Nos. 05-20604 & 05-20606

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DAVID KAY and DOUGLAS MURPHY,

Defendants-Appellants.

On Appeal From The United States District Court
For The Southern District Of Texas

BRIEF FOR THE UNITED STATES

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STATEMENT REGARDING ORAL ARGUMENT

The United States does not oppose appellants' requests for oral argument.

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JURISDICTIONAL STATEMENT

These are direct appeals from final judgments of conviction in a criminal case. The district court had jurisdiction under 18 U.S.C. §3231. The judgments were entered on July 6, 2005. Kay's notice of appeal was timely filed on July 8, 2005; Murphy's notice of appeal was timely filed on July 12, 2005. The jurisdiction of this Court is invoked under 18 U.S.C. §3742 and 28 U.S.C. §1291.

STATEMENT OF THE ISSUES

1. Whether the district court properly instructed the jury on the *mens rea* element of an offense under the Foreign Corrupt Practices Act (FCPA).

2. Whether the indictment sufficiently alleged the *mens rea* element of an FCPA offense.

3. Whether Murphy was entitled to a jury instruction on "good faith" with respect to the obstruction charge under 18 U.S.C. §1505.

4. Whether the interstate commerce element of an FCPA offense was sufficiently charged in the indictment and proven at trial.

5. Whether the Due Process Clause barred the application on remand of this Court's earlier interlocutory decision in this case, which reversed the pre-trial dismissal of the indictment.

6. Whether the district court abused its discretion in ruling that the government could cross-examine Kay about whether he spoke to government investigators if Kay testified that he told corporate counsel about the bribes to foreign officials.

7. Whether the district court erred in excluding foreign tax documents for lack of authentication under 18 U.S.C. §3505.

8. Whether the district court erred in enhancing Murphy's sentence for abuse of a position of trust.

STATEMENT OF THE CASE

Following a jury trial in the United States District Court for the Southern District of Texas, defendants Kay and Murphy were convicted on 12 counts of paying bribes to foreign officials, in violation of the FCPA, 15 U.S.C. §§78dd-1(a) and 78dd-2(a); and conspiring to do so, in violation of 18 U.S.C. §371. Murphy was also convicted of obstructing a proceeding before the Securities and Exchange Commission (SEC), in violation of 18 U.S.C. §1505.

Kay was sentenced to 37 months' imprisonment and two years of supervised release. R.E. Tab 5. Murphy was sentenced to 63 months' imprisonment and three years of supervised release. R.E. Tab 6.

STATEMENT OF FACTS

The Foreign Corrupt Practices Act prohibits publicly-traded companies and their officers from making "use of the mail or any means or instrumentality of interstate commerce corruptly in furtherance of" a bribe to a foreign official for purposes of influencing the official's actions "in order to assist [the company] in obtaining or retaining business." 15 U.S.C. §78dd-1(a)(1). Defendants David Kay and Douglas Murphy were officers of American Rice, Inc. (ARI). The evidence at

trial showed that Kay and Murphy authorized the payment of bribes to customs and tax officials of the Republic of Haiti in exchange for their acceptance of false shipping documents that understated the amount of rice being imported into and sold in Haiti, thereby reducing the amount of customs duties and sales taxes paid by ARI.

1. ARI Imports Rice Into Haiti. ARI is a publicly-traded corporation based in Houston, Texas, that processes and sells rice throughout the world. 4 Tr. 153-54; 6 Tr. 14. During the 1990s, Murphy was the president and chief executive officer of ARI. 4 Tr. 155-56, 227; 8 Tr. 61. Kay was vice-president of southern operations. In 1996, he became vice-president of Caribbean operations and reported directly to Murphy. 4 Tr. 155, 226; 6 Tr. 132-34.

In the late 1980s, ARI began doing business in Haiti by importing bags of rice from its mill in Freeport, Texas. 2 Tr. 72. In the early 1990s, ARI negotiated an agreement with the Haitian government to convert a defunct soybean mill into a rice processing plant. Murphy was directly involved in the negotiations. His "vision" was that ARI could capture a share of the Haitian market by importing rice in bulk and then processing and bagging it at the plant for distribution. 2 Tr. 72-73; 6 Tr. 136; 7 Tr. 160-61. Murphy placed Kay in charge of converting the soybean mill, and Kay completed the conversion in late 1992. 6 Tr. 136-37, 139. Rice Corporation of

Haiti (RCH) was formed to act as a "service company" operating the mill in Haiti for ARI. 2 Tr. 73, 165.

ARI shipped rice in bulk aboard its own barge, the *LaurieKristi*, and other vessels to the Haitian mill, which was located near a port at Laffiteau. The imported rice had already been mostly milled at ARI's plant in Freeport. 2 Tr. 74-75; 4 Tr. 62-63, 156-57. The rice was "polished" and bagged at the Haitian mill and then distributed primarily in the area around Port au Prince. 2 Tr. 74-75; 4 Tr. 9-10, 58-60.

ARI sold four brands of rice in Haiti, but the best-selling brand was a premium rice called Blue Ribbon. 4 Tr. 12-13, 59, 93, 110-11; 5 Tr. 123-124. ARI faced competition from merchant traders who also imported and sold rice in Haiti. 2 Tr. 79. ARI's Blue Ribbon brand competed most directly against two premium brands called Lucky and Jumbo Blue. 2 Tr. 79; 4 Tr. 13-14, 94. Lucky brand rice was already bagged when it was imported into Haiti. 4 Tr. 111-12. ARI set the price of Blue Ribbon in relation to Lucky's price, generally around 50¢ less per 50-kilogram bag. 4 Tr. 95-98, 115, 146-47. Jumbo Blue was sold by Newfield Partners, which imported the rice in bulk and bagged it with equipment on the dock at the port at Port au Prince. 2 Tr. 79, 144; 3 Tr. 122-23; 6 Tr. 163-67. Blue Ribbon's price was generally 25-30¢ more per bag than Jumbo Blue's price. 4 Tr. 14-15. Kay set the prices at which ARI's brands of rice were sold. 4 Tr. 15, 77-79.

ARI was required to provide shipping documents that set forth the amount and value of the rice aboard the vessels that carried the bulk rice to Laffiteau. The documents included an invoice, a stowage plan and an export declaration for each shipment. 2 Tr. 82; 4 Tr. 158-59, 162-64. The shipping documents were prepared by employees of Kay's office in Houston. 2 Tr. 84-85. When a vessel arrived in Haiti, it called at Port au Prince, where it was met by Haitian port officials who cleared the vessel to proceed to Laffiteau. When the vessel reached Laffiteau, ARI had to obtain a "bordeau" by paying the applicable customs duties, wharfage fees, and taxes before Haitian customs officials would allow the vessel to discharge its cargo. 2 Tr. 82-84, 86-88, 110; 4 Tr. 16-17, 44, 157.

2. ARI Pays Bribes To Obtain "Franchises." In the early 1990s, ARI became concerned about competition from smugglers who evaded the payment of customs duties and taxes by bringing rice into remote ports. 2 Tr. 88-89. Smugglers and merchant traders also obtained "franchises," which were licenses that allowed charitable organizations to import food without paying customs duties. 2 Tr. 106-08; 3 Tr. 177-78, 216-17; GX 21.

Between 1991 and 1993, ARI paid bribes to an aide to the Haitian prime minister to obtain "franchises." 2 Tr. 106, 108-110, 158-59; 3 Tr. 76-81, 178-79. Murphy authorized the bribes. 2 Tr. 109; 3 Tr. 78. ARI later attempted to obtain

franchises through other Haitian officials, which became known as Plan C, but the plan was not successful. 2 Tr. 115, 118-19, 130-31.

3. ARI Pays Bribes To Obtain Favorable Tax Treatment For RCH. Under Haitian law, a company that imported rice had to pay sales tax on the rice sold and income tax on the profit. On the advice of its Haitian accountant, RCH designated itself as a "service company" that did not legally own the rice imported by ARI. That designation allowed both RCH and ARI to avoid paying sales and income taxes: RCH did not pay the taxes because it was not the seller of the rice, and ARI did not pay the taxes because it was not legally recognized to do business in Haiti. 2 Tr. 139, 165-66; 5 Tr. 58, 93.

The Director General Impôts (DGI) was the Haitian taxing authority. 2 Tr. 139-40, 160-61; 5 Tr. 63. Early in 1994, Murphy and Kay approved the payment of bribes to DGI officials to obtain DGI's acceptance of the service corporation designation for RCH, with the result that RCH paid taxes only on the income it received for the services provided to ARI. 2 Tr. 166-69, 171-73, 175-79; 3 Tr. 89-91; GX 22, 23, 69.

4. ARI "Shrinks" Its Cargo To Reduce Customs Duties. In 1994, Haiti adopted a 7% *ad valorem* duty to be paid when shipments arrived in Haiti. Haiti also became more aggressive about collecting customs duties. Murphy, Kay, and

Lawrence Theriot, a consultant for ARI, believed the collection of the customs duties placed ARI at a competitive disadvantage with respect to smugglers. 2 Tr. 110-11; 4 Tr. 169-70.

To reduce the customs duties, Murphy and Kay approved "shrinking" the cargo. ARI typically under-declared the quantity of rice by 2-3% in an invoice to account for "shrink," *i.e.*, rice lost during shipping and processing. 4 Tr. 160-61, 169, 214-16. In 1994, Murphy and Kay directed ARI employees to increase the percentage of shrink beyond 2-3% in order to reduce customs duties. 2 Tr. 111-12, 143; 4 Tr. 158-62, 165-66, 168-69. The plan to shrink the quantity on the invoices became known as Plan A. 2 Tr. 114-16.

Kay supplied the shrink percentage to Larry Watson, ARI's export sales service manager who prepared the shipping documents. 4 Tr. 151, 157-58, 160. Murphy pressured Watson to increase the shrink percentage, and he supplied Kay with the percentage to be used. 4 Tr. 165, 167-69. Haitian customs officials were paid bribes to accept the false invoices. 2 Tr. 112; 4 Tr. 20-23, 83, 141-42.

5. ARI Submits False Invoices To Reduce Customs Duties And Taxes. In September 1996, Haiti imposed a 10% sales tax on imported rice, which was known as the TCA tax, that was collected at the point of importation rather than the point of sale. The TCA tax required importers to pay 10% of the value of the rice aboard the

vessel and then to file monthly sales reports on the amount of rice sold. At the end of the year, the TCA sales tax liability was adjusted to account for the actual amount of rice sold. 2 Tr. 86, 113, 179-80; 3 Tr. 131-32, 181-82; 5 Tr. 109-10; 7 Tr. 22, 90. The TCA tax was in addition to the customs duty. Following its adoption, RCH was required to pay a levy of 18% of the value of the rice on each shipment: 7% for the customs duties, 10% for the TCA sales tax, and 1% for a forfeiture tax. 2 Tr. 86-87, 95, 113; 3 Tr. 141-43; 4 Tr. 128; 5 Tr. 108.

In June 1996, shortly before the TCA tax went into effect, Kay warned Murphy that the TCA sales tax system could have "a profound and lasting effect on the profitability of the Haiti market." GX 73; 7 Tr. 90-91. Between 1996 and 1998, Murphy, Kay and ARI's consultant, Theriot, became increasingly concerned that the 18% payment for customs duties and taxes put ARI at a competitive disadvantage because smugglers were evading the payments and competitors were bribing customs officials to accept reduced payments. 2 Tr. 88-89, 92-99, 102-05; 4 Tr. 24, 82. In August 1998, Kay informed Murphy that RCH's market share had declined by 5% since 1996 and that the loss was "related to the TCA tax." GX 98; 7 Tr. 91-92, 95.

Beginning in January 1998, Murphy and Kay decided to reduce ARI's payments of customs duties and TCA sales taxes by "under-invoicing" the amount of rice on the shipments to Haiti and by paying bribes to Haitian customs officials to

accept the false documents. 2 Tr. 115; 7 Tr. 31, 77-82. The under-invoicing scheme was known as Plan B. 2 Tr. 114-15, 125-26; 7 Tr. 99-100.

Murphy and Kay directed ARI employees to prepare two sets of shipping documents for each shipment. One set accurately reflected the amount on board and was used internally. The second set under-declared the amount of rice on board by 20%-50% and was presented to Haitian customs officials. 2 Tr. 125-26; 4 Tr. 24-29, 228- 235, 238; 5 Tr. 18-27. ARI realized substantial savings on each shipment, because the customs duties and TCA taxes based on the false invoice's under-declared quantity and value were substantially less than they would have been based on the actual quantity and value. 2 Tr. 126-129; 4 Tr. 32-36; 5 Tr. 39-42; 7 Tr. 82-88; GX 33. Murphy and Kay authorized RCH employees to pay bribes of one-third of the savings to Mario Morisette, the Haitian customs official at Laffiteau, to accept the false documents. 2 Tr. 125-28, 132-33, 145, 155-56; 3 Tr. 224, 233; 4 Tr. 29-32, 35-38, 51-52; 5 Tr. 38-41, 44-45, 53-55.

For example, with respect to the first shipment in January 1998, the true invoice was for a shipment of 7,718 metric tons, but the false invoice stated that the shipment involved only 6,218 metric tons . GX 1A, 1C; 4 Tr. 25-29. Kay calculated that the difference between the two quantities resulted in a gross "savings" on customs duties and taxes of $82,839, with a "net savings" of $57,839 after payment

of a $25,000 "consulting fee." GX 33; 2 Tr. 126-28; 4 Tr. 32-38; 5 Tr. 188; 7 Tr. 82-88. In an email message, Kay sent the calculations to Joe Schwartz, RCH's comptroller, with instructions to share the message with Joe Malebranche, RCH's plant manager, and "then destroy." GX 33; 5 Tr. 39-41.

The savings were significant in terms of RCH's ability to compete in the Haitian market. 2 Tr. 128-29, 163; 4 Tr. 34, 36; GX 33. Before the scheme was implemented, RCH's profit margins and net income were declining quarter-over-quarter, but the profit margins and net income increased quarter-over-quarter after ARI began paying the bribes. 7 Tr. 195-96; DX 100A. In January 1999, Kay demonstrated to Murphy, using calculations for one shipment, that the bribery scheme resulted in a net profit of $1.01 per hundredweight of rice while payment of the full amount of customs duties and taxes would have resulted in a loss of 5¢ per hundredweight. GX 83, at 142-143; 7 Tr. 97-109.

Between January 1998 and August 1999, Murphy and Kay authorized the use of false shipping documents and the payment of bribes to the Haitian customs official in connection with 12 shipments of rice.[1/] GX 1-12; 4 Tr. 25-29, 40-51, 142-43, 5 Tr. 23-26. Based on a comparison of the actual and false invoices for those 12

[1] Those 12 shipments form the basis for the FCPA violations charged in Counts 1-12 of the indictment. R.E. Tab 3.

shipments, ARI under-declared 29,987 metric tons of rice valued at over $7.7 million, resulting in a total gross savings of over $1.5 million and a total net savings after the payment of the bribes of over $1 million. 5 Tr. 180-84, 191, 216, 222, 225; GX 63. The savings to ARI resulting from the bribes was initially 30¢ per hundredweight but increased to 72¢ by August 1999. 5 Tr. 190-91.

6. ARI Pays Bribes To Resolve A Tax Issue. After the TCA sales tax system went into effect, ARI, which could not legally do business in Haiti, faced the dilemma of determining how to pay the sales tax in light of RCH's status as a service corporation. 2 Tr. 179-83; 5 Tr. 58, 93. RCH paid the 10% tax on the imported rice when it arrived at Laffiteau but did not file monthly sales reports. In late 1998, DGI billed RCH for back taxes. 5 Tr. 57-59, 94-96. DGI also decided that RCH was not a service company and owed back taxes for the period from 1992-1996. 2 Tr. 183-84. The total bill for back taxes was over $800,000. 5 Tr. 59, 70-71.

The tax liability created a major financial crisis for ARI. 2 Tr. 184, 203; 5 Tr. 59, 96. In addition, ARI was not be allowed to unload its vessels unless it had a quitus, which was a document certifying that no taxes were owing. 2 Tr. 144-45, 200; 3 Tr. 103-04; 5 Tr. 63. Kay and Joe Schwartz, RCH's comptroller, attempted to resolve the issue through RCH's accountant, Lionel Turnier, by delivering partial tax payments totaling $286,000 to Turnier to give to DGI. After Turnier was unable to

account for the money, Murphy flew down to Haiti, fired Turnier, and took control of the situation. 2 Tr. 186-87, 202; 5 Tr. 59, 98-99, 103.

Murphy retained Hubert LeGros, who was known as Shadow, to resolve the tax issue with DGI. 2 Tr. 190-92; 5 Tr. 60-62, 66, 99. LeGros negotiated a settlement in which RCH paid $40,000 in back taxes to DGI and then made monthly TCA sales tax payments of $20,000 in addition to the 10% tax prepaid when a vessel unloaded. Under the settlement, RCH also paid DGI officials an initial bribe of $40,000 and then paid monthly bribes of $20,000 (both in Haitian dollars). 2 Tr. 193-97; 5 Tr. 63-70, 101-02, 155-56; GX 43. The $20,000 monthly tax payments were based on false reported sales amounts that were less than half of the amount of rice actually sold. 5 Tr. 64, 67-68, 152, 157. As part of the settlement, LeGros was able to obtain the quitus for RCH. 2 Tr. 200; 5 Tr. 62-63, 100-01, 143-44. Murphy and Kay approved the settlement and the payment of the bribes. 2 Tr. 194; 3 Tr. 227; 5 Tr. 59, 62-63, 65-66, 155-56.

7. Murphy Lies During The SEC investigation. ARI's payment of bribes continued until Murphy was fired in October 1999. 2 Tr. 133, 203; 4 Tr. 52, 238; 5 Tr. 27; 7 Tr. 127-28. Thereafter, Murphy claimed ownership of RCH, and he and Theriot took over its operations. Murphy attempted to import two more under-

invoiced shipments of rice by bribing Haitian officials, but he fled after Haitian authorities froze the second shipment. 2 Tr. 203-09; 3 Tr. 151-52; 4 Tr. 52-56.

In February 2001, the SEC began an investigation into ARI's activities. 6 Tr. 16-17. On October 18, 2001, Murphy testified under oath in the SEC proceeding pursuant to a subpoena. 6 Tr. 18-20. During his testimony, Murphy lied about his knowledge of the false shipping documents and his involvement in the bribes paid to Haitian customs and tax officials. 6 Tr. 25-43.

SUMMARY OF ARGUMENT

1. The *mens rea* elements of the FCPA require that a defendant act "willfully" as well as "corruptly." Because defendants did not request a jury instruction on the "willfully" element, their challenge to the jury charge is reviewed for plain error. Although the government and defendants disagree over what "willfully" means in the context of the FCPA, the jury charge was not erroneous because the instruction on "corruptly" required the jury to find facts that also established defendants' view of what "willfully" requires. In addition, defendants cannot establish the other requirements for relief on plain error review.

2. The indictment failed to use the term "willfully" in the FCPA counts, but its other allegations fairly imported the willfulness element through their description of defendants' dishonest conduct. In any event, the failure to allege the "willfully"

element was harmless error, because the jury instructions required the jury to find facts that established defendants' view of what "willfully" requires in order to convict.

3. Murphy's oral request for a good faith instruction with respect to the obstruction charge under 18 U.S.C. §1505 was insufficiently specific to preserve his claim for review, and the court did not commit plain error in refusing to give the instruction. Because the district court adequately instructed the jury on the *mens rea* element of the offense, the refusal to give a good faith instruction was not erroneous. In addition, defendants cannot establish the other requirements for relief on plain error review.

4. The interstate commerce element of an FCPA violation was sufficiently charged in the indictment and proven at trial. That element does not require that the bribe itself be transmitted in interstate commerce. Rather, it is sufficient if interstate facilities are used in furtherance of making the bribe.

5. In an earlier interlocutory decision, this Court interpreted the scope of the business nexus element of the FCPA in reversing the district court's dismissal of the indictment. Because the Court's interpretation of the statute was not "unexpected or indefensible," the Due Process Clause did not bar application of that interpretation on remand. Defendants' claim is based on the wrong legal test.

6. The district court ruled that the government could cross-examine Kay about whether he spoke to government investigators if Kay testified on direct examination that he told ARI's attorneys about the bribes paid to foreign officials. Because Kay did not testify on the subject matter at trial, he did not preserve his challenge to the ruling. In any event, the ruling did not burden Kay's Fifth Amendment privilege against self-incrimination, because a defendant may be questioned about his post-arrest silence to correct a misleading impression that he cooperated.

7. The district court excluded Haitian tax documents offered by the defense. Because the documents were not made part of the record, defendants have not preserved their challenge to the ruling. In any event, the district court could properly conclude that the documents were not admissible under 18 U.S.C. §3505 because they were not produced in a timely manner and because the circumstances surrounding the foreign certification indicated a lack of trustworthiness. In addition, defendants cannot establish the other requirements for relief on plain error review.

8. The district court correctly enhanced Murphy's sentence for abuse of a position of trust. Murphy held a position of trust with respect to ARI and its shareholders, who were victims in this case along with the Haitian government.

ARGUMENT

I. THE DISTRICT COURT PROPERLY INSTRUCTED THE JURY ON THE *MENS REA* ELEMENT OF AN FCPA OFFENSE.

Defendants contend (Kay Br. 22-43; Murphy Br. 2) that the district court committed reversible error by declining to instruct the jury that the FCPA required proof of a specific intent to violate the law. Because the district court's jury charge, taken as a whole, correctly instructed the jury on the *mens rea* elements of an FCPA violation, that contention has no merit.

A. PROCEDURAL BACKGROUND.

1. The FCPA makes it unlawful for an officer of an "issuer," or for a "domestic concern," to use the mails or other instrumentalities of interstate commerce "corruptly" in furtherance of paying a bribe to a foreign official. 15 U.S.C. §§78dd-1(a), 78dd-2(a). Kay and Murphy were each charged with violating §78dd-1(a) as officers of an "issuer" and with violating §78dd-2(a) as "domestic concerns."[2/]

An officer of an issuer who violates §78dd-1(a) is subject to a civil penalty, but an officer who "willfully" violates that section is subject to imprisonment and fine. 15 U.S.C. §78ff(c)(2). Similarly, a domestic concern who violates §78dd-2(a)

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[2] An "issuer" is a corporation, such as ARI, that has issued securities that are registered with the SEC or that is required to file periodic reports with the SEC. 15 U.S.C. §§ 78c(a)(8), 78dd-1(a). A "domestic concern" includes an individual who is an American citizen. 15 U.S.C. §78dd-2(h)(1).

is subject to a civil penalty, but a domestic concern who "willfully" violates that section is subject to imprisonment and a fine. 15 U.S.C. § 78dd-2(g)(2).

2. Defendants submitted two proposed jury instructions defining the "corruptly" element. R.E. Tab 17. The first instruction stated that "[t]o act 'corruptly' means to act willfully, knowingly, and with the specific intent to violate the law." *Id.* at 27. The instruction required the jury to "find that the defendant knew that the Foreign Corrupt Practices Act prohibited American businessmen from providing anything of value to a foreign official in order to obtain or retain business, yet acted with the specific intent to violate that law; that is to say, with bad purpose either to disobey or disregard the law." *Ibid.*; *see also* 8 Tr. 113-16, 134, 194-95. The district court refused that instruction. 8 Tr. 133, 151, 215.

Defendants submitted an alternative instruction that stated that "[t]o act 'corruptly' means to act knowingly and dishonestly, with the specific intent to achieve an unlawful result by influencing a foreign public official's action in one's own favor." *Id.* at 29-30. The alternative instruction required the jury to find that "the defendants knowingly committed acts which the law forbids, purposefully intending to violate the law." *Id.* at 30; *see also* 8 Tr. 116-18, 134. The district court refused the alternative instruction. 8 Tr. 151-52, 215.

Defendants did not request an instruction defining "willfully." Nor did defendants argue at the jury charge conference that willfulness was a separate element on which the jury needed to be instructed. Rather, defendants agreed that the elements of the offense set forth in the government's proposed jury instructions, which did not include willfulness as an element, were "accurately stated" and "correct." 8 Tr. 109-10.

3. In the jury charge, the district court instructed the jury that one of the elements of an offense was that "the defendant acted corruptly . . . ." R.142: Jury Instructions, at 15; 9 Tr. 17. The court defined the term "corruptly" as follows:

> An act is 'corruptly' done if done voluntarily and intentionally, and with a bad purpose or evil motive of accomplishing either an unlawful end or result, or a lawful end or result by some unlawful method or means. The term "corruptly" is intended to connote that the offer, payment, and promise was intended to induce the recipient to misuse his official position.

R.E. Tab 16, at 17; 9 Tr. 19. The court defined "knowingly" to mean "that the act was done voluntarily and intentionally, not because of accident or mistake." R.142: Jury Instructions, at 11; 9 Tr. 14. The court informed the jury that each defendant was raising as a defense that he did not act with corrupt intent in participating in the authorization of payments to Haitian officials. R.142: Jury Instructions, at 29, 30; 9 Tr. 30, 31.

During deliberations, the jury sent a note stating "define criminal intent as applies to case." R.E. Tab 15, at 1. The court asked the jury to be more precise. *Ibid.*; 11 Tr. 10. The jury then sent a note that inquired: "Can lack of knowledge of the FCPA be considered an accident or mistake?" R.E. Tab 15, at 2. The note referenced the instruction defining "knowingly." *Ibid*; *see also* 11 Tr. 10-11. In response, the court directed the jury to consider all of the instructions on the intent element. R.E. Tab 15, at 2; 11 Tr. 16-21.

4. Defendants claimed, for the first time, that the district court improperly failed to instruct the jury on the "willfully" element of an FCPA violation in their post-trial first motion for a new trial (R.178) and supplemental motion for a new trial (R.175). The district court denied those motions. R.E. Tabs 10 & 11.

B. STANDARD OF REVIEW.

A challenge to the jury charge is reviewed for abuse of discretion when the challenge is preserved through a requested jury instruction or an objection to the jury charge. *United States v. Redd*, 355 F.3d 866, 873-74 (5th Cir. 2003); *United States v. Storm*, 36 F.3d 1289, 1294 (5th Cir. 1994). When a defendant fails to request a jury instruction or fails to object to the jury charge, the Court reviews the instructions only for plain error. *Redd*, 355 F.3d at 874; *United States v. Daniels*, 281 F.3d 168,

183 (5th Cir. 2002); *see also Jones v. United States*, 527 U.S. 373, 387-89 (1999); Fed. R. Crim. P. 30(d) and 52(b).

C. ARGUMENT.

Defendants argue (Kay Br. 22-42) that the jury charge was flawed because it omitted the willfulness element of an FCPA violation. Defendants, however, did not claim at trial that "willfully" was an element of the offense. Rather, they made that claim for the first time in their post-trial motions. In response to those motions, the government took the position that "willfully" was not a distinct element from "corruptly."

Upon further consideration, we now agree that "willfully" and "corruptly" are distinct elements of a criminal violation of the FCPA. *Cf. Bryan v. United States*, 524 U.S. 184, 187-89 & nn.2 & 6 (1998) (18 U.S.C. §§ 922(a)(1)(A) & 924(a)(1)); *United States v. Tucker*, 345 F.3d 320, 334 & n.45 (5th Cir. 2003) (15 U.S.C. §§ 77q(a) & 77x)). We disagree with defendants, though, that "willfully" requires proof that the defendant acted with intent to violate the law. As used in the FCPA, "willfully" merely requires proof that a defendant acted with knowledge he was committing the acts that constitute a violation of the statute.

1. "Willfully" Does Not Require Proof That A Defendant Acted With Knowledge That He Was Violating The Law.

Within broad constitutional limits, "the definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute." *Staples v. United States*, 511 U.S. 600, 604 (1994) (internal quotation omitted). The Supreme Court has "long recognized that determining the mental state required for commission of a federal crime requires 'construction of the statute and . . . inference of the intent of Congress.'" *Id.* at 605 (*quoting United States v. Balint*, 258 U.S. 250, 253 (1922)). That determination is based on "the statute's language, structure, subject matter, context, and history – factors that typically help courts determine a statute's objectives and thereby illuminate its text." *Almendarez-Torres v. United States*, 523 U.S. 224, 228 (1998).

The Supreme Court has noted that "[t]he word 'willfully' is sometimes said to be a 'a word of many meanings' whose construction is often dependent on the context in which it appears." *Bryan*, 524 U.S. at 191; *see United States v. Arditti*, 955 F.2d 331, 340 (5th Cir. 1992) ("The meaning of 'willfully' varies depending on the context."). Indeed, this Court's pattern jury instructions refrain from setting forth "an inflexible definition" of "willfully." *See Fifth Circuit Pattern Jury Instructions,*

Criminal Cases No. 1.38, at 53 (2001). As a general matter, the term "willfully" has been used to describe three different types of *mens rea* for criminal offenses.

First, the Supreme Court has held in some contexts that "willfully" requires proof that the defendant acted with knowledge of the specific statutory provision that he was charged with violating, *i.e.*, with specific intent to violate the statute charged. *See Ratzlaf v. United States*, 510 U.S. 135, 138, 149 (1994) (money laundering); *Cheek v. United States*, 498 U.S. 192, 201 (1991) (tax violation). The Supreme Court has limited that definition of "willfully" to prosecutions involving "highly technical statutes that present[] the danger of ensnaring individuals engaged in apparently innocent conduct." *Bryan*, 524 U.S. at 194 (footnote omitted).

At the charge conference, the first instruction requested by defendants defined "corruptly" to require proof that they knew the FCPA prohibited bribes to foreign officials "yet acted with the specific intent to violate that law." *See* R.E. Tab. 17, at 27; 8 Tr. 113, 134 (defense citing *Cheek* and *Ratzlaf* as support for requested instruction). On appeal, however, defendants appear to disavow any claim that "willfully" requires proof that the defendants acted with the specific intent to violate the FCPA. *See* Kay Br. 26 & n.6. Thus, it appears that defendants have abandoned

the primary position they took in the district court with respect to the *mens rea* element of the FCPA.[3/] *See* 8 Tr. 113, 116, 134.

Second, the Supreme Court has held in other contexts that "willfully" requires proof that a defendant acted with "knowledge that the conduct is unlawful," *i.e.*, with specific intent to violate the law. *Bryan*, 524 U.S. at 196. That type of willfulness does not require proof that the defendant had knowledge of the particular law that made his conduct unlawful; it requires only that the defendant act with consciousness of wrongdoing. *Id.* at 194-95.

On appeal, defendants argue (Kay Br. 28-32) that type of willfulness is what is required under the FCPA, calling it "ordinary specific intent" (*id.* at Br. 26 & n.6) to distinguish it from the type of willfulness involved in *Cheek* and *Ratzlaf*.[4/] At the

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[3] The National Association of Criminal Defense Lawyers (NACDL), as *amicus curiae*, argues (Br. 3-6) that the FCPA requires proof of a specific intent to violate the statute. The FCPA, however, is not the same type of "highly technical" statute as those at issue in *Cheeks* and *Ratzlaf*, for the FCPA's prohibition on bribery presents no danger of ensnaring individuals in "apparently innocent conduct." Moreover, the FCPA was enacted in 1977 as an amendment to the Securities Exchange Act of 1934, 15 U.S.C. §78a *et seq*. *See* Pub. L. No. 95-213, 91 Stat. 1494 (1977). The criminal penalty provision for securities fraud is §78ff(a), while one of the criminal penalty provisions for the FCPA is §78ff(c). At least three circuits have held that a defendant may commit securities fraud "willfully" in violation of §78ff(a) even if he does not know at the time of the acts that his conduct violated the securities laws. *United States v. Tarallo*, 380 F.3d 1174, 1180 (9th Cir. 2004), *amended*, 413 F.3d 928 (2005); *United States v. O'Hagan*, 139 F.3d 641, 647 (8th Cir. 1998); *United States v. Peltz*, 433 F.2d 48, 54 (2d Cir. 1970) (Friendly, J.) ("A person can willfully violate an SEC rule even if he does not know of its existence.").

[4] The Supreme Court has noted that the "venerable distinction" between "general intent" and "specific intent" has been "the source of a good deal of confusion." *United States v. Bailey*, 444 U.S. 394, 403 (1980). In this case, the parties used those terms during the charge conference in discussing

charge conference, the alternative instruction requested by defendants defined "corruptly" to require proof that "the defendants knowingly committed acts which the law forbids, purposefully intending to violate the law." R.E. Tab 17, at 30; *see also* 8 Tr. 116, 134.

Finally, the Supreme Court has held in some contexts that "willfully" means intentionally or voluntarily. *See Browder v. United States*, 312 U.S. 335, 340-42 (1941) ("the word 'willful' often denotes an intentional as distinguished from an accidental act"); *Arditti*, 955 F.2d at 340 ("The Supreme Court has recognized that in common usage the word 'willful' is considered synonymous with such words as 'voluntary,' 'deliberate,' and 'intentional,' and that in law the word generally refers to conduct that is not merely negligent."). Used in that sense, "willfully" has essentially the same meaning as "knowingly." *See United States v. Brown*, 186 F.3d 661, 665 n.5 (5th Cir. 1999) (approving pattern jury instruction defining "knowingly" to mean that "the act was done voluntarily and intentionally, and not because of accident or mistake"). The Supreme Court has explained that "the term 'knowingly'

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the *mens rea* element of the FCPA. The defense argued that the FCPA required "specific intent," while the government argued that the statute required only "general intent." 8 Tr. 111-12, 113, 116, 122-23, 131, 134. The district court ruled that the FCPA required "general intent." 8 Tr. 133, 151-52, 215.

merely requires proof of knowledge of the facts that constitute the offense," as distinguished from knowledge of the law. *Bryan*, 524 U.S. at 193.

The legislative history reveals that the FCPA uses the term "willfully" in §78dd-2(g)(2) and §78ff(c)(2) in that sense. At the time the FCPA was enacted, several decisions had held, in the context of civil violations of the securities laws, that "willfully" meant "intentionally committing the act which constitutes the violation," with "no requirement that the actor also be aware that he is violating one of the Rules or Acts." *Tager v. Securities and Exchange Comm'n*, 344 F.2d 5, 8 (2d Cir. 1965); *see also Gearhart & Otis, Inc. v. Securities and Exchange Comm'n*, 348 F.2d 798, 802-03 (D.C. Cir. 1965); *Arthur Lipper Corp. v. Securities and Exchange Comm'n*, 547 F.2d 171, 180-81 & n.7 (2d Cir. 1976). The report on the House bill, which required that a violation be "knowingly and willfully," cited those decisions and stated:

> Consistent with the often reiterated holdings of the courts that have interpreted a similar standard in the few places it is included in the federal securities laws, the knowledge required is merely that a defendant be aware that he is committing the act which constitutes the violation – not that he knows his conduct is illegal or has any specific intent to violate the law. . . . *Indeed, even in the criminal context, neither knowledge of the law violated or the intention to act in violation of the law is generally necessary for conviction, and the Committee does not intend that either be required here in either civil or criminal proceedings*. . . .

H.R. Rep. No. 95-640, at 15 (1977) (emphasis added) (citations omitted).[5/] The committee of conference of the House and Senate later adopted the Senate bill's version of the penalty provision, which required only that an individual act "willfully." H.R. Conf. Rep. No. 94-831, at 12-13 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4121, 4125.

The Supreme Court has observed that "when 'judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its . . . judicial interpretations as well.'" *Merrill Lynch v. Dabit*, 126 S. Ct. 1503, 1513 (2006) (*quoting Bragdon v. Abbott*, 524 U.S. 624, 645 (1998)). Here, by explicitly incorporating a particular judicial interpretation of "willfully" as used elsewhere in the securities laws, the legislative history leaves little doubt that Congress intended that "willfully," as used in the FCPA, merely requires proof that a defendant intended

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[5] The House report also cited *Ellis v. United States*, 206 U.S. 246, 257 (1907), in which Justice Holmes stated that "[i]f a man intentionally adopts certain conduct in certain circumstances known to him, and that conduct is forbidden by the law under those circumstances, he intentionally breaks the law in the only sense in which the law ever considers intent."

At the time the FCPA was under consideration, several decisions had held, in the context of another provision of the securities laws, that "willfully" required proof of "a realization on the defendant's part that he was doing a wrongful act." *Peltz*, 433 F.2d at 55 (Friendly, J.) (internal quotation omitted); *see also United States v. Charnay*, 537 F.2d 341, 351-52 (9th Cir. 1976); *United States v. Dixon*, 536 F.2d 1388, 1397 (2d Cir. 1976). The legislative history makes no reference to those decisions.

to commit the acts that were unlawful – and not that he knew his conduct violated the statute or violated the law.[6/]

2. Because Defendant Did Not Request A Jury Instruction On "Willfully," Plain Error Review Applies.

Defendants argue (Kay Br. 28-41) that the jury charge was erroneous because the district court failed to instruct the jury that the "willfully" element required proof that they acted with knowledge that their conduct was unlawful. Defendants, however, did not request an instruction on the "willfully" element. Nor did they object to the jury charge that was given on the ground that it failed to include such an instruction. Defendants have therefore failed to preserve their challenge to the jury instructions on the ground that it omitted the willfulness element. *Redd*, 355 F.3d at 874-875; *see also Jones*, 527 U.S. at 388.

Contrary to defendants' suggestion (Kay Br. 41 n.11), the jury instructions that they did request do not preserve the claim they are now making on appeal. Both of the proposed instructions defined the term "corruptly," not the term "willfully." R.E. Tab 17, at 27-30. The first instruction defined "corruptly" to require proof that the

[6] Used in that sense, the term "willfully" makes clear that *individual* criminal liability under the statute requires a showing of purposeful, intentional action. The *mens rea* requirements in the penalty provisions of the FCPA distinguish "willful" criminal violations from civil violations, for which no special showing of intent is required. Corporate criminal liability, corporate and individual civil liability and injunctive relief under the FCPA may be premised on theories of vicarious liability, *respondeat superior*, negligent supervision and the like.

defendants acted with the specific intent to violate the FCPA. *Id.* at 27. As discussed above, defendants apparently now concede that that instruction was not a correct statement of the law.[7/] *See* Kay Br. 26 & n.6.

The alternative instruction defined "corruptly" to require proof that defendants acted with specific intent to violate the law. R.E. Tab 17, at 29-30. Although that mental state is the one that defendants now claim is required by the "willfully" element, the alternative instruction was not a correct statement of the law because "corruptly" refers to a separate *mens rea* element requiring proof that a defendant acted with "a bad or wrongful purpose and an intent to influence a foreign official to misuse his official position." *Stichting v. Schreiber*, 327 F.3d 173, 183 (2d Cir. 2003).[8/] Defendants' failure to bring the "willfully" element to the district court's

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[7] Defendants' position on appeal is not entirely clear. Defendants argue that the "willfully" element of the FCPA requires proof that they acted "with knowledge that [their] conduct was unlawful" and with "specific intent to violate the law," Kay Br. 28, and they rely on the Supreme Court's interpretation of "willfully" in *Bryan* to support their argument, *id.* at 29. They also emphasize, though, that they did not know the FCPA prohibited their conduct. *See* Kay Br. 13, 42. If the "willfully" element requires only knowledge that the conduct is unlawful (as opposed to knowledge of the particular statute), defendant's lack of knowledge of the FCPA is wholly irrelevant. Rather, the relevant question for the jury to resolve would be whether defendants knew that the preparation of false documents and the payment of bribes were unlawful.

[8] The Senate report explained the "corruptly" element as follows:

> The word "corruptly" is used in order to make clear that the offer, payment, promise, or gift, must be intended to induce the recipient to misuse his official position in order to wrongfully direct business to the payor or his client, or to obtain preferential legislation or a favorable regulation. The word "corruptly" connotes an evil motive or purpose, an intent to wrongfully influence the recipient. It does not

attention at the charge conference deprived the court of an opportunity to include an instruction on "willfully" before the jury began deliberations. *See Jones*, 527 U.S. at 387-88 (Timely objections "enable a trial court to correct any instructional mistakes before the jury retires and in that way help to avoid the burdens of an unnecessary retrial."). Thus, the requested jury instructions did not preserve the challenge that defendants are raising on appeal, and the jury charge should be reviewed only for plain error. *Id.* at 388; *Redd*, 355 F.3d at 874-875 & n.8.

In *United States v. Olano*, 507 U.S. 725, 731-32 (1993), the Supreme Court set forth a four-prong test for granting relief on plain error review. Under that test, this Court may grant relief only if a defendants shows "(1) 'error,' (2) that is 'plain,' and (3) that 'affect[s] substantial rights.'" *Johnson v. United States*, 520 U.S. 461, 466-67 (1997) (*quoting Olano*, 507 U.S. at 732). If those three conditions are met, the Court "may then exercise its discretion to notice a forfeited error, but only if (4) the error 'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.'" *Johnson*, 520 U.S. at 467 (*quotin*g *Olano*, 507 U.S. at 732) (internal quotation marks omitted); *see also Jones*, 527 U.S. at 389.

> require that the act be fully consummated, or succeed in producing the desired outcome.

S. Rep. No. 95-114, at 10 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4098, 4108. The House report contained a similar explanation, noting that the term "corruptly" was intended to have the same meaning as in the bribery statute, 18 U.S.C. §201. *See* H.R. Rep. No. 95-640, at 7-8 (1977).

3. The Jury Instructions Were Not Erroneous Even Under Defendants' View Of The *Mens Rea* Element.

As discussed above, the legislative history of the FCPA strongly supports the view that the "willfully" element of a criminal violation does not, contrary to defendants' contention on appeal, require proof that a defendant acted with specific intent to violate the law. Accordingly, no such instruction was necessary in this case.

Even if this Court were to agree with defendants' view of the "willfully" element, however, the district court's jury charge was not erroneous. While the court did not use or define the term "willfully," the court's instruction on "corruptly" required the jury to find facts that established defendants acted "willfully," as well as "corruptly," in order to convict. As defendants note (Kay Br. 29), the Supreme Court expressed approval of the following definition of "willfully" in *Bryan*:

> A person acts willfully if he acts intentionally and purposely with the intent to do something the law forbids, that is, with the bad purpose to disobey or to disregard the law. Now, the person need not be aware of the specific law or rule that his conduct may be violating. But he must act with the intent to do something that the law forbids.

524 U.S. at 190. In this case, the district court instructed the jury:

> An act is 'corruptly' done if done voluntarily and intentionally, and with a bad purpose or evil motive of accomplishing either an unlawful end or result, or a lawful end or result by some unlawful means. The term "corruptly" is intended to connote that the offer, payment, and promise was intended to induce the recipient to misuse his official position.

R.E. Tab 16, at 17; 9 Tr. 19.[9/] The first sentence of the court's instruction requiring proof of an act done "with a bad purpose or evil motive of accomplishing either an unlawful end or result, or a lawful end or result by some unlawful means" is, as a practical matter, equivalent to the *Bryan* instruction requiring proof of an act done "with the intent to do something the law forbids, that is, with the bad purpose to disobey or to disregard the law." Thus, although the jury charge did not separately define willfulness, the instruction on the "corruptly" element required the jury to find, in substance, that defendants acted with specific intent to violate the law. *Cf. Tucker*, 345 F.3d at 335; *United States v. Jobe*, 101 F.3d 1046, 1059 & n.16 (5th Cir. 1996). Consequently, even if this Court agrees with defendants' view of the "willfully" element, the jury instructions were not erroneous.[10/]

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[9] The district court's instruction was based on an instruction approved in *United States v. Liebo*, 923 F.2d 1308, 1312 (8th Cir. 1991), an FCPA prosecution.

[10] Defendants are mistaken in claiming (Kay Br. 41 n.10, 42 n.12) that reversals on Counts 1-12 would also require reversal on Count 13, the conspiracy count. To prove a conspiracy under 18 U.S.C. §371, the government must prove "the same degree of criminal intent as is necessary for proof of the underlying substantive offense." *United States v. Dadi*, 235 F.3d 945, 950 (5th Cir. 2000); *see United States v. Feola*, 420 U.S. 671, 686-87 (1975) (§371 does not require knowledge that conduct violates federal law). With respect to the conspiracy count, however, the district court instructed the jury that one of the elements was that "the defendant knew the unlawful purpose of the agreement and joined in it willfully, that is, with the intent to further the unlawful purpose." R. 142: Jury Instructions, at 26; 9 Tr. 27. During the charge conference, defendants agreed that instruction was correct. 8 Tr. 192-93.

4. Defendants Cannot Satisfy The Other Requirements For Relief On Plain Error Review.

Even if this Court were to conclude that the district court's jury instructions were erroneous, defendants cannot satisfy the other requirements of Fed. R. Crim. P. 52(b) for obtaining relief.

Defendants cannot show that any error was "plain" in the sense that it was "clear" or "obvious" under current law. *Olano*, 507 U.S. at 734; *see also United States v. Fuchs*, 467 F.3d 889, 901 (5th Cir. 2006). They have not cited, and we are not aware of, any case holding that the "willfully" element of the FCPA requires proof of specific intent to violate the law.[11/] Nor have they pointed to anything in the legislative history to support their view of the "willfully" element.

Nor can defendants show that any error "affect[ed] substantial rights," *i.e.*, that the error was "prejudicial" in that it "must have affected the outcome of the district court proceedings." *Olano*, 507 U.S. at 734. As *Olano* explained, Rule 52(b) normally requires a "harmless error" inquiry to determine whether an error was

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[11] Defendants' reliance (Kay Br. 33-34) on *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005), which was decided after this case was tried, is misplaced. *Arthur Andersen* did not involve a statute with a "willfully" element. Rather, that case involved the *mens rea* elements of 18 U.S.C. §1512, which prohibits "knowingly . . . corruptly persuad[ing] another person . . .with intent to . . . cause" that person to withhold documents from an official proceeding. 544 U.S. at 703. The Supreme Court in *Arthur Andersen* found that the jury instructions failed to require the requisite consciousness of wrongdoing and allowed the jury to find guilt even if the defendant honestly and sincerely believed that its conduct was lawful. *Id.* at 706. That is simply not the case here.

prejudicial "with one important difference: It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." *Ibid.*; *see also United States v. Vonn*, 535 U.S. 55, 62 (2002). In the context of this case, defendants must show "a reasonable probability that, but for [the error claimed], the result of the proceeding would have been different." *United States v. Dominguez Benitez*, 542 U.S. 74, 82 (2004) (internal quotation omitted).

Defendants cannot show a reasonable probability that they would have been acquitted had the jury been given an instruction on willfulness like the one in *Bryan*. As discussed above, the jury charge required the jury to find, in effect, that defendants acted with the specific intent to violate the law, and the jury found the defendants guilty. To be sure, the jury's notes during deliberations asked questions about the *mens rea* element, but the clarifying third note – which asked "can lack of knowledge of the FCPA be considered an accident or mistake" – suggests the jury may have thought the government was required to prove that defendants acted with specific intent to violate the FCPA. R.E. Tab 15. Defendants agree, at this stage, that no such proof was required. *See* Kay Br. 26 & n.6. Moreover, the evidence overwhelmingly showed that Murphy and Kay authorized the preparation of false shipping documents and the payment of the bribes to Haitian officials. It is hard to believe that any

reasonable jury would find that Murphy and Kay did not know that that type of conduct – which at its core involved lying and cheating – was unlawful.

Finally, defendants cannot show that any error "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." *Olano*, 507 U.S. at 732 (internal quotation omitted). The evidence was overwhelming that Murphy and Kay knew that the shipping documents for the 12 shipments charged in the indictment were false. The evidence was likewise overwhelming that Murphy and Kay knew that Haitian officials were being paid bribes to accept those false shipping documents. Indeed, Kay admitted as much when he testified at trial. 7 Tr. 78-82. In light of that overwhelming evidence supporting an inference that Murphy and Kay knew their conduct was unlawful, they are entitled to no relief on plain error review. *See United States v. Cotton*, 535 U.S. 625, 632-33; *Johnson*, 520 U.S. at 470.

II. THE INDICTMENT'S FAILURE TO ALLEGE THE "WILLFULLY" ELEMENT WAS, AT MOST, HARMLESS ERROR.

Defendants contend (Kay Br. 43-47; Murphy Br. 2) that Counts 1-12 of the indictment failed to state offenses under the FCPA because they did not allege that defendants acted "willfully," as well as "corruptly," in paying bribes to foreign officials. Although the indictment did not allege that defendants acted willfully, defendants are not entitled to reversal of their convictions.

A. PROCEDURAL BACKGROUND.

After the jury returned its guilty verdicts, defendants filed a post-trial motion (R.176) to dismiss the indictment under Fed. R. Crim. P. 12(b)(3) and to arrest the judgments under Fed. R. Crim. P. 34. Defendants argued in those motions, for the first time, that Counts 1-13 of the indictment were insufficient because they failed to allege that defendants acted "willfully." The district court denied the motions. R.E. Tab 11.

B. STANDARD OF REVIEW.

The sufficiency of an indictment is reviewed *de novo*. *United States v. Harms*, 442 F.3d 367, 372 (5th Cir. 2006); *United States v. Fitzgerald*, 89 F.3d 218, 221 (5th Cir. 1996). If the challenge is raised for the first time "after trial, the indictment must be liberally construed in favor of validity, 'unless it is so defective that by any reasonable construction, it fails to charge an offense for which the defendant is convicted.'" *United States v. Threadgill*, 172 F.3d 357, 373 (5th Cir. 1999) (*quoting United States v. Salinas*, 956 F.2d 80, 82 (5th Cir. 1992)).

C. ARGUMENT.

Counts 1-12 of the indictment did not charge that the FCPA violation was committed "willfully." Nor did those counts refer to the penalty provisions in 15 U.S.C. §§ 78dd-2(g) and 78ff(c)(2). R.E. Tab 3. Nevertheless, the indictment as a

whole fairly imported the "willfully" element into Counts 1-12. In any event, any error in failing to charge the element was harmless.

1. The Indictment As A Whole Fairly Imported The "Willfully" Element.

The test for sufficiency of an indictment is "not whether the indictment could have been better drafted, but whether it conforms to minimal constitutional standards." *United States v. Gonzales*, 436 F.3d 560, 569 (5th Cir. 2006). An indictment is sufficient when it "alleges every element of the crime charged and in such a way as to enable the accused to prepare his defense and to allow the accused to invoke the double jeopardy clause in any subsequent proceeding." *Ibid.* (internal quotation omitted); *see also Hamling v. United States*, 418 U.S. 87, 117 (1974). "Practical, not technical, considerations govern [the] inquiry." *Fitzgerald*, 89 F.3d at 221. The Court has held that "an exact recitation of an element of the charged crime is not required, provided that the indictment as a whole 'fairly imports' the element." *Harms*, 442 F.3d at 372 (quoting *United States v. Wilson*, 884 F.2d 174, 179 (5th Cir. 1989)).

Although the indictment did not allege that defendants acted "willfully" *in haec verba*, the indictment's factual allegations more than "fairly imported" the element of willfulness, in that they described quintessentially dishonest conduct, *i.e.*, that

defendants created false shipping documents and bribed Haitian officials to accept them, thereby cheating the Haitian government out of customs duties and sales taxes. That is not the type of conduct that an ordinary person engages in innocently. *Cf. Ratzlaf*, 510 U.S. at 144 (currency structuring "not inevitably nefarious"). Paragraphs 3-4 and 16-17, for example, describe the defendants' intentional creation of the false shipping documents, and paragraphs 19-21 further describe the defendants' efforts to bribe Haitian officials to accept the false documents and to avoid inquiries into the discrepancies between them and the actual amounts of rice shipped into Haiti. R.E. Tab 3. Coupled with the allegation that defendants acted corruptly, the facts alleged in the indictment sufficiently established the willfulness element under both the government's view (*i.e.*, an intent to commit acts that were unlawful) or defendants' view (*i.e.*, an intent to do something the law forbids, that is, with bad purpose to disobey or disregard the law). *Cf. United States v. Henry*, 288 F.3d 657, 662-63 (5th Cir. 2002); *Wilson*, 884 F.2d at 180-81.

2. The Failure To Charge The "Willfully" Element Was Harmless Error.

Before *United States v. Cotton*, 535 U.S. 625 (2000), was decided, this Court had reversed convictions when the indictment omitted an element of an offense. *See*, *e.g.*, *United States v. Cabrera-Teran*, 168 F.3d 141, 143 (5th Cir. 1999). That

conclusion flowed from the principle that "[a]n indictment's failure to charge an offense constitutes a jurisdictional defect." *Ibid.* (footnote omitted). In *Cotton*, however, the Supreme Court held that defects in an indictment do not deprive a court of subject-matter jurisdiction over a case. 535 U.S. at 631 (overruling *Ex parte Bain*, 121 U.S. 1 (1887), "insofar as it held that a defective indictment deprives a court of jurisdiction"). This Court has recognized that *Cotton* has overruled *Cabrera-Teran* and similar decisions. *See United States v. Longoria*, 298 F.3d 367, 372 & n.6 (5th Cir. 2002) (en banc). The Court has also recognized that *Cotton*, along with the Supreme Court's decision in *Neder v. United States*, 527 U.S. 1 (1999), which applied harmless error review to a failure to instruct a jury on an element of an offense, support the conclusion that defects in an indictment are likewise subject to harmless error review. *United States v. Robinson*, 367 F.3d 278, 285-86 (5th Cir. 2004) (failure of indictment to charge aggravating factors required to justify death sentence was susceptible to harmless error review).[12/]

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[12] Defendants misplace their reliance (Kay Br. 45-46) on *United States v. Henry*, 288 F.3d 657, 660 (5th Cir. 2002), and *United States v. Gonzalez*, 259 F.3d 355, 360 (5th Cir. 2001), to support their claim that the failure of an indictment to allege an essential element of an offense is not subject to harmless error review. The Court had no occasion to consider the application of harmless error review in *Henry* because the Court concluded that the indictment was sufficient despite its failure to allege the intent element. 288 F.3d at 663. *Gonzalez* involved an application of the plain error standard of review to a defective indictment and was reheard by the en banc court in *Longoria*, which overturned the panel's decision. *Longoria*, 298 F.3d at 371, 373-74.

As defendants note (Kay Br. 46 n.16), the question whether harmless error review applies

The indictment's failure to charge the "willfully" element was, at most, harmless error in light of the district court's jury instructions at trial. In assessing whether an error is harmless, the fundamental question is whether the error caused prejudice to the defendant. *See Olano*, 507 U.S. at 734. Where the error involves the grand jury's failure to find probable cause for an element of an offense, that error is harmless when the petit jury subsequently is properly instructed and finds that the element in question has been proved beyond a reasonable doubt. *Cf. United States v. Mechanik*, 475 U.S. 66, 70-71 (1986).

In this case, the jury charge required the jury to find facts that satisfied defendants' view of the willfulness element in order to convict on the FCPA counts. Under defendants' view that willfulness requires knowledge that conduct is unlawful (Kay Br. 26 n.6, 29), the "willfully" element required proof that defendants "act[ed] intentionally and purposely with the intent to do something the law forbids, that is, with bad purpose to disobey or disregard the law." *Bryan*, 524 U.S. at 190. As discussed earlier, the district court, in effect, instructed the jury that it was required to find that type of willfulness through its instructions defining "corruptly" to include acts "done voluntarily and intentionally, and with a bad purpose or evil motive of

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to the failure to allege an element of an offense is currently pending before the Supreme Court in *United States v. Resendiz-Ponce*, No. 05-998 (argued Oct. 10, 2006).

accomplishing an unlawful end or result, or a lawful end or result by some unlawful method or means." R.E. Tab 16, at 17. Because the jury necessarily found facts that established that defendants acted "willfully" in returning its guilty verdicts on the FCPA counts, the omission of the "willfully" element from the indictment was harmless. Defendants are not, therefore, entitled to a dismissal of Counts 1-12 of the indictment.[13/]

III. THE DISTRICT COURT PROPERLY REFUSED TO GIVE A GOOD FAITH INSTRUCTION ON THE OBSTRUCTION OFFENSE .

In a related vein, Murphy separately contends (Murphy Br. 25-28) that the district court erred in refusing to give a good faith instruction on the obstruction offense under 18 U.S.C. §1505. Because the district court adequately instructed the jury on the *mens rea* element of that offense, that contention is meritless.

A. PROCEDURAL BACKGROUND.

Section 1505 provides, in relevant part, that "[w]hoever corruptly . . . influences, obstructs, or impedes . . . the due and proper administration of the law

[13] Defendants' unsupported claim (Kay Br. 45 n.15) that dismissal of Counts 1-12 would also require dismissal of Count 13, the conspiracy count, is clearly wrong. This Court has "consistently held that a conspiracy charge need not include the elements of the substantive offense the defendant may have conspired to commit." *Threadgill*, 172 F.3d at 367; *see also United States v. Ivey*, 949 F.2d 759, 765 (5th Cir. 1991). Count 13 sufficiently alleged the elements of a conspiracy under 18 U.S.C. §371. R.E. Tab 3, at 7-12; *see United States v. Bieganowski*, 313 F.3d 264, 276 (5th Cir. 2002) (setting out elements).

under which any pending proceeding is being had before any department or agency of the United States" commits a felony offense.

During the charge conference, Murphy did not object to the government's proposed instruction, which was based on *Fifth Circuit Pattern Jury Instructions, Criminal Cases* No. 2.65 (2001), on the elements of an offense under §1505. 8 Tr. 196, 200-01. Murphy did not submit a written good-faith instruction, but he orally requested one. The district court denied the request. 8 Tr. 196-97. The court instructed the jury that one of the essential elements of the offense was:

> That the defendant's act [of obstruction] was done "corruptly," that is, that the defendants acted knowingly and dishonestly, with the specific intent to subvert or undermine the due administration of justice.

R.142: Jury Instructions, at 29; 9 Tr. 29.

B. STANDARD OF REVIEW.

As noted earlier, a district court's refusal to include a requested instruction is reviewed for abuse of discretion. *Storm*, 36 F.3d at 1294. When a defendant's request is insufficiently specific, the jury charge is reviewed only for plain error. *Redd*, 355 F.3d at 874-85; see also Fed. R. Crim. P. 30 and 52(b).

C. ARGUMENT.

The district court's refusal to give a good faith instruction was neither an abuse of discretion nor plain error.

1. Defendant's Oral Request For A Good Faith Instruction Did Not Preserve His Challenge To The Jury Charge.

This Court has found that an oral request for a jury instruction is sufficient "if the [district] court is clearly informed of the point involved." *Hull v. United States*, 324 F.2d 817, 824 (5th Cir. 1963). Murphy's oral request for a good faith instruction was not sufficiently specific to permit meaningful review of the district court's ruling. *See* 8 Tr. 196-97 ("[I]f the Court is not going to give a good faith instruction on the FCPA . . . I would request one in this one."). For example, the Court cannot determine, on this record, whether the requested instruction represented a correct statement of the law. *See Redd*, 355 F.3d at 875 n.8 ("We cannot analyze the alleged proposed instruction without knowing what language it may have actually contained."). The district court's ruling should therefore be reviewed only for plain error, limited to determining "whether the district court's charge, as a whole, is a correct statement of the law clearly instructing the jurors." *Id.* at 875.

To satisfy the plain error standard, Murphy must show, as discussed earlier, clear or obvious error that affects his substantial rights; if he does, the Court has discretion to correct a forfeited error that seriously affects the fairness, integrity, or public reputation of judicial proceedings, but is not required to do so. *See Olano*, 507 U.S. at 732; *Redd*, 355 F.3d at 874.

2. The Refusal To Give A Good Faith Instruction Was Not Error.

The district court properly refused Murphy's oral request for a good faith instruction. This Court has consistently held, in a long line of cases, that the omission of a good faith instruction is not an abuse of discretion so long as the district court's *mens rea* instructions ensure that a defendant will not be convicted absent the requisite showing of intent. *Storm*, 36 F.3d at 1294-95; *see also*, *e.g.*, *United States v. Upton*, 91 F.3d 677, 683 (5th Cir. 1996); *United States v. Girarldi*, 86 F.3d 1368, 1376 (5th Cir. 1996). The same is true on plain error review. *United States v. Manges*, 110 F.3d 1162, 1177 (5th Cir. 1997).

The *mens rea* requirement under §1505 is "corruptly," and the district court's definition was taken from the pattern jury instruction for the related offense in 18 U.S.C. §1503. This Court has encouraged use of the pattern instructions. *See United States v. Tomblin*, 46 F.3d 1369, 1379 n.16 (5th Cir. 1995). Murphy did not object to the *mens rea* instruction at trial, and he does not challenge it on appeal. Moreover, Murphy makes no attempt to specify how the omission of a good faith instruction prejudiced his defense, particularly in light of his closing argument. 9 Tr. 166-70. Accordingly, the refusal to give a good faith instruction was neither an abuse of discretion nor plain error.

Contrary to Murphy's contention (Br. 25-27), the Supreme Court's decision in *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005), does not require a good faith instruction in the circumstances of this case. *Arthur Andersen* did not a involve a good faith instruction. Rather, that case involved jury instructions on the *mens rea* requirements of 18 U.S.C. §1512(b), which prohibits "knowingly . . . corruptly persuad[ing] another person . . .with intent to . . . cause" that person to withhold documents from an official proceeding. 544 U.S. at 703. The Supreme Court concluded that the combination of "knowingly" and "corruptly persuades" limited the statute's reach to "persuaders conscious of their wrongdoing." *Id.* at 706.[14/]

The Supreme Court found that the jury instructions in *Arthur Andersen* failed to convey the requisite consciousness of wrongdoing primarily for two reasons. The Court noted that the instructions allowed the jury to convict even if the defendant "honestly and sincerely believed that its conduct was lawful." 544 U.S. at 706. The Court also observed that "significant" modifications to the definition of "corruptly" in this circuit's pattern jury instruction "diluted the meaning of 'corruptly' so that it

[14] Murphy notes (Br. 25-26) that the government argued in *Arthur Andersen* that §1512(b) and §1505 had the same mens rea element of "corruptly." *Arthur Andersen LLP v. United States*, No. 04-368, Brief for United States, 21-22, 35-37 (March 2005) (available at 2005 WL 738080, at *21-*22, *35-*37). That argument was based on the government's position that the term "knowingly" in §1512(b) did not modify the term "corruptly persuades." *Id.* at 35-36. The Supreme Court rejected the government's position. *See* 544 U.S. at 704-05 ("The Government suggests that 'knowingly' does not modify 'corruptly persuades,' but that is not how the statute most naturally reads.").

covered innocent conduct.'" *Ibid.*[15/] Thus, the reversible error in *Arthur Andersen* was giving incorrect instructions on the applicable (and different) *mens rea* requirements of §1512(b), and not failing to give a good faith instruction. *Arthur Andersen* therefore provides no support for Murphy's claim that he was entitled to a good faith instruction in this case.

3. Defendants Cannot Satisfy The Other Requirements For Relief On Plain Error Review.

Murphy also cannot satisfy the other requirements of Fed. R. Crim. P. 52(b) for obtaining relief. Given the long line of cases holding that a good faith instruction is not required when the jury is properly instructed on the *mens rea* requirement, Murphy cannot show that any error was "plain" in the sense that it was "clear" or "obvious" under current law. *Olano*, 507 U.S. at 734; *Fuchs*, 467 F.3d at 901. Murphy likewise cannot show that any error "affect[ed] substantial rights," *i.e.*, that he would have been acquitted of obstruction of justice if a good faith instruction had been given. *See Olano*, 507 U.S. at 734; *Vonn*, 535 U.S. at 62. Nor can he show that any error "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." *Olano*, 507 U.S. at 732. Here, the evidence that Murphy lied about

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[15] As in this case, the definition of "corruptly" in *Arthur Andersen* was taken from *Fifth Circuit Pattern Jury Instruction, Criminal Cases* No. 2.65 (2001). In *Arthur Andersen*, though, the instruction was modified by deleting the word "dishonestly" and adding the term "impede" to the phrase "subvert or undermine." 544 U.S. at 706.

his knowledge of the false shipping documents and his involvement in the bribes paid to Haitian officials during his deposition before the SEC is "essentially uncontroverted." *Johnson*, 520 U.S. at 470; *see also Cotton*, 535 U.S. at 633. Accordingly, Murphy is entitled to no relief on plain error review.

IV. THE INTERSTATE COMMERCE ELEMENT OF AN FCPA OFFENSE WAS PROPERLY CHARGED IN THE INDICTMENT AND PROVEN AT TRIAL.

Defendants contend (Murphy Br. 7-16; Kay Br. 2) that the allegations of the indictment and the evidence at trial were insufficient to satisfy the interstate commerce element of an FCPA violation. That contention has no merit.

A. PROCEDURAL BACKGROUND.

1. Counts 1-12 of the indictment alleged that defendant used "instrumentalities of interstate commerce, to wit, an overnight express service, facsimile transmissions, and an ocean-going barge, which were used to transport and transmit false shipping documents, corruptly in furtherance of" the bribes to Haitian officials. R.E. Tab 3, at ¶ 11. The evidence at trial showed that the false shipping documents were prepared at ARI's office in Houston and sent to RCH's plant manager in Haiti by an overnight courier service, such as Federal Express and DHL. 4 Tr. 17, 157-58, 164, 232-33, 234-35; 5 Tr. 21-23; GXs 1F, 3F, 4F, 6D, 9F, 11F. The documents were also faxed to RCH on occasion. 4 Tr. 234.

The district court instructed the jury that one of the elements of an FCPA violation was that "the defendant made use of the mails or any means of [sic] instrumentality of interstate commerce in furtherance of an unlawful act under the statute." R.142: Jury Instructions, at 15; 9 Tr. 17. The court also instructed the jury that "the sending of packages from Texas to Haiti by Federal Express or other commercial carrier or the sending of such packages by other means from Texas to Haiti constitutes the use of a means or instrumentality of interstate commerce." R.142: Jury Instructions, at 19; 9 Tr. 20-21. At the charge conference, defendants agreed that those instructions, which were part of the government's proposed instructions G2 and G6, were correct. 8 Tr. 110, 137.

2. Defendants challenged, for the first time, the sufficiency of the indictment and the evidence with respect to the interstate commerce element in their post-trial motion under Fed. R. Crim. P. 29 (R.177) and motion to dismiss the indictment under Fed. R. Crim. P. 12(b) and to arrest judgment under Fed. R. Crim. P. 34 (R.176). The district court denied the motions. R.E. Tab 11.

B. STANDARD OF REVIEW.

Although defendants frame their claim in terms of the sufficiency of the indictment and the evidence, both claims concern the scope of the "in furtherance of" language of the interstate commerce element of the FCPA, which presents a question

of statutory interpretation. Defendants' challenge to the sufficiency of the indictment is reviewed *de novo*. *United States v. Brown*, 459 F.3d 509, 517 (5th Cir. 2006); *United States v. Flores*, 404 F.3d 320, 326 (5th Cir. 2005). Defendants' challenge to the sufficiency of the evidence is, in effect, a challenge to the jury instructions. Because defendants did not object, the instructions are reviewed only for plain error. *United States v. Saldana*, 427 F.3d 298, 303 (5th Cir. 2005).

C. ARGUMENT.

Defendants contend (Murphy Br. 7-16) that the interstate commerce element of the FCPA is satisfied only when the bribe itself is transmitted through interstate facilities. That contention is contradicted by the plain language of the statute and its legislative history.

1. The Plain Language Of The Statute Does Not Require That The Bribe Be Transmitted Through Interstate Facilities.

As this Court has observed, "[t]he appropriate starting point when interpreting any statute is its plain meaning." *United States v. Elrawy*, 448 F.3d 309, 315 (5th Cir. 2006), *see also*, *e.g.*, *Holloway v. United States*, 526 U.S. 1, 6 (1999). The words used are given their "ordinary meaning." *Moskal v. United States*, 498 U.S. 103, 108 (1990) (internal quotation omitted). The Court considers "not only the bare meaning

of the word but also its placement and purpose in the statutory scheme." *Bailey v. United States*, 516 U.S. 137, 145 (1995).

A plain reading of the "in furtherance of" requirement covers the conduct charged in the indictment and proven at trial in this case. The language of the FCPA requires that the mails or other means or instrumentality of interstate commerce be used "in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value" to a foreign official. 15 U.S.C. §§78dd-1(a) and 78dd-2(a). As defendants note (Murphy Br. 9), the word "furtherance" ordinarily means an "[a]ct of furthering, helping forward, promotion, advancement, or progress." *Black's Law Dictionary* (6th ed. 1991). Here, the uses of interstate facilities proven at trial – *i.e.*, the use of overnight delivery services and facsimile transmissions – provided a means of delivering the false shipping documents, directly or indirectly, to the Haitian officials who accepted bribes. The false documents were an essential step in the authorization and payment of the bribes, because the defendants would not have authorized the bribes, and the ARI employees in Haiti would not have paid the bribes, unless the Haitian officials accepted them for processing. The false shipping documents, therefore, represented an essential part of the *quid pro quo* of the bribes: In return for the payment of bribes, the Haitian officials accepted the false shipping

documents. Since the transmission of the false shipping documents through the interstate facilities promoted and advanced the payment of the bribes, the interstate facilities were used "in furtherance of" the bribes.

Defendants read the "in furtherance of" language to mean that the bribe itself must be transmitted through interstate facilities. *See* Murphy Br. 13 ("Thus, unlike this case, the allegedly illegal use of the instrumentalities of interstate commerce was, in fact, in furtherance of the bribe – the mails were used to transmit the payment."). That reading drains the "in furtherance of" language of any meaning. Indeed, if the "in furtherance of" language meant what defendants claim, the statute could have omitted the language and simply prohibited making "use of the mails or any means or instrumentality of interstate commerce corruptly to offer, pay, promise to pay, or authorize the payment of" bribes to foreign officials. As discussed below, Congress specifically rejected that approach in enacting the FCPA. In any event, it is a "settled rule that a statute must, if possible, be construed in a fashion that every word has some operative effect." *United States v. Nordic Village, Inc*., 503 U.S. 30, 36 (1992); *see also Bailey*, 516 U.S. at 146. Defendants' interpretation of the "in furtherance language" violates that settled rule by treating the "in furtherance of" language "as surplusage - as words of no consequence." *Ratzlaf*, 510 U.S. at 140.

Contrary to defendants' claim (Murphy Br. 13), the government's interpretation of the "in furtherance of" requirement does not give the FCPA "almost unlimited breadth." Defendants are flatly wrong in asserting (*id.* at 13-14) that a defendant who used the mail on one occasion to transmit a bribe to obtain an advertising contract could be charged, under the government's view, with an FCPA violation each time the defendant used interstate facilities in administering the contract. As defendants appear to recognize, the subsequent uses of interstate facilities in that example are "in furtherance of the contract" (Murphy Br. 14), and not in furtherance of the bribe. The use of interstate facilities is "in furtherance of" a bribe only when, as in this case, it promotes or advances the payment of the bribe. Here, a separate bribe was paid to Haitian officials in connection with each of the 12 shipments for which false shipping documents were transmitted by interstate facilities. The government has never taken the position that "every use of an instrumentality during business activities *facilitated* by a bribe" are in furtherance of the bribe, as defendants maintain. *See* Murphy Br. 9 (emphasis added).

2. The Legislative History Confirms That Interstate Facilities Need Be Used Only In Furtherance Of Making The Bribe.

The legislative history of the FCPA refutes defendants' narrow reading of the "in furtherance of" language as requiring that the bribe itself travel through interstate

commerce. The House bill prohibited making "use of the mails, or of any means or instrumentality of interstate commerce, corruptly to offer, pay, or promise to pay, or authorize the payment, of any money" to a foreign official for improper purposes. H.R. Rep. No. 95-640, at 7, 14 (1977). The Department of Justice expressed concern that the statute, as worded in the House bill, "would require that the mails or instrumentality of interstate commerce be directly used to offer or make the prohibited payment," which the Department considered "unduly restrictive." *Id.* at 18 (Letter of Patricia M. Wald, Ass't Att'y Gen. (Apr. 20, 1977)). The Department suggested that the provision "be modified so as to provide that the mails or interstate facility need only be used in furtherance of the illicit payment, offer, et cetera." *Ibid.*

The Senate bill, on the other hand, already included the "in furtherance of" language in its version of the statute. S. Rep. No. 95-114, at 17 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4098, 4114. The committee of conference of the House and Senate "adopted the identical provisions of both bills with the addition of the Senate 'in furtherance of' language." H.R. Conf. Rep. No. 94-831, at 12 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4121, 4124. The Conference Report explained that "[t]he adoption of the Senate 'in furtherance of' language makes clear that the use of interstate commerce need only be in furtherance of making the corrupt payment." *Ibid.* (emphasis added). The Senate bill passed in lieu of the House bill. Congress

therefore squarely rejected defendants' position that the mail or interstate facility must be used to transmit the bribe itself.

V. RETROACTIVE APPLICATION ON REMAND OF THIS COURT'S EARLIER DECISION INTERPRETING THE BUSINESS NEXUS ELEMENT OF THE FCPA DID NOT VIOLATE DUE PROCESS.

Defendants contend (Kay Br. 47-54; Murphy Br. 2), with the support of *amicus* NACDL (Br. 6-13), that the application on remand of this Court's decision reversing the dismissal of the indictment violated the Due Process Clause. That contention has no merit.

A. PROCEDURAL BACKGROUND.

1. In April 2002, the district court granted defendants' pre-trial motion to dismiss the indictment, finding that its allegations failed to satisfy the "business nexus" element of the FCPA. *United States v. Kay,* 200 F. Supp. 2d 681 (S.D. Tex. 2002) (*Kay I*). The court ruled that bribes directed at reducing customs duties and sales taxes did not fall within the scope of prohibited payments made in order to assist in "obtaining or retaining business." *Id.* at 682, 686.

On appeal, this Court reversed. *United States v. Kay*, 359 F.3d 738 (5th Cir. 2004) (*Kay II*). The Court found, as a matter of statutory construction, that "bribes paid to foreign officials in consideration for unlawful evasion of customs duties and sales taxes *could* fall within the purview of the FCPA's proscription" if "the bribery

was intended to produce an effect – here, tax savings – that would 'assist in obtaining or retaining business.'" *Id.* at 756 (emphasis in original). The Court concluded that "the indictment's paraphrasing of the FCPA's business nexus element . . . pass[ed] the test for sufficiency." *Id.* at 761. The Court noted that on remand the district court could address defendants' claims that the rule of lenity and the Due Process Clause required dismissal of the indictment. *Id.* at 760-61 n.96.

2. On remand, defendants filed a pre-trial motion to dismiss (R.71) on the ground that the indictment did not provide fair warning under the Due Process Clause. The district court denied the motion. R.E. Tab. 20.[16/] Defendants renewed that claim in their post-trial motions to dismiss and to arrest judgment (R.176). The court likewise denied that motion. R.E. Tab 11.

B. STANDARD OF REVIEW.

Defendants' constitutional challenge to the application of the FCPA to the conduct alleged in the indictment is reviewed *de novo*. *See United States v. Sims Bros. Const., Inc.*, 277 F.3d 734, 739 (5th Cir. 2001).

[16] The grand jury subsequently returned a second superseding indictment, which added the conspiracy count against both defendants (Count 13) and the obstruction count against Murphy (Count 14). R.E. Tab. 3.

C. ARGUMENT.

Defendants argue (Kay Br. 47-54) that the application on remand of *Kay II*'s interpretation of the "obtaining or retaining business" language of the FCPA violated the Due Process Clause because they did not have fair notice that paying bribes to obtain reduced customs duties and sales taxes was prohibited by the FCPA.[17] Because that claim rests on an incorrect legal test, it has no merit.

1. Defendants' Due Process Claim Rests On The Wrong Legal Test.

As defendants (Kay Br. 49) and *amicus* NACDL (Br. 10) point out, the Supreme Court stated in *United States v. Lanier*, 520 U.S. 259, 266 (1997), that, "although clarity at the requisite level may be supplied by judicial gloss on an otherwise uncertain statute . . . , due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." Defendants are mistaken, however, in claiming that the test for determining whether a judicial interpretation of a criminal statute may be retroactively applied is "the same test used for claims of qualified immunity: a defendant cannot be held liable unless his conduct

[17] Defendants also renew their argument that the "obtaining or retaining business" language of the FCPA does not reach payments to minimize or avoid foreign taxes, but they recognize that *Kay II*, which resolved that issue against them, is binding on subsequent panels as law of the case. Defendants make the argument to preserve it for further review. *See* Kay Br. 47.

violated 'clearly established statutory or constitutional obligations of which a reasonable person would have known.'" Kay Br. 50 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)) (footnote omitted). None of the cases cited by defendants supports that proposition.[18/]

In *Lanier*, the Supreme Court cited *Bouie v. City of Columbia*, 378 U.S. 347 (1964), along with *Marks v. United States*, 430 U.S. 188 (1977), and *Rabe v. Washington*, 405 U.S. 313 (1972), to support its statement that "due process bars courts from applying a novel construction of a statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." 520 U.S. at 266. *Bouie* held that the Due Process Clause required reversal of the

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[18] *Harlow* established the test for qualified immunity in civil suits against public officials under *Bivens v. Six Unknown Fed. Narcotic Agents*, 403 U.S. 388 (1971), and 42 U.S.C. §1983, holding that a public official is shielded from damages unless his actions violate "clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U.S. at 818.

Lanier involved a prosecution under 18 U.S.C. §242, which makes it a crime for a state official to act willfully and under color of law to deprive a person of rights protected by the Constitution. 520 U.S. at 261. As construed, §242's coverage is limited "to rights fairly warned of, having been 'made specific' by the time of the charged conduct." *Id.* at 267. *Lanier* equated the fair notice requirement of §242 to the standard for determining qualified immunity in civil actions against public officials, holding that a state official has fair warning that his conduct deprives a victim of a constitutional right under §242 when the constitutional right is "clearly established" under the immunity standard in civil actions. 520 U.S. at 270-71; *see also Hope v. Pelzer*, 536 U.S. 730, 739-740 (2002); *Kinney v. Weaver*, 367 F.3d 337, 352 n.16 (5th Cir. 2004) (en banc).

Lanier, therefore, merely held that the test for claims of qualified immunity is the same test for determining the reach of §242. Nothing in *Lanier,* or the other cases cited by defendants, suggests that the test for claims of qualified immunity should be applied to determine whether a judicial interpretation of a criminal statute may be applied retroactively.

defendants' trespass convictions because the state court's interpretation of the trespass statute was "clearly at variance with the statutory language" and "ha[d] not the slightest support in prior [state] decisions." 378 U.S. at 356. Drawing an analogy to the Ex Post Facto Clause, the Supreme Court explained (*id.* at 353-54):

> The fundamental principle that "the required criminal law must have existed when the conduct in issue occurred . . . , must apply to bar retroactive criminal prohibitions emanating from courts as well as from legislatures. If a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct at issue,' it must not be given retroactive effect.

Here, defendants contend (Kay Br. 48) that they did not have fair notice under the Due Process Clause because "*Kay II* extended criminal liability under FCPA beyond the explicit terms of the Act[.]" Accordingly, the *Bouie* test is the proper test to determine whether *Kay II* may be applied retroactively.[19] *See also Rogers v. Tennessee*, 532 U.S. 451, 461 (2001).

2. Retroactive Application of *Kay II* On Remand Did Not Deprive Defendants Of Due Process.

Kay II's construction of the "obtaining or retaining business" language of the FCPA was not "unexpected and indefensible" under *Bouie*. Rather, *Kay II* involved

[19] The other two cases cited by *Lanier* did not modify the *Bouie* test. *Marks* reversed a federal obscenity conviction based on a judicial construction of the statute adopted in a decision issued after the defendants were indicted. 430 U.S. at 189-92, 195-96. *Rabe* reversed a state obscenity conviction based on an unforeseeable judicial construction of the statute. 405 U.S. at 315-16.

a straightforward application of well-settled principles of statutory interpretation. Defendants argued in *Kay II* that the "obtaining or retaining business" language limited the FCPA's applicability "to those payments that [were] intended to obtain a foreign official's approval of a bid for a new government contract or the renewal of an existing government contract." 359 F.3d at 743. This Court concluded that "neither the ordinary meaning nor the provisions surrounding the disputed text [were] sufficiently clear to make the statutory language susceptible of but one reasonable interpretation." *Id.* at 745. The Court accordingly examined the legislative history of the FCPA. *Id.* at 746-56. The Court concluded that it could "not hold as a matter of law that Congress meant to limit the FCPA's applicability to cover only bribes that lead directly to the award or renewal of contracts." *Id.* at 755. Instead, the Court found that "Congress intended for the FCPA to apply broadly . . . and that bribes paid to foreign tax officials to secure illegally reduced customs and tax liability constitute a type of payment that can fall within this broad coverage." *Ibid.*

Kay II's interpretation of the business nexus element is not "clearly at variance with the statutory language." *Bouie*, 378 U.S. at 356. Indeed, as *Kay II* concluded, the plain meaning of "obtaining or retaining business" does not limit itself to the award or renewal of contracts. Nor does the plain meaning of the language necessarily exclude an evasion of customs duties and sales taxes that results in a

competitive advantage for existing business. *See* 359 F.3d at 743-45. Thus, the statutory language was, at worst, "ambiguous as a matter of law." *Id.* at 746.

Kay II's interpretation of the business nexus element of the FCPA was likewise not "a marked and unpredictable departure from prior precedent." *Rogers*, 532 U.S. at 467. As defendants note (Kay Br. 51), *Kay II*'s interpretation of the statutory language was "unprecedented," but only in the sense that there were no prior reported decisions that "squarely address[ed] the scope of the "obtain and retain business" language. *See* 359 F.3d at 745 n.21. The absence of any reported decisions interpreting the business nexus element, however, did not entitle defendants to a "first bite at the apple" when the statutory language was broad enough, on its face, to cover their conduct.[20/] Moreover, as *Kay II* concluded, the legislative history of the FCPA showed that "Congress was concerned about both the kind of bribery that leads to discrete contractual arrangements and the kind that more generally helps a domestic payor obtain or retain business for some person in a foreign country," including "illicit payments made to officials to obtain favorable but unlawful tax treatment." *Id.* at 755-56. Accordingly, since *Kay II*'s interpretation of the business nexus element was not "an exercise of the sort of unfair and arbitrary judicial action against

[20] If defendants were uncertain over the application of the FCPA to the bribes in question, they could have caused ARI to request an opinion pursuant to the Department of Justice's FCPA Opinion Procedure to clarify the meaning of the prohibition. See 28 C.F.R. §80.1 *et seq*.

which the Due Process Clause aims to protect," retroactive application of *Kay II* on remand did not deprive defendants of fair notice under the Due Process Clause. *Rogers*, 532 U.S. at 467.[21]

VI. THE DISTRICT COURT'S CONDITIONAL RULING ALLOWING THE GOVERNMENT TO IMPEACH KAY DID NOT BURDEN HIS FIFTH AMENDMENT PRIVILEGE.

Kay separately contends (Kay Br. 54-62) that the district court unfairly burdened his Fifth Amendment privilege against self-incrimination when the court ruled that the government could cross-examine him about whether he spoke to government investigators if he testified on direct examination that he disclosed the bribes to ARI's attorneys. Kay has not properly preserved that claim for appellate review. In any event, the district court's ruling was correct.

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[21] *Amicus* NACDL asserts (Br. 7-8, 11-12) that the rule of lenity should be applied to exclude defendants' conduct from coverage of the statute in light of *Kay II*'s conclusion that the statutory language was ambiguous. *See* 359 F.3d at 746. The rule of lenity, however, is a "tool of last resort" to be invoked "only where 'a reasonable doubt persists about a statute's intended scope even after resort to the language and structure, legislative history, and motivating policies of the statute.'" *United States v. Reedy*, 304 F.3d 358, 367 n.13 (5th Cir. 2002) (*quoting Moskal*, 498 U.S. at 108; *see also Holloway*, 526 U.S. at 12 n.14.

Amicus NACDL also asserts (Br. 8, 12-13) that defendants' convictions violate the prohibition on federal common law crimes. *Kay II*, however, merely interpreted the statutory language defining an element of the offense created by Congress; it did not create a new element. *See Lanier*, 520 U.S. at 267 n.6.

A. PROCEDURAL BACKGROUND.

1. The SEC opened its investigation of ARI in February 2001. 6 Tr. 16. On December 12, 2001, Kay was indicted on 12 counts of violating the FCPA. On December 21, 2001, the SEC sent a subpoena for Kay's testimony to counsel for Kay. R.E. Tab 14. Kay invoked his Fifth Amendment privilege against self-incrimination. *Ibid.*

2. At trial, Thomas Meier, an attorney with the SEC, testified that the SEC opened the investigation in February 2001 after attorneys for ARI notified the SEC about potential payments to Haitian officials. The district court admitted the testimony for background purposes. 6 Tr. 15-16. Defense counsel informed the court that he planned to ask Meier whether he knew that Kay was the source of that information. Defense counsel represented that Kay had disclosed the payments to attorneys with Andrews & Kurth, who were representing ARI in a civil case, and those attorneys notified ARI's board of directors, who then hired another law firm, Kramer Levin, which conducted an internal investigation and notified the SEC. 6 Tr. 64-66, 72-73. The government objected to the question on the grounds that Kay had declined to talk to government investigators about the payments. *Id.* at 66-77.

The district court conditionally ruled that if defense counsel asked Meier whether Kay was the source of the information about the payments, the government

could inquire whether Meier asked to speak to Kay and whether Kay agreed to speak with Meier. *Id.* at 77-80. Based on that ruling, counsel for Kay decided not to question Meier. *Id.* at 81.

2. Kay testified in his own defense. During Kay's testimony, defense counsel inquired whether the court would rule in a similar manner if Kay was asked on direct examination about whether he disclosed the payments to ARI's attorneys. 7 Tr. 5-7, 11. The government again objected. *Id.* at 7-12. The court stood by its ruling, stating that it would allow the government to ask Kay two questions: whether he was asked to speak to the SEC, and whether he spoke to the SEC. *Id.* at 12-15. The court offered to instruct the jury, at Kay's request, that Kay had an absolute right under the Fifth Amendment not to appear and not to make any statement. *Id.* at 6, 8, 13, 14. Defense counsel did not ask Kay on direct-examination whether he had disclosed the payments to ARI's attorneys. *Id.* at 15-16.

3. In a post-trial motion (R. 179), defendant Kay moved for a new trial based on the district court's rulings. The court denied the motion. R.E. Tab 12.

B. STANDARD OF REVIEW.

The Court reviews a district court's decision to admit or exclude evidence for abuse of discretion. *United States v. Ragsdale*, 426 F.3d 765, 774 (5th Cir. 2005).

The Court reviews constitutional issues *de novo*. *United States v. Bell*, 367 F.3d 452, 465 (5th Cir. 2004).

C. ARGUMENT.

Since he did not testify on direct-examination about the subject matter at issue, Kay failed to preserve his claim that the district court's ruling unfairly burdened his Fifth Amendment privilege against self-incrimination. In any event, the district court's ruling was correct as a matter of evidentiary and constitutional law.

1. Kay Has Not Properly Preserved His Fifth Amendment Claim.

In *Luce v. United States*, 469 U.S. 38, 43 (1984), the Supreme Court held that "to raise and preserve for review the claim of improper impeachment with a prior conviction, a defendant must testify." In that case, the defendant declined to take the stand and testify after the trial court made an *in limine* ruling that the government would be allowed to impeach him with a prior conviction if he testified. The Supreme Court ruled that the defendant's failure to testify at trial barred appellate review of his challenge to the trial court's ruling. *Id.* at 41-42.

The *Luce* principle has been extended by this Court and other courts to bar appellate review of rulings that would have allowed other types of impeachment if a defendant testified. *United States v. Bond*, 87 F.3d 695, 700-01 (5th Cir. 1996); *see also United States v. Wilson*, 307 F.3d 596, 600 (7th Cir. 2002); *United States v.*

Nivica, 887 F.2d 1110, 116-17 (1st Cir. 1996); Fed. R. Evid. 103 advisory committee's note to 2000 amendment.

In this case, the *Luce* principle should be applied to bar appellate review of the district court's conditional ruling that the government could cross-examine Kay about whether he spoke to government investigators if he testified on direct examination that he disclosed the bribes to ARI's attorneys. To be sure, this case is not exactly like *Luce*, since Kay took the stand and testified at trial about other matters. That difference, though, is more a matter of degree than kind. As in *Luce*, the "precise nature" of Kay's testimony is "unknowable" because he did not testify about the subject matter at issue. 469 U.S. at 41. The district court may have reconsidered its ruling, and the government may have reconsidered its cross-examination, depending on what Kay said on the stand. *Id.* at 41-42. Indeed, the court made clear that its ruling was not set in stone. See 7 Tr. 15 (court comments that "if each of you want to open it up more, I'll consider it"). Moreover, it is difficult to determine whether any error in the court's ruling was harmless without knowing precisely what Kay would have said. *Cf. Luce*, 469 U.S. at 42; *see* Kay Br. 61 (acknowledging that harmless error framework "does not neatly apply"). In these circumstances, Kay's claim is not presented in "a concrete factual context." *Luce*, 469 U.S. at 43 (internal quotation omitted). Accordingly, the Court should decline to review Kay's claim.

2. The District Court's Conditional Ruling Was Correct.

Kay argues (Br. 56-61) that the district court's ruling was incorrect as a matter of evidentiary law under *United States v. Hale*, 422 U.S. 171 (1975), and incorrect as a matter of constitutional law under *Doyle v. Ohio*, 426 U.S. 610 (1976). *Hale* and *Doyle* both ruled that evidence of a defendant's post-arrest silence was inadmissible as impeachment of a defendant's exculpatory story told for the first time at trial. *See United States v. Carter*, 953 F.2d 1449, 1464 (5th Cir. 1992); *United States v. Blankenship*, 746 F.2d 233, 237 (5th Cir. 1984). Kay is not entitled to relief under either line of authority.

a. In *Hale*, a defendant under arrest for robbery invoked his Fifth Amendment privilege when questioned by police about the source of money found on his person. At trial, the defendant testified that his ex-wife had given him the money. 422 U.S. at 174. The Supreme Court held, under its supervisory power over federal courts, that the trial court committed reversible error by allowing cross-examination of the defendant about his post-arrest silence. *Id.* at 176-81. Finding that post-arrest silence could be interpreted in different ways, *id.* at 176-77, the Supreme Court concluded that the defendant's post-arrest silence was not "sufficiently probative of an inconsistency with his in-court testimony to warrant admission," *id.* at 180, and that its limited probative value was outweighed by its prejudicial impact, *ibid*.

Hale has no application to this case. *Hale* merely bars use of a defendant's post-arrest silence to impeach his exculpatory testimony at trial. In this case, for example, *Hale* would have barred use of Kay's silence to impeach testimony that he did not authorize the bribes. Here, though, Kay admitted authorizing the bribes (6 Tr. 174; 7 Tr. 26, 31-32), and the proffered testimony that he disclosed the bribes to ARI's attorneys was not an exculpatory story. Rather, the purpose of the testimony was to suggest that Kay cooperated in the investigation. *See* 6 Tr. 70. The purpose of the government's cross-examination was to reveal the lack of any cooperation by Kay with the government. It is well settled that *Hale* does not bar use of a defendant's post-arrest silence to correct a misleading impression that the defendant cooperated with law enforcement authorities. *See United States v. Griffin*, 530 F.2d 101, 103 (5th Cir. 1976); *United States v. Fairchild*, 505 F.2d 1378, 1383 (5th Cir. 1975). Consequently, the district court's ruling was not error under *Hale*.[22/]

In addition, the district court's ruling limited any prejudicial impact of the evidence of Kay's silence. The court restricted the government's cross-examination to two questions: whether Kay was asked to speak to the SEC, and whether he spoke

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[22] Kay also relies (Br. 57-58) on *Grunewald v. United States*, 353 U.S. 391 (1957), which was discussed in *Hale*. *Grunewald* held that a defendant's invocation of his Fifth Amendment privilege against self-incrimination before a grand jury was not a prior "inconsistent" statement that could be used to impeach his exculpatory testimony at trial. *Id.* at 416-24; *see also Hale*, 422 U.S. at 177-79. *Grunewald* is inapplicable here for the same reasons as *Hale*.

to the SEC. 7 Tr. 12-15. The court also offered to instruct the jury, at Kay's request, that Kay had an absolute right under the Fifth Amendment not to appear and not to make any statement. *Id.* at 6, 8, 13, 14. Accordingly, the court's ruling was not an abuse of discretion.

b. In *Doyle*, the Supreme Court held that the Due Process Clause bars the government from using a defendant's post-arrest silence after receiving *Miranda* warnings to create an inference of guilt. The Supreme Court explained that the government may not "impeach a defendant's exculpatory story, told for the first time at trial, by cross-examining the defendant about his failure to have told the story after receiving *Miranda* warnings at the time of his arrest." 426 U.S. at 611; *see also United States v. Rodriguez*, 260 F.3d 416, 420 (5th Cir. 2001); *United States v. Garcia-Flores*, 246 F.3d 451, 455 (5th Cir. 2001).

Doyle likewise has no application to this case. In *Fletcher v. Weir*, 455 U.S. 603, 605-07 (1982), the Supreme Court limited the *Doyle* rule to silence occurring after *Miranda* warnings. *See also Brecht v. Abrahamson*, 507 U.S. 619, 628 (1993); *United States v. Musquiz*, 45 F.3d 927, 930 (5th Cir. 1995); *Blankenship*, 746 F.2d at 237. The *Doyle* rule does not apply here because Kay was not given *Miranda* warnings by the government. Kay argues (Br. 59-61) that his counsel's advice to invoke his Fifth Amendment privilege in response to the SEC subpoena was

equivalent to *Miranda* warnings, but that argument ignores the basis for the *Doyle* rule: *Doyle* rests on the rationale that "[b]y giving *Miranda* warnings, the Government implicitly assures a defendant that he will not be penalized for exercising those rights by remaining silent." *Rodriguez*, 260 F.3d at 421; *see also Brecht*, 507 U.S. at 628; *Doyle*, 426 U.S. at 618. No such assurance exists when defense counsel advises a defendant to remain silent.

In any event, Kay was not entitled to use his Fifth Amendment privilege as a sword in order to create the misleading impression that his cooperation was instrumental in revealing the bribery scheme. The Supreme Court expressly noted in *Doyle* that a defendant's post-arrest silence could be used to challenge his "behavior following arrest." 426 U.S. at 619-20 n.11 (citing *Fairchild*). This Court has accordingly recognized that *Doyle*, like *Hale*, does not bar use of a defendant's post-arrest silence to correct a misleading impression that the defendant cooperated in an investigation. *Chapman v. United States*, 547 F.2d 1240, 1243 n.6 (5th Cir. 1977) (noting that *Griffin* and *Fairchild* "clearly survive *Doyle*"); *see also Rodriguez*, 260 F.3d at 421; *United States v. Reveles*, 190 F.3d 678, 684-85 (5th Cir. 1999); *United States v. Allston*, 613 F.2d 609, 610-11 (5th Cir. 1980). Consequently, the district court's ruling was not error under *Doyle*.

VII. THE DISTRICT COURT CORRECTLY EXCLUDED HAITIAN TAX DOCUMENTS FOR LACK OF AUTHENTICATION.

Defendants contend (Murphy Br. 16-24; Kay Br. 2) that the district court erred in excluding Haitian tax documents for lack of authentication. The district court acted well within its discretion in excluding the documents.

A. PROCEDURAL BACKGROUND.

1. The authentication of foreign documents in a criminal case is governed by 18 U.S.C. §3505. On the first day of trial, the government alerted the district court that it had not received foreign certifications under §3505 for a "thick bundle of documents that purport to be Haitian tax receipts." 1 Tr. 44. The government explained that it would not stipulate to the authenticity of the documents because the bundle "simply had a Post It on it saying it had been obtained from the defendant [Murphy]." *Ibid.*; 2 Tr. 217. Defense counsel informed the court that the documents were receipts for sales taxes obtained from RCH in Haiti and that the defense had received the certifications the preceding day. 1 Tr. 45-46.

The following morning, the government acknowledged that it had received the certification, as well as some additional documents. The government continued to object to the documents for lack of authentication. 2 Tr. 58. Later that day, the district court heard argument on the government's objections. *Id.* at 215-21.

The government pointed out that the foreign certification was signed by Michel LeGros, who was the brother of Hubert LeGros, as the chairman of RCH. The government also noted that the documents were copies rather than originals and the charged offenses involved the falsification of documents. 2 Tr. 216-17. The government argued that "a certification by a person who is related to a coconspirator, that we get the day before trial and have not had a chance to test at all," was not sufficient. *Id.* at 217.

The district court examined the foreign certification. 2 Tr. 216. After hearing argument from defense counsel, the court sustained the objection. *Id.* at 218-21. The court declined to expound on its ruling. *Id.* at 230-31.

Neither the foreign certification nor the documents were made part of the record. *See* Murphy Br. 18 n.5.

2. In a post-trial motion (R.175), defendants argued that they were entitled to a new trial based on the excluded Haitian tax documents. The district court denied the motion. R.E. Tab 10.

B. STANDARD OF REVIEW.

A district court's decision to exclude evidence is ordinarily reviewed for abuse of discretion, with any error reviewed for harmlessness. *Harms*, 442 F.3d at 377; *Ragsdale*, 426 F.3d at 774; *see* Fed. R. Crim. P. 52(a). When a party fails to properly

preserve a challenge to an evidentiary ruling under Fed. R. Evid. 103(a), the ruling is reviewed only for plain error. *United States v. Avants*, 367 F.3d 433, 443 (5th Cir. 2004); *see* Fed. R. Crim. P. 52(b); Fed. R. Evid. 103(d).

C. ARGUMENT.

There is no merit in defendants' argument (Murphy Br. 16-24) that the district court's exclusion of the Haitian tax documents amounted to reversible error.

1. Defendants Failed To Preserve Their Challenge To The District Court's Ruling.

Under Fed. R. Evid. 103(a)(2), a party may not challenge a ruling excluding evidence unless the party makes an offer of proof. *See United States v. Winkle*, 587 F.2d 705, 710 (5th Cir. 1979). This Court has noted: "While the primary purpose of Rule 103(a)(2) is to enable the district court to rule correctly, the rule has another purpose: to provide an appellate court with a record allowing it to determine whether the exclusion was erroneous or not." *James v. Bell Helicopter Co.*, 715 F.2d 166, 175 (5th Cir. 1983) (internal quotation omitted).

In this case, defense counsel made oral representations about what the excluded documents showed, and the district court examined the foreign certification before ruling. 2 Tr. 216-21. As defendants acknowledge (Murphy Br. 18 n.5), though, the foreign certification and the documents were not marked for identification and not

made part of the record. *See* 1 Mueller & Kirkpatrick, *Federal Evidence* § 14, at 76 (2d ed. 1994) (proponent of document "should mark it as an exhibit and lodge it with the clerk to make it part of the record"). Consequently, defendants failed to preserve their challenge to the district court's ruling. *James*, 715 F.2d at 175 & n.9 (declining to "speculate" on exclusion of documents "without sufficient knowledge of the true character of the evidence involved"); *see* 21 Wright & Graham, *Federal Practice and Procedure: Evidence* §5040.3, at 905 (2d ed. 2005) ("Brandishing the document before the [trial] judge will not preserve error if the document itself is not made part of the record.").

Because defendants failed to preserve their challenge to the district court's exclusion of the Haitian tax documents, the ruling is reviewed only for plain error. *See Olano*, 507 U.S. at 731-32. To satisfy that standard, defendants must show, as discussed earlier, clear or obvious error that affects their substantial rights; if they do, the Court has discretion to correct a forfeited error that seriously affects the fairness, integrity, or public reputation of judicial proceedings, but is not required to do so. *See Avants*, 367 F.3d at 443; *Redd*, 355 F.3d at 874.

2. The Exclusion Of The Haitian Tax Documents Was Not Error.

The district court properly excluded the Haitian tax documents because the foreign certification did not comply with the requirements of 18 U.S.C. §3505. First,

the certification was untimely. Section 3505(a)(2)(B) requires that a party who intends to offer foreign records must provide written notice "[a]t the arraignment or as soon after the arraignment as practicable." This Court has stated that compliance with the notice requirement is not "a prerequisite to the admissibility of evidence under the statute." *United States v. Garcia Abrego*, 141 F.3d 142, 177 (5th Cir. 1999). In that case, though, the government provided the defendant with notice 26 days before the hearing at which the trial court made its initial ruling on admissibility and 48 days before their admission into evidence at trial. *Id.* at 178. In holding that the trial court properly admitted the documents, this Court "express[ed] no opinion on whether a showing of prejudice resulting from untimely notice of an intent to offer foreign records could eliminate §3505 as a potential pathway for admissibility of foreign business records." *Id.* at 178 n.26.

In contrast to the circumstances in *Garcia Abrego*, defendants in this case never provided written notice of their intention to offer foreign records. Instead, the government received a "thick bundle" of foreign records from the defense the week before the trial began. 1 Tr. 44-45; 2 Tr. 216, 218. Defendants did not provide the foreign certification under §3505 until after jury selection on the first day of trial. 2 Tr. 58, 216. At that time, the defense also produced additional foreign records for the first time. 1 Tr. 46; 2 Tr. 58, 218-19. Defendants claimed that a hurricane in Haiti

the week before trial was the cause of the delay, 1 Tr. 45-46; 2 Tr. 220, but they offered no explanation why notice or the records or the certification could not have been provided earlier during the seven-month period between the reinstatement of the indictment on appeal in February 2004 and the beginning of trial in September 2004. The government was prejudiced by the untimely certification, because it did not have "a chance to test [the certification and the underlying documents] at all." 2 Tr. 217. In these circumstances, the foreign records were properly excludable on timeliness grounds alone.

Second, the district court properly excluded the foreign records because the certification was unreliable. Section 3505(a)(1) allows district courts to exclude foreign records for which a certification has been produced when "the source of information or the method or circumstances of preparation indicate lack of trustworthiness." Even if the untimely production of the certification did not by itself justify exclusion of the documents, the fact that the certification was not produced until after the first day of trial, along with the other circumstances surrounding the certification and the documents, indicated a lack of trustworthiness.

The charges against defendants included allegations (later proven at trial) that they authorized the preparation of false documents in connection with the bribes paid to Haitian officials. When the government first received the foreign documents, an

attached note indicated that the source of the documents was Murphy. 1 Tr. 44; 2 Tr. 217. After the government declined to stipulate to the authenticity of the documents, defendants produced the foreign certification, which was signed by Michel LeGros, the brother of an unindicted coconspirator, Hubert LeGros. Michel LeGros signed the certification as the chairman of RCH, but the government informed the district court that, to the government's knowledge, Murphy had been the only chairman of RCH and RCH was no longer in existence. 2 Tr. 216-17.

Finally, the foreign documents were copies. Although defense counsel claimed that RCH was "still a valid company in Haiti," *id.* at 218, the defense had no explanation when the district court inquired where the originals of the documents were. *Id.* at 216-17. Based on that combination of questionable circumstances, the district court could reasonably conclude that the certification was insufficient under §3505(a)(1) because "the source of information or the method or circumstances of preparation indicate[d] lack of trustworthiness."

2. Defendants Cannot Satisfy The Other Requirements For Relief On Plain Error Review.

Defendants also cannot satisfy the other requirements of Fed. R. Crim. P. 52(b) for obtaining relief. They have made no showing that any error was "plain" in the

sense that it was "clear" or "obvious" under current law. *Olano*, 507 U.S. at 734; *Fuchs*, 467 F.3d at 901.

Nor have defendants shown that any error "affect[ed] substantial rights," *i.e.*, that the error was "prejudicial" in that it "must have affected the outcome of the district court proceedings." *Id.* at 734; *see also Vonn*, 535 U.S. at 62. They claim (Murphy Br. 16-17, 23-34) that the exclusion of the documents prejudiced their defense because the documents showed that ARI later paid much of the initial underpayment of sales taxes in subsequent reconciliations with the Haitian tax authorities. *See also* 8 Tr. 218 (documents were "intrinsic" to defense by showing that "taxes did get paid"). Without the documents, though, this Court cannot evaluate whether there is a reasonable probability that admission of the documents would have resulted, in the context of all the other evidence in the case, in acquittals. For example, it cannot be determined in the absence of the documents what additional amounts of sales taxes were paid and whether those payments related to the 12 shipments underlying Counts 1-12 of the indictment. Where the effect of an error is "uncertain" or "indeterminate," the defendant "cannot meet his burden of showing that the error actually affected his substantial rights." *Jones*, 527 U.S. at 394-95.

Finally, any error in the exclusion of the Haitian tax documents did not seriously affect the fairness, integrity or public reputation of judicial proceedings.

The district court's ruling occurred on the second day of trial, after the direct examination of the government's first witness. 2 Tr. 221. There is nothing in the record to indicate that defendants ever attempted to clarify the circumstances surrounding the certification for the district court, such as submitting evidence to support their claims that RCH was still a valid company and that Michel LeGros was the chairman. Nor does the record indicate whether defendants attempted to locate and produce the original documents. Moreover, the district court's ruling did not preclude defendants from calling LeGros (or another individual) as a witness at trial to authenticate the documents, but they did not do so. Accordingly, defendants are not entitled to a new trial.[23]

VIII. MURPHY'S SENTENCE WAS PROPERLY ENHANCED FOR ABUSE OF A POSITION OF TRUST.

Murphy separately contends (Murphy Br. 28-34) that his offense level was improperly increased under Sentencing Guidelines §3B1.3 for abuse of a position of trust. The district court correctly applied the enhancement.

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[23] Defendants suggest (Murphy Br. 24 n.6) that the excluded documents require a remand for resentencing even if they do not require a new trial. Although defendants initially argued that the excluded documents should not be used to calculate the amount of the benefit obtained for sentencing purposes, 10 Tr. 8-10, they subsequently entered into a sentencing stipulation concerning the amount. 11 Tr. 3; R. 145: Sentencing Stipulation, at 2. Accordingly, they are clearly not entitled to a remand for resentencing based on the excluded documents.

A. PROCEDURAL BACKGROUND.

Murphy's guideline range was 63-78 months' imprisonment, based on an offense level of 26 and a criminal history category I. 6/29/05 Tr. 29; Presentence Report (PSR) ¶¶ 24-34. The offense level included a two-level enhancement under §3B1.3 for abuse of a position of trust. PSR ¶ 28. Murphy objected to the enhancement. PSR Addendum, at 5-6. At the sentencing hearing, the district court heard argument on the objection and overruled it. 6/29/05 Tr. 9, 11-17. The court sentenced Murphy to 63 months' imprisonment. R.E. Tab 6, at 3.

B. STANDARD OF REVIEW.

As a general matter, this Court reviews the district court's interpretation and application of the Sentencing Guidelines *de novo* and its factual determinations for clear error. *United States v. Caldwell*, 448 F.3d 287, 290 (5th Cir. 2006).

As relevant here, the two-level enhancement under Guidelines §3B1.3 applies if a defendant "abused a position of public or private trust . . . in a manner that significantly facilitated the commission or the concealment of the offense." The Court has taken varying positions on the standard to review whether a defendant occupied a "position of trust." *Compare, e.g., United States v. Sudeen*, 434 F.3d 384, 391 n.19 (5th Cir. 2005) (*de novo* standard) with *United States v. Brown*, 941 F.2d 1300, 1304 (5th Cir. 1991) (clearly erroneous standard). Whether a defendant abused

the position in a manner that "significantly facilitated the commission or concealment of the offense" is a question of fact reviewed for clear error. *Sudeen*, 434 F.3d at 391 n.19; *Brown*, 941 F.3d at 1304.

C. ARGUMENT.

Murphy argues (Br. 29-33) that the district court erred in applying the §3B1.3 enhancement because he did not hold a position of trust with respect to the victim of the crime. He also argues (Br. 33-34) that the enhancement does not apply because any abuse of trust is inherent in an FCPA violation.

1. Murphy Abused A Position Of Trust With Respect To ARI.

The Haitian government was clearly a victim in this case, because it was cheated out of the full amount of customs duties and sales taxes due on the under-invoiced shipments of rice. Murphy argues (Br. 29-33) that the §3B1.3 enhancement was improperly applied because he did not hold a position of trust with respect to the Haitian government. This Court, however, has "never held . . . that the determination whether a defendant occupied a position of trust must be assessed from the perspective of the victim." *United States v. Buck*, 324 F.3d 786, 794 (5th Cir. 2003) (footnote omitted). The Court concluded in *Buck* that the enhancement may be applied "whenever *any* victim of a criminal scheme placed the defendant in a position of trust that significantly facilitated the crime." *Id.* at 795 (emphasis added) (footnote

omitted).[24/] In other words, the enhancement may be applied "even if the defendant did not occupy a position of trust in relation to the offense of conviction; it is enough if the defendant also harmed the person whose trust she did abuse." *United States v. Cruz*, 317 F.3d 763, 766 (7th Cir. 2003); *see also Buck*, 324 F.3d at 795 & n. 17; *United States v. Cusack*, 229 F.3d 344, 349 (2d Cir. 2000).

ARI and its public shareholders were also victims in this case. As the president and chief executive officer of ARI, Murphy owed a fiduciary duty to ARI and its public shareholders to act in the best interests of the company. Murphy therefore occupied a "position of trust" with respect to them. *See United States v. Dahlstrom*, 180 F.3d 677, 685 (5th Cir. 1999). He abused that position of trust by engaging in unlawful conduct on behalf of ARI when he authorized the payment of bribes to Haitian customs officials to accept false invoices for ARI's rice shipments. Because Murphy's unlawful conduct exposed ARI itself to possible criminal prosecution and civil sanctions under the FCPA, ARI was a victim of Murphy's conduct. *See* 15 U.S.C. §§78dd-2(g), 78ff(c).

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[24] In discussing the standard of review, *Sudeen* quoted a Second Circuit decision that stated that "[w]hether a defendant occupies a 'position of trust' within the meaning of this provision is viewed from the perspective of the victim, and is a question of law, which we review de novo." 434 F.3d at 391 n.19 (*quoting United States v. Hussey*, 254 F.3d 428, 431 (2d Cir. 2001). *Sudeen* endorsed the *de novo* standard of review, but the Court did not separately address whether a defendant must hold a position of trust with respect to the victim.

Murphy does not appear to contest that his position of trust with ARI "significantly facilitated the commission or concealment of the offense" within the meaning of §3B1.3. That determination turns on "whether the defendant occupied a superior position, relative to all people in a position to commit the offense, as a result of [his] job." *United States v. Fisher*, 7 F.3d 69, 70-71 (5th Cir. 1993); *see also Buck*, 324 F.3d at 795. In this case, there can be little doubt that Murphy's unique position as the president and chief executive officer of ARI placed him in a superior position to authorize the payment of bribes and the use of false invoices in connection with ARI's rice shipments. *Cf. Buck*, 324 F.3d at 795; *Dahlstrom*, 180 F.3d at 685. Accordingly, because ARI placed Murphy in a position of trust that significantly facilitated the crime and was harmed by Murphy's unlawful conduct, the district court properly applied the §3B1.3 enhancement.

2. The Abuse of Trust Was Not Otherwise Included In The Calculation Of The Sentence.

Section 3B1.3 provides that the enhancement "may not be employed if an abuse of trust . . . is included in the base offense level or specific offense characteristic." Murphy's base offense level was 8 under §2B1.4, the guideline applicable to commercial bribery offenses.[25/] PSR ¶ 24. One specific offense characteristic in

[25] The 2000 edition of the Guidelines manual was used to calculate Murphy's offense level. PSR ¶ 23. The Sentencing Guidelines were amended effective November 1, 2002, to change the

§2B1.4 was applied: a ten-level enhancement for the value of the improper benefit conferred. PSR ¶ 25. Because abuse of trust was not included in either the base offense level or the specific offense characteristic, the enhancement under §3B1.3 was properly applied.

Murphy's argument that the enhancement does not apply is based on a misreading of §3B1.3. He argues (Br. 33-34) that any abuse of trust is inherent in every violation of the statute because an essential element of a FCPA violation is that the defendant be an "officer, director, employee, or agent of" a company and engaged in the illicit payment "in order to assist such [company] in obtaining or retaining business for or with, or directing business to, any person." 15 U.S.C. §78dd-1(a). By its plain terms, however, the limitation on the application of §3B1.3 is determined by reference to the base offense level and the specific offense characteristics under the applicable offense guideline, and not the statutory elements of the offense. *See United States v. Bracciale*, 374 F.3d 998, 1006-07 (11th Cir. 2004) (commentary to §3B1.3 "draws a distinction between who should receive the enhancement and who should not without regard to the elements of the underlying fraud offense."). Here,

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guideline applicable to offenses under the FCPA from §2B4.1 to §2C1.1, the guideline applicable to public corruption cases. *See* U.S.S.G. App. C, amendment 639. The commentary to §2C1.1, which has a higher base offense level than §2B4.1, specifically provides that §3B1.3 should not be applied in calculating the offense level under §2C1.1. *See* U.S.S.G. §2C1.1, comment. (n.6) (2006).

abuse of trust was not encompassed within the base offense level for commercial bribery offenses or the specific offense characteristic based on the value of the benefit conferred. For similar reasons, Murphy's argument (Br. 34) that the §3B1.3 enhancement does not apply because he was separately assessed a four-level enhancement for an aggravating role in the offense under §3B1.1 also fails: the §3B1.1 adjustment is not a specific offense characteristic. PSR ¶ 27. Moreover, no "double counting" occurred, because the §3B1.1 enhancement and the §3B1.3 enhancement are based on different offense conduct. *Cf. United States v. Olis*, 429 F.3d 540, 549 (5th Cir. 2005); *Bracciale*, 374 F.3d at 1009. Accordingly, the district court properly enhanced Murphy's offense level for abuse of a position of trust.

CONCLUSION

For the foregoing reasons, the judgments of conviction should be affirmed.

Respectfully submitted.

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1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because:

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December _____, 2006