No. 11-1203

IN THE

Supreme Court of the United States

SHOLOM RUBASHKIN

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE ALEPH INSTITUTE, AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

JEFFREY T. GREEN
CO-CHAIR, AMICUS COMMITTEE
NAT'L ASS'N OF CRIMINAL DEFENSE LAWYERS
1660 L St., N.W.
Washington, D.C. 20036
(202) 872-8600

NATHAN M. CRYSTAL*
CRYSTAL & GIANNONI-CRYSTAL, LLC
6 Marbel Lane
Charleston, S.C. 29403
(803) 331-2826
nmcrystal@cgcfirm.com

Counsel for Amici Curiae

* Counsel of Record

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INTEREST OF *AMICI CURIAE*[1]

Amicus curiae, the National Association of Criminal Defense Lawyers (NACDL), is a nonprofit professional bar association that works on behalf of public and private criminal defense attorneys and their clients. Founded in 1958, NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of justice. NACDL has more than 10,000 members nationwide – joined by 90 state, local, and international affiliate organizations with another 30,000 members. Its membership, which includes private criminal defense lawyers, public defenders, law professors, and active-duty military defense counsel, is committed to preserving fairness within America's criminal justice system.

Amicus Curiae, the Aleph Institute, is a national charitable institution founded by Rabbi Sholom D. Lipskar under the direction of the Lubavitcher Rebbe, Rabbi Menachem M. Schneerson, 31 years ago with the guidance of United States District Judge Jack B. Weinstein. The Institute addresses issues arising from the administration of America's criminal-justice system, including the religious, educational, humanitarian, and advocacy needs of

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[1] Pursuant to Supreme Court Rule 37.6, *amici curie* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici curiae*, their members, and their counsel, made any monetary contributions towards the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.2(a), *amici curiae* certify that counsel of record for both parties received timely notice of *amici curiae* intent to file this brief and have consented to its filing in letters on file with the Clerk's office.

individuals in military and institutional environments. It also provides social services to families in crisis. The Aleph Institute is committed to a legal system that upholds constitutional rights including the guarantees of a fair trial to those accused of criminal offenses.

SUMMARY OF ARGUMENT

The district judge presided over petitioner's criminal trial and sentencing even though she had met *ex parte* at least six times over a seven-month period with prosecutors and government agents who were planning an enforcement raid on petitioner's meat packing plant without disclosing to petitioner the extent of her involvement in planning of the enforcement operation. The conduct of the judge raises fundamental substantive and procedural issues about when disqualification of a judge is necessary to assure that the defendant receives a fair trial. In particular, was disqualification of the trial judge required by the federal disqualification statute, 28 U.S.C. § 455(a) or the due process clause of the Fifth Amendment? In addition, when objective evidence of these *ex parte* contacts is not discovered until after entry of a final judgment, must the defendant show that the evidence would probably result in an acquittal in order to obtain a new trial?

ARGUMENT

I. THE COURT SHOULD GRANT REVIEW TO DECIDE WHEN EXTENSIVE, *EX PARTE*, PRETRIAL CONTACTS BETWEEN A JUDGE AND PROSECUTORS, COUPLED WITH THE JUDGE'S FAILURE TO DISCLOSE SUCH CONTACTS, REQUIRE DISQUALIFICATION UNDER 28 U.S.C. § 455(A) OR THE DUE PROCESS CLAUSE OF THE CONSTITUTION.

The record references numerous meetings between the district judge and federal prosecutors between October 10, 2007, and May 12, 2008, when the raid on the Agriprocessors, Inc. plant took place. Meetings occurred on the following dates:

October 10, 2007

October 16, 2007

January 28, 2008

March 17, 2008

April 4, 2008

See email of April 11, 2008 indicating "weekly operations/planning meeting with ICE/RAC [XXX] Chief Judge, AUSA, and USMS." See Cert. Pet. App. 143.

In addition, the record shows many other communications between various government agencies involved in the enforcement effort, including the US Attorney's Office, and the district judge. Cert. Pet. App. 140-43.

This Court has not yet addressed whether either the federal disqualification statute, 28 U.S.C. § 455(a), or the due process clause of the Fifth Amendment, requires a federal district court judge to

recuse herself from trial of a case as a result of such numerous undisclosed *ex parte* communications with prosecutors prior to trial. In addition, most states have judicial disqualification provisions similar to 28 U.S.C. § 455(a). See ABA Model Code of Judicial Conduct 2.11 (2011). State judges are also subject through the Fourteenth Amendment to due process limitations on their participation in cases. See *Caperton* v. *A.T. Massey Coal Co.*, 556 U.S. 868 (2009). Even if the Court considers that § 455(a) does not prohibit *ex parte* contacts as extensive as those here, the Court's decision in this case would nonetheless clarify due process limitations on these contacts for both federal and state judges.

A. 28 U.S.C. § 455(a) requires disqualification.

The federal disqualification statute, 28 U.S.C. § 455(a) states:

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

While the Court has not addressed the application of the statute to *ex parte* communications with trial judges, the Court did hold in *Liljeberg* v. *Health Servs. Acquisition Corp.*, 486 U.S. 847 (1988), that a judge was disqualified from handling the trial of a case when then the judge was a member of the board of trustees of a university that had a financial interest in the outcome of the case. This was true even where the judge did not know (or had forgotten) at the time of the trial of the financial interest. The Court concluded that the judge's actual knowledge of the financial interest of the university was irrelevant under §455(a) because the purpose of the section was

"to promote public confidence in the integrity of the judicial process." *Id.* at 860. Therefore, whether the judge should be disqualified depended on whether a reasonable person knowing all the facts would conclude that the judge's impartiality might be questioned. *Id.* at 861-62.

As applied to this case, a reasonable person knowing all the facts would conclude that the district judge's impartiality might be questioned. The following factors support this conclusion:

1. The extent of the *ex parte* contacts. The number of contacts between a district judge and the prosecutors is significant for at least two reasons. First, the greater the number of contacts, the higher the likelihood that the judge was exposed to substantive matters about the defendant's case. Second, it is human nature that when people work together on a project they begin to consider themselves as part of a team with a common goal. If judges begin to consider themselves part of a team formed in the interest of one party, their impartiality has been undermined. In this case the contacts were extensive and lasted for almost seven months.

2. The nature of the case. Our society treats criminal cases with special care because the defendant's liberty is at stake. Various constitutional protections, including the right to counsel and the requirement that the prosecution prove guilt beyond a reasonable doubt, embody the special status of criminal cases. A reasonable person would take into account the special importance of criminal cases in deciding whether the impartiality of a judge who had extensive *ex parte* contacts with the prosecution might be questioned. This case is

not only a criminal case, but a very serious one in which the defendant has been sentenced to 27 years in prison, likely a life sentence.

3. The need for the judge to participate in both planning of the enforcement effort and trial of the resulting cases. To be sure, any large-scale government enforcement effort that is expected to produce hundreds of arrests and prosecutions requires advance planning not only by the agents but by the court system. That does not mean that the *same* judge should have been involved in both extensive planning of the raid and trial of the resulting cases. Throughout the planning process a central concern of the Judge (and not necessarily of the prosecutors) was timing of the raid to avoid conflicts with her own schedule. Even if the Judge deemed it necessary for a judge to participate in the planning process, that role could have been assigned to another district court judge or even to a Magistrate Judge. Or, in the alternative, she could have been actively involved in planning for the raid while recusing herself from any resulting trials.

4. The judge's failure to disclose *ex parte* contacts with the prosecution. The district judge failed to disclose to the defendant the timing, extent, and substance of her *ex parte* contacts with the prosecution. In one of the immigration prosecutions arising out of the raid -- *United States* v. *De La Rosa-Loera*, 08-CR-1313-LRR (N.D. Iowa Aug. 13, 2008), ECF No. 30 -- the defendant moved to disqualify the district judge. The motion for disqualification was based almost exclusively on publicly available information concerning her contracts with the prosecution and did not include any of the information

> revealed to petitioner beginning in March 2010 in response to his FOIA lawsuit. See Cert. Pet. App. 50. The district judge denied the motion. At no time, however, either in connection with this motion, in her order denying the motion, or in connection with petitioner's prosecution, did the judge disclose how extensive her contacts with the prosecutors had been. See Cert. Pet. App. 140-43 for a description of the contracts.

The district judge's failure to disclose the extent of her *ex parte* contacts with government agents and the prosecutors is particularly significant because this failure is alone sufficient to establish that her impartiality might reasonably be questioned. The Code of Conduct for United States Judges generally prohibits judges from engaging in *ex parte* communications. See Canon 3(A)(4). However, a judge may "when circumstances require it, permit *ex parte* communication for scheduling, administrative, or emergency purposes, but only if the *ex parte* communication does not address substantive matters and the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the *ex parte* communication." Canon 3(A)(4)(b). Thus, a central question with regard to the district judge's conduct is whether the *ex parte* communications were limited to scheduling or administrative purposes, or whether they involved substantive matters.

In denying petitioner's motion for a new trial under Rule 33, the district judge declared that her contacts with the prosecution pretrial were not improper because: "[t]he undersigned's planning was limited to ensuring that a sufficient number of judges, court-appointed attorneys and interpreters would be available and that the court would be able to function

efficiently at an off-site location." Cert. Pet. App. 48. See also Cert. Pet. App. 57, where the judge refers to her involvement as purely "logistical".

However, the documents produced by the Government in response to petitioner's FOIA request indicate that the contracts between the district judge and the Government were more than logistical:

- Entry of October 16, 2007, stating that the district judge "indicated full support for the initiative";
- Entry of January 28, 2008, stating that "they are willing to support the operation in any way possible, to include staffing and scheduling";
- Entry of March 17, 2008, describing meeting with the district judge to discuss "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";
- Entry of March 20, 2008, stating the district judge "has indicated she wants a final game plan in two weeks (April 4)";
- Entry of March 31, 2008, stating that the district judge "has requested a briefing on how the operation will be conducted" (See also the entry for April 4, 2008);
- Entry of April 2, 2008, referring to "coordination" between the district court and the government with regard to the raid;
- Entry of April 11, 2008, referring to "weekly operations/planning meetings" with the district judge.

In denying petitioner's Rule 33 motion, the district judge stated: "Defendant fails to show that any information made available to the undersigned by law enforcement was not directly linked to logistical preparations for the court." Cert Pet. App. 55. The judge also concluded that the Government memoranda in response to the FOIA lawsuit had been "misstated" and "mischaracterized." Cert. Pet. App. 56. The judge's order amounts to a general denial without addressing specifically the information produced by the Government.

Thus, it appears that questions of fact exist as to whether the district court's pretrial involvement was "logistical" or whether it included substantive matters. The district court could have dealt with these factual issues without creating an appearance of impropriety by making prompt full disclosure of the extent, timing, and substance of her contacts with the Government. She could have then convened a hearing at which she could have sought a waiver from the parties to allow her continued participation in the case; 28 U.S.C. § 455(e) provides that a judge may continue to hear a matter despite the appearance of partiality if the judge obtains a waiver from the parties, provided it is preceded by "full disclosure on the record of the basis for disqualification." If the parties were unwilling to waive any possible appearance of partiality, she or a different judge could have conducted a hearing on the issue of whether her contacts with the prosecutors were properly limited to logistical matters or whether they included substantive aspects of the case. The evidentiary record and the final order after such a hearing would have provided a basis for appellate review of a decision that she should not be disqualified.

In *Liljeberg* the Court suggested that full disclosure of the relevant facts when the judge first learns of the circumstances creating a possible appearance of impropriety, followed by an evidentiary hearing before a different judge is the proper way for the district court to proceed:

> [I]t is remarkable-and quite inexcusable-that Judge Collins failed to recuse himself on March 24, 1982. A full disclosure at that time would have completely removed any basis for questioning the judge's impartiality and would have made it possible for a different judge to decide whether the interests-and appearance-of justice would have been served by a retrial. Another 2-day evidentiary hearing would surely have been less burdensome and less embarrassing than the protracted proceedings that resulted from Judge Collins' nonrecusal and nondisclosure.

486 U.S. at 866.

Instead, the district judge continued in the case without disclosure of the extent of her contacts with the prosecutors. The judge's failure to disclose this information creates a disqualifying appearance of impropriety in two ways. First, if these contacts were as innocuous as the district judge believed them to be, then why did she fail to disclose them? If they were not, then it follows that an appearance of partiality if not actual partiality existed. Moreover, this is not the type of situation where the contacts were so trivial or fleeting that a judge could overlook them or disregard any possibility of their creating an appearance of partiality. Instead, they were extensive enough for the judge to call for a "final game plan" at the end of a seven month process.

Second, by failing to disclose the extent of her contacts with the prosecutors, the judge prevented the development of an evidentiary record on whether those contacts were logistical or substantive. Based on the current record, unrebutted objective evidence from the files of the Government indicates that there is a substantial possibility that her contacts with the prosecutors involved substantive matters. A reasonable person would conclude that the objective evidence from the Government's files coupled with the judge's failure to disclose the extent of her contacts with the prosecutors creates a disqualifying appearance of partiality under 28 U.S.C. § 455(a).

B. Due process requires disqualification.

As the Court stated in *In re Murchison*, 349 U.S. 133, 136 (1955): "A fair trial in a fair tribunal is a basic requirement of due process." However, most matters involving judicial disqualification do not rise to a constitution level. See *Caperton*, 556 U.S. at 876 (citing *FTC* v. *Cement Institute*, 333 U.S. 683, 702 (1948)).

In a line of cases beginning with *Tumey* v. *Ohio*, 273 U.S. 510 (1927) and developed most recently in *Caperton*, *supra*, the Court has decided when a judge's failure to recuse himself or herself amounts to a violation of due process. It is clear that the application of the due process clause to judicial disqualification is not limited to cases in which the judge has a financial interest. In *Murchison*, the Court considered the constitutionality of a state procedure in which the judge first examined witnesses to determine whether criminal charges should be brought against them and then presided over their criminal trials. The Court set aside the convictions; it found that the judge had a conflict of interest at the trial because of his earlier

participation in the decision to charge them. The *Murchison* Court emphasized several factors in finding a constitutional violation: the prior proceeding was accusatory rather than adversarial and the judge had acquired information about the defendants in the prior proceeding

Petitioner's case is similar to *Murchison* in two ways. In *Murchison* the judge was involved in a prior accusatory proceeding that the Court likened to a one-man grand jury. 349 U.S. at 133. In *Rubashkin* the district court's involvement was in the pretrial planning stage, which was not a "proceeding," but which was certainly "accusatory" in nature. In *Murchison* the judge received information about the defendants during the "grand jury" proceeding. Here, we do not know what was said between the prosecutors and the district judge, but given her extensive meetings with the prosecutors, her exposure to information about the petitioner, including the types of charges contemplated and the nature of petitioner's business, would seem reasonable to any objective observer. In addition, the judge could have avoided issues about the scope of these meetings by formalizing them with the presence of a court reporter. In deciding whether the judge's impartiality might reasonably be questioned, the failure of the judge to make a record that would eliminate any improper influence is significant.

Petitioner's case thus provides an opportunity to clarify for trial judges when *ex parte* communications with prosecutors before trial constitutionally requires their recusal. Although the Court has not faced the issue of judicial recusal because of *ex parte* communications with prosecutors, the significance and uncertainty of the issue is demonstrated in two federal appellate court decisions. In *Johnson* v.

Carroll, 369 F.3d 253 (3d Cir. 2004), a sentencing judge in Delaware state court had had an *ex parte* communication from a former prosecutor who had prosecuted the defendant in a prior case. The former prosecutor told the judge that the defendant was a "bad guy" and that he "wanted to see that justice was done." *Id.* at 255. The trial judge disclosed this communication to both the prosecutor and the defense counsel. The defense counsel consulted with his client and decided not to make a disqualification motion. In state post-conviction relief proceedings the Delaware Supreme Court held that the judge was not disqualified under an appearance of partiality test because the appearance of partiality was limited to situations in which the judge was "actively involved" in the circumstances that created the possible appearance of partiality. The defendant then brought a federal habeas court action. The district court held that the Delaware Supreme Court had adopted an unreasonable interpretation of federal law under the Antiterrorism and Effective Death Penalty Act, 28 USC 2254(d)(1) because its "active involvement" test ignored the reaction of a reasonable observer to the judge's conduct. The Third Circuit reversed the district court. While the court assumed that there was an appearance of partiality, the court found that the district court erred in concluding that the appearance of partiality amounted to a violation of due process. *Id.* at 262-263. Although the court in *Johnson* did not find a violation of due process, that case involved only <u>one</u> *ex parte* contact between a <u>former</u> prosecutor and the trial judge, rather than the extensive contacts involved in this case. If the *Johnson* court's test of "active involvement" had been applied to this case, the district judge in this case should have been disqualified. In addition, unlike this case, the trial

judge in *Johnson* fully disclosed the contact on the record to the parties.

Westbrook v. *Thaler*, 585 F.3d 245 (5th Cir. 2009), involved a murder prosecution in Texas state court. While the prosecution was going on, the prosecutors informed the judge *ex parte* that they were engaged in an undercover investigation of the defendant for soliciting other murders. The defendant had made a motion seeking information about any deals the prosecution had made with witnesses against the defendant. The prosecutors requested an *ex parte* meeting with the judge. They told the judge that they could not reveal at that time an agreement with a fellow inmate of the defendant because the investigation was still ongoing on. The judge told the prosecutors that they would have to reveal the results of their investigation to the defense if they planned to use it at trial and that any disclosure had to give the defendant sufficient time to prepare. *Id.* at 256-57. After a second *ex parte* meeting, the prosecution disclosed the evidence that it had obtained through the undercover investigation. The defendant moved to disqualify the judge based on the *ex parte* contacts. The court recognized that a due process violation occurs when a judge has a dual role of both investigating and judging criminal activity. *Id*. at 256. On the facts of the case, the court held that there was no due process violation because the judge had not taken on the role of an investigator. *Id*. at 259. *Westbrook* did not involve the extensive contacts or active involvement of the judge that took place in this case; the judge in *Westbrook* fully disclosed on the record all contacts with the prosecutors; and the judge took steps to protect the defendant's constitutional rights.

Further, this Court's precedent in *Caperton*, 556 U.S. 868, indicates that even disclosure may not be sufficient to avoid due process violations. There, the contributions by Mr. Blankenship to the campaign of Justice Benjamin were well known, so lack of disclosure was not an issue. Nonetheless, the Court found that Justice Benjamin's participation in the appeal by Mr. Blankenship's company violated due process because a serious risk of actual bias existed: "There is a serious risk of actual bias when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent." *Id.* at 870.

As all of these decisions show, due process principles plainly apply to pretrial *ex parte* communications between a judge and a prosecutor, but their precise scope is unclear. Review by this Court could assist in establishing the proper constitutional boundary for such contacts.

II. THE COURT SHOULD GRANT REVIEW TO DECIDE WHETHER THE EIGHTH CIRCUIT'S UNIQUE REQUIREMENT FOR GRANTING A MOTION FOR A NEW TRIAL -- THAT NEWLY DISCOVERED EVIDENCE WOULD PROBABLY LEAD TO AN ACQUITTAL -- IS UNSOUND WHEN APPLIED TO NEWLY DISCOVERED EVIDENCE SHOWING EXTENSIVE UNDISCLOSED *EX PARTE* CONTACTS BETWEEN THE TRIAL JUDGE AND THE PROSECUTOR.

A. The Eighth's Circuit's requirement of a probability of acquittal when applied to evidence of judicial disqualification conflicts with that of other circuits.

The Eighth Circuit follows a highly restrictive test for determining whether a new trial should be granted under Rule 33 of the Federal Rules of Criminal Procedure. Under Rule 33 a court may grant a new trial "if the interest of justice so requires." The circuits appear to be in agreement that when the newly discovered evidence relates directly to guilt or innocence, as is the case with a *Brady* violation, the evidence must be sufficient to show a reasonable probability defendant might be acquitted if the court grants a new trial. See Cert. Pet. 13 This approach may be sound both logically and as matter of policy for newly discovered evidence that would be admissible at trial. Rule 33 allows a court to grant a new trial when the interest of justice requires. If there is no reasonable probability that the newly discovered evidence would make a difference in the outcome, then a new trial probably should not be granted.

However, when the motion is based on newly discovered evidence that shows a structural defect that undermines the fairness of the trial, it does not make sense to apply a requirement that the evidence would probably result in the defendant's acquittal. Avoiding due process violations is also "in the interests of justice." As the defendant's petition for writ of certiorari shows, decisions from at least seven courts of appeal reject the Eighth Circuit's rule when the evidence goes to the fairness of the trial. Cert. Pet. 14-15. In addition, decisions from the Fourth, Ninth, and Eleventh Circuits have held that the requirement of "reasonable probability of acquittal" does not apply to a Rule 33 motion based on newly discovered evidence specifically concerning judicial impropriety. See Cert. Pet. 16-17.

Amici join petitioner in this argument based on the conflict among the circuits. In addition, the amici would point out that the Eighth Circuit's approach to Rule 33 motions involving judicial disqualification (and other structural defects for that matter) is unsound and should be reviewed by the Court for two additional reasons, set forth in sections (B) and(C) below.

B. The Eighth Circuit's requirement is inconsistent with the Court's holding that relief from structural trial defects does not require a showing of prejudice.

The Eighth Circuit's requirement of probability of acquittal in order to obtain relief under Rule 33 in all cases is inconsistent with the Court's holdings in a number of cases that structural defects in a proceeding do not require a showing of prejudice. The Court has so held both generally and specifically with regard to judicial disqualification. In *United States* v. *Marcus*, 130 S.Ct. 2159 (2010), the Court

dealt with the requirements for appellate review for "plain error" under Rule 52(b) of the Federal Rules of Criminal Procedure. The Court stated that its precedents establish four requirements for plain error review:

> (1) there is an "error"; (2) the error is "clear or obvious, rather than subject to reasonable dispute"; (3) the error "affected the appellant's substantial rights, which in the ordinary case means" it "affected the outcome of the district court proceedings"; and (4) "the error seriously affect(s) the fairness, integrity or public reputation of judicial proceedings."

Id. at 2164.

The Court went on to explain that in the ordinary case, plain error review required the appellant to show that the error affected the outcome of the proceeding. However, the Court noted that there was a class of cases involving "structural errors" that the affected substantial rights of the defendant "regardless of their actual impact on an appellant's trial." *Id.* In the case of a structural error it is often difficult to assess the effect of the error on the proceeding. The Court listed a number of situations that involved structural errors, one of which was the lack of an impartial trial judge, citing *Tumey*, 273 U.S. 510.

C. The Eighth Circuit's decision is inconsistent with the Court's holding in *Liljeberg* v. *Health Services Acquisition Corp.*

In *Liljeberg*, 486 U.S. 847, discussed above, Health Services moved for a new trial under Rule 60(b)(6) of the Federal Rules of Civil Procedure ten months after the Court of Appeals affirmed a judgment against it,

on the ground that it had just discovered that the district judge who decided the case was a member of the board of trustees of Loyola University, which had a financial interest in Liljeberg's success in the litigation with HAS. The Court held that the judge had violated 28 U.S.C. § 455(a) because an appearance of partiality was present even though the judge lacked actual knowledge of Loyala's financial interest at the time he decided the case. The Court stated that:

> an appearance of partiality is created even though no actual partiality exists because the judge does not recall the facts, because the judge actually has no interest in the case or because the judge is pure in heart and incorruptible.

Id. at 860.

Having found that the federal disqualification statute did not require a showing of actual harm to the appellant, the Court then addressed whether relief was available under Rule 60(b)(6). The Court stated that relief was available when "appropriate to accomplish justice." *Id.* at 864. In particular, the Court, unlike the Eighth Circuit, did not apply a litmus test of whether the newly discovered evidence would probably affect the outcome of the case. Instead, the Court stated that in deciding whether to vacate a judgment

> it is appropriate to consider the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process. We must continuously bear in mind that "to perform its high function in the best way 'justice must satisfy the appearance of justice.'"

Id.

While Rule 60(b) applies to relief from a civil judgment and Rule 33 applies to criminal cases, both have the broad standard allowing a court to grant relief when justice requires.

The Eighth Circuit barely mentioned *Liljeberg* in its opinion and did not attempt to reconcile the inconsistency between its interpretation of Rule 33 and the Court's holding in *Liljeberg* that probable effect on the outcome of the proceeding is not a *per se* requirement relief from a final judgment.

CONCLUSION

For the foregoing reasons, amici respectfully request that the Court grant the petition for writ of certiorari to rule on the important substantive and procedural issues regarding judicial disqualification raised by this case.

Respectfully submitted,

JEFFREY T. GREEN
CO-CHAIR, AMICUS COMMITTEE
NAT'L ASS'N OF CRIMINAL DEFENSE LAWYERS
1660 L. St., N.W.
Washington, D.C. 20036
(202) 872-8600

NATHAN M. CRYSTAL*
CRYSTAL & GIANNONI-CRYSTAL, LLC
6 Marbel Lane
Charleston, S.C. 29403
(803) 331-2826
nmcrystal@cgcfirm.com

Counsel for Amici Curiae

* Counsel of Record

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