ATTACHMENT TO 2255 PETITION UNDER QUESTION 12
GROUNDS FOR RELIEF

GROUND ONE

(a) Grounds and Supporting Facts

Mr. Rubashkin's right to due process of law under the Fifth Amendment was violated when the government failed to disclose material, exculpatory information concerning actions it took to influence the trustee as well as prospective buyers in the Agriprocessors' bankruptcy proceeding, and when the government presented materially inaccurate testimony concerning this issue at sentencing. The government's actions had a chilling effect on the bankruptcy asset sale process, thereby increasing the "loss" attributable to Mr. Rubashkin's convictions by tens of millions of dollars. This evidence should have been fully disclosed to Mr. Rubashkin and his counsel, in accordance with the teachings of *Brady v. Maryland*, 373 U.S. 83 (1963).

It also appears that the government presented materially inaccurate testimony from at least two witnesses at Mr. Rubashkin's sentencing, in violation of Mr. Rubashkin's due process rights under the rule announced in *Alcorta v. Texas,* 355 U.S. 28 (1957). The testimony of these witnesses either downplayed or explicitly denied the very acts of undue influence concerning the efforts of the trustee prospective buyers in the bankruptcy. This lack of information caused the Court to make findings concerning the loss attributable to Mr. Rubashkin's convictions based on incomplete and inaccurate information, and violated Mr. Rubashkin's right to due process of law under the Fifth Amendment.

The government's influence in the bankruptcy sale process prejudiced Mr. Rubashkin, in that industry standard methods for estimating liquidation value of a company show that the reasonably expected liquidation value of Agriprocessors, absent government interference in the bankruptcy sale, would have been tens of millions of dollars higher. Therefore, the Court never heard the most probative evidence concerning the "reasonably foreseeable pecuniary harm" from Mr. Rubashkin's offenses. Accordingly, Mr. Rubashkin should be granted leave to conduct discovery; should be granted a hearing; and ultimately, his sentence should be vacated, and a new sentencing hearing granted.

Supporting Facts

The facts supporting this claim are set forth in detail, along with supporting affidavits, in Movant Sholom Rubashkin's Memorandum in Support of Motion to Vacate, Set Aside or Correct the Judgment or Sentence Pursuant to 28 U.S.C. § 2255, filed contemporaneously with this application, and incorporated herein by reference. By summary, the essential facts are as follows:

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 on Agriprocessors. (Case No. 08-02751, U.S. Bankruptcy Court, E.D.N.Y.). The bankruptcy trustee, Joseph Sarachek, sought to sell Agriprocessors' assets in a 363 sale.

The United States Attorney's Office for the Northern District of Iowa (USOA) told Mr. Sarachek that the business was worthless and would likely be forfeited to the government as a result of the criminal case against Mr. Rubashkin. This significantly

hampered Mr. Sarachek's efforts to maximize the value of the estate for the benefit of creditors.

The USAO also warned bidders that no member of the Rubashkin family could be involved in any bid for Agriprocessors' assets. The No-Rubashkin edict, coupled with the threat of forfeiture, deterred interested buyers, including one who had initially planned to offer $40 million, from ultimately bidding. The USAO also hindered Mr. Sarachek by demanding that he not do business with certain suppliers that would have saved the estate hundreds of thousands of dollars.

The USAO failed to disclose to Mr. Rubashkin's counsel its direct, forceful intervention, which led to Agriprocessors' assets being sold at a firesale price. Further, the USAO presented misleading testimony at trial, suggesting his office did not intervene in the sale process.

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 the testimony of Mr. Sarachek's counsel, and discrediting the testimony of Defendant's witnesses on this issue. New evidence shows that the government concealed evidence from Mr. Rubashkin's counsel, and presented misleading evidence, all leading to a disproportionately long guideline sentence for Mr. Rubashkin.

Mr. Rubashkin also incorporates herein by reference all points and authorities set forth in Movant Sholom Rubashkin's Memorandum in Support of Motion to Vacate, Set Aside or Correct the Judgment or Sentence Pursuant to 28 U.S.C. § 2255, filed contemporaneously herewith.

(b) Direct Appeal

(1) No

(2) This claim of due process violations under *Brady v. Maryland*, 373 U.S. 83 (1963) and *Alcorta v. Texas*, 355 U.S. 28 (1957) was not raised on direct appeal, because Mr. Rubashkin was not aware of all of the facts supporting this claim, nor could he have, through the exercise of reasonable diligence at the time, discovered such facts.

(c) Post-Conviction Proceedings

(a) No.

GROUND TWO

(a) Grounds and Supporting Facts

Mr. Rubashkin's right to due process of law under the Fifth Amendment was violated when the government failed to disclose material, favorable facts concerning ex parte contacts with the trial judge that occurred prior to indictment, causing trial counsel to fail to make a timely motion for recusal of the trial judge under the Due Process Clause. This failure to disclose information violated the rule of *Brady v. Maryland*, 373 U.S. 83 (1963). Had counsel made a timely motion, the structural error (automatically requiring reversal without being subject to harmless error review) resulting from the trial judge's appearance of bias would have been properly raised and preserved for consideration on the merits. Because the issue wasn't raised in a timely fashion, Mr. Rubashkin was prejudiced, in that on appeal, the Eighth Circuit disposed of the point on a "harmless error" standard of review.

Supporting Facts

The facts supporting this claim are set forth in detail, along with supporting affidavits, in Movant Sholom Rubashkin's Memorandum in Support of Motion to Vacate, Set Aside or Correct the Judgment or Sentence Pursuant to 28 U.S.C. § 2255, filed contemporaneously with this application, and incorporated herein by reference. The quotations below are supported by affidavit citations in the Memorandum. By summary, the essential facts are as follows:

On May 12, 2008, the Immigration and Customs Enforcement Agency ("ICE") launched a raid on Agriprocessors' Postville facility.

In October, 2007, the USAO had coordinated with ICE and various other law enforcement agencies concerning an investigation of Agriprocessors. In conjunction with this investigation, On October 10, 2007, representatives of the USAO met with United States District Judge Linda Reade, numerous times and "provided her with a briefing regarding the number of criminal prosecutions that they intend to pursue relative to [the] investigation." 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." Judge Reade advised the USAO that "she would be out of the country and unavailable for all of February and half of March, 2008

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." 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. 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."

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." 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."

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. Later, after Mr. Rubashkin was indicted, Guy Cook entered his appearance to represent Mr. Rubashkin as co-counsel with Mr. Brown. 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.

Both Mr. Cook and Mr. Brown (jointly, "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. Trial counsel knew that Judge Reade, in her order, had been critical of the defendant's argument for recusal, and said that the defendant in that case didn't understand the "true facts" surrounding her pre-raid contacts with the government. 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. 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.

At no time did any member of the USAO provide trial counsel with any additional factual detail regarding the *ex parte* contacts discussed *supra*. 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. 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.

Mr. Rubashkin also incorporates herein by reference all points and authorities set forth in Movant Sholom Rubashkin's Memorandum in Support of Motion to Vacate, Set Aside or Correct the Judgment or Sentence Pursuant to 28 U.S.C. § 2255, filed contemporaneously herewith.

(b) Direct Appeal

(1) No

(2) This claim of due process violations under *Brady v. Maryland*, 373 U.S. 83 (1963) was not raised on direct appeal, because Mr. Rubashkin was not aware of all of the facts supporting this claim, nor could he have, through the exercise of reasonable diligence, discovered such facts.

(c) Post-Conviction Proceedings

(a) No.

GROUND THREE

(a) Grounds and Supporting Facts

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.

(b) Direct Appeal

(1) No

(2) This claim of due process violations under *Brady v. Maryland*, 373 U.S. 83 (1963) and *Alcorta v. Texas*, 355 U.S. 28 (1957) was not raised on direct appeal, because Mr. Rubashkin was not aware of all of the facts supporting this claim, nor could he have, through the exercise of reasonable diligence at the time, discovered such facts.

(c) Post-Conviction Proceedings

(a) No.