

22-313

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

STEPHEN M. CALK, AKA, SEALED DEFENDANT 1,

Defendant-Appellant.

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

BRIEF FOR *AMICUS CURIAE*
NEW YORK COUNCIL OF DEFENSE LAWYERS
IN SUPPORT OF DEFENDANT-APPELLANT STEPHEN M. CALK

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STATEMENT OF INTEREST OF AMICUS CURIAE

The New York Council of Defense Lawyers (“NYCDL”) is a not-for-profit professional association of approximately 350 lawyers, including many former federal prosecutors, whose principal area of practice is the defense of criminal cases in the federal and state courts of New York.¹ NYCDL’s mission includes protecting the constitutional rights of defendants, enhancing the quality of defense representation, taking positions on important defense issues and promoting the proper administration of criminal justice. NYCDL offers the Court the perspective of experienced practitioners who regularly handle some of the most complex and significant criminal cases in the federal courts.

NYCDL files this amicus brief in support of Defendant-Appellant Stephen M. Calk’s argument on the issue of the Government’s improper use of the grand jury for trial preparation purposes. NYCDL has a particular interest in this case because it directly implicates NYCDL’s concerns with prosecutorial abuse of the grand jury process.

¹ The Government and Defendant-Appellant have consented to the filing of this amicus brief. Accordingly, this brief may be filed without leave of Court, pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure. NYCDL affirms that no counsel for a party authored this brief in whole or in part, nor did any person, other than NYCDL or its counsel, make a monetary contribution to the preparation or submission of this brief.

PRELIMINARY STATEMENT

NYCDL submits this amicus brief to draw this Court's attention to the prosecutorial abuse of the grand jury that occurred in this case, and the potential for future abuse created by the district court's opinion denying Calk's motion to preclude witness testimony. The facts and circumstances of Calk's case make clear that the Government used the investigative powers of the grand jury, post-indictment, for the impermissible purpose of previewing a potential trial witness's testimony to find out whether, and on what topics, he would testify favorably for the Government at trial. The Government did not need and did not use the witness's testimony to support the conspiracy charge in the superseding indictment, which required no new investigation and flowed directly from the evidence used to support the substantive bribery charge in the original indictment.

Instead of scrutinizing the Government's actions and motivations, the district court sanctioned the Government's conduct based on the fact that the witness's testimony could have elicited facts relevant to a conspiracy, and the grand jury ultimately issued a superseding indictment charging conspiracy. If that is viewed as sufficient to justify what happened here, we will see more improper use of the grand jury in the future. There are many cases in which the Government charges a substantive crime and

can use the same evidence to charge a conspiracy as well. In such cases, the fact that the Government obtains a superseding indictment adding a conspiracy charge, and the possibility that grand jury testimony could relate to the conspiracy charge, are not a limit on the Government's use of the grand jury; they are a foregone conclusion. The choice to defer bringing a conspiracy charge cannot provide the Government with free rein to compel trial witnesses to testify in the grand jury so long as, and until the time that, the Government seeks a superseding indictment.

Although the grand jury is afforded a presumption of regularity, courts are required to scrutinize the Government's motivations for using the grand jury to ensure that the Government's "dominant purpose" is not to prepare for trial. That stems from the role of the grand jury as an investigative body and the recognition that prosecutors, after an investigation has been conducted and an indictment returned, are not entitled to use the grand jury to prepare for trial. The criminal discovery rules govern both parties' pre-trial access to evidence and potential trial witnesses. Those rules—in particular Rules 16 and 17 of the Federal Rules of Criminal Procedure—set out detailed procedures for disclosure by the Government and the defendant, and limited third-party discovery. No provision authorizes either party to take depositions of trial witnesses. But in this case

the district court allowed the Government to use the grand jury to effectively compel a secret pre-trial deposition of a potential trial witness. This provided the Government with a tactical advantage that defendants do not enjoy. Indeed, under the district court's reasoning, the Government in future cases will have continued access to the grand jury to prepare for trial so long as it has the potential to charge a superseding indictment, even of the same criminal conduct.

In order to prevent the Government from using the grand jury to obtain an advantage in this case and in the future, the NYCDL respectfully asks this court to reverse the district court's denial of Calk's motion to preclude witness testimony and to vacate Calk's conviction.

RELEVANT BACKGROUND

I. Factual and Procedural Background

In May 2019, Stephen M. Calk, the chairman and CEO of The Federal Savings Bank ("TFSB"), was indicted for financial institution bribery in violation of 18 U.S.C. § 215. (A-45.²) In May 2020, ahead of the original September 2020 trial date, the Government identified retired Major

² Citations that begin with "A-" are to Defendant-Appellant's Appendix (Dkts. 25, 26). Citations that begin with "SPA-" are to Defendant-Appellant's Special Appendix (Dkt. 27).

General Randall Rigby, a member of TFSB's board, as a potential trial witness and served him with a trial subpoena. (A-85.) Before the September 2020 trial date, the Government asked Rigby to meet voluntarily, and Rigby declined. (*Id.*)

The trial was adjourned repeatedly due to COVID-19, and the same sequence of events occurred in the lead up to each scheduled trial date. (A-85–86.) When the trial was adjourned a third time to June 2021, the Government again issued a trial subpoena to Rigby and asked him to meet voluntarily. Rigby once again declined to meet. (A-86.) The Government then subpoenaed Rigby to testify in the grand jury, which he did on March 4, 2021, almost two years after the original indictment was issued. (*See* A-90.)

The Government's questioning of Rigby in the grand jury focused on (1) information Calk had shared with Rigby and the TFSB board about the loans to Manafort, and Calk's efforts to obtain a position in the Trump Administration (*e.g.*, A-108–109, 112–120); (2) conversations that Rigby and other TFSB board members had with Calk after an article about the Manafort loans was published in the *Wall Street Journal* (A-109–111); and (3) whether Rigby had spoken to defense counsel about the case (A-125). Minutes after Rigby finished testifying, the Government called an FBI

agent to testify in connection with a summary PowerPoint, most of which was evidence the grand jury had heard two years before in connection with the substantive bribery charge, and which did not reference Rigby's testimony. (A-130, 142–148.) The same day, the grand jury returned a superseding indictment charging Calk with conspiracy to commit financial institution bribery. (A-152.) According to the Government's letter accompanying the superseding indictment, the superseding indictment "charge[d] Calk with conspiring to commit the *same* crime (financial institution bribery) with the *same* persons, based on the *same* course of events, *already charged* substantively in Count One." (A-181 (emphasis added).) With the benefit of a preview of his testimony, the Government decided to call Rigby at trial and highlighted his favorable testimony during summation. (*See* A-406.)

On May 24, 2021, Calk moved to exclude Rigby's testimony on the basis that the Government used a grand jury subpoena for the primary purpose of compelling Rigby to meet before trial and to learn what his testimony would be.³ (*See* SPA-2.) The district court recognized that the

³ Calk learned about the grand jury subpoena because Rigby moved to quash the subpoena or modify it to allow him to testify remotely, and in that motion, Rigby detailed the Government's multiple efforts to meet with him

party challenging the subpoena must “overcome the presumption of proper purpose by showing that the Subpoena was issued for the sole and dominating purpose of preparing for trial.” (SPA-3.) The court found that Calk had not satisfied his burden and denied his motion. (SPA-4.)

II. Legal Background

Owing to the grand jury’s role as an investigative body, the grand jury process is afforded a “presumption of regularity.” *See, e.g., United States v. Salameh*, 152 F.3d 88, 109 (2d Cir. 1998); *see also, e.g., United States v. Calandra*, 414 U.S. 338, 343 (1974) (“The scope of the grand jury’s powers reflects its special role in insuring fair and effective law enforcement.”). After an indictment is issued, by contrast, the pre-trial discovery rules govern. Those rules provide for limited discovery and are not meant to give the Government access to discovery tools to which a criminal defendant is denied. It might be preferable for both sides to be afforded some of the discovery procedures to which civil litigants can avail themselves, such as depositions and interrogatories. That is not, however, the system established for criminal discovery in the federal rules. In

before subpoenaing him to the grand jury. (A-82, 85–86.) Because the Government consented to video testimony, Rigby’s motion was denied as moot, and Calk was given an opportunity to brief the preclusion issue before trial. (A-76–77.)

criminal trials, both sides are subject to the risk of surprise to an extent that is not present in civil litigation.

What limited discovery exists is focused on the production of materials for use at trial. Rule 16 requires each side to turn over certain documents to the other side, with an emphasis on documents intended for use at trial. *See* Fed. R. Crim. P. 16(a)(1)(E)–(F) (requiring the Government to turn over documents and reports that are “material to preparing the defense” or that “the government intends to use . . . in its case-in-chief at trial”); Fed. R. Crim. P. 16(b)(1)(A)–(B) (imposing reciprocal obligations on defendants). Rule 17(c) is available to both parties to gather third-party materials for trial, but the proponent must demonstrate, among other things, that they are relevant and necessary to prepare for trial. *See, e.g., United States v. Skelos*, 988 F.3d 645, 661 (2d Cir. 2021).

Rule 17 is a much narrower third-party discovery tool than is available to the Government through the grand jury process, where a subpoena can be issued “merely on suspicion that the law is being violated, or even just because it wants assurance that it is not,” *United States v. Morton Salt Co.*, 338 U.S. 632, 642–43 (1950). Likewise, while the Government operates in the grand jury in secret, when documents are

obtained via Rule 17(c), “the court may permit the parties and their attorneys to inspect all or part of” the responsive items. Fed. R. Crim. P. 17(c).

Rule 17(f)(1) provides for court-ordered depositions, but only under limited circumstances set forth in Rule 15(a), “to preserve testimony for trial” and “exceptional circumstances and in the interest of justice.” Fed. R. Crim. P. 15(a). “It is well-settled that the ‘exceptional circumstances’ required to justify the deposition of a prospective witness are present if that witness’s testimony is material to the case and if the witness is unavailable to appear at trial.” *United States v. Johnpoll*, 739 F.2d 702, 709 (2d Cir. 1984). Therefore, Rule 17(f) is not a tool than can be used to depose prospective trial witnesses in order to decide whether a given witness would be helpful to the prosecution or the defense. Again, the system might be more fair if the Government and the defense were allowed to take such depositions of anticipated trial witnesses. But that is unmistakably not the law.

It is well established that the Government cannot skirt the discovery rules and use the grand jury to prepare its case for trial. *See, e.g., United States v. Punn*, 737 F.3d 1, 6 (2d Cir. 2013). The Government, however, can use the grand jury to continue investigating after an indictment issues and even once trial preparation has begun. Given that timing alone is

not the end of the inquiry, the role of the courts is to police the line between grand jury investigation and trial preparation, by ensuring that the Government does not use the former to serve the latter. *See, e.g., United States v. Sells Engineering, Inc.*, 463 U.S. 418, 433–34 (1983) (limiting the circumstances in which lawyers for the Civil Division of the Justice Department may obtain grand jury materials to prepare for civil suits, reasoning that “use of grand jury materials by government agencies in civil or administrative settings threatens to subvert the limitations applied outside the grand jury context on the Government’s powers of discovery and investigation”).

The relevant test is whether the Government’s “sole or dominating purpose” in issuing a grand jury subpoena is to prepare for trial on the pending indictment. *See, e.g., United States v. Dardi*, 330 F.2d 316, 336 (2d Cir. 1964). In performing that analysis, courts must look at why the Government convened the grand jury, who it called to testify and how that testimony relates to any *ongoing* investigation, as opposed to the pending indictment.

ARGUMENT

I. The District Court’s Overly Deferential Analysis Improperly Allows the Government, in This Case and Future Cases, To Use the Grand Jury’s Investigative Powers To Circumvent Limitations on Pre-Trial Discovery.

In this case, the facts and circumstances surrounding the issuance of a grand jury subpoena to Rigby lead to the obvious conclusion that the Government called Rigby to the grand jury for the “dominant purpose” of previewing his testimony before making the decision to call him at trial. As a result, it was an improper use of the grand jury.

The facts and circumstances include (1) the numerous attempts by the Government to speak with Rigby, which he declined to do; (2) the Government’s decision to seek a superseding indictment based on a conspiracy charge that flowed automatically from the original indictment, which required *no* new evidence, let alone evidence from Rigby; (3) Rigby’s actual testimony, during which he responded to numerous questions from the Government that seemed clearly geared toward discovering how he would testify at trial; and (4) the Government ultimately seeking the superseding indictment based on a presentation prepared before Rigby’s testimony that was not supplemented with any evidence from Rigby’s testimony.

Despite these highly suspicious facts and circumstances, the district court did not scrutinize the Government’s purpose at all. For

example, the district court based its ruling in part on the fact that “the Government has offered several examples of questions put to Rigby before the Grand Jury directed at the Conspiracy Charge.” (SPA-3.) But the district court ignored the fact that the evidence supporting the bribery charge and the conspiracy charge was entirely overlapping. If the question for the court is whether the testimony *could have been* relevant to the superseding indictment, the test will always be met in cases like this because any evidence supporting the substantive bribery charge also necessarily supports the conspiracy charge. *See United States v. Kovalesski*, 406 F. Supp. 267, 270 (E.D. Mich. 1976) (finding that the question of the Government’s dominant purpose in conducting a perjury investigation between mistrial, where defendant testified, and retrial “cannot be answered from reading the transcript” because “[t]o the extent the questioning of [the defendant] was relevant to a perjury investigation, it was also relevant to an investigation of the substantive offense”). This type of analysis, studied by prosecutors, will encourage rather than deter misuse of the grand jury.

The district court also relied heavily on the fact that “Defendant was ultimately charged with . . . conspiracy to commit financial institution bribery in addition to the original substantive charge.” (SPA-3.) The district court relied on this Court’s decision in *United States v. LaPorta*:

“By bringing a superseding indictment, the government here was not ‘preparing an already pending indictment for trial.’ Rather, it was ensuring that it could try at the same time before the same jury [multiple crimes].” (SPA-3 (alteration in original) (quoting *United States v. LaPorta*, 46 F.3d 152, 161 (2d Cir. 1994).) In *LaPorta*, though, the superseding indictment added charges related to arson of a different car, which would have required introduction of new evidence. *See LaPorta*, 46 F.3d at 154–55. Here, by contrast, the district court ignored the fact that there was no need to include any new evidence—and certainly not the testimony of Rigby—to add a conspiracy charge.

When reviewing a motion such as this one, a district court should consider whether the new testimony was in any way necessary to the additional charges, and whether the additional charges were themselves a pretext to seek this testimony. If, as in this case, there is strong evidence that the superseding indictment served as a mere pretext for calling additional witnesses, the district court should give significant weight in its analysis to those facts. Here, for example, Rigby’s testimony served no role in proving a conspiracy between Calk and Manafort (which had already been proven by the same facts underlying the substantive bribery charge), and the conspiracy charge itself did not allege new facts, did not increase Calk’s

potential Guidelines range and increased his maximum sentencing exposure only marginally—from 30 to 35 years (*see* 18 U.S.C. § 215(a)(2); 18 U.S.C. § 371). These facts were given no weight in the district court’s analysis; the opinion makes the possibility of any superseding indictment a safe harbor for any preceding presentation in the grand jury.

Having ignored much of the important factual context in this case, the district court was able to quickly dispense with Calk’s timing argument, writing: “Although Rigby is one of the Government’s possible witnesses on the Bribery Charge and the Subpoena was issued to Rigby after he refused three of the Government’s requests to interview him prior to trial, the timing of the issuance of the Subpoena does not necessarily lead to the conclusion that it was issued as a means to gain insight into Rigby’s possible trial testimony on the Bribery Charge.” (SPA-4.) That conclusion was based on the district court’s attempt to distinguish Calk’s case from *Simels* and *Bergstein*, two cases the district court suggested, without much explanation, had more suspicious timing than this case.⁴ But even if the

⁴ The district court described this Court’s decision in *Simels* as a case “where the subpoena was issued to a potential trial witness shortly after that trial witness refused to comply with a trial subpoena pertaining to an already pending charge.” (SPA-3–4.) But it is not clear why that is a distinguishing factor. In this case, the Government served Rigby with trial subpoenas

timing did not “necessarily” lead to the conclusion that the Government sought Rigby’s testimony to prepare for trial, it certainly was highly probative evidence that trial preparation was the Government’s dominant purpose. And in any event, the standard is not whether the timing *necessarily* leads to a finding of improper purpose, but rather whether, taken together with the rest of the facts and circumstances, it is probative of one. *See, e.g., United States v. McTague*, No. 5:14-CR-00055, 2015 WL 13158499, at *5 (W.D. Va. Dec. 10, 2015) (“Review of potential grand jury abuse must center on the grand jury’s work product to determine whether the new matter contained in the later indictment . . . demonstrates that the government’s ongoing use of the grand jury was primarily for a proper purpose. The mere issuance of a new indictment cannot relieve the court of its obligation to treat seriously any allegation of misconduct in the grand jury process.” (internal quotation marks and citation omitted)).

before each trial, before it ever sought a superseding indictment. Therefore, Rigby too was subpoenaed on “an already pending charge.” The court described *Bergstein* as a case where the “subpoena [was] issued more than a year after the original indictment and approximately two months before trial, with a document return date prior to trial.” (SPA-4.) But here, too, the grand jury subpoena was issued “more than a year after the original indictment,” and only several months before trial.

In this case, the superseding conspiracy charge flowed logically from the bribery charge and did not require any additional testimony, and certainly not testimony by Rigby. The district court erred by failing to conduct a probing inquiry of the Government's dominant purpose, and had it engaged in a proper inquiry, it would have concluded that the Government's dominant purpose in calling Rigby was to prepare its case for trial.

II. This Court Should Remedy the Government's Abuse of the Grand Jury in This Case, and Prevent It From Recurring in Future Cases.

This Court should address the abuse of the grand jury in part because of its historic role in policing the Government's compliance with the rules that govern criminal practice. It also should do so because the Government's abuse of the grand jury leads to it having an advantage in a case that could tip the scales in favor of conviction. If this Court leaves this decision in place, it will only embolden other prosecutors to do in future cases what the prosecutors did here.

The facts of this case provide a good example of what can happen when the Government is permitted to use the grand jury as a discovery tool. Rigby turned out to be a key trial witness for the Government, with the Government highlighting his testimony during closing arguments. The Government reminded the jury that Rigby "didn't even

know the bank's policies on [bank bribery], but he knew that it was wrong, so wrong that he felt he had to resign over it." (A-406.) By using the grand jury not to investigate crime but to prepare for trial, the Government obtained an advantage that prejudiced the defendant here.

Reversing the district court on this issue is not only the right outcome in this case. It is also critical that this Court not permit this sort of abuse of the grand jury in the future. Allowing the district court's opinion on this issue to stand would present the Government with an opportunity to reopen grand jury proceedings in advance of trial, so long as there is a prospect of a superseding indictment, and to call witnesses—including potential defense witnesses—to obtain a preview of their testimony. That these witnesses' testimony could *potentially* be relevant to the potential superseding charge would present no check on the Government's power, especially where the evidence supporting both the original and superseding counts—as in the case of a substantive and conspiracy count—would largely overlap.⁵

⁵ The potential for abuse is not limited to cases involving potential conspiracy charges. One could imagine a similar tactic in a wire or mail fraud prosecution where the Government could supersede the indictment to include an additional wire or mailing at almost any point in the case. So long as the grand jury testimony relates to the fraud generally, it could also

The Government must not use the grand jury's investigative tools to prepare for trial, and to benefit from the equivalent of deposition discovery to which the defendant cannot avail himself. (*See supra* at 7–10.) Had the Government decided not to call Rigby at trial, it would have had no obligation even to disclose his grand jury testimony to the defense. The criminal discovery rules do not allow for pre-trial depositions, and they certainly do not allow for what are in effect *ex parte* depositions, to which the defendant has no access.

While the abuse in this case related to use of the grand jury process to compel testimony, the district court's reasoning would also allow the Government to continue to use grand jury subpoenas to compel the production of documents in advance of trial, so long as there is a prospect of seeking a superseding indictment. In this context, the Government could also avoid the possibility of the court allowing for inspection of documents received pursuant to Rule 17, which would not be a concern if the Government sought documents by way of a grand jury subpoena.

be said to relate to the new wire or mailing, and, under the district court's reasoning in this case, that would be sufficient to rebut the defendant's argument of grand jury abuse.

This case presents an important opportunity for this Court to ensure that the Government does not engage in such practices in the future. The Government generally uses the grand jury in secret, and as such these issues may not routinely come before this Court. In this case, the Government's use of the grand jury came to light only because of a fortuity: Rigby moved to quash the grand jury subpoena and brought the dispute before the district court, thus alerting Calk as well, who then sought relief. The correct result is to vacate and reiterate that the Government's ability to use a grand jury's investigative tools before trial is necessarily limited and must be for the purpose of furthering an actual grand jury investigation, not for the purpose of preparing for trial. The Government should not have engaged in these practices here, nor should it perceive that it has the authority to do so in the future.

CONCLUSION

For the foregoing reasons, the district court's decision to deny Calk's motion to preclude General Rigby's testimony was erroneous and should be reversed, and the judgment should be vacated. If the Court declines to reverse the conviction on the additional grounds put forward by Calk, the case should then be remanded for a new trial.

Dated: June 7, 2022
New York, New York

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 4,251 words, calculating by the word processing system used in its preparation, and excluding parts of the brief exempted by Fed. R. App. P. 32(f).

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

Dated: June 7, 2022
New York, New York

Respectfully submitted,
/s/ Benjamin Gruenstein
Benjamin Gruenstein