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

UNITED STATES OF AMERICA,	)	
	)	
Petitioner,	)	
	)	**Case No. 13-CV-1028-LRR**
v.	)	
	)	
SHOLOM RUBASHKIN,	)	
	)	
Respondent.	)	

MOVANT SHOLOM RUBASHKIN'S MEMORANDUM IN SUPPORT OF MOTION TO VACATE, SET ASIDE OR CORRECT THE JUDGMENT AND SENTENCE PURSUANT TO 28 U.S.C. § 2255

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Movant, Sholom Rubashkin, files this Memorandum in Support of his Motion to Vacate, Set Aside or Correct the Judgment and Sentence Pursuant to 28 U.S.C. § 2255.

Following trial, Mr. Rubashkin discovered, and presents in attached affidavits that during his trial, the government repeatedly concealed from him, and presented affirmatively misleading testimony on the government's direct, forceful interference in the bankruptcy sale of Agriprocessors, which caused a diminution in value of the sale and a corresponding increase in the length of Mr. Rubashkin's sentence. Further, the government withheld its contacts with Judge Reade where it attempted, *ex parte*, to influence Judge Reade by conveying substantive information about the government's charging strategies and ongoing undercover investigation. Finally, the government appears to have withheld exculpatory evidence provided by testifying witnesses.

The government's concealment and active misrepresentations violated Mr. Rubashkin's rights under the Fifth and Sixth Amendments to the United States Constitution. Among other violations, the government engaged in several *Brady* violations by failing to turn over potentially exculpatory information to Mr. Rubashkin's trial counsel. Rubashkin has raised sufficient evidence of material constitutional violations to warrant discovery and a full hearing on his Motion. Further the evidence already uncovered, when proven true at hearing, warrants vacating Mr. Rubashkin's conviction and sentence.

Mr. Rubashkin plans to file a separate motion with supportive brief for a hearing and Rule 6 discovery.

I. STATEMENT OF THE CASE

United States Supreme Court Justice George Sutherland wrote, in 1935, that the interest of the United States Attorney in a criminal prosecution "is not that [he] shall win a case, but that justice shall be done," and therefore, "while [a United States Attorney] may strike hard blows, he is not at liberty to strike foul ones." *United States v. Berger*, 295 U.S. 78, 88, 55 S.Ct. 629, 633 (1935). Justice Sutherland explained that it is as much a United States Attorney's "duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Id*. Here, the government's improper methods related to three subjects.

First, recently discovered evidence reveals that the United States Attorney's Office for the Northern District of Iowa ("USAO") failed to disclose, among other things, material, exculpatory evidence concerning its representatives' actions to influence the Agriprocessors trustee in bankruptcy and its lender, as well as prospective buyers of Agriprocessors' assets. The USAO's direct, forceful intervention quashed interest of prospective buyers, thereby increasing the loss attributable to Mr. Rubashkin's convictions by potentially many millions of dollars. This evidence should have been fully disclosed to Mr. Rubashkin and his counsel.

Not only did the USAO conceal this evidence from Mr. Rubashkin, it affirmatively presented materially inaccurate testimony from at least two witnesses on the subject at Mr. Rubashkin's sentencing. The witnesses' testimony downplayed or explicitly denied the USAO's acts of undue influence on the trustee and prospective buyers. This misleading testimony influenced the Court's findings concerning the

magnitude of the loss attributable to Mr. Rubashkin's convictions. Cumulatively, the omissions from and/or gaps in the record violated Mr. Rubashkin's right to due process of law under the Fifth Amendment.

The USAO's concealment and affirmative misconduct has placed Mr. Rubashkin in the difficult position in proving the magnitude of the increase in loss caused by the government's conduct. Mr. Rubashkin is forced to prove a hypothetical: What would the sales price have been absent the USAO's misconduct? How would that have reduced his guidelines requirements? Discovery will allow Mr. Rubashkin to obtain relevant information that would allow this calculation to be made to a level of certainty sufficient to meet guidelines requirements. For present purposes, we attach an expert economist report opining that absent the government interference in the bankruptcy sale, Agriprocessors' reasonably expected liquidation value would potentially have been as much as 26 million dollars higher. Thus the relevant evidence may show the "reasonably foreseeable pecuniary harm" from Mr. Rubashkin's offenses as significantly lower than the amount used for sentencing. Accordingly, Mr. Rubashkin should be granted leave to conduct discovery on this issue and a hearing, and ultimately, his sentence should be vacated and a new sentencing hearing granted.

Second, the USAO violated Mr. Rubashkin's right to due process of law under the Fifth Amendment when it failed to disclose material, favorable facts concerning *ex parte* contacts with the trial judge that occurred before indictment and that related to the government's charging strategies and the results of its ongoing undercover investigations at the Agriprocessors plant. Mr. Rubashkin's new knowledge regarding the contacts

comes from information received as a result of FOIA requests for government investigative materials. The government's concealment of this evidence caused Mr. Rubashkin's trial counsel to fail to make a timely motion for recusal of the trial judge. Mr. Rubashkin should be granted leave to conduct discovery regarding the government's misconduct, and should be granted a hearing at which he will demonstrate that he is entitled to have his convictions and sentence vacated.

Third, the government appears to have withheld exculpatory evidence provided by testifying witnesses.

II. STATEMENT OF FACTS

B. Agriprocessors, Inc.

Agriprocessors, Inc., a kosher slaughtering and meat-production company, with facilities in Pottsville, Iowa was founded and wholly owned by Aaron Rubashkin, a Russian immigrant and the father of Movant, Sholom Rubashkin. [Dkt. No. 898 ("Trial Tr."), at 22:93-97, 26:26]. By 2008 it employed approximately 1000 workers in numerous departments. Agriprocessors also operated facilities in Florida, New York, and Nebraska. [Trial Tr. 26:30].

Sholom Rubashkin, one of Aaron's nine children, began his career by helping at his parents' businesses, but soon left to be a teacher with a Jewish outreach organization. [Trial Tr. 26:7-8]. Eventually, however, his father wanted him to return to help the family business. [Trial Tr. 26:8-10]. He did so and participated in management with other members of the Rubashkin family members (including brother Heshy, brother

Joseph, sister Gittel, brother-in-law Yossi, and Sholom himself), and a few other employees. [Trial Tr. 21:121-122; 22:218, 22:93; 26:17].

In 1999, to meet the cash flow needs inherent in the meat-packing industry, Agriprocessors obtained a revolving line of credit from First Bank Business Capital, Inc. ("FBBC"), a subsidiary of St. Louis-based First Bank. [Trial Tr. 6:5-8; 7:5-8].

Agriprocessors paid interest on the draws it had made on the loan on a regular basis. Until the federal government raided its facility (as described in further detail below), the company never missed an interest payment. [Trial Tr. 6:53].

C. Agriprocessors is Raided in May, 2008.

On May 12, 2008, the Immigration and Customs Enforcement Agency ("ICE") launched a raid on Agriprocessors' Postville facility. [Trial Tr. 26:39]. ICE agents arrested 389 allegedly undocumented workers, mostly of Hispanic origin. [Trial Tr. 19:10-11].

D. USAO's *Ex Parte* Contacts with Trial Judge.

In October, 2007, the USAO coordinated with ICE and various other law enforcement agencies concerning an investigation of Agriprocessors, Inc. It was the USAO's intention "to prosecute each criminal offender in addition to the target company Agriprocessors if possible." (Ex. 1, p. 2).

Beginning on October 10, 2007 and continuing through March 17, 2008, the USAO met with Judge Reade a number of times to discuss matters such as the number of prosecutions, scheduling, IT issues, and staffing. Based, however, on ICE materials

obtained from a series of FOIA requests (described below), Mr. Rubashkin has learned that the government wrongly tainted the process by communicating with the trial judge on its "ongoing investigation" of Agriprocessors and the USAO's "charging strategies," and "other issues related to the CVJ investigation and operation." (Ex. 2 at ¶ 14; Ex. 3 at ¶¶ 14-21) Further, the notes indicate that the trial judge told the USAO that she would "support" the raid on the plant. (Ex. 2, ¶ 12) (Relevant ICE notes attached as Ex. 3A).

The notes do not discuss the extent of Judge Reade's involvement; what was discussed regarding the ongoing investigation; what was discussed regarding charging strategies; the meaning of the judge's "support" of the raid on the plant; or the nature and extent of "other issues related to CVJ investigation and operation." To an objective observer, though, they raise the inference that, in the government's view, it was involved in frequent, substantive discussions with the trial judge regarding the investigation, the charging strategies, and the manner for handling the expected prosecutions. (Ex. 3, ¶¶ 1-15

E. Trial Counsel Considers Recusal Motion, But Declines to File Based on Incomplete Information.

In August, 2008, F. Montgomery Brown was retained to represent Sholom Rubashkin in relation to anticipated state and federal charges relating to the raid at Agriprocessors. (Affidavit of F. Montgomery Brown, Ex. 2, ¶ 1). Later, after Mr. Rubashkin was indicted, Guy Cook entered his appearance to represent Mr. Rubashkin as co-counsel with Mr. Brown. (Affidavit of Attorney Guy R. Cook, Ex. 3, ¶3). On December 10, 2008, in connection with initial pretrial proceedings, Judge Reade ordered

that any motions for recusal must be filed on or before January 30, 2009, (Scheduling Order, Ex. 4, ¶3), and specifically asked Mr. Cook on the record whether a recusal motion was going to be filed. (Ex. 2, ¶7).

Both Mr. Cook and Mr. Brown (collectively, "trial counsel") were aware that Judge Reade had recently issued an order concerning a recusal motion made in *United States v. De La Rosa-Loera*, N.D. Iowa No. 08-CR-1313-LRR, a separate-but-related prosecution of an Agriprocessors supervisor. (Ex. 3, ¶ 7; Ex. 2, ¶ 6). They knew that Judge Reade's order had been critical of the defendant's argument for recusal, stating that the defendant in that case didn't understand the "true facts" surrounding her pre-raid contacts with the government, which had been merely "logistical." (Ex. 3, ¶¶ 8, 9). The Order provided "Put simply, one should not believe everything that is written in newspapers, press releases, letters or accept as true the misinformed speculation of those who lack personal knowledge of all the facts." (Ex. 3, ¶ 9).

Based on Judge Reade's opinion and admonition, trial counsel believed that the trial judge had not participated in repeated meetings with government, and had not been privy to discussions regarding prosecutorial functions, including charging strategies against any Postville defendants or substantive facts regarding the ongoing investigation. (Ex. 3 at ¶¶ 8-14; Ex. 2 at ¶¶ 9-15). Accordingly, trial counsel made the difficult decision not to file a motion for recusal of Judge Reade. (Ex. 3 at ¶ 11; Ex. 2 at ¶ 8).

At no time did any member of the USAO provide trial counsel with any additional factual detail regarding the government's *ex parte* contacts with the trial judge. Had trial counsel been fully informed of the extent and nature of the prosecution team's *ex parte*

contacts with Judge Reade in the months leading up to the May, 2008 raid on Agriprocessors, they would have moved for Judge Reade's recusal from the case in a timely fashion. (Ex. 3 at ¶14; Ex. 2 at ¶15).

F. Agriprocessors Files for Bankruptcy and Sholom Rubashkin is Indicted.

On November 4, 2008, Agriprocessors filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code, seeking reorganization after several difficult months following the immigration raid. (Case No. 08-02751, U.S. Bankruptcy Court, E.D.N.Y.). Shortly thereafter, on November 13, 2008, Sholom Rubashkin was charged with immigration offenses in a three-count indictment in the Northern District of Iowa.

G. Trustee Sarachek Attempts To Reorganize Business For Benefit of Creditors.

On November 20, 2008, Joseph E. Sarachek was appointed the Trustee of Agriprocessors' Chapter 11 reorganization. (Status Report, p. 1, attached hereto as Ex. 5). As the Trustee of the estate, Sarachek "intend[ed] to maximize the value of the estate so as to afford its creditors the greatest possible recovery. [He] believe[d] that such value can only be achieved through an open, fair and transparent 363 sale process before this Court." (*Id*. at p. 6).

At the time of Mr. Sarachek's appointment as Trustee, Agriprocessors had ceased operations. (Motion for Orders, p. 5, attached hereto as Ex. 6). But, in keeping with his intention to reorganize the company and have it emerge from bankruptcy as a going concern, Mr. Sarachek moved the bankruptcy court for an order approving a $2.5 million emergency credit facility through First Bank. Mr. Sarachek believed that the facility was

"needed to fund the administration of the [bankruptcy] case and to ensure continued operation of the business, subject to the terms of a budget." (*Id*.) The Court granted Mr. Sarachek's motion on December 1, 2008. (Ex. 5). Upon obtaining the emergency funding, Mr. Sarachek recommenced Agriprocessors' operations on a limited basis, continuing to process the company's inventory of 750,000 chickens. To do so, Mr. Sarachek rehired 300 of Agriprocessors' workforce. (Ex. 6).

On December 5, 2008, Mr. Sarachek and counsel advising the Trustee attended a court hearing in the Agriprocessors/Rubashkin criminal case, "to monitor the proceedings and to protect the estate's interest with respect to any fines and/or penalties that could eventually be imposed in connection with that proceeding." (Ex. 5).

H. Representatives of the USAO Warn Trustee of Intent to Forfeit Agriprocessors' Assets – Government Files Superseding Indictment Seeking Forfeiture.

During the first few weeks he served as Trustee, Mr. Sarachek met with representatives of the USAO several times, "to discuss the indictment and its effect on the bankruptcy proceeding, including but not limited to, a sale under section 363 of the bankruptcy code." *Id*. At these meetings, representatives of the USAO informed Mr. Sarachek that Agriprocessors is a "sham business," that it has "no value," and that anything of value in the company would likely be forfeited to the government as a result of the criminal case involving Agriprocessors and Mr. Rubashkin. The representatives of the USAO told Mr. Sarachek "not to get the plant restarted or sold." (Affidavit of Brian Dror, Ex. 7; Affidavit of Menachem Genack, Ex. 8, ¶ 2).

Despite the government's warnings and threats, Mr. Sarachek proceeded with his plan to continue Agriprocessors' operations, reorganize the business, and maximize the value of the assets for the creditors' benefit.

The very next day, December 11, 2008, the USAO filed a superseding indictment, seeking forfeiture of Agriprocessors' assets. (Ex. 5).

I. "The Chilling Effect" – Trustee Begins Negotiations With Potential Bidders – Government Lowers Business Value By Warning Bidders of Forfeiture If Rubashkins Are Involved In Company.

On January 16, 2009, Mr. Sarachek had a conference with his Trustee's counsel concerning, in Mr. Sarachek's words, the "chilling effect [the] AUSA is having on [the] sale process." (Ex. 9, Ex. B., p. 43 of 86, slip no. 1062). Mr. Sarachek had been engaged in talks with several potential bidders, and during that time, representatives of the USAO were communicating directly with the potential bidders, and making known their intention to go forward with forfeiture of Agriprocessors' assets if any of the bidders associated in any way with members of the Rubashkin family. All bidders were required to attest:

> An entity submitting an alternative bid shall complete a disclosure statement, which shall be sworn to under the penalty of perjury under pursuant to 28 U.S.C. §1746 setting forth any and all connections or affiliations of the proposed bidder, whether direct or indirect, express, implied, contingent or unmatured, with any creditors or other parties-in-interest in the case, including, without limitation, connections or affiliations with the Related Parties, including intention to employ or enter into consulting agreements with such parties post sale. The disclosure statement shall also (a) indicate whether and to what extent any Related Party will have an interest, directly or indirectly, in the Assets and/or the acquiror of the

> Assets following the consummation of any proposed sale transaction with the Trustee; ….

In re Agriprocessors, Bankruptcy No. 08-2751 (N.D. Iowa), Doc. 329-2, Ex. A, Bid Procedures, (c)(ix)). The term "Related Parties" refers to anyone with "connections or affiliations with [Agriprocessor's] principals or members of [its] management." *Id.,* doc. 329, ¶ 17).

As early as December, 2008, Mr. Sarachek had been contacted by "no fewer than 12 parties that [had] expressed an interest [in] undertaking due diligence in connection with a potential proposal to acquire all or a portion of the debtor's assets," and that "one of the issues of concern to potential buyers is the interplay of the potential forfeiture remedy and the 363 sale process." (Ex. 5; Ex. 6, Status Report, ¶ 20).

One such bidder was Meyer Eichler, Vice Chairman of Liberty Pointe Bank, who traveled to Postville and met with representatives of FBBC as well as representatives of the USAO. (Affirmation of Meyer Eichler, Ex. 10, ¶¶ 2, 3). As part of his due diligence, Mr. Eichler met with Assistant United States Attorney Richard Murphy, who warned Eichler that if the government were to discover that any member of Rubashkin family had an equity interest or management role in the company going forward, the DOJ would pursue the matter and that Mr. Eichler's investment group "would be subject to prosecution." (*Id.*, ¶ 4). Mr. Eichler attests to the consequences of this threat – it stopped his group from bidding on the company:

> Ultimately, however, the exclusion of Rubashkin family members pronounced by the US Attorney's Office prevented the group of investors from making a formal offer for the company. While the parties that we were in discussion with had the financial wherewithal

> to consummate a deal that we believed would be acceptable to the bank and the trustee. *** By forbidding all members of the Rubashkin family from having any type of management role in the company, the US Attorney's Office made it virtually impossible for us to put together a management team with the experience and knowledge necessary (a) to satisfy our investors and (b) to successfully operate such a business.

(*Id.*, ¶¶ 7, 8)

Like Mr. Eichler, Frederick Goldfein and Philip Wachs contemplated making an offer to purchase Agriprocessors. (Goldfein Affidavit, Ex. 11). Mr. Goldfein and Mr. Wachs had considerable financial resources and connections in the Jewish community which made them appropriate purchasers in the kosher meat industry. (*Id.* ¶ 2*)* When Mr. Sarachek informed them that the USAO would not permit any member of the Rubashkin family to be involved in management on threat of forfeiture of assets, Mr. Goldfein's and Mr. Wachs's interest in purchasing the assets of Agriprocessors waned. (*Id*., ¶¶ 5-8).

J. The Government Forbids Trustee From Using Discounted Services of Rubashkin Related Entities.

Due to further government encroachments on his autonomy as Trustee, Mr. Sarachek experienced great difficulties operating Agriprocessors within the limits of the post-petition financing made available to the company. (Ex. 7) Significant losses stemmed from the USAO's decree that Agriprocessors not do business with Cottonballs – a company in which Sholom Rubashkin had a financial interest and partial ownership. Agriprocessors had a contract to pay Cottonballs a reasonable fee to raise chickens that was lower than alternative sources, and because Cottonballs operated 12 chicken houses close to Postville, the transportation cost of the chickens was low. Each house could

raise approximately 50,000 chickens every 7 weeks. (Chaim Abrahams Affidavit, Ex. 12, ¶ 3).

But, because of the Government's insistence that Agriprocessors have nothing to do with Cottonballs (on threat of forfeiture), Mr. Sarachek was forced to process chickens shipped from western Iowa and Minnesota. By not using Cottonballs' facilities, Agriprocessors incurred far greater transportation and production costs, and lower yields of chicken product. An experienced manager at Agriprocessors estimates that, had Mr. Sarachek been able to use Cottonballs, the savings in yield, operational costs and transportation costs would have totaled $300,000 to $350,000. (*Id.* at ¶6).

Moreover, the USAO told Mr. Sarachek that Agriprocessors could not do business with Best Trucking – another business with ties to the Rubashkin family – unless no other trucks were available. (Ex. 7). This was a major financial burden to Agriprocessors, as Best Trucking, which was a local company, provided very competitive prices.

At trial, Ms. Roby testified that she decided not to do business with Cottonballs because it "was not the best place for us to be growing chickens," and that the trustee's decision had nothing to do with a directive from the USAO. [Tr. Trans. 497:8-21] Mr. Rubashkin's counsel, however, has attached two affidavits directly contradicting her testimony, attesting that that the USAO told Mr. Sarachek that Agriprocessors could not do business with Cottonballs, (Ex. 7, ¶5; Ex. 12, ¶4). (Her explanation also is questionable on its face as she fails to address why Cottonballs was not the best place to buy chickens given the $300-350,000 increase in costs to buy elsewhere.) (Ex. 12 at ¶6).

The government's threats of forfeiture, demands that no buyer involve any member of the Rubashkin family in the business going forward, and operational intrusions into the Trustee's autonomy compromised Mr. Sarachek's ability to obtain fair value for Agriprocessors' creditors in the bankruptcy. (*Id*).

K. Trustee Receives $40,000,000 Offer – Moves Bankruptcy Court for Auction Sale.

In keeping with his intention to "maximize the value of the estate so as to afford its creditors the greatest possible recovery, Sarachek moved, on January 25, 2009, for the bankruptcy court to approve an auction sale of substantially all the assets of Agriprocessors, subject to higher and better offers. (Ex. 6). Attached to that motion was a proposed "term sheet" containing an offer of $40 million for the sale of Agriprocessors to Soglowek Nahariya LTD. The Bankruptcy Court granted the motion, and the auction was scheduled for March 23 and 24, 2009. (Order, Ex. 13).

L. Soglowek Meets with USAO on February 6, 2009 – Is Warned of "No Rubashkin Edict."

On February 6, 2009, Mr. Soglowek traveled to Cedar Rapids with Mr. Sarachek to meet with USAO representatives. (Ex. 9, Ex. B., p. 45 of 86). Mr. Soglowek wished to address his concerns about the fact that the USAO was asserting a right of forfeiture of Agriprocessors' assets in connection with the criminal case against Sholom Rubashkin. (Affidavit of Nathan Tzivin, Ex. 14).

At the meeting with the USAO, Mr. Soglowek was told by representatives of the USAO that if Soglowek Nahariya LTD would purchase Agriprocessors' assets, no

member of the Rubashkin family or any related entity could have any management, consulting or ownership role in the business going forward. (Affidavit of Eli Soglowek, Ex. 15). Mr. Soglowek was told by representatives of the United States Attorney's Office that if it was discovered that any Rubashkin was involved in the business going forward, there would be "very bad consequences." (*Id*.) Frightened by the threat, Soglowek called his father after the meeting expressing his deep concern, asking "why do we need problems with the FBI and the American Government?" (Ex. 14, ¶6).

The USAO never disclosed this discussion with Mr. Soglowek to defense counsel, or presumably, to the Court.

M. Soglowek Does Not Bid at Auction – Auction Results in No Sale of Assets – FBBC Declares Trustee In Violation of Post-Petition Financing Agreement for Failure To Complete Soglowek Sale, and Because of Insecurity Due to Government Threats of Forfeiture.

At the auction held March 23 and 24, 2009, several parties submitted bids substantially lower than the initial $40,000,000 term sheet executed by Soglowek Nahariya. (Supplemental Motion, p. 4, Ex. 16). Soglowek Nahariya did not participate in the auction, and submitted no bid. At the conclusion of the auction, First Bank made a credit bids for their collateral in the amount of $20,000,000 and $6,500,000, respectively – an act "reflecting their unwillingness to accept the consideration being offered by bidders at the Auction." (*Id*.).

On the same day, March 24, 2009, counsel for First Bank and FBBC sent a letter to Mr. Sarachek advising him that FBBC intended to "exercise[] its rights… to terminate

the Credit Agreement and to declare immediately due and payable the entire unpaid principal amount of the Note now outstanding." (Ex. 17).

The letter advised that FBBC was electing to accelerate the debt and exercise its rights regarding enforcement of liens on collateral within five days after the date of the letter for several reasons, including "the failure of the Borrower to comply with the covenant in Section 6.12(a) of the Agreement regarding the proposed asset sale to Soglowek." *Id*. Also, and most notably, the letter stated that "based on discussions with certain government officials on or about March 24, 2009, the Lender deems itself insecure with respect to the actual or potential assertion by the United States of a right to forfeiture of assets of the Estate and the actions of the United States in pursuit of such a right or claim of right." *Id*.

The USAO disclosed neither this letter nor the facts concerning any contact between the Government and FBBC to Mr. Rubashkin or his trial counsel. Thus Mr. Rubashkin was not aware of the Government's interference jeopardizing the sale.

Following the auction, Mr. Sarachek met with and spoke with both First Bank and MLIC in an effort to convince them to allow the sale of Agriprocessors' assets. (Ex. 9, p. 22). First Bank and MLIC told Mr. Sarachek that they were prepared to shut down Agriprocessors' operations and foreclose on their respective assets without an acceptable allocation of the sale proceeds or a sale of each party's respective obligations. (*Id*.) Their action would have resulted in a complete shutdown of Agriprocessors' operations, and Mr. Sarachek would not have been able to revive Agriprocessors' operations if this occurred. (*Id*.) Ultimately, no sale was consummated as a result of the March auction.

The bankruptcy court adjourned the sale motion pending the scheduling of a further hearing on the motion. (Ex. 16, p. 4-5).

N. SHF Industries, LLC Negotiates With Primary Creditors and the Trustee – Government Threatens SHF With Forfeiture, Demands "No Rubashkin" Assurances.

After the Auction failed to secure a bid acceptable to the primary secured creditors – largely because the Soglowek bid had fallen through – several parties engaged in negotiations with First Bank and MLIC to obtain their consent to a proposed transaction. (*Id.*, p. 9). As a result of these negotiations, on May 6, 2009, First Bank assigned all of its right, title and interest in and to its post-petition credit facility to SHF Industries, LLC, as a prelude to SHF ultimately making a bid to purchase the assets of Agriprocessors. (*Id*, p. 5).

Subsequently, Daniel Hirsch, the President of SHF, was asked to participate, together with SHF's counsel, in a telephone conference with the USAO. (May 19th Email from Anita Shodeen to Daniel Hirsch, Ex. 18.). The call was scheduled for May 21, 2009, at 8:00 a.m. Neither Mr. Sarachek nor any member of the Trustee team was invited to participate. (*Id*.; Letter of AUSA Richard Murphy dated July 14, 2009, Ex. 19).

Upon information and belief, during that call, the USAO informed Mr. Hirsch and other representatives of SHF that unless SHF made sworn representations that no member of the Rubashkin family (or any related entity) would have any connection with the business going forward, the government would exercise its right to forfeit all of the assets of Agriprocessors. That very day, Mr. Hirsch executed an affidavit affirming that that

neither he nor SHF had any affiliation with any member of the Rubashkin family, or any of their associated businesses, and waived his right to confidentiality, authorizing an investigation of his financial status and business affiliations. (May 21, 2009 affidavit of Hirsch, Ex. 20).

Shortly later, on June 5, 2009, SHF acquired by assignment all of MLIC's right, title and interest to the MLIC loan to Agriprocessors. (Ex. 16, p. 5). SHF then made an offer to Mr. Sarachek to acquire the assets of Agriprocessors for a total purchase price of $8.5 million -- $31.5 million less than the Soglowek offer made only five months before. (Order on Supplemental Motion, Ex. 21).

On June 23, 2009, Mr. Sarachek – feeling pressure to stop the depreciation in value of estate assets – made a motion to the bankruptcy court to approve the sale of Agriprocessors' assets at this price. (Ex. 16). In his motion, Mr. Sarachek noted that "[t]he Offer is currently being memorialized in an asset purchase agreement (the "APA") that will be filed with the Court in advance of any continued hearing on the Asset Sale." (Ex. 16, p. 6, n. 5)

O. USAO Demands Terms in Connection With Asset Purchase Agreement.

The parties then began negotiations concerning the language of the APA, with what appears to have been substantial involvement and direction by the USAO. SHF, its attorney, and its representative Hershey Friedman had a further telephone conference with the USAO on July 7, 2009, involving AUSA's Richard Murphy and Peter Deegan. (Ex. 19). After that conversation, AUSA Murphy sent a letter to the attorney for SHF,

which reflected the USAO's threat of forfeiture if the offer involved any participation by any of the Rubashkins:

> *We are also assured by the representations that neither your client nor the purchasing entity are currently, nor will become, associated in the purchase or operation of the plant, including through any financial or management interest or arrangement, with any of the previous owners or plant managers, including those charged with criminal offenses.* As you know, this relates to our concern that any person involved in previous criminal wrongdoing not be permitted to circumvent the forfeiture laws through bankruptcy, or otherwise benefit or enrich themselves through the use, acquisition, or disposition of any financial or management interest in assets subject to forfeiture.
>
> Finally, as we have discussed, and as you have previously acknowledged in conversations, *it remains our position that any forfeiture interest of the United States will remain unaffected by the bankruptcy process.* However, we are certainly willing to continue to discuss any matters related to forfeiture and, in particular, the orderly disposition of trademarks and trade names.

(Ex. 19) (emphasis added).

The next day, July 15, 2009, Mr. Murphy had an email exchange with Thomas Miller, Deputy Attorney General of the State of Iowa. This communication spelled out, in no uncertain terms, that the "No Rubashkin Edict" was a policy of the USAO, and further that the edict was explicitly tied to the USAO's threats of forfeiture of Agriprocessors' assets. Mr. Miller wrote to Mr. Murphy (and to AUSA Peter Deegan):

> Your office has been involved in the Agriprocessors bankruptcy proceedings, and has held talks with Mr. Sarachek and the major creditors. Based upon my conversations with both of you over the past several months, it is my understanding that it has been the U.S. Attorney's position that the federal forfeiture action, which threatens to seize all of the assets of Agriprocessors, will act as a safeguard against the possibility of a sale to anyone who might have inappropriate connections with Sholom Rubashkin or any of those who have been engaged with Rubashkin in the matters which are the subject of your indictments.

(Ex. 22, p. 18).

Mr. Murphy responded:

> Tom – thanks for your email… It is our position that the bankruptcy hearing should not adversely impact our forfeiture rights and we have so notified the buyer. The buyer is aware of our position more specifically through discussions with the buyer and counsel for the buyer….
>
> I am attaching the certification we received yesterday from buyer's counsel. There are limits as to what we can do to affect the sale.

(*Id*.)

On July 16, 2009, Anita Shodeen, the attorney for SHF, sent an email to Marty McLaughlin of the USAO, asking whether he had any suggestions for language to be included in the bankruptcy court's final order and findings on the asset sale. (Ex. 23, p. 12). Mr. McLaughlin answered, a few days later, that he had discussed the matter with AUSA Richard Murphy, and that the following language should be included in the proposed order to rectify the concerns set forth in Mr. Murphy's July 14 letter:

> The Buyer SHF agrees that SHF, its agents, assignees, and any subsequent recipient or transferee of assets acquired by SHF pursuant to this order, shall be obligated for a period of five years from the date of this order to disclose the amount, date, and method of any payment or other consideration given, or any agreement to make a future payment or to provide other consideration, to any related party (as defined in the Bid Procedures). Such disclosures must be made to the United States Attorney's Office for the Northern District of Iowa not later than the date of the payment or other consideration is given or the date an agreement is reached to do so in the future.
>
> Further, the Buyer, SHF, acknowledges that the forfeiture interest of the United States will remain unaffected by the sale of assets pursuant to this order and the provisions of 11 U.S.C. Section 363(f).

(*Id*., p. 12).

P. Unsecured Creditors Committee Objects to Lack of Transparency in Asset Sale. .....

On July 14, 2009, the Official Committee of Unsecured Creditors filed an objection to Sarachek's motion for an order approving the sale of Agriprocessors' assets to SHF. (Ex. 24). The Committee's objections highlight the lack of transparency involved in the asset sale. To illustrate, the Committee noted that despite the fact that an auction was held on March 23 and 24, 2009, the trustee didn't accept any bids or request an order approving the sale. (*Id*. at p. 2). The Committee also complained that the Trustee filed no pleadings notifying the Court, creditors or parties of SHF's acquisition of FBBC and MLIC's rights until after such assignments were completed, and the Committee's "disappointment that the auction process apparently will not result in a purchase price sufficient to enable a distribution to unsecured creditors…" (*Id.* at pp. 2-3). Finally, the Committee objected that SHF's proposed asset purchase agreement had not been filed or forwarded to the Committee as of the day before the hearing before the Court for approval of the sale. (*Id*.)

Q. Bankruptcy Court Approves Asset Sale.

The Bankruptcy Court entered its order approving the sale of Agriprocessors' assets to SHF on July 20, 2009. (Ex. 21). In the findings of fact supporting the order, the Bankruptcy Court stated that "[t]he auction sale could not be consummated under the pending credit bids, and at the Trustee's request, the Auction and Sale Hearing were adjourned to permit additional negotiations, or additional offers, to be solicited and evaluated, with any further Court action dependent upon the outcome of such actions."

(*Id*. at p. 4). The Bankruptcy Court found sufficient justification for the proposed sale to SHF for $8.5 million for the following reasons:

> (i) There is a significant risk of immediate and irreparable deterioration in the value of the Assets if the Asset Sale is not consummated quickly; (ii) the Offer constitutes the highest and best bid for the Assets or any portion thereof; (iii) the consummation of the Offer presents the best opportunity to realize the value of the Assets and avoid further decline and devaluation thereof; (iv) the sale presents the best opportunity for the estate to realize the highest distributions possible to all creditors, (v) the Asset Sale pursuant to the Offer is in the public interest, as it will result in the continued operation of the Debtor's business and (vi) the contemplated Asset Sale has been negotiated in good faith, is fair and reasonable and represents an arm's length transaction.

(*Id*. at p. 7).

On Thursday, July 21, 2009, AUSA Richard Murphy sent an email to Anita Shodeen, the attorney for SHF. In that email, Mr. Murphy expressed "shock" that the Bankruptcy Court's order did not contain the language proposed by his office requiring SHF to disclose any transaction with any Related Party (identified as any Rubashkin or Rubashkin-related entity) for a period of five years. (Ex. 25). Mr. Murphy further stated that "we have never agreed to forego any of our rights or interests," and that "we may be forced to act … to address our continuing concerns." (*Id*.)

R. Mr. Rubashkin is Convicted of Financial Fraud.

Mr. Rubashkin's month-long jury trial on financial fraud charges began in October, 2009. Following the trial, the jury acquitted Mr. Rubashkin on five counts of willfully violating an order of the Secretary of Agriculture, and convicted on the rest of the charges.

S. At Sentencing, The USAO conceals evidence and presents misleading testimony in dispute over "loss."

At the sentencing hearing, a principal dispute between Mr. Rubashkin and the Government concerned the amount of "loss" attributable to Mr. Rubashkin under U.S.S.G. § 2B1.1. (Ex. 26, p. 20). The Government advocated for a loss calculation between $20 million and $50 million, resulting in a 22-level upward adjustment. (*Id*.). Mr. Rubashkin objected to this loss calculation, arguing that this amount of loss was not "reasonably foreseeable and resulted from an independent intervening cause." (*Id*.)

One such "intervening cause" identified by Mr. Rubashkin was that, in the Agriprocessors bankruptcy, the government took the position that no purchaser of Agriprocessors could have any involvement with any member of the Rubashkin family, resulting in a depressed sale price for Agriprocessors. (*Id*. at 22). Mr. Rubashkin presented evidence and called several witnesses – all of whom were familiar with exploratory efforts by various potential buyers – who testified that they were told, by various people affiliated with the USAO's office that it would be a "deal breaker" if any member of the Rubashkin family (or any entity affiliated with the Rubashkins) were made a part owner or manager of any company acquiring Agriprocessors' assets. (Sent. Tr. at 522 – 535). Yechiel Cohen, president and CEO of Twin City Poultry Company, testified that the prohibition against involving Aaron Rubashkin in a successor corporation reduced the value of Agriprocessors by "millions of dollars." (*Id*. at 535).

In rebuttal, the USAO presented testimony from Paula Roby, the bankruptcy trustee's attorney. The USAO asked Ms. Roby whether she had an opinion of whether

any forfeiture allegation in the indictment had any effect on prospective bidders. (Sent. Tr. at p. 493). Ms. Roby testified that the forfeiture allegations had no impact on prospective bidders because, upon hearing of the forfeiture allegation, they "immediately contacted the US Attorney's office and started a dialogue," and that after a particular meeting between a prospective bidder and members of the USAO, the bidders "seemed very satisfied with the responses they had gotten."

The USAO also asked Ms. Roby if she was aware of any "no-Rubashkin agreement" in connection with the orderly sale of the company. Id. She testified that she wasn't, and that she was present at a particular meeting between the USAO, the trustee, and a representative of a prospective bidder, Mr. Soglowek, where Mr. Soglowek opined that Heshy Rubashkin was a "crucial part of the organization," and Soglowek was "told by the U.S. Attorney's Office that that was not a deal breaker." *Id.* The USAO asked her a number of questions calculated to debunk the idea that there was ever a "No Rubashkin Edict," and specifically asked questions calculated to refute the idea that the "related parties" disclosures required by the trustees in connection with any bid on the assets was related to any such edict:

> Q: There's been some talk about this "no-Rubashkin" agreement. First of all, are you aware of any agreement out there that relates to some agreement not to hire Rubashkins?
>
> A: No. There was – if I could just expound on that for just a second.
>
> Q: Yes, please.
>
> A: There was in – in the bidding procedures a provision that required anyone who wished to be a qualified bidder to identify their connections with several parties, including the related parties in the

bankruptcy, A.A. Rubashkin and sons, the Rubashkin family, but also with creditors, with – you know, with anyone involved in Agriprocessors. That's – that's a fairly routine thing for us to do. We need to make disclosures to the bankruptcy court. Ultimately, my trustee is responsible to the creditors and to Judge Kilburg, and he needs to go in and be able to say in good faith that he has qualified bidders ready to bid.

Q: All right. And so this whole idea of related parties, is that something that happens in bankruptcy as part of the procedures on a pretty regular basis?

A: It has happened in bankruptcies I have seen in the past, yes.

Q. And is it your testimony that there was never an edict or prohibition that any purchaser could be involved with Aaron Rubashkin?

A. Is there an edict that they couldn't, is that your question?

Q. That they couldn't, yeah.

A. There was none to my knowledge.

Q. Did Mr. Murphy tell Mr. Eichler and the other Point [sic] board member that if any -- if any member of the Rubashkin family were to have an ownership interest or management role, that would subject them to prosecution?

A. I don't remember that being said, no, and I think I would.

(Sent. Tr. at pp. 495-496).

In addition to this testimony regarding the "No Rubashkin Edict," Ms. Roby also testified that at a February 6, 2009 meeting the representatives of the United States Attorney's Office told Eli Soglowek that Heshy Rubashkin and Aaron Rubashkin's continuing involvement in the Agriprocessors' organization "was not a deal breaker." Mr. Soglowek, however, states that he was told that by members of the USAO that any

association with any member of the Rubashkin family or any related entity would result in "'very bad consequences.'" (Ex. 15, ¶5).

Ms. Roby also testified that the reason Soglowek withdrew its $40 million offer was that "they began due diligence and discovered that there were inflated inventory and receivables numbers and didn't believe that $40 million was a reasonable amount to offer for this company." [Sent. Trans. 498]. Mr. Soglowek attests that her statement is not true: "My reasons for not completing the acquisition were not related to any inflated inventory and receivables numbers or that that I didn't believe that the $40 million was a reasonable amount to offer for the company at that time." (Ex. 15, ¶ 6).

And, during the cross-examination of government agent Randy Van Gent, Mr. Van Gent testified as follows:

> Q: In fact, one of the conditions of disposition of the plant, from as early as perhaps November of 2008, from the US Attorney's Office was no buyer could have any involvement with Sholom Rubashkin or any other members of his family, true?
>
> A: I know the US Attorney's Office was concerned that any future buyer – the concern was that – that a future buyer may be bidding on behalf of the defendant and/or his family, and so that's a concern that the US Attorney's Office had, yes.
>
> Q: And so there was a no-Rubashkin edict that was public knowledge among – in the bankruptcy and prospective purchasers, correct?
>
> A: I wouldn't describe it as a no-Rubashkin edict. I would describe it as I have, that there was a concern about that issue.

(Sent. Tr. at p. 56). This testimony was not corrected in any fashion by any member of the USAO at sentencing.

The district court, in its sentencing order, summarily disposed of the defense argument that "reasonably foreseeable loss" should be lower because of the "No Rubashkin Edict," crediting Ms. Roby's testimony, and discrediting the testimony of Defendant's witnesses on this issue. (Ex. 26, p. 22).

III. ARGUMENT

A. MR. RUBASHKIN'S RIGHT TO DUE PROCESS OF LAW UNDER THE FIFTH AMENDMENT WAS VIOLATED WHEN (1) THE GOVERNMENT FAILED TO DISCLOSE MATERIAL, EXCULPATORY INFORMATION CONCERNING ACTIONS IT TOOK TO INFLUENCE AND INTIMIDATE THE AGRIPROCESSORS' BANKRUPTCY TRUSTEE AND PROSPECTIVE BUYERS BANKRUPTCY PROCEEDING, AND (2) WHEN THE GOVERNMENT PRESENTED MISLEADING TESTIMONY CONCERNING THIS ISSUE AT SENTENCING.

1. Introduction

Mr. Rubashkin's twenty-seven year sentence was largely the result of the district court's finding that the "loss" involved in this case for purposes of U.S.S.G. § 2B1.1 was approximately $27 million. The district court calculated the loss amount as the entire unpaid balance on the Agriprocessors loan, minus the lenders' recovery in the bankruptcy proceeding.

In refuting the loss calculation, Mr. Rubashkin argued, among other things, that any shortfall on the balance of the loan was in great measure caused by the USAO's active interference in the bankruptcy trustee's efforts to sell the company, by informing potential buyers of its position that no member of the Rubashkin family may be involved in the new management of the company going forward – a policy defense counsel

referred to as the "No Rubashkin Edict." For its part, the USAO denied that any such policy existed, and called both an attorney for the bankruptcy trustee and one of its case agents at sentencing to testify that they weren't aware of any such restriction upon the sale of the business.

Mr. Rubashkin has subsequently discovered additional evidence demonstrating that the USAO directly demanded assurances from several prospective buyers that none of the "connections or affiliations with [Agriprocessor's] principals or members of [its] management." – an obvious reference to the Rubashkin family – would have any ownership or management interest in the new company. The USAO tied these demands, in every instance, to its "concern that any person involved in previous criminal wrongdoing not be permitted to circumvent the forfeiture laws…" The evidence shows that the Trustee and prospective buyers were intimidated by the Government's demands and threats of forfeiture, and thus the demands substantially reduced value the primary creditors ultimately received for the assets of the business. Of course, the reciprocal effect was to substantially increase the "loss" figure the district court used to calculate Mr. Rubashkin's sentence.

The extent of the USAO's involvement in the bankruptcy was never disclosed to counsel for Mr. Rubashkin. Instead, the government presented evidence intended to refute the existence of its influence in the bankruptcy, thereby misleading the trial court in connection with sentencing. The government's actions therefore violated Mr. Rubashkin's due process rights under the rules set forth in *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963) and *Alcorta v. Texas*, 355 U.S. 28, 78 S.Ct. 103 (1957).

Accordingly, Mr. Rubashkin's sentence must ultimately be vacated, and he should receive a new sentencing hearing. At this stage, Mr. Rubashkin should be granted leave of Court to conduct discovery on this issue, and is entitled to an evidentiary hearing regarding whether the Government withheld exculpatory evidence at sentencing, and whether it made deliberate or reckless false representations to the Court.

2. Standards of Review

There are four grounds upon which a federal prisoner may move to vacate or set aside a conviction and sentence: (1) the sentence was imposed in violation of the Constitution or laws of the United States; (2) the court was without jurisdiction to impose the sentence; (3) the sentence exceeded the maximum authorized by law; and (4) the sentence is otherwise subject to collateral attack. *See Hill v. United States,* 368 U.S. 424, 426-27, 82 S.Ct. 468, 7 L.Ed.2d 417 (1962) (citing 28 U.S.C. § 2255). Section 2255 is intended to redress "fundamental defect[s]" that result in a miscarriage of justice and "omission[s] inconsistent with the rudimentary demands of fair procedure." *Hill,* 368 U.S. at 428.

In addition, there is the rule of procedural default. "[H]abeas petitioners ... cannot assert claims they failed to raise at trial or on direct appeal unless they can show 'cause' for the default and 'prejudice' resulting from it." *Wainwright v. Sykes,* 433 U.S. 72, 87, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977)). *See also Reed v. Farley,* 512 U.S. 339, 354, 114 S.Ct. 2291, 129 L.Ed.2d 277 (1994) ("Where the petitioner--whether a state or federal prisoner--failed properly to raise his claim on direct review, the writ is available only if

the petitioner establishes "cause" for the waiver and shows "actual prejudice from the alleged ... violation.'") (quoting *Wainwright,* 433 U.S. at 87)). However, the Eighth Circuit has recognized three possible exceptions to the procedural default rule as it relates to Sentencing Guideline claims: (1) an ineffective assistance of counsel claim alleging a violation of his Sixth Amendment right to counsel, *See Anderson v. United States*, 25 F.3d 704, 706 (8th Cir.1994); (2) claims involving a sentence in excess of the maximum authorized by statute, *See Auman v. United States*, 67 F.3d 157, 160-61 (8th Cir.1995); and (3) claims that rise to the level of a "miscarriage of justice." *See Auman,* 67 F.3d at 161.

In this case, Mr. Rubashkin's claims that his rights to due process were violated by a sentencing record that relied on misleading information, and this rises to the level of a "miscarriage of justice." It is a fundamental principle of the American criminal justice system and an axiom of due process that "deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with [the] rudimentary demands of justice." *Giglio v. United States*, 405 U.S. 150, 153, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972) (internal quotation marks omitted). When the government obtains a criminal conviction and deprives an individual of his life or liberty on the basis of evidence that it knows to be false, it subverts its fundamental obligation, embodied in the Due Process Clauses of the Fifth and Fourteenth Amendments, to provide every criminal defendant with a fair and impartial trial. The Supreme Court has accordingly held that the government may not knowingly suppress evidence that is exculpatory or capable of impeaching government witnesses. *See Banks v. Dretke*, 540 U.S. 668, 691, 124 S. Ct.

1256, 157 L. Ed. 2d 1166 (2004)(discussing *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)). Similarly, it has held that the government is obligated to *correct* any evidence introduced at trial that it knows to be false, regardless of whether it solicited the evidence. *See Napue v. Illinois*, 360 U.S. 264, 269, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959); *Alcorta v. Texas*, 355 U.S. 28, 78 S. Ct. 103, 2 L. Ed. 2d 9 (1957); *Pyle v. Kansas*, 317 U.S. 213, 63 S. Ct. 177, 87 L. Ed. 214 (1942). These constitutional duties provide fundamental protections that are vital to the successful operation of an adversarial system of criminal justice; they embody the state's obligation not to obtain the accused's conviction at all costs, but rather to do justice by furthering the truth-finding function of the court and jury.

Moreover, under *Brady*, the government must disclose any evidence both "favorable to an accused" and "material either to guilt or to punishment." *See United States v. Whitehill*, 532 F.3d 746, 753 (8th Cir. 2008) (citing *Brady*, 373 U.S. at 87). Brady applies to exculpatory and impeachment evidence, whether or not the accused has specifically requested the information. *See id*. (citing *United States v. Bagley*, 473 U.S. 667, 676, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985) and *Kyles v. Whitley*, 514 U.S. 419, 433-34, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995)). Evidence favorable to the accused is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id*. (quoting *Bagley*, 473 U.S. at 682). "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. *Id*.

3. Discussion

At the sentencing hearing, a principal dispute between Mr. Rubashkin and the Government concerned the amount of "loss" attributable to Mr. Rubashkin under U.S.S.G. § 2B1.1. (Government's Sentencing Memorandum, p. 20). The Government advocated for a loss calculation between $20 million and $50 million, resulting in a 22-level upward adjustment. (*Id*.). Mr. Rubashkin objected to this loss calculation, arguing that this amount of loss was not "reasonably foreseeable and resulted from an independent intervening cause." (*Id*.) One such "intervening cause" identified by Mr. Rubashkin was that, in the bankruptcy of Agriprocessors, the government took the position that no purchaser of Agriprocessors could have any involvement with any member of the Rubashkin family, resulting in a depressed sale price of Agriprocessors. (*Id*. at 22).

4. The Importance of "Legal Causation" under §2B1.1 – "Reasonable Foreseeability."

In 2001, the United States Sentencing Guidelines concerning theft and fraud offenses were amended in several important ways, but none more important than the new definition of "loss." (See Amendment 617, Appendix C, 2010 Guidelines Manual). The amendment defined "actual loss" as the "reasonably foreseeable pecuniary harm" that resulted from a defendant's offenses. In expounding upon what this means, the Sentencing Commission stated:

> The amendment incorporates this causation standard that, at a minimum, requires factual causation (often called "but for" causation) and provides a rule for legal causation (i.e., guidance to courts regarding how to draw the

> line as to what losses should be included and excluded from the loss determination)… "Reasonably foreseeable pecuniary harm" is defined to include pecuniary *harms that the defendant knew or, under the circumstances, reasonably should have known, was a potential result of the offense*.

(*Id*.) (emphasis added).

In sentencing Mr. Rubashkin, this Court acknowledged these principles, but found that Mr. Rubashkin's arguments "fail[ed] to consider the impact of a massive fraudulent scheme on the value of the company." (Ex. 26, p. 23). The Court agreed with the government's assertion that "it is not reasonable for a defendant to assume that in the wake of the failure of a loan due to a massive fraud, every nickel of every real account receivable will not be recovered." (Ex. 26, p. 23).

The Court was not presented certain key facts showing that, ultimately, it wasn't "market factors" that caused the assets of Agriprocessors to be sold at less than "fire sale" values, or even a failure to collect all of the outstanding accounts receivable. Rather, there was substantial undisclosed evidence that the Court never heard showing *direct, forceful, government interference* in the market for the assets of Agriprocessors. This influence was the factual and legal cause for Agriprocessors' collateral to be sold for far less than it would have been worth absent government intervention. Discovery and an evidentiary hearing will allow for further development of why the influence occurred and how it impacts the measure of "actual loss."

5. The USAO Withheld Exculpatory Evidence Concerning "Legal Causation" from Defense Counsel and the Court, and Presented False and/or Misleading Testimony.

At sentencing, Mr. Rubashkin presented evidence and called several witnesses – all of whom were familiar with exploratory efforts by various potential buyers concerning the assets of Agriprocessors, Inc. – who testified that they were told by various people affiliated with the USAO that it would be a "deal breaker" if any member of the Rubashkin family (or any entity affiliated with the Rubashkins) were made a part owner or manager of any company acquiring Agriprocessors' assets. (Sent. Tr. at 522 – 535). Yechiel Cohen, president and CEO of Twin City Poultry Company, testified that the prohibition against involving Aaron Rubashkin in a successor corporation reduced the value of Agriprocessors by "millions of dollars." (*Id*. at 535).

In rebuttal, the USAO presented testimony from Paula Roby, the attorney for the bankruptcy trustee. As described in greater detail in Section II.R., *supra*, the USAO asked Ms. Roby if she was aware of any "no-Rubashkin agreement" in connection with the orderly sale of the company. She testified that she wasn't, and that she was present at a particular meeting between the USAO, the trustee, and a representative of a prospective bidder, Mr. Soglowek, where Mr. Soglowek opined that Heshy Rubashkin was a "crucial part of the organization," and Soglowek was "told by the U.S. Attorney's Office that that was not a deal breaker." The USAO also asked her a number of questions calculated to essentially debunk the idea that there was ever a "No Rubashkin Edict," and specifically asked questions calculated to refute the idea that the trustee's required "related parties" disclosures was related to any such edict.

Further, during the cross-examination of government agent Randy Van Gent, the USAO failed to correct testimony by Mr. Van Gent that there wasn't any evidence of a "No Rubashkin Edict."

This Court, in its sentencing order, summarily disposed of defense arguments that loss was exacerbated by the "No Rubashkin Edict," crediting Ms. Roby's testimony, and discrediting the testimony of Defendant's witnesses on this issue. (Ex. 26, p. 22).

However, the newly discovered information described above in greater detail demonstrates that USAO representatives exercised substantial influence over the Trustee in bankruptcy, the primary creditors, and potential buyers of Agriprocessors' assets with demands that the Rubashkins be banned from any operations of the reorganized company going forward. These newly discovered facts – considered in conjunction with other key facts which were presented to the Court at sentencing – demonstrate not only that the "No Rubashkin Edict" was very much an agenda of the USAO, but also that the "related parties" disclosures described by Ms. Roby were hardly a "routine matter" in the bankruptcy. Rather, the disclosures were the subject of detailed negotiations between the USAO and the ultimate buyer – all calculated to ensure that no member of the Rubashkin family (or any related entity) be involved as a manager or owner of the business going forward, on threat of forfeiture of the acquired assets.

To illustrate, the undersigned counsel has discovered the following previously undisclosed facts:

1. Representatives of the USAO told Mr. Sarachek, within days of his appointment as Trustee, that Agriprocessors is a "sham business," that it has "no value,"

and that anything of value in the company would likely be forfeited to the government as a result of the criminal case involving Agriprocessors and Mr. Rubashkin. The representatives of the USAO told Mr. Sarachek "not to get the plant restarted or sold." (Ex. 7; Ex. 8).

2. The government's threats of forfeiture, its demands that no buyer involve any member of the Rubashkin family in the business going forward, and its operational intrusions into the Trustee's autonomy compromised the Trustee's ability to maximize value for the creditors of Agriprocessors in the bankruptcy. (Ex. 7).

3. At a February 6, 2009 meeting, USAO representatives told Mr. Soglowek that if Soglowek Nahariya purchased Agriprocessors' assets, no member of the Rubashkin family or any related entity could have any management, consulting or ownership role in the business going forward. USAO representatives further told Mr. Soglowek that if it was discovered that any Rubashkin was involved in the business going forward, there would be "very bad consequences" for Mr. Soglowek and Soglowek Nahariya. (Ex. 14; Ex. 15). It would seem that this meeting between Mr. Soglowek and the USAO is the very meeting concerning which Ms. Roby testified that the USAO told Mr. Soglowek that having Rubashkins involved in the business was "not a deal breaker."

4. On March 24, 2009 – the same day that First Bank ensured the Auction's failure by submitting a credit bid totaling $20 million – the USAO had discussions with First Bank causing the lender to deem itself "insecure" as a result of the government's assertion of a right to forfeiture of Agriprocessors' assets. (Ex. 17).

These previously undisclosed facts demonstrate that the USAO demanded assurances from most (if not all) of Agriprocessors' prospective buyers that none of the "connections or affiliations with [Agriprocessor's] principals or members of [its] management." – an obvious reference to the Rubashkin family – would have any ownership or management interest in the new company. Considered with various other documents submitted at Mr. Rubashkin's sentencing hearing (Sent. Tr. pp. 18-19; 12; 2; 11; 16; Sentencing Ex. 11023), these undisclosed facts make it apparent that the USAO advanced its "no-Rubashkin" agenda by insisting upon and negotiating the wording of the very "related parties" disclosures that Ms. Roby discounted in her testimony as having nothing to do with any "No Rubashkin Edict." (*Id*.) And more prejudicial, the USAO put on contrary testimony from Ms. Roby. Further, there was testimony denying the existence of a "no Rubashkin edict" from Special Agent Van Gent. Finally, cross-examination could not have brought out these facts because Mr. Rubashkin did not know the information.

Indeed, Mr. Rubashkin has now learned that the USAO engaged in several dozen meetings, phone calls and emails with the Trustee, his representatives and/or his counsel. (Ex. 27). With targeted discovery on this issue, Mr. Rubashkin would be able to develop the full nature of those contacts, and the significant impact they had on the asset sale.

Because these facts were squarely at issue before the trial court in connection with sentencing, the USAO's failure to disclose them violated the teachings of *Brady*. If trial counsel had been aware of these facts, they would have been able to use them not only

during their own case-in-chief, but also to impeach the very witnesses upon whom the Court relied in discrediting the testimony of the government's witnesses.

The government also presented evidence intended to refute the existence of the no-Rubashkin edict. This caused a misleading record for the district court at sentencing. It also affected Mr. Rubashkin's counsel's ability to make proper arguments in connection with sentencing. This also violated Mr. Rubashkin's due process rights, and the error is presumed prejudicial.

To illustrate, in *Alcorta v. Texas*, 355 U.S. 28 (1957), the Court recognized that the prosecution's failure to correct misleading testimony violated due process, because the prosecutor had knowingly fostered a false impression in his examination of a key prosecution witness. The Court granted relief because the witness conveyed a false impression, despite the fact that the testimony itself was not demonstrably false. *Id*. at 31 (prosecutor knowingly adduced testimony from key witness that he was merely a "friend" of the defendant's slain wife, when he was actually having an affair with her). This misleading testimony rebutted defendant's claim that he acted in "sudden passion." And, as recognized later by the Supreme Court in *United States v. Bagley*, 473 U.S. 667, 680 (1985), "use of perjured testimony . . . is considered material unless failure to disclose it would be harmless beyond a reasonable doubt."

In essence, this is precisely what happened in Mr. Rubashkin's case. There appears to have been materially inaccurate testimony from Paula Roby and Agent Van Gent. Judge Reade credited this testimony in summarily rejecting the "No Rubashkin"

argument at sentencing. This violated Mr. Rubashkin's due process rights, as described in *Alcorta* and its progeny.

6. The Government's Misconduct Prejudiced Mr. Rubashkin, Because the Expected Liquidation Value of Agriprocessors' Assets, Absent Government Activity Influencing the Sale, Was Many Millions of Dollars Higher.

Mr. Rubashkin has engaged the firm of Partners2Market ("P2M") to formulate and testify to an opinion concerning the "actual loss" in this case, meaning "the reasonably foreseeable pecuniary harm that resulted from the offense." In sum, P2M analyzed the loss caused by the crime, and foreseeable to a reasonable person. P2M's work showed the following:[1]

According to the government's theory at trial and sentencing, "actual loss" in this case was caused by the falsification of the value of Agriprocessors' assets, which served as collateral for a revolving credit facility. This falsification, according to the Government, caused the bank to lend more that it should have given the firm's true financial condition.

If the government's theory is correct, then the maximum expected loss to the bank would occur if the firm were to go into bankruptcy and its assets, in turn, were to be liquidated. Put differently, it would be reasonably foreseeable that, as a result of fraud, a bankruptcy and ensuing liquidation of the firm's assets might occur. Thus, in order to

[1] *See* Report of Partners2Market, attached hereto as Ex. 28. As noted in the report, the authors state that "An evidentiary hearing would be extremely helpful in allowing us to better quantify the effect of the government's intervention on the reasonably foreseeable loss suffered by First Bank." *Id*. at p. 9.

determine the "reasonably foreseeable pecuniary harm" to Agriprocessors, one must first determine the expected liquidation value of the firm as a result of the crime, and then compare this expected liquidation value to the size of the bank's claim on that liquidation value.

The industry standard method to determine the expected liquidation value of assets was first established by Benjamin Graham and subsequently published by Benjamin Graham and David Dodd in their seminal book, Security Analysis.[2] Graham's standard for the calculation of expected liquidation value is used universally in the investing community, and is a widely accepted principle among investment professionals for the determination of expected liquidation value. To be specific, Graham's liquidation value is the dollar value that one would expect a firm's assets to yield in the event of an orderly liquidation of its assets. This is a reasonable estimate of what Mr. Rubashkin – or any other reasonable person – might expect to be the liquation value of Agriprocessors from the resulting orderly liquidation of assets in bankruptcy.

As applied to the facts of Mr. Rubashkin's case, the Graham and Dodd model results in an expected liquidation range of a loss of $2.88MM to a gain of $3.36MM, and a single point estimate of reasonably foreseeable loss of $0.304MM. That is, a rational person who anticipated an orderly liquidation of Agriprocessors' assets would expect there to be no reasonably foreseeable loss whatsoever. In contrast, they would expect a reasonably foreseeable gain.

[2] Benjamin Graham and David Dodd, Security Analysis Principles and Technique, 6th Edition, McGraw-Hill, NY., 2008, pg. 560 First Edition published 1934.

In P2M's opinion, what caused the loss to ultimately be something other than that predicted by the Graham and Dodd model was the USAO's influencing prospective buyers with the prospect of government asset seizure and forfeiture should the buyers have interaction with any of the Rubashkins on the management team. This effective "No Rubashkin Edict" had a devastating effect on Agriprocessors' value. It was tantamount to making Agriprocessors unsellable at anywhere near the reasonably foreseeable liquidation value of its assets, and resulted in such an enormous erosion of value, that the firm – in its entirety – was ultimately sold at a fire sale price.

Further, according to P2M, there are two principal reasons why the "no Rubashkin Edict" had such an impact on the ultimate price fetched for Agriprocessors' assets. First, no reasonable buyer would put up their hard-earned cash to buy Agriprocessors (even at its expected liquidation value), when there was a credible threat that the very assets that they just purchased could be seized at the whim of the government, and therefore become effectively worthless. The threat of forfeiture overwhelmingly impaired the value of the assets.

Moreover, many firms – and Agriprocessors, a Glatt Kosher food processor, is one of these – have idiosyncratic knowledge, skills, and customer relationships that are required in order to operate effectively. As a consequence of this, when such firms are sold, the buyer usually requires as a condition of the sale that some or all the members of the management team be retained for a specified period to maintain the continuity of operations, and, more importantly, the firm's customer relationships. As a result, these retained managers are typically not "bought out" at the time of the acquisition, but

instead have "earn out" plans; they are retained by the acquiring firm, and received their pay out over time by continuing to work at the firm, and their "earn out" compensation is tied to the firm's performance post-acquisition. Given that the glatt kosher meat processing industry requires specialized knowledge, and that Agriprocessors' profitability was closely tied to the relationships between the management team, its customers, and its vendors, the prohibition against a prospective buyer's even consulting with the existing management team had a tremendously destructive effect on the value of the firm's assets, and on its ultimate selling price.

As noted above, the industry standard for estimating the liquidation value of a company employed by sophisticated investors everywhere is the Graham and Dodd model. Accordingly, this model is the best possible measure for what a reasonable person in Mr. Rubashkin's situation would believe to be the liquidation value of the company, even if it filed bankruptcy and was forced to liquidate in an orderly fashion.

It was not reasonably foreseeable, however, that the government would influence the orderly liquidation with threats of forfeiture and unreasonable constraints on the powers of the trustee to manage the business in an optimum manner and bargain for the best price for Agriprocessors' assets. Therefore, without having the material evidence, the district court made a conclusion regarding "actual loss," including an assessment of whether the loss was "reasonably foreseeable," without any unforeseeable intervening causes beyond Defendant's control. This constitutes a violation of *Brady* and its teachings, and mandates that Mr. Rubashkin's convictions and sentence be vacated and a new trial granted.

7. Mr. Rubashkin is Entitled to Discovery and an Evidentiary Hearing In Support of his Claims.

Mr. Rubashkin has raised substantial claims and has presented evidence to support those claims. Mr. Rubashkin believes that the factual evidence he has supplied already supports relief. But if for any reason the Court disagrees, or believes that further factual support may be necessary, Mr. Rubashkin should be allowed to pursue discovery and receive an evidentiary hearing to develop a record on these claims.

Mr. Rubashkin plans to file a separate motion with supportive brief for a hearing and Rule 6 discovery. Rule 6(b) of the Rules Governing Section 2255 Proceedings in the United States District Courts permits the Court to grant a party to a Section 2255 case leave to utilize the process of discovery available under the Federal Rules of Criminal Procedure, or those under the Federal Rules of Civil Procedure "to the extent that, the judge in the exercise of his discretion and for good cause shown, grants leave to do so." In analyzing the standard for discovery under Rule 6, the Supreme Court has held that "good cause for discovery exists where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief." *Bracy v. Gramley*, 520 U.S. 899, 908-09 (1997); *Wallace v. Ward*, 191 F.3d 1235, 1245 (10th Cir. 1999) (good cause for discovery in habeas cases is established where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is entitled to relief).

Although it is generally within a district court's discretion to grant or deny discovery requests under Rule 6, a court's denial of discovery is an abuse of discretion if discovery is "indispensable to a fair, rounded development of material facts." *Toney v. Gammon*, 79 F.3d 693, 700 (8th Cir. 1996), *citing East v. Scott*, 55 F.3d 999, 1001 (5th Cir. 1995) (discovery granted). *See also, Teague v. Scott*, 60 F.3d 1167, 1172 (5th Cir. 1995) (discovery granted; district court's denial of an opportunity for discovery was an abuse of discretion where the discovery was necessary fully develop the facts of a claim); *Bracy*, 520 U.S. at 902 & n.3, 908-09 (abuse of discretion in denying petitioner discovery of nonpublic documents in the state's possession).

Numerous cases have identified circumstances under which "good cause" existed, entitling a petitioner to Rule 6 discovery. In *Moore v. Gibson*, 195 F.3d 1152 (10th Cir. 1999), the petitioner alleged a *Brady* claim that the police had planted evidence at his residence and failed to disclose that fact. The Tenth Circuit found that petitioner was entitled to discovery on the issue, reversing the holding of the district court. *Id*. at 1165-66. *See also Wagner v. United States*, 418 F.2d 618, 621 (1969); *Toney, supra; Teague, supra; Bracy, supra*. Moreover, the good cause showing under Rule 6 is targeted at discovery and is not meant to be judged by whether a petitioner would succeed on the merits of his claim. *Stouffer v. Reynolds*, 168 F.3d 1155, 1173 (10th Cir. 1999).

Mr. Rubashkin has ample reasons for his request to conduct discovery. These include that, while it is clear from the fee applications filed by the Trustee in the Agriprocessors bankruptcy that the Trustee and his representatives had several dozen contacts (via email, telephone calls, and face-to-face meetings) with representatives of

the USAO, there is a need to conduct formal discovery to determine exactly what was discussed, who was involved during those contacts, and the extent of the USAO's interference in the asset sale. The deposition of Joseph Sarachek, the Trustee, is essential to develop these facts. Moreover, Mr. Rubashkin requests leave of Court to serve narrow requests for production of documents on the USAO, to obtain all documents concerning its contacts with the Trustee, the Agriprocessors lenders, or any prospective buyers.

There is good reason to expect that this discovery will further corroborate Mr. Rubashkin's arguments. Mr. Rubashkin represents that there is a good faith basis for the requested discovery, in that all of the documents and facts referenced in the discussion above illustrate the pervasive contact that the USAO had with both the Trustee and prospective buyers. It is critical for a full and fair hearing of Mr. Rubashkin's claims that he be able to conduct discovery concerning what occurred during these contacts.

At the conclusion of discovery, Mr. Rubashkin is also entitled to an evidentiary hearing. After a § 2255 motion is filed, "the judge must review [the materials] to determine whether an evidentiary hearing is warranted." Rule 8(a); see also § 2255 (requiring court to hold hearing unless "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief."). Accordingly, if the Court does not vacate Mr. Rubashkin's sentence based on this petition, he is entitled to an evidentiary hearing to establish he is entitled to relief.

B. MR. RUBASHKIN'S RIGHT TO DUE PROCESS OF LAW UNDER THE FIFTH AMENDMENT WAS VIOLATED WHEN THE GOVERNMENT FAILED TO DISCLOSE MATERIAL, FAVORABLE INFORMATION CONCERNING *EX PARTE* CONTACTS WITH THE TRIAL JUDGE, RESULTING IN PREJUDICE TO MR. RUBASHKIN.

1. Introduction

Prior to Mr. Rubashkin's trial, the government was aware of numerous pre-indictment *ex parte* contacts between members of the prosecution team and the trial judge. The government failed to disclose the details regarding these contacts to Mr. Rubashkin or his trial counsel. Had trial counsel been aware of these material, favorable facts, they would have made a timely motion for recusal of the trial judge. The government's failure to disclose the *ex parte* contacts to Mr. Rubashkin's counsel violated the teachings of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963) and its progeny, requiring vacation of Mr. Rubashkin's convictions and sentence.

2. Standard of Review

Under *Brady,* the government must disclose any evidence both "favorable to an accused" and "material either to guilt or to punishment." *See United States v. Whitehill*, 532 F.3d 746, 753 (8th Cir. 2008) (citing *Brady*, 373 U.S. at 87). *Brady* applies to exculpatory and impeachment evidence, whether or not the accused has specifically requested the information. *See id.* (*citing United States v. Bagley*, 473 U.S. 667, 676, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985) and *Kyles v. Whitley*, 514 U.S. 419, 433-34, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995)). Evidence favorable to the accused is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the

result of the proceeding would have been different." *Id*. (quoting *Bagley*, 473 U.S. at 682). "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id.*

As noted in Point I above, violations of *Brady* rise to the level of a "miscarriage of justice," which is a cognizable ground for relief overcoming §2255's procedural default rules.

The government will likely claim that the issue of recusal was raised on direct appeal and therefore may not be raised again in this proceeding. *See Bear Stops v. United States*, 339 F.3d 777, 782 (8th Cir. 2003) ("It is well settled that claims which are raised and decided on direct appeal cannot be relitigated on a motion to vacate pursuant to 28 U.S.C. § 2255.") Mr. Rubashkin, however, did not raise this precise issue on appeal. Mr. Rubashkin raises an issue that has never been considered on its merits by any court – that the prosecution's failure to disclose its contacts with the trial judge violated *Brady* and its progeny. As many circuits have explained, "an issue previously raised on direct appeal cannot be relitigated in a Section 2255 proceeding only if the issue was resolved on the merits." *See United States v. Linder*, 561 F.3d 339, 343 (4th Cir. 2009). *See also Kramer v. United States*, 788 F.2d 1229, 1231 (7th Cir. 1986) (same); *United States v. Davis*, 406 F.3d 505, 511 (8th Cir. 2005) (Section 2255 relitigation bar applies to claims "raised and decided" on direct appeal.) Here, no court has been presented with, let alone decided, whether *Brady* was violated. Thus Mr. Rubashkin is not barred from raising the issue in this proceeding.

3. Discussion

Members of the prosecution team – including the USAO and ICE – were well aware of their many *ex parte* pre-raid contacts with Judge Reade and possessed significant documentation describing the nature of such contacts, but much of this information was not disclosed to Mr. Rubashkin or his counsel.

To illustrate, it appears the USAO knew, but failed to disclose, the following key facts:

A. That on October 10, 2007, representatives of the USAO met with United States District Judge Linda Reade, and "provided her with a briefing regarding the number of criminal prosecutions that they intend to pursue relative to [the] investigation." (Ex. 1, p. 2). The USAO expressed to Judge Reade "their expectation that [the investigation] is anticipated to result in several hundred criminal arrests and subsequent criminal prosecutions within the judicial boundaries of the Northern District of Iowa." (*Id*. at p. 3). Judge Reade advised the USAO that "she would be out of the country and unavailable for all of February and half of March, 2008. (*Id*.)

B. Over the next few months, the USAO continued to have *ex parte* contacts with Judge Reade. For example, ICE agents proposed an "enforcement action date for the week of May 11, 2008," and the USAO "did not appear to have any issues with this date and discuss (sic) the dates with the Chief US District Court Judge to see if that

meets her scheduling needs." (*Id*. at p. 3). The government also discussed the overall planning and logistics of the enforcement action with Judge Reade. For example, in January, 2008, a meeting was held among Judge Reade, the clerk of the court, the United States Marshal's Service ("USMS"), Probation, USAO, and ICE. (*Id*. at p. 4). At this meeting "[t]he Judge was updated on the process of the Cattle Congress as well as discussions about numbers, potential trials, IT issues for the court, and logistics. The Court made it clear that they were willing to support the operation in any way possible, to include staffing and scheduling." (*Id*.).

C. Judge Reade met again with the prosecution team on March 17, 2008, and "discussed an overview of charging strategies, numbers of anticipated arrests and prosecutions, logistics, the movement of detainees, and other issues related to the CVJ investigation and operation." (*Id*. at p. 5). Upon information and belief, in early April, 2008, Judge Reade held a meeting with representatives of the USAO, so they could provide her with a "final gameplan," consisting of a briefing on "how the operation will be conducted." (*Id*. at pp.6-7).

These facts raise the strong inference that Judge Reade was made privy to facts from a "prior proceeding," which arguably made her a part of the prosecution function. But these facts were never disclosed to trial counsel. The failure to disclose these facts,

ultimately, was the reason why trial counsel considered, but declined to file, a timely pretrial motion seeking recusal of the trial judge.

Specifically, in August, 2008, F. Montgomery Brown was retained to represent Sholom Rubashkin in relation to anticipated forthcoming state and federal charges relating to the raid at Agriprocessors. (Ex. 2). When he was retained, Mr. Brown was generally familiar with the raid of Agriprocessors, the publicized consequences of the enforcement action, and with the prosecution of undocumented workers and supervisors Martin De La Rosa and Carlos Guerrero. (*Id*.). Mr. Brown also knew that the USAO deemed Sholom Rubashkin the putative "CEO" of Agriprocessors and that they believed he controlled the "day-to-day" operation and management of the business. (*Id*.)

Later, after Mr. Rubashkin was indicted, Guy Cook entered his appearance to represent Mr. Rubashkin as co-counsel with Mr. Brown. (Ex. 3, p. 1). On December 10, 2008, in connection with initial pretrial proceedings, Judge Reade ordered that any motions for recusal must be filed on or before January 30, 2009, (Ex. 4), and specifically asked Mr. Cook on the record whether a recusal motion was going to be filed. (Ex. 2, p. 3).

Both Mr. Cook and Mr. Brown (collectively, "trial counsel") were aware that Judge Reade had recently issued an order concerning a recusal motion made in *United States v. De La Rosa-Loera*, N.D. Iowa No. 08-CR-1313-LRR, a separate-but-related prosecution of an Agriprocessors supervisor. (Ex. 3, p. 2; Ex. 2, p. 3). Trial counsel knew that Judge Reade, in her order, had been critical of the defendant's argument for recusal, and said that he didn't understand the "true facts" surrounding her pre-raid

contacts with the government. (Ex. 3, p. 2). Judge Reade stated in her *De La Rosa-Loera* order that her involvement had been merely "logistical," and trial counsel believed, based on such statements, that the trial judge had not been privy to any prosecutorial functions, including charging strategies against any Postville defendants. (*Id*. at pp. 2-3). Accordingly, trial counsel made the difficult decision not to file a motion for recusal of Judge Reade in compliance with the deadlines set forth in the scheduling order. (*Id*. at pp. 2-3; Ex. 2, pp. 3-4).

At no time did any member of the USAO provide trial counsel with any additional factual detail regarding the *ex parte* contacts discussed above. It was only after trial counsel filed a Freedom of Information Act ("FOIA") lawsuit against ICE that they discovered evidence of the extent of the government's *ex parte* contacts with Judge Reade. (Affidavit of Attorney Guy R. Cook, p. 4). Had trial counsel been fully informed of the extent of the prosecution team's *ex parte* contacts with Judge Reade in the months leading up to the May, 2008 raid on Agriprocessors, they would unquestionably have moved for Judge Reade's recusal from the case in a timely fashion. (*Id*. at p. 3; Affidavit of Attorney F. Montgomery Brown, p. 5).

And, had trial counsel filed such a motion, they would have avoided the very prejudice suffered by Mr. Rubashkin when the issue of recusal was finally raised after trial and on appeal – the Eighth Circuit ultimately reviewed and rejected the recusal issue under a "plain error" standard of review, *See Rubashkin*, 655 F.3d 849, 858 (8th Cir. 2011), which, just like the "harmless error" standard, requires a showing of prejudice to

Mr. Rubashkin's "substantial rights." *See United States v. Olano*, 507 U.S. 725, 744, 113 S.Ct. 1770 (1993).

If trial counsel had made a timely motion seeking the trial judge's recusal, the failure of the trial judge to recuse herself would have been considered on its merits, and if the appearance of bias was found, it would have been "structural error" requiring reversal. The presence on the bench of a judge who is not impartial constitutes a "structural defect[] in the constitution of the trial mechanism, which def[ies] harmless error analysis." *See Arizona v. Fulminante*, 499 U.S. 279, 309-10, 111 S.Ct. 1246, 1265 (1991).

"It is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process.'" *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876, 129 S.Ct. 2252, 2259 (2009). Indeed, "[t]here are circumstances in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Id.* One such instance requiring recusal is where a judge had determined in an earlier proceeding whether criminal charges should be brought and then proceeded to try and convict the prisoners. *Id*. at p. 880. (citing *In re Murchison*, 349 U.S. 133, 75 S.Ct. 623.

The facts requiring recusal in *Murchison* arose out of a state-law procedure whereby a judge examined witnesses to determine whether charges should be brought against two defendants, then presided over their trial and conviction. *Id.* The Supreme Court –referring to this process as a "one-man grand jury" – reversed the convictions, stating that Due Process mandates that "no man can be a judge in his own case," adding

that "no man is permitted to try cases in which he has an interest in the outcome." *Murchison*, 349 U.S. at 136.

Judge Reade did not serve on the Grand Jury which indicted Mr. Rubashkin. But under the reasoning of *Murchison* (and later *Caperton*), her many *ex parte* contacts and discussions with those who made the charging decisions in Mr. Rubashkin's case nonetheless required recusal. As the Supreme Court noted in *Murchison* and *Caperton*, "the disqualifying criteria cannot be defined with precision," and "[c]ircumstances and relationships must be considered." *Caperton*, 556 U.S. 880. A chief concern that may require recusal is "[t]he judge's prior relationship with the defendant, as well as the information acquired from a prior proceeding…" *Id*. at 881.

Ultimately, the Due Process cause may require recusal under "objective standards that do not require proof of actual bias." *Id*. at 883. "In defining these standards the Court has asked whether, under a realistic appraisal of psychological tendencies and human weakness, the interest [of the trial judge] poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." *Id*. at 883-884. Moreover, the Supreme Court has declared that the presence on the bench of a judge who is not impartial is a "structural defect in the construction of the trial mechanism, which defy analysis by 'harmless error' standards." *See Arizona v. Fulminante*, 499 U.S. 279, 309-10, 111 S.Ct. 1246, 1265 (1991).

Thus, had trial counsel been aware of the information concealed by the government, the error arising from the trial judge's appearance of bias would have been properly preserved for appellate review.

Given the fact that the concealed information would have supplied grounds for trial counsel to move for Judge Reade's recusal under the Due Process Clause, the information was without a doubt "favorable information material to the accused," in that Judge Reade's potential for bias constituted a "structural defect in the construction of the trial mechanism, which def[ies] analysis by 'harmless error' standards," *See Fulminante*, 499 U.S. at 309-10, such that in the absence of such information, his trial did not "result[] in a verdict worthy of confidence." *See Kyles*, 514 U.S. at 433-34.

For this reason, Mr. Rubashkin should be granted leave to conduct discovery concerning the full extent of the Government's *ex parte* contacts with the trial judge, and should be granted a hearing. His convictions must be vacated, and a new trial granted.

C. THE GOVERNMENT ENGAGED IN POSSIBLE BRADY VIOLATIONS REGARDING EXCULPATORY INFORMATION PROVIDED BY GOVERNMENT WITNESSES.

There is credible evidence that the government engaged in *Brady* violations by failing to provide potentially exculpatory information to Mr. Rubashkin's counsel. The information is from witnesses who informed the government that Mr. Rubashkin did not intend to defraud the bank by transferring the money among accounts. Rather, the purpose was ordinary-course, commercial cash management. Defense counsel's investigation, including discussions with Mr. Rubashkin's trial counsel, reveals that the

USAO did not provide this information to Mr. Rubashkin's counsel. When proved, these violations should warrant overturning Mr. Rubashkin's conviction.

D. WITHDRAWAL OF MR. RUBASHKIN'S COUNSEL

The Court held a show cause hearing on September 23, 2013 on the issue of whether Mr. Rubashkin's trial counsel improperly contacted jurors from his trial. At the hearing, Judge Reade held in abeyance a decision regarding her contempt sanction based on whether Mr. Rubashkin intended to use the juror information in this motion or not. Mr. Rubashkin's counsel, Jim Wyrsch, believed this created a conflict of interest in preparing this motion by presenting the Hobson's choice of using the information in this motion or facing a possibly enhanced contempt penalty. Accordingly, he withdrew, which required Mr. Rubashkin to rely on new counsel in this immensely complex case. The impact of the withdrawal was compounded because it occurred shortly before the Jewish holiday of Sukkot, which resulted in the Rubashkin family and others familiar with the case not being available to communicate electronically for six days (including two Sabbaths). As this interruption has possibly prejudiced the rights afforded him under the U.S. Constitution, he respectfully reserves the right to further develop the arguments contained in the brief.

Respectfully submitted,

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Certificate of CM/ECF Service

I hereby certify on September 30, 2013 I electronically filed the foregoing with the Clerk of the Court for the United States District Court Southern District of Iowa by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system. Defendant has been served by U.S. Mail at his above address on September 30, 2013.

/s/ Paul Rosenberg