

Dbl0chi7

Hoffmann - cross

1 (In open court)

2 THE COURT: All right, Special Agent Hoffmann, you're
3 excused, sir, you may step down.

4 THE WITNESS: Thank you.

5 (Witness temporarily excused)

6 THE COURT: All right, everyone may be seated.

7 All right. I see Mr. McGinley and Mr. Sahni. Come on
8 back up.

9 Mr. Chichakli, do you want to be heard at all with
10 respect to the discussion that we had this morning? Or that I
11 had this morning with Mr. McGinley? Or the government's
12 letter, or the government's further letter that I distributed
13 to you at lunchtime enclosing the various press reports.

14 MR. CHICHAKLI: Not at this point in time. I would
15 like to hear, further, what the government have to say about
16 it.

17 THE COURT: All right.

18 Mr. McGinley, do you want to be heard further?

19 MR. MCGUIRE: Sure, your Honor. And I'm happy to
20 address any specific questions that you may have. And I think,
21 for purposes of everyone's understanding, as I hope our letter
22 earlier today hopefully sheds some light on how this was
23 initiated.

24 The government's statement, which was picked up in the
25 media, we then received the e-mail, which we handed up to your

Dbl0chi7

Hoffmann - cross

1 Honor earlier from Judge Scheindlin's chambers.

2 The two teleconferences then followed. And the
3 government did defer, as it normally does, to the judge's
4 decision with respect to a court reporter as to both of those
5 conferences.

6 As a result of those conferences, the judge vacated
7 the original August 24th order and -- I think after an express
8 discussion with both parties about the credibility findings of
9 both agents. As a result of that, and in reliance on that, the
10 government did not seek any further relief as to the original
11 order, because it deemed it a nullity, legally and factually,
12 and that those adverse credibility findings were now no longer.
13 As a result, the government's motion in limine, in this case,
14 was one made out of an abundance of caution in an effort to
15 inform the Court of the circumstances of those opinions, both
16 the vacated one and the operative order. And, in an effort to
17 inform the Court of that, and to ensure that, in fact, those
18 adverse credibility findings, particularly in this case, the
19 one with respect to Special Agent Zachariasiewicz, remained a
20 nullity, as it is, and consistent with Judge Sheindlin's
21 subsequent orders.

22 So that is really where the government, I think, that
23 the government now would want to make sure that your Honor is
24 fully informed of that, and assured of that. Because I think
25 both the contents of the conference calls as summarized in the

Dbl0chi7

Hoffmann - cross

1 government's letter, as well as the orders on their face, both
2 the, I think pretty clear order of vacatur, as well as the new
3 order, I think, demonstrate that the judge did not make any
4 credibility determinations as to either of the agents in
5 reaching her decision to suppress.

6 THE COURT: She did, but she withdrew it in
7 an arrangement that she made with the government.

8 MR. McGUIRE: Again, I don't think it is fair to call
9 it an arrangement with the government. This was a conference
10 call with both parties present --

11 THE COURT: You recalled it a proposal, that she made
12 to you, this morning. And that you had to go back and consult
13 with higher ups in the office about whether the government
14 could accept the proposal. And then you told me that you came
15 back and you accepted the proposal. Didn't you?

16 MR. McGUIRE: That is correct, your Honor.

17 THE COURT: Okay. Isn't that an arrangement?

18 MR. McGUIRE: Well, I think it is unfair to call it an
19 arrangement with the government --

20 THE COURT: What would you call it?

21 MR. McGUIRE: I would call it a judge initiating a
22 conference call with both parties, discussing it with both
23 parties in anticipation of a potential motion for
24 reconsideration and determining that she is able to reach the
25 same result -- she reached a result on multiple bases. And she

Dbl0chi7

Hoffmann - cross

1 determined that she is able to reach the same result and avoid
2 further motion practice by just relying on a particular set of
3 bases, and not on an adverse credibility finding.

4 And I think judges do that regularly. And that is
5 what was done in this case. And I think the point here is
6 there is no doubt from her orders that this original order is
7 null. And it was withdrawn effective immediately. And I
8 think that's where the adverse credibility finding is found.
9 And there was nothing untoward about the manner in which the
10 order was vacated.

11 I mean it was publicly filed. And the new order was
12 publicly filed. So there was no transcript, per the judge's
13 instructions that there was going to be no court reporter. But
14 there was no arrangement or anything improper done by the
15 government in reaching these decisions, which the judge
16 proposed. And the new decision had made no mention, and did
17 not call for a credibility finding. And all we're asking is
18 that your Honor not revive that vacated order and the
19 credibility findings therein, to now impact, negatively, this
20 agent who testified two years ago in front of Judge Scheindlin,
21 going forward. He will now have, should this Court revive that
22 original order, he will have the negative repercussions of that
23 adverse credibility finding with him, that Judge Scheindlin
24 deemed were not appropriate in that case. And that's why she
25 vacated the original order. And that's the concern of the

Dbl0chi7

Hoffmann - cross

1 government. And there was nothing --

2 I take your Honor's point that this could have been
3 done in a different way. The government deferred to Judge
4 Scheindlin's procedures with respect to these conference calls.
5 But to now -- the result of that to now be that this agent, is
6 visited upon the agent an adverse credibility finding that was
7 vacated by the very judge who watched him testify, strikes us
8 as unfair and not paying due deference to Judge Scheindlin's
9 orders.

10 THE COURT: Isn't it probative of the judge's
11 potential -- excuse me, of the agent's potential bias?

12 MR. McGUIRE: Isn't it what? The adverse credibility
13 finding?

14 THE COURT: The fact that the government went in and
15 persuaded the judge to excise the credibility determinations --

16 MR. McGUIRE: Judge, I --

17 THE COURT: -- for the very reasons that you are
18 articulating to me about how terrible this would be for the
19 agent.

20 MR. McGUIRE: Judge, I think it is important to be
21 clear about what happened on those conference calls.

22 Again, this was not an arrangement by the government.
23 This was not a set of conference calls initiated by the
24 government. It was a conference call initiated, by Judge
25 Scheindlin, at which she requested what is the basis for your

Dbl0chi7

Hoffmann - cross

1 motion to reconsider. And the government said we are
2 considering our options, but are particularly concerned about
3 the adverse credibility findings as to the agents, and feel
4 compelled to move for reconsideration on at least that bases.

5 Understanding that, the judge then -- the judge, not
6 the government -- raised the prospect of a new order that did
7 not reach the credibility determinations. We have had that in
8 the past in our office, where reconsideration motions have been
9 made or discussed with judges, and judges revise opinions
10 accordingly to avoid adverse credibility findings against
11 witnesses. This is no difference. And the question, your
12 Honor's question, presumes there was something improper about
13 the manner in which this vacated opinion was obtained. And
14 there was nothing improper here, Judge. There was nothing
15 improper. The judge, Judge Scheindlin, made the decision to
16 make this proposal. The government considered it. The defense
17 did not object to it. And now we have a vacated order --

18 **THE COURT:** And the defendant wasn't there.

19 MR. McGUIRE: Waived by defense counsel, your Honor.

20 Judge Scheindlin asked defense counsel at the start.
21 And, again, this is -- this is an issue that -- I mean, Judge
22 Scheindlin addressed this. And, again, this was an issue that
23 I think the context of the phone calls made clear that she
24 deemed these adverse credibility findings not relevant to her
25 finding, and that opinion was withdrawn.

Dbl0chi7

Hoffmann - cross

1 THE COURT: I have a simple question for the
2 government. Does the government consider this Brady material?
3 And I guess I'm directing that question to the assistants who
4 are on this case.

5 MR. EVERDELL: Your Honor, I believe what we've been
6 talking about, up to this point, is the adverse credibility
7 finding that was withdrawn. And if we're talking about Giglio
8 material, if we are talking about issues that impact on
9 credibility, if the finding was withdrawn, and these are the
10 circumstances as outlined by Mr. McGuire, it didn't seem like
11 there was an adverse credibility finding to then report on.

12 But I raise, your Honor, the whole reason why we
13 brought it to the Court's attention in an ex parte manner in an
14 abundance of caution, which is what we thought we were
15 following the correct procedures here, was that we actually did
16 believe this was a nullity, as our office has treated it since
17 it happened. But we did want to raise it with the Court
18 because this was --

19 THE COURT: Did Judge Sheindlin strike her nullity
20 from the docket?

21 MR. MCGUIRE: I don't believe so, your Honor.

22 THE COURT: You know she didn't.

23 MR. MCGUIRE: Which is why we raised it with your
24 Honor. Because the order is there. That doesn't mean the
25 order is effective, your Honor. By definition, the order to

Dbl0chi7

Hoffmann - cross

1 vacate references back to the order that was vacated. But,
2 again, the legal operation of the new -- of the order to vacate
3 and the new order, it strikes that adverse credibility finding.
4 And so now to revive that, which would be in direct
5 contravention of Judge Scheindlin's order to vacate, after the
6 government had it stood down and not sought additional relief
7 at the time because of the new opinion, the government --

8 THE COURT: Because the government made an
9 arrangement, an agreement. They agreed not to appeal, not to
10 take any further reconsideration if they could -- if the
11 government could just get Judge Scheindlin to remove the
12 credibility determinations from her opinion. Right?

13 MR. McGUIRE: It was Judge Scheindlin's proposal. And
14 the government agreed to it, you're right, your Honor.

15 THE COURT: All right.

16 MR. McGUIRE: But understanding that the order to
17 vacate did what it said it does, which is immediately and fully
18 withdraw and render null the original opinion. And that's the
19 only reference to the adverse credibility finding. And I take
20 your Honor's point. This isn't a run-of-the-mill example, I
21 think is why we're here, is to inform you of the circumstances
22 here.

23 But I guess getting to the issue that is before your
24 Honor, in terms of this being a chain of custody witness, Agent
25 Zachariasiewicz, in this case simply to admit the computer of

Dbl0chi7

Hoffmann - cross

1 Mr. Bout, and that's the only thing he is going to testify
2 about, that is -- again, that doesn't mean you're not subject
3 to any cross-examination, I'm not going that far. But the
4 notion that an adverse credibility finding that was vacated by
5 Judge Scheindlin is now going to have bearing on him in this
6 trial, after the government has considered, based on our
7 conversations with Judge Scheindlin and defense counsel, that
8 those adverse credibility findings were vacated, is now leaving
9 the government in a position where an opinion that the judge
10 who issued it is saying, it is null, it is now being revived,
11 potentially, if your Honor were to find that this is, in fact,
12 an adverse credibility finding and is proper fodder for cross.

13 And that's the government's concern.

14 THE COURT: Well, but the circumstances are clear.
15 There was a finding about credibility. The government went to
16 bat for those agents. And then the finding was withdrawn. How
17 is that not evidence that can be used to show that the agent
18 has a reason to have a bias for the government?

19 MR. MCGUIRE: So, your Honor, just so I'm clear, is it
20 the government going to bat for the agent that you are
21 asking about, or is it the underlying adverse credibility
22 finding, and the basis for that that you are asking about. It
23 was not clear to me whether you were asking about the fact that
24 the government going to bat is relevant --

25 THE COURT: It is both.

Dbl0chi7

Hoffmann - cross

1 MR. McGUIRE: -- to the defendant's bias.

2 THE COURT: Mr. McGuire, it is both.

3 MR. McGUIRE: Okay. I'll take each of them
4 separately.

5 I think the first one, which is the underlying adverse
6 credibility finding, which was a basis, among several, in Judge
7 Sheindlin's original order, it is not uncommon, I don't think
8 at all, for judges, upon discussion with parties after opinions
9 are entered or motions filed, to revise opinions or to vacate
10 opinions and issue new opinions.

11 THE COURT: You may say, as you state it, generally,
12 is not uncommon. But, I am not subscribing to what happened,
13 all right?

14 MR. McGUIRE: Okay.

15 THE COURT: So don't tell me about motions that were
16 made. No motions were made. No record was made.

17 MR. McGUIRE: But, again, your Honor, but to visit, to
18 then the prejudice from that to flow to the agent, in him being
19 allowed to be crossed on an adverse credibility finding because
20 neither the Court, nor the government, nor defense counsel had
21 a court reporter --

22 THE COURT: Move to your second point, because you're
23 not persuading me on the first.

24 MR. McGUIRE: The second point, the fact that the
25 government would go to bat, as you say, for an agent to move,

Dbl0chi7

Hoffmann - cross

1 in an effort to move against an adverse credibility finding,
2 again, not an uncommon occurrence. And to allow for
3 cross-examination by a defendant in a subsequent trial about
4 the fact that prosecutors, in a prior case, went to bat for a
5 judge, made a motion to a judge, or discussed making a motion
6 for a judge on his behalf, I don't know how that is relevant to
7 cross-examination for any agent witness. But it certainly
8 seems, from a 403 standpoint, as confusing, and of minimal
9 probative value that somehow the agent is on the hook, or
10 somehow more biased because prosecutors in a former case
11 elected to make a motion in an effort to assist him, or assist
12 his reputation by trying to minimize an adverse credibility
13 finding.

14 I think just to clarify, in terms of going to bat, it
15 is a legal argument that we were discussing with the Court and
16 with defense counsel on this. It was not like we were going to
17 Judge Scheindlin, ex parte, with a resume and a highlight reel
18 of this agent. We were making an argument for reconsideration,
19 because we found that her findings as to the credibility of
20 these agents was unsupported by the record. And it was -- she
21 compared the live testimony of two agents to a submitted
22 affidavit of the defendant, and credited the defendant, wholly,
23 and the affidavit wholly. That was her determination. And we
24 advised her that we felt compelled to challenge that --

25 **THE COURT:** No, she listened to live testimony from

Dbl0chi7

Hoffmann - cross

1 two agents and found they were incredible. That is what she
2 did.

3 MR. McGUIRE: That's on the basis of the first
4 opinion, your Honor. And that has been rendered null. And I
5 think that's -- we circle back to that. And the government
6 understood that to be null. Defense counsel understood that to
7 be null. And I think Judge Scheindlin's language indicates
8 that she understood that to be null. And now the government is
9 in a position, and the agent is in a position where an issue
10 that was believed to have been resolved two years ago is now
11 going to be revived when we had an order from a -- from Judge
12 Scheindlin saying this finding has now been vacated. And
13 that's where it is difficult to understand how that can now be
14 revived against the agent. Particularly in a case like this,
15 where you are not talking about testimony about a post-arrest
16 statement. You are not talking about testimony that at all
17 resembles the testimony he gave in the suppression hearing.
18 The testimony is chain of custody testimony.

19 But more importantly, for future cases, this agent,
20 who was is, for what it's worth, a senior DEA agent working on
21 significant cases is now going to be marked with, if your Honor
22 were to find that this was an adverse credibility finding, he
23 is gonna be marked with this finding after the judge who heard
24 him testify vacated the adverse credibility finding. And
25 that's the primary concern of the government. Whether there is

Dbl0chi7

Hoffmann - cross

1 cross allowed of this agent on some of his testimony at the
2 suppression hearing, I'm not suggesting that all of that should
3 necessarily be precluded. The concern the government has is a
4 narrower one, which is that your Honor makes a finding that the
5 adverse credibility finding is actually an actual finding that
6 is now operative going forward and constitutes Giglio for this
7 agent going forward. And that is the real concern. The
8 cross-examination and the scope thereof, in this case, is one
9 which, obviously, we want to understand so that we can
10 effectively examine the witness. But the key concern here is
11 that your Honor indicates that, going forward, this adverse
12 credibility finding that Judge Scheindlin vacated is now once
13 again revived.

14 So I just wanted to focus the issue there that that's
15 really our principle concern, and that we can convince your
16 Honor that that's not appropriate, because that was not Judge
17 Scheindlin's finding in her operative order. And it was
18 explicitly vacated as a result of the conference calls
19 following the original order. Because she was able to make
20 findings based on other bases in that case.

21 And there was no -- there was no findings in the
22 operative order that was tied, at all, to credibility
23 determination.

24 So, I don't know if that is helpful to focus the
25 issue, but that's really the government's principle concern, is

Dbl0chi7

Hoffmann - cross

1 that this adverse credibility finding against this agent is not
2 somehow revived here.

3 He can be cross-examined. He can be cross-examined
4 potentially about some of the testimony he gave in that
5 hearing, but -- but, the concern is your Honor ruling that that
6 is an adverse credibility finding, notwithstanding Judge
7 Scheindlin's order and that, therefore, that constitutes
8 Giglio, for all time, going forward for this agent.

9 THE COURT: All right, thank you, Mr. McGuire.

10 Mr. Chichakli, do you want to be heard?

11 MR. CHICHAKLI: Yes, please, if the Court allow, your
12 Honor.

13 I heard the argument the government has made. And I
14 read the text. It is it a fact that -- that a full
15 cross-examination would be necessary in order to assert
16 certain -- that at least a chain of custody is maintained
17 properly. The adverse credibility finding that was vacated,
18 although it is vacated, the circumstances, as the government
19 described it, not the run-of-the-mill in a case with such high
20 profile, such the case of Mr. Viktor Bout.

21 A reasonable person would expect that everybody will
22 be at least adhering to the proper procedure. The government
23 expressed their worry about the agent being labeled. It is
24 rather a genuine concern. And it should be considered.
25 However, there is also a person who is -- life gonna be spent

Dbl0chi7

Hoffmann - cross

1 in jail. And he could also deserve consideration.

2 For a matter of fact, we will never know what
3 happened. We have text in front of us. We do have material.
4 But these texts, and material are just simply not documented.
5 Based on my limited experience in this court, over the last few
6 days, I'm unable to speak to anybody without this court
7 reporter having notes. I wonder why would that be absent.

8 But this is -- this is not my concern. My concern at
9 this point in time, based on this information and other
10 information which is available to me, and other acts by agents
11 from the same agency, I do believe an adverse credibility would
12 be an issue for somebody who handle the source of all, most,
13 the majority of the evidence in this case.

14 I believe what happened in the other case, it's not my
15 concern, but my concern is the evidence that is presented in
16 this very trial. I'm not -- I'm not, at this point of time,
17 questioning anything. I was not there. I don't know what
18 happened. But I know that there is a whole lot that did not
19 happen, according to the government, properly. And I do have
20 serious and genuine concern about the evidence presented from
21 Mr. Bout's computer. And, therefore, the least I would
22 request, humbly, the Court to the offer us full
23 cross-examination of the agent concerned, sir.

24 THE COURT: Well --

25 MR. CHICHAKLI: If I may, sir?

Dbl0chi7

Hoffmann - cross

1 THE COURT: Yes.

2 MR. CHICHAKLI: I did not -- I do not have resources,
3 but I believe in my, during my little search, I found at least
4 one instance, it's immediate instance, where it says there is a
5 certain judge in this very district who -- the word
6 was "leaning under pressure" or something. Judge Baer,
7 possibly, or something like that. I'm not hundred percent
8 sure. A judge who vacated a decision two months later, the
9 media, thought it is because of the media, and the President of
10 the United States, I think, made comments about it.

11 This is a court of justice. And justice is what
12 everyone expect. And, therefore, I am stating this. I think
13 an act, as such, undermines the process of justice, and I
14 appeal to the Court to grant at least full examination.

15 THE COURT: All right. Look, I'm gonna think about
16 this situation.

17 Mr. Chichakli, I'm going to encourage you, given the
18 complicated posture that we're in at the moment, to consult
19 closely with Mr. Kirton about this matter, as I continue to
20 think about it.

21 When does the government expect to call this agent?

22 MR. EVERDELL: Your Honor, we're getting to the
23 portion of the case where we are going to have to start trying
24 to admit the Bout laptop computer. And the chain of custody
25 witnesses will be coming up Monday and Tuesday of next week.

Dbl0chi7

Hoffmann - cross

1 We could try to play with the order. And I mean that is
2 something we can do so that it's not until Tuesday, but it
3 would be next week. I think we had him planned for Monday,
4 but, like I said, if it requires some consideration, we may be
5 able to play with the witness order a little bit.

6 THE COURT: Well, without deciding the ultimate
7 question, I think, at a minimum, the government should provide
8 to Mr. Chichakli and Mr. Kirton, tomorrow, any communications
9 it had with the agent regarding the August 24, 2011 order by
10 Judge Scheindlin, any disciplinary action or memorandum to the
11 agent's personnel file relating to Judge Scheindlin's findings,
12 including her subsequent finding of coercion of a statement
13 from Viktor Bout, and any letters or communications by the U.S.
14 Attorney's Office supporting the agent giving him a
15 commendation, aiding him in his employment in any way. Those
16 materials are to be provided tomorrow to Mr. Chichakli and his
17 stand-by counsel.

18 And I'm going to consider this matter further.

19 But, Mr. McGuire, I don't know if you have anything
20 else you want to offer to me. You and I do not see this the
21 same way.

22 MR. MCGUIRE: Your Honor, I only offer, and I
23 appreciate the opportunity to address this with you.

24 The only thing I would offer, is that notwithstanding
25 the manner in which this issue, or which this potential motion

Dbl0chi7

Hoffmann - cross

1 by the government was handled by Judge Scheindlin,
2 notwithstanding that the government could have handled it
3 better in retrospect, the government would ask your Honor to
4 consider seriously that the remedy flowing from that should not
5 be visited upon, the prejudice should not be visited upon the
6 agent. And these --

7 THE COURT: Except I have a defendant who is on trial.

8 MR. McGUIRE: I understand that. And I think there is
9 a way in which the defendant in this case can be afforded an
10 opportunity for full and fair cross-examination of the agent,
11 without, as I said earlier, your Honor reviving this adverse
12 credibility finding, which will have permanent negative
13 consequences for this agent. And I there is a balance there of
14 interest which, again, the government simply was following the
15 request of the Court, two years ago, to convene a conference
16 call. And there was, again, I'll just say --

17 THE COURT: And you said you didn't know what the
18 conference call was about initially. And I can understand
19 that. But when it -- when it took on other dimensions, didn't
20 it occur to you that you should make a record of it?

21 MR. McGUIRE: Your Honor, I have been just doing this
22 only, myself, just for eight years. I have never, once, told a
23 judge, in any case, whether or not a court reporter was
24 appropriate. We defer to your Honors. We allow your deputies
25 to order court reporters or not. There are numerous judges in

Dbl0chi7

Hoffmann - cross

1 this courthouse that conduct conference calls and meetings
2 every day without court reporters. So it is difficult to say
3 that that the obligation was ours.

4 And defense counsel was present entirely. This was
5 nothing -- the part, Judge, that gives me real pause here is I
6 get the sense from you that you believe there was something
7 improper done by the government in somehow obtaining this new
8 order. And it just couldn't be further from the truth.

9 The events were initiated by Judge Scheindlin in that
10 e-mail that we handed up to your Honor, and ended with Judge
11 Scheindlin, and in the middle she made a proposal. And, yes,
12 the government considered it and agreed to it, of course. But
13 there was nothing here that the government did, in terms of
14 bullying or doing anything improper to the district judge in
15 that case. Period. There is no evidence of that.

16 And I want to assure your Honor of that because, at
17 the end of the day, if that is alleviated, our hope is that we
18 can then look at these orders on their face. And I think the
19 orders on their face make clear that this is original order,
20 and the credibility findings within them, are no longer. And,
21 again, I'm not saying that that doesn't mean that Mr. Chichakli
22 gets some opportunity to cross-examine the agent in this case
23 about anything related to that testimony. Again, the point is
24 that those adverse credibility findings should not be given new
25 life, because there was not a transcript created of these

Dbl0chi7

Hoffmann - cross

1 conference calls. Or something else, in some way, that was
2 deemed, now, not as thorough as could have been done at the
3 time. Which I -- I grant you, Judge. I would much prefer I
4 was here with you today with two transcripts of both calls. We
5 defer to the judge's judgment. And here we are. And all we're
6 trying to do is avoid this adverse credibility finding. We're
7 not trying to deprive Mr. Chichakli of his right to
8 cross-examine the agent, whatsoever. And that is why I think
9 there is a middle ground here that can be struck, where both
10 interests are served. And that's all.

11 I appreciate the opportunity, Judge.

12 MR. KIRTON: Your Honor?

13 THE COURT: Mr. Kirton.

14 MR. KIRTON: If I could just make one point.

15 THE COURT: I wish you would.

16 MR. KIRTON: I don't think that this Court is looking
17 to disturb the rulings or the findings of Judge Scheindlin. I
18 think the issue before this Court is whether or not that whole
19 entire episode is a proper subject of cross-examination under
20 403. My client thinks that it is.

21 I don't think it is an either/or. I don't think the
22 Court is going to open up anything regarding that finding. I
23 think it's just a matter of whether or not it is proper 403.

24 I just wanted to make that --

25 THE COURT: All right. If the government wants to