NO. _____

In the
Supreme Court of the United States

SHOLOM RUBASHKIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Federal Rule of Criminal Procedure 33 requires a criminal defendant with newly discovered evidence that goes not to guilt or innocence but to the fundamental fairness of his criminal trial—here, that the trial judge should have been recused under 28 U.S.C. § 455(a)—to show nonetheless that the new evidence would probably lead to his acquittal.

2. Whether a sentence is unreasonable when a district court fails to consider and explain on the record, as required by this Court's precedents, its basis for rejecting a defendant's nonfrivolous argument for a below-Guidelines sentence—resulting in, here, a 27-year sentence for a first-time, nonviolent offender that is significantly greater than sentences for similarly situated individuals.

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PETITION FOR CERTIORARI

Petitioner Sholom Rubashkin respectfully petitions this Court for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit to review the judgment in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1-40) is reported at 655 F.3d 849. The district court's order denying petitioner's motion for a new trial (App. 43-68) is unpublished. The district court's sentencing memorandum (App. 69-135) is reported at 718 F. Supp. 2d 953.

JURISDICTION

The judgment of the court of appeals was entered on September 16, 2011. A petition for rehearing was denied on November 3, 2011. App. 41-42. On January 18, 2012, Justice Alito extended the time for filing a petition for a writ of certiorari to and including April 2, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

FEDERAL STATUTES AND RULE INVOLVED

Relevant portions of the federal statutes and rule involved in this case—18 U.S.C. § 3553(a), 28 U.S.C. § 455(a), and Federal Rule of Criminal Procedure 33—are reproduced at App. 171-75.

STATEMENT OF THE CASE

Following a May 2008 raid on the meatpacking plant he managed, petitioner Sholom Rubashkin was convicted of various financial crimes. The government sought a 25-year sentence against the 51-year old, first-time offender, even though it would

result in unwarranted sentencing disparities with similarly situated defendants, contrary to 18 U.S.C. § 3553(a)(6). Ignoring the disparity argument, the district court went beyond the government's recommendation and imposed a 27-year sentence, an effective life sentence.

After sentencing, Mr. Rubashkin received the results of a pretrial FOIA lawsuit that revealed that the trial judge had been far more involved in the government's investigation than she had previously disclosed—at least twelve *ex parte* meetings with prosecutors and federal agents regarding the raid's planning and execution. Based on this evidence, Mr. Rubashkin moved for a new trial under Federal Rule of Criminal Procedure 33, asserting that the judge should have been recused under 28 U.S.C. § 455(a) because of an appearance of partiality. The judge denied the motion as well as requests that she refer the matter to another judge and that an evidentiary hearing be held.

The Eighth Circuit affirmed based on a *non sequitur*: It applied a standard denying consideration of newly discovered evidence unless the evidence "probably will result in an acquittal upon retrial." Under that standard, new evidence relating to the fundamental fairness of the proceedings, but not guilt or innocence, can never be considered, no matter how probative. The Eighth Circuit also held that Mr. Rubashkin's extraordinary 27-year sentence was reasonable, notwithstanding the district court's failure to address his disparity argument.

A. The Raid on Agriprocessors

On May 12, 2008, approximately 600 Immigration and Customs Enforcement (ICE) agents raided Agriprocessors, Inc., a Postville, Iowa, kosher meatpacking plant managed by petitioner Sholom Rubashkin. App. 2, 4-5; Pet. C.A. Br. 5-6. ICE arrested almost 400 Agriprocessors employees and charged them with criminal immigration violations. App. 5. Federal prosecutors concurrently informed Mr. Rubashkin that he was being investigated for financial and immigration crimes. *Id.* Seven superseding indictments were issued, expanding the initial financial and immigration charges against Mr. Rubashkin into 163 counts. *Id.*

A separately charged Agriprocessors employee filed a motion to recuse the judge presiding over his case—the same judge presiding over Mr. Rubashkin's case. App. 6. The motion cited publicly available documents indicating the judge's knowledge of the raid before its execution. *Id.*; U.S. C.A. App. 42-357. The judge denied the motion, describing her role as minor and ministerial. U.S. C.A. App. 429-40. The judge stated that she performed duties only "in her official capacity" to ensure "logistical cooperation." *Id.* at 434.

B. Mr. Rubashkin's Trial and Sentencing

The district court severed the 91 financial charges against Mr. Rubashkin from the 72 immigration charges and, over his objection, tried the former first. App. 6. The financial charges against Mr. Rubashkin included bank, wire, and mail fraud, making false statements to a bank, and money laundering. *Id.* at 5. Trial evidence

concerned Mr. Rubashkin's inflation of the value of collateral underlying a revolving loan and temporary diversion of customer payments to facilitate cash draws. The prosecution also contended that Mr. Rubashkin had made false statements by attesting that the company was complying with all laws, when it was allegedly violating immigration laws. *Id.* at 3-4.

The presiding judge made many pretrial and trial rulings that prejudiced Mr. Rubashkin's defense. For example, she denied his request to have the immigration charges tried first. App. 16-18. She also permitted the prosecution to present evidence of immigration violations even though that evidence was irrelevant to the financial charges, its probative value was substantially outweighed by its prejudicial effect, and its admission contradicted the purpose of severing the immigration charges. *Id.* at 19. She barred defense evidence that Mr. Rubashkin had retained immigration counsel (and thereby had not knowingly violated immigration laws). *Id.* at 21. And she refused to dismiss the money-laundering counts notwithstanding that, under *United States v. Santos*, 553 U.S. 507 (2008), the conduct on which they were based improperly merged with the predicate offenses. App. 26-29. The jury found Mr. Rubashkin guilty on 86 counts. *Id.* at 2.

At sentencing, the government initially appeared to seek life imprisonment for Mr. Rubashkin, prompting a letter to the court from an extraordinary bipartisan group of six former United States Attorneys General and seventeen high-ranking former federal prosecutors and Department of Justice officials. The signatories expressed

concerns over "how the federal sentencing guidelines may be deployed" in Mr. Rubashkin's case, and stated that they could not "fathom how truly sound and sensible sentencing rules could call for a life sentence—or anything close to it—for Mr. Rubashkin." They additionally indicated that "a short term of incarceration" would achieve both "just punishment and deterrence." Pet. C.A. App. 262-67.

The government ultimately urged the functional equivalent of life imprisonment on the 51-year old, first-time offender by requesting a 25-year sentence. Pet. C.A. Br. 16. The defense responded that he was a first-time nonviolent offender, had benign motives, was extremely charitable and involved civically, had a large family with an autistic son, and posed no risk of recidivism. App. 38, 127-33; Pet. C.A. Br. 15-16. Mr. Rubashkin also specifically argued that, under 18 U.S.C. § 3553(a)(6), the 25-year sentence the government urged was wildly disparate from similarly situated offenders. Pet. C.A. Br. at 17. Numerous witnesses testified in his support, and the court received hundreds of letters from those whose lives Mr. Rubashkin had positively affected. *See* Pet. C.A. App. 189-209, 214-35. By contrast, the government presented two victim-impact statements, both from representatives of one cattle-supply cooperative that allegedly lost $4,000 from late payments. *Id.* at 209-14.

After dramatically increasing Mr. Rubashkin's offender level by finding that he caused $27 million in loss to the bank, the judge imposed a 27-year within-Guidelines sentence, two years *more* than the government's request. App. 91-102, 133. The judge refused to impose a sentence below the Guidelines

range that her factual finding had established, and she never responded to Mr. Rubashkin's § 3553(a)(6) disparity argument. *Id.* at 129-33.

Iowa state prosecutors also filed over *9,000* misdemeanor counts against Mr. Rubashkin. Of this seemingly unprecedented number, only 67 were ultimately submitted to an Iowa state jury. Mr. Rubashkin was found not guilty on *all* counts. Pet. C.A. Br. 21.

C. The Results of the FOIA Request and Mr. Rubashkin's Motion for a New Trial

Before his trial, concerned that more evidence regarding the trial judge's involvement in the Agriprocessors raid might exist than was publicly available, Mr. Rubashkin had initiated a FOIA lawsuit requesting ICE documents. App. 7. After initially contesting the request, ICE provided redacted documents after Mr. Rubashkin's sentencing. *Id.* at 8. The disclosed emails, memoranda, and presentations demonstrated that between October 2007 and May 2008 the judge had extensively participated in meetings with ICE agents and prosecutors regarding, as one document stated, both "planning" and "operational"—not just logistical—aspects of the raid. *Id.* at 8-9; Pet. C.A. App. 309.

For example, on October 10, 2007, almost seven months before the raid, prosecutors gave the judge a "briefing" regarding "the number of criminal prosecutions that they intend[ed] to pursue relative to th[e] investigation" of Agriprocessors. Pet. C.A. App. 268. Prosecutors also met with the judge to discuss which possible dates for the raid would

"meet[] her scheduling needs." *Id.* at 271. The raid's date was ultimately "set by the availability of the courts." *Id.* at 304.

In a January 2008 meeting with ICE agents and prosecutors held at the judge's request, the judge "made it clear" that she was "willing to support the operation in any way possible." Pet. C.A. App. 276. The judge again met with ICE agents and prosecutors in March 2008, during which they discussed "charging strategies, numbers of anticipated arrests and prosecutions, logistics, the movement of detainees, and other issues related to the … investigation and operation." *Id.* at 278. Several weeks later, the judge "requested a briefing on how the operation [would] be conducted" and directed prosecutors to provide her with a "final gameplan." *Id.* 280-81. The first assistant United States Attorney provided such a presentation to the judge, who was described as a "stakeholder[]" in the operation. *Id.* at 280, 308.

The FOIA documents demonstrated that the raid was directed at not only undocumented employees but also higher-level executives such as Mr. Rubashkin. A presentation prepared by ICE specifically described one of the raid's "objectives" as "[i]dentify[ing] any criminal acts committed by … officials of the company." Pet. C.A. App. 289. ICE "believe[d] that one or more company officials may have knowledge of criminal conduct … and may even be culpable themselves." *Id.* at 290. The only "officials" the presentation specifically identified were Mr. Rubashkin's father, who founded and owned Agriprocessors, and Mr. Rubashkin himself,

who was identified as "[t]he Vice-President of the company." *Id.* at 284.

Based on this newly discovered evidence demonstrating the remarkable and previously undisclosed extent of the judge's pre-raid involvement, Mr. Rubashkin filed a motion in the district court for a new trial pursuant to Federal Rule of Criminal Procedure 33. App. 10. The motion also sought discovery of additional *ex parte* communications and requested that a different judge be assigned to decide the motion. *Id.* The judge herself denied the motion without a hearing. *Id.* at 10, 68.

D. The Eighth Circuit's Decision

The Eighth Circuit affirmed the conviction and sentence and the denial of the Rule 33 motion. App. 1-40. It stated that under "clear and binding" Eighth Circuit precedent, a Rule 33 motion for a new trial based on newly discovered evidence must show that "the newly discovered evidence probably will result in an acquittal upon retrial." *Id.* at 12-13 (citing *United States v. Baker*, 479 F.3d 574, 577 (8th Cir. 2007)) (ellipsis and internal quotation marks omitted). Because, in the court's view, Mr. Rubashkin had "concede[d]" that his newly discovered evidence concerning the judge's pre-raid involvement "does not relate to acquittal," he could not prevail on his motion. *Id.* at 12.

The Eighth Circuit expressly rejected Mr. Rubashkin's contention that where new evidence is directed at a trial's fairness rather than the defendant's potential innocence, a Rule 33 movant need not demonstrate a probability that the new

evidence will result in acquittal. App. 12-13. The court acknowledged that decisions in other circuits had considered motions raising new evidence concerning the fundamental fairness of the proceedings and applied a different standard in so doing. *Id.* It held, however, that in contrast, the Eighth Circuit rule was "clear and binding": "The rule *requires* that the newly discovered evidence 'probably will result in an acquittal.'" *Id.* at 13 (quoting *Baker*, 479 F.3d at 577) (emphasis in original).

The court of appeals also briefly addressed whether 28 U.S.C. § 455(a) required the trial judge to recuse herself. App. 13-15. It did so under a plain-error standard of review because, apart from the rejected Rule 33 motion, Mr. Rubashkin "did not make a timely recusal motion"—notwithstanding that his trial counsel could not, and did not, know of the relevant evidence until after the FOIA documents were released following sentencing. *Id.* at 14. The court stated that Mr. Rubashkin was essentially arguing that the district court should have recused herself *sua sponte* and concluded: "We have never found that a district court plainly erred in this fashion, and we are reluctant to do so now." *Id.*

The court of appeals also upheld Mr. Rubashkin's 27-year sentence as reasonable. App. 35-40. As to Mr. Rubashkin's contention that his sentence was procedurally unreasonable because the district court never addressed, let alone explained, its basis for rejecting his § 3553(a)(6) disparity argument, the court of appeals held that district courts must simply "consider the factors laid out in

[§ 3553(a)]." *Id.* at 39. It then erroneously stated that the district court "explicitly discussed each possible basis" for a below-Guidelines sentence. *Id.*

The court also concluded that Mr. Rubashkin's 27-year sentence was substantively reasonable. App. 39-40. Applying both "'a deferential abuse-of-discretion standard'" and a presumption of reasonableness for within-Guidelines sentences, the court held that Mr. Rubashkin's sentence was reasonable because it was "within the guideline range." *Id.* at 39. As for Mr. Rubashkin's age, charitable acts, community involvement, and family obligations, those factors, the court stated, were the "very characteristics that the district court properly took into account when considering the § 3553(a) factors." *Id.* Accordingly, the court held, the district court "did not abuse its considerable discretion" in imposing a 27-year sentence. *Id.* at 40.

The court of appeals denied Mr. Rubashkin's petition for rehearing and rehearing en banc (with three judges recusing themselves). App. 41-42.

REASONS FOR GRANTING THE PETITION

This case presents two issues of extraordinary importance to both criminal defendants and the proper functioning of the criminal justice system as a whole. In the decision below, the Eighth Circuit first held that a criminal defendant seeking a new trial based on newly discovered evidence casting doubt on the fundamental fairness of the trial—here, evidence that the trial judge should have never sat on this case—must demonstrate that the new evidence will probably result in acquittal upon retrial. But applying a "probable acquittal" standard for new

evidence that does not go to guilt or innocence is a complete *non sequitur*. Nevertheless, when confronted with the argument that its "probable acquittal" standard makes no sense when the new evidence goes not to guilt or innocence, but suggests judicial bias or prosecutorial misconduct, the Eighth Circuit held firm: Even in those circumstances, its rule "is clear and binding" and "*requires* that the newly discovered evidence probably will result in an acquittal." The rule is illogical and conflicts with the approach of numerous other circuits.

The Eighth Circuit also erred in refusing to demand analysis of and justification for the grossly disparate sentence in this case. While perpetrators of massive frauds depriving thousands of stakeholders of their life savings are treated leniently, here a first-time offender received a functional life sentence. The disparity and unfairness is eye-popping and has garnered the attention of numerous former high-ranking Justice Department officials. But the district court did not even address the disparity, let alone justify it, and in stark contrast to other circuits, the Eighth Circuit endorsed that procedurally inadequate analysis.

In short, when a criminal defendant discovered new evidence suggesting the trial judge should never have sat on his case, he was told that the courts would not even consider the evidence because it did not go to guilt or innocence. And when he presented evidence that the sentence here was wildly disparate, he was told that the courts need not even explain the basis for the disparity. Not only are these results doubly unjust, they implicate issues on which the courts of appeals are badly divided and

desperately in need of guidance. Both issues implicate the public confidence in the fundamental fairness of our criminal justice system and merit this Court's plenary review.

I. THE COURT SHOULD GRANT REVIEW TO REVERSE THE EIGHTH CIRCUIT'S UNIQUE LIMITING CONSTRUCTION OF RULE 33 THAT BARS MOTIONS FOR A NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE THAT THE TRIAL WAS FUNDAMENTALLY UNFAIR.

The Eighth Circuit's "clear and binding" rule forecloses motions for a new trial based on newly discovered evidence demonstrating a trial's fundamental unfairness rather than the defendant's factual innocence. That erroneous result conflicts with the decisions of this Court and other circuits and warrants the Court's review.

A. The Court Of Appeals' Decision Conflicts With The Decisions Of Other Courts Of Appeals.

Federal Rule of Criminal Procedure 33 provides that "[u]pon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). A new trial motion must generally be filed within fourteen days after the verdict, but a motion "grounded on newly discovered evidence" may be filed within three years after the verdict. *Id.* 33(b). This distinction, as the Court observed with respect to Rule 33's predecessor, is intended to provide for relief when it later appears that "because of facts

unknown at the time of trial, substantial justice was not done." *United States v. Johnson*, 327 U.S. 106, 112 (1946).

The typical Rule 33 motion grounded on newly discovered evidence will suggest that "substantial justice was not done" by identifying newly discovered evidence going to the defendant's factual innocence. The courts of appeals are in agreement that, in that context, it makes eminent sense to require the defendant to show that the newly discovered evidence probably will result in an acquittal upon retrial. *See, e.g.*, *United States v. Robinson*, 627 F.3d 941, 948 (4th Cir. 2010); *United States v. Owen*, 500 F.3d 83, 87-88 (2d Cir. 2007); *United States v. Harrington*, 410 F.3d 598, 601 (9th Cir. 2005); *United States v. Higgins*, 282 F.3d 1261, 1278 (10th Cir. 2002); *United States v. Erwin*, 277 F.3d 727, 732 (5th Cir. 2001); *United States v. Seago*, 930 F.2d 482, 488 (6th Cir. 1991); *United States v. Sjeklocha*, 843 F.2d 485, 487 (11th Cir. 1988); *cf. United States v. Agurs*, 427 U.S. 97, 111 n.19 (1976). The Eighth Circuit has likewise adopted this requirement. *See* App. 12 (citing *Baker*, 479 F.3d at 577).

The courts of appeals have also recognized, however, that not all newly discovered evidence goes to guilt or innocence. "Newly discovered evidence need not relate directly to the issue of guilt or innocence to justify a new trial, 'but may be probative of another issue of law.'" *United States v. Campa*, 459 F.3d 1121, 1151 (11th Cir. 2006) (quoting *United States v. Beasley*, 582 F.2d 337, 339 (5th Cir. 1978) (per curiam)); *see also* 3 Charles Alan Wright et al., *Federal Practice & Procedure* § 583 (4th ed. 2011). Rule 33 may thus encompass newly

discovered evidence that "goes to the fairness of the trial rather than to the question of guilt or innocence." *United States v. Williams*, 613 F.2d 573, 575 (5th Cir. 1980). And where the newly discovered evidence "goes to the fairness of the trial," but not guilt or innocence, at least seven courts of appeals have understood that a "probability of acquittal" standard is completely out of place, and have not required the defendant to make that showing. When the Eighth Circuit confronted that same situation, it stubbornly insisted that such a showing is always required.

Holmes v. United States, 284 F.2d 716 (4th Cir. 1960), typifies the law in other circuits. There, convicted defendants learned after trial that, during trial, a marshal had revealed to a juror that one of the defendants was incarcerated on another charge. *Id.* at 718. The Fourth Circuit acknowledged that in the usual Rule 33 case, newly discovered evidence must be "likely to lead to an acquittal on a new trial," and defendants' new evidence "would be entirely irrelevant on a subsequent trial." *Id.* at 719. The court nonetheless rejected "import[ing] into the procedural rule the standards for appraisal of a particular kind of newly discovered evidence." *Id.* The court explained that "[w]hen the newly discovered evidence bears upon the substantive issue of guilt," attention is appropriately placed upon "its admissibility upon a subsequent trial and its probable effect upon the result of that trial." *Id.* at 720. But where the newly discovered evidence "bears upon the integrity of the earlier trial," a "different set of standards" applies. *Id.* Applying this construction of Rule 33, the Fourth Circuit held

that the improper communication affected the "integrity of the jury's verdict," and it ordered a new trial. *Id.*

In *United States v. McCarthy*, 54 F.3d 51 (2d Cir. 1995), the Second Circuit similarly observed that the usual Rule 33 case requires a showing that newly discovered evidence "would probably lead to an acquittal." *Id.* at 55 (internal quotation marks omitted). The court declined to apply that standard because the newly discovered evidence "pertain[ed] not to the defendant's guilt, but to his competency to stand trial." *Id.* In *Rubenstein v. United States*, 227 F.2d 638 (10th Cir. 1955), the defendant discovered after his trial that government agents had improperly contacted members of his jury, thereby denying him "a fair and just trial." *Id.* at 642. The Tenth Circuit vacated the conviction without requiring the defendant to establish that his newly discovered evidence probably would result in acquittal upon retrial. And at least four other courts of appeals have held likewise, across varying types of newly discovered evidence bearing not on guilt or innocence, but on the trial's fundamental fairness. *See United States v. Elso*, 364 F. App'x 595 (11th Cir. 2010) (evidence of judicial bias); *United States v. Conforte*, 624 F.2d 869 (9th Cir. 1980) (Kennedy, J.) (evidence of judicial bias); *Williams*, 613 F.2d 573 (evidence of *ex parte* communication between court and juror); *Horton v. United States*, 256 F.2d 138 (6th Cir. 1958) (evidence of handbook distributed to jurors).

In stark contrast, the Eighth Circuit held below that even when newly discovered evidence goes toward not guilt or innocence but the trial's

fundamental fairness—such as, here, whether the trial judge should have ever sat on the case—a defendant nevertheless *must* establish that the new evidence probably will result in acquittal upon retrial. App. 12-13. This was no oversight; the court squarely rejected Mr. Rubashkin's argument that the general rule for cases where the newly discovered evidence goes to guilt or innocence should not apply to evidence going to fundamental fairness, and it insisted that there is just one test in the Eighth Circuit. "[T]he standard in [this] circuit" is "clear and binding," and "*requires* that the newly discovered evidence probably will result in an acquittal." *Id.* at 13 (quoting *Baker*, 479 F.3d at 577) (emphasis in original) (internal quotation marks omitted). Only one other circuit has even suggested that the "probable acquittal" standard applies when new evidence does not concern guilt or innocence. *See United States v. Dunkel*, 986 F.2d 1425 (7th Cir. 1993) (unpublished).

The Eighth Circuit's decision thus creates a split among the circuits over whether, in a motion for a new trial based on new evidence concerning the fairness of the trial, a defendant must establish that the new evidence will probably result in an acquittal upon retrial. Had Mr. Rubashkin been prosecuted in any of the circuits that have properly dispensed with that requirement, his new trial motion would have received the full airing that the "interest of justice" demands. Indeed, the Eighth Circuit's decision conflicts with decisions of the Fourth, Ninth, and Eleventh Circuits addressing the specific context of newly discovered evidence concerning judicial impropriety. *See Elso*, 364 F. App'x at 597-98;

United States v. Agnew, 147 F. App'x 347, 352-53 & n.4 (4th Cir. 2005) (citing *Holmes*); *Conforte*, 624 F.2d at 878-82. The Court's review is therefore necessary to resolve the divide among the courts of appeals.

B. The Court Of Appeals Failed to Distinguish This Case From Conflicting Decisions In Other Circuits.

The Eighth Circuit erred in holding that a Rule 33 motion based on newly discovered evidence may only succeed if the evidence "probably will result in an acquittal." As other circuits have recognized, that test makes sense when the newly discovered evidence concerns the defendant's guilt or innocence, but is a complete misfit when the newly discovered evidence concerns the fairness of a trial. The Eighth Circuit is simply wrong to insist on driving a square peg into a round hole. Imposing a *per se* "probable acquittal" requirement for all new trial motions based on newly discovered evidence would foreclose consideration of evidence plainly calling into question a trial's fairness simply because that critical evidence happened to have been discovered after, rather than during, trial. That result is as unsound as it is unprecedented.

The plain language of Rule 33 does not condition relief on a "particular kind of newly discovered evidence." *Holmes*, 284 F.2d at 718. To the contrary, Rule 33 authorizes a district court to vacate a judgment and grant a new trial "if the interest of justice so requires." That is a "broad standard," *United States v. Vicaria*, 12 F.3d 195, 198

(11th Cir. 1994), and the rule accordingly "confers broad discretion on a district court" to grant a new trial, *United States v. Prescott*, 221 F.3d 686, 688 (4th Cir. 2000). The Eighth Circuit improperly curtails that discretion by prohibiting a district court from granting a new trial if evidence brought to its attention after the verdict does not bear on the defendant's guilt or innocence.

The Eighth Circuit attempted to distinguish the decisions of other circuits by asserting that "[m]ost" of them involved "the possibility of a new trial following discovery of a *Brady* violation." App. 12-13. In fact, the decisions in other circuits covered a broad array of newly discovered evidence challenging the fairness of a trial. *See McCarthy*, 54 F.3d at 55 (competency to stand trial); *Conforte*, 624 F.2d at 878 (judicial bias); *Williams*, 613 F.2d at 574-75 (*ex parte* communication between court and juror). Indeed, almost *none* of the cases comprising the circuit split involved newly discovered evidence supporting a *Brady* claim.

Regardless, the court's explanation that because "a *Brady* violation involves the withholding of exculpatory evidence from the defense," such cases are "far more likely to result in an acquittal" than the circumstances here, is unavailing. App. 13. At most, that would be an argument for treating new evidence of *Brady* violations the same as new evidence demonstrating guilt or innocence that prosecutors did not withhold. It could certainly be argued that the prosecutorial misconduct implicated by *Brady* violations involves more fundamental and structural concerns, such that the probable acquittal standard is inappropriate. *Cf. Kyles v. Whitley*, 514

U.S. 419, 434-35 (1995) (suggesting the withheld evidence must "'undermine[] confidence in the outcome of the trial'"); *Agurs*, 427 U.S. at 111 (defendant need not "satisfy the severe burden of demonstrating that newly discovered evidence probably would have resulted in acquittal"). But whatever the proper standard for evaluating *Brady* violations, when the newly discovered evidence suggests the trial judge should have never sat on the case, insisting that newly discovered evidence make it probable that the defendant would have been acquitted simply makes no sense.

The Eighth Circuit's decision is especially misguided given that the new evidence concerned judicial impartiality, which is so necessary an antecedent to any fair consideration of guilt or innocence that its absence constitutes structural error automatically requiring reversal. *See Neder v. United States*, 527 U.S. 1, 8 (1999); *Tumey v. Ohio*, 273 U.S. 510 (1927). The absence of an impartial adjudicator also calls a defendant's sentence into doubt now that district courts enjoy broad sentencing discretion. The Eighth Circuit's ruling undercuts these principles and other decisions of the Court identifying similar errors "affect[ing] the framework within which the trial proceeds." *United States v. Marcus*, 130 S. Ct. 2159, 2164-65 (2010) (quoting *Johnson v. United States*, 520 U.S. 461, 468 (1997)) (internal quotation marks omitted). More generally, defendants are not normally required to establish that they "probably" would have been acquitted had their trial been fair. *See, e.g.*, *United States ex rel. Hampton v. Leibach*, 347 F.3d 219, 246 (7th Cir. 2003) ("[P]rejudice has been established so

long as the chances of acquittal are better than negligible.")

Under the Eighth Circuit's unique limitation on Rule 33, criminal defendants can never obtain a new trial if they have newly discovered evidence casting doubt upon the fundamental fairness of the trial—no matter how compelling—absent a demonstration of factual innocence. The decision creates the very real possibility that an individual could obtain evidence that he was denied an impartial adjudicator—one of the cornerstones of a fair trial—but would have no recourse since that evidence would not directly bear on his guilt or innocence. That is fundamentally inconsistent with the decisions of this Court and other circuits and the "interest of justice" articulated in Rule 33 itself. The Court's intervention is necessary to forestall this undesirable outcome.

C. The Issue Warrants The Court's Review In This Case Because The Newly Discovered Evidence Demonstrates That The Trial Judge Should Have Been Recused Under 28 U.S.C. § 455(a).

The potential for the Eighth Circuit's decision to foreclose meritorious claims of trial unfairness based on newly discovered evidence was realized in this case, making it an ideal vehicle for addressing the question presented. Under this Court's decision in *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988), the trial judge should have been recused because her "impartiality might reasonably be questioned." 28 U.S.C. § 455(a).

The FOIA documents revealed that the judge engaged in numerous *ex parte* communications with prosecutors and ICE agents when they were planning the very raid that led to Mr. Rubashkin's arrest and conviction. These extensive and repeated interactions were never revealed to Mr. Rubashkin or his counsel. Instead, in rejecting the recusal motion brought by an Agriprocessors employee, the judge downplayed her pre-raid participation as involving, at most, "logistical cooperation." But the newly discovered evidence demonstrated far more involvement than the judge previously let on and certainly enough that her "impartiality might reasonably be questioned":

(a) Almost seven months before the raid took place, the judge began meeting with prosecutors and ICE agents in regular "operational/planning meeting[s]."

(b) In the months leading up to the raid, the judge, prosecutors, and ICE agents discussed "charging strategies, numbers of anticipated arrests and prosecutions, … and other issues related to the … investigation and operation."

(c) The judge received a "briefing" regarding the anticipated prosecutions from government agents and attorneys who had specifically identified Mr. Rubashkin as a potential target for criminal charges.

(d) The judge "made it clear" to prosecutors and ICE agents that she was "willing to support the operation in any way possible."

(e) Shortly before the raid—the timing of which was set according to her needs—the judge directed

prosecutors to provide her with a "final gameplan." For good reason, therefore, the lead prosecutor working on the raid—who provided her with the requested "gameplan"—considered the judge a "stakeholder" in the operation.

Two of the nation's leading experts on legal ethics, Mark Harrison (former Chair of the American Bar Association's Committee on Revision of the Code of Judicial Conduct) and Stephen Gillers (author of the leading works on legal ethics), have opined that the conduct of the judge and prosecutors in this case violated ethical canons and that the judge should have been recused under 28 U.S.C. § 455(a). *See* App. 136-70. The Eighth Circuit's Rule 33 ruling, however, forecloses consideration of *any* of this evidence because it does not directly bear on Mr. Rubashkin's guilt or innocence.

The Eighth Circuit purported to assess whether the trial judge should have recused herself, but because of its erroneous Rule 33 holding, it applied plain-error review, asserting that Mr. Rubashkin's failure to move for recusal justified that higher standard. But the judge's participation in planning the raid had been kept from Mr. Rubashkin, and therefore he could not have been expected to move for her recusal. There is thus no merit either to the Eighth Circuit's reformulation of the issue as whether the judge should have recused *sua sponte*, or to its conclusion that it has never found recusal mandatory in such circumstances, and was "reluctant to do so now." App. 14.

In *Liljeberg*, this Court explicitly considered and ruled on the comparable situation in a civil case.

The issue in *Liljeberg* was whether a party to a civil case could invoke Federal Rule of Civil Procedure 60(b) to assert a violation of § 455(a) if the violation "is not discovered until after the judgment has become final." 486 U.S. at 858. This Court held that Rule 60(b) may be invoked in such circumstances, *id.* at 863-64, and it addressed the § 455(a) claim under standard appellate review, not a plain-error standard, *id.* at 864-70. The Court then found that the judge's conduct created grounds for recusal and reversed the judgment. *Id.*

In this criminal case, Mr. Rubashkin's § 455(a) claim was made under the Federal Rules of Criminal Procedure, rather than under Civil Rule 60(b), but there is no principled basis for a different result. Both rules are guided by broad standards of justice. *See* Fed. R. Civ. P. 60(b) (permitting court to vacate civil judgment on "just terms"); Fed. R. Crim. P. 33(a) (permitting court to vacate criminal judgment in the "interest of justice"). Just as Rule 33 confers broad discretion upon district courts, *see* pp. 17-18, *supra*, Rule 60(b) "grants federal courts broad authority to relieve a party from a final judgment." *Liljeberg*, 486 U.S. at 863. Rule 33 is the criminal law analog of Rule 60(b), and the same approach this Court took to Rule 60(b) in *Liljeberg* applies here.

No other court of appeals that has considered a Rule 33 motion premised on newly discovered evidence demonstrating a lack of judicial impartiality has applied a plain-error standard to that claim—on this question, the Eighth Circuit again stands alone. *See Elso*, 364 F. App'x at 597-98; *Agnew*, 147 F. App'x at 352-53; *Conforte*, 624 F.2d at 878-82. And not only did the Eighth Circuit apply

the inapposite plain-error standard; because of its erroneous Rule 33 ruling, it failed materially to discuss any of the newly discovered evidence bearing on the judge's partiality. Nor did it discuss the separate but equally important question of whether the trial judge should have assigned Mr. Rubashkin's motion to another judge, particularly given that she disputed aspects of the account reflected in the FOIA materials.

There are other reasons that this case is an excellent vehicle for addressing whether a defendant must show that newly discovered evidence implicating the fairness of a trial will probably result in an acquittal. First, there are no antecedent questions the court must answer before addressing that question. The Eighth Circuit affirmed the denial of Mr. Rubashkin's new trial motion solely because of his failure to make the required showing. App. 13. Second, the Eighth Circuit squarely addressed the question presented, and it not only stated that its standard was "clear and binding" but denied rehearing en banc, ensuring that its rule will remain in place absent the Court's intervention.

Few aspects of the criminal justice system are more important than a fair trial conducted by an impartial judge. *See Weiss v. United States*, 510 U.S. 163, 178 (1994) ("A necessary component of a fair trial is an impartial judge."); *Bridges v. California*, 314 U.S. 252, 282 (1941) (Frankfurter, J., dissenting) ("The administration of justice by an impartial judiciary has been basic to our conception of freedom ever since Magna Carta."). If evidence comes to light after trial casting doubt on the impartiality of the presiding judge, defendants should have the means

to seek a new trial based on that evidence. Mr. Rubashkin was deprived of that opportunity by the Eighth Circuit's aberrant, erroneous, and disquieting decision. This Court's review is necessary for him to receive the fair trial he was denied.

II. THE COURT SHOULD GRANT REVIEW TO DECIDE WHETHER A SENTENCE IS REASONABLE UNDER THIS COURT'S *RITA* AND *GALL* DECISIONS IF THE DISTRICT COURT FAILS TO CONSIDER AND EXPLAIN ON THE RECORD THE BASIS FOR REJECTING A NONFRIVOLOUS ARGUMENT FOR A BELOW-GUIDELINES SENTENCE.

This Court's review is also necessary to resolve a split among the circuits over whether reasonableness review requires a sentencing court to consider and explain on the record its basis for rejecting a defendant's nonfrivolous argument for a sentence below the Federal Sentencing Guidelines range. In this case, the district court wholly failed to explain why it rejected Mr. Rubashkin's argument under 18 U.S.C. § 3553(a) that a within-Guidelines sentence would result in an unwarranted disparity as compared to similarly situated defendants. Consistent with circuit precedent but contrary to decisions of this Court and other courts of appeals, the Eighth Circuit approved such silence by affirming the imposition on a first-time, nonviolent offender of an extraordinary 27-year sentence.

A. The Federal Courts Of Appeals Are Divided On The Issue.

This Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), ushered in a new era of federal appellate review of the reasonableness of sentencing decisions under the now-non-mandatory Guidelines. *See id.* at 226-27, 245, 261-63. Sentencing courts need only consider the applicable Guidelines range as one of the "numerous factors that guide sentencing" set forth in 18 U.S.C. § 3553(a). *Id.* at 261. Those same factors "guide appellate courts" in determining whether a sentence is reasonable. *Id.*

In *Rita v. United States*, 551 U.S. 338 (2007), and *Gall v. United States*, 552 U.S. 38 (2007), this Court clarified that an appellate court conducting reasonableness review must first ensure that the sentencing court "committed no significant procedural error," which includes "failing to consider the § 3553(a) factors." *Id.* at 51. The appellate court must next consider the "substantive reasonableness" of the sentence, under an abuse-of-discretion standard. *Id.* In so doing, an appellate court may apply a "presumption of reasonableness" to a within-Guidelines sentence. *Id.*

The Court also clarified the nature of sentencing proceedings. District courts must first calculate the applicable Guidelines range correctly, then give parties an opportunity to argue for "whatever sentence they deem appropriate," and finally "consider all of the § 3553(a) factors to determine whether they support the sentence requested by a party." *Id.* at 49-50. Upon determining a sentence, the judge must "adequately explain the chosen

sentence to allow for meaningful appellate review," *id.* at 50, setting forth "enough [explanation] to satisfy the appellate court that he has considered the parties' arguments and had a reasoned basis for exercising his own legal decisionmaking authority," *Rita*, 551 U.S. at 356. If the judge applies the Guidelines and no party has sought a different sentence, a "lengthy explanation" is generally not required. *Id.* at 356-57. But "[w]here the defendant or prosecutor presents nonfrivolous reasons for imposing a different sentence," the judge "will normally go further and explain why he has rejected those arguments." *Id.* at 357.

Since these decisions, the courts of appeals have divided over whether procedural reasonableness requires a sentencing judge to "explain why he has rejected" a defendant's "nonfrivolous reason[] for imposing a different sentence" than the one provided by the Sentencing Guidelines. The Third, Sixth, and Seventh Circuits have held that for a sentence to be procedurally reasonable, a sentencing court *must* consider and explain on the record its reasons for rejecting a defendant's nonfrivolous argument for a lower sentence. The Sixth Circuit said in *United States v. Gapinski*, 561 F.3d 467 (6th Cir. 2009), that "'when a defendant raises a particular, nonfrivolous argument in seeking a lower sentence, the record must reflect both that the district judge considered the defendant's argument and that the judge explained the basis for rejecting it.'" *Id.* at 474 (quoting *United States v. Lalonde*, 509 F.3d 750, 770 (6th Cir. 2007)) (brackets omitted). The *Gapinski* sentence was vacated as procedurally unreasonable because the record did not reveal that the sentencing

court "ever considered or explained its reasons for rejecting Gapinski's argument for a lower sentence" based on cooperation with the government. *Id.* at 475.

In *United States v. Ausburn*, 502 F.3d 313 (3d Cir. 2007), the Third Circuit held that while "review in this area is necessarily flexible," there is "one concrete requirement" to ensure that a sentencing court gives "meaningful consideration to the relevant § 3553(a) factors": The sentencing court "must acknowledge and respond to any properly presented sentencing argument which has colorable legal merit and a factual basis." *Id.* at 328-29. The *Ausburn* sentence was vacated because the district court had failed to respond to the defendant's demonstration that—as in this case—the proposed sentence would result in "'unwarranted sentence disparities among similarly-situated defendants.'" *Id.* at 330 (quoting 18 U.S.C. § 3553(a)(6)) (brackets omitted). And in *United States v. Miranda*, 505 F.3d 785 (7th Cir. 2007), the Seventh Circuit held that where a defendant "raise[s] nonfrivolous reasons to impose a different sentence, the district court must focus on the section 3553(a) factors as they apply to [the defendant] in particular." *Id.* at 796.

Three other courts of appeals have strongly encouraged, though not required, district courts to explain on the record why they rejected nonfrivolous arguments for a lower sentence. *See United States v. Pulido*, 566 F.3d 52, 64 (1st Cir. 2009) (observing that when the defendant "'advances specific arguments for leniency,'" it is "'reasonable to expect a district court to explain why those specific arguments are or are not persuasive'") (quoting

United States v. Scherrer, 444 F.3d 91, 97 (1st Cir. 2006) (en banc) (Lipez, J., concurring)); *United States v. Carter*, 564 F.3d 325, 328 (4th Cir. 2009); *United States v. Mondragon-Santiago*, 564 F.3d 357, 362 (5th Cir. 2009).

By contrast, the Second, Eighth, Ninth, and Eleventh Circuits have expressly rejected this requirement. In *United States v. Villafuerte*, 502 F.3d 204 (2d Cir. 2007), the Second Circuit acknowledged that "[n]on-frivolous arguments for a non-Guidelines sentence" may "require more discussion" by the district court, but the court held that "we do not insist that the district court address every argument the defendant has made." *Id.* at 210. In *United States v. Gray*, 533 F.3d 942 (8th Cir. 2008), the Eighth Circuit explicitly held that "not every reasonable argument advanced by a defendant" for a below-Guidelines sentence "requires a specific rejoinder by the judge." *Id.* at 944; *accord United States v. Lee*, 553 F.3d 598, 600 (8th Cir. 2009). The Ninth Circuit has held that a district court has "no obligation to address and resolve each of [a defendant's] arguments on the record." *United States v. Carter*, 560 F.3d 1107, 1118-19 (9th Cir. 2009). And the Eleventh Circuit has stated, in the context of sentencing determinations, that "[n]ot every case requires a … response to every argument." *United States v. King*, 433 F. App'x 763, 768 (11th Cir. 2011).[1]

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[1] The Tenth Circuit has taken a unique approach. It requires a sentencing court to address a defendant's "'material, non-frivolous arguments'" when imposing a sentence outside the Guidelines range. *United States v. Lente*, 647 F.3d 1021, 1036

The foregoing disarray among the circuits warrants the Court's intervention. The courts of appeals have adopted categorically different views of what the Court meant in *Rita* and *Gall* when it required a district court to "consider" the § 3553(a) factors and determine on the record whether they support the requested sentence, to "adequately explain the chosen sentence," and to "explain why [the court] has rejected" arguments for imposing a different sentence. Had Mr. Rubashkin been tried in the First, Third, or Seventh Circuits, the district court's failure to explain why it rejected his § 3553(a)(6) argument for a below-Guidelines sentence based on unwarranted sentencing disparities would constitute procedural unreasonableness and require vacatur; indeed, that was the exact basis for the Third Circuit's holding in *Ausburn*. *See* 502 F.3d at 330. Because he was tried in the Eighth Circuit, however, his sentence stands. The Court's review is necessary to bring much-needed clarity and uniformity to this issue.

B. The Court Of Appeals' Decision Is Erroneous.

In the decision below, the Eighth Circuit held that for a sentence to be procedurally reasonable, a sentencing court need only "consider the factors laid out in" 18 U.S.C. § 3553(a), and it concluded the district court had done so in Mr. Rubashkin's case. App. 39. Contrary to other courts of appeals, it did not fault the district court's specific failure to explain

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(10th Cir. 2011). But "[w]hen a district court imposes a within-Guidelines sentence," the court "'need not … respond to every argument for leniency that it rejects.'" *Id.* at 1034.

on the record its basis for rejecting Mr. Rubashkin's § 3553(a)(6) argument that the government's proposed 25-year sentence—and, *a fortiori*, any longer sentence such as the court actually imposed—would result in unwarranted disparities with similarly situated individuals. That ruling was erroneous.

This Court has observed that in the sentencing process, "a statement of reasons is important." *Rita*, 551 U.S. at 356. A sentencing judge must provide enough explanation to satisfy an appellate court that "he has considered the parties' arguments" and "has a reasoned basis for exercising his own legal decisionmaking authority." *Id.* This requirement is especially critical given the deferential abuse-of-discretion standard that "reasonableness" review utilizes, *see Gall*, 552 U.S. at 51, and the presumption of reasonableness that many circuits, including the Eighth Circuit, apply to within-Guidelines sentences, *see Rita*, 551 U.S. at 341; *United States v. Robinson*, 516 F.3d 716, 717 (8th Cir. 2008).

By "articulating reasons, even if brief," a sentencing judge "assures reviewing courts (and the public) that the sentencing process is a reasoned process." *Rita*, 551 U.S. at 357. Consequently, when a defendant "presents nonfrivolous reasons" for a sentence below the Guidelines, a sentencing judge rejecting those reasons will "explain why he has rejected" them. *Id.* That expectation was particularly critical in this case because the within-Guidelines range is substantial, even ranging up to life imprisonment. When, as here, judicial factfinding about a loss amount drives the

Guidelines range to such extremes, a judicial justification for the disparity is the *sine qua non* of any meaningful judicial review.

These salutary policies are undercut, however, when a sentencing court does not explain why it rejected a defendant's particular § 3553(a) argument for a lower sentence and a court of appeals nevertheless deems the sentence procedurally reasonable. Absent such explanation, it becomes all but impossible to determine whether the sentencing court actually "consider[ed]" the specific argument, thereby preventing the appellate court from properly carrying out its reviewing function.

The result is precisely what occurred in this case: The Eighth Circuit made the flatly erroneous statement that the district court "explicitly discussed each possible basis for departure." App. 39. But the district court did no such thing; despite Mr. Rubashkin's contentions both in his sentencing memorandum and at the sentencing hearing that, contrary to § 3553(a)(6), a Guidelines sentence would result in a sentence radically disparate from defendants convicted of similar offenses, *see* Pet. C.A. Br. 87-88, 90-93, the court's sentencing memorandum did not address this argument in the least—much less provide any explanation for rejecting it. A rule under which sentences are procedurally unreasonable absent a court's explanation why it rejected a nonfrivolous § 3553(a) argument—as a number of circuits currently utilize—heightens an appellate court's attentiveness

and prevents sentencing errors of the very type that took place here.[2]

The Eighth Circuit's error was compounded by its cursory review of the substantive unreasonableness of Mr. Rubashkin's sentence. By condoning the district court's failure to explain why it rejected Mr. Rubashkin's § 3553(a)(6) argument, the Eighth Circuit upheld an extraordinary 27-year sentence exceeding those of some of recent history's most infamous fraudsters, whose crimes, unlike Mr. Rubashkin's, deprived countless individuals of their life savings—including Bernard Ebbers, the former CEO of Worldcom (25 years); Marc Dreier, the founder of Dreier LLP (25 years); Jeffrey Skilling, the former CEO of Enron (approximately 25 years); John Rigas, the former CEO of Adelphia Communications (12 years); and Joseph Nacchio, the former CEO of Qwest Communications (approximately 6 years).[3]

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[2] The Eighth Circuit purported to address whether Mr. Rubashkin's sentence "creates unwarranted disparities with similarly situated defendants," concluding that it does not. App. 38. The Eighth Circuit apparently believed that it was being asked to address that question in the first instance; Mr. Rubashkin, however, had argued that the *district court* had failed to address that question. The distinction is critical, since, compared to an appellate court, "'[t]he sentencing judge is in a superior position to find facts and judge their import under § 3553(a).'" *United States v. Gall*, 552 U.S. 38, 51 (2007).

[3] Skilling's sentence, moreover, has been vacated by the Fifth Circuit because the district court calculated a Guidelines sentence that was too high. *See United States v. Skilling*, 554 F.3d 529, 591 (5th Cir. 2009), *vacated in part on other grounds*, 130 S. Ct. 2896 (2010).

The Eight Circuit concluded that this remarkable sentence was substantively reasonable simply by invoking the presumption of reasonableness and stating that Mr. Rubashkin's sentence was "at the low end" of the Guidelines range. It rejected the many factors demonstrating the sentence's substantive unreasonableness by noting that they were the "very characteristics that the district court properly took into account when considering the § 3553(a) factors." App. 39. But the district court did not "properly [take] into account" the § 3553(a) factors, given its failure to respond to Mr. Rubashkin's § 3553(a)(6) argument. More significantly, the Eighth Circuit's single-sentence analysis merely duplicated procedural reasonableness review; consequently, there was no substantive reasonableness review apart from application of the presumption of reasonableness. But the combination of judicial factfinding concerning the fraud loss—which drove the Guidelines range—and a presumption of reasonableness for a within-Guidelines sentence rendered the entire enterprise difficult to square with the Sixth Amendment right to jury factfinding. The absence of any meaningful appellate review thus both conflicts with the promise of this Court's sentencing precedents and raises serious Sixth Amendment difficulties as well.

C. The Issue Is An Important One That Warrants The Court's Review In This Case.

Although the eye-popping functional life sentence in this case has attracted the attention of numerous former Justice Department officials as an

examplar of what ails the federal sentencing system, it demonstrates problems that recur in courts nationwide. Sentencing and reviewing courts, as well as parties, continue to struggle with implementing this Court's recent landmark sentencing decisions. The foregoing circuit split demonstrates critical differences over the obligation of sentencing courts to explain rejections of nonfrivolous arguments for lower sentences. This unresolved question affects nearly every instance of federal criminal sentencing and plainly warrants review.

This case, moreover, is an ideal vehicle for resolving that question. The district court responded to all of Mr. Rubashkin's § 3553(a) arguments for a lower sentence *except* the one that mattered most—his § 3553(a)(6) argument based on sentencing disparities. And there can be little doubt that his § 3553(a)(6) argument is "nonfrivolous"; the remarkable 27-year sentence is both wildly disparate when compared to other similarly situated defendants and more broadly reflects the gross sentencing disparities that have evolved in the wake of *Booker*. *See, e.g.*, Mosi Secret, *Wide Sentencing Disparity Found Among U.S. Judges*, N.Y. Times, Mar. 5, 2012, at A21.

Review of this case would be especially constructive because the district court's failure to consider and respond to Mr. Rubashkin's disparity argument, and the Eighth Circuit's approval of this approach, resulted in an extraordinary sentence inconsistent with any meaningful definition of substantive reasonableness. Mr. Rubashkin is a 51-year-old, nonviolent, first-time offender whose

principal motive was not personal greed but keeping his father's business afloat and continuing to provide an essential service—kosher meat production—to people sharing his family's religious beliefs. Hundreds of individuals attested to his charitable and civic involvement. He is married and the father of ten, including an autistic son heavily dependent on his presence. He was nevertheless sentenced to 27 years in prison—essentially, a life term. His remarkable sentence was two years *more* than the government requested. Nonetheless, the court of appeals did little more than locate the sentence within the Guidelines range in concluding that it was substantively reasonable.

Substantive reasonableness, however, must mean more than, as here, a trial judge finding facts that dramatically increase the applicable Guidelines range, a defendant being sentenced within that range, and an appellate court affirming the sentence because it falls within the judge-enhanced Guidelines range. *Cf. Rita*, 551 U.S. at 374 (Scalia, J., concurring in part and concurring in the judgment) ("[T]here will inevitably be *some* constitutional violations under a system of substantive reasonableness review, because there will be some sentences that will be upheld as reasonable only because of the existence of judge-found facts."). Thus if this Court reviews the procedural reasonableness question presented here, it could also address the substantive reasonableness of Mr. Rubashkin's extraordinary sentence and provide additional, much-needed guidance to the lower courts on this important issue.

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The wildly disproportionate sentence here only reinforces the concerns over the judge's impartiality implicated by the Rule 33 issue. The one thing that is clear is that Mr. Rubashkin received neither full consideration of his newly discovered evidence requiring the judge's recusal nor a full explanation for the disparity of his sentence. A full exploration of either would likely produce a new trial or a reduced sentence. But, at a minimum, an exploration of these issues on the merits would ameliorate a sense of injustice fostered by the courts' unwillingness to consider the first issue or explain the disposition of the latter. This case clearly merits this Court's plenary review.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari.

Respectfully submitted,

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