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VIA ECF

Catherine O'Hagan Wolfe, Clerk of Court
United States Court of Appeals for the Second Circuit
40 Foley Square
New York, New York 10007

Re: *United States v. Skelos*, Nos. 18-3421(L), 18-3442(CON)

Dear Ms. Wolfe:

Pursuant to the panel's request at oral argument, appellant Dean Skelos submits this supplemental brief to address the impact of *United States v. Silver*, 948 F.3d 538 (2d Cir. 2020) ("*Silver II*"). Under *Silver II*, the jury instructions at Skelos's trial were erroneous. That error deprived Skelos of his constitutional right to have the jury find each element beyond a reasonable doubt. The only remaining question is whether that error can be held harmless.

The government's strategy to save these convictions is clear. It will focus only on the prosecution's evidence, and ignore evidence of innocence presented by the defense. It will focus on points where it urged the jury to convict based on a *quid pro quo* tied to specific matters, and ignore points where it told the jury it could also convict on a more generalized understanding that Dean Skelos would be "standing by" to help in some unspecified way as opportunities arise. It will argue this case as if it were an insufficiency claim, and ignore the *Neder* standard.

If this Court applies the law on harmlessness, there is only one possible result: reversal.

A. The Court Must Vacate If A Properly Instructed Jury Might Have Acquitted

The harmlessness standard is critical. The government bears the burden of demonstrating

beyond a reasonable doubt that constitutional errors are harmless. *Chapman v. California*, 386 U.S. 18, 24 (1967). In *Neder v. United States*, 527 U.S. 1 (1999), the Supreme Court applied *Chapman* to instructional error that prevents a valid finding on an element of an offense: "where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding[, the reviewing court] should not find the error harmless." *Id.* at 19; *accord United States v. Silver*, 864 F.3d 102, 119-24 (2d Cir. 2017) ("*Silver I*"); *United States v. Newman*, 773 F.3d 438, 451 (2d Cir. 2014); *United States v. Quattrone*, 441 F.3d 153, 179 (2d Cir. 2006).

That directive is clear. And under that standard, this is not a close case.[1]

B. The Defense Case And The Government's Alternative Theories Require Reversal

Before analyzing the charges in detail, it is crucial to understand the basic points that compel reversal. *Silver II* held that, for bribery offenses, "a particular question or matter must be *identified at the time* the official makes a promise or accepts a payment." 948 F.3d at 558 (emphasis altered). In violation of *Silver II*, the instructions allowed the jury to convict Skelos for promising unspecified official action, as the opportunities arose, in exchange for the benefits to Adam—a generic *quid pro quo*, which we will call the "generic official action" theory. The government contends that this error was harmless by arguing the jury could have inferred that Skelos promised to act on specific, identified matters in exchange for the benefits to Adam (what we will call the "specified matter" theory). But the government's focus on inculpatory evidence, instead of the record as a whole, is flawed. Even if the evidence was *sufficient* for a jury to find a promise on a specified matter, it is not clear beyond a reasonable doubt that the jury did so.

The jury could easily have rejected the government's specified-matter theory and

[1] At oral argument, the government argued that this Court should apply the test in *United States v. Jackson*, 196 F.3d 383 (2d Cir. 1999). As Adam Skelos's supplemental brief explains, *Jackson* does not bind this panel. Regardless, the error in this case cannot be held harmless.

convicted based on the government's alternative theory of generic official action. As the government concedes, the defense contested the *quid pro quo* element and presented evidence, including testimony from Skelos himself, that there was no *quid pro quo* whatsoever. (G.Br.4, 22-23). The jury did not accept this denial wholesale, but could have credited it in part, finding that Skelos's promises of official action were only vague and generic in nature. This is especially likely given the evidence and the arguments to the jury, as well as the fact that the jury deliberated for three days. *See United States v. Stewart*, 907 F.3d 677, 689 (2d Cir. 2018).

First, the defense disputed that there was any *quid pro quo* involving the specific matters identified by the government, and there was sufficient evidence to support the defense theory.[2] The defense case rested on several fundamental pillars, including that (1) Skelos had always supported the legislation in question without regard to any payments to Adam; (2) Skelos could not have flouted his party and opposed the legislation, (3) the timing of benefits to Adam suggested no exchange for any official acts, and (4) the payors had long-term relationships with Skelos and thus had reason to help Adam independent of any specific legislation. These pillars had "some basis in the record," *Quattrone*, 441 F.3d at 180, including Skelos's own testimony, and often overwhelming support. A properly instructed jury could have found for the defense.

Second, precisely because of these defense arguments, the government urged the jury to convict on its alternative theory that Skelos had promised generic official action. It began its summation and its rebuttal by underscoring Skelos's "[e]normous" power (A6586, A6860) and repeatedly returned to this theme (A6589, A6599, A6679-80, A6861-63), noting that "when the CEO of the Senate calls you and asks you to do something, you do it" (A6614). It characterized

[2] The government tacitly conceded this at oral argument by focusing on the second step of *Jackson*'s two-part test. (*See* audio recording at 22:18-22:53; AS.Supp.Br.2).

the defense arguments about specific matters as "completely irrelevant" and argued that, based on the erroneous jury instructions, it was enough that Skelos had offered favorable treatment "as opportunities present themselves." (A6887).[3] And it reiterated this point for each charged scheme, as explained below. Thus, the jury was presented with two theories of guilt—one legally valid, one legally invalid. There is no way to know which one the jury chose, requiring reversal. *McDonnell v. United States*, 136 S. Ct. 2355, 2375 (2016); *Silver I*, 864 F.3d at 119.

C. The Government Cannot Prove Harmlessness As To Any Of The Charged Schemes

1. *The jury could have convicted Skelos for promising generic official action to Glenwood.* All the jury had to do was accept the testimony of Charles Dorego, who repeatedly testified that he did not fear Skelos would harm Glenwood on any specific matter. On direct, he testified that "there [we]re an enormous number of statutes and regulations that could implicate our business, and things could change that I wouldn't even see." (A4602). He testified that he did not "fear[] anything specific" and "just had an overall sense of anxiety." (A4338). On cross, he conceded that Skelos "never linked his legislative position to help for Adam." (A4710). On redirect, he testified that while Glenwood initially cared about "two major pieces of legislation," later "there were any number of other things that were in front of us" that "could have impacted the business adversely." (A4727). On recross, he conceded that Skelos "never…specif[ied] any action that he would take against [Glenwood]." (A4728). On re-redirect, he testified that "at any time [Skelos] could do anything behind the scenes that could adversely impact our business," which created "anxiety" that "something bad could happen to us." (A4729). And on re-recross, he conceded that Skelos "never, ever, identified this 'something.'" (A4729).

[3] It also emphasized Skelos's state of mind when he took official action, discouraging the jury from considering whether he had a specific matter in mind earlier, at the time of the promise or payment. (A6594, A6868).

In its summation, the government emphasized this testimony and characterized it as dispositive. The government first cited Dorego for the generic proposition that Glenwood got "Dean Skelos [to] use his official actions to help the company and not harm it." (A6596). Then, it quoted Dorego's testimony that "at *any* time [Skelos] could do *anything*" to harm Glenwood. (A6596 (emphasis added)). Finally, it argued that "[t]hat is an illegal quid pro quo right there." (A6597). Having "told the jury that [this] w[as] 'devastating evidence,'" the government cannot claim the error was harmless. *United States v. Joseph*, 542 F.3d 13, 21 n.7 (2d Cir. 2008). The jury "could have" convicted on this basis "and gone no further." *Silver I*, 864 F.3d at 123 n.114.

Dorego did not testify that there was a *quid pro quo* for specific legislation because that would have been absurd. Skelos had always supported the 421-a extenders, which were crucial to many constituencies and regularly passed with overwhelming bipartisan support. (A4316, A4674, A4705, A6218-20, A6246-47, A6333). Moreover, the evidence showed mismatched timing between benefits and official acts. 421-a was passed as part of the Rent Act in June 2011—but Adam did not receive any benefits until 18 months later. (A4461, A4783, A4980).[4]

The government suggests that the affirmance of Silver's "real estate" convictions requires affirmance here, but it is wrong. *First*, unlike Skelos, Silver did not testify. *Cf. Quattrone*, 441

[4] The government argues that Glenwood "promised" Adam a job before the 2011 Rent Act, and that Skelos "raised that promise" at a June 2011 meeting about the Act. (ECF No. 175). But this mischaracterizes the testimony, and the jury was not required to accept the government's view. *Silver I*, 864 F.3d at 123. *First*, Glenwood did not "promise" any job. Dorego testified that he told the Skeloses he would "introduce" Adam to AbTech to see "if they were comfortable" with hiring him. (A4431, A4435-36, A4446-47, A4449). *Second*, while Dorego testified that Skelos requested help for Adam at the June 2011 meeting, Dorego did not believe Skelos was linking his vote to Dorego's willingness to help Adam. Rather, Dorego simply thought the request was "improper" because it was made in a "business" context and might "cloud[] people's judgment." (A4458-59). *Third*, as explained above, Dorego did not testify to any specific link. *Finally*, the government's Rent Act contention is inconsistent with its oral argument in the prior appeal, where it claimed that "each scheme" was an "'as opportunities arise' scheme[]" rather than "a one-off agreement: this payment for this vote." (No. 16-1618 audio recording at 47:09-47:39).

F.3d at 179-80. *Second*, Silver was a Democrat who generally voted against Glenwood. (*Silver II*, No. 18-2380, Dkt. 59, JA0874). Skelos had strong political reasons to support Glenwood, so Glenwood had no need to bribe him. *Third*, the "pattern" of payments and votes was stronger in *Silver*. 948 F.3d at 563, 571. *Fourth,* Silver's jury deliberated just over one day, not three days. *Cf. Stewart*, 907 F.3d at 689. *Fifth*, it is unclear that *Silver II* properly analyzed harmlessness, which the parties did not brief. (*Silver II*, Dkt. 135-1 at 13-14). The error here was not harmless.

2. *The jury could have convicted Skelos for promising generic official action to PRI.* Anthony Bonomo's testimony, like Dorego's, suggested that Skelos did not promise to act on any specified matter. Bonomo testified that he did not want to jeopardize legislation that was important to PRI (A5527-28), but "there were many laws and proposals in the State that would have an effect on PRI's business" (A5533). While PRI was especially interested in the extender legislation, the government did not want to rely exclusively on the extenders. Instead, it specifically elicited testimony from Bonomo that "multiple issues" and "other pieces of legislation g[o]t discussed" at "lobbying meetings with Senator Skelos," since "insurance is a very heavily regulated and legislatively run business." (A5537-39, A5570). Bonomo testified at length about PRI's many different legislative interests from 2011 through 2015, and the government introduced a chart exhibit that outlined these interests for the jury. (A5541-42, A5553-56, SA60). The government had a PRI lobbyist testify about them as well. (A5947-58).

When Bonomo testified about his decision not to fire Adam despite his bad behavior, he cited only a vague "fear of, you know, a reprisal or something not happening properly in Albany," and the desire to avoid "a wedge in our legislative pursuits up in Albany" or "any problem with the senator." (A5645-46). On cross, he admitted that Skelos never linked "his legislative position" or "the extender" to Adam's employment. (A5751). And on redirect, the

government made sure to ask him about the *several* different "pieces of legislation" that PRI had "pending in Albany at that time." (A5853-54). In summation, the government quoted Bonomo's amorphous testimony about "reprisals" and "wedges," encouraging the jury to convict Skelos based on Bonomo's unspecified fears. (A6676). And the government urged the jury to "keep in mind" the exhibit chart showed that "PRI always has issues pending." (A6888-89; *see* SA60). Given the number of different programs at issue, the jury could have found a *quid pro quo* for "insurance legislation" in general. This would not satisfy *Silver II*. *See* 948 F.3d at 570 n.22.

Bonomo did not claim there was a *quid pro quo* for the extender legislation because it would have been utterly implausible. As with 421-a, the extenders regularly passed with overwhelming support, the Republican Senate's support for the extenders was never in doubt, and Skelos had always supported them for reasons independent of any payments to Adam. (A4317-21, A5349-52, A5750, A5993-96, A6003-04, A6203-09, A6322-23). Furthermore, the timing of Adam's employment with PRI suggested it had nothing to do with Skelos's votes. The extenders were approved in 2011, 2012, and 2015. (SA59). However, Bonomo did not make any serious efforts to hire Adam until late 2012, after the first two votes; Adam only began work in 2013; and Adam's contract expired before the 2015 vote. (A5585-88, A5602, A5828).[5]

3. *The jury could have convicted Skelos for promising generic official action to AbTech.* While the government argued that Skelos agreed to act on certain specific matters, it also expressly relied on the alternative theory that Skelos promised to benefit AbTech in

[5] More generally, the evidence of a *quid pro quo* was weak. Bonomo initially agreed to refer court-reporting work to Adam's girlfriend's employer, but the assistance was apparently negligible and, at worst, an attempt to curry favor with Skelos. (A5574, A5801-04). Bonomo also considered Skelos a friend (A5785-86), and he "felt sorry for Adam and wanted to help him out by giving him a job at PRI" (A5902); Skelos "did not arrange the job" (A5909). Later, Bonomo firmly confronted Adam about his bad behavior and demoted him. (A5742-47).

unspecified ways. Invoking the jury instructions, the government argued that "all of the little things that Dean Skelos did, like setting up the DOH meeting, can be considered as evidence of a corrupt agreement," even if they were not official acts, and that "those little things….show[] you how the defendants made clear to AbTech that the senator was standing by to help." (A6645). According to the government, this open-ended arrangement was an independent "reason" to convict: "the Skeloses previewed for AbTech what their money could buy" and signaled that Skelos would "be standing by to help the company as the opportunities present themselves." (A6641-42; *see also* A6641 (defendants "made sure that AbTech knew that the senator had a great deal of power and that paying his son was a way to tap into it"), A6645-46 ("in return for paying Adam Skelos 10,000 a month, the senator would take care of AbTech in Albany" and "be available to help AbTech in the future")). Indeed, Bjornulf White vaguely testified that AbTech gave Adam a raise because "Skelos would be available to be helpful to AbTech." (A5015-16).

The jury could easily have accepted this theory and rejected the government's other, more specific ones. The "hostage email," for example, was sent by Dorego to AbTech, purportedly after Dorego spoke to Adam. Skelos denied sending or authorizing it; there was no proof he did; and even AbTech believed it might be a ploy by Dorego rather than the Skeloses. (A4991-92, A5160-63, A5241-44, A6393). AbTech didn't seek legislation until well over a year after the email, and again, Skelos had independent reasons for supporting it. (A5353-56, A5414-15, A6232-33; AS.Br.15). And while Skelos asked Mangano about Nassau County's debt to AbTech, this was not necessarily official action, and Skelos had reasons other than bribery for making that inquiry (such as that AbTech was owed money and Adam brought that problem to Skelos's attention). (A6502-03). The jury could have acquitted had it been properly instructed.

For these reasons, and those in Adam's brief, a new trial is required on all counts.

Catherine O'Hagan Wolfe, Clerk of Court
February 21, 2020

Respectfully submitted,

/s/ Alexandra A.E. Shapiro

Alexandra A.E. Shapiro

cc: All Counsel (via ECF)