18-3421(L)

18-3442(CON)

To Be Argued By:
ALEXANDRA A.E. SHAPIRO

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

—against—

DEAN SKELOS, ADAM SKELOS,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR DEFENDANT-APPELLANT DEAN SKELOS

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INTRODUCTION

This case exemplifies a trend in federal criminal law for the last several decades. Federal prosecutors, who view federal police power as unlimited, argue for inexorable expansion—everything bad must be a crime, every crime must be a federal crime, every federal crime must be punishable by years or decades. These arguments find some success in lower courts. Then, every so often, the Supreme Court steps in and cuts back on federal power, limiting the reach of federal criminal statutes. *McDonnell* was an example of this trend. The Supreme Court's recent grant of certiorari in *Kelly v. United States*, the "Bridgegate" case, suggests that the trend will continue.

But whenever federal prosecutors lose at the Supreme Court, they return to lower courts and seek to undermine those holdings. Rather than accepting the limits, they re-start the process of inexorable expansion. The prosecution did that here. It proceeded as if *McDonnell* changed nothing.

The government's arguments on appeal follow the same script. It argues that Skelos's conduct, if left unpunished, would have "profound negative consequences." It argues, in other words, that the conduct was bad, therefore *must* be a crime, and therefore *must* be covered by not one but multiple federal criminal statutes carrying years or decades in prison. Those arguments, which sound in policy more than law, are inconsistent with *McDonnell*.

ARGUMENT

I. THE JURY INSTRUCTIONS ELIMINATED AN ESSENTIAL ELEMENT

Bribery requires payment in exchange for an official act. Under *McDonnell v. United States*, 136 S. Ct. 2355 (2016), the official act must be specific and concrete. *McDonnell* also reiterated that bribery—including Hobbs Act extortion and honest-services fraud—requires an actual *quid pro quo*. The government must prove that when the parties entered the bargain, they had a specific exchange in mind on a particular matter. Thus, *McDonnell* abrogated this Circuit's precedents regarding the "as opportunities arise" theory of bribery.

Seeking to evade *McDonnell*'s implications, the government requested and received as-opportunities-arise instructions, and it argued that theory to the jury. On appeal, the government argues that this Court should ignore *McDonnell*'s clear holdings because applying them faithfully makes corruption prosecutions too difficult. It also argues that it presented sufficient evidence even without the as-opportunities-arise theory. But sufficiency is not the standard. When jury instructions omit an element of the offense, the error cannot be harmless unless the element was uncontested. Here, there was substantial and credible evidence that Skelos did not trade specific legislation for benefits to his son, which is precisely why the government was forced to rely on the invalid as-opportunities-arise theory.

A. Skelos Preserved His Challenge

The government claims Skelos waived his instructional argument by not raising it in the first appeal. (G.Br.38-39). That is nonsense. At the first trial, *McDonnell* had not been decided, and the as-opportunities-arise doctrine was settled Circuit law. Accordingly, Skelos did not object to the instruction, and he did not raise it on appeal, where it would have been reviewed only for "plain error." At his retrial, Skelos vigorously litigated the issue, which must now be reviewed *de novo*. These "different standards of review" foreclose the government's "law-of-the-case" argument. *United States v. Johnson*, 616 F.3d 85, 93 (2d Cir. 2010), *abrogated on other grounds by Johnson v. United States*, 135 S. Ct. 2551 (2015). The government cites *United States v. Ben Zvi*, 242 F.3d 89 (2d Cir. 2001), where the defendant could not appeal a previously-*affirmed* conviction just because the case was remanded for *resentencing*. *Id.* at 95-96. But where a case is "remanded for a new trial," the defendant plainly may "raise issues not raised at the first trial." *United States v. Lawson*, 736 F.2d 835, 837 (2d Cir. 1984). Skelos may therefore raise his claim.

B. Bribery Requires An Exchange

The government's arguments regarding the as-opportunities-arise theory are an analytical muddle. One aspect of its confusion relates to the distinction between agreement and words expressing agreement. The government correctly notes that

bribery does not require that the terms of the corrupt bargain be stated in express terms such as a written contract. (G.Br.39, 43 n.16). But from that premise, the government leaps to the conclusion that bribery does not require any identifiable exchange between bribe giver and recipient. That is false. The terms need not be explicit, but there nonetheless must be an agreed-upon exchange of payment for official action on a specific matter. *United States v. Silver*, 864 F.3d 102, 111 & n.24 (2d Cir. 2017) (citing cases and noting that the core requirement of bribery is a *quid pro quo*—that is, an "exchange" of benefits for an official act).

Contract law provides the obvious analogy, since bribery is essentially an illegal contract. A contract requires agreement—the manifestation of mutual assent. This manifestation may be made by words *or by conduct*, because "words are not the only medium of expression." Restatement (Second) of Contracts § 19 & cmt. a; *see Meyer v. Uber Techs., Inc*., 868 F.3d 66, 79 (2d Cir. 2017) (assent "need not be express"). Nevertheless, there must be a bargained-for exchange of consideration to which both parties assent—that is, a "*quid pro quo*." Restatement § 71, cmt. a.

The same is true in conspiracy law. Conspiracy is an agreement to commit a crime. This agreement may be "tacit," rather than "formal" or explicit. *United States v. Amato*, 15 F.3d 230, 235 (2d Cir. 1994). Nonetheless, the government

must prove an agreement, as well as the "specific intent" to commit identified offenses. *United States v. Monaco*, 194 F.3d 381, 386 (2d Cir. 1999).

Bribery is no different. Bribery requires a *quid pro quo*—an exchange of a payment for some official act on a specific and identifiable official matter. The terms of the exchange need not be made express by oral or written statements. Nonetheless, in order to be guilty of bribery, a politician must have specifically "intended to receive[] something of value in exchange for an official act." *Silver*, 864 F.3d at 111. The official act must be identifiable and identified by the parties to the exchange (*see* DS.Br.23-28), even if they need not state the terms of their deal out loud. The amorphous as-opportunities-arise theory effectively eliminates that requirement and raises the constitutional and basic fairness concerns averted by *McDonnell*'s narrow reading of federal bribery law.

C. Bribery Requires More Than Mere Receipt of Gratuities

A second source of confusion results from the government's persistent mischaracterization of the relationship between bribery and gratuities. Contrary to the government's suggestion (G.Br.47-48), it is not easier to prove a bribe.

The Supreme Court in *United States v. Sun-Diamond Growers of California*, 526 U.S. 398 (1999), described the difference under 18 U.S.C. §201. Bribery is the more serious offense—it has a stricter "intent element," which corresponds to greater culpability and greater authorized punishment. *Id*. at 404-05. Bribery

requires "a *quid pro quo*—a specific intent to give or receive something of value *in exchange* for an official act"—while "illegal gratuity requires only that the gratuity be given or accepted 'for or because of' an official act." *Id*. But the Court rejected the government's position that "unlike the bribery statute," the gratuity statute "did not require any connection between [the defendant's] intent and a specific official act." *Id.* at 405. *Sun-Diamond* held that, at least under §201, both require such a connection.

Prior to *McDonnell*, this Court ruled that *Sun-Diamond* is limited to §201, approving the as-opportunities-arise theory for bribery prosecutions brought under the Hobbs Act and the honest-services statute. *See, e.g.*, *United States v. Ganim*, 510 F.3d 134, 145-49 (2d Cir. 2007). Relying on this precedent, the government argues that *Sun-Diamond* is irrelevant because Skelos was not charged under §201. (G.Br.47-48). But *Ganim* and its progeny were thoroughly undermined by *McDonnell*. Governor McDonnell was also charged under the Hobbs Act and the honest-services statute. The Supreme Court, in defining bribery under those statutes, repeatedly relied on *Sun-Diamond* and incorporated §201's definitions. *See* 136 S. Ct at 2368-73. Never once did the Court suggest that bribery under the Hobbs Act or honest-services statute is different from bribery under §201. To the contrary, it stated that those statutes would be constitutionally infirm if they did not incorporate those same definitions. *Id*. at 2372-73.

The conflict between this Court's prior case law and the Supreme Court's definition of bribery is patent. Here is what this Court said in *Ganim*: "to establish the quid pro quo essential to proving bribery, the government need not show that the defendant intended for his payments to be tied to specific official acts." 510 F.3d at 148. But here is what the Supreme Court said in *Sun-Diamond*: "for bribery there must be a *quid pro quo*—a specific intent to give or receive something of value *in exchange* for an official act." 526 U.S. at 404-05. And then *McDonnell*: "the offense [of bribery] is completed at the time when the public official receives a payment in return for his agreement to perform specific official acts." 136 S. Ct. at 2365 (quoting *Evans v. United States*, 504 U.S. 255, 268 (1992)).

Bribery requires a link between payment and official act. Indeed, it requires more than a mere link: It requires *an exchange* of payment for action on a specific, identified matter.[1] The district court's instructions in this case failed to convey that requirement.

[1] This flows inexorably from *McDonnell*'s holdings. *McDonnell* did not merely define "official act" (G.Br.42); it mandated jury findings concerning the official "matter" that are incompatible with the as-opportunities-arise theory (DS.Br.23-25). The post-*McDonnell* cases cited by the government (G.Br.43-46) are unpersuasive and/or do not address this argument.

D. The Government Cannot Demonstrate Harmlessness

The harmlessness inquiry is critical in this appeal. The government is wrong on the standard and wrong on the evidence.

1. The Government Applies The Wrong Standard

When jury instructions fail to describe the elements of the offense, the government bears the burden of proving that the error was harmless beyond a reasonable doubt. *Neder v. United States*, 527 U.S. 1, 17-18 (1999); *Silver*, 864 F.3d at 119. The government superficially acknowledges this test (G.Br.38), but ignores *Neder*'s holding that if the jury fails to find an essential element of the offense, the error can only be harmless if that element was "uncontested" by the defense and "supported by uncontroverted evidence." 527 U.S. at 17-18.

The question is not whether a properly instructed jury legally could have found the defendant guilty. (G.Br.50). The question is not whether a properly instructed jury probably would have found the defendant guilty—because as to this element, there has not yet been a jury finding of guilt. *See Sullivan v. Louisiana*, 508 U.S. 275, 278-79 (1993). Rather, the question is whether the element was uncontested such that properly instructed jury necessarily would have found that the element was proven beyond a reasonable doubt. *Neder*, 527 U.S. at 17-18. The government cannot meet that standard.

2. The Element Was Contested, And The Jury Heard Conflicting Evidence

The government points to evidence from its case-in-chief supporting a finding of guilt, but the presence of such evidence does not prove harmlessness. Harmless error inquiry extends to "the record as a whole," *United States v. Onumonu*, 967 F.2d 782, 789 (2d Cir. 1991), and does not including drawing inferences in the government's favor, *United States v. Mejia*, 545 F.3d 179, 199 n.5 (2d Cir. 2008). This was a case where the defense also presented extensive evidence, including testimony from Skelos himself. He testified that while he attempted to help his son find work, he never sought work for Adam in exchange for votes. (DS.Br.20). Under *Neder*, his testimony alone suffices to show that the *quid pro quo* element was controverted, that a rational jury could have found it was not proven, and therefore that the error was not harmless.

The other trial evidence confirms the point. Consider, for example, the 421-a renewal act, which was the primary *quo* in the alleged Glenwood scheme.

The 421-a program was a tax exemption to support real estate development and rehabilitation. Originally passed in the 1970s, the law sunset every four years—and was renewed by the New York legislature every time. This was important to Glenwood, but it was also important to everyone else surrounding the real estate industry, and it helped to support affordable housing. Senator Tony Avella, a government witness, testified that 421-a was "good for everybody."

(A-4316). Unsurprisingly, the extenders regularly passed with overwhelming bipartisan support. (A-4705, A-6218-20).

Dorego, the government's star witness as to Glenwood, testified similarly. The government elicited testimony that 421-a was critical to Glenwood, which was obvious. But Dorego also testified that Glenwood had always made significant contributions to a variety of New York politicians to ensure 421-a renewals—it was the "backbone" of Glenwood's support of Republican senators. (A-4674). He testified that as long as he had known Skelos, he knew that Skelos had always supported 421-a. (*Id.*). He also agreed that Skelos "never once said" that if Dorego did not find work for Adam, Skelos would pull his support for 421-a, and he agreed that Skelos "never linked his legislative position to help for Adam." (A-4710).

That conclusion was corroborated by defense witnesses. Robert Mujica, the majority chief of staff and senate finance committee secretary, described how the 421-a bill proceeded through the legislature—and how it was passed with overwhelming bipartisan support. (A-6216-20). Mujica confirmed that 421-a was important to the broader New York real estate industry, which lobbied extensively for renewal. (A-6246-47).

Finally, Skelos's testimony confirmed what others had already said: "My entire career I supported [421-a], and there was never a question about my support

of that position." (A-6333). He explained that "it's not just a matter of a developer making money, it's also the union guy that's building it, it's the person that some day is going to be the doorman[;]…one of the biggest things about 421-A is the fact that it's an economic engine." (*Id.*).

Thus, while the 421-a legislation was a specific official matter, and the government argued that Skelos supported 421-a as part of a *quid pro quo*, its evidence was far from overwhelming. To the contrary, the jury heard extensive and unrebutted evidence that Skelos always had supported 421-a and would have supported it without regard to any benefit for Adam. And it was undisputed that Glenwood did not direct any benefits to Adam until more than year after the passage of 421-a. For precisely that reason, the government was forced to emphasize its as-opportunities-arise theory to the jury. (A-6887-88; *see* DS.Br.31). Unable to safely rely on 421-a, the government argued that Glenwood helped Adam so they could have Skelos "standing by to help" in case there was some other "opportunity down the road." (A-6641, A-6888). And the district court's instructions allowed the jury to find guilt on that basis, without finding any exchange on a specific matter. The error cannot possibly be harmless.

* * * *

The instructional error cannot be held harmless with respect to the Glenwood counts, which served as the narrative core of the government's case. The same holds true for the PRI and AbTech counts.

The PRI "extender" legislation was, in many respects, like 421-a. Once again, Senator Avella testified that the legislation was uncontroversial—it passed the Republican-controlled Senate by a 58-to-1 vote before being approved by the Democrat-controlled Assembly and Democrat governor. (A-4317-21). Chief Senate majority counsel Elizabeth Garvey, a government witness, testified that the legislation passed overwhelmingly because the alternative would have been a "collapse" of New York's malpractice insurance industry. (A-5349-52). And she and Mujica both confirmed that Skelos had always supported the legislation. (A-5352, A-6203-06).

Bonomo agreed. He testified that the legislation was critical to PRI, but also that it was uncontroversial and had always been passed with bipartisan support going back to the 1980s. (A-5750). He admitted that Skelos never suggested his support for the bill was contingent on work for Adam. (A-5750-51). And once again, Skelos himself testified that he had always supported the legislation for reasons having nothing to do with Adam or any benefit from PRI. "I always supported it. I think I may have voted for it going back when Mario Cuomo was governor, or close to that." (A-6322).

As to AbTech, the government's theory was far less clear. It relied, in part, on funding for water infrastructure included in the 2015 state budget. But once again, the jury heard evidence from a variety of witnesses that Skelos had very good reasons for supporting that legislation that had nothing to do with Adam. (*E.g.*, A-5353-56, A-5414-15, A-6232-33). (The government also pointed ominously to AbTech's efforts to obtain design-build legislation required for its Nassau County project. But this legislation was never drafted and was never brought to the floor.) Fundamentally, the government did not have strong evidence that Skelos supported these acts in exchange for benefits to Adam. Adam may have received benefits, but Skelos supported the acts regardless. Aware of this flaw in its case, the government deployed the invalid as-opportunities-arise theory to maximize its chances of conviction, telling the jury on rebuttal that defendants' arguments were "irrelevant, total distraction, because as I expect Judge Wood will instruct you, the crime is making the payment with the understanding that the Senator would be expected to take official actions as opportunities present themselves." (A-6887).

The error cannot be harmless, especially under the stringent *Neder* standard.[2]

[2] That the jury deliberated for three days (A-7002-36) underscores that this was a close case, and that the error could not have been harmless. *See United States v. Stewart*, 907 F.3d 677, 689 (2d Cir. 2018).

3. *The Special Verdict On Gratuities Does Not Render The Erroneous Instruction Harmless*

As to the §666 counts, the jury by special verdict found Skelos guilty on both a bribery theory and a gratuity theory. The government argues that because the gratuity instructions did not include the "as opportunities arise" language, the jury found a link between payment and official act and would therefore have convicted for bribery even if properly instructed. (G.Br.52-54). The Court cannot, however, affirm based on such speculation.

For starters, it is unclear the jury understood that the "as opportunities arise" language applied only to bribery. The district court's instructions on the elements—delivered over two days—were a somewhat bewildering non-linear sequence of references and cross-references. The gratuity instructions, which were delivered the morning after the afternoon when the jury had heard about bribery, cross-referenced the prior definition of "official act" (A-6979), and the prior instructions had repeatedly used the phrase "official act" in conjunction with "as opportunities arise." (A-6937-38, A-6961-62, A-6971-72). A jury of laypersons was unlikely to parse out "as opportunities arise" when it came to gratuities.

More importantly, the jury was explicitly instructed that to find guilt on the gratuities theory, it was not required to find the core element of bribery—a *quid pro quo*. The instructions stated: "Unlike a bribe, an illegal gratuity does not involve a *quid pro quo* exchange." (A-6978). The jury was further instructed that

gratuities do not require a showing that payment influenced the official act. (A-6979). Because the jury's special verdict on gratuities did not include any finding of a *quid pro quo*—which was the critical disputed element in this case—it cannot render harmless the instructional error on the bribery counts.

Simply put, the problem with the as-opportunities-arise instruction was that it effectively eviscerated the *quid pro quo* element. The gratuity instructions did not require a finding on that element *at all*. The special verdict therefore cannot cure the error.

II. THE INDICTMENT FAILED TO ALLEGE AN OFFENSE

The indictment was arguably even more flawed than the jury instructions since it did not even purport to comply with *McDonnell*. Not only did it rely on the as-opportunities-arise theory, it also recited "official acts" that no longer qualify under *McDonnell*. The government should have sought a superseding indictment after the law changed, but it declined to do so. Its strategy of proceeding as if *McDonnell* changed nothing was, again, a fatal error.

The problem is not that the indictment *refers* to the as-opportunities-arise theory (G.Br.58), but rather that it relies on offers and threats of generic, unspecified "official action," without findings by the grand jury that Skelos agreed to act on specific matters at the time he solicited benefits for Adam (DS.Br.33). This is not a "superfluous allegation[] about…timing" (G.Br.58), since the public

official *must* contemplate acting on a specific matter "at the time" he solicits payment. *McDonnell*, 136 S. Ct. at 2365, 2371, 2374. The indictment is therefore missing an essential element, in violation of the Fifth Amendment. (DS.Br.32); *see Apprendi v. New Jersey*, 530 U.S. 466, 489 n.15 (2000) ("The indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted."). While the government claims the indictment included all essential elements (G.Br.58), it clearly did not. When the indictment was returned, Circuit precedent did not require agreement on a specific "matter," and the government continues to insist that the law does not require it.

The government claims that any violation was harmless, since Skelos had adequate notice, and the proof at trial mitigated double-jeopardy concerns. (G.Br.58-59). But the Grand Jury Clause does not exist merely to provide notice and avoid double jeopardy. Rather, it exists primarily to ensure that citizens are not subjected to "the trouble, expense, and anxiety" of a criminal prosecution until a group of fellow citizens has approved the charges. *Ex Parte Bain*, 121 U.S. 1, 12 (1887); *accord Stirone v. United States*, 361 U.S. 212, 218 (1960). Indeed, "a bill of particulars cannot save an invalid indictment," even though it provides notice. *Russell v. United States*, 369 U.S 749, 770 (1962). An indictment must "inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction." *Id.* at 768. And it must "ensure that the prosecution

will not fill in elements of its case with facts other than those considered by the grand jury." *United States v. Walsh*, 194 F.3d 37, 44 (2d Cir. 1999). "The substantial right implicated here is not notice; it is the 'right to be tried only on charges presented in an indictment returned by a grand jury.'" *United States v. Roshko*, 969 F.2d 1, 6 (2d Cir. 1992) (quoting *Stirone*). That right was violated here, and the error cannot be harmless. (DS.Br.34-37).

* * * *

The government indicted Skelos before *McDonnell* was decided. The government's tactical decision not to supersede should not be endorsed by an anything-goes approach to harmlessness. The government's desire to proceed quickly with a high-profile prosecution cannot justify its choice to ignore the Grand Jury Clause.

III. SECTION 666 DOES NOT CRIMINALIZE GRATUITIES

For Counts Six through Eight, the jury convicted Skelos for both bribery and gratuities, even though §666 does not prohibit gratuities. (DS.Br.37-40). The government offers no substantive response to the compelling reasoning of the First Circuit in *United States v. Fernandez*, 722 F.3d 1, 20-27 (1st Cir. 2013), explaining why this is so.

IV. THE DISTRICT COURT ERRED BY QUASHING DEFENSE SUBPOENAS

Applying the *Nixon* standard, the district court quashed defense subpoenas. Relying on district court and out-of-circuit cases, the government argues that the *Nixon* standard governs. Those cases are unpersuasive and inconsistent with the Supreme Court's logic. The district court should have applied the text of Rule 17, not the extratextual standard of *Nixon*. And the error mattered, because it prevented the defendant from exposing the lies of key government witnesses—lies that the government endorsed in closing.

A. *Nixon* Does Not Apply To Defense Subpoenas To Third Parties

1. The standard of *United States v. Nixon*, 418 U.S. 683 (1974), does not apply to defense subpoenas served on third parties. (DS.Br.45-51). Contrary to the government's suggestion, the question remains undecided in this Circuit, as this Court recognized in *United States v. Barnes*, 560 F. App'x 36, 40 n.1 (2d Cir. 2014). It has not since ruled on the issue.[3]

The cases the government cites (G.Br.75) are unavailing. As we previously explained, neither *United States v. Ulbricht*, 858 F.3d 71 (2d Cir. 2017), nor *In re Irving*, 600 F.2d 1027 (2d Cir. 1979), reached the question, and the *Nixon* standard was irrelevant to the outcome. (DS.Br.45 n.10, 48 n.11). The government's four

[3] The appeal pending before this Court in *United States v. Bergstein*, No. 18-1966, presents the same question.

unpublished cases have no precedential value, and none of them addressed the question either. The defendant raised it in *Barnes*, but there, this Court stated that it "need not address that point" because the defendant's subpoena failed to meet even the more permissive standard. 560 F. App'x at 40 n.1.

2. This Court should now squarely hold that *Nixon* does not apply to defense subpoenas served on third parties.

The government's core argument is that "the text of Rule 17(c) provides no support for a distinction." (G.Br.76). But the text provides no support for the *Nixon* standard. It merely says that "the court may quash or modify [a] subpoena if compliance would be unreasonable or oppressive." Fed. R. Crim. P. 17(c)(2). *Nixon*'s "approach is a relic from a 'bygone era of statutory construction.'" *Food Marketing Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019) (quoting Brief of United States). It was based on policy concerns that have no applicability here, including "deference to a coordinate branch of Government" that had received the subpoena. *Nixon*, 418 U.S. at 702.

The government traces the *Nixon* standard back to *Bowman* and *Iozia* (G.Br.75-76), but that does not help it. Those cases required defendants to satisfy heightened requirements because, by serving a Rule 17 subpoena *on the government*, they were potentially circumventing Rule 16's limits on party discovery. *See Bowman Dairy Co. v. United States*, 341 U.S. 214, 219-20 (1951);

United States v. Iozia, 13 F.R.D. 335, 338 (S.D.N.Y. 1952). The absence of Rule 16 concerns is precisely why, in *Nixon*, *the government itself* argued that "*Bowman*… and *Iozia* do[] not apply in [their] full vigor where the subpoena…is issued to third parties rather than to government prosecutors." 418 U.S. at 699 n.12. Neither the government nor the mass of unreasoned district-court cases it cites meaningfully addresses that issue.

While the government suggests that it would be "dangerous" to have Rule 17's standard vary across contexts (G.Br.76), *Nixon* expressly left that possibility open. 418 U.S. at 699 n.12. There is nothing "dangerous" about adhering to Rule 17's text where the policy reasons for applying a heightened, extratextual standard are absent (as explained above) or outweighed by other considerations (such as a defendant's constitutional rights). *See Irving*, 600 F.2d at 1036 ("the considerations supporting disclosure…are even stronger than those in *Nixon* [where] the rights of defendants are at stake rather than the interests of the prosecution").

What is dangerous is allowing the government to undermine a criminal defendant's constitutional rights by hiding evidence from the jury. What is dangerous is allowing government witnesses to lie on the stand, and then refusing to allow the defense a fair opportunity to expose those lies. What is dangerous is

when government attorneys exploit and repeat those lies in closing argument. And that is precisely what happened here.

Skelos had a factual basis for his subpoenas, which sought information critical to the defense. (DS.Br.41-45, 51-52). The district court erroneously quashed the subpoenas, violating his constitutional rights to Confrontation, Compulsory Process, and Due Process.

B. Skelos Was Prejudiced By His Inability To Confront The Government's Cooperators With Documents That Would Have Exposed Their False Testimony

The government states that any error was harmless because the defense was able to cross-examine government witnesses anyway. (G.Br.81-82). But questions asked by attorneys are not evidence. Merely asking a question is no substitute for being able to confront a witness with evidence—especially when the witness is willing to lie on the stand. The evidence was not relevant merely to impeach Bonomo's character for truthfulness; Bonomo's past misconduct showed his incentives to curry favor with Skelos (at the time of the charged conduct) and the government (at trial). But Bonomo took the stand and misled the jury about his past dishonesty, including during the period of his cooperation agreement.

The government's response also whitewashes the record below. The government fought the subpoenas and engaged in a strategy of delay. Months before trial, the defense served subpoenas, including on Bonomo and his company,

to obtain documents about his extensive misconduct and fraud. The government, however, moved to quash the subpoenas, and the district court ultimately ordered only very limited disclosures to the defense at the 11th hour. (SPA-1-2, SPA-42-43; A-5463-64,). Although the district court only agreed to permit defense counsel to cross-examine Bonomo on a limited subset of the findings of the New York State Department of Financial Services ("DFS") during trial (SPA-45-48; A-5673-5717), the defense was never given access to the critical documents underlying the DFS findings that could have been deployed to expose his lies to the jury. In the end, the only evidence of DFS's conclusions that was disclosed was Bonomo's own self-serving testimony before DFS. The net effect is that defense counsel was effectively foreclosed the possibility of effective cross-examination. And as a result, Bonomo as able to stonewall the cross-examination and mislead the jury.

C. The DFS Findings Were Not Mere Allegations

Having a government witness mislead the jury is bad enough, but in this case, something far more troubling happened. On redirect, the prosecutor, acting like the witness's personal lawyer, used a series of leading questions to guide Bonono through a point-by-point refutation of the DFS's findings. (A-5832-52). In closing argument, the government's trial attorney repeated and endorsed Bonomo's lies that the DFS findings were mere "allegations." (A-6881-82). On

appeal, the government attempts to cover for that strategy by stating that the DFS is akin to a private civil plaintiff, and that it only has authority to make allegations. (G.Br.82 n.30). That is nonsense.

The DFS is not a private civil litigant. It is a public agency with explicit statutory authority to regulate and oversee the insurance and financial industries, and here it made findings of egregious misconduct to support its decision deauthorizing Bonomo's company. Those findings and that decision, like any administrative agency's decisions, are reviewed only under the deferential arbitrary and capricious standard. *See* N.Y. CPLR §7803; *Wooley v. Dept. of Correctional Servs*., 15 N.Y.3d 275, 280 (2010).

Regulated entities subject to adverse DFS findings have the right to contest those findings in court under that deferential standard. And for someone as corrupt and litigious as Anthony Bonomo, it is not surprising that he will exhaust every avenue to contest the findings DFS made. Bonomo's testimony had the ring of a sovereign citizen—it was clear that he refused to accept the legitimacy of DFS itself. Regardless, setting aside Bonomo's eccentric and conspiratorial views, the fact remains that the DFS made *findings* of fraud.

The district court's decision to quash the defense subpoenas allowed Bonomo and the government to mislead the jury about his fraud. Given that Bonomo was a star witness, that decision cannot possibly be harmless. Moreover,

the government has the burden of proving harmlessness (DS.Br.51), which it cannot do without knowing what evidence the subpoenas would have uncovered. Nor should it be permitted to obtain a tactical advantage by preventing the defense from obtaining materials one would have thought the government was duty-bound to procure for itself, to ensure that its star witness was not committing perjury. Skelos is entitled to a new trial or, at a minimum, a hearing on prejudice after the documents he sought are produced.

V. THE GOVERNMENT LEAKED GRAND JURY INFORMATION, AND THE DISTRICT COURT REFUSED TO INVESTIGATE THE MISCONDUCT

The district court erred when it refused to investigate substantial evidence of government misconduct involving grand jury leaks. There was more than *prima facie* evidence to justify a hearing. The government does not strenuously contest that point on the merits—rather, it urges this Court to avoid the merits. The government's waiver arguments are meritless, and its claims of harmlessness cannot be assessed without first conducting a hearing.

A. Skelos Preserved His Argument

The government again attempts to avoid the claim on the merits by resorting to law-of-the-case doctrine. The district court declined to apply that discretionary doctrine, *see Westerbeke Corp. v. Daihatsu Motor Co*., 304 F.3d 200, 219 (2d Cir. 2002), and instead ruled on the merits. That was proper because the doctrine

requires a realistic assessment of the parties' incentives at the time of the prior proceeding. *United States v. Quintieri*, 306 F.3d 1217, 1229-30 (2d Cir. 2002). It does not require a defendant to litigate every possible claim in a first appeal. Establishing such a rule would undermine rather than further interests of judicial economy. And once again, in this case, the nature of the claims changed between the first trial and the second.

By the time of the second trial, the motion for a Rule 6(e) hearing had a different evidentiary basis. That was due in part to the evidence of leaks in related cases, including *United States v. Walters*. The government now claims that "the leaks in the *Walters* case clearly had no bearing on this case." (G.Br.89 n.33). To the contrary, the leaks in the *Walters* were pivotal in showing the pattern and practice of leaks out of the Southern District of New York United States Attorney's Office under Preet Bharara. (DS.Br.58).

B. The District Court Applied The Wrong Standard When It Declined To Hold A Hearing

The district court denied Skelos's motion because it held that the defendant had failed to make a "definite" showing of federal law enforcement leaks. But in order to obtain a hearing, a defendant need only make a *prima facie* case of a violation. That is a low standard, requiring only enough evidence to raise a fair inference of a violation that justifies further inquiry.

On appeal, the government tacitly concedes that a "definite showing" is not required to obtain a hearing. Rather, the government argues that the district court did not actually apply that standard, and instead only used the word "definite" once. (G.Br.93). But the district court's language, reasoning, and conclusion show that it applied the wrong standard. In describing the standard, the district court relied on Fifth Circuit law that, where a defendant's showing is not "definite," a court may summarily deny a hearing based on a government denial of leaks. (SPA-30). It then repeatedly returned to that standard throughout its discussion of the proffered evidence of leaks. It its discussion, it began by stating that the disclosure was "not necessarily prohibited by Rule 6(e)." (SPA-31). It concluded by stating that defendants had failed to make a sufficient showing—and it again cited the incorrect Fifth Circuit standard, stating that the defense showing was "not definite." (SPA-32).

In discussing the April 16 and 17 *Post* and *Newsday* articles, the district court concluded that it was "not necessarily true" that the sources were federal law enforcement, because the source "could have" been local law enforcement. (SPA-33). And it again noted that it would credit the government's denial as sufficient to defeat a *prima facie* case. (*Id.*). It applied the same standard discussing the April 16 and 17 *Times* articles, as well as unsourced articles. (SPA-33-34). Throughout these discussions, the district court here relied several times on *United States v.*

Blaszczak, 2018 WL 1322192 (S.D.N.Y. Mar. 12, 2018)—another district court case that held the defendant to an unnecessarily stringent standard.

The court did the same with respect to the May 2 *Post* article. That article cited "law-enforcement sources," but the district court held it was "unlikely" that those sources were federal. The court again cited *Blaszczak.* (SPA-34).

Throughout its order, the district court relied on an improper heightened standard. It held that the defendant's motion could be denied because a government attorney had denied any leaks and because the defendant's showing was "not definite." It stated repeatedly that the evidence did "not necessarily" show a violation, so no hearing was required. It held that so long as there were some possible innocent explanation for the articles, no further inquiry was required. And on top of all that, the district court erroneously held that because none of the articles were individually sufficient to show a Rule 6(e) violation, the articles taken together were insufficient to show a violation. "[T]his kind of divide-and-conquer approach is improper" because it ignores that individual facts, while potentially innocent "in isolation," must be "viewed as part of a totality." *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018).

No reasonable jurist could look at the totality of the evidence here—including everything that is known about how the United States Attorney's Office under Preet Bharara and the New York FBI regularly fed information to the

press[4]—and conclude that federal law enforcement played no role in these leaks. At a minimum, the evidence submitted by the defendant raised a fair inference that warranted further inquiry.

C. The Government's Prejudice Arguments Lack Merit

The government argues that because Skelos cannot, on the existing record, demonstrate prejudice sufficient to justify dismissal of the indictment, he is entitled to no relief. (G.Br.94-97). The government's prejudice argument rests on three analytical flaws.

First, the government falsely suggests that any errors in grand jury proceedings are necessarily harmless if a defendant is subsequently convicted at a fair trial. For that proposition, it relies on *United States v. Mechanik*, 475 U.S. 66 (1986). But while *Mechanik* rejected the bold proposition that any Rule 6 violation "requires automatic reversal," *id*. at 71, it did not adopt the equally absurd proposition that a Rule 6 violation *never* justifies reversal. Rather, it held that such errors are subject to the standard of Rule 52. *Id*. at 71-72.

[4] A year ago, the Office of the Inspector General released a report that detailed a "culture of unauthorized media contacts" in the FBI's New York office. Office of the Inspector Gen., U.S. Dep't of Justice, No. 18-04, *A Review of Various Actions by the Federal Bureau of Investigation and Department of Justice in Advance of the 2016 Election* xii (2018), *available at* https://www.justice.gov/file/1071991/download. It found that "numerous [New York] FBI employees...at all levels of the organization" were "in frequent contact with reporters." *Id*. at xii, 429-30. These are not isolated incidents.

Second, the government falsely assumes that the only possible remedy is outright dismissal of the criminal case. But as courts around the country have held, dismissal is not the only remedy for illegal disclosure of grand jury secrets. "Appropriate relief under Rule 6(e) may include contempt sanctions and equitable relief, *i.e.*, either or both, depending upon the nature of the violation." *Barry v. United States*, 865 F.2d 1317, 1321 (D.C. Cir. 1989). Equitable relief could have included trial relief, such as jury instructions or exclusion of evidence. It is admittedly true that dismissal would only be true for severe violations, but it does not follow that only the most severe violations can result in a remedy.

Third, and most importantly, the government falsely suggests that a defendant must demonstrate prejudice as part of his *prima facie* case to obtain a hearing at all. That argument puts the cart before the horse. The primary purpose of an evidentiary hearing is to determine the nature and scope of the violation, and thus the nature and scope of the remedy. Ordinarily a district court would assess prejudice after a hearing—"[i]f after such a hearing the trial court determines that remedial action is warranted, it may order" an appropriate remedy. *Id.* at 1321.

It would be highly unusual for this Court, based on the existing record, to dismiss the case based on the government's violation of Rule 6(e). But that is not what Skelos is requesting. As was made clear in his opening brief (DS.Br.60), his claim on appeal is that the district court erred by dismissing this issue without a

hearing. The proper appellate remedy for that error is a remand for an evidentiary hearing so the district court can determine how far the abuse reached. At that point, the district court can determine what further remedy, if any, is warranted.

* * * *

Setting to one side the remedial question, the bigger picture is that the government's grand jury leaks were part of a pattern of misconduct throughout this case. That government's misconduct cannot be ignored, and its attempts to evade scrutiny should be rejected. This Court should not endorse the government's win-at-all-costs approach to criminal prosecution.

CONCLUSION

The judgment should be vacated, and the case remanded for a new trial.[5]

Dated: New York, New York
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[5] Pursuant to Rule 28(i), Skelos joins Points I and II of Adam Skelos's reply brief in full, and Point V to the extent applicable to Skelos.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENT, AND TYPE STYLE REQUIREMENT

1. The undersigned counsel of record for Defendant-Appellant Dean Skelos certifies pursuant to Federal Rules of Appellate Procedure 32(g) and Local Rule 32.1 that the foregoing brief contains 6,818 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), according to the Word Count feature of Microsoft Word 2016.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point font of Times New Roman.

Dated: July 24, 2019

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