No. 12-531

In the Supreme Court of the United States

FREDERIC BOURKE, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court's deliberate ignorance instruction was consistent with this Court's decision in *Global-Tech Appliances, Inc.* v. *SEB S.A.*, 131 S. Ct. 2060 (2011).

2. Whether the district court properly declined to instruct the jury that it was required to unanimously agree on a specific overt act committed in furtherance of the charged conspiracy.

3. Whether the district court properly declined to admit, pursuant to Federal Rule of Evidence 106, the entirety of a memorandum prepared by a government witness.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-36) is reported at 667 F.3d 122.

JURISDICTION

The judgment of the court of appeals was entered on December 14, 2011. A petition for rehearing was denied on July 27, 2012 (Pet. App. 131-132). The petition for a writ of certiorari was filed on October 25, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiring to violate the Foreign Corrupt Practices Act of 1977 (FCPA), 15 U.S.C. 78dd-1 *et seq.*, and the Travel Expense Act of 1949

(Travel Act), 18 U.S.C. 1953, in violation of 18 U.S.C. 371 (Count 1); and making false statements, in violation of 18 U.S.C. 1001 (Count 3).[1] He was sentenced to one year and one day of imprisonment, and fined $1 million. Pet. App. 37-47. The court of appeals affirmed. *Id.* at 1-36.

1. In the mid-1990s, petitioner, a successful entrepreneur, met Viktor Kozeny, an international entrepreneur whose fraudulent schemes profiting off of the privatization of Czech industries were well-known and had earned him the nickname "Pirate of Prague." Pet. App. 4. Petitioner, despite being aware of Kozeny's dealings and his settlement of criminal charges against him in the Czech Republic, agreed with Kozeny to engage in a scheme to purchase SOCAR, the state-owned Azerbaijani oil industry. *Ibid.*; Gov't C.A. Br. 2-5.

In the late 1990s, Azerbaijan had begun converting state-controlled industries to private ownership through a voucher-based initiative similar to the one used in the Czech Republic. As part of the privatization process, the Azerbaijani government issued to each citizen voucher booklets containing four coupons, which were tradeable and could be used to bid at auction for shares of state-owned enterprises being privatized. Foreigners seeking to participate in the auctions had to pair their vouchers with options issued by the State Property Committee (SPC), the entity tasked with administering the privatization process. Pet. App. 4-5; Gov't C.A. Br. 5-6.

To accomplish the SOCAR purchase, Kozeny set up two entities in Baku, Azerbaijan: the Minaret Group,

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[1] The jury acquitted petitioner of conspiracy to commit money laundering (18 U.S.C. 1956(h)). Pet. App. 11.

an investment bank, and Oily Rock, which would purchase and hold the privatization vouchers issued by the Azerbaijani government. Pet. App. 5; Gov't C.A. Br. 6-7. Kozeny also met with Ilham Aliyev, the vice-president of SOCAR and the son of the president of Azerbaijan, who in turn introduced them to Barat Nuriyev, an official at the SPC. Nuriyev advised Kozeny that the purchase of SOCAR would require one million vouchers. He also advised that an "entry fee" of $8 to $12 million would have to be paid to various Azerbaijani officials, including President Aliyev. The fee was intended to encourage the president to approve SOCAR's privatization. Kozeny agreed to pay the fee by means of cash payments that Nuriyev would pass on to the president. Nuriyev additionally demanded that two-thirds of Oily Rock's voucher books and options be transferred to Azerbaijani officials, enabling the officials to receive two-thirds of the profits from SOCAR's eventual privatization without having to invest any money. In September 1997, Kozeny instructed his attorney, Hans Bodmer, to create a complex corporate structure involving multiple parent and holding companies, to control the vouchers and options that were allocated to the Azerbaijani officials. Pet. App. 5-6; Gov't C.A. Br. 8-9.

In February 1998, petitioner and Kozeny traveled to Baku, Azerbaijan. There, petitioner questioned Bodmer about Azerbaijani interests in the investment. Bodmer told petitioner about the transactions—and in particular, the arrangement by which Azerbaijani officials would receive two-thirds of the vouchers, and of the eventual profits, without any investment—and the corporate structures created to carry them out. Bodmer subsequently conveyed the substance of his

conversation with petitioner to Rolf Schmid, an associate at Bodmer's law firm. Schmid later memorialized Bodmer's description of the conversation in a memorandum that stated that "at the beginning of 1998 * * * in Baku [Bodmer] * * * briefed [petitioner] in detail about the involvement of the Azeri interests . . . the 2/3:1/3 arrangement." Pet. App. 7, 32; Gov't C.A. Br. 11-12, 66.

Petitioner thereafter invested $7 million in Oily Rock and recruited other American investors. During this same period, petitioner asked another investor several times whether "[Kozeny] [was] giving enough" money to the Azerbaijani officials. Pet. App. 7-8; Gov't C.A. Br. 13-14.

In April 1998, after another trip to Baku, petitioner contacted his attorneys to discuss ways to limit his potential liability for violating the FCPA, which prohibits making or offering corrupt payments or gifts to a foreign official for the purpose of influencing official decisionmaking or inducing the official to violate his legal duties. 15 U.S.C. 78dd-2(a). During the telephone call, which was recorded, petitioner raised the issue of bribe payments and investor liability, and was advised by his attorneys that being linked to corrupt practices could expose the investors to FCPA liability. Petitioner and another Oily Rock investor subsequently agreed to form separate United States advisory companies affiliated with Oily Rock and the Minaret Group in the hopes of shielding United States investors from liability for any corrupt payments made by Kozeny. Pet. App. 8, 19; Gov't C.A. Br. 15-20.

In mid-1998, Bodmer set up Swiss bank accounts for purposes of transferring bribe money to Azerbaijani officials, including Nuriyev. Between May and

September 1998, nearly $7 million in bribe payments were wired to these accounts. Additionally, from March 1998 through September 1998, petitioner and other conspirators arranged and paid for medical care, travel, and lodging in the United States for both Nuriyev and his son. Pet. App. 9; Gov't C.A. Br. 21-22.

In late 1998, Kozeny abandoned hope that SOCAR would be privatized and began closing down the investment scheme. In January 1999, petitioner resigned from the boards of the United States advisory companies. Following his resignation, however, petitioner made another trip to Baku to meet with President Aliyev in an attempt to use allegations of fraud against Kozeny and SPC officials to pressure Aliyev to follow through with the privatization of SOCAR. Pet. App. 9; Gov't C.A. Br. 22-23.

In 2000, the government began investigating the bribery scheme. In 2002, petitioner met with the United States Attorney's Office and the Federal Bureau of Investigation pursuant to a proffer agreement. During those sessions, petitioner falsely denied knowing whether Kozeny made corrupt payments, transfers, and gifts to Azerbaijani officials. Pet. App. 9-10; Gov't C.A. Br. 23-24.

2. In 2009, petitioner was charged in a superseding indictment with conspiracy to violate the FCPA and the Travel Act, conspiracy to commit money laundering, and making false statements. In June and July 2009, petitioner was tried before a jury. 1:05-cr-00518 Docket entry No. 191 (S.D.N.Y. May 5, 2009); Pet. App. 10.

a. At trial, Bodmer testified that he had told petitioner that the Azerbaijani government officials would

receive two-thirds of the vouchers in an arrangement that would allow them to incur no risk. After the defense challenged Bodmer's recollection of the conversation, the court permitted the government to introduce Schmid's testimony that Bodmer had told him about the conversation in 1998. The court also allowed the government to introduce a portion of the memorandum written by Schmid in 2001 that referenced Bodmer's conversation with petitioner. Pet. App. 31-32; Gov't C.A. Br. 65-66. The defense did not object to the admission of that portion of the memorandum, but argued that it should be allowed to put into evidence the entire memorandum under Federal Rule of Evidence 106, which provides that when one party introduces part of a writing, "an adverse party may require the introduction * * * of any other part * * * that in fairness ought to be considered at the same time." In particular, petitioner sought to introduce portions of Schmid's memo in which he stated that he and Bodmer believed at the time that the arrangements were "arm's length" and that they lacked "specific knowledge of corrupt payments." Pet. App. 32-33; Gov't C.A. Br. 66-67.

After Schmid testified that the memo was based on his personal understanding and opinions, and that he did not consult Bodmer in drafting the memo, the district court refused to permit the defense to admit the entirety of the memo. Pet. App. 33-34; Gov't C.A. Br. 66-67.

b. i. Because petitioner contended that he had not been aware of the bribery scheme, the district court gave the following conscious-avoidance instruction when it charged the jury on the elements of a substantive FCPA violation:

> When knowledge of existence of a particular fact is an element of the offense, such knowledge may be established when a person is aware of a high probability of its existence, and consciously and intentionally avoided confirming that fact. Knowledge may be proven in this manner if, but only if, the person suspects the fact, realized its high probability, but refrained from obtaining the final confirmation because he wanted to be able to deny knowledge.
>
> On the other hand, knowledge is not established in this manner if the person merely failed to learn the fact through negligence or if the person actually believed that the transaction was legal.

Pet. App. 16-17; Gov't C.A. Br. 32.

ii. The district court also instructed the jury that it was required to return a unanimous verdict. Pet. App. 150. With respect to the conspiracy charge, the court instructed the jury, in relevant part, that it was required to find that a conspiracy existed, that petitioner knowingly joined the conspiracy, and that at least one overt act in furtherance of the conspiracy was committed by a member of the conspiracy. *Id.* at 134-150. Because the statute of limitations permitted liability only for acts committed on or after July 22, 1998, the court also instructed the jury that it had to find that "some member of the conspiracy committed any overt act in furtherance of the conspiracy on or after * * * July 22, 1998." *Id.* at 150. The court rejected petitioner's request that the jury be instructed that it had to unanimously agree on the specific overt act that was committed in furtherance of the conspiracy. *Id.* at 11-12; Gov't C.A. Br. 75.

c. The jury found petitioner guilty of conspiring to violate the FCPA and the Travel Act, in violation of 18 U.S.C. 371, and making false statements, in violation of 18 U.S.C. 1001. It acquitted petitioner on the money laundering conspiracy charge. On November 10, 2009, the district court sentenced petitioner to a term of imprisonment of one year and one day and a fine of $1 million. Pet. App. 11, 37-39, 43.

d. Petitioner appealed his convictions. Pet. App. 3. After briefing had been completed, this Court issued its decision in *Global-Tech Appliances, Inc.* v. *SEB S.A.*, 131 S. Ct. 2060 (2011) (*Global-Tech*), which addressed the issue of willful blindness in a civil patent case. Pet. App. 3. In a letter submitted pursuant to Federal Rule of Appellate Procedure 28(j), petitioner argued that *Global-Tech* demonstrated that the district court's conscious-avoidance instruction was incorrect. Pet. 18.

3. The court of appeals affirmed. Pet. App. 1-36.

a. The court rejected petitioner's challenge to the conscious-avoidance instruction. Pet. App. 18-23. The court first found an adequate factual basis for the instruction because the government introduced ample evidence that petitioner either actually knew, or consciously avoided knowledge of, the corrupt scheme. *Id.* at 18-21. The court explained that "[petitioner] had serious concerns about the legality of Kozeny's business practices and worked to avoid learning exactly what Kozeny was doing." *Id.* at 22. The court also rejected petitioner's claim that the instruction improperly allowed the jury to convict him based on mere negligence, stating that "the district court specifically charged the jury not to convict based on negligence" and there was "no reason to suspect that the

jury ignored that instruction." *Id.* at 23. The court did not address this Court's decision in *Global-Tech*.

b. The court of appeals next held that the district court properly refused to instruct the jury that it had to agree unanimously on a single overt act committed in furtherance of the conspiracy. Pet. App. 12-16. The court held that while a jury has to unanimously agree that the government had proved each element of the charged offense, it was not necessary for the jury to unanimously agree on the underlying facts that compose the proof of a particular element. "[A]lthough proof of at least one overt act is necessary to prove an element of the crime, which overt act among multiple such acts supports proof of a conspiracy conviction is a brute fact and not itself [an] element of the crime." *Id.* at 16 (citing *Schad* v. *Arizona*, 501 U.S. 624, 631 (1991) (plurality opinion)).

c. Finally, the court of appeals rejected petitioner's claim that the entire Schmid memo should have been introduced into evidence under the rule of completeness set forth in Federal Rule of Evidence 106. Pet. App. 31-34. The court explained that under the rule of completeness, an omitted portion of an admitted writing or statement must be admitted into evidence "if necessary to explain the admitted portion, to place the admitted portion in context, to avoid misleading the jury, or to ensure fair and impartial understanding of the admitted portion." *Id.* at 33 (quoting *United States* v. *Johnson*, 507 F.3d 793, 796 (2d Cir. 2007), cert. denied, 552 U.S. 1301 (2008)). At the same time, the rule "does not * * * require the admission of portions of a statement that are neither explanatory of nor relevant to the admitted passages." *Ibid.* (internal quotation marks and citation omitted).

Applying that standard, the court held that the unadmitted portions of the memorandum were not necessary to explain or give context to the admitted portion, which simply stated in factual terms that Bodmer told Schmid that he explained the two-thirds voucher arrangement to petitioner. The omitted portions, by contrast, described Schmid's "own understanding and opinions" concerning the legality of the transactions and did not reflect consultation with Bodmer. *Ibid.* The court therefore concluded that the omitted portion of the memorandum was irrelevant to the admitted portion, which was offered solely "to corroborate Schmid's testimony that Bodmer had told him he discussed the two-thirds/one-third split with [petitioner]." *Id.* at 34.

ARGUMENT

Petitioner raises two claims of instructional error: first (Pet. 15-24), that the conscious-avoidance instruction given by the district court is inconsistent with this Court's decision in *Global-Tech Appliances, Inc.* v. *SEB S.A.*, 131 S. Ct. 2060 (2011), and second (Pet. 24-30), that the district court erred in refusing to instruct that the jury had to unanimously agree on the identity of the overt act in order to convict on the conspiracy charge. Petitioner also challenges (Pet. 30-38) the district court's refusal to allow him to introduce the entire memo prepared by Schmid. The court of appeals' rejection of these claims was correct, and its decision does not conflict with any decision of this Court or other courts of appeals. Further review is not warranted.

1. a. Petitioner argues (Pet. 15-24) that the conscious-avoidance instruction given by the district court is inconsistent with *Global-Tech*. The Court has

recently denied certiorari in two cases that raised the same issue and alleged the same circuit conflict. See *Jinwright* v. *United States*, 133 S. Ct. 843 (2013) (No. 12-6350); *Brooks* v. *United States*, 133 S. Ct. 839 (2013) (No. 12-218). The same result is warranted here.

i. *Global-Tech*, a civil patent case, concerned whether "a party who 'actively induces infringement of a patent' under 35 U.S.C. § 271(b) must know that the induced acts constitute patent infringement." 131 S. Ct. at 2063. The Court held that knowledge of the infringing nature of the acts is required under Section 271(b) and that the knowledge requirement could be satisfied by "willful blindness." *Id.* at 2068.[2] To determine the standard that should be used to ascertain the existence of willful blindness in the patent-inducement context, the Court looked to the criminal context, observing that "[t]he doctrine of willful blindness is well established in criminal law." *Ibid.* Surveying the courts of appeals, the Court explained that "[w]hile the Courts of Appeals articulate the doctrine of willful blindness in slightly different ways," they "all appear to agree on two basic requirements: (1) the defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact." *Id.* at 2070. The Court stated that "[w]e think these requirements give willful blindness an appropriately limited scope that surpasses recklessness and negligence." *Ibid.*

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[2] The courts have used the terms "willful blindness", "conscious avoidance," and "deliberate ignorance" interchangeably. See *United States* v. *Vasquez*, 677 F.3d 685, 695-696 (5th Cir. 2012) (per curiam).

The Court distilled these aspects of willful blindness from the varying formulations used by the courts of appeals. *Global-Tech*, 131 S. Ct. at 2070 n.9. For instance, the Court approvingly cited a Second Circuit decision that held that a conscious-avoidance instruction is appropriate if the evidence shows that the defendant "was aware of a high probability of the disputed fact" and "deliberately avoided confirming that fact." *Ibid.*; see *United States* v. *Svoboda*, 347 F.3d 471, 480 (2003), cert. denied, 541 U.S. 1044 (2004). The Court also cited a Fifth Circuit decision that held that a conscious-avoidance instruction is appropriate if the record supports inferences that the defendant was "subjectively aware of a high probability of the existence of" a fact and "purposely contrived to avoid learning" of it. *United States* v. *Freeman*, 434 F.3d 369, 378 (2005) (quoting *United States* v. *Scott*, 159 F.3d 916, 922 (5th Cir. 1998)).

The *Global-Tech* Court did not suggest that it intended its distillation of the "basic requirements" of willful blindness, 131 S. Ct. at 2070, to supersede or replace the range of circuit court formulations on which it relied. Rather, the Court's approving citation of varying verbal formulations of willful blindness demonstrates the opposite. These formulations, the Court recognized, in fact reflected "agree[ment]" on the core requirements of willful blindness, notwithstanding differences in the terminology. *Ibid.*

In evaluating the adequacy of the Federal Circuit's willful-blindness standard, the Court examined whether that standard included the core requirements of willful blindness. *Global-Tech*, 131 S. Ct. at 2071. The Court concluded that the Federal Circuit had departed from the "proper willful blindness standard"

applied by the other courts of appeals because it required only a "known risk" of infringement and "deliberate indifference" to that risk, rather than a subjective belief that infringement has likely occurred and "active efforts * * * to avoid knowing about the infringing nature of the activities." *Ibid.* The Court did not suggest that it found the Federal Circuit's standard inadequate because that court had used wording that was different from the Court's. Rather, the Court emphasized that the Federal Circuit's standard required only recklessness and was therefore substantively more lenient than the standard that the Court drew from the decisions of other courts of appeals. *Ibid.*

ii. Petitioner contends (Pet. 21-24) that the conscious-avoidance instruction given in this case was inadequate under *Global-Tech*. Petitioner is incorrect. Because *Global-Tech* does not suggest that lower courts must adopt the precise verbal formulation that the Court used to synthesize the standards employed by the courts of appeals, the relevant question is whether the district court's instruction contained the core requirements identified in *Global-Tech*. Although the district court's instruction did not track verbatim the language used by the *Global-Tech* Court in synthesizing the ingredients generally understood to constitute willful blindness, the instruction conveyed the substance of the standard set forth in *Global-Tech*. See 131 S. Ct. at 2070.

The district court instructed the jury that conscious avoidance requires that the defendant be "aware of a high probability of [a fact's] existence," and that he "consciously and intentionally avoided confirming that fact" and "refrained from obtaining

the final confirmation because he wanted to be able to deny knowledge." Pet. App. 17. Petitioner contends (Pet. 23) that this instruction omits the second requirement of *Global-Tech*'s formulation, namely, that the defendant have taken "deliberate actions" to avoid learning of the fact at issue. To the contrary, that requirement was satisfied by the district court's direction that the person must have "consciously and intentionally avoided confirming that fact." Pet. App. 17. That formulation clearly connotes that petitioner must have taken steps to avoid learning of the corrupt bribery scheme. It is difficult to imagine how a person could "intentionally avoid" learning of a fact, *ibid.*, without engaging in some sort of deliberate conduct. Thus, as in *Global-Tech*'s formulation, petitioner could be convicted only upon a finding that he took "deliberate actions to avoid confirming a high probability of wrongdoing." 131 S. Ct. at 2070. Indeed, the district court's instruction is nearly identical to several of those on which the *Global-Tech* Court relied. *Id.* at 2070 n.9 (citing instructions requiring that the defendant "intentionally failed to investigate those facts" or "purposely closed his eyes to avoid knowing" facts).

Petitioner also argues (Pet. 23-24) that the district court improperly failed to instruct the jury that recklessness does not suffice to establish conscious avoidance. But *Global-Tech* held that an instruction that contains the two "basic requirements"—knowledge of a high probability that the fact exists and deliberate efforts to avoid learning of it—properly "give[s] willful blindness an appropriately limited scope that surpasses recklessness and negligence." 131 S. Ct. at 2070. Because the district court instructed the jury that it must find both requirements delineated in the

Global-Tech formulation, thereby precluding a conviction based on recklessness alone, it was unnecessary for the district court to further caution the jury that it could not convict based on a finding of recklessness.[3]

iii. Petitioner contends (Pet. 16-17) that a conflict among the circuits exists with respect to the proper conscious-avoidance instruction after *Global-Tech*. Petitioner first argues that the decision below conflicts with *United States* v. *Jinwright*, 683 F.3d 471, 480-481 (4th Cir. 2012), cert. denied, 133 S. Ct. 843 (2013), which he claims adopted *Global-Tech*'s standard. Pet. 16 n.8. But the instruction in *Jinwright*, which required that the defendants were aware of a "high probability" of a fact's existence and had a "conscious purpose to avoid learning the truth," 683 F.3d at 480, is virtually indistinguishable from the one given in this case.

Petitioner also relies (Pet. 16 & n.9) on other circuit courts' approval of instructions that use slightly different formulations, but those decisions do not reflect any disagreement on the "basic requirements" identified by *Global-Tech*. 131 S. Ct. at 2070-2071; see *United States* v. *Brooks*, 681 F.3d 678, 701-703 (5th Cir. 2012) (defendant must have "deliberately closed his eyes to what would otherwise have been obvious to him"), cert. denied, 133 S. Ct. 839 (2013); *United*

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[3] Moreover, the instruction in this case cautioned that "knowledge is not established * * * if the person merely failed to learn the fact through negligence or if the person actually believed that the transaction was legal." Pet. App. 17. That instruction ensured that the jury—which is presumed to have followed the court's instructions—did not convict based on a finding that petitioner simply disregarded a known risk. See *United States* v. *Geisen*, 612 F.3d 471, 486 (6th Cir. 2010), cert. denied, 131 S. Ct. 1813 (2011).

States v. *Denson*, 689 F.3d 21, 24 n.4 (1st Cir. 2012) (same), cert. denied, 133 S. Ct. 996 (2013). As the *Global-Tech* Court recognized, the courts of appeals have "articulate[d] the doctrine of willful blindness in slightly different ways," while agreeing on the fundamental requirements. 131 S. Ct. at 2070.

Petitioner also points out (Pet. 16) that the Third and Eighth Circuits have changed their pattern instruction on deliberate ignorance to track the *Global-Tech* formulation more closely. That linguistic change is permissible, but it does not suggest any substantive disagreement. And in any event, the pattern instructions on which petitioner relies cannot create a circuit conflict warranting this Court's review, because those instructions, like all pattern instructions, are not intended to bind courts, but are instead merely "helpful suggestions." See *United States* v. *Norton*, 846 F.2d 521, 525 (8th Cir. 1988); *United States* v. *Maury*, 695 F.3d 227, 259 (3d Cir. 2012), petition for cert. pending, No. 12-876 (filed Jan. 16, 2013).

b. Petitioner next contends (Pet. 21-22) that "no evidence" established that he made deliberate efforts to avoid learning of the bribery scheme and, therefore, the court of appeals "erred under *Global-Tech* in finding a sufficient evidentiary basis to support a willful blindness instruction." Further review of that fact-bound contention is not warranted.

The court of appeals correctly found "ample evidence" to support a conviction under a theory of conscious avoidance, and in particular, to establish petitioner's efforts to avoid learning of the bribery scheme. Pet. App. 18. The government presented evidence that petitioner was aware of Kozeny's reputation for corrupt dealings as the "Pirate of Prague."

During a recorded telephone conversation with his attorneys shortly after the opening of the Minaret offices, petitioner expressed concern to other investors and their attorneys that Kozeny and others were paying bribes—but he never asked his attorneys to undertake the due diligence that other investors undertook. *Id.* at 23. He proposed the formation of the American advisory companies to shield himself and other American investors from potential liability from payments made in violation of FCPA, indicating that he was concerned about that possibility—but again, he decided not to investigate further. Gov't C.A. Br. 35-36. As the court of appeals observed, the formation of the companies "enabled [petitioner] to participate in the investment without acquiring actual knowledge" of the scheme. Pet. App. 19. In sum, a rational jury could have found that petitioner deliberately decided to avoid gaining certainty about the bribery scheme.

2. Petitioner also challenges (Pet. 24-30) the district court's refusal to instruct the jury that it had to unanimously agree on a single overt act committed in furtherance of the conspiracy. The court of appeals correctly rejected this claim.

a. Although a federal jury must unanimously agree that the government has proved each element of an offense, it is well established that the jury need not unanimously agree on the specific means that the defendant used to commit each element of the crime. In *Schad* v. *Arizona*, 501 U.S. 624 (1991) (plurality opinion), the four-Justice plurality stated that "[w]e have never suggested that in returning general verdicts in such cases the jurors should be required to agree upon a single means of commission, any more than the indictments were required to specify one

alone." *Id.* at 631 (Souter, J.) (relying on the *Andersen* v. *United States*, 170 U.S. 481 (1898), which held that an indictment need not specify which overt act was the means by which an offense was committed). Instead, the plurality explained, "[i]n these cases, as in litigation generally, 'different jurors may be persuaded by different pieces of evidence, even when they agree upon the bottom line. Plainly there is no general requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict.'" *Id.* at 631-632 (citation omitted). In his concurring opinion, Justice Scalia agreed with that aspect of the Court's opinion, stating that "it has long been the general rule that when a single crime can be committed in various ways, jurors need not agree upon the mode of commission." *Id.* at 649 (Scalia, J., concurring in part and concurring in the judgment).

The Court later reaffirmed that principle in *Richardson* v. *United States*, 526 U.S. 813 (1999), stating that the jury "need not always decide unanimously which of several possible sets of underlying brute facts make up a particular element, say, which of several possible means the defendant used to commit an element of the crime." *Id.* at 817. Thus, where "an element of robbery is force or the threat of force, some jurors might conclude that the defendant used a knife to create the threat; others might conclude he used a gun. But that disagreement—a disagreement about means—would not matter as long as all 12 jurors unanimously concluded that the Government had proved the necessary related element, namely, that the defendant had threatened force." *Ibid.*

Whether a "particular kind of fact" is an element of an offense is principally a question of statutory con-

struction. *Richardson*, 526 U.S. at 817-818. The general federal conspiracy statute under which petitioner was convicted, 18 U.S.C. 371, requires the government to prove that a member of the conspiracy committed "any act to effect the object of the conspiracy." Thus, commission of some overt act in furtherance of the conspiracy is an element of the offense. See *United States* v. *Griggs*, 569 F.3d 341, 344 (7th Cir. 2009) (jury must agree unanimously that the defendant "had taken a step toward accomplishing the goal of the conspiracy, had gone beyond mere words"), cert. denied, 130 S. Ct. 1551 (2010). But the means by which the defendant or a co-conspirator "effect[s] the object of the conspiracy"—in other words, the precise identity of the overt act—is not an element of the offense. 18 U.S.C. 371. Indeed, Section 371's provision that a conspirator must simply commit "*any* act" in furtherance of the conspiracy's objective demonstrates that the statute focuses on whether a conspirator has committed any act to further the conspiracy, not on the identity of any particular act in furtherance.

Petitioner argues (Pet. 28-30) that *Richardson* supports his argument that the jury must agree on the identity of the overt act, but that is incorrect. In *Richardson*, the Court reiterated that the jury need not unanimously agree on the means by which the defendant accomplishes an element of the crime. 526 U.S. at 817. The Court concluded, as a matter of statutory construction, that the continuing criminal enterprise (CCE) statute, 21 U.S.C. 848(c), which criminalizes commission of a "continuing series of violations," makes each individual "violation" an element of the crime. 21 U.S.C. 848(c)(2). As a result, the jury must unanimously agree not only that the defendant

committed a "series" of violations, but also on the identity of each "violation." *Richardson*, 526 U.S. at 815, 824. The Court relied on Congress's use of the word "violation," which connotes "not simply an act or conduct[, but] an act or conduct that is contrary to law," as well as the jury's traditional role in "determining whether alleged conduct 'violates' the law." *Id.* at 818. That reasoning has no application to Section 371, which simply requires that the defendant have committed "any act" in furtherance of the conspiracy, and does not make any *particular* overt act a separate element of the conspiracy offense.

Petitioner also relies on *Richardson*'s observation that the need to ensure that juries would not elide significant disagreements over the defendant's conduct militated in favor of treating each "violation" as an element. 526 U.S. at 819. As the Court observed, however, the possibility that the jury will gloss over factual disagreements is always present to some degree when "multiple means are at issue." *Ibid.* That concern was particularly weighty in the CCE context, the Court stated, because the existence of multiple criminal offenses—"violations"—is the focus of the offense and the justification for imposing a mandatory minimum sentence of 20 years. *Ibid.*

In the conspiracy context, by contrast, the illegal agreement, not the overt act, is the focus of the crime. Cf. *Smith* v. *United States*, 133 S. Ct. 714, 719 (2013) ("The essence of conspiracy is the combination of minds in an unlawful purpose.") (internal quotation marks and citation omitted). The overt act itself need not be a crime, and it need not have been committed by the defendant himself. *Braverman* v. *United States*, 317 U.S. 49, 53 (1942); 18 U.S.C. 371. At com-

mon law, moreover, the offense of conspiracy did not require an overt act, and some federal conspiracy statutes similarly omit the element. See *Whitfield* v. *United States*, 543 U.S. 209, 214 (2005). Petitioner is therefore incorrect to argue that the fact that the jury may disagree on the identity of the overt act—while unanimously agreeing that such an act occurred—unduly expands the offense of conspiracy or risks permitting the jury to disagree on fundamental aspects of the offense. See *Griggs*, 569 F.3d at 344 ("That [the jury] may have disagreed on what step [the defendant] took was inconsequential, especially since they didn't have to find that the step was itself a crime, or even base conviction on an overt act charged in the indictment.") (internal citation omitted).[4]

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[4] Petitioner's statute of limitations defense at trial did not require the district court to instruct the jury that it had to agree unanimously on the identity of the overt act. Although continuation during the limitations period is not an element of the conspiracy offense, see *Smith*, 133 S. Ct. at 720, the government bore the burden of proving that the conspiracy continued after July 22, 1998—the boundary of the limitations period—and that an overt act was committed after that date, see *Grunewald* v. *United States*, 353 U.S. 391, 396 (1957). It was therefore necessary for the jury to agree unanimously that the conspiracy continued after July 22, 1998, and that some overt act occurred after that date. The government's need to rebut petitioner's limitations defense by proving that some overt act occurred after July 1998 did not transform the means by which the overt act was committed into an element of the offense on which the jury had to agree unanimously. Cf. *Smith*, 133 S. Ct. at 720 (holding that where a defendant claims that he withdrew from a conspiracy outside the limitations period, the government's burden of proving that the conspiracy continued within the limitations period does not mean that the government must affirmatively prove that the defendant's participation continued within that period; rather, defendant must prove withdrawal).

b. Petitioner contends (Pet. 25-26) that the courts of appeals are divided on whether the jury must unanimously agree on the identity of the overt act. Petitioner is incorrect. Although the issue rarely arises, the courts to squarely consider it have rejected the claim that the jury must unanimously agree on a particular overt act in order to convict on conspiracy. See *Griggs*, 569 F.3d at 343; *United States* v. *Sutherland*, 656 F.2d 1181, 1202 (5th Cir. 1981), cert. denied, 455 U.S. 949 (1982). Petitioner points to no decision, and we are aware of none, holding that it is error not to instruct the jury that it must unanimously agree on a particular overt act, or that failure to do so warrants reversal of a conviction.

Petitioner argues (Pet. 25) that the pattern jury instructions of the Third, Eighth, and Ninth Circuits require unanimity as to an overt act. But, as explained above (see p. 16, *supra*), the pattern instructions cannot create a circuit conflict warranting this Court's review because they, like all pattern instructions, are not intended to bind courts, but are instead merely "helpful suggestions." *Norton*, 846 F.2d at

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Accordingly, the district court instructed the jury that it was required to find unanimously that "some member of the conspiracy committed any overt act in furtherance of the conspiracy on or after * * * July 22, 1998." Pet. App. 150. That instruction properly placed the burden of demonstrating continuation within the limitations period on the government, without requiring the jury to agree on the identity of the overt act. Although petitioner suggests (Pet. 27) that the government's evidence of post-July 1998 overt acts was sparse, the instruction did not relieve the government of its burden of proof by permitting the jury to rely on overt acts that occurred before July 1998. The jury is presumed to have followed its instructions and to have unanimously agreed that some overt act occurred after July 1998.

525; see, *e.g.*, *United States* v. *Liu*, 631 F.3d 993, 1000 n.7 (9th Cir. 2011) (questioning whether, in light of *Schad*, the jury must agree on the identity of the overt act, even though the Ninth Circuit pattern instruction does so require); cf. *Schad*, 501 U.S. at 645 ("We do not, of course, suggest that jury instructions requiring increased verdict specificity are not desirable," but "only that the Constitution [does] not command such a practice.").

3. Finally, petitioner contends (Pet. 30-38) that the district court's refusal to allow him to introduce the entire memorandum prepared by Schmid contravenes the rule of completeness, as set forth in Federal Rule of Evidence 106. The court of appeals correctly rejected this claim, and petitioner asserts no conflict among the courts of appeals. Further review of that factbound claim is not warranted.

Rule 106 provides that "[i]f a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part—or any other writing or recorded statement—that in fairness ought to be considered at the same time." Fed. R. Evid. 106. The common law rule of completeness underlying Rule 106 was that "[t]he opponent, against whom a part of an utterance has been put in, may in his turn complement it by putting in the remainder, in order to secure for the tribunal a complete understanding of the total tenor and effect of the utterance." *Beech Aircraft Corp.* v. *Rainey*, 488 U.S. 153, 171 (1988) (internal citation omitted). As the Court noted in *Beech*, one of the concerns addressed by the rule was "that the court not be misled because portions of a statement are taken out of context." *Id.* at 171 n.14.

Petitioner contends (Pet. 32-38) that "whether Rule 106 requires that the additional matter be independently admissible" under the Federal Rules of Evidence is a "controversial" question and that the Court in *Beech* suggested that the additional evidence admitted under Rule 106 need not be independently admissible. Pet. 32. That question is not presented here. The court of appeals upheld the district court's refusal to admit the remainder of Schmid's memorandum on the ground that the additional material was neither "explanatory of nor relevant to the admitted passages." Pet. App. 33 (internal quotation marks and citation omitted). It is well established that the rule of completeness does not require a district court to admit materials that do not explain or cast light upon the already-admitted portions. See, *e.g.*, *United States* v. *Vargas*, 689 F.3d 867, 876 (7th Cir.), cert. denied, 133 S. Ct. 804 (2012); *United States* v. *Lopez-Medina*, 596 F.3d 716, 735 (10th Cir. 2010); *United States* v. *Kopp*, 562 F.3d 141, 144 (2d Cir.) (per curiam), cert. denied, 130 S. Ct. 529 (2009); *United States* v. *Hoffecker*, 530 F.3d 137, 192 (3d Cir.), cert. denied, 555 U.S. 1049 (2008); *United States* v. *Garcia*, 530 F.3d 348, 351-352 (5th Cir. 2008) (Rule 106 "only allows the admission of portions that are relevant and necessary to qualify, explain, or place into context the portion already introduced.") (internal quotation marks and citations omitted).

The court of appeals correctly held that the district court did not abuse its discretion in declining to admit the remainder of the Schmid memorandum because it did not explain the already-admitted portions. Pet. App. 33-34. The government introduced Schmid's testimony after the defense challenged Bodmer's

testimony that in 1998 he had explained to petitioner the arrangement by which Azerbaijani officials would receive two-thirds of the vouchers. Schmid testified that Bodmer had told him about the conversation at the time. Schmid further testified that in 2001, he had memorialized Bodmer's account of his conversation with petitioner in a memorandum. The district court permitted the government to introduce that portion of Schmid's memorandum that stated that Bodmer told Schmid that he had "briefed [petitioner] in detail about * * * the 2/3:1/3 arrangement." *Id.* at 31; Gov't C.A. Br. 66.

The remainder of the memorandum set forth Schmid's own opinion—which did not reflect consultation with or review by Bodmer—that the transactions between Kozeny and others were "arm's length" and, to his knowledge, not corrupt. Pet. App. 32-33; Gov't C.A. Br. 66-69. That material did not explain or give context to the admitted portion of the memorandum, which simply recounted that Bodmer had told Schmid of his 1998 conversation with petitioner. Because the admitted portion did not convey the impression that *Schmid* believed the two-thirds arrangement to be illegal, Schmid's personal opinion, expressed in the unadmitted portion of the memorandum, that he and Bodmer lacked "specific knowledge of corrupt payments," was irrelevant to the memorandum's factual statement that Bodmer had told petitioner about the two-thirds arrangement.[5] Pet. App. 33-34. The court

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[5] *Beech* is therefore distinguishable on its facts. That case concerned a products liability suit arising from a plane crash. 488 U.S. at 156. The Court held that after one party elicited testimony from a flight instructor that suggested that he had written in a letter that pilot error could have caused the crash, the other party

of appeals' factbound conclusion that the remainder of the memorandum did not explain the admitted portions is therefore correct, and it does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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should have been permitted to introduce the witness's statement in the same letter that a mechanical malfunction was the most likely cause of the crash. *Id.* at 159-160. The unadmitted statement in *Beech* thus gave critical context to the admitted statements, without which the jury received the "distorted" impression that the witness had opined that pilot error was the most likely cause of the crash. *Id.* at 170. No such distortion occurred here.