No. 11-1203

In The

Supreme Court of the United States

SHOLOM RUBASHKIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF THE ASSOCIATION OF PROFESSIONAL RESPONSIBILITY LAWYERS (APRL) AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

W. WILLIAM HODES, ESQ.
THE WILLIAM HODES LAW FIRM
Counsel of Record
811 Chapman Loop
Lady Lake, FL 32162
317-590-1692
317-863-1163 (fax)
wwh@hodeslaw.com

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

INTEREST OF *AMICUS CURIAE*[1]

The Association of Professional Responsibility Lawyers (APRL) is an independent national organization of lawyers and legal scholars whose practices and areas of academic inquiry are concentrated in all aspects of the law of lawyering. These include the professional conduct of lawyers and judges, professional licensing and discipline, the disqualification of judges and lawyers, the organization and forms of law practice, and funding and risk management concerns.

Members of APRL practice in every American jurisdiction, and its membership includes foreign lawyers who practice both in the United States and abroad. APRL presents continuing legal education programs at least twice a year, sometimes in foreign venues in conjunction with lawyers and judges in those countries.

From time to time, when recommended by its Public Statements Committee and then authorized by

---

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or their counsel made a monetary contribution to this brief's preparation or submission.

Pursuant to Supreme Court Rule 37.2, *amicus curiae* states that counsel of record for both petitioner and respondent were timely notified of the intent to file this brief; counsel's letters consenting to the filing of this brief are on file with Clerk of this Court.

its Board of Directors or general membership, the Association of Professional Responsibility Lawyers makes public comment on issues within its area of interest and expertise, provides commentary on rules or other initiatives proposed by courts or bar associations or other professional organizations, or files *amicus curiae* briefs in its own name.

SUMMARY OF THE ARGUMENT

Petitioner Sholom Rubashkin has presented to this Court a clear split of authority among the Circuit Courts of Appeals with respect to the proper application of Rule 33 of the Federal Rules of Criminal Procedure in the situation here involved.

In the Eighth Circuit, where this case arose, a criminal defendant seeking a new trial on the ground of newly discovered evidence is sometimes – as in this case – met with an insurmountable wall. No matter how compelling the defendant's grounds for a new trial would be if they arose in some other procedural context, the Eighth Circuit follows a "clear and binding" (and apparently immutable) interpretation that prevents it and trial courts within the Circuit from even considering those grounds under Rule 33, unless the defendant is also able to show that the newly discovered evidence *itself* "probably will result in an acquittal upon retrial." *U.S. v. Rubashkin*, 655 F.3d 849, 857-58 (8th Cir. 2011) (relying on existing Eighth Circuit precedent); Pet. App. 12-13.

In several other Circuits, however, a new trial can be granted via the procedural route of Rule 33 if the newly discovered evidence demonstrates that the trial in question was structurally flawed or fundamentally unfair, without regard to whether that evidence will likely lead to an acquittal on retrial. In other words, in that class of cases the new trial will be ordered – if it is otherwise warranted under substantive law, of course – but whether the outcome at the retrial will be the same or different cannot be known until that second trial is held.[2]

Amicus curiae the Association of Professional Responsibility Lawyers (APRL) is best positioned to assist this Court in assessing the merits of petitioner's substantive claim of entitlement to a new

---

[2] A perfect example of this form of agnosticism may be seen in *Holmes v. United States*, 284 F.2d 716 (4th Cir. 1960), relied upon by petitioner; Pet. 14. A new trial was ordered after it was learned that during the first trial a marshal had improperly disclosed to a juror that one of the defendants in the case was already incarcerated in connection with another matter. The new trial would proceed with more close-mouthed marshals, and the defendant would be convicted or acquitted as the evidence dictated, *but a tainted trial would have been canceled from the system*.

If *Rubashkin* had arisen in the Fourth Circuit, where *Holmes* was decided, the analogous result would be that a new trial, *without the participation of the original trial judge, who should have been disqualified*, would be ordered. At the retrial before a different judge, Mr. Rubashkin might be convicted again or acquitted, or there might be a hung jury or a plea bargain, but in all events "the interest of justice" – which is the standard set out in Rule 33 – would have been served.

trial – the claim that the Eighth Circuit refused even to consider. Thus, APRL will assume the correctness of the petitioner's argument that the Eighth Circuit is on the wrong side of the Circuit split with respect to the threshold procedural issue respecting Rule 33. This will allow APRL to home in on just how badly tainted and fundamentally unfair were the proceedings that the Eighth Circuit put beyond its purview.

With that assumption in mind, APRL's substantive argument will proceed as follows.

First, information learned by petitioner after trial and after sentencing, in response to his Freedom of Information Act (FOIA) requests, revealed that the trial judge, Chief Judge Linda R. Reade of the United States District Court for the Northern District of Iowa, had participated in numerous *ex parte* meetings about the instant case with prosecutors as well as investigators and other Executive Branch personnel. This strongly suggests that she should have disqualified herself,[3] rather than continuing to sit on the

---

[3] The petitioner and the courts below frequently use the terms "recuse" or "recusal" as a substitute for and interchangeably with "disqualify" or "disqualification." APRL will use the latter terms only, however, because they alone are found in the Code of Conduct for United States Judges and in 28 U.S.C. §455.

In addition, there is more here than the replacement of one common usage by another. Once it has been determined that a judge is "disqualified" to sit on a particular case, the modern formulation more insistently connotes the idea that if a court nonetheless plunges ahead with the disqualified judge still in place, the resulting proceeding is, by definition, fundamentally

(Continued on following page)

case. Such pervasive *ex parte* contacts, without more, presumptively require disqualification under Code of Conduct for United States Judges Canon 3(C)(1), as well as under 28 U.S.C. §455(a): the contacts by themselves demonstrate that the trial judge's "impartiality might reasonably be questioned."

When the issue of disqualification was raised, first in a companion case, *United States v. Martin De La Rosa-Loera*, No. 08-1313 (N.D. Iowa, Aug. 13, 2008), and then in the instant case through the Rule 33 Motion for a New Trial, Judge Reade responded by asserting that the contacts concerned "logistical" issues only, such as scheduling and making physical arrangements for the large number of arrestees contemplated, many of whom did not speak English and would require interpreters. If those were the facts, *and if those were the only facts*, then it might be said that an objective observer would no longer reasonably question Chief Judge Reade's impartiality. But the material turned over under FOIA suggested that the facts were more nuanced, and somewhat different.

Regrettably, however, although some of the core facts of what transpired between Judge Reade and non-judicial personnel are properly spread upon the record, no evidentiary hearing was held (by Judge Reade or any other judicial officer) to determine what

---

flawed. Indeed, the absence of an impartial judicial officer is a "structural error" that this Court's cases teach requires an automatic reversal. *See* Section I.A, *infra*.

those core facts signified, and what other facts might exist that might cast them in a different light. Instead, Judge Reade took the worst possible course; she neither referred the underlying factual disputes to a different judge, nor even held a record hearing on her own. She simply "decided" that her recollection and characterization of events was the only correct one, and based her ruling with respect to her own disqualification on those "facts." Pet. App. 43, 54-57 and *passim*.[4]

That leads to the second and most important argument that *amicus curiae* APRL will present to this Court. As just described, Judge Reade's justification for the admitted *ex parte* contacts, and her consequent refusal to disqualify herself, was plausible *only* if the FOIA materials were found to be both consistent with and probative of *her* recollection and understanding of the events. But *these were contested*

---

[4] As a result, the parties (including *amicus curiae* parties) and reviewing courts do not have a reliable record upon which to ground their arguments or decisions regarding the merits of the disqualification aspects of the case. The expert witness that petitioner proffered to the District Court on this issue suffered from the same disability. *See* Pet. App. 136. Mr. Harrison, a prominent Phoenix attorney who concentrates much of his practice in the law of lawyering, was at pains to note that his opinions could only be based upon facts that he assumed to be true; *id.* at 139 & n.4.

Mark Harrison is an active member of the Association of Professional Responsibility Lawyers, and one of its Past Presidents. APRL had no involvement in his submission to the District Court, however.

matters of fact. Most significantly, it was not only Rubashkin and the Government who disagreed about these facts, but Judge Reade herself and others who were involved in the *ex parte* meetings, including prosecutors and personnel from the Immigration and Customs Enforcement Agency (ICE). In several important instances, Judge Reade and those other actors put different interpretations on the same memos and minutes that had been disclosed under FOIA.

Accordingly, Judge Reade was obligated by Code of Conduct for United States Judges Canons 3(C)(1)(a) and 3(C)(1)(d)(iv) to refer this factual dispute to a different judge for resolution; she had "personal knowledge of disputed evidentiary facts," and was therefore "likely to be a material witness" with respect to the disqualification aspects of the case. Moreover, 28 U.S.C. §§455(b)(1) and 455(b)(5)(iv) carry these precepts of judicial ethics into positive law, and *require* Judge Reade's disqualification from serving as a fact finder with respect to this aspect of the case.

It is unthinkable for a judge to "find" the facts (or "confirm" facts of which she already has personal knowledge), especially when her own conduct and *bona fides* are implicated by them. Yet, as discussed further in Section II, *infra*, that is exactly what Judge Reade did, while the Eighth Circuit blandly recited this fundamentally unfair feature of the proceedings in the trial court only in passing, and apparently found it to be completely routine and not worthy of comment. Pet. App. 10.

Third, if Chief Judge Reade did have good grounds to engage in limited *ex parte* communications with prosecutors and Executive Branch personnel, and if the contacts were indeed limited to legitimate logistical concerns only, a full verbatim transcript of every such contact, delivered to the defendant after any danger of compromising the law enforcement effort had passed, but before trial, would have served to allay the fears of the defendant and mollify members of the public who might otherwise reasonably question the impartiality of the proceedings. The only possible remedy for Judge Reade's failure to provide these safeguards is to provide that record now, by remand for a record hearing before a different judge.

Finally, coming full circle, APRL will conclude by arguing that some of the trial court's discretionary rulings – especially with respect to sentencing – were sufficiently troubling that they tended to confirm that the "average person on the street who knows all the relevant facts of a case," Pet. App. 43, 63 (citing *United States v. Martinez*, 446 F.3d 878, 883 (8th Cir. 2006)), would be well advised to question the trial court's impartiality.

That is an additional reason for this Court to resolve the threshold Circuit split regarding the proper procedural application of Rule 33 against the position of the Eighth Circuit and in accord with the argument of petitioner. If petitioner Rubashkin only learned the extent of judicial partiality after trial and after sentencing, the Eighth Circuit's "clear and binding" rule of closing its eyes unless guilt or

innocence is directly implicated by the newly discovered evidence will have the pernicious effect of immunizing from judicial scrutiny even a trial as badly tainted and fundamentally unfair as this one was.

That is reason enough for this Court to reject the Eighth Circuit's outlier interpretation,[5] and remand either for a new trial or for detailed findings by a different judge respecting the "threshold to the threshold" issue of judicial disqualification, with the question of a new trial to abide the results of that inquiry.

[5] The Eighth Circuit's attempt to distinguish cases in other Circuits that allowed Rule 33 to be the vehicle for presenting newly discovered evidence going to the fairness of the trial is wholly unconvincing. For example, after correctly noting that *Holmes v. United States*, *supra* n.2, was a case in which the Fourth Circuit found that a marshal's improper statement to a juror "bore upon the integrity of the jury's verdict," Pet. App. 13, the Eighth Circuit mechanically responded merely that "Rubashkin has not shown here that the [trial] court's pretrial meetings prejudiced the jury's verdict." *Id*.

This misses the point badly. Petitioner's argument is that *the entire first trial* "lacked integrity," and that is also the argument advanced by *amicus curiae* APRL in Section II, *infra*.

ARGUMENT

I. The Trial Judge's Admitted *Ex Parte* Meetings with Prosecutors and Other Executive Branch Personnel, Without More, Were Sufficient to Require Her Disqualification, Because Her Impartiality Might Therefore "Reasonably Have Been Questioned."

A. The Critical Element of Judicial Impartiality and the Development of an Objective Standard for Determining When Disqualification is Required

The lack of an impartial trial judge is so inimical to the very idea of a fair trial that it is one of the small number of trial defects that this Court has put into the category of "structural errors" that are immune from harmless error review and may qualify as plain error under *United States v. Olano*, 507 U.S. 725 (1993). *See United States v. Marcus*, 130 S. Ct. 2159, 2164-65 (2010).

Structural errors are defects "affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself," *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991), cited and quoted in *Johnson v. United States*, 520 U.S. 461, 468 (1997), and *United States v. Marcus*, *supra*, 130 S. Ct. at 2164-65 (internal quotation marks omitted). Because the entire "framework" of the trial is suspect in such cases, the error is so interwoven into the proceedings that a reviewing court will have difficulty "assessing the effect of the error," *United States v.*

Gonzalez-Lopez, 548 U.S. 140, 149, n.4 (2006) (finding the wrongful deprivation of chosen counsel to be structural error).

This Court's pronouncements on judicial impartiality are relatively few, but extremely well known. In the seminal case, *Tumey v. Ohio*, 273 U.S. 510 (1927), this Court invalidated a regime in which the mayors of small towns were authorized to sit as judges to hear (without a jury) cases involving petty criminal offenses under the Ohio alcoholic beverages laws. Upon conviction, a defendant would pay a small fine, part of which would be paid to the Mayor personally as a stipend. As this Court readily saw, the stipend was effectively a reward not merely for taking on the extra duty of sitting as a judge, but for taking on the extra duty of *convicting* defendants. With the judicial officer having a direct financial stake in the outcome of each case, this Court held that it would be impossible for the judge to "hold the balance nice, clear and true" as between the litigants, *id.* at 532, even though Tumey was no doubt guilty of the offense, and even though the amount of money at stake was small.

In *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986), this Court reversed a judgment of the Alabama Supreme Court against Aetna for punitive damages, because one of the justices voting to uphold the award, after refusing to disqualify himself, was the lead plaintiff in a class action seeking punitive damages against a different insurance carrier. Significantly, this Court first rejected the claim that the

justice was biased or prejudiced towards insurance companies generally, as evidenced by statements he had made at his deposition in the class action.

Instead, this Court found that the justice suffered from a *Tumey*-like self-interestedness, although one that was not as direct: while the justice could not gain at Aetna's expense in the case before the court, a ruling against Aetna on punitive damages would significantly enhance his leverage against the defending carrier in the other case. Thus, *Aetna* was entitled to have this justice removed from decision-making in *its* case as a matter of fundamental fairness.

Because the pressure towards partiality was more subtle in *Lavoie* than in *Tumey*, this Court had to determine what would elevate a disqualification issue to the level of a structural defect. This Court did not retreat from the *Tumey* requirement that a judicial officer must be able to "hold the balance nice, clear and true," and further quoted with approval the language in *Tumey* referencing a mere "possible temptation" not to do so, *Lavoie*, 475 U.S. at 825, quoting *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972), which in turn had adopted that language from the *Tumey v. Ohio* opinion.

Ultimately, however, this Court made even more explicit than previously that judicial disqualification had to rely, at least in part, on a variation of the

"appearance of impropriety" standard that had long informed judicial discipline:

> The Due Process Clause "may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, 'justice must satisfy the appearance of justice.'"

Lavoie, 475 U.S. at 825, quoting *In re Murchison*, 349 U.S. 133, 136 (1986) (internal citation omitted).

More recently, this Court extended *Tumey* and *Lavoie* to a situation in which *only* an appearance of possible partiality was at stake. In *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009), this Court overturned a West Virginia Supreme Court ruling in favor of the Massey Coal Company, because a recently elected justice of that court refused to disqualify himself in the wake of heroic (financial) efforts by the Massey CEO that quite likely ensured the justice's election. Despite the fact that the CEO engaged in massive independent expenditures (rather than campaign contributions), which the candidate did not seek and could not prevent or influence, and despite the fact that during the same period the same justice ruled *against* Massey Coal in several higher dollar cases, this Court ultimately adopted Caperton's argument that the justice would inevitably feel such a "debt of gratitude," which is "inherent in human nature," that "a constitutionally intolerable probability

of actual bias" would be created. *Caperton*, 129 S. Ct. at 2262.

Thus, this Court held, the ultimate touchstone must be an objective standard that does not depend exclusively on the challenged judicial officer's self-examination, even if performed in total good faith, and does not depend upon proof of actual bias or partiality. *Id.* at 2263. Instead, the standard that this Court adopted relies on how the facts will appear to objective, reasonable outside observers, much in the manner of most codes of judicial conduct.[6] *Id.* at 2266-67.

For the past 30 years and more, Congress has taken essentially the same stance, after it completely revised 28 U.S.C. §455 in 1974 to *require* a judicial officer to disqualify himself "in any proceeding in which his impartiality might reasonably be questioned."[7] As this Court explained at the very outset of

---

[6] As discussed immediately below, that same standard, where "impartiality might reasonably be questioned," has been incorporated into 28 U.S.C. §455(a) since 1974.

[7] It is not surprising that it was in the mid-1970's that Congress took action to change 28 U.S.C. §455 from a mild provision suggesting that a judge should step aside when "in his opinion" it was improper for him to hear the case, to the more robust and mandatory provision that it is now.

In 1972, the American Bar Association replaced its former Canons of Judicial Ethics (1924) with the Model Code of Judicial Conduct, which was intended to have the force of law in each state after modification and adoption by the state's highest court. The Judicial Conference of the United States first promulgated

(Continued on following page)

its opinion in *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988), this language is triggered

> when a reasonable person, *knowing the relevant facts*, would expect that a justice, judge, or magistrate knew of circumstances creating an appearance of partiality. . . .

Id. at 850 (emphasis supplied).

Liljeberg involved the unusual circumstance of a district court judge who at least temporarily forgot or failed to notice that he had a clear conflict of interest in the case, because of his membership on the Board of Trustees of Loyola University in New Orleans, which had distinct interests in the matter. The judge did not disqualify himself even after he finally recognized the conflict, however, and part of the decision in both the Fifth Circuit and in this Court involved the issue of an appropriate remedy, once the tainted decision became final.

With respect to the substantive standard governing disqualification under §455(a), however, this Court's adoption of language from the Fifth Circuit's opinion in the case has more general applicability:

> The goal of section 455(a) is to avoid even the appearance of partiality. If it would appear to a reasonable person that a judge has

---

the Code of Conduct for United States Judges in 1973. Both of these codes included language requiring disqualification when the judge's impartiality "might reasonably be questioned." Plainly, Congress amended §455 to harmonize it with these provisions.

> knowledge of facts that would give him an interest in the litigation then an appearance of partiality is created even though no actual partiality exists . . . . Under section 455(a), therefore, recusal is required even when a judge lacks actual knowledge of the facts indicating his interest or bias in the case if a reasonable person, *knowing all the circumstances*, would expect that the judge would have actual knowledge.

Liljeberg, 486 U.S. at 860 (ellipses and emphasis supplied; internal citation omitted).[8]

B. Improper *Ex Parte* Communications Between the Court and Counsel or Parties are Prime Examples of Conduct that Would Cause a Reasonable Person to Call into Question the Judge's Impartiality

It should be obvious that improper *ex parte* contacts between judicial officers and counsel or parties

---

[8] The Eighth Circuit's treatment of *Liljeberg* as applied to the instant case is both excessively narrow and wholly beside the point. Pet. App. 14-15. In the Circuit Court's account, *Liljeberg* is limited to situations in which the trial court *never* disclosed any facts that might suggest bias to a reasonable observer, either during or after the trial.

The court then went on to assert that petitioner Rubashkin was aware of Chief Judge Reade's *ex parte* contacts before the trial, so that *Liljeberg* did not apply. But the main point of this *amicus curiae* brief is that all of the facts were *not* known, and that some of what was found by the trial court to be true is still in dispute today. *See* Section II, *infra*.

to a proceeding must be sufficient to trigger disqualification under 28 U.S.C. §455(a). (As discussed immediately below and in Section II, this formulation assumes that some *ex parte* contacts may not be improper under some circumstances.)

Every code of judicial conduct generally proscribes *ex parte* communications about pending or impending matters, with narrowly tailored exceptions that do not implicate the substantive rights of the parties. *Compare* Code of Conduct for United States Judges Canon 3(A)(4)[9] *with* Model Code of Judicial Conduct Rule 2.9 ("*Ex Parte* Communications").

---

[9] Canon 3(A)(4) provides:

> A judge should accord to every person who has a legal interest in a proceeding, and that person's lawyer, the full right to be heard according to law. *Except as set out below*, a judge should not initiate, permit, or consider *ex parte* communications or consider other communications concerning a pending or impending matter that are made outside the presence of the parties or their lawyers. If a judge receives an unauthorized *ex parte* communication bearing on the substance of a matter, the judge should promptly notify the parties of the subject matter of the communication and allow the parties an opportunity to respond, if requested. *A judge may*:
>
> (a) initiate, permit, or consider *ex parte* communications as authorized by law;
>
> (b) when circumstances require it, permit *ex parte* communication for scheduling, administrative, or emergency purposes, *but only if the ex parte communication does not address substantive matters and the judge reasonably believes that no party will gain a*

(Continued on following page)

If the "average person on the street who knows all the relevant facts of a case," to employ the felicitous phrasing of the Eighth Circuit, *United States v. Martinez*, 446 F.3d 878, 883 (8th Cir. 2006), knows only that a judge is meeting secretly with one side of a case but not the other, and then not even telling the other side, the average person will surely believe that the judge is "on the team" of the favored side, and will perforce question the judge's impartiality.

The reporters are crowded with frivolous motions, often brought by *pro se* litigants, to disqualify a federal judge on account of (imagined) *ex parte* communications. These motions are routinely and correctly denied, but only on the ground that the movant had his facts wrong.

In marked contrast is *In re Kensington International Limited,* 368 F.3d 289 (3d Cir. 2004), where the Third Circuit disqualified the district court judge from further participation in three out of five major

---

procedural, substantive, or tactical advantage as a result of the ex parte communication;

(c) obtain the written advice of a disinterested expert on the law, but only after giving advance notice to the parties of the person to be consulted and the subject matter of the advice and affording the parties reasonable opportunity to object and respond to the notice and to the advice received; or

(d) with the consent of the parties, confer separately with the parties and their counsel in an effort to mediate or settle pending matters.

(Emphasis supplied.)

asbestos-related bankruptcies, largely on the ground that he and the five "advisors" that he appointed (from outside the judicial branch) held innumerable *ex parte* meetings with each other and with counsel for different parties. Significantly, the Circuit Court had first remanded the case to the district court for expedited discovery and a full hearing on precisely what information had been exchanged at these meetings.

In the instant case, Judge Reade almost certainly recognized that *unexplained ex parte* meetings in a major criminal case would create the appearance of impropriety and require her disqualification. Accordingly, she provided an elaborate explanation that on its face might have brought the meetings with government personnel within the ambit of one of the exceptions set out in Canon 3(A)(4) of the Code of Conduct, *see supra* n.9 and accompanying text, and thus provided "the average person on the street" with sufficient additional information to restore confidence that her impartiality was not subject to question after all.

Unfortunately, because of the way in which she went about providing that additional information, Judge Reade only made the situation worse, making it *more* reasonable to question her impartiality in the matter.

II. By Purporting to Resolve Disputed Issues of Fact that Were Necessary to a Determination of the Disqualification Issue, the Trial Judge Made Herself Both a Witness and the Judge in Her Own Case.

In her *Order Denying Motion for New Trial*, Pet. App. 43, Judge Reade laid out a detailed justification for the admitted *ex parte* contacts between herself and prosecutors and other government personnel. Perhaps relying on – but not adverting to – language in Canon 3(A)(4) of the Code of Conduct that permits *ex parte* contacts for non-substantive "scheduling, administrative, or emergency purposes," Judge Reade asserted that the contacts and meetings were strictly "logistical" in nature, made necessary by the large number of anticipated arrests at the meat processing plant.

But in a large number of instances, several of which are listed below, the judge incorporated into her justification *factual* assertions that were disputed not only by the petitioner, but by some of the government personnel as well. Ironically, while admitting that her memory had been shown by the documentary record to have been faulty with respect to an insignificant point, Pet. App. 47 & n.4, Judge Reade never wavered in her insistence that her every other "finding" was unassailable.

A perfect example appears at Pet. App. 56, where Judge Reade "resolves" a dispute over what another person meant by his statement:

> The undersigned did not pledge to "support the operation in any way possible." Def. Brief at 14. The very exhibits to which Defendant cites confirm this fact. Any reference to the undersigned's "support" of the operation clearly appears in the context of the court's duty to logistically prepare for the arrest of hundreds of persons.

Why was the author of the exhibit in question not asked what he meant?

Another example of the trial court's peremptory style of fact finding begins in the next paragraph:

> In other words, despite Defendant's best efforts to characterize the ICE Memoranda as revealing conduct by the undersigned that was purposefully concealed and therefore deceitful, they simply confirm all of the court's prior representations that the undersigned's pre-enforcement action involvement was logistical in nature.

Pet. App. 56. That is not only conclusory, but circular.

Finally, when addressing the disqualification argument directly, Judge Reade summed up by stating that

> An average person on the street, privy to all the facts of this case, would presume that the Chief Judge of a district court must perform

> certain duties to ensure that court proceedings are efficient and afford all constitutional guarantees to defendants. *That is precisely what the undersigned did* in relation to the enforcement action.

Pet. App. 64 (emphasis supplied). But of course what Judge Reade "did" was precisely the factual question that was still in dispute.

Even a judge is not allowed to be a judge in her own case, and judges are among the few who are not permitted to be witnesses in their own cases either; *see* Code of Conduct for United States Judges Canon 3(C)(1)(d)(iv), which prohibition is codified in 28 U.S.C. §455(b)(5)(iv). Thus, Judge Reade was not only disqualified from sitting in *Rubashkin* generally, she was at the threshold disqualified from deciding the disqualification motion.

On appeal, the Eighth Circuit closed its eyes to this difficulty, just as it closed its eyes to the newly discovered evidence generally. Effectively ratifying the inappropriate fact finding by the district court without comment, the Circuit Court merely said, "The district court *stated* that the ICE memoranda had not revealed [anything new]. The district court *took issue* with the wording of the ICE memoranda and *explained* [its view of the situation]." Pet. App. 10 (emphasis supplied).

It would have been preferable if Judge Reade had referred at least the fact finding in connection with the disqualification issues to another judge or

magistrate. As this Court remarked in *Liljeberg*, where fact finding was eventually referred to a different judge as a matter of course, but only after long delay,

> Another 2-day evidentiary hearing [before the first judgment became final] would surely have been less burdensome and less embarrassing than the protracted proceedings that resulted from Judge Collins' nonrecusal and nondisclosure.

486 U.S. at 866.

Now, it would appear, the only possible remedy in *Rubashkin*, short of granting a new trial directly, is a remand to the district court for fact finding by a different judge.[10]

III. The Trial Court's Substantive Rulings and Sentencing Decisions Give Further Support to Reasonable Persons Who Might Question Her Impartiality.

The petitioner and the other *amici curiae* parties have argued persuasively that if Judge Reade had

[10] The situation was different in *In re Kensington International Limited*, *supra*, where the Third Circuit initially remanded for fact finding by the *same* judge. That was appropriate, because unlike in *Liljeberg* and *Rubashkin*, the historical facts of what actually transpired were not in dispute. After discovery and a further hearing, the district court judge again denied the motions for disqualification, but the Third Circuit's reversal was on the law, not on the facts.

been disqualified from sitting on the *Rubashkin* case, as she should have been, she would not have been in a position to make a series of substantive discretionary decisions that damaged petitioner's defense effort. That, in turn, helps support the petitioner's case that Judge Reade was not impartial.

Amicus curiae the Association of Professional Responsibility Lawyers submits that the same argument can be made with respect to the extraordinarily long sentence that Judge Reade imposed. If the "average person on the street who knows all the relevant facts of a case" was given the further facts that six former Attorneys General of the United States, from both major political parties and with strikingly different legal philosophies, wrote to Judge Reade suggesting that a short term of years would be consistent with both the Sentencing Guidelines and this Court's instructions on how they should applied, and that several notorious white collar criminals had been given much shorter sentences, perhaps they might have different questions to ask about Judge Reade's impartiality.

Perhaps they might say, "Judge Reade gave Sholom Rubashkin 27 years? Maybe she has it in for the man."

CONCLUSION

Over the past several Terms, this Court has paid increasing attention to how lawyers and judges

actually operate in the legal system. *See generally* Renee Newman Knake, *The Supreme Court's Increased Attention to the Law of Lawyering: Mere Coincidence or Something More*?, 59 Am. U. L. Rev. 1499 (2010). That seems appropriate, inasmuch as the justice system can only be as good as its judges and lawyers are – and the justice system is ultimately in the hands of this Court.

Rubashkin v. United States presents this Court with another opportunity to fine-tune both the Rules of Criminal Procedure and the actual operation of 28 U.S.C. §455. For the reasons stated in the Petition and in this *amicus curiae* brief, the Petition should be granted. After further proceedings in this Court, the judgment below should be vacated, and the case remanded to the district court either for a new trial or for a hearing with respect to the disqualification of Chief Judge Linda Reade, in either case before a different judge.

Respectfully submitted,

W. WILLIAM HODES, ESQ.
THE WILLIAM HODES LAW FIRM
Counsel of Record
811 Chapman Loop
Lady Lake, FL 32162
317-590-1692
317-863-1163 (fax)
wwh@hodeslaw.com