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To Be Argued By:
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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

BRIEF FOR DEFENDANT-APPELLANT DEAN SKELOS

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INTRODUCTION AND SUMMARY OF ARGUMENT

The defendant in this case, Dean Skelos, was the New York State Senate Majority Leader. The federal government pursued him with a conviction bordering on zealotry. Amid a crush of negative reporting from the New York news media—much of it apparently provoked by government attorneys—prosecutors obtained convictions for public corruption offenses and a lengthy prison sentence.

But as a legal matter, this was never a typical bribery case. A classic case of bribery involves a direct exchange, where a public official agrees to perform a specific act in exchange for money. This case was different. Skelos had a troubled son, Adam, and he sought to help Adam by asking friends and associates if they could help Adam obtain work. These individuals' businesses perennially lobbied the New York legislature for favorable treatment. The prosecution sought to show that Skelos implicitly threatened to act contrary to their interests unless they helped his son.

The evidence, however, painted a different picture. Among other things, the legislative acts in question were uncontroversial matters that Skelos had always supported for reasons having nothing to do with his son. And his so-called threats involved saying things like "if you could see fit, to maybe throw some work

Adam's way, it would really be appreciated." The people Skelos asked for help could not reasonably fear he would harm them if they declined.

To be sure, the prosecution uncovered some unappealing behavior. Adam often did not show up for a job that one of Skelos's friends had given him. But as the Supreme Court held in *McDonnell v. United States*, not all tawdry and distasteful behavior by politicians or their relatives is criminal. Bribery requires a *quid pro quo*—that is, the specific intent to exchange a focused and specific official act for payment.

Skelos was initially indicted and tried before *McDonnell*. There is no question that his indictment and first conviction relied on a legal theory invalidated in *McDonnell*. Accordingly, this Court reversed his first conviction. On remand, however, the government barely altered its course. It did not return to the grand jury to obtain a superseding indictment. And it again presented an invalid legal theory to the petit jury —this time, an "as opportunities arise" theory that, under *McDonnell*, is no longer a valid basis for a bribery conviction. The government emphasized Skelos's power as Senate Majority Leader and his ability to use that power to affect the companies he interacted with in various unspecified ways, as the opportunities arose. The jury instructions permitted a conviction on this theory, even though *McDonnell* requires greater specificity at the time of the purportedly corrupt agreement.

In addition to pushing beyond *McDonnell*'s clear substantive limits, the government also pushed procedural boundaries throughout this case, denying Skelos a fair trial. The prosecution successfully fought to hide key impeachment evidence regarding its star witnesses from the jury. It also illegally leaked grand jury information to the press, while it was tapping Skelos's phone calls. The government then used those recordings, which showed fear of the press reports, to argue consciousness of guilt.

In any high-profile case it is difficult for a defendant to obtain a fair trial. Here, prosecutors exploited that dynamic to their advantage. The resulting convictions are tainted by several errors and should be reversed.

First, the district court improperly instructed the jury on the elements of the offenses because it allowed the jury to find guilt under an "as opportunities arise" theory. That theory is invalid under the Supreme Court's decision in *McDonnell*.

Second, the indictment was similarly deficient, because it too relied on a legally invalid "as opportunities arise" theory.

Third, the district court improperly allowed the jury to convict on counts under 18 U.S.C. §666 for soliciting gratuities. Properly construed, that statute only covers bribery.

Fourth, Skelos's Fifth and Sixth Amendment rights were violated when the district court quashed subpoenas to obtain evidence critical to the defense. The

government exploited this ruling by allowing its witnesses to give false and misleading testimony, and explicitly relied on that false testimony in closing arguments.

Fifth, the district court erred when it refused to grant an evidentiary hearing to examine government leaks regarding the grand jury proceedings. The court below relied on the wrong legal standard, stating that in order to make a *prima facie* case, the defense had to make a definite showing of government misconduct.

Finally, the district court denied Skelos a fair trial by refusing to change the venue even though the jury pool was tainted by years of pervasive and hostile press coverage, as Adam explains in Point I of his brief. Skelos joins Point I in full, and Points VI and VII to the extent applicable to him. *See* Fed. R. App. P. 28(i).

STATEMENT OF JURISDICTION

The district court had jurisdiction under 18 U.S.C. §3231. The judgment of conviction was entered on October 31, 2018. (SPA-60). Skelos filed a timely notice of appeal on November 13, 2018. (SPA-76). This Court has jurisdiction under 28 U.S.C. §1291.

ISSUES PRESENTED

(1) Whether an "as opportunities arise" theory is inconsistent with the Supreme Court's opinion in *McDonnell v. United States*.

(2) Whether the indictment, which was returned prior to *McDonnell*, validly pleaded any offense under *McDonnell*.

(3) Whether 18 U.S.C. §666 criminalizes only bribery, or both bribery and gratuities.

(4) Whether the district court violated Skelos's constitutional rights when it quashed defense subpoenas seeking to obtain critical evidence that would have demonstrated key cooperating witnesses' bias and motive to lie.

(5) Whether the district court erred when it refused to hold an evidentiary hearing to examine government leaks of secret information regarding grand jury proceedings.

STATEMENT OF THE CASE

A. Procedural History

Skelos appeals from a judgment of conviction entered on October 31, 2018, by the United States District Court for the Southern District of New York (Wood, J.). The relevant rulings are unreported.

The indictment was filed in 2015 and charged Skelos and his son Adam with conspiracy to commit extortion in violation of the Hobbs Act, 18 U.S.C. §1951 (Count One), and related substantive offenses (Counts Three-Five); conspiracy to commit honest services fraud in violation of 18 U.S.C. §§1343, 1346, and 1349

(Count Two); and solicitation of bribes and gratuities in violation of 18 U.S.C. §666 (Counts Six-Eight).

Following a four-week trial in November 2015, the jury found both defendants guilty of all counts. In May 2016, Judge Wood sentenced Skelos to 60 months' imprisonment. Skelos appealed.

Shortly after sentencing, the Supreme Court decided *McDonnell v. United States*, 136 S. Ct. 2355 (2016), which clarified the legal requirements for bribery prosecutions against public officials. On appeal, this Court held that the jury instructions at the first trial were defective under *McDonnell* because they incorrectly described the "official act" element of bribery. *United States v. Skelos*, 707 F. App'x 733, 736-38 (2d Cir. 2017). It therefore "vacate[d] [the] convictions in their entirety," *id.* at 738, and remanded for a new trial.

The second trial commenced on June 16, 2018 and lasted approximately one month. On July 17, after three days of deliberations, the jury found both defendants guilty on all counts. (A-7033-36).

On October 25, 2018, the district court sentenced Skelos principally to 51 months' imprisonment and a $500,000 fine. Skelos is currently serving his sentence. This appeal challenges his convictions on all counts.

B. Factual Summary

Skelos was a New York state legislator. He first ran for office in 1980, representing a Long Island district in the Assembly. (A-6303). In 1984, he was elected to the Senate, where he eventually assumed leadership roles and ultimately became majority leader. (A-6304-07). He was, by all accounts, an important figure in New York government throughout his career.

In 1982, he adopted his son Adam. (A-6305). When Skelos's marriage faltered, he was often Adam's primary caregiver. (A-6308). Adam struggled in school, and as he got older he had other challenges as well, including substance abuse issues. He drank excessively, and at times he displayed a difficult and abrasive temperament. (A-6310-11).

Testifying in his own defense, Skelos candidly admitted that he had often asked his friends and acquaintances to help Adam in various ways. "[Q]uite frankly, I—you know, I've asked a lot of people to help my son, and again, part of it, he was moving in the right direction, so I—if I had the opportunity to ask somebody to help Adam, I did it." (A-6338).

The government alleged, however, that in several instances, Skelos's requests constituted extortion and solicitation of bribes. It alleged that Skelos obtained jobs and other benefits for Adam in exchange for favorable legislative

treatment. The charges in this case centered on allegations that Skelos and Adam extorted three different businesses: Glenwood, PRI, and AbTech.

1. Glenwood

Glenwood Management is a real estate company that owns and operates luxury apartment buildings, primarily in Manhattan. It was owned by Leonard Litwin, who, prior to his death in 2017, was one of the wealthiest real estate developers in the country, as well as a powerful supporter of the Republican Party in New York. (A-4673-74). The government alleged that Skelos somehow extorted Glenwood to obtain a job for Adam—even though, as a Republican senator who consistently supported the real estate industry and benefited from its contributions to his party's campaigns, there was no reasonable possibility Skelos would exercise his power to harm it.

To prove the alleged Glenwood scheme, the government relied primarily on Charles Dorego, who testified pursuant to a non-prosecution agreement. (A-4336). Dorego was Glenwood's general counsel and vice president. He testified that political matters were crucial to Glenwood's business, and that Glenwood, Litwin, and Dorego himself were actively involved in politics, making large campaign contributions and employing numerous lobbyists. (A-4348-51). Glenwood made over $13 million in campaign contributions over several years, including donations

to Skelos and a wide variety of other politicians across the political spectrum, such as Governor Cuomo. (A-4363, A-4676-82).

Through these extensive lobbying efforts, Dorego had met Skelos many times. Dorego testified that he, Litwin, and others had a meeting with Skelos in December 2010, shortly after Republicans took control of the State Senate and Skelos was to be majority leader. (A-4374-75). At that meeting, they discussed various legislative matters, including renewing Section 421-a, a state tax abatement program critical to Glenwood's business. Skelos assured them that the Section 421-a renewal would easily pass in the Senate. (A-4378). Section 421-a, which was enacted in 1971, required periodic votes to remain in effect, and it was repeatedly and regularly renewed by New York's legislature and governor.

After the meeting, as Skelos shook Litwin's hand to say goodbye, Skelos asked if they could help Adam. According to Dorego, Skelos told him and Litwin that Adam was "getting into the title business," and said: "so if you could see fit, Mr. Litwin, to maybe throw some title work his way, it would really be appreciated." (A-4379).

Dorego testified that he and Litwin were surprised and upset by the request. But Dorego said he agreed to meet with Adam about a week later because Litwin told him to "be polite" and "take the meeting." (A-4382). He met with Adam in a "pleasant" and "polite" meeting. (A-4421). Adam pitched him title business.

Dorego thought Adam presented himself well, but he did not agree to give Adam any business. (A-4422). Dorego and Litwin met Skelos a couple months later and he again raised the possibility of giving Adam some work. According to Dorego, Skelos asked if they could "you know, maybe find some title work for him that would help him get his business going." (A-4429-30).

Dorego testified that he felt threatened by these "repeated" requests. But he and Litwin did not, in fact, give Adam any title work. Instead, Dorego had the idea to call his friend Glenn Rink and ask Rink to give Adam a job with his company, AbTech. (A-4431). Both the Litwin family and Dorego himself owned stock in AbTech. (A-4434). In May of 2011, Dorego met with Adam to propose that he go to work at AbTech. Adam was initially non-committal about the opportunity. (A-4449). But Adam eventually agreed, and he continued to pitch other business ideas.[1]

Dorego testified that he tried to arrange work for Adam because he was concerned as a result of Skelos's "repeated" requests. (A-4337-38). He initially claimed that he and Litwin were concerned that if they did not find Adam work, it might threaten both Section 421-a and also rent control legislation that was

[1] Before the AbTech job was finalized, Dorego and Adam discussed referring some title insurance work to Adam, and Dorego arranged for Glenwood's title company to give Adam a $20,000 check. (A-4540). While Adam performed no work in exchange, there was no evidence that Skelos knew this.

important to Glenwood. But he conceded he "didn't have any specific fears" and simply had a general "sense of anxiety" that "something bad could happen," even though Skelos "never, ever identified this 'something.'" (A-4338, A-4729; *see also* A-4479, A-4488). He admitted that Skelos never made any threats, nor did Skelos ever suggest that his support was contingent on helping Adam. (A-4710).

It clearly was not. Dorego testified that he had "always known [Skelos] to be supportive of 421-a," and that "Litwin knew him to be supportive" as well. (A-4674). As Skelos himself testified, he had supported the legislation for his "entire career," and "there was never a question about [his] support." (A-6332-33). Dorego also testified that these laws were uncontroversial, and easily passed with bipartisan support. (A-4705; *see also* A-6218-20). 421-a in particular was important to many sectors of the community, including unions and other developers. (A-4849-50, A-6333). It was inconceivable that Skelos would alienate these constituencies to punish Glenwood.

2. PRI

PRI is a large medical malpractice insurance company in New York with annual revenues approaching $400 million. (A-5530). The government alleged that Skelos extorted PRI to provide Adam with work even though, again, there was no reasonable possibility he would harm PRI. The government primarily relied on the testimony of Anthony Bonomo, who was CEO of a related entity that managed

PRI. (A-5522). That entity, which Bonomo owned, charged PRI a management fee of approximately $40 million annually. (A-5530). Like Dorego, Bonomo testified pursuant to a non-prosecution agreement. (A-5523).

Like Glenwood, PRI was active in political affairs. It donated to campaigns and employed many lobbyists. (A-5532, A-5539-40). PRI was dependent on the extension of risk-based capital laws. Those laws dealt with the financial viability of insurance companies, and how to account for premiums and contingent liabilities. (A-5556-57). By one measure, PRI operated in a state of negative surplus, meaning it could technically be declared insolvent, thus losing its license to sell insurance. (A-5557-58). But since the 1980s, PRI and other companies had been granted a legislative exemption from that declaration of insolvency. Like the Section 421-a laws that impacted Glenwood, the insurance exemptions expired every three years and had to be renewed by the legislature. (A-5559-60). And like 421-a, they were also regularly renewed as a matter of course, by overwhelming majorities. (A-5750, A-5895).

Bonomo knew Skelos since around 1980, when Skelos helped Bonomo get a law clerk job at the firm where Skelos worked. (A-5534, A-6323). They remained friends and saw each other socially, including having dinner with their wives each year around the holidays. (A-5536). Over the years, as Bonomo rose at PRI and

Skelos rose in the Senate, the two discussed political matters and legislation, including the insurance exemptions that were critical to PRI. (A-5569).

In late 2010, Bonomo saw Skelos at a holiday fundraiser in Manhattan. Skelos asked him if he could help arrange for PRI to hire a company called U.S. Legal Support for some of its court reporting services. (A-5571). Skelos explained that Adam and his girlfriend were involved with that company. Bonomo responded: "I told him to have Adam call me and I would see what, if anything, we could do." (A-5574). Adam followed up with a pitch for business, and PRI eventually hired Adam's company to do some court reporting work. (A-5577). Skelos subsequently thanked Bonomo for giving Adam some work and asked if he could do more. Again, Bonomo responded that he would see what he could do. (A-5577-78, A-5583-84).

In 2012, Bonomo saw Skelos at Saratoga. (A-5587-88). They discussed their families, and Skelos said Adam was having some difficulties, and that he needed a job with health benefits. Bonomo responded: "Have Adam give me a call." (A-5588). Bonomo later saw Adam at the same event. "I asked Adam if he would be interested, to give me a call and I would see what, if anything, our company had available that could possibly help him." (A-5590). Adam said thank you, but several months went by and Adam did not call to pursue the job. (A-5590, A-5592).

Bonomo saw Skelos again at other fundraisers, and Bonomo *himself* raised the question: "I told him again that I had not heard from Adam, was he still looking for something, and he said, yes, that he would have Adam call me." (A-5595). Adam finally did call, and Bonomo hired him in early 2013 as a full-time employee with health benefits and a salary of $78,000. (A-5603-05, A-5632).

The job went badly. Adam often did not show up for work, and he was unable to obtain the license that he needed to do sales. (A-5634-38). He had a conflict with a supervisor, Chris Curcio. Curcio challenged Adam for missing work, and Adam responded with insults and threats—including saying, "do you know who my father is?" (A-5638). Skelos called Bonomo after the incident and asked him if they could work something out. Adam remained in the job for a short time, but then Bonomo decided to transfer Adam to a lower-paid consulting position without health insurance. (A-5657-60, A-5663-65, A-5746). Bonomo told Skelos about the transfer, and Skelos responded: "[T]hank you. Adam is important to me and I appreciate you trying to help him." (A-5660). Adam continued to work for PRI for a time but did inadequate work, and PRI did not renew his contract. (A-5665, A-5828).

Bonomo claimed that he did not immediately fire Adam in part because he feared that he might face adverse consequences from Skelos. (A-5527). He said he feared adverse action on the exemption legislation, which was critical to PRI

and the medical malpractice insurance industry. But this was a fabrication. After his call with Skelos about Adam's performance, Bonomo went to Adam's office, asked him "[w]hat the fuck [he was] doing," and "told him nobody cared who [his] father [wa]s at PRI." (A-5637-40, A-5742-44). And even if Bonomo had fears, they were unreasonable. He testified that the extender legislation always passed overwhelmingly. (A-5750). Like Dorego, Bonomo admitted that Skelos never threatened adverse action if he did not hire Adam, and in fact Skelos never linked his support for that legislation in any way to Adam's work at PRI. (A-5751). Again, it clearly was not. Failing to pass the legislation would be disastrous for the state, which is precisely why the legislation enjoyed unwavering support in the Senate, including from Skelos himself for decades. (A-5349-52, A-5561-66, A-5895-96, A-5993-94, A-6003-04, A-6204-09, A-6322-23).

Indeed, one of PRI's lobbyists, former Senator Alfonse D'Amato, testified that from his conversations with Bonomo, he understood that Skelos "did not arrange the job for Adam at PRI." (A-5909). Rather, "Bonomo told [D'Amato] that he felt sorry for Adam and wanted to help him out by giving him a job at PRI." (A-5902). Bonomo never suggested to D'Amato that he felt threatened by Skelos or that he feared Skelos would withdraw his support for the exemption legislation. (A-5903). Bonomo himself testified that he had committed no crime in hiring

Adam or keeping him at PRI (A-5790-91, A-5877-78), and that he had hired Adam as a favor to his friend, Skelos, and to "curry goodwill" with him (A-5874).

3. AbTech

AbTech is an environmental technology company. It sold water filters to counties and municipalities for water treatment plants. As noted above, Adam eventually worked at AbTech, and he provided valuable services. The government alleged that Skelos and Adam extorted AbTech for a raise, even though there was no real evidence that Skelos communicated or knew about any threat. To prove its alleged scheme, the government relied primarily on the testimony of Bjornulf White, an AbTech employee who testified pursuant to a non-prosecution agreement. (A-5084-85).

White worked under Glenn Rink, AbTech's CEO. (A-4907). In 2012, Rink told White that Dorego had recommended hiring Adam. (A-4916). Rink said he thought it was a good idea, since Adam might be able to help AbTech expand into the large New York market, where AbTech previously had no significant presence. He thought Adam could really help "open doors" to make additional sales. (A-4917). White met Adam, and although he went into the meeting skeptical, he came out surprised by Adam's enthusiasm and his ideas for expansion. (A-4921-22). He and Rink decided to hire Adam. He was hired on a consulting basis, with

compensation of $4,000 per month. (A-4925-26). Others with political connections were paid much more, despite doing little. (A-5141-43).

At various points, Adam complained about pay, and White said that he took Adam's statements as threats that if he was not paid more, Skelos might not back important legislation. (A-4986-88). There was no evidence, however, that Skelos knew anything about these statements. Adam frequently implied that he could help with various pieces of legislation. But in any event, he did valuable sales work for AbTech.

White was approached by federal investigators in February 2015. (A-5084). He agreed to cooperate with the investigation, including wearing a wire and participating in various pretext phone calls. In one meeting, with the FBI's knowledge, White plied Adam, who has had alcohol-abuse problems, with drinks while wearing a wire. (A-5221-22, A-6311). Adam was recorded stating that he feared he was under investigation.

4. Recordings and Leaks

In an effort to show consciousness of guilt, the government introduced these recorded conversations, as well as recorded phone calls in which Skelos told Adam that "these are dangerous times" and spoke in vague language that the government described as "code." But as Skelos explained at trial, the caution he and Adam displayed was understandable. News articles reported that Speaker of the New

York State Assembly Sheldon Silver was under investigation, and once he was indicted, U.S. Attorney Preet Bharara said there was "More to come." (A-6409). Silver's arrest led to paranoia in Albany. (A-6022-23). David Lewis, legal counsel for the Republican members of the Senate, "c[a]me in and talk[ed] to the [Republican] conference about caution," and he "indicated that anything you say can be misconstrued, [be] careful what you say, careful who you talk to, and on and on." (A-6409-10; *see also* A-6413).

The government was, of course, investigating the Skeloses. In January 2015, News 4 reported that, according to "[s]ources familiar with the investigation," Skelos "has been under criminal investigation by the feds." (A-146). The report revealed that both the U.S. Attorney's Office "and the FBI are taking a hard look at how Skelos made some of his money with part of the investigation looking into his apparent ties to the real estate industry." (*Id.*). The report concluded that the decision "whether or not to charge Skelos" could "come in a matter of weeks, up to the next month or two." (A-148).

It soon became apparent that the government was leaking information about grand jury proceedings to the press to further its investigation. In April 2015, the New York Times learned that a grand jury was investigating Skelos. Reporter William Rashbaum contacted him and Adam and asked questions that were based on detailed knowledge of the grand jury proceedings. (A-114-21). Soon after, the

Times published an article stating: "[f]ederal prosecutors have begun presenting evidence to a grand jury considering a case against the leader of the New York State Senate, Dean G. Skelos of Long Island, and his son." (A-150). The article cited unnamed sources with knowledge of the matter.

The next day, both the New York Post and Newsday ran similar articles. The Post cited "law-enforcement sources" and reported that the U.S. Attorney's Office had convened a grand jury to investigate corruption allegations against Skelos and his son. (Dkt.251 at 7). The Newsday article named one of the witnesses and described the substance of his testimony before the grand jury. The next day the Post ran yet another article, again citing another "government source" with knowledge of the case, and again describing testimony before the grand jury panel. (*Id.* at 8). Those initial three articles generated a wave of follow-up articles with similar reporting from other news outlets.

Two weeks later, as the grand jury completed its initial investigation, the Post reported that an indictment was forthcoming. It cited "law-enforcement sources" and reported that the grand jury was "planning to indict" Skelos and Adam. (*Id*. at 9-10).

5. The Defense

The defense at trial was straightforward: Skelos was innocent because whenever he asked for help for Adam, he was merely asking for favors from old

friends and others he knew well, and he had no intention whatsoever of suggesting his official acts were linked to those favors. Skelos took the stand and testified unequivocally that he did not intend to take official action in exchange, or to lead anyone to believe that he would. (A-6331-32, A-6344, A-6397, A-6431). Skelos had been a senator for decades, and his political positions were well-established and not in doubt. He would not vote against legislation critical to Glenwood or PRI, for example, nor could he. The purported victims of his "extortion," such as Litwin, Dorego, and Bonomo, were wealthy, powerful, and politically connected individuals who could not reasonably fear him. Although the jury ultimately found Skelos guilty, it plainly was a close case, requiring three days of deliberations. (A-7002-36).

STANDARDS OF REVIEW

This Court reviews jury instructions and the legal sufficiency of an indictment *de novo*. *United States v. Nouri*, 711 F.3d 129, 138 (2d Cir. 2013); *United States v. Shellef*, 507 F.3d 82, 104 (2d Cir. 2007).

A ruling to quash a subpoena is generally reviewed for abuse of discretion. *United States v. Ulbricht*, 858 F.3d 71, 109 (2d Cir. 2017). But alleged violations of the Confrontation Clause are reviewed *de novo*, *United States v. Vitale*, 459 F.3d 190, 195 (2d Cir. 2006), as are violations of a defendant's rights under the

Compulsory Process Clause, *United States v. Desena*, 287 F.3d 170, 176 (2d Cir. 2002).

The denial of an evidentiary hearing is reviewed for abuse of discretion. *CSX Transp. Inc. v. Island Rail Terminal, Inc.*, 879 F.3d 462, 467 (2d Cir. 2018). A district court abuses its discretion when it relies on an error of law, applies the wrong legal standard, or applies legal standards incorrectly. *Aurelius Capital Partners v. Argentina*, 584 F.3d 120, 129 (2d Cir. 2009).

ARGUMENT

I. A NEW TRIAL IS REQUIRED BECAUSE THE JURY INSTRUCTIONS INCORRECTLY DESCRIBED THE "OFFICIAL ACT" ELEMENT APPLICABLE TO ALL COUNTS

The government had to prove that Skelos accepted benefits in exchange for an "official act" on a specifically identified "matter." In *McDonnell*, the Supreme Court held that the government must identify, and the jury must find, a *quid pro quo* agreement on an official matter: "something specific and focused that is 'pending' or 'may by law be brought' before a public official." 136 S. Ct. at 2372.

For every count, the jury instructions failed to require proof on that element. Rather, the district court instructed the jury that the government could satisfy its burden by showing that payments were made for hypothetical and unspecified future actions—future official actions "as opportunities arise." Those instructions were inconsistent with *McDonnell* and require vacatur.

A. The "As Opportunities Arise" Instructions Tainted Every Count

After this Court granted a retrial in light of *McDonnell* and the case returned to district court, Skelos filed a motion to dismiss the indictment. Among other things, he argued that the indictment relied on an impermissible "as opportunities arise" theory rather than identifying a specific matter on which Skelos agreed to act. (Dkt.248 at 14-18; Dkt.295 at 9-12). Relying primarily on pre-*McDonnell* case law, the district court rejected that argument. It held that the "as opportunities arise" theory survived *McDonnell*. (SPA-25-26).

Over repeated objections,[2] the district court repeatedly instructed the jury that it could find guilt on an "as opportunities arise" theory. It told the jury that in order to prove Hobbs Act extortion, the government had to prove "the property was given at least, in part, in exchange for the promise or performance of Dean Skelos' official actions, as opportunities arise." (A-6937). It restated the same principle in defining the *quid pro quo* requirement: "To prove a *quid pro quo*, the government must prove that property was sought or received by Dean Skelos, directly or indirectly, in exchange for the promise or performance of official action, as opportunities arise." (*Id*). And for the remaining counts, the court incorporated these definitions by reference or gave other instructions emphasizing that the government only needed to prove that Skelos agreed to take

[2] *E.g.*, Dkt.378 at 6-8; Dkt.385-1 at 30 & n.14; A-6074-77.

unspecified official action as opportunities arose. (A-6947, A-6959-62, A-6970-72).

B. The Instructions Contravened *McDonnell*

The "as opportunities arise" theory is legally invalid. *McDonnell* made clear that to be guilty of bribery, a public official must agree to exercise power on a "focused and concrete" matter that is specifically "identified" at the time of the corrupt bargain. 136 S. Ct. at 2369-70, 2372, 2374.

McDonnell's definition of official action has two parts: (1) a "decision or action" on (2) a "question or matter." *Id.* at 2368-70. The second requirement (the "matter") refers to "a formal exercise of governmental power that is similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee," and "that is 'pending' or 'may by law be brought' before a public official." *Id.* at 2372. With respect to this "matter" requirement, the Supreme Court emphasized the need for two types of specificity.

First, the matter must be identified with precision. The government "must identify" a specific matter on which the public official agreed to act, and the jury may convict only after "identify[ing]" the same matter and concluding that the official "made a decision or took an action—or agreed to do so—*on* the identified [matter]." *Id.* at 2368, 2374; *see also id.* at 2372 (official must act "on *that* [matter], or agree to do so") (emphasis added); *United States v. Silver*, 864 F.3d

102, 117 (2d Cir. 2017); *United States v. Boyland*, 862 F.3d 279, 289 (2d Cir. 2017).

Second, the identified matter "must be more specific and focused than a broad policy objective." *McDonnell*, 136 S. Ct. at 2374. The Court repeatedly underscored the need for "something specific and focused"—"the kind of thing that can be put on an agenda, tracked for progress, and then checked off as complete." *Id.* at 2369, 2372, 2374. Analyzing the matters on which Governor McDonnell allegedly took official actions, the Court held that "Virginia business and economic development" was not sufficiently "focused and concrete" to qualify as a matter, since "[e]conomic development is not naturally described as a matter 'pending' before a public official—or something that may be brought 'by law' before him." *Id.* at 2369. By contrast, "focused and concrete" policy decisions before Governor McDonnell, such as whether state universities should initiate a study of a particular drug, whether a particular state commission should allocate grant money to that study, and whether the state health insurance plan should cover that drug, did qualify as matters. *Id.* at 2370.

The upshot is that there is no crime unless the public official agrees to act on a specifically identified matter at the time of the alleged agreement. *McDonnell* expressly stated that "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." *Id.* at 2365 (emphasis added); *see also United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 406 (1999) ("The insistence upon an 'official act,' carefully defined, seems pregnant with the requirement that some particular official act be identified and proved."). The public official's intent "at the time he accept[s]" a benefit determines whether he has committed a crime. *McDonnell*, 136 S. Ct. at 2374. Put another way, *McDonnell* requires the jury to "determine whether the public official agreed to perform an 'official act' *at the time of* the alleged *quid pro quo*." *Id.* at 2371 (emphasis added). If the official agrees generally to act for the benefit of the bribe-giver as opportunities arise, but does not agree to act on a specific matter, it is impossible to "identify" any matter for purposes of the official action analysis, *id.* at 2368, 2374, let alone verify that this matter is sufficiently "focused and concrete," *id.* at 2369-72, 2374. An agreement of this sort may be "tawdry" and "distasteful," but is not illegal. *Id.* at 2375.

Requiring the government to prove that the parties agreed on the specific matter is necessary to avoid the "significant constitutional concerns" the Supreme Court identified in *McDonnell*. *Id.* at 2372-73. Absent this requirement, a public official who receives any benefit from a constituent might be reluctant to take official action that might favor the constituent, lest he be accused of performing acts for the constituent "as opportunities arise." Similarly, the constituent might be

reluctant to lobby for official action, even if it is unrelated to the benefit, to avoid the appearance of having bought that official action on an "as-needed" basis. *See id.* Constituents confer benefits on public officials all the time to "build a reservoir of goodwill that might ultimately affect one or more of a multitude of unspecified acts, now and in the future." *Sun-Diamond*, 526 U.S. at 405. This is not a crime. *See id.* at 405-08; *Citizens United v. FEC*, 558 U.S. 310, 359 (2010) ("Favoritism and influence are not…avoidable in representative politics."). It is easy, however, to mistake this practice for an attempt to buy official action while leaving the details unspecified.

To prevent convictions based on such mistakes, and avoid exposing public officials to prosecution for every gift or favor they accept, *McDonnell* requires the government to prove an agreement to exchange payment for official acts on an "identified," "specific," and "focused" matter. 136 S. Ct. at 2374. While this may exclude other conduct the public perceives as "corrupt" from the federal criminal laws, the Supreme Court has consistently opted for underinclusive rather than overinclusive definitions of criminal corruption in order to avoid sweeping in ordinary political conduct. *See id.* at 2372-73; *Skilling v. United States*, 561 U.S. 358, 408-11 (2010); *Sun-Diamond*, 526 U.S. at 406-12; *McCormick v. United States*, 500 U.S. 257, 272-74 (1991). The conduct of public officials can be, and is, regulated through other means, including administrative regulations and ethics

rules. *See Sun-Diamond*, 526 U.S. at 409-12. "Given that reality, a statute in this field that can linguistically be interpreted to be either a meat axe or a scalpel should reasonably be taken to be the latter." *Id.* at 412; *accord McDonnell*, 136 S. Ct. at 2373.

The district court relied on this Court's pre-*McDonnell* cases finding it "sufficient if the public official understands that he or she is expected as a result of the payment to exercise particular kinds of influence…as specific opportunities arise." *United States v. Ganim*, 510 F.3d 134, 145 (2d Cir. 2007). This language, however, does not "convey [*McDonnell*'s] requisite specificity." *Silver*, 864 F.3d at 119. Under *McDonnell*, an agreement to "exercise particular kinds of influence" suffices only if the parties agree, implicitly or explicitly, on the specific matter or matters the public official will seek to influence through official action.

Moreover, the Supreme Court held in construing 18 U.S.C. §201 that "insistence upon an 'official act,' carefully defined, seems pregnant with the requirement that some particular official act be identified and proved." *Sun-Diamond*, 526 U.S. at 406. *Sun-Diamond* concerned §201's gratuity provision, but the bribery provision contains the same language, and it requires that "a specific act to be completed must be identified at the time of the promise." *United States v. Bahel*, 662 F.3d 610, 635 n.6 (2d Cir. 2011). In *Ganim*, this Court distinguished *Sun-Diamond* in order to endorse an "as opportunities arise" theory, and did so on

the basis that the Hobbs Act, honest-services statute, and §666 do not "contain the same express statutory requirement" of an "official act." 510 F.3d at 146; *see also Bahel*, 662 F.3d at 635 n.6. But this Court has since recognized that §201's official act requirement—and *McDonnell*—apply equally to those three statutes, which are at issue here. *See, e.g.*, *Silver*, 864 F.3d at 118; *Skelos*, 707 F. App'x at 735-37.[3] Accordingly, this Court has already eviscerated a key rationale for the "as opportunities arise" theory, further demonstrating that the theory cannot survive post-*McDonnell*.

The "as opportunities arise" instructions given here are incompatible with *McDonnell*. They relieved the jury of the critical task of finding a specific "matter" and allowed it improperly to convict based on a nebulous, vague theory that Skelos might take some type of undefined future acts favorable to PRI, Glenwood, or AbTech. Even if *McDonnell* does not require agreement as to the *specific act* that the public official will take, the *matter(s)* to be acted on must be sufficiently concrete to give a reviewing court "assurance that the jury reached its

[3] In its non-precedential opinion deciding Skelos's first appeal, the Court cited its pre-*McDonnell* case law concerning the "as opportunities arise" theory as if it were still applicable. *See* 707 F. App'x at 738-39. However, the Court did not grapple with the arguments made here because the issue was not squarely presented. Nor was the "as opportunities arise" language necessary for any of the Court's holdings. The Court recited but did not rely on that language in discussing Skelos's sufficiency arguments. *See id.* at 738-40.

verdict after finding" each of the required elements of an official act. *McDonnell*, 136 S. Ct. at 2374.

C. The *McDonnell* Error Requires A New Trial On All Counts

Erroneous instructions require a new trial unless the government proves the error is "harmless beyond a reasonable doubt" under the *Chapman* standard. *Neder v. United States*, 527 U.S. 1, 18 (1999); *Silver*, 864 F.3d at 119. This standard is particularly exacting for an instructional error that fails to require proof on an element of the offense. In such cases, there is not a "complete verdict" of guilt. *Neder*, 527 U.S. at 10-12 (discussing *Sullivan v. Louisiana*, 508 U.S. 275 (1993)). Therefore, an erroneous instruction on an element can only be held harmless if that element was "uncontested" by the defense and "supported by uncontroverted evidence." *Id.* at 17-19. *See, e.g.*, *United States v. Cherer*, 513 F.3d 1150, 1155 (9th Cir. 2008) ("[A] jury instruction error would not be harmless if a defendant 'contested the omitted element and raised evidence sufficient to support a contrary finding.'") (quoting *Neder*, 527 U.S. at 19).

In short, it is not sufficient for the government to show that a properly instructed jury could have or even would have made a finding of guilt. Rather, the government must show that the element was essentially uncontested. If the element was contested by the defense at trial, and a jury could have made a contrary finding, then the error cannot be held harmless.

The government cannot meet that standard here because the defense vigorously contested the *quid pro quo* element and "raised evidence sufficient" to support its arguments. First, the defense argued that Skelos was merely asking friends and associates to provide some assistance for his troubled son. (A-6801-02). These requests reflected poor judgment, but they were not made in exchange for official action. "[W]as there ever, ever, ever an intent to trade his office, exchange his office? Absolutely not." (A-6802). Second, the defense argued that Skelos supported the legislation in question for years for reasons having nothing to do with Adam or any payments. (A-6792-93). The defense arguments that the government had failed to prove a *quid pro quo* (A-6806-07) were supported by evidence elicited in cross-examination of government witnesses and in testimony from Skelos himself.

A properly instructed jury therefore could have found that Skelos did not enter any corrupt agreement, or that any such agreement was murky and not tied to any specific matter. Recognizing this, the government explicitly relied on the "as opportunities arise" theory in its own closing. Both defendants argued strenuously to the jury that the timing of the payments and jobs relative to the legislation cast doubt on there being a *quid pro quo*. (*E.g.*, A-6706-07, A-6719, A-6786-90, A-6795-96). For example, the PRI extenders were voted on before and after Adam worked at PRI, but not while he was there. (A-6719). And the 421-a legislation,

which was the focus of the government's case on the Glenwood charges, passed well over a year before Glenwood provided any benefit to Adam. (A-4461, A-4626, A-4494-97, A-5136-37, A-4518-21). The government characterized these arguments as "completely irrelevant" because "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 government argued that was exactly what Glenwood, PRI, and AbTech were hoping for—favorable treatment in the future, as opportunities arose. They hired Adam because "[t]here is always going to be an opportunity down the road where they are going to need the Senate Majority Leader." (A-6888). They hired Adam so that Skelos would be "standing by to help." (A-6641, A-6645; *see also* A-6646). They hired Adam because "the senator was one of the most powerful people in state politics" and "at *any* time could do *anything* behind the scenes that would adversely impact [their] business." (A-6596 (emphasis added); *see also* A-6679-80, A-6686).[4]

The defense disputed that there was a *quid pro quo* and presented evidence that there was none; in response, the government encouraged the jury to rely on the "as opportunities arise" theory. In light of those arguments, the instructional error

[4] Moreover, the government erroneously focused the jury's attention on Skelos's state of mind when he "t[ook] official action" (Tr.2631, 2905), because the jury could easily find he had no particular official matters in mind when he asked friends and acquaintances to help Adam.

cannot be held harmless. Even an "innocuous incorrect statement" in the charge can be "extremely damaging" when the government emphasizes it during summations. *Chalmers v. Mitchell*, 73 F.3d 1262, 1267-69 & n.1 (2d Cir. 1996).

II. THE INDICTMENT'S FAILURE TO ALLEGE EACH ELEMENT OF THE OFFENSE VIOLATED SKELOS'S FIFTH AMENDMENT RIGHTS, REQUIRING REVERSAL OF ALL CHARGES

The indictment was filed before *McDonnell*, and the government did not supersede after *McDonnell*. The indictment, like the jury instructions, relied on an invalid "as opportunities arise" theory of bribery. This requires reversal.

A. The Indictment Failed To State An Offense

The Grand Jury Clause of the Fifth Amendment provides that a defendant may not be prosecuted for a federal felony unless he has been indicted by a grand jury. An indictment must set forth "all the elements necessary to constitute the offence intended to be punished." *Hamling v. United States*, 418 U.S. 87, 117 (1974); *accord United States v. O'Brien*, 560 U.S. 218, 224 (2010). The reason for that requirement is clear: A defendant must not face a trial until a grand jury has determined that there is probable cause to believe each element is met. Just as a petit jury must ultimately find each element before it convicts, a grand jury must find each element before trial proceeds at all. *See Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000).

Here, the indictment alleged that the Skeloses obtained payments from Glenwood and PRI with offers and threats of generic, unspecified "official action." (A-81-82 ¶ 8 (alleging that Skeloses "referred implicitly and explicitly to [Dean Skelos]'s power to reward and punish through official action"), A-82 ¶ 9 (alleging that Dean Skelos "foster[ed] the expectation that [he] would take official action favorable to and would refrain from taking official action to the detriment of [Glenwood and AbTech]"), A-85 ¶ 12 (alleging that Dean Skelos told a Glenwood representative "that he would take detrimental action against real estate developers who did not support him"); A-96-105 (referring generically to "official actions" and government "transactions")).

While the indictment did list specific acts that Skelos allegedly took "as the opportunities arose" "in exchange for the illegal payments" to Adam and "to ensure they would continue" (A-92 ¶ 27), it did not allege that Skelos agreed, "at the time" he solicited or accepted payment, that he would take these particular actions or actions on any concrete, identified matter. *McDonnell*, 136 S. Ct. at 2365, 2371, 2374. Instead, the indictment implied that Skelos insinuated to Glenwood and PRI that he would help them if they paid Adam and would harm them if they did not. Generic solicitations of this sort do not satisfy *McDonnell*, as they do not relate to any "focused," "concrete," or specifically "identified" matter

that is pending before the official or could be brought before him. *Id*. at 2369-70, 2372, 2374. And consequently, the indictment did not state an offense.[5]

B. The Convictions Should Be Reversed Because They Were Based On An Invalid Indictment

In *United States v. Lee*, this Court held that the failure to adequately allege an element of the offense is subject to harmlessness review, and that the government "has the burden of proving that [the] constitutional error was harmless…'beyond a reasonable doubt.'" 833 F.3d 56, 71 (2d Cir. 2016). There, the indictment failed to allege that the value of stolen goods exceeded $1,000, as required for a felony conviction. The Court held that the error was harmless based on "all [of] the [following] circumstances": the defendant had adequate notice of the core conduct for which he was charged; the defendant had adequate notice the government intended to prove the value exceeded $1,000; the evidence "overwhelmingly supported a finding" that the value exceeded $1,000; and "there [wa]s no need to guess whether a grand jury would be inclined to allege that [the goods were] worth more than $1,000," as it returned a superseding indictment alleging just that during the trial. *Id.* at 71-73.

Here, the error cannot possibly be harmless. First, while *Lee* involved the mere omission of a dollar amount—essentially a scrivener's error—the indictment

[5] As explained above, on remand, the Skeloses moved to dismiss the indictment on these grounds, and the district court denied the motion.

in this case failed to allege a core component of the charged crimes: that Skelos agreed to act on a specifically identified matter. Second, in contrast to the evidence in *Lee*, the evidence that Skelos agreed to act on a specifically identified matter was *not* "overwhelming." Third, there was *no* further superseding indictment to provide assurance that a properly instructed grand jury would have charged a valid offense under *McDonnell*. Fourth, in *Lee*, the defendant did not complain about any defect in the indictment until after the government had rested its case at trial. *See* 833 F.3d at 72. Here, the Skeloses objected to the indictment shortly after the case was remanded and well in advance of trial. The government had every opportunity to seek a new indictment, one that alleged an offense in accordance with *McDonnell*, but it chose not to do so. *Cf. United States v. Pirro*, 212 F.3d 86, 92 (2d Cir. 2000) (Gibson, J., concurring in judgment) ("[A] defendant who objects to the indictment before trial…is entitled to a more exacting review of the indictment than one who waits until after trial to object."). The convictions are invalid.

Separately, the Supreme Court or this Court *en banc* should hold that a facially invalid indictment is structural error and can never be harmless. Other circuits have held that when an indictment fails to allege an element of an offense, such an error is "not amenable to harmless error review" and therefore entitles a defendant to automatic reversal. *United States v. Du Bo*, 186 F.3d 1177, 1180 (9th

Cir. 1999) (citing *United States v. Spruill*, 118 F.3d 221, 227 (4th Cir. 1997)); *see also United States v. Pickett*, 353 F.3d 62, 70 (D.C. Cir. 2004) (Rogers, J., concurring) (arguing that errors in an indictment are not subject to harmless error review).[6]

These courts are correct, and *Lee* was wrongly decided. *Lee* relied heavily on the notion that an indictment's function is to provide notice. *See* 833 F.3d at 69-70. But "[t]he substantial right implicated here is not [just] 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 v. United States*, 361 U.S. 212, 217 (1960)); *accord Russell v. United States*, 369 U.S. 749, 768-71 (1962); *United States v. Walsh*, 194 F.3d 37, 44 (2d Cir. 1999) (indictment "serves the Fifth Amendment protection against prosecution for crimes based on evidence not presented to the grand jury"). If Grand Jury Clause violations could be held harmless on a showing of actual notice, then the government could bypass the grand jury altogether and simply send the defendant a bill of particulars instead. That is not the law. *See Russell*, 369 U.S. at 770.

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[6] A decade ago, the Supreme Court granted certiorari to settle a circuit split and determine whether errors in the indictment constitute structural error. *See United States v. Resendiz-Ponce*, 549 U.S. 102, 116-17 (2007) (Scalia, J., dissenting) (failure to allege element of offense is structural error). But the majority in *Resendiz-Ponce* disposed of the case on other grounds. The Supreme Court has not settled the question since.

Moreover, if failure to allege an element in the indictment could be cured by presenting sufficient trial evidence on the same element, then all such errors would automatically be held harmless on appeal unless the defendant also showed that the evidence was insufficient (in which case he would not need to attack the indictment). *Lee's* approach to harmlessness eviscerates the Grand Jury Clause and should be rejected.

III. THE SECTION 666 COUNTS MUST BE REVERSED BECAUSE THE STATUTE PROSCRIBES ONLY BRIBERY, NOT GRATUITIES

Counts Six through Eight alleged violations of 18 U.S.C. §666. Those counts were prosecuted on alternative theories of either bribes or gratuities. This Court has previously held that §666 covers both. *See, e.g.*, *United States v. Crozier*, 987 F.2d 893, 898-99 (2d Cir. 1993). The Supreme Court, however, has never endorsed the gratuity theory, and other circuits have held to the contrary. While this panel must follow *Crozier* and its progeny, the Court *en banc* or the Supreme Court should overrule it.[7]

The federal criminal code distinguishes between bribery and gratuities. For example, 18 U.S.C. §201(b) defines the offense of bribery, and §201(c) defines the offense of giving or receiving illegal gratuities. *See Sun-Diamond*, 526 U.S. at

[7] Skelos moved to dismiss the gratuity theory in the indictment and objected to submitting it to the jury. (Dkt.248 at 21-23; Dkt.385-1 at 75 & n.81; A-6069).

404-05. The former is punishable by up to 15 years' imprisonment, whereas the maximum sentence for the latter is only 2 years. *See id.*

Section 201 applies to federal officials taking bribes and gratuities. In 1984, Congress enacted §666, which was intended to apply at least some similar prohibitions to certain state officials of agencies receiving federal funds. But in enacting §666, Congress was less than pellucid about what exactly it meant to cover. *See United States v. Jackowe*, 651 F. Supp. 1035, 1036 (S.D.N.Y. 1987). Congress did not clearly specify whether it meant to cover only bribes to state officials, or whether it meant to cover gratuities as well.

In *Crozier*, this Court held that §666 covers both. While recognizing that §666 did not clearly cover gratuities, it held that the "'for or because of' language [in §666(c)] includes both past acts supporting a gratuity theory and future acts necessary for a bribery theory." 987 F.2d at 899. The statute was subsequently amended, removing the very language on which *Crozier* relied, but this Court held that change insignificant. *United States v. Bonito*, 57 F.3d 167, 171 (2d Cir. 1995).[8]

[8] The subsequent reasoning in *Ganim* shows that *Crozier* and *Bonito* were wrongly decided. The Court stated: "We intimated [in *Bonito*] that a payment made to 'influence' connotes bribery, whereas a payment made to 'reward' connotes an illegal gratuity." 510 F.3d at 150. But federal criminal liability must rest on clearly stated prohibitions—not vague "intimations" and "connotations."

Other circuits have criticized *Crozier* and *Bonito*. In *United States v. Jennings*, the Fourth Circuit explained in detail why *Crozier* and *Bonito* were wrongly decided. 160 F.3d 1006, 1014-16 & n.4 (4th Cir. 1998). More recently, in *United States v. Fernandez*, 722 F.3d 1 (1st Cir. 2013), the First Circuit held that §666 covers only bribes.

The First Circuit's analysis of the statute in *Fernandez* was extensive, and its arguments are compelling. First, the plain language and structure of §666 suggest that it only covers bribes. Most notably, §666 does not contain two separate provisions of the sort enacted in §201. Second, the legislative history of the statute suggests that Congress only meant to reach bribes, as it focuses on bribery and does not refer to gratuities. Third, the penalties provided in §666 relative to §201 confirm that the former only covers bribes. *Crozier*'s interpretation of §666 punishes state officials more harshly than federal officials for accepting gratuities and treats state officials who accept bribes as equally culpable to those who accept gratuities. Fourth, federalism concerns suggest that when Congress decided to extend into the arena of state agencies, it would have targeted only the more serious crime of bribery rather than the less serious crime of receiving gratuities. *See id.* at 20-27. In short, when it waded into the regulation of state agencies and their agents, Congress acted with a scalpel rather than a cleaver. *Id*. at 25 (citing *Sun-Diamond*, 526 U.S. at 408).

Using only those methods of statutory interpretation, *Fernandez* held that §666 covers only bribes. The Court held that the answer was clear enough that it did not need to apply the rule of lenity. *Id*. at 26 n.15. Even if that were not true—even if other methods of interpretation fail to resolve the ambiguity of §666—lenity compels a narrow reading. The statute does not cover gratuities.

IV. THE DISTRICT COURT VIOLATED SKELOS'S CONSTITUTIONAL RIGHTS WHEN IT QUASHED SUBPOENAS SEEKING EVIDENCE CRITICAL TO THE DEFENSE

The district court quashed defense subpoenas seeking essential evidence concerning the government's star witnesses. It relied on the exceptionally stringent standard articulated by the Supreme Court in *United States v. Nixon*, 418 U.S. 683 (1974)—a unique context in which a special prosecutor subpoenaed records of a sitting President. This Court has never held that the *Nixon* standard applies to a defendant's subpoena to a third party, because it clearly does not. A more relaxed standard is required by both Rule 17 and a defendant's constitutional rights under the Fifth and Sixth Amendments. Skelos's subpoenas were valid, and the district court's erroneous decision to quash them hamstrung the defense, requiring a new trial.

A. The District Court Applied The *Nixon* Standard To Quash Subpoenas Critical To The Defense

As explained, Anthony Bonomo and Charles Dorego were critical government witnesses, and both testified pursuant to non-prosecution agreements.

Both men, however, had engaged in dubious business transactions themselves. Prior to trial, the defense served Rule 17 subpoenas to obtain evidence regarding these transactions.

First, after a thorough investigation of PRI, the New York Department of Financial Services ("DFS") deauthorized Bonomo from managing PRI based on extensive written findings that he had engaged in egregious fraud and misconduct. (A-670-88). The defense sought to obtain the evidence underlying these findings. Second, the 3500 material suggested that Dorego had engaged in various kickback schemes, and the defense sought the underlying evidence as well. The kickback evidence was relevant in part because there was a strong likelihood that Dorego had committed perjury at the first trial about whether he had accepted such kickbacks. And the evidence against Bonomo and Dorego was relevant for several other purposes as well. It showed they had routinely engaged in deceptive conduct, which was essential to the jury's assessment of their credibility. It showed that, as a result of their misconduct, they had incentives to do favors for powerful people like Skelos—incentives that had nothing to do with Skelos's purported threats against their companies. And it also showed they were vulnerable to prosecution and thus were motivated to curry favor with the government by providing biased, inaccurate testimony against the Skeloses. Notably, DFS's investigation of PRI discovered that Bonomo had engaged in

serious misconduct from 2006 through 2015 (A-670-88, A-5764, A-5772-73), possibly even after he began cooperating against the Skeloses and signed his non-prosecution agreement in July 2015 (A-690-92). Bonomo's recent misconduct and potential breach of his non-prosecution agreement gave him overwhelming incentives to shade his testimony in favor of the government.

The government moved to quash the subpoenas. Applying the *Nixon* standard, the district court held that the defense had to identify any requested documents with "specificity," and that documents were only discoverable if the defense could show that those particular documents would be "admissible" at trial. (SPA-2-5).

Based on that stringent standard, the court granted the motions to quash subpoenas related to Bonomo. It primarily reasoned that the defense requests were "not sufficiently specific" under *Nixon* and did not seek admissible evidence. (*E.g.*, SPA-5). As to the Dorego-related subpoenas, the district court issued a mixed ruling, quashing several but requiring some production. (SPA-12-17). The district court later reiterated those rulings and denied defense requests for production related to Bonomo. (SPA-42).

These rulings were extremely prejudicial to the defense, as demonstrated by Bonomo's extraordinary testimony. When questioned about his fraudulent activity at PRI, Bonomo repeatedly denied any wrongdoing. He also falsely denied that

DFS had made any "findings" against him—he repeatedly falsely stated that there were only "allegations" made in the case. (A-5762). Over and over again, he repeated that mantra, claiming that the legal case against him had only made allegations. (A-5765-67). He repeatedly made incredible claims, denying knowledge of transactions he had directed. (A-5766-67, A-5771-72). When asked why there were no records of millions of dollars of salary he had illicitly paid himself, he responded "There were no records required to be kept." (A-5772-73). He even denied—falsely—that he was personally a target of the state investigation. (A-5830).

Bonomo's testimony was evasive at best, perjurious at worst. But lacking any actual evidence to pin him down, the defense was unable to establish his repeated lies. DFS concluded that Bonomo should be barred from managing PRI after conducting 16 depositions and reviewing several thousand documents. (A-675). Without these materials, the Skeloses could not probe his flat denials any further.

The government's treatment of Bonomo on redirect was even more appalling. It began its redirect questioning with a series of improper leading questions that endorsed Bonomo's claims that the case against him involved only "allegations" as opposed to "findings." Its first question was: "Do you recall receiving a number of questions on cross-examination…regarding all of DFS's

allegations against you and your company?" (A-5832 (emphasis added)). The prosecutor repeatedly referred to the findings as allegations, and elicited testimony suggesting that no findings had yet been made by a competent decisionmaker.

> Q. Have DFS's allegations against you been finally sustained or upheld or rejected by a state court judge?
>
> A. No, there's been no decision.

(A-5833).

Like all lawyers, the prosecutors in this case were well aware of the legal difference between findings and allegations. They were well aware that DFS's statutory authority to regulate the insurance and finance industries in New York includes the power to investigate financial fraud, make findings regarding misconduct, and impose civil penalties. *See* N.Y. Fin. Serv. Law §§404, 408.[9] The prosecutors were well aware that DFS had investigated Bonomo and made findings of misconduct. And yet they not only fought to prevent the jury from learning the truth but affirmatively misled the jury about Bonomo's misconduct.

In closing argument, the prosecution doubled down, telling the jury to ignore the legal proceedings against Bonomo and labelling them mere allegations:

> Let me say a couple things about those.

[9] *See also Excess Line Ass'n v. Waldorf & Assocs.*, 87 N.E.3d 117, 125 (N.Y. 2017) (noting "DFS's broad, explicit enforcement function"); *New York State Land Title Ass'n v. DFS*, 92 N.Y.S.3d 49, 54 (1st Dep't 2019) (discussing scope of DFS's regulatory and enforcement authority).

> The first is these are allegations. [Defense counsel] read to you yesterday some of his questions to Mr. Bonomo, questions in which he described some of the allegations that DFS has made. What he didn't read to you is Mr. Bonomo's answer which is, yeah, that's an allegation that they've made, an allegation that Mr. Bonomo is disputing and is contesting, allegations that are pending in another matter, in another court house that aren't going to be resolved here about people and events that really don't have anything to do with the defendants or this case.

(A-6881-82).

The district court's ruling also prevented Skelos from adequately testing the truth of Dorego's testimony concerning both Glenwood and AbTech. While the court allowed Skelos to subpoena certain documents, primarily concerning kickbacks that Dorego received, it did not allow Skelos to seek documents concerning his involvement in potential sham transactions and straw campaign contributions. (Dkt.300 at 5-6, 19; SPA-13, 16-17).

B. The District Court's Erroneous Application Of The *Nixon* Standard Requires A New Trial

This case presents a question of first impression in this Circuit, which has never ruled whether the *Nixon* standard applies to subpoenas issued by criminal defendants to third parties. *See United States v. Barnes*, 560 F. App'x 36, 40 n.1 (2d Cir. 2014) (leaving question open).[10] The only constitutional answer to that

[10] The Court cited *Nixon* in *Ulbricht*, 858 F.3d 71, but the defendant did not advocate for another standard; the Court quashed the subpoenas on grounds unrelated to *Nixon*; and the subpoenas apparently were directed at the government, not a third party. *See id.* at 109-10.

question is no. A defendant's subpoena power must be interpreted in light of his rights to Confrontation, Compulsory Process, and Due Process. Applying the *Nixon* standard to defense subpoenas violates those Fifth and Sixth Amendment rights, as well as the Federal Rules of Criminal Procedure.

Subpoenas in criminal cases are governed by Rule 17, which allows either party in a criminal case to subpoena witnesses as well as documents and other objects. It states that subpoenas may be modified or quashed "if compliance would be unreasonable or oppressive." Fed. R. Crim. P. 17(c)(2). As the text and advisory committee notes make clear, the criminal rule is patterned on, and "substantially the same as Rule 45(b) of the Federal Rules of Civil Procedure." *See* Fed. R. Crim. P. 17, 1944 advisory committee's note to subdivision (c). The text of Rule 17 contains no specificity requirement, nor does it state that a party may only subpoena evidence that will be admissible at trial.

In *Nixon*, the Supreme Court applied Rule 17 in an unusual and highly fraught context: The Watergate special prosecutor subpoenaed materials from a sitting United States President. The Supreme Court noted that the materials were "presumptively privileged" and should only be turned over if the prosecutor could show that they were "essential to the justice of the (pending criminal) case." 418 U.S. at 713. The Court stated that in order to make an initial showing of need

under Rule 17, "the Special Prosecutor, in order to carry his burden, must clear three hurdles: (1) relevancy; (2) admissibility; (3) specificity." *Id*. at 700.

Those "hurdles" have no basis in Rule 17's text. The Rule says nothing about admissibility or specificity, nor does it say that the party seeking disclosure bears any burden. To the contrary, Rule 17 states that a subpoenaed person may only quash the subpoena if it is "unreasonable or oppressive." But *Nixon* made clear that the circumstances called for a restricted application of the subpoena power. "In a case such as this, however, where a subpoena is directed to a President of the United States, appellate review, in deference to a coordinate branch of Government, should be particularly meticulous to ensure that the standards of Rule 17(c) have been correctly applied." *Id*. at 702.

Nixon's holding was controversial, and the Court took pains to clarify its limited reach. The Court acknowledged that the stringent three-hurdle test originated in cases where defendants issued subpoenas "to government prosecutors" to circumvent Rule 16, and thus, a "lower standard" might properly apply to subpoenas "issued to third parties." *Id*. at 699 n.12. It expressly left that question open, however, since it found that the special prosecutor satisfied the higher standard anyway. *Id*.

A "lower standard" necessarily does apply to subpoenas that criminal defendants issue to third parties. "The right to the production of all evidence at a

criminal trial…has constitutional dimensions," *id*. at 711, and "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," *In re Irving*, 600 F.2d 1027, 1036 (2d Cir. 1979).[11]

Under the Sixth Amendment, a defendant has the right to confront witnesses against him. That includes the right to impeach prosecution witnesses with evidence that they are vulnerable to prosecution themselves and therefore biased in the government's favor. *Davis v. Alaska*, 415 U.S. 308 (1974). Relatedly, in part based on due process principles, the prosecution may not suppress impeachment evidence. *Giglio v. United States*, 405 U.S. 150 (1972). Additionally, a defendant's rights under the Compulsory Process Clause and the Due Process Clause include the right to obtain documentary evidence critical to the defense. *See Pennsylvania v. Ritchie*, 480 U.S. 39, 55-58 (1987); *United States v. Burr*, 25 F. Cas. 30, 35 (C.C. Va. 1807) (Marshall, C.J.). Thus, Rule 17 must be "liberally interpreted" to "enable the accused to meet the charges presented against him" and to ensure he is not "denied information relevant to his defense by a restrictive interpretation of the Federal Rules." *United States v. O'Connor*, 237 F.2d 466, 475-76 (2d Cir. 1956).

[11] *Irving* applied *Nixon* to subpoenas served on federal employees. Apparently, no party advocated for a different standard, so the issues we raise were not presented. The Court allowed the subpoenas, so a laxer standard would not change the result.

For these reasons, several courts have found that "*Nixon* should not so readily be divorced from the concerns that produced it," and that "it is vitally important" not to "let [*Nixon*'s] frequent repetition…lead to mindless application in circumstances [where it] never was intended to apply." *United States v. Stein*, 488 F. Supp. 2d 350, 365 (S.D.N.Y. 2007). In *United States v. Tucker*, the district court held that the *Nixon* standard did not apply to a subpoena issued by the defendant to a third party. It observed that "[u]nlike the government, the defendant has not had an opportunity to obtain material from non-parties either through a grand jury subpoena or through Rule 16 discovery (which only applies to parties)." 249 F.R.D. 58, 64 (S.D.N.Y. 2008). Moreover, applying *Nixon* enables "the government [to] prevent defendants from obtaining [relevant] material by choosing not to obtain it for itself," a "perverse result [that] cannot be intended by the Federal Rules of Criminal Procedure." *Id.* at 65. Based on these fairness considerations, and to protect criminal defendants' constitutional rights, the court applied the text of Rule 17(c) rather than the heightened *Nixon* standard, holding that the subpoena was enforceable if it sought information "material to the defense" and was "not unduly oppressive." *Id.* at 66; *see also United States v. Nachamie*, 91 F. Supp. 2d 552, 561-63 (S.D.N.Y. 2000). "Impeachment of… cooperators is clearly material to [the] defense." *Tucker*, 249 F.R.D. at 66.

Similarly, in *United States v. Rajaratnam*, 753 F. Supp. 2d 317 (S.D.N.Y. 2011), the court observed that under the government's misreading of *Nixon*, "a defendant in a breach of contract case can call on the power of the courts to compel third-parties to produce any documents 'reasonably calculated to lead to the discovery of admissible evidence,'…[but] a defendant on trial for his life or liberty does not even have the right to obtain documents 'material to his defense' from those same third-parties." *Id.* at 321 n.1. *Nixon*'s specificity requirement is especially unfair, since "[i]t is extraordinarily difficult for a defendant, who has limited ability to investigate, to know enough about the discovery he is seeking such that he can" "know[] exactly what…documents" third parties possess. *Id.* Thus, the court found *Tucker*'s logic compelling, as have others. *See, e.g.*, *United States v. Soliman*, No. 06-cr-236A, 2009 WL 1531569, at *3-4 (W.D.N.Y. May 29, 2009).

While other courts have disagreed with *Tucker*, they invariably fail to recognize two critical facts. First, *Nixon* itself is not binding on the question because the Supreme Court explicitly left open whether a lower standard might apply to subpoenas to third parties. 418 U.S. at 699 n.12. Second, the *Nixon* standard is more stringent than Rule 17 and fails to adequately protect a defendant's constitutional rights.

Under the constitutional-avoidance canon, when a text is susceptible of multiple interpretations, a court should choose the interpretation that avoids constitutional difficulties. *Jennings v. Rodriguez*, 138 S. Ct. 830, 836 (2018). At a minimum, that means that when a defendant issues subpoenas to third parties, Rule 17(c) should be applied in accordance with its plain text rather than the heightened judicial gloss of *Nixon*.

Here, the district court erroneously applied the *Nixon* standard. If the district court had applied the proper standard and simply asked whether the subpoenas were reasonable, they could not have been quashed. The evidence sought was self-evidently material to the defense, and the subpoenaed parties did not make any showing that the defense requests were oppressive.

This error requires a new trial. It is difficult to assess the resulting prejudice, since there is no telling what evidence would have been turned over if the court had not quashed the subpoenas. But regardless, because the error here resulted in a denial of the defendant's constitutional rights, the government bears the burden to show harmlessness; the defense has no burden to show prejudice. *Gutierrez v. McGinnis*, 389 F.3d 300, 303 (2d Cir. 2004).

In any event, the existing record shows why the error was prejudicial. Dorego was the key witness concerning the alleged Glenwood scheme and a critical witness for the alleged AbTech scheme. Bonomo was the key witness for

the alleged PRI scheme. Their motives, bias, and overall credibility were squarely at issue throughout the trial, but the jury was prevented from making a complete assessment. Bonomo gave false and misleading statements on the stand, and the prosecutors not only failed to correct them but affirmatively endorsed them—in violation of their duty to correct false statements made by their witnesses. *Napue v. Illinois*, 360 U.S. 264, 269 (1959); *Drake v. Portuondo*, 553 F.3d 230, 239-41 (2d Cir. 2009). Because the district court quashed the defense subpoenas, the defense had no effective way to prove these lies. A rational jury armed with all of the facts would not have believed Bonomo. The error could not have been harmless.

V. THE DISTRICT COURT ABUSED ITS DISCRETION BY FAILING TO CONDUCT AN EVIDENTIARY HEARING TO EXAMINE THE GOVERNMENT'S PRETRIAL LEAKS TO THE MEDIA

Most federal criminal cases do not implicate matters of great public concern. They pass through the system with little or no press coverage. This case, to put it mildly, was not an ordinary case. It generated an enormous amount of publicity and press coverage, nearly all of it hostile to the defendants, as Point I of Adam's brief details.

The government did not shy away from that publicity. To the contrary, it regularly and repeatedly stoked the fires of outrage in the press. Then-U.S. Attorney Preet Bharara repeatedly made improper public statements denouncing

Silver, Skelos, and the supposed culture of corruption in Albany. These remarks "troubled" the judge presiding over Silver's trial, who warned that the "case is to be tried in the courtroom and not in the press." *United States v. Silver*, 103 F. Supp. 3d 370, 378-79, 382 (S.D.N.Y. 2015); *see also id.* at 379 (describing government's defense of one of Bharara's statements as "pure sophistry").

Even more disturbingly, the government's tactics included leaks regarding the grand jury proceedings. As detailed above, multiple news articles described the grand jury proceedings and testimony based on information they expressly attributed to "government" or "law enforcement" sources. *See supra* at 19.

Prior to trial, the Skeloses moved to dismiss the indictment based on those leaks and requested an evidentiary hearing under Federal Rule of Criminal Procedure 6(e). (Dkt.251). The motion detailed extensive evidence, including excerpts of the grand jury transcripts that were linked to statements that had appeared in the press. (*Id.*; A-156-57). The purpose of the evidentiary hearing would have been to determine the source of the leaks, and what if any relief was required. But the district court essentially held that the defendants were not entitled to a hearing unless they could definitively prove in advance which government actors were the source of leaks—something that, without a hearing, the defendants obviously could not do. (SPA-30 (asking whether defendants could

show a "definite" source for information appearing in the press)). This was the wrong legal standard, and the denial of a hearing was erroneous.

A. A Hearing Is Required If The Defense Makes A *Prima Facie* Showing That The Government Has Leaked Grand Jury Information

A defendant is entitled to an evidentiary hearing when he makes a *prima facie* case of a Rule 6(e) violation. *United States v. Rioux*, 97 F.3d 648, 662 (2d Cir. 1996) (citing *Barry v. United States*, 865 F.2d 1317, 1321 (D.C. Cir. 1989)). The district court suggested that a defendant can only make a *prima facie* case when he can make a "definite" showing that the source of the information was a government attorney or agent. That is incorrect. In order to obtain some *ultimate* relief, there must be a definite finding of a government leak. But the requirement for a *prima facie* case is much lower.

The *prima facie* showing is part of a typical burden-shifting framework. At the first stage, a defendant must make a *prima facie* showing of a violation. "Once a *prima facie* case is shown," a fuller examination is justified, and at that stage, "the burden shifts to the Government to come forward with evidence to negate the *prima facie* case." *Barry*, 865 F.2d at 1321. Then, after hearing all the evidence, the district court determines what remedy is appropriate, if any. *Id*. at 1321-22.

That sort of burden-shifting framework is common across many areas of law. In employment discrimination cases, the plaintiff must first make a *prima facie* showing of discrimination, and if she does so, the burden shifts to the

defendant to demonstrate a legitimate reason for the employment action. *Bucalo v. Shelter Union Sch. Dist.*, 691 F.3d 119, 128-29 (2d Cir. 2012). Similarly, a criminal defendant who seeks to show a *Batson* violation must first make a *prima facie* case of discriminatory use of peremptories. Once he does so, the burden shifts to the prosecution to show a race-neutral justification for strikes. *Johnson v. California*, 545 U.S. 162, 168 (2005).

Burden-shifting frameworks apply in situations where, as here, the moving party has informational disadvantages. They are a balance between competing considerations. On one hand, to avoid mere fishing expeditions, the moving party must make some initial showing to justify further inquiry. On the other hand, since the non-moving party possesses most of the relevant information, the moving party need not make a definite showing at the first stage to justify further inquiry.

Across the law, the quantum of evidence needed for a *prima facie* case is low. In the employment context, the requirement for a *prima facie* case is "minimal" and "not onerous." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993); *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981). A party makes out a *prima facie* case when her initial evidence gives rise to a fair inference of misconduct. *See Graham v. Long Island R.R.*, 230 F.3d 34, 38 (2d Cir. 2000). In the entirely separate context of habeas petitions, a *prima facie* case is "not a particularly high standard" and only requires a showing sufficient to "warrant a

fuller exploration." *Haouari v. United States*, 510 F.3d 350, 353 (2d Cir. 2007) (quoting *Bennett v. United States*, 119 F.3d 468, 469 (7th Cir. 1997)).

The same is true in the Rule 6(e) context. The initial burden of showing a *prima facie* case is "relatively light." *In Re Sealed Case No. 98-3077*, 151 F.3d 1059, 1068 n.7 (D.C. Cir. 1998). A defendant need not prove a violation, much less by definite or clear proof. Rather, "[t]he articles submitted need only be susceptible to an interpretation that the information reported was furnished by an attorney or agent of the government." *Id*.

The reason for this low standard is obvious: It is the government that possesses the relevant evidence. A defendant seeking an evidentiary hearing cannot be "expected to do more" at the first stage because he would "almost never have access to anything beyond the words of the [news] report." *Barry*, 865 F.2d at 1326. A defendant need only make a showing sufficient to warrant further exploration.

The district court mistakenly ruled that, to make out a *prima facie* case, a defendant must make a "definite" showing that the government was the source of leaks. (SPA-30).[12] That is the wrong standard, in part because it would ordinarily be impossible to make such a showing *prior* to an evidentiary hearing.

[12] In ruling that a more "definite" showing is required, the district court relied on *In re Grand Jury Investigation*, 610 F.2d 202, 219 (5th Cir. 1980). But that statement

B. The Skeloses Established A *Prima Facie* Case

The district court applied the wrong standard in determining whether to grant an evidentiary hearing. That is, by itself, an abuse of discretion. *See Aurelius Capital*, 584 F.3d at 129. Under a proper standard, there is no question that the defendants made out a *prima facie* case of a government leak, and they should have received an evidentiary hearing.

The specific news articles the defense cited must be assessed against several key background facts. First, this case generated an incredible amount of press coverage. As the defendants detailed in their venue transfer motion, and Adam elaborates on in Point I of his brief, the press coverage of this case was relentless and pervasive—and nearly all of it was highly critical of the defendants. (Dkt.257 at 5-11 (citing and discussing dozens of news articles)).[13] Second, the government did not seek to avoid publicity. Quite the contrary. As noted above, then-U.S.

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was taken entirely out of context. While the Fifth Circuit said the lack of a definite showing "might" cause a *prima facie* case to fail, it went on to say that even without a definite showing, "the detail as well as the seriousness of a disclosure may militate in favor of a further investigation." *Id*.

Additionally, the Fifth Circuit took pains to emphasize that a court should examine the entire spectrum of news articles rather than taking a divide-and-conquer approach to each individual article. Most importantly, the Fifth Circuit stated that the movant's burden must be assessed in light of his informational disadvantage. "The respondent, on the other hand, is in the best position to know whether he is responsible for a violation." *Id*.

[13] In conjunction with their venue motion, the defendants also submitted 500 pages of exhibits, which consisted of over 100 articles in the press. (A-158-666).

Attorney Bharara repeatedly tantalized the press with public statements about corruption cases. In early 2015, he held a press conference revealing his intent to indict Skelos, telling the media to "stay tuned." (A-126).

Third, the same government offices that handled this case have shown a pattern of similar leaks. In *United States v. Walters*, 910 F.3d 11 (2d Cir. 2018), this Court examined another case prosecuted by the U.S. Attorney's Office for the Southern District of New York and the FBI. That case also involved substantial leaks of grand jury information. While this Court found that the leaks had not resulted in prejudice to the defendant sufficient to dismiss the case, it found that the government had committed misconduct that was "deeply disturbing and perhaps even criminal." *Id*. at 28. Concurring, Judge Jacobs noted that evidentiary hearings on potential Rule 6(e) violations enable the judiciary and the public to learn "how far or where the abuse reached." *Id*. at 32.

In sum, it is all too common for government agents to strategically leak grand jury information. And given the government's publicity-seeking approach to this case, it makes perfect sense that government agents would have leaked grand jury information to the press.

Against that background, the specific news articles the defense cited were easily sufficient to make a *prima facie* case. *See supra* at 18-19. Those articles, by their plain terms, referenced and revealed "matter[s] occurring before the grand

jury." Fed. R. Crim. P. 6(e)(2)(B). And those articles, by their plain terms, revealed their sources as prohibited parties—namely government investigators. Bearing in mind that at the initial stage of a Rule 6(e) proceeding, the defendant will rarely have "access to anything beyond the words of the [news] report," *Barry*, 865 F.2d at 1326, the news articles themselves are all any defendant can use to make out a *prima facie* case. And in this case, the news articles themselves stated explicitly that government investigators had revealed information about matters before a grand jury. That is a *prima facie* case.

The district court turned semantic somersaults and engaged in speculation to avoid granting a hearing. While the reports themselves noted that law enforcement sources had revealed information, the district court speculated that those sources might not have been "federal officials privy to the grand jury investigation," but could instead have been "other non-federal law enforcement officials with general knowledge of the investigation." (SPA-33). Putting aside the utter implausibility of that inference, the fundamental point is that at the initial stage, it is not the defendant's burden to rule out all innocent explanations. Rather, "[t]he articles submitted need only be susceptible to an interpretation that the information reported was furnished by an attorney or agent of the government." *In Re Sealed Case No. 98-3077*, 151 F.3d at 1068 n.7.

The articles submitted here were not merely "susceptible" to such an interpretation—they explicitly identified a government actor as the source of the leaks. The defendants made a *prima facie* case, and the district court abused its discretion in denying an evidentiary hearing. This case should be remanded with orders to conduct a hearing so that the court may determine "how far or where the abuse reached." *Walters*, 910 F.3d at 32 (Jacobs, J., concurring). Once that determination is made, an appropriate remedy may be fashioned.

CONCLUSION

For the foregoing reasons, this Court should reverse the convictions, vacate the convictions and grant a new trial, or at a minimum, remand for a hearing on the grand jury leaks.

Dated: New York, New York
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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 13,957 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: March 18, 2019

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