[redacted]

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
Case No. 4:01-cr-00914-2

REPLY BRIEF FOR APPELLANT DOUGLAS MURPHY

Amy Howe
Kevin K. Russell
HOWE & RUSSELL, P.C.
4607 Asbury Pl. NW
Washington, DC 20016
(202) 237-7543

Thomas C. Goldstein
Paul W. Butler
AKIN, GUMP, STRAUSS,
HAUER & FELD LLP
1333 New Hampshire Ave., NW
Washington, DC 20036
(202) 887-4060

Counsel for Douglas Murphy

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-20606

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
Case No. 4:01-cr-00914-2

REPLY BRIEF FOR APPELLANT DOUGLAS MURPHY

Defendant Douglas Murphy files this reply brief in response to the Brief of the United States in this action. Defendant Murphy also adopts and incorporates by reference the arguments made by co-defendant David Kay in his reply brief.

I. The Government Failed To Plead Or Present Sufficient Evidence To Satisfy The Interstate Commerce Element Of An FCPA Offense.

A. Standard of Review

The Government does not dispute that Defendants made a timely objection to the sufficiency of the evidence to support the interstate commerce element of their FCPA convictions through their post-trial Rule 29 motion. Govt. Br. 48; *see also* R.E. Tab 11 (Order ruling on Defendants' Rule 29 Motion). The Government

nonetheless inexplicably asserts that although the motion was timely made, the denial of the motion is subject to plain error review because Defendants did not object to the portion of the *jury instructions* relating to the interstate commerce element. Govt. Br. 49.[1] This, the Government says, makes the sufficiency of the evidence objection "in effect," an unpreserved "challenge to the jury instructions." *Id.* Tellingly, the Government was unable to find a single case to cite for this extraordinary proposition.

The sufficiency of the evidence to support a conviction is a question entirely distinct from the adequacy of the jury instructions. A sufficiency of the evidence objection requires the court to determine "whether the evidence, when reviewed in the light most favorable to the government with all reasonable inferences and credibility choices made in support of a conviction, allows a rational fact finder to find every element of the offense beyond a reasonable doubt." *United States v. Harris*, 293 F.3d 863, 869 (5th Cir. 2002) (citation omitted). If the evidence is sufficient, it makes no difference whether the jury was improperly instructed – the Rule 29 motion must be denied. *See, e.g., United States v. Kozminski*, 487 U.S. 931, 953 (1988). Conversely, even if the jury instructions are impeccable, the conviction must be reversed if there is insufficient evidence to support the jury

---

[1] The Government acknowledges that Defendants made a timely objection to the sufficiency of the indictment in the trial court and that the sufficiency of the indictment therefore is subject to *de novo* review. Govt. Br. 48-49.

verdict. *See Harris*, 293 F.3d at 869. By the time the instructions are read to the jury, the Government has put on all the evidence it will be allowed to present. As a result, no amount of instruction can save a prosecution in which the Government has simply failed to put on evidence supporting an essential element of the offense. Accordingly, the denial of Defendants' Rule 29 motion is subject to *de novo* review. *See United States v. Payne*, 99 F.3d 1273, 1278 (5th Cir. 1996).

B. The Government Misconstrued The Interstate Commerce Element Of The FCPA.

The Government acknowledges that the indictment and the evidence for conviction were sufficient only if, as a matter of law, the transmission of the false shipping documents in this case constituted the "use of ... [an] instrumentality of interstate commerce ... in furtherance of an offer, payment, promise to pay, or authorization of the payment" of a bribe. 15 U.S.C. § 78dd-1(a). In particular, the disputed question is whether the use of instrumentalities to transmit those documents was "in furtherance" of the bribe within the meaning of the Act.

The Government seems to acknowledge that the transmission of the shipping documents did not "further" the bribe in the traditional sense of assisting Defendants in making the unlawful payment. That is, the instrumentalities were not used in planning the bribe, communicating the offer to the customs officials, coordinating the payment, or actually transmitting the money to the officials. Instead, the purpose of the bribe was to 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.

The Government nonetheless asserts that the shipment of the documents was "in furtherance" of the bribes "because defendants would not have authorized the bribes, and the ARI employees in Haiti would not have paid the bribes, unless the Haitian officials accepted [the documents] for processing." Govt. Br. 50. That interpretation, however, inverts the "in furtherance" requirement and gives the statute a breadth Congress did not intend.

Under the Government's view, a defendant who pays a bribe to facilitate acceptance of false shipping documents commits a new offense every time the documents are shipped and accepted thereafter, even if the bribe was consummated long before any of the documents were shipped. That is because, the Government says, without the *quo* (the transportation and acceptance of the documents) there would have been no *quid* (the bribe). But that view of the law entirely eliminates the requirement that the use of an instrumentality must be in furtherance of the *bribe*, not simply in furtherance of the *scheme* (as Congress defined the offense under the mail fraud statute, 18 U.S.C. § 1341) or in furtherance of the activities made possible by the bribe. Under the statute as written, the instrumentality must be in furtherance of the *quid*, not the *quo*. And it is impossible to say that an activity is "in furtherance of" a bribe when the bribe has already been

consummated, in the same way that conduct cannot constitute an act in furtherance of a conspiracy whose objective has already been achieved. *Cf. Grunewald v. United States*, 353 U.S. 391, 396-97 (1957).

While the Government disclaims that its interpretation gives expansive breadth to the statute, there is no avoiding that conclusion. Under the Government's view, for example, it makes no difference how many bribes were paid in this or any other case. Take, for example, a case in which a defendant used the mail to pay a single bribe to secure a contract with a foreign government to supply computers at an inflated price. Under the logic of the Government's argument in this case, every time an instrumentality is used to ship a computer – the acceptance and purchase of which was made possible only because of a bribe – there is a new violation of the Act. That is, the defendant would not have authorized the bribe unless the officials had agreed to accept each computer shipment. The shipment, therefore, "promotes or advances the payment of the bribe" in the same way as in this case – without the bribe there would be no acceptance of the shipment and without the agreement to accept the shipment there would be no bribe. But if that relationship suffices to establish a violation of the FCPA, a single bribe could lead to countless violations, each with a possible five-year sentence, long after the bribe has been paid.

The more natural reading of the "in furtherance" requirement is that an instrumentality of interstate commerce must be used in planning, communication, or transmission of the bribe. As Defendants have pointed out, and the Government ignores, when Congress has intended a broader meaning of "in furtherance," it has made that intention clear in the statute. *See* Murphy Br. 10 (pointing to mail fraud statute, 18 U.S.C. § 1341, which criminalizes the use of the mails "for the purpose of executing [a] scheme or artifice" to defraud).

The Government responds that Defendants' argument amounts to insisting that "the bribe itself must be transmitted through interstate facilities," an interpretation the Government argues would read "in furtherance" out of the statute and conflicts with the legislative history. Govt. Br. 51. This misconstrues Defendants' argument. Defendants have been clear that the Act prohibits not only using instrumentalities to transmit a bribe but also criminalizes using instrumentalities in furtherance of the payment of the bribe in various other ways, including, for example, assisting in planning the bribery or communicating the offer of payment. That interpretation is entirely consistent with the portions of the legislative history indicating that Congress was concerned that the statute not simply criminalize the use of instrumentalities for the payment of a bribe. *Contra* Govt. Br. 52-54. At the same time, Defendants' view of the Act is consistent with Congress's specific determination that criminal liability attaches not simply when

instrumentalities are used in the course of a bribery scheme, but only when they are used "in furtherance of *making the corrupt payment*." H.R. Rep. No. 94-831 at 12 (emphasis added).[2]

The Government's present interpretation is not only inconsistent with the ordinary meaning of the words used in the statute, but, as far as Defendants can discern, entirely unprecedented. The Government fails to point to any case in which a court has accepted its expansive view of the Act's jurisdictional element and, indeed, does not even cite to any example in which the Government has used its present theory in charging a defendant under the Act. Instead, as far as Defendants can tell, the Government has heretofore given the statute its ordinary meaning and charged defendants based on uses of instrumentalities that facilitated the planning, communication or payment of a bribe. *See, e.g., United States v. Lockheed*, No. CR.A. 194CR226MHS, 1995 WL 17064259, at *3-*4 (N.D. Ga., Jan. 9, 1995) (one count per wire transfer used to transmit bribe); *United States v.*

[2] In any case, the Government may not resort to the legislative history to support a broader reading of a criminal statute than the ordinary meaning of the Act's language would suggest. *See Hughey v. United States*, 495 U.S. 411, 422 (1990) (holding that "longstanding principles of lenity, which demand resolution of ambiguities in criminal statutes in favor of the defendant, preclude ... resolution of [any] ambiguity against [a criminal defendant] on the basis of general declarations of policy in the statute and legislative history"); *Crandon v. United States*, 494 U.S. 152, 160 (1990) ("Because construction of a criminal statute must be guided by the need for fair warning, it is rare that legislative history or statutory policies will support a construction of a statute broader than that clearly warranted by the text."). Thus, even if the Government's interpretation were a plausible construction of the statutory language, and even if it were consistent with the legislative history, this Court would nonetheless be required to "resolv[e] [any] ambiguity in a criminal statute as to apply it only to conduct *clearly* covered." *United States v. Lanier*, 520 U.S. 259, 266 (1997) (emphasis added).

Young & Rubicam, Inc., 741 F.Supp. 334, 336 (D. Conn. 1990) (charging "conspiracy to use the mails and other instrumentalities of interstate and foreign commerce to pay money to, or give things of value to [officials] to influence them to use their positions and/or influence with the Jamaica Tourist Board ('JTB') to obtain and retain Y & R as their advertising agency ...."). Nor has the Government pointed to any indication that it has ever expressed its novel view of the statute through any of the mechanisms Congress created to allow the Attorney General to give fair warning to the public of his interpretation of the Act. *See* 15 U.S.C. § 78dd-1(d)-(e).

Creativity and innovation may be virtues in many fields, but not in the interpretation of criminal statutes. The Government's misconstruction of the FCPA's interstate commerce clause element led to an indictment that alleged, and a prosecution that proved, no crime. The convictions must therefore be reversed.

II. The District Court Erred In Excluding The Haitian Tax Documents.

Even if this Court concludes that the Government otherwise alleged and proved a violation of the FCPA, it should nonetheless reverse the convictions and order a new trial because the trial court precluded Defendants from presenting critical evidence that the taxes the Government alleged they paid bribes to avoid were, in fact, largely paid.

A. Standard of Review

The Government errs in asserting that Defendants failed to preserve their objection to the exclusion of the Haitian tax documents because those excluded documents were not made a part of the trial record. Under Fed. R. Evid. 103(a)(2), an objection is preserved so long as "the substance of the evidence *was made known* to the court by offer or was apparent from the context within which questions were asked" (emphasis added). The Government does not contest that Defendants made known the substance of the evidence to the district court – indeed, the Government acknowledges that "defense counsel made oral representations about what the excluded documents showed, and the district court examined the foreign certification before ruling." Govt. Br. 72. The Government likewise acknowledges that its objection, and the district court's ruling, did not turn in any way on the content of the documents, but rather on the Government's assertion that they were not validly authenticated under 18 U.S.C. § 3505. Govt. Br. 73.

Nothing in Rule 103(a)(2) requires a defendant to ensure that an excluded document is included in the record in order to preserve the objection to the exclusion for appeal. And, in fact, the Government is unable to find any authority so holding. The only case the Government cites, *James v. Bell Helicopter Co.*, 715 F.2d 166 (5th Cir. 1983), directly undermines its position. In that case, the district

court excluded certain test results from evidence. This Court held that the plaintiff had failed to preserve its objection to that error not because it failed to include the documents in the record, but rather because it "made *no* offers of proof in regard to these tests." *Id.* at 175 (emphasis added). The plaintiff argued that it had given an adequate oral description of the test results. *Id.* Rather than holding that an oral description was insufficient as a matter of law, this Court rejected the plaintiff's argument on the ground that the plaintiff's "statements about the excluded evidence are so general as to be meaningless." *Id.* In this case, the Government does not argue in this Court that the oral description of the tax documents was too general. Nor did the Government raise that objection at trial, when Defendants could have addressed any such complaint with further description of the documents or a request to include the documents themselves in the record.

No doubt, it may be better practice to ask the trial court to include excluded documents in the record, at least when the nature of the objection and the court's ruling depends in some way on the contents of exhibits, a point made in the treatises cited by the Government. *See* Govt. Br. 73 (citing 1 Mueller & Kirkpatrick, FEDERAL EVIDENCE § 14, at 76 (2d ed. 1994); 21 Graham & Wright, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5040.3, at 905 (2d ed. 2005)). But none of the authorities cited by the Government state, or even suggest, that failure to follow that practice results in the forfeiture of any objection to the

document's exclusion. *See* Mueller & Kirkpatrick, *supra*, § 14 (proponent "*should* mark it as an exhibit and lodge it with the clerk") (emphasis added); Graham & Wright, *supra*, § 5040.3 ("An offer of proof can be made 'of record' in many different ways but Rule 103 does not prescribe any particular method for doing this.").

In this case, Defendants' proffer adequately informed the trial judge and this Court of the substance of the evidence to be introduced for purposes of evaluating the only challenge to their admissibility at issue on this appeal (namely, whether they were duly authenticated under 18 U.S.C. § 3505). Accordingly, the trial court's exclusion of the evidence must be reviewed for abuse of discretion, not plain error. *See United States v. Garcia Abrego*, 141 F.3d 142, 178 (5th Cir. 1998).

B. The Exclusion Was Erroneous.

The Government argues first that the documents were properly excluded because, it claims, it was not provided sufficient advance notice of their planned introduction. Govt. Br. 74. The Government acknowledges that this Court held, in *United States v. Garcia Abrego*, that the "plain language of § 3505 does not make compliance with the notice requirement a prerequisite to the admissibility of evidence under the statute." The Government nonetheless persists in claiming that the opposite is true here, because the nature of the non-compliance in this case (allegedly, providing no written notice at all) was different than the nature of the

non-compliance in *Garcia Abrego* (delay of more than two years). But that distinction makes no difference. This Court held that the notice requirement of Section 3505(b) was not a condition for admission plain and simple, explaining that the statute provided express criteria for admissibility in subsection (a), which the Court declined to supplement by reference to subsection (b). *Id.* Although this Court did not decide whether a showing of prejudice might lead to a different conclusion, *id.* at 178 n.26, the answer to that question is plain on the rationale of the Court's decision. Congress knew how to describe conditions for admissibility, it did so expressly in subsection (a), and did not include compliance with the timely notice requirement. The courts are not free to rewrite the statute to conform to a different view of what the conditions for admissibility ought to be.

In any case, the Government is wrong in implying (Govt. Br. 74-75) that it was provided no notice, and that the delay was prejudicial. All the statute requires is that "a party intending to offer in evidence under this section ... shall provide written notice of that intention to each other party." 18 U.S.C. § 3505(b). The Government acknowledges that it received the documents themselves, which it fully understood were being provided because Defendants intended to introduce them at trial. Govt. Br. 74-75. That submission suffices as a "written notice" of Defendants' intention to introduce the documents and, indeed, provided the Government far more information about the planned submission (*i.e.*, the contents

of the documents themselves, rather than simply notice of the intention to submit documents) than it was entitled to under the statute.

Nor did the Government demonstrate that it was prejudiced by any delay in notification. While it asserts that it "did not have 'a chance to test'" the certification and the underlying documents at all, *id.* 75, the Government did not ask the district court for a continuance or to delay introduction of the documents until later in the trial in order to permit the Government time to review the documents and the certification. Given the critical importance of the documents to the defense, either option would have been a far better accommodation of interests than the complete exclusion of the documents.

Second, the Government argues that exclusion of the evidence was proper becaue the certification was unreliable. *Id.* 75-76. Defendant Murphy has already addressed that objection in his opening brief (Murphy Br. 18-21), to which the Government has offered no response other than to reiterate its prior assertions.[3] It is, however, worth noting that the Government's defense of the trial court's decision is premised entirely on facts and evaluative judgments that, for all the record discloses, the district court never actually made. The district court never

---

[3] Particularly inexplicable is the Government's continued insistence that the fact that the documents were duplicates provided grounds for their exclusion, even though the statute expressly contemplates certification of copies so long as the certification makes clear that the document is a duplicate. *See* 18 U.S.C. § 3505(a)(1)(D).

stated that it found the certification unreliable. It may, in fact, be that the trial court rested its decision entirely on the legally erroneous conclusion that the delay in providing notice to the Government supported exclusion, without evaluating – much less accepting – the Government's assertion that the certification was unreliable. If that were true, the fact that the trial court failed to give any explanation for its decision – either at trial or even after the decision was singled out in post-trial briefing as one of a handful of alleged errors warranting a new trial – should not insulate the district court's legal determination from appropriate appellate review. Thus, this Court should, at the very least, remand the case with instructions to the district court to explain the basis of its decision. *See, e.g.*, *United States v. Johnson*, 970 F.2d 907, 912, 916 (D.C. Cir. 1992) (remanding case to the District Court to state the basis for its decision to exclude alibi witnesses and articulate its application of legal test); *United States v. King*, 222 F.3d 1280, 1283 n.2 (10th Cir. 2000) (where "the record from the district court proceedings 'is insufficiently developed regarding the suppression issue' to allow this court to resolve an appeal, a remand for further factual findings is the appropriate remedy" (citation omitted)).

C. The Error Requires Reversal.

The Government does not argue that the exclusion of the tax documents was harmless, but argues instead solely that Defendants cannot satisfy the requirements

for relief on plain error review. *See* Govt. Br. 76. Accordingly, if the Court concludes that Defendants preserved their objection (so that plain error does not apply) and that the exclusion was erroneous, it must reverse the convictions and remand for a new trial.

In any event, the exclusion would require reversal even if plain error review applied. As described above and in Defendant Murphy's prior brief, the certification met each of the statutory criteria for admission of a foreign record. The Government has never offered any basis to dispute Defendants' proffer that the records would show that much of the taxes alleged not to have been paid as a result of the alleged bribes were in fact paid. Instead, the Government simply chose to object to the evidence on the grounds of authentication. Nor does the Government offer any real reason to doubt that evidence demonstrating payment of the taxes alleged to have been avoided would have had a dramatic effect on the outcome of the district court proceedings, especially with respect to the sentences, which were based in large part on the amount of the benefit alleged to have been obtained through the FCPA violations. In fact, after the documents were excluded, Defendants had no reasonable basis for contesting the Government's calculation of the amount of the benefit and, accordingly, stipulated to the calculation for

sentencing purposes.[4] Finally, the Government suggests (Govt. Br. 78) that Defendants might have been able to overcome the trial court's evidentiary ruling by "attempt[ing] to clarify the circumstances surrounding the certification for the district court" by, for example, "submitting evidence to support their claims that RCH was still a valid company and that Michael LeGros was the chairman." But Defendants had no reason to think that any such effort would have persuaded the trial court to change its order – particularly since the court gave no ground to believe that these facts actually affected its decision, and given that the Government articulated no basis for its groundless assertions that RCH was no longer operational and that LeGros was not its chairman (a failure it repeats in its brief to this Court).

Accordingly, under any standard of review, the erroneous exclusion of the proffered tax documents requires reversal and remand for a new trial.

III. The Trial Court Committed Reversible Error In Refusing To Give The Tendered Good Faith Instruction For The Obstruction Of Justice Charge.

As explained in Defendant Kay's briefs, the district court erred in rejecting Defendants' request for a good faith instruction with respect to the FCPA-related

---

[4] While the Government asserts, without citation to authority, that the stipulation automatically precludes correction of any sentencing-related effects of an erroneous exclusion of documents, it does not dispute that the reason Defendants entered into the stipulation was because they were forbidden from introducing the tax documents that would have supported a different amount. *See* Govt. Br. 78 n.23.

counts. The court likewise erred in refusing to give a good faith instruction for Defendant Murphy's obstruction charge. The Government's arguments to the contrary are meritless.

A. Standard of Review

The Government errs initially in asserting that plain error review applies because Defendant Murphy failed to make an adequate request for a good faith instruction at trial. The Government does not dispute that Defendants proffered a detailed written good faith instruction on the FCPA charges. *See* R.E. Tab 17, at 36. Nor does the Government dispute that the parties and the trial court discussed that charge at length during the charge conference. And the Government acknowledges that when the court denied the request to give that instruction for the FCPA charges, Defendant Murphy requested the court to at least provide the instruction for the obstruction of justice charge. Govt. Br. 42. The Government nonetheless complains that the request was insufficiently specific to preserve the objection. This is incorrect.

It is true that after the trial court rejected the good faith instruction for the FCPA charge, it declined to permit extensive discussion of whether a good faith instruction should nonetheless be available for the obstruction charge.[5] But when,

---

[5] The exchange occurs at 8 Tr. 196-97:

as in this case, a trial court declines the opportunity to hear argument on an objection to a jury charge by summarily denying a proffered instruction, the defendant does not lose the right to appeal the objection by respecting the court's determination to move on. *See, e.g., United States v. Eiland*, 741 F.2d 738, 742 (5th Cir. 1984)[6]; *United States v. Bernal*, 814 F.2d 175, 182-83 (5th Cir. 1987) (objection preserved where "the record suggests that the defendant was not afforded the opportunity to explain his objection fully" because the court "summarily refused instructions offered by the defendants, cutting off [the objections] in midsentence.").

Defense: But if – if the Court is not going to give a good faith instruction on the FCPA – and I'm sorry I didn't ask for it in the written materials, but I thought we were going to get one [on the FCPA charge] -- I would request one in this one.

Court: In where?

Defense: For the obstruction of justice.

Court: Denied. Denied. Objection, if any, is overruled. It goes in as it is tendered by the Government.

[6] In *Eiland*, this Court found a colloquy similar to the one in this case sufficient to preserve an objection:

The Court: Defendant have any objections to the charge?

[Defense]: May I have a minute, Your Honor?

The Court: All right.

[Defense]: My only objection, Your Honor, would be that there is nothing included in here on failure to testify by the defendant.

The Court: Well, I told them several times that the defendant is not required to prove his innocence, doesn't have to produce any evidence at all. I think that is sufficient.

[Defense]: Yes, Sir.

The Court: So [I will] overrule that objection.

Id. at 742 n.1.

In this case, the trial court was fully aware of the nature of the charge Defendant Murphy was requesting because Murphy simply asked to have the substance of the FCPA good faith charge (discussed at length and submitted in writing) made applicable to the obstruction charge. The court's summary rejection of the request does not serve to limit this Court's review of that decision on appeal.

B. The Court Erred In Refusing The Proffered Good Faith Instruction.

The Government acknowledges that in *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005), the Supreme Court held that the obstruction of justice offense in 18 U.S.C. § 1512(b) precludes conviction of a defendant who "honestly and sincerely believed that its conduct was lawful." Govt. Br. 45 (quoting *Andersen*, 544 U.S. at 706). It cannot seriously be contested, therefore, that the good faith instruction requested by Defendant Murphy correctly states the law with respect to obstruction of justice under Section 1512(b) , the provision at issue in *Andersen*. There is no basis for a different rule under the related obstruction of justice provision, Section 1505, at issue in this case. Indeed, the Government acknowledges that it argued in *Andersen* that both provisions have the same *mens rea* requirement. Govt. Br. 45 n.14. The Government nonetheless now takes the position that the intent elements are in fact different and that Defendant Murphy may be convicted of obstruction of justice under Section 1505 even if he acted in good faith in responding to the SEC inquiry, honestly and sincerely believing that

his conduct during those interactions was lawful. Govt. Br. 44-45.[7] That view of the statute is mistaken.

The Government offers no reason why Congress would have intended such dramatically different conceptions of obstruction of justice under Sections 1505 and 1512(b). It nonetheless insists that Congress must have intended to punish good faith responses to government inquiries under Section 1505, even if it intended to preclude prosecution for such behavior under Section 1512(b). For this strange proposition, the Government points (Govt. Br. 45) to the fact that Section 1512(b) requires proof that the defendant "knowingly ... corruptly persuad[ed] another person" to withhold documents, whereas Section 1505 punishes a defendant who "corruptly ... obstructs" an investigation. But the Government offers no reason why this distinction should be read to signal an intent to criminally punish good faith acts that have the effect of obstructing a government proceeding. Indeed, whatever the normal definition of "corruptly" in other contexts, it is impossible to conceive of any conception of "corrupt obstruction of justice" that punishes good faith conduct.

---

[7] The fact that *Arthur Andersen* involved review of a jury instruction defining the *mens rea* requirement under the statute, rather than a separate good faith instruction, is entirely irrelevant. *Contra* Govt. Br. 45. As the Government notes (Govt. Br. 44), it makes no difference whether the essence of the offense is described through a definition of the *mens rea* elements or through a separate good faith instruction, so long as the jury instructions read as a whole properly convey the requirements of the offense. Accordingly, the question addressed in *Arthur Andersen* is the same question at issue here – whether the obstruction offense at issue permits the conviction of a defendant who acted in the good faith belief that his conduct was lawful.

C. The Error Requires Reversal.

Again, the Government does not attempt to meet the burden of establishing that the denial of the good faith instruction was harmless. Instead, the Government rests its defense on the assertion that plain error review applies and is not satisfied. Govt. Br. 46. Accordingly, if this Court determines that there was preserved error in this case, reversal is required.

IV. Murphy's Sentence Was Improperly Enhanced Based On A Legal Misconstruction Of The Abuse Of Trust Guideline.

The Government's attempts to defend the application of the abuse of trust enhancement, U.S.S.G. § 3B1.3, to Defendant Murphy's sentence also fail.

A. Defendant Murphy Did Not "Abuse A Position Of Public Or Private Trust" In The Commission Of The Offenses.

The Government argues that the abuse of trust enhancement under Section 3B1.3 applies whenever a corporate officer uses his position within the company to facilitate a crime, reasoning that the corporation and its shareholders constitute "victims" of the crime, even when the crime itself enhanced the profitability of the company to the benefit of the shareholders.[8] There is no authority to support this

[8] The Government points out that this Court has not always been precise in stating the standard of review of § 3B1.3 enhancements, *see* Govt. Br. 80, but acknowledges that in *United States v. Sudeen*, 434 F.3d 384, 391 n.19 (5th Cir. 2005), this Court held that the question whether a defendant occupies a "position of trust" within the meaning of the provision is a question of law that is reviewed *de novo*. *See* Govt. Br. 81 n.24. The question presented here – whether a corporate officer "abuse[s] a position of ... private trust," U.S.S.G. § 3B1.3, whenever he uses his corporate authority to commit a crime – is likewise a pure question of law that should be reviewed *de novo*.

position, which would expand the enhancement far beyond its intended scope, subjecting virtually every white collar defendant to an abuse of trust enhancement.

The Government does not contest that the general rule in the circuits is that Section 3B1.3 applies only when the defendant held and abused a position of trust vis-à-vis the victim of the crime. Murphy Br. 29 (collecting cases). Nor does the Government assert that this Court has ever held to the contrary. Govt. Br. 80. The standard interpretation of Section 3B1.3 is correct – the enhancement does not apply whenever a defendant has "*used* a position of trust"; the Government must show that the position of trust was "abused." And the most natural understanding of an "abuse" of trust requires that the defendant must have taken advantage of the person placing trust in him.

The Government nonetheless argues that a corporation and its shareholders should be considered the "victims" of any crime committed by its officers, even if the crime is directed toward some outside entity for the purpose of enhancing the profitability of the company. None of the cases the Government cites (Govt. Br. 81) adopts that position. In *United States v. Cruz*, 317 F.3d 763 (7th Cir. 2003), an employee forged company checks and used the money for her own personal use, making her employer the direct victim of the crime in a very traditional sense. In *United States v. Buck*, 324 F.3d 786 (5th Cir. 2003), the federal government gave grants to a nonprofit, the Congressional Hunger Center (CHC), which gave

subgrants to another nonprofit, the Mississippi Action for Community Education (MACE). An officer of MACE then misappropriated the funds for non-approved uses and filed false reports to CHC, which then forwarded the false information to the federal grant agency. *Id.* at 789. This Court held that both the CHC and the federal government were victims of the crime, but did not hold that the defendant's employer was also a victim for purposes of Section 3B1.3. *Id.* at 794-95. In *United States v. Cusack*, 229 F.3d 344 (2d Cir. 2000), an employee of a law firm representing the New York Archdiocese used his position of trust with the Archdiocese to obtain documents which he then modified and sold under the false claim that they were historic documents relating to President John F. Kennedy. *Id.* at 346-47. The Second Circuit held that the Archdiocese and the purchaser were both victims, as the defendant's scheme involved stealing the Archdiocese's legal papers and selling them under false pretenses to the buyer. *Id.* at 349. Again, however, the court did not hold that the defendant's employer (his law firm) was a victim of the crime.[9]

Nor has the Sentencing Commission given any indication of approval of such a broad construction of the enhancement. To the contrary, all of the examples

---

[9] *United States v. Dahlstrom*, 180 F.3d 677, 685 (5th Cir. 1999), held that a corporate officer holds a position of trust vis-à-vis investors in the company, but did not hold that the share holders are the victim of every crime committed by the officer through his official position. Instead, *Dahlstrom* involved an ordinary case of investor fraud. *Id.* at 685.

given in the Commentary involve victims of the crime in the most traditional sense. *See* U.S.S.G. § 3B1.3 cmt. n.1 (2006) ("This adjustment, for example, applies in the case of an embezzlement of a client's funds by an attorney serving as a guardian, a bank executive's fraudulent loan scheme, or the criminal sexual abuse of a patient by a physician under the guise of an examination.").

It is true that crimes committed by corporate officials on behalf of the company can have adverse consequences for the shareholders if the official is caught. But that theory of victimization has no stopping point and bids fair to eliminate the requirement of "abuse" of trust altogether. Under the Government's interpretation, the defendant himself is just as much the victim of the crime, given that he too is exposed to criminal punishment if caught. So are his co-conspirators. And, of course, the defendant's family will suffer adverse consequences of any conviction, as may the bank that holds his mortgage. They are all "victims" of the crime in a broad colloquial sense. But there is no ground to believe that the enhancement was intended to extend to every case in which the crime visits indirect adverse consequences upon someone with whom the defendant holds a position of trust.

Given the hundreds of cases considering the proper application of the enhancement, and the thousands of while collar convictions to which the Government's theory could apply, it is significant that the Government is unable to

cite even a single decision applying its interpretation of the Guidelines. This Court should not be the first.

B. Abuse of Trust Is Included In The Base Level Offense Of Commercial Bribery.

The abuse of trust enhancement is unavailable in this case for the additional reason that it is already included in the base offense level for an FCPA violation. The Government disagrees, arguing that even if abuse of trust is inherent in an FCPA violation, it is not inherent in commercial bribery, which forms the base offense level in this case. Govt. Br. 82-84. The Government never explains, or cites to any authority for, its assertion that abuse of trust is not included in the offense of commercial bribery. In fact, as the Government acknowledges, in a recent amendment to the Guidelines, the Commission has clarified that abuse of trust is inherent to public bribery. *See* Govt. Br. 82 n.25 (citing U.S.S.G. § 2C1.1, cmt. n.6 (2006)); *cf. also* U.S.S.G. § 1B1.11(b)(2) cmt. n.1 (courts are to apply clarifying amendments to pending cases). The Government offers no explanation why the same is not true of commercial bribery.[10] In fact, commercial bribery no

---

[10] The Government seems to insinuate that abuse of trust is treated as inherent in public, but not commercial, bribery because the base level offense for public bribery is higher. Govt. Br. 82-83 n.25. But that does not follow. Whether or not abuse of trust is included in a base level offense depends on the nature of the offense and degree of punishment assigned to it. Rather than reflecting the odd and unsubstantiated suggestion that abuse of trust is inherent in public but not commercial bribery, the difference in base levels undoubtedly reflects the Commission's determination that abusing the public trust is the more serious form of abuse. This Court should not countenance the district court's decision to nonetheless apply the abuse of trust enhancement

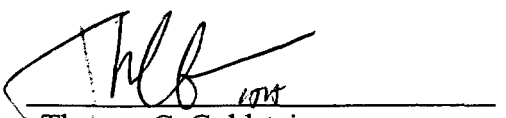
less entails an abuse of trust than does the specific form of bribery criminalized by the FCPA or public bribery in general. In all cases, the bribery entails inducing someone to abuse her position of trust (be it within a company or a government) for her own enrichment.

Accordingly, because the base offense level included abuse of trust, the § 3B1.3 enhancement was not available even if it were otherwise applicable.

CONCLUSION

For the foregoing reasons, the sentences in this case should be vacated and the verdicts reversed.

Respectfully submitted,



Thomas C. Goldstein
Paul W. Butler
AKIN, GUMP, STRAUSS,
HAUER & FELD LLP
1333 New Hampshire Ave., NW
Washington, DC 20036
(202) 887-4060

Amy Howe
Kevin K. Russell
HOWE & RUSSELL, P.C.
4607 Asbury Pl. NW
Washington, DC 20016
(202) 237-7543

Counsel for Douglas Murphy

---

to a commercial bribery base offense level, thereby reducing the difference in punishment the Commission intended to create between commercial and public bribery.

CERTIFICATE OF SERVICE

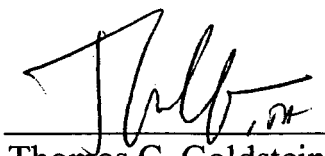
I certify that on January 23, 2007, copies of the foregoing Reply Brief for Appellant Douglas Murphy, were served in both paper and electronic form by next business day delivery, upon:

Joseph Wyderko
U.S. DEPARTMENT OF JUSTICE
Robert F. Kennedy Bldg.
Room 1264
950 Pennsylvania Ave., NW
Washington, DC 20530
(202) 514-3608

Reid H. Weingarten
Brian Heberlig
David M. Fragale
STEPTOE & JOHNSON, LLP
1330 Connecticut Ave., N.W.
Washington, D.C. 20036-1795
(202) 429-3000

Robert C. Bennett
BENNETT & SECREST, LLP
808 Travis, 24th Floor
Houston, TX 77002
(713) 757-0679

I further certify that, on the same date, one original and six paper copies, plus an electronic copy, of the Reply Brief for Appellant Douglas Murphy were sent by next business day delivery to the Clerk of the United States Court of Appeals for the Fifth Circuit.



Thomas C. Goldstein
Attorney

CERTIFICATE OF COMPLIANCE

Pursuant to FRAP 32(a)(7)(C), the undersigned certifies that this brief complies with the type/volume limitations of FRAP 32(q)(7)(B).

1. Exclusive of the exempted portions in FRAP 32(a)(7)(B)(III), the brief contains 6,488 words.

2. The brief has been prepared in proportionally spaced typeface using:

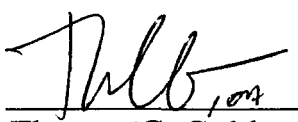
Software Name and Version: MS WORD 2002

Typeface Name: Times New Roman

Font Size: 14 point

3. Pursuant to the Fifth Circuit Rule 31.1, an electronic version of the brief has been filed with the clerk.

4. The undersigned understands that a material representation in completing this certificate, or circumvention of the type-volume limits in Fifth Circuit Rule 32.2.7, may result in the court's striking the brief and imposing sanctions against the person signing the brief.



Thomas C. Goldstein
Attorney