No. 14-4044

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES,

Plaintiff - Appellee.

v.

NADER MODANLO

Plaintiff -Appellant,

Appeal from the United States District Court
For the District of Maryland
In Case No. 8:10-cr-00295-PJM (Mesitte, J.)

BRIEF FOR NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT AND REVERSAL

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May 29, 2015

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RULE 29 STATEMENT OF THE *AMICUS CURIAE*

Amicus curiae National Association of Criminal Defense Lawyers (NACDL), a non-profit corporation, is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. A professional bar association founded in 1958, NACDL's approximately 10,000 direct members in 28 countries—and 90 state, provincial, and local affiliate organizations totaling up to 40,000 attorneys—include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges committed to preserving fairness and promoting a rational and humane criminal justice system.

NACDL has frequently appeared as *amicus curiae* before the U.S. Supreme Court, the federal courts of appeals, and the highest courts of numerous states. In furtherance of NACDL's mission to safeguard fundamental constitutional rights, the Association often appears as *amicus curiae* in cases involving the ability of criminal defendants to vindicate their rights on direct appeal and through collateral post-conviction review. As relates to the issue before the Court in this case, NACDL has an interest in ensuring the government is prevented from securing criminal convictions based on improper *ex parte* contacts with the court.

No counsel for any party authored this brief in whole or in part, no party, and no counsel for any party, contributed money that was intended to fund the

preparation or submission of this brief, and no person—other than the *amicus curiae*, its members, or its counsel—contributed money that was intended to fund the preparation or submission of this brief.

All parties have consented to the filing of this brief.

STATEMENT OF THE ISSUES

Amicus curiae National Association of Criminal Defense Lawyers submits this brief to address the question whether Defendant-Appellant Nader Modanlo is entitled to a new trial on all counts because the government's *ex parte* and off-the-record communications with the court violated his constitutional rights.

STATEMENT OF THE CASE

Nader Modanlo was convicted of conspiring to violate, and violating, the Iran Transaction Regulations ("ITR") by brokering a contract for a satellite between Iran and a Russian company. He was also convicted of money laundering and obstructing bankruptcy proceedings. The District Court denied Modanlo's motion for a judgment of acquittal, or in the alternative, for a new trial.

STATEMENT OF RELEVANT FACTS

In this matter, the government and the District Court engaged in dozens of *ex parte* contacts, over the course of a year, before and during trial. The sheer number of those contacts is astonishing, as is their familiar tone — the court offered to "help" the government with its "to-do list," and joked about traveling abroad with the prosecutors to conduct discovery, while the prosecution joked about "what may develop" in witness interviews, "assuming the witnesses actually cooperate!!??" The government has dismissed these communications as "related to scheduling or to administrative, non-substantive matters," Government's Opposition to Defendant's Motion for Access to Record Materials (January 12,

2015) at 2, but this banter between prosecutors and the court is shocking in that it exposes a court and prosecutors who seem to view themselves as colleagues engaged in a "joint enterprise."

But what is truly outrageous is the cavalier manner in which the District Court gave its ear to the government and decided critical issues without the defendant's participation — and, in some cases, without the defendant's knowledge — in what the government concedes were "substantive *ex parte* contacts." (*Id*.) Moreover, in at least one instance, when the District Court *did* inform the defendant — after the fact — of an *ex parte* contact, the court misled the defendant, intentionally or not, as to the nature of that contact.

In addressing the defendant's motion for discovery of the United States' correspondence with Swiss and Russian authorities,[1] the District Court ordered the government to produce "[a]ll" such correspondence for *in camera* review. The United States responded with an *ex parte*, undocketed, and off-the-record letter-brief, including *samples* of the MLAT correspondence. Modanlo did not know of the submission, and thus could not respond to it. And in denying Modanlo's request for disclosure, the District Court misstated the events, asserting that it had reviewed "all" of the correspondence, and not mentioning the letter-brief.

[1] The prosecution obtained evidence from Swiss and Russian authorities via the Mutual Legal Assistance Treaty ("MLAT") process.

The government engaged in additional *ex parte* contacts with the District Court when it moved to depose certain Swiss witnesses. The court conditioned the depositions on the government's providing adequate assurance that the foreign witnesses would in fact testify, and on its submission of any written statements by, or memoranda summarizing interviews of, the proposed witnesses. Again, the government did not comply, instead submitting another *ex parte*, undocketed and off-the-record letter-brief, after which the court — again without acknowledging or disclosing the government's submission — granted the government's motion to take the depositions.

When one of the Swiss witnesses exercised his right, under Swiss law, to prevent the release of his deposition transcript, the government moved to continue the trial date (from which the court had earlier said there would be no further continuance). The government had earlier said that the absence of this witness's testimony would be "tantamount to probably a dismissal of the case," and when the court refused to continue the trial, it ordered the government to advise all parties within three days whether it would dismiss the case. The day before the government was to provide this advice, it telephoned the court, *ex parte*, to request more time. No order was entered granting additional time, but the court accepted the government's late-filed motion for reconsideration, and then agreed to continue the trial date.

Finally, on the day before trial began, the government sent an *ex parte* email to the District Court, purporting to seek the court's guidance as to whether it was required to disclose the fact that in a 2010 interview, a witness described by the District Court as the "linchpin" of the government's case had stated that the defendant had *refused* to assist Iran with satellite projects. In its own *ex parte* email response to the government, the court ordered this obviously exculpatory statement disclosed, but the government failed to disclose it for several more days. When the statement was finally produced, the defense requested a hearing, at which the court described the material as "clearly" exculpatory, and stated that it would consider whether to order disclosure of the entire memorandum. In response, the government sent the court yet another *ex parte* email, arguing against disclosure of the memo and requesting that the court hear a presentation from the Chief of the District's National Security Section. The court advised the prosecution — again, *ex parte* — that it would hold a hearing on the issue.

The defense received no notice of the government's filing, or of the hearing. On the morning of the hearing, the court summoned the defense, still without disclosing the subject of the hearing. At the hearing, the government claimed that although the memorandum had been declassified, its "concerns" about disclosing it could only be expressed in a "secret proceeding" from which the defense was excluded. After hearing from the government in the absence of the defense, and

with — at the government's suggestion — no court reporter present, the court ruled that it was "not appropriate" to order disclosure of the entire memorandum.

The government asserts that these "substantive *ex parte* contacts," were necessary because they involved "decisions . . . about which documents and what information to disclose to Modanlo, in an effort to balance the defendant's constitutional and statutory rights with delicate national security considerations." Government's Opposition to Defendant's Motion for Access to Record Materials (Jan. 12, 2015), at 2-3. The District Court permitted these extraordinary *ex parte* contacts because "that's the way it goes in these security cases." (Tr. at 13, Apr. 29, 2013 (JA3360)). Although there may be cases in which "national security" concerns require *ex parte* communications, the mere incantation of "national security" does not give the government *carte blanche* to exclude the defendant from important portions of the proceedings against him. *Ex parte* communications are "anathema" to our criminal justice system, and are permitted only when extraordinary circumstances make them necessary to serve some compelling interest.

The past decade and a half has seen a significant increase in criminal cases that may involve issues of "national security." In this context, it is particularly important that courts do not reflexively authorize *ex parte* communications whenever the government invokes "national security." Instead, the courts must

protect the defendant's rights to full participation in the proceedings against him, by ensuring that *ex parte* communications occur only when *extraordinary circumstances* make them *necessary* to protect some *compelling interest.* The District Court here failed utterly to do so.

SUMMARY OF ARGUMENT

Ex parte communications strike at the heart of our adversary system of justice, and must be avoided whenever possible. Communications between prosecutors and courts outside the presence of the defense undermine the adversary process on which our criminal justice system is based. They also rob defendants of their constitutional rights to be present and effectively represented at proceedings against them, and to a public trial and an impartial decision-maker.

There are extraordinary circumstances in which *ex parte* communications may be necessary to protect some higher good. When counsel for an indigent criminal defendant seeks funding for expert or other services, *ex parte* communications are necessary to preserve the adversary character of the proceedings. *Ex parte* communications may also be necessary to avoid disclosure of information — such as the identity of an informant — where that disclosure may cause significant harm to others.

Ex parte communications may also be necessary to protect national security, an issue that arises with increasing frequency in the "post-9/11 world." But courts

and prosecutors must not be too quick to invoke "national security" to exclude defendants, and before excluding a defendant, the court must undertake a rigorous analysis of whether *ex parte* communications are necessary and, if they are, whether they can be had without violating the defendant's fundamental constitutional rights. The proceedings in this case illustrate the damage that can be done when prosecutors are too quick to cry "national security," and where a court fails to conduct that necessary analysis.

ARGUMENT

I. *EX PARTE* COMMUNICATIONS ARE HIGHLY DISFAVORED.

Ex parte communications are "anathema in our system of justice." *Guenther v. Comm'r*, 889 F.2d 882, 884 (9th Cir. 1989). The adversary system — the bedrock of American justice — is premised on the notion that "[n]o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and the opportunity to meet it." *United States v. James Daniel Good Real Property*, 510 U.S. 43, 55 (1993) (quoting *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 170-72 (1951) (Frankfurter, J., concurring)). Particularly in criminal proceedings, where an individual's liberty is at stake, due process requires that a defendant have not only the opportunity to advance his own position, but "to correct or contradict" the government's. *United States v. Abuhamra*, 389 F.3d 309, 322-23 (2d Cir. 2004).

Because they strike at the very heart of this seminal principle, *ex parte* communications are — except in extraordinary circumstances — strictly forbidden. *Thompson v. Greene*, 427 F.3d 263, 269 n.7 (4th Cir. 2005) (prohibition on *ex parte* contacts is "one of the basic tenets of our adversary system"); *Doe v. Hampton*, 566 F.2d 265, 276 (D.C. Cir. 1977) (*ex parte* contacts are "prohibited as fundamentally at variance with our conceptions of due process"). As this Court has held, "[t]he ends of criminal justice would be defeated if judgments were to be founded on a partial . . . presentation of the facts." *United States v. Moussaoui*, 382 F.3d 453, 471 (4th Cir. 2004).

The adversary system depends upon "one-sided loyalty" — each party is "required to be partisan;" *i.e.*, responsible "to present its side, not an even-handed assessment of the facts." Roberta K. Flowers, *An Unholy Alliance: The Ex Parte Relationship Between the Judge and the Prosecutor*, 79 Neb. L. Rev. 251, 257-58 (2000). It is "through the interplay of the two participants, presenting their cases and disputing the other side's version, from which a fair decision can be reached." *Id*. at 287. The adversary system:

> [O]perates on the assumption that the self-interests of the combatants will clash so as to hone the issues in such a way as to find the truth, and thus, reach a just result.

Id.; *see also* Irving R. Kaufman, *Does the Judge Have a Right to Qualified Counsel?*, 61 A.B.A. 569, 569 (1975) ("truth is best discovered by powerful statements on both sides of the question").

As a result, the participation of *both* sides is the "fundamental instrument of judicial judgment." *In re Taylor*, 567 F.2d 1183, 1188 (2d Cir. 1977). "Debate between adversaries" is "essential" to the truth-seeking function of the adversary system. *Gardner v. Florida*, 430 U.S. 349, 360 (1977). By foreclosing that debate, *ex parte* communications make it impossible for courts to conduct fair and accurate proceedings. "Fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights." *James Daniel Good Real Property*, 510 U.S. at 55. "One would be hard pressed to design a procedure more likely to result in erroneous deprivations" than one in which one party is allowed to presents its side of a contested issue, with no response from the other. *Am.-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1069 (9th Cir. 1995). "[T]he very foundation of the adversary process assumes" that the risk of error inherent in consideration of *ex parte* communications violates due process. *Id.*

The federal courts' power lies in their legitimacy. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 865 (1992). *Ex parte* communications undermine that legitimacy by making impossible, as a matter of both perception and reality, the "neutral and detached" fact finder that is the "first and most essential element"

of the adversary system. Anne Strick, *Injustice For All* 145 (1996). Untested by correction, contradiction, or even comment from the other party, information provided *ex parte* almost inevitably carries unmerited weight and distorts the fact finder's view of the dispute. "Unchallenged evidence or arguments are more salient, more likely to be recalled by the decision maker, and more likely to carry inordinate weight in the mental process of reaching a final conclusion." John R. Allison, *Combinations of Decision-Making Functions, Ex Parte Communications, and Related Biasing Influences: A Process-Value Analysis*, 1993 Utah L. Rev. 1135, 1197 (1993). *Ex parte* communications are, by definition, unchallenged as they are made, and the party making them gains the advantage of "having the 'first word,'" *United States v. Earley*, 746 F.2d 412, 416 (8th Cir. 1984), as well as the advantage of depriving its adversary of "notice of the precise content of the communications and an opportunity to respond." *United States v. Napue*, 834 F.2d 1311, 1319 (7th Cir. 1987) (citing *In re Taylor*, 567 F.2d at 1187-88). As a result, they violate due process even when the opposing party is given a belated chance to respond. *Earley*, 746 F.2d at 416.

Ex parte communications also threaten the courts' legitimacy as a matter of perception. "Justice must satisfy the appearance of justice," *Offutt v. United States*, 348 U.S. 11, 14 (1954), and giving one party "private access to the ear of the court" is a "gross breach of the appearance of justice." *United States v.*

Carmichael, 232 F.3d 510, 517 (6th Cir. 2000). Secret communications between the court and only one party to a dispute, held without notice outside of public view, justifiably raise questions about the court's impartiality, and therefore its legitimacy.

II. THE DISTRICT COURT FAILED TO DETERMINE WHETHER *EX PARTE* COMMUNICATIONS WERE MADE NECESSARY BY CONCERNS FOR "NATIONAL SECURITY," AND WHETHER SUCH COMMUNICATIONS WOULD VIOLATE THE DEFENDANT'S CONSTITUTIONAL RIGHTS.

Although heavily disfavored, *ex parte* communications may be required in extraordinary circumstances. For example, indigent defendants seeking the issuance of subpoenas at government expense, or funding for "investigative, expert, or other services necessary for adequate representation," are entitled to *ex parte* hearings. Fed. R. Crim. P. 17(b); 18 U.S.C. § 3006A(e)(1). In these cases, *ex parte* proceedings are necessary to *preserve* the adversary system, by allowing indigent defendants to shield their strategies from the government in advance of trial — just as non-indigent parties may do — and thereby ensuring the defendant will have a full and fair opportunity to put his own best case forward to meet the prosecution's. *United States v. Meriweather*, 486 F.2d 498, 506 (5th Cir. 1973). The "substantive" *ex parte* communications here had the opposite effect, excluding the defendant from important decisions and undermining the adversary character of the proceedings.

Ex parte communication may be permissible even where it precludes adversary participation, where necessary to protect some other interest, such as the integrity of an investigation, *see United States v. Barnwell*, 477 F.3d 844, 850 (6th Cir. 2007), or the safety of a witness or juror. *Napue*, 834 F.2d at 1316-18. However, the grave risks to the adversary process inherent in *ex parte* communications require that they be permitted only in "extraordinary" circumstances, upon a showing of a "compelling" interest. *Barnwell*, 477 F.3d at 850-51; *see also Napue*, 834 F.2d at 1318 (*ex parte* communications between the trial court and the prosecution in a criminal case "should be avoided whenever possible and, even when they are appropriate, their scope should be kept to a minimum"). When it indulges in such communications, "[t]he Government bears a heavy burden in showing that the Defendant was not prejudiced" by them. *Barnwell*, 477 F.3d at 850-51 (quoting *United States v. Minsky*, 963 F.2d 870, 874 (6th Cir. 1992)).

Here, the Government asserts that its "substantive" *ex parte* communications were necessary because they involved "decisions . . . about which documents and what information to disclose to Modanlo, in an effort to balance the defendant's constitutional and statutory rights with delicate national security considerations." Government's Opposition to Defendant's Motion for Access to Record Materials, at 2-3 (Jan. 12, 2015). It is clear that the District Court, too, viewed "national

security" concerns as justifying *ex parte* communications in this case. During trial, when the government asked to present *ex parte* argument on its *Brady* obligations, the court told defense counsel:

> He's now proposed that he'd have to make an *ex parte* communication, which happens in these security cases. It happens. I know you feel offended by it, but the fact is that's the way it goes in these security cases. And I do sometimes have to take *ex parte* communications. That's the way it is.

(Tr. at 13, Apr. 29, 2013 (JA3360)).

But "national security" is not a talisman the invocation of which obviates the need for careful analysis of whether the circumstances are truly so "extraordinary" as to justify *ex parte* communications. As an initial matter, the court's perception of this case as one of "these security cases" was incorrect. The vast majority of the dozens of *ex parte* communications at issue here had nothing to do with "national security," and the government never claimed that they did. "National security" surely cannot be invoked to justify *ex parte* contacts that the prosecution never claimed were required to protect it.

Even where national security issues legitimately are at issue, *ex parte* proceedings are permissible only in "extraordinary cases," *see United States v. Presser*, 828 F.2d 330, 335 (6th Cir. 1987), and the court may not simply, and reflexively, exclude the defendant. Before permitting *ex parte* communications in order to protect national security, the court must determine whether procedures can

be implemented that balance the government's interest in protecting national security with the defendant's trial rights. *In re Terrorist Bombings of U.S. Embassies in E. Afr.*, 552 F.3d 93, 115-16 (2d Cir. 2008) (quoting *United States v. Pappas*, 94 F.3d 795, 799 (2d Cir. 1996)). If the two cannot be reconciled, the defendant's interest in a fair trial must prevail, even if it means that the government must choose between disclosing sensitive information and abandoning the prosecution. *See United States v. Smith*, 780 F.2d 1102, 1107-10 (4th Cir. 1985) (*en banc*) (governmental privilege to withhold national security information "must . . . give way" when that information "is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause") (citing *Roviaro v. United States*, 353 U.S. 53, 60-61 (1957)).

In the single instance in this case where the government actually invoked "national security" to justify an *ex parte* hearing, the District Court failed to undertake any such analysis. The District Court should have looked to the procedures set out in the Classified Information Procedures Act, 18 U.S.C. App'x 3 ("CIPA"), which was enacted to afford procedures by which a court may weigh the government's interest in national security against the defendant's trial rights. *See* Timothy J. Shea, *CIPA Under Siege: The Use And Abuse Of Classified Information In Criminal Trials*, 27 Am. Crim. L. Rev. 657, 661 (1990). CIPA

protects the government from "graymail"[2] by ensuring that a defendant may not derail prosecution by threatening to disclose classified information gratuitously. At the same time, however, CIPA recognizes that, if a defendant cannot be fairly tried without disclosing classified information, the government must determine "whether or not the benefits of prosecution will outweigh the harm stemming from public disclosure of such information." 126 Cong. Rec. 26503 (daily ed. Sept. 22, 1980) (statement of Rep. Mazzoli). In order to protect interests in national security without sacrificing the defendant's right to a fair trial, CIPA prescribes careful procedures to be used in making these determinations.

CIPA may not have been applicable here, because the memorandum that was the subject of the *ex parte* argument had been declassified. JA3352, JA3361. In fact, counsel for the government stated that he would "almost" have to invoke CIPA to explain his apprehension. JA3359-JA3360. Nevertheless, the concern addressed by CIPA — that the government not be permitted to withhold information from the defendant unless strict procedures are followed to ensure that such withholding is required, and that the defendant's rights are protected — surely applies where the government seeks to withhold *un*classified information on

[2] "Graymail" describes a process in which a criminal defendant seeks to avoid prosecution by threatening to expose classified information in his defense. *See* Karen H. Greve, Note, *Graymail: The Disclose or Dismiss Dilemma in Criminal Prosecutions*, 31 Case W. Res. L. Rev. 84, 85 n.5 (1980).

"national security" grounds. And the procedures employed by the District Court in conducting the *ex parte* hearing did not come close to addressing that concern.

Under CIPA, the court must hold a hearing when requested by a party to address matters relating to classified information. CIPA §6(a). That hearing may be *ex* parte, but *only* when "the Attorney General certifies to the court . . . that a public proceeding may result in the disclosure of classified information." CIPA goes on to provide that:

> Before any hearing is conducted pursuant to a request by the United States under subsection (a), the United States shall provide the defendant with notice of the classified information that is at issue. . . . When the United States has not previously made the information available to the defendant in connection with the case, the information may be described by generic category, in such forms as the court may approve, rather than by identification of the specific information of concern to the United States.

CIPA § 6(b)(1). The court must "set forth in writing the basis for its determination" as to each piece of classified information it orders withheld from the defendant, and where this determination is made in an *in* camera hearing, "the record of such *in camera* hearing shall be sealed and preserved by the court for use in the event of an appeal." CIPA §§ 6(a), 6(d).

Here, the *ex parte* hearing was not supported by any representation by the government – and certainly not by the Attorney General – that classified information was at risk. In fact, the document at issue had been "declassified,"

JA3352, JA3361, and counsel for the government based the request to exclude the defense on unspecified "concerns," telling the court that:

> One thing leads to another is the best I can say here. You give one thing up in here and there are foreign entities that would like to use that.

JA3359-JA3360. The only reasoning given by the court for permitting the government to withhold the document at issue was the pronouncement – on the heels of the ex parte hearing – that, "I'm satisfied based on the representations that have been made that it is not appropriate to disclose" the document. JA3363. No transcript of the hearing was prepared for appeal.[3]

Thus, the District Court allowed the government to withhold a document memorializing a statement by the "linchpin" of the government's case, which was known to contain exculpatory material, on the basis of unnamed "concerns" and "representations." The defendant was given no opportunity to oppose the government's request, and this Court has no transcript from which to judge the propriety of the District Court's ruling. Had the document not been declassified, and had the government actually invoked CIPA, the procedure employed here would be an obvious violation of CIPA. That procedure is plainly insufficient to

[3] Pursuant to Federal Rule of Appellate Procedure 10(e), the government prepared, and the district court certified, a statement of what occurred at this hearing, to which the defendant has been denied access.

protect the defendant's rights where the government's side of the balance contains *no* classified information.

CONCLUSION

Since the September 11, 2001, terrorist attacks, federal courts have seen an exponential increase in criminal prosecutions that touch on matters of national security. *See* Richard A. Posner, *Mock Trials and Real Justices and Judges*, 34 Cardozo L. Rev. 2111, 2144 (2013) ("after the 9/11 terrorist attacks, [U.S. prosecutors] felt pressure to increase national-security measures, resulting in prosecutions for conduct that in more placid times would not have been thought dangerous"); Yochai Benkler, *A Public Accountability Defense For National Security Leakers And Whistleblowers*, 8 Harv. L. & Pol'y Rev. 281, 282 (2014) ("[t]he past decade has seen an increase in accountability leaks: unauthorized national security leaks and whistleblowing that challenge systemic practices, alongside aggressive criminal prosecution of leakers more generally"); Carol D. Leonnig, *D.C. Sees Sharp Drop In Federal Prosecution*, Wash. Post, Oct. 21, 2007, *available at* 2007 WLNR 28543308 (noting increase in national security prosecutions between 2002-2007); Shannon McGovern, *National Security Law Needs Reform*, U.S. News & World Rep., July 20, 2012, *available at* 2012 WLNR 15389253 ("[t]he Obama administration may hold the record for the number of national security leak prosecutions"); Lara Jakes Jordan, *Illegal exports to China*,

Iran, on rise, USA Today, Oct. 28, 2008, http://usatoday30.usatoday.com/news/washington/2008-10-28-3261470697_x.htm ("[p]rosecutors described a 30 percent increase in 2008 of exporters violating U.S. national security laws). These cases increasingly require courts to consider government requests for *ex parte* communications, and while *ex parte* communications may, at times, be necessary to serve a greater interest in "national security," courts must take careful steps to protect defendants' rights to full participation in the proceedings against them.

In this case, the District Court failed to do so, instead permitting the government to make *ex parte* communications at will, even where no "national security" interest was involved. These communications robbed the defendant of a fair trial, and require reversal in this case.

May 29, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 4,560 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

/s/ Paul F. Enzinna
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CERTIFICATE OF SERVICE

I hereby certify that, on this 29th day of May 2015, I caused this Brief of National Association of Criminal Defense Lawyers as *Amicus Curiae* in Support of Appellant to be filed via the CM/ECF filing system, which will then send notification of such filing to all counsel of record.

/s/ Paul F. Enzinna
Paul F. Enzinna

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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COUNSEL FOR: National Association of Criminal Defense Lawyers

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CERTIFICATE OF SERVICE

I certify that on May 29, 2015 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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