UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

NOS. 10-2487, 10-3580

UNITED STATES OF AMERICA,

Appellee,

vs.

SHOLOM RUBASHKIN,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA, EASTERN DIVISION
HONORABLE LINDA R. READE, CHIEF JUDGE

BRIEF OF APPELLEE

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SUMMARY OF THE CASE

Defendant Sholom Rubashkin appeals his jury convictions on 86 counts for a $26 million financial fraud and related offenses and his 324-month bottom-of-the-range sentence.

Defendant claims the district court erred in evidentiary rulings at trial and in not dismissing 10 money laundering counts.

Defendant also claims his advisory guidelines range was miscalculated and his sentence was unreasonable.

Finally, defendant appeals the denial of his new trial motion where he untimely sought recusal of the trial judge, not for bias but for a claimed appearance of partiality.

The government requests 15 minutes of oral argument.

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STATEMENT OF THE CASE

Nature of the Case

Defendant appeals his jury convictions and within-range sentence.

Course of the Proceedings

On October 30, 2008, a criminal complaint charged defendant with harboring and aiding and abetting the harboring of illegal aliens for profit, aiding and abetting document fraud, and aiding and abetting aggravated identity theft.

(1MJ1).[1] He was arrested and released on bond. (1MJ7, 1MJ8). On November 13, 2008, a grand jury returned a superseding indictment in an existing case against Karina Freund. This indictment charged defendant with one count of harboring and aiding and abetting the harboring of illegal aliens for profit, one count of aiding and abetting document fraud, and one count of aiding and abetting aggravated identity theft. (CR80).

On November 14, 2008, a criminal complaint charged defendant with bank fraud. (2MJ1). He was ordered detained by a magistrate judge (2MJ7, 2MJ17), but the order was vacated on appeal to Chief United States District Court Judge Linda R. Reade. (CR199).

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[1] The Clerks's Record in 08-MJ-00363 is referred to by the document number with the prefix "1MJ." The Clerks's Record in 08-MJ-00381 is referred to by the document number with the prefix "2MJ." Items from the Clerk's Record in 08-CR-1324 are referred to by the document number with the prefix "CR." The trial transcript is referred to by date with the prefix "TT" and, where needed to identify the transcript, the witness name in parentheses. "ST" refers to the sentencing transcript from proceedings on 4/28/10 and 4/29/10. "ST2" refers to the transcript of the imposition of sentence on 6/22/10. "DH1" refers to the transcript of a pretrial detention hearing on 1/26/09 and 1/27/09. "DH1(Excerpt)" refers to the separately produced transcript of government agents' testimony from the same hearing. "DH2" refers to the transcript of a post-trial detention hearing on 11/8/09. "GXB" refers to Government Exhibits. "AOB" refers to Appellant's Opening Brief. "DADD" refers to defendant's Addendum. "DAPX" refers to defendant's Appendix. "GADD" refers to the Government's Addendum. "GAPX" refers to the government's Appendix. "PSR" refers to the Presentence Report and is followed by a paragraph number.

On November 20, 2008, a second superseding indictment added four defendants and several counts against defendant, including two counts of bank fraud. (CR94). On December 11, 2008, a third superseding indictment added a forfeiture allegation regarding property connected to alien harboring. Karina Freund had pled guilty and was not charged in the third superseding indictment. (CR150).

On December 4, 2008, defendant filed a motion for extension of time to file pre-trial motions. Defendant stated he was "contemplating in a timely manner the following motions . . . Motion for Recusal." Defendant requested a "deadline through the end of December 2008 to file . . . [a] Motion for Recusal." (CR126 3). A telephonic status conference was held on December 9, 2008, where the potential for a motion to recuse was discussed. (CR141). The court ordered any such motion to be filed by January 30, 2009. (CR142). Defendant did not file a motion to recuse.

A fourth superseding indictment was returned on January 15, 2009 (CR177), a fifth on March 31, 2009 (CR413), a sixth on May 14, 2009 (CR464), and a seventh on July 16, 2009 (CR544). The final indictment charged defendant with 1 count of conspiring to harbor illegal aliens for profit in violation of 8 U.S.C. §§ 1324(a)(1)(A)(v)(I) and 1324(a)(1)(B)(i); 69 counts of harboring and

aiding and abetting the harboring of illegal aliens for profit in violation of 8 U.S.C. §§ 1324(a)(1)(A)(iii), 1324(a)(1)(A)(iv), 1324(a)(1)(A)(v)(II), and 1324(a)(1)(B)(i); 1 count of conspiring to commit document fraud in violation of 18 U.S.C. § 371; 1 count of aiding and abetting document fraud in violation of 18 U.S.C. §§ 1546(a) and 2; 14 counts of bank fraud in violation of 18 U.S.C. § 1344; 24 counts of making false statements to a bank in violation of 18 U.S.C. § 1014; 14 counts of wire fraud in violation of 18 U.S.C. § 1343; 9 counts of mail fraud in violation of 18 U.S.C. § 1341; 10 counts of money laundering and aiding and abetting in violation of 18 U.S.C. §§ 1956(a)(1)(A)(i), 1956(a)(1)(B)(i), and 2; 20 counts of violating an order of the Secretary of Agriculture and aiding and abetting in violation of 7 U.S.C. § 195 and 18 U.S.C. § 2; and a forfeiture allegation regarding property connected to alien harboring. (CR544).

On June 25, 2009, Judge Reade granted defendant's resisted request for separate trials. As requested by defendant, the court ordered the harboring, document fraud, and conspiracy offenses ("the harboring counts") tried in one trial and the remaining counts ("the financial counts") tried in a separate trial. (CR519). On July 6, 2009, the court ordered the financial counts to be tried first. (CR526).

On September 1, 2009, Judge Reade granted defendant's resisted motion to transfer venue and moved the trial to South Dakota. (CR656).

Trial on the financial counts began on October 14, 2009. (CR700). On November 12, 2009, a jury found defendant guilty on:

- 14 counts of bank fraud;
- 24 counts of making false statements to a bank;
- 14 counts of wire fraud;
- 9 counts of mail fraud;
- 10 counts of money laundering; and
- 15 counts of violating an order of the Secretary of Agriculture to timely pay suppliers of livestock.

(CR736 (renumbered[2] Counts 1-71, 73-80, 84-89, and 91)). Defendant was acquitted on five counts of violating an order of the Secretary of Agriculture to timely pay suppliers of livestock. (CR736). Defendant was detained following conviction. (CR734, CR748).

On November 19, 2009, with defendant's consent, the harboring counts were dismissed without prejudice. (CR746).

On March 1, 2010, the court denied defendant's motions for directed verdict and new trial. (CR854).

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[2] Counts 73 through 163 in the Seventh Superseding Indictment were renumbered as Counts 1 through 91 for the first trial.

Disposition Below

Sentencing hearings were held on April 28 and 29, 2010. (CR910). The court issued a written ruling on all sentencing issues on June 21, 2010 (CR927) and imposed sentence on June 22, 2010. (CR298). The court applied a total offense level 41, criminal history category I, for an advisory guidelines range of 324 to 405 months' imprisonment. (CR927 43). The court sentenced defendant to 324 months' imprisonment followed by 5 years' supervised release. (CR927 50-51; CR929). No fine was imposed, and defendant was ordered to pay $8,600 in special assessments and $26,852,152.51 in restitution. (CR927 51; CR929). Judgment was entered on June 22, 2010. (CR929).

Defendant filed a timely notice of appeal on July 2, 2010. (CR932).

Post-judgment Motion for New Trial

On August 5, 2010, defendant filed a motion for new trial based upon purported newly discovered evidence. Defendant also sought discovery and adjudication of his motion by a different judge. (CR942). Defendant's motion was denied on October 27, 2010. (CR958).

Defendant filed a timely notice of appeal of the denial on November 8, 2010. (CR259).

STATEMENT OF THE FACTS

A. Defendant's Offenses

Defendant is a former corporate officer of Agriprocessors, Inc. ("Agriprocessors"), a slaughterhouse and wholesale supplier of meat. Agriprocessors' primary facility was located in Postville, Iowa. Although defendant's father was the sole shareholder of Agriprocessors, defendant ran the day-to-day operations of the plant. This included making the financial decisions. (TT 10/14/09 14-17; TT10/21/09 (Bensasson) 26-27, 48-49; TT10/26/09 82).

In 1999, Agriprocessors entered into a revolving loan agreement with First Bank Business Capital ("FBBC"). The loan was secured by inventory and accounts receivable of Agriprocessors. Under the loan agreement, as Agriprocessors acquired inventory and accounts receivable, Agriprocessors was entitled to borrow against such assets. At defendant's direction, nearly every business day during the life of the loan, Agriprocessors borrowed hundreds of thousands of dollars from FBBC based, in part, upon Agriprocessors' reported inventory and accounts receivable. (TT10/20/09 (Lykens) 5, 16). Ultimately, the balance on the loan was consistently in excess of $30 million. (GXB 2052-2065).

For several years, defendant instructed Agriprocessors' employees to create false invoices and bills of lading for sales that never occurred. (TT10/14/09

225-231; TT10/15/09 21-23, 221-222, 305). The purpose of the invoices was to inflate sales figures in Agriprocessors' computer accounting system. (TT10/21/09 (Bensasson) 56). Those sales figures were provided to FBBC on a regular basis in one form or another. Each day Agriprocessors requested an advance on the revolving loan, the false sales figures were used to calculate the "borrowing base" for the loan. (TT10/20/09 98). During the time-frame of the charges, the borrowing base consistently was inflated. (TT10/21/09 (Bensasson) 66). Those sales figures were also incorporated into monthly financial statements (aging reports) that also consistently were inflated. (TT10/20/09 114).

In addition to creating inflated sales through false invoices and bills of lading, defendant created false accounts receivable by failing to tell FBBC about customer payments. As customer accounts were paid down, defendant instructed Agriprocessors' accounting personnel to put the money into different accounts and not post the payments in Agriprocessors' accounting system. (TT10/22/09 (Hamilton) 33). As a result, the customer accounts receivable falsely appeared to be greater in Agriprocessors' accounting system than they really were. (TT10/21/09 (Bensasson) 96-97). The false accounts receivable figures in Agriprocessors' accounting system were furnished to FBBC as evidence of the amount of available collateral. (TT10/20/09 114).

Defendant's diversion of customer payments defrauded FBBC in another way. Under the loan agreement, payments on accounts receivable were to go directly to FBBC via a "sweep" or "depository" account. By diverting the payments, defendant stole the collateral and then lied to FBBC about it. (TT10/20/09 (Lykens) 19). To hide the diversion of customer payments, defendant told accounting personnel handling deposits including diverted customer payments to include extra "round up" checks so the deposit totals were round numbers. This made the deposits look like loans, transfers, or some other type of funds – anything but customer payments that would be expected to be in odd amounts. (TT10/22/09 (Hamilton) 38; TT10/21/09 (Bensasson) 92).

Because there was a cap on the amount of money Agriprocessors could borrow from FBBC (TT10/20/09 (Lykens) 61), defendant needed a way to periodically pay down the loan balance with money that was not from customer payments. In order to do so without alerting the bank to his actions, he took money from Agriprocessors' operating account (consisting largely of fraudulently obtained loan proceeds) and had the money run through two third-party entities under his control. He then transferred this laundered money to the bank along with genuine customer payments. The third-party entities were a small grocery store (Kosher Community Grocery) and a small private school (Torah Education).

(TT10/22/09 (Hamilton) 74; GBX 2021, 2027). Defendant told accounting personnel to make sure checks from the Kosher Community and Torah Education accounts were drawn in odd amounts so they looked like customer checks. (TT10/22/09 (Hamilton) 69, 82).

Defendant also defrauded FBBC by periodically certifying Agriprocessors was not violating the law in a way that would adversely impact the business or the bank's collateral. (TT10/20/09 (Lykens) 18, 23-24). As defendant knew, this was not true.

Defendant knew the vast majority of Agriprocessors' workforce was illegal. Defendant knew the workers' identification documents were bad, but he kept workers employed through a number of methods. (TT10/27/09 (Billmeyer) 81). At one point in the Fall of 2007, he had a number of illegal workers placed on a separate payroll because Agriprocessors' human resources manager refused to accept their obviously false identification documents. (TT10/28/09 (Althouse) 59; GXB 1108). In early May 2008, after suspecting Immigration and Customs Enforcement ("ICE") was preparing for a large immigration enforcement action, defendant orchestrated a scheme to "rehire" workers he knew were illegal. Defendant provided money to plant supervisors to loan employees to get new, better, false identification documents. (TT10/29/09 63-64). Defendant also

instructed a human resources assistant to conduct "hiring" the Sunday before the Monday enforcement action. Agriprocessors' human resources manager was out of town at the time. (TT10/28/09 (Althouse) 72, 89). On May 12, 2008, ICE found approximately 500 people working at Agriprocessors, and 389 of them were illegal aliens. (TT11/2/09 62; GXB 142; PSR 7).

Defendant also knew Agriprocessors was not complying with the Packers and Stockyards Act ("Packers Act"). Defendant knew this because he was the one who decided when to release substantially all checks at Agriprocessors – including those released consistently late to cattle suppliers. (TT10/22/09 90-93; TT10/26/09 96-97). In addition to violating the law in a way that was material to FBBC, defendant was violating a previous order of the Secretary of Agriculture that prohibited Agriprocessors and its employees from violating the Packers Act. (TT10/26/09 190; GXB 3000).

B. Defendant's Post-Search Conduct and Attempts to Obstruct Justice

Following the May 12 search, defendant intensified his efforts to defraud FBBC and took several steps to obstruct justice.

- Around the time of the search, defendant gathered immigration I-9 forms for the employees with the obviously false identification documents whom he had placed on the separate payroll. Those forms were never seen again. (TT10/28/09 (Althouse) 65-66).

- Soon after the seatch, on approximately May 15, 2008, defendant assured FBBC personnel he did not know the illegal workers' documents were bad in order to persuade FBBC to continue advancing money on the loan. (TT10/20/09 55-56).

- As production at the plant decreased following the search, defendant caused an increase in the creation of false invoices and false sales. (TT10/21/09 (Bensasson) 131).

- On approximately May 29, 2008, defendant's company credit card was used to buy one-way airline tickets to Israel for Shlomo Ben Chaim, the employee who certified the I-9s for the illegal aliens on the separate payroll. The card was used to purchase tickets for seven of Ben Chaim's family members as well. Ben Chaim and his family then fled to Israel, where they remain. (DH2 105-108).

- Also in late May 2008, defendant became aware Agriprocessors' manager and coconspirator Hosam Amara was a target of the government's criminal investigation. On June 3, defendant gave Amara $4,000 for airline tickets and told him it would be better if he just left and forgot about what had happened at Agriprocessors. (DH2 96-103; GXB 1302). Amara fled to Israel, where he remains pending extradition. (DH2 103-104).

- As defendant became aware Agriprocessors' employees were identified as targets and potential cooperators in the government's investigation, he promised to pay their salaries during any time they spent in prison. Defendant directed Agriprocessors' human resources assistant and coconspirator Laura Althouse to draft "employee status forms" for her, human resources manager and coconspirator Elizabeth Billmeyer, and operations manager and coconspirator Brent Beebe. The forms set forth an annual salary and included a blank space where the years in prison were to be filled in once known. (TT10/28/09 (Althouse) 37; GXB 1314-1316).

- On about October 29, 2008, defendant took a thumb-drive containing records of diverted customer payments and copies of diverted checks from the accounting employee who diverted the payments at defendant's

direction. (TT10/22/09 (Hamilton) 16, 88-89). The thumb-drive and records have never been recovered.

- On about October 31, 2008, while on pretrial release,[3] defendant directed the deletion of additional evidence of diverted payments from Agriprocessors' computer accounting system. (TT10/22/09 (Hamilton) 91).

- On approximately November 3, 3008, while on pretrial release, defendant took copies of false invoices and bills of lading created at his direction. (TT10/15/09 44-45). Those documents have never been found.

- On approximately November 5, 2008, the day after the execution of a federal search warrant at Agriprocessors, and while he was on pretrial release, defendant directed another employee to shred approximately 50 to 75 customer statements that contradicted what Agriprocessors had reported to FBBC. (TT10/22/09 30-31).

C. Agriprocessors' Bankruptcy

Agriprocessors filed for bankruptcy on November 4, 2008. A trustee was appointed to run the business on November 20, 2008. The trustee's managers soon discovered that, at the time of the bankruptcy, Agriprocessors' accounts receivable collateral was overstated by approximately $10 million. (TT10/14/09 31-32).

D. Defendant's Initial Detention and Release

A magistrate judge ruled defendant should be detained pending trial. (2MJ17). Judge Reade then concluded defendant had violated his terms of pretrial

[3] Defendant was immediately released on his own recognizance following his October 30, 2008, arrest.

release. She also determined defendant posed a risk of flight. (CR199 13, 16). Nonetheless, Judge Reade determined conditions of release were adequate to assure defendant's appearance at trial. The court released defendant pending trial. (CR199 17).

E. Defendant's Trial and Convictions

The final indictment[4] included 72 alien harboring, document fraud, and conspiracy counts. It also included 91 financial fraud and related counts. (CR544). The latter charges were tried first, and a jury returned guilty verdicts on 86 of 91 counts.

In the verdict forms, the jury found multiple bases for finding defendant had defrauded or made false statements to FBBC.

- On Counts 1-14 and 39-61, the jury found defendant committed his offenses "by creating false accounts receivable collateral supporting the [revolving loan with FBBC]." (CR736 2-28, 68-112; e.g. GADD 1-2).

- On Counts 1-14 and 39-61, the jury found defendant committed his offenses "by diverting collections from accounts receivable collateral for the [revolving loan with FBBC]." (CR736 2-28, 68-112; GADD 1-2).

- On Counts 15-28, the jury found the offenses were committed by means of a "false statement or statements about whether accounts receivable reported in

[4] The bank fraud was initially charged by complaint because defendant was a flight risk and was obstructing justice. The subsequent grand jury investigation revealed additional criminal conduct that led to several superseding indictments.

collateral certificates submitted by Agriprocessors, Inc. were genuine." (CR736 30-56; e.g. GADD 3-4).

- On Counts 7-8 and 45-46, the jury found defendant committed his offenses "by falsely stating Agriprocessors was in compliance with all laws when Agriprocessors and its employees were failing to comply with the Packers and Stockyards Act." (CR736 14-16, 80-82; e.g. GADD 1-2).

- On Counts 1-9 and 39-47, the jury found defendant committed his offenses "by falsely stating Agriprocessors was in compliance with all laws when Agriprocessors and its employees were harboring or conspiring to harbor undocumented aliens." (CR736 2-18, 67-84; e.g. GADD 1-2).

- On Counts 15-23, the jury found defendant made a "false statement or statements about Agriprocessors, Inc. knowingly harboring and conspiring to harbor illegal aliens." (CR736 3-47; e.g. GADD 3-4).

- On Count 29, the jury found defendant was guilty of falsely stating to FBBC "that during the time period leading up to the arrests of approximately 389 undocumented alien workers at Agriprocessors, Inc. on May 12, 2008, the defendant had been unaware that such alien workers were undocumented." (CR736 57; CR742 19 (Final Jury Instruction 14)).

F. Defendant's Sentencing

The court found defendant's base offense level under USSG §2B1.1(a)(1) was 7. (PSR 333). The court applied a 22-level enhancement because the loss was between $20,000,000 and $50,000,000 and a 2-level enhancement for sophisticated means. The court denied the government's request for a two-level enhancement for more than 10 victims. (CR927 28-29).

The court determined defendant's offense level under the money laundering guideline, §§2S1.1(a)(2) and (b)(2)(B), was 33 and applied a 2-level enhancement for sophisticated laundering. (CR927 31-34).

Under Chapter 3 of the guidelines, the court applied a 4-level enhancement for aggravating role and a 2-level enhancement for obstruction of justice because defendant lied at trial. (CR927 37, 43). The court denied the government's request for a two-level enhancement for abuse of a position of trust. (CR927 41).

The court determined defendant's total adjusted offense level was 41, and his criminal history category was I, for an advisory guidelines range of 324 to 405 months' imprisonment. (CR927 43).[5]

The court heard defendant's arguments for a downward departure or variance and sentenced defendant to a bottom-of-the-range 324 months' imprisonment. (CR927 50-51; CR 929). The court said it would have imposed the same sentence regardless of any error in calculating the advisory guidelines. (CR927 50 n.18). The court supported its sentence – and its alternative ruling – with a detailed discussion of the aggravating circumstances of defendant's offense,

[5]Without the money laundering computation, defendant's range would have been 210-262 months.

defendant's characteristics, and bases for upward departures the court did not impose because it found the 324-month sentence was adequate. (CR927 43-52).

G. Defendant's Motion for New Trial

On August 5, 2010, defendant filed a Rule 33(b)(1) motion for new trial based upon claimed newly discovered evidence. Despite declining the court's pre-trial invitation to file a motion to recuse, defendant sought a new trial before a different judge alleging Judge Reade should have recused herself based upon her involvement in the court's logistical preparations related to the May 12 immigration operation. (CR 942). No claim of actual prejudice was made, see 28 U.S.C. § 144, rather a claim of perceived impartiality was raised, see 28 U.S.C. § 455(a).

1. Preparations for the May 12 Enforcement Action

From October 2007 until May 12, 2008, the government planned a worksite enforcement action at Agriprocessors with the potential for hundreds of criminal cases against illegal workers. In order to facilitate the handling of so many cases, the government notified the court that a large-scale criminal immigration initiative was planned. (GAPX 115). The target of the planned action was not identified to the court. (GAPX 423; CR958 5).

The court decided to temporarily relocate court operations to the site of ICE's temporary facility in Waterloo. The court noted there was inadequate space in the district courthouses to hold and process the anticipated arrestees and the move would "make it easier for arrestees' families to attend court proceedings." (GAPX 80). The court arranged for appointed attorneys and 36 qualified Spanish interpreters to be available. Knowing the government intended to offer fast-track plea proposals to many of those prosecuted (but without knowledge of the specifics of those proposals, save the potential for a judicial order of removal), the court prepared for a large number of initial appearances, potential guilty pleas, and sentencings within a short period of time. (GAPX 116, 421).

The court compiled a handbook to assist counsel and their assigned interpreters. The handbook contained the elements and statutory maximums (GAPX 220-288) for the crimes the government could potentially charge and had charged.[6] The handbook contained copies of waivers and forms already used in the district (GAPX 190-197, 289-300) should those items be needed. In order to assist counsel and their clients, the handbook contained drafts of what the judges would say – including the questions they would ask the defendants – at the

[6] Magistrate Judge Jon S. Scoles reviewed and signed 695 criminal complaints for illegal workers weeks before the operation. (GAPX 114).

potential hearings. (GAPX 187-188, 199-209, 302-308). The forms and drafts were similar to those long-posted on the court's website for use in criminal cases. See, e.g.

http://www.iand.uscourts.gov/e-web/documents.nsf/(Judge%20Scoles);

http://www.iand.uscourts.gov/e-web/documents.nsf/(Judge%20Zoss).

Because the government anticipated seeking judicial removal in many cases, the court included a form removal stipulation and order. The removal materials included citations to the law and a list of the immigration rights each defendant would be foregoing if he or she agreed to judicial removal. (GAPX 309-313).

Although the court was necessarily involved in those aspects of the logistical planning that impacted court functions, Judge Reade was never told, prior to the execution of the search warrants on May 12, that Agriprocessors was the location of the operation.[7] As Judge Reade later wrote:

> The undersigned was never informed . . . who the targets of the prosecutions would be or even where the worksite enforcement action was to take place. The undersigned's planning was limited to ensuring that a sufficient number of judges, court-appointed attorneys and interpreters would be available and that the court would be able to function efficiently at an off-site location.

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[7] Shortly before May 12, Magistrate Judge Scoles was made aware Agriprocessors was the focus of the investigation when he was presented with sealed applications for criminal complaints and search warrants that identified Agriprocessors as the place to be searched. (GAPX 423).

(CR958 5; GAPX 423). Accordingly, Judge Reade was never made aware, prior to May 12, defendant had any potential connection to the government's investigation and enforcement action. The May 12 operation and ensuing prosecutions in Waterloo were focused upon the illegal workers.

2. Published Accounts of the Court's Involvement

The court's involvement in logistical planning related to the May 12 enforcement action was published in a June 2008 article in The Third Branch. In addition to other details about the court's role, the article contained the following quotation from Judge Reade:

> I was advised informally [in December 2007] that a major law enforcement initiative was being contemplated – although I was not given any details . . .. As I received more information – including that there might be over 700 arrests – I talked with my fellow judges about how to best handle the cases. We developed checklists on initial appearances, status conferences, pleas and sentencings. We worded statements and instructions so they would interpret well. The court definitely couldn't accommodate that number without planning.

(GAPX 115).

In July 2008, a U.S. House of Representatives Judiciary subcommittee held a hearing regarding immigration enforcement actions and the Agriprocessors operation. The court's involvement was a topic of inquiry:

> [Subcommittee Chairperson] Ms. Lofgren: . . . . But I would like to know what information was provided by the Department of Justice,

> Department of Labor, Department of Homeland Security – any or all of them – to the Federal court in Iowa. This was planned for a long time. When was the connection made with the court, and what measures were taken to ensure that the court's view of the cases would not be affected and that judicial neutrality would not be compromised?
>
> [Senior Associate Deputy Attorney General] Ms. Rhodes: My understanding – primarily for logistical reasons. That is not unusual. If there is going to be an enforcement operation that is going to bring a large number of cases to the court, it is not uncommon to give the court a head's up on that.
>
> Ms. Lofgren: So Judge Reade would have been contacted in advance? I am not making a value judgment, I am just trying to find out what happened.
>
> Ms. Rhodes: That's correct.

(GAPX 144).

3. De La Rosa Recusal Litigation

On August 13, 2008, in the related case of *United States v. Martin De La Rosa-Loera*, CR 08-1313 LRR, Agriprocessors manager De La Rosa filed a motion to recuse Judge Reade based, in part, upon her participation in the planning for the May 12 enforcement operation. The motion (GAPX 42-358) contained 25 exhibits. These included the Third Branch article (GAPX 114) and a press release issued by the Clerk of Court on May 12, 2008, notifying the public the court was temporarily relocating judges, personnel, and services to Waterloo "in response to the anticipated arrest and prosecution of numerous illegal aliens in

the Department of Homeland Security law enforcement initiative in northern Iowa." (GAPX 80). The motion also included materials containing allegations and criticisms regarding the court's role in the enforcement operation. (GAPX 65-357).

On September 29, 2008, the court issued an order denying the motion. (GAPX 429). The court stated "the undersigned limited her actions in the Waterloo cases to her role as Chief Judge of the Northern District of Iowa, that is, performed duties in her official capacity." (GAPX 434) The court also wrote several pages detailing its preparations for the prosecution of the hundreds of illegal worker cases in Waterloo. (GAPX 434-438).

4. Invitation to File a Motion to Recuse

On December 9, 2008, the court held a telephonic scheduling conference to discuss, among other matters, deadlines for pretrial motions. (CR141). Defendant had previously filed a motion for extension of deadlines stating he was contemplating filing motions to recuse, for change of venue, to sever, and to dismiss for grand jury abuse. (CR126 3 (defendant stating he was "contemplating in a timely manner the following motions . . . Motion for Recusal" and requesting a "deadline through the end of December 2008 to file . . . [a] Motion for Recusal."). The Court ordered any such motions to be filed by January 30, 2009.

(CR142 2). Defendant did not file a motion to recuse and did not seek discovery regarding Judge Reade's contacts with the government prior to the enforcement action.

SUMMARY OF THE ARGUMENT

The court properly denied defendant's post-judgment attempt to litigate an untimely motion to recuse based upon purported "newly discovered" evidence. No relief was available under Rule 33(b)(1) because the purported new evidence had nothing to do with guilt or innocence and would not have been admissible at trial. The evidence relied upon could not be considered newly discovered because the alleged basis for recusal had been litigated in a related case prior to defendant being charged. Further, any error was harmless because defendant failed to allege, much less show, any prejudice at trial.

The court properly admitted evidence of alien harboring because defendant was on trial for defrauding and making false statements to FBBC about his knowledge of alien harboring at Agriprocessors. There was no improper spillover because there was nothing unfairly prejudicial about the evidence under Rule 403.

The court properly excluded evidence that defendant retained lawyers to address illegal workers at Agriprocessors because defendant offered the lawyers as mere fact witnesses and disclaimed any advice of counsel defense. By foregoing

an advice of counsel defense, defendant strategically precluded inquiry into his communications with counsel (and the incriminating nature of the communications – revealed by defendant at sentencing). Because defendant never sought to introduce evidence of the lawyers' advice, evidence of their mere presence was properly excluded based upon the danger of unfair prejudice.

Defendant was properly convicted of money laundering despite the jury not finding his laundering involved "profits" of unlawful activity. *United States v. Santos*, 533 U.S. 507 (2008), only applies in illegal gambling cases. Even under a broader reading of *Santos*, sufficient evidence supported the convictions because defendant's laundering was distinct from, and did not merge with, his fraud and false statement offenses. Even if there were a merger, there was no "merger problem" under the holding of *Santos* because defendant's money laundering convictions did not result in a "radical increase" in the statutory maximum sentence.

The court did err in calculating the advisory guidelines range. The court correctly calculated the loss based upon more than $20 million in actual loss to FBBC. Any error was harmless because the sentence imposed was within the overlap of the range suggested by defendant's loss figure, and the court would

have imposed the same sentence in any event. The court also correctly applied the money laundering guideline.

Finally, the court did not abuse its discretion in imposing the 324-month sentence at the bottom of the advisory guidelines range. The court considered all of the statutory factors and defendant's arguments for a lesser sentence. The sentence was reasonable because defendant (1) committed a broad array of serious financial crimes resulting in over $26 million in loss, (2) committed additional crimes not accounted for in the guidelines, (3) obstructed justice on multiple occasions by perjuring himself, destroying evidence, and tampering with witnesses, (4) enriched himself at the expense of his victims, and (5) demonstrated a lack of remorse for his crimes.

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANT'S MOTION FOR NEW TRIAL BASED UPON INFORMATION UNRELATED TO HIS TRIAL AND WHERE THERE WAS NO ALLEGATION OR SHOWING OF PREJUDICE, THERE WAS NO BASIS FOR RECUSAL, AND DEFENDANT'S MOTION LACKED SUFFICIENT MERIT TO WARRANT DISCOVERY OR TRANSFER TO ANOTHER JUDGE

Defendant argues the court erred in denying his motion for new trial based upon purported newly discovered evidence. Because the motion lacked merit, the

court properly denied defendant's request for discovery and to transfer the motion to a different judge for decision.

A. Standard of Review

The denial of a motion for a new trial based on newly discovered evidence will not be reversed absent a "clear abuse of discretion." *United States v. Baker*, 479 F.3d 574, 578 (8th Cir. 2007).

B. Legal Standards for New Trial Based upon Newly Discovered Evidence

Defendant brought his motion under Rule 33(b)(1). That rule states:

> Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires.
>
> * * *
>
> Any motion for a new trial grounded on newly discovered evidence must be filed within 3 years after the verdict or finding of guilty. * * *

Fed. R. Crim. P. 33(a) and (b)(1).

Motions for new trial based on newly discovered evidence are disfavored and should be granted only with great caution. *United States v. Stofsky*, 527 F.2d 237, 243 (2d Cir. 1975). This is because of the interest in according finality to a jury verdict. Id. The obvious interest addressed by Rule 33(b)(1) is to see that all relevant facts support a conviction and that an innocent person was not convicted. See 3 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure*

§ 583 (4th ed. 2011) ("No court wants a defendant to remain in jail once he discovers evidence showing that he is innocent, but after a defendant has his day in court and has been fairly tried, courts are reluctant to give him a second trial and disrupt finality."). To justify a new trial on the ground of newly discovered evidence, "(1) the evidence must have been unknown or unavailable to a defendant at the time of trial; (2) the defendant must have been duly diligent in attempting to uncover it; (3) the newly discovered evidence must be material; and (4) the newly discovered evidence must be such that its emergence probably will result in an acquittal upon retrial." *United States v. Baker*, 479 F.3d 574, 577 (8th Cir. 2007) (citation and quotation omitted) (evidence must also not be merely impeaching).

Of necessity, the evidence referred to in the rule must be relevant evidence; i.e. "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable." Fed. R. Evid. 401.

C. Rule 33(b)(1) Provided No Vehicle for Relief

Defendant does not claim to have discovered evidence related to the issue of guilt that "probably will result in an acquittal upon retrial." *Baker*, 479 F.3d at 577. Obviously, his claims about the court are unrelated to his guilt or innocence

and could not amount to evidence encompassed by Rule 33. Therefore, Rule 33, by its terms was inapplicable, and there was no abuse of discretion in denying defendant's motion.

Defendant's real reliance is on 28 U.S.C. § 455(a). That section states:

> Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

Section 455(a) deals with, not actual bias, but whether "an average person knowing all the relevant facts of a case might reasonably question a judge's impartiality." *Dossett v. First State Bank*, 399 F.3d 940, 953 (8th Cir. 2005).

By its terms, § 455(a) is prospective, not retrospective, in application. As noted by the Supreme Court, the recusal statute is intended "to prevent [a judge's] future action in the pending cause." *Ex Parte American Steel Barrel Co.*, 220 U.S. 35, 44 (1913) (cited with approval in *Liteky v. United States*, 510 U.S. 540, 549 (1994)). Section 455(a) does not authorize the reopening of closed litigation. *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 863 (1988). The section itself "neither prescribes nor prohibits any particular remedy." Id. at 862. In other words, there must be some other remedial vehicle providing retrospective relief in order to apply § 455(a) to a sentenced criminal such as defendant. Cf. *Liljeberg*, 486 U.S. at 863-64 (timely Fed. R. Civ. P. 60(b)(6) motion provided

relief for § 455(a) violation). As noted above, Fed. R. Crim. P. 33(b)(1) is not that vehicle.

Defendant relies upon *Holmes v. United States*, 284 F.2d 716, 720 (4th Cir. 1960), in support of his broad claim that Rule 33 application may be premised either upon newly discovered evidence bearing "'upon the substantive issue of guilt,' or 'upon the integrity of the earlier trial.'" (AOB 39 (quoting *Holmes*, 284 F.2d at 720)). *Holmes*, however, was not a § 455(a) recusal case and involved different facts where a defendant showed actual prejudice at trial.

In *Holmes*, a deputy marshal told jurors a defendant was staying at a local jail serving a six-year sentence. Id. at 718. The court reversed the conviction because the jury had been "subjected to improper influence," id. at 719, and the new evidence bore "upon the integrity of the jury's verdict," id. at 720.

Holmes is inapposite here because it does not address whether a purported violation of § 455(a) can be pursued under Rule 33(b)(1) – "depriving the decision of any persuasive, as well as precedential, value on that issue. See *Prince v. Kids Ark Learning Ctr.*, 622 F.3d 992, 995-96 n.4 (8th Cir. 2010) (per curiam) (noting implicit determinations of issues not raised or discussed do not constitute controlling precedent) (citing *Brecht v. Abrahamson*, 507 U.S. 619, 630-31, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993) (reasoning stare decisis does not bind future

courts on issues not squarely addressed))." *United States v. Bauer*, 626 F.3d 406, 409 (8th Cir. 2010).

Finally, unlike in *Holmes*, defendant here did not even allege any actual impact on the jury's verdict or any other manner of actual prejudice. Rather, defendant impermissibly sought to use Rule 33(b)(1) to litigate a § 455(a) motion to recuse after the fact. Neither *Holmes* nor any other authority supports defendant's belated attempt, after conviction and sentencing, to gain a new trial before a different judge without a showing of prejudice.[8]

Defendant does not even allege how any involvement by Judge Reade in logistical planning prejudiced defendant at trial.[9] While prejudice is not required when a timely motion is made under 28 U.S.C. § 455(a), Rule 33(b)(1) requires a showing of actual prejudice. See *United States v. Gianakos*, 415 F.3d 912, 927 (8th Cir. 2005) (the evidence must be likely to produce an acquittal if a new trial is granted); *Holmes*, 284 F.2d at 719 (no new trial for jury communication if it

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[8] *Liljeberg*, 486 U.S. at 865, cited by defendant (AOB 31-32), is distinguishable. There, relief was available under a timely 60(b)(6) motion. The Supreme Court noted, "Rule 60(b)(6) . . . grants federal courts broad authority to relieve a party from final judgment 'upon such terms as are just.'" Id. at 863.

[9] The court ruled in defendant's favor, over the government's objection, on several of defendant's most significant requests. The court granted defendant's appeal of the detention order (CR199), ordered a change a venue (CR656), and severed charges as requested by defendant (CR519).

clearly appears "communication was harmless and could not have affected the verdict"); cf. *Fletcher v. Conoco Pipe Line Co.*, 323 F.3d 661, 663 (8th Cir. 2003) (§ 455(a) claim raised for first time on appeal is subject to plain error review, and Court would only reverse were "error prejudiced the substantial rights of the [parties] and would result in a miscarriage of justice"). Although defendant suggests the court was privy to extrajudicial information (AOB 33), he has not alleged with any particularity what impermissible knowledge the court had or how it might relate to defendant's case.

Even if Rule 33(b)(1) applied, defendant's motion was properly denied.

D. Defendant's Evidence Was Not "Newly Discovered"

Defendant alleges ICE materials obtained from a FOIA request constituted "newly discovered evidence." Because defendant knew or should have known the factual basis for his motion prior to trial, his motion was properly denied.

Defendant acknowledged in the district court:

> It was obvious from the fact that the United States District Court sat in temporary space in Waterloo rather than its Cedar Rapids courthouse that some prior logistical arrangements had been made with the District Court to enable the criminal cases against the undocumented aliens to be processed so promptly.

(CR942 3). In addition, several sources of information provided defendant with details regarding the court's involvement in planning court operations in

anticipation of hundreds of arrests. These included the June 2008 article in The Third Branch (GAPX 144), the July 2008 congressional hearing (GAPX 144), and a motion and order in the related case (GAPX 429).

Armed with this information, in December 2008, defendant said he was considering filing a motion to recuse and was given a deadline for any such motion. (CR126, CR142). However, defendant did not file a motion to recuse and did not seek discovery regarding Judge Reade's contacts with the government prior to the enforcement action.

Relying upon a series of ICE documents – mostly memoranda and e-mails – defendant incorrectly argued information regarding Judge Reade's pre-operation involvement had only come to light after trial. On appeal, defendant picks a mere four phrases[10] out of context from the ICE materials and repeats them in an attempt to ascribe meaning that might appear different or in addition to the information already known to defendant prior to trial. However, placed in the context of the documents from which they were taken, the phrases are entirely consistent with the fact – known to defendant prior to trial – that the court was involved in planning court operations prior to May 12 limited to matters of court logistics.

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[10] The phrases are "final gameplan," "briefing on how the operation will be conducted," "an overview of charging strategies," and "support the operation in any way possible." (AOB 42).

There were 13 documents relied upon in defendant's motion. Here, the government discusses only those documents containing the four phrases defendant now relies upon on appeal.[12]

1. "Support" for the Operation

Defendant relies upon an ICE memorandum regarding an October 16, 2007, meeting of the Special Agent in Charge, the United States Attorney, and the First Assistant/Criminal Chief. Regarding Judge Reade, the memorandum states:

> The USAO also stated that they have briefed Chief United States District Court Judge Linda Reade regarding the ongoing investigation and their expectation that it is anticipated to result in several hundred criminal arrests and subsequent criminal prosecutions within the judicial boundaries of the Northern District of Iowa. Judge Reade indicated full support for the initiative, but pointed out that significant planning and preparation will be required to allow the Court to clear docket time, request additional Judges, Court Reporters, Court Certified Interpreters, support staff, and facilities to conduct Judicial proceedings. It was pointed out that the judicial calendar is prepared many months in advance and as such the enforcement phase of this investigation should be planned for the spring of 2008. Judge Reade further advised that she would be out of the country and unavailable for all of February and half of March 2008.

(DAPX 269-270).

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[12] The government addressed each of the original 13 documents (DAPX 268-304) in its response to the motion. (GAPX 1). Defendant added more documents in his reply brief. (DAPX 305-311). Read together, all of the documents defendant relied upon in the district court leave the clear understanding that the court's involvement was limited to logistical planning.

The reference to Judge Reade's "full support for the initiative" clearly relates to the context of the logistical needs of the court in order to handle several hundred criminal arrests. Defendant knew prior to trial the court had taken numerous steps to "support" the operation by having court facilities and personnel available to handle the large number of arrests. The reference to Judge Reade being briefed "regarding the ongoing investigation" is properly read in the context of the remainder of the sentence that reads "and their expectation that it is anticipated to result in several hundred criminal arrests and subsequent criminal prosecutions within the judicial boundaries of the Northern District of Iowa."

The memoranda relied upon by defendant were, in large part, drafted by agents, not lawyers. The Court should resist defendant's invitation to ascribe sinister meaning to each non-technical word. (GAPX 423 ("Judge Reade was not advised by our office, or any investigative agent or agency to my knowledge, of the target(s) of the specific federal charges or warrants or the location of the anticipated search in advance of the execution of those warrants."); CR958 5).

Defendant also relies upon a memorandum regarding a January 28, 2008, meeting with Judge Reade. In this regard, the memorandum states:

> At 1:30 local time a meeting was held with the Chief District Judge. There were many attendees at the meeting as requested by the Judge. The attendees included the Judge, the clerk of the court, USMS, probation,

> USAO, and ICE. The Judge was updated on the process of the Cattle Congress as well as discussions about numbers, potential trials, IT issues for the court, and logistics. The Court made it clear that they were willing to support the operation in any way possible, to include staffing and scheduling.
>
> The U.S. District Court Judge asked that one concern be relayed to ICE HQ. She has asked that ICE/GSA enter into a contract with the Cattle Congress as soon as possible so that she can continue to hold the court's schedule for that time frame. Again, she was very supportive of operating at an offsite location but just wants to make sure we get it locked in as soon as possible.
>
> The court is going to provide us with what they believe they will need as far as IT and communication lines. Once we receive this information, it will be forwarded to the SAC IT support staff.

(DAPX 276-277).

All of the issues discussed in the January 28, 2008, memorandum concern logistics. Judge Reade's "support" for the operation is discussed clearly in relation to the corresponding impact on the court's resources.

2. "Charging Strategies"

Defendant relies upon a memorandum referencing a March 17, 2008, meeting with the court and others. In this regard, the memorandum states:

> On March 17, 2008, RAC Cedar Rapids met with the USAO, U.S. Probation, the USMS, and the United States District Court staff to include the U.S. Magistrate Judge and U.S. Chief District Court Judge. The parties discussed an overview of charging strategies, numbers of anticipated arrests and prosecutions, logistics, the movement of detainees, and other issues related to the CVJ investigation and operation. The Chief District Court Judge requested that ICE and/or USMS ensure that the detainees take

> showers and are wearing clothing that is not contaminated when appearing in court. The next meeting with the Court will be set for the first week of April.

(DAPX 278-279).

As with the other memoranda, this memorandum concerns issues of logistics. As to the court being privy to the potential criminal charges to be brought as part of the operation, this was known to defendant prior to trial. For example, as part of his motion to recuse, De La Rosa had attached court-prepared information sheets including elements, penalties, statutes, and sentencing guidelines for violations of 42 U.S.C. § 408(a)(7)(B), 18 U.S.C. § 1028A(a)(1), 18 U.S.C. § 911, 18 U.S.C. § 1015(e), 18 U.S.C. § 1546(a), and 8 U.S.C. § 1326(a). (GAPX 220-288). The reference to "charging strategies" can be read no more broadly than the discussion of potential charges the court might be presented with in Waterloo. (GAPX421 (discussing the court's preparation of materials to aid "defense counsel and defendants in understanding the nature of the charges and proceedings"); GAPX 423-424 ("there was no warrant for defendant's arrest on May 12, 2008")).

3. "Final Gameplan"

Defendant relies upon a March 20, 2008, e-mail regarding an upcoming meeting to include ICE and Marshal personnel. The e-mail states, in part:

> We have been advised of several developments that require us to get together. The Chief Judge has indicated she wants a final gameplan in two weeks (April 4). That said, the USAO needs to know what the USMS and ICE are going to do by March 28. At this meeting, we need to figure out our gameplan for processing/housing/transportation/manpower.
>
> The USAO and Chief Judge have asked that we work together to be able to do short-term housing at the temporary facility as our criminal arrests may then exceed the 450 mark. Before the meeting on 3/26, [names redacted] and I need to talk to see if we can come to a resolution on this issue. The USMS has concerns and so does DRO, but having no short-term housing will severely impact criminal prosecutions.
>
> Before the meeting, I will also provide [name redacted] our cost estimate which is primarily based off TDY costs, but will be inclusive of collateral other needs for this operation and its aftermath. The USAO, DOJ and Judiciary have been advised that our ability to accomplish this mission is [sic] proposed is contingent on the provision of supplemental funding.

(DAPX 281-282).

In the context discussed in the e-mail, the court's request for a "gameplan" was clearly regarding "processing/housing/transportation [and] manpower." Judge Reade's concern that such logistical components be in place the month prior to the operation was a predictable consequence of all the logistical efforts the court had to make in order to handle the anticipated number of criminal prosecutions. The e-mail adds nothing of substance to what was known to defendant prior to trial.

4. "Briefing" on Operation

Defendant relies upon a March 31, 2008, e-mail regarding a meeting with First Assistant/Criminal Chief Richard Murphy. The e-mail states in part:

> There was a meeting today with ICE, USMS, ODAG and USAO for the Northern District of IOWA regarding the Agriprocessors operation. ICE was represented by OI, DRO and OPLA. The First Assistant for the Northern District Rich Murphy indicated that he has a meeting this Friday (April 4) with the Chief Judge who has requested a briefing on how the operation will be conducted. Murphy has requested an operation plan from ICE by COB Wednesday so that he can incorporate it into his presentation.

(DAPX 280).

As discussed above, the circumstances of the April 4 meeting with the court were predictable consequences of the readily apparent logistical coordination between the court and the government. Regarding the operation plan, while it was important for the government to know what the plan was before meeting with the court, the plan was never shared with Judge Reade or any other court personnel. (GAPX 424).

Regarding defendant's claim the ICE documents constituted "newly discovered evidence," defendant states, "neither he nor his counsel had any idea that ICE documents would describe a series of pre-raid meetings between Judge Reade and the prosecutors. These were documents that the Appellant could not access." (AOB 41). Of course, the question is not what the ICE documents said –

the question is what defendant knew about what actually happened. Long before trial, defendant knew there was contact between the government and Judge Reade – and he neither sought to challenge the propriety of the contact nor to learn from the court any more details until well after his conviction and sentencing. The information was not "newly discovered" within the meaning of Rule 33.

E. Defendant's Recusal Request Was Untimely

This Court has noted, "claims under § 455 'will not be considered unless timely made.'" *United States v. Bauer*, 19 F.3d 409, 414 (8th Cir. 1994) (citations omitted). Defendant was invited by the court to file a timely motion to recuse prior to trial. (CR142). Because none of the information obtained by defendant pursuant to the FOIA request either contradicted or significantly added to what was known by defendant prior to trial, defendant failed to set forth newly discovered evidence of anything for the purposes of Rule 33(b)(1), and defendant's motion was untimely. See *United States v. Elso*, 2010 WL 438364, *2 (11th Cir. 2010) (unpublished) (new trial properly denied where defendant failed to establish he lacked knowledge of the evidence underlying his claim of judicial bias at the time of trial or that recusal was warranted); *United States v. Conforte*, 624 F.2d 869, 879 (9th Cir. 1980) (refusing to consider untimely motion for new trial based upon purported newly discovered evidence of judicial bias).

F. Judge Reade Was Not Obligated to Recuse Herself and No Relief Was Available under Rule 33

Defendant's untimely motion depended upon a showing Judge Reade should have been recused at trial based upon her involvement in the court logistical planning related to the May 12 enforcement operation at Agriprocessors. As the court had already decided in the De La Rosa case (GAPX 429), no recusal was required under § 455(a). Here, for many of the same reasons, the requirements of Rule 33(b)(1) were not met because defendant failed to make "a substantive showing" he suffered any prejudice at trial. *Holmes,* 284 F.2d at 718. Accordingly, even if a Rule 33(b)(1) motion could be premised upon purported new evidence supporting a § 455(a) motion, defendant's failure to satisfy the requirements of § 455(a) made relief unavailable.

1. Law of Recusal

Defendant alleges Judge Reade was required to recuse herself under § 455(a). "[W]hether disqualification is required in a particular case is committed to the sound discretion of the district judge . . . and . . . review[ed] only for an abuse of that discretion." *In re Kansas Public Employees Retirement System*, 85 F.3d 1353, 1358 (8th Cir. 1996). A judge is presumed to be "impartial, and [defendant] bears 'the substantial burden of proving otherwise.'" Id. (citation

omitted). In deciding a recusal motion, a court must "carefully weigh the policy of promoting public confidence in the judiciary against the possibility that those questioning [the Court's] impartiality might be seeking to avoid the adverse consequences of the [the judge] presiding over their case." Id. (citation omitted).

Disqualification under § 455(a) does not require actual bias but must be judged under an objective standard of whether "an average person knowing all the relevant facts of a case might reasonably question a judge's impartiality." *Dossett,* 399 F.3d at 953. "In applying the test, the initial inquiry is whether a reasonable *factual* basis exists for calling the judge's impartiality into question." *United States v. Cooley*, 1 F.3d 985, 993 (10th Cir. 1993) (emphasis in original). However, "'[t]he statute must not be so broadly construed that it becomes, in effect, presumptive, so that recusal is mandated upon the merest unsubstantiated suggestion of personal bias or prejudice.'" *Nichols v. Alley*, 71 F.3d 347, 351 (10th Cir. 1995) (citation omitted).

2. Recusal Analysis

Defendant's claims about the court's involvement in the Waterloo proceedings would not warrant recusal even if timely raised.

In an attempt to manufacture an allegedly "new" basis for § 455(a) recusal, defendant draws unwarranted conclusions from materials received under a FOIA request. Defendant relies on the following meritless claims:

> (1) "Judge Reade communicated *ex parte* with both the United States Attorney's Office and the ICE officers . . .";[13]
>
> (2) "at these meetings, Judge Reade was updated on the status of the investigation . . . [and] was privy to 'information that [did] not enter the record' . . .";
>
> (3) "the repeated *ex parte* meetings between the judge and the prosecutors suggest that they had become 'excessively cozy' . . . and were working in tandem"; and
>
> (4) "Judge Reade had multiple opportunities to disclose the facts surrounding her role in the raid but she took none of them. To the contrary . . . Judge Reade minimized her participation, misrepresenting it as, at most, 'logistical cooperation' . . .."

(AOB 33-34).[14]

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[13]Defendant inaccurately states this is "undisputed." (AOB 33).

[14]Defendant went even further in a press release, disseminated within an hour of filing his motion for new trial, in which he announced, "NEW EVIDENCE SHOWS JUDGE READE UNLAWFULLY PRESIDED OVER RUBASHKIN TRIAL . . .." (GAPX 426-428).

a. There Were No *Ex Parte* Contacts

Defendant habitually refers to the pre-operation contacts between the government and the court as "*ex parte.*" To the contrary, ex parte contacts only occur when there is more than one party to a pending action.

> [T]he meaning of "ex parte proceeding" is well established. See, e.g., *United States v. Meriwether*, 486 F.2d 498, 506 (5th Cir. 1973). *Black's Law Dictionary* defines it as a "proceeding in which not all parties are present or given the opportunity to be heard." *Black's Law Dictionary* 1221 (7th ed. 1999). It further defines "ex parte" as "[d]one or made at the instance and for the benefit of one party only, and without notice to, or argument by, any person adversely interested." Id. at 597.

United States v. Abreu, 202 F.3d 386, 390 (1st Cir. 2000). The Code of Conduct for United States Judges' regulation of ex parte contacts similarly addresses only contacts "concerning a pending or impending matter."

> 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.

Administrative Office of U.S. Courts, *Code of Conduct for United States Judges* Canon 3(A)(4) (2009).

Here there was no pending action and there were no other parties when the pre-enforcement logistical discussions took place. There is no authority to support defendant's suggestion that his criminal case – initiated more than five months

later – was an "impending matter" on May 12, 2008. (DAPX 319).[15] *United States v. Earley*, 746 F.2d 412, 416 (8th Cir. 1984), cited by defendant regarding the dangers of ex parte communications (AOB 30), is inapposite.

Defendant's suggestion Judge Reade was ethically bound to avoid such contacts is similarly without basis. Even assuming there were another party to the action prior to the operation such that communications with the court could be deemed "*ex parte*," such communications would, nonetheless, be permissible.

According to the Code of Judicial Conduct, a judge may:

> (a) initiate, permit, or consider ex parte communications as authorized by law; [and]
>
> (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

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[15]Defendant's retained judicial ethics expert applies the Terminology section of the 2007 Model Code of Judicial Conduct and defines "impending matter" as "a matter that is imminent or expected to occur in the near future." (DAPX 319). He opined the pre-operation contacts were "ex parte" because they concerned the "impending matter" of "Postville raid and the arrest of Agriprocessors employees and officials." Id. While it is unclear which "officials" he is referring to, they could not include defendant who was neither charged nor arrested until October 30, 2008. The same expert inexplicably had this fact wrong in his original affidavit, submitted to this Court as part of defendant's motion to stay and consolidate (No. 10-2487 (Entry ID 3699129)), where he criticized Judge Reade for "failing to recuse herself from presiding over the trial of the principal individual arrested on the raid . . .." (Defendant's Exhibit 1, p. 11 (emphasis added)).

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

Code of Conduct for United States Judges, Canon 3(A)(4). In order to plan for hundreds of criminal prosecutions, the court needed to be contacted at the earliest opportunity to determine whether the court could handle so many prosecutions at once and, if so, when and where. The court needed several months to plan for the proper resources needed to respond to the potential arrests of hundreds of defendants. There is nothing about the communications to suggest anything problematic.

b. The District Court was Not Privy to Information Regarding the Substance of the Investigation

Defendant asks the Court to assume Judge Reade was briefed regarding the substance of the investigation. However, Judge Reade was not told in advance where the enforcement operation was to take place or who the potential targets of the investigation were (GAPX 423; CR958 5), and defendant's "evidence" does not suggest otherwise. Because Judge Reade learned of no facts regarding defendant's or any other case, *United States v. Craven*, 239 F.3d 91 (1st Cir. 2001), and other cases cited by defendant regarding a trial judge's receipt of extrajudicial information (AOB 31) are inapposite.

Even if Judge Reade had been apprised of evidence gathered prior to the search, recusal would not be warranted. Judges are routinely privy to such information in the form of, for example, search warrant applications, wiretap applications, criminal complaints, and pen register applications. Therefore, even if true, defendant's suppositions regarding information shared with Judge Reade would not lead a fully informed person to reasonably question her impartiality.

c. The District Court Was Not Involved in Prosecutorial Functions

Defendant's claim that the meetings between the prosecutors and the court gave an appearance Judge Reade was "excessively cozy" or "working in tandem" with the government is unsupported by any evidence. As the Chief Judge of the district, it was ultimately up to Judge Reade to make sure the necessary preparations were in place for potentially hundreds of anticipated arrests and prosecutions. Judge Reade's role in preparing for the operation was to manage the court's logistical response to and preparations for the anticipated arrests.

There is no evidence to suggest Judge Reade expressed any opinion as to the propriety of the enforcement action or the worthiness of the targets – only that the court was willing to do what it could to prepare for the court's role in the expected prosecutions. Nothing done by the judge showed an involvement in the

substantive resolution of the cases filed other than, along with other district court judges, approving plea agreements in open court and imposing sentences. Defendant acknowledged in the district court "prior logistical arrangements had to be made with the District Court to enable the criminal cases against the undocumented aliens to be processed so promptly." (CR942 3).

United States v. Arnpriester, 37 F.3d 466, 467 (9th Cir. 1994), cited by defendant in support of his suggestion the government's alleged "[s]ymbolic or apparent association" with the court warranted recusal (AOB 31), is distinguishable. In *Arnpriester*, the judge had been the United States Attorney at the time of the investigation leading to the defendant's indictment. Id. There is no evidentiary basis to impute any similar knowledge or undue association between the government and the court here.

d. The District Court Disclosed its Role in Advance of Defendant Being Charged

Defendant's criticism of the district court for allegedly failing to accurately disclose its role in the pre-operation logistical planning is baseless. To the contrary, Judge Reade took the step – weeks after the operation – of publically disclosing the manner and purpose of the court's preparations for, and involvement in, the Waterloo proceedings. (GAPX 114). Moreover, in view of

the extensive information (both accurate and inaccurate) gathered and produced as part of the De La Rosa recusal litigation, all relevant information about the court's involvement was publically available prior to trial and even prior to defendant's arrest.

Defendant is left to argue the court misled him by "misrepresenting" its role in the pre-operation planning. (AOB 34). The evidence – including the ICE materials submitted as purported new evidence – do not support this conclusion. Defendant's belated claim notwithstanding, Judge Reade's role was limited to coordinating the logistical aspects of the court's function in the Waterloo proceedings. As Judge Reade found in denying defendant's motion:

> The pertinent facts are these: (1) the undersigned was never informed prior to the commencement of the enforcement action that Defendant was or could be a target of the enforcement action; (2) the undersigned was not told prior to May 12, 2008 where the enforcement action would occur; (3) the undersigned did not express personal support for or policy agreement with the enforcement action; (4) any knowledge that the court had prior to the enforcement action was specifically tailored to ensuring that the court could gather the necessary resources to guarantee arrestees their rights; (5) the undersigned did not visit the site at the Cattle Congress before the day of the commencement of the enforcement action; (6) providing the dates when the court is unavailable is common and necessary because the undersigned is the only district judge in the eastern part of the district that handles felony criminal matters; (7) the court did not perform any functions that fall within the executive branch (i.e. who to charge, what to charge and whether a plea agreement offer should be made and the terms of it); and (8) the undersigned did faithfully and impartially discharge and perform all of the

duties that are incumbent upon her as the Chief Judge of the Northern District of Iowa.

(CR958). There is no evidence to suggest any of the above facts are not true and accurate.

"[S]peculation, beliefs, conclusions, innuendo, suspicion, opinion, and similar non-factual matters" will not support recusal. *Nichols*, 71 F.3d at 351. The court is presumed to be impartial. *In re Kansas Public Employees Retirement System*, 85 F.3d at 1358 (citation omitted). Defendant's claim, based only upon an apparent "conspiracy theory" without factual support, fails to meet his "substantial burden." Id.

G. Even Assuming Defendant's Characterization of the Court's Pre-Search Involvement Were Accurate, the Waterloo Proceedings Were Too Attenuated from Defendant's Case to Warrant Recusal or New Trial

The hundreds of felony prosecutions commenced on May 12 and completed in Waterloo in the ensuing days focused on Agriprocessors' workers – not its management. The investigation of defendant and his wrongdoing was in its infancy. Defendant was not charged with any criminal offense until October 30 – after other Agriprocessors mangers and office personnel had been prosecuted and cooperated. (See PSR 95-96). Defendant's first financial charges were not

brought until November 14. (2MJ1). Even then, additional criminal conduct was not discovered until several weeks later.

Defendant cannot link any alleged improprieties in the planning related to the May 12 search with the fairness of his trial or Judge Reade presiding over it. Even assuming defendant's allegations could have given cause to question Judge Reade presiding over the cases of the illegal workers, any such concerns could not transfer to defendant's trial.

H. There was no Prosecutorial Misconduct

On appeal, defendant raises a new claim that he was entitled to a new trial due to prosecutorial misconduct. The misconduct, according to defendant, occurred when the government attorneys "engaged in unrecorded, extrajudicial communications concerning the prospective raid with the judge and failed to disclose these communications to defense counsel." (AOB 35).

This Court reviews a claim of prosecutorial misconduct not raised in the district court for plain error. *United States v. Londondio*, 420 F.3d 777, 787 (8th Cir. 2005). Even where the issue is preserved, this Court "'will reverse for prosecutorial misconduct only if the conduct, even if improper, so prejudiced [the defendant] that he was unable to obtain a fair trial.'" *United States v. Barrera*, 628 F.3d 1004, 1007 (8th Cir. 2011) (citation omitted). As discussed above, defendant

has failed to allege or show any prejudice as a result of Judge Reade presiding over his trial or sentencing.

Defendant fails to offer any legal theory or authority that would support a new trial based upon any alleged prosecutorial misconduct in this case. Rather, defendant suggests such relief should be a derivative result of purported "*ex parte*" contacts with the court. (AOB 36).[16] As discussed above, there were no ex parte contacts and, even if there were, they were authorized under the model judicial code of ethics. Defendant's suggestion of prosecutorial conduct is baseless

I. Defendant's Motion Was Properly Denied Without Discovery or an Evidentiary Hearing and Without Being Transferred to a Different Judicial Officer for Determination

This Court has said:

> The questions of whether an evidentiary hearing should be held in connection with a motion for a new trial based on the ground just stated, and the question of whether the motion should be granted, either with or without a hearing, address themselves to the broad discretion of the trial judge whose determinations will not be reversed in the absence of abuse.

United States v. Cardarella, 588 F.2d 1204, 1205 (8th Cir. 1978). The evidence offered by defendant was incapable of supporting any relief, and his motion was

[16] Although defendant makes a passing reference to *Brady v. Maryland*, 373 U.S. 83 (1963), defendant did not allege a *Brady* violation here or in the district court.

otherwise without merit. The court was well within its broad discretion in denying discovery or further proceedings.

Defendant's request to have another judicial officer consider his motion was also properly denied. The court has proven itself perfectly capable of deciding whether recusal is warranted. Compare *United States v. De La Rosa*, CR 08-1313 (GAPX 429 (September 29, 2008, order denying defendant's motion to recuse pursuant to 28 U.S.C. § 455(a)), with *United States v. Robert Miell*, CR 07-101 (document # 27 (April 8, 2008, order granting defendant's motion to recuse pursuant to § 455(a)).

J. Any Error Was Harmless

Beyond this, any error was harmless.

Under the harmless error standard of review, the government must show any error was harmless. *United States v. Craiglow*, 432 F.3d 816, 819 (8th Cir. 2005). If any error is not constitutional, the government need only show there is no grave doubt as to whether any error substantially influenced the proceedings' outcome. Id.

Here, there is no grave doubt the lack of a recusal did not influence the outcome of the trial. Defendant does not even allege there was an influence or that there was actual bias. Absent such, any error was harmless.

Even if there were a constitutional error, it still was harmless.

Constitutional error is subject to harmless error analysis, *Chapman v. California*, 386 U.S. 18, 20, 23-24 (1967), and – with a few exceptions (structural defects) – federal courts may not grant relief when a constitutional error is shown to be harmless beyond a reasonable doubt.

The Supreme Court has identified six constitutional "structural defects." These are: 1) the total deprivation of the right to counsel; 2) the denial of the right to an impartial judge; 3) unlawful discrimination in the grand-jury selection process; 4) the denial of the right to self-representation at trial; 5) the denial of the right to a public trial; and 6) the giving of a defective instruction on reasonable doubt. *United States v. Allen*, 406 F.3d 940, 944 (8th Cir. 2005). "[I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless-error analysis." *Rose v. Clark*, 478 U.S. 570, 578 (1986). In *Allen*, this Court found that the list of structural defects was meant to be exhaustive. Id. An appearance of partiality, as opposed to actual partiality, is not a structural defect.

At most,

> Supreme Court precedent reveals only three circumstances in which an appearance of bias – as opposed to evidence of actual bias – necessitates recusal. First, due process requires recusal of a judge who "has a direct,

> personal, substantial pecuniary interest in reaching a conclusion against [one of the litigants]." * * * Second, due process requires recusal if a judge becomes "embroiled in a running, bitter controversy" with one of the litigants. * * * Third, due process requires recusal if the judge acts as "part of the accusatory process."

Crater v. Galaza, 491 F.3d 1119, 1131 (9th Cir. 2007) (citations omitted).

"Here, there was no evidence of actual bias, and [defendant's allegations do] not fall within the three circumstances where the Supreme Court has required recusal." *United States v. Berber-Tinoco*, 510 F.3d 1083, 1092 (9th Cir. 2007).[17] Defendant has not alleged he suffered any prejudice as a result of the alleged failure to recuse, and this lack of prejudice shows any error was harmless beyond a reasonable doubt.

For the above reasons, the court did not abuse its discretion in denying defendant's motion for new trial.

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[17] Based upon its inaccurate assumption Judge Reade "[a]ssisted in the [o]rganization, [p]lanning, and [e]xcution of the [c]riminal [p]rosecution" of defendant, the Iowa ACLU argues recusal was constitutionally required under *Caperton v. Massey Coal Co.,* 129 S.Ct. 2252, 2265 (2009) (due process requires recusal where there is a high probability of actual bias). (Iowa ACLU Brief 5). Because Judge Reade did not play such a role in defendant's case, and because there is otherwise no evidence of such a probability of bias, the Iowa ACLU's argument is without merit. The remaining portions of the amicus briefs substantially restate defendant's arguments and do not warrant further discussion here.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EVIDENCE OF ALIEN HARBORING THAT WAS RELEVANT TO THE CHARGED OFFENSES AND EXCLUDING DEFENDANT'S PURPORTED REBUTTAL EVIDENCE REGARDING THE PRESENCE OF LAWYERS WHERE NO ADVICE OF COUNSEL DEFENSE WAS ASSERTED

Defendant's argument regarding the purported prejudicial impact of alien harboring evidence lacks any legal foundation. Rather, defendant batches together allegations regarding the improper admission of evidence, the improper exclusion of evidence, the scheduling of trials in the wrong order, and improper jury instructions – suggesting the cumulative impact of the purported errors rendered the trial unfair. The court did not err in any of the ways suggested by defendant.[18]

A. Standard of Review

Generally, this Court gives "broad deference to a district court's determination under Rule 403," *United States v. Holmes*, 822 F.2d 802, 806 (8th Cir. 1987), and reviews the admission of evidence for abuse of discretion, *United States v. Parker*, 364 F.3d 934, 941 (8th Cir. 2004). Defendant has failed to identify specific evidence that was erroneously admitted in violation of Rule 403

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[18] Defendant does not raise the alleged mis-ordering of trials or alleged error in instructing the jury as independent claims for relief. (See AOB 62-63). Accordingly, the Court's consideration of the order of trials and jury instructions should be limited to whether any alleged error aggravated the allegedly erroneous admission and exclusion of evidence such that a new trial is required.

and has failed to identify how the question of the Rule 403 admissibility of any piece of evidence was preserved for appeal. Therefore, any review should be for plain error. *United States v. Worman*, 622 F.3d 969, 974 (8th Cir. 2010).[19]

B. Harboring Evidence was Properly Admitted

The evidence was relevant under Rule 402 because defendant was indicted for committing fraud and false statement offenses by lying to FBBC about his knowledge of alien harboring at Agriprocessors. He was convicted of several offenses expressly on that basis (CR736), and does not contest the legal sufficiency of the evidence supporting those convictions.[20]

Federal Rule of Evidence 403 provides: "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Fed. R. Evid. 403. "Evidence is unfairly prejudicial only if it has an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one . . . or otherwise may cause a jury to base

[19] Defendant appears to have first raised this issue in the form of a motion for mistrial toward the end of the testimony of Elizabeth Billmeyer. (TT10/28/09 123).

[20] Indeed, defendant only challenges the sufficiency of the evidence supporting the 18 U.S.C. § 1956 money laundering counts. (AOB 67).

its decision on something other than the established propositions in the case." *Carter v. Hewitt*, 617 F.2d 961, 972 (3d Cir. 1980) (internal quotation omitted).

Instead of presenting a cognizable Rule 403 challenge on appeal, defendant claims there was too much evidence (AOB 54) and it was likely more interesting to the jury than the other evidence of bank fraud. (AOB 55-56). Neither of these arguments supports a claim of Rule 403 error.

Regarding the quantity of harboring evidence, defendant complains the government committed less than 3 out of 10 days to the harboring portion of its case and called 7 out of 46 witnesses on harboring issues. (AOB 54). In conclusory manner, defendant claims this constituted "overkill" and a "trial within a trial." (AOB 55). To the contrary, defendant's awareness of alien harboring was part of the charged conduct in 62 of the 91[21] counts. The government was efficient in its presentation of harboring evidence, and the court did not abuse its discretion in admitting the evidence.

Nor was the evidence unfairly prejudicial. It is not enough to claim the evidence may have been more interesting than the other portions of the government's case. Unfair prejudice under Rule 403 requires a showing of an

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[21] It was relevant to all counts except false statement counts 30-38 and Packers Act counts 72-91.

"undue tendency to suggest decision on an improper basis." *Carter*, 617 F.2d at 972.[22] Defendant fails to specify how the harboring evidence suggested a decision on an improper basis. Rather, defendant's argument boils down to his theory – dispelled by the verdict – that the lying-about-harboring theory was a weak one, and, therefore, the government should have been prohibited from introducing evidence in support of it. This argument has no merit.

C. No Evidence was Improperly Excluded

Defendant next claims the court erred in excluding evidence that Agriprocessors retained two attorneys for legal advice regarding "no match letters" and illegal workers. (AOB 58-60). Defendant made the strategic decision not to offer any evidence of advice of counsel, and there was no error in curtailing defendant's attempt to suggest he acted properly merely by retaining attorneys.

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[22] Defendant's claim (AOB 52-53) the court "essentially made the required Rule 403 evaluation" in granting the severance presents an incomplete picture of the court's ruling. After first acknowledging that granting a severance would "likely result in two juries hearing some of the same evidence" (CR519 20), the court stated "it appears unlikely that all of the evidence underlying the Immigration Counts would be admissible to prove the Financial Counts and *vice versa*." (CR519 21 (citing Rule 403)). The court was careful to note, however, "[t]his is a preliminary assessment. It is made in an evidentiary vacuum. It should not be construed as a ruling on any evidentiary dispute that may arise at trial." (CR 519 21 n.9). The court was correct. The government presented only a fraction of its harboring evidence at trial.

Defendant repeatedly assured the court he was not presenting an advice of counsel defense and did not intend to offer any evidence regarding legal advice. (TT11/4/09 65, 67; TT11/5/09 53). Rather, defendant attempted to characterize Agriprocessors' lawyers as "fact witness[es]." (TT11/4/09 65). This was a strategic decision on defendant's part as the assertion of an advice of counsel defense would have further incriminated defendant by opening the door to the substance of the lawyers' advice.[23] Defendant incorrectly suggests he should have been permitted to introduce evidence that Agriprocessors hired counsel while persisting in a protective strategy of not asserting an advice of counsel defense and thereby keeping secret his attorney's warning about defendant's conduct.

> [R]eliance on the advice of counsel requires independent evidence "showing (1) [the defendant] made full disclosure of all material facts to his [or her] attorney before receiving the advice at issue; and (2) he [or she] relied in good faith on the counsel's advice that his [or her] course of conduct was legal."

Covey v. United States, 377 F.3d 903, 908-909 (8th Cir. 2004) (citations omitted). Here, defendant deliberately chose not to offer any evidence of communications between himself and any attorneys. Accordingly, he failed to establish the evidentiary predicate for any reliance upon advice of counsel.

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[23] Indeed, at sentencing, defendant disclosed for the first time a letter from one of the attorneys instructing defendant that Agriprocessors was at legal risk for failure to take timely action based upon "no match letters." (GADD 7-11).

Defendant's reliance upon *United States v. Taglione*, 546 F.2d 194 (5th Cir. 1977) (AOB 60) is misplaced. In *Taglione*, the defendant was convicted for making extortionate demands in exchange for the return of lost property. The Court found error in the exclusion of testimony from the defendant's lawyer about statements made by the defendant regarding what the defendant intended to do with the property. The court found the defendant's statements to the lawyer were probative of the defendant's "then existing state of mind" and admissible under Fed. R. Evid. 803(3). Id. at 201.

Here, defendant did not proffer any evidence of any statements he made to Agriprocessors' lawyers. Rather, defendant simply sought to introduce the fact that lawyers had been retained in order to suggest to the jury that he thought he was operating in compliance with the law.

Even if the mere retention of lawyers were relevant to defendant's state of mind, any probative value was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Fed. R. Evid. 403. The court did not abuse its broad discretion in excluding the evidence. *United States v. Loveless*, 139 F.3d 587, 593 (8th Cir. 1998) (this Court gives broad deference to Rule 403 determination and will not reweigh the evidence).

D. The Court did not Err in Scheduling the Order of Trials

The court did not abuse its broad discretion, *Jones v. Clinton*, 72 F.3d 1354, 1361 (8th Cir. 1996), in scheduling the financial trial prior to the immigration trial. The court's decision was based, in part, upon codefendant Brent Beebe's request for more time to prepare for his participation in the immigration trial.[24] (CR526 2). The court also gave careful consideration to the potential prejudice to defendant.

In his brief in support of his motion to sever (CR 433-2), defendant stated he intended to testify regarding the immigration counts but was "highly likely to decline to testify" regarding the financial counts. The court noted that, if the immigration counts were tried first, defendant's statements might be admissible against him in the financial trial. (CR528 2 n.1). This potential harm was directly analogous to the type of prejudice involved in *Taylor v. Singletary*, 122 F.3d 1390, 1392-93 (11th Cir. 1997) (denial of defendant's motion to be tried after codefendant was erroneous because codefendant's testimony was sufficiently material and favorable to defendant), cited by defendant. (AOB 61).

Defendant inaccurately claims there would have been no harboring evidence in a financial trial tried subsequent to the harboring trial. In a convoluted analysis,

[24] Beebe was not charged in any of the financial counts.

defendant claims an acquittal on the harboring counts would have collaterally estopped the government from arguing he violated immigration laws in a second trial. In the event of a conviction, defendant claims "his guilt on immigration offenses would have been stipulated." (AOB 61).

In fact, there would have been harboring evidence in any event. Following any acquittal, the government still would have, at a minimum, presented evidence that others were harboring aliens at Agriprocessors and defendant made false statements to FBBC about it. See *United States v. Howe*, 590 F.3d 552, 556 (8th Cir. 2009) (collateral estopple only occurs where an issue was necessarily decided by a jury's acquittal in a prior trial). Moreover, there is no record defendant offered to stipulate to anything in the event of a conviction. The government would not have been required to accept any proposed stipulation in any event. See *Old Chief v. United States*, 519 U.S. 172, 189 (1997).

The order of trials does not support defendant's claim he was denied a fair trial.

E. The Jury was Properly Instructed

Defendant next argues the court's supplemental jury instructions regarding the crime of harboring illegal aliens were erroneous and aggravated the alleged error in the admission and exclusion of harboring evidence.[25]

1. Mens Rea Instruction

Despite the fact the jury was properly instructed regarding the mens rea requirement for each offense, defendant claims it may have been confused by a supplemental instruction explaining the crime of harboring illegal aliens. (AOB 64). Defendant's argument is without merit.

Counts 1 through 14 (bank fraud) and 39 through 52 (wire fraud) all included an allegation defendant defrauded FBBC by falsely certifying Agriprocessors was in compliance with the law "even though, as defendant RUBASHKIN well knew, defendant AGRIPROCESSORS had violated the Packers Act and was knowingly harboring undocumented aliens." (CR544 27). With regard to each of these offenses, the jury was correctly instructed they must find defendant acted with "intent to defraud." (CR742 13, 16, 23). The jury was further properly instructed:

[25] Because this issue is raised for the first time on appeal, even if presented as independent grounds for relief, the Court's review would be for plain error. *United States v. Robertson*, 606 F.3d 943, 954 (8th Cir. 2010).

> To act with "intent not defraud" means to act knowingly and with the intent to deceive someone for the purpose of causing some financial loss or loss of property to another or bringing about some financial gain to oneself or another to the detriment of a third party.

(CR742 24). The jury is presumed to have followed the court's instructions. *United States v. Wisecarver*, 598 F.3d 982, 989 (8th Cir. 2010).

Defendant's claim is based upon a supplemental instruction the court included, without objection, so the jury understood what it meant for someone to have unlawfully harbored illegal aliens. The instruction correctly stated that the mens rea for harboring was that the person "knew, or recklessly disregarded the fact, that one or more aliens was not lawfully in the United States." The court also included instructions regarding the Packers Act, conspiracy to harbor, and corporate liability. (CR742 30-31).

In an effort to construct error, defendant asks the Court to ignore the fact that one can subjectively know that a general intent crime is being committed. The court's supplemental instruction accurately stated the law as applied to the facts of this case. Defendant committed fraud when he subjectively knew he and other authorized agents of Agriprocessors were, at a minimum, recklessly disregarding the fact Agriprocessors was harboring illegal aliens. He intentionally deceived FBBC about these violations in order to continue obtaining advances on

the loan. This is how the jury was instructed, and neither the supplemental instruction nor government counsel's argument (see AOB 64) suggested otherwise. Because the jury was properly instructed as to the mens rea requirement, there was no constructive amendment of the indictment, and the cases cited by defendant (AOB 65-66) are inapposite.

In *United States v. Robertson*, 606 F.3d 943 (8th Cir. 2010), the Court rejected an analogous argument in a more problematic case. The defendant in *Robertson* was charged with the specific intent crime of attempted aggravated assault. Nonetheless, based upon the superfluous inclusion of the term "knowingly" in the indictment, the jury was given a definition of "knowingly" that required only general intent. *Robertson*, 606 F.3d at 955. The jury was correctly instructed the term "attempt" required specific intent. Id. This Court affirmed, finding, despite the inclusion of the superfluous instruction, "the instructions, taken as a whole, accurately and adequately stated the relevant law with respect to the mens rea standard." Id. Here, as in *Robertson*, the entire charge accurately and adequately stated the relevant law, and there was no error.

2. Illegal-Alien Status of a Particular Individual

Defendant also is incorrect arguing the supplemental instruction regarding harboring was erroneous under *United States v. Pereyra-Gabino*, 563 F.3d 322 (8th

Cir. 2009). In *Pereyra-Gabino*, the Court found the jury instructions were defective because they did not require sufficient unanimity. That is, the lack of a sufficient unanimity instruction went directly to the offense of conviction. Here, the fact of alien harboring was only an issue because it constituted part of the subject matter of defendant's lies to FBBC. Indeed, it was not even necessary that defendant be the one who was doing the harboring on behalf of Agriprocessors. The circumstances of the harboring instruction in this case are fundamentally more attenuated than the circumstances in *Pereyra-Gabino.*

F. Any Error in the Admission or Exclusion of Evidence was Harmless

Any error in the admission of alien harboring evidence and exclusion of purported rebuttal evidence was harmless.

> An evidentiary ruling is harmless if the substantial rights of the defendant were unaffected, and the error had no, or only a slight, influence on the verdict. *United States v. Crenshaw*, 359 F.3d 977, 1003-04 (8th Cir. 2004). In determining harmlessness, this court considers the effect of the erroneously-admitted evidence in the overall context of the government's case. See id.

Worman, 622 F.3d at 976. Given the several, alternative bases for conviction on the fraud and false statement counts, and the overwhelming evidence of guilt, the evidentiary rulings challenged by defendant, even if erroneous, would not warrant reversal.

1. Alleged Errors did not Impact Independent Bases for Convictions

Defendant claims the harboring evidence improperly "spilled over" such that his entire trial was unfair. However, nearly every count of conviction based upon harboring evidence had independent bases for conviction. The only exception was Count 29 that was based upon a face-to face false statement defendant made to FBBC representatives shortly after the May 12 enforcement action. (CR736 57).

Thus, all but one count of conviction was based upon independent facts and circumstances that had nothing to do with alien harboring. Because the challenged evidence only concerned the harboring aspect of the government's case, its impact upon the validity of 85 out of 86 counts is exceedingly attenuated and harmless. Cf. *United States v. Holmes*, 620 F.3d 836, 845 (8th Cir. 2010) (other overwhelming independent evidence made error harmless); *United States v. Briley*, 319 F.2d 360, 365 (8th Cir. 2003) (government introduced independent evidence supporting verdict); *United States v. Papakee*, 573 F.3d 569, 574 (8th Cir. 2009) (affirm verdict if evidence sufficient to support any of alternative theories after general verdict). This is especially true because defendant does not challenge the sufficiency of the evidence on these independent grounds.

Moreover, the special interrogatories to the jury served as a guard against any possible "spillover." For the counts where lying to FBBC about harboring was an option, the jury was given special interrogatories to determine the basis or bases upon which they found defendant guilty. (CR736 2-56, 68-112). The jury was deliberate in the options it chose. The "harboring" option was checked only with regard to counts occurring prior to the arrest of the illegal workforce on May 12 and only where there was a false certification in the relevant submission. (See CR736 (Counts 1-9, 14-23 and 39-47 (advance requests and certifications sent May 1 or before); compare Counts 10-14, 24-28 and 48-61 (advance requests and certifications occurring June 2 or after and other submissions to FBBC)). The interrogatories reinforced the court's instructions that defendant was charged with violating the law in distinct ways for several of the counts and helped ensure unanimity with regard to those counts. The answers to the interrogatories also served as confirmation that the jury did its job and carefully considered the harboring evidence only with regard to the harboring theories. Cf. *United States v. Kaminski*, 692 F.2d 505, 520 (8th Cir. 1982) ("consistency of the jury verdicts,

viewed as a whole, demonstrates the jury's ability to compartmentalize the evidence as it related to each defendant").[26]

2. The Evidence was Overwhelming Relative to the Alleged Errors

This was not a close case. With regard to all the different ways defendant committed crimes, there was abundant evidence showing defendant was responsible. The following merely highlights some of the more compelling evidence establishing defendant's guilt:

False Invoices - Defendant asked a customer service employee to create false invoices and bills of lading for sales that never occurred. (TT10/14/09 225-231; TT10/15/09 21-23). Other employees were aware of the false sales (TT10/15/09 221-222, 305), and customers testified the sales never occurred. (TT10/19/09 30, 78, 138, 177-180, 229-235, 262-264, TT10/26/09 24-27, 60). One of the purported customers testified his Brooklyn clothing store never bought meat from Agriprocessors. (TT10/15/09 157-158). False invoices to the clothing store were discovered in the work papers of a deceased customer services manager in a folder labeled "Sholom." (GXB 2096). A marked-up copy of an accounts receivable aging report was seized from defendant's residence. The accounts

[26] Defendant's acquittal on five counts also shows there was no spillover. See *United States v. Jewell*, 614 F.3d 911, 922 (8th Cir. 2010).

shown to contain false sales (and some others) were marked in red and totaled on a separate sheet in defendant's handwriting. (GXB 2088, 2092). Although defendant testified he never asked the employee to back up the false sales with false bills of lading (TT11/5/09 (Defendant) 120),[27] evidence of defendant's false invoice scheme – resulting in approximately $10 million in false collateral – was largely unrebutted by defendant.

Diverted Customer Payments - Defendant regularly directed an accounting employee to pull customer checks – worth hundreds of thousands of dollars – and deposit the money in other Agriprocessors accounts instead of the proper bank account. Approximately $2 million of FBBC's money was diverted at any given time. (GXB 2011 (showing over $25 million in diverted checks over approximately two years)). Defendant also directed her to attach "round-up" checks to the deposits so they looked like something other than diverted income. (TT10/22/09 (Hamilton) 33). Summaries of the deposit items showed large customer checks and the addition of miscellaneous "round-up" checks. (GBX 2011). There was no evidence anyone other than defendant directed the diversion

[27] Defendant's perjured testimony was a basis for an obstruction of justice enhancement (CR927 42) uncontested on appeal.

of income, yet defendant testified he never asked anyone to add "round-up" checks to the deposits. (TT11/5/09 (Defendant) 123).[28]

Money Laundering - Defendant also directed an employee to write checks from Torah Education and Kosher Community grocery and deposit them in the bank account designated for FBBC. (TT10/22/09 (Hamilton) 74). The money was then immediately replaced. (GBX 2021, 2027). The result of the activity was to get money back to FBBC while making it appear it was from customers. (TT10/21/09 (Bensasson) 104). Over a period of approximately 9 months, defendant directed the laundering of $20,000,000 through accounts at Torah Education and Kosher Community Grocery. (GBX 2021, 2027). Again, there was no evidence that anyone but defendant caused this laundering of funds. Indeed, an accountant for Torah Education testified she was not even aware of the secret account used by defendant to launder the funds. (TT10/26/09 137).

Packers and Stockyards - Defendant alone authorized the release of cattle payment checks at Agriprocessors. (TT10/22/09 90-93, 10/26/09 96-97). At times, he would direct an accounts payable employee to run envelopes through a postage machine in order to make it appear as though the checks were mailed in a

[28] This perjurious testimony was another basis for the now unobjected-to obstruction of justice enhancement. (CR927 42-43).

timely manner. He then held the checks well past the mailing date required by law. Defendant also pulled cattle checks from the outgoing mail. (TT10/22/09 90-93, 111). Evidence of defendant's responsibility for the late cattle payments was virtually unrebutted at trial. Compliance with the Packers Act was a specific requirement of the revolving loan agreement, and false statements about compliance were was a basis for several of the jury's guilty verdicts.

Harboring[29] - Evidence of defendant's knowledge and direction of unlawful alien harboring at Agriprocessors was similarly abundant. Billmeyer testified defendant was aware in May 2005 hundreds of employees had mismatched social security numbers. (TT10/27/09 (Billmeyer) 81). Nothing was done until May 2007 when letters were sent to employees directing them to fix the problem. There was no follow up. (TT10/29/09 (Billmeyer) 92-93). Rather, according to human resources employee Laura Althouse, when Billmeyer stopped accepting employees with outdated identifications, defendant directed Althouse and others to add the employees to a separate payroll behind Billmeyer's back. (TT10/28/09

[29] Defendant argues all harboring evidence was improperly admitted. However, to the extent the Court determines any particular item of evidence was either improperly admitted or excluded, any error was harmless due to the overwhelming nature of the properly admitted harboring evidence.

(Althouse) 59). This evidence was corroborated by an e-mail from Billmeyer to defendant complaining about his putting people on the separate payroll:

> It's also not right to simply hire the people with very bad id's that are no longer even valid and put them on the Hunt payroll! The same laws have been ignored and someone could go to prison for it.

(GADD 6).

The week before the enforcement action, a list was circulated of employees to be terminated. Beef Supervisor Juan Carlos Guerrero-Espinoza and Operations Manager Brent Beebe obtained a $4,500 loan from defendant to finance new false identification documents for existing employees. (TT10/29/09 43-44, 63-64). Defendant directed Althouse and others to come in and process supposed new hires over the weekend. (TT10/28/09 (Althouse) 72, 89). Defendant was in the human resources department on the Sunday before the Monday May 12 search inspecting the new false identifications. (TT10/28/09 (Althouse) 145). Bank records confirmed the $4,500 loan (GXB 1058), and agents seized 96 false resident alien cards from the human resources department the next day. (10/27/09 (Spalding) 33). Many of the cards had photographs of existing Agriprocessors employees on them, and nearly all the cards bore the same thumb print. (TT10/29/09 84, GBX 1057A).

Defendant repeatedly argues the evidence was prejudicial, but that is not the test. All "relevant evidence is inherently prejudicial." *United States v. Zimmerman*, 832 F.2d 454, 458 (8th Cir. 1987). Defendant has failed in his burden to show the claimed unfair prejudice of the evidence "substantially outweigh[ed] its value." *Old Chief*, 519 U.S. at 182; see *United States v. Abodeely*, 801 F.2d 1020, 1025 (affirming admission of prostitution and gambling evidence in tax case where it was relevant to show receipt of unreported income).

III. THE DISTRICT COURT CORRECTLY IMPOSED JUDGMENT ON MONEY LAUNDERING COUNTS WHERE *SANTOS* DID NOT APPLY AND, EVEN IF IT DID, DEFENDANT'S UNDERLYING CRIMES WERE SUFFICIENTLY DISTINCT FROM HIS MONEY LAUNDERING

The jury found defendant's money laundering involved "proceeds" of bank fraud and false statements but not "profits." (CR736 (Counts 62-71)). On this basis, defendant claims his money laundering convictions must be vacated pursuant to *United States v. Santos*, 553 U.S. 507 (2008). Because *Santos* has no application outside of the illegal gambling context, and because defendant's crimes satisfied the broadest reading of *Santos* in any event, defendant's money laundering convictions should be affirmed.

A. Standard of Review

"This court reviews the sufficiency of the evidence supporting a conviction *de novo*, viewing the evidence most favorably to the jury verdict, resolving conflicts in favor of the verdict, and giving it the benefit of all reasonable inferences." *United States v. Spencer*, 592 F.3d 866, 879 (8th Cir. 2010) (reviewing, post-*Santos,* sufficiency of evidence supporting money laundering conviction). This Court also reviews questions of federal law involving statutory interpretation de novo. *United States v. Stanko*, 491 F.3d 408, 413 (8th Cir. 2007).

B. *Santos* has no Application Outside of the Illegal gambling Context

In *Santos*, a plurality determined "proceeds" always means "profits," *Santos*, 553 U.S. at 514, while four Justices in dissent determined "proceeds" always means "gross receipts." Id. at 529-49. Justice Stevens concurred with the plurality to form a majority, but he determined "proceeds" means "profits" when the transactions involved "revenue generated by a gambling business that is used to pay the essential expenses of operating that business." Id. at 528 (Stevens, J., concurring). This Court has said:

> Because *Santos* was a plurality opinion, its precedent is the narrowest holding that garnered five votes. Justice Stevens's concurrence provides the narrowest holding: "The revenue generated by a gambling business that is used to pay the essential expenses of operating that business is not

'proceeds' within the meaning of the money laundering statute." 553 U.S. at ----, 128 S.Ct. at 2033.

Spencer, 592 F.3d at 879 n.4 (8th Cir. 2010) (citations omitted). Thus, this Court has determined the holding of *Santos* is limited to gambling cases. See *United States v. Searles*, No. 09-5169, 2011 WL 488750, at *2 (10th Cir. Feb. 11, 2011) (unpublished) (Eighth and Fourth Circuit Courts of Appeals have "interpreted *Santos* as only applying in the illegal gambling context"); but see *United States v. Askarkhodjaev*, 2010 WL 3940957, *1 (W.D. Mo. Oct. 4, 2010) (finding *Spencer* did not limit the precedential value of *Santos* in the context of mail fraud).

Under this Court's precedent – where *Santos* does not apply – "proceeds" includes anything that is the gross receipt of illegal activity. *United States v. Simmons*, 154 F.3d 765, 770 (8th Cir. 1998).

Therefore, the gross receipts from defendant's fraud constituted proceeds for purposes of money laundering.

C. Even if *Santos* did Apply, Defendant's Money Laundering Convictions Do Not Merge With the Underlying Offenses

Even if *Santos* applies, defendant's convictions on Counts 62-71 should be affirmed because they do not merge with the underlying offenses. Justice Stevens' concurring opinion relied on a "merger problem" presented where the underlying offense necessarily involved a violation of the money laundering statute. The two

crimes are said to "merge" because someone violating the illegal gambling statute will automatically violate the money-laundering statute and potentially be subject to a greater punishment than Congress intended. To avoid this problem, the Court's plurality opinion held that "proceeds" cannot mean "receipts" in the illegal gambling context and must, instead, mean "profits." *Santos*, 553 U.S. at 515.

The merger problem does not exist, and *Santos* does not apply, where the underlying transaction is distinct from the money laundering itself. As one court has stated, "use of proceeds (whether they be profits or not) *outside* the illegal operation does not implicate the merger problem, making the distinction between gross proceeds and profits irrelevant in that context." *United States v. Ali*, 620 F.3d 1062, 1072 (9th Cir. 2010) (emphasis in original). Instead, "the offense of money laundering must be separate and distinct from the underlying offense that generated the money to be laundered." *United States v. Hall*, 613 F.3d 249, 254–55 (D.C. Cir. 2010).

Here, defendant's money laundering offenses were distinct from his underlying offenses. This is particularly true with regard to his false statement convictions – underlying offenses specifically identified by the jury in finding defendant guilty of money laundering (CR736 117-142) yet overlooked by defendant in his "merger" argument. (AOB 72-73).

Defendant's § 1014 offenses were completed once the false statements were made to FBBC. See *United States v. Farmer*, 42 Fed. Appx. 804, 806 (6th Cir. 2002) (unpublished) (section 1014 violation was "completed upon [defendant's] utterance of the statements"). The violations included false statements about the value of the bank's collateral. But they also included false statements about Agriprocessors' compliance with the law. There is no connection between defendant's concealment of criminal proceeds by laundering them through Kosher Community Grocery and Torah Education and his underlying lies to FBBC about alien harboring and Packers Act violations at Agriprocessors. On this basis alone, defendant's "merger" argument fails.[30]

There also was no merger between defendant's money laundering transactions and his creation of false collateral through false invoices and his diversion of customer income.

First, there was nothing about either scheme that required defendant to pay down the revolving loan at all. Rather he could have just pocketed the proceeds. Instead, defendant chose to use the proceeds to pay down the revolving loan and keep the line of credit open. Defendant could have paid down the revolving loan

[30] Similarly, there was no merger regarding defendant's bank fraud committed by falsely certifying compliance with the law.

without committing money laundering by simply writing checks from Agriprocessors' accounts and depositing them into the depository account. Indeed, he did so on some occasions. (GBX 2028-2032). However, with regard to his money laundering convictions, he took the extra step of running the money through Kosher Community Grocery and Torah Education accounts to conceal its source. (TT10/22/09 (Hamilton) 69, 74, 82). Although this certainly helped defendant defraud FBBC again, it was not at all necessary to the completion of any of his bank fraud or false statement offenses.

Defendant's money laundering offenses were sufficiently distinct from his multiple fraudulent schemes and false statements that they survive even the broadest interpretation of *Santos*.[31]

[31] Under a similar "merger" theory, defendant incorrectly claims his convictions must be reversed even under pre-*Santos* precedent, citing *United States v. Phythian*, 529 F.3d 807, 813 (8th Cir. 2008), and suggests the proceeds in this case were not derived from "separate criminal activity." (AOB 76). For the reasons discussed above, the criminal activity was separate, and the cited dicta from *Phythian* is inapposite. See *United States v. Rist*, 154 Fed.Appx. 556, 558 (8th Cir. 2005) (unpublished) (no "merger" where defendant obtained money from bank under false pretenses and routed it through others in order to conceal).

D. Even If *Santos* Applied and Defendant's Money Laundering "Merged" with the Underlying Offenses, Reversal Would Not Be Warranted Where There Was No Increase in the Statutory Maximum

Finally, defendant's money laundering convictions should be affirmed under the Sixth Circuit's reasoning in *United States v. Kratt*, 579 F.3d 558, 562 (6th Cir. 2009). The *Kratt* court disposed of a *Santos* challenge in a case on all fours with this case. The court found Justice's Stevens' "merger problem" was not present where the predicate offenses were bank fraud or making false statements. This was because there was only a "merger problem" if the money laundering conviction "radically increased" the statutory maximum sentence. Id. Since it did not, *Santos* did "not require [the court] to apply a profits definition of proceeds to [bank fraud and making false statements and reports to a bank]." Id. On this basis, as well, defendant's money laundering convictions should be affirmed.

IV. THE DISTRICT COURT DID NOT ERR IN SENTENCING DEFENDANT WHERE ITS ADVISORY GUIDELINES CALCULATIONS WERE CORRECT AND THE COURT WOULD HAVE IMPOSED THE SAME SENTENCE IN ANY EVENT

Defendant argues the court erred in calculating the advisory guidelines range. Defendant claims the court erred in assessing a 22-level enhancement based upon the loss being between $20,000,000 and $50,000,000. (AOB 80). Defendant claims the court should have enhanced his sentence 20 levels based

upon a loss of between $7,000,000 and $20,000,000. (AOB 84). Based upon his *Santos* challenge to his money laundering convictions, defendant also claims the court erred in enhancing defendant's offense level by four levels for money laundering (including sophisticated laundering). Because the court correctly applied the guidelines, defendant's argument should be rejected. Further, any error in the application of the loss guideline was harmless.

A. Standard of Review

The Court reviews a district court's "interpretation and application of the guidelines de novo and its findings of fact for clear error." *United States v. Jenkins-Watts*, 574 F.3d 950, 960 (8th Cir. 2009). A district court's loss calculation is reviewed for clear error. *United States v. Erhart*, 415 F.3d 965, 970 (8th Cir. 2005).

B. The District Court Correctly Calculated the Amount of Loss as More Than $20,000,000

Loss is the greater of either actual loss or intended loss. USSG §2B1.1, comment (n. 3(A)). Actual loss "means the reasonably foreseeable pecuniary harm that resulted from the offense." USSG §2B1.1, comment (n.3(A)(I)). "The court only needs to make a reasonable estimate of the loss." USSG §2B1.1, comment (n.3(c)). See also *United States v. Waldner*, 580 F.3d 699, 705 (8th Cir.

2009) ("Because the loss caused by fraud is often difficult to determine precisely, 'a district court is charged only with making a reasonable estimate of the loss.'") (citation omitted).

The commentary to §2B1.1 provides special instructions regarding loss calculation in cases involving pledged collateral. Application note 3(E)(ii) provides:

> (E) Credits Against Loss. – Loss shall be reduced by the following:
>
> * * * *
>
> (ii) In a case involving collateral pledged or otherwise provided by the defendant, the amount the victim has recovered at the time of sentencing from disposition of the collateral, or if the collateral has not been disposed of by that time, the fair market value of the collateral at the time of sentencing.

USSG §2B1.1, comment (n.3(E)(ii)). In the case of a fraudulent loan, available collateral and proceeds from the sale of collateral are accounted for by offsetting the principal balance on the loan. *United States v. Parish*, 565 F.3d 528, 535 (8th Cir. 2009).

1. The Proper Loss Calculation

The court properly found the actual loss in this case was between $20,000,000 and $50,000,000. While loss under the advisory guidelines is sometimes difficult to calculate, such was not the case here. Rather, where funds

have been loaned on the basis of fraudulently inflated collateral, Application Note 3(E) to USSG §2B1.1 provides a relatively simple roadmap. The outstanding principal on the loan is reduced by any recoveries from the sale of collateral and the value of any unsold collateral. The resulting figure is the actual loss amount under §2B1.1(b)(2).

As of the time of sentencing, the outstanding principal balance on the loan was $29,501,340. This figure accounted for the proceeds from the sale of collateral. (ST 30). When the principal balance was further reduced by the fair market value of remaining unsold collateral and other credits (see PSR ¶ 315; ST33; CR927 17), the total became $26,848,952 – well above the $20,000,000 threshold.

2. Defendant's Alternative Calculation is Flawed

Defendant claims the loss amount should be no more than approximately $12,000,000 because the bank's inability to collect additional amounts "was independent of the charged fraud." (AOB 80-87). Defendant's argument ignores the law governing the application of §2B1.1(b)(1), the breadth of his fraud, and the result of his continued concealment at the time of the bankruptcy.

a. Where Actual Loss is Greater Than Intended Loss, the Actual Loss Controls

Defendant argues the loss should have been calculated solely on the basis of the principal attributed to the false collateral supporting the loan. (AOB 80). That is, defendant claims he should have received full credit at sentencing for the face value of all actual accounts receivable supporting the loan without any adjustment based upon the reduced value of the collateral upon liquidation in bankruptcy. Defendant's argument misapplies the law.

The proper method for taking into account pledged collateral is set forth in note 3(E)(ii) to §2B1.1. The actual value of collateral is deducted from the total principal owing on the loan. The result of the calculation reflects the actual loss because it takes into account the actual position of the victim (at least with regard to principal). In contrast, defendant's proposal ignores the actual position of the victim and employs a false presumption that, in the wake of the failure of a loan due to a massive fraud, every nickle of every real account receivable will be recovered. Although defendant's proposal would still result in a loss figure of in excess of $10,000,000, it does not approximate the actual loss.

Defendant cites cases (AOB 81) supporting the calculation of intended loss in accordance with the additional amount of money lent due to the fraud. See

United States v. Miller, 588 F.3d 560 (8th Cir. 2009); *United States v. Carter*, 412 F.3d 864, 869 (8th Cir. 2005); *Kok v. United States*, 17 F.3d 247, 250 (8th Cir. 1994). However, defendant's argument fails to account for the fact that, in this case, the actual loss was far greater.[32] Thus, defendant's argument is contrary to the directive in the guidelines that "loss is the greater of actual loss or intended loss." USSG §2B1.1, comment (n. 3(A)). The actual loss in this case exceeded $20,000,000. Any lesser calculation based upon intended loss is trumped by the actual loss.

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[32] Regarding *Kok* and *Carter*, defendant inaccurately claims the intended loss calculations in those cases were "intended to capture the maximum possible loss from the fraud, which constitutes the 'intended loss' unless the defendant's subjective intent was to repay the victim" and "necessarily also serve[d] as the upper limit on the *actual* loss attributable to the fraud." (AOB 81 n.7) (emphasis in original)). *Kok* and *Carter* said nothing about whether a defendant's "subjective intent was to repay the victim." Rather, in both cases, there was no evidence that the loans were in default. See *Kok*, 17 F.3d at 250 ("In the instant case, there was no evidence of actual loss with regard to the line of credit. All loans, plus interest, obtained during the period in question were repaid . . . in a timely fashion"); *Carter*, 412 F.3d at 867 (quoting the case agent's testimony acknowledging there was no evidence the banks lost any money on the loans). *United States v. Anderson*, 68 F.3d 1050, 1054-55 (8th Cir. 1995), cited by defendant (AOB 81 n.7) provides no support for defendant's argument as that, too, was a case where the intended loss was found to be greater than the actual loss. Id. at 1054 ("the district court determined that the intended loss Anderson attempted to inflict was larger than the actual loss").

b. Defendant's Fraud Caused Over $20,000,000 in Lost Principal

Defendant's argument that his fraud did not cause FBBC to lose over $20 million on the revolving loan is contrary to the record. The jury found defendant defrauded FBBC by using false invoices, diverting customer payments, and falsely certifying compliance with laws regarding the Packers Act and alien harboring. (GADD 1-4).

The first two schemes resulted in approximately $10-12 million in false collateral supporting the loan. (ST 36, 80). However, the loss caused by these schemes was far greater. The uncertainty created by theses schemes and defendant's persistent concealment of them caused the value of the company as a going concern to be dramatically reduced. Counsel for the trustee testified at sentencing that the value of the company "was greatly reduced in the eyes of the prospective bidders . . . [due to the] fraudulent accounts receivable, the fraudulent inventory numbers, and . . . the overall scheme." (ST 489). Indeed, one prospective purchaser originally showed an interest in buying the company for $40 million but walked away after doing his due diligence and learning of the "inflated inventory and receivable numbers." (ST 498). Accordingly, defendant's inflation of collateral directly caused the trustee's failure to obtain more money for the sale of the company and its assets, and FBBC lost more than $20,000,000 in principal

as a result. The court correctly found, "[g]iven the fact that Defendant knew he was causing FBBC to loan against approximately $10 million in fake invoices and was diverting millions of dollars in FBBC's collateral, a reasonable person would have foreseen a loss well in excess of $20 million." (CR927 24).

Defendant attempts to distance his criminal conduct from FBBC's failure to recover more in the bankruptcy by arguing his fraud did not lead to bankruptcy. (AOB 86). Defendant is wrong. The road to filing of the bankruptcy began in the Fall of 2008 when the bank discovered an initial diversion of approximately $1.4 million in customer payments. (TT10/21/09 (Lykens) 38-39). Rather than continue advancing money to a borrower that had been stealing its collateral, FBBC stopped advancing funds and demanded its borrowing base be reconciled – which, of course, defendant could not do because it was fraudulently inflated by more than $10 million. Without its primary source of operating income, Agriprocessors filed for bankruptcy. Thus, the diversion of customer income was the direct cause of the bankruptcy.

Defendant also suggests, without directly arguing, all FBBC's lost principal should not have been included as loss because the loan was "lawfully originated." (AOB 85). Defendant attempts to distinguish *Parish,* 565 F.3d at 535, and other cases standing for the proposition that loss is properly calculated based upon the

amount of the fraudulently obtained loans less payments on the principal and the value of the collateral at the time of sentencing. (AOB 85).

The *Parish* Court did not recognize a "lawful origination" limitation. However, even if it did, the entire principal amount of the loan here was obtained through fraud. This was a revolving loan where defendant and Agriprocessors borrowed approximately $1 million nearly every business day. (TT10/20/09 (Lykens) 16; GBX 2052-2065). Accordingly, approximately every 30 business days, defendant caused Agriprocessors to borrow in the neighborhood of $30 million. Defendant began diverting customer payments in approximately 1998 (PSR 285) and creating false invoices no later than 2003 (PSR 287). He falsely certified the borrowing base each time there was an advance. (TT10/20/09 (Lykens) 5, 16, TT10/21/09 (Bensasson) 66). To say the loan was "lawfully originated" ignores the reality that tens of millions in new money was advanced every month – and all of that money was advanced as a result of false certifications regarding the borrowing base. Accordingly, the entire "amount of loss related to the false statement[s]." *United States v. Wilson*, 980 F.2d 259, 262 (4th Cir. 1992) (cited at AOB 86).

Because the actual loss in this case was more than $20,000,000, a 22-level enhancement was properly applied.

C. Any Error was Harmless

Even if the court erred in assessing two additional levels for loss, any error was harmless because the court would have imposed the same sentence without the change in the guidelines range. If the court erred in calculating the loss as alleged by defendant, defendant's total offense level would have been 39, and his advisory guidelines range would have been 262 to 327 months' imprisonment. The 324-month sentence would still have been within the guidelines range and presumed reasonable on appeal. *United States v. Robinson*, 516 F.3d 716, 717 (8th Cir. 2008).

Harmless error in sentencing occurs "when the district court would have imposed the same sentence absent the error." *United States v. Idriss*, 436 F.3d 946, 951 (8th Cir. 2006). Here, the court made clear it would have imposed the same sentence whether or not it erred in calculating the guidelines range.

> The court notes that, even if it inadvertently erred in computing the advisory Guidelines sentence, it would still impose a sentence of 324 months of imprisonment after considering the factors in § 3553(a).

(CR927 50 n.18).

The court's alternative finding is supported by its decision not to depart upward for extraordinary obstruction of justice under §5K2.0(a)(3) and the guidelines' failure to account for a large amount of defendant's criminal conduct

under §5K2.21. (CR927 45-46). Although the court found such factors would support an upward departure, it declined to depart because the sentence imposed was "sufficient to satisfy the goals of sentencing." (CR927 46).

Moreover, the court "explained in detail why it believed [the sentence imposed] was appropriate . . .." *United States v. Jackson*, 594 F.3d 1027, 1030 (8th Cir. 2010) (finding harmless error where record was clear the court intended to impose the same sentence and took into account the potential impact of the specific error alleged). The court issued a 52-page sentencing memorandum in which it made detailed findings of fact, addressed 8 contested sentencing guidelines calculations, addressed 5 purported bases for departure, and considered 5 arguments for downward variance. (CR927). Defendant cannot reasonably claim the court was misinformed or misunderstood the impact of its guidelines calculations on the ultimate sentence.

Requiring remand and resentencing due to any error in the calculation of loss would be a waste of judicial resources.

D. The Money Laundering Guideline was Properly Applied

Defendant argues the court erred in increasing his sentencing guidelines range based upon his money laundering convictions. (AOB 79). For the reasons

discussed above with regard to the validity of the convictions, the money laundering guideline was properly applied.[33]

V. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN IMPOSING A WITHIN-RANGE SENTENCE WHERE THE COURT PROPERLY CONSIDERED ALL STATUTORY SENTENCING FACTORS

Defendant argues the 324-month sentence failed to account for defendant's purported motive and unwarranted sentencing disparities. The sentence should be affirmed.

A. Standard of Review

This Court reviews the imposition of sentences, whether inside or outside the guidelines range, under "'a deferential abuse-of-discretion standard.'" *United States v. Hayes*, 518 F.3d 989, 995 (8th Cir. 2008) (quoting *Gall v. United States*, 552 U.S. 38, 41 (2007)). It is defendant's burden to show his sentence should have been lower. *United States v. Peck*, 496 F.3d 885, 891 (8th Cir. 2007). "A

[33] Although the court's finding that it would have imposed the same sentence "even if it inadvertently erred in computing the advisory Guidelines sentence" (CR 927 p. 50 n.18) would appear to render any misapplication of §2S1.1 harmless, there is room for disagreement as to whether the court intended the finding to apply in the event defendant was wrongly convicted of money laundering. In that event, a remand would be appropriate for the court to clarify its intentions.

sentence within the Guidelines range is accorded a presumption of substantive reasonableness on appeal." *Robinson*, 516 F.3d at 717.

B. The Sentence was Reasonable

Because the sentence was within the advisory guidelines range, it is presumed reasonable. *Robinson*, 516 F.3d at 717. Apart from the presumption, the sentence in this case reasonably accounted for extremely serious criminal conduct and an utterly remorseless defendant.

1. Nature and Circumstances of the Offenses

Defendant's offenses were extraordinary in many ways – the first being that his fraud was really several different fraudulent schemes. He defrauded FBBC by (1) fabricating approximately $10 million in sales, (2) diverting tens of millions of dollars in customer payments that were supposed to go directly to FBBC, and (3) falsely certifying Agriprocessors' compliance with the law when he was harboring an illegal workforce[34] and failing to pay his cattle suppliers in accordance with the law. Thus, defendant's fraud was much more serious than the typical fraud.

Defendant's crimes also caused an extraordinary amount of damage – far beyond the $26 million in FBBC's lost principal. Defendant's Packers Act

[34] Defendant's harboring of illegal workers was not accounted for in his guidelines range.

Violations contributed approximately $5 million to that lost principal,[35] but they also deprived several cattle suppliers of the time value of their money and put some at significant financial risk.[36] (ST 102-104, CR927 27). FBBC's monetary damage was also increased by another approximately $5 million in debtor-in-possession financing when it unwittingly loaned more money to Agriprocessors during the bankruptcy without knowing the accounts receivable were short by $10 million due to false invoices. (ST 81). There was also untold financial damage to Agriprocessors's unsecured creditors who thought they were doing business with a law-abiding company and got nothing in the bankruptcy. Finally, like other creditors, the City of Postville was left saddled with millions in debt for a facility it built to process Agriprocessors' wastewater. (PSR 361). The people of Postville were doubly harmed when defendant made thousands in illicit cash payments to their mayor. (PSR 361-364).

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[35] By operation of law, the cattle suppliers obtained top priority in the bankruptcy. Accordingly, and despite FBBC's best efforts to require and monitor compliance with the Packers Act, FBBC's recovery was reduced by the approximately $5 million owed to cattle suppliers when Agriprocessors became insolvent. (PSR 313, ST 73-74).

[36] Defendant's Packers Act violations were not accounted for in his guidelines range.

2. History and Characteristics of the Defendant

Although defendant argues his personal circumstances were a mitigating factor (AOB 93-98), the opposite was true.

Federal courts routinely sentence defendants whose personal backgrounds include such obstacles as poverty, lack of one or both parents, and abuse. Here, defendant had the benefit of money, family love and support, an education, and a supportive community. Not only did he use his good fortune as a platform for crime, he treated himself and his family to an opulent lifestyle in doing so.

In addition to his regular salary, defendant caused approximately $1.5 million in Agriprocessors' funds to be transferred to his personal bank account over the course of approximately two years. (GXB 114). While some of that money appeared to have been for business expenses (TT11/2/08 43), approximately $300,000 went to pay defendant's credit card bills, approximately $200,000 went toward an addition to defendant's Postville home, approximately $76,000 went to pay defendant's personal state and federal income taxes, approximately $41,000 went to pay his personal mortgage, more than $25,000 went toward jewelry purchases, more than $20,000 went toward sterling silver purchases, $1,245 per month paid for life insurance, and $365 per month paid

defendant's car payment. (GADD 12).[37] The evidence showed defendant's motive was, at least in part, personal enrichment.

Defendant's lack of remorse was truly unique – and most apparent in his tendency to blame others for the consequences of his criminal actions.

- He blamed the bank for loaning him the money – and not recognizing sooner what a horrible position they were in. (TT11/9/09 66, 69, 76-77, 85).
- He blamed the cattle suppliers – saying they acquiesced in the late payments. (TT11/9/09 90).
- He blamed the government for not working with him and his lawyers before the search – at a time when he was helping his illegal workforce get new, false identification documents. (TT11/9/09 70).
- He blamed his illegal workforce suggesting he was the victim of document fraud – when he knowingly financed false documents himself. (CR895 26).
- He blamed his Human Resource Manager – when defendant went around her back to put people on the separate payroll. (TT11/5/09 29, DADD 5-6, CR895 25).
- He blamed his CFO – despite the fact it was defendant who directed the creation of false invoices, diversion of customer checks, and laundering of criminal proceeds. (TT11/9/09 92).

Defendant not only rejected any responsibility for his crimes and the harm they caused, he opportunistically attempted to ascribe blame to others at every turn.

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[37] This, despite the fact defendant was prohibited from paying himself more than $150,000 per year under the terms of Agriprocessors' loan agreement with FBBC. (GXB 2000 36).

Although defendant's guidelines range incorporated a standard, two-level enhancement for obstruction of justice based upon perjury at trial (CR927 43), his other attempts to obstruct justice were unflagging throughout the investigation and prosecution. He caused the destruction or concealment of several items of evidence:

- he ordered incriminating computer evidence deleted (TT10/22/09 (Hamilton) 91);
- he ordered incriminating customer statements shredded (TT10/22/09 30-31);
- he gathered and concealed false invoices and bills of lading (TT10/15/09 44-45); and
- he gathered and concealed copies of diverted checks and a thumb drive with corresponding records (TT10/22/09 (Hamilton) 88-89).

In addition, in an attempt to prevent the use of incriminating testimony against him, he offered to pay coconspirators while they were in prison (TT10/28/09 (Althouse) 37; GXB 1314-1316), and he helped material witnesses flee the country (DH2 103-108). Defendant's obstructive conduct highlights his most pertinent character trait – an utter disrespect for the law.

3. Sentencing Disparity - Respect for the Law - Just Punishment - Deterrence

The sentence reasonably "promote[d] respect for the law," provided "just punishment," "afford[ed] adequate deterrence," and "avoid[ed] unwarranted sentencing disparities." 18 U.S.C. §§ 3553(a)(2) and (6). Although defendant's 324-month sentence was lengthy, a substantially shorter sentence would have been out of proportion with the sentences imposed under comparable circumstances.

This case presented aggravating circumstances that went far beyond a typical $26 million bank fraud. While courts have seen fit to impose shorter sentences in other fraud cases, the sentence in this case was not unreasonable given the multiple fraudulent schemes, defendant's roles in both orchestrating the broader criminal activities and perpetrating the more individualized criminal acts, defendant's repeated attempts to obstruct justice, and defendant's persistent lack of remorse. Attached at Addendum pages 13-15 is a spreadsheet of several fraud cases involving lengthy sentences of imprisonment. While each case presented unique facts and circumstances, upon comparison, the totality of the aggravating circumstances of this case appears unmatched.

C. Defendant Fails to Show his Sentence Should Haven Been Lower

Defendant offers several unpersuasive reasons why he believes his sentence is unreasonable.

1. Charity

Defendant argues he has an extraordinary record of charitable activities. (AOB 94). The court acknowledged "his charitable nature" and considered this factor in fashioning its sentence. (CR 927 p. 49). Considered in the context of other factors (including defendant's dishonesty (CR927 48)), defendant's charitable history did not render the sentence unreasonable. As the court found, "it is far easier to be generous with someone else's money instead of one's own." (CR927 49).

2. Family Circumstances

Defendant argues his family circumstances, including having an autistic son, warranted "substantial weight" at sentencing. (AOB 96). Although sad, the impact of defendant's incarceration upon innocent family members was not so unusual as to warrant a reduction in defendant's sentence.

Defendant's family circumstances were considered by the court and found not to be substantially unique for the purposes of sentencing. (CR927 49).

This case is very different from the cases relied upon by defendant (AOB 96-97) due to the relative level of defendant's exposure under the advisory guidelines. In *United States v. Haverset*, 22 F.3d 790 (8th Cir. 1994), the defendant was facing a guideline range of only 8 to 14 months. *Haversat*, 22 F.3d at 793. The court sentenced Haverset to probation based upon a finding he was an "irreplaceable" part of his wife's treatment. Id. at 797. Similarly, in *United States v. Spero*, 383 F.3d 803 (8th Cir. 2004), this Court affirmed a departure to a split sentence of probation with home confinement, finding, "Spero's role in [his disabled son"s] life is indispensable." Id. at 805. In *Spero*, the sentencing court departed from a total offense level of 13 to a total offense level of 5. Id. at 804.

In contrast, here defendant did not request a sentence of probation or home confinement. Rather, defendant argued a sentence of up to 72 months was appropriate. (CR895 54). By the time defendant would serve six years, his autistic son would be an adult – and would no longer be dependant upon defendant in the same way as he may have been prior to defendant's detention. Under the circumstances of this case, defendant could not have properly been considered an "irreplaceable" or "indispensable" part of his son's life. A lesser sentence based upon defendant's family circumstances would have been inappropriate.

3. Other Alleged Circumstances

Defendant's other arguments warrant less discussion.

Defendant notes his offenses were non-violent (AOB 93) and he had no prior criminal convictions. (AOB 94). These circumstances are common in fraud cases.

Defendant claims his purported reasons for committing his offenses were laudable and "not to exalt his personal lifestyle." (AOB 93). To the contrary, he had $1.5 million transferred from the business to his personal accounts during the course of the fraud. (GXB 114, GADD 12).

Defendant claims his crimes were committed "in the operation of an otherwise lawful business." (AOB 94). Agriprocessors was engaged in the sale of a lawful product. But it could hardly be described as "otherwise lawful" when it was defrauding its primary lender for approximately 10 years, falsifying financial statements, harboring an illegal workforce, repeatedly violating the Packers Act, laundering millions of dollars, paying off a local politician, and paying its employees under the table.

Finally, defendant claims he poses "no risk of recidivism" because he intends to return to teaching. (AOB 97). Defendant's self-serving assurance rings hollow in view of the dimensions of his criminal conduct in this case.

4. The District Court Properly Applied Section 3553(a)

Defendant inaccurately claims the court "failed to consider the § 3553(a) factors," in particular, defendant's motive and purported sentencing disparities. (AOB 87). Defendant is wrong.

Regarding motive, the court addressed this factor, stating in part:

> Defendant devotes a substantial amount of evidence and argument to his contention that his offenses of conviction were not motivated out of a sentence of personal greed, but rather out of a sentence of duty to maintain his family business for religious purposes.

(CR927 48). Thus, the court was aware of the circumstances as alleged by defendant and expressly considered them. "Where the district court in imposing a sentence makes 'an individualized assessment based on the facts presented,' addressing the defendant's proffered information in its consideration of the § 3553(a) factors, such sentence is not unreasonable." *United States v. Stults*, 575 F.3d 834, 849 (8th Cir. 2009) (quoting *Gall*, 552 U.S. at 50).

Defendant seems to disagree with the court's weighing of his purported motive in determining his sentence. However, even assuming defendant's motive were a mitigating factor, the "district court's decision to place greater emphasis in this case on factors that favored a sentence within the advisory range . . . than on other § 3553(a) factors that might favor a more lenient sentence is a permissible

exercise of the considerable discretion available to a sentencing court under the post-*Booker* regime." *United States v. Ruelas-Mendez*, 556 F.3d 655, 658 (8th Cir. 2009).

The court was aware of defendant's disparity arguments through his filings (CR879 47-49), and the topic was addressed in the presentence investigation report (PSR 103) and at sentencing argument. (ST 555-557, 561-564).

In its sentencing memorandum, the court stated it "carefully considered all of the statutory factors set forth in 18 U.S.C. § 3553(a)." (CR927 50). Prior to imposing sentence, the court confirmed it had "decided to impose a guideline sentence after carefully considering the statutory factors at 18 USC 3553(a)." (ST2 588). The court later confirmed it had considered all arguments and subarguments made by the parties in arriving at the sentence. (ST2 594). Although the court did not address the "sentencing disparities" factor by name, this Court does "not require a district court to provide a mechanical recitation of the § 3553(a) factors when determining a sentence. Rather, it simply must be clear from the record that the district court actually considered the § 3553(a) factors in determining the sentence." *United States v. Walking Eagle*, 553 F.3d 654, 659 (8th Cir. 2009) (internal quotations and citation omitted). Because the court considered potential

"sentencing disparities" and all other section 3553(a) factors, reversal is not warranted.

In view of all appropriate considerations, defendant's 324-month sentence was reasonable, and there was no abuse of discretion. The is not "the unusual case when [this Court] reverse[s] a district court sentence as substantively unreasonable." *United States v. Feemster*, 572 F.3d 455, 464 (8th Cir. 2009) (en banc).[38]

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[38] Defendant incorrectly argues any resentencing should be before a different judge based upon the court's alleged "preemptive refusals to take seriously a remand for resentencing." (AOB 99).

The court has shown no unwillingness to comply with any remand and merely did what this Court has suggested – made an alternative ruling in the interest of judicial efficiency. See *United States v. Vickers*, 528 F.3d 1116, 1121 (8th Cir. 2008) ("[W]e encourage a district court in resolving [a fact-intensive guidelines issue] to state whether its resolution of the issue affected its ultimate determination of a reasonable sentence.").

Nor did the court's statement regarding a potential basis for an upward variance indicate any "refusal" to take a remand seriously. The court simply stated that, if it were inclined to vary at all, it would have varied upward on the basis of "additional criminal conduct involving harboring of illegal aliens." (CR927 50). This statement did not suggest, as argued by defendant, the court might impose a higher sentence on remand. (AOB 98). Rather, the court was only declining to apply an upward variance it determined to be unnecessary given an advisory guidelines range it found to be adequate.

The cases cited by defendant (AOB 99-100) are distinguishable. In *United States v. Mosley*, 505 F.3d 804, 812 (8th Cir. 2007), and *In re Ellis*, 356 F.3d 1198, 1211 (9th Cir. 2004), the sentencing judges had been exposed to improper information. There has been no such claim in this case. In *United States v. Pepper*, 518 F.3d 949, 953 (8th Cir. 2008), appeal after remand, 570 F.3d 958 (8th Cir. 2009), (affirmed in part, vacated in part, and remanded, --- S.Ct. ----, 2011

CONCLUSION

For the above reasons, defendant's convictions and sentence should be affirmed.

Respectfully submitted,

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WL 709543 (U.S. Mar. 2, 2011)), and *United States v. Martin*, 455 F.3d 1227, 1242 (11th Cir. 2006), the sentencing judges had twice been reversed for error in sentencing the same defendants. Moreover, in *Pepper*, the sentencing judge said he would be reluctant to engage in resentencing if there were a remand. *Pepper*, 518 F.3d at 953. *United States v. Campo*, 140 F.3d 415, 420 (2d Cir. 1998), is similarly unlike this case in that the district court "expressly abdicat[ed] [its] discretion" to consider a below-guidelines sentence where there was a motion under USSG §5K1.1, and absent a below-guidelines recommendation from the government. In *United States v. Torkington*, 874 F.2d 1441, 1447 (11th Cir. 1989), unlike this case, the sentencing judge had made disparaging comments about a party such that there was an appearance of impropriety.

If the case were remanded for any reason, defendant should not be allowed to shop for a different judge.

CERTIFICATE OF FILING AND SERVICE

I certify that on March 11, 2011, I, Sali Van Weelden, Legal Assistant for the Attorney for Plaintiff-Appellee, the United States of America, electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit using the CM/ECF system. The electronic brief and the addendum attached to the brief, if any, have been scanned for viruses using Trend Micro OfficeScan and the scan showed no virus.

I further certify that on _____, 2011, I submitted 10 paper copies of the brief to the Clerk of Court and 1 paper copy to each party separately represented or proceeding pro se. Paper copies of the appendix, if one was prepared, were submitted to the Clerk of Court and each party on the date of electronic filing.

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BY: s/ S. Van Weelden

Copies to: Mark Weinhardt

RULE 32(a)(7), FED. R. APP. P., AND
RULE 28A(C), 8TH CIR. R., CERTIFICATION

I certify that the foregoing brief complies with the type-volume limitation of Rule 32(a)(7), Fed. R. App. P. The brief uses a proportional-spaced typeface, 14-point Times New Roman font. Based on a count under Corel Word Perfect Version X3 for Windows, the brief contains 23,252 words, excluding the table of contents, table of authorities, statement with respect to oral argument, any addendum, and certificates of counsel.

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ADDENDUM