Nos. 05-20604 & 05-20606

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DAVID KAY and DOUGLAS MURPHY,

Defendants-Appellants.

On Appeal From the United States District Court
for the Southern District of Texas

District Court Case No. Crim. A. H-01-914

PETITION FOR REHEARING *EN BANC*

REID H. WEINGARTEN
BRUCE C. BISHOP
DAVID M. FRAGALE
Steptoe & Johnson LLP
Washington, D.C. 20036
(202) 429-3000

Counsel for David Kay

THOMAS C. GOLDSTEIN
CHRISTOPHER M. EGLESON
Akin Gump Strauss
Hauer & Feld LLP
1333 New Hampshire Ave., NW
Washington, D.C. 20036-1564
(202) 887-4000

KEVIN K. RUSSELL
Howe & Russell, P.C.
4607 Asbury Pl. NW
Washington, D.C. 20016

Counsel for Douglas Murphy

CERTIFICATE OF INTERESTED PARTIES

United States of America v. David Kay & Douglas Murphy,

Nos. 05-20604 & 05-20606

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 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
4. Reid H. Weingarten
5. David M. Fragale
6. Brian M. Heberlig
7. Bruce C. Bishop
8. Steptoe & Johnson LLP
9. Thomas C. Goldstein
10. Paul Butler
11. Christopher M. Egleson
12. Akin Gump Strauss Hauer & Feld LLP
13. Amy Howe
14. Kevin K. Russell
15. Howe & Russell, P.C.
16. Robert C. Bennett, Jr.
17. Bennett & Secrest
18. Robert J Sussman
19. Charley A Davidson
20. Locke Liddell & Sapp LLP
21. Clifford Rones
22. James L Turner
23. Philip Urofsky
24. Ellen R Meltzer
25. Joseph Charles Wyderko

Attorney of Record for Appellant Douglas Murphy

STATEMENT OF IMPORTANCE

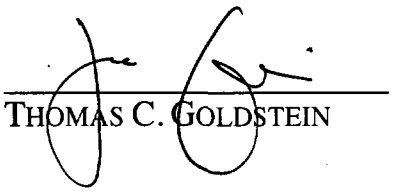
The undersigned counsel certifies that this proceeding involves three questions of exceptional public importance, two of which conflict with decisions of the United States Supreme Court.

The panel's decision of the first issue, regarding the substantive reach of the Foreign Corrupt Practices Act, is a "landmark decision of first impression," Hector Gonzalez & Claudius Sokenu, *Outside Counsel: Scope of Foreign Corrupt Practices Act's Bribery Provision Set*, Vol. 231 N.Y.L.J., June 29, 2005, at 1, which extended the reach of the FCPA for the first time to cover bribes paid to foreign officials that were not directly connected to obtaining or retaining business with any person, but instead were directed toward obtaining competitive business advantage by reducing import taxes. The panel decision conflicts with *Crandon v. United States*, 494 U.S. 152 (1990), and *Hughey v. United States*, 495 U.S. 411, 422 (1990), by using legislative history to define the substantive reach of a statute where the text of the statute is fundamentally ambiguous as a matter of law.

The panel's decision of the second issue, regarding application of this Court's first-impression interpretation of the FCPA to reach defendant's conduct in this case (which pre-dated that interpretation) conflicts with Supreme Court decisions regarding retroactive application of a new judicial gloss on an otherwise uncertain statute, including *United States v. Lanier*, 520 U.S. 259 (1997) and *Bouie v.*

City of Columbia, 378 U.S. 347 (1964).

The panel's decision of the third issue, regarding whether the jury was correctly instructed on the specific intent required for a criminal violation of the FCPA, is of exceptional public importance because it approves, for a specific intent offense requiring a showing of "willfulness," a jury instruction that was given to cover only a general intent crime, i.e., to require only a showing of awareness of conduct, without knowledge that the conduct was unlawful. The resulting dilution of the "willfulness" standard creates the potential for confusion and injustice in future prosecutions under any statute that requires a "willful" violation before criminal punishment is warranted.



THOMAS C. GOLDSTEIN

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STATEMENT OF ISSUES

1. Whether the panel erred in holding that the Foreign Corrupt Practices Act's prohibition on bribing foreign officials to "obtain or retain business . . . for or with any person,"[1] criminalizes payments to reduce taxes on the attenuated theory that any tax savings may, in turn, indirectly improve a company's competitive position and thereby eventually increase its ability to obtain or retain business.

2. Whether the Due Process Clause permits retroactive application in a criminal case of a decision construing the FCPA to prohibit bribes to reduce tax payments, where the interpretation addressed a question of first impression in the federal courts and was admittedly based on inferences drawn from the legislative history in light of the hopelessly ambiguous text of the statute.

3. Given that the theory of the prosecution is not only attenuated under the statutory text but had never before been thought to be a basis for criminal liability, whether, at the very least, the jury instructions in this case—which the Government wrote to encompass a general intent crime—were sufficient to require proof that the appellant had the specific intent to violate the law.

COURSE OF PROCEEDINGS

The defendants were indicted in the Southern District of Texas. The district

[1] 15 U.S.C. §§ 78dd-1(a).

court dismissed the indictment, and a panel of this court reversed (*Kay I*).[2] On appeal after defendants' conviction on remand, a different panel affirmed (*Kay II*).[3]

FACTS

Appellants David Kay and Douglas Murphy were executives at American Rice, Inc. (ARI), a Texas company that grew rice in the United States and sold it abroad. In the 1990s, ARI exported rice to Haiti during what the panel recognized was "a time of political chaos and rampant corruption in that country."[4] Like many other importers, ARI paid Haitian customs officials to reduce its import duties.

At the time they authorized the payments, Kay and Murphy had no reason to believe that these payments were a matter of concern to any government other than Haiti's, as no court had ever construed the Foreign Corrupt Practices Act (FCPA)—which prohibits only corrupt payments made to "obtain or retain business" in a foreign country[5]—to extend to payments intended to reduce taxes. Nor, at that time, had the federal government ever taken the position that the statute criminalized such payments, under any theory.

In 1999, Kay described the payments to lawyers representing ARI in a civil suit. The lawyers reported the disclosure to the company's directors, who in turn reported it to the SEC. The SEC investigated, and Kay and Murphy were indicted

[2] *United States v. Kay*, 200 F. Supp. 2d 681 (S.D. Tex. 2002), *rev'd*, 359 F.3d 738 (5th Cir. 2004).
[3] *United States v. Kay*, Nos. 05-20604 & 05-20606, Slip Op. (5th Cir. Oct. 24, 2007).
[4] *Kay II*, Slip Op. 2.

for "willfully" violating the FCPA. The district court, however, dismissed the indictment, concluding that the Act did not extend to such payments, which had only an indirect effect on obtaining or retaining business.

A panel of this Court reversed. That panel agreed with the district court that the statutory language was ambiguous on its face. However, rather than concluding that the rule of lenity required adopting the less expansive view of the statute, the panel undertook a fine parsing of not only the House, Senate, and conference reports, but also an SEC report that had been submitted to the Senate a year earlier. Examination of those materials led it to "surmise" that Congress meant the statute to apply broadly, so it reversed.[6]

On remand, the district court rejected defendants' assertion that the Act created a specific intent crime and instructed the jury accordingly. On appeal from defendants' subsequent conviction, a second panel affirmed.

ARGUMENT

Appellants have been sentenced to substantial prison terms—roughly three and five years, respectively—for engaging in conduct that even the district court judge in this case believed to be non-criminal. The initial panel reached a contrary conclusion based on a parsing of the legislative history. That strained reading of the statute is wrong and this Court sitting *en banc* should reject it. If it does not, it

[5] 15 U.S.C. § 78dd-1(a).

should at a minimum reverse the second panel's application of that decision to these defendants, who had no way of anticipating that the statute would be read in this way. In addition, the Court should review the most recent panel's approval of the jury instructions in this case, which were designed to require only general intent but which the panel held was sufficient to instruct the jury on a specific intent crime as well. That approval will create substantial confusion in the Circuit regarding what must be proved to establish a specific intent crime in a wide range of future cases. *En banc* review is warranted.

I. *En Banc* Review Is Warranted to Correct the Erroneous Holding of the *Kay I* Panel, Which Read the FCPA's Admittedly Ambiguous Language to Create Criminal Liability on the Basis of Equally Ambiguous Legislative History

The FCPA prohibits payments to "any foreign official for purposes of . . . inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official . . . in order to assist [the company] in obtaining or retaining business for or with, or directing business to, any person."[7] That language obviously prohibits companies from bribing foreign officials in order to win government business or business directed by foreign officials. And until the indictments in this case, that is the only basis upon which the government had ever prosecuted any defendant. The *Kay I* panel nonetheless held that the statute also criminalizes

[6] *Kay I*, 359 F.3d at 748; *see id.* at 742-46.

[7] 15 U.S.C. § 78dd-1(a)(1).

bribes that have only a tangential, indirect effect on a business's ability to obtain or retain business by reducing the company's operating costs, thereby extending the statute to nearly every bribe that a business official might undertake. That new and expansive view of the statute is wrong.

In the FCPA, Congress did not criminalize all foreign bribes—it prohibited only those directed at "obtaining of retaining business for or with . . . any person."[8] This limitation must be respected, particularly given that the FCPA amounts to an unusual exercise at the outer limits of Congress's Commerce Clause authority to govern conduct occurring within another sovereign nation and in relation to that nation's officials.[9] Here, the broad interpretation of the statute adopted in *Kay I* and followed in *Kay II* leaves this "business nexus" limitation with little effect. It is difficult to conceive of an action by a foreign official that a company would pay for which did not somehow improve the company's competitive position.

The effect of this interpretation is to do what Congress chose not to do—to criminalize *all* bribes of foreign officials. The *Kay I* panel recognized that its expansive construction of the FCPA was not compelled, or even strongly supported, by the statutory text.[10] To the contrary, the panel noted that Congress expressed

[8] *Kay I*, 359 F.3d at 743 (quoting statute).

[9] *Cf. Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957) (Before a statute will be read to interfere "in such a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed").

[10] *Kay I*, 359 F.3d at 742-45.

the scope of the FCPA's prohibition "obliquely"[11] and acknowledged that the statutory language itself did not indicate "how attenuated" the linkage could be between the foreign official's action and the obtaining or retaining of business.[12] Accordingly, it concluded that the statute was "ambiguous as a matter of law."[13]

Given the ambiguities, the panel should have construed the statute narrowly in light of not only the rule of lenity, *see infra*, but also the reasonable expectation that if Congress had actually intended to criminalize virtually every commercial bribe of a foreign official, it would have said so directly. Instead, the panel looked to the legislative history of the statute in search of justification for a broader reading.[14] That decision was erroneous. The Supreme Court has stated clearly that "[i]t is rare that legislative history or statutory policies will support a construction of a statute broader than that clearly warranted by the text."[15] Here, the text and structure of the statute did not "clearly warrant[]" a broad interpretation. And the panel did not explain why this was one of the "rare" cases in which legislative history may be used to resolve ambiguity in a criminal statute against a defendant.

This was not in fact such a case. Indeed, neither this Court nor the Supreme

[11] *Kay I*, 359 F.3d at 745.
[12] *Id.* at 744.
[13] *Id.* at 746.
[14] *Id.* at 746-55.
[15] *Crandon v. United States*, 494 U.S. 152, 160 (1990); *see also Hughey v. United States*, 495 U.S. 411, 422 (1990) ("[L]ongstanding principles of lenity . . . preclude our resolution of the am-

Court has ever identified a case in which it would be appropriate to adopt an expansive interpretation of a criminal statute over a narrower one, simply on the basis of the legislative history.[16] Over the years this Court has issued more than five dozen opinions dealing with the rule of lenity and legislative history, and among those opinions *Kay I* is the only one to have relied so extensively on legislative history in the absence of any other significant indication supporting a broader view.

What is more, the legislative history here in fact gives every indication that Congress intended the statute *not* to cover the payments at issue here. The Senate Report says that the statute bars companies from making payments to a foreign official "for the purpose of inducing him to obtain or retain business for the corporation."[17] It goes on to clarify that "the offer, payment, promise, or gift, must be intended to induce the recipient to misuse his official position in order to wrongfully *direct business to* the payor or his client."[18] Moreover, the Senate report indicates that when officials take money to "expedit[e] shipments through customs" or provide "required permits" or "adequate police protection," those actions are *not* taken

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biguity against petitioner on the basis of general declarations of policy in the statute and legislative history.") (internal citation omitted).

[16] The closest the Supreme Court has ever come is its decision in *Dixson v. United States*, 465 U.S. 482 (1984) (adopting broad reading of domestic bribery statute). But in that case the Court merely confirmed the breadth of a statute that had been broadly interpreted by the majority of courts to consider it in decisions predating the defendants' conduct by nearly 20 years. In light of that history, there was no reason to be concerned there about a lack of fair notice.

[17] S. REP. 95-114, at 10.

[18] *Id.*

"in order to assist" a company in obtaining or retaining business.[19] Possession of a "required permit[]" and "adequate police protection" are of as much "assist[ance]" to a company trying to do business as are lower import duties. Anyone wondering if a payment would violate the statute would have a hard time spotting the difference between the former and the latter even if he reviewed the Committee report.

The panel ignored these contrary indications in the legislative history, relying instead on the SEC report that prompted Congress to enact the statute.[20] "It may well be true that in most cases the proposition that the words of the United States Code or the Statutes at Large give adequate notice to the citizen is something of a fiction, albeit one required in any system of law; but necessary fiction descends to needless farce when the public is charged even with knowledge of Committee Reports."[21] This "farce" is exacerbated where, as here, the document is not even the committee report itself but an *agency study*.

What is more, the comparison between the SEC report and the statute in fact cuts just the other way. The SEC wanted Congress to ban four categories of bribes: those made (1) "in an effort to procure special and unjustified favors or advantages in the enactment or administration of the tax or other laws"; (2) "with the intent to assist the company in obtaining or retaining government contracts"; (3)

[19] *Id.*

[20] *Kay I*, 359 F.3d at 747 & n.36.

[21] *United States v. R.L.C.*, 503 U.S. 291, 309 (1992) (Scalia, J., concurring).

"to persuade low level government officials to perform functions they are obliged to perform"; or (4) to a political campaign.[22] Congress, however, ultimately chose to prohibit only the second of these four categories.[23] It used "business" instead of "government contracts," which may have been intended to broaden the category.[24] But substituting "business" for "government contracts" would be a strikingly obscure way to also cover "special and unjustified favors or advantages in the enactment or administration of the tax or other laws." The payments at issue in this case fall easily into the latter category, which Congress chose not to cover in the language it enacted. Having failed to persuade Congress, the SEC obtained the extension it was denied by the legislature from a panel of this Court.

Because the text was ambiguous and the legislative history inconclusive, the *Kay I* panel could only "surmise" that Congress intended to criminalize tax-related bribes.[25] But the Due Process Clause does not allow Congress, or the courts, to require ordinary citizens to "surmise"—*i.e.*, take its best "educated guess"—at the meaning of a criminal statute, with incarceration the price of guessing wrong.[26] In light of the plain language of the statute, the unusual extraterritorial scope of the

[22] *Kay I*, 359 F.3d at 747-48 (quoting Report of the Securities and Exchange Commission on Questionable and Illegal Corporate Payments and Practices, submitted to the Senate Banking, Housing and Urban Affairs Committee, May 12, 1976).

[23] *See id.* at 743 (quoting 15 U.S.C. § 78dd-1(a)); *see also id.* at 746-47 (citing H.R. Conf. Rep. No. 95-831, at 12 (1977), reprinted in 1977 U.S.C.C.A.N. 4120, 4124-25).

[24] *See Kay I*, 359 F.3d at 748.

[25] *Id.* at 748.

statute, and the rule of lenity, the *Kay I* panel should have held, and this Court sitting *en banc* should yet hold, that the statute does not extend to bribes directed at achieving tax benefits rather than obtaining or retaining business directly.

II. The Supreme Court's Decision in *United States v. Lanier* Prohibited Retroactive Application of *Kay I* to These Defendants

Due Process prohibits a court from applying a clarifying "judicial gloss on an otherwise uncertain statute . . . to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope."[27] "While such a construction is of course valid for the future, it may not be applied retroactively, any more than a legislative enactment may be, to impose criminal penalties for conduct committed at a time when it was not fairly stated to be criminal."[28] This means that a defendant is not liable unless his conduct violated "clearly established statutory . . . [obligations] of which a reasonable person would have known."[29]

Retroactive application of *Kay I* violates these principles because the illegality of Kay and Murphy's conduct was not "clearly established" prior to the *Kay I* decision. The FCPA prohibits corrupt payments when an official acts "in order to assist [the company]" to "obtain or retain business." In the 1990s, all prosecutions

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[26] *See, e.g.*, *Muscarello v. United States*, 524 U.S. 125, 138 (1998).

[27] *United States v. Lanier*, 520 U.S. 259, 266-67 (1997).

[28] *Bouie v. City of Columbia*, 378 U.S. 347, 362 (1964).

[29] *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *see also Hope v. Pelzer*, 536 U.S. 730, 739-40 (2002) (test for whether a criminal statute may be applied retroactively is the same as the test for qualified immunity set forth in *Harlow*).

under the statute involved bribes directly aimed at obtaining or retaining business by, for example, paying a bribe to secure a government contract.[30] No case had ever been brought involving payments for beneficial tax treatment or any other "effort to procure special and unjustified favors or advantages in the enactment or administration of the tax or other laws," the category of bribes proposed to be regulated by the SEC but rejected by the Senate.[31] The government had never taken the position that such payments were covered by the Act, and Kay and Murphy could not have known that they were.

The *Kay I* panel acknowledged that the government's prosecution theory was unprecedented.[32] It noted "the failure of the language of the FCPA to give a clear indication of the exact scope of the business nexus element."[33] It called the statute "ambiguous as a matter of law."[34] It noted that the Conference report "offers little insight into the FCPA's precise scope," and instead "merely parrots the statutory language itself."[35] It thus dug below legislative history to rely on the

[30] *See, e.g.*, *United States v. Young & Rubicam, Inc.*, 741 F. Supp. 335 (D. Conn. 1990); *see also Kay I*, 359 F.3d at 745 n.21 (acknowledging that the few reported decisions under the FCPA before this case each involved the acquisition or renewal of contracts or commercial agreements).

[31] *Kay I*, 359 F.3d at 747-48.

[32] *Id.* at 745 n.21; *see also id.* at 760 n.96 (leaving open defendants' fair-notice argument, which was grounded in "the dearth of case law on the subject").

[33] *Id.* at 744.

[34] *Id.* at 746.

[35] *Id.* at 747.

SEC report that prompted the legislation,[36] even though it acknowledged that Congress "only loosely addressed" the contents of that report.[37] From these scraps, it "surmise[d]" Congress's intent.[38]

Even if these minutiae are sufficient grounds to read the statute broadly going forward, they do not provide the clarity that is demanded for retroactive application of the law. The district court itself was unable to discover the panel's ultimate interpretation hidden in the legislative history. Learned judges of this Court, aided by the arguments of counsel, could not find the clear meaning of the statute in its text or its legislative history, but had to rely on an agency report that *preceded* Congress's first consideration of the matter.[39] Ordinary citizens like David Kay and Douglas Murphy could not have known, from the statute's text, its legislative history, or any prior judicial decisions or prosecutions, that American law criminalized the payment of foreign officials to obtain a benefit—favored tax treatment—bearing only a tangential relationship to "obtaining or retaining business . . . with any person," as the statute requires. If "man is free to steer between lawful and unlawful conduct,"[40] these men should have been allowed to steer their course with a clear view of what the law commanded. Under *Lanier* and the other Supreme

[36] *Id.* at 747 & n.36.
[37] *Id.* at 748.
[38] *Id.*
[39] *Id.* at 747.
[40] *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

Court cases that bind this Court, and the fair notice principles those cases embody, retroactive application of the decision in *Kay I* to the defendants here is unfair and unconstitutional.

III. The Panel's Reading of the District Court's Jury Instruction Sets a Precedent that Will Confuse Juries in Every Case Involving Criminal Willfulness

The defendants argued below that the FCPA creates a specific intent crime, requiring proof that each defendant knew that his conduct was in violation of U.S. law. The Government disagreed, arguing that the Act created only a general intent crime. On that basis it proffered jury instructions that did not require proof of the defendants' knowledge of the unlawfulness of their conduct and opposed defendants' proposed jury instruction that their good faith belief in the lawfulness of their conduct was a complete defense. After considering this dispute, the district court declared its view that the Act established a general intent crime and, for that reason, accepted the Government's jury instructions and rejected the defendants'. [41]

Remarkably, the *Kay II* panel nonetheless held that the defendants' specific intent jury instruction, which the district court expressly rejected as setting too high a *mens rea* requirement, was a "correct" statement of the law,[42] but nonetheless concluded that the instruction given—which both the Government and the District

[41] *See* 8 Tr. 111-12, 184, 186, 188 190 (government arguing for general intent instruction); *id.* at 151, 215 (district court ruling "it's a general intent crime").
[42] *Kay II*, Slip Op. 21.

Court believed was a general intent instruction—required the jury to find specific intent. In fact, that instruction—which excluded any reference to good faith—allowed conviction despite defendants' belief that their conduct was not unlawful. The instruction given required only that the defendant acted "voluntarily and intentionally, and with a bad purpose or evil motive of accomplishing either an unlawful end or result."[43] Under that instruction, even if the defendant did not know his conduct was *in fact* unlawful, the jury nonetheless could convict if the defendant intended to accomplish an end or result that, unbeknownst to him, *is* unlawful. Thus, in this very case, a confused jury specifically asked the Court whether "lack of knowledge of the FCPA" could "be considered an accident or mistake?"[44] Rather than giving the good-faith instruction that the *Kay II* panel acknowledged was correct for a specific intent crime, the trial court simply referred the jury back to the instruction that court had used to convey a general intent crime.[45] At the very least, in the context of the FCPA, this instruction creates the significant prospect that the jury will improperly convict based on a finding that the defendants knew that their conduct violated *foreign* law.

The *Kay II* panel's conclusion that those general intent instructions suffice for a specific intent crime does not simply inflict a grave injustice in this case,

[43] *Id.* at 25-26.
[44] *Id.* at 26 n.62.
[45] *Id.*

where there was substantial evidence that defendants did not, in fact, anticipate the *Kay I* panel's unprecedented interpretation of the Act based on the legislative history. The decision also threatens the integrity of future prosecutions under specific intent statutes of all kinds by providing a court-approved model instruction that was intended, and did, serve the precise opposite function—to instruct on general intent only.

CONCLUSION

To correct these errors and prevent grave injustice in this case and in the future, the full Court should accept this case for *en banc* consideration.

Respectfully submitted,

REID H. WEINGARTEN
BRUCE C. BISHOP
DAVID M. FRAGALE
Steptoe & Johnson LLP
Washington, D.C. 20036
(202) 429-3000

Counsel for David Kay

THOMAS C. GOLDSTEIN
CHRISTOPHER M. EGLESON
Akin Gump Strauss
Hauer & Feld LLP
1333 New Hampshire Ave., NW
Washington, D.C. 20036-1564
(202) 887-4000

KEVIN K. RUSSELL
Howe & Russell, P.C.
4607 Asbury Pl. NW
Washington, D.C. 20016

Counsel for Douglas Murphy

November 20, 2007

CERTIFICATE OF SERVICE

I certify that on November 20, 2007 copies of the foregoing PETITION FOR REHEARING *EN BANC* were served by email and in hard copy by next business day delivery upon:

JOSEPH WYDERKO
U.S. Department of Justice
Robert F. Kennedy Bldg.
Room 1264
950 Pennsylvania Ave., NW
Washington, DC 20530
joseph.wyderko@usdoj.gov
(202) 514-3608

THOMAS C. GOLDSTEIN

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
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Nos. 05-20604

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

DAVID KAY; DOUGLAS MURPHY

Defendants-Appellants

Appeals from the United States District Court
for the Southern District of Texas
USDC No. 4:01-CR-914

Before HIGGINBOTHAM, BARKSDALE, and CLEMENT, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

David Kay and Douglas Murphy, executives at an American company that exported rice to Haiti in the 1990's, paid Haitian officials to reduce duties and taxes on their rice. Kay disclosed this activity to the attorney for his employer, the SEC investigated, and Murphy and Kay were prosecuted for violating the Foreign Corrupt Practices Act ("FCPA" or "the Act"). The district court

dismissed the indictment, concluding that the FCPA did not cover bribes to reduce duties and taxes. We reversed the dismissal of the indictment and remanded to the district court, finding that no prior law clearly controlled the issue but that the indictment fell within the scope of the FCPA. On remand, a jury convicted both Defendants of the counts charged in the indictment. We now affirm the FCPA and obstruction of justice convictions.

I

American Rice, Inc. ("ARI") is a publicly-held company incorporated in Texas and based in Houston that exports rice to various parts of the world. It exported rice to Haiti in the 1990's, a time of political chaos and rampant corruption in that country, through Rice Corporation of Haiti ("RCH"), a subsidiary incorporated in Haiti. During that time, Murphy was ARI's President and Kay was its Vice President for Caribbean Operations.

Haiti levied both duties and taxes on rice importers. ARI, through Murphy and Kay, took various steps to reduce those costs: purchasing from government officials licenses, called "franchises," permitting charities to import food without duty; paying for a "service corporation" designation for RCH, which allowed the company to avoid paying sales and income taxes by claiming that it did not actually own the products it was importing; underreporting imports to reduce duties and taxes and paying officials to accept the underreporting; and paying officials to resolve another tax issue. While these payments, if made

domestically, would surely pose serious issues of criminal liability, the standard practice of Haitian government officials was to routinely press companies like RCH to pay for local service, and almost all companies, including RCH's competitors, paid. In short, paying officials for government service and escape from obstacles to business including taxes was "business as usual" in Haiti during the 1990's.

In 1999, ARI retained a prominent Houston law firm to represent it in a civil suit. Preparing for this suit, the lawyers asked Kay for background information on ARI's rice business in Haiti. Kay volunteered that he had taken the actions mentioned above, explaining that doing so was part of doing business in Haiti. Those lawyers informed ARI's directors. The directors self-reported these activities to government regulators.

The SEC launched an investigation into ARI, Murphy, and Kay. Murphy and Kay were eventually indicted on twelve counts of violating the FCPA, 15 U.S.C. §§ 78dd-2, 78ff, which makes it a crime to (1) "willfully;" (2) "make use of the mails or any means or instrumentality of interstate commerce;" (3) "corruptly;" (4) "in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to;" (5) "any foreign official;" (6) "for purposes of [either] influencing any act or decision of such foreign official

in his official capacity [or] inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official [or] securing any improper advantage;" (7) "in order to assist such [corporation] in obtaining or retaining business for or with, or directing business to, any person." The Government never charged ARI, or Defendants civilly, under the FCPA.

In 2002, the district court granted a motion to dismiss the indictment, concluding that "payments to foreign government officials made for the purpose of reducing customs duties and taxes [do not] fall under the scope of 'obtaining or retaining business' pursuant to the text of the FCPA"[1] (*Kay I*). This court reversed on appeal (*Kay II*). After a rigorous analysis of the FCPA and its legislative history, we concluded that "in diametric opposition to the district court . . . [,] that bribes paid to foreign officials in consideration for unlawful evasion of customs duties and sales taxes *could* fall within the purview of the FCPA's proscription," but "[i]t still must be shown that the bribery was intended to produce an effect - here, through tax savings - that would 'assist in obtaining or retaining business.'"[2] The panel left to the district court on remand whether

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[1] *United States v. Kay*, 200 F. Supp. 2d 681, 682 (S.D. Tex. 2002).

[2] *United States v. Kay*, 359 F.3d 738, 756 (5th Cir. 2004).

further prosecution of this case would deny Defendants due process for want of fair warning.

Back in district court, the Defendants moved to dismiss for lack of fair warning. The district court denied the motion. The Government then filed a superseding indictment repeating the first twelve counts but also charging both Defendants with conspiracy to violate the FCPA and Murphy with obstruction of justice for making false statements to the SEC during its investigation. A jury in Houston found Defendants guilty on all counts. Defendants renewed their lack of fair warning argument in post-trial motions to dismiss and arrest judgment, which the court denied. Murphy and Kay appeal, asserting several grounds, including lack of fair warning.

II

Defendants argue that the statute failed to give fair notice that their conduct was illegal and that proceeding to trial with the late arriving clarification of the Act violated their due process rights. The district court denied Defendants' motion to dismiss the indictment and the jury convicted Kay and Murphy. This court reviews *de novo* the district court's denial of a motion to dismiss an indictment.[3] We also review *de novo* the underlying substantive

[3] *United States v. Wilson*, 249 F.3d 366, 371 (5th Cir. 2001).

issue of whether application of this court's last opinion in this case violates the Due Process Clause.[4]

Bouie provides the appropriate standard of fair notice in the present case. The Supreme Court in *Bouie* recognized two fair notice concerns in criminal statutes, including the vagueness of the statute's language and courts' retroactive enlargement of the scope of a statute, whether the statutory language underlying that enlargement is clear on its face or vague.[5] The Court only applied the latter principle of retroactive enlargement to the facts in *Bouie*, however, since the terms of the statute were clear.[6] *Lanier* expanded upon these standards, in a manner consistent with *Bouie*, and summarized two additional tests for fair notice: the rule of lenity, and a "touchstone principle" of fair notice, which combines the standards of statutory vagueness and judicial enlargement to determine fair notice.[7]

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[4] *Cf. De Zavala v. Ashcroft*, 385 F.3d 879, 893 (5th Cir. 2004) ("We review due process challenges *de novo*.")

[5] *Bouie v. City of Columbia*, 378 U.S. 347, 352 (1964).

[6] *Id.* at 351.

[7] *United States v. Lanier*, 520 U.S. 259, 266-67 (1997).

Kay and Murphy address all four of the *Lanier* standards of fair notice in their appeal[8]: 1) enforcement of a vague statute, 2) the rule of lenity, 3) retroactive application of a "novel" interpretation of a statute, and 4) whether the statute, "standing alone or as construed," made the law reasonably clear when the criminal conduct occurred.[9] Under the fair notice principle of vagueness, they argue that this court's "finding that the statute was ambiguous as a matter of law . . . should have led the Court to dismiss this prosecution under the vagueness doctrine . . . ."[10] Although Defendants argue, and we agreed in *Kay II*, that the business nexus standard is ambiguous,[11] it does not follow that the standard requires guesswork or that the statutory language itself is vague.

The Court in *Lanier* defines a vague statute as one "which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its

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[8] Each defendant has adopted the other's arguments.

[9] *Lanier*, 520 U.S. at 266-67.

[10] Kay Br. at 53.

[11] *Kay II*, 359 F.3d at 746-47.

application."[12] The FCPA delineates seven standards that may lead to a conviction. All are phrased in terms that are reasonably clear so as to allow the common interpreter to understand their meaning. Defendants have, rather than showing vagueness, raised a technical interpretive question as to the exact meaning of "obtaining or retaining" business. Whether "obtaining or retaining" business covers the general activities that an entity undertakes to ensure continued success of a business or Defendants' more limited definition of contractual business is an ambiguity but not one that rises to the level of vagueness and unfair notice.

Nor is the FCPA's business nexus test vague under *McBoyle*, which originally defined the vagueness standard in the context of fair warning. Similar to *Lanier*'s "common intelligence" test, the *McBoyle* test for vagueness requires that "fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed . . . so far as possible the line should be clear."[13] Imprecise general language in one of seven requirements for a bribery conviction under the FCPA does not draw a line so vague that Defendants were not reasonably aware of

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[12] *Lanier*, 520 U.S. at 266.

[13] *McBoyle v. United States*, 283 U.S. 25, 27 (1931).

their potential for engaging in illegal activity under the FCPA when they made payments to Haitian officials to reduce tax and duty burdens through misrepresentation. Although ARI did not make corrupt payments to guarantee one particular contract's success, ARI ensured, through bribery, that it could continue to sell its rice without having to pay the full tax and customs duties demanded of it. Trial testimony indicates that ARI believed these payments were necessary to compete with other companies that paid lower or no taxes on similar imports[14] – in other words, in order to retain business in Haiti, the company took measures to keep up with competitors.[15] The fact that other companies were guilty of similar bribery during the 1990's does not excuse ARI's actions; multiple violations of a law do not make those violations legal or create vagueness in the law.

A man of common intelligence would have understood that ARI, in bribing foreign officials, was treading close to a reasonably-defined line of illegality. As

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[14] Lawrence Henry Theriot, a consultant to ARI who provided "the eyes and ears of what the company needed to be alert to," discussed how "Haitian authorities were very aggressive in trying to collect the full amount of . . . taxes from Rice Corporation" and "'smugglers' were not paying the taxes on imported rice – or not paying a substantial part of the taxes . . . So, they proved to be very tough competitors against Rice Corporation, who was paying a substantial part of the taxes on the imported rice."

[15] We reached a similar conclusion in *Kay II*, finding that "[b]ribing foreign officials to lower taxes and customs duties certainly *can* provide an unfair advantage over competitors and thereby be of assistance to the payor in obtaining or retaining business." 359 F.3d at 749.

the Supreme Court in *Boyce* held, "no more than a reasonable degree of certainty can be demanded [in a criminal statute]. Nor is it unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line."[16] Defendants took this risk, and splitting hairs as to the illegality of one type of action under the business nexus test does not allow them to argue successfully that the FCPA's standards were vague.

In addition to arguing that the statutory language was vague, Defendants, although recognizing that this court must apply its own precedent established by *Kay II*, alternatively assert that the district court erred in its retroactive application of *Kay II*'s interpretation of the FCPA to them. They argue that "*Kay II* extended criminal liability under the FCPA beyond the

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[16] *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 340 (1952). *Boyce* is a void for vagueness case but still applies in this case. The Court in *Bouie* clarified the distinction between "void for vagueness" and "fair notice", and the applicability of the void for vagueness test to fair notice questions. When a statute is void for vagueness, the language on its face is unclear. A statute that fails to provide fair notice, on the other hand, may be clear or unclear on its face but regardless, is applied to conduct outside of the scope of the statute, thus retroactively punishing the defendant for an act that he could not have reasonably expected to fall under the statute's prohibitions. The Court found that the fair notice doctrine is broader than the void for vagueness doctrine, since a conviction under a statute can violate the fair notice doctrine when a statute is void for vagueness *or* when a defendant is retroactively punished under an "expansion" of a clear statute. Void for vagueness analysis is, however, therefore, still applicable to the question of vagueness in a fair notice case. *See Bouie*, 378 U.S. at 351-52.

explicit terms of the Act."[17] In doing so, Defendants misconstrue *Lanier*'s and *Bouie*'s test for fair notice under retroactive application of a law. The *Bouie* fair notice test for retroactive enlargement ("where construction unexpectedly broadens a statute which on its face had been definite and precise"[18]) asks whether a court has held an individual "criminally responsible for conduct which he could not reasonably be proscribed" due to the statute's failure "to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden . . . ."[19] Similarly, the *Lanier* fair notice test for judicial expansion of the scope of a statute is whether the court applied a "novel construction" of the statute to conduct not addressed by the statute or by previous cases. In *Bouie*, the state court had retroactively added a distinct category of illegal conduct to the statute – finding that individuals who remained in a restaurant after being asked to leave violated a statute that had previously only prohibited *entry* onto land after notification that such entry was illegal.[20] The state court,

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[17] Kay argued: "Because *Kay II* extended criminal liability under the FCPA beyond the explicit terms of the Act, defendant could not have had fair notice at the time of their conduct that the conduct was subject to criminal punishment under *Kay II*."

[18] *Bouie*, 378 U.S. at 353.

[19] *Id.* at 351.

[20] *Id.* at 349-50.

in expanding the trespass statute, drew upon the civil, not the criminal law, of trespass.[21]

We are not persuaded that this court in *Kay II* or the district court in applying it, expanded the scope of the FCPA or created a new and independent principle of law. The explicit terms of the FCPA do not include either language relating specifically to contracts or defining more general business practices that may fall under the business nexus test, with the exception of the Act's allowance of "grease" payments. We are not persuaded that the district court's determination that the facts of the case fell within the FCPA's terms of illegality extended the Act beyond its explicit terms.

Our in-depth investigation of one factor's – the business nexus test's – applicability to a specific action, out of a total of seven factors that define illegal bribery under the FCPA, was not an extension of the Act's terms but rather an interpretation and application of its meaning to the facts of the case. A person of common intelligence should have been reasonably aware of this meaning in the 1990's. Paying taxes and customs duties is inherent to foreign business, and decreasing these payments through bribery, as Defendants have admitted, was common practice in Haiti. If bribery to obtain favorable tax and customs

[21] *Id.* at 357-58.

obligations was indeed as common as established in the record, then it is reasonable to imply that businesses viewed these practices as one of the only guarantees of maintaining a successful business in Haiti in the 1990's. It is not therefore a novel application of the law for the district court to find that Defendants made these payments for the purpose of "retaining business."

Defendants rely to a large extent on this court's investigation of the FCPA's legislative history in arguing that the district court retroactively applied law beyond the original scope of the Act, and they assert that "[r]eliance on legislative history (much less history as sparse as the FCPA's) to resolve the meaning of a criminal statute is rarely appropriate." We do not agree. As we discuss in further detail when we turn to the rule of lenity, the Supreme Court has found, since *Crandon*[22] and *Hughey*,[23] that courts should rely on all available sources, including legislative history, when interpreting a potentially ambiguous statute and should find ambiguity only when none of those sources adequately resolve the issue.[24] This court's investigation of the FCPA's legislative history does not indicate that in interpreting the Act, we required the

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[22] *Crandon v. United States*, 494 U.S. 152 (1990).

[23] *Hughey v. United States*, 495 U.S. 411 (1990).

[24] *See infra* note 40 and accompanying text.

district court to use a novel application of the law or that the FCPA is vague. Rather, the history serves as additional support for the court's resolution of the ambiguity of the business nexus test. This Court looked to numerous aspects of the Act – its text, its title, its "grease payments" exception, the dictionary definition of "business," and the Act's legislative history. And although we found that "the statute itself" was "amenable to more than one reasonable interpretation" and therefore "ambiguous as a matter of law"[25] absent its legislative history, this does not indicate that we established a new interpretation of the law.

A third test under *Lanier* – that case's "touchstone principle" – raises similar questions of retroactivity and vagueness in asking "whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal."[26] This addresses both interpretation of the statute "standing alone" and a court's enlargement of a statute in "constru[ing]" the statute, whether by interpreting the statute or applying relevant case law. The FCPA was just as clear in the 1990's – when Defendants' relevant conduct occurred – as it is today. In *Kay II* we determined

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[25] *Kay II*, 359 F.3d at 746.

[26] *Lanier*, 520 U.S. at 267.

that the FCPA was not void for vagueness[27] but rather contained an ambiguous provision. Defendants here fail in their understandable and able effort to inflate the ambiguity of the business nexus test into an issue of unfair notice under vagueness and retroactivity principles.

Defendants also make the most of the impact of sparse prior judicial interpretation, arguing: "In all prior reported prosecutions under the statute, the Government had charged only defendants whose conduct aimed at obtaining or retaining business by, for example, paying a bribe to secure a government contract." This by no means indicates that this narrow type of payment is the only conduct covered by the business nexus test, as suggested. Kay and Murphy's unlucky status as two of the few individuals that the Government has vigorously prosecuted under the Act does not permit them to argue successfully that they were unaware of the boundaries of illegality under the Act in the 1990's. As the Court in *Lanier* points out, the lack of prior court interpretations "fundamentally similar"[28] to the case in question does not create unfair notice. Defendants cannot therefore rely on the fact that courts have only interpreted the meaning of the business nexus test in the context of

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[27] *Kay II*, 359 F.3d at 744 n.16.

[28] *Lanier*, 520 U.S. at 269.

contracts to argue that they had inadequate notice of other reasonable applications of that test.

The Supreme Court has held that a defendant received fair notice under retroactive applications of law broader than *Kay II*'s clarification of the ambiguity of a statute. In *Rogers*, for example, the Court upheld the Tennessee Supreme Court's retroactive abolition of the infrequently-used common law principle that a defendant could not be found guilty of murder if the victim survived the injury by at least a year and a day.[29] The Court found that although Tennessee had not officially abolished the principle when the murder occurred, the law's rarity and the fact that many other jurisdictions had abolished it should have alerted defendant to the possibility that the law was no longer applicable.[30] Courts daily analyze the law's "fit" with the criminal act in question, and without some flexibility of interpretation and clarification, courts would be unable to apply effectively criminal laws to the specific facts of each case. As *Rogers* states, courts require "substantial leeway . . . as they engage in the daily task of formulating and passing upon criminal defenses and interpreting such doctrines as causation and intent, reevaluating and refining

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[29] *Rogers v. Tennessee*, 532 U.S. 451, 462 (2001).

[30] *Id.* at 464.

them as may be necessary to bring the common law into conformity with logic and common sense."[31] To find unfair notice whenever a court specified new types of acts to which a criminal statute applied would stifle courts' ability to interpret and fairly apply criminal statutes.

When a statute is not vague but contains ambiguity, as occurs here under the FCPA, we must still consider the rule of lenity: while the "touchstone" of fair notice is reasonable clarity of the illegality of conduct when it occurred, "the touchstone of the rule of lenity is statutory ambiguity."[32] As the Court in *Lanier* applied the lenity doctrine, it "ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered."[33] The rule is, however, a last resort of interpretation,[34] and "[t]he mere possibility of articulating a narrower construction [or an act] . . . does not by itself make the rule of lenity applicable."[35] The rule only applies in situations of ambiguity more extreme than here, where, "'after seizing everything from which aid can

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[31] *Id.* at 461-62.

[32] *Moskal v. United States*, 498 U.S. 103, 108 (1990) (internal quotations omitted).

[33] *Lanier*, 520 U.S. at 266.

[34] *Moskal*, 498 U.S. at 108.

[35] *Smith v. United States*, 508 U.S. 223, 239 (1993).

be derived, [a court] can make no more than a guess as to what Congress intended."[36] To address potential statutory ambiguity, the Supreme Court has relied upon "common usage,"[37] dictionaries,[38] the societal circumstances surrounding the passage of an act,[39] legislative intent derived from the language of an act,[40] and legislative history[41] to clarify a law's meaning and thus avoid the rule of lenity. In *Dixson*, where petitioners argued that they did not fall within the scope of the federal bribery statute, the Supreme Court (like this court in *Kay II*) found that the words of the statute could support either petitioners' or the Government's interpretation of the statute and that one of the statute's terms was ambiguous. The Court used legislative history to clear up the ambiguity and found that petitioners could not, therefore, rely upon the

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[36] *Reno v. Koray*, 515 U.S. 50, 65 (1995) (internal quotations and citations omitted).

[37] *Smith,* 508 U.S. at 240.

[38] *Id.*

[39] *Id.* (discussing the high rate of drug-related murders in the United States when Congress passed a statute punishing criminals' use of firearms in drug trafficking).

[40] *Id.* at 240 ("Congress affirmatively demonstrated that it meant to include transactions like petitioner's as 'us[ing] a firearm' by so employing those terms . . . .").

[41] *See, e.g., Reves v. Ernst & Young*, 507 U.S. 170, 184 n.8 (1993) ("Because the meaning of the statute is clear from its language and legislative history, we have no occasion to consider the application of the rule of lenity.").

rule of lenity.[42] Later, the Supreme Court in *Hughey* attempted to bar legislative history as a means of clarifying ambiguity and avoiding application of the rule of lenity,[43] but the Supreme Court and the Fifth Circuit have since affirmed that legislative history is an appropriate means of clarification under the rule.[44] Here, where the legislative history shows that "Congress meant to prohibit a range of payments wider than only those that directly influence the acquisition or retention of government contracts or similar commercial or industrial arrangements,"[45] the FCPA is not sufficiently ambiguous to merit application of the rule of lenity.

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[42] *Dixson v. United States*, 465 U.S. 482, 491, 496 (1984) (finding that "[i]f the legislative history fails to clarify the statutory language, our rule of lenity would compel us to construe the statute in favor of petitioners, as criminal defendants in these cases" but that Congress was clear in its intent to broadly define the statutory term at issue).

[43] *Hughey v. United States*, 495 U.S. 411, 422 (1990) ("[L]ongstanding principles of lenity . . . preclude our resolution of the ambiguity against petitioner on the basis of general declarations of policy in the statute and legislative history."(internal citation omitted)).

[44] *See, e.g.*, *Moskal*, 498 U.S. at 108 ("[W]e have always reserved lenity for those situations in which a reasonable doubt persists about a statute's intended scope even *after* resort to the language and structure, legislative history, and motivating policies of the statute." (internal quotations omitted)); *see also Holloway v. United States*, 526 U.S. 1, 10, 12, n.14 (1999) (relying upon legislative history to conclude that Congress did not intend for a crime to be interpreted narrowly, and affirming that "[t]he rule of lenity applies only if, after seizing *everything* from which aid can be derived, . . . we can make no more than a guess as to what Congress intended" (emphasis added) (internal quotations omitted)); *United States v. Reedy*, 304 F.3d 358, 367 n.13 (5th Cir. 2002) (quoting *Moskal*).

[45] *Kay II*, 359 F.3d at 749.

In sum, under all four *Lanier* tests, Defendants have failed to show that the FCPA, and the district court's application of it, failed to provide them fair notice.

III

As Defendants indicate, the Government must prove, and a jury must find beyond a reasonable doubt, that Defendants both corruptly and *willfully* violated subsections (a) or (g) of § 78dd-1 of the FCPA to obtain a criminal conviction under the Act.[46] Here, a jury convicted Defendants on all counts for bribery that induced foreign officials to accept documents containing false reports of the quantities of rice that ARI imported to Haiti, thus reducing taxes and import duties in violation of FCPA, 15 U.S.C. §§ 78dd-1, 78-dd-2. Defendants argue that the district court failed to adequately instruct the jury on the element of willfulness and thus gave improper instructions as to *mens rea*. We disagree.

The court's instructions to the jury indicated that "corruptly" was an element of the offense and defined a corrupt act as one that is "done voluntarily

[46] *See* 15 U.S.C. §78ff(c)(2)(A) ("Any officer, director, employee, or agent of an issuer, or stockholder acting on behalf of such issuer, who willfully violates subsection (a) or (g) of section 78dd-1 of this title shall be fined not more than $100,000, or imprisoned not more than 5 years, or both.")

and intentionally, and with a bad purpose or evil motive of accomplishing either an unlawful end or result, or a lawful end or result by some unlawful method or means." The court also instructed the jury on the definition of an act done "knowingly" (thus incorporating the willfulness element into its instructions) and defined a knowing act as one "done voluntarily and intentionally, not because of accident or mistake." In response to a jury question as to whether "knowledge of the FCPA" could be "considered an accident or mistake," the court referred the jury to its definition of the term "knowingly." Defendants objected to the instruction given to the jury and proposed two alternative jury instructions, thus preserving error.

We review preserved error in jury instructions under an abuse of discretion standard[47] and ask "whether the court's charge, as a whole, is a correct statement of the law and whether it clearly instructs jurors as to the principles of the law applicable to the factual issues confronting them."[48] Under this standard, we must recognize that trial courts have "great latitude" in the court's decision to include or omit jury instructions.[49] The district court abuses

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[47] *United States v. Daniels*, 281 F.3d 168, 183 (5th Cir. 2002).

[48] *Id.* (internal quotations omitted).

[49] *United States v. Correa-Ventura*, 6 F.3d 1070, 1076 (5th Cir. 1993).

its discretion only if a requested instruction "(1) is substantively correct; (2) is not substantially covered in the charge given to the jury; and (3) concerns an important point in the trial so that the failure to give it seriously impairs the defendant's ability to present effectively a particular defense."[50] We find that the district court's instructions provided clear directions to the jury on all applicable principles of the FCPA and that Defendants' first requested instruction was not substantively correct; and the second, although technically correct but unnecessarily detailed, was substantially covered in the jury charge. Nor did the court's omission of both of the instructions seriously impair Defendants' defense. The instructions still allowed Defendants to argue lack of knowledge of their bad acts, lack of intent to commit bad acts, and, more generally, lack of "corrupt" action.

Defendants did not argue at trial that the court should instruct the jury on a separate element of willfulness, but they proposed two alternatives to the court's instructions on the definition of "corruptly." The alternative instructions would have required that an act done "corruptly" be done "willfully" and "knowingly" *and* with "specific intent" to either "violate the law" (in this case, by knowing that the FCPA prohibited Defendants' actions) or to "achieve an

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[50] *United States v. Simkanin*, 420 F.3d 397, 410 (5th Cir. 2005).

unlawful result by influencing a foreign public official's action in one's own favor."

The FCPA does not define "willfully," and we therefore look to the common law interpretation of this term[51] to determine the sufficiency of the jury instructions pertaining to the *mens rea* element. The definition of "willful" in the criminal context remains unclear despite numerous opinions addressing this issue. Three levels of interpretation have arisen that help to clear the haze. Under all three, a defendant must have acted intentionally – not by accident or mistake. The first and most basic interpretation of criminal willfulness is that committing an act, and having knowledge of that act, is criminal willfulness – provided that the actions fell within the category of actions defined as illegal under the applicable statute. In these cases, the defendant need not have known of the specific terms of the statute or even the existence of the statute. The defendant's knowledge that he committed the act is sufficient.[52]

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[51] *See, e.g., Bryan v. United States*, 524 U.S. 184, 193 (1998) (applying the Court's definition of willfulness "unless the text of the statute dictates a different result").

[52] *See, e.g., Staples v. United States*, 511 U.S. 602, 618-19 (1994) (defendant need only be aware that he has engaged in conduct that meets the statutory definition; he need not know of the statute or his violation of the statute).

The second and "intermediate" level of criminal willfulness requires the defendant to have known that his actions were in some way unlawful.[53] Again, he need not have known of the specific statute, but rather he must have acted with the knowledge that he was doing a "bad" act under the general rules of law. Under this intermediate level of criminal common law willfulness, "the Government must prove that the defendant acted with knowledge that his conduct was unlawful."[54]

The strictest level of interpretation of criminal willfulness requires that the defendant knew the terms of the statute and that he was violating the statute. The courts have reserved this category to limited types of statutory violations involving "complex" statutes – namely those governing federal tax law and antistructuring transactions. Although the Fifth Circuit has not addressed the FCPA under this category, the Second Circuit has determined

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[53] *See, e.g.*, *Bryan*, 524 U.S. at 191 nn.12-13, 191-92 (discussing multiple interpretations of criminal willfulness as meaning "not merely voluntarily, but with a bad purpose," "a thing done without ground for believing it is lawful," or "[d]oing or omitting to do a thing knowingly and willfully . . . not only [with] a knowledge of the thing, but a determination with a bad intent to do it or to omit doing it" (internal citations and quotations omitted)).

[54] *Ratzlaf v. United States*, 510 U.S. 135, 137 (1994).

that the FCPA does not fall within this narrow category of complex statutes,[55] and we agree.

The district court's jury instructions captured both the first and second levels of criminal willfulness, but not the third and strictest interpretational level. We find the instructions sufficient, since the strictest interpretation of criminal willfulness is reserved for complex statutes. Under the first and broadest definition of criminal willfulness, the term "knowingly" in the context of willful criminal action "merely requires proof of knowledge of the facts that constitute the offense."[56] For example, a defendant need only have known that he possessed a weapon with the characteristics that fit within the definition of "machinegun" in the relevant statute;[57] he need not have been aware of the statute or that his possession of the gun violated the statute.[58] Indeed, at least one circuit has specifically found that "[k]nowledge by a defendant that it is

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[55] *Stichting Ter Behartiging Van de Belangen Van Oudaandeelhouders In Het Kapitaal Van Saybolt Int'l B.V. v. Schreiber*, 327 F.3d 173, 181 (2d Cir. 2003) [hereinafter *Stichting*].

[56] *Bryan*, 524 U.S. at 193.

[57] *Staples*, 511 U.S. at 619 ("[T]he Government should have been required to prove that petitioner knew of the features of his AR-15 that brought it within the scope of the Act").

[58] *Id.* at 620. The Court did not concern itself with the question of knowledge of the law, but rather with wrongfully convicting "gun owners who were wholly ignorant of the offending *characteristics of their weapons*. . . ." *Id.* (emphasis added); *see also Rogers v. United States*, 522 U.S. 252, 254-55 (1998) (plurality opinion) ("It is not . . . necessary to prove that the defendant knew that his possession was unlawful or that the firearm was unregistered.").

violating the FCPA – that it is committing all the elements of an FCPA violation – is not itself an element of the FCPA crime."[59] The Court in *Bryan* affirmed that the "traditional rule" for criminal willfulness is that "ignorance of the law is no excuse,"[60] and that cases holding otherwise (requiring actual knowledge of violation of the law) have involved unusually complex statutes with the potential to implicate innocent individuals.[61]

The district court, by instructing the jury that a guilty verdict required a finding that defendant acted "voluntarily and intentionally, and with a bad purpose or evil motive of accomplishing either an unlawful end or result," and by including a separate "knowing" instruction, correctly indicated that the jury must identify evidence amounting to "knowledge of facts that constitute the offense" required by the traditional criminal definition of willfulness (which we have described as the first category of willfulness). The court's instructions also substantially covered the requested instruction that Defendants acted "corruptly," meaning they acted "knowingly and dishonestly, with the specific

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[59] *Stichting*, 327 F.3d at 181.

[60] *Bryan*, 524 U.S. at 196; *see also Cheek v. United States*, 498 U.S. 192, 199-201 (1991) (discussing the particular complexity of the federal criminal tax laws and the Court's historic interpretation of these law, which led to a separate definition of willfulness for these laws).

[61] *Bryan*, 524 U.S. at 194-95.

intent to achieve an unlawful result by influencing a foreign public official's action in one's own favor." The instructions suggested that illegal conduct under the FCPA defined the "unlawful end or result" to which the court referred, since the jury had to have some standard by which to gauge lawfulness. Additionally, the instructions correctly indicated that to be guilty under the Act, Defendants must have knowingly (*i.e.*, voluntarily and intentionally) acted with awareness of these unlawful ends.[62]

The district court's instructions, in defining the willfulness standard as requiring knowledge that the acts committed were unlawful acts, were also adequate despite their omission of the exact term "specific intent," which was proposed by Defendants in their second instruction. We have defined specific intent crimes as those involving "willful and knowing engagement in criminal

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[62] We are disturbed by the jury's confusion in this case as to the criminal intent element. The jury's question to the court of whether "knowingly" meant knowing violation of the FCPA ("Can lack of knowledge of the FCPA be considered an accident or mistake?") indicates that the jury was confused as to whether Defendants had to know specifically that they were violating the FCPA when they acted. But the jury need not have found this. Under our first definition of willfulness, Defendants' knowledge that they were committing the acts of corrupt bribery of foreign officials was sufficient. Given, Defendants' proffered instruction that would have required that a finding that they "knowingly and dishonestly, with the specific intent to achieve an unlawful result *by influencing a foreign official's action in one's own favor*" would have helped the jury understand that the "unlawful ends" in the court's instructions on "unlawful end or result . . . or unlawful method or means" could refer to specific knowledge that one was committing a corrupt act as defined by the FCPA. But even if the jury understood "unlawful ends" in the more general sense – of acting with a bad or unlawful purpose – this is an acceptable definition of criminal willfulness, which we describe as the "intermediate" definition of willfulness and discuss below.

behavior."[63] To instruct on specific intent, a court should require the jury "to find that [defendant] intended to do something unlawful."[64] The court gave such an instruction here, despite its failure to use the phrase "specific intent." Where we have struck down jury instructions for failure to convey specific intent, we have done so on the grounds that the court mistakenly thought that the crime was a general intent crime and therefore refused to instruct that the defendant had intended to act unlawfully.[65] Additionally, as discussed in further detail below, Defendants need not have *specifically* known that they were violating the FCPA in this case; only those cases that involve unusually complex statutes require defendants to have specific knowledge that they are violating a statute.[66] Indeed, the district court's jury instructions closely track

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[63] *United States v. Berrios-Centeno*, 250 F.3d 294, 299 (5th Cir. 2001).

[64] *United States v. Burroughs*, 876 F.2d 366, 369 (5th Cir. 1989).

[65] *Id.* at 368-69 (finding that the court mistakenly believed that the drug conspiracy was a general intent crime and that the "[charge] language does not address the requisite intent to break the law by her 'voluntary' actions. It thus does not compensate for the district court's incorrect definition of 'willful' or its omission of any reference to 'specific intent,' 'unlawfulness,' 'purposeful intent to violate the law,' or any like language that would have suggested the need to find specific intent").

[66] *See, e.g.*, *Cheek*, 498 U.S. at 200 ("Congress has . . . softened the impact of the common-law presumption by making specific intent to violate the law an element of certain federal criminal tax offenses. Thus, the Court . . . interpreted the statutory term 'willfully' as used in the federal criminal tax statutes as carving out an exception to the traditional rule. This special treatment of criminal tax offenses is largely due to the complexity of the tax laws."); *Bryan*, 524 U.S. at 194-95 (distinguishing the cases where "the jury must find that the defendant was aware of the *specific* provision of the tax code that he was charged with

the language that the Court in *Bryan* approved as correctly defining criminal willfulness.[67]

Because there are multiple definitions of criminal willfulness, however, we also look to stricter standards of willfulness to consider whether Defendants' instructions were substantively correct and whether omission of those instructions seriously impaired an effective defense. We find that the district court's jury instructions also capture our second, or intermediate, definition of criminal willfulness – a definition that we commonly follow[68] – that a defendant knew that he was doing something generally "unlawful" at the time of his action. This level of interpretation is stricter than the first because it does not only require that the defendant knew that he was committing an act (an act which, incidentally, falls within the definition of the relevant statute); the

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violating" (emphasis added)).

[67] *Bryan*, 524 U.S. at 190. The jury instructions in *Bryan* read as follows: "A person acts willfully if he acts intentionally and purposely and with the intent to do something the law forbids, that is, with the bad purpose to disobey or to disregard the law. Now, the person need not be aware of the specific law or rule that his conduct may be violating. But he must act with the intent to do something that the law forbids." *Id.*

[68] *See, e.g.*, *Burroughs*, 876 F.2d at 368 (describing "'willfully'" to mean that "'the act was committed voluntarily and purposely, with the specific intent to do something the law forbids; that is to say, *with bad purpose either to disobey or disregard the law*'" (quoting U.S. Fifth Circuit District Judges Association Pattern Jury Instruction (Criminal), Basic Instruction 9A, at 21 (1983) (emphasis added)); *United States v. Wilkes*, 685 F.2d 135, 138 (5th Cir. 1982) (upholding instructions that defined "willful as incorporating a 'bad purpose either to disobey or to disregard the law'").

defendant must have known that the act was in some way *wrong*. The district court's jury instructions captured this level of intent well with their requirement that the jury find that Defendants acted "with a bad purpose or evil motive."

Finally, the statute here does not fall within the narrow exception to the *Bryan* Court's rule. Under this rare exception (which covers our third and "strictest" level of criminal willfulness), a defendant must know the specific law that he is violating in order to act willfully. The "highly technical" exceptional statutes to which the Court in *Bryan* refers are federal tax laws, for which the Court has explicitly "carv[ed] out an exception to the traditional rule" that ignorance of the law is no excuse,[69] and a complicated statute addressing structuring of cash transactions, where the Court limited its holding specifically to antistructuring laws.[70] We have agreed that willfulness does *not* generally require that the defendant knew that he was violating the specific provisions

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[69] *Cheek*, 498 U.S. at 200 (citing *United States v. Bishop*, 412 U.S. 346 (1973)); *United States v. Pomponio*, 429 U.S. 10, 12 (1976) (For cases involving tax statutes, the exception defines willfulness as the "voluntary, intentional violation of a known legal duty") (internal quotations omitted)).

[70] *Ratzlaf v. United States*, 510 U.S. 135, 137 (1994) ("To establish that a defendant 'willfully violat[ed]' the antistructuring law, the Government must prove that the defendant acted with knowledge that his conduct was unlawful.").

of a law.[71] Although the Fifth Circuit has not directly addressed this issue in the context of the FCPA, the Second Circuit has held that "[f]ederal statutes in which the defendant's knowledge that he or she is violating the statute is an element of the violation are rare; the FCPA is plainly not such a statute."[72] Thus, the instructions need not have, as Defendants argued, indicated that the jury "must find that the defendant knew that the Foreign Corrupt Practices Act prohibited American businessmen from providing anything of value to a foreign official in order to obtain or retain business . . . ." This level of specificity was not required here.

The instructions' requirements that Defendants acted corruptly, with an "unlawful end or result," and committed "intentional" and "knowing" acts with a bad motive sufficiently captured the definition of criminal willfulness that we follow. They also allowed Defendants to effectively put forth adequate defenses: Defendants could have argued lack of intent and that they were not acting with knowledge of unlawful means or ends. The district court's jury instructions adequately conveyed the "willfulness" required for a conviction under the FCPA.

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[71] *United States v. Garcia*, 762 F.2d 1222, 1224 (5th Cir. 1985) (rejecting defendant's arguments that the jury instructions were erroneous because they "did not clearly require that the Defendant have knowledge of the particular law allegedly violated.").

[72] *Stichting*, 327 F.3d at 181.

IV

Defendants argue that in addition to improperly instructing the jury on the element of willfulness, the district court allowed the jury to convict based on a defective indictment that omitted the element of willfulness. We review this issue *de novo*[73] and will find an indictment to be sufficient if it "alleges every element of the crime charged and in such a way as to enable the accused to prepare his defense and to allow the accused to invoke the double jeopardy clause in any subsequent proceeding."[74]

The second superseding indictment upon which the jury convicted Defendants indeed omitted the term "willful." However, this omission was harmless error at most, as the language of the indictment described the exact type of conduct required for a finding of willfulness. As we discussed in detail in the context of jury instructions, criminal willfulness requires only that criminal defendants have knowledge that they are acting unlawfully or "knowledge of the facts that constitute the offense," depending on the definition followed, unless the statutory text provides an alternate definition of this

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[73] *United States v. Ratcliff*, 488 F.3d 639, 643 (5th Cir. 2007).

[74] *Id.* (internal quotations omitted).

element.[75] The FCPA does not define willfulness, so we rely upon the common law definition.

The indictment in this case was not required to contain the exact term "willfulness." This court has specifically found that an indictment alleging that defendant "corruptly did endeavor" sufficiently "charges an intentional act," which is "interchangeable with the term willful."[76] Similarly, by alleging that Defendants in this case themselves "paid bribes and authorized the payment of bribes;"[77] "acted on his [sic] own behalf and as an agent of American Rice, Inc.,"[78] to reduce customs duties; paid bribes to underreport import quantities because Defendants "believed"[79] that they would otherwise lose sales to competitors; "directed employees"[80] to make false shipping documents; and acted "corruptly"[81] "in violation of their lawful duty,"[82] the indictment

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[75] *Bryan*, 524 U.S. at 193.

[76] *United States v. Haas*, 583 F.2d 216, 220 (5th Cir. 1978) (internal quotations omitted).

[77] Second superseding indictment, Count 3.

[78] *Id.*, Count 6.

[79] *Id.*, Count 3.

[80] *Id.*, Count 5.

[81] *Id.*, Count 11.

[82] *Id.*

sufficiently alleged the element of willfulness by using language that directly asserted Defendants' knowing commission of acts that are unlawful generally and unlawful under the FCPA. The indictment's language sufficiently placed Defendants on notice of each element of the crime charged and allowed them to prepare an effective defense.

V

In addition to arguing that the indictment failed to allege willfulness, Defendants assert that the indictment insufficiently alleged, and the Government failed to prove at trial, that Defendants made "use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value" to foreign officials.[83] They claim that the Government only alleged in the indictment and proved at trial that Defendants used barges and similar interstate commerce for the false documents that underreported ARI's imports but failed to allege or prove that these false documents, or any other money or documents, were sent through interstate commerce "in furtherance" of the actual bribes. To the contrary, they argue, "the purpose of the bribe was to

[83] 15 U.S.C. §§ 78dd-1(a), -2(a).

clear the way for the acceptance of the shipping documents. That is, the bribes furthered the use of instrumentalities to ship the documents and rice into Haiti, not the other way around."[84] Defendants further allege that "payments were made in person in Haiti, with cash drawn from local bank accounts."[85]

When we review a challenge to the sufficiency of the evidence underlying Defendants' conviction and Defendants have moved for a judgment of a acquittal, as they did here in their Rule 29 motions,[86] we ask "whether a rational juror could have found the elements of the offense proved beyond a reasonable doubt. In so doing, we view the evidence in the light most favorable to the government, with all reasonable inferences and credibility choices made in support of the jury verdict."[87] A rational juror could have inferred from the evidence in this case that Defendants used interstate commerce "in furtherance of an offer, payment, promise to pay, or authorization of the payment of any

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[84] Murphy Reply Br. at 4.

[85] Murphy Br. at 8.

[86] Although the Government argues that we should apply a plain error standard of review for sufficiency of the evidence, as Defendants did not object to the jury instructions on the interstate commerce issue in their Rule 29 motions, we need not address this argument; we find that even under a more generous standard of review for Defendants (assuming they properly addressed the interstate commerce element in their Rule 29 motion), Defendants' claim fails.

[87] *United States v. Valles*, 484 F.3d 745, 752 (5th Cir. 2007).

money, or offer, gift, promise to give, or authorization of the giving of anything of value to . . . any foreign official . . . ."

As to the sufficiency of the indictment, the language of the indictment arguably failed to allege that Defendants sent any money for their bribes through interstate commerce,[88] thus requiring us to address Defendants' argument that a defendant can only be convicted under the bribery portion of the FCPA if the defendant used the mails or other interstate commerce "in furtherance of making the bribe itself"[89] and not for more broad use of interstate commerce for activities that support the bribe payment.

This issue does not require us to look to the legislative history or the dictionary, as Defendants would have us do. The plain language of the statute applies to defendants that "make use of . . . any means or instrumentality of interstate commerce . . . in furtherance of an offer, payment, promise to pay, or

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[88] Even this claim in Defendants' briefs is dubious, as the indictment alleges that "[i]n furtherance of bribes. . . defendants authorized employees of American Rice, Inc. to withdraw funds from American Rice, Inc. bank accounts and to pay these funds to officials of the Haitian government . . ." Second Superseding Indictment, Count 7. This language suggests that Defendants, since their company was based in America, sent funds through interstate commerce from America to Haiti to pay these bribes. Because the language does not specifically indicate this, however, we give Defendants' argument some credence and further address the indictment's allegations of documents, rather than money, that Defendants transported in furtherance of bribes.

[89] Murphy Br. at 8.

authorization [to pay] . . . ."[90] The indictment similarly alleges that Kay directed employees to, "in furtherance of . . . bribes . . . prepare shipping documents . . . that falsely represented the weight and value of the rice being exported to Haiti."[91]

Defendants attempt to portray the false shipping documents as a *product of* the bribes and argue that they therefore did not send the documents through interstate commerce "in furtherance" of bribes; rather, they argue, Defendants paid the bribes using cash in Haiti, and these cash bribes allowed ARI to carry a set of false documents with its Haitian-bound cargo. But the indictment alleges, and the evidence shows, a reverse causal chain: ARI used the false documents to calculate the bribes, sending the documents through interstate commerce "in furtherance" of the bribes. Under ARI's "Plan B," Theriot described in testimony how ARI based its bribes to customs officials on the shipping documents: ARI, in its false reports, reduced the quantity of rice that it was importing by 30 percent and paid customs officials 30 percent of this 30 percent reduction to induce the customs officials to continue to accept false documents. Joel Malebranche, a sales and plant manager for ARI in Haiti

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[90] 15 U.S.C. § 78dd-2.

[91] Second superseding indictment, Count 5.

whose responsibility was to "clear the [ARI] vessels for customs," described in detail how the payments were made based on the false shipping documents. Under Plan B for underreporting the amount of rice imported to Haiti and paying customs officials to accept these underreported amounts, ARI sent two sets of documents for each shipment of rice. With the ship, they sent a stowage plan and invoice indicating the correct quantity of rice on board. Then, through DHL or Federal Express, they sent a set of false documents from Houston to Haiti, reporting lower quantities. These false documents, once they arrived in Haiti, allowed ARI employees to clear the vessel in port by writing a check; Kay calculated the amount to be paid by comparing the accurate and underreported quantities of rice. As an example of this system, Government Exhibit 1A showed the correct quantity of rice on board the vessel (7718 metric tons), while Exhibit 1C, accompanied by a Federal Express slip, showed a quantity of 6218 tons. Malebranche, when asked if he had to "make any payments to customs to cause them to accept these documents," responded that ARI had to make cash payments – which he clarified to consist of "a check to cash, which was then cashed at the bank" and used to pay the bribes – and affirmed that he used the "savings" number calculated by Kay (a fraction of the taxes saved from the

underreported amounts[92]) to "calculate how much had to be paid to the officials . . . . One third goes to the officials; and two thirds comes to us, to Rice Corporation." Government Exhibit 1G showed an ARI check, based on the calculation of the savings from underreported rice quantities, written to bribe Haitian officials.

The indictment, by alleging that the false documents transported by interstate means were transported "in furtherance" of bribes, accurately tracked the interstate commerce element of the FCPA and was supported by evidence from the case. It placed Defendants on notice as to the crime charged and allowed them to present an effective defense. The indictment and the evidence were therefore sufficient with respect to the interstate commerce element of the FCPA.

VI

During the SEC's investigation, Murphy was subpoenaed to produce documents and provide testimony. He withheld several documents referring to

[92] Government Exhibit 33, a January 20, 1998 e-mail from Kay, stated, "Share this with Joel then destroy." The exhibit shows the calculations that Kay used to determine, based on the "savings" from the underreported shipping quantities (sent via Federal Express or DHL from Houston to Haiti) as compared to the properly reported quantities (sent on the ship), the payments to customs officials.

payments to Haitian officials, and denied during testimony knowledge of payment to customs officials or of the falsification of shipping documents.

Murphy was convicted on the obstruction charge.[93] He argues that the district court abused its discretion by refusing to give a requested good-faith jury instruction on this count. Assuming that Murphy's proffered instruction is substantively correct, we find no abuse of discretion because Murphy's instruction was substantially covered by the actual charge. The district court used the pattern jury instruction, which explains that one element of obstruction is "[t]hat the defendant's act was done 'corruptly,' that is, that the defendants acted knowingly and dishonestly, with the specific intent to subvert or undermine the due administration of justice." Murphy's proffered jury instruction would have added that "good faith on the part of the defendant is simply inconsistent with a finding that the defendant acted with the corrupt intent required . . . . A person who acts, or causes another person to act, on a belief or an opinion honestly held is not punishable under this statute merely because the belief or opinion turns out to be inaccurate, incorrect, or wrong."

The charge was sufficient without Murphy's requested instruction. While counsel understandably wanted the charge to contain the verbal footing for

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[93] 18 U.S.C. § 1505.

their close, the omission of those wished-for terms was not reversible error. The instruction given required the jury to find that Murphy "knowingly and dishonestly" lied to the SEC, a finding which leaves no room for "good faith" and "honesty." Murphy's argument for inclusion relies heavily on *Arthur Andersen LLP v. United States*, where the Supreme Court vacated an obstruction conviction because a jury instruction, as it read it, permitted the jury to convict where the defendant innocently impeded the government's fact-finding ability.[94] In *Arthur Andersen*, the district court departed from the pattern instruction, removing the word "dishonestly," and with it much of the good-faith defense. Because the district court here followed the pattern instruction, there was no danger under the charge as given that Murphy could have been convicted of violating 18 U.S.C. § 1505 without a corrupt intent. We AFFIRM Murphy's conviction on count 14 for obstruction of justice.

VII

Defendants argue that the district court erred in refusing to admit certified tax receipts on the grounds of inadequate authentication. These documents – consisting of "bordeaus" (customs documents) and memos – would have allegedly shown that following initial underpayments at port, Defendants

[94] *Arthur Andersen LLP v. United States*, 544 U.S. 696, 706-07 (2005).

later engaged in reconciliations with the Haitian government where they substantially paid their taxes owed. Defendants also allege that the bordeaus, which indicate the "amount of rice recorded" in addition to taxes paid, would demonstrate that they mis-reported quantities and underpaid taxes to a lesser extent than claimed by the Government.

Defendants obtained the documents and gave them to the Government several weeks before trial but then sent them back to Haiti for certification. They provided certified copies of the documents to the Government the day before trial. The Government objected to the documents' admission on the basis that the documents were certified by the brother of a co-conspirator in the case, that the Government had not had sufficient time to test the documents, and that the documents were originally accompanied by a post stating that they were "Received from Murphy," not from the individual who later certified the documents. The Government argued that the authentication issues were of particular concern because the case dealt with false documentation. Further, Defendants were unable to locate the originals of the documents or explain why they were unavailable. The district court refused to admit the documents and, although not providing an explicit reason, apparently did so under Rule 403 of the Federal Rules of Evidence. We review a district court's exclusion of relevant

evidence under Rule 403 for an abuse of discretion,[95] and, if we find an abuse of discretion, we find reversible error only if the ruling affected a substantial right.[96]

To preserve error in an evidentiary ruling excluding evidence under Rule 103(a), a defendant must make an "offer of proof" of evidence, meaning that "the substance of the evidence" must have been "made known to the court by offer" or must have been "apparent from the context within which questions were asked."[97] The defendant need not renew his objection to the exclusion of evidence "[o]nce the court makes a definitive ruling on the record admitting or excluding evidence . . . ."[98] If Defendants had failed to make an offer of proof in this case, as the Government claims, then we would not address the court's decision to exclude the evidence.[99] However, a formal offer of proof was not necessary here.[100] By explaining to the court the substance of the proffered

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[95] *United States v. Jimenez*, 256 F.3d 330, 341 (5th Cir. 2001).

[96] *Guy v. Crown Equip. Corp.*, 394 F.3d 320, 324 (5th Cir. 2004); *United States v. Hicks*, 389 F.3d 514, 524 (5th Cir. 2004).

[97] FED. R. EVID. 103(a)(2).

[98] FED. R. EVID. 103(a).

[99] *United States v. Winkle*, 587 F.2d 705, 710 (5th Cir. 1979).

[100] *United States v. Clements*, 73 F.3d 1330, 1336 (5th Cir. 1996); *see also United States v. Ballis*, 28 F.3d 1399, 1406 (5th Cir. 1994) ("[E]xcluded evidence is sufficiently preserved for

evidence (receipts indicating tax payments that Defendants made after shipments were complete) and why the court should admit these documents[101] (describing how the documents had been "subscribed and sworn – and certified by the United States vice counsel"), Defendants made a sufficient "informal" offer of proof. Although Defendants did not renew their attempt to admit the evidence in trial after the court's decision to exclude, the court definitively rejected the evidence in its pre-trial ruling.[102] No further objections by Defendants were necessary.

Although Defendants properly objected to the district court's ruling, the district court did not abuse its discretion here. Defendants attempted to introduce the documents at the last minute, and the court could have reasonably concluded that they would create confusion or unfair prejudice. Additionally, the Government provided evidence that the documents were certified by a potentially biased party. Because the district court did not

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review when the trial court has been informed as to what counsel intends to show by the evidence and why it should be admitted, and this court has a record upon which we may adequately examine the propriety and harmfulness of the ruling").

[101] *See Ballis*, 28 F.3d at 1406 (counsel must demonstrate "what counsel intends to show by the evidence and why it should be admitted.")

[102] *See, e.g., Jimenez*, 256 F.3d at 342-43 (5th Cir. 2001) (although "[o]bjecting to an *in limine* order excluding testimony or evidence does not relieve a party from making an offer of proof" at trial, an informal offer of proof may be sufficient "when the trial court makes clear that it does not wish to hear further argument on the issue").

provide reasons (certification, relevance, or others) for the exclusion of the evidence, however, we also determine whether, if there was any error, it was reversible.

Defendants failed to show that their "substantial rights" were affected by the district court's exclusion of the evidence, and therefore the court's decision did not result in reversible error.[103] To show that the court's decision to exclude the evidence affected their substantial rights, Defendants must demonstrate that the ruling "affected the outcome of the proceedings."[104] The jury here could still have found Defendants guilty if the court had admitted the tax documents. Regardless of whether the tax documents presented evidence that Defendants paid a substantial amount of their taxes in later reconciliations with the Haitian government, as Defendants claim, this fails to diminish the weight of the Government's ample evidence demonstrating that Defendants initially based their tax payments on false reports of the quantity of rice they imported, which Defendants then used to calculate bribes to customs officials and to ensure acceptance of further false reports.

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[103] FED. R. EVID. 103 (a) ("Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected.").

[104] *United States v. Cuellar*, 478 F.3d 282, 295 (5th Cir. 2007) (internal quotations omitted).

Although Defendants also argue that some of the excluded documents demonstrate that they reported more of their rice imports than the Government alleged at trial, they do not suggest that the documents show that Defendants reported the amounts honestly, or in full. Rather, they allege that the excluded evidence would have indicated that "RCH received much less, if any, actual tax benefit from the commission payments it made."[105] The district court had no such evidence that the documents actually demonstrated this – nor do we. And Defendants' claims that they received less "tax benefit" than alleged by the Government skirt the central matter of the case: Defendants underreported quantities of rice and made bribes to continue this false reporting, which in turn allowed for underpayment of taxes and customs duties at port. Whether Defendants actually obtained substantial tax benefits is a collateral matter. The district court did not abuse its discretion in excluding the evidence and, even if it had, Defendants have failed to demonstrate that the court's exclusion of the documents affected their substantial rights by changing the outcome of the case.

VIII

[105] Murphy Br. at 24.

The foreign payments in this case came to the attention of the SEC after Kay voluntarily revealed ARI's conduct to company counsel. Kay, however, refused to speak to a second set of investigating lawyers and, when later subpoenaed, he invoked the Fifth Amendment and refused to testify regarding the payments. At trial, Kay disclosed his intent to introduce testimony of his pre-indictment reports at trial, to suggest that his disclosures evidence his belief that his actions had been lawful. Responding to Kay's *in limine* request, the district court defined Kay's exposure to cross examination should he so testify. The district court ruled that the Government would be able ask Kay whether he had appeared before the SEC and whether Kay had been asked to appear, but no more; and that the court would then if requested by Kay instruct the jury on Kay's Fifth Amendment rights.

In some circumstances, Kay's response to this question and the court's jury instructions may have improperly alerted the jury to Kay's invocation of his Fifth Amendment rights and, despite the court's proposed instruction to the jury in its ruling, would have violated the Fifth Amendment protection guaranteed by *Hale*.[106] But here the court's ruling was tailored to prevent Kay from selectively using his Fifth Amendment rights as a "sword," while

[106] *United States v. Hale*, 422 U.S. 171, 181 (1975).

simultaneously benefitting from the shield created by these rights, and allowed the Government to reasonably respond to Kay's testimony.

Kay correctly asserts that *Hale* erects a fortress around the Fifth Amendment by barring mention in criminal court of a defendant's silence following arrest.[107] Without this protection, the right against self incrimination would be diluted by the high risk that juries might draw a "strong negative inference" from this silence.[108] Although we find, contrary to the Government's assertions, that Kay properly preserved the Fifth Amendment issue under *Luce*, we find no *Hale* violation here.

The Government argues that under *Luce*, Kay failed to preserve the Fifth Amendment issue. Its reliance is misplaced. As the Government admits in its own brief, "this case is not exactly like *Luce*"; in fact, this case bears little resemblance to *Luce*, where the Court found that a defendant must testify in order to preserve claims under Rule 609(a)(1) of the Federal Rules of Evidence.[109] Here, Kay did testify. Although he did not testify regarding his prior statements about payments, Kay's proposed testimony was clear: he

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[107] *Id.*

[108] *Id.* at 180.

[109] *Luce v. United States*, 469 U.S. 38, 41 (1984).

proposed to testify that he voluntarily told the company's lawyers about the payments as evidence that he thought the payments were lawful. The court also made clear that it would allow the Government to elicit on cross that Kay refused to respond to the SEC and that it would instruct the jury that Kay had a constitutional right to not respond to the SEC.[110] It is true that the district court's initial ruling in *Luce* was "subject to change when the case unfold[ed]," but the Court there was particularly concerned with situations where "defendant's 'actual' testimony [may] differ[] from what was contained in the defendant's proffer."[111] This was not an issue here. Before Kay testified, counsel and the court had made clear the proposed testimony on voluntary disclosure of payments, as well as the court's proposed treatment of that testimony if he chose to offer it. In *Luce*, it was "unknowable."[112]

Kay preserved his Fifth Amendment claim. We find, however, that the district court did not err in its ruling. The Supreme Court has found that when

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[110] The district court made it clear in this case that its determination was final, and it made this clarification immediately prior to Kay's testimony. The court confirmed attorney Urofsky's clarification that, if Kay offered evidence that he revealed ARI's activities to his attorneys (thus suggesting he was honest), the court would allow the Government to ask Kay, "Did you talk to SEC?" The court further explained "And then it opens it up for two questions from you [the Government] with my offer of an instruction . . . *that's the end of it.* Okay? No more." (emphasis added).

[111] *Luce*, 469 U.S. at 41.

[112] *Id.*

a "prosecutor's reference to the defendant's opportunity to testify is a fair response to a claim made by defendant or his counsel,"[113] there is no violation of the Fifth Amendment privilege against self-incrimination. As Justice Stevens put it, "the protective shield of the Fifth Amendment should [not] be converted into a sword that cuts back on the area of legitimate comment by the prosecutor on the weaknesses in the defense case."[114] Applying the *Griffin* Court's prohibition against comment on Fifth Amendment silence to "forbid the prosecutor from fairly responding to an argument of the defendant by adverting to that silence"[115] would have been improper here.

Although Appellant's prior initial statements to his attorney may have been consistent with his later invocation of the Fifth Amendment privilege[116] (as

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[113] *United States v. Robinson*, 485 U.S. 25, 32 (1988).

[114] *United States v. Hastings*, 461 U.S. 499, 515 (1983) (Stevens, J., concurring).

[115] *Robinson*, 485 U.S. at 34.

[116] His post-indictment silence and pre-indictment statements appear to be consistent under all three of *Grunewald*'s tests for consistency. First, although Kay did not speak about the payments after being indicted and therefore made no "repeated assertions" of innocence during proceedings, his initial revelation of the payments demonstrates his belief that he was innocent. *Hale*, 422 U.S. at 178 (citing *Grunewald v. United States*, 353 U.S. 391, 422 (1957)). Second, Kay asserted his right to silence in a secretive proceeding by refusing to speak when subpoenaed. As the Court in *Grunewald* found: "Innocent men are more likely to plead the privilege in secret proceedings, where they testify without advice of counsel and without opportunity for cross-examination." 353 U.S. at 422-23. Finally, Kay reasonably believed that he was a potential defendant when the SEC subpoenaed him, and it was therefore "natural for him to fear that he was being asked questions for the very purpose of providing evidence against himself." *Id.* at 423.

required if he wished to receive *Hale* protection),[117] his pre-indictment silence, when a second set of lawyers wished to inquire further as to his earlier disclosures, is not consistent with his initial disclosure of information. Kay claims that the Government sought Fifth Amendment impeachment "only as a naked quid pro quo, to exact a price for Kay's testimony,"[118] but the record shows otherwise. The Government plausibly argued before the district court that if Kay's attorney cross-examined him on his initial disclosure of ARI's bribery, this would suggest that Kay was "the reporter . . . the complainant . . . the one who started this whole thing" – the honest individual who initiated the events leading to the investigation. Kay would have been able to use this testimony to his advantage and block any cross examination as to his subsequent refusal to talk by later invoking the Fifth Amendment.

The district court properly tailored the Government's response to Kay's proposed use of the testimony by allowing the Government – if Kay testified as to his initial statements – to ask if Kay was summoned by the SEC and whether

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[117] *Grunewald*, 353 U.S. at 418–20 (prosecution may impeach defendant regarding invocation of the Fifth Amendment privilege if defendant's use of the privilege is "in fact inconsistent" with his testimony").

[118] Kay Repl. Br. at 27.

he responded but not about his refusal to respond to lawyers engaged by the company to conduct an internal investigation.

Thus, the court made a fair and proportional response in admitting and excluding some evidence. The court recognized here that Kay had a fundamental right to silence, yet he wished to invoke the positive inference of his disclosures by testifying about his disclosures and simultaneously avoid any mention of later silence that could damage this inference. Entirely preventing Government questioning related to Kay's disclosures *and* silence would have prevented the Government from sufficiently responding to Kay's testimony. We find no Fifth Amendment violation.

IX

Murphy contests the district court's decision to increase his sentence by two levels for an abuse of trust under § 3B1.3 of the Federal Sentencing Guidelines. Although post-*Booker,* the Sentencing Guidelines are only advisory,[119] we must still ensure that the district court properly applied the guidelines when enhancing a sentence under the guidelines range.[120] Under § 3B1.3, a defendant commits an abuse of trust by "abus[ing] a position of public

[119] *United States v. Booker*, 543 U.S. 220, 246 (2005).

[120] *See, e.g., United States v. Villegas*, 404 F.3d 355, 362 (5th Cir. 2005) (per curium).

or private trust, or us[ing] a special skill, in a manner that significantly facilitate[s] the commission or concealment of the offense . . . ."

We read the abuse of trust standard as a two-part test, asking "(1) whether the defendant occupies a position of trust and (2) whether the defendant abused her position in a manner that significantly facilitated the commission or concealment of the offense."[121] We further define significant facilitation by determining "whether the defendant occupied a superior position, relative to all people in a position to commit the offense, as a result of her job."[122] Although in *Sudeen* we questioned the first prong and suggested that defendant need not "legitimately" occupy a position of trust,[123] we have not overruled this test and therefore apply it here. We review the court's legal interpretation of § 3B1.3 *de novo,* with deference to the district court.[124] We also review the question of whether Defendants occupied a position of trust *de novo,*

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[121] *United States v. Jobe*, 101 F.3d 1046, 1065 (5th Cir. 1996) (quoting *United States v. Fisher*, 7 F.3d 69, 70-71 (5th Cir. 1993)).

[122] *Id.*

[123] *United States v. Sudeen*, 434 F.3d 384, 391-92 (5th Cir. 2005).

[124] *Id.* at 391.

while we review the abuse of trust for commission or concealment of an offense for clear error.[125]

In reviewing the court's enhancement, we first determine whether an abuse of trust or skill is part of the FCPA (the base offense) or a specific characteristic of the FCPA. If so, the guidelines would not provide for enhancement based on an abuse of trust, as use of the enhancement would lead to double counting.

The FCPA does not require an individual to possess special skills to be culpable under the Act. The Application Notes to § 3B1.3 define "special skill" as a "skill not possessed by members of the general public and usually requiring substantial education, training, or licensing." The FCPA contains no such requirements; it applies to "any officer, director, employee, or agent" of an issuer or "any stockholder thereof acting on behalf of such issuer,"[126] whose actions fall under the remaining elements of the Act. Nor does the Act require a defendant to commit an abuse of trust.

Although we have not yet addressed an abuse of trust enhancement under the FCPA, we have found in fraud and embezzlement cases that the base

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[125] *Id.* (citing *United States v. Hussey*, 254 F.3d 428, 431 (2d Cir. 2001)).

[126] 15 U.S.C. § 78dd-1(a).

offense does not include an abuse of trust but rather a lesser standard of breach of trust.[127] We have also upheld abuse of trust enhancements in money laundering cases, finding that the conduct that led to the conviction under the base offense did not "itself . . . include any abuse of trust."[128] Like fraud, embezzlement, and money laundering offenses, Murphy's actions that led to his FCPA conviction – falsely reporting import quantities and bribing foreign officials to accept false reports – were not themselves an abuse of trust as defined by § 3B1.3. Therefore, a sentence enhancement under § 3B1.3 is not "double counting" in this context.

Under the two-prong test for abuse of trust under § 3B1.3, Murphy occupied a position of trust with respect to the Haitian government. Murphy errs in arguing that the abuse of trust enhancement only applies when a defendant abuses "a position of trust vis-à-vis the victim of the crime." As we noted in *Buck*: "We have never held . . . nor do the guidelines explicitly require, that the determination whether a defendant occupied a position of trust must

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[127] *See United States v. Buck*, 324 F.3d 786, 792-93 (5th Cir. 2003) (discussing cases where the Fifth Circuit has affirmed abuse of trust enhancements in fraud sentences, and determining that "3B1.3 may apply to embezzlement convictions"). Under fraud and embezzlement, the court should distinguish "between the breach of trust necessary . . . and more egregious conduct and discretion necessary to trigger an abuse of trust enhancement." *Id.* at 793.

[128] *United States v. Powers*, 168 F.3d 741, 751 (5th Cir. 1999).

be assessed from the perspective of the victim."[129] In that case, we upheld the defendant's sentence enhancement because she violated her position of trust with respect to the government.[130]

We have also applied § 3B1.3 enhancements where the defendant's position of trust did not apply to the main victims of the crime, but rather to collateral victims. In *Sidhu*, we affirmed a doctor's conviction for defrauding the government and insurance companies by mis-reporting patient services and over-billing patients. The doctor had a position of trust with respect to the patients, yet the lower court based his conviction on government and insurance company fraud.[131] We have interpreted *Sidhu* to permit enhancement under § 3B1.3 "whenever *any* victim of a criminal scheme placed the defendant in a position of trust that significantly facilitated the crime."[132] Here, Murphy, as the president and CEO of ARI, maintained a position of trust with respect to the Haitian government as well as ARI's shareholders. Even if the shareholders are not primary victims of the crime charged, Murphy harmed shareholders by

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[129] *Buck*, 324 F.3d at 794.

[130] *Id.* at 795.

[131] *United States v. Sidhu*, 130 F.3d 644, 647, 655-56 (5th Cir. 1997).

[132] *Buck*, 324 F.3d at 795 (emphasis added).

conducting illegal foreign activities on behalf of the corporation.

Murphy, in occupying a position of trust, maintained a position superior to that of all other individuals with a similar ability to commit or conceal offenses. As a leader within the corporation, the record shows that Murphy authorized employees to pay "commissions" (bribes) to Haitian officials to induce these officials to accept underreported quantities of rice imports.[133] In doing so, Murphy "significantly facilitated the commission" of the FCPA offense. The district court therefore committed no error in applying the § 3B1.3 enhancement for abuse of a trust position to Murphy's sentence, and we AFFIRM the sentencing enhancement.

X

We AFFIRM conviction of Defendants on all counts.

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[133] *See, e.g.*, Government Exhibit 82, E-mail from Douglas Murphy to ARI employees and David Kay (Dec. 29, 1998) (approving a $40,000 commissions payment to Haitian officials); Testimony of Lawrence Theriot (describing conversations with Kay and Murphy regarding ways to "shrink" the cargo and reduce tax payments under "Plan B").

UNITED STATES of America, Plaintiff–Appellant,

v.

David KAY; Douglas Murphy, Defendants–Appellees.

No. 02–20588.

United States Court of Appeals, Fifth Circuit.

Feb. 4, 2004.

Background: Defendants, principals of grain-exporting corporation, were charged with violations of Foreign Corrupt Practices Act (FCPA). The United States District Court for the Southern District of Texas, 200 F.Supp.2d 681, David H. Hittner, J., granted defendants' motion to dismiss indictment for failure to state offense. Government appealed.

Holdings: The Court of Appeals, Wiener, Circuit Judge, held that:

(1) payments allegedly made to Haitian government officials for purpose of reducing corporation's customs duties and taxes were potentially within Act's prohibition against payments to foreign officials to "obtain or retain" business, and

(2) indictment did not have to go beyond tracking language of statute in stating business nexus element of offense.

Reversed and remanded.

1. Criminal Law ⇐1139

Court of Appeals reviews *de novo* federal district court's statutory interpretation.

2. Criminal Law ⇐1139

Court of Appeals reviews *de novo* whether indictment sufficiently alleges elements of an offense.

3. Indictment and Information ⇐144.2

On motion to dismiss indictment for failure to state offense, court takes allegations of indictment as true.

4. Indictment and Information ⇐71.2(4), 71.3

Indictment is sufficient if it: (1) contains elements of offense charged and fairly informs defendant of charge against which he must defend, and (2) enables him to plead acquittal or conviction in bar of future prosecutions for same offense.

5. Statutes ⇐211

It is appropriate to consider title of statute in resolving putative ambiguities.

6. Statutes ⇐217.4

If, after application of standard principles of statutory construction, court concludes that statute is ambiguous, it may turn to legislative history.

7. Bribery ⇐1(1)

Foreign Corrupt Practices Act (FCPA) did not criminalize every payment to foreign official, but only those payments intended to (1) influence foreign official to act or make decision in his official capacity, or (2) induce such official to perform or refrain from performing some act in violation of his duty, or (3) secure some wrongful advantage to payor, and Act criminalized such payments only if result they are intended to produce will assist, or is intended to assist, payor in efforts to get or keep some business. Securities Exchange Act of 1934, § 104(a), 15 U.S.C.A. § 78dd–2(a).

8. Bribery ⇐2

Foreign Corrupt Practices Act's (FCPA) prohibition against payments to foreign officials "in order to assist [briber] in obtaining or retaining business" was ambiguous; Act failed to give clear indication of exact scope of business nex-

us element, i.e. proximity of required nexus between anticipated results of foreign official's bargained-for action or inaction and assistance provided by or expected from these results in helping briber to obtain or retain business. Securities Exchange Act of 1934, § 104(a), 15 U.S.C.A. § 78dd–2(a).

9. Bribery ⇐1(1)

Foreign Corrupt Practices Act's (FCPA) prohibition against payments to foreign officials to obtain or retain business applies to bribes beyond narrow band of payments sufficient only to obtain or retain government contracts. Securities Exchange Act of 1934, § 104(a), 15 U.S.C.A. § 78dd–2(a).

10. Bribery ⇐1(1)

Payments made by defendants, principals of grain-exporting corporation, to Haitian government officials to induce those officials to understate quantities of grain contained in corporation's shipments to Haiti, which in turn reduced its customs duties and taxes, were potentially within Foreign Corrupt Practices Act's (FCPA) prohibition against payments to foreign officials "for purposes of ... securing any improper advantage ... in obtaining or retaining business"; desired result, lower taxes and duties, could provide unfair advantage over competitors and thereby assist corporation in "obtaining or retaining" business. Securities Exchange Act of 1934, § 104(a), 15 U.S.C.A. § 78dd–2(a).

11. Bribery ⇐1(1)

Foreign Corrupt Practices Act's (FCPA) prohibition against payments to foreign officials to obtain or retain business was sufficiently broad to include bribes meant to affect administration of revenue laws. Securities Exchange Act of 1934, § 104(a), 15 U.S.C.A. § 78dd–2(a).

12. Bribery ⇐6(4)

Indictment alleging violation of Foreign Corrupt Practices Act's (FCPA) prohibition against payments to foreign officials "for purposes of ... securing any improper advantage ... to assist [briber] in obtaining or retaining business" did not have to go beyond tracking language of statute in stating business nexus element, i.e. causative nexus between alleged *quid pro quo* of bribe and defendant's "obtaining or retaining business"; core of criminality of provision was bribery itself, not business nexus element. Securities Exchange Act of 1934, § 104(a), 15 U.S.C.A. § 78dd–2(a).

Philip Eric Urofsky (argued), U.S Dept. of Justice, Fraud Section Crim. Div., Washington, DC, for Plaintiff–Appellant.

Reid H. Weingarten (argued), Brian Matthew Heberlig, Erik Lloyd Kitchen, Steptoe & Johnson, Washington, DC, for Kay.

Robert Jon Sussman, Charley A. Davidson, Hinton, Sussman, Bailey & Davidson, Houston, TX, for Murphy.

Rada Lynn Potts, U.S. SEC, Washington, DC, for SEC, Amicus Curiae.

Mark H. Tuohey, Meghan Suzanne Skelton, William E. Lawler, III, Vinson & Elkins, Washington, DC, for Harris, Amicus Curiae.

Martin J. Weinstein, Foley & Lardner, Washington, DC, for Mattson, Amicus Curiae.

Appeal from the United States District Court for the Southern District of Texas.

Before WIENER, BENAVIDES and DENNIS, Circuit Judges.

WIENER, Circuit Judge:

Plaintiff-appellant, the United States of America ("government") appeals the district court's grant of the motion of defendants-appellees David Kay and Douglas Murphy ("defendants") to dismiss the Superseding Indictment[1] ("indictment") that charged them with bribery of foreign officials in violation of the Foreign Corrupt Practices Act ("FCPA").[2] In their dismissal motion, defendants contended that the indictment failed to state an offense against them. The principal dispute in this case is whether, if proved beyond a reasonable doubt, the conduct that the indictment ascribed to defendants in connection with the alleged bribery of Haitian officials to understate customs duties and sales taxes on rice shipped to Haiti to assist American Rice, Inc. in obtaining or retaining business was sufficient to constitute an offense under the FCPA. Underlying this question of sufficiency of the contents of the indictment is the preliminary task of ascertaining the scope of the FCPA, which in turn requires us to construe the statute.

The district court concluded that, as a matter of law, an indictment alleging illicit payments to foreign officials for the purpose of avoiding substantial portions of customs duties and sales taxes to obtain or retain business are not the kind of bribes that the FCPA criminalizes. We disagree with this assessment of the scope of the FCPA and hold that such bribes *could* (but do not necessarily) come within the ambit of the statute. Concluding in the end that the indictment in this case is sufficient to state an offense under the FCPA, we remand the instant case for further proceedings consistent with this opinion. Nevertheless, on remand the defendants may choose to submit a motion asking the district court to compel the government to allege more specific facts regarding the intent element of an FCPA crime that requires the defendant to intend for the foreign official's anticipated conduct in consideration of a bribe (hereafter, the "*quid pro quo*") to produce an anticipated result—here, diminution of duties and taxes—that would *assist* (or is meant to *assist*) in *obtaining* or *retaining* business (hereafter, the "business nexus element"). If so, the trial court will need to decide whether (1) merely quoting or paraphrasing the statute as to that element (as was done here) is sufficient, or (2) the government must allege additional facts as to just *what* business was sought to be obtained or retained in Haiti and just *how* the intended *quid pro quo* was meant to assist in obtaining or retaining such business. We therefore reverse the district court's dismissal of the indictment and remand for further consistent proceedings.

I. FACTS AND PROCEEDINGS

American Rice, Inc. ("ARI") is a Houston-based company that exports rice to foreign countries, including Haiti. Rice Corporation of Haiti ("RCH"), a wholly owned subsidiary of ARI, was incorporated in Haiti to represent ARI's interests and deal with third parties there. As an aspect of Haiti's standard importation procedure, its customs officials assess duties based on the quantity and value of rice imported into the country. Haiti also requires businesses that deliver rice there to remit an advance deposit against Haitian sales taxes, based on the value of that rice, for which deposit a credit is eventually allowed on Haitian sales tax returns when filed.

1. A copy of the Superseding Indictment is appended hereto in its entirety and identified as Appendix A.

2. 15 U.S.C. § 78dd–1 *et seq.* (2000).

In 2001, a grand jury charged Kay with violating the FCPA and subsequently returned the indictment, which charges both Kay and Murphy with 12 counts of FCPA violations. As is readily apparent on its face, the indictment contains detailed factual allegations about (1) the timing and purposes of Congress's enactment of the FCPA, (2) ARI and its status as an "issuer" under the FCPA, (3) RCH and its status as a wholly owned subsidiary and "service corporation" of ARI, representing ARI's interest in Haiti, and (4) defendants' citizenship, their positions as officers of ARI, and their status as "issuers" and "domestic concerns" under the FCPA. The indictment also spells out in detail how Kay and Murphy allegedly orchestrated the bribing of Haitian customs officials to accept false bills of lading and other documentation that intentionally understated by one-third the quantity of rice shipped to Haiti, thereby significantly reducing ARI's customs duties and sales taxes. In this regard, the indictment alleges the details of the bribery scheme's machinations, including the preparation of duplicate documentation, the calculation of bribes as a percentage of the value of the rice not reported, the surreptitious payment of monthly retainers to Haitian officials, and the defendants' purported authorization of withdrawals of funds from ARI's bank accounts with which to pay the Haitian officials, either directly or through intermediaries—all to produce substantially reduced Haitian customs and tax costs to ARI. Further, the indictment alleges discrete facts regarding ARI's domestic incorporation and place of business, as well as the particular instrumentalities of interstate and foreign commerce that defendants used or caused to be used in carrying out the purported bribery.

In contrast, without any factual allegations, the indictment merely paraphrases the one element of the statute that is central to this appeal, only conclusionally accusing defendants of causing payments to be made to Haitian customs officials:

> for purposes of influencing acts and decisions of such foreign officials in their official capacities, inducing such foreign officials to do and omit to do acts in violation of their lawful duty, and to obtain an improper advantage, in order to *assist* American Rice, Inc. in *obtaining and retaining business* for, and directing business to American Rice, Inc. and Rice Corporation of Haiti. (Emphasis added).

Although it recites in great detail the discrete facts that the government intends to prove to satisfy each other element of an FCPA violation, the indictment recites no particularized facts that, if proved, would satisfy the "assist" aspect of the business nexus element of the statute, i.e., the nexus between the illicit tax savings produced by the bribery and the assistance such savings provided or were intended to provide in *obtaining or retaining business* for ARI and RCH. Neither does the indictment contain any factual allegations whatsoever to identify just *what* business in Haiti (presumably some rice-related commercial activity) the illicit customs and tax savings assisted (or were intended to assist) in obtaining or retaining, or just *how* these savings were supposed to assist in such efforts. In other words, the indictment recites no facts that could demonstrate an actual or intended cause-and-effect nexus between reduced taxes and obtaining identified business or retaining identified business opportunities.

In granting defendants' motion to dismiss the indictment for failure to state an offense, the district court held that, as a matter of law, bribes paid to obtain favorable tax treatment are not payments made to "obtain or retain business" within the intendment of the FCPA, and thus are not

within the scope of that statute's proscription of foreign bribery.[3] The government timely filed a notice of appeal.

II. ANALYSIS

A. *Standard of Review*

[1–3] We review *de novo* questions of statutory interpretation, as well as "whether an indictment sufficiently alleges the elements of an offense."[4] As a motion to dismiss an indictment for failure to state an offense is a challenge to the sufficiency of the indictment, we are required to "take the allegations of the indictment as true and to determine whether an offense has been stated."[5]

[4] "[I]t is well settled that an indictment must set forth the offense with sufficient clarity and certainty to apprise the accused of the crime with which he is charged."[6] The test for sufficiency is "not whether the indictment could have been framed in a more satisfactory manner, but whether it conforms to minimum constitutional standards"; namely, that it "[(1)] contain[ ] the elements of the offense charged and fairly inform[ ] a defendant of the charge against which he must defend, and [(2)], enable[ ] him to plead an acquittal or conviction in bar of future prosecutions for the same offense."[7]

Because an offense under the FCPA requires that the alleged bribery be committed for the purpose of inducing foreign officials to commit unlawful acts, the results of which will assist in obtaining or retaining business in their country, the questions before us in this appeal are (1) whether bribes to obtain illegal but favorable tax and customs treatment can ever come within the scope of the statute, and (2) if so, whether, in combination, there are minimally sufficient facts alleged in the indictment to inform the defendants regarding the nexus between, on the one hand, Haitian taxes avoided through bribery, and, on the other hand, assistance in getting or keeping some business or business opportunity in Haiti.

B. *Words of the FCPA*

[5, 6] "[T]he starting point for interpreting a statute is the language of the statute itself."[8] When construing a criminal statute, we "must follow the plain and unambiguous meaning of the statutory language."[9] Terms not defined in the statute are interpreted according to their "ordinary and natural meaning ... as well as the overall policies and objectives of the statute."[10] Furthermore, "a statute must, if possible, be construed in such fashion that every word has some operative effect."[11] Finally, we have found it "appro-

3. *United States v. Kay,* 200 F.Supp.2d 681, 686 (S.D.Tex.2002).

4. *United States v. Santos–Riviera,* 183 F.3d 367, 369 (5th Cir.1999).

5. *United States v. Hogue,* 132 F.3d 1087, 1089 (5th Cir.1998).

6. *United States v. Bearden,* 423 F.2d 805, 810 (5th Cir.1970) (citations omitted).

7. *United States v. Ramirez,* 233 F.3d 318, 323 (5th Cir.2000).

8. *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.* 447 U.S. 102, 108, 100 S.Ct. 2051, 64 L.Ed.2d 766 (1980).

9. *Salinas v. United States,* 522 U.S. 52, 57, 118 S.Ct. 469, 139 L.Ed.2d 352 (1997) (citations and quotation marks omitted).

10. *United States v. Lowe,* 118 F.3d 399, 402 (5th Cir.1997) (citations omitted).

11. *United States v. Nordic Village, Inc.,* 503 U.S. 30, 36, 112 S.Ct. 1011, 117 L.Ed.2d 181 (1992) (recognizing this principle as a "settled rule"); *United States v. Naranjo,* 259 F.3d

priate to consider the title of a statute in resolving putative ambiguities."[12] If, after application of these principles of statutory construction, we conclude that the statute is ambiguous, we may turn to legislative history. For the language to be considered ambiguous, however, it must be "susceptible to more than one reasonable interpretation"[13] or "more than one accepted meaning."[14]

[7] The FCPA prohibits payments to foreign officials for purposes of:

> (i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage ... in order to assist [the company making the payment] in obtaining or retaining business for or with, or directing business to, any person.[15]

None contend that the FCPA criminalizes every payment to a foreign official: It criminalizes only those payments that are intended to (1) influence a foreign official to act or make a decision in his official capacity, or (2) induce such an official to perform or refrain from performing some act in violation of his duty, or (3) secure some wrongful advantage to the payor. And even then, the FCPA criminalizes these kinds of payments only if the result they are intended to produce—their *quid pro quo*—will *assist* (or is intended to assist) the payor in efforts to get or keep some *business* for or with "any person." Thus, the first question of statutory interpretation presented in this appeal is whether payments made to foreign officials to obtain unlawfully reduced customs duties or sales tax liabilities can ever fall within the scope of the FCPA, i.e., whether the illicit payments made to obtain a reduction of revenue liabilities can *ever* constitute the kind of bribery that is proscribed by the FCPA. The district court answered this question in the negative; only if we answer it in the affirmative will we need to analyze the sufficiency of the factual allegations of the indictment as to the one element of the crime contested here.

The principal thrust of the defendants' argument is that the business nexus element, i.e., the "assist ... in obtaining or retaining business" element, narrowly limits the statute's applicability to those payments that are intended to obtain a foreign official's approval of a bid for a new government contract or the renewal of an existing government contract. In contrast, the government insists that, in addition to payments to officials that lead directly to getting or renewing business contracts, the statute covers payments that indirectly advance ("assist") the payor's goal of obtaining or retaining foreign business with or for some person. The government reasons that paying reduced customs duties and sales taxes on imports, as is purported to have occurred in this case, is the type of "improper advantage" that *always* will assist in obtaining or retaining business in a foreign country, and thus is always covered by the FCPA.

[8] In approaching this issue, the district court concluded that the FCPA's language is ambiguous, and proceeded to re-

379, 383 (5th Cir.2001) (*citing Nordic Village, Inc.*).

12. *United States v. Marek*, 238 F.3d 310, 321 (5th Cir.2001).

13. *Lowe*, 118 F.3d at 402.

14. *United Serv. Auto. Ass'n v. Perry*, 102 F.3d 144, 146 (5th Cir.1996).

15. 15 U.S.C. § 78dd–1(a)(1).

view the statute's legislative history.[16] We agree with the court's finding of ambiguity for several reasons. Perhaps our most significant statutory construction problem results from the failure of the language of the FCPA to give a clear indication of the exact scope of the business nexus element; that is, the proximity of the required nexus between, on the one hand, the anticipated results of the foreign official's bargained-for action or inaction, and, on the other hand, the assistance provided by or expected from those results in helping the briber to obtain or retain business. Stated differently, how attenuated can the linkage be between the effects of that which is sought from the foreign official in consideration of a bribe (here, tax minimization) and the briber's goal of finding assistance or obtaining or retaining foreign business with or for some person, and still satisfy the business nexus element of the FCPA?

Second, the parties' diametrically opposed but reasonable contentions demonstrate that the ordinary and natural meaning of the statutory language *is* genuinely debatable and thus ambiguous. For instance, the word "business" can be defined at any point along a continuum from "a volume of trade," to "the purchase and sale of goods in an attempt to make a profit," to "an assignment" or a "project."[17] Thus, dictionary definitions can support both (1) the government's broader interpretation of the business nexus language as encompassing any type of commercial activity, and (2) defendants' argument that "obtain or retain business" connotes a more pedestrian understanding of establishing or renewing a particular commercial arrangement. Similarly, although the word "assist" suggests a somewhat broader statutory scope,[18] it does not connote specificity or define either how proximate or how remote the foreign official's anticipated actions that constitute assistance must or may be to the business obtained or retained.

Third, absent a firm understanding of just what "obtaining or retaining business" or "assist" actually include, the parties' remaining arguments prove little. For instance, the separation of the statutory prohibition into two aspects—(1) seeking to induce a foreign official to act in consideration of a bribe (*quid pro quo*) (2) for purposes of assisting in obtaining or retaining business (business nexus)—provides little insight into the precise scope of the statute. The government may be correct in its contention that the *quid pro quo* requirement expands the scope of the statute, because Congress otherwise could have dispensed with the *quid pro quo* requirement entirely and simply prohibited only those payments resulting directly in obtaining or retaining business contracts. It is at least plausible, however, as defendants argue, that the *quid pro quo* requirement was not necessarily meant to expand the statutory scope, but instead was meant to distinguish acts of a foreign official in his official capacity from acts in his private capacity. Similarly, defendants might be right in urging that the business

16. *Kay*, 200 F.Supp.2d at 683. Neither the district court nor this court concludes that the ambiguity in the FCPA even closely approaches the level of *vagueness*, in the constitutional criminal sense, that could lead to declaring the statute void for vagueness.

17. *Webster's Encyclopedic Unabridged Dictionary*, at 201 (1989).

18. Invoking basic economic principles, the SEC reasoned in its amicus brief that securing reduced taxes and duties on imports through bribery enables ARI to reduce its cost of doing business, thereby giving it an "improper advantage" over actual or potential competitors, and enabling it to do more business, or remain in a market it might otherwise leave.

nexus element restricts the scope of the statute to a smaller universe of payments than those made to obtain *any* advantage; yet it is conceivable that this restriction was included to exempt more marginal facilitating payments, but not the types of payments that defendants are accused of making.

Neither does the remainder of the statutory language clearly express an exclusively broad or exclusively narrow understanding of the business nexus element. The extent to which the exception for routine governmental action ("facilitating payments" or "grease") is narrowly drawn reasonably suggests that Congress was carving out very limited categories of permissible payments from an otherwise broad statutory prohibition.[19] As defendants suggest, however, another plausible implication for including an express statutory explanation that routine governmental action does not include decisions "to award new business to or to continue business with a particular party,"[20] is that Congress was focusing entirely on identifiable decisions made by foreign officials in granting or renewing specific business arrangements in foreign countries, and not on a more general panoply of competitive business advantages.

The fourth and final interpretive factor, the statute's title—"Foreign Corrupt Practices Act"—is more suggestive of a relatively broad application of its provisions, but only slightly so. By itself, such a generic title fails to make one interpretation of the statutory language more persuasive than another, much less establish one as the only reasonable construction of the statute.[21] In sum, neither the ordinary meaning nor the provisions surrounding the disputed text are sufficiently clear to make the statutory language susceptible of but one reasonable interpretation. Inasmuch as Congress chose to phrase the business nexus requirement obliquely, and to say nothing to suggest how remote or how proximate the business nexus must

19. Section 78dd–1(b) excepts from the statutory scope "any facilitating or expediting payment to a foreign official ... the purpose of which is to expedite or to service the performance of a routine governmental action by a foreign official...." 15 U.S.C. § 78dd–1(b). Section 78dd–1(f)(3)(A), in turn, provides that:

> [T]he term "routine governmental action" means only an action which is ordinarily and commonly performed by a foreign official in—
>
> (i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;
>
> (ii) processing governmental papers, such as visas and work orders;
>
> (iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;
>
> (iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or
>
> (v) actions of a similar nature. 15 U.S.C. § 78dd–1(f)(3)(A).

20. 15 U.S.C. § 78dd–1(f)(3)(B).

21. Defendants also contend that the few reported decisions under the FCPA lend additional support to their narrow reading of the statutory language, because each of these cases involved payments linked to the acquisition or renewal of contracts or commercial agreements. *See, e.g., United States v. Liebo*, 923 F.2d 1308, 1311–12 (8th Cir.1991) (defendant paid gifts to foreign official in exchange for contract approval); *United States v. Castle*, 925 F.2d 831, 832 (5th Cir.1991) (defendants made a payment to win bid to provide buses to Canadian provincial government). According to defendant, these cases did not involve payments made to influence some aspect of existing business, i.e., some particular cost of doing business. Defendants nevertheless concede, and the government reiterates, that none of these decisions squarely addresses the scope of the "obtain and retain business" language.

be, we cannot conclude on the basis of the provision itself that the statute is either as narrow or as expansive as the parties respectively claim.

C. *FCPA Legislative History*

As the statutory language itself is amenable to more than one reasonable interpretation, it is ambiguous as a matter of law. We turn therefore to legislative history in our effort to ascertain Congress's true intentions.

1. *1977 Legislative History*

Congress enacted the FCPA in 1977, in response to recently discovered but widespread bribery of foreign officials by United States business interests. Congress resolved to interdict such bribery, not just because it is morally and economically suspect, but also because it was causing foreign policy problems for the United States.[22] In particular, these concerns arose from revelations that United States defense contractors and oil companies had made large payments to high government officials in Japan, the Netherlands, and Italy.[23] Congress also discovered that more than 400 corporations had made questionable or illegal payments in excess of $300 million to foreign officials for a wide range of favorable actions on behalf of the companies.[24]

In deciding to criminalize this type of commercial bribery, the House and Senate each proposed similarly far-reaching, but non-identical, legislation. In its bill, the House intended "broadly [to] prohibit[ ] transactions that are *corruptly* intended to induce the recipient to use his or her influence to affect *any* act or decision of a foreign official...."[25] Thus, the House bill contained no limiting "business nexus" element.[26] Reflecting a somewhat narrower purpose, the Senate expressed its desire to ban payments made for the purpose of inducing foreign officials to act "so as to direct business to any person, maintain an established business opportunity with any person, divert any business opportunity from any person or influence the enactment or promulgation of legislation or regulations of that government or instrumentality."[27]

At conference, compromise language "clarified the scope of the prohibition by requiring that the purpose of the payment must be to influence any act or decision of a foreign official ... so as to assist an issuer in obtaining, retaining or directing

22. The House Committee stated that such bribes were "counter to the moral expectations and values of the American public," "erode[d] public confidence in the integrity of the free market system," "embarrass[ed] friendly governments, lower[ed] the esteem for the United States among the citizens of foreign nations, and lend[ed] credence to the suspicions sown by foreign opponents of the United States that American enterprises exert a corrupting influence on the political processes of their nations." H.R.Rep. No. 95–640, at 4–5 (1977); S.Rep. No. 95–114, at 3–4 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4098, 4100–01.

23. H.R.Rep. No. 95–640, at 5; S.Rep. No. 95–114, at 3.

24. H.R.Rep. No. 95–640, at 4; S.Rep. No. 95–114, at 3.

25. H.R.Rep. No. 95–640, at 7 (emphasis added).

26. H.R. Conf. Rep. No. 95–831, at 12 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4120, 4124–25.

27. S.Rep. No. 95–114, at 17; S. 305, 95th Cong. § 103 (proposing to ban payments that induce action by a foreign official so as "to assist ... in obtaining or retaining business for or with, or directing business to, any person, or influencing legislation or regulations of that government or instrumentality").

business to any person."[28] In the end, then, Congress adopted the Senate's proposal to prohibit only those payments designed to induce a foreign official to act in a way that is intended to facilitate ("assist") in obtaining or retaining of business.

Congress expressly emphasized that it did not intend to prohibit "so-called grease or facilitating payments,"[29] such as "payments for expediting shipments through customs or placing a transatlantic telephone call, securing required permits, or obtaining adequate police protection, transactions which may involve even the proper performance of duties."[30] Instead of making an express textual exception for these types of non-covered payments, the respective committees of the two chambers sought to distinguish permissible grease payments from prohibited bribery by only prohibiting payments that induce an official to act "corruptly," i.e., actions requiring him "to misuse his official position" and his discretionary authority,[31] not those "essentially ministerial" actions that "merely move a particular matter toward an eventual act or decision or which do not involve any discretionary action."[32]

In short, Congress sought to prohibit the type of bribery that (1) prompts officials to misuse their discretionary authority and (2) disrupts market efficiency and United States foreign relations,[33] at the same time recognizing that smaller payments intended to expedite ministerial actions should remain outside of the scope of the statute. The Conference Report explanation, on which the district court relied to find a narrow statutory scope, truly offers little insight into the FCPA's precise scope, however; it merely parrots the statutory language itself by stating that the purpose of a payment must be to induce official action "so as to assist an issuer in obtaining, retaining or directing business to any person."[34]

[9] To divine the categories of bribery Congress did and did not intend to prohibit, we must look to the Senate's proposal, because the final statutory language was drawn from it,[35] and from the SEC Report on which the Senate's legislative proposal was based.[36] In distinguishing among the types of illegal payments that United States entities were making at the time, the SEC Report identified four principal categories: (1) payments "made in an ef-

28. H.R. Conf. Rep. 95–831, at 12.

29. H.R.Rep. No. 95–640, at 4; S.Rep. No. 95–114, at 10.

30. S.Rep. No. 95–114, at 10.

31. H.R.Rep. No. 95–640, at 7–8; S.Rep. No. 95–114, at 10.

32. H.R.Rep. No. 95–640, at 8. Similarly, when the House defined "foreign official" it excluded those individuals "whose duties are essentially ministerial or clerical." *Id.*

33. *See Lamb v. Phillip Morris, Inc.*, 915 F.2d 1024, 1029 (6th Cir.1990) (finding that "the FCPA was primarily designed to protect the integrity of American foreign policy and domestic markets").

34. H.R. Conf. Rep. 95–831, at 12.

35. As the House intended its proposed legislation to apply even more broadly to payments soliciting *any* corrupt act by a foreign official, we assume that any restrictions of scope emanated from the Senate version.

36. Report of the Securities and Exchange Commission on Questionable and Illegal Corporate Payments and Practices, submitted to the Senate Banking, Housing and Urban Affairs Committee, May 12, 1976 [hereinafter, "SEC Report"]. The Senate Report explained that its bill was identical to the bill introduced the year before, which in turn, was based substantially on the SEC Report and its recommendations. S.Rep. No. 95–114, at 2.

fort to procure special and unjustified favors or advantages in the enactment or *administration of the tax* or other *laws*" of a foreign country; (2) payments "made with the intent to assist the company in obtaining or retaining government contracts"; (3) payments "to persuade low-level government officials to perform functions or services which they are obliged to perform as part of their governmental responsibilities, but which they may refuse or delay unless compensated" ("grease"), and (4) political contributions.[37] The SEC thus exhibited concern about a wide range of questionable payments (explicitly including the kind at issue here) that were resulting in millions of dollars being recorded falsely in corporate books and records.[38]

As noted, the Senate Report explained that the statute should apply to payments intended "to *direct business* to any person, *maintain an established business opportunity* with any person, divert any business opportunity from any person or *influence the enactment or promulgation of legislation or regulations* of that government or instrumentality."[39] We observe initially that the Senate only loosely addressed the categories of conduct highlighted by the SEC Report. Although the Senate's proposal picked up the SEC's concern with a business nexus, it did not expressly cover bribery influencing the administration of tax laws or seeking favorable tax treatment. It is clear, however, that even though the Senate was particularly concerned with bribery intended to secure new business, it was also mindful of bribes that influence legislative or regulatory actions, and those that maintain established business opportunities, a category of economic activity separate from, and much more capacious than, simply "directing business" to someone.

The statute's ultimate language of "obtaining or retaining" mirrors identical language in the SEC Report. But, whereas the SEC Report highlights payments that go toward "obtaining or retaining *government contracts,*" the FCPA, incorporating the Senate Report's language, prohibits payments that assist in obtaining or retaining *business,* not just government contracts. Had the Senate and ultimately Congress wanted to carry over the exact, narrower scope of the SEC Report, they would have adopted the same language. We surmise that, in using the word "business" when it easily could have used the phraseology of SEC Report, Congress intended for the statute to apply to bribes beyond the narrow band of payments sufficient only to "obtain or retain government contracts." The Senate's express intention that the statute apply to corrupt payments that *maintain* business opportunities also supports this conclusion.

[10, 11] For purposes of deciding the instant appeal, the question nevertheless remains whether the Senate, and concomitantly Congress, intended this broader statutory scope to encompass the administration of tax, customs, and other laws and regulations affecting the revenue of foreign states. To reach this conclusion, we must ask whether Congress's remaining expressed desire to prohibit bribery aimed at getting assistance in retaining business or maintaining business opportunities was sufficiently broad to include bribes meant to affect the administration of revenue laws. When we do so, we conclude that the legislative intent was so broad.

37. SEC Report, at 25–27 (emphasis added).

38. *Id.* at a (Introduction), 25–27.

39. S.Rep. No. 95–114, at 17 (emphasis added).

Congress was obviously distraught not only about high profile bribes to high-ranking foreign officials, but also by the pervasiveness of foreign bribery by United States businesses and businessmen. Congress thus made the decision to clamp down on bribes intended to prompt foreign officials to misuse their discretionary authority for the benefit of a domestic entity's business in that country. This observation is not diminished by Congress's understanding and accepting that relatively small facilitating payments were, at the time, among the accepted costs of doing business in many foreign countries.[40]

In addition, the concern of Congress with the immorality, inefficiency, and unethical character of bribery presumably does not vanish simply because the tainted payments are intended to secure a favorable decision less significant than winning a contract bid. Obviously, a commercial concern that bribes a foreign government official to award a construction, supply, or services contract violates the statute. Yet, there is little difference between this example and that of a corporation's lawfully obtaining a contract from an honest official or agency by submitting the lowest bid, and—either before or after doing so—bribing a different government official to reduce taxes and thereby ensure that the under-bid venture is nevertheless profitable. Avoiding or lowering taxes reduces operating costs and thus increases profit margins, thereby freeing up funds that the business is otherwise legally obligated to expend. And this, in turn, enables it to take any number of actions to the disadvantage of competitors. Bribing foreign officials to lower taxes and customs duties certainly *can* provide an unfair advantage over competitors and thereby be of assistance to the payor in obtaining or retaining business. This demonstrates that the question whether the defendants' alleged payments constitute a violation of the FCPA truly turns on whether these bribes were intended to lower ARI's cost of doing business in Haiti enough to have a sufficient nexus to garnering business there or to maintaining or increasing business operations that ARI already had there, so as to come within the scope of the business nexus element as Congress used it in the FCPA. Answering this fact question, then, implicates a matter of proof and thus evidence.

In short, the 1977 legislative history, particularly the Senate's proposal and the SEC Report on which it relied, convinces us that Congress meant to prohibit a range of payments wider than only those that directly influence the acquisition or retention of government contracts or similar commercial or industrial arrangements. On the other end of the spectrum, this history also demonstrates that Congress explicitly excluded facilitating payments (the grease exception). In thus limiting the exceptions to the type of bribery covered by the FCPA to this narrow category, Congress's intention to cast an otherwise wide net over foreign bribery suggests that Congress intended for the FCPA to prohibit all other illicit payments that are intended to influence non-trivial official foreign action in an effort to aid in obtain-

40. We recognize that all payments to foreign officials exist on a continuum in which any payment, even if only to connect telephone service in two days instead of two weeks, marginally improves a company's competitive advantage in a foreign country. Nevertheless, Congress was principally concerned about payments that prompt an official to deviate from his official duty, not necessarily payments that get an official to perform properly those usually ministerial duties required of his office. As explained *infra*, Congress enacted amendments in 1988 in an effort to reflect just how limited it envisioned the grease exception to be.

ing or retaining business for some person. The congressional target was bribery paid to engender assistance in improving the business opportunities of the payor or his beneficiary, irrespective of whether that assistance be direct or indirect, and irrespective of whether it be related to administering the law, awarding, extending, or renewing a contract, or executing or preserving an agreement. In light of our reading of the 1977 legislative history, the subsequent 1988 and 1998 legislative history is only important to our analysis to the extent it confirms or conflicts with our initial conclusions about the scope of the statute.

2. *1988 Legislative History*

After the FCPA's enactment, United States business entities and executives experienced difficulty in discerning a clear line between prohibited bribes and permissible facilitating payments.[41] As a result, Congress amended the FCPA in 1988, expressly to clarify its original intent in enacting the statute. Both houses insisted that their proposed amendments only clarified ambiguities "without changing the basic intent or effectiveness of the law."[42]

In this effort to crystallize the scope of the FCPA's prohibitions on bribery, Congress chose to identify carefully two types of payments that are not proscribed by the statute. It expressly excepted payments made to procure "routine governmental action" (again, the grease exception),[43] and it incorporated an affirmative defense for payments that are legal in the country in which they are offered or that constitute bona fide expenditures directly relating to promotion of products or services, or to the execution or performance of a contract with a foreign government or agency.[44]

We agree with the position of the government that these 1988 amendments illustrate an intention by Congress to identify very limited exceptions to the kinds of bribes to which the FCPA does not apply. A brief review of the types of routine governmental actions enumerated by Congress shows how limited Congress wanted to make the grease exceptions. Routine governmental action, for instance, includes "obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country," and "scheduling inspections associated with contract

41. S.Rep. No. 100–85, at 53 (1987) (stating that "the method chosen by Congress in 1977 to accomplish [the task of distinguishing grease payments from bribery] has been difficult to apply in practice").

42. *Id.* at 54; H.R.Rep. No. 100–40, pt. 2, at 77 (1987) (stating that the amendments, particularly the exception for facilitating payments, "will reflect current law and Congressional intent more clearly").

43. 15 U.S.C. §§ 78dd–1(b) & (f)(3)(A). *See supra* note 19 for language of these subsections.

44. 15 U.S.C. § 78dd–1(c). The subsection provides in full:

It shall be an affirmative defense to actions under subsections (a) or (g) of this section that—

(1) the payment, gift, offer, or promise of anything of value that was made, was lawful under the written laws and regulations of the foreign official's, political party's, party official's, or candidate's country; or

(2) the payment, gift, offer, or promise of anything of value that was made, was a reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by or on behalf of a foreign official, party, party official, or candidate and was directly related to—

(A) the promotion, demonstration, or explanation of products or services; or

(B) the execution or performance of a contract with a foreign government or agency thereof. *Id.*

performance or inspections related to transit of goods across country."[45] Therefore, routine governmental action does not include the issuance of *every* official document or *every* inspection, but only (1) documentation that qualifies a party to do business and (2) scheduling an inspection—very narrow categories of largely non-discretionary, ministerial activities performed by mid– or low-level foreign functionaries. In contrast, the FCPA uses broad, general language in prohibiting payments to procure assistance for the payor in obtaining or retaining business, instead of employing similarly detailed language, such as applying the statute only to payments that attempt to secure or renew particular government contracts. Indeed, Congress had the opportunity to adopt narrower language in 1977 from the SEC Report, but chose not to do so.[46]

Defendants argue, nevertheless, that Congress's decision to reject House-proposed amendments to the business nexus element constituted its implicit rejection of such a broad reading of the statute. The House bill proposed new language to explain that payments for "obtaining or retaining business" also includes payments made for the "procurement of legislative, judicial, regulatory, or other action in seeking more favorable treatment by a foreign government."[47] Indeed, defendants assert, the proposed amendment itself shows that Congress understood the business nexus provision to have narrow application; otherwise, there would have been no need to propose amending it.

Contrary to defendants' contention, the decision of Congress to reject this language has no bearing on whether "obtaining or retaining business" includes the conduct at issue here. In explaining Congress's decision not to include this proposed amendment in the business nexus requirement, the Conference Report stated that the "retaining business" language was

> not limited to the renewal of contracts or other business, but also includes a prohibition against corrupt payments related to the execution or performance of contracts or the carrying out of existing business, *such as a payment to a foreign official for the purpose of obtaining more favorable tax treatment*.... The term should not, however, be construed so broadly as to include lobbying or other normal representations to government officials.[48]

At first blush, this statement would seem to resolve the instant dispute in favor of the government; however, the district court interpreted Congress's decision to leave the business nexus requirement unchanged as a determination not to extend the scope of the statute. The court thus declined to defer to the report because, in the court's estimation, the legislative histo-

45. 15 U.S.C. § 78dd–1(f)(3)(A).

46. Defendants argue that Congress intended to maintain the statute's narrow scope by excluding from the routine governmental action exception "any decision by a foreign official whether, or on what terms, to award new business to or to continue business with a particular party...." 15 U.S.C. § 78dd–1(f)(3)(B). We disagree with defendants' contention that the language these amendments indicates a narrow statutory scope. Read in light of Congress's original desire to stamp out foreign bribery run amok, we find that its intention in 1988 to exclude from the grease exception "decision[s] by a foreign official whether, or on what terms ... to continue business with a particular party" replicates the equally capacious language of prohibition in the 1977 legislative history.

47. H.R. Conf. Rep. 100–576, at 918 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1951.

48. H.R. Conf. Rep. No. 100–576, at 918–19 (emphasis added).

ry "consist[ed] of an after-the-fact interpretation of the term 'retaining business' by a subsequent Congress more than ten years after the enactment of the original language."[49]

We agree that, as a general matter, subsequent legislative history about unchanged statutory language would deserve little or no weight in our analysis. The Supreme Court has instructed that "the interpretation given by one Congress (or a committee or Member thereof) to an earlier statute is of little assistance in discerning the meaning of that statute."[50] In this case, moreover, Congress's enactment of subsequent legislation did not include changes to the business nexus requirement itself.

Nevertheless, the Supreme Court has also stated that "[s]ubsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction."[51] And, we have concluded that Congress is "at its most authoritative [when] adding complex and sophisticated amendments to an already complex and sophisticated act."[52] Although in 1988 Congress refused to alter the business nexus requirement itself, it did enact exceptions and defenses to the statute's applicability, both of which the pertinent Conference Report language helps to explain vis-à-vis the statute's overall scope. And it must be remembered that clarifying the scope of the 1977 law was the overarching purpose of Congress in enacting the 1988 amendments.[53] Thus, the legislative history that the district court rejected as irrelevant in fact explains how the 1988 amendments relate to the original scope of the statute and concomitantly to the business nexus element.

First, the Conference Report expresses what is implied by the new affirmative defense for bona fide expenditures for the execution or performance of a contract. The creation of a defense for *bona fide* payments strongly implies that *corrupt*, non-bona-fide payments related to contract execution and performance have always been and remain prohibited. Instead of leaving this prohibition implicit, though, the Conference Report's description of "retaining business" explained that this phrase, and thus the statutory ambit, includes "a prohibition against *corrupt* payments related to the execution or performance of contracts. . . ."[54]

Similarly, in its 1988 statutory description of routine governmental action, Congress stated that this exception *does not* include decisions about "whether, or on what terms . . . to continue business with a particular party,"[55] which must mean, conversely, that decisions that do relate to "continu[ing] business with a particular

49. *Kay*, 200 F.Supp.2d at 685.

50. *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 185, 114 S.Ct. 1439, 128 L.Ed.2d 119 (1994) (citations omitted).

51. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 380–81, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1969).

52. *Mount Sinai Hosp. v. Weinberger*, 517 F.2d 329, 343 (5th Cir.1975).

53. We recognize that the Supreme Court has warned repeatedly that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *Consumer Prod. Safety Comm'n*, 447 U.S. at 117, 100 S.Ct. 2051 (citations omitted). The amendments Congress passed in 1988, however, expressly sought to clarify Congress's intent from 1977. Thus, the views and amendments of Congress in 1988 are necessary to our analysis of the precise scope of the original law.

54. H.R. Conf. Rep. 100–576, at 918 (emphasis added).

55. 15 U.S.C. § 78dd–1(f)(3)(B).

party" *are* covered by, i.e., are not excepted from, the scope of the statute. The Conference Report, in turn, states that "retaining business" means "the carrying out of existing business," thereby simply repeating statutory intent without explaining it.[56] We discern no meaningful distinction between the phrase "continuing business" in the statutory text, and "carrying out of existing business" in the Conference Report.

Third, the Conference Report states that "retaining business" should not be construed so broadly as to include lobbying or "other normal representations to government officials."[57] This statement directly reflects the Conference Committee's decision not to include language from the House bill focusing on legislature and regulatory activity so as to avoid any interpretation that might curb legitimate lobbying or representations intended to influence legislative, judicial, regulatory, or other such action. Thus, like other language of the report, far from being irrelevant to Congress's intentions in 1988, this provides a direct explanation of why Congress elected not to include the newly proposed language.

The remaining contested language in the 1988 Conference Report states that "retaining business" includes—covers—payments such as those made "to a foreign official *for the purpose of obtaining more favorable tax treatment.*"[58] We know that the SEC was concerned specifically with these types of untoward payments in 1977, and that Congress ultimately adopted the more generally-worded prohibition against payments designed to *assist* in obtaining or retaining business. This specific reference in the Conference Report therefore appears to reflect the concerns that initially motivated Congress to enact the FCPA. But even if this language is not dispositive of the question, the rest of the passage does reflect Congress's purpose in passing the 1988 amendments, and therefore deserves weight in our analysis.

Finally, it is inaccurate to suggest, as defendants do, that this report language constituted an attempt to insert by subterfuge a meaning for "retaining business" that Congress had expressly rejected in conference. The only language that Congress chose not to adopt regarding the business nexus requirement concerned payments for primarily legislative, judicial, and regulatory advantages.[59] Corrupt payments "related to the execution or performance of contracts or the carrying out of existing business" have no direct connection with the proposed language on legislative, judicial, and regulatory action, and thus were not part of the proposed amendment.[60]

3. *1998 Legislative History*

In 1998, Congress made its most recent adjustments to the FCPA when the Senate ratified and Congress implemented the Organization of Economic Cooperation and

56. H.R. Conf. Rep. No. 100–576, at 918.

57. *Id.* at 918–19.

58. *Id.* at 918 (emphasis added).

59. We recognize that the House proposal prohibited payments for "procurement of legislative, judicial, regulatory, or *other* action in seeking more favorable treatment by a foreign government." H.R.Rep. No. 100–40, pt. 2, at 75. Applying the *ejusden generis* maxim, we must conclude that by using a term as vague as "other action" directly after the words "legislative, judicial, or regulatory," Congress intended to include only actions quite similar to these types in its amendment, not any other conceivable action (aside from discrete contractual arrangements) that might result in favorable treatment from a foreign government.

60. H.R. Conf. Rep. No. 100–576, at 918.

Development's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the "Convention"). Article 1.1 of the Convention prohibits payments to a foreign public official to induce him to "act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business *or other improper advantage* in the conduct of international business."[61] When Congress amended the language of the FCPA, however, rather than inserting "any improper advantage" immediately following "obtaining or retaining business" within the business nexus requirement (as does the Convention), it chose to add the "improper advantage" provision to the original list of abuses of discretion in consideration for bribes that the statute proscribes. Thus, as amended, the statute now prohibits payments to foreign officials not just to buy any act or decision, and not just to induce the doing or omitting of an official function "to assist ... in obtaining or retaining business for or with, or directing business to, any person,"[62] but also the making of a payment to such a foreign official to secure an "improper advantage" that will assist in obtaining or retaining business.[63]

The district court concluded, and defendants argue on appeal, that merely by adding the "improper advantage" language to the two existing kinds of prohibited acts acquired in consideration for bribes paid, Congress "again declined to amend the 'obtain or retain' business language in the FCPA."[64] In contrast, the government responds that Congress's choice to place the Convention language elsewhere merely shows that Congress already intended for the business nexus requirement to apply broadly, and thus declined to be redundant.

The Convention's broad prohibition of bribery of foreign officials likely includes the types of payments that comprise defendants' alleged conduct. The commentaries to the Convention explain that "'[o]ther improper advantage' refers to something to which the company concerned was not clearly entitled, for example, an operating permit for a factory which fails to meet the statutory requirements."[65] Unlawfully reducing the taxes and customs duties at issue here to a level substantially below that which ARI was legally obligated to pay surely constitutes "something [ARI] was not clearly entitled to," and was thus potentially an "improper advantage" under the Convention.

As we have demonstrated, the 1977 and 1988 legislative history already make clear that the business nexus requirement is not to be interpreted unduly narrowly. We therefore agree with the government that there really was no need for Congress to add "or other improper advantage" to the requirement.[66] In fact, such an amendment might have inadvertently swept grease payments into the statutory ambit—or at least created new confusion as

61. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, art. 1.1, S. Treaty Doc. No. 105–43, 37 I.L.M. 1, 4 (1998) (emphasis added).

62. *See* 15 U.S.C. § 78dd–1(a)(1).

63. *Id.*

64. *Kay*, 200 F.Supp.2d at 686.

65. Commentaries on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 37 I.L.M. at 8 [hereinafter "Commentaries"].

66. Although Congress intended to expand the scope of the FCPA in its implementation of the Convention, such expansion did not clearly implicate the business nexus element. Obviously, Congress added "any improper advantage" to the quid pro quo requirement. Other ways in which Congress intended to expand FCPA coverage included: (1) amending the statute to apply to "any person," instead of the more limited category of issuers

to whether these types of payments were prohibited—even though this category of payments was excluded by Congress in 1977 and remained excluded in 1988; and even though Congress showed no intention of adding this category when adopting its 1998 amendments.[67] That the Convention, which the Senate ratified without reservation and Congress implemented, would also appear to prohibit the types of payments at issue in this case only bolsters our conclusion that the kind of conduct allegedly engaged in by defendants can be violative of the statute.[68]

4. *Summary*

Given the foregoing analysis of the statute's legislative history, we cannot hold as a matter of law that Congress meant to limit the FCPA's applicability to cover only bribes that lead directly to the award or renewal of contracts. Instead, we hold that Congress intended for the FCPA to apply broadly to payments intended to assist the payor, either directly or indirectly, in obtaining or retaining business for some person, and that bribes paid to foreign tax officials to secure illegally reduced customs and tax liability constitute a type of payment that can fall within this broad coverage. In 1977, Congress was motivated to prohibit rampant foreign bribery by domestic business entities, but nevertheless understood the pragmatic need to exclude innocuous grease payments from the scope of its proposals. The FCPA's legislative history instructs that Congress was concerned about both the kind of bribery that

registered under the 1934 Act and domestic concerns; (2) expanding the definition of "foreign official" to include officials of public international organizations; and (3) extending the FCPA to cover "acts of U.S. businesses and nationals in furtherance of unlawful payments that take place wholly outside the United States." S.Rep. No. 105–277, at 2–3.

67. Even though the Commentaries to the Convention also excepted small facilitation payments from its scope, a change in the business nexus requirement to include "other improper advantage" still may have created undue confusion as to whether payments previously allowed were now prohibited by the statute, as the Convention's precise understanding of "facilitating payments" may ultimately differ with Congress's.

68. Indeed, given the United States's ratification and implementation of the Convention without any reservation, understandings or alterations specifically pertaining to its scope, we would find it difficult to interpret the statute as narrowly as the defendants suggest: Such a construction would likely create a conflict with our international treaty obligations, with which we presume Congress meant to comply fully. *See* Restatement (Third) of Foreign Relations Law, § 115, cmt. a (1987) ("It is generally assumed that Congress does not intend to repudiate an international obligation of the United States by nullifying a rule of international law or an international agreement as domestic law, or by making it impossible for the United States to carry out its obligations."); *Boureslan v. Aramco*, 857 F.2d 1014, 1023 (5th Cir.1988) (King, J. dissenting) (recognizing the "presumption that Congress does not intend to violate international law"). We recognize that there may be some variation in scope between the Convention and the FCPA. The FCPA prohibits payments inducing official action that "assist[s] ... in obtaining or retaining business"; the Convention prohibits payments that induce official action "to obtain or retain business or other improper advantage in the conduct of international business." Potential variation exists because it is unclear whether the Convention's "other improper advantage in the conduct of international business" language requires a business nexus to the same extent as does the FCPA. This case, however, does not require us to address potential discrepancies (including whether they exist) between the scope of the Convention and the scope of the statute, i.e., payments that clearly fall outside of the FCPA but clearly fall within the Convention's prohibition or vice versa, because we have already concluded that the type of bribery engaged in by defendants has the potential of violating the statute.

leads to discrete contractual arrangements and the kind that more generally helps a domestic payor obtain or retain business for some person in a foreign country; and that Congress was aware that this type includes illicit payments made to officials to obtain favorable but unlawful tax treatment.

Furthermore, by narrowly defining exceptions and affirmative defenses against a backdrop of broad applicability, Congress reaffirmed its intention for the statute to apply to payments that even indirectly assist in obtaining business or maintaining existing business operations in a foreign country. Finally, Congress's intention to implement the Convention, a treaty that indisputably prohibits any bribes that give an advantage to which a business entity is not fully entitled, further supports our determination of the extent of the FCPA's scope.

Thus, in diametric opposition to the district court, we conclude that bribes paid to foreign officials in consideration for unlawful evasion of customs duties and sales taxes *could* fall within the purview of the FCPA's proscription. We hasten to add, however, that this conduct does not automatically constitute a violation of the FCPA: It still must be shown that the bribery was intended to produce an effect—here, through tax savings—that would "assist in obtaining or retaining business."

D. *Sufficiency of the Indictment*

As in every indictment, the instant indictment's allegations must clearly inform the defense of what it is that the government intends to prove in satisfying each element of the crime, and must enable the defendant to assert double jeopardy and not be subject to prosecution for charges not presented to the grand jury. Here, the question of sufficiency of the factual allegations centers on the business nexus element of the crime, viz., the producing-cause relationship between the substantial avoidance or evasion of duties and taxes and getting or keeping business in Haiti. This, in turn, poses the question, what allegations of the indictment, if any, so inform the defendants of the government's intended proof of such linkage as to be sufficient for mounting a defense?[69] Because the district court determined that the alleged bribes are of a type that can never be covered by the FCPA, that court never reached or addressed the sufficiency of the indictment vis-à-vis the business nexus element. We shall do so now in an effort to assist the district court's proceedings on remand.

We observe as a preliminary matter that this is the kind of case that a relatively few reported opinions have analyzed to determine whether an indictment that sets out the elements of the offense charged *merely by tracking the words of the statute itself,* is insufficient. Most reported opinions that have addressed this issue appear to approve the practice of tracking the statute as long as the words used expressly set out all of the elements necessary to constitute the offense.[70] The cases in

69. *See, e.g., United States v. Richards,* 204 F.3d 177, 192 (5th Cir.2000) (finding that an indictment was sufficient, despite the supposed failure to allege clearly the materiality element of the offense, because the facts alleged "warrant[ed] an inference that the false statements were material") (citation omitted).

70. *See, e.g., United States v. Davis,* 336 F.3d 920, 922–24 (9th Cir.2003); *United States v. Akers,* 215 F.3d 1089, 1101 (10th Cir.2000); *United States v. Monus,* 128 F.3d 376, 388 (6th Cir.1997); *United States v. Cochran,* 17 F.3d 56, 61 (3d Cir.1994); *United States v. Chandler,* 996 F.2d 1073, 1097 (11th Cir.

which an indictment that parrots the statute is held to be insufficient turn on a determination that the factual information that is *not* alleged in the indictment goes to the very *core of criminality* under the statute.

The Supreme Court took this approach in *Russell v. United States,*[71] in which it found indictments defective because the allegations under 2 U.S.C. § 192, which prohibits witnesses before congressional committees from "refus[ing] to answer any question pertinent to the question under inquiry,"[72] failed to identify the "question under inquiry." The Court ruled that the "core of criminality" under the statute was the pertinency to the subject under inquiry of the question a witness refused to answer.[73] The Court stated:

> Where guilt depends so crucially upon such a specific identification of fact, our cases have uniformly held that an indictment must do more than simply repeat the language of the criminal statute.[74]

The Court concluded that the indictments failed this test because, even though they did list the questions that the defendants had refused to answer, they failed totally to specify the topic under inquiry, which was the key to the legality or illegality of the defendants' acts.[75] In short, the defendants faced trial with the "chief issue undefined."[76]

The First Circuit, in *United States v. Murphy,*[77] followed *Russell* to invalidate an indictment that charged the defendant with threatening a particular witness to influence his testimony in an official proceeding. The indictment quoted the statute,[78] and identified the threatened witnesses and the date of the threat.[79] The indictment did not, however, identify any official proceeding. In invalidating the indictment for that omission, the First Circuit concluded that the missing information went to the core of criminality under the statute. Without that information, reasoned the *Murphy* court, the defense did not know what proceeding the grand jury was charging the defendants with attempting to influence.[80]

United States v. Pirro[81] exemplifies the difficulties courts confront with this kind of issue. In that case, the indictment charged violations of Section 7206 of the Internal Revenue Code ("I.R.C."), which makes it a felony for "any person ... [to] [w]illfully make [ ] and subscribe [ ] any [tax] return ... which he does not believe to be true and correct as to every material matter."[82] The allegations were that the defendant, the company president who signed its tax return, failed to report another individual's "ownership interest" in the company on its tax return for a particular year, and also misstated his own own-

1993); *United States v. Young,* 618 F.2d 1281, 1286 (8th Cir.1980).

71. 369 U.S. 749, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962).

72. *Id.* at 752 n. 2, 82 S.Ct. 1038.

73. *Id.* at 764, 82 S.Ct. 1038.

74. *Id.* at 771, 82 S.Ct. 1038.

75. *Id.* at 765–68, 82 S.Ct. 1038.

76. *Id.* at 766, 82 S.Ct. 1038.

77. 762 F.2d 1151 (1st Cir.1985).

78. 18 U.S.C. § 1512(a)(1).

79. *Murphy,* 762 F.2d at 1153.

80. *Id.* at 1154–55 ("[T]he indictment was defective because it did not adequately apprise the defendants of the charges against them.").

81. 212 F.3d 86 (2d Cir.2000).

82. 26 U.S.C. § 7206(1). *See also Pirro,* 212 F.3d at 97.

ership interest in that company on the return.[83] The *Pirro* majority concluded that the indictment was deficient in several respects, including its failure to charge a violation of a known legal right and its failure to allege the essential facts constituting the offense charged. In finding the indictment insufficient, the majority relied on the Supreme Court's opinion in *Russell.*[84] The flaw identified by the *Pirro* majority was the indictment's failure to allege what it was that made the omission from the tax return criminal.[85] The allegation that the "ownership interest" of the chairman was not reported was found insufficient because the term "ownership interest" was *generic,* and no specifics were provided. The statute—I.R.C. § 7206(1)—prohibits an omission only if there is a duty to report.[86] The majority reasoned that because the term "ownership interest" is broader than "share ownership," and there was no duty to report the interest at issue, absent other shareholders, the government's allegation might (or might not) make the tax return incorrect and thus violative of the statute.[87]

The thrust of the vigorous dissent in *Pirro* was that the indictment did allege a crime and did so with sufficient specificity when it alleged that the defendant violated the law by failing to disclose identified ownership interests in the tax return.[88] The dissent emphasized that indictments that do little more than track the language of the statute and state the time and place of the alleged crime in proximate terms are sufficient.[89] In *Pirro,* the indictment provided dates and times, tracked the statute, and alleged all the elements of the offense by tracking the statute. The dissent found that the definition of the offense did not include any "generic term" that required a "descen[t] to particulars," asserting that even without the added information that the defendant wanted, the parties knew the issues.[90] Consequently, the dissent was satisfied that the indictment was sufficient, leaving for trial—not pretrial, on a scant record—the question whether the government could prove its case with sufficient evidence.[91]

[12] Here, the issue can be phrased in a number of ways. In *Russell*-like terms, the issue is whether the alleged *quid pro quo* of bribery-obtained reductions in sales taxes and customs duties has an "intent-to-assist" nexus to obtaining or retaining business in the foreign country. As explained *ad nauseam* in the foregoing analysis of the legislative history of the FCPA, the "assist" nexus is indisputably the element of the crime that distinguishes it from garden-variety bribery on the broad end of the spectrum and bribery to obtain or retain a particular government contract on the narrow end.[92] In terms of the sufficiency of the indictment, however, the question is whether the business nexus element—which in the instant indictment is merely a paraphrase of that part of the statute—goes to the "core of criminality"[93] under the statute and contains generic

83. *Id.* at 87–88.

84. *Id.* at 92–95.

85. *Id.* at 93.

86. *Id.*

87. *Id.* at 93–94.

88. *Id.* at 100–04.

89. *Id.* at 92–93.

90. *Id.* at 93 (quoting *United States v. Cruikshank,* 92 U.S. 542, 23 L.Ed. 588 (1875)).

91. *Id.* at 105.

92. *See supra* at 753–55.

93. *Russell,* 369 U.S. at 764, 82 S.Ct. 1038.

terms, requiring more particularity. Stated differently, the question is whether the lack of detail in that part of the indictment that deals with this one element is more like an absence of detail as to how the crime was committed than a failure to specify what the crime was.

Obviously, an indictment does not have to set out evidence or details of how a crime was committed as long as it gives the defendant notice of what the government is charging.[94] Here, the question is whether the statutory prohibition against a bribe that "assists [the defendant] in obtaining and retaining business" for some person can properly be viewed as containing only "generic" terms, which demand more particularity in the indictment. Without more, the words "assists" and "business" are certainly candidates for classification as generic terms. There are innumerable ways and degrees of assisting; and—as we have seen in conjunction with the FCPA's legislative history—"business" is as broad as it is tall. True, there are many crimes that include nexus elements, such as effects on interstate commerce or use of the mails in connection with a scheme to defraud, in which the nexus element cannot be said to go to the core of criminality. For such crimes, the courts appear to take the approach that those kinds of nexus elements can be alleged without factual detail and still not violate the Fifth or Sixth Amendments.

The line between deficient and sufficient factual detail in an indictment is not a bright one, particularly when, as here, the statute itself does not clearly define the offense. Although the instant indictment does allege in sufficient detail the linkage between the payment of bribes and the tax benefit obtained (*quid pro quo*), it does not detail any "assist" nexus between the tax benefit and getting or keeping business. Like the defendants, we are left to ask *how* the tax benefit was intended to *assist* in obtaining or retaining business, and *what* was the business or business opportunities sought to be obtained or retained? All that is known from the indictment is that the business involves rice imported into Haiti at below-legal tax and custom rates.

Although we recognize that lowering tax and customs payments presumptively increases a company's profit margin by reducing its cost of doing business, it does not follow, *ipso facto*,—as the government contends—that such a result satisfies the statutory business nexus element. Even a modest imagination can hypothesize myriad ways that an unwarranted reduction in duties and taxes in a large-volume rice import operation could *assist* in obtaining or retaining business. For example, it could, as already indicated, so reduce the beneficiary's cost of doing business as to allow the beneficiary to underbid competitors for private commercial contracts, government allocations, and the like; or it could provide the margin of profit needed to fend off potential competition seeking to take business away from the beneficiary; or, it could make the difference between an operating loss and an operating profit, without which the beneficiary could not even stay in business; or it could free up funds to expend on legitimate lobbying or other influence-currying activities to favor the beneficiary's efforts to get, keep, or expand its share of the foreign business. Presumably, there are innumerable other hypothetical examples of how a significant diminution in duties and taxes could assist in getting or keeping particular business in

94. *See, e.g., United States v. Ellender,* 947 F.2d 748 (5th Cir.1991) ("To comply with [Federal Rule of Criminal Procedure] 7(c), an indictment need not provide the evidentiary details of the government's case.") (citations omitted).

Haiti; but that is not to say that such a diminution *always* assists in obtaining or retaining business. There are bound to be circumstances in which such a cost reduction does nothing other than increase the profitability of an already-profitable venture or ensure profitability of some start-up venture. Indeed, if the government is correct that anytime operating costs are reduced the beneficiary of such advantage is assisted in getting or keeping business, the FCPA's language that expresses the necessary element of assisting is obtaining or retaining business would be unnecessary, and thus surplusage—a conclusion that we are forbidden to reach.

If the business nexus element does go to the *core of criminality* of the FCPA, a criminal defendant cannot be left to read the government's mind to determine what existing businesses or future business opportunities the government might, at trial, try to link causally with assistance provided by a lessened customs and tax burden. If business nexus is core, then in addition to alleging at least minimally sufficient facts that, if proved, will meet the other elements of a violation of the FCPA (such as the citizenship of the briber, the identity of the qualified business entity, the particular instrumentalities of foreign and interstate commerce employed, the identity of the foreign country and of the officials to whom the suspect payments are made, and the sought-after unlawful actions taken or not taken by the foreign official in consideration of the bribes), a sufficient FCPA indictment would also have to allege facts that at least minimally put the defense on notice of *what* business transactions or opportunities were purportedly sought to be obtained or retained, and *how* the results of the foreign official's unlawful acts were meant to "assist" in getting or keeping such business. In other words, if the business nexus element goes to the core of the FCPA's criminality, the indictment would have to allege facts that, if proved, would establish an intended causal *assistance* link between the illicit benefit of reduced taxes and duties and the obtaining or retaining of the business venture or activity thus identified.

As noted at the outset of this opinion, the indictment contains no such specific allegations. Except for closely paraphrasing the objective "purpose" language of the statute regarding the aim of the bribe being to produce some conduct by a foreign official, the results of which (*quid pro quo*) will assist in obtaining or retaining foreign business for some person (business nexus), the indictment alleges nothing whatsoever about (1) the nature of the assistance purportedly intended or produced by the lowered taxes, (2) the identity of the particular business or business opportunity the obtaining or retaining of which was being sought, or (3) the way (nexus) such assistance was supposed to help get or keep such business or opportunity.[95] As such, the indictment's sufficiency hinges on a determination whether the business nexus element of the crime is core.[96]

95. The potential lacuna in the instant indictment is distinguishable from the failure of the indictment clearly to allege the element of materiality in *Richards,* in which we found the indictment sufficient because the other facts alleged in it "warrant[ed] an inference that the false statements were material." 204 F.3d at 192. Except for the overbroad, generic reference to the rice business, no combination of facts here alleged in the indictment allow an inference of what business was purportedly obtained or retained or how the illicit tax savings produced by the bribery were intended to assist ARI or RCH in obtaining or retaining it.

96. On appeal, as in the district court, defendants advance alternative bases for holding the indictment insufficient. One such defense was grounded in the rule of lenity in the face

We conclude that, as important to the statute as the business nexus element is, it does not go to the FCPA's core of criminality. When the FCPA is read as a whole, its core of criminality is seen to be bribery of a foreign official to induce him to perform an official duty in a corrupt manner. The business nexus element serves to delimit the scope of the FCPA by eschewing applicability to those bribes of foreign officials that are not intended to assist in getting or keeping business, just as the "grease" provisions eschew applicability of the FCPA to payments to foreign officials to cut through bureaucratic red tape and thereby facilitate matters. Therefore, the indictment's paraphrasing of the FCPA's business nexus element passes the test for sufficiency, despite alleging no details regarding what business is sought or how the results of the bribery are meant to assist, passes the test for sufficiency.

III. CONCLUSION

We cannot credit the district court's *per se* ruling that the fiscal benefits of the maladministration of foreign revenue laws by foreign officials in consideration for illicit payments by United States businessmen or business entities can never come within the scope of the FCPA. Just as bribes to obtain such illicit tax benefits do not *ipso facto* fall outside the scope of the FCPA, however, neither are they *per se* included within its scope. We are satisfied that—for purposes of the statutory provisions criminalizing payments designed to induce foreign officials unlawfully to perform their official duties in *administering* the laws and regulations of their country to produce a result intended to assist in obtaining or retaining business in that country—an unjustified reduction in duties and taxes can, under appropriate circumstances, come within the scope of the statute.

As the district court held the indictment insufficient based on its determination that the kind of bribery charged in the indictment does not come within the scope of the FCPA, that court never reached the question whether the indictment was sufficient as to the business nexus element of the crime, for which the charging instrument merely tracked the statute without alleging any discrete facts whatsoever. As we conclude that the business nexus element of the FCPA does not go to the core of criminality of that statute, we hold that the indictment in this case is sufficient as a matter of law. For the foregoing reasons, therefore, the judgment of the district court dismissing the indictment charging defendants with violations of the FCPA is reversed and the case is remanded for further proceedings consistent herewith.

REVERSED and REMANDED.

APPENDIX A

SUPERSEDING INDICTMENT

The Grand Jury charges that:

GENERAL ALLEGATIONS

1. At all times material to this Indictment, the Foreign Corrupt Practices Act of 1977 (FCPA), as amended, 15 U.S.C. §§ 78dd–1, *et seq.*, was enacted by Congress for the purpose of, among other things, making it unlawful for

of the statute's ambiguity, and another was grounded in the fair-warning requirement of the Due Process Clause in the face of the dearth of case law on the subject. As today we reverse the district court's dismissal of the indictment as insufficient and remand for further proceedings which might include a requirement that the government be more specific regarding the business nexus element, we do not address these alternative propositions. They can, however, be addressed for the first time by the district court on remand.

APPENDIX A—Continued

United States persons, businesses and residents to use the United States mails, or any means or instrumentality of interstate or foreign commerce in furtherance of an offer, promise, authorization, or payment of money or anything of value to a foreign government official for the purpose of obtaining or retaining business for, or directing business to, any person.

2. At all times material to this Indictment:

   a. American Rice, Inc. ("ARI") was a business incorporated under the laws of the State of Texas, and having its principal place of business in Houston, Texas. American Rice, Inc. had a class of securities registered pursuant to Section 15 of the Securities Exchange Act of 1934 (15 U.S.C. § 78*o*) and was required to file reports with the U.S. Securities & Exchange Commission under Section 12 of the Securities Exchange Act (15 U.S.C. § 78*l*). As such, American Rice, Inc. was an "issuer" within the meaning of the Foreign Corrupt Practices Act, 15 U.S.C. § 78dd–1.

   b. Rice Corporation of Haiti ("RCH") was a subsidiary of defendant American Rice, Inc. that was incorporated in the Republic of Haiti. RCH was formed to act as a "service corporation" to represent American Rice, Inc.'s interest in Haiti. At all times prior to September 1999, American Rice, Inc. controlled all of RCH's actions, paid all of RCH's expenses, employed all of RCH's management, retained title to all rice imported by RCH until sold to third parties and consolidated its financial statements with those of American Rice, Inc.

APPENDIX A—Continued

   c. Defendant DAVID KAY was an American citizen and a vice-president for marketing of American Rice, Inc. who was responsible for supervising sales and marketing in Haiti. As such, KAY was an officer of an "issuer" and a "domestic concern" within the meaning of the Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd–1, 78dd–2.

   d. Defendant DOUGLAS MURPHY was an American citizen and president of American Rice, Inc. As such, MURPHY was an officer of an "issuer" and a "domestic concern" within the meaning of the Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd–1, 78dd–2.

3. Beginning in or about 1995 and continuing to in or about August 1999, defendants KAY and MURPHY and other employees and officers of American Rice, Inc. paid bribes and authorized the payment of bribes to induce customs officials in the Republic of Haiti to accept bills of lading and other documents which intentionally understated the true amount of rice that ARI shipped to Haiti for import, thus reducing the customs duties owed by American Rice, Inc. and RCH to the Haitian government.

4. In addition, beginning in or about 1998 and continuing to in or about August 1999, defendant KAY and other employees and officers of American Rice, Inc. paid and authorized additional bribes to officials of other Haitian agencies to accept the false import documents and other documents which understated the true amount of rice being imported into and sold in Haiti, thereby reducing the amount of sales taxes paid by RCH to the Haitian government.

APPENDIX A—Continued

5. In furtherance of these bribes, defendant KAY directed employees of American Rice, Inc. to prepare two sets of shipping documents for each shipment of rice to Haiti, one that accurately reflected and another that falsely represented the weight and value of the rice being exported to Haiti.
6. In furtherance of these bribes, defendants KAY and MURPHY, acting on his own behalf and as an agent of American Rice, Inc., agreed to pay and authorized the payment of bribes, calculated as a percentage of the value of the rice not reported on the false documents or in the form of a monthly retainer, to customs and tax officials of the Haitian government to induce these officials to accept the false documentation and to assess significantly lower customs duties and sales taxes than American Rice, Inc. would otherwise have been required to pay.
7. In furtherance of these bribes, defendants KAY and MURPHY authorized employees of American Rice, Inc. to withdraw funds from American Rice, Inc. bank accounts and to pay these funds to officials of the Haitian government, either directly or through intermediary brokers.
8. As a result of the bribes and the Haitian officials' acceptance of the false shipping documents, American Rice, Inc. reported only approximately 66% of the rice it actually imported into Haiti between January 1998 and August 1999 and thereby significantly reduced the amount of customs duties it was required to pay to the Haitian government.
9. As a further result of these bribes, American Rice, Inc., using official Haitian Customs documents reflecting the amounts reported on the false shipping documents, reported only approximately 66% of the rice it sold in Haiti and thereby significantly reduced the amount of sales taxes it was required to pay to the Haitian government.

APPENDIX A—Continued

COUNTS ONE—TWELVE

FOREIGN CORRUPT PRACTICES ACT (15 U.S.C. § 78dd-1)

10. The grand jury incorporates by reference the allegations set forth in paragraphs 1–9 above and charges that:
11. On or about the dates set forth below, in the Southern District of Texas and elsewhere, defendants DAVID KAY and DOUGLAS MURPHY, domestic concerns and officers of American Rice, Inc., an "issuer" within the meaning of the Foreign Corrupt Practices Act, did use and cause to be used instrumentalities of interstate and foreign commerce, to wit, an overnight express service, facsimile transmissions, and an ocean-going barge, which were used to transport and transmit false shipping documents, corruptly in furtherance of an offer, payment, promise to pay and authorization of the payment of money to foreign officials, to wit, customs officials of the Government of the Republic of Haiti, directly and through third persons, for purposes of influencing acts and decisions of such foreign officials in their official capacities, inducing such foreign officials to do and omit to do acts in violation of their lawful duty, and to obtain an improper advantage, in order to assist American Rice, Inc. in obtaining and retaining business for, and directing business to, American Rice, Inc. and Rice Corporation of Haiti.

APPENDIX A—Continued

COUNT	DATE	BARGE
1	January 6, 1998	*LaurieKristie*
2	February 20, 1998	*Balsa 51*
3	April 20, 1998	*LaurieKristie*
4	June 4, 1998	*LaurieKristie*
5	June 27, 1998	*LaurieKristie*
6	October 7, 1998	*LaurieKristie*
7	December 7, 1998	*LaurieKristie*
8	February 16, 1999	*LaurieKristie*
9	April 14, 1999	*LaurieKristie*
10	May 27, 1999	*LaurieKristie*
11	June 30, 1999	*LaurieKristie*
12	August 3, 1999	*Blumarlin*

All in violation of Title 15, United States Code, Sections 78dd–1(a) and 78dd–2(a), and Title 18, United States Code, Section 2.

John Henry PELT; Janice Pelt, Plaintiffs–Counter Defendants–Appellants,

v.

U.S. BANK TRUST NATIONAL ASSOCIATION, formerly known as First Trust Bank National Association, as Trustee under the Pooling and Service Agreement, New Century Home Equity Loan Trust, Series 1998–NC7, Defendant–Counter Claimant–Appellee,

New Century Mortgage Corporation, Defendant–Appellee.

No. 03–10206.

United States Court of Appeals, Fifth Circuit.

Feb. 9, 2004.

Background: Borrowers sued lender and current holder of home equity loan, seeking declaration that defendants violated various provisions of the homestead section of the Texas Constitution in connection with the origination of the loan. After jury trial, the United States District Court for the Northern District of Texas, Sam A. Lindsay, J., 2003 WL 193468, entered judgment in favor of defendants, and plaintiffs appealed.

Holdings: The Court of Appeals, King, Chief Judge, held that:

(1) the district court did not err when it instructed the jury that Texas law does not require lenders to provide borrowers with "a signed copy" of each document that borrowers sign at closing, and

(2) the district court, by its supplemental jury instruction, did not ask the jury to decide a question of law.

Affirmed.

1. Federal Courts ⇐763.1, 908.1

Court of Appeals reviews a district court's jury instructions under a two-prong standard of review: first, the challenger must demonstrate that the charge as a whole creates substantial and ineradicable doubt whether the jury has been properly guided in its deliberations, and second, even if the jury instructions were erroneous, the Court of Appeals will not reverse if it determines, based upon the entire record, that the challenged instruction could not have affected the outcome of the case.