04-5007-cr

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

FRANK QUATTRONE,

Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of New York

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF APPELLANT FRANK QUATTRONE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

PUBLICATIONS

WEB REFERENCES

INTRODUCTION

Amici National Association of Criminal Defense Lawyers, New York Association of Criminal Defense Lawyers, and California Attorneys for Criminal Justice acknowledge that this brief presents an unusual subject matter for an *amicus* brief. It does not address an issue of substantive criminal law, such as the validity of a statute or application thereof. Nor does it discuss any particular procedure, or evidentiary rule. Nevertheless, *amici* have undertaken this brief because the proceedings below present a more fundamental problem: the breakdown of the adversary process, in which there should be a prosecutor, a defense attorney, and an impartial judge acting as arbiter between them.

In this case, unfortunately, the record reveals that the trial court abandoned that position in favor of transparent bias against the defendant, and unprovoked antagonism toward defense counsel. While ordinarily a single case of this type may not provide sufficiently broad context for *amicus* treatment, here *amici* believe it does for the following two reasons: (1) this was not an ordinary case. It was closely followed in the media – through the initial trial and then retrial – and media reports, as discussed **post**, were remarkable in their recognition of the patent bias of the trial court; (2) in light of the high-profile nature of the case, and the quality and reputations of the defense lawyers who tried the case, we are concerned that

less esteemed and experienced defense counsel might well see the conduct of this trial – if it is tolerated – as a norm that they are unable and/or unwilling to challenge. That perception would no doubt chill effective advocacy across the board, and diminish the Sixth Amendment right to effective and zealous representation to which every criminal defendant is entitled.

While the record is replete with evidence of the trial court's interference with Mr. Quattrone's Fifth Amendment Due Process right to a fair trial, this *amici* brief will concentrate on several categories that fully and vividly illustrate the intractable obstacles that the defense, and defense counsel, faced at trial. Many more instances appear in the trial record, but these examples are more than sufficient to provide the Court ample flavor of the defects in the district court's conduct of the trial. Those principal categories are:

(1) the trial court's different standard of relevance for the prosecution and defense evidence;

(2) the trial court's *sua sponte* objections to defense examinations and evidence;

(3) the trial court's *sua sponte* interruptions of the presentation of the defense case;

(4) the trial court's different standards for admitting "state of mind"

testimony depending on whether the testimony was elicited by the prosecution or defense;

(5) the trial court's repeated denigration of the defense case and defense counsel, including frequent complaints that the defense and counsel were wasting time, refusing to permit sidebars and then chastising defense counsel in the presence of the jury, and threatening defense counsel with contempt; and

(6) the trial court's persistent attempts to deny defense counsel the opportunity to make a full factual record.

In essence, as the catalog of error outlined above and detailed below make clear, this *amici* brief is about each defendant's Fifth Amendment Due Process right to a fair trial, and the manifest unfairness of the trial below in this case.

INTEREST OF *AMICI*

The National Association of Criminal Defense Lawyers (hereinafter "NACDL"), a nonprofit corporation, is the only national bar association working in the interest of public and private criminal defense attorneys and their clients. NACDL was founded in 1958 to ensure justice and due process for persons accused of crimes; foster the integrity, independence and expertise of the criminal defense profession; and promote the proper and fair administration of justice.

NACDL has more than 11,000 members nationwide – joined by 80 state and local affiliate organizations with 28,000 members – including private criminal defense lawyers, public defenders and law professors committed to preserving fairness within America's criminal justice system. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates.

The *New York State Association of Criminal Defense Lawyers* (hereinafter "NYSACDL"), is a not-for-profit corporation with a subscribed membership of more than 800 attorneys, which include private practitioners, public defenders, legal aid, and law professors. It is a recognized State Affiliate of NACDL. NYSACDL was founded in 1986 to promote study and research in the field of criminal defense law and the related disciplines. Its stated goals include promoting the proper administration of criminal justice; fostering, maintaining and encouraging the integrity, independence and expertise of defense lawyers in criminal cases; to protect individual rights and improve the practice of criminal law; to enlighten the public on such issues; and to promote the exchange of ideas and research, to include appearing as *Amicus Curiae* in cases of significant public interest or of professional concern to the criminal defense bar.

California Attorneys for Criminal Justice (hereinafter "CACJ") is a

nonprofit California corporation. According to Article IV of its by-laws, CACJ was formed to achieve certain objectives including "to defend the rights of persons as guaranteed by the United States Constitution, the Constitution of the State of California and other applicable law." (Article IV, By-Laws of CACJ.). The organization has approximately 2,000 dues-paying members who are primarily criminal defense lawyers practicing before the state and federal courts located in California. These lawyers are employed both in the public and private sectors, and CACJ's membership is distributed around the state. CACJ often appears as an *amicus curiae* before Courts on matters of importance to its membership and stated goals.

Amici's interest in this case is founded on their commitment to preserving defendants' Fifth Amendment Due Process right to a fair trial, which includes the right to an impartial judge at trial.

STATEMENT OF THE FACTS

Amici adopt Appellant's Statement of the Facts.

ARGUMENT

THE TRIAL COURT'S CONDUCT DENIED DEFENDANT HIS FIFTH AMENDMENT DUE PROCESS RIGHT TO A FAIR TRIAL

It is axiomatic that the most important element necessary to ensure a fair trial is an impartial judge. Indeed, as the Eighth Circuit pointed out in *Warner v. Transamerica Insurance Co.*, 739 F.2d 1347, 1351 (8th Cir. 1984), "[a] trial judge should never assume the role of advocate." When the trial court strays from its function as neutral arbiter, that biased judicial conduct violates a defendant's constitutional right to a fair trial. *Lisenba v. California,* 314 U.S. 219, 236 (1941). As a result, this Court has cautioned that a trial judge "must not . . . usurp the functions either of the jury or of the representatives of the parties and must take care not to give the jury an impression of partisanship on either side." *United States v. DeSisto*, 289 F.2d 833, 834 (2d Cir. 1961).

Here, unfortunately, the trial court failed to adhere to those essential maxims. Nor are *amici* alone in reaching that conclusion. In fact, the media covering the trial(s) repeatedly commented on the trial judge's apparent bias against the defendant, and how that attitude manifested itself in court, before the jury, in statements and rulings adverse to the defense.

A sampling of that coverage includes the following reports:

- A. Sorkin, *A Shift in Testimony in Ex-Banker's Trial*, THE NEW YORK TIMES, April 23, 2004 at C3 (reporting that the day's proceedings "may have shown the jury for the first time just how much the judge appears to be favoring the prosecution in his rulings[,]" and that certain of the trial court's rulings produced "audible gasps and mocking laughter" from spectators);
- Ackman, *Quattrone Prosecution Plays Fast And Loose*, FORBES, May 4, 2004, ("[t]he rulings of the trial judge, who seemed increasingly hostile to the defense, will be tested on appeal.");
- D. Gilmor, *Quattrone Debacle: His Retrial Wasn't Fair*, SAN JOSE MERCURY NEWS, May 4, 2004 at B1 ("[Judge Owen] didn't treat the defendant or his lawyers with anything like the kind of impartiality so essential when a person's freedom is at stake");
- Robin Sidel, *Judge's Mien, Evidence Rulings May Figure in a Quattrone Appeal*, WALL STREET JOURNAL EUROPE, May 5, 2004 at M1 ("Judge Owen's role in the Quattrone case has been controversial for months."); and
- P. Braverman, *Hard to Beat*, AMERICAN LAWYER, January 2005, page 83 ("[Judge] Owen has a pro-prosecution reputation, and . . . was

openly antagonistic toward Keker . . .").

That rather striking perception on the media's part – extraordinary, in *amici*'s collective experience, in the context of a federal criminal trial[1] – is a primary motivation for *amici*'s participation herein, since the type of behavior reported by the media (and reflected amply in the record), seriously threatens the integrity of federal criminal proceedings in two ways:

(1) it sends a message to the public that court proceedings are not fair, and that judges are not impartial, thereby diminishing the public's confidence in and respect for federal court proceedings;[2] and

(2) if the conduct at issue herein is tolerated, it will discourage defense counsel in criminal cases from engaging in vigorous advocacy, since it will inform them – particularly those without sufficient experience and/or courage – that a trial court's partisanship constitutes "business

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[1] Ordinarily, media reporting pits defense counsel against the appropriate adversary in the courtroom – the prosecutor – and not the *trial judge*.

[2] Just this week, in his State of the Union address, President Bush reminded the nation that "[b]ecause courts must always deliver impartial justice, judges have a duty to faithfully interpret the law, not legislate from the bench . . . Because one of the main sources of our national unity is our belief in equal justice, we need to make sure Americans of all races and backgrounds have confidence in the system that provides justice." Available at www.whitehouse.gov/news/releases/2003/01/20030128-19.html.

as usual," and that challenging that proposition could result in the imposition of sanctions against the defense lawyer.

Consequently, the behavior of the trial court here implicates the most fundamental aspects of the role of both the judge and defense counsel. The failure to correct the errors in that behavior will impair the effectiveness of each in the fulfillment of their respective roles in the criminal justice system.

A. *The Trial Court's Different Standards for Determining Relevance of Evidence and Testimony Introduced By the Prosecution and the Defense*

The trial court was candid in explaining its method of determining relevance, but that cannot excuse its one-sided approach. During Mr. Quattrone's first trial, the trial court expressed its point of view in response to a defense objection on relevance grounds:

> THE COURT: A relevance argument really doesn't get you there, because as I said earlier, *I'm going to accept the government's statement that something is arguably relevant over your objection that it's not.* I am prepared to hear argument why something has become – because the government's taking its position as to relevance now *I'm going to credit their good faith in that over an argument just complaining that it ain't.* But if you were to argue something to me about it that it was improperly prejudicial, that I'd be prepared to hear. *But the mere fact it's not relevant doesn't get it excluded.*

First Trial Transcript, at 283:25-284:9 [10/1/03, Docket #56].

During the re-trial, the application of that same standard, *see* T. 2031:6-14 & 845:20-846:2, made for a decidedly unequal relevance standard. While it is difficult to identify all relevance objections, since often the trial court ruled on an objection without requiring that a ground be stated, review of the transcript establishes that *all 26* identifiable relevance objections interposed by the government were sustained: T. 671:15, 700:18, 791;1, 822:4, 880:22, 886:7, 939:2, 958:1, 1042:5, 1042:12, 1061:3, 1081:3, 1087:15, 1115:14; 1123:12, 1129:12, 1384:7, 1386:11, 1508:3, 1529;12, 1537:21, 1541:21, 1548:8, 1621:11, 1628:18, 1906:14.[3]

In contrast, only two defense relevance objections were granted (and only partially), (T. 762:13-19 & 844:5-11), while at least 22 defense relevance objections were overruled: T. 712:3, 713:5, 716:11, 721:5, 723:24, 726:11, 727:21, 742:24, 810:15, 844:25, 1169:9, 1235:10, 1284:17, 1295:8, 1297:25, 1415:14, 1446:14, 1601:3, 2031:6, 2046:15, 2171:11, 2178:8.

By itself, that scorecard might not be probative with respect to judicial bias, but in the context of (a) the trial court's stated predilection to "credit" the government's claim of relevance; (b) the avalanche of media reports sampled **ante**; and (c) the other examples of partiality cited **post**, it is illustrative of how

[3] "T." refers to the trial transcript.

the Appellant was denied a fair trial by the trial court's conduct.

B. *The Trial Court's Constant* Sua Sponte *Objections to Defense Examinations and Evidence*

The trial court's only *sua sponte* objections were to defense evidence and questions. *See, e.g.*, T. 663:8; 769:17; 795:6; 886:12; 1372:1; 1524:23; 1525:6; 1597:25; 1620:7; 1706:19; 1912:7; 2206:25; 2207:14 and 2396:4. Not once did the trial court intercede to object to prosecution questions or evidence. Again, alone, that alarming statistic might not be remarkable, but in combination with the other conduct set forth in this Brief, it is illuminating, as was the manner in which those *sua sponte* objections were made.

For instance, on some occasions the trial court simply interjected "sustained" in the absence of any objection by the government. Again, these spontaneous objections by the trial court were interposed exclusively against the defense. *See, e.g.*, T. 681:5; 769:1: 776:7; 779:4; 779:13; 795:14; 796:16; 886:22; 1366:19; 1523:15; 1703:13 and 1895:6.

In addition, at times the trial court intervened *sua sponte* even when the government had acceded to defense evidence and/or questions:

> Q: At this point that you were working on the talking points, did you understand that the Wall Street Journal was going to write an article alleging that hedge fund clients –

THE COURT: That has all been gone over again and again.

MR. KEKER: No, it hasn't, not with this witness.

THE COURT: He said this before. If you go back to the transcript - he is going to say he knew they were coming out and then he had to withdraw this because they changed their mind. He already told us that.

MR. KEKER: But not this question, your Honor. Was the story that hedge funds were paying extra commissions on trading in order to get IPO allocations?

THE COURT: *Are you objecting to that?*

MR. ANDERS: *Not to this one, your Honor.*

THE COURT: Very well. You may answer.

T. 1366:25-1367:15 (emphasis added). *See also* T. 883:18-884:10.

The trial court also solicited the government's agreement with its *sua sponte* objections, and/or prodded the government to make objections:

Q: Did you serve any of them on Mr. Quattrone?

THE COURT: That's sustained.

MR. KEKER: I'm sorry, your Honor?

THE COURT: I've said that's sustained. You asked two questions.

MR. KEKER: I asked did she serve this subpoena. Now I'm asking did she serve any of these subpoenas she's testified about to Mr. Quattrone.

THE COURT: *I take it you're taking the same position.*

MR. ANDERS: *Yes, your Honor.*

THE COURT: *You have to rise and then I will see you.*

MR. ANDERS: *I understand, your Honor.*

THE COURT: The objection is sustained.

T. 776:7-19 (emphasis added). *See also* T. 1709:18 ("[AUSA] Peikin, is that the position you are taking?"). Once the trial court even chastised the government for not objecting enough: ". . . The government has been sitting on its hands." T. 770:2-3.

At other points, the trial court interrupted the government by asking his own questions – for example, to establish required foundation testimony:

THE COURT: Let me --

MR. ANDERS: I'm sorry.

THE COURT: You don't have to be sorry. *I am getting foundation for whatever I have to do.*

T. 2029:14-17 (emphasis added). *See also* T. 724:1-20; 773:11-16; & 1008:12-24.

Sometimes the trial court reminded the government to prove something it had forgotten to prove:

THE COURT: . . . By the way, does the jury understand the testimony was under oath? Was that said by you in the beginning?

MR. PEIKIN: No.

THE COURT: That should be added.

MR. PEIKIN: Okay, would you like me to say that?

THE COURT: Yes.

T. 1479:16-22. *See also* T. 1295:18-24.

Regrettably, the record reveals that these instances of interference were neither isolated nor evenly applied to both sides. As this Court cautioned more than a half-century ago, a trial judge "is decidedly not a prosecuting attorney. . . . he must remain the judge, impartial, judicious, and, above all, responsible for a courtroom atmosphere in which guilt or innocence may be soberly and fairly tested." *United States v. Brandt*, 196 F.2d 653, 655-56 (2d Cir. 1952); *see also Warner v. Transamerica Insurance Co.*, 739 F.2d at 1351 (8th Cir. 1984) (trial judge "must preserve an attitude of impartiality in the conduct of a trial.").

Here, the trial court crossed that boundary, and in so doing denied Mr. Quattrone his Fifth Amendment Due Process right to a fair trial and impartial judge.

C. *The Trial Court's Frequent* Sua Sponte *Interruption of the Presentation of the Defense Case Was Improper*

The trial court's *sua sponte* objections noted above were paired with its repeated interruptions of either defense counsel or defense witnesses. Excluding interruptions about needing to orient or to hear better, the transcript reveals five

sua sponte interruptions to government examinations, T. 758:10; 827:20; 890:21; 1033:13; 1258:14, while, in contrast, there were more than fifty *sua sponte* interruptions to defense examinations. T. 669:5; 672:15; 686:15; 689:15; 878:8; 914:16; 1041:12; 1060:15; 1084:16; 1104:1; 1114:5; 1114:23; 1143:10; 1144:4; 1213:12; 1258:14; 1335:12; 1360:1; 1367:3; 1368:16; 1369:23; 1376:17; 1430:20; 1517:9; 1519:11; 1533:10; 1537:3; 1542:9; 1559:13; 1559:22; 1560:8; 1614:18; 1674:15; 1703:8; 1716:11; 1717:4; 1719:11; 1814:2; 1823:5; 1836:7; 1899:3; 1900:3; 1908:19: 1909:20; 1910:15; 1912:8; 1948:7; 1951:15; 1959:25; 2001:16; 2003:16; 2014:24; and 2070:8. That imbalance in the number of interruptions, which occurred with considerable frequency and effect even during the defendant's own testimony, *see* Appellant's Brief, at 53-61, cannot reasonably be attributed to any distinction in the quality of lawyering (*see* **post**, at 21 n. 4 & 24 n. 6), but instead raises the disturbing specter of the partiality reported in the media.

It also establishes a Fifth Amendment Due Process violation. *See United States v. Coke,* 339 F.2d 183, 186 (2d Cir. 1964) (ordering a new trial due to the trial judge's "repeated deprecating interjections in the examination of witnesses by the defendant's counsel"). Similarly, in *United States v. Filani,* 74 F.3d 378 (2d Cir. 1996), this Court quoted Francis Bacon to emphasize the principle that a trial judge's interruption of the presentation of evidence, in a manner prejudicial to the

defense, is improper:

> an over-speaking judge is no well-tuned cymbal. It is no grace to a judge first to find that which he might have heard in due time from the bar; or to show quickness of conceit in cutting off evidence or counsel too short; or to prevent information by questions, though pertinent.

74 F.2d at 386 (*quoting* Bacon).

As Judge Hand observed sixty years ago, a trial court must take the greatest precautions not to favor one side in litigation over the other, or to telegraph to the jury the trial court's view of the merits of either side's case:

> the judge was exhibiting a prosecutor's zeal, inconsistent with that detachment and aloofness which courts have again and again demanded, particularly in criminal trials. Despite every allowance he must not take on the role of a partisan; he must not enter the lists; he must not by his ardor induce the jury to join in a hue and cry against the accused. Prosecution and judgment are two quite separate functions in the administration of justice; they must not merge.

United States v. Marzano, 149 F.2d 923 (2d Cir. 1945) (L. Hand, J.).

Here, as the record, and the perceptions of the media demonstrate, the trial court failed to adhere to either responsibility, and instead made his sentiments obvious to all observers, including the jury.

D. *The Trial Court's Use of Different Standards for Admitting "State of Mind" Testimony Elicited By the Prosecution and the Defense*

The trial court's use of different standards for the prosecution as opposed to

the defense extended to other evidentiary issues beyond relevance (as set forth **ante**, at 9-10). Another example was with respect to "state of mind" testimony.

While the government was granted considerable leeway in eliciting "state of mind" testimony from witnesses, T. 1268:8-12 (Brodsky direct), 1576:24-1577:3 (Dollard cross), 1577:24-1578:1 (Dollard cross), 1642:23-1643:1 (Char cross), 1656:11-14 (Char cross), 1657:12-18 (Char cross), the defense was not afforded the same opportunity, as government objections were regularly sustained. T. 1073:8-1077:11 (McCarthy cross), 1537:2-10 (Dollard direct), 1537:19-1538:12 (Dollard direct), 1620:12-1623:3 (Char direct), 1628:16-21 (Char direct), 1682:5-8 (Char direct) & 1611:9-13 (Char direct).

Moreover, as noted above (in the identification of the witnesses whose testimony was at issue), in some instances the change in standard occurred between direct and cross, always shifting to the government's advantage. *Compare, e.g.,* T. 1415:10-1416:18 (Loh direct), *with* T. 1508:8-22 & 1781:14-1783:20 (Loh cross), and (with respect to interpreting the language in e-mails) T. 1281:8-1282:12, 1305:5-9, 1398:6-12 & 1398:19-23 (Brodsky direct), *with* T. 1316:21-1319:25 & 1366:9-20 (Brodsky cross).

This inequality reached its nadir during the defendant's testimony, as Mr. Quattrone, whose state of mind when he authored the pivotal e-mail was the

critical issue at trial, was not permitted to describe his own state of mind:

Q:	At the end of the day, how did you feel with respect to this conversation that you had with Mr. Brodsky [which the government contends alarmed Quattrone to such degree as to make him want to obstruct justice]?
MR. ANDERS:	Objection, Your Honor.
THE COURT:	I will sustain that.

T. 1840:23-1871:1.

Yet, during cross-examination, the government was permitted to cross-examine Mr. Quattrone as to his "understanding." *See, e.g.*,T. 2070:4-24; 2144:1-25; 2145:19-25.

In addition to those subject matters and aspects of the trial cited in the text, the trial court's uneven treatment of objections and examination was not limited to issues of relevance or the scope of "state of mind" testimony. For example, the standard applied to the defense and prosecution was different – to the prosecution's advantage – with respect to (1) the limitation on leading questions; and (2) the scope of hypothetical questions.

Regarding leading questions, while the trial court allowed the government to "focus" witnesses with leading questions, *see* T. 1296:16-22, *see also, e.g.*, T. 1279:7-13, the government's objections to defense counsel's questions on the grounds of leading were sustained on all but two occasions. *Compare* T. 1706:18;

1817:25; 1822:25; 1856:21; 1873:4; 1876:25; 1876:23; 1894:15; 1903:8; 1909:13; 1909:20; 1910:15, *with* T. 1835:19 & 1878:2.

Various questions to the defendant were barred as leading, *e.g.* T. 1822:22-23, 1876:6-9, 1876:23, 1903:6-9, 1909:11-14, 1909:19, 1910:15, 1912:6, including asking the defendant to discuss documents in sequential order. T. 1912:3–1913:22. Conversely, the government was permitted to have its witnesses review documents sequentially, paragraph by paragraph. *See* T. 723:1-728:20 (Sherman); 753:1-764:15 (Pennington); and 810:10-814:25 (Khuzami). Relatedly, in one instance, the trial court *sua sponte* refused to permit a defense question on direct about a witness' negotiation of Mr. Quattrone's contract, T. 1703:11-18 & 1724:18-1726:3, while the government was allowed to raise the negotiation on cross. T. 1723:1-6.

The same gulf existed with respect to the authority to ask hypothetical questions, with the government being allowed to ask its witness, Richard Char, about various hypothetical ways in which a banker might receive notice of an obligation to preserve documents, T. 1638:14, 1638:18, but the defense was not allowed to explore that subject with its witnesses, Kevin McCarthy and Adrian Dollard. T. 1090:22-1091:1, 1523:11-15. Similarly, the government was allowed to ask hypothetical questions to Mr. Quattrone on cross-examination, T.

2146:24–2147:5, while defense counsel was not permitted to ask an essentially identical hypothetical question on direct. T. 1897:15-20.

Once again, these examples by themselves would not be grounds for complaint, but aggregated with the illustrations catalogued **ante** and **post**, they form a troubling pattern that materially impaired the defense function in this case, and denied Mr. Quattrone a fair trial.

E. *The Trial Court's Frequent Denigration of the Defense and of Defense Counsel*

This Court has "repeatedly insisted that trial judges display patience with counsel so as not to prejudice a party or create an impression of partisanship before the jury." *United States v. Pellegrino*, 470 F.2d 1205, 1207 (2d Cir. 1972). Unfortunately, here, the trial court manifested its displeasure with counsel throughout the trial, and undoubtedly conveyed that to the jury.

A principal means by which the trial court denigrated counsel was the refrain that the defense was wasting time (including, at times, when the defense made objections). *See* T. 795:21; 914:20; 1018:3; 1031:14-15; 1060:23-24; 1104:1; 1104:7-8; 1104:11-12; 1113:19-20; 1213:14-18; 1367:3-4; 1597:25; 1899:3; 1900:2-3; 1903:18; 1908:19; 1910:15-16; 2003:18-24. In contrast, the government was never once admonished for the pace of its presentation or examination(s).

Lead defense counsel John W. Keker, Esq.,[4] was also threatened with a contempt citation early in the trial, T. 915:9, as a result of the following cross-examination and colloquy:

Q:	Why did you send this e-mail about VA Linux only to those people as opposed to others in the bank?
MR. ANDERS:	Objection.
THE COURT:	As opposed to what?
MR. KEKER:	As opposed to others in the bank. She only went to that number of people.
THE COURT:	I thought she was asked that on direct. I remember your saying you went to somebody and they helped you pick out who to send it to?
THE WITNESS:	That is correct.

[4] Mr. Keker's credentials are, simply, impeccable. Beginning with his clerkship for then-retired Supreme Court Chief Justice Earl Warren, his career has been marked by achievement and recognition as one of this nation's foremost and most respected lawyers. He has served with the Independent Counsel's office (Iran/Contra investigation), as a federal public defender, and as a principal of his own firm (Keker & Van Nest LLP), in which capacity he has been honored as the best lawyer in the San Francisco Bay Area (by the *San Francisco Chronicle* in 2003), and inducted into the California State Bar's Litigation Hall of Fame in 2002. He is a fellow of The American College of Trial Lawyers, the International Academy of Trial Lawyers, the American Board of Trial Advocates, and the American Bar Foundation. A combat veteran of the Viet Nam war (1967), Mr. Keker has also served as President of the San Francisco Police Commission (1996-97) (among other civic positions in San Francisco), and is co-author of *Effective Direct and Cross Examination*, published by the California Continuing Education of the Bar.

THE COURT: She answered that on direct. You can have it again if you want.

MR. KEKER: Yes, sir.

Q: Why did you send it to those people as opposed to more people in the bank?

A: Those were the people – those are were the names of the people given to me as having worked on the IPO.

Q: Why did you limit yourself to the people -

THE COURT: Sir, she answered your question.

MR. KEKER: I don't think so.

THE COURT: You said why did she send it to these people and she told you why. Please move along.

Q: Why didn't you send a copy of the letter to these people?

MR. ANDERS: Objection.

THE COURT: Objection sustained.

Q: Was it your intention to only give notice –

THE COURT: Sir, come to the side bar please.

(Side bar conference)

THE COURT: Mr. Keker, that is the fourth time you have asked this question and the fourth time the objection has been sustained. I am going to be blunt about this. Given the way you are dealing with the court, you are now almost trying to have a test of wills with me on this and if do you this kind of a thing where you ask the same question

> 4 5, 6 times in the future, I am going to find you in contempt, and I want you to be aware of that.

T. 913:23-915:10.[5]

Of course, the threat of contempt is sobering for any defense counsel, and *amici* are concerned that all of the above-cited conduct by the trial court, coupled with the prospect of contempt, could very well chill the willingness of many defense counsel to engage the court in perfectly permissible argument that might nevertheless incur the court's sanction. The result would be self-imposed passivity on the lawyer's part, to the decided detriment of the defendant.

That defense counsel in this case were capable, experienced, and aggressive,[6] and continued to attempt to present the defense case through cross-

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[5] Although the threat of contempt occurred during the sidebar conference, it nevertheless "indicates the acrimonious atmosphere that pervaded the courtroom." *United States v. Nazzaro*, 472 F.2d 302, 311 n. 10 (2d Cir. 1973).

[6] Howard E. Heiss, Esq., is no doubt familiar to this Court. Mr. Heiss was an Assistant United States Attorney for the Southern District of New York for eleven years, during which tenure he served as Chief of the Securities and Commodities Fraud Task Force (1992-95), Deputy Chief of the Narcotics Unit, Deputy Chief of the Criminal Division, Chief of the General Crimes Unit, and Chief of the Organized Crime Unit. Mr. Heiss also received the Attorney General's Award for Distinguished Service (1993), and, from the Director of the Executive Office for United States Attorneys, the Director's Award for Superior Performance (1987). Currently, Mr. Heiss is a partner at O'Melveny & Myers LLP's New York office.

Jan Nielsen Little, Esq., the third member of the defense team, has also had a

examination and defense witnesses and evidence, only exacerbates the irony, and the danger that *amici* foresee. Less seasoned defense counsel would more likely have been intimidated by the district court's ire early and entirely, and would not have continued to challenge the trial court. The result would been a defense impaired even more than that in this case, since the self-censorship such counsel would practice would severely dilute the zealousness with which lawyers are obliged to represent their clients, particularly when they are criminal defendants, and even more particularly when lawyers know they risk contempt sanctions if they pursue their duty vigorously.

The only way to prevent that diminution of the defense function – and, in turn, the fairness of the criminal justice system and the adversary process – is to enforce in this case the rule that judges must be impartial, and must not convey to the jury any deviation from that standard.

F. *The Trial Court's Persistent Attempts to Deny Defense Counsel the Opportunity to Make a Full Factual Record Were Improper*

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distinguished career, including five years (1982-86) with the Department of Justice's Public Integrity Section, where she received the department's Special Commendation Award. She is also past co-chair of the American Bar Association Litigation Section Complex Crimes Committee and that organization's Northern California White Collar Crime Committee. She is presently a partner at Keker & Van Nest LLP, which received the *American Lawyer*'s 2005 "Litigation Boutique of the Year" award.

Defense counsel's attempts to make an appropriate record at trial were the subject of these no doubt frustrating exchanges with the trial court:

MR. KEKER: I'll clarify this Your Honor... [court interrupts] ... I would like you to listen to it [court interrupts] ... Can I be heard [court interrupts] ... Your Honor could I be heard [court interrupts] ... I'd really like to be heard Your Honor.

THE COURT: Sure, go ahead.

T. 1074:15-1075:14.

* * *

MR. KEKER: If I could just finish [for] the record Your Honor . . . [interruption by AUSA] . . . Can I finish? . . . [interruption by AUSA] . . . Can I finish making a record or is this just not about us? . . . Can I finish?

T. 1140:12-1141:8.

* * *

MR. KEKER: Can I just make the record?

THE COURT: No you can't.

MR. KEKER: – on this?

THE COURT: No you can't.

MR. KEKER: Could I do it later?

THE COURT: Okay, let's go back [to open court].

T. 1382:14-17.

* * *

MS. LITTLE: May I approach the bench your Honor?

THE COURT: No. We have the language.

MS. LITTLE: I'm trying to find – do you want me to explain or not?

THE COURT: No, that's sustained. Put a new question.

MS. LITTLE: May I make an offer of proof?

THE COURT: At a later point.

T. 1524:6-12. *See also* T. 1493:14-1500:22 (rejecting offer of proof of exhibits excluded under *in limine* rulings).

On other occasions, the trial court refused defense counsel's request to approach the sidebar to make a record. *See e.g.*, T. 819:22; 1078:3; 1104:13; 1270:7; 1306:23; 1477:25; 1499:16; 1524:6; 1902:13; 2003:25; 2176:11; 2189:8. In by now familiar contrast, the government was never denied a request for a sidebar.

G. *The Matter Should Be Remanded for Re-Trial Before a Different Judge*

As noted above, it is not any particular aspect of the trial court's conduct, bur rather the accumulation of the instances in the record, outlined **ante**, that has compelled *amici* to participate in this case. In *United States v. Nazzaro*, 472 F.2d 302, 310 (2d Cir. 1973), this Court declared that "[w]here the defendant's guilt or

innocence rests almost exclusively on the jury's evaluation of the witnesses' demeanor and credibility, we cannot ignore [conduct] by a judge which so clearly signals to the jury the judge's partisanship."

That, unfortunately, is the case here, and in order that any subsequent retrial be fair, and alleviate the concerns expressed by *amici* in this Brief, it is also respectfully submitted that, consistent with the principle enunciated in this Court's decision in *United States v. Bryan*, 393 F.2d 90 (2d Cir. 1968), that "the practice of retrial before a different judge is salutary and in the public interest, especially as it minimizes even a suspicion of partiality[,]" 393 F.2d at 91, *see also United States v. Londono*, 100 F.3d 236, 242 (2d Cir. 1996) ("reassignment is advisable to preserve the appearance of justice"), the matter be remanded for retrial before a different district judge.

* * *

Judicial impartiality has been fundamental to our system of criminal justice since its inception, and remains so. Thus, more than three centuries after William Penn, in *Fruits of Solitude* (1693), wrote that "[j]ustice is justly represented blind, because she sees no difference in the parties concerned. . . Impartiality is the life of justice[,]" this Court reaffirmed that "the trial court may actively participate and give its own impressions of the evidence or question witnesses, as an aid to the

jury, so long as it does not step across the line and become an advocate for one side." *United States v. Filani*, 74 F.3d at 385.

Here, examination of the totality of the record compels the conclusion that the trial court stepped across that line and denied Appellant his Fifth Amendment Due Process right to a fair trial and an impartial judge. Consequently, it is respectfully submitted that Mr. Quattrone's conviction be vacated, and the matter remanded for a new trial before a different district judge.

Conclusion

Accordingly, for the reasons set forth above, it is respectfully submitted that Appellant's conviction should be vacated, and the matter remanded for a new trial.

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