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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 17-2373, 17-3169, 17-3425

UNITED STATES OF AMERICA,

Appellee,

-against-

THOMAS C. DAVIS,

Defendant,

WILLIAM T. WALTERS,

Defendant-Appellant.

Panel: Jacobs, Chin, C.JJ., Kuntz, D.J.

May 29, 2018

Oral Argument

1 HON. DENNIS JACOBS: And, at this time, we'll hear
2 United States versus Walters.

3 HON. DENNIS JACOBS: Good morning.

4 MS. SHAPIRO: May it please the Court. Good morning.
5 My name is Alexandra Shapiro and I represent William Walters
6 on this appeal.

7 The prosecution and conviction of Mr. Walters was
8 tainted by extraordinary Government misconduct from start to
9 finish. It began with a deliberate, systematic campaign to
10 violate Grand Jury secrecy. The FBI agent supervising the
11 investigation quite remarkably has admitted that, in order to
12 revive what he called a dormant investigation, he embarked on
13 a deliberate, extensive, and illegal campaign to leak
14 confidential Grand Jury information to reporters at the Wall
15 Street Journal and the New York Times in exchange for
16 information about Mr. Walters from these reporters and in
17 order to generate press that could create evidence for the
18 Government.

19 The Government then tried to conceal this. The
20 defense filed a pretrial motion about this, and the
21 Government told the District Court that this defense motion
22 and request for a hearing was a fishing expedition and
23 baseless. They repeatedly stated that the leaks had not come
24 from the Government, and their brief stated that there was no
25 leaked information in these articles. They submitted a sworn

1 declaration, which also contained, at worst, misleading
2 information.

3 The District Court had initially ordered a hearing,
4 and then the Government, in order to prevent Mr. Walters from
5 further exploring the facts and developing the record of how
6 he was prejudiced, tried to avoid the hearing, and was
7 successful, by then submitting an unsworn letter, attaching
8 six partial emails out of thousands of emails and texts that
9 the Government had apparently reviewed over just a three-
10 month period, as opposed to the entire two years that we now
11 know this agent was conducting this leaks campaign.

12 HON. DENNIS JACOBS: You're arguing that this course
13 of conduct amounts to outrageous Government misconduct?

14 MS. SHAPIRO: We are, Your Honor, and also a blatant
15 violation of Rule 6(e).

16 HON. DENNIS JACOBS: What case--in what case have we
17 ever found outrageous Government misconduct? Maybe we should
18 more often. But I'm not sure we ever have.

19 MS. SHAPIRO: Well, Your Honor, just to be clear, we
20 make two separate arguments. So, first there's the argument
21 that the Rule 6(e) violation--

22 HON. DENNIS JACOBS: Taints the--

23 MS. SHAPIRO: itself tainted the investigation. And,
24 under Bank of Nova Scotia and numerous cases from this Court,
25 the District Court could have exercised supervisory authority

1 to either dismiss the indictment or at least hold a hearing.

2 And we're asking--

3 HON. DENNIS JACOBS: But isn't that subject to an
4 abuse of discretion?

5 MS. SHAPIRO: No, Your Honor.

6 HON. DENNIS JACOBS: The decision to hold a hearing?

7 MS. SHAPIRO: And we would submit that, at a
8 minimum, the decision to hold a hearing here was erroneous,
9 because what happened was the Government admitted to the
10 misconduct after having concealed it and misled the District
11 Court, precisely in order to avoid the hearing that would
12 have enabled Mr. Walters, among other things, to discover
13 more facts and prove the prejudice.

14 HON. DENNY CHIN: The Government was willing to
15 assume a violation of the rule. But the argument is that
16 there's no prejudice. And what is the prejudice here?

17 MS. SHAPIRO: Well, Your Honor, there are three
18 things, and I also submit that more could be found at a
19 hearing. First of all, the prejudice is that this
20 investigation was dormant, as admitted not only by the agent
21 but there are numerous articles, which are in the appendix,
22 that relate to the leaks that make the statements--

23 HON. DENNY CHIN: The articles don't come out until
24 May of 2014.

25 MS. SHAPIRO: Your Honor, there are articles--and,

1 just as a couple of examples, there's one on Page, I believe,
2 A86, another one on 318. Those articles appear in the spring
3 of 2014. And the articles themselves say that the
4 investigation was dormant.

5 HON. DENNY CHIN: Right, but the articles don't come
6 out until 2014. But there is evidence that the investigation
7 was ongoing during 2013.

8 MS. SHAPIRO: Well, Your Honor, the leaks started in
9 2013 and continued until--

10 HON. DENNY CHIN: I understand that the leaks
11 started in 2013. But if the basis of the prejudice argument
12 is the articles, the articles don't come out until the spring
13 of 2014. But the Government was investigating before that,
14 well before that.

15 MS. SHAPIRO: Yes, Your Honor. Just to be clear, the
16 point is the Government was investigating for several years
17 and was unable to produce enough evidence to indict Mr.
18 Walters. And the articles came out in the spring of 2014.
19 Indeed, in the spring of 2014, additionally, the Government
20 submitted an affidavit, a sworn affidavit, in support of its
21 application for a wiretap, in which it said that
22 investigative techniques other than a wiretap were not
23 working.

24 So, those are--that's additional evidence that the-

25 -

1 HON. DENNIS JACOBS: But there was an ongoing
2 wiretap in play.

3 MS. SHAPIRO: No, Your Honor. The leaks started--the
4 leaks started in 2013. In 2014, the Government told the
5 District Court, in its application for the wiretap, that
6 there was not--that other investigative techniques weren't
7 working. And that's why it needed the wiretap. Then the leaks
8 start.

9 HON. DENNIS JACOBS: And the fact that you can have
10 an active investigation even if it's not fruitful for a
11 period of time, that doesn't mean it's dormant.

12 MS. SHAPIRO: But just--well, Your Honor, this agent
13 said it was dormant. And the point is that nothing was
14 happening, Your Honor. And what happened after the leaks--the
15 articles started coming out, among other things, was that
16 the--Mr. Davis started to repay a loan that the Government
17 claims was a phony loan. The Government used this evidence
18 both in the Grand Jury and at the trial to suggest that it
19 was some kind of consciousness of guilt evidence against Mr.
20 Walters.

21 And then, on top of that, there's an article in
22 August of 2015, which is the first article that actually
23 names Mr. Davis, and that we believe is what triggered him to
24 cooperate, what triggered his cooperation. And so, for all of
25 those reasons, we believe that prejudice has been shown.

1 But, most importantly--and we've asked, as an
2 alternative remedy, for this Court to remand the case for the
3 limited purpose of holding a further hearing. We believe that
4 a further hearing would help Mr. Walters further demonstrate
5 the prejudice. His ability to do so was cut off. There are
6 numerous questions that need to be answered that the
7 Government has deliberately swept under the rug.

8 For example, who else was involved? The district
9 judge himself, in an order he issued this past April 2018, on
10 April 2nd, stated that the full extent and identity of the
11 other participants is not yet known to that Court. It's clear
12 from what limited information the Government has selectively
13 chosen to appeal that numerous others were involved, and
14 potentially not just at the FBI. The--a hearing is needed to
15 establish that. Also--

16 HON. DENNY CHIN: If there were others involved, how
17 does that impact prejudice?

18 MS. SHAPIRO: Well, if--we need to know exactly what
19 was leaked and what, among other things, what did the agents
20 get back from the reporters in exchange for the leaks? And
21 how was that used against Mr. Walters? Was the United States
22 Attorney's Office involved?

23 As I mentioned earlier, not only was the--did the
24 Government attempt to conceal this from the District Court--
25 and frankly, none of this would have come to light if the

1 District Court hadn't initially decided to order a hearing.
2 And the Government shouldn't be allowed to simply cut off
3 further inquiry and further deep-six the matter--

4 HON. WILLIAM KUNTZ: Doesn't that go to the point
5 that you're really asking this Court to take the view that
6 the District Court has abused its discretion by not having
7 this hearing that you're now pushing for, when, in fact, the
8 District Court did order the earlier hearing that unearthed
9 the problems you're talking about?

10 So, Judge Castel, in fact, went forward with the
11 hearing, did he not? And it's his view that there's nothing
12 further to be learned that would have an impact under the
13 circumstances, given the fact the Government concedes that
14 its agent was a problem.

15 MS. SHAPIRO: Well, Your Honor, I submit that, at a
16 minimum, Judge Castel abused his discretion, because what he
17 did was he took the Government's concession and accepted the
18 premise that, once they had conceded the violation, there was
19 no need for the Defendant to have a right to develop any
20 further evidence to establish the prejudice.

21 HON. WILLIAM KUNTZ: What is the further need if you
22 were to send this back to the District Court? What is the
23 District Court supposed to do that he has not done at this
24 point?

25 MS. SHAPIRO: Well, at a minimum, Your Honor, the

1 District Court should direct the Government to provide
2 discovery of the other thousands of emails and texts that it
3 reviewed but did not share with the parties or the Court,
4 with the Defendant or the Court. And, in addition, we believe
5 that a hearing is appropriate as well. But, at a minimum,
6 that material should be provided.

7 In addition, it only pertains to that three-month
8 period, and we know that the leaks went on for two years. We
9 don't know what led to the August 2015 article. We would
10 submit that we're entitled to discovery over the entire
11 period—. How could the Government have thousands of emails
12 related to its own discussions with journalists about this
13 investigation? It's a Grand Jury investigation. These facts
14 are remarkable.

15 And even the six emails that were disclosed to the
16 District Court--and, by the way, the Government initially
17 submitted that letter ex parte and didn't even want to allow
18 the Defendant to see it. At least one of the emails is not
19 even a full email.

20 And so, much is not known about what was leaked,
21 who leaked it, and how it harmed Mr. Walters. What
22 information did the Government get from these reporters that
23 was used against Mr. Walters?

24 I see I'm very low on time. I just want to very
25 briefly touch on the perjury issue, because I think what it

1 illustrates is that the extraordinary misconduct in this case
2 did not stop with the investigation and the indictment, but
3 continued through the trial. I think it's quite clear that
4 Mr. Davis was lying about this bat phone, which filled a
5 critical gap in the Government's case during the--

6 HON. WILLIAM KUNTZ: Isn't that a decision for the
7 jury to make, as to who was lying about the existence of or
8 nonexistence of the bat phone?

9 MS. SHAPIRO: Well--

10 HON. WILLIAM KUNTZ: You say he's lying. The jury
11 obviously didn't see it that way.

12 MS. SHAPIRO: There are at least four cases from
13 this Court, and one from the Seventh Circuit, that we've
14 cited in our papers, in which the Courts have said that, when
15 there's knowingly perjured testimony, and even if some or all
16 of it is unearthed during the trial, that the conviction must
17 be reversed because it's repugnant to the Constitution.

18 And we think that's clear here because it's an
19 absolute certainty that this lie about the bat phone was not
20 true. Mr. Davis was absolutely certain and did not waver.
21 This was one of the few things he didn't waver about in his
22 testimony, that this alleged bat phone handoff occurred at a
23 particular place, the Dallas Love Field Airport, Terminal 1,
24 that he saw Mr. Walters' plane, that he described the
25 insignia on the plane, the other participants who came on the

1 plane with Mr. Walters, the purpose of their trip, which was
2 to meet with some banks in Dallas--

3 HON. DENNY CHIN: The District Court acknowledged
4 these discrepancies and determined, in essence, that he was
5 mistaken, that the witness was mistaken.

6 MS. SHAPIRO: But, Your Honor, there was no basis
7 for that; that was speculation. It was quite clear from all
8 of the evidence that was presented that there was no other--

9 HON. DENNY CHIN: The backdrop for this is the very
10 substantial evidence that the Government presented, including
11 all the phone calls, the sequences of the phone calls and the
12 trades, other evidence besides Davis.

13 MS. SHAPIRO: Well, Your Honor, the phone calls that
14 they rely on are what created--precisely what created the gap
15 that caused Mr. Davis to invent this bat phone. There are not
16 records like that during--

17 HON. DENNY CHIN: But my point simply is we're not
18 looking at the bat phone in isolation. We're looking at the
19 bat phone and the testimony about the bat phone in the
20 context of all of the evidence presented.

21 MS. SHAPIRO: But, Your Honor, my point is that the
22 bat phone is really the only piece of evidence that the
23 Government had to corroborate Mr. Davis's claims of having
24 tipped Mr. Walters about the White Wave spinoff.

25 HON. DENNIS JACOBS: Wasn't the existence of the bat

1 phone corroborated by Mrs. Davis, Mrs. Davis that was?

2 MS. SHAPIRO: If anything, her testimony, I think,
3 undermined it. First of all, she said it was maroon, whereas
4 he had stated repeatedly that it was black. She purported to
5 identify two telephone numbers in her own cell phone that she
6 claimed were the numbers for Mr. Davis's bat phone, when in
7 fact they were his office telephone numbers.

8 And, furthermore, she said that, when the divers
9 were--there was a television report about the divers from the
10 FBI searching the creek, that he smirked and said, "They'll
11 never find the phone." So, I submit that her testimony was
12 completely unhelpful.

13 HON. DENNIS JACOBS: It's murky, and it's tidal.
14 And, I mean, there could be several reasons why he would be
15 skeptical as to whether they would find it.

16 MS. SHAPIRO: Well, Your Honor, I think what's clear
17 is that he was certain that--as to precisely where and what
18 the circumstances were of the handoff. We know that that
19 absolutely happened in December 2012, months after he claimed
20 he had received the phone and had supposedly used it to
21 provide tips to Mr. Walters. I've--

22 HON. DENNIS JACOBS: You've reserved rebuttal.

23 MS. SHAPIRO: Thank you, Your Honor.

24 HON. DENNIS JACOBS: We will hear you then.

25 MS. CUCINELLA: Good morning. May it please the

1 Court. My name is Brooke Cucinella and I represent the
2 Government in this appeal, as I did in the case down below.

3 Mr. Walters was convicted of insider trading
4 because he was guilty of insider trading. As Judge Castel
5 found, the proof of Mr. Walters' guilt at this trial was
6 overwhelming. This is not a case where there is a real
7 concern that an innocent man was convicted.

8 What we are doing here today is my adversary is
9 asking this Court to grant the Defendant a windfall based on
10 the--a rogue agent's unauthorized disclosure of Grand Jury
11 information. As the Court is aware, the Government--

12 HON. DENNY CHIN: The misconduct is indeed
13 remarkable, is it not?

14 MS. CUCINELLA: It--Agent Chaves' conduct in this
15 case is indeed remarkable. I think that our office's reaction
16 to it at the time was appropriate. And I think that it is
17 something that our office and the FBI have both taken very
18 seriously and are very disappointed that this happened.

19 HON. DENNIS JACOBS: It seems odd also that, when
20 the issue was raised by the Judge, the Government counsel
21 took a "Who, me?" position. You know, now, "Who knows?" But
22 the Government knew a lot.

23 MS. CUCINELLA: And--

24 HON. DENNIS JACOBS: I mean, it certainly seems as
25 though Judge Castel would have been on firm ground if he had

1 attacked or questioned the honesty of Government counsel.

2 MS. CUCINELLA: Well, I think there are a number of
3 responses to that. First, I would say that the Government
4 acknowledges that we should have done more investigation at
5 that point, when the allegations were raised. In retrospect,
6 that's something that I think all of us wish we had done.

7 HON. DENNIS JACOBS: When you speak of "the
8 allegations," you mean the office knew that information from
9 someone privy to what the Grand Jury was doing had been
10 leaked to two newspapers.

11 MS. CUCINELLA: Well, the line assistants, myself
12 included, did not have knowledge of that. And so, the authors
13 of the brief did not have knowledge of that fact. While it is
14 true that there were individuals at the office, including one
15 of the former assistants who had known of it at the time,
16 that assistant did not recall it during this time.

17 There was no bad faith here with respect to what
18 the representations made to the Court. We addressed the
19 motion as it was presented to us, and the--

20 HON. DENNIS JACOBS: Well, you addressed the motion
21 after a date was set for the hearing.

22 MS. CUCINELLA: Well, we originally addressed the
23 motion in our response, in terms of the legal standard. After
24 a hearing was ordered, then, of course, we did more
25 investigation. And, as soon as we realized what had happened,

1 as soon as we went back through the emails and realized that
2 this had taken place, we did everything to try and remedy
3 that fact.

4 We asked the Court to assume a violation and to
5 move forward with that fact. Agent Chaves has been referred
6 to not only the FBI's disciplinary committee but to OIG.
7 There is an ongoing criminal investigation into his conduct.

8 HON. DENNIS JACOBS: Well, the OIG, he seems to have
9 his hands full. And I'm not sure when that's going to happen.

10 MS. CUCINELLA: Well, Your Honor, the PIN
11 investigation, the public integrity section, is ongoing. And
12 Judge Castel is actually monitoring it very closely. In
13 spring--I believe it was last month, he ordered that they
14 continue to give him additional reports. He is staying on top
15 of it. To the extent that it is not going fast enough, he has
16 said that he may appoint a special prosecutor, because he is
17 concerned that this misconduct be looked into.

18 And it's something that the Government feels
19 strongly about as well. We--

20 HON. DENNY CHIN: There are some open questions, for
21 sure. The Government only looked at three months rather than
22 two years. We don't know who else was involved in making
23 leaks. We don't know what information reporters gave back to
24 the FBI. Why shouldn't there be a hearing to examine these
25 questions and others?

1 MS. CUCINELLA: Well, I think, as Judge Castel found
2 down below, he had an ample evidentiary record to make a
3 finding that there was no prejudice here. Taking the claims
4 of potential prejudice that have been raised, first, with
5 respect to addressing this claim of dormancy, which, to be
6 clear, is a statement that Agent Chaves made when being
7 questioned, it's a self-serving statement to try and justify
8 why he leaked this information. So, I think it's important
9 that it be taken in that context.

10 When Judge Castel was presented with the actual
11 timeline of this investigation, it's clear that the
12 investigation was not dormant. In April of 2013, I believe it
13 was April 26 of 2013, FINRA made a recommendation to the SEC
14 that identified Mr. Walters' trading in Dean Foods. That was
15 the first time that that trading had been identified. It also
16 identified his relationship with Mr. Davis.

17 HON. DENNIS JACOBS: Well, you—r Footnote 1 talks
18 about the liberties taken in Walters' brief. You say the case
19 wasn't dormant because it was an active wiretap.

20 MS. CUCINELLA: Right.

21 HON. DENNIS JACOBS: That doesn't seem to me like a
22 frenzy of activity.

23 MS. CUCINELLA: Well, an active wiretap actually--
24 the investigation involved in developing probable cause to
25 get up on a wiretap is actually pretty--I don't know if I'd

1 use the word "frenzied," but it is an active investigation.
2 From the point where the FINRA recommendation or FINRA
3 referral came in in April of 2013, the Government was
4 actively subpoenaing records and reviewing phone records,
5 trading records, and developing this relationship between Mr.
6 Walters and Mr. Davis.

7 HON. DENNIS JACOBS: And then you say that the rogue
8 agent was not the agent leading the investigation as the
9 Defendant argued, but was instead a supervisor. So, he's the
10 supervisor leading the investigation.

11 MS. CUCINELLA: Well--

12 HON. DENNIS JACOBS: I mean, I'm not sure that, when
13 you undertake to debunk your adversary's argument, you get
14 very far.

15 MS. CUCINELLA: Well, I think there are a number of
16 inaccuracies in my adversary's brief. Taking those two, I
17 think the implication was that Agent Chaves was the one that
18 was actually doing the day-to-day investigation, and would
19 have known regularly what was going on with that
20 investigation. And that's simply not the case.

21 HON. DENNIS JACOBS: Well, if he's the supervisor,
22 he could have known as much as he wanted to know.

23 MS. CUCINELLA: He could have known, but I think
24 that the record that Judge Castel carefully considered in
25 coming to his conclusions debunks that story that Chaves has

1 presented. He was presented with a timeline of this
2 investigation, which showed very clearly what the Government
3 was actually involved in and that the investigation was
4 active. It was opened in 2011 with a focus that was separate
5 from Mr. Davis and Dean Foods.

6 In April of 2013, the FINRA referral comes in. And,
7 from there on, the Government was doing the typical steps
8 that it does in every insider trading investigation to gather
9 these records and develop a circumstantial case. That is then
10 put together in a very detailed wire affidavit that is taken
11 to a judge, who then signs off.

12 That is all happening during this period. That is
13 actually a very aggressive investigation. It's very un--

14 HON. DENNIS JACOBS: What do you say to your
15 adversary's argument that it looks like more than one rogue
16 agent, because there was at least one meeting with the Wall
17 Street Journal with three agents, that they bartered
18 information, confidential information from the Grand Jury
19 proceedings, for information in the possession of
20 investigative reporters?

21 MS. CUCINELLA: Well, I--

22 HON. DENNIS JACOBS: And that that would be a fruit
23 of the misconduct that nobody knows what it is or how it was
24 used or what effect it had?

25 MS. CUCINELLA: Well, I think an important fact with

1 respect to that, Your Honor, is that Judge Castel and my
2 adversary had the ability to review the Grand Jury minutes
3 here. So, we know exactly what the Grand Jury was presented
4 with and what result--

5 HON. WILLIAM KUNTZ: It's not about the Grand Jury
6 minutes. It's about what they have not been able to see, the
7 interactions between the reporters and the investigators, not
8 just superintendent, but the others. That's what's being
9 addressed. And you haven't denied that there are emails,
10 numerous emails that the Defendant's counsel has not been
11 able to see, and that Judge Castel, were he to be directed to
12 have this expanded hearing, would obviously have to deal
13 with. Right?

14 MS. CUCINELLA: Not exactly, Your Honor. Judge
15 Castel has to deal with the issue of whether or not this
16 Defendant was prejudiced in this case. And so, to the extent
17 he undertook that inquiry, which he did and very carefully
18 considered, as the record below shows, he looked at the Grand
19 Jury minutes. He looked at the timeline in the investigation.
20 And he determined that there was no prejudice here, based on
21 what actually occurred before--

22 HON. WILLIAM KUNTZ: Is it your representation to
23 this Court that he has reviewed all the documents that your
24 adversary now believes might yield a different result with
25 respect to prejudice? Are you saying that he's looked at

1 that?

2 MS. CUCINELLA: I'm not saying that he looked at
3 that. What I'm saying is that he found, and he stated, and
4 the Special Appendix, Page 16, notes that he's noted that a
5 further evidentiary hearing is not necessary here, that he's
6 been provided with sufficient evidence by the parties in
7 order to make a ruling. And that ruling was based on the
8 Government assuming a violation of 6(e).

9 With respect to the prejudice inquiry, which we
10 have to turn back to here, there simply is no prejudice. And
11 that's something that, if a hearing even were to be ordered,
12 there's nothing else for the Defendant to explore.

13 HON. DENNIS JACOBS: Your adversary is pointing out
14 that, in this matter, the Government produced just one or two
15 percent of the information and the emails that are
16 potentially relevant. So, any lawyer who gets to produce even
17 99 percent of the documents the other side wants has a very
18 big advantage. So, who knows what's in the others?

19 MS. CUCINELLA: Well--but that--

20 HON. DENNIS JACOBS: And how could Judge Castel be
21 confident when Judge Castel has only seen what the Government
22 has deigned to produce?

23 MS. CUCINELLA: Well, Your Honor, again, what Judge
24 Castel was looking at was whether or not there was a
25 violation of Grand Jury secrecy, and then, to the extent that

1 that is found, whether or not there has been any prejudice.
2 And so, that has to take us back again to the facts of this
3 case.

4 And here, in looking at what was presented to the
5 Grand Jury--and now I think it's important to remember we're
6 not at the stage pretrial where we're only going on the Grand
7 Jury record. There has now been a full and fair trial where
8 the jury convicted the Defendant.

9 And I think in this Court, in United States versus
10 Eisen, this Court also upheld a District Court's decision not
11 to hold an evidentiary hearing, noting that the Defendant had
12 an ample opportunity during the trial in Eisen to further
13 develop prejudice.

14 HON. DENNIS JACOBS: What is the standard of review
15 here, on the decision to hold a hearing?

16 MS. CUCINELLA: Abuse of discretion, Your Honor. And
17 Judge Castel did not abuse his discretion. He carefully
18 considered the evidence before him. He repeatedly invited the
19 defense counsel to present to the Court examples of
20 prejudice. He thoroughly considered all of them. There is a
21 very thorough record on the potential prejudice. Here, what
22 they have come up with--

23 HON. DENNIS JACOBS: Yeah, but your adversary's
24 argument is that whatever was going on is going on behind a
25 screen that they cannot look behind. And therefore, if they

1 don't know what was--what--who or what--if they don't know
2 what was released of the Grand Jury proceedings, or to whom,
3 or why, or how much, and they don't know what was gotten in
4 return, it's very hard--very difficult for them to make the
5 argument of prejudice, isn't it?

6 MS. CUCINELLA: I disagree, Your Honor. With respect
7 to the--with respect to prejudice, they need to be able to
8 show that, in some tangible way, that Mr. Walters was denied
9 a fair trial, that there was something that substantially
10 affected either the Grand Jury's decision to indict or his
11 ability to get a fair trial.

12 Here, there is nothing that rises to that level.
13 The arguments they have made are such stretches with respect
14 to the record here. With respect to Mr. Davis cooperating,
15 that is not something that is a result of these Grand Jury
16 leaks.

17 HON. DENNIS JACOBS: But you assert that. I mean, it
18 might or might not be.

19 MS. CUCINELLA: Pardon?

20 HON. DENNIS JACOBS: I mean, they say it could be,
21 because Mr. Davis was, as it were, outed in the newspapers,
22 lost his job and his livelihood, was already financially
23 embarrassed, and therefore was reduced to coming to the
24 prosecutor on his knees.

25 MS. CUCINELLA: Well, two responses to that, Your

1 Honor. First, Judge Castel rejected that argument and found
2 that that was wholly speculative. Second, even if that were
3 the case, this Court has considered that, in United States
4 versus Friedman, where, in that case, it was found that they-
5 -the Circuit assumed that the Prosecution systematically did
6 targeted Grand Jury leaks for the purpose of cultivating
7 cooperators.

8 And there, the Court found that that did not rise
9 to the level of prejudice to warrant the dismissal of an
10 indictment. So, even if that were the case, it doesn't rise
11 to the level of prejudice that would result in a different
12 outcome for Mr. Walters.

13 They're seeking a windfall here. The appropriate
14 remedy is what is already happening, that Agent Chaves has
15 been referred for a criminal investigation. And, where
16 they're starting with Agent Chaves in the disclosures in this
17 case, they have the ability to look into the fact of whether
18 or not other agents were involved, other disclosures were
19 made. All of that can be looked into in that criminal
20 investigation.

21 All of those things that don't--did not impact Mr.
22 Walters' trial here. Here, he was given a fair, full trial.
23 They had the ability to develop additional evidence with
24 respect to Mr. Davis's cooperation at trial. They cross--
25 they, in fact, did cross-examine him on it. And it didn't

1 change the outcome.

2 Because Judge Castel considered this so carefully,
3 because he felt that he had a full record and that there was
4 no prejudice here, the Court should affirm his rulings. I see
5 that I'm out of--almost out of time. If there are additional
6 questions on--

7 HON. DENNIS JACOBS: Thank you.

8 MS. CUCINELLA: Okay.

9 MS. SHAPIRO: Your Honors, I'd just like to respond
10 to four points. First, the Government says that it takes this
11 matter very seriously. I would submit that the record in this
12 case shows otherwise.

13 First of all, with respect to the referral to Main
14 Justice, which, by the way, occurred 18 months ago, the
15 District Court himself has several times been critical of the
16 meager reports he is getting, which we have no access to,
17 from the Department of Justice.

18 And, in his order on April 2nd, which is Docket
19 Number 264, in addition to noting, as I mentioned earlier,
20 that the extent of the leaks and identity of other
21 participants is not yet known, the Court criticized the
22 Government for its failure to really be doing anything about
23 this, and noted, for example, that it had previously had
24 occasion to counsel, to use a charitable word, the Public
25 Integrity Unit, for submitting a report with four lines of

1 text beyond the introductory and concluding sentences, which
2 contained virtually no substance.

3 The fact of the matter is nothing has been done,
4 and, indeed, Agent Chaves is out there running a hedge fund
5 consulting business called, believe it or not,
6 ToneAtTheTop.com to this day, apparently unconcerned about
7 this investigation. Number 2--

8 HON. DENNIS JACOBS: Well, that would mean--that
9 would seem to me that he's lost his employment with the
10 Government.

11 MS. SHAPIRO: Oh, well, that certainly may have
12 occurred. But the point is he's out there telling hedge funds
13 how to comply with the law, apparently unconcerned that he's
14 going to be prosecuted, and for good reason.

15 Secondly, with regard to the Government's efforts
16 to kind of minimize the extent to which it attempted to
17 mislead the District Court, I do want to take just a few
18 minutes and go through some clearly misleading statements in
19 the sworn declaration, the only sworn piece of evidence the
20 Government submitted in this matter, when it was trying to
21 avoid the hearing.

22 And this is at Docket 44 in the District Court; I
23 don't believe it's in the Appendix. But I would urge the
24 Court to scrutinize Paragraphs 12, 14, and 17. Paragraph 12
25 says that, on May 13th, the United States Attorney's office

1 learned from the FBI Press Office that the Wall Street
2 Journal would not be able to publish a story about our
3 investigation until May 22nd at the earliest.

4 In fact, the United States Attorney's Office was
5 well aware that the reason the Wall Street Journal wasn't
6 publishing the piece was that there had been two meetings
7 between the FBI and the Wall Street Journal to urge them not
8 to do so, one on May 6, with Agent Chaves as well as another
9 person from the FBI, and one on a telephone call on May 13th.
10 And this is reflected at Appendix 220-222.

11 If you turn to Paragraph 14, this sworn declaration
12 states that the assistant had learned from the SEC that the
13 New York Times was considering publishing an article and,
14 quote, "realizing there was virtually no chance both papers
15 would hold off on their stories, that a decision was made to
16 approach Mr. Davis and Phil Nicholson." In fact--and this is--
17 --there's an email at--

18 HON. DENNIS JACOBS: But doesn't that suggest--we
19 can ignore the time.

20 MS. SHAPIRO: Thank you, Your Honor.

21 HON. DENNIS JACOBS: Doesn't that suggest that these
22 disclosures were impairing and hobbling the Government's
23 case, rather than--

24 MS. SHAPIRO: No, my point is that's a false
25 statement, that the declaration states that the Government

1 thought there was no chance the papers would hold off, when
2 in fact the reason that they knew the article was going to be
3 published was because--and this is at Appendix 230--because
4 the FBI had been in contact with the two newspapers and also
5 felt--and this is just remarkable; I would urge the Court to
6 read this email in the middle of that page--that the FBI had
7 an obligation to tell the Journal another journalist was
8 planning to write a story.

9 I mean, this is just--I know this sounds crazy, but
10 it's a conspiracy between the FBI and the Wall Street Journal
11 and the New York Times. I mean, this is unbelievable. Now, my
12 point, though, is that this declaration is incredibly
13 misleading, because it fails to disclose this information,
14 which the assistant who signed the declaration is on this
15 email.

16 And then, lastly and not least, Paragraph 17, in
17 Paragraph 17, this assistant swears that he and the case
18 agent, a Mr. Thoresen--that neither of them leaked. Yet,
19 nonetheless, we now know that Agent Thoresen was aware of
20 this May 27th meeting, which had, by the way, five people
21 from the FBI, not three, with the Wall Street Journal, that
22 Agent Thoresen had learned about it at the time, and there's
23 no mention of that in here.

24 There's no mention of all of this other material
25 that we now see numerous high-level assistant U.S. attorneys,

1 the U.S. Attorney himself, the Deputy U.S. Attorney are on
2 these emails. And yet, this declaration simply states that,
3 you know, neither the assistant who signed it, nor Mr.
4 Thoresen, had leaked--certainly literally true.

5 HON. DENNIS JACOBS: What's the basis for assuming
6 that these five agents were conveying to newspapers
7 information that was derived from the Grand Jury as opposed
8 to other sources?

9 MS. SHAPIRO: Well, what--

10 HON. DENNIS JACOBS: And leaks are not punishable by
11 dismissal of an indictment.

12 MS. SHAPIRO: What we do know is that--and what the
13 Government admitted in its December 2016 submission was that
14 there were leaks of Grand Jury material, but at--

15 HON. DENNIS JACOBS: There were leaks.

16 MS. SHAPIRO: And, in addition, the problem is that
17 we don't know. So, even the Government's December 2016
18 submission makes clear that it has conflicting information
19 about what occurred at this meeting. Agent Chaves and at
20 least one other participant at the meeting apparently,
21 according to the letter, told the United States Attorney's
22 Office that information about the investigation was shared
23 with these reporters at that meeting. Apparently, three other
24 members of the FBI deny that.

25 But who knows what really happened? We're not able

1 to explore it. And all we have is the Government's say-so in
2 that letter. And I submit that that's unfair.

3 And two other quick points, Your Honor: just with
4 respect to the Government's main argument, really, which is,
5 you know, this is a windfall to Mr. Walters, in no way is
6 this a windfall. He was harmed by this pattern of illegal
7 conduct by the Government. And the extent of the violation,
8 as the Government concedes, as the District Court has said as
9 recently as two months ago, remains unknown.

10 And so, how can we know to what extent it has
11 prejudiced Mr. Walters, when the extent of the violation
12 remains unknown and the District Court allowed it to remain
13 unknown by refusing to hold a hearing at the time?

14 And, lastly, I just want to correct one thing,
15 which is: the Government makes the argument that Mr. Walters
16 had an opportunity at trial to explore these matters. That is
17 in fact not true. Defense counsel asked for permission to go
18 into these topics and what Mr. Davis knew about these
19 articles and the leaks, and he was not permitted to do so.
20 And you can find that at Transcript Page 545, is the District
21 Court's ruling, and there's argument that starts a few pages
22 earlier, at Transcript Page 537.

23 If the Court has no further questions, we would ask
24 that the conviction be reversed, or at least that the case be
25 remanded for a hearing or a new trial. And I will rest on our

1 papers for the other points that weren't argued today.

2 HON. DENNIS JACOBS: Thank you both.

3 MS. CUCINELLA: Thank you, Your Honor.

4 HON. DENNIS JACOBS: We will reserve decision.

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C E R T I F I C A T I O N

9

10 I, Sonya Ledanski Hyde, certify that the foregoing transcript

11 is a true and accurate record of the proceedings.

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17 Veritext Legal Solutions

18 330 Old Country Road

19 Suite 300

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22 Date: May 31, 2018

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