IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN/DUBUQUE DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	No. CR 08-1324 LRR
	)	
vs.	)	
	)	
SHOLOM RUBASHKIN,	)	
	)	
Defendant.	)	

GOVERNMENT'S MEMORANDUM IN SUPPORT OF RESPONSE TO DEFENDANT'S MOTION FOR NEW TRIAL

The United States submits its memorandum in support of its response to defendant's August 5, 2010, Motion Under Rule 33(b)(1) For New Trial (Document #942).

I. Introduction

Defendant's motion for new trial was filed on August 5, 2010 – long after sentence had been imposed and defendant's notice of appeal had been filed. Although styled as a motion for new trial based upon newly discovered evidence, defendant's motion is premised upon circumstances known to defendant well in advance of trial.

There is no dispute defendant was aware, prior to trial, of the court's participation in logistical planning for the May 12, 2008, enforcement action at Agriprocessors prior to trial. (See, e.g., Defendant's Brief p. 1). His purported "newly discovered" evidence only confirms what he knew before his trial in this matter – that Court representatives, including Chief Judge Linda R. Reade, met with representatives of the United States Attorney's Office and Immigration and Customs Enforcement (ICE) to ensure the Court's logistical needs would be met during the operation. Defendant disingenuously feigns surprise that the Chief Judge personally attended meetings and surveyed the site proposed for the court's temporary location.

During a December 9, 2008, telephonic scheduling conference, counsel for defendant discussed the fact that defendant was contemplating filing a motion to recuse. The Court issued an order the following day setting a January 30, 2009,

deadline for filing any "motions for recusal." (Lewin Exb. 17).[1] Defendant chose not to file a motion to recuse. Now, after trial and sentencing, defendant has changed his mind. However, the law forbids a criminal defendant from gaming the system by seeking recusal after conviction and sentencing based upon previously known facts. Upon careful reading, defendant's motion is revealed for what it is – a frivolous waste of the Court's time and the public's resources. Defendant's motion should be denied without a hearing.

II. Facts

A. The May 12, 2008, Enforcement Action

From October 2007 until May12, 2008, the government planned a worksite enforcement action at Agriprocessors, Inc., in Postville, Iowa, with the potential for hundreds of criminal cases as a result. In order to facilitate the criminal justice system's handling of so many expected cases, the government notified the Court that a large scale criminal law enforcement initiative was planned for May 12, 2008. (DLR Exb. M, p. 3). The government shared only as much information as was necessary for the Court to make its preparations. Without prior warning and significant logistical coordination with the government, the Court would have been unable to adequately handle such a large number of cases in a manner that adequately protected the rights

[1]. "Lewin Exb." refers to exhibits attached to the Declaration of Nathan Lewin (attached to defendant's motion). "DLR Exb." refers to exhibits attached to Martin De La Rosa's Motion to Recuse filed in 08-1313 LRR. Of course, defendant's counsel were aware of the motion and the Court's order denying it. The entire motion (with attachments) is attached hereto as Exhibit 1. Additional government exhibits are designated "Gov. Exb."

of those involved and without severe interruption to the Court's regular docket. (DLR Exb. M, p. 3, "The Court definitely couldn't accommodate that number without planning.").

To ensure defendants' rights were protected and ensure a proper handing of the expected cases, the Court decided to temporarily relocate Court operations to the site of ICE's temporary processing facility in Waterloo. The Court also noted that moving court to Waterloo would "make it easier for arrestees' families to attend court proceedings." (DLR Exb. D). Further, there was "inadequate space in the Cedar Rapids and Sioux City courthouses to hold and process those arrested." Id. Because there were only a handful of qualified Spanish interpreters in Iowa, the Court arranged for 36 qualified interpreters to be brought in. The Court also arranged for the necessary number of Criminal Justice Act panel attorneys to be available. Knowing the government intended to offer fast-track plea proposals[2] to the vast majority 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 and potential guilty pleas and sentencings within a short period of time.

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[2] It is a matter of public record that the Department of Justice may authorize so-called "fast-track" programs in exceptional circumstances where it is demonstrated a district will confront an exceptionally large number of a specific class of offenses within the district and failure to handle such cases on an expedited or "fast-track" basis would significantly strain prosecutorial and judicial resources available in the district. Indeed, in the PROTECT Act, Congress tacitly approved the use of fast-track or "early disposition" programs, "authorized by the Attorney General and the United States Attorney," and directed the Sentencing Commission to amend the sentencing guidelines to account for such programs.

Counsel for the undocumented alien defendants necessarily learned of the enforcement action soon after the execution of the search and shortly before they were to begin their work. Accordingly, the Court compiled a handbook to assist defense counsel and their assigned interpreters. For easy reference, the handbook contained the elements and statutory maximums (DLR Exbs. Q-5 through Q-10) for the crimes the government could potentially charge and had charged.[3] The handbook contained copies of waivers and forms typically used in the District (DLR Exbs. Q-2, Q-3, Q-11, Q-12, Q-13) should those items be needed. In order to assist defense counsel in preparing for court, and those defendants choosing to plead guilty, the handbook also contained scripts of what the judges would say – including the questions they would ask the defendants – at the various potential hearings. (DLR Exbs. Q-1, Q-4, Q-14). The forms and scripts 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 judicial 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. (DLR Exb. Q-15).

[3] Magistrate Judge Scoles had reviewed and signed 695 criminal complaints weeks before the operation, and had approved search warrants in the matter days before the operation.

Although the Court was necessarily involved in those aspects of the logistical planning that impacted Court functions, Chief Judge Reade was never told, prior to the execution of the search warrants on May 12, 2008, that Agriprocessors was the target of the operation.[4] (See Murphy Affidavit ¶ 13 (Gov. Exb. 3)). Accordingly, Chief Judge Reade was never made aware, prior to May 12, 2008, defendant Sholom Rubashkin[5] had any potential connection to the government's investigation and planned enforcement action.

B. Published Accounts of the Court's Involvement

The Court's involvement in logistical planning related to the May 12, 2008, 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 contains the following quotation from Chief 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.

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[4]Shortly before May 12, 2008, Magistrate Judge Jon S. Scoles was necessarily 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.

[5]Defendant's baseless supposition that the government had an arrest warrant for him at the time of the enforcement action (Defendant's Brief p. 6) is inaccurate. The arrest warrant referred to in the Executive Summaries included as Lewin Exhibits 11 and 12 was not for defendant and was returned un-executed. (See Murphy Affidavit ¶ 15 (Gov. Exb. 3)).

> We worded statements and instructions so they would interpret well. The court definitely couldn't accommodate that number without planning.

(DLR Exb. M, p. 2).

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?
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> [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.
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> 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.
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> Ms. Rhodes: That's correct.
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> Ms. Lofgren: Now, we were—there have been accounts—and I don't know if they are accurate—that the U.S. District Courts for the Northern District of Iowa—Judge Reade—personally called defense lawyers asking them for favors and warning them not to tell anyone and then inviting them to attend a meeting in Cedar Rapids with other defense lawyers to take on the representation. Did anyone at DOJ ask Judge Reade to do this? Do you know if that report is accurate?
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> Ms. Rhodes: I know that defense counsel were contacted somewhat in advance, at least some of them were.
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> Ms. Lofgren: By Judge Reade?

Ms. Rhodes: That is my understanding. I don't have all the details.

(Lewin Exb. 16). In addition to prepared statements and other testimony, the subcommittee hearing record contained purported accounts of the operation, including the Court's role, from a criminal defense attorney who was asked, but declined, to represent some of the defendants (see Lewin Exb. 15, p. 28) and from an interpreter who assisted the court and counsel in the proceedings (see DLR Exb. T).[6]

C. The *De La Rosa* Recusal Litigation

On August 13, 2008, in *United States v. Martin De La Rosa-Loera*, CR 08-1313 LRR, defendant De La Rosa filed a motion to recuse Chief Judge Reade based, in part, upon her participation in the planning for the May 12, 2008, enforcement operation. The motion, attached hereto as Exhibit 1, contained 25 exhibits (some in several parts). These included the Third Branch article (DLR Exb. M) and a press release issued by the Court on May 12, 2008, notifying the public that 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." (DLR Exb. D). The motion also included numerous materials containing every manner of allegation and criticism regarding the Court's role in the Agriprocessors operation. (DLR Exbs. A-Y).

[6]Although the criticisms contained in these accounts are without basis, the accounts were among the items available to defendant prior to trial to determine whether to file a motion to recuse.

The government responded to the motion on August 26, 2008. The government's response is attached hereto as Exhibit 2.

On September 29, 2008, the Court issued an order denying the motion. (Lewin Exb. 18). 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." (Id.) The Court also wrote several pages detailing its preparations for the prosecution of hundreds of felony cases in Waterloo. (Id. at pp. 7-11).

D. Pretrial Motions, Trial and Sentencing

On December 9, 2008, the Court held a telephonic scheduling conference to discuss, among other matters, deadlines for pretrial motions. Counsel for defendant discussed the fact that defendant was contemplating filing a motion to recuse, motion for change of venue, motion to sever, and motion alleging grand jury abuse. The Court ordered any such motions to be filed by January 30, 2009. (Lewin Exb. 17). Defendant did not file a motion to recuse.

Defendant proceeded to trial. On November 12, 2009, a jury found defendant guilty of 86 financial fraud and related counts. On June 22, 2010, defendant was sentenced to 27 years' imprisonment; a sentence toward the lower end of his advisory guidelines range.

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

Defendant files his motion under Rule 33(b)(1), which states:

> Any motion for a new trial grounded on newly discovered evidence must be filed within 3 years after the verdict or finding of guilty. If an appeal is pending, the court may not grant a motion for a new trial until the appellate court remands the case.

Fed. R. Crim. P. 33(b)(1).[7]

A. The Eighth Circuit Standard for Rule 33 Motion on Claim of Newly Discovered Evidence

Rule 33 of the Federal Rules of Criminal Procedure provides that the district court may grant a new trial "if required in the interest of justice." Fed. R. Crim. P. 33. To justify a new trial on the ground of newly discovered evidence, defendant has the burden of demonstrating (1) the evidence was discovered after trial; (2) the failure to discover this evidence must not be attributable to a lack of due diligence on the part of the movant; (3) the evidence must not be merely cumulative or impeaching; (4) the evidence must be material; and (5) the evidence must be likely to produce an acquittal if a new trial is granted. *United States v. Gianakos*, 415 F.3d 912, 927 (8th Cir. 2005); *United States v. Duke*, 255 F.3d 656, 659 (8th Cir. 2001). See also *United States v. Mosby*, 12 F.3d 137, 138 (8th Cir. 1993) (per curium) (quoting *United States v. Begnaud*,

[7]A district court has jurisdiction to entertain a motion for a new trial brought under Rule 33 of the Federal Rules of Criminal Procedure after a notice of appeal has been filed and the district court may either deny the motion or certify its intention to grant the motion. *United States v. Cronic*, 466 U.S. 648, 667 n.42 (1984). See also *Ferina v. United States*, 302 F.2d 95, 107 n.1 (8th Cir. 1962) (district court may rule upon a motion for a Rule 33 new trial after the filing of a notice of appeal). When a "motion for a new trial [is] based on the ground of newly discovered evidence [while] . . . an appeal is pending the court may grant the motion only on remand of the case." Fed. R. Crim. P. 33. "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. Duke*, 255 F.3d 656, 658 (8th Cir. 2001).

848 F.2d 111, 113 (8th Cir. 1988)) ("Among other things, in order to obtain relief under Rule 33, a movant must produce newly discovered evidence, 'that is [evidence] discovered since the trial' and allege facts 'from which the court may infer diligence on the part of the movant.'"). When the factual basis of a claim is available to a defendant at trial, the evidence is not "newly discovered." *United States v. Ryan*, 153 F.3d 708, 713 (8th Cir. 1998).

B. Defendant's Theory Regarding Rule 33 Jurisdiction is Without Legal Basis

Defendant does not claim to have discovered evidence on the substantive issue of guilt "likely to produce an acquittal if a new trial is granted" (*Gianakos*, 415 F.3d at 927) in satisfaction of the Eighth Circuit standard. Rather, in a footnote, defendant cites *Holmes v. United States*, 284 F.2d 716, 720 (4th Cir. 1960), in support of his claim that Rule 33 jurisdiction may be premised either upon newly discovered evidence bearing "'upon the substantive issue of guilt,' *or* 'upon the integrity of the earlier trial.'" (Defendant's Brief p. 17 n.1 (quoting *Holmes*, id.)). *Holmes*, however, was not a recusal case and involved widely different factual circumstances in which a defendant alleged and showed actual prejudice at trial.

In *Holmes*, after submission of the case but before deliberations had begun, a juror asked a deputy marshal where the defendants were staying. The deputy marshal responded that one of the defendants was staying at the local jail serving a 6-year sentence. Id. at 718. The district court found defendant's motion for new trial was untimely, and the Fourth Circuit Court of Appeals reversed. Foregoing the standard

analysis applicable when newly discovered evidence goes to the substantive issue of guilt, the court stated, "[w]hen there has been such a communication, a new trial must be granted unless it clearly appears that the subject matter of the communication was harmless and could not have affected the verdict." Id. at 719. The court was careful to note that the movant was nonetheless required to make "a substantive showing" that the "newly discovered evidence . . . shows the jury to have been subjected to improper influence" and that the "motion is based upon information that the defendant does not have when the verdict is received." Id. at 719.

Here, unlike in *Holmes*, defendant does not allege, and cannot show, any actual impact on the jury's verdict or any other manner of actual prejudice. Rather, defendant impermissibly seeks to use Rule 33(b)(1) to litigate a section 455(a) motion to recuse from scratch as if it were timely brought prior to trial. Defendant does not allege Chief Judge Reade should have been recused under 28 U.S.C. § 455(b) based upon any actual "personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding." Accordingly, defendant cannot show any actual prejudice, and a Rule 33(b)(1) new trial is inappropriate as a matter of law. 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.

Defendant does not even attempt to allege any particular decision by Chief Judge Reade resulted in prejudice at trial as a result of any involvement in the

pre-operation planning.[8] While such prejudice is not required when a timely motion is made under 28 U.S.C. § 455(a), there is no basis for Rule 33(b)(1) jurisdiction without some showing defendant was, in fact, prejudiced. See *Gianakos*, 415 F.3d at 927 (the evidence must be likely to produce an acquittal if a new trial is granted); *Holmes* 284 F.2d at 719 (no new trial where impact on jury was "harmless and could not have affected the verdict"); cf. *Fletcher v. Conoco Pipe Line Co.*, 323 F.3d 661, 663 (8th Cir. 2003) (section 455(a) claim raised for the 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"). The admissibility of the evidence gathered on May 12, 2008, was never even challenged by defendant. He never filed a motion to suppress any evidence seized on May 12, 2008, and he stipulated the 389 undocumented aliens encountered on May 12, 2008, were, in fact, illegally in the United States. He still fails to substantiate any impermissible knowledge the Court obtained outside of judicial proceedings.

Regardless, even if defendant could properly invoke Rule 33(b)(1) jurisdiction in order to present a post-trial motion to recuse under section 455(a), defendant's motion fails for several other reasons.

[8]The Court ruled in defendant's favor, over the government's objection, on several; of defendant's mot significant requests. The Court granted defendant's appeal of the Magistrate's detention order. The Court ordered a change a venue at defendant's request. The Court severed the charges in the case precisely as requested by defendant.

IV. Defendant's Evidence Is Not "Newly Discovered" under Rule 33 as it Does Not Materially Add to Facts That Were Known, or Through Due Diligence Should Have Been Known, to Defendant Prior to Trial

Defendant alleges materials obtained from a FOIA request constitute "newly discovered evidence" for the purposes of Rule 33(b)(1). Because the factual basis for defendant's motion was known to defendant prior to trial, or in the exercise of due diligence should have been known, defendant's motion fails.

A. The Factual Basis for Defendant's Motion was Known to Defendant Prior to Trial

As acknowledged by defendant:

> 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.

(Defendant's Brief p. 3). Nevertheless, defendant seeks to rely upon a series of ICE documents – mostly memoranda and e-mails – in support of his suggestion that new information has only come to light after trial. Each piece of information is discussed below. The government addresses each cited document in the order obtained by defendant.

March 31, 2010, disclosure - First Supplemental Release

Defendant does not rely upon any records obtained on March 31, 2010.[9]

April 15, 2010, disclosure - Second Supplemental Release

[9]The cover letter to the March 31, 2010, supplemental response shows the initial FOIA disclosure was sent to defendant's counsel on September 17, 2009. (Lewin Exb. 1, p. 3).

- A November 14, 2007, ICE memorandum regarding "Cedar Valley Junction Processing Facility Requirements." Regarding coordination with the district court, the memorandum states:

> [c]ommunication between the United States Attorney's Office and the United States District Court for the Northern District of Iowa has revealed that the District Court is willing to conduct judicial proceedings at the National Cattle Congress facility during the scheduled time period.
>
> * * * *
>
> The United States Attorney's Office and the U.S. District Court for the Northern District of Iowa have agreed to hold onsite U.S. District Court proceedings at the processing and holding area.

(Lewin Exb. 5). The memorandum discusses in detail the logistical requirements of the planned operation. These included:

> The U.S. District Court will need to have an established courtroom near the processing facility for the purposes of initial appearances, plea hearings, and possible sentencing proceedings.
>
> * * * *
>
> [T]he facility will need to be large enough to accommodate 500-800 law enforcement officers/agents, Assistant United States Attorneys, Defense Attorneys, Consular Officials, Interpreters, Judges, Technical Support Staff, law enforcement support staff, and other involved participants. These involved participants will be working on a 24 hour rotating shift schedule.
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> * * * *
>
> The Courthouse Building will need to be separated from the other buildings as to provide access for defense attorneys and interpreters. There will need to be a physical barrier between the Courthouse and the holding/processing buildings. This building will need to be accessed by the United States Marshals Service prior to the operation for site security purposes.

(Lewin Exb. 5).

Nothing in the November 14, 2007, ICE memorandum constitutes "newly discovered evidence." The Third Branch article (DLR Exb. M) and the Court's order denying De La Rosa's motion to recuse (Lewin Exb. 18) made clear the Court was contacted well in advance of the May 12, 2008, operation to coordinate logistics. That Chief Judge Reade identified December 2007 as the time she was advised of the operation (DLR Exb. M, p. 2) as opposed to either October or November 2007 is a distinction without a difference. At bottom, prior to trial, defendant knew or should have known the Court became involved logistically many months prior to May 12, 2008.

May 19, 2010, disclosure - Third Supplemental Release

- October 12, 2007, memorandum from an ICE Special Agent regarding a meeting held on October 10, 2007, with the United States Attorney and First Assistant/Criminal Chief. Regarding Chief Judge Reade, the memorandum states:

> The USAO advised that they had met with Chief United States District Court Judge Linda Reade and had provided her with a briefing regarding the number of criminal prosecutions that they intend to pursue relative to this investigation. The USAO advised that judicial proceedings should be held within the geographical boundaries of the Northern District of Iowa. In addition, the USAO stated that extensive planning and preparation will be required to bring additional U.S. District Court Judges into the Northern District of Iowa to preside over potentially hundreds of judicial proceedings. The planning and preparation in regards to judicial proceedings will focus on obtaining Court Clerks, Court Reporters, U.S. District Court certified interpreters and other support staff and equipment required to set up several remote courtrooms for this case. Special arrangements must be made in advance with the United States Public Defenders office. The USAO indicated that they are seeking authorization from the Department of Justice to establish a "Fast Track" program relative to criminal prosecutions. In their discussions with Chief Judge Reade it was noted that significant "lead time" will be required to block off court calendars and "docket time". The USAO reminded RAC Cedar Rapids that every person arrested pursuant to a criminal arrest warrant must be brought before a United States

> District Court Judicial Officer without delay. As such, upon ultimate execution of a law enforcement operation, all facilities, personnel and preparation must be in place to meet this legal requirement.

(Lewin Exb. 2).

The information contained in the October 12, 2007, memorandum only confirms the Court's involvement in logistical coordination with the government – all of which was known by defendant prior to trial.

- October 17, 2007, memorandum from an ICE Special Agent regarding a meeting held on October 16, 2007, between the ICE Special Agent in Charge and the United States Attorney and First Assistant/Criminal Chief. Regarding Chief 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.

(Lewin Exb. 3).

Although the October 17, 2007, memorandum refers to Chief Judge Reade's "support for the initiative," such support is clearly discussed in the context of the logistical needs of the Court in order to handle several hundred criminal arrests in the district. It was obvious to defendant prior to trial that the Court had taken numerous

steps to "support" the operation by having Court facilities and personnel available to handle such a large number of arrests. The reference to Chief Judge Reade being briefed "regarding the ongoing investigation" needs to be read in the context of the remainder of the sentence, which 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. (See Murphy Aff. ¶ 13 (Gov. Exb. 3) ("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.")).

- October 30, 2007, memorandum from an ICE Special Agent regarding, among other items, an October 29, 2007, meeting with the United States Attorney's Office. Regarding the October 29, 2007, meeting, the memorandum states:

> On **October 29, 2007**, the case agent and co-case agent met with the USAO for a scheduled weekly meeting. The USAO was presented the information regarding a possible enforcement action date for the week of May 11, 2008. The USAO did not appear to have any issues with this date and [will] discuss the dates with the Chief US District Court Judge to see if that meets her scheduling needs.

(Lewin Exb. 4).

Defendant cannot reasonably claim he was unaware, prior to trial, that the operation had to be coordinated with the Court's schedule. In its order denying De La

Rosa's motion to recuse, the Court discussed the fact that Chief Judge Reade had to obtain permission from the Chief Judge of the Eighth Circuit Court of Appeals for district judges from three other districts to sit in the Northern District of Iowa. (Lewin Exb. 18, p. 7). As discussed in detail in the Third Branch article, the Court had to set up an entire infrastructure in Waterloo. Courtrooms were established onsite, and an engineer was sent from the Administrative Office of the U.S. Courts to establish adequate data connections for the court's systems. (DLR Exb. M, p. 3). The clerk's office and probation office had to be temporarily relocated, and defense attorneys and interpreters needed to be secured. (Id. at p. 4). That the October 30, 2007, memorandum says there would be coordination with the Court's schedule simply adds nothing to the information previously known to defendant.

- January 28, 2008, ICE memorandum regarding, among other items, a January 28, 2008, meeting with Chief 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 withe 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.

(Lewin Exb. 6).

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

- March 17, 2008, ICE memorandum regarding, among other items, 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.

(Lewin Exb. 7).

As with other memoranda, the March 17, 2008, 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) (false representations about social security numbers), 18 U.S.C.

§ 1028A(a)(1) (aggravated identity theft), 18 U.S.C. § 911 (false claim of citizenship), 18 U.S.C. § 1015(e) (false claim of citizenship to obtain employment), 18 U.S.C. § 1546(a) (use of false employment documents), and 8 U.S.C. § 1326(a) (unlawful reentry). (DLR Exb. Q-5 through Q-10). The reference to "charging strategies" in the March 17, 2008, can be read no more broadly than the discussion of potential charges the Court might be presented with in Waterloo. (See also Murphy Aff. ¶ 10 (Gov. Exb. 3) (discussing the Court's preparation of materials to aid "defense counsel and defendants in understanding the nature of the charges and proceedings"); id. at ¶ 15 ("there was no warrant for defendant's arrest on May 12, 2008")).

June 18, 2010, disclosure - Fourth Supplemental Release

- ICE power-point presentation dated March 12, 2008, regarding Agriprocessors. The power-point identifies defendant as the Vice-President. (Lewin Exb. 10). Contrary to defendant's unfair and baseless supposition (Defendant's Brief 6), the power-point was never shared outside of the law enforcement community and was not shown to Chief Judge Reade or any other court personnel. (See Murphy Affidavit ¶ 14 (Gov. Exb. 3) ("Judge Reade was not shown by our office, or any investigative agent or agency to my knowledge, the power-point presentation"); id. at ¶ 13 ("Judge Reade was not advised . . . 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")). The fact that defendant obtained a power-point presentation from

ICE in response to a FOIA request is meaningless. It is not "newly discovered evidence" of anything.

- An undated ICE headquarters memorandum regarding the choice of the National Cattle Congress as a processing site. The memorandum states, in part:

> Due to the scope of this investigation and the potential to arrest approximately 600 undocumented aliens, its is necessary to utilize a large facility to allow for the processing of detainees. In addition, the U.S. Attorney's Office for the Northern District of Iowa (USAO) has indicated that they will prosecute every individual amenable to criminal prosecution. Upon consultation with the Chief District Court Judge, it was determined that the current U.S. Courthouse was not capable of accommodating more than 15 individuals at a time. The Chief Judge requested that DOJ and ICE identify a suitable alternative location that can accommodate the complete relocation of the United States District Court for the Northern District of Iowa for this operation.
>
> Discussion
>
> ICE and the USAO conducted a preliminary search for possible facilities that could accommodate the needs of ICE, the USAO and the District Court. There were a limited number of venues large enough to accommodate this operation, however, ICE conducted an assessment of all that were identified.

(Lewin Exb. 13). The memorandum then discussed in detail the logistical needs of the governmental entities involved in the operation. Six locations were discussed as alternatives to the National Cattle Congress. The memorandum then states:

> Finally, a site the National Cattle Congress in Waterloo, Iowa was identified that appears to meet all necessary requirements to include space and security requirements. In addition, this site was surveyed by the Chief Judge and the USAO who concurred that this site will meet their requirements.

(Lewin Exb. 13).

As discussed above, the Third Branch article (DLR Exb. M) and the order denying the De La Rosa motion to recuse (Lewin Ex. 18) made clear prior to

defendant's trial that the Court's ability to accommodate hundreds of felony prosecutions was dependant upon extensive logistical coordination and the establishment of a temporary court facility. As the Chief Judge of the Northern District of Iowa, it would be surprising if Chief Judge Reade had not personally inspected the location in advance to determine if such a relocation of court services was feasible. This is not new information and does not support a Rule 33(b)(1) motion for new trial.

July 15, 2010, disclosure - Final Supplemental Release

- February 14, 2008, ICE headquarters e-mail regarding the coordination of the operation date with the Court's calendar. The e-mail states:

> The date for the operation was set by the availability of the courts, not by ICE and is the first dates that the District Courts could go. Because we anticipate a very high percentage of the arrests going criminal, the Chief District Court Judge requested we coordinate with her court. The Chief District Court Judge has cleared the court calendars, including moving trials and clearing the calendars for 3 other District Judges and 2 Magistrate's court schedules in order to go May 7th. While we can move the operation a day or two forward or back, we do not have the ability to move it any further due to the court schedules. We have also already contracted with the Cattle Congress for these dates, changing it now would be virtually impossible.

(Lewin Exb. 14).

As discussed above, the fact that the operation was coordinated with the Court's calendar was a fact that should have been obvious to defendant prior to trial. The fact that it may have been "virtually impossible" to substantially change the date only underscores that the Court's logistical concerns were its own and were distinct from law enforcement's. This is not new information that would implicate Rule 33(b)(1).

- March 20, 2008, e-mail regarding an upcoming meeting to include ICE and USMS 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.

(Lewin Exb. 9).

In the context discussed in the March 20, 2008, e-mail, the Court's request for a "gameplan" is clearly regarding "processing/housing/transportation [and] manpower." All of these are logistical concerns of the Court that were known to defendant prior to trial. Chief 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 expend in order to handle the anticipated number of criminal prosecutions. The March 20, 2008, e-mail adds nothing of substance to what was known to defendant prior to trial.

- March 31, 2008, e-mail among personnel at ICE headquarters regarding a March 31, 2008, 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.

(Lewin Exb. 8).

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 Chief Judge Reade or any other Court personnel. (Murphy Affidavit ¶ 17 (Gov. Exb. 3)).

- April 2, 2008, e-mail addressed to Marcy Forman at ICE headquarters. The e-mail contains an "Executive Summary" that states, in part:

> This enforcement operation is scheduled for May 12, 2008, and will include the execution of criminal arrest warrants for at least one corporate official and a criminal search warrant at the company.
>
> * * * *
>
> The morning of May 12, 2008, ICE will serve a criminal search warrant on the company and execute a criminal arrest warrant for the corporate official.

(Lewin Exb. 11).[10]

As defendant is well aware, he was not arrested in May 12, 2008. He was first arrested several months later on October 30, 2008. The arrest warrant referred to in the April 2, 2008, e-mail was for another person and was returned un-executed. (See Murphy Affidavit ¶ 15 (Gov. Exb. 3)). It was signed by a judicial officer other than Chief Judge Reade, (see Murphy Affidavit ¶ 15 (Gov. Exb. 3)), and there is no evidence to suggest Chief Judge Reade was ever made aware of it. There is no allegation or evidence to suggest the Executive Summary was shared with Chief Judge Reade or any other court personnel.

B. Defendant's Request for Recusal is Untimely

The Eighth Circuit Court of Appeals has made clear, "claims under § 455 'will not be considered unless timely made.'" *United States v. Bauer*, 19 F.3d 409, 414 (8th Cir. 1994) (quoting *Holloway v. United States*, 960 F.2d 1348, 1355 (8th Cir. 1992) and *Oglala Sioux Tribe v. Homestake Mining Co.*, 722 F.2d 1407, 1414 (8th Cir. 1983)). Defendant was invited by the Court to file a timely motion to recuse prior to trial. (Lewin Exb. 17 (December 10, 2008, Scheduling Order, stating "[a]ny . . . motions for recusal . . . must be filed **on or before January 30, 2009**")).[11] Because none of the information

[10]Lewin Exb. 12 contains the same Executive Summary as Lewin Exb. 11.

[11]The Eighth Circuit Court of Appeals has held a conscious choice not to move for recusal results in a waiver.

> [Defendant] chose not to raise the matter of recusal before the trial court, although he plainly thought that he might have a basis for asking the judge to recuse.

obtained by defendant pursuant to the FOIA request either contradicts or significantly adds to what was known by defendant prior to trial, defendant has failed to set forth newly discovered evidence of anything for the purposes of Rule 33(b)(1), and defendant's motion should be dismissed as untimely and for lack of district court jurisdiction. See *United States v. Elso*, 2010 WL 438364, *2 (11th Cir. 2010) (unpublished) ("Elso failed to establish that he lacked knowledge of the evidence underlying his claim of judicial bias at the time of trial or that recusal was warranted . . . [and the] judge did not abuse her discretion in denying his motion for new trial on that basis"). *United States v. Conforte*, 624 F.2d 869, 879 (9th Cir. 1980) ("Because the motion [for new trial based upon purported newly discovered evidence of judicial bias] is not timely, we do not consider it, although by so doing we do not intimate that the conduct in question would have been grounds for finding bias or prejudice in any event.").

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

Defendant's untimely motion depends upon a showing Chief Judge Reade should have been recused at trial based upon her involvement in the planning of the

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> Defendant did not simply forfeit an objection by mere inadvertent inaction; he made a conscious choice not to raise the objection. In these circumstances, it is plain to us that he has waived it. See *United States v. Olano*, 507 U.S. 725, 732-34, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993).

United States v. Mathison, 157 F.3d 541, 545 (8th Cir. 1998).

May 12, 2008, enforcement operation at Agriprocessors. As the Court has already decided in the *De La Rosa* case, CR 08-1313 LRR (Lewin Exb. 18), no recusal was required under 28 U.S.C. § 455(a). In this case, for many of the same reasons, the requirements of Rule 33(b)(1) have not been met because defendant has failed to make "a substantive showing" that he suffered any prejudice at trial. *Holmes* 284 F.2d at 719. Accordingly, even if a Rule 33(b)(1) motion could be premised upon purported new evidence supporting a section 455(a) motion, defendant's failure to satisfy the requirements of section 455(a) here render relief under Rule 33(b)(1) unavailable.

A. Law of Recusal

Defendant alleges Chief Judge Reade was required to recuse herself under Title 28, United States Code, Section 455(a). Section 455(a) states "[a]ny . . . judge . . . of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."[12] "[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); *United States v. Martinez*, 446 F.3d 878, 883 (8th Cir. 2006).

[12]Again, there is no claim by defendant of actual bias or prejudice under 28 U.S.C. § 455(b).

In deciding a recusal motion, the 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." *In re Kansas Public Employees Retirement System*, 85 F.3d at 1358 (quoting *In re Drexel Burnham Lambert, Inc.*, 861 F.2d 1307, 1312 (2d Cir. 1988)).

Although litigants are entitled to an unbiased judge, they are not entitled to a judge of their choosing. Accordingly, if the rules do not require recusal, the Court is "obliged to remain on the [case]." *Southwestern Bell Telephone Company v. Federal Communications Commission,* 153 F.3d 520, 523 (8th Cir. 1998). "A judge is as much obliged not to recuse [her]self when it is not called for as [she] is obligated to when it is.'" *In re Drexel Burnham Lambert, Inc.*, 861 F.2d 1307, 1312 (2d Cir. 1988) (quoted in *Southwestern Bell Telephone Company,* 153 F.3d at 523). "Judges have an obligation to litigants and their colleagues not to remove themselves needlessly, because a change of umpire in mid-contest may require a great deal of work to be redone . . . and facilitate judge-shopping." *In re National Union Fire Ins. Co.*, 839 F.2d 1226, 1229 (7th Cir. 1988) (quoted in *Southwestern Bell Telephone Company,* 153 F.3d at 523). See also *In re Aguinda*, 241 F.3d 194, 201 (2d Cir. 2001) ("[W]here the standards governing disqualification have not been met, recusal is not optional; rather, it is prohibited.").

A disqualification under § 455(a) does not require actual bias, but must be based upon analysis under an objective standard "judged by whether the average person on

the street might question the judge's impartiality." *United States v. Fazio,* 487 F.3d 646, 653 (8th Cir. 2007) (citing *Moran v. Clarke*, 296 F.3d 638, 649 (8th Cir. 2002)). See also *Dossett v. First State Bank*, 399 F.3d 940, 953 (8th Cir. 2005) (recusal required "when an average person knowing all the relevant facts of a case might reasonably question a judge's impartiality."). Another Court has stated there must be a showing that would cause "an objective, disinterested observer fully informed of the underlying facts [to] entertain significant doubt that justice would be done absent recusal." *United States v. Lauersen*, 348 F.3d 329, 334 (2d Cir. 2003) (citation omitted).

"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) (quoting *Cooley*, 1 F.3d at 993, internal citations and quotations omitted). "Neither is the statute intended to bestow veto power over judges or to be used as a judge shopping device." Id. The issue of recusal must be resolved ". . . in light of the full record, not simply in light of an isolated incident." *Little Rock Sch. Dist. v. Pulaski Cty. Sp. School*, 839 F.2d 1296, 1302 (8th Cir. 1988).

"[W]here a judge's opinions are based on 'facts introduced or events occurring in the course of the current proceedings, [or of prior proceedings],' those opinions warrant recusal under § 455(a) only if they 'display a deep-seated favoritism or antagonism that

would make fair judgment impossible.'" *United States v. Sypolt*, 346 F.3d 838, 839 (8th Cir. 2003) (quoting *Liteky v. United States*, 510 U.S. 540, 555 (1994)). "[T]he statute does not extend literally to any kind of doubtful behavior." Id. "Rules against 'bias' and 'partiality' can never mean to require the total absence of preconception, predispositions and other mental habits." *United States v. Burnette*, 518 F.3d 942, 945 (8th Cir. 2008) (citations omitted).

The Tenth Circuit Court of Appeals has set out a "nonexhaustive list of various matters not ordinarily sufficient to require § 455(a) recusal:"

> (1) Rumor, speculation, beliefs, conclusions, innuendo, suspicion, opinion, and similar non-factual matters; (2) the mere fact that a judge has previously expressed an opinion on a point of law or has expressed a dedication to upholding the law or a determination to impose severe punishment within the limits of the law upon those found guilty of a particular offense; (3) prior rulings in the proceeding, or another proceeding, solely because they were adverse; (4) mere familiarity with the defendant(s), of the type of charge, or kind of defense presented; (5) baseless personal attacks on or suits against the judge by a party; (6) reporters' personal opinions or characterizations appearing in the media, media notoriety, and reports in the media purporting to be factual, such as quotes attributed to the judge or others, but which are in fact false or materially inaccurate or misleading; and (7) threats or other attempts to intimidate the judge.

Nichols, 71 F.3d at 351 (quoting *Cooley*, 1 F.3d at 993-94).

As noted in *United States v. Greenough*, 782 F.2d 1556, 1558 (11th Cir. 1986) (quoting *In re United States*, 666 F.2d 690, 695 (1st Cir. 1981)):

> "Although public confidence may be as much shaken by publicized inferences of bias that are false as by those that are true, a judge considering whether to disqualify himself must ignore rumors, innuendoes, and erroneous information published as fact in the newspapers . . .. To find otherwise would allow an irresponsible, vindictive or self-interested press informant and/or an irresponsible, misinformed or careless reporter to control the choice of judge."

"[T]he existence of the appearance of impropriety is to be determined 'not by considering what a straw poll of the only partly informed man-in-the-street would show[,] but by examining the record facts and the law, and then deciding whether a reasonable person knowing and understanding all the relevant facts would recuse the judge.'" *United States v. Bayless*, 201 F.3d 116, 126-27 (2d Cir. 2000) (citation omitted).

B. Recusal Analysis

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

1. Defendant Stretches the Logical Import of the FOIA Materials

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

a. "Judge Reade Engaged in *Ex Parte* Contacts Much Earlier Than Required for 'Logistical Cooperation.'";

b. "Judge Reade Engaged in a More Managerial Role Than Needed for 'Logistical Cooperation.'";

c. "The Subjects Discussed by Law-Enforcement Personnel With Judge Reade Exceeded the Needs of 'Logistical Cooperation.'"; and

d. Judge Reade's Expressed Approval of the Raid Exceeded 'Logistical Cooperation.'"

(Defendant's Motion pp. 12-13).[13]

[13]Defendant went even further in a press release, disseminated within an hour of filing the instant motion, in which he announced, "NEW EVIDENCE SHOWS JUDGE READE UNLAWFULLY PRESIDED OVER RUBASHKIN TRIAL . . ." (Gov. Exb. 4).

For the reasons discussed above regarding whether defendant's purported "new evidence" is truly "new," the information for the FOIA request does not suggest any involvement by Chief Judge Reade beyond logistical coordination. 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. The Court needed several months to plan for its role in the operation. There is nothing about the timing of the notification to suggest anything nefarious.[14]

Defendant's claim about Chief Judge Reade's managerial role is even less remarkable. As the Chief Judge of the district, it was ultimately up to Chief Judge Reade to make sure the necessary preparations were in place for hundreds of anticipated arrests and felony prosecutions. Chief Judge Reade did play a managerial role; she managed the Court's response to and preparations for the anticipated arrests. Nothing about defendant's evidence suggests the Chief Judge's managerial role went beyond court logistics and preparations to handle the types of legal matters that would be presented by the cases.[15]

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[14]The contacts with the Court were not ex parte. Ex parte contacts can only occur when there are more than one party to a pending action. Here there was no pending action and no other parties when the pre-enforcement discussions took place. *United States v. Earley*, 746 F,2d 412, 416 (8th Cir. 1984), cited by defendant regarding the dangers of *ex parte* communications, is inapposite.

[15]Other Judges of the Northern District of Iowa have temporarily relocated court services in response to immigration worksite enforcement actions. (See Murphy Aff. ¶ 7 (n.1)) (Gov. Exb. 3)).

Regarding the "subjects discussed" with Chief Judge Reade, defendant wrongly presumes the Court was briefed regarding "specific targets of the investigation [and] the relevant facts." (Defendant's Brief p. 13). The Chief Judge was never told where the enforcement operation was to take place or who the potential targets of the investigation were (see Murphy Affidavit ¶ 13 (Gov. Exb. 3)), and defendant's "evidence" does not suggest otherwise. Because Chief 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 (Defendant's Brief p. 8) are inapposite. The Court was apprised of the potential charges against the undocumented workers only so the Court could take appropriate measures to protect the rights of those charged and ensure proper handling of cases. There is no evidence to suggest the term "charging strategies" meant anything other than apprising the Court of potential charges against the undocumented workers.

As to Chief Judge Reade's purported "expressed approval of the raid" (Defendant's Brief p. 14), there is no evidence to suggest the Court did anything more than stand ready to handle the hundreds of expected felony cases and make appropriate plans to do so. There is no evidence to suggest Chief 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 expected prosecutions.

Defendant's motion must be based on facts, not supposition. "Rumor, speculation, beliefs, conclusions, innuendo, suspicion, opinion, and similar non-factual matters" will not suffice. *Nichols*, 71 F.3d at 351 (quoting *Cooley*, 1 F.3d at 993-94). "In applying the test, the initial inquiry is whether a reasonable *factual* basis exists for calling the judge's impartiality into question." *Cooley*, 1 F.3d at 993 (emphasis in original). Here, defendant's claim is based only upon an imagined "conspiracy theory" that is without factual support.

2. Logistical Planning Does Not Warrant Recusal

It is a far cry from planning a process to ensure the constitutional and timely handling of several hundred cases to being involved in the executive function of pursuing prosecution. In fact, the planning by the Court furthered the judicial goals of providing defendants fair hearings without delay, ensuring defendants were fully advised and aware of their rights, and ensuring defendants' waivers of rights were knowing and voluntary. Nothing done by the Court showed an involvement in the substantive resolution of the cases filed other than, along with other district court judges, approving the Rule 11(c)(1)(C) pleas in open court and imposing sentence. Defendant acknowledges, "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." (Defendant's Brief p. 3).[16]

[16]Defendant boldly charges Chief Judge Reade's opinion in *De La Rosa* was "misleading" as to her role in the planning of the May 12, 2008, operation. (Defendant's Brief p. 18). It was not, and defendant's evidence does not suggest otherwise.

3. Even Assuming the Court Was Privy to Certain Facts as Alleged by Defendant, Recusal Would Not Be Warranted

Chief Judge Reade was not privy to the location of the place to be searched on May 12, 2008, or who the potential targets of the investigation might be. (Murphy Affidavit ¶ 13 (Gov. Exb. 3)). Accordingly, her involvement in the pre-search logistical coordination of Court operations could not have exposed her to any facts about defendant, his family's business, or the evidence gathered prior to the search. However, even if Chief Judge Reade had been apprised of the evidence gathered prior to the search, recusal would not be warranted. Judges are routinely privy to such information in the form of, for example, Rule 41 search warrant applications, Title III wiretap applications, criminal complaints, and pen register applications. Therefore, even if true, defendant's claims about the information shared with Chief Judge Reade would not lead a fully informed person to reasonably question her impartiality. See 18 U.S.C. § 455(a).

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

Defendant's evidence, even under defendant's wildly mischaracterized version, falls far short of demonstrating the requirements for recusal or a new trial for defendant.

Accordingly, Chief Judge Reade did not "fail[] to disclose evidence suggesting bias" (see Defendant's Brief p. 9), and *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 867 (1988) (criticizing court for not disclosing its knowledge of fiduciary interest in litigation in ruling on motion to vacate) is inapposite.

The hundreds of felony prosecutions commenced on May 12, 2008, 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 charges until October 30, 2008; after other Agriprocessors mangers and office personnel had been prosecuted and cooperated.[17] Defendant's first financial charges were not brought until November 14, 2008. Even then, additional criminal conduct (such as the fake invoice scheme) was not discovered until several weeks later. Indeed, the evidence at trial showed defendant was still committing an array of crimes long after the May 12, 2008, search.

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

Defendant cannot link any alleged improprieties in the planning of the May 12, 2008, search with the fairness of his trial or Chief Judge Reade's presiding over it. Even assuming defendant's allegations gave cause to question Chief Judge Reade's presiding over the cases of the undocumented workers, the concerns do not logically

[17]The Court will recall only a single undocumented alien arrested on May 12, 2008, was called to testify at defendant's trial.

transfer to defendant's trial. Defendant was tried and convicted, over a year later, based upon a broader financial investigation. The evidence gathered on May 12, 2008, was only a discrete part of the mountains of evidence used to convict defendant.

VI. Defendant's Motion Should Be Denied Without Discovery or an Evidentiary Hearing and Without Being Transferred to a Different Judicial Officer for Determination

The Eighth Circuit Court of Appeals 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 is incapable of supporting any relief, and his motion is otherwise without merit. No discovery or further proceedings are warranted.

Moreover, defendant's request to have another judicial officer consider his motion should be denied. The Court is perfectly capable of deciding whether a new trial is required based upon a claim recusal was warranted. Compare *United States v. De La Rosa*, CR 08-1313 (document # 60 (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 28 U.S.C. § 455(a)).

VII. Conclusion

For the above reasons, defendant's motion for new trial should be denied without discovery, without an evidentiary hearing, and without being referred to a different judicial officer.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I electronically served a copy of the foregoing document to which this certificate is attached to the parties or attorneys of record, shown below, on August 23, 2010.

UNITED STATES ATTORNEY

BY: s/ S. Van Weelden

COPIES TO: Counsel of record