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Rajaratnam Team Urges Circuit to Suppress Wiretap Evidence

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Body

The lawyer for imprisoned insider trading ringleader [Raj Rajaratnam](#) attacked the government yesterday for misleading a judge in a wiretap application that yielded the critical evidence that sealed her client's conviction.

In intense arguments at the U.S. Court of Appeals for the Second Circuit, Patricia Ann Millett of [Akin Gump Strauss Hauer & Feld](#) said there were "outright false statements" on the credibility and criminal history of a key government cooperator made in an affidavit seeking wiretap authority from then-Southern District Judge Gerard Lynch ([See Profile](#)).

The false statements and omissions concerning a parallel Securities and Exchange Commission civil probe made by the FBI agent swearing out the affidavit and the prosecutor who drafted it, Millett said, require suppression of the voluminous wiretap evidence used last year at Rajaratnam's trial, a hearing on other evidence infected by the wiretap evidence and, at minimum, a new trial.

Assistant U.S. Attorney Andrew Fish vigorously defended the government and said trial judge [Richard Holwell](#) should be upheld for finding that the agent and the prosecutor did not intentionally mislead Lynch. Fish said the additional information would have, if anything, strengthened their case for a wiretap.

Read briefs from [Rajaratnam](#) and [the prosecution](#).

Rajaratnam, 55, is serving an 11-year prison sentence imposed by Holwell following a May 2011 conviction on five distinct insider trading conspiracies and nine counts of securities fraud for trading on or passing on material nonpublic information on Intel, [Goldman Sachs](#) and other

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companies.

The jury at his trial heard 45 tapes acquired through the initial wiretap authorization by Lynch and renewed on a rolling basis by six other Southern District judges. Among the tapes played for the jury was a recording of Rajaratnam in 2008 saying, "I heard yesterday from someone on the board of [Goldman Sachs](#) that they're going to lose \$2 a share."

That tape helped sink not just Rajaratnam but former [Goldman Sachs](#) director Rajat Gupta at a trial in June. Gupta was sentenced on Oct. 24 by Judge [Jed Rakoff](#) to serve two years in prison.

Gupta was one of 69 people who have been convicted or pleaded guilty in the insider trading probe over the last three years. One of those who pleaded guilty was Michael Cardillo, who cooperated with the government and was sentenced to a term of three-years' probation yesterday by Rakoff, who acknowledged his "truly extraordinary" cooperation.

The issue before the Second Circuit was whether former Assistant U.S. Attorney Lauren Goldberg and FBI Special Agent B.J. Kang met the standard in the wiretap statute for making a "full and complete statement as to whether or not other investigative procedures have been tried and failed or why they appear reasonably unlikely to succeed if tried or to be too dangerous. [18 U.S.C. §2518\(1\)\(c\)](#)."

Following a hearing in 2010, Holwell refused to suppress thousands of Title III wiretapped conversations gathered over 19 months in building the case, finding that the wiretaps were necessary because, without them, Rajaratnam would have foiled the investigation.

The judge, now in private practice, was critical that the government had "all but ignored the SEC investigation" in the affidavit, but he said the SEC had "'hit a wall' of sorts" and the government had made a proper showing of "necessity" for the taps.

Yesterday at the circuit, Millett told Judges [Jose Cabranes \(See Profile\)](#), Robert Sack [\(See Profile\)](#) and Susan Carney [\(See Profile\)](#) that the first widespread use of wiretaps in 75 years of insider trading investigations was undermined by the failure to include information on cooperator and codefendant Roomy Khan and the extent of the SEC inquiry.

This "leaves on the cutting floor the sum and substance, the heart and soul, the most important aspect of the investigation" of what took place in this case, Millett said.

Millet said the problem was not cured by the inclusion of more information in later affidavits before the other judges.

"If you want fair, the government has to do it right the first time," Millett said.

Cabranes asked whether all six judges "were deceived in the way you say Judge Lynch was deceived?"

Millet answered that Holwell found the first submission to be the critical one.

"Judge Lynch didn't even know what questions to ask because he wasn't told the whole story," Millett said.

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Sack asked Millett at the outset to explain the mens rea aspect of the analysis and whether Holwell was right to apply a standard of "reckless disregard" for the accuracy of the affidavit.

Millett said recklessness was a factor in the analysis under the Fourth Amendment, but that under Title III, "even good faith wouldn't matter" and "even if it's just an accident, suppression would ensue."

Holwell, she said, made the right findings on the government's alleged misstatements and omissions in the affidavit, but he reached the wrong conclusion on suppression.

But Fish said that Holwell was right to deny suppression and wrong to criticize the government because it actually did reference the SEC in the initial affidavit, which shows "there was no effort to hide the SEC."

"Where he did err was in stating there was reckless disregard for the truth," Fish said, and he reminded the court that Holwell found that the agent and the prosecutor "didn't deceive Judge Lynch."

Fish insisted the standard for measuring whether a person is making accurate representations is whether they know it's "highly likely that what you are saying is not true," and, "It doesn't mean telling the judge something he'd like to know."

Carney wanted to know, if the court declined to suppress the wiretaps, "What tools would be available to us" in the future should a similar case arise with a "similarly dramatic omission?"

Fish's answer was that there won't be a similar case. He said the testimony of Goldberg and Kang at the hearing before Holwell showed they were aware of "adverse court decisions" that "pounded" home the message that criminal prosecutors "can't tell the SEC what to do" so they didn't emphasize the SEC's investigation.

But Fish also assured the court that, "I expect in the future people would throw in a paragraph saying" there was a parallel civil investigation.

Carney asked, "Doesn't suppression send a message that it's not OK to omit" material facts about the investigation?

Fish told the panel that the Southern District "had no interest in litigating" this issue in the future.

Millett said an important factor withheld from Lynch dealt with necessity, as the government failed to state "they were successfully making a substantial circumstantial case."

"If that's not reckless, I don't know what is," she said.

But Millett ran into trouble at the end when Sack asked, "How would it help your client had all this been set forth?"

Sack said he found it "hard to believe" that the additional information for Lynch wouldn't have made "a better case for issuing a wiretap."

And Cabranes said Holwell had found that it was "reasonably unlikely" the additional documents

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would have made a difference to Lynch.

Lawrence Lustberg and Alicia Bannon of Gibbons filed an amicus on behalf of eight retired federal judges, including John Gibbons. The brief said the wiretap application "recklessly omitted information" and the wiretaps should be suppressed.

Similarly, professor [G. Robert Blakey](#) of Notre Dame Law School submitted an amicus in the case through counsel [Tai Park](#) of [Park & Jensen](#). Blakey drafted the "Blakey Bill" which became the model for key language in Title III.

His brief said the "government's failure to provide a 'full and complete' statement of necessity violated a core precondition for a lawful wiretap" and suppression was the only solution.

Also submitting an amicus in Rajaratnam on behalf of the National Legal Aid & Defender Association and the Bronx Defenders was [Vino Varghese](#) of [Varghese & Associates](#).

Varghese wrote the government's "lack of candor, which the lower court found to be reckless at best, cannot be tolerated" and, if allowed to stand would "gut the Fourth Amendment and Title III protections in wiretap cases going forward."

At the end of the arguments yesterday, Millett was asked by Cabranes whether any court of appeals has accepted the theory offered by Blakey.

The answer was no, Millett said, but she added "No court of appeals has confronted what happened here."

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