

Walters Case Commands Tougher Cure For Gov't Misconduct

By **Harry Sandick and Danielle Quinn** (December 10, 2018, 2:24 PM EST)

Last week in *United States v. Walters*, a Second Circuit panel — consisting of Circuit Judges Dennis Jacobs and Denny Chin and U.S. District Judge William F. Kuntz by designation — affirmed the conviction of professional gambler William T. Walters for securities fraud and related claims arising out of insider trading. On appeal, Walters argued that the indictment should be dismissed in light of repeated leaks of confidential grand jury information made by the FBI to reporters from *The Wall Street Journal* and *The New York Times* in violation of Federal Rule of Criminal Procedure 6(e) and the due process clause of the Fifth Amendment.



Harry Sandick

The court agreed that the FBI's leaks violated Rule 6(e), but it determined that Walters was not prejudiced by the leaks, and therefore dismissal of Walters' indictment was inappropriate. Moreover, the court held that Walters's Fifth Amendment due process rights were not violated because the leaks were not the kind of systematic and pervasive misconduct that could serve as an exception to the prejudice requirement, nor were these leaks so outrageous as to undermine the judicial process used to obtain Walters' conviction. Judge Jacobs also wrote a short, 150-word opinion, concurring in the court's decision but expressing his deep concern about the misconduct by the agent who leaked the grand jury information, calling it "in some respects more egregious than anything Walters did." [1] While the court denounced the FBI's leak to the media and reasonably applied controlling law in affirming the conviction, there is a risk that the government may draw the wrong conclusion that this type of misconduct is acceptable so long as the case against the defendant is strong. In order to protect the rights of those under investigation, it may be necessary for Rule 6(e) to be amended to provide for a tougher remedy, so as to deter this type of misconduct from happening again.



Danielle Quinn

Background

The FBI Leaks Details of Its Investigation

The FBI and the U.S. Attorney's Office for the Southern District of New York began investigating Walters in 2011 for suspicious trading in shares of the Clorox Company. Special Agent Matthew Thoreson served as the FBI's primary case agent, and Special Agent David Chaves was Thoreson's supervisor. As part of its investigation, the government received authorization to conduct a wiretap on Walters' cellphone.

Authorization was granted on April 22, 2014, and renewed a month later.

In May 2014, after seeking authorization to continue the wiretap, the prosecutors learned that a reporter knew details about its investigation as early as May 2014, and was planning to publish a story. Shortly thereafter, the Journal and the Times both published articles revealing sensitive details concerning the Walters investigation, including details about “when the investigation began, who the targets were, which stocks were traded, what specific trades were being investigated, when those trades took place, what evidence was being examined, which investigative techniques were being employed by investigators, and ‘which theories’ the government was ‘exploring.’”[2] Follow-up articles continued to appear with additional details. As discussed below, it was later discovered that Chaves — the supervising agent — provided information to the Journal and the Times in 2013 and 2014.

Challenging the Indictment

Almost two years after the articles concerning Walters’ investigation were published, the grand jury returned a 10-count indictment charging Walters for, among other things, his receipt of material nonpublic information about Dean Foods from a member of Dean Foods’ board of directors.

Walters moved for a hearing to determine if the government leaked confidential grand jury information to the press “as part of a concerted effort to breathe life into a flagging investigation.”[3] The government opposed the motion, arguing that “the source was not a government official.”[4] The district court ordered an evidentiary hearing, but just days before the hearing, the government conceded that “FBI leaks occurred, and [] such leaks resulted in confidential law enforcement information about the Investigation being given to reporters.”[5] The government admitted that there was a Rule 6(e) violation and it provided a summary of its investigation to the district court. The district court canceled the hearing. Chaves was referred for internal discipline.

Walters then moved to dismiss the indictment, arguing inter alia that he was prejudiced by the Rule 6(e) violation because it caused his co-defendant, Thomas Davis, to plead guilty and testify against Walters. Walters also argued that, even if he was not prejudiced by the Rule 6(e) violation, Chaves’ leaks constituted “systematic and pervasive” prosecutorial misconduct that counseled dismissal. In addition, he asserted that the government’s conduct violated the due process clause of the Fifth Amendment. He still sought an evidentiary hearing to determine the facts relevant to analyzing the Rule 6(e) violation.

The district court denied the motion to dismiss and found that Walters failed to show prejudice from the violation, and that any due process clause violation did not provide Walters the relief he requested — the dismissal of his indictment. Walters proceeded to trial, at which he was convicted on all counts. He was sentenced to, inter alia, 60 months’ imprisonment, a \$10 million fine, the forfeiture of more than \$25.3 million, and restitution in the approximate amount of \$8.9 million.

The Second Circuit Decision

The Rule 6(e) Violation on Appeal

Despite the undisputed Rule 6(e) violation, the Second Circuit held that dismissal of Walters’ indictment was not appropriate under either the court’s supervisory powers or the due process clause of the Fifth Amendment.

Rule 6(e) prohibits certain persons, including prosecutors, from “disclos[ing] a matter occurring before

the grand jury.”[6] The prosecutor is permitted to disclose to federal agents such information “necessary to assist in performing that attorney’s duty to enforce federal criminal law.”[7] However, the agent is then subject to the grand jury secrecy requirement.[8] To dismiss an indictment for a Rule 6(e) violation, a defendant must show a rule violation that “substantially influenced the grand jury’s decision to indict,” or casts “‘grave doubt’ that the decision to indict was free from the substantial influence of such violations.”[9]

On de novo review, the court concluded that, despite the undisputed Rule 6(e) violation, Walters failed to show he was prejudiced by the leaks. To the court, Walters’ asserted prejudice — that the news leaks “revived a dormant investigation” that caused Davis to testify against Walters — was speculative. It found that the record did not support that the government’s investigation was dormant at the time of the leaks, nor that the leaks contributed to Davis’ cooperation with the government. Moreover, the overwhelming evidence introduced at trial to support Walters’ conviction “underscored” the absence of prejudice.[10]

The court declined to adopt dicta from Bank of Nova Scotia that would permit the dismissal of an indictment, even in the absence of a showing of prejudice, in cases involving “systematic and pervasive prosecutorial misconduct.”[11] The court was unaware of any court that applied this dicta to dismiss an indictment. Even if an indictment could be dismissed on these grounds, Walters’ allegations did not fit within the narrow dicta. The examples in Nova Scotia of “systematic and pervasive prosecutorial misconduct” where prejudice was presumed involved allegations of racial and gender discrimination in selecting the grand jury.[12] The court noted the availability of “remedial measures short of dismissal,” including the ongoing criminal investigation and disciplinary actions against Chaves, that “were sufficient to address the violations in this case.”[13] The court held that “the violations in this case do not raise a substantial and serious question about the fundamental fairness of the process that resulted in Walters’s indictment.”[14]

The court further determined that Walters failed to show outrageous governmental misconduct in violation of the Fifth Amendment due process clause. In recognition of this exacting standard — conduct “so outrageous that common notions of fairness and decency would be offended” — the court concluded that, though deeply disturbing, the conduct here was “not commensurate with the conduct in those cases where the indictments were dismissed for coercion or violations of bodily integrity.”[15] Moreover, Walters’ failure to demonstrate prejudice also defeated his due process challenge.

The court also concluded that the district court did not abuse its discretion in declining to hold an evidentiary hearing. The government’s internal review of the leaks and submission of findings to the district court served as a sufficient evidentiary record.

Other Challenges on Appeal

Walters also challenged his conviction, forfeiture and restitution order on the grounds that: (1) the government suborned perjured testimony at trial, (2) the evidence introduced at trial to support his conviction was insufficient to support certain counts, and (3) the district court improperly calculated restitution and forfeiture. The court affirmed on the first two grounds, and affirmed the forfeiture order. With respect to the restitution order, however, the court vacated and remanded for the district court to reconsider its restitution calculations in light of the U.S. Supreme Court decision in *Lagos v. United States*,[16] a decision that places certain limits on the availability of restitution for the costs of investigation.

What Is Left of Rule 6(e)?

Walters' case raises an issue that is a common denominator for many rule and procedural violations in criminal proceedings: There is a clear violation but the defendant is unable to show prejudice caused by it. The facts here were extreme: There were repeated and undisputed leaks of confidential grand jury information to two prominent newspapers. Yet the strength of the underlying charges prevented the court from providing relief, even though Walters alleged that the information in those articles caused his co-defendant to testify against him. Without a hearing to develop the record as to the rule violating conduct, or how the defendant may have been prejudiced, it was hard for Walters to put forward the strongest case for reversal. Judge Jacobs, in a concurring opinion, recognized as much. While the district court did not abuse its discretion in not holding such a hearing, "without a hearing, it is unknown how far or where the abuse reached." [17]

It remains to be seen whether the types of remedial measures identified by the court, i.e the investigation and proceedings against Chaves, will deter further Rule 6(e) violations in the first instance. Protections against disclosure of confidential grand jury information are necessary to protect the integrity of the grand jury proceedings. Once confidential grand jury information is leaked to the public, the damage cannot be undone. A person who provides information to a grand jury asks his lawyer, "Will this remain confidential?" The lawyer should be able to give an unqualified, honest, affirmative answer, but the facts of this case make this impossible. As Judge Jacobs explained: "The FBI depends on the confidence of the public, jurors and judges. That confidence is critical to its mission; so this kind of thing is very bad for business." [18]

Given the development of the law in this area and its heavy emphasis on prejudice, it may be appropriate for Rule 6(e) to be amended to include a specific provision that defines a remedy for the violation of the rule that is not dependent on prejudice, that lowers the showing of prejudice that is required, or that puts the burden on the government to show the absence of prejudice. While this might lead some guilty defendants to avoid punishment, it would help build confidence in the secrecy of grand jury proceedings and prevent the next violation.

Harry Sandick is a partner at Patterson Belknap Webb & Tyler LLP and a former assistant U.S. attorney for the Southern District of New York.

Danielle C. Quinn is an associate at the firm.

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[1] United States v. Walters, 17-2373 (Dec. 4, 2018), at *49.

[2] Id. at *6.

[3] Id. at *12.

[4] Id. at *13.

[5] Id. at *14.

[6] Fed. R. Crim. P. 6(e)(2)(B)(vi).

[7] Id. at 6(e)(3)(A)(ii).

[8] Id. at 6(e)(2)(B)(vii).

[9] Bank of Nova Scotia v. United States, 487 U.S. 250, 256 (1988) (citation omitted).

[10] Walters, 17-2373, at *26.

[11] Id. at *29.

[12] Id. at *29-30.

[13] Id. at *32-34.

[14] Id. at *31.

[15] Id. at *36.

[16] Lagos v. United States, 138 S. Ct. 1684 (2018).

[17] Walters, 17-2373, at *49.

[18] Id.