Docket No. 10-3974

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IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

v.

JOSEPH W. NAGLE,

Defendant-Appellee.

_____

On Appeal from Order of the United States District Court
for the Middle District of Pennsylvania (Rambo, J.)
Granting Testimonial Immunity to a Defense Witness,
in No. 09-CR-384-01

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MEMORANDUM OF AMICI CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND PENNSYLVANIA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS SUPPORTING APPELLEE ON JURISDICTIONAL QUESTION

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INTEREST OF *AMICI*

The National Association of Criminal Defense Lawyers (NACDL) is a District of Columbia nonprofit corporation founded over 50 years ago, the membership of which now includes more than 11,000 attorneys, including citizens of every state. The NACDL has some 90 local, state and international affiliates which permit it to speak on behalf of over 35,000 professional defenders. The American Bar Association recognizes NACDL as an affiliate and accords it representation in its House of Delegates. NACDL is widely recognized as the voice of the criminal defense bar.

NACDL was founded to promote study and research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. NACDL seeks to defend individual liberties, as guaranteed by the original Constitution and the Bill of Rights. Rules of law which limit the government's power to challenge decisions favoring criminal defendants are a key component of a system of justice which seeks the appropriate balance between society's interest in finality and liberty against the sometimes competing interest in a strict or perfect legality.

NACDL often files amicus briefs before the Supreme Court of the United States. Moreover, NACDL has appeared as amicus curiae in this Court in several important and carefully chosen cases, including United States v. Tomko, 562 F.3d 558 (3d Cir. 2009) (en banc); United States v. Grier, 475 F.3d 556 (2007) (en banc), United States v. Leahy, 438 F.3d 328 (2006) (en banc), United States v. Vazquez, 271 F.3d 93 (2001) (en banc) (amicus invited to argue); United States v. Cepero, 224 F.3d 256 (3d Cir. 2000) (en banc); United States v. Mitchell, 122 F.3d 185 (3d Cir. 1997), rev'd, 526 U.S. 314 (1999); United States v. One 1973 Rolls

Royce, 43 F.3d 794 (3d Cir. 1994) (amicus invited to argue). The NACDL national amicus curiae committee requested and authorized the undersigned to file this brief.

The Pennsylvania Association of Criminal Defense Lawyers, known as PACDL, is an affiliate of NACDL. PACDL is a Pennsylvania nonprofit corporation established in 1988, whose membership comprises over 800 public and private criminal defense attorneys from throughout the Commonwealth. The Association attempts, as stated in its by-laws, "to foster, maintain and encourage the integrity, independence and expertise of the defense lawyer in criminal cases"; "to achieve justice and dignity for defense lawyers, defendants and the criminal justice system itself"; "to protect and insure by rule of law, those individual rights guaranteed by the Pennsylvania and United States Constitutions"; and "to promote the proper administration of criminal justice." PACDL is the only statewide organization working strictly on behalf of the professional interests of public and private criminal defense lawyers, including the rights of their clients. While PACDL appears as *amicus curiae* more often in the state appellate courts of Pennsylvania than in this Court, in recent years, PACDL has made an increased commitment to training its members on aspects of federal law, including Third Circuit practice, and it has appeared occasionally as an *amicus* in this Court. See Banks v. Horn, 316 F.3d 228 (3d Cir. 2003) (amicus invited to argue), rev'd, Beard v. Banks, 542 U.S. 406 (2004); Vazquez, supra. The filing of this brief was authorized and directed by PACDL's board of directors which, like its NACDL counterpart, has an interest in the Court's maintaining the integrity of its well-established and Congressionally-limited rules defining the government's limited right to appeal in criminal cases.

STATEMENT OF ISSUES ADDRESSED BY AMICI CURIAE

1. Does the well-established rule that 28 U.S.C. § 1291 does not confer jurisdiction on this Court over appeals by the United States from "final orders" in criminal cases extend as well to "collateral orders" arising during the prosecution of such cases?

2. Does this Court's mandamus jurisdiction permit interlocutory review of a discretionary order by a district court granting testimonial immunity to a defense witness pursuant to this Court's decision in Gov't of Virgin Is. v. Smith, 615 F.2d 964 (3d Cir. 1980)?

ARGUMENT FOR AMICI

I. THIS COURT'S LACK OF JURISDICTION UNDER 28 U.S.C. § 1291 OVER APPEALS BY THE UNITED STATES FROM ORDERS ARISING IN THE COURSE OF A CRIMINAL CASE HAS NO EXCEPTION FOR COLLATERAL ORDERS.

The Supreme Court has recognized for well over a century that the federal government is not authorized to appeal any judgment or other decision in favor of a defendant in a criminal case without express statutory authority, a proposition that it has reiterated time after time. United States v. Sanges, 144 U.S. 310 (1892); accord, United States v. DiFrancesco, 449 U.S. 117, 131 (1980); United States v. Scott, 437 US 82, 84 (1978); United States v. Sisson, 399 U.S. 267, 291 (1970); DiBella v. United States, 369 U.S. 121, 130 (1962). As this Court, sitting en banc, has echoed, the statute providing jurisdiction over most appeals by other litigants, 28 U.S.C. § 1291, "does not create appellate jurisdiction over appeals by the United States in criminal cases." United States v. Jannotti, 673 F.2d 578, 580 n.1

(3d Cir. 1982) (en banc).[1] This Court has "reaffirmed the 'well-settled rule that an appeal by the prosecution in a criminal case is not favored and must be based upon statutory authority.' Gov't of Virgin Is. v. Hamilton, 475 F.2d 529, 530 (3d Cir. 1973)." United States v. Gilchrist, 215 F.3d 333, 335-36 (3d Cir. 2000). Accord, United States v. Farnsworth, 456 F.3d 394, 399 (3d Cir. 2006); Gov't of Virgin Is. v. Douglas, 812 F.2d 822, 831 (3d Cir. 1987). No exception to that general rule applies in this case.

The Supreme Court's "continuing refusal to assume that the United States possesses any inherent right to appeal reflects an abiding concern to check the Federal Government's possible misuse of its enormous prosecutorial powers." Arizona v. Manypenny, 451 U.S. 232, 247 (1981).[2] Thus, "appeals by the Government in criminal cases are something unusual, exceptional, not favored." Carroll v. United

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[1] There is language in some of this Court's published cases, in which panels have occasionally mistakenly cited § 1291 as conferring jurisdiction over government appeals in criminal cases. For various reasons, however, none of those cases appears to have resulted in the review of a case in which the Court actually lacked jurisdiction. See United States v. Lychock, 578 F.3d 214, 217 (3d Cir. 2009) (mistakenly citing § 1291 as conferring jurisdiction over gov't sentencing appeal; citation to 18 U.S.C. § 3742(b) would have been correct); United States v. Tomko, 562 F.3d 558, 564 n.5 (3d Cir. 2009) (en banc) (citing § 1291 along with § 3742(b) as conferring jurisdiction over gov't sentencing appeal); United States v. Watkins, 339 F.3d 167, 169 n.1 (3d Cir. 2003) (citing § 1291 along with 18 U.S.C. § 3731 as conferring jurisdiction over gov't appeal from speedy trial dismissal; reliance on § 3731 but not § 1291, was correct); United States v. Sherman, 150 F.3d 306, 310 (3d Cir. 1998) (citing § 1291 alone as conferring jurisdiction over gov't appeal from dismissal of indictment; reliance on § 3731(¶1) would have been correct); United States v. DeJulius, 121 F.3d 891, 893 (3d Cir. 1997) (citing § 1291 as conferring jurisdiction over gov't sentencing appeal; reference to 18 U.S.C. § 3742(b) would have been correct); United States v. Perry, 788 F.2d 100, 102 (3d Cir. 1986) (citing § 1291 along with 18 U.S.C. § 3145(c) as conferring jurisdiction over gov't appeal from bail order; the correct references would be § 3145(c) and § 3731(¶4), but not § 1291).

[2] In Manypenny, an exceptional case, a state criminal indictment of a federal officer was removed to federal court. The Court held that an appeal by the prosecution was authorized under 28 U.S.C. § 1291 but only when state law would have allowed the prosecutor to appeal.

States, 354 U.S. 394, 400 (1957). The government's memorandum on jurisdiction totally ignores this entire body of controlling Supreme Court and Circuit authority.

In 1907, fifteen years after the Sanges decision, Congress enacted the first Criminal Appeals Act, which gave the federal government the authority to appeal in criminal cases in highly limited circumstances. See United States v. Wilson, 420 U.S. 332, 336-37 (1975) (describing history of Act). The grounds for government appeals were expanded in 1942. See Carroll, 354 U.S. at 402-03. In 1970, Congress enacted a new Criminal Appeals Act as part of the Omnibus Crime Control Act of 1970, 18 U.S.C. § 3731, that removed even more of the prior limitations. Even with this Act, "an appeal by the prosecution in a criminal case is not favored and must be based upon express statutory authority." Gov't of Virgin Is. v. Hamilton, 475 F.2d 529, 530 (3d Cir. 1973). In 1984, Congress further amended § 3731 to authorize appeals from grants of new trials and authorized the government to appeal from sentencing decisions as part of the Sentencing Reform Act of 1984. 18 U.S.C. § 3742(b).

The government properly does not claim jurisdiction over its present appeal under any clause of § 3731. Despite some overly broad language in Wilson,[3] the Supreme Court soon clarified that § 3731 "was 'intended to remove all statutory barriers' to [government] appeals from orders terminating prosecutions," United States v. Martin Linen Supply Co., 430 U.S. 564, 568 (1977), but not the limitations on other appeals. See also Gilchrist, 215 F.3d at 337. Thus, in United States v. Pharis, 298 F.3d 228 (3d Cir. 2002) (en banc), this Court looked to the post-Wilson Supreme Court decision in Sanabria v. United States, 437 U.S. 54, 65-68

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[3] "[T]he legislative history [of § 3731] makes it clear that Congress intended to remove all statutory barriers to Government appeals and to allow appeals whenever the Constitution would permit." 420 U.S. at 337.

(1978), to conclude that the precise wording of § 3731 defines the scope of the Court's jurisdiction over government appeals from an order entered in a criminal case that does not terminate the proceedings as to any count. 298 F.3d at 237-40.

If, as the government appears to concede, its appeal is not permitted by § 3731 or any of the other statutes specifically authorizing a government appeal, then this Court lacks appellate jurisdiction. Nonetheless, the parties' memoranda appear to assume that "collateral order" jurisdiction is something other than appellate jurisdiction under § 1291. It is not: the "collateral order" doctrine is no more than a construction and elaboration of the concept of "finality" under § 1291. See Mohawk Industries, Inc. v. Carpenter, 558 U.S. —. 130 S.Ct. 599, 604-05 (2009).[4] But if this Court has no jurisdiction at all under § 1291 over government appeals from "final orders" arising out of the ordinary course of criminal cases, as it concededly does not, then it certainly does not possess jurisdiction over orders which are merely "collaterally final" in such cases.

Indeed, the Supreme Court has never recognized "collateral order" jurisdiction over a government appeal arising out of an order entered during the course of a criminal case. And none of the few cases where this Court has exercised jurisdiction in such an appeal would justify the government's attempt to appeal here. In Carroll v. United States, supra, prior to the amendment of § 3731 to cover appeals from orders suppressing evidence, the Court unanimously rebuffed a government effort to obtain collateral order review of a suppression order that the government represented as fatally undermining its ability to prove the case. Five years later, in DiBella v. United States, 369 U.S. 121 (1962), the Court – again without dissent –

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[4] Both parties' memoranda overlook this most recent Supreme Court decision, narrowly defining the "collateral order doctrine" and overturning some of this Court's precedent in doing so. See id. at 604 n.1.

rejected the government's attempt to distinguish Carroll and obtain review of an order to return seized evidence that had been granted after the defendant's arrest but before indictment. The government had sought to rely on language in Carroll, suggesting that the Court could allow the government a collateral order appeal relating to a criminal proceeding if "made *prior to indictment*, or in a *different district* from that in which the trial will occur, or *after dismissal* of the case, or perhaps where the emphasis is on the *return of property* rather than its suppression as evidence." 354 U.S. at 403-04 (emphasis original, citations omitted).[5]

To be sure, in a handful of cases, this Court has extended the "collateral order" doctrine to certain government appeals in criminal cases. None helps the United States here, even if they are viewed as binding precedent notwithstanding more recent Supreme Court decisions. In United States v. Fields, 425 F.2d 883, 886 (3d Cir. 1970), the Court invoked the "return of property" category to uphold a government appeal from an order (entered in disregard of a pending civil forfeiture proceeding) directing the return of seized property to a third party on motion of the defendant. In the case of In re Grand Jury Proceedings (U.S. Steel-Clairton Works), 525 F.2d 151, 154-56 (3d Cir. 1975), the district court had entered an order entirely enjoining grand jury proceedings pending resolution of a parallel civil action. This Court declared the order collaterally appealable, although it would seem that the order appealed from could as easily have been characterized as a "dismissal" under § 3731.[6] The appeal of In re Rogalsky, 575 F.2d 457 (3d Cir.

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[5] As an example (the only one) of a government appeal allowed in such circumstances, the Court cited Burdeau v. McDowell, 256 U.S. 465 (1921). There, the United States succeeded in overturning an order to return to a suspect property which had been stolen from him and given to a government agent, when the prosecutor wished to use it as evidence before a grand jury. (Jurisdiction, however, was not discussed in the decision at all.)

[6] In In re Grand Jury Empanelled February 14, 1978, 597 F.2d 851, 857-58 (3d Cir. 1979), the panel opined that if a grand jury proceeding is not part of a "criminal case"

1978), presented the essentially administrative question whether the Federal Public Defender's budget or that of the U.S. Attorney was responsible for payment of the bills of psychiatrists who examined the defendant for sanity (at the behest of the defense) and competency (at the government's behest). Without discussion, the Court held that the order was collaterally appealable (although a mandamus might have been more appropriate).[7]

More recently, this Court has recognized two additional categories of orders collaterally appealable by the government. In United States v. Wecht, 484 F.3d 194, 201 (3d Cir. 2007), this Court without comment recognized § 1291 jurisdiction with respect to the government's appeal of an order granting a motion filed by certain media interveners to unseal documents that had been provided to the defense in discovery subject to a protective order. That ruling, however, consistent with the 1970 decision in Fields, did not directly implicate the rights of the defendant. Finally, in United States v. Whittaker, 268 F.3d 185, 191-93 (3d Cir. 2001), the Court declared that it could exercise § 1291 collateral order jurisdiction to review an ill-founded order disqualifying the entire United States Attorney's Office of a district from prosecuting a case. The panel did not discuss any of the Supreme Court or Circuit case law on the government's limited authority to appeal orders in criminal cases, and acknowledged that its ruling gave the government a right to

_____(footnote continued)

within the meaning of § 3731 (and of the Sanges doctrine), then the Court "would" find collateral order jurisdiction to review an order quashing a grand jury subpoena. (The panel appears to have overlooked that in DiBella, 369 U.S. at 131, the Supreme Court had already held that the grand jury phase is part of the criminal case for these purposes.) The holding of the case, however, is that the quashal was indeed an order "suppressing evidence" within the meaning of § 3731, in light of that statute's liberal construction clause. Id.(¶5).

[7] Cf. United States v. Ferri, 686 F.2d 147, 151-52 (3d Cir. 1982) (declining to recognize new category of "collateral order" on government appeal from untimely order reducing defendant's sentence; mandamus granted instead).

appeal a category of order (disqualification of counsel) that the Supreme Court did not allow to be collaterally appealed either in a civil case or by a criminal defendant. Id. 192-93. Perhaps in recognition of the questionable nature of this holding, the panel went on to comment that "if we did not have appellate jurisdiction, we could and would exercise mandamus jurisdiction." Id. 193.

None of these few cases in which the Court has recognized collateral order jurisdiction under § 1291 at the behest of the government in a criminal case has anything in common with the instant case. In fact, in its most recent collateral order decision – declining to allow an appeal from an order rejecting a claim of attorney-client privilege – the Supreme Court noted that Congress has given the authority to define categories of appealable "final orders" to the Court in its administrative capacity (upon advice of the Judicial Conference), to be exercised in the rulemaking process, rather than on a case by case basis. See Mohawk Industries, 130 S.Ct. at 609. That alone is a sufficient ground not to recognize any new classes of "collateral orders." See id. 609-10 (Thomas, J., concurring).

Moreover, as both parties contend, the most similar of this Court's precedents is United States v. Santtini, 963 F.2d 585 (3d Cir. 1992). In Santtini (as here) the district court took action that is normally within the government's sphere of authority (there, to defer an arrest; here, to immunize a witness), where the court deemed it necessary in order to protect a defendant's Sixth Amendment right to compulsory process. For the reasons fully explicated by defendant Nagle, just as this Court held in Santtini, the order that the government seeks to appeal here does not qualify as a collateral order. For those reasons, as well as for the broader reasons discussed by Amici, the government's purported appeal must be dismissed.

II. THE UNITED STATES CANNOT HAVE A "CLEAR AND INDISPUTABLE RIGHT TO RELIEF" ON MANDAMUS TO OVERTURN A DISCRETIONARY DECISION RENDERED PURSUANT TO THIS COURT'S PRECEDENT, NOT CONTRARY TO ANY SUBSEQUENT SUPREME COURT PRECEDENT, AND NOT AMOUNTING TO A "GROSS ABUSE OF DISCRETION" THAT THREATENS THE SUCCESS OF THE CRIMINAL CASE.

That this Court lacks appellate jurisdiction is no reason to reach out for mandamus jurisdiction under 28 U.S.C. § 1651 that it would not otherwise exercise. "The remedy [of appellate mandamus] has been termed 'a drastic one, to be invoked only in extraordinary situations.'" Santtini, 963 F.2d at 593 (citation omitted). This Court "does not lightly resort to section 1651." United States v. Bertoli, 994 F.2d 1002, 1014 (3d Cir. 1993). Its use in criminal cases is both "extraordinary" and "exceptional." In re United States, 273 F.3d 380, 385 (3d Cir. 2001). "Thus while a simple showing of error might suffice to obtain reversal on direct appeal, issuance of a writ of mandamus or prohibition under such circumstances 'would undermine the settled limitations upon the power of an appellate court to review interlocutory orders.'" Santtini, 963 F.2d at 593 (quoting Will v. United States, 389 U.S. 90, 98 n.6 (1967)).

"Nor is the case against permitting the writ to be used as a substitute for interlocutory appeal made less compelling by the fact that the Government has no later right to appeal." Id. 97 (quotation marks and citation omitted). The Court will grant mandamus only when the applicant's right to this remedy is "clear and indisputable." Kerr v. U.S. District Court, 426 U.S. 394, 403 (1976), quoting U.S. ex rel. Bernardin v. Duell, 172 U.S. 576, 582 (1899); accord, Wilderman v. Cooper & Scully, P.C., 428 F.3d 474, 478 (3d Cir. 2005). "[A]ppellate courts must be parsimonious with the writ ...." United States v. Wexler, 31 F.3d 117, 129 (3d Cir. 1994). The government's alternative petition for mandamus should therefore be denied.

Before mandamus can be granted, all of the enumerated criteria for extraordinary relief must be present: a clear error of law, a lack of adequate, alternate remedy (either before or after trial), and anticipated "irreparable injury." United States v. Farnsworth, 456 F.3d 394, 400 (3d Cir. 2006); Wexler, 31 F.3d at 128. In this case, the government has established none of those criteria. The Supreme Court has recently summarized the preconditions for issuance of mandamus:

> As the writ is one of 'the most potent weapons in the judicial arsenal,' [Will, 389 U.S. at] 107, three conditions must be satisfied before it may issue. Kerr v. United States Dist. Court for Northern Dist. of Cal., 426 U.S. 394, 403 (1976). First, 'the party seeking issuance of the writ [must] have no other adequate means to attain the relief he desires,' ibid. -- a condition designed to ensure that the writ will not be used as a substitute for the regular appeals process, [Ex parte] Fahey, [332 U.S. 258], 260 [(1947)]. Second, the petitioner must satisfy 'the burden of showing that [his] right to issuance of the writ is 'clear and indisputable.'' Kerr, supra, at 403 .... Third, even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances. Kerr, supra, at 403 (citing Schlagenhauf v. Holder, 379 U.S. 104, 112 n.8 (1964)).

Cheney v. United States District Court, 542 U.S. 367, 380-81 (2004). This standard is "stringent." Wexler, 31 F.3d at 128. Although the government has not presented an alternative petition for a writ of mandamus in proper form under Fed.R. App.P. 21, it must nevertheless be held to its burden of making a specific showing on each prong of these criteria for relief. This it has not done, and cannot do.

Since mandamus cannot be used to control discretion, or to address routine errors, Santtini, 963 F.2d at 593, unless the district court committed an abuse so palpable that it amounts to a "clear error of law," mandamus will not lie. Farnsworth, 456 F.3d at 403; Wexler, 31 F.3d at 128. In particular, when considering the extraordinary step of granting mandamus to overturn a discretionary decision, this Court requires that the government demonstrate "a high probability of failure

of a prosecution." Wexler, 31 F.3d at 129, quoted in Farnsworth, 456 F.3d at 401. In Mr. Nagle's case, there was no "clear abuse of discretion" or "clear error of law."

In Wexler, the challenged jury instruction was contrary to controlling precedent from this Court and the Supreme Court. See 31 F.3d at 122-24, 127. In Farnsworth, the challenged instruction was modeled on Circuit case law. Accordingly, although the panel was not reticent to express its doubts as to the correctness of both of those cases, it declined to issue the writ. 456 F.3d 401-03. Here, by contrast, as set forth in Mr. Nagle's brief, the district court's action fell within its discretion, as set forth in this Court's precedent. Under these circumstances, it simply cannot be "clear error" for a district court, as here, to exercise that discretion.

The district court committed no "usurpation of power," Santtini, 963 F.2d at 594, when it fulfilled its duty to protect defendant Nagle's Sixth Amendment right to compulsory process by judiciously exercising the authority to immunize a witness as recognized by this Court in Gov't of Virgin Is. v. Smith, 615 F.2d 964 (3d Cir. 1980). Nor was Smith overruled by any dictum in Pillsbury Co. v. Conboy, 459 U.S. 248, 257 & n.13, 260-61 (1983) and/or United States v. Doe, 465 U.S. 605, 616-17 (1984). *Cf.* Gov't Mem. at 6 n.1, 10. Pillsbury held that the judge in a civil action erred in overruling a witness's valid claim of Fifth Amendment privilege. The Court noted that only a grant of immunity could require such testimony, and that the Department of Justice, not the judge, has the statutory authority to grant such immunity. In Doe, the Court sustained the validity of an "act of production" Fifth Amendment objection to a grand jury subpoena for the business records of a sole proprietorship. The Court cited Pillsbury in rejecting the government's suggestion that a court could require production while assuring the witness, absent a grant of statutory immunity, that the implied testimony from the act of production would be protected. But neither case involved a judge's determination that a

criminal defendant's Sixth Amendment right to compulsory process and thus to a fair trial could only be assured by immunizing otherwise privileged testimony of a necessary witness. In fact, neither Supreme Court case involved a situation where protecting an individual's constitutional rights made necessary the limited overriding of a statutory limitation.

Even if Judge Rambo had erred, which she did not, and even if that error were clear, which it isn't, the United States would still not be entitled to mandamus in this case. The government has failed to establish -- or even to attempt to show -- the required "high probability of failure of a prosecution." Farnsworth, 456 F.3d at 401, quoting Wexler, 31 F.3d at 129. That standard must be met in order that mandamus at the behest of the prosecution in a criminal case may satisfy the criterion of irreparable injury, regardless of any "error" or "abuse of discretion" in the challenged immunity order.

CONCLUSION

For these reasons, the National and Pennsylvania Associations of Criminal Defense Lawyers suggest that the government's appeal must be dismissed, and that its alternative prayer for mandamus is likewise due to be denied.

Dated: November 23, 2010

Respectfully submitted,

s/Peter Goldberger

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CERTIFICATE OF SERVICE

On November 23, 2010, I served a copy of the foregoing Memorandum via ECF filing on the attorneys for the parties, addressed as follows:

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