UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

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| UNITED STATES OF AMERICA, | : | Criminal Action No. |
| Plaintiff, | : | 1:21-cr-245 |
| versus | : | October 14, 2022, |
| IGOR Y. DANCHENKO, | : | |
| | : | Volume 4 (PM Session) |
| Defendant. | : | Pages 1044 - 1091 |

TRANSCRIPT OF JURY TRIAL
BEFORE THE HONORABLE ANTHONY J. TRENGA
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S

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NO AFTERNOON WITNESSES

MISCELLANY

**AFTERNOON PROCEEDINGS**

(Court proceedings commenced at 2:03 p.m.)

THE COURT: Ready to proceed?

MR. SEARS: Yes, Your Honor.

THE COURT: All right. Let's bring the witness in.

(Witness seated.)

(Jury present.)

THE COURT: Please be seated. Mr. Sears, any cross?

MR. SEARS: It's a little anti-climatic, Your Honor, but I have no questions for this witness.

THE COURT: All right. Thank you. You may return to the counsel table.

Government, call its next witness.

MR. DURHAM: Your Honor, respectfully, the government rests its case.

THE COURT: All right. Ladies and gentlemen, I'm going to excuse you back to your jury room. I hope to bring you out here shortly and let you know where we are. All right. You'll be returned to the jury room.

(Jury dismissed.)

THE COURT: All right. Mr. Sears.

MR. SEARS: Your Honor, before I make our Rule 29 motion, I did want to advise the Court that we moved into evidence, earlier, Exhibit 420T, which is a translated version of 420. We did not specifically move in 420. I think the

common practice throughout this trial was to admit both documents.

THE COURT: Yes.

MR. SEARS: And for that reason, we would seek to admit 420 as well, and I don't think there's any objection.

MR. DURHAM: No objection.

THE COURT: Without objection, 420 is admitted. I have it already. We'll make sure it's in.

Before we do Rule 29s, given what we talked about, is there any need to retain the jury further or should I excuse them till Monday?

MR. DURHAM: The government's view would be they could be released now. It's fine.

THE COURT: I don't see any reason to keep them; do you?

MR. SEARS: I don't want to be the reason to keep them here late on a Friday, Your Honor. We're okay with you sending them home as well.

THE COURT: All right. Why don't we bring them back in.

(Jury present.)

THE COURT: Please be seated. Ladies and gentlemen, we're at the point where I need to take up some matters with counsel outside of your presence, and there's -- as I mentioned, the government's completed its case, and at this

point, there'll be nothing further for you to do this afternoon. So I hate to disappoint you, but I'm going to release you early for the weekend, and you're to report here on Monday at 9:30, at which time I think we'll be in a position to proceed with the jury instructions and closing argument.

So with that, you're excused for the weekend. Again, please do not discuss this case with anyone outside of the courtroom. Don't do any research. Don't do any social media, communicating; and if you happen to find yourself exposed to any radio or television coverage of this trial, please try to excuse yourself from listening to any of that.

So with that, enjoy the weekend and I'll see you Monday morning.

(Jury excused.)

THE COURT: All right. Mr. Sears.

MR. SEARS: Thank you, Your Honor. I won't insult you with the standard at this stage in the proceeding.

Obviously, the Court is aware of what inferences it must take in favor of which party, but as the Court is aware, the Court also has to make a determination as to whether any reasonable juror could find the elements the government was required to prove beyond a reasonable doubt.

And we've previewed the issues we expected to be arguing today in our motion to dismiss. At that time, the

Court had not seen any of the evidence. Obviously, now the Court has seen all of the government's evidence; and in our opinion, Your Honor, our arguments that we argued in the motion to dismiss are actually stronger now at the close of evidence.

Starting with the Chuck Dolan count, Count 1 in the indictment, the government's case fails for a reason it didn't when we argued the motion to dismiss, which is that there is no evidence at this trial that Mr. Danchenko has ever seen Report 105.

And that's the only report in this case where any information that could have come from Chuck Dolan or could have been sourced to Chuck Dolan, even though it was public information, that's the only report that contained that information.

So it's -- if he's never seen it, there's no way he would ever even know whether anything that he received from Chuck Dolan ended up in the dossier.

They completely failed to prove that Mr. Danchenko was ever even aware of that report or ever reviewed it. For that reason alone, that case should be out at this point.

The second point I'm at, which is what we thought was the strongest point when we argued the motion to dismiss, is that Mr. Danchenko was asked whether he had ever talked to Mr. Dolan about anything that ended up in the dossier.

And he said, No, I didn't talk to anything about -- anything specific with him, only something general. Chuck Dolan testified that he never talked to Mr. Danchenko about anything that ended up in the dossier.

Kevin Helson, who was on the stand yesterday, said that if it was true that Mr. Danchenko had never talked to him, his answer to the question he asked him was literally true. That was his testimony. That's the testimony of the government's witnesses in this case.

Even if the government is going to argue that he should have known by "talked," that that meant any form of communication of any kind, or because the FBI was interested in learning everything they possibly could, he no longer had to just answer the questions he was asked, he had to answer every question he wasn't asked, it doesn't make his statement untrue.

He said he didn't talk to him about anything in the dossier, and the government's own evidence has established that they never even argued to the contrary. They never presented any evidence to the contrary of that, and they would be required to prove some way that his answer to that question is untrue or would not be true, and they can't.

And so, from my perspective -- I said it wasn't a close call at the motion to dismiss; Your Honor said it was a close call -- I believe even stronger today, particularly

because of the lack of evidence of his knowledge of Report 105, that that count cannot go forward. No reasonable juror could find beyond a reasonable doubt that his statement that he did not talk to Charles Dolan on this evidence was false.

With regard to Sergei Millian, Your Honor, the government had to -- the first thing the government had to establish was that Mr. Danchenko never received an anonymous call in late July of 2016. They haven't done that. I don't know that they can do that.

They produced phone records, but there's also a stipulation, 1810, in this case that says that communications that came through a messaging app would not show up on a phone record. The evidence is pretty clear that Mr. Danchenko recalled receiving that mess- -- that call through a messaging app, and they have not proven and they cannot prove that he didn't.

Mr. Danchenko not only didn't have all the information on his phone, at the time he was being interviewed by the FBI, months and months later, Agent Helson told him to wipe his phone clean at one point while he was cooperating, and the government has no evidence to show that they can look at whatever messaging apps he was using.

There's no evidence that someone could -- a reasonable juror could find that he absolutely did not, beyond a reasonable doubt, did not receive an anonymous call. And if

they can't prove that, which they were required to prove, that's game over on those counts, all four of those counts, and they haven't been able to prove it.

Now, if they're not able to prove that, then the next thing they have to prove is that it would have been unreasonable, if he did receive one, to believe that that caller would have been Sergei Millian. And, frankly, we're in a stronger position now, after the government's investigation, that it was perfectly reasonable for him to believe that if he did receive an anonymous call that week in July, that it was Sergei Millian.

Your Honor, the government's evidence in this case is that he went to New York that week. The Amtrak records confirmed what he told them back in January. The government's records also show the Amtrak records of him traveling there.

They also show communication on the day of July 28th where he says "another meeting tonight."

The evidence also shows that Sergei Millian, just by chance, happened to be arriving in New York City on the evening of July 27th, the night before Mr. Danchenko thought he was having a meeting that night.

It's perfect -- whether they think he should have believed it or not, no reasonable juror could find under that evidence that it was unreasonable for him to believe it could have been Sergei Millian, and that's what they're being asked

to decide.

And I just don't see how any reasonable jury could find beyond a reasonable doubt -- even the agents testified, If you had known this information that the Special Counsel didn't show you, you would agree that tends to corroborate his belief about who that caller was? And they agreed with that.

And so while there is a lot of evidence in this case, on the most crucial points of what the government has had to prove, they don't have the evidence to convince a reasonable juror beyond a reasonable doubt.

And the last point I'll make, Your Honor, as to materiality, certainly with regards to the Millian counts, it didn't matter what he said about whether that caller was Sergei Millian or not or whether he didn't know.

Christopher Steele -- the evidence is in the record -- had indicated that Mr. Danchenko had met with Sergei Millian on multiple occasions. The FBI had a full investigation into Sergei Millian months before they ever knew who Mr. Danchenko was.

There's no way that if Mr. Danchenko had waltzed in and said, No, never happened, I made the whole thing up, they would have said, Okay, we're going to believe this guy and we're going to shut down the investigation. It wasn't capable of influencing their decision no matter what he said to that answer.

And for those reasons, Your Honor, this nightmare of a case for Mr. Danchenko and his family, it should end today and it should end now. Thank you.

THE COURT: Mr. Durham.

MR. DURHAM: May it please the Court. The government won't burden Your Honor with the standard either because it's well known what the Rule 29 burden is.

With respect to the evidence, taken in the light most favorable to the government, that has been presented, respectfully, the essential elements, as the Court will instruct the jury, have been met.

Counsel makes reference to Count 1 and suggests that the evidence has to show -- or what we're required to prove was that the FBI had shown Mr. Danchenko the dossier report 2016/105. That's not what's required. The requirement would be whether or not when the defendant was asked the question and the question was posed to him relating to Mr. Dolan, as set forth in paragraph 102 of the indictment, it's whether or not within the Eastern District of Virginia, Mr. Danchenko willfully and knowingly made a material false statement on or about June 15, 2017, and that he denied to the agents of the FBI that he had spoken with, in the indictment, PR Executive 1 about material contained in the company's reports.

The evidence in the case reflects that Mr. Millian's information -- I'm sorry -- the information related to

Mr. Dolan is clearly contained in the dossier report.

And the evidence shows that with respect to the FBI meeting with Mr. Danchenko on January 24, 25th and 26th, he, in fact, had his own copy of the dossier reports with him. The evidence further reflects that --

THE COURT: They had been published by then, correct?

MR. DURHAM: Pardon me?

THE COURT: They had been published by then?

MR. DURHAM: At that point, the reports had been published.

THE COURT: Right. All right.

MR. DURHAM: So he had those reports -- just, again, so he was being interviewed in January --

THE COURT: January. Right.

MR. DURHAM: -- of 2017.

THE COURT: Right. Right.

MR. DURHAM: And they had been published then at that point. And with -- so he had them himself when the January 2017 interviews occurred.

THE COURT: Right.

MR. DURHAM: The testimony included not only did he have his own copies of the reports, but Mr. Auten, in particular, had noticed that there were some -- there was some writing and so forth that were on those reports at the time.

So, I mean, he clearly had the reports, and it would be reasonable to infer from that, as he was preparing for the information to be elicited by the FBI, that he reviewed them. But separate and apart from that, the evidence also reflects that with respect to those reports, when he, Mr. Danchenko, first met with Mr. Helson on March 16th in a recorded conversation, the defendant had his own copies of the reports.

And not only did he have his own copies of the report, but he said, and it's reflected in the transcript of the first excerpt that we had played, that he had reviewed them in preparation for the meeting.

I don't want to misstate what was in the transcript, but the transcript makes it abundantly clear that he had prepared for the meeting with Helson on March 16th and had his copies of the dossier reports.

So it certainly would be reasonable to infer, to the extent that our burden was to prove that he knew that it was in the report, that he had the reports, and he had reviewed them on multiple occasions beforehand.

With respect to the defendant's second point as it relates to the Dolan count, that is, you know, whether what Mr. Danchenko told the agent in response to the question posed to him, respectfully, I believe that the case law does require that one look to the context in which the statement was made.

And with respect to the context in which the

statement was made, I mean, we inquired of Mr. Auten, not extensively, but I mean, we asked multiple questions, what it was that the defendant was told concerning what the agents are looking for, sourcing information, how critical it was, any information at all that he had relating to that.

We introduced, and the Court admitted into evidence, the immunity agreement, which sort of codifies what the understandings were. No admission -- no omissions, no false statements, not trying to protect anybody, and the like.

And, similarly, when Mr. Helson testified on that same point, he, again, testified to the context in which this was -- these questions were being asked, how clear that he and others had made it to Mr. Danchenko about what they were looking for, that Mr. Danchenko had previously provided, that is prior to June 15th of 2017, had provided other documents and records that he had.

So in that context, in understanding in that context what the question was, it certainly is reasonable to believe he understood what the agents are asking for, and not the sort of narrow isolation of the word "talk," but much broader than that.

And I believe that the case law that we had provided to the Court previously in the motion to dismiss talks about that being a jury question. And so, we respectfully submit that that's where that should be. It should be resolved by

the jury.

As to the Sergei Millian counts, with respect to counsel's argument, the government doesn't have to prove to it 100 percent certainty that the defendant, you know, didn't believe that he had got a call from Millian or that a call had come in.

But with respect to the evidence that was presented on that point, the available records clearly established that from July 20th until the end of August of 2016, there was no incoming number or incoming call to Mr. Danchenko's number from any unaccounted for number.

The evidence also establishes that the FBI, or at least the investigators involved in this matter, diligently went through and identified the subscriber or the person associated with a phone number. We explained how that happened.

The bottom line being that there was never a call received during the pertinent period of time on Mr. Danchenko's phone that would match his description of what he told the FBI at the various times that are outlined or stated in the respective Millian counts of the indictment.

Now, with respect to the reasonableness question, counsel made reference to the fact that -- well, there are Amtrak records showing he went to New York. Well, what's the more complete evidence on that?

The complete evidence on that is at least as early as July 18th, Mr. Danchenko was planning on going to New York. It didn't have anything to do with an anonymous call. That was already preplanned.

And similarly, with regard to the July 21st email, it is clear that Mr. Danchenko was planning on being in New York the next week.

And, in fact, the indictment -- I'm sorry -- the email doesn't suggest anything other than, Hey, I could meet you in New York, I could meet you in Washington, and I happen to be in New York next week, which doesn't support the proposition, Well, we ran and immediately bought a ticket and jumped on a train because of this phone call. Or at least that's a question for the jury to resolve as well.

And then, in terms of overall reasonableness, it certainly would be a matter that the jury would want to consider is appropriately a -- consider in this context -- doesn't make any sense that a person who was a Trump supporter, as -- the evidence in the record before the jury, is that Millian was a supporter of then-candidate Donald Trump.

It doesn't make any sense at all that Mr. Millian would call the defendant and provide information, such as the information that's at issue here that ends up in Report No. 095, that is talking about evidence to the effect of well,

there's a -- there's a well-developed conspiracy of cooperation between Trump and Trump Organization and Russian leadership. That makes no sense whatsoever.

Nor does it make any sense that with respect to, again, the evidence is before the jury in this case, that Mr. Millian who had never spoken to Mr. Danchenko, there's no claim that there was any prior existing relationship between the two, that he would call a person he doesn't know about.

And, in fact, the evidence shows that on July 26th, Mr. Millian is asking Mr. Zlodorev, who is this person Igor, and whatnot. If there's anything -- or the evidence in the record would suggest quite the contrary, that Mr. Millian had no reason to nor would he call Mr. Danchenko.

So, again, with respect to that particular information, it would not be reasonable to conclude that Mr. Danchenko actually thought that he had gotten a call from Mr. Millian.

And then finally, with respect to the last witness that we had called to the stand, not only did Special Agent James' testimony establish that there were no incoming calls according to the call records, the toll records or whatnot, but further, there's nothing in the record that would reflect that Mr. Danchenko would have or did ever share with Mr. Millian anything about any apps, phone apps or internet apps or the like.

Now, it is true, and the evidence -- and we'll argue the other side of that point -- it is true that when Mr. Danchenko was talking with the FBI, the FBI asked him to produce telephone records about this call. And he said he would check and he produced nothing.

And then he -- in that connection he was talking about apps, it could have been an app call or whatnot. Well, there's no evidence in this record before this jury that, first of all, that Millian had any apps. There's no evidence in this record that, if he did have some apps on his phone, Mr. Danchenko knew what they were.

And, in fact, with respect to internet apps in general, there's really no evidence other than Mr. Danchenko making generalized remarks to the FBI concerning it could have been an app, maybe Wickr, or Signal, or Viber or what have you.

And finally, with respect to that point, the evidence shows the jury could reasonably conclude that there was no call made to Mr. Danchenko's phone that he describes.

The other side of it on the app part is, not only does he not -- he, Mr. Danchenko -- not convey to Millian any apps that would be applicable, but with respect to those instances in which Mr. Danchenko wanted to talk to somebody over an app, the evidence in the record before this jury is that he would tell a person. You know, let's talk on Signal

or let's talk on some other app. That did not happen here.

So respectfully, Your Honor, the government believes that it has presented sufficient evidence for a reasonable juror to conclude that the defendant committed the crimes of which he's been charged, and accordingly, the Rule 29 Motion ought to be denied and the jury ought to make the decision on these matters.

THE COURT: Thank you.

MR. DURHAM: Thank you, Your Honor.

THE COURT: Mr. Sears.

MR. SEARS: Yeah. I don't want to repeat my documents, and Your Honor is well aware of the facts in the case and the legal arguments in the case.

The testimony in this case from Agent Helson was that all you need is someone's phone number to call them on an app. And just because someone doesn't say, call me on an app, doesn't mean they can't call you on an app. The person who calls you gets to decide how they call you. So I don't really see how that proves anything in this case.

The government is the one who has the burden in this case. And they cannot prove, again, that he had Company Report 105. Whether he showed up with documents or not, he was never asked at one point in all his questioning about that report.

So there's no way of knowing where he got those

reports, how many reports he had, which ones they were. And if he didn't have them and he hadn't seen them, he can't knowingly have lied either -- even under their theory because he would not have known that there was any miscommunications, his email communications with Mr. Dolan and the report. And absent that evidence, he can't be convicted beyond a reasonable doubt, and the case can't go forward.

With regard to, again, the term "talked," even -- and this is the example I used at the motion to dismiss -- even if he understood or had a reason to believe that Agent Helson wanted to know any possible communication he had, his answer is still true.

It's the example I gave Your Honor about, Look, Mr. Sears, we want to know, were you in your office at any point yesterday, okay? Okay, I understand. Did you go to your office yesterday morning? No, I didn't go to my office yesterday morning.

If I didn't go to my office yesterday morning and I went in the afternoon, it's true. That's not a false statement. It's up to the agent to pin me down on that, and they didn't do that. And under those facts, it's just not fair, really, for that count to go forward under those facts.

With regard to Mr. Millian, Your Honor, it doesn't matter whether he's a Trump supporter or not, I don't know what that has to do with anything related to what their burden

is on that count, which is to show that he did not receive an anonymous call on a messaging application. They had not and cannot prove it.

And if they have not and cannot prove that, then the question becomes for you to determine whether any reasonable juror could find that he didn't believe that that caller could have been Sergei Millian. And there's plenty of evidence that would lead someone to believe that if they receive an anonymous call. Certainly enough to find that you couldn't just prove that beyond a reasonable doubt.

And that's the question Your Honor is being asked to decide at this stage, is whether any reasonable juror could find him guilty of that either -- any of the five counts.

And for that reason, Your Honor, I think the case has to end today.

THE COURT: All right. Thank you.

The Court is going to take a recess, and I'll get back to you shortly.

(Recessed at 2:30 p.m. and resumed at 2:56 p.m.)

THE COURT: The Court has reviewed the evidence with respect to the defendant's Rule 29 motion. The United States government, through the Special Counsel's Office has brought a five-count indictment against the defendant, Igor Danchenko.

All five counts alleged that Mr. Danchenko made materially false statements to the FBI agents during a series

of interviews in 2017 in violation of Title 18 of the United States Code, Section 1001(a)(2).

Specifically, Count 1 alleges that on June 15, 2017, Mr. Danchenko denied to agents of the FBI that he had spoken with Charles Dolan about any material contained in the Steele reports. Despite knowing that Mr. Dolan was the source of an allegation contained in a report prepared by Christopher Steele dated August 22, 2016.

Counts 2 through 5 allege that Mr. Danchenko, on March 16, May 18, October 24, and November 16, 2017, lied to FBI agents when he told them that he probably spoke or was under the impression or believed that he did speak with Sergei Millian.

A Section 2001 false statement conviction requires, first, the false statement in a matter involving a government agency; secondly, made knowingly or willfully, that it's, third, material to the matter within the agency's jurisdiction.

The defendant has moved for a judgment of acquittal under Rule 29 as to all counts. Under Rule 29, the Court must decide whether there is substantial evidence, direct or circumstantial, which, taken in the light most favorable to the prosecution, would warrant a jury finding that a defendant was guilty beyond a reasonable doubt.

Therefore, the defendant's motion must be granted

unless sufficient evidence was adduced at trial for a reasonable jury to have concluded beyond a reasonable doubt that the defendant provided the false alleged statements.

As the Court -- Supreme Court has made clear in the case *Bronston v. United States*, when it evaluated a perjury conviction under Title 18, Section 1621, criminal statutes, especially those involving perjury or false statements, are not to be loosely construed. Rather, as the Supreme Court stated, precise questioning is imperative as a predicate for the offense of perjury and is the burden on the questioner to pin down the witness -- to pin the witness down to the specific object of the questioner's inquiry.

As the Fourth Circuit has recognized, those, essentially, same principles apply to a Section 2001 false statement case as well; and for that reason, and as repeatedly recognized by the Fourth Circuit, a prosecution for a false statement under Section 1001 cannot be based on a literally true statement even if that response is nonresponsive or misleading.

Here, with respect to Count 1, the government has charged Mr. Danchenko with making a false statement based on the following exchange on June 15, 2017, between Special Agent Helson and Mr. Danchenko:

"Special Agent Helson: You had never talked to Chuck Dolan about anything that showed up in the dossier,

right?

"MR. DANCHENKO: No.

"MR. HELSON: You don't think so?

"MR. DANCHENKO: No. We talked about, you know, related issues, perhaps, but no, no, no, nothing specific."

The government presented two witnesses that provided direct evidence concerning Count 1: Charles Dolan and FBI Special Agent Kevin Helson. Dolan identified to one occasion when he spoke on the phone with Mr. Danchenko about the dossier, specifically on January 11, 2017, the day after it was published by BuzzFeed. Dolan testified, however, that there was no discussion about anything in the dossier, precisely what Danchenko told Helson, although the dossier was mentioned.

The government also presented the recorded statement at issue and the corresponding transcript. The transcript of June 15, 2017 interview evidences no effort on the part of Agent Helson to define what he meant by "talked," either at the time he asked the question or in his earlier set of questions, nor do the other recorded interviews and corresponding transcripts establish that Agent Helson previously sought to define the word "talked."

Moreover, Special Agent Helson confirmed in his testimony that he never explained to the defendant what he meant by "talked," nor did he follow up with the defendant

about what the defendant meant by his answer that he had talked about related issues with Dolan.

The issue, then, is what the scope or meaning can be attributed to the word "talk." The leading dictionaries, including those by the Fourth Circuit in *United States vs. Sarwari* define "talk" as meaning to deliver or express in speech, to express, communicate, or exchange ideas or thoughts by means of spoken words, to convey or exchange ideas, thoughts, information, and so on, by means of speech. The standard definition of "talk" means communication through the spoken word.

Applying that definition, the evidence in this case establishes that Mr. Danchenko's answer was literally true.

The government failed to introduce any evidence that Mr. Danchenko verbally communicated with Dolan about the Manafort allegations that ended up in the Steele dossier.

Moreover, Dolan, a government witness, himself, clearly testified that he and Danchenko never talked about anything that ended up in the dossier, including the Manafort allegations. The only communication between Dolan and Danchenko involving this topic came via email.

Nonetheless, the government argues that Count 1 should be submitted to a jury because Special Agent Helson's question to Danchenko about what he talked about, whether he talked with Dolan, was arguably ambiguous, and it's up to the

jury to decide whether Mr. Danchenko understood that the question called for all communications, not just verbal exchanges.

But given the standard definition of "talk," Agent Helson's question did not fall within the category of an arguably ambiguous question. On its face, it was not ambiguous at all, and the standard meaning of "talk" does not readily align with the government's proffered broader meaning that it includes all forms of communication, specifically written communications.

While the literal truth defense does not apply to an answer that would be true on one construction of an arguably ambiguous question, but false on another, Special Agent Helson's question was not arguably ambiguous.

To the contrary, Helson asked an unambiguous question, defined otherwise would allow the government to impose the serious consequences of criminal liability under Section 1001 by divorcing words from the commonly understood meaning.

For these reasons, Mr. Danchenko's answer that forms the basis of Count 1 was literally true, and criminal liability cannot be imposed based on the standard definition of "talk."

The only remaining issue, then, as to Count 1 is whether the government has presented sufficient evidence from

which a jury could find beyond a reasonable doubt that the context of the question made it arguably ambiguous or that Danchenko somehow understood the word "talked" to mean all forms of communication.

But as the Court stated -- the Fourth Circuit stated in *Sarwari*, even where a question in the midst of two reasonable interpretations, some evidence must show what the question meant to the defendant when he answered it.

In short, as other courts have recognized, the government must offer some evidence, whether circumstantial or direct, from which a jury could conclude beyond a reasonable doubt that the defendant understood the question, as did the government, and that, so understood, the defendant's answer was false; and absent such proof, the government fails to carry its burden.

Here, the government has not presented any evidence that would allow the jury to find that Mr. Danchenko understood the word "talk" more broadly than its standard definition.

The government points to Government Exhibits 119 and 120 to argue that Mr. Danchenko attributed and understood a far broader meaning to "talk" to include written communications by his use of the word "conversation," "conversation on social network" and "speaking on social network," but those exhibits do not mention the word "talk" or

any variation or associate these other words with talking.

Moreover, the government fails to offer any evidence that Agent Helson and Mr. Danchenko previously used the word "talked" in a broader meaning the government now seeks to apply to the word.

Moreover, despite knowing that Mr. Danchenko employed terms, such as "speaking on social media" and "conversation on social networks" when referring to nonverbal communications, such as those that occurred on or through instant messages, Agent Helson did not use those terms in his question.

Instead, Agent Helson simply used the word "talked." In fact, use of the word "talk," in light of these other terms that Agent Helson knew Danchenko used to include nonverbal communications, would be perceived as having an important objective of obtaining knowledge of communications with Dolan that would not be reflected or memorialized in written form.

Indeed, Agent Helson testified that if what Dolan said was true, Mr. Danchenko's answer was literally true; and in light of that testimony, Agent Helson understood the question the same way that Mr. Danchenko did, as asking for verbal communications.

That the FBI wanted to obtain as much information as possible does not change the meaning of the words used. And as the FBI observed in *United States v. Good*, that the

government's question may have sought more information -- that regardless of whether the government's question may have sought more information, the language of the question controls.

And Special Agent Helson's question did not ask for email or written communications.

Likewise, Special Agent Helson did not know about the email exchanges between Danchenko and Dolan and asked his question in ignorance of that fact, again, does not change the meaning of the words used.

Nor did Mr. Danchenko's immunity agreement somehow transform the standard meaning of "talk." Whatever his obligations were under the immunity agreement, that agreement, likewise, did not import specialized meanings into the words used when asking him questions, here, specifically the word "talk."

The Court previously denied the defendant's motion to dismiss based on the premise that the government would introduce at trial evidence of context that would allow a reasonable juror to find beyond a reasonable doubt that Mr. Danchenko understood the word "talked" to mean any form of communication, including verbal and written communications. The government has failed to introduce that requisite evidence.

So for these reasons, the Court concludes that the

government has failed, as matter of law, to present evidence -- substantial evidence, direct or circumstantial, which taken in the light most favorable to the prosecution, would warrant a jury finding that Mr. Danchenko was guilty beyond a reasonable doubt on Count 1, and the Court will, therefore, enter a judgment of acquittal pursuant to Federal Rule 29 as to Count 1.

With respect to Counts 2 to 5, the Court's not prepared at this juncture to conclude that the evidence is insufficient as a matter of law to sustain a conviction, and the better course, at this point, is to reserve on this aspect of the motion pending a verdict.

So for these reasons, Count 1 of the indictment is dismissed, and Counts 2 to 5 will be submitted to the jury.

All right. At this point, what I'd like to do is take up the jury instructions.

Anything else counsel wants to raise?

MR. DURHAM: Not from the government. Thank you, Your Honor.

MR. SEARS: Your Honor, due to the fact the government has rested and Your Honor has ruled on the Rule 29 motion, now would be the time for our case.

THE COURT: Right.

MR. SEARS: I can tell the Court we do not have a case. I'm assuming the Court would like to do a colloquy with

Mr. Danchenko before --

THE COURT: Right.

MR. SEARS: -- before we rest.

THE COURT: What I'll do is -- let me do that now. Mr. Danchenko, why don't you come to the podium, please.

I understand from your counsel that it does not intend to present a -- present a defense. That would include an opportunity for you to testify.

Do you understand that?

THE DEFENDANT: Yes, I do, Your Honor.

THE COURT: Have you spoken with your lawyer about whether or not you should testify?

THE DEFENDANT: Yes, I have.

THE COURT: And you do understand that you do have the right to testify?

THE DEFENDANT: I understand, yes.

THE COURT: Has anyone threatened you, tried to influence you in any way in making your decision not to testify in this case?

THE DEFENDANT: No, not in any way, Your Honor.

THE COURT: All right. Thank you.

And what we'll do, Mr. Sears, I'll have you announce that you have no evidence before the jury before we bring them in on Monday.

MR. SEARS: Yes, Your Honor.

THE COURT: All right. Why don't I take a short recess, and we'll come back out and deal with the jury instructions.

(Recessed at 3:10 p.m. and resumed at 3:29 p.m.)

THE COURT: All right. I'd like to go through the contested instructions, and appreciate Counsel's working out the balance of these.

I understand that there's really no issue as to the defendant's Proposed Instruction 28, Government's Proposed Exhibit Instruction A, is that right?

MR. SEARS: Yes, Your Honor. I think -- but we can double-check that the language lines up between the two of them, but I think the additional language in that instruction is this.

MR. DURHAM: In that one, Your Honor, the defendant's original instruction, it included language about if the evidence is capable of two instructions, one consists of innocence and the other with guilt. But that language has been rejected by the Fourth Circuit, as cited in Counsel's footnote and ours. So Counsel -- the defense took that out so we're in agreement as to the instruction on presumption.

THE COURT: Okay. All right. So we'll use the -- either one. Government's instruction, is that what we're -- either one?

MR. SEARS: I think they're identical at this point.

THE COURT: All right. Great.

MR. SEARS: Whichever one, Your Honor.

THE COURT: All right. Under false, fictitious, or fraudulent statements, given the Court's ruling, do we need anything other than the first two paragraphs in either -- in either proposal?

MR. DURHAM: The government has looked at it in the recess, and I would agree. Those -- the literal truths provisions or recommendation there, if those come out, then I think the instruction is the standard O'Malley instruction.

THE COURT: All right. I'm not sure we -- yeah, it would just be the first two paragraphs of the Government's Proposed B.

MR. DURHAM: Yes, Your Honor.

MR. SEARS: That is correct, Your Honor.

THE COURT: All right. And then, knew or knowing, I guess the only issue is whether the -- is defendant's additional sentence. Is that right?

MR. SEARS: So we submitted a supplement to our Instruction 30, which was 30-1.

THE COURT: I'm not sure I have that. Do you have it?

MR. SEARS: I have a copy of it that I gave to the Court. Unfortunately, I only have one, but I think I may have it on my computer.

(A pause in the proceedings.)

THE COURT: How does this differ from your original 30?

MR. SEARS: Your Honor, unfortunately, I gave you my only copy so I'm trying to pull it up right now.

THE COURT: It looks identical to me. It doesn't have -- it doesn't have --

MR. SEARS: Your Honor, we took out the "or omission" language.

THE COURT: Oh, right. Right. Right. Okay.

MR. SEARS: And that was because, you know, given the nature of the charges in this case, we think it's risky to put that language in there.

THE COURT: Right. Right. All right.

MR. SEARS: Yeah. So we took it out, that language.

THE COURT: What's the Government's position, particularly at this point, that Count 1 is out. Do you still think "omission" should be in there?

MR. DURHAM: I believe that it should remain in there. I'm not -- the Court -- there may be some additional language that Your Honor would want to include or defense could suggest, but the fact that Mr. Danchenko failed to, you know, bring that evidence -- the -- the emails to the attention of the authorities, is evidence that goes to knowledge and intent.

We're in agreement that his failure to produce that is not what's charged in the count. So I don't think the word "omission" should actually come out, but it may be that there's some other suggestion counsel has as to how that might be dealt with to clarify it.

But the "omission of" -- "knowing omission of relevant information," we believe is probative evidence and, you know, striking "omission" would be a mistake.

THE COURT: But this is an affirmative falsehood claim in Counts 2 through 5, and the knowing requirement pertains to that false statement, correct?

MR. DURHAM: That is correct, Your Honor.

THE COURT: So how would an omission be even relevant in reference to an omission? What would it even refer to?

MR. DURHAM: The failure to disclose that relevant evidence or information would be evidence that would go to proof of knowledge.

THE COURT: With respect to Counts 2 through 5, though, what was omitted?

MR. DURHAM: What was omitted was his -- what was omitted was providing that relevant information to the FBI in response to questions that were posed, and records that were requested, and the like.

THE COURT: All right. All right. I'll consider

that. And willfully?

MR. SEARS: Your Honor, I think the -- I think the primary dispute on "willfully" is we would include language about an act is done willfully if it is done with the intention to do something that a law forbids.

THE COURT: Right.

MR. SEARS: That is that the bad purpose is disobeying the law. I think that -- I think that is the law.

THE COURT: Right.

MR. SEARS: I think that is correct. I -- I would agree with Special Counsel's argument in their -- in their objections to our instructions that they don't -- I don't think they have to prove that he knew he was violating 18 U.S.C. 1001.

And I would not object to some language because I have seen that in instructions from time to time that it is not necessary to prove he knew what's -- what law specifically he was breaking, but I do think that it's pretty black letter law for willfully. I've just got to be -- it's got to be done for a bad purpose. And we cited that in our pleading, Your Honor. Unfortunately, I think Your Honor has my copy of the pleading.

THE COURT: Here, let me give it back to you.

MR. SEARS: I apologize.

THE COURT: Let me give it back to you.

I've read both sides. I'll review this. My inclination is to give the Government's Instruction, but I'll consider your position on that.

MR. SEARS: Thank you, Your Honor.

MR. DURHAM: Thank you, Your Honor.

THE COURT: Materiality. I think you-all were fighting about is -- statement may be relevant, but not material?

MR. SEARS: Yes, and I think also "trivial detail" is another item we're in disagreement with the Government on.

THE COURT: All right. Anything more you want to say about that, Mr. Durham? I've read your position.

MR. DURHAM: I mean, I -- the difficulty, from our perspective, is if the instructions that are introduced -- an additional term that is relevance.

THE COURT: Yeah.

MR. DURHAM: And does that require an additional instruction on what relevance means. And then, an explanation as to the difference between materiality and relevance.

And so --

THE COURT: I'm not sure the case is talking about relevance. They talk about how it could be interesting or wanting, and not material, but I'm not sure they use the term "relevance." It seems to me if you -- once something is relevant, it gets pretty close to being material.

MR. DURHAM: And as you're saying, it gets close to the number of angels dancing in the head of a pin for most people.

THE COURT: Right.

MR. DURHAM: So I think that that's confusion and not clarity to the jury.

THE COURT: All right. I'll consider that. What I'll do is generate a proposed set of instructions and give those to you Monday morning or maybe even this afternoon. I can email those out to you.

All right. Good faith. I've got an issue with both of these. On the defense, the third paragraph, "the law is intended to subject criminal punishment only to those who act willfully and knowingly." I'm not sure that's appropriate.

On the defense side, and I've dealt with this issue before. The third paragraph, I've never quite -- I've never quite known what it means that someone does not act in good faith if -- even if they hold an honest -- honestly hold a certain belief, but -- the defendant knowingly makes false or fraudulent pretenses and so on to others. Within what context, related to what?

MR. SEARS: I think that's the Government's instructions.

THE COURT: I know. That's what I'm saying. That's what I'm saying.

MR. SEARS: Yeah, I didn't understand that language either.

THE COURT: Yeah. And on the defendant's instruction, again, the third sentence is -- I'm not likely to give. "The law is intended to subject criminal punishment only those who act knowingly and willfully." I don't know that --

MR. DURHAM: Your Honor, with respect to the proposed government's proposal, I believe that is word-for-word straight from O'Malley.

THE COURT: I know -- I know it is.

MR. DURHAM: With respect to the third paragraph, I think what the -- that particular instruction that is aimed at is somebody can, you know, have an opinion that they don't think they should have to, you know, whatever, be respectful to the Court.

But whether they think it is respectful or not, if they engage in contempt, if they engaged in contempt. And I think that that's what it's aimed at. You can think a lot of things or have an opinion, but simply because you have an opinion, it doesn't permit good faith to save you, if you then knowingly engage in what you know to be, in this instance, criminal conduct.

MR. SEARS: I think, Your Honor, we -- I think we noted that there could be scenarios where that could be true.

I just think in this case --

THE COURT: Right.

MR. SEARS: -- given the facts of this case and what the jury is being asked to do, you couldn't do both.

THE COURT: Yeah, I mean, if he -- if they thought he, in good faith, believed that he had gotten a phone call.

MR. SEARS: From somebody he believed was --

THE COURT: This language would invite them to say, Well, even though we think he, in good faith, believed he got a phone call, on some other occasion with respect to some other issue he was making false statements, therefore, it negates the good faith of his belief on this particular statement.

MR. SEARS: Right. I just think --

THE COURT: It's almost a propensity kind of a concern.

MR. SEARS: It's very problematic, I think, for the reasons the Court has just articulated.

MR. DURHAM: Well, to the extent that that may be the concern, that concern, I think, can be addressed, if the Court were to simply add some clarifying language in that provision.

So if -- if that paragraph or that sentence were to read "the defendant does not act in good faith if -- even though defendant honestly holds a certain opinion or belief,

that defendant also knowingly makes a false, fraudulent -- makes false, fraudulent pretenses, representations or promises to others as alleged in the indictment."

THE COURT: But what would -- what would -- based on the evidence, what would justify the jury concluding that even though the defendant honestly believed he had received an anonymous phone call, that he didn't act in good faith because of what?

MR. DURHAM: If he honestly believed that he had received a phone call.

THE COURT: Yeah, if they -- if they -- if they find that even though the defendant honestly holds a certain opinion or belief, i.e., that he got a phone call from -- anonymous phone call from Millian, that he still is acting -- based on this instruction, he still isn't acting in good faith because of what?

What would this instruction allow them to conclude that would negate the good faith they would otherwise find? If I'm making any sense.

MR. DURHAM: Your Honor, I'm just trying to think through why this is in here, why it's a part of the O'Malley instruction, and how it applies in this case.

THE COURT: Right.

MR. DURHAM: If the defendant honestly believed that he had gotten a phone call from Millian.

THE COURT: Yeah. He still wasn't acting -- he didn't have a good faith belief because of what?

MR. DURHAM: That would be right. I mean, if he honestly believed that he had gotten a phone call from Millian, then his statement to the police, or the FBI in this instance, would not be knowingly false.

THE COURT: Right. But this --

MR. DURHAM: That says otherwise.

THE COURT: Yeah. This instruction tends to suggest some other inquiry.

MR. DURHAM: We have no objection to removing that sentence --

THE COURT: All right.

MR. DURHAM: -- if that's --

THE COURT: I mean, I'm inclined to give the government's good faith instruction without that paragraph.

And then "nature of the offense charged," we'll take out -- throughout, we're going to have to just eliminate Count 1 references, but I didn't notice any other real issues there.

MR. SEARS: Your Honor, we had submitted a new version of our 34.

THE COURT: Okay.

MR. SEARS: And it just -- it was more fulsome in the description of how the counts were charged in the

indictment, and that's the instruction that we would propose, is 34.1. I can hand it up to the Court.

THE COURT: All right.

MR. SEARS: This was part of our October 9th filing.

THE COURT: We have a Word document on these, don't we? Do we, Bryon?

(A pause in the proceedings.)

THE COURT: All right. Well --

MR. DURHAM: We have no objection --

THE COURT: 34 -- no objection to 34.1, the revised one without --

(Simultaneously speaking.)

MR. DURHAM: With respect to Count 1, that would --

THE COURT: Come out?

MR. DURHAM: -- come out.

THE COURT: Right. All right. Can I hold on to this?

MR. SEARS: Yes.

THE COURT: Did you have this in a Word document?

MR. SEARS: I do.

THE COURT: All right. If you could just --

MR. SEARS: Email it to the Court?

THE COURT: Yes. All right. And I think that's it, isn't it? Those are the only --

MR. SEARS: That's it.

THE COURT: And what we'll do is go through and eliminate references to Count 1.

MR. SEARS: And I think, Your Honor --

And if you don't want to do this now and you want to do it when you're in the office, you could always notify the Court if you have an issue with it.

(Counsel confers.)

MR. DURHAM: We have no objection to that. I think that what we were discussing -- part of what we were discussing with counsel was whether it makes more sense to refer to these as the dossier reports, but I don't see that's in here. We call them the company reports. I mean, the jury knows them as --

(Simultaneously speaking.)

THE COURT: Call them Steele reports or Steele dossier?

MR. SEARS: It doesn't matter to us what those counts say. I think we all know what we're talking about. I don't think it's going to be an issue, but it sounds like the rest of the instruction, apart from that issue, is not objectionable.

MR. DURHAM: We'll read through, but if it's from the indictment, no objection.

THE COURT: And I'll generate a copy, full set of the instructions and get those to you.

MR. DURHAM: And, Your Honor, I take it with respect to those proposed instructions that the parties agreed on, would it be the Court's intention to give all of those, or you haven't decided?

THE COURT: I'm going to go through those, but I think I would unless -- I'll have to see what they are.

MR. SEARS: Some aren't going to be applicable, obviously.

THE COURT: Right. I'll go through those and get you a proposed set. I'll try to do that this afternoon.

MR. ONORATO: Your Honor, just one other issue. And I'll propose to government counsel -- but the Court has, you know, struck Count 1, and there are two witnesses who testified, and I think the jury will apply common sense that the, you know, testimony of the two witnesses today have no bearing on the other counts. I don't know if there's something that the jury needs to be instructed about, because there will be --

THE COURT: I'm not sure how I will do that. I think you can do that in argument.

MR. ONORATO: Okay, but the only other thing is that they'll -- they were told there were five counts, and now they'll only have four.

THE COURT: That's the other thing I wanted to raise with counsel, is your views on what I would tell the jury. I

would simply tell them that Count 1 has been -- is no longer in this case, and they shouldn't let that decision affect their decision as to the remaining counts.

Anything else?

MR. DURHAM: No. As the Court said, just something neutral. Just say no longer -- they don't need to consider the count, period?

THE COURT: Right.

MR. DURHAM: That's fine with the government.

MR. SEARS: I would, you know -- frankly, I would defer to the Court, as I think I've had to on just about everything. But, you know, the concern on our end would be that the jury is walking away with the impression that they -- you found they didn't prove that case, but you think the other case is good and live, which is actually true, but, you know, the message that it could send to the jury -- I trust the Court to instruct --

THE COURT: No, I understand. We'll think about it, and if you have some better language, I'll be happy to consider it.

How long for closing, Mr. Durham?

MR. DURHAM: We have not discussed that with counsel. Does the Court have some standard -- I mean, obviously, the length of the trial --

THE COURT: I would think something around an hour

for each side.

MR. SEARS: I don't see any reason why my closing wouldn't be within a hour, Your Honor.

THE COURT: Yeah. Well, think about it. If you want more time, let me know --

MR. DURHAM: Yes, Your Honor.

THE COURT: -- on Monday. All right?

MR. DURHAM: Yes, sir.

THE COURT: All right. I've read studies that say juries lose all attention after 20 minutes, so...

MR. DURHAM: I've noticed that over the years myself, Your Honor.

THE COURT: All right. Anything else we can accomplish?

MR. SEARS: No, Your Honor.

THE COURT: All right. I'll see everyone Monday at nine o'clock, and I'll try to get a set of instructions to you this afternoon. If not, it will be early Monday morning.

MR. SEARS: And I'll email you that Word version as soon as I get back to the office.

THE COURT: Great. All right. Thank you. Court will stand in recess.

**(Proceedings adjourned at 3:50 p.m.)**

CERTIFICATE OF REPORTER

I, Tonia Harris, an Official Court Reporter for the Eastern District of Virginia, do hereby certify that I reported by machine shorthand, in my official capacity, the proceedings had and testimony adduced upon the Jury Trial in the case of the **UNITED STATES OF AMERICA versus IGOR Y. DANCHENKO**, Criminal Action No.: 1:21-cr-245, in said court on the 14th day of October, 2022.

I further certify that the foregoing 48 pages constitute the official transcript of said proceedings, as taken from my machine shorthand notes, my computer realtime display, together with the backup tape recording of said proceedings to the best of my ability.

In witness whereof, I have hereto subscribed my name, this October 14, 2022.

Tonia M. Harris, RPR
Official Court Reporter