UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

APPEAL NO. 10-3974

UNITED STATES OF AMERICA,

Appellant,

v.

JOSEPH W. NAGLE,

Appellee.

ON APPEAL FROM AN ORDER OF THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
CRIMINAL NO. 1:CR-09-384-01
(HON. SYLVIA H. RAMBO, S.J.)

AND

NO. 11-1006

IN RE: UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF PROHIBITION OR
MANDAMUS TO THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA,
CRIMINAL NO. 1:CR-09-384-01

REPLY BRIEF OF APPELLANT/PETITIONER TO BRIEF OF APPELLEE/RESPONDENT JOSEPH W. NAGLE

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INTRODUCTION

On the morning of the first day set for Nagle's trial, the district court entered an order, over the government's objection, granting Fink "judicial immunity from prosecution for all truthful testimony given at trial."[1] Add. 81 (emphasis added). This extraordinary order was issued despite the fact that the district court acknowledged that "no one–not Nagle, not the Government, and not the Court–knows exactly what Fink would testify to if he were immunized." Add. 76. The district court went on to incorrectly find that despite not knowing what Fink's testimony would be, it would be "clearly exculpatory," "essential," and would outweigh any competing government interests, including a well-recognized interest in preventing one co-conspirator from giving his confederates an "immunity bath." Add. 77-78.

The United States filed an immediate appeal prior to the selection of the jury and moved for a stay. The district court agreed and stayed the trial pending the outcome of the appeal.

The United States filed the appeal, as well as its Petition for a Writ of Prohibition or Mandamus ("Petition"), because the

[1] Nagle's brief incorrectly quotes the district court's order which is the subject of this appeal and petition. Conveniently, he omits the language from the order which makes it a grant of transactional immunity, rather than use immunity, by omitting the words, "from prosecution." See Appellee's Br., p. 7. Misquoting the order and characterizing it as a "testimonial order," however, does not change the fact that the order was an immunity order which barred further prosecution of Fink for crimes known and unknown.

district court's order not only jeopardized Nagle's prosecution, but also prohibited a prosecution of Fink, an issue which seriously invaded the Executive Branch's exclusive authority to make immunity decisions based on its own assessment of the public interest. Although the district court cited Government of Virgin Islands v. Smith, 615 F.2d 964 (3d Cir. 1980), as authority for its decision, the United States respectfully submits that the district court committed a clear error of law, clearly abused its discretion, and usurped a power reserved for the Executive Branch by conferring judicial immunity from prosecution on Fink.

According to Nagle, the United States has no remedy. Nagle contends that there is no appellate jurisdiction for the appeal and that the standards for the issuance of a writ of prohibition or mandamus have not been met. In his view, the case should have proceeded with the immunity order in force, immunizing Fink's unknown testimony, and having the government suffer the consequences of a potential acquittal for Nagle and a prohibition on prosecuting Fink. The United States respectfully disagrees.

As explained below, this Court has appellate jurisdiction under the collateral order doctrine because the immunity order, as it relates to Fink, was completely separate from the Nagle prosecution. Assuming, arguendo, there is no appellate jurisdiction, this case is precisely the sort of extraordinary situation where a writ of prohibition or mandamus is warranted.

This Court should take this opportunity to reverse Smith and join with all the other courts of appeals which have held that

the district courts have no inherent power to confer judicial immunity on witnesses. In the alternative, this Court should reverse the district court because it incorrectly applied Smith to the facts of this case.

I. THIS COURT HAS JURISDICTION UNDER THE COLLATERAL ORDER DOCTRINE.

This Court has appellate jurisdiction under the collateral order doctrine.[2]

In United States v. Santtini, 963 F.2d 585 (3d Cir. 1992), the case which Nagle contends is controlling, this Court set out a three-part test in order to satisfy the collateral order doctrine. An order is appealable under that doctrine if:

(1) it conclusively determines the disputed question;

(2) it resolves an important issue completely separate from the merits of the action; and if

(3) it is effectively unreviewable on appeal from a final judgment.

Santtini, 963 F.2d at 591.

Nagle has not argued that the judicial immunity order fails to satisfy conditions one and three, and it is clear that the order does satisfy those conditions. Regarding the first prong, the district court made a conclusive determination that Fink would testify at Nagle's trial despite his Fifth Amendment

[2] The United States incorporates by reference the response it filed on November 17, 2010 addressing appellate jurisdiction.

privilege and granted him judicial immunity from prosecution for all truthful testimony given at Nagle's trial. Whether interpreted as "use" or "transactional" immunity, this order conclusively determined that Fink would testify under a grant of judicial immunity. Regarding the third prong, if allowed to stand, the order would be unreviewable on appeal because Fink would have already testified and been immunized. In addition, because the government cannot appeal an acquittal, the potential adverse consequences of the order to Nagle's trial would be unreviewable as well.

Nagle's only argument is that the issue the order resolved is not "completely separate" from the merits of the action.[3] Appellee's Br., p. 56. The United States respectfully disagrees.

The judicial immunity order issued by the district court would prohibit the federal government, as well as any state or local government, from prosecuting Fink for any offenses he testifies about at trial (if interpreted as transactional immunity) or, at the least, prohibit those entities from using his testimony, directly or indirectly, to prosecute him (if interpreted as use immunity). This blanket immunity order for

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[3] The second prong of the test also requires an "important issue." Nagle has not contested that portion of the test, and the issue here is undeniably important, i.e., whether a district court has the inherent power to grant judicial immunity over the government's objection, in the absence of prosecutorial misconduct, and where the United States otherwise possesses jurisdiction to prosecute the witness based on his self-incriminating statements.

crimes known and unknown is "completely separate" from the merits of the Nagle trial. Simply characterizing it as a "testimonial order" does not avoid the implications of the grant of immunity to a future prosecution of Fink.

The ramifications of the judicial immunity order are not just a hypothetical construct, but are real and significant in the context of this case. Fink pled guilty to a wide-ranging conspiracy that encompassed many federal judicial districts and states up and down the mid-Atlantic and northeast region of the United States. His plea agreement only protects him from future prosecutions instituted by the U.S. Attorney's Office for the Middle District of Pennsylvania which arise out of the DBE scheme. The judicial immunity order, by its broad terms, would impact the ability of any other federal or state jurisdiction to prosecute Fink for any crime he testifies about. Moreover, because his testimony is unknown, it could impact the jurisdiction of the Middle District of Pennsylvania because the plea agreement only covers offenses which arise out of the DBE scheme. Finally, as discussed in the United States' Petition, the judicial immunity order could impact the ability of the district court to use Fink's testimony at his sentencing. See Petition, p. 21-22 n.8. All these matters are completely separate from Nagle's trial, and a consequence of the judicial immunity order. Thus, it is respectfully submitted that the collateral order doctrine is satisfied and appellate jurisdiction exists in this case.

II. THE GRANTING OF A WRIT OF PROHIBITION OR MANDAMUS IS AN APPROPRIATE REMEDY IN THIS CASE.

If this Court concludes that the district court's immunity order is not appealable under the collateral order doctrine, the United States requests that the Petition be granted.

A. Supreme Court and Third Circuit Caselaw Indicates that a Petition for a Writ of Prohibition or Mandamus is an Appropriate Remedy in This Case.

Nagle cites the policy against the exercise of prohibition or mandamus jurisdiction in criminal cases where the order does not have the effect of terminating the litigation, to argue that the judicial immunity order should not be reviewed prior to trial. Nagle ignores, however, the Supreme Court's and this Court's jurisprudence which indicates that in extraordinary situations, like the case sub judice, the writ should be granted.

Nagle principally relies on Will v. United States, 389 U.S. 90 (1967), to argue that the writ should not be granted and quotes extensively from that opinion. The portion he quotes, however, undermines his position because the Supreme Court acknowledged in Will that the writ is properly granted when the trial court totally deprives the government of its right to initiate a prosecution:

> This is not to say that mandamus may never be used to review procedural orders in criminal cases. It has been invoked successfully where the action of the trial court totally deprived the Government of its right to initiate a prosecution. Ex Parte

United States, 287 U.S. 241, 53 S. Ct. 129, 77 L. Ed. 283 (1932).

Will, 389 U.S. at 97.

In this case, the district court's judicial immunity order would have the effect of depriving the government of its right to initiate a prosecution of Fink, and thus, Will supports issuance of the writ here. At the least, the immunity order would severely hamper any prosecution of Fink because the government would be prohibited from directly or indirectly using his testimony in a future prosecution, which has the practical effect of negating a prosecution. See United States v. Turkish, 623 F.2d 769, 775 (2d Cir. 1980) (noting the "heavy burden" the government faces to prove that its evidence has not been obtained as a result of the immunized testimony).

Recently, this Court decided United States v. Higdon, 2011 WL 937647 (3d Cir. Mar. 17, 2011), a case where the district court refused to properly charge the elements of the offense for which Higdon was on trial. This Court stated that the case was precisely the sort of extraordinary situation where a writ of mandamus is warranted. Higdon, 2011 WL 937647 at *5. See also United States v. Wexler, 31 F.3d 117, 129 (3d Cir. 1994) (same).

Nagle attempts to distinguish cases like Higdon and Wexler, by arguing that the jury instructions in those cases were found to be clearly erroneous, and this case involves an order that was not clearly erroneous. Of course, that conclusion is the precise question we seek to litigate, so that argument begs the question.

The fact that the district court here based its decision on Smith does not mean the decision was not clearly erroneous or a clear abuse of discretion, if Smith was erroneous when decided or applied incorrectly.

In addition, Nagle's argument that the government has not suggested that it could not proceed with the prosecution of Nagle despite the judicial immunity order is insignificant. The government, in Higdon and Wexler, could have proceeded with their trials despite an erroneous jury instruction as well, but the fact that a potential acquittal would result is sufficient to establish harm under mandamus review. Higdon, 2011 WL 937647 at *10, citing Wexler, 31 F.3d at 129.

Nagle's attempt to distinguish Santtini, a case which is very similar to the case sub judice, is also unpersuasive. Simply stating that there was no statute or caselaw supporting the district court's asserted authority in Santtini, and citing the Smith case as support for the district court here, begs the question of whether Smith is good law or whether Smith was applied incorrectly. The Santtini case is notable, however, for three other reasons.

First, the writ was granted in Santtini despite the defense witness's having submitted a sworn statement to the United States Attorney that "fully exculpated all his alleged co-conspirators, contending that he alone was responsible for all criminal acts, and that he had only implicated the others to gain his own freedom." Santtini, 963 F.2d at 588 (emphasis added). In the

case sub judice, Fink has not submitted any statement and has never exculpated Nagle. As the district court observed, no one knows exactly what he will say. Add. 76.

Second, Santtini is also notable because this Court clearly stated that "Smith has been limited to its particular facts by this court" and had been "flatly rejected" by the other courts of appeal to have considered this issue.[4] Santtini, 963 F.2d at 598 n.6. Thus, Santtini shows what an outlier Smith is.

Third, Santtini is notable because while Santtini involved the Executive Branch's power to arrest individuals, this case involves the more fundamental power of the Executive Branch to prosecute individuals. Thus, the United States submits that Santtini actually supports the government's argument regarding the separation of powers doctrine and there is greater reason here to grant the writ than in Santtini.

B. Smith Was Implicitly Overruled by the Supreme Court in Pillsbury and Doe.

Smith was implicitly overruled by the Supreme Court in Pillsbury Company v. Conboy, 459 U.S. 248 (1983), and United States v. Doe, 465 U.S. 605 (1984).

Nagle argues that Pillsbury and Doe did not overrule Smith, and the fact that this Court continues to cite Smith subsequent

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[4] As noted by one district court, the facts underlying the Smith decision were "totally bizarre." United States v. Sampson, 661 F. Supp. 514, 518 (W.D. Pa. 1987). Those bizarre facts have no similarity to the facts in the present case.

to Pillsbury and Doe indicates it is still good law. But as the United States pointed out in its Petition, this Court has never had the opportunity to review a district court's order granting judicial immunity under Smith in the 31 years that the case has been on the books. See Petition, p. 40. Every case that Nagle cites is an affirmance of a district court's denial of immunity for the witness, which hardly indicates that this Court has reaffirmed the principle that district courts have the inherent power to immunize a witness, post Pillsbury and Doe.[5]

More to the point, the United States agrees with the observation of three prior judges of this Court that, "[t]he [Supreme] Court may have meant to express the view that the judiciary lacks even the nonstatutory power to immunize a witness." United States v. Bazzano, 712 F.2d 826, 851 (3d Cir. 1983) (Adams, J., with Hunter and Becker, J.J., dissenting).

In Pillsbury, the Supreme Court held that the district court lacked authority to compel testimony from a civil deponent who had asserted a valid Fifth Amendment privilege in the absence of a statutory request for immunity from the United States. The Court explained, "[n]o court has authority to immunize a witness. That responsibility, as we have noted, is peculiarly an executive

[5] Nagle has only found one district court case where a district court actually granted judicial use immunity to a defense witness under Smith in the 31 years Smith has been on the books. S. App. 10. However, there is no district court opinion explaining that decision, and because the government didn't appeal, this Court didn't have the opportunity to review Smith. Thus, that case is of limited value to the issues presented here.

one, and only the Attorney General or a designated officer of the Department of Justice has the authority to grant use immunity." Id. at 261. In explaining the immunity statute, the Pillsbury court noted:

> Use immunity was intended to immunize and exclude from a subsequent criminal trial that information to which the Government expressly has surrendered future use. If the Government is engaged in an ongoing investigation of the particular activity at issue, immunizing new information . . . may make it more difficult to show in a subsequent prosecution that similar information was obtained from wholly independent sources.

Pillsbury, 459 U.S. at 260.

The following year, in United States v. Doe, 465 U.S. 605, 616-17 (1984), the Supreme Court upheld the district court's refusal to compel production of documents after the owner asserted a valid Fifth Amendment privilege. The government had promised not to use the owner's production against him, but did not make a statutory request for immunity. The Supreme Court concluded that compelling production would amount to an improper grant of constructive immunity by the court. In reaching its decision, the Court reasoned that district courts lack the authority to grant immunity to witnesses other than through the statutory procedure established by 18 U.S.C. 6002, et seq. The Court explained:

> We decline to extend the jurisdiction of courts to include prospective grants of

> immunity in the absence of the formal request that the statute requires. As we stated in Pillsbury v. Conboy, [citations omitted], in passing the use immunity statute, "Congress gave certain officials in the Department of Justice exclusive authority to grant immunities." Id. at 253-54 (footnotes omitted). "Congress foresaw the courts as playing only a minor role in the immunizing process . . .." Id. at 254 n.11. The decision to seek use immunity necessarily involves a balancing of the Government's interest in obtaining information against the risk that immunity will frustrate the Government's attempts to prosecute the subject of the investigation. See United States v. Mandujano, 425 U.S. 564, 575 (1976) (plurality opinion). Congress expressly left this decision exclusively to the Justice Department.

Doe, 465 U.S. at 616-617.

The United States recognizes that neither Pillsbury nor Doe explicitly overruled Smith. However, because use immunity is statutorily created, jurisdiction to grant immunity is limited by 18 U.S.C. § 6003 and the Supreme Court cases that interpret it. Accordingly, the government submits that Smith has been implicitly overruled.

Nagle also argues that this Court's internal operating procedures prevent this panel from reversing Smith. Appellee's Br., p. 27 n.6. However, an intervening Supreme Court decision is a sufficient basis to bypass the general rule requiring full court review to reverse a prior panel's decision. Dique v. New Jersey State Police, 603 F.3d 181, 187 (3d Cir. 2010). Assuming, arguendo, that this Court finds that Pillsbury and Doe have not implicitly overruled Smith, the United States requests that this

appeal and petition be referred to the full court for en banc review.[6]

C. All the Other Courts of Appeals Have Rejected Smith, and This Court Should Join Those Courts and Reverse Smith.

Nagle does not dispute that the nine Courts of Appeals comprising the First, Second, Fourth, Fifth, Sixth, Seventh, Tenth, Eleventh, and D.C. Circuits, have all rejected or criticized Smith. He cites, however, cases from the Eighth and Ninth Circuits which he claims support Smith and show that this is not the unanimous view. The United States submits that a close reading of the Eighth and Ninth Circuit cases actually undermines Nagle's position and shows that the rejection of Smith, as it applies to this case, is unanimous.

In United States v. Hardrich, 707 F.2d 992 (8th Cir. 1983), the Eighth Circuit case cited by Nagle, the Court stated, "it is doubtful that a district court judge may order judicial immunity for a reluctant witness in this circuit." Hardrich, 707 F.2d at 994. The Court went on to state in pure hypothetical fashion,

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[6] Ironically, the Smith case itself is suspect because it represented a reversal of prior Third Circuit law which had ruled that district courts do not have the inherent power to confer judicial use immunity on defense witnesses in the absence of prosecutorial misconduct. See United States v. Herman, 589 F.2d 1191, 1204-1205 (3d Cir. 1978) (suggesting that the issue should be submitted to full court review because it would represent a rejection of prior Third Circuit caselaw).

"However, assuming the district court has such authority, it is clear that the proffered testimony must be clearly exculpatory." On this hypothetical statement, Nagle argues that the Eighth Circuit has left open the possibility that Smith was correctly decided. Appellee's Br., p. 42. The Eighth Circuit, however, specifically rejected Smith six years after Hardrich, stating, "[w]e decline to follow Smith and reassert our doubt that the Court has the power to order such a grant of judicial immunity." United States v. Cappozzi, 883 F.2d 608, 614 (8th Cir. 1989). Thus, it cannot be said that the Eighth Circuit supports this Court's decision in Smith, or has even left open the possibility that Smith was correctly decided.

Nagle also cites a Ninth Circuit case arguing that the Ninth Circuit supports this Court's analysis in Smith. See Appellee's Br., p. 41, citing United States v. Straub, 538 F.3d 1147 (9th Cir. 2008). Straub, however, only dealt with the power of the district court to compel the government to offer use immunity under 18 U.S.C. § 6003 when there was a finding of prosecutorial misconduct.[7] That issue is not in dispute here. See Petition, p. 9 ("The United States does not dispute the power of the courts to order acquittal if the prosecution's denial of statutory use immunity is undertaken with the deliberate intention of

[7] Prosecutorial misconduct, in the Ninth Circuit's view, can be established by "selective denial of immunity that has the 'effect' of distorting the fact-finding process." Straub, 538 F.3d at 1160.

distorting the judicial fact finding process."). The prong of the Smith case which is challenged in this case is the power of the district court to confer judicial immunity in the absence of prosecutorial misconduct. Thus, it is submitted that Straub does not support Smith on the issues that are relevant to this case. On the prong of Smith that is relevant here, the Ninth Circuit stated as follows:

> There are important separation of powers concerns present in a request to compel immunity.
>
> It has long been recognized that the Executive Branch of government has exclusive authority and absolute discretion to decide whether to prosecute a case . . .. To interpret the Fifth and Sixth Amendments as conferring on the defendant the power to demand immunity for co-defendants, potential co-defendants, or others, when the government might in its discretion wish to prosecute would unacceptably alter the historic role of the Executive Branch in criminal prosecutions. Of course, whatever power the government possesses may not be exercised in a manner which denies the defendant the due process guaranteed by the Fifth Amendment.

Straub, 538 F.3d at 1156, quoting United States v. Alessio, 528 F.2d 1079, 1081-82 (9th Cir. 1976).

Thus, the United States submits that the Ninth Circuit's approach, which sets out a test for compelling a grant of statutory immunity where there is a finding of prosecutorial misconduct, rather than judicial immunity from prosecution in the

absence of prosecutorial misconduct, does not support Smith on the issues relevant here.[8]

The United States maintains, therefore, that all the other courts of appeal to have addressed the issues raised in this appeal have unanimously rejected Smith.

D. The District Court's Order Plainly Exceeded Smith by Conferring Transactional Immunity on Fink, Rather Than Use Immunity.

Nagle argues that because he did not ask that Fink receive transactional immunity and because Smith only authorizes use immunity, it shows that the district court only conferred use immunity on Fink. However, a plain reading of the order and the

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[8] Nagle also cites United States v. Ebbers, 458 F.3d 110, 119 (2d Cir. 2006), as support for Smith. Appellee's Br., p. 43 n.9. The Ebbers case, like Straub, involved claims of prosecutorial misconduct in which the defendant proves that the government has used immunity in a discriminating way, has forced a potential witness to invoke the Fifth Amendment through overreaching or has deliberately denied immunity for the purpose of withholding exculpatory evidence and gaining a technical advantage through such manipulation. Ebbers, 458 F.3d at 119. The district court made no such findings here, and thus, Ebbers, like Straub, does not support Smith in a way that applies to this case. The Second Circuit has made abundantly clear that it rejects Smith on the issues that apply to this case. See United States v. Turkish, 623 F.2d 769, 773-777 (2d Cir. 1980) (neither the Due Process Clause nor the Compulsory Process Clause provide a basis for court-conferred defense witness immunity). The line of state cases from California which Nagle cites also suffer from the same infirmity the Hardrich case suffered from, i.e., no court ever held that such inherent power existed, and no court granted the judicial immunity. The concept was discussed as a hypothetical only.

opinion supporting the order shows that transactional immunity was granted, that is, "judicial immunity from prosecution." Add. 81; 80 (emphasis added). Neither Nagle's request, nor the Smith case, controls the terms of the district court's order.

Nagle also complains that the government never raised this issue in the district court. Because the court issued the order on the morning set for the first day of trial, the government had no opportunity to raise this issue. The government filed its written opposition to Nagle's motion, which only requested use immunity, and therefore could not have been expected to raise the issue in its written response. After the order was entered, the government filed an immediate appeal, so the issue has been preserved.

Nagle also argues that "[t]o the extent there is any ambiguity in its order, the district court can clarify its order when this case is returned to it for trial." Appellee's Br., p. 44-45. Absent a mandate from this Court, there is no guarantee that the court will do so. As explained in the government's response addressing jurisdiction, it may be that the district court deliberately worded the order in this way so that it could use Fink's testimony at his sentencing. See Government's Court-Ordered Response Addressing Jurisdiction of the Court of Appeals, p. 6 n.1. Thus, the Petition should be granted, at the least, to correct this clearly erroneous portion of the judicial immunity order.

E. Fink's "Testimony" is Not Clearly Exculpatory, Nor Essential, and was Outweighed by Strong Countervailing Government Interests.

The United States relies on the arguments it made in its Petition in response to Nagle's arguments. However, Nagle incorrectly argues that the government did not object to Nagle supporting his motion for judicial immunity with a proffer. See Appellee's Br., p. 48 n.11. To the contrary, the United States opposed the motion for judicial immunity largely because of the speculative nature of the proffer. As the government stated in its opposition:

> In this case, counsel for Mr. Nagle has failed to state how he can be so sure what Mr. Fink will testify to on direct examination. His proffer appears to be nothing more than what he hopes Mr. Fink would say and is probably based on his client's characterization of the events in question, which he has taken as gospel . . .

Add. 46.

The government went on to state that Nagle had not met his burden in showing that the proffered testimony was clearly exculpatory or essential because:

> In the usual case, there is a basis for the proffered testimony, such as an affidavit or some other surety that the witness will testify as the defendant suggests.
>
> In Smith, for example, the witness made a statement to the police in which he inculpated himself and exculpated the defendants on trial.

> Here, there is nothing. Thus, this case would set a new standard--conferring use immunity--without knowing in advance what the witness will say.

Add. 48.

Therefore, the government objected to the proffer as a basis to grant Fink judicial immunity, and this issue was preserved.

CONCLUSION

WHEREFORE, for the reasons stated above, and in the Petition for a Writ of Prohibition or Mandamus, the United States respectfully requests that this Court (1) find jurisdiction under the collateral order doctrine or under the All Writs Act, 28 U.S.C. § 1651; (2) reverse Government of Virgin Islands v. Smith, 615 F.2d 964 (3d Cir. 1980); (3) vacate the district court's judicial immunity order and remand the case for trial; or (4) grant the Petition for a Writ of Prohibition or Mandamus, and either prohibit the district court from enforcing its judicial immunity order or direct the district court to vacate its judicial immunity order; and (5) remand the case for trial.

Respectfully submitted,

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Date: April 6, 2011

CERTIFICATE OF BAR MEMBERSHIP

I hereby certify that I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

/s/ Bruce Brandler
BRUCE BRANDLER
Assistant U.S. Attorney
Senior Litigation Counsel

RULE 32 CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. Rule 32(a)(7)(C), counsel certifies that based on the word-counting function of the government's word processing system, that this brief complies with the type-volume limitations of Rule 32(a)(7)(B), in that the brief is prepared in a monospaced format (12-point Courier type, displaying 10.5 characters per inch) and contains less than 14,000 words, to wit: Approximately 4,519 words.

/s/ Bruce Brandler
BRUCE BRANDLER
Assistant U.S. Attorney

IDENTICAL PDF & HARD COPY CERTIFICATE

The undersigned hereby certifies that the PDF file and hard copies of this brief are identical.

/s/ Bruce Brandler
BRUCE BRANDLER
Assistant U.S. Attorney

Date: April 6, 2011

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This eMAIL and the attached brief has been automatically scanned during preparation and upon sending by the following virus detection programs: Trend Micro OfficeScan, ScanMail, and Viruswall, and no viruses were detected.

/s/ Bruce Brandler
BRUCE BRANDLER
Assistant U.S. Attorney

PJS:BB:nl

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,	:	
	:	
Appellant/Petitioner,	:	
v.	:	
	:	
UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA,	:	**C.A. Nos. 10-3974, 11-1006**
	:	
Nominal Respondent,	:	
	:	
JOSEPH W. NAGLE,	:	
	:	
Appellee/Respondent.	:	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee in the Office of the United States Attorney for the Middle District of Pennsylvania and is a person of such age and discretion to be competent to serve papers.

That this 6th day of April, 2011, she served a copy of the attached

REPLY BRIEF OF APPELLANT/PETITIONER TO BRIEF OF APPELLEE/RESPONDENT JOSEPH W. NAGLE

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/s/ Naomi Losch
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