No. 05-20604

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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

REPLY BRIEF FOR APPELLANT DAVID KAY

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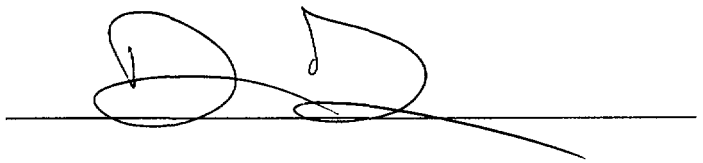
CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. United States of America
2. David Kay
3. Douglas Murphy



Attorney of Record for Appellant David Kay

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Defendant-Appellant David Kay respectfully submits this reply brief. Kay adopts Co-Defendant Murphy's arguments regarding the interstate commerce element of an FCPA offense (Murphy Reply Brief Part I), and the exclusion of the Haitian tax documents (*id.* Part II), under F.R.A.P. 28(i).

ARGUMENT

I. The District Court Erroneously Instructed the Jury on the *Mens Rea* Element of a Criminal FCPA Offense

The district court gave the jury a general intent instruction based on its view that the criminal provision of the FCPA does not require proof that Defendants knew their conduct was unlawful. That question was debated extensively below, precisely because one of Defendants' principal defenses was that they conducted themselves with the good faith belief that their conduct did not violate U.S. law—a view shared by the district court, until this Court pronounced a different first-impression interpretation of the statute. The Government and the district court's view of the statute's intent requirement is incorrect, as are the jury instructions that flowed from that interpretation. Defendants preserved their objection to those instructions, which were, in any event, plainly erroneous and seriously prejudicial. As a result, the convictions on the substantive FCPA counts, as well as the conspiracy count, must be reversed.

A. The Statutory Combination of Both "Willfully" and "Corruptly" Requires Proof That Defendants Knew Their Conduct Was Unlawful

The Government acknowledges that willfulness, standing alone, often requires proof that defendant was aware his conduct was unlawful. Govt. Br. 23-24. It insists, however, that "willfully" sometimes means "intentionally or voluntarily," and that that is all Congress intended for it to add in the criminal provision of the FCPA. This argument ignores the ordinary meaning of "willfully" in the criminal context (the context in which the word is used in the FCPA), as well as the structure of the FCPA's enforcement provisions. Taken together in context, the statutory requirement of "willfully" engaging in "corrupt[]" conduct requires proof that Defendants knew their conduct was unlawful.

1. "Willfully" Ordinarily Requires Proof That Defendants Knew Their Conduct Was Unlawful

While the Government insists "willfully" *can* mean nothing more than "not accidental" in a criminal statute, the Supreme Court has repeatedly (and recently) made clear that it *normally* requires proof the defendant knew his conduct was unlawful. *See, e.g., Bryan v. United States*, 524 U.S. 184, 191 & n.12 (1998); *Screws v. United States*, 325 U.S. 91, 101 (1945) (in the criminal context, "'willfully' has been held to connote more than an act which is voluntary or intentional"). Indeed, the Government recently told

the Supreme Court that "willfully" as used in criminal statutes "generally refers to a 'culpable state of mind,' such as a 'bad purpose' to violate the law." Brief for the United States as Amicus Curiae, *Safeco Ins. Co. v. Burr*, No. 06-84, at 8-9, *available at http://www.usdoj.gov/osg/briefs/2006/3mer/1ami/2006-0084.mer.ami.pdf.* The Supreme Court applied that basic presumption this Term, interpreting the willfulness requirement of the federal gun possession statute to require that the defendant "acted with [the] knowledge that his conduct was unlawful." *Dixon v. United States*, 126 S. Ct. 2437, 2441 (2006) (citation omitted).

2. The Structure Of the FCPA Confirms Congress Intended to Require Proof of Knowledge of Unlawfulness for Criminal Sanctions

To interpret the willfulness requirement properly, one must examine "the context in which it appears." *Bryan*, 524 U.S. at 191. The FCPA's *mens rea* requirement arises from the *combination* of the corrupt and willful intent elements, which *together*, in the context of the statutory structure, make clear that a criminal violation requires proof of knowledge of unlawfulness.

The Government does not dispute that the *only* distinction Congress drew between the predicate for civil and criminal penalties under the statute is the addition of the willfulness requirement for individual criminal pun-

ishment. Rather, the Government's argument is that the only purpose served by the addition of the willfulness element is to prevent an FCPA conviction for accidental conduct. Govt. Br. 25. But under the Government's own definition of "corruptly"—which requires conduct undertaken with a "bad purpose or evil motive" (Govt. Br. 19)—any corrupt attempt to bribe an official is necessarily intentional, not accidental.

Thus, under the Government's view, vigorously urged below, "the term 'corruptly' subsumes the concept of 'willfulness.'" Govt. D.Ct. Br. 33.[1] This is precisely the kind of statutory interpretation the Supreme Court has rejected. *See, e.g., Bryan*, 524 U.S. at 191-92 (criminal provision punishing "willful" violation of statute's substantive provisions required knowledge of unlawfulness). This Court likewise has repeatedly construed statutes of the same structure—where one provision defines unlawful conduct and another punishes willful violations—as requiring proof that the defendant knew his conduct violated the law. *See, e.g., United States v. Rodriguez*, 132 F.3d 208, 211 (5th Cir. 1997) (firearms sales under 18 U.S.C. §§ 922(a)(5), 924(a)(1)(D)); *United States v. Covarrubias*, 94 F.3d 172, 175 (5th Cir. 1996) (exportation of defense articles under 22 U.S.C. § 2278); *United*

[1] References to "Govt. D.Ct. Br." are to the Omnibus Response of the United States to Defendants' Post-Trial Motions (R.181).

States v. Hernandez, 662 F.2d 289, 292 (5th Cir. 1981) (same); *United States v. Tooker*, 957 F.2d 1209, 1213 (5th Cir. 1992) (Trading With the Enemy Act); *United States v. Granda*, 565 F.2d 922, 923-26 (5th Cir. 1978) (violation of 31 U.S.C. §§ 1058, 1101).

The coupling of the "willfully" and "corruptly" requirements further demonstrates Congress's intent to punish criminally only the violation of known legal obligations. Though the Government all but ignores it (Br. 33 n.11), the Supreme Court recently made clear in *Arthur Anderson LLP v. United States*, 544 U.S. 696 (2005), that a statute that criminally punishes only "knowingly" engaging in "corrupt[]" conduct requires a higher *mens rea* standard than corrupt intent alone, lest the additional element be rendered superfluous. Accordingly, the Court held that a statute criminalizing only "knowingly" "corrupt" conduct could not be applied to a defendant who "honestly and sincerely believed that its conduct was lawful." *Id.* at 706. The Government offers no reasonable basis to conclude that a statute prohibiting only "*willfully*" "corrupt" conduct could be susceptible of any different interpretation.

3. *Legislative History Cannot be Used to Rewrite the Statute*

The Government makes no serious attempt to respond to Defendants' arguments based on the statute's text, structure, or context. Instead, the

Government relies almost exclusively on snippets of legislative history. Specifically, the Government rests its case on language in a House committee report purporting to explain the meaning of language in a predecessor version of the statute that was never enacted. Govt. Br. 26 (*citing* H.R. Rep. No. 95-640, at 15 (1977)); *id.* 26-27 (acknowledging that final version of criminal provisions came from the Senate version of the bill). There is no evidence that Congress as a whole endorsed the attempt by the House Report's authors to render the willfulness requirement a nullity. In fact, neither the Senate Report nor the Conference report repeated the misguided statements in the House Report. The statute's text and structure speak for themselves, of course, but even so, no congressperson voting for the enacted Senate bill could have agreed with the authors of the House Report that all the willfulness element did was to prevent the conviction of a person who accidentally corruptly bribed a foreign official.

B. Defendants' Objection to the Jury Instructions Was Preserved

The Government is simply wrong in asserting that Defendants failed to preserve their objections to the jury instructions below.

The Government does not dispute that Defendants made absolutely clear to the district court their position that the FCPA establishes a specific intent crime; that as a result, the jury should be instructed that knowledge of

unlawfulness was required for conviction and that Defendants' good faith belief that their conduct lawful was a complete defense; and that the jury instructions given failed to convey those requirements. These issues were debated at length before the district court at trial. *See, e.g.*, 8 Tr. 111-123, 132-33, 184-89, 200.

The Government nonetheless claims Defendants failed to preserve their objection because they raised their argument by asking that knowledge of unlawfulness be included in the definition of "corruptly," rather than through a separate instruction on willfulness. Govt. Br. 28. This quibble should be rejected.

First, the Government cites no authority for the proposition that a defendant who proposes an otherwise accurate instruction on an essential element of the offense not otherwise conveyed to the jury waives the error by seeking to attach the instruction to the definition of the wrong word in the statute. The question for this Court is whether the "requested jury instruction ... was a *substantially* correct statement of the law." *United States v. Richards*, 204 F.3d 177, 204 (5th Cir. 2000) (emphasis added). That is, viewing the instructions "taken as a whole," the Court must ask whether the charge "clearly instructs jurors as to the principles of the law applicable to the factual issues confronting them." *United States v. Guidry*, 406 F.3d 314,

321 (5th Cir.), *cert. denied*, 126 S. Ct. 190 (2005). The Government cannot seriously contest that if Defendants are right that the FCPA requires knowledge of unlawfulness, then the jury instruction Defendants proposed met that standard.

Second, as discussed above, the requirement of specific intent does not arise solely from Congress's use of the word "willfully" in the criminal provision, but also from its combination with the word "corruptly" and from the statute's structure as a whole. In such cases, it is never technically correct to say the statutory *mens rea* element is defined exclusively in only one term within the statute.

Third, the Government ignores entirely Defendants' separate request for a good faith instruction, which did not purport to define any statutory term, but rather described the consequence of the fact that the statute required the Government to prove "that each defendant acted corruptly with the specific intent to violate the law." R.E. Tab 17, at 36 (Kay Proposed Jury Instr. No. 11). The Government cannot, and does not, claim that this instruction misstated the law if Defendants' interpretation of the statute is correct.

Defendants' proposed instruction on "corruptly," and the extensive argument thereon, preserved the specific intent argument. Even if not, their good faith instruction alone was more than adequate to preserve the issue.

C. The Court Committed Reversible Error In Giving An Erroneous Instruction and In Refusing To Provide Defendants' Proffered Good Faith Instruction Under Any Standard of Review

Regardless of the standard of review, the jury instructions in this case were erroneous and require reversal of the convictions.

1. The Jury Instructions Did Not Inform the Jury That Knowledge of Unlawfulness Was Required

Though it argued precisely to the contrary below, the Government now claims that its jury instruction, given over Defendants' objection, "required the jury to find, in substance, that defendants acted with specific intent to violate the law." Govt. Br. 32. This disingenuous assertion should be rejected.

The Government argued below that its proposed instruction (which the court accepted) encapsulated the *mens rea* requirement for a general intent statute. 8 Tr. 111-12. The Government defended the instruction on the ground that "neither knowledge of the law violated nor intention to act in violation of the law is generally necessary for a conviction." *Id.* 119; *see* also *id.* 120 (arguing "there's absolutely no FCPA precedent that supports a specific intent instruction"). At the same time, the Government argued strenuously that Defendants' proposed instructions were erroneous because they would allow the jury to acquit if it found that Defendants believed in

good faith that their conduct was lawful. *Id.* at 184, 187.

The trial court made clear that it accepted the Government's proposed instruction because it believed the instruction properly described the *mens rea* element for a general intent crime, having rejected Defendants' position that the Act required proof of a specific intent to violate the law. *See* 8 Tr. 133-51 ("I'm finding it's a general intent crime").

Unsurprisingly, the instruction the Government drafted, and the district court accepted, conveyed precisely what it was intended to convey—that the jury could convict Defendants if it found they intentionally engaged in conduct that, whether they knew it or not, violated the law. All the Government had to prove was that Defendants "acted 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." R.E. Tab 16, at 17. Under that instruction, the jury was only required to find that Defendants acted with the purpose of accomplishing an end or result that was in fact unlawful, or used means that were illegal, whether Defendants were aware of the illegality of not. Were there any doubt, the jury's questions during deliberation made clear they did not understand the instruction to require proof that Defendants knew their conduct was unlawful. *See* Kay Br. 15-16, 52.

2. *The Jury Instruction Errors Are Reversible Under Any Standard of Review*

The Government does not contest that if the FCPA creates a specific intent offense, and Defendants preserved their objection, reversal is required. *See* Govt. Br. 31-35 (arguing only that instruction was not erroneous and that Defendants cannot show plain error). *See also United States v. Burroughs*, 876 F.2d 366 (5th Cir. 1989) (reversing conviction where court gave general intent instruction under specific intent statute). Reversal is also required even under plain error review.

First, as described above, the instruction was in error. *Second*, the error was plain. The Supreme Court's holdings in *Andersen* and *Bryan* make plain that the combination of "willfully" *and* "corruptly" in the statute creates a specific intent offense. Failure to provide an unambiguous specific intent instruction for a specific intent crime constitutes plain error.[2] *See, e.g., United States v. Flitcraft*, 803 F.2d 184 (5th Cir. 1986); *Mann v. United States*, 319 F.2d 404 (5th Cir. 1963).

Third, the error affected Defendants' substantial rights by precluding the jury from considering the central element Congress used to distinguish between civil and criminal violations of the Act. Significantly, the Govern-

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[2] The district court understood that if its general intent ruling was wrong, the case was "going to come back." 8 Tr. at 186.

ment does not argue that it presented any evidence or argument on Defendants' awareness of whether their conduct violated U.S. law. Instead, the Government asserts that the jury *would have found* specific intent based on the fact that Defendants' violation of the FCPA "at its core involved lying and cheating." Govt. Br. 34-35. "It is hard to believe," the Government argues, "that any reasonable jury would find that Murphy and Kay did not know that that type of conduct ... was unlawful." *Id.* This claim is facile. As the Government knows, until reversed by this Court, even the district court was under the very strong impression that Defendants' conduct did not violate U.S. law. It is in fact quite difficult to believe that any reasonable judge or jury would share the Government's apparent assumption that U.S. law pervasively criminalizes all forms of dishonest conduct throughout the world.

In fact, the FCPA is an exceptional statute, stretching the arm of U.S. law far beyond the nation's territorial jurisdiction, exercising the outermost limits of Congress's enumerated powers. That exceptional reach is tempered by important limitations in scope. Even where it applies, the FCPA does not purport to criminalize all "dishonest" conduct, or even all bribery of foreign officials. *See United States v. Kay*, 359 F.3d 738, 743 (5th Cir. 2004) ("*Kay II*") ("None contend that the FCPA criminalizes every payment to a foreign

official."). Indeed, until the prior appeal in this case, no court had ever held that the FCPA applied to payments made to reduce foreign taxes rather than to obtain business directly. Moreover, this Court acknowledged that Defendants could not have determined whether the FCPA applied to their conduct by reading the text of the statute, which was hopelessly ambiguous on this point. *Id.* at 745-46. It is accordingly quite understandable that the jury focused intensely on the question of Defendants' knowledge of the law, even though they were ultimately instructed that had no bearing on the proper verdict.

Finally, the failure to instruct the jury on a central element of the offense, in a case in which the Government made no attempt to prove the element and where there is every reason to believe that the element could not have been established, surely "seriously affect[ed] the fairness, integrity, or public reputation of [the] judicial proceedings." *United States v. Olano*, 507 U.S. 725, 732 (1993) (internal quotation marks and citations omitted); *see, e.g.*, *United States v. Dobson*, 419 F.3d 231, 240-41 (3d Cir. 2005). Accordingly the convictions on the FCPA and conspiracy counts[3] must be reversed.

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[3] The Government does not contest that the failure to properly instruct the jury on the *mens rea* element of the underlying FCPA violation also requires retrial on the conspiracy count. *See, e.g., Tooker*, 957 F.2d at 1213 (for conspiracy charge, the "government must prove 'at least the degree of criminal intent necessary for the substantive of-

II. The Indictment's Failure to State an Offense Requires Reversal

The Government does not dispute that willfulness is an essential element of a criminal offense under the FCPA—indeed, the only element that distinguishes criminal from civil violations of the Act. *See* Govt. Br. 21. The Government also admits the indictment did not allege Defendants willfully violated the FCPA. *Id.* 36. To save the verdicts, the Government nonetheless claims the indictment *implicitly* alleged willfulness, and that, in any case, the error was harmless. Both arguments fail.

A. The Indictment Did Not Fairly Import The "Willfully" Element

The Government agrees an indictment is insufficient unless it "alleges *every* element of the crime charged." Br. 37 (emphasis added). It nonetheless argues an indictment may omit an essential element so long as the indictment contains facts which could support a finding of the element, if the grand jury had actually been asked. That is not the law.

"An indictment is sufficient if it contains the elements of the charged offense, fairly informs the defendant of the charges against him, and ensures that there is no risk of future prosecutions for the same offense." *United States v. Sims Bros. Constr.*, 277 F.3d 734, 741 (5th Cir. 2001) (citation omit-

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fense'") (*quoting United States v. Davis*, 583 F.2d 190, 192 (5th Cir. 1978)).

ted). Thus, an indictment must *both* allege every element of the offense *and* set forth the factual basis supporting each element in a manner sufficient to "fairly inform[] the defendant of the charges against him." *United States v. Harms*, 442 F.3d 367, 372 (5th Cir. 2006).[4] The indictment serves not only to give the defendant notice of the claims against him, but also to ensure that the grand jury was asked to, and did, find probable cause to establish every element of the crime.[5]

In this case, the Government does not argue that the indictment, read as a whole, demonstrates that the grand jury understood that willfulness was an element of a criminal FCPA offense and concluded there was probable cause to believe this element was established. Indeed, any such assertion would be entirely implausible—until reconsidering for purposes of appeal, the Government had taken the position that willfulness is *not* an essential element of an FCPA offense, *see* Govt. D.Ct. Br. 31, and the Government continues to insist the statute does not require proof of knowledge of unlawfulness. Instead, the Government argues that the facts alleged in the indict-

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[4] *See also United States v. Resendiz-Ponce*, No. 05-998, 2007 WL 43827, at *4 (U.S. Jan. 9, 2007) (the indictment must "contain[] the elements of the offense *and* fairly inform[] a defendant of the charge against him which he must defend") (emphasis added); *Russell v. United States*, 369 U.S. 749, 763, 765 (1962).

[5] *Russell*, 369 U.S. at 760-61, 770-71; *United States v. Outler*, 659 F.2d 1306, 1310 (5th Cir. Oct. 1981) ("A grand jury can perform its function of determining probable cause and returning a true bill only if all elements of the offense are contained in the indictment."); *see also United States v. Cabrera-Teran*, 168 F.3d 141, 145 (5th Cir. 1999).

ment *could* have supported a finding of willfulness *if* the grand jury had been asked to decide that question. *See* Govt. Br. 37-38. But that is a harmless error argument, not an argument that the indictment actually included the willfulness element.

In any event, there is no more reason to believe that the facts alleged in the indictment would have led the grand jury to find a willful violation than there is reason to believe that the petit jury would have found willfulness had it been asked to do so under a proper *mens rea* instruction. *See supra*. At most, the indictment alleged dishonest conduct that, until this Court's decision in the last appeal, no court had ever held to be a violation of the FCPA.

B. The Failure to Plead an Essential Element of an Offense Is Not Subject to Harmless Error Review

The Government acknowledges that on-point circuit authority has held that failure to allege an essential element of an offense requires automatic reversal of the conviction and is not susceptible to harmless error analysis. Govt. Br. 38-39; *see also United States v. Mekjian*, 505 F.2d 1320, 1324 (5th Cir. 1975); *United States v. Denmon*, 483 F.2d 1093, 1097-98 (8th Cir. 1973). However, it contends this authority was overruled by *United States v. Cotton*, 535 U.S. 625 (2002), as recognized by *United States v. Longoria*, 298 F.3d 367 (5th Cir. 2002) (en banc) and *United States v. Robin-*

son, 367 F.3d 278 (5th Cir. 2004). That is incorrect.

First, neither *Cotton* nor *Longoria* or *Robinson* considered whether harmless error analysis applies to an indictment's failure to allege an *element of the offense*. Those cases were all sentencing cases—they considered "whether the omission from a federal indictment of a fact that enhances the statutory maximum sentence justifies a court of appeals' vacating the enhanced sentence ...." *Cotton*, 535 U.S. at 627; *see also Longoria*, 298 F.3d at 373; *Robinson*, 367 F.3d at 285.[6] *Cotton* did not even decide that question on the merits. It decided only that such an error would not affect subject matter jurisdiction, so it was forfeitable. 535 U.S. at 631. *Cotton* specifically declined to decide the question presented here: whether a preserved indictment error can be harmless error or is instead structural, requiring automatic reversal. *See id.* at 632; *see also Robinson*, 367 F.3d at 285-86 (recognizing that *Cotton* left question open).

Neither *Longoria* nor *Robinson* establishes that *Cotton* overruled this Circuit's prior authority with respect to harmless error analysis. In

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[6] There is a difference between an indictment's failure to include so-called *Apprendi* factors—facts that allow an enhanced sentence—and failure to include an element of the offense necessary for conviction. An indictment lacking *Apprendi* factors still allows conviction, whereas an indictment lacking a necessary element of the offense *fails to state an offense at all.* The latter is the structural error addressed by cases like *Mekjian,* 505 F.3d at 1325.

Longoria, this Court stated its earlier precedents were overruled only "*[t]o the extent that* [they held] that a 'defective indictment deprives a court of jurisdiction.'" 298 F.3d at 372 (emphasis added). This limited overruling *as to subject matter jurisdiction* does not impair the rule in this Circuit that omission of an offense element in an indictment is structural error that cannot be harmless.

This Court's prior decisions acknowledged in the Government's brief are the binding law of the Circuit, unless and until they are overruled by this Court sitting en banc or by the Supreme Court. *Cent. Pines Land Co. v. United States*, 274 F.3d 881, 893-94 (5th Cir. 2001). Under those decisions, the omission of the willfulness element from the indictment is structural error requiring reversal.

C. The Government Has Not Proven That the Failure to Allege Willfulness in the Indictment Was Harmless Beyond a Reasonable Doubt

Even if harmless error analysis applied, the Government has not carried its heavy burden of establishing that the indictment omission was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967). The Government has not shown (and cannot show) that "[n]o rational grand jury would fail to find that [the] evidence constituted anything less than probable cause to believe that" all of the elements of the crime

were established. *Robinson*, 367 F.3d at 289.

The Government's only attempt to satisfy that standard is to point out that Defendants were subsequently convicted by a petit jury. Relying on a "*cf.*" cite to *United States v. Mechanik*, 475 U.S. 66, 70-71 (1986), the Government asserts that any indictment error is necessarily harmless "when the petit jury subsequently is properly instructed for an element of the offense and finds the element in question has been proved beyond a reasonable doubt." Govt. Br. 40. That is not the law. In *Mechanik*, the Court simply held that a violation of a procedural grand jury rule (Fed. R. Crim. P. 6(d), governing who may be present during grand jury proceedings) was shown harmless by a subsequent conviction. 475 U.S. at 70-71. The Court did not purport to establish a rule for all grand jury errors; much less did it consider the proper standard for harmless error review for the failure of an indictment to include an element of the offense.[7] This Court has declined to adopt the categorical view of *Mechanik* proposed by the Government here. *See Robinson*, 367 F.3d at 288; *Cabrera-Teran*, 168 F.3d at 144-45 (citing *Outler*,

[7] The Court has since retreated even from the limited holding of *Mechanik*. *See Bank of Nova Scotia v. United States*, 487 U.S. 250, 256-57 (1988) (adopting harmless error standard articulated in Justice O'Connor's *Mechanik* concurrence for prosecutorial misconduct claims); *see also Midland Asphalt Corp. v. United States*, 489 U.S. 794, 797 n.1, 800 (1989) (noting unsettled question of whether *Mechanik* applies beyond technical violations of grand jury rules).

659 F.2d at 1314). To do so would excuse virtually every violation of the Fifth Amendment right not to be tried except upon a finding of probable cause by a grand jury. The Supreme Court has never adopted such a rule. *See, e.g., United States v. Hooker*, 841 F.2d 1225, 1232 (4th Cir. 1988).

In any case, even if *Mechanik* otherwise were applicable, it would not apply here. As the Government concedes, any such rule would depend on the petit jury being properly instructed on the element missing from the indictment. Govt. Br. 40. As discussed above, this petit jury was not adequately instructed on the *mens rea* element of a criminal FCPA offense.[8]

III. The Decision in the First Appeal Should Not Have Been Applied Retroactively to This Case

The FPCA and conspiracy convictions must also be reversed because they depend on a construction of the statute that cannot be applied to this case consistent with the fair notice requirements of the Due Process Clause.

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[8] The conspiracy count should be reversed as well. Although it is true that the Government is not *required* to plead the elements of the underlying statute in setting forth a conspiracy charge, Govt. Br. 41 n.13, reversal should be required when the Government *does* plead the elements and does so in a way that makes clear that the grand jury could have been misled into thinking that the defendants conspired to engage in acts that were not, in fact, a crime. There can be little doubt that if the grand jury had been properly informed of the elements of an criminal FCPA violation, and concluded that the willfulness element was not met, it would have refused to indict Defendants on the conspiracy count as well.

A. Standard

The Government is wrong in arguing that the Due Process fair-notice test enunciated by the Supreme Court in *United States v. Lanier*, 520 U.S. 259 (1997), has no application to this case. The Government asserts that *Lanier* applied a statutory standard, arising from 18 U.S.C. § 242, rather than the constitutional standard applicable to this case. Br. 57 & n.18. That assertion cannot be squared with the Court's conclusion in *Lanier*:

> In sum, as with civil liability under § 1983 or *Bivens*, all that can usefully be said about criminal liability under § 242 is that it may be imposed for deprivation of a constitutional right if, but only if, "in the light of pre-existing law the unlawfulness [under the Constitution is] apparent." Where it is, the *constitutional requirement* of fair warning is satisfied.

520 U.S. at 271-72 (citation omitted). That summary of the Court's holding made clear both that the qualified immunity standard for civil liability was the same as the standard for criminal liability under Section 242, and that both standards implement the Due Process Clause requirement of fair warning. This makes perfect sense: surely one whose liberty is at stake is entitled to at least as much fair warning regarding the lawfulness of his conduct as a government officer subject only to a judgment for money damages.

The Government apparently takes the view that *Bouie v. City of Columbia*, 378 U.S. 347 (1964), established an additional requirement inconsistent with *Lanier*, namely that the judicial interpretation of the statute must

also be "indefensible" to violate the Due Process Clause. Br. 58. While it is true that the Court in *Bouie* found the decision in that case to be indefensible in light of prior law, the Court has not restricted the fair warning principle to such cases. In subsequent decisions, the Court has stated the rule of *Bouie* without reference to the indefensible nature of the interpretation. *See Lanier*, 520 U.S. at 266; *Marks v. United States*, 430 U.S. 188, 192 (1977); *Douglas v. Buder*, 412 U.S. 430, 432 (1973); *Rabe v. Washington*, 405 U.S. 313, 315-16 (1972). Indeed, to apply that limitation to a federal court's interpretation of a federal criminal statute would essentially eliminate the Due Process protection altogether, as any decision that is applicable to the case (*i.e.*, precedent binding upon the trial court) is necessarily presumed to be not only defensible, but correct.[9] Yet, in *Marks*, the Supreme Court held that the Due Process Clause precluded retroactive application of its own decision in *Miller v. California*, 413 U.S. 15 (1973), to pending criminal prosecutions, without ever suggesting that the decision was wrong, much less indefensible. 430 U.S. at 191-97. It was enough, the Court held, that the defen-

[9] In *Rogers v. Tennessee*, 532 U.S. 451 (2001), the Court did apply the "indefensible" standard in a case involving the retroactive application of judicial decisions modifying criminal common law offenses. *Id.* at 461. That decision, however, stressed the central importance of permitting state common law courts the "substantial leeway they must enjoy as they engage in the daily task of formulating and passing upon criminal defenses and interpreting such doctrines as causation and intent...." *Id.* No such considerations are at play in the federal system, where there is no federal criminal common law or federalism interest at issue. All federal crimes are fixed by statute.

dants "had no fair warning that their [conduct] might be subjected to the new standards." *Id.* at 195.

B. Defendants Lacked Fair Warning of This Court's Clarifying Construction of the FCPA

The Government argues that Defendants had fair warning that the FCPA applied to their conduct—bribery to obtain tax benefits that had the indirect effect of improving a company's competitive position and, thereby, could indirectly assist in "obtaining or retaining business"—because in reaching that conclusion this Court applied "well-settled principles of statutory construction," Govt. Br. 59, reached a decision "not clearly at variance with the statutory language," *id.* (internal quotation marks and citation omitted), and therefore did not engage in "arbitrary judicial action," *id.* at 60 (citation omitted). The procedural regularity of this Court's statutory construction in *Kay II*, however, says nothing about whether defendants had fair notice of the scope of the statute's prohibition *prior to* this Court's clarifying construction. That they did not is strongly suggested not only by the unprecedented nature of the ruling, but also by this Court's own conclusion that the text of the statutory prohibition was ambiguous as a matter of law. *Kay II*, 359 F.3d at 746.

There can be little doubt that the statute itself provided Defendants no fair warning of the Court's interpretation. The scope of its textual prohibi-

tion could not be discerned by a federal district judge despite extensive briefing from expert counsel. And no other court had previously addressed the question, much less resolved it in the Government's favor. Moreover, because this case involved the outer limits of a criminal statute at the outer limits of Congress's Commerce Clause authority, Defendants would have had every reason to believe that the courts would give it a narrow construction in the face of any ambiguity. *See, e.g., INS v. St. Cyr*, 533 U.S. 289, 299 (2001); *McNally v. United States*, 483 U.S. 350, 359-60 (1987).[10]

IV. The District Court Unfairly Burdened Kay's Exercise of His Fifth Amendment Rights

The district court committed reversible error when it ruled that if Kay testified he voluntarily told ARI's attorneys about the customs payments, the Government could impeach with Kay's counseled refusal to respond to an SEC subpoena. Kay Brief 54-58. The Government responds that by not so testifying, forfeited the issue, and that the district court's ruling correctly allowed the Government to refute any misleading suggestion that Kay had cooperated with the SEC. Both contentions are wrong.

A. As the District Court Noted, Kay's Offer of Proof Was Sufficient to Preserve the Issue

The Government invokes *Luce v. United States*, which held "that to

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[10] *See also* Murphy Reply Br. 7 n.2 (quoting cases on rule of lenity).

raise and preserve for review the claim of improper impeachment with a prior conviction, a defendant must testify." 469 U.S. 38, 42 (1984); *see* Govt. Br. 64. *Luce's* holding does not apply here for two reasons: (1) unlike in *Luce* and its progeny cited, Kay (a) took the stand, and (b) made an offer of proof as to the additional proposed testimony at issue; and (2) *Luce* involved only *nonconstitutional* evidentiary errors, not the choice between constitutional protections imposed here.

Luce reviewed a ruling that if the defendant testified, he could be impeached with prior felony convictions under Rule 609(a). *Luce*, 469 U.S. at 39-40. The Supreme Court foreclosed Luce's challenge because he had not testified. *Id.* at 40, 43. *Luce* was based on four concerns: *first*, that without the defendant's testimony, the district court could not balance probative value versus prejudice, as required under Rule 609(a)(1); *second*, that any harm was speculative because the *in limine* ruling could always be revisited; *third*, that "because an accused's decision whether to testify seldom turns on the resolution of one factor, a reviewing court cannot assume that the adverse ruling motivated [the] defendant's decision not to testify"; and *fourth*, that without defendant's testimony, it is difficult to conduct a harmless error analysis. *United States v. Bond*, 87 F.3d 695, 700 (5th Cir. 1996) (quoting *Luce*) (citations and internal quotation marks omitted).

The first two concerns in *Luce* and *Bond* are not present here, because Kay made an offer of proof of what his testimony would be.[11] Though dicta in *Luce* suggests an offer of proof would make no difference, 469 U.S. at 41-42 & n.5, the *Luce* holding was based on no testimony or proffer being given at all. 469 U.S. at 39, 41.[12] Kay's proffer was simple: "that he's the one [who] told [ARI] lawyers about the payments," 7 Tr. 11; *cf. also* 7 Tr. 6; 6 Tr. 65, and there is no reason to fear that the testimony would change. The district court had no difficulty understanding what the testimony would be. *See* 7 Tr. 5-15. Indeed, the district court expressly stated that it accepted counsel's proffer as sufficient under the rules. 7 Tr. 12. It would be unfair to hold Kay was required to do more, after he relied on the court's assurance that his offer of proof was enough.

Moreover, there was no need for a nuanced analysis of Kay's testimony to determine probative value or prejudice under any evidentiary rule. The government's impeachment evidence—that Kay invoked the Fifth Amendment before the SEC—did not in any way undercut the fact that Kay told the lawyers about the payment. That fact was conceded. *See* 7 Tr. 15.

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[11] Kay Br. 12-13, 55; 7 Tr. 5-15; *see also* 6 Tr. 65-66.

[12] Similarly, in each of *Luce's* progeny cases cited by the Government, the defendant neither testified nor made an offer of proof. *See Bond*, 87 F.3d at 700; *United States v. Wilson*, 307 F.3d 596, 599-600 (7th Cir. 2002); *United States v. Nivica*, 887 F.2d 1110, 1116-17 (1st Cir. 1989).

The Fifth Amendment impeachment was sought only as a naked quid pro quo, to exact a price for Kay's testimony. *See* 6 Tr. 68.

The third *Luce/Bond* concern is not present here, because Kay did in fact testify. There is thus no mystery as to his reason for not testifying, or the scope of omitted testimony attributable to the challenged *in limine* ruling. The ruling caused Kay to omit his testimony that he told ARI lawyers about the payments; no other testimony or lack thereof is at issue.

The fourth *Luce/Bond* concern—that without the testimony and impeachment it is difficult to analyze for harmless error—overlaps with the second distinction of *Luce*—that *Luce* was expressly limited to nonconstitutional evidentiary errors. 469 U.S. at 42-43.13 The Court expressly distinguished "Fifth Amendment challenges to [trial] court rulings that operated to dissuade defendants from testifying." *Id.* at 42; *see Bond*, 87 F.3d at 701 (acknowledging distinction).[14] The harm at issue here is not that Kay suf-

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[13] *See also id.* at 43-44 (Brennan, J., concurring).

[14] It is true that *Bond*, *Wilson*, and *Nivica* (cited Govt. Br. 64-65) involved Fifth Amendment challenges, where defendants sought to limit the scope of their cross-examinations prior to testifying. Those cases, however, involved much more significant actions by the defendants to open the door to impeachment. In *Bond*, the defendant put his actual innocence in issue by arguing it as a basis for withdrawing his plea, but then sought to foreclose cross-examination on it. 87 F.3d at 698. In *Wilson*, the defendant waived his *Miranda* rights and spoke to the FBI, but did so selectively. 307 F.3d at 598. In *Nivica*, the defendant proposed to testify broadly on three different topics, but sought a prospective ruling (before testifying and without offer of proof) limiting cross-examination. 887 F.2d at 1115-16. Each situation required analysis of the defendant's

fered improper impeachment under the evidentiary rules. It is that he was required to elect between constitutional rights: his right to testify in his defense, versus his right to be free from penalty for invoking his Fifth Amendment right to silence. It was this forced election, not the allowed improper impeachment, that prejudiced Kay's substantial rights. Kay Br. 61-62.

B. The District Court's Ruling Was Error

On the merits, the Government argues *United States v. Hale*, 422 U.S. 171 (1975), and *Doyle v. Ohio*, 426 U.S. 610 (1976), do not apply, because the proposed elicitation of Kay's silence before the SEC was proper to counter a supposed misimpression that Kay actively cooperated with authorities. The argument is a straw man. Kay never sought to imply or argue that he cooperated with the Government.

Kay sought to elicit one simple fact: "that he's the one [who] told [ARI] lawyers about the payments." 7 Tr. 11. This was exculpatory[15] be-

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actual testimony to determine the extent to which the defendant opened the door, thereby waiving his Fifth Amendment right *on the stand*. By contrast, here, the Fifth Amendment right at issue was a *Hale/Doyle* violation—the right not to be penalized for a *past* (nonselective) invocation of the right to silence. Moreover, there was no doubt as to either the single fact Kay wanted to offer—that he had told ARI's attorneys about the payment—or the single fact the government would elicit in response—that Kay refused to speak to the SEC. Thus, there was not the same need for live testimony to determine the extent and effect of the testimony.

[15] Contrary to the Government's argument, Br. 67.

cause it undercut the government's proof of intent: it evidenced that at the time of the statement in 1999, Kay did not believe he had anything to hide. A person who believes his conduct was criminal does not volunteer that conduct to the company's outside counsel. That was the sole (and exculpatory) purpose of the testimony.

The claim that Kay sought to create a misleading impression of cooperation with the Government is of the Government's own making. In colloquy below, only the Government brought up the idea that Kay was trying to argue that he was "the good guy who started all this," *i.e.*, the SEC investigation. 6 Tr. 76, *see also* 6 Tr. 72; 7 Tr. 8. Kay's counsel denied that argument. 7 Tr. 11 ("No. My– I wouldn't go into those details."). Counsel argued instead that Kay's volunteering the information was consistent with an innocent state of mind. 6 Tr. 66 ("And I think it's relevant because it is consistent with innocence,"); 6 Tr. 70 ("I mean, the fact that he volunteered this information ... shows him to be in a completely different position than his alleged coconspirators."). There was no misimpression to correct.

The Government's argument that *Doyle* applies only where a defendant has received *Miranda* warnings (Br. 68-69) is incorrect for the reasons explained in Kay's Brief at 58-61.

CONCLUSION

For the reasons explained above and in the opening briefs, the verdicts should be reversed.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Brief of Appellant David Kay was served in both paper, by U.S. mail, and electronic form, via electronic mail, on the attorneys set forth below on this 23rd day of January 2007. Appellant Kay's Reply Brief was filed with the clerk by dispatching it in both paper and electronic form to the United States Postal Service on January 23, 2007 for delivery to the clerk within three calendar days (*see* F.R.A.P. 25 (a)(2)(B)(ii)).

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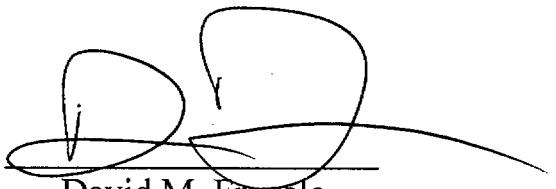

January 23, 2007 David M. Fragale

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January 23, 2007 David M. Fragale