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# A Stacked Deck: Getting Justice for Grand Jury Leaks

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Just like in Las Vegas, what happens in the grand jury room is supposed to stay in the grand jury room. This is the code that sports gambler turned stock trader Billy Walters and his lawyers relied on during a federal government investigation of Walters and recent presentation to the grand jury.

Grand jury information is sacrosanct. A grand jury leak can be a powerful and prejudicial weapon against a defendant because it can taint jurors and otherwise deny a defendant due process. Despite being a serious legal and ethical violation, the leak of grand jury information is not uncommon.

To make matters worse, defendants seeking to rectify the harm they suffered from a grand jury leak face an uphill battle. And that hill just became steeper. While defendants can move to dismiss the indictment following a grand jury leak, a recent Southern District of New York (SDNY) decision reinforced, and arguably increased, the level of difficulty of obtaining such a dismissal. In *United States v. Walters*, the SDNY refused to dismiss an indictment despite a Federal Bureau of Investigation (FBI) agent *admitting* his egregious leak of grand jury information directly to the press.

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A leak from the grand jury or a government investigation, especially when it makes its way into headlines, can prejudice the administration of justice in a number of ways. For example, leaks tend to place an inflammatory spin on allegations and influence the decision of the grand jury and the trial jury. Leaks can also influence the testimony of grand jury and trial witnesses, who may decide to tailor their testimony to the leaked information or decide not to testify at all because their testimony is inconsistent with the leaked testimony. Accordingly, Federal Rule of Criminal Procedure 6(e) precludes the disclosure of matters occurring before a grand jury (except under very limited circumstances). Ongoing government investigations are also supposed to remain confidential. For example, as Deputy Attorney General Rosenstein highlighted in his May 2017 memorandum relating to former FBI Director James Comey: there is a "longstanding policy that [federal agents and prosecutors] refrain from publicizing non-public information."

Despite the safeguards in place to protect grand jury and investigative information, there have been several noteworthy leaks within the last few years:

- In July 2016, former FBI Director James Comey publicly announced his recommendations to the Justice Department about whether to charge Hillary Clinton. Deputy Attorney General Rosenstein has since criticized Comey for ignoring established policy that charging decisions belong to the U.S. Department of Justice (DOJ), not the FBI.
- In August 2016, Kathleen Kane, the former Pennsylvania Attorney General, was convicted for leaking grand jury information.
- In January 2015, news of Sheldon Silver's arrest was disclosed to the press before he was arrested, despite an agreement between defense counsel and the government to keep the complaint sealed until Silver was arrested. A media frenzy spurred by the SDNY U.S. Attorney's Office ensued as the grand jury deliberated over whether to indict Silver, the Speaker of the New York Assembly. Judge Caproni expressed that "the U.S. Attorney, while castigating politicians in Albany for playing fast and loose with ethical rules

that govern their conduct, strayed so close to the edge of the rules governing his own conduct that Defendant Sheldon Silver has a non-frivolous argument that he fell over the edge to the Defendant's prejudice."

- Federal prosecutors tried to keep three key defense witnesses off the stand in *United States v. Nicholas* (C.D. Cal. 2008) by improperly contacting the witnesses' lawyers and leaking information about the grand jury proceedings to the media. In response, in December 2009, the court dismissed the criminal case and recommended the U.S. Securities and Exchange Commission not pursue its stayed case against the defendants.

In *Walters*, an FBI agent admitted leaking sensitive information on the investigation of Billy Walters to reporters at *The New York Times* and *Wall Street Journal* from April 2013 through as late as August 2015. Walters' lawyers argued the government had violated grand jury secrecy rules and sought dismissal of the indictment, charging Walters with securities fraud, wire fraud, and conspiracy. The U.S. Supreme Court set a very high burden for dismissal of an indictment for prosecutorial misconduct in *Bank of Nova Scotia v. United States* (1988), holding that an indictment may be dismissed only if the prosecutorial misconduct "substantially influenced the grand jury's decision to indict," or the judge has "grave doubt" that the grand jury's decision was free from substantial influence. Walters' lawyers argued the evidence raised "grave doubts" that the leak had not substantially influenced the grand jury's decision to indict. In March of this year, the SDNY found the defense had not met its burden, concluding that the FBI's behavior was not "so systematic and pervasive as to raise a substantial and serious question about the fundamental fairness of the process which resulted in the indictment." Despite undisputed evidence of an intentional violation of the grand jury secrecy rules, the court held that Walters had not been prejudiced by the leak. Instead, the court suggested the proper response was a DOJ investigation of the FBI agent.

The *Walters* case is a reminder that the odds are stacked against a defendant confronting government leaks. As Justice Holmes once said "[t]he theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument . . . and not by any outside influence, whether of private talk or public print." Defendants seeking due process can only hope the government will heed Justice Holmes' advice when tempted to roll the dice and present a case to the grand jury and the media at the same time.