IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

SHOLOM RUBASHKIN, Petitioner-Appellant, vs. UNITED STATES OF AMERICA, Respondent-Appellee.	)	Case No. 17-1654 **APPLICATION FOR CERTIFICATE OF APPEALABILITY**

Petitioner-Appellant Sholom Rubashkin ("Rubashkin") is serving a 27-year sentence on financial fraud charges. On September 30, 2013, he filed a timely Motion to Vacate, Set Aside or Correct the Judgment and Sentence Pursuant to 28 U.S.C. § 2255 (the "2255 Motion"). On January 26, 2017, the United States District Court for the Northern District of Iowa entered a 142- page order and final judgment denying the 2255 Motion.

At the conclusion of its ruling (the length of which underscores the complexity and debatable nature of the issues), the District Court declined to issue a certificate of appealability on any of the three grounds for which Rubashkin sought relief. Rubashkin therefore requests, for reasons set forth below, and pursuant to Fed. R. App. P. 22(b)(2) and 28 U.S.C. § 2253(c), that a Circuit Judge issue a certificate of appealability on whether the government violated his due process rights by: **Ground One**: withholding significant exculpatory evidence on loss amount and presenting

false testimony at his sentencing hearing, leading to a 22-level increase under the United States Sentencing Guidelines equating to nearly 25 additional years' imprisonment; **Ground Two**: failing to disclose the trial judge's substantial personal involvement in the government investigation giving rise to the charges against Rubashkin, which created a structural defect in his trial and sentencing; and **Ground Three**: withholding exculpatory information from a cooperating witness on money laundering charges that, had it been disclosed, would have created a "reasonable probability" of acquittal on those charges. Rubashkin further seeks appellate review with respect to whether he is entitled to discovery and an evidentiary hearing on these issues, and whether the trial court judge should have recused herself from hearing this § 2255 motion.

Argument in Support of Request for Certificate of Appealability

I. Legal Standard.

A movant "must make a substantial showing of the denial of a constitutional right in order to be granted a certificate of appealability." *Garrett v. United States*, 211 F.3d 1075, 1076 (8th Cir. 2000). "A substantial showing is a showing that issues are debatable among reasonable jurists, a court could resolve the issues differently, or the issues deserve further proceedings." *Id.* (quoting *Cox v. Norris*, 133 F.3d 565, 569 (8th Cir. 1997)). A certificate of appealability is appropriate in cases where a district court resolves credibility issues without an evidentiary hearing or concludes

a movant's claim for relief is "speculative" without giving the movant an opportunity to present the matter in open court. *See, e.g.*, *Roundtree v. United States*, 751 F.3d 923 (8th Cir. 2014) (granting certificate of appealability after district court judge declined to do so and reversing and remanding on the merits).

II. Rubashkin Made a Substantial Showing of the Denial of a Constitutional Right on Ground One of His § 2255 Petition Because the Government at Sentencing Presented False Testimony and Withheld Material Exculpatory Evidence on Loss Amount.

A. The Government Presented False Testimony and Withheld Material Evidence.[1]

At Rubashkin's sentencing hearing in April 2010, one of the hotly-contested issues was the loss amount attributable to him under the United States Sentencing Guidelines. The government presented evidence that the victim of the offenses, a financial institution named First Bank Business Capital ("First Bank"), lost nearly $27 million in principal on loans to Agriprocessors, Inc., the kosher meat processing company where Rubashkin worked as a vice-president. The government argued the entire loss resulted from Rubashkin's fraud and thus his Offense Level under the Sentencing Guidelines should be increased by 22 levels, increasing the bottom end of his Sentencing Guidelines range by nearly 25 years.

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[1] Every statement in this section was supported in the District Court by trial evidence or affidavit(s). References to "App.," "Govt. App." and "Reply App." are to the appendices filed in the District Court, which can be found at Docket Nos. 44-1, 52-1, and 53-1, respectively.

Among other arguments, Rubashkin countered that the loss was unforeseeable to him and was instead caused by the government's improper interference in Agriprocessors' bankruptcy case in the United States Bankruptcy Court for the Northern District of Iowa. Agriprocessors had entered bankruptcy around the time Rubashkin was charged, and an independent bankruptcy trustee was appointed to run the company and prepare its assets for sale to the highest bidder, with First Bank being entitled to the proceeds of that sale up to the value of its loans to the company. Rubashkin presented evidence at sentencing that prosecutors injected themselves into the bankruptcy process by threatening to pursue forfeiture against whichever party ended up winning the bidding process if that party permitted any members of Rubashkin's family to have an ownership, management, or consulting role in the business after the bankruptcy sale. Rubashkin argued (1) this was an improper use of forfeiture because no other members of his family had been charged with criminal offenses, and (2) fair value could not be achieved in the bankruptcy sale without the involvement of his father (who founded and owned the company, had relationships with key customers, and whose name was synonymous with its kosher meat products) and other family members. Rubashkin asserted the government's forfeiture threats scared off potential bidders and drove down the purchase price, leading to an inflated loss to First Bank.

The government presented testimony from Paula Roby, an attorney for the independent bankruptcy trustee, to rebut Rubashkin's argument that the government's forfeiture position caused the loss. For example, an Assistant United States Attorney elicited the following testimony from Roby at sentencing:

> Q. And there's been some discussion about a forfeiture allegation in the indictment and how that may or may not have affected any prospective bidders. Do you have an opinion about how that may have impacted any of the bidders in this case?
>
> A. I do.
>
> Q. And what's that?
>
> A. It did not.

(Govt. App. 81.) During investigation for this § 2255 case, Rubashkin learned for the first time that the government withheld from him a letter written by counsel for First Bank (the victim of the offense) to the same AUSA stating the government's forfeiture position "is likely to have a significantly negative impact on the prospects of the sale of Agriprocessors' assets" and "there may be few, if any, potential purchasers willing to navigate through a pending forfeiture proceeding and pay fair value for Agriprocessors' assets." (App. 81-82.) The government does not dispute withholding the letter, and offers no justification for having suppressed it. The government also never disclosed to Rubashkin that it was warned by the independent bankruptcy trustee (in Roby's presence) that the government's forfeiture threats

would "kill off bidders" and "enormously hurt" his ability to do his job of maximizing the value of the estate. (App. 87.)

Although it did not disclose the letter from the victim to the AUSA warning of the consequences of the government's forfeiture threats, the government did disclose at the time of sentencing a letter *from* the AUSA *to* First Bank dated one day prior to the date of the undisclosed letter. (Govt. App. 88-89.) The AUSA's letter acknowledged the likelihood of the government pursuing forfeiture but assured First Bank the government did not wish to impede the sale of Agriprocessors' assets to a legitimate buyer. The disclosure of this letter (but not First Bank's response the following day) made the *Brady* violation worse by giving the false impression the Bank was satisfied with the government's approach to forfeiture, when, in fact, the opposite was true. The government compounded the problem a few weeks after the exchange of letters when the same AUSA represented to the bankruptcy judge in open court that prosecutors had "good discussions" with First Bank and the parties were "all on the same page" with respect to forfeiture. (Govt. App. 117-118.) In addition, in his investigation of this § 2255 case, Rubashkin learned that on March 24, 2009, First Bank declared a default on its post-petition financing arrangement with the bankruptcy trustee because of its discomfort with the government's forfeiture position, stating: "[B]ased on discussions with certain government officials on or about March 24, 2009, [First Bank] 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 or right." (App. 108-110). The government never disclosed to Rubashkin the discussions on March 24, 2009, that led to First Bank feeling so threatened.

In addition to withholding exculpatory evidence, the AUSA elicited false testimony from Roby at sentencing regarding the government's threats to use forfeiture against any bidder in the bankruptcy process who employed Rubashkin's father or any other member of his family in an ownership, management, or consulting role. Rubashkin referred to these threats as the "No Rubashkin Edict," but Roby falsely denied any such restriction was imposed:

> 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 could not, yeah.
>
> A. There was none to my knowledge.

(App. 30-31); (*see also* Govt. App. 85) ("[A] prohibition [on Rubashkins] was never leveled."). Roby further falsely testified that any rumors about a "No Rubashkin" rule were "very unreliable" (App. 37), and that her client, the independent bankruptcy trustee, "worked very, very hard to dispel any [such] rumors that were in the community." (App. 32-33). The District Court relied on Roby's false

testimony to conclude the government did not impose a "No Rubashkin" rule during the bankruptcy process:

> Defendant argued that, in the Bankruptcy, the government took the position and presented testimony that no purchaser of Agriprocessors could have any involvement with Defendant or Defendant's family, resulting in a depressed sale price of Agriprocessors. However, the attorney for the Trustee in the Bankruptcy Auction, Paula Roby, testified that there was no such condition attached to the sale of Agriprocessors. The court credits Roby's testimony and discredits testimony from Defendant's witnesses. Accordingly, the court declines to consider this theory in arriving at an actual loss calculation.

(Court's Sentencing Memorandum (Crim. Dkt.[2] No. 957) at pp. 22-23).

In his investigation of this § 2255 case, and in direct contradiction of Roby's testimony and the Court's conclusion, Rubashkin learned that an AUSA expressly told Roby and the independent bankruptcy trustee during a meeting on December 5, 2008, that "No Rubashkins is very important to us" and "non-negotiable." (App. 86.) The AUSA further insisted there could be "No involvement of Rubashkins or family from any standpoint" following the bankruptcy sale. (App. 87). The AUSA who later conducted the examination of Roby at Rubashkin's sentencing hearing was present when these statements were made. He did not, however, disclose the statements to Rubashkin's counsel, nor did he correct Roby's testimony when she said "[t]here was none [No Rubashkin Edict] to my knowledge" and any rumors to

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[2] References to "Crim. Dkt." are to the docket in Rubashkin's criminal case, Case No. 2:08-cr-01324-LRR.

the contrary were "very unreliable." (App. 30-31, 32-33). Rubashkin only learned of the statements prosecutors made to the independent bankruptcy trustee through the fortuitous discovery in his investigation for this § 2255 case of notes kept by a different attorney who was also present during the meeting with the AUSAs. The government does not dispute the authenticity or accuracy of the notes.

The notes reveal that the reason for the government's decision to use the threat of forfeiture to enforce its "No Rubashkin" position was prosecutors' fundamental distrust of bankruptcy law and the bankruptcy judge. Prosecutors appear to have been particularly concerned with the language of 11 U.S.C. § 363, which permits the sale of assets in bankruptcy to a "good faith purchaser." In the words of the AUSA who would later examine Roby at sentencing: "Right now, until we take some action [forfeiture] to put our marker down, people are asking us to rely on the Bankruptcy process and a promise that 'good faith' means the same to you as we need it to mean." (App. 88) (emphasis in original). Elsewhere he stated: "'Good faith' – what does that mean? Whatever judge says. Very broad." (App. 85). In essence, prosecutors decided *they*, rather than the bankruptcy court, should get to determine who would own and operate Agriprocessors after bankruptcy even though Rubashkin was the only member of his family ever charged and this Court has sharply criticized prosecutors in the past for similar heavy-handed involvement in bankruptcy proceedings. *See United States v. Riley*, 78 F.3d 367, 371-72 (8th Cir.

1996) (reversing prosecutors' attempt to take over an insurance business, forfeit all revenues, and determine which creditors to pay and criticizing the government for having "seemingly lost sight of this statutory limit on its authority").

The independent bankruptcy trustee, Joseph Sarachek (whom Roby represented), confirms the falsity of Roby's sentencing hearing testimony in a declaration submitted in Rubashkin's § 2255 case. He states: "[Prosecutors] were particularly focused on making sure the Company was not sold to Aaron Rubashkin or any other member of the Rubashkin family, and that no member of the Rubashkin family would have any involvement in managing the business on a going forward basis. Prosecutors made this restriction very clear to my attorneys and me during the meeting shortly after my appointment as Trustee." (App. 39).

Roby's false testimony was highly material. Rubashkin submitted sworn declarations from numerous bidders and even the independent bankruptcy trustee that the government's forfeiture threats had a materially negative impact on the value of the Agriprocessors' bankruptcy estate. In the trustee's words: "[T]he government's assertion of forfeiture claims and restriction on the involvement of members of the Rubashkin family clearly had a chilling effect on the Agriprocessors' bankruptcy sale process and resulted in the Company selling for a lower amount than it otherwise would have." (App. 40). Numerous prospective bidders confirm in sworn declarations that the government's "No Rubashkin Edict" impacted their

valuation of Agriprocessors' assets. These prospective bidders explain the unique expertise, relationships, insight, and name recognition associated with Aaron Rubashkin had tremendous value, and thus his forced exclusion from the business had a substantial downward effect on what the bidders were willing to pay (and whether they submitted a bid at all). Prospective bidder Sid Borenstein summarized the issue as follows: "[t]he position of the U.S. Attorney's Office had a chilling effect on our interest in purchasing the assets of Agriprocessors . . . We viewed Aaron Rubashkin as a 'key man' without whose involvement we would have no ability to manage this business. Accordingly we did not submit a bid." (App. 46). Other bidders made essentially the same point. (App. 106-107, 42, 119, 48-49, 99, 100).

Rubashkin also submitted evidence in this § 2255 case that the assets sold in the bankruptcy process had a value of at least $68.6 million (App.50-78), yet were sold for only $8.5 million. (App. 40).[3] Rubashkin further submitted undisputed evidence that the independent bankruptcy trustee received an offer of $40 million during the bankruptcy proceeding but decided not to accept it outright because he believed he would obtain even higher bids by using the $40 million bid as a "stalking horse" in an auction process. (App. 39). The $40 million bidder withdrew his bid,

[3] The source of the $68.6 million figure was an independent financial analyst, Marc Ross, who was the government's very first witness in Rubashkin's criminal trial. His credibility is therefore presumably not in doubt.

however, shortly after being forced to meet with prosecutors, who threatened to forfeit the assets after the purchase if he permitted members of Rubashkin's family to have an ownership, management, or consulting role with his company. (App. 94-95, 118-119). Other prospective bidders, all of whom were also exposed to the government's threats, ended up either not bidding at all or submitting bids far below $40 million. (App. 94-95, 118-119). As indicated above, Rubashkin submitted sworn declarations from the $40 million bidder and others who state that the government's threats of forfeiture negatively impacted their willingness to bid on Agriprocessors' assets and amount they were willing to pay for those assets. (App. 94-95, 118-119, 46, 106-107, 42, 119, 48-49, 99, 100). Had Agriprocessors been sold for $40 million, the bankruptcy sale would have generated sufficient revenue to repay First Bank in full, and thus Rubashkin's loss amount would have been $0 and Sentencing Guidelines range 30-37 months.

In addition to the false testimony described above, Roby falsely testified during the sentencing hearing about the timing of the meeting between prosecutors and the $40 million bidder. She testified the bidder met with prosecutors *before* making his $40 million bid, thus giving the false impression the meeting with prosecutors had no effect on his decision to withdraw his offer. In full, she stated:

> A. There had been some discussion about concern that there might be someone coming in buying on behalf of Mr. Rubashkin. But at the meeting that I sat in with Mr. Soglowek, my trustee and Mr. Soglowek made it very clear that they saw him as an

indispensable advisor, and they were told by the United States Attorney's Office that that was not a deal breaker. That did not – was not something that was going to trigger any action or make it impossible to buy this company.

Q. What was the date of that?

A. I don't recall the date offhand.

Q. Was it in January or was it in April?

A. Well, it wouldn't have been in January because that's when my son was in the hospital, so it would have been sometime after that.

Q. It was in April when Soglowek came back for a second run at trying to buy the company, right?

A. No, it was not. It was prior to the initial auction.

Q. Was it before – was it before Niat Israel (phonetic) offered $17 million plus rent of $3 million per year?

A. **It was before Soglowek entered its $40 million bid. We met with the US Attorneys prior to that**.

(App. 30-31) (emphasis added). Roby's (and the bankruptcy trustee's) own fee petitions, which her firm submitted to the Bankruptcy Court, show the bidder met with prosecutors 12 days *after* submitting his $40 million offer and withdrew his bid a few days after the meeting. (App. 153-155). By reversing the sequence, Roby's testimony gave the misleading impression the bidder's meeting with the government did not discourage him from moving forward with his offer. The actual timing of that meeting – as well as affidavits from the bidder and one of his associates (App. 94-95 and 118-119) – show the opposite is true: the inability to use Rubashkins in

the ownership or operation of the successor entity had a materially-negative impact on the bidder's desire to purchase the business.

Although not known to Rubashkin's counsel at the time of sentencing, it is clear, in retrospect, that Roby's role in providing false and misleading testimony was not coincidental. Roby harbored serious bias against Rubashkin (despite having never met the man) to the point that she described him to one of her clients as the "sleaziest bastard to ever walk the earth." (App. 157). Roby also told the client she "was going to make sure he [Rubashkin] was put away for a long time." (Id.) This, too, was not disclosed by the government even though Roby had numerous conversations with prosecutors throughout the bankruptcy and criminal cases and surely would have shared her bias with them.

B. Rubashkin Made a Substantial Showing of a Violation of His Due Process Rights.

Under *Napue v. Illinois*, 360 U.S. 264 (1959), prosecutors are forbidden from knowingly presenting false testimony and must correct it whenever it occurs, even if not elicited by them. Similarly, *Brady v. Maryland*, 373 U.S. 83 (1963), requires prosecutors to disclose exculpatory evidence. "*Brady* and *Napue* apply when the suppressed evidence concerns the credibility of a witness, as well as when the suppressed evidence directly concerns the guilt or punishment of the accused." *United States v. McCarty*, 177 F.3d 978 (5th Cir. 1999) (emphasis added); *see also United States v. Whitehill*, 532 F.3d 746, 753 (8th Cir. 2008) (government must

disclose evidence "favorable to an accused" and "material either to guilt or to punishment") (emphasis added). For purposes of *Brady*, "[e]vidence is 'material' if it creates a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Cone v. Bell*, 556 U.S. 449, 469-470 (2009). Under *Napue*, a lower materiality threshold applies: "the fact that testimony is perjured is considered material unless failure to disclose it would be harmless beyond a reasonable doubt." *United States v. Bagley*, 473 U.S. 667, 679-80 (1985); *see also Giglio v. United States*, 405 U.S. 150, 153-154 (1972) (*Napue* violation is material if "the false testimony could … in any reasonable likelihood have affected" the outcome of the proceeding).

It is, at a minimum, "debatable among reasonable jurists" that the government violated *Napue* during and after Rubashkin's sentencing hearing when it presented, and failed to correct, Roby's testimony and the District Court's erroneous ruling flowing therefrom that there was not a "No Rubashkin" rule and the prosecutors' actions had no impact on the Agriprocessors sale price in the bankruptcy. It is, at a minimum, equally debatable that the government also violated *Brady* by failing to disclose: (1) the letter from the victim dated December 9, 2008, stating that the government's actions would "have a significantly negative impact on the prospects for a sale" of Agriprocessors' assets and that "few, if any, potential purchasers [would be] willing to navigate through a pending forfeiture proceeding and pay fair

value";[4] (2) the existence or substance of the December 5, 2008, meeting with the bankruptcy trustee in which prosecutors announced the "No Rubashkin" rule in Roby's presence and were warned that pursuing forfeiture would "kill off bidders" and "enormously hurt [the trustee's] ability to do his job" of maximizing the value of the estate; (3) the substance of prosecutors' later meetings with prospective bidders in which they continued to make threats and prohibit Rubashkin's father's involvement in the successor entity; (4) the substance of prosecutors' "discussions" regarding forfeiture with First Bank in March 2009 that unsettled the Bank to such a degree it declared a default on its post-petition financing; and (5) the direction prosecutors provided to the trustee to communicate to potential bidders the "No Rubashkin" rule. Rubashkin therefore respectfully requests the issuance of a Certificate of Appealability on this issue so that it may be addressed fully in briefing.

The District Court denied Ground One of Rubashkin's § 2255 Motion in a 142-page ruling and, notwithstanding the length of the ruling (which seems to

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[4] As noted above, the *Brady* violation is made worse by the government's disclosure of the letter an AUSA sent to the Bank one day earlier expressing a desire not to impede the bankruptcy auction sale. *See Strickler v. Greene*, 527 U.S. 263, 285, 119 S. Ct. 1936, 1950, 144 L. Ed. 2d 286 (1999) (disclosure of certain records made it "especially unlikely" that defense counsel would realize other records had not been disclosed).

underscore the "debatable" nature of Rubashkin's claims), declined to issue a certificate of appealability. The District Court denied relief for several reasons.

First, the District Court asserted that Rubashkin's § 2255 Motion relied on a misreading of the portion of the Court's Sentencing Memorandum in which it credited Roby's testimony and discredited Rubashkin's evidence on the issue of the No Rubashkin rule. In its § 2255 Ruling, the Court asserted that at the time of sentencing it had credited Roby's testimony on the question of the impact of the No Rubashkin rule, not the question of whether such a restriction existed at all:

> Rather than focus on the extent of the government's restriction on the Rubashkins' involvement [in the business post-bankruptcy], the court focused on whether the forfeiture position could have impacted the sales price of Agriprocessors' assets. The court credited Paula Roby's opinion about the **impact** that the government's forfeiture position had on potential bidders. And, the court discredited witnesses' opinions that were offered in support of the movant's assertion that the government's forfeiture position resulted in a depressed sales price of Agriprocessors' assets.

(§ 2255 Ruling at 130) (emphasis added). It is impossible, however, to reconcile this aspect of the § 2255 Ruling with the language the District Court used in its original Sentencing Memorandum, which focused on the existence of the No Rubashkin rule, not the impact:

> Defendant argued that, in the Bankruptcy, the government took the position and presented testimony that no purchaser of Agriprocessors could have any involvement with Defendant or Defendant's family, resulting in a depressed sale price of Agriprocessors. However, the attorney for the Trustee in the Bankruptcy Auction, Paula Roby, testified that **there was no such condition** attached to the sale of

> Agriprocessors. The court credits Roby's testimony and discredits testimony from Defendant's witnesses. Accordingly, the court declines to consider this theory in arriving at an actual loss calculation.

(Sentencing Memorandum at 21-22) (emphasis added). Indeed, in briefing in the lower court, even the government did not argue that the District Court was merely referring to the "impact" of the government's forfeiture position on potential bidders when it relied on Roby's testimony to conclude "there was no such [No Rubashkins] condition attached to the sale of Agriprocessors."

Even if the District Court's new interpretation of its Sentencing Memorandum is accurate, it merely highlights the *Brady* violation. The government possessed, but did not disclose, a letter ***from the victim*** asserting that the government's forfeiture position was "likely to have a significantly negative impact on the prospects for the sale" and that "there may be few, if any, potential purchasers willing to navigate through a pending forfeiture proceeding and pay fair value." The government further knew, but again did not disclose, that Bankruptcy Trustee Sarachek's team believed the government's forfeiture position would "kill off bidders" and "enormously hurt [Sarachek's] ability to do his job" of maximizing the value of the estate. This undisclosed evidence shows the District Court's current interpretation of the Sentencing Memorandum as merely relating to the <u>impact</u> of the No Rubashkin rule on bidders does nothing to cure the due process violation. Instead, under the current interpretation, the District Court is acknowledging that it credited

testimony in a situation where directly contradictory evidence ***from the victim*** and ***the government witness's own colleagues*** was withheld by the government. This is, at a minimum, a "debatable" *Brady* violation.

Turning to the issue of Roby's testimony, the Court concluded it was not perjury if viewed in the proper context and that any inaccuracies resulted from "confusion, mistake, or faulty memory." (§ 2255 Ruling at 119.) This conclusion rests on the mistaken premise that Rubashkin needed to prove perjury in order to establish a due process violation. This is not so. *See United States v. McClintic*, 570 F.2d 685, 692 (8th Cir. 1978) (government must correct false testimony even if witness did not technically commit perjury; "Regardless of the lack of intent to lie on the part of the witness, Giglio and Napue require that the prosecutor apprise the court when he knows that his witness is giving testimony that is substantially misleading"). Roby's false statements, even if made innocently (which Rubashkin disputes, and would prove otherwise, if necessary), form the basis for a due process violation if the government was aware of the falsity and failed to correct it, as was the case here. Indeed, as Roby's testimony revolved around the government's own actions and words, the government clearly knew it was false. The government's failure to correct the statements therefore violates *Napue* regardless of whether Roby committed perjury.

In any event, the District Court's conclusion Roby did not provide false testimony once her testimony is viewed in full fails to acknowledge the Court's interpretation the first time it heard it. In its Sentencing Memorandum, the Court referenced Roby's testimony as follows:

> Defendant argued that, in the Bankruptcy, the government took the position and presented testimony that no purchaser of Agriprocessors could have any involvement with Defendant or Defendant's family, resulting in a depressed sale price of Agriprocessors. However, the attorney for the Trustee in the Bankruptcy Auction, Paula Roby, testified that there was no such condition attached to the sale of Agriprocessors. The court credits Roby's testimony and discredits testimony from Defendant's witnesses.

This language makes clear the Court viewed Roby's testimony ("there was no such condition") as a rebuttal to the defense position articulated by the Court in the immediately-preceding sentence—i.e., that "no purchaser of Agriprocessors could have any involvement with [Rubashkin] or [Rubashkin's] family."[5] The possibility that a broader reading of Roby's testimony might make her testimony less false (which Rubashkin disputes) does not cure the due process violation because the District Court's interpretation at the time was inaccurate and the government failed

[5] Other interested parties interpreted the testimony the same way. Rubashkin's sentencing counsel was so disturbed by Roby's testimony that it offered a sur-rebuttal witness, Yechiel Cohen, to try to refute her. Shortly thereafter, counsel argued that "contrary to the last witness' testimony, Ms. Roby, the government insisted there could be no Rubashkins involved." (Reply App. 8.)

to correct it. Furthermore, even under the District Court's current interpretation of Roby's testimony (that there was a condition that no Rubashkins could be involved in the business but it had no impact on the bidders), the due process violation is not cured because the testimony is still false and the government violated *Brady* in failing to provide material evidence in its possession from the victim and Roby's own colleagues.

The District Court's next basis for denying the § 2255 petition is that Rubashkin failed to present credible evidence that the government's forfeiture position was a standalone cause of any reduction in the bankruptcy sales price or the amount of such reduction. In reaching this conclusion, the Court found not credible the declarations Rubashkin submitted from numerous prospective bidders who said the "No Rubashkin" rule had a substantial negative impact on their valuation of Agriprocessors' assets and willingness to participate in the bankruptcy auction sale. The Court concluded "the buyers' declarations that they would have paid more if the Rubashkins could have had an ownership interest or management role directly conflicts with their interest in paying as little as possible for Agriprocessors' assets" and that "[n]o potential buyer could credibly assert that Aaron Rubashkin's name and the involvement of the other remaining Rubashkins had value in the tens of millions." (§ 2255 Ruling at 127). The District Court is not permitted, however, to make such credibility determinations without holding an evidentiary hearing. *See*,

e.g., *Roundtree v. United States*, 751 F.3d 923, 926-27 (8th Cir. 2014). Indeed, the bidder declarations and other evidence provide many plausible reasons why Aaron Rubashkin's name was so valuable, including: (1) this was a highly-specialized market in which customers needed to trust the products they were purchasing were truly kosher, and Aaron's name and involvement carried that trust; (2) Aaron had relationships with large customers; (3) Aaron had unmatched experience and knowledge in the industry; and (4) without the assistance of prior ownership, a new buyer will experience expensive growing pains. It is hardly implausible to suggest the presence of a key executive would make the difference between a company being worth "going concern" value and mere "fire sale" value; indeed, courts have expressly recognized this value. *See*, *e.g.*, *In re Bonner Mall P'ship*, 2 F.3d 899, 915-16 (9th Cir. 1993) ("Old owners may have valuable expertise and experience that outside investors lack."); *In re BMW Group I, Ltd.*, 168 B.R. 731, 741 (Bankr. W.D. Okla. 1994) (prior ownership often "brings special value to the reorganization effort").

The District Court's analysis also failed to address Rubashkin's most powerful evidence that the government's forfeiture position had an adverse effect on the bankruptcy sales price: the undisclosed letter from First Bank on December 9, 2008, and declarations from Bankruptcy Trustee Sarachek confirming the harmful impact of the government's position. Like the bidder declarations, there is nothing

facially implausible about Sarachek's declaration or the First Bank letter blaming the government for the loss in value; indeed, Sarachek is a neutral party who would have no reason to lie and the Bank is the victim of the offense. The District Court erred in making credibility determinations and disregarding this key evidence.[6]

The final reason the District Court denied the § 2255 petition is that it said it would have imposed the same sentence even if Rubashkin established the government as an intervening cause of some or all of First Bank's loss. This assertion is impossible to evaluate, however, without knowing what the correct Sentencing Guidelines range was. *See United States v. Viezcas-Soto*, 562 F.3d 903, 908 (8th Cir. 2009) (refusing to conclude Court would have imposed the same sentence without the calculation of an "alternative Guidelines range without the disputed enhancement"). The District Court acknowledged, for example, that the value of Agriprocessors' assets may have been as high as $40 million.[7] Had the bankruptcy auction yielded that price, Rubashkin's loss amount would have been $0 and his Sentencing Guidelines range would have been 30-37 months. Surely the

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[6] The District Court also failed to address Rubashkin's evidence that Roby possessed undisclosed bias against him at the time of her sentencing testimony.

[7] The District Court rejected evidence that the assets had a value of $68.6 million even though the source of that figure was the bankruptcy trustee's independent financial advisor whom the government offered as its first trial witness. This, again, was an impermissible credibility determination.

District Court did not mean to suggest it would have departed upward by *287 months*, particularly when the Court declined to depart upward at the original time of sentencing. To the extent the Court tried to impose such an astronomical upward departure, it would have needed to provide a far more extensive explanation for doing so. *See*, *e.g.*, *United States v. Kemp*, 530 F.3d 719, 722 (8th Cir. 2008) (reversing and remanding for new sentencing where district court failed to provide adequate explanation for upward departure).

Underlying the District Court's rejection of Rubashkin's § 2255 Petition is its application of the legal principle that a "non-constitutional" error in calculating the Sentencing Guidelines range is not cognizable in post-conviction review proceedings. *See* § 2255 Ruling at 104-107, 114-115; *see also Sun Bear v. United States*, 644 F.3d 700, 704 (8th Cir. 2011) ("[O]rdinary questions of guideline interpretation falling short of the 'miscarriage of justice' standard do not present a proper section 2255 claim."). At first, the District Court correctly recognized this principle does not prevent a sentence from being vacated when a defendant's due process rights are violated at the sentencing hearing. *See* § 2255 Ruling at 107-108 (citing cases). However, the Court later indicated any error in calculating a defendant's sentence – even if caused by *Brady* and *Napue* violations – is not cognizable under § 2255 unless the sentence exceeds the statutory maximum. *See id.* at 115 ("In the context of collateral proceedings, a sentence below the ceiling

imposed by Congress – whether by statute or the Guidelines – does not constitute a miscarriage of justice."). If accepted, this conclusion means the government may violate *Brady* and *Napue* with impunity at a sentencing hearing as long as the violations do not result in a sentence in excess of the statutory maximum. The accuracy of such a conclusion is not merely debatable; it cries out for the Eighth Circuit's attention. *See*, *e.g.*, *Townsend v. Burke*, 334 U.S. 736, 740-41 (1948) (sentencing decision based on materially untrue information violates due process even when sentence is within statutory limits); *United States v. Weintraub*, 871 F.2d 1257, 1264-65 (5th Cir. 1989) (granting § 2255 petition in light of government's withholding of impeachment evidence material to sentencing); *cf. United States v. Ortiz*, 741 F.3d 288, 294-95 (1st Cir. 2014) (sentence based on erroneous information violates due process and "threatens the basic integrity of the sentencing process").

In sum, Rubashkin submitted evidence in this § 2255 case that prosecutors told the bankruptcy trustee "No Rubashkins is very important to us" and "non-negotiable" and there could be "no involvement of Rubashkins from any standpoint," yet the government presented testimony from a witness at sentencing that "a [No Rubashkins] prohibition was never leveled"; "there was none [No Rubashkin rule] to my knowledge"; any rumors regarding such a prohibition were "very unreliable"; and the trustee "worked very, very hard to dispel any [such]

rumors." In addition, the government elicited testimony from the witness that the government's forfeiture actions "did not" affect potential bidders in the bankruptcy case despite withholding a letter ***from the victim*** telling the government forfeiture would "likely have a significantly negative impact on the bankruptcy sale" and result in "few, if any, potential purchasers willing to navigate through a pending forfeiture proceeding and pay fair value for Agriprocessors' assets," and despite the declarations from the bankruptcy trustee and the bidders and prospective bidders that in fact the government's actions had a significant negative impact.. The government further failed to disclose statements from its witness's colleagues that forfeiture would "kill off bidders" and "enormously hurt" Trustee Sarachek's ability to maximize the value of the estate. These facts amount, at a minimum, to a "debatable" constitutional violation, and thus Rubashkin respectfully requests the issuance of a certificate of appealability on Ground One of his § 2255 Petition.

III. Rubashkin Made a Substantial Showing of a Constitutional Violation on Ground Two of His § 2255 Petition Because the District Court Judge Who Presided Over His Trial and Sentencing Was Substantially Involved in the Immigration Raid Giving Rise to the Charges Against Him.

Prior to Rubashkin's trial, the government was aware of, but failed to disclose, numerous pre-indictment *ex parte* contacts between members of the prosecution team and the trial judge leading up to the massive immigration raid at Agriprocessors in April 2008. The full substance of these contacts remains unknown, but Rubashkin submitted credible evidence with his § 2255 Petition that prosecutors met with the

trial judge as many as a dozen times beginning in October 2007 and that those meetings included, among other things, "an overview of charging strategies, numbers of anticipated arrests and prosecutions, logistics, the movement of detainees, and other issues related to the [] investigation and operation." The meetings were extensive enough that an Immigrations and Customs Enforcement agent identified the trial judge as a "stakeholder" in the investigation and the agents and prosecutors believed it was necessary to provide her with a "final gameplan" before the raid to explain "how the operation will be conducted." Rubashkin's trial attorneys state, in sworn affidavits, that they did not become aware of the full extent of the trial judge's involvement in the pre-raid investigation until after his trial and sentencing.

Ground Two of Rubashkin's § 2255 Petition argued the government's failure to disclose the pre-raid *ex parte* communications violated his *Brady* rights and deprived him of his constitutional right to a "fair trial in a fair tribunal." *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (1991). The trial judge, in effect, acted in an oversight role in the investigation but later as the judge in his trial and sentencing. *See In re Murchison*, 349 U.S. 133 (1955) (finding due process violation where trial judge previously served as "one-man grand jury" deciding whether charges should be brought). This is a "structural defect[] in the constitution of the

trial" and not subject to harmless error review. *Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991).

In the § 2255 case, Rubashkin moved to recuse the trial judge on the basis that there would be an appearance of impropriety under 28 U.S.C. § 455 if a judge were to preside over a case in which the judge's own words and actions were at issue. Rubashkin's motion also argued other grounds for recusal, including the existence of even more undisclosed *ex parte* communications between the trial judge and prosecutors occurring just a few days before Rubashkin's sentencing hearing. (The government disclosed the fact of the pre-sentencing communications, but did not disclose the communications themselves.) These additional *ex parte* communications occurred because the trial judge was dissatisfied with the status of an investigation "connected to [Rubashkin's] case."

The District Court denied Rubashkin's recusal motion on grounds that, for all intents and purposes, also constituted a denial of Ground Two of his § 2255 Petition, including: (1) the Court's conclusion that Ground Two and the recusal motion misunderstood the true facts surrounding the trial judge's involvement in the immigration raid, and (2) the issue of recusal already had been raised and rejected on direct appeal. In later briefing, Rubashkin re-asserted Ground Two for error preservation purposes, but acknowledged the Court's recusal ruling effectively denied his claim.

Under *Nelson v. United States*, 297 F. App'x 563, 566 (8th Cir. 2008), it appears that a certificate of appealability is not necessary to appeal the District Court's denial of the motion to recuse. Nonetheless, because *Nelson* is an unpublished opinion, and in the interest of ensuring appellate jurisdiction, Rubashkin respectfully submits it is, at a minimum, reasonably debatable whether a district court judge should preside over a § 2255 proceeding in which the judge's own actions and words are at issue. *See*, *e.g.*, *Hurles v. Ryan*, 706 F.3d 1021, 1039 (9th Cir. 2013) (reversing and remanding post-conviction relief matter where trial court judge "found facts based on her untested memory of events, putting material issues of fact into dispute"). Notably, the government did not move to dismiss Ground Two of Rubashkin's § 2255 Petition, but rather answered Ground Two on the merits, thus putting disputed issues of fact into play. Absent recusal, this placed the trial judge in the position of evaluating her own words and conduct. This is impermissible. *See In re Murchison*, 349 U.S. at 138 (due process violation where judge "called on his own personal knowledge and impression of what had occurred in the grand jury room and his judgment was based in part on this impression, the accuracy of which could not be tested by adequate cross-examination"); *Hurles*, 706 F.3d at 1039; *Dziurgot v. Luther*, 897 F.2d 1222, 1227 (1st Cir. 1990) (remanding § 2255 proceeding to different judge where original judge would have been forced to evaluate correctness of his own determination regarding the voluntariness of the

defendant's waiver of rights). If necessary, the Court should issue a certificate of appealability on the issue of recusal.

The certificate also should issue on Ground Two itself. It is true, as the District Court noted, that the Eighth Circuit's ruling on direct appeal addressed the issue of recusal in the context of deciding whether to grant Rubashkin a new trial under Fed. R. Crim. P. 33 and under a plain error standard of review. Rubashkin's § 2255 motion raises a different argument, however, which rests on the intersection of his due process rights under *Brady* and those arising under *Fulminante* and *Murchison*; specifically, whether the government is obligated under the due process clause to disclose evidence in its possession indicating partiality on the part of a judge or juror. Binding Supreme Court precedent indicates the answer is "yes." *See Williams v. Taylor*, 529 U.S. 420, 442 (2000) (ordering evidentiary hearing in post-conviction review proceeding where prosecutor failed to disclose his alleged knowledge that a prospective juror responded falsely to *voir dire* questions). A certificate of appealability therefore should be issued to allow this Court to address the merits of this new argument.

A certificate is especially appropriate in light of a recently-decided case of the United States Supreme Court, *Williams v. Pennsylvania*, 136 S.Ct. 1899, 1905 (2016), which had not been decided at the time of filing of Rubashkin's § 2255 motion. In *Williams*, the Court held "there is an impermissible risk of actual bias

when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant's case." *Id.* at 1905. Here, the trial judge arguably served in the role of "prosecutor" by participating in extensive pre-raid meetings, receiving briefings on "charging strategies" and other substantive matters, and asking for a "final gameplan." While the District Court characterized her involvement as merely "logistical," Rubashkin has submitted credible information indicating the Court's involvement was more extensive. The merits of Ground Two are therefore, at a minimum, debatable.

Similarly, it is debatable whether the District Court was obligated to hold an evidentiary hearing prior to addressing the merits of Ground Two. Rubashkin submitted affidavits from his trial counsel asserting they were not aware of the full extent of the trial judge's *ex parte* communications with the government and, had they been aware, they would have moved for recusal. The District Court essentially rejected these affidavits, concluding trial counsel did, in fact, have sufficient information to bring a recusal motion. There is nothing facially implausible about trial counsel's affidavits, however, and thus the District Court was required to hold an evidentiary hearing before addressing the merits. *See Roundtree v. United States*, 751 F.3d 923, 926-27 (8th Cir. 2014).

For these reasons, Rubashkin respectfully submits the issuance of a certificate of appealability on Ground Two of his § 2255 Petition.

IV. Rubashkin Made a Substantial Showing of a Constitutional Violation on Ground Three of His § 2255 Petition Because the Government Admitted Failing to Disclose Exculpatory Statements From a Cooperating Witness.

At trial and sentencing, the government presented evidence of financial transactions in which funds were transferred from the Agriprocessors' operating account at Citizens State Bank to the accounts of related entities Kosher Community Grocery ("KCG") and Torah Education ("TE"). *See*, *e.g.*, Government Trial Exs. 2021, 2027. The government also presented evidence of transfers from the KCG and TE accounts to the Agriprocessors' account at Decorah Bank & Trust, which served as a "sweep" account for First Bank. *See id.* The government characterized these transactions as money laundering:

> [D]efendant's only purpose for routing the funds through the Torah Education and Kosher Community Grocery Store accounts was to make the funds appear to be payments by customers so that First Bank did not become aware that defendant was depositing Agriprocessors funds into the sweep account at Decorah Bank and Trust.

Government's Resistance to Defendant's Motion for Judgment of Acquittal at 20 (Crim. Dkt. No. 738). The jury ultimately convicted Rubashkin of ten counts of money laundering in violation of 18 U.S.C. § 1956.

The government's case on money laundering suffered from two significant weaknesses. First, undisputed evidence shows that Agriprocessors frequently transferred money *directly* from its operating account at Luana State Bank to the sweep account at Decorah Bank & Trust. In 2008 alone, more than 325 checks

totaling more than $30 million were written directly from the operating account to the sweep account – more than double the amount of funds flowing through the KCG and TE accounts. *See* Government Trial Exs. 2021, 2027-28, 2031. These direct transfers undermine the government's theory that the "only purpose" for Rubashkin to pass funds through the KCG and TE accounts was to conceal the source of the funds from First Bank. There is no plausible reason why Rubashkin would on some occasions use what the government characterized as a "sophisticated" and "multi-layered" laundering scheme to keep the bank from learning that an Agriprocessors account was the source of the funds, and yet on hundreds of other occasions occurring on the very same days have checks written directly on an Agriprocessors account. The hundreds of direct transfers therefore prove Rubashkin did not use the KCG and TE accounts for the purpose of concealment.

Second, the government's own exhibits show that checks were written from the KCG or TE accounts to the sweep account before corresponding checks were written from the Agriprocessors operating account at Citizens State Bank to the KCG or TE accounts. *See* Trial Ex. 2021 (earliest checks in the sequence were from KCG to Decorah Bank & Trust); 2027 (same with respect to TE account). In other words, the checks from the operating account to the KCG and TE accounts clearly were designed to backfill a hole that had been created by earlier checks from KCG or TE to the sweep account. The government should have, at most, characterized these

transactions as "check kiting." However, check kiting charges would not have affected the Sentencing Guidelines calculation, and thus the government labeled them as "money laundering." This resulted in a four-point enhancement under the Sentencing Guidelines (two points for laundering plus two more for sophisticated laundering), which, at Rubashkin's offense level, equated to nearly ten additional years' imprisonment, as measured from the bottom of the Guidelines range.

In the face of the weaknesses of the government's proof on money laundering, the due process problems that permeated the sentencing hearing (as described in Ground One) infected the trial, as well. Prior to trial, cooperating witness Mitchel Meltzer provided exculpatory information to the government that would have tipped the scales in Rubashkin's favor on the money laundering charges. This exculpatory information was never disclosed to Rubashkin's trial counsel. Had it been disclosed, and keeping in mind the already-weak evidence supporting the money laundering charges, there is a "reasonable probability" the jury would have acquitted Rubashkin on those ten counts. *See Kyles v. Whitley*, 514 U.S. 419, 434 (1995) ("[The] touchstone of materiality is a 'reasonable probability' of a different result."). This, in turn, would have substantially affected Rubashkin's Sentencing Guidelines calculation, as he no longer would have been subject to four additional levels under USSG §2S1.1.

Meltzer was a cooperating witness who worked in the Agriprocessors accounting department from 1996 to 2009. (App. 159). Meltzer avers, and the government does not deny, that he provided the following information to prosecutors and law enforcement agents during interviews prior to his trial testimony:

> Sholom Rubashkin was always in a very tight cash position as a result of constant expansions to the Agriprocessors plant and his financial support for Jewish entities such as the shul and kosher grocery and restaurant, as well as the requirement for "up front" payment for purchasing cattle. As a result, Sholom often "played the float" to try to help with short-term cash flow problems. When banking practices changed in the early 2000s to cause checks to be processed in 1-3 days instead of the usual 3-7 days, Sholom tried to "re-create" the lost float by transferring monies to and from other accounts. By including additional accounts in the movement of funds, Sholom could give himself an extra day or two before certain expenditures would be settled. I told the agents and prosecutors that I did not believe Sholom intended to defraud the bank with these transactions; rather, he was simply trying to keep the company going in any way he could. My understanding was, and is, that the movement of funds was simply a means of managing cash flow.

(App. 159-160)).

Meltzer also informed the government that First Bank "never reviewed actual checks as part of its audit." (Id. at ¶ 4). It follows that Agriprocessors would not have needed to move funds through the KCG and TE accounts in order to conceal the source of those funds from First Bank. (Id.) The bank would have been none the wiser even if funds were transferred directly from one Agriprocessors account to the other (which they often were).

Meltzer's information provided what would have been the final link in exposing the insufficiency of the government's evidence on money laundering. The evidence already established more than 325 transactions in the year 2008 alone that were inconsistent with the government's theory that Rubashkin passed funds through the TE and KCG accounts to fool the bank regarding the source of funds. The evidence further established that checks were written from the KCG and TE accounts to the sweep account before corresponding checks were written from the Agriprocessors operating account(s) to KCG or TE—exactly the opposite order than one would expect if, as the government argued, the "only" purpose of the transactions with KCG and TE was to conceal the source of funds. Meltzer's information would have confirmed that the transactions with KCG and TE "could only have been designed to extend the time of the 'float' and help with short-term cash flow management." (Id.)

Having provided this important information to the government, Meltzer states: "When I testified at trial, I was surprised that no one asked me whether I thought Sholom intended to defraud the bank in connection with the various financial transactions and movement of funds. I would have said 'no.'" (Id. at ¶ 5).

The government did not provide this information to Rubashkin's trial counsel. Accordingly, trial counsel did not elicit this information from Meltzer during cross-examination at trial.

The District Court denied Ground Three of the § 2255 Petition and declined to issue a certificate of appealability because it found Meltzer's undisclosed evidence cumulative and already within Rubashkin's knowledge. This conclusion is erroneous. Rubashkin of course knew there was no intent to launder money in connection with the transfer of funds to KCG and TE, but did *not* know whether Meltzer would admit that fact and others corroborating it during cross-examination. *See United States v. Mahaffy*, 693 F.3d 113, 131 (2d Cir. 2012) (finding *Brady* violation despite government's claim the defendant already knew the exculpatory information; "whatever [the defendant] knew, he did not know what [the witness] told the SEC under oath"). Indeed, it is undisputed that Meltzer made false statements to a bank and lied under oath to the grand jury. (App. 23). Under the circumstances, trial counsel surely would not take a chance in asking Meltzer about the purpose and history of the transfer of funds among accounts without knowing exactly what Meltzer told the government about those issues. *See Mahaffy*, 693 F.3d at 131 ("Not knowing what [the witness] might testify to, [the defendant] did not call him at trial."). An unexpected answer could have been devastating. The government's failure to disclose Meltzer's prior statements therefore prejudiced Rubashkin.

Moreover, even if the validity of the money laundering conviction itself is somehow not reasonably debatable, a certificate of appealability still should issue

because Meltzer's exculpatory information is material to sentencing. The calculation of the Sentencing Guidelines range was premised on the government's theory that the laundering was "sophisticated" for purposes of USSG §2S1.1(b)(3) because it involved two or more layers of transactions. Meltzer's testimony would have confirmed that Rubashkin, at most, moved funds through the KCG and TE accounts solely to extend the time of the float and not for any purpose of concealment. Had this information been disclosed, the government could not have proven two or more layers of laundering transactions and thus could not have established "sophisticated" laundering pursuant to USSG §2S1.1(b)(3).

CONCLUSION

Rubashkin has made a substantial showing of constitutional violations on all three grounds of his § 2255 Petition. Furthermore, and at a minimum, the District Court should have held an evidentiary hearing to evaluate the credibility of the affidavits submitted by Rubashkin and permitted Rubashkin to take discovery. Rubashkin therefore respectfully requests the issuance of a certificate of appealability on all three grounds.

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served upon the parties to this action by serving a copy upon each party listed below on March 30, 2017 by

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