22-313

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—

STEPHEN M. CALK, AKA, SEALED DEFENDANT 1,

Defendant-Appellant.

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

REPLY BRIEF FOR DEFENDANT-APPELLANT STEPHEN M. CALK

PAUL H. SCHOEMAN
DARREN A. LAVERNE
KRAMER LEVIN NAFTALIS
& FRANKEL LLP
1177 Avenue of the Americas
New York, New York 10036
(212) 715-9100

ALEXANDRA A.E. SHAPIRO
DANIEL J. O'NEILL
AVERY D. MEDJUCK
SHAPIRO ARATO BACH LLP
500 Fifth Avenue, 40th Floor
New York, New York 10110
(212) 257-4880

Attorneys for Defendant-Appellant Stephen M. Calk

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INTRODUCTION

The government's brief confirms the fundamental flaws underlying this extraordinary prosecution. Stephen M. Calk was convicted of bank bribery for loans that became the most profitable in the bank's history—even though the evidence established that he believed the loans would benefit his bank, and even though the alleged "bribe" was a *referral* with no objectively quantifiable value that led to no job offer or second interview. This evidence is incompatible with the bank bribery statute's requirements that the defendant acted "corruptly" and received a "thing of value." As the opening brief explained, the language, structure, and purpose of the bank bribery statute prove that (1) a "thing of value" must have objective pecuniary value; and (2) acting "corruptly" requires acting *against* the bank's interests.

The government attempts to dismiss Calk's arguments as foreclosed by precedent, but this Court has never interpreted the statutory provisions of §215 at issue here. That is why the district court acknowledged when granting bail that Calk's appeal raises "a novel or fairly debatable question." (A-581-82). The government relies on outdated cases involving other statutes and completely ignores this Court's most recent pronouncement on the meaning of "corruptly," which conclusively disposes of its arguments about that statutory term. *See Pfizer, Inc. v. U.S. Dep't of Health & Human Servs.*, 42 F.4th 67, 74 (2d Cir. 2022).

These obfuscations underscore what is missing from the opposition brief: any meaningful analysis of the bank bribery statute's *text*, let alone the rigorous, formal statutory construction mandated by recent Supreme Court decisions. The text and structure of §215 flatly refute the government's erroneous contentions that Calk can be guilty even though he received nothing of objective monetary value in connection with the Manafort loans and believed the loans would benefit the bank.

The government's efforts to defend its improper use of a grand jury subpoena to secure General Rigby's presence and prepare for trial are equally spurious.

Calk's convictions should be reversed.

ARGUMENT

I. INSUFFICIENT EVIDENCE AND FLAWED JURY INSTRUCTIONS AS TO "THING OF VALUE" MANDATE REVERSAL

To support a felony violation of 18 U.S.C. §215, the government was required to prove that Calk received a "thing of value" worth over $1,000 from Paul Manafort. As Calk's opening brief explains, a "thing of value" under §215 must have objective monetary value. (Br.26-30). The evidence at trial, however, established that the *only* thing Calk received from Manafort—a referral for a "courtesy" job interview that was unlikely to lead to a position in the incoming Trump administration—lacked any objective market value, and was precisely the

sort of thing typically given for free.[1] This fact exemplifies the unprecedented nature of Calk's conviction and eviscerates the government's case.

A. A "Thing Of Value" Under §215 Must Have Objective Pecuniary Value

The government spends page after page arguing that, within §215, "anything of value" is code for "anything at all that the defendant subjectively values." (G.Br.16-25). Conspicuously missing from the government's analysis, however, is any discussion of the *text* of §215 or "anything of value"'s meaning in the specific context of the statute. This is unsurprising, because the text and structure of §215 conclusively establish that Congress intended to limit "thing of value" to "things" whose value can be quantified in monetary terms. (*See* Br.26-31).

Rather than confront the actual language of §215, the government resorts to authorities construing similar language in *other* statutes. But those statutes lack the unique structural characteristics—a felony/misdemeanor distinction and fines tied to the bribe's monetary value—reflecting Congress's intent that "thing of value" have an objectively ascertainable monetary value. In so doing, the government ignores the Supreme Court's admonition that statutory interpretation "begins with the language of the statute" construed "in its context and in light of the terms

[1] The government apparently has abandoned any argument that Calk's unpaid volunteer position on the NEAC was a "thing of value" that could support conviction. (G.Br.25-28).

surrounding it." *Leocal v. Ashcroft*, 543 U.S. 1, 8-9 (2004). Likewise, the government ignores "that identical language may convey varying content when used in different statutes, sometimes even in different provisions of the same statute." *Yates v. United States*, 574 U.S. 528, 537-38 (2015) (collecting cases); *see also*, *e.g.*, *Ratzlaf v. United States*, 510 U.S. 135, 141 (1994) ("'Willful'…is a word of many meanings, and its construction is often influenced by its context.") (cleaned up).

The government ignores recent Supreme Court precedents hewing closely to statutory text and structure under analogous circumstances, which compel a narrow construction of "thing of value." *See*, *e.g.*, *Van Buren v. United States*, 141 S. Ct. 1648, 1654-60 (2021); *Lagos v. United States*, 138 S. Ct. 1684, 1688-89 (2018); *McDonnell v. United States*, 579 U.S. 550, 565-77 (2016); *Yates*, 574 U.S. at 535-49; *Begay v. United States*, 553 U.S. 137, 141-43 (2008); *Leocal*, 543 U.S. at 9-13. These cases reject the expansive use of a word or phrase in a criminal statute where, as here, the statutory text and structure limit its reach, and lenity principles or other constitutional concerns dictate a limiting construction.

Ignoring the Supreme Court's teachings, the government relies on outdated cases that forgo textual analysis and bedrock canons of statutory interpretation, instead using legislative history, purpose, or other methods to expand the statutory text. The Supreme Court now rejects such an approach as a "relic from a bygone

era of statutory construction." *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019).[2] Thus, the subsequent Supreme Court precedent "fatally undercut[s]" the government's caselaw. *Finkel v. Stratton Corp.*, 962 F.2d 169, 175 (2d Cir. 1992).

Even if they were still good law, the government's cases would be inapposite. The government relies primarily on dicta from four cases decided in the early 1990s or before. (G.Br.20). But each interpreted "thing of value" in the context of *other* statutes (some not even involving bribery) that lack §215's structural characteristics. *See United States v. Williams*, 705 F.2d 603, 622-23 (2d Cir. 1983) (18 U.S.C. §201); *United States v. Ostrander*, 999 F.2d 27, 30-31 (2d Cir. 1993) (18 U.S.C. §1954); *United States v. Rosenthal*, 9 F.3d 1016, 1023-24 (2d Cir. 1993) (§1954); *United States v. Girard*, 601 F.2d 69, 70-71 (2d Cir. 1979) (18 U.S.C. §641). Moreover, none held that a "thing" with no objectively-measurable monetary value that is commonly given for free—like the "thing" here (Br.32)—can be a "thing of value":

[2] In *United States v. Williams*, for example, the court ignored the text and instead relied on Congress's general "purpose of punishing misuse of public office." 705 F.2d 603, 623 (2d Cir. 1983). *United States v. Girard* similarly eschews textual analysis in favor of a hodgepodge of cases interpreting unrelated statutes about "gambling," "intercourse," and other things. 601 F.2d 69, 70-71 (2d Cir. 1979).

1. In *Williams*, the "thing of value" was stock in a mining venture expected to be worth as much as $100 million once financing was obtained. 705 F.2d at 607, 611. The stock lacked objective monetary value *only* in that its value was contingent, not because it was a "thing" of the sort usually given for free, with value only to the defendant.

2. In *Ostrander*, the "thing of value" was the opportunity to purchase off-market warrants exchangeable for stock in a holding company. The defendant purchased the warrants for $13,200 and later they were worth $750,000. 999 F.2d at 29. The defendant's argument, which the Court rejected, was that the warrants were not "things of value" because they were purchased without any discount and were not guaranteed to rise in value. *Id.* at 30-31. The Court did *not* hold that the warrants were "things of value" simply because the defendant subjectively prized them; in fact, the Court specifically noted that "the warrants had value, if for no other reason [than] because numerous investment professionals…were willing to, and did, purchase them." *Id.* at 31.

3. *Rosenthal* concerned transactional tax losses the defendant generated to help a third party lower his taxes by $800,000. 9 F.3d at 1018, 1023-24. Under the circumstances, the Court easily concluded that the tax losses were a "thing of value"; the defendant facilitated them knowing they would lead to savings of

hundreds of thousands of dollars. *Id.* at 1023. That massive tax savings bears no resemblance to the putative "thing of value" here.

4. *Girard* did not even involve bribery, but instead a conviction for unauthorized sale of government property. 601 F.2d at 70. The "thing of value" was information revealing whether certain individuals were DEA informants, which the defendant sold for $500 per request. *Id.* The only question was whether intangible information could be a "thing of value" under §641; the Court, noting that cash had been exchanged for the information, held that it could. *Id.* at 71. However, Calk does not dispute that an intangible can be a "thing of value" under §215, so long as the evidence establishes that the thing has objective pecuniary value.

None of these cases sheds light on the question here: whether a referral for a "courtesy" job interview not likely to lead to a job offer, which multiple witnesses testified they would never think to charge for, is a "thing of value" under §215.[3]

[3] The government's out-of-circuit authority is similarly inapposite. In *United States v. Marmolejo*, unlike here, the objective "market value" of the bribe was ascertainable by "traditional valuation methods," based on the cash amount paid by the briber to the bribee. 89 F.3d 1185, 1194 (5th Cir. 1996). *United States v. Townsend* also relied on the "market price" agreed to by the briber and bribee. 630 F.3d 1003, 1012 (11th Cir. 2011). In *United States v. Fernandez*, the subject matter of the bribe was *objectively* worth around $1.5 million. 722 F.3d 1, 15-16 (1st Cir. 2013). Similarly, *United States v. Mongelli* stated only that the statutory threshold could be met by evidence of "the *actual* value of" the subject matter of the bribe to the defendants. 794 F. Supp. 529, 531 (S.D.N.Y. 1992) (emphasis

The government's cursory efforts to brush aside the textual evidence that "Congress clearly intended [§215's] 'thing of value' to have at least some ascertainable value," *Adcock v. Freightliner LLC*, 550 F.3d 369, 375 (4th Cir. 2008), are equally misplaced. The government acknowledges that §215 uses the monetary value of the alleged bribe to distinguish between misdemeanor and felony offenses and to prescribe the maximum permissible fine. But it dismisses these unique statutory characteristics as irrelevant. It contends that "[i]f defendants' subjective valuation of an item can distinguish legal from illegal conduct, it can *a fortiori* distinguish felony from misdemeanor offenses," and "[i]t can hardly be the case that a defendant's subjective valuation of an item can distinguish criminal from non-criminal conduct, but cannot be used to set a maximum fine amount." (G.Br.21, 23). These arguments, however, prove nothing, because they assume the conclusion the government seeks to demonstrate: that, under §215, a defendant's subjective valuation is relevant to whether a "thing of value" was exchanged. Question begging aside, the government does not offer any way to square its statutory interpretation with the language of §215.

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added). The government's other cases involved statutes with no dollar threshold for the "thing of value." Many did not even involve bribery offenses.

B. The Government Failed To Prove Calk Received A "Thing of Value" Worth Over $1,000

The *only* evidence the government presented to support its theory was that Calk spent approximately $1,850 to travel, on short notice, from Chicago to New York to attend a preliminary interview for a position in the Trump administration. (*See* A-525). On appeal, the government doubles down on this theory, asserting that Calk's travel and lodging expenses provide "concrete proof" that Manafort's assistance was worth more than $1,000, at least to Calk. (G.Br.25). But the government's contrived valuation theory is flawed in numerous respects, and merely underscores the intellectual hoops the government is willing to jump through to artificially shore up this unprecedented prosecution.

First, as demonstrated in Calk's opening brief (at 26-31) and *supra*, only *objective monetary value* is sufficient to establish a "thing of value" under §215. Calk's travel expenses fail to prove anything about the real-world value of Manafort's assistance.

Second, it is common sense that Calk's travel expenses fail to establish beyond a reasonable doubt anything at all about the value that Calk placed on Manafort's assistance. The government cites no authority endorsing its strained valuation theory; indeed, when the government resorts to these sorts of creative valuation theories, courts reject them. *See*, *e.g.*, *United States v. Tillmon*, 954 F.3d 628, 645-46 (4th Cir. 2019) (rejecting evidence "tangentially related" to value of

subject matter of bribe); *cf. United States v. Owens*, 697 F.3d 657, 660-61 (7th Cir. 2012) (evidence that subject matter of alleged bribe "involved" something worth more than statutory threshold insufficient where subject matter itself could be obtained for free). Calk's travel expenses were dictated by the price of airline travel on short notice and the cost of a high-end hotel; it would be absurd to accept these expenses as proxies for the value of the alleged bribe. It is no surprise that the government cannot identify a single case endorsing its valuation theory, or anything like it.

Third, the government's contention that Calk's travel expenses prove "a lower bound on the interview's value to Calk" (G.Br.26) fails, because it proceeds as if Calk paid *Manafort* approximately $1,850 for his assistance. The argument ignores that in exchange for his money Calk received a round-trip airplane flight and lodging at a Manhattan hotel, *not* a referral from Manafort for an interview in the Trump administration. Rather than addressing this obvious fact, the government argues, bizarrely, that the jury "could reasonably reject" the argument that Calk's money went to pay for hotel and airfare, as if the evidence on this point allowed for multiple competing reasonable inferences. But there is no dispute that Calk received precisely what he paid for—flights and a hotel stay—in exchange for his money. The government also improperly focuses on Calk's subjective appraisal of the value of the *interview itself*, instead of the value of Manafort's

assistance. In any case, whether the evidence was sufficient turns on the *legal question* whether travel costs are an appropriate measure of a bribe's value, which this Court reviews *de novo*. *See United States v. Novak*, 443 F.3d 150, 157 (2d Cir. 2006); *Tillmon*, 954 F.3d at 637.

The government also suggests that, beyond Calk's travel expenses, there was alternative evidence from which the jury could have found a "thing of value" worth over $1,000. These efforts to distort the trial court record are unavailing.

For example, the government vaguely asserts that the value of the excess risk associated with the loans was "surely" above $1,000 because, long after they were extended, the OCC rated the loans "substandard." (G.Br.28 n.4, Dkt.123 at 2; *see also* G.Br.2 (describing loans as "flawed")). But the jury never heard this evidence because it was *excluded* by the district court (Dkt.159), and Calk's conviction obviously cannot be affirmed based on evidence never presented to the jury. The government's attempt to use excluded evidence to prove Calk's conviction smacks of gamesmanship and underscores the paucity of *actual* "value" evidence it had. In any event, the loans were offered at the bank's standard terms and rates, or higher (A-490-91, A-348-49), and were part of the bank's portfolio lending program, which was specifically for riskier loans that would generate higher income (A-320-23). The government repeatedly told the jury it could convict even if the loans were the "best…in the world" (A-421-22)—a contention

starkly at odds with the government's suggestion that it proved the loans were excessively risky. Indeed, at sentencing, the district court found that "the evidence failed to establish" by even a preponderance of the evidence "the economic value of what Mr. Calk gave to Mr. Manafort." (A-573).

The government fares no better with its claim that a preliminary interview for Undersecretary of the Army is an "inherently valuable opportunity" that is obviously worth more than $1,000. (G.Br.28 n.4). Calk was a successful CEO seeking the position as a form of public service, and, according to government witness Anthony Scaramucci, was given only an initial courtesy interview and was unlikely to be offered the role. (A-293-94). The government—acknowledging that valuing an interview for a role in government is complex and cannot be left to guesswork or surmise—initially sought to introduce expert testimony on the monetary value of the position. But after Calk called into question the reliability of the purported expert's methodology and noted that he was valuing the job itself rather than Manafort's "assistance" (*see* Dkt.123), the government chose not to call him or elicit any other testimony on the matter.

The government's new contention that the jury could simply assume Manafort's assistance was worth over $1,000 is starkly at odds with its prior view that the issue was a proper topic for expert testimony. In any case, that type of speculation is insufficient to support a conviction. *See United States v. Pauling*,

924 F.3d 649, 662 (2d Cir. 2019) (reversing conviction because even inference that was "likely" or "probable" was insufficient); *United States v. Coplan*, 703 F.3d 46, 76 (2d Cir. 2012) ("speculation and surmise" insufficient).

Thus, the evidence was insufficient to prove beyond a reasonable doubt that Calk received a "thing of value," much less one worth over $1,000.

C. The Jury Was Improperly Instructed On "Thing of Value"

If the Court does not reverse for insufficient proof of a "thing of value" worth over $1,000, it should grant a new trial because the jury charge improperly suggested the jury could make that finding by speculating as to Calk's subjective appraisal of the value of Manafort's assistance. (Br.35-37). The government defends the district court's instruction based on its erroneous contention that a "thing of value" under §215 can include "things" having no objective monetary value, so long as the defendant subjectively values the thing at issue. (G.Br.20-25). As discussed *supra* and in Calk's opening brief (Br.26-31), that argument is flatly contradicted by §215's text and structure, which the government ignores to reach a construction that can support this novel prosecution.

The government does not dispute that any instructional error regarding the meaning of "thing of value" would have been prejudicial. Thus, Calk's convictions must, at minimum, be vacated.[4]

II. THE EVIDENCE WAS INSUFFICIENT TO PROVE THAT CALK ACTED "CORRUPTLY," AND FLAWED JURY INSTRUCTIONS ALLOWED THE JURY TO CONVICT WITHOUT PROOF OF CORRUPT INTENT

Without any legal support, the government argues for an overbroad and countertextual construction of §215 that could criminalize transactions undertaken with a good faith belief they would benefit the bank—precisely the outcome Congress sought to avoid when it added the "corrupt" intent requirement to the statute. The government's construction is contrary to basic rules of statutory construction and this Circuit's most recent pronouncement on the term "corruptly." And it relies—once again—on inapposite cases interpreting different statutes.

A. A Quid Pro Quo Alone Is Insufficient To Prove Corrupt Intent Under §215

The government does not, and cannot, dispute that the text, history, and purpose of §215 all demonstrate that a quid pro quo without a breach of the duty to

[4] The erroneous instructions would require a new trial even if the evidence were deemed sufficient under the government's *alternative* valuation theories. It is plainly "possible" that the jury convicted based on Calk's subjective appraisal; indeed, that is likely, given the government's focus on the travel expenses in its closings. *McDonnell*, 579 U.S. at 579.

act in the bank's best interests is insufficient to support a conviction. (*See* Br.37-42).

If any quid pro quo exchange was inherently corrupt under §215, then Congress' inclusion of the word "corruptly" would be meaningless surplusage, in contravention of a cardinal rule of statutory construction. *See Yates*, 574 U.S. at 545-46; *McDonnell*, 579 U.S. at 569. The government does not meaningfully dispute this conclusion and fails to posit a construction of §215 that gives meaning to "corruptly" beyond what is already conveyed by §215's requirement that the "thing of value" be given or received "with intent to influence or reward." Nor does the government engage with §215's legislative history, which demonstrates that §215 was amended to *avoid* criminalizing transactions entered with a good faith belief they would be "good for the bank"—that is, to avoid criminalizing a quid pro quo unaccompanied by a breach of the duty to act in the bank's best interests. *See* H.R. Rep. 99-335, at *3 (1985) ("[T]he purpose of a bank bribery offense is 'to deter instances of corruption in the bank industry where efforts are made *to undermine an employee's fiduciary duty* to his or her employer.'") (emphasis added); *see also United States v. Rooney*, 37 F.3d 847, 852 (2d Cir. 1994) (receipt of alleged bribe "cannot be considered 'corrupt' because" alleged bribee "violated no duty").

Rather than meet these arguments, the government seeks to avoid engaging with the text, structure, and history of the bank bribery statute by contending that *United States v. Ng Lap Seng*, 934 F.3d 110 (2d Cir. 2019), forecloses Calk's argument. (G.Br.30-35). But *Ng Lap Seng* does no such thing.

First, *Ng Lap Seng* did not purport to construe §215—it dealt with convictions under 18 U.S.C. §666 and the FCPA for bribery of UN officials. *Id.* at 142-45. *Ng Lap Seng* relied on the particular textual characteristics of the FCPA, which (mirroring 18 U.S.C. §201) separately proscribes "corrupt" offers intended to *either* (i) influence official acts; (ii) induce a breach of official duty; *or* (iii) secure an improper advantage, *see* 15 U.S.C. §78dd-2(a)(1)(A). This structure allowed the court to conclude that corrupt intent does not *per se* entail a breach of duty (or intent to induce a breach). *See Ng Lap Seng*, 934 F.3d at 143. But §215 lacks any such structural characteristics; to the contrary, its structure proves that corrupt intent requires proof of *more* than a quid pro quo. (*See* Br.37-39).

Second, *Ng Lap Seng* relied on *Rooney*'s observation that "it is an obvious violation of duty and public trust for a public official…to accept or demand a personal benefit intending to be improperly influenced in one's official duties." 37 F.3d at 853. But §215 governs the conduct of private bankers for whom (unlike

with public officials) it cannot be assumed that a quid pro quo is inherently corrupt.[5]

In any case, *Ng Lap Seng* primarily grounded its conclusions on dicta in *United States v. Alfisi*, noting that "[t]he 'corrupt' intent necessary to a bribery conviction is in the nature of a *quid pro quo* requirement." 308 F.3d 144, 149 (2d Cir. 2002). After *Ng Lap Seng* was decided, however, this Court emphatically rejected *Alfisi*'s characterization of "corrupt" intent as equivalent to the intent to engage in a quid pro quo. *See Pfizer*, 42 F.4th at 74.

Pfizer clarified that although a bribe necessarily involves a quid pro quo and is "by definition corrupt," "that does not mean the inverse is true, *i.e.*, that all quid pro quo transactions are necessarily corrupt." *Id.* In so holding, this Court adopted the reasoning of the *Alfisi* dissent, which rejected the conclusion that corrupt intent is equivalent to the intent to engage in a quid pro quo and emphasized that "a bribe payer seeks advantage or benefit by attempting to influence an official *to breach a*

[5] Contrary to the government's contentions (G.Br.30), *Ng Lap Seng*'s citation of a §215 case hardly makes it a binding interpretation of §215, especially given the starkly different purposes of the statutes. *Compare United States v. Jumper*, 838 F.2d 755, 758 (5th Cir. 1988) (§215 seeks to "prevent[] unsound and improvident lines of credit from being made"), *with Marmolejo*, 89 F.3d at 1192 (§666 is intended "to safeguard the integrity of federal funds by assuring the integrity of organizations or agencies that receive them") *and United States v. Hoskins*, 902 F.3d 69, 102 (2d Cir. 2018) (FCPA is designed to protect the "ethical foundations of American businesses") (Lynch, J., concurring).

public duty." *Alfisi*, 308 F.3d at 155 (Jacobs, J., dissenting) (emphasis added). The government ignores *Pfizer*—this Court's most recent pronouncement on the meaning of "corrupt" intent—even though it was decided more than a month before the government filed its brief.

The government's arguments fail to undercut the substantial reasons that a quid pro quo, without a breach of duty to act in the best interests of the bank, is insufficient under §215. At minimum, any doubt as to the meaning of "corruptly" in §215 should be resolved in favor of Calk. *See*, *e.g.*, *Yates*, 574 U.S. at 547-48.

B. The Government Failed To Prove Calk Acted "Corruptly"

The government did not prove that Calk lacked an honest belief that the Manafort loans would benefit TFSB. On the contrary, it is undisputable that the loans were offered at TFSB's standard rates and terms, or better (A-490-91, A-348-49), supported by so much collateral that even though Manafort defaulted because of his indictment (including for defrauding TFSB), the bank will collect its principal, all interest, and more. (A-562). Indeed, the Manafort loans were the most profitable in TFSB's history. (*See* Dkt.294 at 7).

None of the evidence the government marshals to claim Calk acted with "corrupt" intent (G.Br.36-40) undermines the overwhelming evidence that Calk believed the loans would benefit TFSB—a reality the government tacitly acknowledged when it repeatedly insisted, during summation, that Calk's belief in

the quality of the loans was irrelevant (A-421-22, A-434). Nor is the government's characterization of the evidence regarding Calk's intent accurate or complete.

For example, the government claims that after the election "Calk caused" TFSB to approve a previously rejected loan. (G.Br.37). But there was no evidence that Calk compelled the underwriters or the loan committee to approve the loan. And the government ignores the critical fact that, between Election Day and approval, (1) TFSB's President told Calk and others that keeping the loan on the bank's portfolio was acceptable, (2) an underwriting manager who had access to Manafort's financials confirmed that he "would feel confident in issuing a term sheet or a commitment to the borrower" (A-485), and (3) Bank of Internet was expected to approve the loan, with TFSB brokering the transaction or selling the loan (A-483). The government also omits that the loan was originally rejected because Manafort had tried to renegotiate at closing, not because it was deemed too risky. (A-481-82).

The government claims Calk told Manafort "we are in no way scheduling a closing until this loan is fully structured, underwritten and approved," but then emailed Manafort a term sheet the next day, implying that an intervening phone call between Calk and Manafort caused the reversal. (G.Br.37; SA85). But the government ignores a critical event: Between Calk's first email and his second,

TFSB's chief underwriter—Brennan—completed the term sheet for the loan and sent it to Calk and TFSB's President for review. (GX296).

There was no evidence that TFSB's credit committee and underwriters were unaware of Manafort's credit issues or that Manafort had initially misstated the amount of an existing loan on one of his properties by $1 million. (*See* SA61). Despite these issues, Brennan gave each of the Manafort loans an "Average" rating and testified that Calk had not influenced that rating. (A-346-47, A-350).

The remaining "facts" the government contends prove Calk's "corrupt" intent (G.Br.36-40) are similarly riddled with distortions and omissions. In any case, these "facts" are irrelevant, because they fail to show that Calk did not believe the loans would benefit TFSB and consequently fail to prove that he acted with the corrupt intent required under §215.

C. The Jury Instructions Misstated The Law

At a minimum, a new trial is required because the jury was improperly charged. The district court instructed the jury that acting "corruptly" and acting with the intent to engage in a quid pro quo are equivalent. This error was compounded by the court's improper introduction of the puzzling concept of "dual intent," which improperly suggested that Calk's belief the Manafort loans would benefit TFSB was irrelevant. (Br.44-45).

Proof of an intentional quid pro quo does not establish "corrupt" intent. *Pfizer*, 42 F.4th at 74; *see supra* at 14-18. But that is precisely what the district court instructed when it charged the jury that (1) "[t]o act corruptly means simply to act voluntarily and intentionally with an improper motive or purpose to be influenced or rewarded," and (2) Calk's intent to benefit the bank was irrelevant so long as Calk also had an "improper motive"—that is, an intent to engage in a quid pro quo. (A-387-88). In so instructing, "[t]he district court merely used the statute's other terms to define 'corruptly,' thus effectively reading 'corruptly' out of the statute." *Alfisi*, 308 F.3d at 156 (Sack, J., dissenting).

The government's defense of these instructional errors is meritless. The government notes that, after instructing that acting "corruptly" means intentionally engaging in a quid pro quo, the district court stated that "this involves conscious wrongdoing, or…a bad or evil state of mind." (G.Br.32; A-387). But a statement that corrupt intent "involves…a bad or evil state of mind" hardly resolves the error; the clear implication of the instruction, read in conjunction with the "dual intent" charge, was that an intentional quid pro quo is *inherently* "bad or evil." "Objectionable instructions are considered in the context of the entire jury charge, and reversal is required where, based on a review of the record as a whole, the error was prejudicial or the charge was highly confusing." *United States v.*

Kopstein, 759 F.3d 168, 172 (2d Cir. 2014). In any case, "a 'bad purpose' is not synonymous with a corrupt intent." *Pfizer*, 42 F.4th at 76.

The government's contention that the "dual intent" instruction accurately stated the law under §215 (G.Br.35) is also incorrect. The government reaches this conclusion by—once again—ignoring the text of §215 and relying on outdated, inapposite cases.

The government cites *United States v. Coyne*, 4 F.3d 100 (2d Cir. 1993), a case that did not discuss the meaning of "corruptly" and involved public corruption—a context in which courts have been willing to assume that a quid pro quo is inherently corrupt, *see*, *e.g.*, *Rooney*, 37 F.3d at 853—rather than §215.[6] The government identifies no case in which a "dual intent" charge has been upheld outside the context of public corruption.

The government's reliance on *United States v. Biaggi*, 909 F.2d 662 (2d Cir. 1990), fares no better. *Biaggi* also pertained to public corruption, *id.* at 670-75, rather than §215, and involved no discussion of the meaning of "corruptly." *Biaggi* also specifically noted that, "where a payment appears to have a lawful

[6] In any case, the *Coyne* defendant, a former county executive, never argued his conduct—accepting bribes for favorable treatment in municipal budgeting—was undertaken with a good faith belief that the transactions at issue would benefit the county. Rather, he merely claimed to have been "motivated by friendship." *Coyne*, 4 F.3d at 113.

purpose in addition to its allegedly unlawful purpose" the court's instructions should "focus the jury's attention on the special problems presented by the possibilities of dual motivation." *Id.* at 684. Here, rather than "focus[ing]" the jury on the "special problems" of "dual motivation," the district court simply instructed the jury that the concept was irrelevant, improperly suggesting that Calk's belief that the Manafort loans would benefit TFSB was beside the point. (A-388).

The government took full advantage of the erroneous "dual intent" instruction in its summation, foreclosing any argument that the error was harmless. (*See* A-421-22). At minimum, the district court's instructions on corrupt intent were highly confusing. *Kopstein*, 759 F.3d at 172. Vacatur is therefore required.

III. CALK'S TRIAL WAS TAINTED BY GOVERNMENT ABUSE OF THE GRAND JURY FOR TRIAL PREPARATION PURPOSES

The government doesn't dispute that it viewed General Randall Rigby as a key witness long before issuing its grand jury subpoena, or that it served the subpoena only after Rigby repeatedly refused to meet with prosecutors who were preparing for trial on the bank bribery charge. It also admits Rigby knew nothing about the only additional element required to prove a conspiracy—an agreement between Calk and Manafort—and that the conspiracy charge was based on "the other new evidence Agent Hilliard offered to the grand jury," not Rigby's testimony. (G.Br.50 n.11). Together, these conceded facts confirm that the

government abused the grand jury's subpoena power for trial preparation, and that the district court should have precluded Rigby from testifying at trial. (Br.52-59).

The government's arguments amount to the plea: "Trust us." Trust the return of a superseding indictment as proof the subpoena had a proper purpose; trust that when the government used the grand jury to examine Rigby on matters that would underlie his trial testimony on the pending substantive count, it was "investigating" the conspiracy that Rigby knew nothing about; and trust prosecutors' representations of motive and purpose at face value, even though they were made to quell suspicions of serious impropriety.

But courts are not potted plants. They are not permitted to blindly defer to a prosecutor's self-serving assurance that he acted in good faith—particularly in this context. Because grand juries "operat[e] peculiarly under court supervision," courts "must give more scrutiny" than the government would like and have a duty to "ensure that the grand jury…is not misused by the prosecutor for trial preparation." *In re Grand Jury Subpoena Duces Tecum Dated Jan. 2, 1985 (Simels)*, 767 F.2d 26, 29 (2d Cir. 1985). Where, as here, such scrutiny indicates that the government's "sole" or even "dominating purpose" was to prepare for trial, the taint on the defendant's trial requires reversal. *See United States v. Punn*, 737 F.3d 1, 6, 13-14 (2d Cir. 2013).

1. The government insists that "[w]here a superseding indictment is returned…the obvious inference is that the grand jury's work was geared toward that proper purpose." (*E.g.*, G.Br.44, 47-48). But a superseding indictment is not an all-purpose shield against scrutiny of potential abuse of the grand jury's subpoena power. The government may be entitled to reconvene a grand jury to seek a superseding indictment, but that doesn't mean it can abuse the reconvened grand jury by causing it to issue a subpoena for the "sole or dominant purpose" of trial preparation.

Moreover, the government's argument would create an end-run around this Court's decisions insisting on genuine scrutiny of potential grand jury misuse, and invite prosecutors to disregard their duty to use the grand jury for proper investigative purposes. Criminal conduct often supports both substantive offenses and a conspiracy charge. As amicus points out, if a superseding indictment always shielded prosecutors from a charge of grand jury abuse, prosecutors could easily duck enforcement of the rules prohibiting such abuse. For instance, the government could deliberately limit its charges to one or more substantive counts, procure an indictment, and then reactivate the investigation and the grand jury's subpoena power as trial nears. Then it could use a superseding indictment adding a conspiracy count as cover to subpoena an uncooperative trial witness, or to obtain new document discovery not otherwise permitted under the Federal Rules. *See*

NYCDL.Br.16-18. The government offers no response to this argument. (G.Br.52 n.13).

The cases the government cites on this point (G.Br.44, 48) are inapposite. In each of them, the superseding indictments materially changed the scope of the prosecution and thus required separate investigation and new evidence. *See United States v. Flemmi*, 245 F.3d 24, 29-30 (1st Cir. 2001) (added four new RICO predicate acts of murder); *United States v. Jones*, 129 F.3d 718, 723 (2d Cir. 1997) (added multiple defendants and charges); *United States v. Vanwort*, 887 F.2d 375, 381 n.2 (2d Cir. 1989) (same); *United States v. Ohle*, 678 F. Supp. 2d 215, 220 (S.D.N.Y. 2010) (added tax evasion and IRS obstruction counts). Here, by contrast, no new evidence—and certainly none from Rigby—was needed to support the additional count. Count One already alleged an agreement between Calk and Manafort (A-48), as well as overt acts allegedly taken in furtherance of the conspiracy (*compare* A-51-52, A-61-65, *with* A-176-77). Count Two simply reiterated those allegations using the formal language of conspiracy. (A-175-77). As the government explained below, "Count Two…charge[d] Calk with conspiring to commit the same crime…with the same persons, based on the same course of events, already charged substantively in Count One." (A-181). The government's decision to add the window dressing of a conspiracy charge to a substantive count based on the exact same conduct is not the issue; instead, it is its use of the

superseding indictment as a pretext to invoke the grand jury's subpoena power for trial preparation with an uncooperative witness that was improper.

2. The government argues that it "repeatedly questioned Rigby" and that Rigby "offered evidence relevant to the conspiracy charge." (GBr.45, 51). But the topics of the prosecutor's questions in the grand jury were used only to establish that Rigby knew *nothing* about Calk's dealings with Manafort. (G.Br.51; *see* A-115-18, A-121-22, A-126-27). The government says the "only way" to find out what Rigby knew "was to ask" (G.Br.51), as if it believed he might know something useful about the relationship between Calk and Manafort. This is nonsense. The government (first the Special Counsel's Office and then the U.S. Attorney's Office) had *years* to investigate that relationship and collected all manner of e-mails, text messages, and other documents and testimony from numerous sources about the two men's communications. It had even obtained Manafort's own testimony before a different grand jury. *See* Submission In Support Of Breach Determination at 2-3, *United States v. Manafort*, 1:17-cr-00201-ABJ (D.D.C. Dec. 7, 2018), ECF No. 460. If there had been any evidence suggesting Rigby had personal knowledge about the Calk-Manafort relationship, the government would have unearthed it long ago, and would have cited it to defend the grand jury subpoena. Instead, as the grand jury transcript makes plain, the government was pointedly trying to elicit Rigby's *lack* of knowledge,

auditioning its trial arguments that Calk's lack of candor with the board evidenced a corrupt intent.

3. The government argues that it would not have been helpful or practical to mention Rigby in the PowerPoint presentation it showed the grand jury, since he had just testified. (G.Br.49). But the point is that the government prepared that PowerPoint *before* Rigby testified, because it knew he could not provide new information bearing on the alleged conspiracy and that it could obtain a superseding indictment without him. (Br.55-56).

4. The government tries to downplay the suspicious timing of the Rigby subpoena, arguing that the adjournment of the trial created an opportunity to seek a superseding indictment. (G.Br.46). But again, this misses the point. We are challenging the government's use of the superseding indictment as a pretext to subpoena Rigby, not the superseding indictment itself. In any event, the government could have added a conspiracy count years earlier, given the substantial overlap with the substantive count, and the stop-and-go trajectory of the case, which provided several similar multi-month adjournments in which to do so. (*See* Dkt.93 (adjourning trial 5 months), Dkt.115 (3.5 months), Dkt.154 (*sine die*)). Instead, it did so only after Rigby repeatedly rebuffed its requests for an interview.

The government claims there is "nothing unusual" in "resorting to subpoena" with an uncooperative witness. (G.Br.48). That is true when the

government is conducting an investigation, but not true when it is preparing for trial. And of course, when the government first sought "a voluntary pre-trial interview" with Rigby (Dkt.170 at 2), its purpose was to prepare for trial on the bank bribery count, not to investigate and obtain his information for a potential new conspiracy count. "Resorting" to a *grand jury* subpoena to compel Rigby's presence was manifestly improper. *See Simels*, 767 F.2d at 29-30.

5. The government says the AUSA's self-serving affidavit conclusively settles its good faith (G.Br.46-47), as if federal prosecutors are incapable of stretching the truth to obscure their own missteps from judicial scrutiny. The government cites two cases in which district courts relied on prosecutors' statements to reject claims of grand jury misuse. (G.Br.46). But in those cases, the statements disclosed investigations separate from, or broader than, the operative indictment. *See United States v. Salameh*, 152 F.3d 88, 109 (2d Cir. 1998) ("joint FBI-NYPD investigation of terrorism…not connected to the [EDNY] passport fraud case"); *United States v. LaPorta*, 46 F.3d 152, 161 (2d Cir. 1994) ("single, larger" arson conspiracy encompassing the two fires the indictment charged separately). Neither requires a court to blindly accept the government's representations, particularly on questions of "purpose" or "motive." Quite the contrary, courts do not hesitate to reject such self-serving representations when, as here, the facts make clear that the government's true purpose was to prepare for

trial. (Br.53-54 (discussing *Simels*, 767 F.2d 26; *United States v. Bergstein*, 302 F. Supp. 3d 580 (S.D.N.Y. 2018); *United States v. Raphael*, 786 F. Supp. 355 (S.D.N.Y. 1992))).

6. Lastly, the government contends any error was harmless because Rigby's trial testimony represents only a fraction of the transcript. (G.Br.53). But Rigby was damning to the defense. He was the only board member who was not a friend of Calk, he contradicted exculpatory evidence that the Manafort loans were disclosed to outside board members, and he castigated Calk as "improper" for trying to "buy" a role in government. (Br.59-60). The government recognized the value of Rigby's testimony and seized on it in summation, telling the jury that "General Rigby…didn't even know the bank's policies on this, but he knew that it was wrong," so Calk must have known, too. (A-406). Having specifically urged the jury to convict based on Rigby's trial testimony, the government cannot meet its burden to demonstrate that the testimony "did not substantially influence the jury." *United States v. Al-Moayad*, 545 F.3d 139, 164 (2d Cir. 2008).

CONCLUSION

The judgment should be reversed and remanded with instructions to enter a judgment of acquittal or vacated and remanded for a new trial.

Dated: New York, New York
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/s/ Alexandra A.E. Shapiro
Alexandra A.E. Shapiro
Daniel J. O'Neill
Avery D. Medjuck
SHAPIRO ARATO BACH LLP
500 Fifth Avenue, 40th Floor
New York, New York 10110
(212) 257-4880

Paul H. Schoeman
Darren A. LaVerne
KRAMER LEVIN NAFTALIS & FRANKEL LLP
1177 Avenue of the Americas
New York, New York 10036
(212) 715-9100

Attorneys for Defendant-Appellant
Stephen M. Calk

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Date: October 4, 2022

/s/ Alexandra A.E. Shapiro
Alexandra A.E. Shapiro