April 19, 2016

Via Federal Express and E-Mail

The Honorable Kevin Techau
US Attorney's Office
111 7th Ave SE
Cedar Rapids, IA 52401

Re: *United States v Sholom Rubashkin*

Dear Mr. Techau:

We write regarding Sholom Rubashkin's Motion to Vacate, Set Aside or Correct the Judgment or Sentence Pursuant to 28 U.S.C. § 2255.

The mission of the Department of Justice includes ensuring that the constitutional and other protections afforded to an accused are not infringed in the zeal to secure a conviction and sentence. Through recent actions such as the post-conviction dismissal of all charges against former U.S. Senator Ted Stevens after his lawyers revealed prosecutorial misconduct, the Department has demonstrated and vindicated its commitment to the fundamental principle that justice must always be pursued ethically and that it is never too late to remedy any injustice to which federal prosecutors have contributed.

The signatories of this letter — former DOJ officials, FBI officials, federal judges, law professors and State Attorneys General — ask that you now act to address new troubling evidence of prosecutorial misconduct that has emerged in connection with the prosecution and sentencing of Sholom Rubashkin. We recognize that the underlying actions transpired before your tenure as United States Attorney, and we recognize the challenges in addressing these concerns (as many of us have been in your position). However, as the United States Attorney for the Northern District of Iowa, you are uniquely situated and have the ability to decide how the government of the United States remedies a persistent injustice to which prosecutors in your office have contributed.

Many of us were signatories to prior letters expressing our deeply-held view that the 27-year sentence imposed upon Mr. Rubashkin was patently unjust and inconsistent with the goals of the criminal justice system.[1] This letter, however, addresses a different (but related) issue: the \

[1] Over 60 U.S. Senators and members of the House of Representatives, six former United States Attorneys General, 86 former federal judges and senior Department of Justice officials, dozens of law professors, as well as several of the country's leading experts on legal ethics (Professors Stephen Gillers, Geoffrey Hazard and Mark Harrison) have expressed serious concerns about the Department of Justice's handling of this prosecution. Over 50,000 individuals signed a petition to the White House expressing similar concerns. This groundswell of high-level attention and

shocking new evidence that prosecutors in your office knowingly presented false and misleading testimony at the sentencing hearing regarding their own actions in contributing to the $27 million loss which served as the foundation for Mr. Rubashkin's sentence, and withheld exculpatory evidence regarding the same actions.[2] This conduct resulted in Mr. Rubashkin receiving an effective life-sentence for nonviolent offenses against a financial institution despite considerable mitigating personal circumstances, including being a 51-year-old, first-time offender, and father of 10 (one of whom is an acutely autistic child who depends heavily on him).

Recently, Mr. Rubashkin filed a Merits Brief in connection with his § 2255 Motion which provides overwhelming evidence that (1) the prosecutors in your office wrongfully interfered in the Agriprocessors bankruptcy, intimidating potential buyers through the threat of forfeiture of the Agriprocessors business and thereby substantially decreasing the ultimate sale price, and (2) at Mr. Rubashkin's sentencing, the prosecutors knowingly elicited false testimony which concealed the significant impact their actions had on the loss incurred by First Bank, thereby misleading the judge into finding Mr. Rubashkin fully responsible for a massive loss which led to a "bottom-of-the-guideline" sentence of 27 years in prison.

As the Merits Brief describes in detail, the prosecutors threatened each prospective bidder with forfeiture of the Agriprocessors business if the bidder planned to use Mr. Rubashkin's father, Aaron Rubashkin, in a management, consulting or ownership capacity at Agriprocessors. Aaron Rubashkin was seen as crucial to the successful operation of the enterprise given his experience and relationships in the kosher meat industry and was never charged with wrongdoing. The effect of this threat was to substantially reduce the potential purchase price that any bidder was willing to pay, and thereby to create the loss incurred by the victim bank. Had the assets sold for $40 million — which was the amount of an offer the bankruptcy trustee declined to accept because he thought an auction would yield something even higher — Mr. Rubashkin's guideline loss amount would have been $0. The resulting properly calculated Sentencing Guidelines range

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concern about the fair administration of justice in a single case is virtually unprecedented and is based largely on enduring concerns about troubling actions taken by seemingly overzealous prosecutors during the pretrial and trial phases of the case.

[2] By way of background, Mr. Rubashkin, the former manager of Agriprocessors, a family-owned kosher meatpacking plant in Postville (which was 100%-owned by his father, Aaron Rubashkin), was found guilty, after a one-month jury trial in late 2009, of committing a number of financial offenses primarily by inflating the value of collateral for the draws taken by the business on a line of credit with a St. Louis bank, First Bank Business Capital ("First Bank"). Mr. Rubashkin's sentencing depended heavily on the amount of financial loss incurred by the victim, First Bank, which, in turn, depended on the purchase price offered and ultimately paid by prospective bidders in bankruptcy for the assets of Agriprocessors.

would have been 30-37 months, rather than the 324-405 months Guideline range that resulted in the 27-year sentence Mr. Rubashkin is currently serving. Mr. Rubashkin has served more than 80 months as of this writing — meaning he has already been imprisoned more than twice as long as he should have been, even had he been sentenced at the very top of a properly-calculated Guideline range.

At sentencing, the prosecutors in your office presented false testimony from Paula Roby, an attorney representing the Agriprocessors bankruptcy trustee. She testified that prosecutors did *not* prohibit Aaron Rubashkin from having a role in the business, or otherwise affect any prospective bidders or the bankruptcy sale price with the threat of criminal forfeiture of Agriprocessors. Ms. Roby further testified that any suggestions to the contrary were based on unreliable rumors ("the grapevine can be a very unreliable thing"). The Judge explicitly found Ms. Roby's denials credible and, on that basis, relied on her testimony in calculating the loss attributable to Mr. Rubashkin ("[t]he court credits Roby's testimony and discredits testimony from Defendant's witnesses. Accordingly, the court declines to consider this theory [the No-Rubashkin Rule] in arriving at an actual loss calculation.").

Newly-discovered evidence now reveals that the prosecutors knew that Ms. Roby's testimony was false and misleading and also withheld exculpatory evidence concerning these matters. This newly-discovered evidence includes detailed handwritten notes (authenticated by, among others, a former Assistant United States Attorney who was acting as co-counsel for the bankruptcy trustee) from a meeting in December 2008 between prosecutors in your office and the independent bankruptcy trustee (appointed by the bankruptcy court) and his counsel, in which the prosecutors imposed precisely the restrictions they (supported by Ms. Roby's false testimony) later denied having imposed. During that meeting, prosecutors told the trustee there were to be "no Rubashkins" in any successor entity "from <u>any</u> standpoint" (emphasis in original) and that they would pursue the forfeiture of Agriprocessors against any buyer who violated this restriction. Prosecutors described the restriction of employing Aaron Rubashkin and other members of his family as "non-negotiable." The prosecutors later repeated their forfeiture threats directly to prospective bidders, including during the bankruptcy sale auction.

Equally disturbing -- and also previously undisclosed -- the *victim* in this case, First Bank – which was also Agriprocessors' primary secured creditor in the bankruptcy proceeding – told the prosecutors they did not want the prosecutors to pursue forfeiture and that doing so would make it impossible to maximize value in the bankruptcy sale. The independent bankruptcy trustee told the prosecutors the same thing ("[m]y attorneys and I met with prosecutors shortly after my appointment as Trustee to express our concerns regarding the potential forfeiture claims. The prosecutors listened to our concerns, but ultimately made clear that they believed the assertion of

forfeiture was necessary and appropriate regardless of the effect it would have on the bankruptcy sale."). Prosecutors refused to relent and instead continued to forbid interested parties from using Aaron Rubashkin in any ownership or management role in any successor entity.

The prosecutors in this case also continuously failed to disclose to the defense information showing the full nature and extent of their conduct in the bankruptcy proceeding. Mr. Rubashkin has produced nine affidavits from various bidders for Agriprocessors stating that prosecutors intimidated them and threatened forfeiture, which either led them not to bid at all or to significantly reduce the price they were willing to pay. These tactics by the prosecutors severely depressed interest in the company in the bankruptcy sale, because, as previously noted, Aaron Rubashkin was seen as crucial to the successful operation of the enterprise given his experience and relationships in the kosher meat industry.

The overall effect of the prosecutors' pre-conditions and threats was to substantially reduce the purchase price for the business and thereby create the loss incurred by First Bank; rather than a sale at $40 million or more (for a business appraised at $68 million), which would have resulted in no loss, the business was sold for a paltry $8.5 million, resulting in a $27 million loss.

In conclusion, although the aforementioned actions took place prior to your tenure, we believe a prompt and effective remedy for the above-described misconduct is called for. Indeed, we respectfully submit that it is your duty to ensure that the miscarriage of justice that Mr. Rubashkin's extreme prison sentence represents is now remedied, not perpetuated.

More than eighty years ago, the United States Supreme Court stated: "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor — indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his 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." *Berger v. United States*, 295 U.S. 78 (1935). This excerpt has been repeated so many times as to border on cliché, but the thrust of it is so central to your responsibilities as U.S. Attorney and fits so squarely in this case that we cannot help but recite it again.

To that noble end, we look forward to seeing your office take concrete steps to rectify the injustice that has taken place in the prosecution and sentencing of Sholom Rubashkin.

Most respectfully yours,

John D. Ashcroft
Attorney General of the United States 2001-2005
Attorney General of Missouri 1977-1984

Ramsey Clark
Attorney General of the United States 1966-1969

Edwin Meese, III
Attorney General of the United States 1985-1988

Michael B. Mukasey
Attorney General of the United States 2007-2009
United States District Court Judge, Southern District of New York 1987-2006

Stuart M. Gerson
Acting Attorney General of the United States 1993

Louis J. Freeh
Director, Federal Bureau of Investigation 1993-2001
United States District Judge, Southern District of New York 1991-1993

William S. Sessions
Director, Federal Bureau of Investigation 1987-1993
United States District Judge, Western District of Texas 1974-1987
United States Attorney, Western District of Texas, 1971

Joseph I. Lieberman
United States Senator, Connecticut 1989-2013
Attorney General of Connecticut 1983-1989

William F. Weld
Governor of Massachusetts 1991-1997
Assistant Attorney General of the United States 1986-1988
United States Attorney, District of Massachusetts 1981-1986

Donald B. Ayer
Deputy Attorney General of the United States 1989-1990
Principal Deputy Solicitor General 1986-1989
United States Attorney, Eastern District of California 1982-1986

Jamie S. Gorelick
Deputy Attorney General of the United States 1994-1997

Philip B. Heymann
Deputy Attorney General of the United States 1993-1994
Professor of Law, Harvard Law School

Paul J. McNulty
Deputy Attorney General of the United States 2005-2007
United States Attorney, Eastern District of Virginia 2001-2005

Charles B. Renfrew
Deputy Attorney General of the United States 1980-1981
United States District Court Judge, Northern District of California 1972-1980

Larry D. Thompson
Deputy Attorney General of the United States 2001-2003
United States Attorney, Northern District of Georgia 1982-1986

Rudolph W. Giuliani
United States Attorney, Southern District of New York 1983-1989
Associate Attorney General of the United States 1981-1983

John H. Shenefield
Associate Attorney General of the United States 1979-1981

Kenneth Starr
Solicitor General of the United States 1989-1993
United States Court of Appeals Judge, District of Columbia Circuit 1983-1989

Seth P. Waxman
Solicitor General of the United States 1997-2001

John M. Harmon
Assistant United States Attorney General 1977-1981

Sanford M. Litvack
Assistant United States Attorney General 1979-1981

Robert. A McConnell
Assistant United States Attorney General, 1981-1984

Michael R. Bromwich
Inspector General for the Department of Justice 1994-1999

Nathaniel R. Jones
United States Court of Appeals Judge, Sixth Circuit Court of Appeals 1979-1995

Timothy K. Lewis
United State Court of Appeals Judge, Third Circuit Court of Appeals 1992-1999
United States District Court Judge, Western District of Pennsylvania 1991-1992

William G. Bassler
United States District Court Judge, District of New Jersey 1991-2006
Professor of Law, Fordham Law School

Edward N. Cahn
United States District Court Judge, Eastern District of Pennsylvania 1974-1998

Paul G. Cassell
United States District Court Judge, District of Utah 2002-2007
Associate Deputy Attorney General of the United States 1986-1988
Professor of Law, University of Utah

U.W. Clemon
United States District Court Judge, Northern District of Alabama 1980-2009

David H. Coar
United States District Court Judge, Northern District of Illinois 1994-2010
United States Bankruptcy Court Judge, Northern District of Illinois 1986-1994

David Folsom
United States District Court Judge, Eastern District of Texas 1995-2012

David Warner Hagen
United States District Court Judge, District of Nevada 1993-2005

Frederick B. Lacey
United States District Court Judge, District of New Jersey 1971-1986
United States Attorney, District of New Jersey 1969-1971

Hector M. Laffitte
United States District Court Judge, District of Puerto Rico 1983-2007

Thomas D. Lambros
United States District Court Judge, Northern District of Ohio 1967-1995

John C. Lifland
United States District Court Judge, District of New Jersey 1988-2007

Howard A. Matz
United States District Court Judge, Central District of California 1997-2013

Frank H. McFadden
United States District Court Judge, Northern District of Alabama 1969-1982

Joseph W. Morris
United States District Court Judge, Eastern District of Oklahoma 1974-1978

Edward W. Nottingham
United States District Court Judge, District of Colorado 1989-2008

Stephen M. Orlofsky
United States District Court Judge, District of New Jersey 2005-2007

Layn R. Phillips
United States District Court Judge, Western District of Oklahoma 1987-1991
United States Attorney, Northern District of Oklahoma 1984-1987

Abraham D. Sofaer
United States District Court Judge, Southern District of New York 1979-1985

Herbert J. Stern
United States District Judge, District of New Jersey 1973-1987
United States Attorney, District of New Jersey 1971-1973

Dickran M. Tevrizian, Jr.
United States District Judge, Central District of California 1985-2005

Alfred M. Wolin
United States District Court Judge, District of New Jersey 1988-2004

Robert L. Barr, Jr.
United States Attorney, Northern District of Georgia 1986-1990

Michael A. Battle
United States Attorney, Western District of New York 2002-2005

James S. Brady
United States Attorney, Western District of Michigan 1977-1981

J.R. Brooks
United States Attorney, Northern District of Alabama 1977-1981

A. Bates Butler III
United States Attorney, District of Arizona 1980-1981

Ben Burgess
United States Attorney, District of Kansas 1984-1990

Robert C. Corrente
United States Attorney, District of Rhode Island 2004-2009

Richard Cullen
Attorney General of Virginia 1997-1998
United States Attorney, Eastern District of Virginia 1991-1993

William B. Cummings
United States Attorney, Eastern District of Virginia 1975-1979

W. Thomas Dillard
United States Attorney, Northern District of Florida 1983-1987
United States Attorney, Eastern District of Tennessee 1981

Edward L. Dowd
United States Attorney, Eastern District of Missouri 1993-1999

Lawrence D. Finder
United States Attorney, Southern District of Texas 1993

Robert B. Fiske, Jr.
United States Attorney, Southern District of New York 1976-1980

Jonathan L. Goldstein
United States Attorney, District of New Jersey 1974-1977

David C. Iglesias
United States Attorney, District of New Mexico 2001-2007
Associate Professor of Law and Politics, Wheaton College

Salvatore R. Martoche
United States Attorney, Western District of New York 1982-1986
New York State Supreme Court Justice 2000-2013

A. Melvin McDonald
United States Attorney, District of Arizona 1981-1985
Maricopa County Superior Court Judge 1974-1981

Kenneth J. Mighell
United States Attorney, Northern District of Texas 1977-1981

George L. O'Connell
United States Attorney, Eastern District of California 1991-1993

K. William O'Connor
United States Attorney, Districts of Guam & the Northern Mariana Islands 1986-1989
Chief Justice, High Court of American Samoa 1977-1978

Matthew D. Orwig
United States Attorney, Eastern District of Texas 2001-2007

Richard J. Pocker
United States Attorney, District of Nevada 1989-1990

George W. Proctor
United States Attorney, Eastern District of Arkansas 1979-1987
Chair of Attorney General's Advisory Committee of United States Attorneys

Ira H. Raphaelson
Special Counsel for Financial Institutions, Department of Justice 1991-1993
United States Attorney, Northern District of Illinois 1989-1990

James H. Reynolds
United States Attorney, Northern District of Iowa 1976-1982

James G. Richmond
United States Attorney, Northern District of Indiana 1985-1991

Benito Romano
United States Attorney, Southern District of New York 1989

Donald K. Stern
United States Attorney, District of Massachusetts 1993-2001

F.L. Peter Stone
United States Attorney, District of Delaware 1969-1972

Brett L. Tolman
United States Attorney, District of Utah 2006-2009

Stanley A. Twardy, Jr.
United States Attorney, District of Connecticut 1985-1991

Peter F. Vaira
United States Attorney, Eastern District of Pennsylvania 1978-1983

Atlee W. Wampler III
United States Attorney, Southern District of Florida 1980-1982
Attorney-In-Charge, Miami Strike Force, Organized Crime & Racketeering Section, Criminal Division, U.S. Department of Justice, 1975-1980

Dan K. Webb
United States Attorney, Northern District of Illinois 1981-1985

Robert Abrams
Attorney General of New York 1979-1993

John J. Easton, Jr.
Attorney General of Vermont 1981-1985

Tyrone C. Fahner
Attorney General of Illinois 1980-1983

Karen M. Freeman-Wilson
Attorney General of Indiana 2000-2001

Michael C. Geraghty
Attorney General of Alaska, 2012-2014

Troy R. King
Attorney General of Alabama 2004-2011

Clarine Nardi Riddle
Attorney General of Connecticut 1989-1991
Connecticut Superior Court Judge 1991-1993

John Van de Kamp
Attorney General of California 1983-1991

Aviva Abramovsky
Professor of Law, Syracuse University

Robert H. Aronson
Professor of Law, University of Washington

Lara Bazelon
Co-Chair of the ABA's Ethics Committee

Douglas A. Berman
Professor of Law, Ohio State University

Sande Buhai
Professor of Law, Loyola Law School

Alan Dershowitz
Professor of Law, Harvard Law School

Joshua Dressler
Professor of Law, Ohio State University

Eric Freedman
Professor of Law, Hofstra University

Bennett L. Gershman
Professor of Law, Pace Law School

Sheri Lynn Johnson
Professor of Law, Cornell Law School

Harold Krent
Dean and Professor of Law, Chicago-Kent College of Law

Mark Lee
Professor of Law, University of San Diego

Brian Levin
Professor of Law

Michael Meltsner
Professor of Law, Northeastern University

Michael Millemann
Professor of Law, University of Maryland

Charles J. Ogletree
Professor of Law, Harvard Law School

Ronald D. Rotunda
Professor of Law, Chapman University

Robert Steinbuch
Professor of Law

Laurence H. Tribe
Professor of Law, Harvard Law School