11-4416-cr

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

—against—

DANIELLE CHIESI,

Defendant,

RAJ RAJARATNAM,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR *AMICI CURIAE* NATIONAL LEGAL AID & DEFENDER ASSOCIATION AND THE BRONX DEFENDERS IN SUPPORT OF DEFENDANT-APPELLANT

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INTEREST OF *AMICI CURIAE*

Amici curiae are members of the criminal defense bar from across the United States who focus on providing representation to those financially unable to afford private counsel.[1] These organizations include defense attorneys, former prosecutors, policy makers, and social justice workers. The National Legal Aid & Defender Association (NLADA) is the nation's oldest and largest non-profit association of legal professionals and organizations dedicated to providing legal services to low-income people in America. The Bronx Defenders is a non-profit organization that advocates for broad criminal justice reform and provides free legal representation and social support to Bronx, New York residents charged with crimes.

As practitioners who litigate daily in state and federal courtrooms on behalf of indigent defendants, *amici* have a heightened interest in protecting the balance and integrity of the adversarial system in criminal cases, particularly in cases which involve proceedings of an *ex parte* nature. In filing this amicus brief, *amici* urge the Second Circuit to safeguard the historic protections of the Fourth Amendment and Title III of the Omnibus Crime Control and Safe Streets Act of 1968 ("Title III") (18 U.S.C. §§ 2510-18) against the radical reformulation of those

[1] No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. No person – other than *amici* or their counsel – contributed money that was intended to fund preparing or submitting the brief. All parties have consented to counsel's filing of this brief.

protections envisioned by the lower court's order in *United States v. Rajaratnam*, No. 09 Cr. 1184, 2010 WL 4867402 (S.D.N.Y. November 24, 2010) (Holwell, J.) ("Order"). Reversal of the lower court is essential in order to restore the integrity of *ex parte* proceedings and to fully protect the rights of the accused.

The integrity of the judicial system relies on honesty and candor from the government at all times. Never is that requirement as pronounced as when the government makes an *ex parte* application to the court. This requirement of utmost candor is doubly important when dealing with the vitally sensitive privacy interests implicated in an *ex parte* application seeking a wiretap authorization under Title III. Faced with the delicate task of balancing the government's use of electronic surveillance to obtain evidence while protecting individual privacy, the Fourth Amendment requires prior authorization and a showing of probable cause, and Title III echoes that requirement. Title III additionally establishes the explicit condition that the government only use wiretaps where conventional techniques either have failed or are unlikely to succeed, and requires the government to make an honest showing that such techniques have indeed failed or are unlikely to succeed.

Here, the government failed in upholding its duty of candor to the authorizing court. Based on the findings contained in the Order, the government's failure was not at the margins, but rather was a wholesale abdication of its

responsibilities. Specifically, the lower court found the government had made reckless misrepresentations and omissions in obtaining its wiretap. Despite its condemnation of the government for its pervasive lack of candor to the authorizing judge, the lower court permitted the government to use the deceptively-obtained wiretap evidence against the appellant. In an unprecedented ruling, the lower court denied suppression based on new factual allegations and arguments advanced for the first time by the government two and half years after the wiretap was authorized.

Amici respectfully submit that such lack of candor, which the lower court found to be reckless at best, cannot be tolerated. The impact of the lower court's radical reasoning, in the Order, if upheld, will be to 1) gut the Fourth Amendment and Title III protections in wiretap cases going forward, 2) ignore the Fourth Amendment and Title III requirements of prior authorization, and, perhaps most ominously, 3) eviscerate the integrity of the adversarial system at exactly that moment where it requires the highest protection -- in *ex parte* applications by the government where defendants are unable to defend themselves.

BACKGROUND

The lower court made numerous factual findings that were striking in magnitude and scope. Remarkably, in the face of its unbridled criticism of the

government, the lower court refused to suppress the wiretap evidence, instead permitting the application to go forward. These findings are highlighted below.[2]

- The government made a "literally false statement" that Khan had been cooperating with the FBI only since November 2007.
- Agent Kang's affidavit's summary of telephone conversations between Roomy Khan and appellant did not "win high marks for candor" and "evince[d] a lack of frankness that should be found in all *ex parte* applications" because the paraphrasing subtly changed appellant's answers and they skipped parts of conversations.
- The government's statements regarding Khan's prior record were "misleading" and "false" in stating that Khan "has not yet been charged with any crimes." The government's omission of "highly-relevant information" regarding Khan's criminal record for fraud were peculiarly probative of credibility:
    - The FBI and USAO had been investigating Khan since 1998 in connection with allegations that she was sending inside information about her company to appellant's phone;
    - In 2001, Khan pleaded guilty to felony wire fraud and was sentenced to probation; and
    - Agent Kang's interview memoranda (produced in discovery) describes his knowledge of Khan's past criminal record and "problems KHAN had in the past with the FBI."
- The *Franks* hearing exposed a glaring omission by the government – that the SEC had been conducting an extensive investigation into the very same activity the wiretap was intended to expose using many of the same techniques the affidavit casually affirmed had been or were unlikely to be successful.
    - The SEC had given criminal authorities documents "of particular note" as well as chronologies outlining circumstantial cases of insider trading and identifying likely sources of inside information regarding several different companies.
    - An on-site examination of Galleon was already under way since early 2007, and the SEC interviewed eighteen Galleon employees and appellant, himself, twice regarding insider trading.

[2] *Amici* adopt the recitation of facts in appellant's brief.

  - The SEC made almost two dozen requests for numerous classes of documents, including trading records, telephone records, and a complete record of e-mails and IMs sent and received by appellant and others in 2006.
  - Appellant was deposed all day on June 7, 2007. The USAO received a copy of the deposition along with five other depositions in connection with the SEC investigation.
  - Criminal authorities met with the SEC to talk "strategy" regarding the appellant's deposition.
  - Galleon produced four million pages of documents in response to the subpoenas, including several hundred thousand e-mails and almost fifty thousand pages of IMs.
  - The SEC served 221 subpoenas on banks, clearing houses, telephone companies, and issuers of publicly traded securities prior to Agent Kang's affidavit.
- While aware that all of the above evidence was being developed through conventional investigative techniques, the government did not disclose them to Judge Lynch despite Title III's requirement of "a full and complete statement as to whether or not other investigative procedures have been tried . . . ."
- "The USAO and FBI knew about all of this."
- The government's allegation that it had reviewed trading records and other information by the SEC "obscures" that the prosecutors' investigation was, "in sum and substance, the SEC investigation, and its results up until March 2008 were the product of entirely conventional investigative techniques not disclosed to Judge Lynch."
  - The "Kang affidavit all but ignored the SEC investigation—the elephant in the room—the boilerplate representation that 'alternative investigative techniques have been tried or appear unlikely to succeed if tried' remains just that—boilerplate."
- Broad omissions made several specific statements misleading. "A properly drafted affidavit would have (and should have) disclosed that . . . ."
- The government misrepresented that warrants were not appropriate at this stage of the process as locations of records were not fully identified – because "[a]t that stage of the investigation—unknown to Judge Lynch—the government had, in fact, accumulated or had access to four million Galleon documents obtained through either SEC or grand jury subpoenas and had built a compelling circumstantial case of insider trading in several securities."

- "This is precisely the nuts and bolts of an investigation that must be presented to a court if it is to fulfill its function of determining whether conventional investigative techniques are likely to prove inadequate."
- "[T]he government in this case did not merely omit some discrete piece of information possibly relevant to a reviewing court's analysis of necessity; it failed to disclose the *heart and soul* of its investigation, without which a reasoned evaluation of the necessity of employing wiretaps was *impossible*" (emphases added).
- "When the FBI interviewed Roomy Khan, she agreed to cooperate, identified sources of information, and recorded phone calls with [Appellant] . . . . And none of this compromised the covert nature of the criminal investigation."

See Rajaratnam, No. 09 Cr. 1184, 2010 WL 4867402 (S.D.N.Y. November 24, 2010).

SUMMARY OF ARGUMENT

Long after this case and the government's current initiative against insider trading fade from the headlines, the lower court's decision allowing the government to introduce wiretap evidence fraudulently obtained in violation of the Fourth Amendment and Title III, will have turned the adversarial system on its head. If this decision is permitted to stand, the defense bar will be forced to reassess and advise its clients in a markedly different manner -- a manner inconsistent with the Fourth Amendment and Title III. In this matter, the lower court excused government behavior that "recklessly" deprived the issuing court of a full and fair opportunity to decide if the wiretap was indeed necessary, a prerequisite to Title III.

The lower court, instead of suppressing these wiretaps, took the extraordinary and unprecedented step of allowing the government to vouch for the veracity of its initial application by submitting evidence two and a half years later, and only after appellant challenged the wiretap. Furthermore, even after determining that the government should have provided this information, without which it would have been "impossible" for the issuing court to have made a proper necessity determination, the lower court refused to suppress such evidence. *Amici* respectfully submit that the lower court decision was wrong and urge this Court to reverse this decision, which if left to stand, fundamentally undermines Fourth Amendment and Title III jurisprudence.

ARGUMENT

I. THE LOWER COURT FAILED TO HOLD THE GOVERNMENT ACCOUNTABLE FOR ITS GLARING LACK OF CANDOR IN THE *EX PARTE* PROCESS

A. The Expectation Of Candor To The Court Is At A Premium In *Ex Parte* Applications By The Government.

Typically, courts do not permit the government to unilaterally choose to exclude information vital to the court's decision making. The judiciary and adversarial system provide the necessary check on the executive branch and its prosecutors.

> Adversary proceedings are a major aspect of our system of criminal justice. Their superiority as a means for attaining justice in a given case is nowhere more evident

> than in those cases, such as the ones at bar, where an issue must be decided on the basis of a large volume of factual materials, and after consideration of the many and subtle interrelationships which may exist among the facts reflected by those records. As the need for adversary inquiry is increased by the complexity of the issues presented for adjudication, and by the consequent inadequacy of *ex parte* procedures as a means for their accurate resolution, the displacement of well-informed advocacy necessarily becomes less justifiable.

United States v. Huss, 482 F.2d 38, 50 n. 8 (2d Cir. 1973) quoting *Alderman v. United States*, 394 U.S. 165, 183-184 (1969). The law does recognize an exception to the normal adversary process in rare instances, where it permits the government to submit *ex parte* applications to the court. In these limited circumstances, such as in wiretap applications, the government's duty of candor and forthrightness is at its apex. By design, defendants are not afforded an opportunity to defend themselves in *ex parte* proceedings, and therefore must rely on the ability of the judicial branch to make judgments based on the full and complete (and honest) information provided to it by the government.

In this case, the government failed its obligation of candor in its *ex parte* application for a wiretap, thereby forcing appellant to challenge this improperly gained evidence. As the lower court found, appellant was able to demonstrate incredible and inexcusable government conduct, yet the lower court still denied suppression for reasons that defy common sense. It credited post-hoc explanations provided two and a half years later on the eve of trial. The lower court failed the

appellant, and perhaps, worse yet, failed future defendants, who similarly and understandably expect candor from the government in *ex parte* applications generally, and adherence to the dictates of the Fourth Amendment and Title III.

A district court judge provides a primary check on government, which cannot be trusted to police itself. "'Self-scrutiny is a lofty ideal, but its exaltation reaches new heights if we expect a District Attorney to prosecute himself or his associates for well-meaning violations of the search and seizure clause during a raid the District Attorney or his associates have ordered.'" *Franks v. Delaware*, 438 U.S. 154, 169 (1978) (internal citations omitted). In this context, when Congress enacted the wiretapping provisions of Title III, it intended to "make doubly sure that the statutory authority [for wiretaps] be used with restraint and only where the circumstances warrant the surreptitious interception of wire and oral communications." *United States v. Giordano*, 416 U.S. 505, 515 (1974). Here, the lower/reviewing court allowed the wiretap to stand even though it found that the government had made profound misrepresentations and omissions throughout its application. This Court should not excuse the lower court's decision to forgive the government.

B. The Lower Court Ignored The Requirement Of Prior Authorization And Instead, Improperly Relied On Information First Revealed In The *Franks* Hearing To Deny Suppression.

Title III provides an independent, statutory basis requiring suppression when its requirements are not met. Separate and apart from this statutory basis of suppression, multiple Circuits have suppressed wiretap orders when the affidavits submitted by the government concealed or misrepresented material facts leading a judge inappropriately to find necessity. *See, e.g.*, *United States v. Rice*, 478 F.3d 704, 712 (6th Cir. 2007) (affirming suppression where sworn affidavit of FBI agent was designed to fool the courts into approving wiretap of defendant based in part on misdirection and fabrication); *United States v. Harris*, 464 F.3d 733, 739 (7th Cir. 2006) (overruling lower court's denial of request for *Franks* hearing and stating that a lower court's action of "[c]onsidering new information presented in the supplemental filing that supported a finding of probable cause was beyond [its] analytical reach. Rather, its consideration of new information omitted from the warrant affidavit should have been limited to facts that did not support a finding of probable cause"). *See also United States v. Blackmon*, 273 F.3d 1204 (9th Cir. 2001) (stripped of its material misstatements and omissions, the application contained only generalized statements that would be true of any narcotics investigation, thus it was lacking any specific facts necessary to satisfy the requirements of § 2518(1)(c)); *United States v. Simpson*, 813 F.2d 1462 (9th Cir.

1987) (necessity not established once affidavit was analyzed with corrected misstatements and omissions); *United States v. Ippolito*, 774 F.2d 1482 (9th Cir. 1985) (suppression ordered where material false statements impacted necessity determinations).

The restrictive strictures of Title III, and independently, *Franks*, *Giordano*, and their progeny honored the necessary checks and balances on the executive branch and did not allow the government to make post-hoc explanations for reckless behavior. That is, until this decision.

II. THIS COURT SHOULD NOT REWARD THE GOVERNMENT FOR ITS RECKLESS BEHAVIOR

A. The Lower Court's Reasoning Jeopardizes Confidence In The Judiciary In That It Condemned The Government For Its Failure To Reveal The "Heart And Soul" Of Its Investigation Yet Permitted The Government To Benefit From This Transgression.

The lower court's decision in the instant case excuses the government from accountability for material misrepresentations and omissions to an Article III judge in an *ex parte* wiretap application. The decision not only violates the constitutional rights of criminal defendants accused or convicted of white collar crimes but also threatens the liberties of all defendants prosecuted via wiretap evidence or any other proceedings of an *ex parte* nature.

Franks warns of the limitations of the district court's ability to provide a check on the executive branch and its prosecutors in *ex parte* proceedings. "The

usual reliance of our legal system on adversary proceedings itself should be an indication that an *ex parte* inquiry is likely to be less vigorous. The magistrate has no acquaintance with the information that may contradict the good faith and reasonable basis of the affiant's allegations. The pre-search proceeding will frequently be marked by haste, because of the understandable desire to act before the evidence disappears; this urgency will not always permit the magistrate to make an extended independent examination of the affiant or other witnesses." *Franks*, 438 U.S. at 169 (1978).

Here, the issuing court relied on representations made by the government in issuing the warrant. According to the lower court, however, these representations when challenged by appellant, were proven to be a combination of misrepresentations, false statements, and overall reckless behavior that pervaded the application. The government chose not to provide these facts to the issuing court, and as the government routinely reminds criminal juries in courtrooms across this nation that "choices have consequences," here the consequence as expressly required by Title III, and independently, the Fourth Amendment, is suppression.[3]

Here, the government should have disclosed this material information.

[3] *Amici* cannot think of any reason for this deliberate or reckless choice by the government, other than the fact that the government felt that an issuing court would not have granted the application because of the immense, parallel, conventional SEC investigation that was yielding results.

"'[T]he prudent prosecutor will resolve doubtful questions in favor of disclosure.' This is as it should be. Such disclosure will serve to justify trust in the prosecutor as 'the representative . . . of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done.'" *Kyles v. Whitley*, 514 U.S. 419, 439 (1995) (internal citations omitted). Here, however, the lower court's decision encourages the government to be less prudent and forthcoming, and in reality, less honest, because the government can make false statements, and then explain them away if ever challenged.

The lower court's decision threatens the integrity of the Fourth Amendment by violating the individual's right to be free of unreasonable searches and seizures and infringes on the individual's civil liberties. In addition, the language of Title III highlights the importance of judicial oversight by requiring prior judicial authorization and necessity, and such heightened oversight is impossible without complete and truthful information from the government. The reason for heightened judicial oversight is because this is an *ex parte* situation where defendants cannot challenge the evidence presented to the judge.

This Court has urged district courts to be more vigilant in scrutinizing wiretap applications and warned the government that to avoid the possibility of suppression orders, "it would do well to spell out in more detail its investigative efforts [and that] [a] wiretap is not a device to be turned to as an initial matter, but

only where the circumstances demonstrate that it is necessary." *United States v. Concepcion*, 579 F.3d 214, 220 (2d Cir. 2009). Here, the lower court and the government flouted this Court's admonitions in *Concepcion*.

With the lower court's Order, where it determined that it was "impossible" for the issuing judge to have made an informed decision as to necessity without knowing what was subsequently revealed at the *Franks* hearing, the government did not need to heed the warning of this Court in *Concepcion*. Ignoring *Concepcion* without consequence can only happen if a lower court, as here, absolves the government of any responsibility for its actions.

Therefore, this Court should reverse the lower court's Order because it flies in the face of the warning this Court issued in *Concepcion* and the lesson this Court articulated in *Huss*.

> It should be clear by now that the problem of electronic surveillance strikes deep emotional chords in a people whose concern for the protection of privacy–particularly the privacy of words and thoughts–is historic. In Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Congress responded to this by balancing the needs of law enforcement against the important public and individual concern for privacy. It authorized electronic surveillance only under the most rigorous, carefully drawn standards.

Huss, 482 F.2d 38, 52 (2d Cir. 1973) (internal citations omitted).[4]

[4] To be sure, Special Agent Kang's affidavit was sworn before this Court issued its ruling in *Concepcion*, but 35 years after this Court's decision in *Huss*.

The lower court's decision "breeds contempt for the law" -- exactly what this Court warned about in *Huss*. *Id.*[5] If allowed to stand, the lower court decision rewards government malfeasance. The lower court decision encourages "[a] cavalier, carefree and careless attitude towards the conduct of electronic surveillance [and] makes a mockery of the labors of Congress to tailor the statute with precision. More importantly, the lower court's decision offends the spirit of liberty which has distinguished this nation from its birth." *Id.*

Defendants must rely on the honesty and integrity of the government's representations to a court in *ex parte* proceedings because the very nature of an *ex parte* proceeding already excludes the defendant and restrains his civil liberties in the interest of pursuing government investigation. The government's representations to the issuing court must contain a "'full and complete statement' explaining whether other investigative procedures have been tried and have failed, or appear 'unlikely to succeed' . . . ." *United States v. Lilla*, 699 F.2d 99, 103 (2d Cir. 1983).

We recognize that while the law allows the government to make *ex parte* applications for wiretaps, protecting the integrity of the process is integral to a fair administration of justice because the *ex parte* process does not allow defendants to inspect evidence or challenge representations as in normal proceedings. Thus,

[5] This Court quoted Justice Brandeis' dissenting opinion in *Olmstead v. United States*, 277 U.S. 438, 471, 485 (1928) and warned against the government becoming a lawbreaker.

what the government presents to an Article III judge in such a proceeding must be honest; if not, the system is imperiled and any resulting convictions will be tainted. As the Supreme Court has held, "conviction by means of unlawful seizures . . . should find no sanction in the judgments of the courts . . . and that such evidence 'shall not be used at all.'" *Mapp v. Ohio*, 367 U.S. 643, 648 (1961) (internal citations omitted).

The lower court's decision inexplicably allowed the government a second bite at the apple despite the Fourth Amendment and Title III requirements of prior authorization. This is simply not the law. The lower court cannot credit after the fact explanations provided by the government to support a necessity finding. It bears note that permitting the government to retell its story after the government has charged a defendant, and is fighting to preserve its evidence for trial, invites self-serving and suspect explanations. "The requirement that a warrant not issue 'but upon probable cause, supported by Oath or affirmation,' would be reduced to a nullity if a police officer was able to use deliberately falsified allegations to demonstrate probable cause, and, having misled the magistrate, then was able to remain confident that the ploy was worthwhile." *Franks*, 438 U.S. at 168 (1978). The government's actions here and the lower court's sanctioning of their actions violate the spirit and the law of *Franks*.

B. If Upheld, the Lower Court's Decision Will Thwart Future Defendants, Especially Those With Limited Resources, From Challenging Government Misconduct.

As noted above, this decision, if upheld, changes the landscape for all defendants going forward. The lower court's decision will adversely impact the willingness of defendants with constrained resources to challenge false or misleading *ex parte* applications. It goes without saying that conducting suppression hearings and challenges are costly for any defendant in terms of resources, energy, and time. A defendant who knows he can demonstrate false or misleading statements by the government in an *ex parte* application would still be faced with the prospect that the government would get its second bite of the apple. In a world of limited resources, this may well reduce the willingness to challenge government misconduct, resulting in the public harm of government misconduct at best going unexposed, and quite possibly being encouraged.

If the lower court's Order and its radical new vision of the Fourth Amendment and Title III is allowed to stand, the legacy of this case will have nothing to do with high profile prosecutions, insider trading, or white-collar crime on Wall Street. Instead, the lasting legacy of this case, if affirmed, will be the loss of constitutional and statutory protections to which all defendants are entitled, thereby permanently damaging the integrity of our system of justice.

CONCLUSION

For all of the aforementioned reasons, this Court should reverse the lower court's Order, grant appellant's motion to suppress, and reverse his convictions.

Dated: February 1, 2012
New York, New York

Respectfully submitted,

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Certificate of Compliance with Rule 32(a)

1. As required by Fed, R. App. P. 32(a)(7)(C), I certify that this brief is proportionally spaced and contains 4,288 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I relied on my word processor, Microsoft Office Word 2007, to obtain this count.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Office Word 2007 in Time New Roman Style, 14 point font.

I certify that the foregoing information is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

Dated: February 1, 2012

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11-4416-cr *USA v. Rajaratnam*

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Notary Public:

/s/ Nadia R. Oswald Hamid

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