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.	Nos. 05-20604 ~~05-20606~~

GOVERNMENT'S OPPOSITION TO MOTION TO STAY ISSUANCE OF THE MANDATE

Defendants David Kay and Douglas Murphy have moved for an order staying the issuance of the mandate pending their filing of a petition for a writ of certiorari in the United States Supreme Court. The United States opposes the motion and respectfully requests that the Court deny it.

STATEMENT

Defendants Kay and Murphy, former executives of American Rice, Inc., were indicted on 12 counts of paying bribes to foreign officials, in violation of the Foreign Corrupt Practices Act (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 charged with obstructing a proceeding before the Securities and Exchange Commission, in violation of 18

U.S.C. §1505. The FCPA counts alleged that defendants paid bribes to officials in Haiti to accept false documents understating rice shipments in order to reduce customs duties and taxes paid by the company. The district court dismissed those counts, ruling that bribes paid to foreign officials for the purpose of reducing customs duties and taxes were not payments made to "obtain or retain business" within the meaning of FCPA. On the government's appeal, this Court unanimously reversed, holding that such payments could satisfy the business nexus element of the FCPA if it were shown "that the bribery was intended to produce an effect – here, through tax savings – that would 'assist in obtaining or retaining business.'" *United States v. Kay*, 359 F.3d 738, 756 (5th Cir. 2004) (*Kay I*).

Defendants were tried and convicted by a jury on all counts. This Court unanimously affirmed defendants' convictions. *United States v. Kay*, 2007 WL 3088140 (Oct. 24, 2007) (*Kay II*). In particular, the Court rejected defendants' claims that the FCPA did not provide fair notice that their conduct was unlawful and that application of this Court's earlier decision interpreting the FCPA's business nexus element violated the Due Process Clause. *Id.* at *2-*6. The Court also rejected defendants' claim that the indictment was defective because the FCPA counts did not allege that they acted "willfully." *Id.* at *10.

On January 10, 2008, the Court denied defendants' petition for rehearing and

rehearing en banc, with no member of the Court having requested a poll on rehearing en banc. *United States v. Kay*, 2008 WL 96106, at *1 (Jan. 10, 2008).

ARGUMENT

Under Fed. R. App. P. 41(d)(2), a motion to stay the mandate pending the filing of a petition for a writ of certiorari "must show that the certiorari petition would present a substantial question and that there is good cause for a stay."[1] The advisory committee notes to the 1994 amendment to Rule 41 refer to the conditions established by the Supreme Court for granting a stay as the type of showing that must be made to obtain a stay under Rule 41. *Cf. United States v. Warner*, 507 F.3d 508, 511 (7th Cir. 2007) (Wood, J., in chambers) (Rule 41 standard "is similar to the one that the Justices themselves use"); *United States v. Holland*, 1 F.3d 454, 456 (7th Cir. 1993) (Ripple, J., in chambers) ("judges of the lower courts are to apply the same criteria [as the Justices]").

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[1] Defendants rely (Mot. 5 & n.12) on this Court's local rule, which is phrased disjunctively rather than conjunctively like Rule 41, as setting forth the standard for a stay of the mandate. The local rule states:

> A motion for a stay of the issuance of a mandate in a direct criminal appeal filed under Fed. R. App. P. 41 shall not be granted simply upon request. Unless the petition sets forth good cause for stay or clearly demonstrates that a substantial question is to be presented to the Supreme Court, the motion shall be denied and the mandate thereafter issued forthwith.

5th Cir. R. 41.1. To the extent the local rule may be viewed as inconsistent with Rule 41, Rule 41 controls. *See* Fed. R. App. P. 46(a) ("A local rule must be consistent with * * * [national] rules adopted under 28 U.S.C. 2072.").

The Supreme Court has made clear that a mandate should not be stayed unless three conditions are met:

> [T]here must be a reasonable probability that four members of the [Supreme] Court would consider the underlying issue sufficiently meritorious for the grant of certiorari . . .; there must be a significant possibility of reversal of the lower court's decision; and there must be a likelihood that irreparable harm will result if that decision is not stayed.

Barefoot v. Estelle, 463 U.S. 880, 895 (1983) (internal quotations and citations omitted); *accord Rubin v. United States*, 524 U.S. 1301, 1302 (1998) (Rehnquist, C.J., in chambers); *Netherland v. Tuggle*, 515 U.S. 951, 952 (per curiam); *Maggio v. Williams*, 464 U.S. 46, 48 (1983) (per curiam). Relief in the form of a stay "is appropriate only in those extraordinary cases where the applicant is able to rebut the presumption that the decision[] * * * [is] correct." *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers). Defendants satisfy none of these requirements for a stay of the mandate.

1. *Defendants Have Not Shown A "Reasonable Probability" That Certiorari Will Be Granted And A "Significant Possibility" Of Reversal.* Defendants identify three issues as the subjects of their petition for a writ of certiorari.

a. First, defendants claim (Mot. 5-7) that there is a substantial question whether an indictment's failure to allege an essential element of an offense – in this

case, willfulness in the FCPA counts – may be deemed harmless error. They rely primarily (Mot. 7) on the fact that the Supreme Court recently granted certiorari to consider that issue in *United States v. Resendiz-Ponce*, 127 S. Ct. 782 (2007), but ultimately decided that case without reaching the issue. That issue is not squarely presented in this case, however, because this Court, in ruling that the omission was "harmless error at most," concluded that "the language of the indictment described the exact type of conduct required for a finding of willfulness." 2007 WL 3088140, at * 10. In other words, the Court found that the indictment was sufficient despite the absence of an explicit allegation of willfulness. In any event, the Supreme Court in *Resendiz-Ponce* granted the government's petition for certiorari to review a decision by the Ninth Circuit holding that harmless error analysis did *not* apply to an indictment's omission of an essential element. *See* 127 S. Ct. at 786. The fact that four Justices voted in favor of reviewing the Ninth Circuit's refusal to apply harmless error analysis to an indictment error in *Resendiz-Ponce* does not necessarily mean that four Justices will vote in favor of reviewing this Court's application of harmless error analysis in this case.

Nor have defendants shown a significant possibility of reversal on this issue. As this Court has recognized, the Supreme Court's decision in *Cotton v. United States*, 535 U.S. 625 (2000), casts substantial doubt on the proposition that an

indictment's omission of an element of an offense requires automatic reversal. *See United States v. Longoria*, 298 F.3d 367, 372 & n.6 (5th Cir. 2002) (en banc) (overruling prior precedent). The Court has also observed that *Cotton*, along with the Supreme Court's decision in *Neder v. United States*, 527 U.S. 1 (1999), which applied harmless error analysis to a failure to instruct the jury on an essential 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, 285-286 (5th Cir.), *cert. denied*, 543 U.S. 1005 (2004).

Defendants note (Mot. 7 & n.21) that Justice Scalia expressed the view in his dissent in *Resendiz-Ponce* that an indictment's omission of an element of an offense was a "structural" error requiring reversal. See 127 S. Ct. at 793. No other Justice, however, joined Justice Scalia's dissent in whole or in part. Moreover, Justice Scalia also dissented in *Neder*, which applied harmless error analysis to the omission of an element in the jury instructions. See 527 U.S. at 30-40 (Scalia, J., dissenting). Defendants, therefore, have not shown a "significant possibility" that at least five Justices would vote to reverse this Court's decision.

b. Second, defendants claim (Mot. 7-10) that there are substantial questions regarding whether this Court's decision in *Kay I* interpreting the scope of the business nexus element is correct. Their claim, however, overstates the breadth of this Court's

ruling in *Kay I*. *See* Mot. 8 ("The Court's broad interpretation of the FCPA reads the statute to criminalize *all* foreign bribes.") (emphasis added). Moreover, as defendants acknowledge (Mot. 11), *Kay I* addressed the scope of the business nexus element as a matter of first impression. There is, therefore, no conflict among the circuits over the scope of the FCPA for the Supreme Court to review. *See* S. Ct. R. 10(a). Defendants argue (Mot. 9-10) that *Kay I*'s interpretation of the business nexus element contravenes the Supreme Court's cases on the use of legislative history and the rule of lenity, but this Court essentially considered and rejected those arguments in *Kay II*. *See* 2007 WL 3088140, at *5 (discussing use of legislative history and distinguishing *Crandon v. United States*, 494 U.S. 152 (1990), and *Hughey v. United States*, 495 U.S. 411 (1990)); *id.* at *6 (discussing rule of lenity)[2]. Defendants simply do not address this Court's analysis in *Kay II*, much less explain why the Court's reasoning is incorrect. Consequently, defendants have shown neither a "reasonable probability" that certiorari will be granted on this issue nor a "significant likelihood" of reversal.

c. Finally, defendants claim (Mot. 10-13) that there is a substantial question whether *Kay I*'s interpretation of the business nexus element may be applied

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[2] To avoid confusion, we note that the Court in what the parties now call *Kay II* (*i.e.*, the second appeal) referred to the decision in the first appeal as *Kay II* and the district court's decision as *Kay I*.

retroactively to their prosecutions. For the most part, their claim simply repeats the arguments they made in their second appeal. In *Kay II*, this Court extensively analyzed defendants' due process claims under both *Bouie v. City of Columbia*, 378 U.S. 347 (1964), and *United States v. Lanier*, 520 U.S. 259 (1997), and rejected them. *See* 2007 WL 3088140, at *2-*6. As the Court noted, "[a]lthough Defendants argue, and we agreed in [*Kay I*] that the business nexus standard is ambiguous, it does not follow that the standard requires guesswork or that the statutory language is itself vague." *Id.* at *2 (footnote omitted). Defendants largely ignore this Court's analysis in *Kay II* and offer no explanation why it is incorrect. As with the other two issues, defendants have shown neither a "reasonable probability" that certiorari will be granted on this issue nor a "significant likelihood" of reversal.

2. *Defendants Have Not Shown That Denial Of A Stay Will Result In Irreparable Harm.* Defendants have not claimed, much less demonstrated, that they will suffer irreparable harm if a stay is denied. Moreover, defendants may file an application to stay enforcement of the judgment with the Supreme Court in the event that this Court denies a stay of the mandate. *See* S. Ct. R. 23. Finally, none of the issues identified by defendants as the subjects of a petition for a writ of certiorari implicates defendant Murphy's separate conviction for obstruction of justice. Thus, even were the Supreme Court to grant certiorari and reverse defendants' convictions

on the FCPA counts, Murphy's conviction on the obstruction-of-justice count would still stand.

WHEREFORE, the government respectfully requests that the Court deny defendants' motion to stay issuance of the mandate pending the filing of a petition for a writ of certiorari.

Respectfully submitted,

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January 18, 2008

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT copies of the foregoing Government's Opposition To Motion To Stay Issuance Of The Mandate were served this 18th day of January, 2008, by email and in hard copy by first-class mail upon the following counsel:

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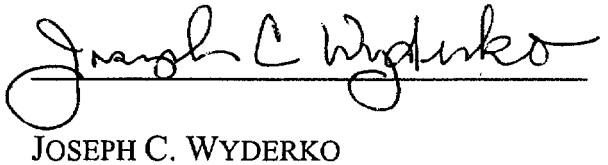

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