# SUPREME COURT OF THE UNITED STATES



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| In the Matter of: | ) | |
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| THE BANK OF NOVA SCOTIA, | ) | |
| | ) | |
| Petitioner, | ) | Case No. 87-578 |
| | ) | |
| v. | ) | |
| | ) | |
| UNITED STATES, | ) | |
| | ) | |
| and | ) | |
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| WILLIAM A. KILPATRICK, ET AL., | ) | |
| | ) | |
| Petitioners, | ) | Case No. 87-602 |
| | ) | |
| v. | ) | |
| | ) | |
| UNITED STATES. | ) | |

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Supreme Court
Washington, D.C.

Wednesday,
April 27, 1988

The above-entitled matter met, pursuant to notice, at 10:05 a.m., Chief Justice Rehnquist presiding.

APPEARANCES:

On behalf of the Petitioners:

JAMES E. NESLAND
Denver, Colorado

On behalf of the Respondent:

WILLIAM C. BRYSON
Dep. Sol. Gen.
Department of Justice
Washington, D.C.

P R O C E E D I N G S

(10:05 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear arguments first this morning in the opinion of the Court, and first this morning is No. 87-578, The Bank of Nova Scotia v. The United States; No. 87-602, William Kilpatrick against The United States.

Mr. Nesland, you may proceed whenever you are ready.

ORAL ARGUMENT OF JAMES E. NESLAND, ESQ.

ON BEHALF OF PETITIONERS

MR. NESLAND: Mr. Chief Justice, may it please the Court, the question presented by this case is whether a District Court may exercise supervisory authority to dismiss an indictment before trial before that District Court finds that the indictment was procured by deliberate, pervasive, intentional misconduct.

If I may, I would like to briefly outline the three issues which we believe this question raises. The first issue is whether a District Court may dismiss an indictment under a supervisory authority absent finding that the misconduct substantially prejudiced the defendant.

CHIEF JUSTICE REHNQUIST: You are talking about dismissal before trial?

MR. NESLAND: Yes, we are, Justice.

We believe Judge Seymour's dissent is correct in the court below, that United States v. Hastings, that Young v. United States, and I submit more recently the case in Illinois v.

Taylor, confirm that actual prejudice to a defendant is not a condition to, and does not foreclose the Court's exercise of supervisory authority.

As Judge Seymour held in her dissenting opinion, the balancing approach established by the supervisory authority is unnecessary if actual prejudice is always required in every case.

Q Mr. Nesland, may I inquire of whether -- if we think that some sort of prejudice is required to be shown, or that some sort of grave doubt about whether the grand jury's decison to indict was influenced here, could you meet that standard, and did you meet that standard below?

MR. NESLAND: Your Honor, I might answer it this way and say the Court of Appeals in the majority opinion held that we had not established substantial prejudice. We challenged in this Court, and the Court denied certiorari on the issue that that Court of Appeals decision, majority opinion, was unfounded and infirm on that ground.

So that we stand here at least with the majority's opinion that no prejudice was shown. We do believe that there was substantial prejudice below that all of this misconduct substantially influenced the outcome.

Q But we have to take it, the case here, on the assumption that there as no prejudice?

MR. NESLAND: That is correct, Your Honor, because the issue is foreclosed by this Court's denial of certiorari on the issue

of both a methodology and the standard of proof below.

Q Thank you.

MR. NESLAND: The second issue we believe that is raised by this question is in what circumstances can the Court exercise that supervisory authority when there is no prejudice. We believe when it finds, as the District Court did here, and the Court of Appeals did not disturb those findings, that the misconduct was deliberate, when the conduct and the acts of misconduct were pervasive, and when they were intended to prejudice the grand jury.

Reverting back to Justice O'Connor's question, we believe that in any case where the Court exercises supervisory authority, that the Court must look to whether there is a likelihood of prejudice if these kinds of acts are not stopped, and this kind of misconduct is not prevented. And that likelihood was present in this case, and that likelihood is present in this case if this case is affirmed by this Court.

We believe prejudice --

Q What kind of misconduct wouldn't qualify under that standard? I mean, I assume that the reason it is misconduct is that it has been determined by this society that this kind of activity is not necessary, or not proper for the proper investigation of the truth. Is there anything that wouldn't qualify under the standard you are setting forth here?

MR. NESLAND: Yes, Your Honor. It is a balancing approach,

and I believe that the Court in any acts of misconduct, even under the balanced approach that is suggested in Hastings, and under the supervisory authority, must determine first whether or not that kind of misconduct is deliberate, whether or not it is pervasive, and the importance of pervasiveness, Justice Scalia, is whether or not that kind of misconduct is likely to recur, whether or not that kind of misconduct is substantially influential.

And, third, whether or not that misconduct is directed at the process. For example, in United States v. Morrison, this Court held that an agent who had tried to secur the cooperation of a defendant after indictment, and deliberately violated that defendant's constitutional right to counsel, this Court held that there was no prejudice there because it was after indictment. So there are acts of deliberate misconduct that for causation purposes the Court would not have to consider.

Q Mr. Nesland, I think you refer to a number of alleged items of misconduct. Which are you relying on?

MR. NESLAND: Your Honor, we rely on all of those that were found by the District Court, and undisturbed by the Court of Appeals.

Q They being?

MR. NESLAND: Well, the swearings of the agents of the grand jury, and the use of those agents in a manner which led, and misled, I suggest, the grand jury to believe that these people

were not acting as IRS agents anymore, that they were fiduciaries of the grand jury, and they allowed those IRS agents in violation of Rule 6(d) to represent virtually the entire case that was presented from the first grand jury to the second grand jury without the attorneys being available, being present, most of the time.

And if the Court looks at the record in this case, you will see in the Appendix (noting that the agents were in the grand jury reading). That is all you see.

Q What else?

MR. NESLAND: Then we have the 6(e) violations, Justice Brennan, in which the government for purposes of prejudicing these defendants were disclosing that they were under investigation, were disclosing that they were under investigation in tax shelters, and they were disclosing that outside the grand jury to people who were working with the tax shelter operation, to people that were investing in a tax shelter operation, and the purpsoe was found that that was to prejudice to try to interfere with and stop the tax shelter program long before, long before, the indictment was handed down.

Q Anything more?

MR. NESLAND: Yes, Your Honor.

The 6(e) violations with respect to Mr. Blondin, one of the prosecutors, called the former defense attorney for certain of the targets. Those two defense counsel, and they were securities

defense counsel, that represented the targets in the SEC investigation that preceded the grand jury investigation, and for tactical advantages they obligated those two witnesses out of the hundreds of witnesses in this case, they were the only two that were told that you cannot discuss your appearance, or the contents of your appearance, or what was happening here, with your attorneys, with anybody outside the grand jury.

In addition --

Q Mr. Nesland, I have read the record, and I must say it discloses a certain amount of arrogance on the part of the Tax Commission, which anyone who has practiced in the provinces is familiar with, but it doesn't seem to me to show the sort of flagrant type of thing that you are suggesting.

MR. NESLAND: Your Honor, what was presented to the Court below, and what the District Court has to look at, was the totality of circumstances in this case.

For example, with respect to the Bank of Nova Scotia, at the tail end, the very tail end of the grand jury process, and indeed the last day or two of the 20 month period that it was under investigation, the bank for the first time was presented to the grand jury as a potential target. And at that time these agents, these grand jury agents, summarized what they contended was all the evidence, but it was not, to the grand jury.

And in that summarization they falsely informed the grand jury of several critical facts with respect to the bank, so that

you had -- and the Court below found -- the Court of Appeals did not disturb that these agents, and these prosecutors, knowingly presented misinformation to the grand jury.

Q Is that a ground for dismissing an indictment? How about our Costello case?

MR. NESLAND: Your Honor, I don't think in United States the Costello -- the question was whether or not misinformation was presented to that grand jury. What the issue, as I understand in Costello was whether or not hearsay.

Q But supposing -- can one challenge an indictment after it has been returned on the grounds that a witness who testified before the jury gave false testimony?

MR. NESLAND: Well, there are certain Courts of Appeals, Your Honor, that do allow that, but I would suggest it would be different if the prosecutors knowingly presented perjury to the grand jury.

Q Do you think that is open to challenge to the indictment? What case of our Court supports that?

MR. NESLAND: There is no Court of Appeals -- there is no Supreme Court decision holding that, but we would suggest that that is the kind of case that the supervisory authority is intended to reach where the government purposely violates the law, purposely tries to prejudice by abusive practices, the grand jury's decision-making responsibility.

Q But did the District Court find that there was a

knowing use of perjury testimony?

MR. NESLAND: I think that is a semantical difference. What the District Court found was that there was knowing use of misinformation, and maybe I can clear it up a little bit if I point to one of the pieces of information, and only one of the pieces of information, that they were talking about.

The agents testified that an individual by the name of Mr. Waters had testified that the bank knew that the tax shelter operation was illegal because a bank president from the Bank of Nova Scotia had come to meet with Mr. Kilpatrick in Denver. What had happened is Mr. Waters had never testified. Mr. Waters had been interviewed, and the prosecutor below testified that they learned before they presented this matter finally to the grand jury that there was serious question whether or not that information was correct.

And yet they went ahead and used that information, summarized it to the grand jury without ever letting them know that that's unreliable information, and then the prosecutor stepped up after that information was presented and said that that supported the fact that the Bank of Nova Scotia knew that this was an illegal tax shelter because they'd been told it when Monty Smith, who was the President, met with Mr. Kilpatrick in Denver.

So you have a clear case in which the District Court made findings after listening to the reason of the agent, after

listening to the reasons of the prosecutor, that they had knowingly presented misinformation, that they seriously --

Q Well, but that isn't the same thing as knowingly presented perjured testimony. I mean, misinformation is kind of a weasel word.

MR. NESLAND: Well, we certainly did not know whether or not Mr. Waters' testimony was perjurious from his point of view, but they certainly knew that it was unreliable, and yet they went ahead.

Q Is that grounds for challenging an indictment returned by a grand jury that one of the witnesses gave "unreliable" testimony?

MR. NESLAND: No. The difference -- the distinction, I think, between what your question is, and what was presented in Costello, and the cases that follow Costello, is that the government there presents the information, it doesn't vouch for its reliability, and it doesn't present that information if it believes it is unreliable.

The question is whether or not the government can do that kind of thing when it knows what it is doing. The mere fact that it happens, that is governed, we submit, by the harmless error rule.

Q Yeah, but you could say that hearsay testimony was unreliable, which is what we said you couldn't challenge in Costello.

MR. NESLAND: The question there was not whether or not hearsay testimony was or was not reliable. There is an evidentiary ground. Judge Learned Hand's opinion below found, as a matter of fact, that the hearsay testimony presented was reliable, was persuasive, of the charges. It simply had an evidentiary obstacle to it. And the Supreme Court in that case affirmed Judge Learned Hand's opinion saying that that evidentiary violation, that evidentiary incompetency, was not going to be something that the Court was going to be interested in, and that the Court was going to prevent through the use of his supervisory authority.

But the Court was not presented there with the issue here as to whether or not the government when it presents misinformation, and when it knowingly does so, should not be held to a different standard, and that is whether or not this Court ought to exercise its supervisory authority to prevent that kind of misconduct.

The problem you have in the grand jury context is that the probable cause standard is very low compared to the burden of proof in a criminal trial, so that prosecutors know, and the record in this case shows that they know, that it is virtually impossible to establish that the grand jury's decision was substantially influenced by any errors.

And so they have taken from that the idea, and it was argued before the District Court below, that, yes, our misconduct, if proven, would warrant dismissal, but they argue that is only if

you don't require prejudice, and that's only if you would use your supervisory authority as other circuits do.

So they were challenging -- they were trying to defend their very misconduct on the fact that you can't establish prejudice in the grand jury level.

Q What did they suggest prejudice might be? It wasn't the kind of prejudice they were talking about that it appeared to interfere with the independence of the grand jury?

MR. NESLAND: Well, the Court of Appeals was concerned with the independence of the grand jury, and that's what it focused on.

Q Well, I know, but what kind of prejudice wa the government talking about? Or how do you understand what the word prejudice means as the government used it?

MR. NESLAND: Well, first of all, the government never conceded at any point along the line that there was any prejudice.

Q I agree with you, but what were they talking about? What is prejudice?

MR. NESLAND: They were talking about whether or not the independence of the grand jury was infringed by their misconduct as opposed to the outcome of the grand jury was infringed.

Q All right. Yes, all right. That is what the Court of Appeals for the Tenth Circuit was talking about.

MR. NESLAND: Right. The Court of Appeals for the Tenth

Circuit, the Ninth Circuit, and some of the other circuits, focused exclusively on whether or not the independence of the grand jury is infringed, not whether or not the outcome of the grand jury's decision is influenced substantially or otherwise by the misconduct, or by the misinformation.

Q The Tenth Circuit, it ruled that on these facts, on -- even with this misconduct, that its judgment was that the independence of the grand jury was not threatened.

MR. NESLAND: That's correct, that's what the Court of Appeals held.

Q Mr. Nesland, I don't understand the distinction. If you have an indictment that comes out of the grand jury that isn't independent, isn't that a tainted indictment?

MR. NESLAND: If it comes out of a grand jury that is not independent?

Q That's right.

MR. NESLAND: I believe that would be one taint, yes.

Q I mean, I don't separate that from some other errors that go to whether the indictment was correct or not. I mean, if it comes form a non-independent grand jury, it's not a correct indictment, no matter how much the facts might support it, isn't that right?

MR. NESLAND: That's correct.

Q And that leads me to another point. Do you know of any of our cases that support the proposition that we have

supervisory authority, and that couldn't be equivalently explained, not on the basis of equivalent authority, but on the basis that we will not entertain an invalid indictment? It has nothing to do with whether we are in the business of supervising the prosecutor, but an indictment is not a good indictment that does not come from a proper grand jury, is simply not valid before our eyes.

Can't we explain all that we have said in this area on that basis?

MR. NESLAND: It seems to me, Justice Scalia, that the issue is whether or not a Court below, the District Courts, and the Courts of Appeals, should be able to look at the misconduct, and to be able to deter misconduct that reflects upon the grand jury process, that reflects upon the criminal justice system, because of the way the government operates, because of the way the government conducted itself irrespective of whether or not these particular defendants were prejudiced by this particular activity. It seems to me that's what --

Q I understand that, but do you know any case of this Court that is inconsistent with the proposition that we -- that the Courts have some indirect supervisory effect; that is, to the extent they throw away an indictment that has been affected by misconduct. Of course, that will bear upon how the prosecutor will behave in the future.

But, nonetheless, is there any case that couldn't be

explained, or even statements in cases that can't be explained, simply on the assumption that we will not -- it is just like a complaint. It isn't properly signed, or isn't properly validated. An indictment that comes from a non-independent grand jury, or that has been vitiated by conduct of such -- to such a degree of error that it has affected the judgment of the grand jury, is simply no good.

Can't we explain all our cases on that ground?

MR. NESLAND: I don't believe so in the grand jury context simply because it is virtually impossible, and I think this case proves it, it is virtually impossible to carry the burden of establishing that conduct, no matter how outrageous, no matter how flagrant, no matter how egregious, would ever infringe the grand jury's independence, would ever substantially influence its outcome.

The Courts of Appeals that the government may find comfort in, that constantly hold that absent prejudice, then youhave to-- you can't dismiss, those cases uniformly hold that, yes, the conduct here was outrageous; yes, the conduct here was flagrant; yes, the conduct here was unlawful, but it didn't prejudice the defendants. And the reason that happens is that it is an impossible burden to carry.

And I submit that the supervisory authority of this Court has to be used to deter misconduct. You simply can't allow it to keep going on, to keep going on and on, because you say, well, it

is a preliminary step to process.

Q But the ultimate -- surely the ultimate rule for which you argue must be based on the idea that if these errors hadn't occurred, the grant jury wouldn't have indicted. Otherwise, why isn't that state of affairs perfectly satisfactory? So long as the grand jury does what it would have done without the errors, why does it develop a body of law enforcing a lot of standards that really haven't -- whose violation hasn't hurt anyone?

MR. NESLAND: Because the body of law -- we are not trying to create here a new body of law, Mr. Chief Justice. What we are trying to do here is to apply a body of law that exists to the grand jury in order to protect the criminal justice system, in order to protect the perception that the grand jury process is fair.

Q Protect -- from what? Protected from what?

MR. NESLAND: To protect it from this kind of misconduct because there is nothing else to protect the grand jury process, and respect for the grand jury process, except this kind of sanction.

Q Then you are seeking a rule which would go further than just focus on whether the grand jury's conduct was influenced by whether or not an indictment was returned. You want some sort of a Marquis of Queensbury rule that would say even though there is no practical effect here, nonetheless we should discipline these people, and the Court should do it.

MR. NESLAND: I'm not suggesting they should discipline these people. That is for the contempt procedures, and other kinds of alternative remedies.

What they have to do though, and I am suggesting that the foundations of McNabb, Mallory, and all the supervisory authority cases, are that your focus is not upon whether these particular defendants were injured by the conduct, were they substantially prejudiced by the conduct, but whether or not the public perception, and the respect for the judicial process for the grand jury process, is nullified, is put into disrespect, if you constantly say, well, yes, the government's conduct was outrageous; yes, it was egregious, but the grand jury just finds probable cause anyway, and you can't prejudice it, so why bother.

I suggest that the grand jury is an essential institution. It is embodied in the Fifth Amendment, and youc an't treat it so cavalierly. You can't mistreat it by saying that because they are only finding probable cause it makes no difference. The historic purpose of the grand jury was to stand between the accused and the government.

Q And to refuse to indict where the government has not shown probable cause. And if your standards were directed there, they would certainly find a more sympathetic reception to me. But you are saying, no, we shouldn't focus on whether or not the grand jury would have indicted or not indicted given the absence of the government.

You're saying that if there was violation of rules, whether or not it affected the grand jury, we should dismiss the indictment, without any causal link at all.

MR. NESLAND: Well, the causal link is that it's the kind of misconduct that is intended to prejudice the grand jury; it is intended to influence; it is intended to misuse this process.

Q But by hypothosis has failed of that intent.

MR. NESLAND: The problem with the rule as it exists today in the circuits, except for the Second Circuit, and perhaps the D.C. Circuit, and Eleventh Circuit, is that success, or that failure -- excuse me -- failure is success. If you fail in your assault on the grand jury, you are successful after the indictment because no matter what you did, you still got your indictment.

And I submit that the deterrance to misconduct is sponsored by that kind of opinion, by that kind of decision.

Q Well, Mr. Nesland, what is the proper test of prejudice in your view? What is the standard by which a Court below will determine whether there is prejudice? Have you looked at any of our cases to determine what that standard should be?

MR. NESLAND: Well, I would suggest that the standard was the one that you articulated in your concurring opinion.

Q In Mechanik?

MR. NESLAND: In Mechanik. And that is --

Q Do you think that just can't ever be met, that you can

show there is grave doubt about whether the decision of the grand jury was affected?

MR. NESLAND: Let me answer that two ways.

Q Because I thought you answered me at the outset, that you thought in this case that standard could have been met.

MR. NESLAND: I'm not sure if the Court of Appeals would have exercised that standard, it would have come to a different conclusion or not.

Q Did the Court of Appeals apply that standard?

MR. NESLAND: No. It applied a standard which looked exclusively to --

Q What standard do you think they apply?

MR. NESLAND: -- infringement of the independence.

For example, a number of the findings that the Court of Appeals considered was whether or not activity occurred within or outside the grand jury, so it never focused on findings below, for example, that there was misuse of the grand jury process to prejudice these defendants. They said, well, how could that prejudice the grand jury since it happened outside the grand jury, so that you had that problem.

They also accepted the Costello argument that you don't look behind what happened in the grand jury, so that the government in this case was able to knowingly bring in seven witnesses. They knew they weren't going to testify; they knew they were going to invoke their Fifth; he did it simply to put it on the record, and

the Court below found that that prejudiced the grand jury. It brought impermissible inferences into the grand jury.

The Court of Appeals says "we don't care." That only focuses on the culpability of the prosecutors, and that's not the purpose of prejudice. The purpose of prejudice is determined by the impact on the grand jury.

And I would like to reserve the remainder of my time. Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Nesland. We'll hear now from you, Mr. Bryson.

ORAL ARGUMENT OF WILLIAM C. BRYSON, ESQ.

ON BEHALF OF THE RESPONDENT

MR. BRYSON: Mr. Chief Justice, may it please the Court. This is a harmless error case. The general principle in this Court's harmless error cases is that you don't reverse a criminal conviction, or dismiss an indictment in the absence of a showing of prejudice. And the question in this case is whether or not that general principle is applicable to this case.

Now, the Petitioners are contending that this case is a case which fits into that small class of cases in which the Court had said the dismissal is appropriate without a specific showing of prejudice. It is settled, and I think this is an answer -- I give the same answer to Justice O'Connor's question as the Petitioners did, it is settled that for purposes of this case we have to assume that there was, in fact, no prejudice shown in

this case.

Q Mr. Bryson, what do you think the standard for prejudice should be in this context?

MR. BRYSON: I think the standard for prejudice is was there an effect on the charging decision; that is to say --

Q Do you agree with the standard set forth in the concurring opinion in Mechanik?

MR. BRYSON: That is correct, we do.

Q And did the Court below apply that test, or standard?

MR. BRYSON: We believe they did. The Court of Appeals referred to an effect on the charging decision at several points in its opinion. It referred to effects --

Q Did it apply the grave doubt standard?

MR. BRYSON: I don't recall whether they used the term grave doubt in point --

Q No, I don't think they did, but I think that it was applied.

MR. BRYSON: They made clear that what they were looking at is was there an effect on the charging decision.

Q Can you look at the cumulative effect of all the errors in determining whether you have grave doubt about the effect on the decision?

MR. BRYSON: I think so. I think so. It may well be, as is true at trial. A single error, or even two errors, would

independently -- or five errors, would not independently result in prejudice to a defendant, but cumulatively the errors can result in prejudice. The same thing could apply in the grand jury setting.

Here, however, the Court of Appeals concluded that there was no prejudice from any single error, or cumulatively, and that finding is settled for purposes of this litigation at this point.

Q In your view, Mr. Bryson, was there any misconduct by the government or its agents in this case?

MR. BRYSON: Yes, Your Honor, we think that there were errors. You can put the term misconduct on it. I think there were errors. For example, I think it was improper. You can call it misconduct for the prosecutor to engage in an argument with an expert witness, which occurred after the grand jury proceeding of the morning it concluded, but nonetheless occurred during a lunch break in the --

Q Is that the most egregious example of misconduct in your view?

MR. BRYSON: I think you could call it misconduct. I don't think --

Q Is that the most egregious one that occurred in this case, in your view?

MR. BRYSON: I think that is probably the one incident in which -- which is not subject to an explanation other than it is simply a flat error of judgment on the part of the prosecutor.

Q And what about the reference to the grand jury proceedings by tax agents and tax auditors in other civil audits? Was that appropriate, or was that improper?

MR. BRYSON: Well, Your Honor, there are a couple of things. First of all, the Court of Appeals found that there was no 6(e) violation in this case. Our position all along has been that what the agents did in going out, gather evidence, was perfectly consistent with their responsibilities in Rule 6(e), and the Court of Appeals agreed.

There is another point which was the letters that were sent out to people that were believed not to be in the grand jury subpoena power, which indicated that there was an ongoing grand jury investigation, and the subject of that grand jury investigation. We believe that was not error. The Court of Appeals didn't resolve that question. The District Court found that to be error.

Q Were there any sanctions, or reprimands issued to any government officials as a result of the conduct in this case?

MR. BRYSON: There was an extensive investigation by--internal investigation by the Office of Professional Responsibility. Their conclusion was that there were some errors, most pointedly, for example, the argument with the expert witness, and the violation of Rule 6(d) for having the two agents together reading testimony at the same time, but they concluded that these were not major significant errors that justified

serious sanctions, and they concluded that, in fact, the fact that the prosecutors had been sharply criticized in published judicial opinions was sanction enough.

Q And in your view there are adequate sanctions other than dismissing the indictment in circumstances such as these?

MR. BRYSON: We certainly think so. We certainly think so. And, in fact, we think that not only are there adequate sanctions, but we believe that in this case the sanctions that the system has imposed have been more than enough to deter conduct like this. These people have been given a very long and unpleasant ride through the judicial system, and they have been investigated not only by the Office of Professional Responsibility, but also by the local Bar Associations, which also have found no cause for sanctions, but they have been subject to those investigations.

Those are very real sanctions that are imposed directly on the attorneys as opposed to imposed on the case, or on society, through dismissal of a case.

There is a further sanction which was not employed in this case, but which is available under Rule 6(e), and under general contempt power of the Court. If the Court feels that there are willful violations of Court rules, the Court can impose contempt. That was not done in this case, but that is an available sanction, and we think those sanctions are adequate.

The --

Q Mr. Bryson, before you go on, what about the testimony of this witness Mendrop, about the bank's knowledge, do you think that was proper?

MR. BRYSON: Yes, Your Honor. If I can explain the factual background of this. This gets into the facts of the case, which I don't think are really necessary to resolution of the case at this point, but I want to try to clear that up because there has been a lot of confusion about what the exact status of Mendrop's testimony was, and whether this was misleading, or perjurious, or whatever.

Mendrop testified at the end of the prosecution's presentation in this case, and the prosecutor said, "now, Mr. Mendrop will summarize for you, and run through one more time the case."

Mendrop then began to testify. At several points he made it quite clear in the course of his testimony that he was referring and relying not only on previous evidence that had been actually presented to the grand jury, or to the preceding grand jury, but to his own inteviews with witnesses in his own investigation, which he had conducted outside of the grand jury room.

Mendrop testified at one point that the -- that there had been a visit by this fellow, Monty Smith, from the bank to Mr. Kilpatrick. Now, the claim is that there as no basis for that testimony, or that the testimony was very shakey. But, in fact, if you look at the joint appendix it is very clear what happened.

Prior to Mendrop's testimony in September of '82 there had been some doubt as to whether this visit occurred. At Joint Appendix 88-89 there is an explanation of what happened. The prosecutor sent Mendrop back to double check this, find out what he could find by way of corroboration of that evidence.

Then at Joint Appendix 189-190 Mendrop explained to the grand jury there was this visit. Waters, who didn't testify, but who was questioned by Mendrop, Waters said it was true. The chauffer said it was true, the chauffer for Kilpatrick, and, in fact, Kilpatrick had himself said it was true when he told Waters.

And, in fact, Waters later testifies at the obstruction trial against Kilpatrick that Kilpatrick did, in fact, say that Smith visited him.

We submit that that establishes that Mendrop had plenty basis.

Q I know the record so well. The District Court made these findings, which I guess you are saying are really erroneous. One, that his testimony is both misleading and inaccurate. You are saying that's not right.

And, secondly, he said the grand jury was never informed of these mischaracterizations, or of any alternative basis for Mendrop's summary.

So you are saying that those findings are clearly erroneous.

MR. BRYSON: Well, the second is absolutely clearly

erroneous because Mendrop simply said the chauffer said this was true, and in relating what Waters had said, he said that Waters had said that Kilpatrick had said that the visit had occurred.

Q Do you think -- I mean, again, I have great confidence in you. I am sure you are representing the record correctly. But do you think as we sit here, should we go behind the District Court's findings to dispose of this case?

MR. BRYSON: I don't think you have to because the Court of Appeals said -- while the Court of Appeals did not resolve the question as to whether this had -- the source of Mendrop's evidence was misleading -- in other words, the Court of Appeals did not look behind the District Court's finding that the grand jury was misled as to whether Mendrop's evidence came from prior evidence presented to the grand jury, or from his own investigations.

But what the Court of Appeals did say, and this is at Pet App, I think, 822, No. 12, was that there was no perjured testimony inadvertent or knowing presented to this grand jury, and that was enough to persuade the Court of Appeals that a) there was nothing that would justify dismissal in this case under the Costello rule; and b) that there was no unfair misleading of the grand jury.

Now, it may be that the Court of Appeals should have gone ahead and resolved the question, which we asked them to resolve, as to whether, in fact, the District Court was simply flat wrong

as to its characterization of the events dealing with that visit, but that wasn't necessary for the Court of Appeals, and we don't think it's necessary for this Court to resolve the case.

I think that point, once you find -- at least once you find that there is no intentional perjured testimony, or even unintentional perjured testimony as the Court of Appeals found, that resolves the case under Costello, resolves that claim.

Now, the very few situations in which this Court has said that there is no need for specific proof of harmless error are those situations -- excuse me, of prejudicial error -- are those situations in which, as the Court has said, there is a fundamental error, one, that undermines confidence in the whole proceeding, or as the Court said in Rose v. Clark, necessarily renders the trial fundamentally unfair, or an error that renders the -- that means that the criminal trial cannot reliably serve its function as a vehicle for determination of guilt of innocence.

Those errors include, and are in the main limited to errors such as complete lack of counsel at trial, bias on the part of the judge of the fact finder, bias on the part of the prosecutor, discrimination in the selection of grand jurors, or petty jurors.

This case is simply not in that class. This is a case which if you look at these errors in terms of what effect they would have at trial, you would look at the trial and say "these errors

can be assessed for their prejudicial impact, they have to be assessed for their prejudicial impact," and you would conclude that they were either non-prejudicial, or that they were prejudicial and required reversal. That is exactly the way the Court of Appeals treated this case.

And that we submit is correct under the -- not only the cases that this Court has decided in the harmless error area, but also under the two non-case law authorities that we cite. One is the statute, the harmless error statute, 28 USC 2111, and the other is the Rule of Criminal Procedure, Rule 52(a), both of which require a violation -- a showing of prejudice in the context of any violation to grant either reversal of a conviction, or a dismissal of indictment.

The District Court dismissed on three grounds in this case. First, Rule 6(d) violations; second, Rule 6(e) violations; and third, the totality of the circumstances, including the 6(d) and 6(e) violations.

Now, we believe that this Court's decision, and the Court of Appeals agreed with us, in Mechanik, resolved the first two points, and resolved the question of whether violations of Rule 6(d), and by clear implication violations of Rule 6(e), are violations that require showing of prejudice, and that are subject to the harmless error rule.

We believe the Court clearly accepted that proposition, and therefore, the District Court is clearly wrong in dismissing in

this case for violations of 6(d) or 6(e) in the absence of showing of prejudice.

Now, the next ground is the totality of the circumstances. As we have argued, we think that you can't plug into the totality of the circumstances, either 6(d) or 6(e), and get any more mileage out of them than you can by reciting them as bases for dismissal separately, unless, of course, as Justice O'Connor pointed out, they somehow add to all of the prejudice and result in a finding of prejudice.

But in this case the Court of Appeals found that neither the 6(d) nor the 6(e) violations resulted in any prejudice at all, so they contribute nothing to the ultimate conclusion.

Now, there are other points that the District Court focused on. Some of them we think are absolutely lawful, not unlawful at all, such as the use of informal immunity. The Court of Appeals said there is nothing wrong with that, and therefore that washes out all together.

There are other points that the District Court found were unlawful, but the Court of Appeals didn't find it necessary to resolve, but we submit are completely lawful, such as calling witnesses before the grand jury who invoke their Fifth Amendment privilege.

Q The alternative would be simply to take someone's informal word that if they are called they are going to take the Fifth Amendment.

MR. BRYSON: Exactly. And while there is some suggestion the Department of Justice policy is contrary to the position that was taken in this case, and what the prosecutors did, in fact, Department of Justice policy authorizes, except in the case of targets, calling individuals before the grand jury even if they are expected to invoke their Fifth Amendment privilege, simply to determine if they, in fact, are going to invoke their privilege, and to make a record that you tried to get evidence from that particular witness, something that can be of great use later on if the witness decides to be forthcoming in a different setting, and you are implicitly or explicitly charged with not having really done your homework by calling the witness and finding out what he had to say.

Similarly, while we admit that the mistreatment of the expert witness was improper, we agree with the Court of Appeals that a) there was no prejudice that flowed from that; and b) it is just not the kind of error that could possibly be sufficient to invoke a reversal without showing of prejudice rule.

If this occurred, for example, at trial, and there was an argument between the prosecutor and the witness, which happened as the jurors were filing out, and there is no doubt in my mind that a Court of Appeals would say this is something that has to be assessed for actual impact on the trial, and if it didn't have an impact on the trial, that would be the end of it.

Q The fact that it may not be reversible error in any

context, does not prevent it from reflecting on the Department?

MR. BRYSON: No, it reflects badly on the Department. There is no question about it. That was a mistake, and I wish it hadn't happened, and I'm sure that the prosecutors now wish that it hadn't happened.

I might say that if you look closely at the evidence, it was not as if the prosecutor was beating this fellow with a stick. This was a law professor who was very firm in his views of what the law was, and the prosecutor, and the law professor, got into what amounts to a little bit of a shouting match. It didn't last very long, and in the course of which the prosecutor said, "well, I'll see you in Court on that one," challenging his assertion as to what the law was on a particular point.

The witness took umbrage of that and felt that he was threatening him, but the witness later said that he did not feel intimidated, and in fact, he did not change his testimony in any respect. The reply brief suggests that there was a recantation on his part, but there was not.

Now, they attempt to get around the general principles of harmless error that this Court's decisions have set forth, and that Rule 52(a) and Section 2211 require, by invoking the magic wand of the supervisory power. But we submit that if you look at this Court's recent cases in the area of harmless error, and supervisory power in the inner section of those two documents, you can't find support for their submission.

The Payner case -- it's an important case in this line-- establishes that where the exercise of the supervisory power, as here, is invoked in order to deter misconduct that was engaged in in bad faith, and Payner was the ultimate bad faith misconduct case, it is improper to apply the supervisory powers to dismiss an indictment where the exclusionary rule would not have required suppression or dismissal.

The Morrison case, similarly, again invocation of a power to dismiss because of bad faith misconduct. No question that it was bad faith conduct. But once again, the Court said you can't dismiss for deterrance purposes without a showing of prejudice.

The Hasting case, again repeated misconduct. The Court of Appeals, Seventh Circuit, felt that there had been repeated instances of the violation in that case in the circuit, and wanted to do something about it by way of deterrance.

Once again, the Supreme Court said that there was no basis in the law under the supervisory power, or otherwise, for ignoring the question of prejudice.

And finally, in Rose against Clark, the Court reiterated, and summarized this line of cases, by saying there is a strong presumption that errors other than this very small class of errors that really taint the entire process from beginning to end, and make it impossible to assess the possibility of prejudice.

There is a strong presumption that other errors are subject

to harmless error analysis, and that's our submission in this case, that this case falls into the large group of cases that are subject to harmless error analysis, and not into the very small group of cases that are not subject to that analysis.

If there are no further questions, I have nothing further.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Bryson.

Mr. Nesland, you have two minutes remaining.

ORAL ARGUMENT BY JAMES E. NESLAND, ESQ

ON BEHALF OF THE PETITIONERS - REBUTTAL

MR. NESLAND: Thank you, Mr. Chief Justice.

With respect to the questions of Justice Stevens, I would like to point out the government spends virtually half of its brief relitigating the findings below. And I suggest if the government is entitled to relitigate the findings of misconduct, we're entitled to relitigate whether or not there was prejudice.

We disbelieve that the Court of Appeals properly made that determination, in the same manner that they contend that the District Court and the Court of Appeals did not properly reach their findings with respect to the deliberate, purposeful, and intentional violations of law and standards of conduct in this case.

I would suggest that the harmless error rule is not sensitive to the problem in the grand jury context. To preserve respect for this grand jury, and all grand juries, and to deter

misuse of the grand jury process, this Court simply cannot rely exclusively upon harmless error because the answer of the government will always be as they argued below, as they argue in all of the circuits, yes, you found misconduct; yes, it was flagrant; yes, it was egregious; yes, it was outrageous, but it didn't prejudice you in the grand jury's decision-making charge.

And I submit that this Court should not sponsor that perception of the grand jury system, and the criminal justice system. Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Nesland. The case is submitted.

[Whereupon, at 10:55 a.m., the argument was concluded.]

# REPORTER'S CERTIFICATE

DOCKET NUMBER: 87-578 and 87-602

CASE TITLE: The Bank of Nova Scotia v. The United States and William A. Kilpatrick, et al.. v. United States

HEARING DATE: April 27, 1988

LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the United States Supreme Court.

Date: 5-3-88

Margaret Daly

Official Reporter

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