *Id.* at 65-66.

5. In preparation for sentencing, the Probation Office issued a Presentence Investigation Report (PSR) concluding that petitioner had an advisory Guidelines range of life imprisonment, subject to the statutory maximum sentence applicable to each count of conviction.

See Doc. No. 930, para. 391 (June 24, 2010). Petitioner filed dozens of objections to the presentence report and he also filed additional sentencing memoranda. In April 2010, the district court held a two-day sentencing hearing, and two months later the court issued a lengthy sentencing memorandum (see Pet. App. 69-135) to explain its rulings in advance of pronouncing sentence.

Petitioner's criminal history category was I. With respect to the fraud and false statement counts, the district court increased petitioner's base offense level of seven by 22 levels for the amount of the loss (which the court found to be almost $27 million) and two more levels for his use of sophisticated means, but the court declined to impose an increase for the number of victims in the case. Pet. App. 91, 94, 102-107. Based on the court's loss calculation, the offense level for the money laundering counts was 31, which the court increased by four levels for a conviction under 18 U.S.C. 1956 and sophisticated laundering. Pet. App. 107-110. For all of the counts, the court then adjusted petitioner's offense level upward a total of six levels for being an organizer or leader and for obstructing justice, but it declined to apply any enhancement for abuse of trust. *Id.* at 115, 120, 123. That resulted in a total offense level of 37 on the fraud counts (for an advisory Guidelines range of 210 to 262 months of imprisonment) and 41 on the money laundering counts (for an advisory range of 324 to 405 months of imprisonment), before the court considered the statutory maximum sentence on each count. *Id.* at 123.

The district court expressly considered but rejected various grounds advanced by the government for an upward departure. Pet. App. 125-127. Likewise, the court rejected petitioner's various arguments in favor of a

downward departure, including his "charitable and civic work," his "mental condition," and "his relationship with his autistic minor son." *Id.* at 127-129. Finally, the court considered but rejected petitioner's numerous arguments for a downward variance from the advisory Guidelines range in accordance with the sentencing factors set forth in 18 U.S.C. 3553(a). Pet. App. 129-133. The court stated that if it were to vary at all, it "would vary upward to take into account additional criminal conduct involving harboring of illegal aliens, which was charged in over seventy counts * * * [that] were later dismissed." *Id.* at 133. Ultimately, however, the district court did not vary from the advisory Guidelines range that it had calculated. Instead, the court imposed a sentence at the bottom of that range of 324 months of imprisonment. *Ibid.*

6. The court of appeals affirmed. Pet. App. 1-40.

a. The court of appeals held that the district court had not abused its discretion in denying petitioner's motion for a new trial under Rule 33. Pet. App. 15. The court of appeals analyzed the denial of petitioner's Rule 33 motion under a four-factor test, omitting the question whether the newly discovered evidence was merely cumulative. *Id.* at 12. With respect to the first factor of timeliness, the court of appeals observed that petitioner "never moved for recusal while his case was pending" but instead "moved months after sentencing." *Id.* at 11. The court thus appeared to hold that the alleged new evidence was not "unknown or unavailable" to petitioner at the time of trial, because petitioner "was aware before trial of the agency coordination with the district court." *Id.* at 12.

With respect to the fourth factor of the probability of an acquittal upon retrial, the court of appeals observed

that "[petitioner] concedes that the evidence he puts forward does not relate to acquittal." Pet. App. 12. Petitioner argued that this factor "does not apply to Rule 33 motions when they are based on a trial's fairness as opposed to potential innocence," *ibid.*, but the court rejected petitioner's reliance on out-of-circuit cases, noting that he could not prevail even under the precedent on which he relied "heavily" (*Holmes* v. *United States*, 284 F.2d 716 (4th Cir. 1960)) because he could not show an effect "upon the integrity of the jury's verdict." Pet. App. 13 (quoting *Holmes*, 284 F.2d at 720). In any event, the court held that "the standard in [its] circuit for a Rule 33 motion * * * *requires* that the newly discovered evidence 'probably will result in an acquittal.'" *Ibid.* (quoting *United States* v. *Baker*, 479 F.3d 574, 577 (8th Cir. 2007)). Because petitioner "concede[d] that his new evidence would not likely affect the jury's verdict on retrial," the court of appeals concluded that "the district court did not err in denying [petitioner's] Rule 33 motion." *Ibid.*

The court of appeals explained, however, that even if it "were to construe [petitioner's] arguments as raising the issue of recusal for the first time on appeal, he still would not prevail." Pet. App. 13. The court noted that petitioner "did not make a timely recusal motion after he learned through court documents filed in the related case of *De La Rosa-Loera* that the district court had attended logistical meetings with federal agencies," but "waited until after his conviction and his sentencing before raising the issue." *Id.* at 14. "After studying the lengthy record," the court found "no evidence of bias or prejudice" against petitioner in the "district court's rulings and statements" and thus no evidence that the dis-

trict court's "decision to remain on the case prejudiced [petitioner's] verdict." *Id.* at 15.

b. The court of appeals also rejected petitioner's argument "that the district court failed to consider all of the sentencing factors under 18 U.S.C. § 3553(a)," finding "no basis in the record for that contention." Pet. App. 38. The court of appeals observed that "[d]istrict courts are not required 'to provide a mechanical recitation of the § 3553(a) factors when determining a sentence.'" *Id.* at 39 (quoting *United States* v. *Walking Eagle*, 553 F.3d 654, 659 (8th Cir. 2009)). Here, according to the court of appeals, "the district court explicitly discussed each possible basis for departure, disproving [petitioner's] contention that it overlooked them." *Ibid.* The court of appeals thus saw "no error in the district court's § 3553(a) analysis." *Ibid.*

ARGUMENT

1. Petitioner contends (Pet. 12-25) that the court of appeals applied the incorrect standard in reviewing the denial of his motion for a new trial pursuant to Federal Rule of Criminal Procedure 33(b)(1). That contention does not warrant this Court's review. Although some lower courts have expanded Rule 33(b)(1) to encompass claims based on allegedly new evidence even when the evidence does not concern the defendant's innocence, that expansion has involved claims that call into question the accuracy or integrity of the verdict. Here, petitioner does not maintain that the trial judge was actually biased—a claim that would bear on the integrity of the verdict. Rather, petitioner maintains only that the trial judge had an appearance of partiality, without demonstrating any link between the judge's failure to recuse herself and any unfairness at trial. Absent such linkage,

a new trial based on newly discovered evidence is unwarranted, and no circuit has held to the contrary.

Nor can petitioner satisfy the other accepted prerequisites for obtaining a new trial. Petitioner cannot point to newly discovered evidence that he pursued with due diligence. The memoranda by ICE agents on which petitioner relies do not reveal anything that petitioner did not know or could not have known by the time of his trial. And, most importantly, petitioner's allegedly new evidence does not show a probability of error, *i.e.*, that the trial judge probably should have recused herself. Those alternative grounds for affirmance make this case an exceptionally poor vehicle for considering whether the court of appeals applied the correct legal standard.

a. Rule 33(a) provides that "[u]pon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). Under Rule 33(b)(1), any motion for a new trial based on "newly discovered evidence" must be filed within three years of the verdict or finding of guilt, whereas Rule 33(b)(2) requires "[a]ny motion for a new trial grounded on any reason other than newly discovered evidence" to be filed within 14 days of the verdict or finding of guilt. It is the former provision that is at issue in this case. Almost nine months after the jury found petitioner guilty on 86 counts of various financial crimes, petitioner moved for a new trial, alleging that he had discovered new evidence showing that the trial judge should have recused herself from his case based not on a claim of actual bias, but instead on a claim of an appearance of bias under 28 U.S.C. 455(a). See Doc. Nos. 736, 942.

The court of appeals upheld the denial of petitioner's motion, applying a four-prong test that considers wheth-

er the evidence was "unknown or unavailable" to petitioner "at the time of trial"; whether petitioner was "duly diligent in attempting to uncover it"; whether the newly discovered evidence was "material"; and whether that evidence "probably will result in an acquittal upon retrial." Pet. App. 12 (quoting *United States* v. *Baker*, 479 F.3d 574, 577 (8th Cir. 2007)). The court of appeals held that petitioner could not satisfy the first and fourth requirements and that, in any event, petitioner had not suffered any prejudice from the trial judge's failure to recuse. *Id*. at 11-15. Petitioner contends that the court of appeals' reliance on the fourth requirement—the probability of an acquittal upon retrial—was in error.

b. The four-prong test employed by the court of appeals originated more than 160 years ago in *Berry* v. *State*, 10 Ga. 511, 527 (1851). See 3 Charles Alan Wright & Sarah N. Welling, *Federal Practice and Procedure* 451-452 (4th ed. 2011) (*Federal Practice*). The test reflects the reluctance of courts to set aside verdicts based on claims that new evidence, not presented to the factfinder, might have led to a different outcome. See *United States* v. *Johnson*, 327 U.S. 106, 110-113 (1946). Every court of appeals applies that test in substance to a Rule 33 motion based on newly discovered evidence going to guilt or innocence, although some courts describe the elements in slightly different terms. *Federal Practice* 451-452.[1]

[1] See *United States* v. *Piazza*, 647 F.3d 559, 565 (5th Cir. 2011); *United States* v. *Robinson*, 627 F.3d 941, 948 (4th Cir. 2010); *United States* v. *Quiles*, 618 F.3d 383, 388-389 (3d Cir. 2010); *United States* v. *Orrego-Martinez*, 575 F.3d 1, 10 (1st Cir. 2009), cert. denied, 130 S. Ct. 3347 (2010); *United States* v. *Kenny*, 505 F.3d 458, 462 (6th Cir. 2007); *United States* v. *Owen*, 500 F.3d 83, 87-88 (2d Cir. 2007), cert. denied, 552 U.S. 1237 (2008); *United States* v. *LaVallee*, 439 F.3d 670, 700 (10th Cir. 2006); *United States* v. *Harrington*, 410 F.3d 598, 601 (9th Cir.

The original scope of relief under Rule 33(b)(1) seems to have been limited to newly discovered evidence that purportedly shows the defendant's innocence. Before Rule 33 was adopted in 1944, the Supreme Court Advisory Committee on Rules of Criminal Procedure proposed to allow a motion based on newly discovered evidence to be made "at any time before or after final judgment." *Federal Practice* 564; Lester B. Orfield, *New Trial in Federal Criminal Cases*, 2 Vill. L. Rev. 293, 294 (1957) (Orfield).[2] The Advisory Committee and its supporters reasoned that a new trial should always be available when a defendant comes forward with new evidence demonstrating his actual innocence. See *id.* at 299-300; *Federal Practice* 564 & n.20; see also *United States* v. *Smith*, 62 F.3d 641, 649 (4th Cir. 1995). The absence of any time limit, however, met with considerable resistance, including from federal and state judges. See Orfield 299-302. This Court inserted a requirement in Rule 33 that a motion based on newly discovered evidence be made within two years of final judgment (which has since been altered to allow three years after the verdict). See *Federal Practice* 565. That two-year time limit served "to cut off claims concerning the question of guilt or innocence at a certain time after trial." *United States* v. *White*, 557 F.2d 1249, 1251 (8th Cir.), cert. de-

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2005), cert. denied, 546 U.S. 1115 (2006); *United States* v. *Lopeztegui*, 230 F.3d 1000, 1002 (7th Cir. 2000); *United States* v. *Bryant*, 117 F.3d 1464, 1469 (D.C. Cir. 1997), cert. denied, 523 U.S. 1071 (1998); *United States* v. *Espinosa-Hernandez*, 918 F.2d 911, 913 n.5 (11th Cir. 1990).

[2] Some members of the Advisory Committee wanted to go even further and allow a new trial motion at any time based not only on newly discovered evidence but also on fraud, duress, or other gross impropriety. See Orfield 296. A majority of the Advisory Committee rejected that proposal because the facts bearing on such claims would ordinarily be known at the time they occurred. See *id.* at 297-298.

nied, 434 U.S. 870 (1977). The entire debate, however, over whether to have any such time limit appears to have been premised on the understanding that Rule 33(b)(1) applies only to claims of newly discovered evidence of a defendant's innocence.

This Court applied that understanding of Rule 33(b)(1) in *United States* v. *Agurs*, 427 U.S. 97 (1976). In *Agurs*, the defendant moved for a new trial, alleging that the prosecution had violated *Brady* v. *Maryland*, 373 U.S. 83 (1963), by withholding evidence that she had acted in self-defense. This Court reasoned that "the defendant should not have to satisfy the severe burden of demonstrating that newly discovered evidence probably would have resulted in acquittal," because "[i]f the standard applied to the usual motion for a new trial based on newly discovered evidence were the same when the evidence was in the State's possession as when it was found in a neutral source, there would be no special significance to the prosecutor's [*Brady*] obligation." *Agurs*, 427 U.S. at 111. The Court therefore required the defendant to show that the suppressed evidence gave rise to a "reasonable doubt" about her guilt, viewed "in the context of the entire record." *Id.* at 112. Although that decision relaxed what a defendant must show when her Rule 33 motion is based on newly discovered evidence of a *Brady* violation, it continued to apply the principle that, in order to justify a new trial, newly discovered evidence must cast doubt on the integrity of the verdict.

Petitioner is correct (Pet. 13-15) that some courts of appeals have permitted claims under Rule 33(b)(1) that do not necessarily concern defendants' guilt or innocence. But that expansion has involved claims that bore directly on the integrity or reliability of the jury's verdict. Of the nine cases that petitioner cites, four in-

volved newly discovered evidence of improper contact with jurors, and two involved evidence of an alleged *Brady* violation and prosecutorial misconduct.[3] Two other cases are most naturally read as involving claims that trial judges were *actually* biased, not simply that they appeared to be biased.[4] In the remaining case, the defendants claimed that the government had committed misconduct in opposing a change of venue based on prejudicial pretrial publicity that had allegedly prevented

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[3] See *United States* v. *Williams*, 613 F.2d 573, 575 (5th Cir.) (trial judge had ex parte communications with a juror about the juror's acquaintance with a defense witness), cert. denied, 449 U.S. 849 (1980); *Holmes* v. *United States*, 284 F.2d 716, 718 (4th Cir. 1960) (marshal informed jurors that one of the defendants was imprisoned on a previous conviction); *Horton* v. *United States*, 256 F.2d 138, 139 (6th Cir. 1958) (jurors were given a handbook on jury service by the court clerk); *Rubenstein* v. *United States*, 227 F.2d 638, 641 (10th Cir. 1955) (government agents improperly questioned jurors), cert. denied, 350 U.S. 993 (1956); see also *United States* v. *McCarthy*, 54 F.3d 51, 55-56 (2d Cir.) (government failed to disclose psychiatric report on defendant's competence and allegedly committed misconduct at trial), cert. denied, 516 U.S. 880 (1995); *United States* v. *Beasley*, 582 F.2d 337, 340-342 (5th Cir. 1978) (per curiam) (government failed to disclose notes of witness interviews in claimed violation of *Brady*).

[4] See *United States* v. *Conforte*, 624 F.2d 869, 878 (9th Cir.) (Kennedy, J.) (defendants contended that the trial judge "had been biased and prejudiced against them at trial"), cert. denied, 449 U.S. 1012 (1980); *id.* at 878-879, 881 (trial judge expressed disapproval of defendant based on his prior convictions and proprietorship of a house of prostitution); see also *United States* v. *Elso*, 364 Fed. Appx. 595, 597 (11th Cir. 2010) (per curiam) (new trial motion was based in part on evidence that "the judge obtained extrajudicial information that maligned [the defendant] and, moreover, concerned disputed evidentiary facts"), cert. denied, 131 S. Ct. 1550 (2011); *id.* at 597-598 (citing statutes concerning both actual bias and appearance of bias without specifying the precise ground for the defendant's recusal request).

the defendants from receiving a fair trial.[5] As far as the government is aware, to the extent that courts have allowed mere appearance-of-bias claims under Rule 33(b)(1), they have done so without any analysis of the Rule's requirements and, critically, they have denied relief.[6] Petitioner does not point to any case holding that a defendant may obtain a new trial under Rule 33(b)(1) by presenting evidence that a trial judge appeared to be—but was not actually—biased, without showing *any* effect on the actual course of the trial.

c. Consistent with that focus on the integrity of the verdict, in the cases on which petitioner relies (Pet. 14-15), courts generally denied relief because defendants could not show prejudice to the jury's deliberations. See, *e.g.*, *United States* v. *Williams*, 613 F.2d 573, 575 (5th Cir.) (denying new trial motion because there was "no substantial possibility of prejudice" from the judge's ex parte communications with a juror), cert. denied, 449 U.S. 849 (1980). When courts granted relief, however, they did so because the defendant had shown such prejudice, see *Holmes* v. *United States*, 284 F.2d 716, 718 (4th Cir. 1960) ("The subject matter of the communication [with the jury] was far from harmless."), or because the defendant should have had the opportunity to show such prejudice, see *Rubenstein* v. *United States*, 227 F.2d 638, 643 (10th Cir. 1955) (remanding for a hear-

[5] See *United States* v. *Campa*, 459 F.3d 1121, 1151-1152 (11th Cir. 2006) (en banc).

[6] See *United States* v. *Cerceda*, 172 F.3d 806, 812, 816 (11th Cir.) (finding, *inter alia*, no risk of injustice to the defendants from failure to recuse), cert. denied, 528 U.S. 985 (1999); *United States* v. *Agnew*, 147 Fed. Appx. 347, 352-353 (4th Cir. 2005) (per curiam) (finding no abuse of discretion in judge's failure to recuse under 28 U.S.C. 455); see also *Elso*, 364 Fed. Appx. at 597-598 (finding that recusal under 28 U.S.C. 144 and 455(a) was not warranted).

ing to determine whether government's misconduct influenced the jurors), cert. denied, 350 U.S. 993 (1956). Petitioner cites no authority that he can obtain a new trial based on newly discovered evidence of an alleged violation of 28 U.S.C. 455(a), absent some showing that the violation called into question the integrity of the verdict.

Nor can petitioner establish that he would be entitled to relief under the law of any other circuit. Although the court of appeals relied on its requirement that the newly discovered evidence demonstrate a probability of acquittal upon retrial, see Pet. App. 13, it also considered and applied the integrity-of-the-verdict test adopted by the Fourth Circuit in *Holmes*, see *ibid.* (quoting *Holmes*, 284 F.2d at 720), and emphasized by petitioner here, see Pet. 14-15. The court squarely concluded that, unlike in *Holmes*, petitioner "has not shown here that the court's pretrial meetings prejudiced the jury's verdict." Pet. App. 13; see *id.* at 15 ("The district court's rulings and statements to the jury reveal no evidence of bias or prejudice toward [petitioner]."). In the absence of *any* prejudice—even prejudice that might fall short of independently justifying a new trial—no circuit would grant petitioner relief.

A rule denying relief absent an effect on the integrity of the verdict is consistent with this Court's decision in *Liljeberg* v. *Health Services Acquisition Corp.*, 486 U.S. 847 (1988). In *Liljeberg*, the Court considered whether a party could obtain relief from a final judgment under Federal Rule of Civil Procedure 60(b)(6) based on subsequent discovery that the trial judge had an appearance of bias. 486 U.S. at 850-851. The Court recognized that although the trial judge should have recused himself under 28 U.S.C. 455(a), the "conclusion that a statutory

violation occurred does not * * * end [the] inquiry." 486 U.S. at 862. "As in other areas of the law," the Court explained, "there is surely room for harmless error committed by busy judges who inadvertently overlook a disqualifying circumstance." *Ibid.* The Court concluded that "in determining whether a judgment should be vacated for a violation of [Section] 455(a), it is appropriate to consider the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process." *Id.* at 864.

This Court has not considered whether the *Liljeberg* factors apply equally in the criminal context. In accord with *Liljeberg*, however, several courts of appeals have held in the criminal context that a violation of Section 455(a) does not necessarily require a new trial. See, *e.g.*, *United States* v. *Amico*, 486 F.3d 764, 777 (2d Cir. 2007); *United States* v. *Cerceda*, 172 F.3d 806, 812 (11th Cir.), cert. denied, 528 U.S. 985 (1999); *United States* v. *Jordan*, 49 F.3d 152, 158 (5th Cir. 1995). After considering the factors set forth in *Liljeberg*, those courts have denied relief when the asserted Section 455(a) violation did not substantially harm the defendant or the judicial process. See *Cerceda*, 172 F.3d at 813-816; *Jordan*, 49 F.3d at 158; see also *Amico*, 486 F.3d at 777 (granting a new trial "because, under the second and third *Liljeberg* factors, the case for reversal is unique and unusually strong"); cf. *In re Bergeron*, 636 F.3d 882, 884 (7th Cir. 2011) ("We could order a do-over of the contempt proceeding were this an egregious case of apparent bias, as the Supreme Court considered *Liljeberg* to be; but the appearance of impropriety in this case is too attenuated to justify that extraordinary remedy.").

Here, petitioner suggests that the *Liljeberg* factors should apply, see Pet. 23 ("[T]he same approach this Court took to Rule 60(b) in *Liljeberg* applies here."), but he does not discuss those factors or attempt to show how the district court's failure to recuse produced any substantial harm to the parties or the judicial process. This is not, as in *Liljeberg*, "an egregious case of apparent bias." *Bergeron*, 636 F.3d at 884. With respect to the first factor in *Liljeberg* (*i.e.*, harm to the parties), petitioner complains that the district court "made many pretrial and trial rulings that prejudiced [his] defense." Pet. 4. The court also made favorable rulings, including reversing a pretrial detention order, moving venue, and severing the financial and immigration counts. See Pet. App. 59. And to the extent petitioner challenged the court's pretrial or trial rulings in his Rule 33 motion, the court of appeals affirmed, see *id.* at 15-35, and he does not challenge those rulings here. Petitioner cannot obtain a new trial on the basis of rulings that, as this case comes to the Court, are presumed legally correct.

With respect to the second factor (*i.e.*, harm in other cases), unlike in *Liljeberg*, petitioner's asserted ground for recusal (*i.e.*, the court's involvement in preenforcement action planning) is not a clear and accepted basis for recusal, such that the failure to recuse calls into question the integrity of the judicial process or the court's diligence. See *Liljeberg*, 486 U.S. at 867-868. District courts "routinely approve search warrants, decide where and when hearings will be held, conduct initial appearances, preside over arraignments and decide whether or not to approve plea agreements." Pet. App. 65 n.10. Petitioner contends that the extent of the court's particular pretrial involvement here was impermissible, but arranging judges, counsel, and interpret-

ers for hundreds of expected criminal defendants was both consistent with the court's past practice and necessary "to ensure that court proceedings [were] efficient and afford[ed] all constitutional guarantees to defendants." *Id.* at 64.

With respect to the third factor (*i.e.*, public confidence in the judicial process), the district court twice carefully explained—both here and in a related case—why its pre-trial actions did not require recusal under Section 455(a). See Pet. App. 50, 63-67. In disputing that explanation, petitioner mischaracterizes the nature of the court's pretrial involvement. See pp. 21-23, *infra*. Viewing the record in context, the district court's decision to preside over petitioner's trial did not call into any serious question the fair and impartial administration of justice. Rather, the court presided in an unbiased way over a trial that resulted in an unchallenged finding of guilt. Accordingly, in this case society's interest in finality outweighs any interest in the public appearance of impartiality. See *United States* v. *Medina*, 118 F.3d 371, 373 (5th Cir. 1997) ("[I]n the context of a new trial motion, finality remains a paramount concern unless the defendant can show that an injustice occurred.").

d. Finally, petitioner cannot satisfy other accepted prerequisites for obtaining a new trial. Those alternative grounds for affirmance make this case an exceptionally poor vehicle for considering whether the court of appeals applied the correct legal standard.

As an initial matter, petitioner does not point to any new evidence that he did not know or could not have known by the time of his trial. Unlike in *Liljeberg*, the basis for recusal—the court's pre-enforcement action planning—was known to petitioner and other related defendants long before trial. See 486 U.S. at 869; Pet.

App. 62. One of those defendants, Martin De La Rosa-Loera, moved for Chief Judge Reade's recusal pursuant to 28 U.S.C. 455(a). See p. 4, *supra*. Petitioner's trial counsel was aware of the motion and its denial, but counsel did not move for recusal. Pet. App. 50; see *id.* at 14 ("[Petitioner] waited until after his conviction and sentencing before raising the issue."). Petitioner contends that he would have moved for recusal if he had known the *extent* of the court's involvement in the planning process. But petitioner never asked the court for details about its involvement. Petitioner's preferred approach—a FOIA request followed by a post-trial recusal motion—squanders judicial resources and encourages strategic behavior by defendants.

More importantly, petitioner's allegedly new evidence does not show a probability of error, *i.e.*, that the trial judge probably should have recused herself. Petitioner is incorrect (Pet. 21-22) that the ICE memoranda show more than logistical planning. For instance, petitioner contends (Pet. 21) that Chief Judge Reade pledged her support for the operation at a meeting in January 2008, roughly four months before the enforcement action. At that meeting, which included the court clerk and representatives of the USAO, ICE, the Probation Office, and the United States Marshals Service (USMS), Chief Judge Reade was "updated on the progress with the Cattle Congress as well as discussions about numbers, potential trials, IT issues for the court, and logistics." Doc. No. 942-5, at 30 (Aug. 5, 2010). Because Chief Judge Reade's courthouse can accommodate only about 15 people, an off-site location was being secured to accommodate the hundreds of expected defendants: the National Cattle Congress Fairgrounds in Waterloo, Iowa.

At the January meeting, ICE agents reported that court personnel "made it clear that they are willing to support the operation in any way possible, to include staffing and scheduling," but Chief Judge Reade asked ICE to "enter into a contract with the Cattle Congress as soon as possible so that she can continue to hold the court's schedule for that time frame." Doc. No. 942-5, at 30. Chief Judge Reade was "very supportive of operating at an offsite location," provided that it was "locked in as soon as possible." *Ibid.* In context, it is clear that Chief Judge Reade was pledging to provide the necessary logistical support for proceedings at the Cattle Congress, not to assist the government in its efforts to prosecute individuals arrested during the enforcement action. See *id.* at 20 ("Judge Reade indicated full support for the initiative, but pointed out that significant planning and preparation will be required to allow the Court to clear docket time, request additional Judges, Court Reporters, Court Certified interpreters, support staff, and facilities to conduct Judicial proceedings.").

Petitioner also contends (Pet. 21) that Chief Judge Reade was briefed on the government's charging strategies and anticipated prosecutions. At a meeting in March 2008, the USAO, Probation Office, USMS, and court staff met to discuss "charging strategies, numbers of anticipated arrests and prosecutions, logistics, the movement of detainees, and other issues." Doc. No. 942-6, at 2. Specifically, Chief Judge Reade requested that "detainees take showers and are wearing clothing that is not contaminated when appearing in court." *Ibid.* Again, in context it is clear that the parties were discussing the *logistics* of charging that many defendants at an off-site facility approximately 60 miles from Chief Judge Reade's courthouse; the parties were

not discussing the government's legal theories or strategy.

In April 2008, one month before the enforcement action, Chief Judge Reade received a briefing to ensure that the hundreds of expected defendants could be adequately housed and processed at the temporary facilities. Doc. No. 942-6, at 5, 8. According to ICE agents, that "final gameplan" was a "gameplan for processing/housing/transportation/manpower." *Id.* at 7-8. Those ICE memoranda contain no hint of anything other than logistical planning and support. Petitioner states that the agents "had specifically identified Mr. Rubashkin as a potential target for criminal charges," Pet. 21, but they had not identified him as a target *to Chief Judge Reade*. As she explained in denying petitioner's recusal motion, she was "never informed * * * who the targets of the prosecutions would be or even where the worksite enforcement action was to take place." Pet. App. 48.

In the end, the memoranda at issue show nothing more than what petitioner knew long before his trial: Chief Judge Reade was involved in logistical planning for an extremely large enforcement action. As petitioner's counsel acknowledged during post-trial proceedings, "no court could move off-site with its personnel, over thirty interpreters from outside the district, defense attorneys and technology without significant advance planning." Pet. App. 49. That advance planning does not call into reasonable question Chief Judge Reade's impartiality, and petitioner's arguments to the contrary mischaracterize her pretrial role. A case in which the allegedly newly discovered evidence was reasonably available to petitioner (had he asked the judge to elaborate on her logistical role) and establishes no valid basis for recusal is not an appropriate vehicle

for addressing the legal standard that applies to appearance-of-bias claims brought under Rule 33(b)(1).

2. Petitioner incorrectly claims (Pet. 25-37) that his sentence is procedurally unreasonable because, in imposing that sentence, the district court failed to explicitly address one of his many arguments for a below-Guidelines sentence. This Court has declined to review similar claims recently, see, *e.g.*, *LaFarga* v. *United States*, 131 S. Ct. 1784 (2011) (No. 10-7712); *Martinez-Mendoza* v. *United States*, 131 S. Ct. 1043 (2011) (No. 10-6695), and the same result is warranted here.

a. After the Probation Office prepared a PSR and the government filed its sentencing memorandum, petitioner filed an amended 52-page sentencing memorandum (with 13 pages of exhibits) and an amended 25-page motion for a downward departure or variance (with 32 pages of exhibits). See Doc. No. 895 (Apr. 21, 2010); Doc. No. 896 (Apr. 21, 2010). In those filings, petitioner raised a host of objections to the PSR's calculation of the Guidelines range and also requested a below-Guidelines sentence. In response to petitioner's submissions, the district court conducted a two-day sentencing hearing. See Doc. No. 910 (Apr. 28, 2010). Following that two-day hearing, the court issued a 52-page sentencing memorandum that addressed at length virtually all of petitioner's arguments. See Pet. App. 69-135. The court calculated an advisory Guidelines range of 324 to 405 months of imprisonment, which was below the range recommended by the PSR. The court then sentenced petitioner at the bottom end of that range to 324 months of imprisonment. *Id.* at 133.

Petitioner focuses here (Pet. 25) on one argument he advanced at sentencing that the district court failed explicitly to address: his argument that the court should

avoid unwarranted sentencing disparities with similarly situated defendants under 18 U.S.C. 3553(a)(6). Although petitioner terms that the argument "that mattered most," Pet. 35, he addressed it in three pages toward the end of his fifty-plus-page sentencing memorandum and not at all in his motion for a downward departure or variance. See Doc. No. 895, at 52-54. In his sentencing memorandum, he pointed out that two co-defendants in the case were exposed to lower sentences, although he acknowledged that "these defendants cooperated with the government, and [petitioner] did not." *Id.* at 52. Petitioner did not address the differences between his conduct and role in the offenses vis-à-vis the conduct and involvement of the co-defendants.

Petitioner also listed in his sentencing memorandum (as he does here in his petition, see Pet. 33) a number of white-collar defendants who had received comparable or lesser terms of imprisonment. See Doc. No. 895, at 53-54. Other than reciting the losses caused by those defendants' crimes, however, petitioner did not attempt to show that they were similarly situated. For instance, petitioner did not attempt to show that other defendants were similarly situated because they had failed to accept responsibility for their crimes; they had gone to trial and been found by the trial court to have willfully obstructed justice by "[lying] at trial under oath," Pet. App. 122; they had been convicted on more than 80 counts of money laundering, fraud, and false statements involving sophisticated, deceptive conduct; or they did not have other case-specific reasons for the particular sentences that they received. Petitioner simply selected a handful of well-known defendants (like Bernard Ebbers or Joseph Nacchio) and asserted that his sentence should be comparable to or lower than theirs.

b. The district court did not commit reversible error in failing to address petitioner's disparity argument, which he barely developed below. Indeed, although the district court issued its sentencing memorandum on June 21, 2010—the day before it imposed sentence—petitioner never brought his current objection to the court's attention, which would have allowed the court to address why petitioner's sentence was appropriate under 18 U.S.C. 3553(a)(6).

In any event, this Court's decision in *Rita* v. *United States*, 551 U.S. 338 (2007), makes clear that the district court did not commit any error. In *Rita*, this Court considered the extent to which a sentencing court must state its reasons for imposing a particular sentence. According to the Court, "[t]he appropriateness of brevity or length, conciseness or detail, when to write, what to say, depends upon circumstances." *Id.* at 356. The Court recognized that "a full opinion" is not necessary "in every case." *Ibid.* "Sometimes a judicial opinion responds to every argument," the Court explained, and "sometimes it does not" but rather "rel[ies] upon context and the parties' prior arguments to make the reasons clear." *Ibid.* The Court noted that "[t]he law leaves much, in this respect, to the judge's own professional judgment." *Ibid.* What matters is that the sentencing judge "set forth enough to satisfy the appellate court that he has considered the parties' arguments and has a reasoned basis for exercising his own legal decision-making authority." *Ibid.*

Applying that standard here, the record makes evident that the district court considered petitioner's arguments and had a reasoned basis for its sentence. Petitioner offered dozens of reasons why the Probation Office had miscalculated his advisory Guidelines range and

why he should receive a below-Guidelines sentence. In its sentencing memorandum, after calculating a lower Guidelines range than the Probation Office had recommended (and a range that petitioner does not dispute here), the court specifically addressed petitioner's two grounds for a downward departure and five more grounds for a downward variance. See Pet. App. 127-133. Ultimately the court was not persuaded that a downward variance was appropriate, and indeed the court stated that "[w]ere [it] to vary, the court would vary upward to take into account additional criminal conduct involving harboring of illegal aliens, which was charged in over seventy counts of the Seventh Superseding Indictment [that] were later dismissed." *Id.* at 133.

The district court then stated that "[i]n arriving at a sentence," it had "carefully considered all of the statutory factors set forth in 18 U.S.C. § 3553(a)." Pet. App. 133; see *id.* at 127. "Having done so," the court explained, it had found "that a sentence within the computed advisory Guidelines range is firmly rooted in credible evidence produced at trial and at sentencing." *Id.* at 133. The court notified the parties that at sentencing it would impose "a sentence of 324 months of imprisonment," which in the court's view was "sufficient, but not greater than necessary, to comply with the purposes of 18 U.S.C. § 3553(a)." *Ibid.* (emphasis omitted). The court noted that "even if it inadvertently erred in computing the advisory Guidelines sentence, it would still impose a sentence of 324 months of imprisonment after considering the factors in [Section] 3553(a)." *Id.* at 133 n.18.

The district court thus stated several times that it had considered the sentencing factors in Section 3553(a). See, *e.g.*, *United States* v. *Diaz-Pellegaud*, 666 F.3d 492,

504 (8th Cir. 2012) (affirming sentence where, although the district court "did not mechanically list each" of the Section 3553(a) factors, it "stated that it had considered [them]" after hearing extensive argument from counsel), petitions for cert. pending, No. 11-10972 (filed June 1, 2012); No. 11-10908 (filed June 14, 2012); *United States* v. *Johnson*, 445 F.3d 339, 345 (4th Cir. 2006) ("To establish the reasonableness of a sentence, a district court need not explicitly discuss every § 3553(a) factor on the record. This is particularly the case when the district court imposes a sentence within the applicable Guidelines range.") (internal citations and quotation marks omitted). The court did not specifically address petitioner's argument about sentencing disparities under Section 3553(a)(6), but petitioner had not developed that argument in a meaningful way. See pp. 25-26, *supra*. For instance, petitioner had not attempted to show that those defendants had "similar records" and had been found guilty of "similar conduct." 18 U.S.C. 3553(a)(6).

In any event, Section 3553(a) requires that courts consider "the need to avoid *unwarranted* sentence disparities." 18 U.S.C. 3553(a)(6) (emphasis added). The district court's comments in its sentencing memorandum make clear that any asserted disparity with other defendants was not "unwarranted" because of the extent of petitioner's criminal conduct and the fact that he had perjured himself at trial. See, *e.g.*, Pet. App. 127 ("The court agrees that Defendant's obstructive conduct in the instant action was more excessive than that involved in a typical financial crime case and that it likely falls out of the heartland of similar cases."). As in *Rita*, the district court "listened to each argument" and "considered the supporting evidence." 551 U.S. at 358. The court simply found petitioner's cursory argument "insufficient

to warrant a sentence lower than the Guidelines range." *Ibid.*

c. Petitioner contends (Pet. 27-30) that this Court should resolve a split among the circuits over whether reasonableness review requires a sentencing court to expressly address all of a defendant's nonfrivolous arguments for a below-Guidelines sentence. As an initial matter, petitioner is incorrect that *Rita* requires such an approach. In *Rita*, this Court noted that "[w]here the defendant or prosecutor presents nonfrivolous reasons for imposing a different sentence, * * * the judge will *normally* go further and explain why he has rejected those arguments." 551 U.S. at 357 (emphasis added). The extent of that explanation, however, will vary depending on the circumstances of each case. As the Court explained, "[s]ometimes a judicial opinion responds to every argument; sometimes it does not; sometimes a judge simply writes the word 'granted' or 'denied' on the face of a motion while relying upon context and the parties' prior arguments to make the reasons clear." *Id.* at 356. This Court in *Rita* thus specifically declined to require that a sentencing court expressly address all of a defendant's nonfrivolous arguments for a below-Guidelines sentence, because, as in this case, context may make clear why the court has declined to adopt those arguments.

Consistent with *Rita*, petitioner acknowledges (Pet. 28-29) that seven courts of appeals—the First, Second, Fourth, Fifth, Eighth, Ninth, and Eleventh Circuits—do not require a sentencing court to expressly address every one of a defendant's nonfrivolous arguments for a below-Guidelines sentence. Petitioner claims (Pet. 27-28), however, that three courts of appeals—the Third, Sixth, and Seventh Circuits—have

adopted the opposite approach. To the contrary, those courts have found in particular cases, on the basis of the facts before them, that additional explanation was necessary, because the context or circumstances did not otherwise indicate why defendants' arguments had been rejected. Those cases are simply inapposite here, because, as explained above, the record shows that the district court considered petitioner's arguments for a below-Guidelines sentence but believed that a within-Guidelines sentence was "sufficient, but not greater than necessary, to comply with the purposes of 18 U.S.C. § 3553(a)." Pet. App. 133.

For instance, in *United States* v. *Gapinski*, 561 F.3d 467 (6th Cir. 2009), the defendant was resentenced and argued for a lower sentence based upon his substantial assistance to the government since his initial sentencing. *Id.* at 474-475. After quoting the relevant exchange between the government and the district court at the resentencing hearing, the Sixth Circuit explained that it was not clear from that exchange whether the district court had understood that the defendant sought a variance "based upon his further cooperation after the original sentencing." *Id.* at 476. The Sixth Circuit concluded that "the context and the record in th[e] case" did not indicate that the district court had considered the defendant's substantial-assistance argument. *Id.* at 477. The Sixth Circuit in *Gapinski* did not announce a categorical rule that a district court must expressly address each of a defendant's nonfrivolous arguments for a below-Guidelines sentence.

The other cases that petitioner cites (Pet. 28) also involved facts far different from those of the present case. In *United States* v. *Ausburn*, 502 F.3d 313 (3d Cir. 2007), cert. denied, 555 U.S. 828 (2008), the district court

"imposed a sentence more than twice as high as that called for by the [G]uidelines," but gave "no indication" why the case was atypical and fell outside the heartland of similar cases. *Id.* at 331 (citing *Rita*, 551 U.S. at 344). And in *United States* v. *Miranda*, 505 F.3d 785 (7th Cir. 2007), after recognizing that "[a] judge need not comment on every argument the defendant raises," the Seventh Circuit remanded for resentencing because the district court had not addressed the defendant's "principal argument" that he should receive a lower sentence because he was mentally ill, even though the defendant had a "well-documented mental health history." *Id.* at 792. Unlike in *Miranda*, here the district court plainly addressed petitioner's principal arguments; "focus[ed] on the [S]ection 3553(a) factors as they appl[ied] to [the defendant] in particular," *id.* at 796; and concluded that, even if the Guidelines range were different, it would have imposed the same sentence after considering the Section 3553(a) factors. See Pet. App. 133 n.18. For that same reason, any error in petitioner's sentence was harmless, because it is apparent from the record that "the district court would have imposed the same sentence absent the error." *United States* v. *Idriss*, 436 F.3d 946, 951 (8th Cir. 2006).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Acting Solicitor General
LANNY A. BREUER
Assistant Attorney General
DANIEL S. GOODMAN
Attorney

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