09-4704-cr(L)
09-5149-cr(XAP)

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee-Cross-Appellant,

v.

VIKTOR KOZENY, DAVID PINKERTON,

Defendants,

FREDERIC BOURKE JR.,

Defendant-Appellant-Cross-Appellee,

LANDLOCKED SHIPPING COMPANY, DR. JITKA CHVATIK,

Petitioners.

On Appeal from the United States District Court
for the Southern District of New York (New York City)

BRIEF FOR DEFENDANT-APPELLANT-CROSS-APPELLEE FREDERIC BOURKE JR. (REDACTED)

John D. Cline
LAW OFFICE OF JOHN D. CLINE
5A Funston Avenue
San Francisco, California 94129
415-747-8287

Attorney for Defendant-Appellant-Cross-Appellee Frederic Bourke Jr.

(Additional Counsel On the Reverse)

Harold A. Haddon
Saskia A. Jordan
Jason C. Middleton
HADDON, MORGAN AND FOREMAN, P.C.
150 East 10th Avenue
Denver, Colorado 80203
303-831-7364

Attorneys for Defendant-Appellant-Cross-Appellee Frederic Bourke Jr.

Michael E. Tigar
LAW OFFICE OF MICHAEL E. TIGAR
552 Fearrington Post
Pittsboro, NC 27312
202-549-4229

Attorney for Defendant-Appellant-Cross-Appellee Frederic Bourke Jr.

TABLE OF CONTENTS

REDACTED

TABLE OF CITATIONS

Page

CASES

STATUTES

CONSTITUTIONAL PROVISIONS

RULES

OTHER AUTHORITIES

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The district court had subject matter jurisdiction under 18 U.S.C. § 3231. The district court entered judgment against appellant Frederic Bourke, Jr. on November 12, 2009. SA182.1 Bourke filed his notice of appeal on November 10, 2009. JA1189. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

A jury convicted Bourke of conspiring to bribe Azerbaijan officials to obtain the state-owned oil company in a privatization auction and lying to the FBI about his knowledge of the bribes. The trial turned on whether Bourke knew about the bribes and intended to violate the law. To meet its burden of proof on these elements, the prosecution relied on the testimony of two cooperating witnesses, both of whom have pleaded guilty: Thomas Farrell (an American expatriate residing in St. Petersburg, Russia) and Hans Bodmer (a Swiss lawyer). The prosecution also sought to show, over objection, that Bourke conducted inadequate due diligence before investing in privatization.

The issues presented are:

---

[1] The Joint Appendix is cited as "JA," the Confidential Appendix as "CA," and the Special Appendix as "SA." Pleadings and orders are cited by the district court docket number ("DE"). Government exhibits are cited as "GX" and defense exhibits as "DX." The trial transcript is cited by page. Other transcripts are cited by date and page.

1. Did the district court err in giving a conscious avoidance instruction, where (a) there was no evidence that Bourke deliberately avoided knowledge of the bribes, and (b) the government argued that Bourke failed to perform adequate due diligence, increasing the risk that the jury would convict him for negligence or recklessness?

2. Did the district court err in refusing to instruct the jury that the mens rea for conspiring to violate the Foreign Corrupt Practices Act ("FCPA") includes the "corruptly" and "willfully" elements required for the underlying offense?

3. Did the district court err in refusing Bourke's requested good faith instructions?

4. Did the district court err in admitting evidence of due diligence conducted by another potential investor without Bourke's knowledge?

5. Did the district court err in excluding defense evidence that Columbia University invested $15 million in Azeri privatization after due diligence similar to Bourke's, offered to counter the government's due diligence evidence?

REDACTED

7. Did the district court err in admitting portions of a memo, prepared by Bodmer's law partner, that appeared to corroborate key aspects of Bodmer's

testimony, while excluding other portions that contradicted Bodmer's testimony and placed the admitted portions in an entirely different light?

8. Does the cumulative effect of the district court's errors bearing on Bourke's knowledge and intent require reversal?

9. Is the evidence insufficient on the false statement charge?

10. Did the district court err in refusing to instruct the jury that it had to agree unanimously on a particular overt act?

STATEMENT OF THE CASE

I. INTRODUCTION.

In the mid-1990s, Azerbaijan--an oil-rich former Soviet republic--began privatizing its state-owned enterprises. A Czech entrepreneur, Viktor Kozeny, launched an effort to acquire the state-owned oil company, SOCAR, through a privatization auction. Bourke and other Americans (including Columbia University and AIG) invested millions of dollars with Kozeny. They lost every penny.

In late 1998, Bourke learned that Kozeny and his associates, including Farrell, had committed a massive fraud against the investors. He urged that this fraud be reported to the authorities. In the course of the investigation that Bourke triggered and civil litigation that followed, it emerged that Kozeny, with the assistance of Farrell and Bodmer, had paid substantial sums to Azeri government

officials. Farrell and Bodmer entered guilty pleas and, in an effort to reduce their sentences, claimed that they had told Bourke about the payments.

Bourke cooperated with federal prosecutors and the FBI. He met with prosecutors and agents for four days in 2002 and waived the attorney-client privilege so the government could interview his lawyers and obtain their documents. In the end, however, the government embraced Farrell and Bodmer and indicted Bourke for participating in Kozeny's bribery and for lying to the FBI when he denied knowledge of the bribes.

II. PROCEEDINGS BELOW.

The grand jury indicted Bourke and two other defendants--Kozeny and David Pinkerton of AIG--on May 12, 2005. Kozeny remains a fugitive in the Bahamas. The government dismissed charges against Pinkerton in 2008. The case went to trial against Bourke alone.

The indictment charged Bourke with conspiracy to violate the FCPA and the Travel Act; money laundering conspiracy; substantive FCPA, Travel Act, and money laundering violations; and false statements. The indictment sought forfeiture of $174,000,000. DE1.

Bourke moved to dismiss (except for the false statement charge) on statute of limitations grounds. The district court dismissed a number of the counts, *United States v. Kozeny*, 493 F. Supp. 2d 693 (S.D.N.Y. 2007), and this Court affirmed,

United States v. Kozeny, 541 F.3d 166 (2d Cir. 2008). Bourke went to trial on three charges: conspiracy to violate the FCPA and the Travel Act; money laundering conspiracy; and false statements to the FBI. JA60.

Trial began on June 1, 2009 and concluded on July 10. The jury acquitted Bourke on money laundering conspiracy and found him guilty on the other two charges. JA1046-47. The district court denied Bourke's motions for new trial and for judgment of acquittal. SA86, 115.

On November 10, 2009, the district court sentenced Bourke to a year and a day incarceration and a $1 million fine. SA182; JA1184-85. The court recounted Bourke's good works and declared that "[a]fter years of supervising this case, it is still not entirely clear to me whether Mr. Bourke was a victim, or a crook, or a little bit of both." JA1183. The court released Bourke pending appeal. SA180.

III. STATEMENT OF FACTS.

With the exception of certain testimony by Farrell and Bodmer discussed below, the facts are largely undisputed.

Bourke is a 64-year-old inventor, investor in biomedical research, and philanthropist. T.1665, 1902-03, 1921-22, 2545-46. In earlier years, he co-founded the accessory company Dooney & Bourke. T.1005-06, 1445-46, 1917-22. In the mid-1990s, Bourke met Viktor Kozeny, a Czech citizen living in the

Bahamas. JA134. Kozeny later bought a home in Aspen, Colorado, where Bourke also lived. JA859-60.

A. May and June 1997: Kozeny and Bourke Visit Baku.

In May 1997, Kozeny invited Bourke to travel abroad with him to examine potential investments. JA860-61. At a brief stop in Baku, capital of Azerbaijan, Bourke and Kozeny learned about the country's privatization program. JA136-38. Under that program, the government, through the State Property Committee ("SPC"), auctioned state-owned assets to Azeri citizens and private investors. The auction worked through "vouchers," which were distributed in books of four to Azeri citizens. The Azeris could either sell their vouchers in a secondary market or use them to bid on state-owned assets. JA146-47. Foreign investors could purchase vouchers, but they also had to buy "options" from the Azeri government to participate in the auction. JA153, 175-76. A foreign investor had to purchase one option for every voucher, or four options per voucher booklet. JA176-77.

Following the trip, Bourke and Kozeny fell out based on Kozeny's failure to invest in a biomedical project that Bourke recommended. JA863-64; T.1537-39. The two men had virtually no contact from July 1997 until late December 1997. JA864-65.

B. July 1997 to December 1997: Kozeny, Farrell, and Bodmer Concoct Their Scheme Without Bourke's Involvement.

Kozeny decided to invest in Azeri privatization. He wanted to acquire SOCAR, the state-owned oil company. JA149, 281. In July 1997--after he and Bourke had broken off contact--Kozeny established a company in Baku called Oily Rock, Ltd.[2] Oily Rock was headed by Farrell, an American from St. Petersburg, Russia, who had served as Kozeny's bodyguard. T.362-63, 992-93. Farrell's task was to purchase the vouchers and options necessary to acquire SOCAR. JA141-43, 250. Kozeny engaged Hans Bodmer, a Swiss lawyer who specialized in hiding assets through offshore corporations, to establish the structure for the privatization investment. JA320-21.

Others involved with Kozeny's Baku operations included Christine Rastas, who worked for Minaret, T.808-10; John Pulley, who traveled with Kozeny and handled logistics, JA123-24; and Amir Farmin-Farma, who ran the equity sales desk for Minaret, JA441-42. Rastas, Pulley, and Farmin-Farma spent considerable time with Kozeny and Farrell in Baku in 1997 and 1998, and they all denied knowledge of bribery. JA312, 448; T.281, 906-07, 919-21. Pulley and Rastas testified under non-prosecution agreements that required truthful testimony.

[2] Oily Rock was named for the first offshore oil drilling installation in Azerbaijan. JA116. Kozeny also established an investment bank in Baku called Minaret. JA320, 444. Minaret was not directly involved in Kozeny's privatization investment. JA142-43.

T.280-81, 892-94, 900-02. The government has never sought to revoke those agreements.

Kozeny and Farrell had trouble purchasing the quantity of vouchers needed to acquire SOCAR. In fall 1997, Kozeny met with Ilham Aliyev, the son of the President of Azerbaijan. JA156. Ilham Aliyev referred him to Nadir Nasibov and Barat Nuriyev, the two top SPC officials. In October 1997, Kozeny and Farrell met with Nasibov and Nuriyev. Nuriyev demanded that Kozeny provide an up-front payment of millions of dollars, JA163, 170; that Kozeny give President Aliyev two-thirds of the vouchers and options that Oily Rock acquired, JA159, 262; T.458; and that Oily Rock purchase its vouchers through Nuriyev's sources, JA165-66. In return, Nuriyev promised that Oily Rock could acquire vouchers without interference and bid on SOCAR when it was privatized. JA162-64.

Farrell testified that, in accordance with Nuriyev's directive, he brought him a dufflebag with millions of dollars in cash and thereafter purchased vouchers through Nuriyev's sources. JA172. Bodmer, in the meantime, established offshore trusts to hold President Aliyev's two-thirds interest in the Oily Rock vouchers and options and prepared sham "credit facility agreements" to make it appear that Aliyev had borrowed funds to purchase the vouchers and options. JA324-39.

Nuriyev had initially told Kozeny and Farrell that one million voucher books would be required to obtain SOCAR at auction. In mid-December 1997, however,

he told Farrell that the price had doubled. JA184-86. Nuriyev also told Farrell that Oily Rock would benefit from having a reputable, well-known figure associated with it. JA257-58.

C. December 1997 to March 1998: Kozeny Pursues Bourke and Other American Investors.

Kozeny devised a plan to meet Nuriyev's demands. In late December 1997, he held a lavish Christmas party in Aspen to which he invited Bourke and other wealthy Americans. JA259, 865-66. In the days following the party, Kozeny touted his Azeri investment to Bourke and others. T.2860-61. Bourke made an inviting target; not only was he wealthy, but he also was a longtime friend of former Senator George Mitchell, who could lend Oily Rock respectability. JA258. Kozeny thus latched on to Bourke with dual aims: to obtain his money and, through him, to obtain Senator Mitchell's participation.

By mid-January 1998, Kozeny convinced Bourke and others to travel to Baku to see the Oily Rock operation. T.2861-62. The potential investors on the trip included Tom McCloskey, an Aspen resident; Bobby Evans, one of Bourke's childhood friends; and Carrie Wheeler, representing the investment fund Texas Pacific Group ("TPG"). JA260, 513-25; T.1430-33. McCloskey and Evans invested in Oily Rock; TPG did not. JA527, 777-78; T.1440-41.

In Baku, Kozeny showed the potential investors the state-of-the-art Oily Rock office, which included a heavily guarded vault containing the vouchers and

options that Oily Rock had acquired. JA516. Kozeny had Nuriyev address the assembled investors and intimated to them that he and Nuriyev had a close relationship. JA519-20; T.2550-51, 2576-77.

Bourke was impressed with Kozeny's Oily Rock operation but not yet ready to invest. T.2862-63. He returned to the United States, consulted advisors, and, on February 6, 1998, flew back to Baku with Kozeny and Evans. During that brief visit, Bodmer and Grant Thornton accountant Rolf Hess--who did work for Oily Rock--told Bourke and Evans that they had just met with President Aliyev, and he would also be investing in privatization. Bodmer and Hess presented Aliyev's participation as a positive development. JA606-07, 868-69; T.2537-40. In early March 1998, after consulting counsel and obtaining their view that President Aliyev's participation was lawful, JA607-09, 630-31, 870-71; T.1953-54, Bourke invested $5.3 million of his own money and $1.7 million from friends and family, T.1063, 1077-78; GX 218. The March 1998 investment--made through a company that Bourke's lawyers formed called Blueport, T.1555-56--was Bourke's only investment of his own money in Oily Rock. Kozeny defrauded them of every penny. JA633-34.[3]

[3] Bourke's friends and family members invested another $1 million on July 13, 1998. GX525. They, like Bourke, lost their entire investment to Kozeny. JA633-34.

Senator Mitchell invested in Oily Rock through Blueport in March 1998. JA495-98; DXS-2. Bourke had introduced Mitchell to Kozeny at a dinner in London in January 1998, and Mitchell soon decided to invest. JA494-96. Mitchell also accepted a position on the Oily Rock board and spoke at the grand opening of Minaret in Baku in late April 1998. JA498-502; T.1092-97.

D. February 1998 to April 1998: The Alleged Bodmer and Farrell "Walk Talks."

The February 6, 1998 Baku trip assumed great significance at trial. The government sought to prove that Bourke knew Kozeny was bribing Azeri officials *before* he invested in Oily Rock in March 1998. It declared in opening that on one of Bourke's trips to Baku, Bodmer had "told the defendant about the Azeri's two-thirds interest in Oily Rock's vouchers, about all of the holding companies, and about all the structure that gave the Azeri officials a huge incentive to privatize SOCAR." JA101-02. The prosecutor continued:

> Bourke was sold. The evidence will show that the defendant went back home and within days instructed his lawyers to organize his own offshore company in the British Virgin Islands, a company named Blueport. And then in March, 1998 he funded his investment in Oily Rock with about $5 million in his own money and another 2 million he raised from friends and family.

JA102.

Bourke had met with Bodmer only once in Baku before his investment in March 1998--on the February 6 trip with Kozeny and Evans. JA1234. At trial,

Bodmer testified that on the late afternoon of February 5 Bourke approached him in the lobby of the Baku Hyatt and asked about the "arrangement" with the Azeris; that Bodmer obtained permission from Kozeny that evening to tell Bourke about the agreement to give President Aliyev two-thirds of the Oily Rock vouchers and options; and that at 8 am on February 6, Bodmer and Bourke took a fifteen-minute walk near the Hyatt during which Bodmer told Bourke about that agreement. JA344-54, 377-78; T.1305-09. According to Bodmer, "[a]bout two weeks" after the February 6 walk, Bourke agreed to invest. JA355-56.

Bodmer's testimony about the February 6 "walk talk" with Bourke fit neatly with the government's theory that Bourke decided to invest after hearing from Bodmer about the arrangement to bribe the Azeris. But the defense proved that testimony false. Kozeny, Bourke, and Evans traveled to and from Baku in February on Kozeny's plane. Flight records and Evans' notes showed that Bourke and Kozeny were in London--not in Baku--on February 5 when Bodmer claimed Bourke asked about the "arrangement" and when Bodmer claimed he met with Kozeny in a Baku hotel to obtain Kozeny's advance approval to discuss it. JA1234-37; T.2534-35, 2543. The records and notes proved as well that the plane did not arrive in Baku until 9:20 am on February 6, after Bodmer claimed the walk talk had occurred. JA1234-38; T.2535-36. Given this evidence, the government

had to concede that Bodmer's testimony about February 5 and 6 was wrong. JA770.

The government could not abandon Bodmer's story, however, without conceding the case. Accordingly, in closing it surrendered its claim that the walk talk occurred before Bourke invested and argued instead that it occurred at the Minaret opening in late April 1998, the only other time Bodmer and Bourke were both in Baku. JA920-21, 945, 1234. The government's theory that the walk talk occurred in April 1998--what it called in closing the "April option," JA921--has no support in Bodmer's testimony. Bodmer described the Minaret opening and surrounding events, including specific conversations and meetings, but said nothing about walking with Bourke. T.1126-39.

Nor does the "April option" fit the other evidence. Bodmer testified that the walk occurred on an occasion when Evans accompanied Bourke to Baku. JA344-45, 353-54; T.1305, 1307. He even claimed to have seen Bourke and Evans in the hotel breakfast room together after the walk. JA350-51; T.1306. But Evans was not in Baku in April 1998, T.2542, 2608, and Bodmer never met him other than on the February 1998 trip to Baku, JA354.

The testimony of Bodmer's law partner, Rolf Schmid, further refutes the government's "April option."[4] Schmid (like Bodmer) testified *before* the defense exposed Bodmer's story about the February 6 walk talk as false, when the government still sponsored that version. Schmid claimed that Bodmer told him about the walk talk with Bourke at the "beginning of 1998," JA394-95, either "January or February," JA425. That testimony supported Bodmer's February 6 version of the walk talk but conflicts with the "April option." In addition, Schmid and Bodmer both made clear that Schmid was not with Bodmer in Baku on the alleged walk talk trip. JA354-55, 395-96. But Schmid *was* with Bodmer at the Minaret opening in April 1998--the only time he and Bodmer traveled to Baku together. T.1126, 1357, 1364-66. In this respect too Schmid's testimony refutes the "April option."

Nor does the government's revised theory square with common sense. On his trip to the opening, Senator Mitchell met President Aliyev and received his assurance that SOCAR would be privatized in due course. JA193-94; T.1643-44, 1696-97. He and Bourke then met the President's son Ilham--head of SOCAR--and received similar assurances. T.1645, 1697. It is implausible that after receiving

[4] Schmid was in charge of corporate work for Oily Rock (including the privatization investment) and also did contract work. T.960, 987, 1086, 1352-61. In 2005, following Bodmer's guilty plea and return to Switzerland, Schmid left Von Meiss Blum and joined Bodmer's new firm, where he remains. JA420-22, 432.

these assurances from the President and the head of SOCAR, Bourke would be so anxious about privatization that he would ask Bodmer (and Farrell, *see infra*) about improper arrangements. Nor is it plausible that Bourke would invest in March 1998, *before* he learned of the bribes (according to the revised Bodmer story), but never invest his own money *after* he learned of the bribes.[5]

Farrell was the only other witness who claimed to have told Bourke about Kozeny's bribes to Azeri officials. Like Bodmer, Farrell testified about one-on-one walk talks with Bourke in Baku, during which he claimed that they discussed the bribery. Farrell testified that the second (and last) of these walks occurred during Bourke's late April 1998 trip to Baku for the Minaret opening--the same trip to which, in closing argument, the government tried to assign the Bodmer walk. JA188-92, 195. The first talk, Farrell testified, occurred in Baku several weeks or a month earlier--that is, in late March or early April 1998. JA188.

Farrell's story, like Bodmer's, fell victim to the travel records. Those records proved that Bourke was not in Baku between February 6, 1998 and the late April 1998 visit for the Minaret opening, JA1234--and thus Farrell's claim to have talked with him there in late March or early April was untrue. And Farrell's testimony

[5] Bodmer also claimed to have received a telephone call from Bourke in the fall of 1998 in which Bourke allegedly asked, "Are you sure that they get enough or that they get paid enough." T.1173. The government provided no corroboration for this alleged conversation--not even a telephone bill.

that he spoke with Bourke about Kozeny's payments to the Azeris at the April 1998 opening was implausible for the reasons outlined above.

E. April 1998 to October 1998: ORUSA and the Share Capital Increase.

During the April 1998 visit to Baku, Kozeny told Bourke and other investors that he wanted them on the Oily Rock board. JA875; T.2873. When Bourke returned home, he consulted his lawyers about his potential liability as an Oily Rock board member, given his inability to monitor Kozeny's activities abroad. JA635; T.2146-49. He and other investors and their counsel had conference calls in which they discussed these risks. Bourke's counsel recorded one such call, on May 18, 1998, in which Bourke mentioned the possibility that Kozeny was paying bribes as an example of conduct that could occur without the directors' knowledge and subject them to liability. JA639, 1193-94; T.2168-72. The government cited Bourke's remarks on this call as evidence that he knew Kozeny was paying bribes. Two lawyers who participated in the call--one representing Bourke and the other a Hale and Dorr partner representing a potential investor--testified that they did not interpret Bourke's remarks as indicating knowledge of bribery. JA641-42, 664-68; T.2514-17.

On advice of counsel, Bourke and the other American investors in Oily Rock declined to join the Oily Rock board. JA874-76; T.1571-72, 1582, 2052-53, 2174-

75, 2208, 2514.[6] Instead, the lawyers formed a separate company, Oily Rock U.S. Advisors ("ORUSA"), and the investors served on the board of that company. JA1225; T.1142-45, 1583-86, 2174-77, 2218-19, 2518.

In May or June 1998, Bourke learned that Kozeny planned to issue 300,000,000 shares in Oily Rock to President Aliyev or other Azeri interests, leaving the Azeris with two-thirds of the outstanding shares. JA879-81; T.1155-59. Bourke was furious. JA878-79; T.2185. He instructed his lawyers to obtain assurances from Bodmer that the existing Oily Rock shareholders would not be diluted--that is, that the Azeris would provide full value for the shares they received. JA612-13; T.1568-70. Bodmer repeatedly assured Bourke's lawyers, Bourke himself, and other investors and their counsel that the American investors would not be diluted. JA380-81, 613-15, 619-29, 652-54, 669-70, 677-78, 691-95, 773-75, 879-81, 1216, 1248; T.1161-62, 1570-71; DXO-2.

F. March 1998 to September 1998: Nasibov and Nuriyev Visit New York for Medical Treatment.

Between March and September 1998, Nasibov and Nuriyev made a combined three visits to New York for medical treatment. T.259-62, 788-90, 838-72, 947-50. Bourke recommended doctors for them. T.574-93, 845-46, 973-74, 1082, 1149, 1565-66, 2879-80. Kozeny paid their medical bills and other

[6] The testimony conflicted slightly on this point; some government witnesses testified that Bourke and other American investors joined the Oily Rock board briefly, but soon left and joined the ORUSA board instead. *E.g.*, JA399.

expenses. T.260-61, 838-44, 869-73, 931-32, 977-80. There was no evidence that Bourke knew Kozeny was making the payments.

G. October 1998 to February 1999: Bourke Discovers the Options Fraud.

As the summer of 1998 passed without SOCAR privatized, Bourke and the other investors became increasingly concerned. In October 1998, Bourke returned to Baku, where he found the Oily Rock offices largely deserted. JA883-84. Farrell and another employee explained that they intended to pursue other business until privatization occurred. JA884-85.

On the same trip, Bourke obtained documents which suggested that Kozeny had engaged in a massive fraud against some of the investors, including a hedge fund called the Omega Group. JA886-87; T.2702-04. Omega had signed a coinvestment agreement with Kozeny under which he would (1) purchase options for Omega at the best price available and (2) not re-sell his own options to Omega. JA197-98. Kozeny secretly violated this agreement, aided by Omega employee Clayton Lewis.[7] Kozeny had obtained options in 1997, when they cost about $1 each, and then encouraged Nasibov and Nuriyev to raise the price to $25 each. JA180-82, 262-69. In 1998, Kozeny re-sold his options to Omega for the

[7] Kozeny gave Lewis $5 million in options and vouchers, which Lewis sold secretly to companies associated with Omega with the assistance of Farrell and Bodmer. T.568-70, 613-19, 723-26, 1258-88. The government signed a plea and cooperation agreement with Lewis, but did not call him as a witness. T.2817-18.

increased price of $25 rather than for his cost of $1, thus making a secret $24 profit on each of the millions of options. JA265-66; T.621, 2335-38. Kozeny and Farrell then schemed with Nuriyev to conceal the fraud. JA199-201; T.568-74.

Bourke insisted that Omega report Kozeny's fraud to law enforcement. He worked with Omega's counsel, Eric Vincent, to compile documents proving the fraud, and he demanded that Omega provide those documents--referred to as "the book"--to the United States Attorney's Office. Omega refused. JA643-44, 798-800, 890-91; T.2112-13, 2122-23, 2339-46, 2600-02. Bourke flew to Baku in February 1999 with Vincent to disclose the options fraud directly to President Aliyev. JA891; T.2111-12, 2717-24; DXF-11. In 2001 he testified before a Manhattan grand jury investigating that fraud. JA705-06. The grand jury returned an indictment against Kozeny for grand larceny of almost $200 million from American investors. JA706; T.2118-19.

The government asserted at trial that Kozeny's options fraud was unrelated to the bribes he gave Azeri officials and thus that Bourke's efforts to expose the fraud were not inconsistent with knowledge of the bribes. T.3032. But this overlooks the obvious link between the bribes and the fraud. According to Bodmer, the Azeris received two-thirds of Oily Rock's vouchers *and options*. *E.g.*, JA325, 349 , 396. The Azeris did not need the alleged bribe options to participate in privatization; only foreigners needed them. To realize the value of their options,

therefore, the Azeris had to sell them to foreigners. Given these facts, anyone with knowledge of the alleged two-thirds/one-third split--including Bourke, if Bodmer had actually told him--would conclude that the millions of options Kozeny sold to Omega from the Oily Rock stock in 1998 included some or all of the Azeris' share. And any such person would thus have known that exposure of Kozeny's options fraud would lead directly to exposure of the fact that Kozeny had given two-thirds of Oily Rock's options to the Azeris. It follows either that Bourke knowingly exposed the very corruption in which (according to the government) he was a participant, or--more plausibly--that he was ignorant of the two-thirds/one-third split.

H. Farrell and Bodmer Retain Counsel and Decide to Plead and Cooperate.

Farrell and Bodmer became concerned about Bourke's effort to disclose Kozeny's crimes, in which they had played a significant role. Between 1999 and 2001 they met several times. JA243; T.696-98, 1176-77, 1324-27. In 2001, Farrell hired counsel and sought an agreement with the government. JA286. In March 2003, after more than a year of negotiations and overseas proffers, he traveled to New York and entered his guilty plea to violating the FCPA and conspiring to violate the FCPA. JA131-32, 236-37, 272, 1226-31. The government permitted him to return to St. Petersburg after the plea. JA294-95.

Farrell has profited handsomely from his agreement with the government. He has not had to return $700,000 of Omega's money that he obtained through Kozeny's fraud and concealed with Bodmer's assistance in off-shore companies. T.694. Nor has he had to forfeit the boat and the bar in St. Petersburg that he bought with the Omega money. JA295. He has paid only $8000 out of $500,000 in taxes and penalties on the money he received from Kozeny. JA248-49, 787-88. He will apparently not be made to repay, or pay taxes on, a $150,000 undocumented, interest-free "loan" he solicited from Nuriyev in October 2001. T.698-700. The government has not prosecuted him for filing a false 1998 tax return, which omits the $700,000. JA295-96, 787-88. And Farrell still has not been sentenced--or even had a sentencing date set--more than seven years after his plea. JA297. He remains free in St. Petersburg, managing his bar and sailing his boat. JA294-95; T.694-95.

Bodmer was not as quick as Farrell to embrace the prosecution. In August 2003, he was arrested in South Korea and imprisoned there for five months until he was sent to the United States. JA360-61. He remained in jail in Manhattan for two weeks until, over the prosecution's objection, he was released to house arrest near Washington, D.C. JA362-63. He stayed there for nine months. In October 2004, he pled guilty to money laundering conspiracy and agreed to cooperate. T. 952, 1194-95, 1338-43. Only after Bodmer reached his agreement with the

government, more than a year after his arrest, was he permitted to return to Switzerland, where he currently resides and maintains a law practice. JA362-65; T.954-55. He now travels widely for work and pleasure with the government's unstinting permission. T.1327-33.

I. Bourke Cooperates and Gets Indicted.

Bourke cooperated fully with law enforcement in his effort to bring Kozeny to justice. In 2001, he testified before the state grand jury investigating Kozeny's fraud. The grand jury later indicted Kozeny. JA706. In 2002, Bourke submitted voluntarily to four days of interviews with prosecutors and FBI agents--interviews that spanned 24 to 28 hours and produced an FBI memorandum of 131 single-spaced pages covering roughly 70 topics. JA756-57; T.1913, 2392. He instructed his lawyers to waive the attorney-client privilege and submit to interviews with the prosecution. JA598; T.1528-29, 2132. He produced his lawyers' notes and other documents, including the May 18, 1998 tape that the government introduced at trial. T.1529, 2395-98.

The government charged Bourke in Count Three with falsely stating during the interviews that he "was not aware that Viktor Kozeny had made various corrupt payments, transfers and gifts to Azeri government officials." JA92.

SUMMARY OF THE ARGUMENT

1. The district court committed three crucial errors in instructing the jury on the necessary mens rea. First, the court instructed on conscious avoidance, despite the absence of evidence that Bourke deliberately avoided knowledge of Kozeny's bribes. Second, contrary to *United States v. Feola*, 420 U.S. 671 (1975), the court refused to instruct that conviction for conspiracy requires the same mens rea as the underlying FCPA offense--meaning (among other things) a bad purpose to disobey or disregard the law. Third, the court rejected Bourke's proposed good faith instructions, even though Bourke produced ample evidence to warrant the instructions and no other instruction covered the point.

2. The district court erred in admitting testimony from Wheeler and former Cleary Gottlieb attorney James Rossman about the due diligence they performed for TPG. Because Bourke knew nothing about their work, their testimony was irrelevant to his state of mind. That testimony increased the risk, created by the conscious avoidance instruction and heightened by the government's closing, that the jury would convict Bourke based on his negligence or recklessness--what he *should have known*, rather than what he *actually knew*.

Having erroneously admitted the Wheeler and Rossman testimony, the district court should at least have permitted Bourke to present the contrasting testimony of Bruce Dresner. Dresner--the head of investments for Columbia

University--would have established that Columbia invested $15 million with Kozeny in Azeri privatization after due diligence comparable to Bourke's. Dresner's testimony would have rebutted the government's claim that Bourke's lack of due diligence compared to TPG established his culpability. The district court erred in excluding the Dresner testimony as irrelevant.

REDACTED

4. The district court permitted the government to introduce, as a prior consistent statement by Bodmer, a fragment of a memorandum that Schmid wrote in October 2001. The fragment purported to reflect what Bodmer had told Schmid in 1998 about the alleged walk talk with Bourke. The district court abused its discretion in refusing Bourke's request, under Fed. R. Evid. 106, to admit the entire memorandum, and in barring cross-examination of Schmid about the omitted portions. The excluded portions placed the admitted fragment in an entirely

different light and thus were necessary to explain the admitted portion, to place it in context, and to prevent it from misleading the jury.

5. Any one of these errors concerning Bourke's knowledge of Kozeny's bribes and his criminal intent, standing alone, warrants reversal. But even if those errors were harmless in isolation, their cumulative effect requires reversal. *See, e.g., United States v. Al-Moayad*, 545 F.3d 139, 178 (2d Cir. 2008).

6. The evidence was insufficient to convict Bourke on Count Three for knowingly making false statements to the FBI during his four days of voluntary interviews. The conviction rests on speculation and conjecture about Bourke's state of mind, contrary to many cases from this Court. The Court should direct entry of a judgment of acquittal or grant a new trial on that count.

7. The district court erred in refusing to instruct the jury on Count One that it had to agree unanimously on a particular overt act. Because an overt act is an element of the offense under 18 U.S.C. § 371, the Sixth Amendment and Fed. R. Crim. P. 31(a) require that all jurors agree that a particular act has been proven. The error in failing to require unanimity was particularly important because there was substantial doubt whether the government could prove the commission of an overt act within the statute of limitations.

ARGUMENT

The trial focused on two related issues: whether Bourke knew that Kozeny was bribing the Azeris, and whether he willfully and corruptly joined the bribery conspiracy. The district court committed a series of errors that crippled Bourke's mens rea defense. It instructed on conscious avoidance and otherwise watered down the mental state necessary for conviction. It admitted evidence of due diligence performed by Wheeler and Rossman for TPG, without Bourke's knowledge, to suggest that Bourke either must have known about Kozeny's bribery or should have discovered it, and then excluded similar testimony showing that Columbia University invested after performing due diligence comparable to Bourke's. And the court made evidentiary errors that impeded Bourke's ability to impeach Farrell and Bodmer, the two principal witnesses against him. This cascade of errors produced a fundamentally unfair trial.

I. THE DISTRICT COURT ERRED IN INSTRUCTING THE JURY ON MENS REA.

The district court committed three crucial errors in instructing the jury on the mens rea necessary for conviction: it instructed on conscious avoidance, despite the absence of evidence that Bourke deliberately avoided knowledge of Kozeny's bribes; it refused Bourke's requested instruction that the mens rea for conviction on the conspiracy count required the same mens rea as the underlying FCPA offense--

meaning (among other things) a bad purpose to disobey or disregard the law; and it rejected Bourke's good faith instructions.

A. The Standard of Review.

This Court reviews claims of error in jury instructions de novo. *See United States v. Hassan*, 542 F.3d 968, 986 (2d Cir. 2008); *United States v. Quattrone*, 441 F.3d 153, 177 (2d Cir. 2006). "'An erroneous instruction, unless harmless, requires a new trial.'" *Id.* (quoting *Anderson v. Branen*, 17 F.3d 552, 556 (2d Cir. 1994)). "An error is harmless only 'if it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" *Id.* (quoting *United States v. Carr*, 424 F.3d 213, 218 (2d Cir. 2005)) (internal quotation omitted). The failure to give a requested instruction requires reversal when "'that instruction is legally correct, represents a theory of defense with basis in the record that would lead to acquittal, and the theory is not effectively presented elsewhere in the charge.'" *Id.* (quoting *United States v. Doyle*, 130 F.3d 523, 535 (2d Cir. 1997)) (internal quotations omitted); *see United States v. Bah*, 574 F.3d 106, 113-15 (2d Cir. 2009).

B. The District Court Erred in Giving the Conscious Avoidance Instruction, Because There Was No Evidence That Bourke Consciously Avoided Knowledge of Kozeny's Bribes.

Over objection, *e.g.*, JA214-15, 228, 894-99, 976, the district court instructed the jury on conscious avoidance, JA983-84. That instruction was error,

because there was no evidence that Bourke deliberately avoided learning about Kozeny's bribery. The instruction was particularly damaging because the government presented evidence and argued that Bourke failed to exercise adequate due diligence, thus exacerbating the risk inherent in the conscious avoidance instruction that the jury would convict for negligence or recklessness.

1. The Conscious Avoidance Instruction Was Error. --This Court has expressed concern that a jury instructed on conscious avoidance will "conclude that no actual knowledge existed," but "nonetheless convict, if it believe[s] that the defendant had not tried hard enough to learn the truth." *United States v. Ferrarini*, 219 F.3d 145, 157 (2d Cir. 2000). To reduce this danger, the Court insists that a conscious avoidance instruction be given "only where it can almost be said that the defendant actually knew . . . but he refrained from obtaining the final confirmation . . . . This, and this alone, is wilful blindness." *United States v. Reyes*, 302 F.3d 48, 54 (2d Cir. 2002) (citation omitted). The Court has emphasized that "[e]ssential to the concept of *conscious* avoidance" is the requirement that the defendant "be shown to have *decided* not to learn the key fact, not merely to have failed to learn it through negligence." *United States v. Rodriguez*, 983 F.2d 455, 458 (2d Cir. 1993) (emphasis in original). As Judge Posner explained:

> The most powerful criticism of the ostrich instruction is, precisely, that its tendency is to allow juries to convict upon a finding of negligence for crimes that require intent. The criticism can be deflected by thinking carefully about just what it is that real ostriches

> do (or at least are popularly supposed to do). They do not just fail to follow through on their suspicions of bad things. They are not merely *careless* birds. They bury their heads in the sand so that they will not see or hear bad things. They *deliberately* avoid acquiring unpleasant knowledge. The ostrich instruction is designed for cases in which there is evidence that the defendant, knowing or strongly suspecting that he is involved in shady dealings, takes steps to make sure that he does not acquire full or exact knowledge of the nature and extent of those dealings.

United States v. Giovannetti, 919 F.2d 1223, 1228 (7th Cir. 1990) (citations omitted; emphasis in original).[8] When (as here) the government's entire presentation seeks to establish that the defendant *actually knew* the fact at issue, it cannot use conscious avoidance as a fallback theory, at least "where there was no evidence that the defendant deliberately avoided learning the truth." *Ferrarini*, 219 F.3d at 157. This Court declared:

> If conscious avoidance could be found whenever there was evidence of actual knowledge, a jury could be given a conscious avoidance instruction in a case where there was only equivocal evidence that the defendant had actual knowledge and where there was no evidence that the defendant deliberately avoided learning the truth. Under those circumstances, a jury might conclude that no actual knowledge existed but might nonetheless convict, if it believed that the defendant had not tried hard enough to learn the truth.

---

[8] *See generally* Ira P. Robbins, *The Ostrich Instruction: Deliberate Ignorance as a Criminal Mens Rea*, 81 J. Crim. L. & Criminology 191 (1990) (discussing legal and philosophical flaws in use of conscious avoidance as a judicial substitute for actual knowledge); *United States v. Heredia*, 483 F.3d 913, 930-33 (9th Cir.) (en banc) (Graber, J., dissenting) (criticizing conscious avoidance doctrine), *cert. denied*, 552 U.S. 1077 (2007).

Id.; *see United States v. Lara-Velasquez*, 919 F.2d 946, 951 (5th Cir. 1990) ("[T]he district court should not instruct the jury on deliberate ignorance when the evidence raises only the inferences that the defendant had actual knowledge or no knowledge at all of the facts in question."). The trial record contains no evidence that Bourke "*decided* not to learn" about Kozeny's bribery. *Rodriguez*, 983 F.2d at 458 (emphasis in original). No witness testified, for example, that Bourke asked not to be told certain facts, or took steps to avoid knowledge. *Compare, e.g., United States v. Hopkins*, 53 F.3d 533, 542 (2d Cir. 1995) (instruction upheld where supervisor told employees handing him a tampered sample, "I know nothing, I hear nothing"); T.620 (Farrell describes conversation with unindicted Omega representative: "Finally I just went off and said, 'Look, do you really want to know the whole story?' And he said, 'No,' and that was the last time he asked me that question.").[9] To the contrary, the government's theory from beginning to end was that Bourke "knew all about the brazen bribery scheme." JA98

[9] There was evidence that Bourke and the other American investors took steps on advice of counsel to avoid *liability* for what they did *not* know. The May 18, 1998 tape (JA1192) and the formation of ORUSA both address the American investors' desire to limit their legal risk for actions Kozeny took without their knowledge. But there is a crucial difference between avoiding *liability* for the unknown and avoiding *knowledge*. There was no evidence that Bourke deliberately avoided *knowledge* of Kozeny's bribes.

(government opening).[10] The government presented testimony through Farrell and Bodmer that Bourke asked *repeatedly* about Kozeny's corrupt arrangement with the Azeris. In rebuttal the government expressly disavowed reliance on conscious avoidance. JA941 ("Those [actual knowledge and conscious avoidance] are not the government's two theories. Our theory is the first theory."). The government argued that Bourke "did everything he could to learn about the arrangement." JA942. It continued:

> The government's proof shows [Bourke] *didn't look the other way*. He was a detail-oriented person *who did everything he could to find out about this arrangement*. He asked questions. He asked them again. Mr. Hempstead, his lawyer, testified he sometimes asked the questions three times. And that's what he did here. *And that's why he absolutely knew everything he needed to know to become a member of this charged conspiracy*.

JA941-42 (emphasis added).[11] A person who "d[oes]n't look the other way" and "d[oes] everything he c[an] to find out about" a corrupt arrangement does not "decide[] not to learn" about the arrangement. The person either knows about the

[10] *See, e.g.*, JA101 (government opening; Bourke "wanted to hear the details, and he wanted to hear it from [Bodmer's] mouth."), 103 (Bourke "had one important question for Farrell and it was a question that spoke volumes about the defendant's knowledge of the bribery scheme: Is Viktor giving the Azeris enough money?"), 106-07 ("That's what Bourke thought went on in this part of the world, and in this case the evidence will show that's what he knew had happened."), 112 ("Because the evidence will show that the defendant knew that the only way this deal worked was through bribery and corruption.").

[11] Bourke renewed his objection to the conscious avoidance instruction after the rebuttal argument. JA976.

arrangement or he does not, but he does not consciously avoid knowledge of it. Because there was no evidence that Bourke "decided not to learn about" Kozeny's bribery, the district court should not have instructed on conscious avoidance.

2. The Instruction Was Prejudicial.--The conscious avoidance instruction prejudiced Bourke on both counts of conviction. Courts recognize the danger that a jury instructed on conscious avoidance will convict on negligence or recklessness. *See United States v. Kaplan*, 490 F.3d 110, 122 (2d Cir. 2007); *Ferrarini*, 219 F.3d at 157; *Rodriguez*, 983 F.2d at 458. To exploit that danger, the government contrasted Bourke's due diligence before investing in Oily Rock with the due diligence of another potential investor--TPG--that considered investing but ultimately did not.

To draw this contrast, the government first called Wheeler and Rossman to describe their due diligence for TPG. JA511-13, 526-27, 531-89. It began with a description of their usual due diligence practices when evaluating an investment. JA511-13, 532-33.[12] It then elicited their specific steps with respect to the Oily Rock investment. Wheeler described her trip to Baku, her hiring of Cleary

[12] Rossman testified that he had a "standard checklist" to investigate FCPA issues, JA532; that "a lawyer's job . . . is to determine whether or not there is any aspect of the investment that would involve issues like that," *id.*; that "you have to take a look at the investment and the structure of the investment and who is benefiting from it," JA532-33; and that this includes "due diligence," which Rossman defined as "verifying the facts . . . you actually go and determine all of the facts to make sure it's true or not," JA533.

Gottlieb, and the research the law firm was asked to perform, including research concerning the FCPA. JA514-26. Rossman testified that he conducted "background research," on the internet and through the Cleary Gottlieb library, JA533; that he contacted Kozeny's lawyers, including Bodmer, and obtained financial and organizational documents concerning Oily Rock and related entities, JA534-42; that his review of the documents raised questions for him to investigate, including questions concerning the FCPA, JA541-53; that he requested and received more documents, which spurred further questions, JA553-65; and that he traveled to Switzerland to meet Bodmer, review more documents, and seek answers, JA565-88.

The government asked Rossman repeatedly whether particular documents "raised questions" for him, and in response he described his concerns about the investment. Rossman testified that, after his investigation, Cleary Gottlieb advised TPG that Oily Rock was a "dumb investment" and that "there was a significant risk because of the lack of information about the other shareholders, that there could be a FCPA issue. And unless we had a lot more information, we thought he was taking a big risk, and . . . we recommended that he not do it." JA589.

None of this testimony was relevant to Bourke's state of mind. Rossman never met Bourke or otherwise communicated with him, JA590, and Wheeler never communicated with him before or after the trip to Baku, JA527-28. Bourke

knew nothing of TPG's due diligence efforts.[13] The government offered the testimony of Wheeler and Rossman solely as a contrast with the comparatively skimpy inquiry that Bourke and his lawyers performed. This point became apparent when the government called those lawyers--Arnold Levine of Proskauer in New York and David Hempstead and Jay Colvin of the Bodman firm in Detroit--and questioned them about the inquiries they made on Bourke's behalf before he invested in March 1998. JA451-55, 597, 600, 607-10, 627, 652-66, 673.

The government made the point of this comparison explicit in its closing:

> Now, you heard testimony in this trial about another potential investor, Carrie Wheeler of TPG. . . . [S]he saw enough and heard enough in the January trip to send a lawyer to investigate, to do due diligence. That was James Rossman. . . . [H]e went to Zurich and met with Hans Bodmer . . . and he immediately learns enough about the deal to see FCPA red flags all over the place. He calls his client. And TPG declines to invest.
>
> Defendant took a different road. He didn't ask any of his many lawyers to do any due diligence on the deal. Instead, he made another visit to Baku in February, and he decided to invest several millions of dollars in Oily Rock . . . .

JA917. The government returned to this point later in its closing:

> [B]efore he invested, the defendant did not engage a lawyer to do any due diligence for potential violations of the FCPA. . . . Now, there was at least one potential investor that did consult an attorney. That was David Bonderman [of TPG]. He hired that lawyer from Cleary, James Rossman. . . . And when Rossman got to Zurich, it only took him a couple of hours to figure out that these unnamed investors in

[13] For this reason, the Wheeler and Rossman testimony was irrelevant and should have been excluded under Fed. R. Evid. 401 and 403. *See infra* Part II.A.

> Oily Rock, these Azeris, as Bodmer described them, screamed out FCPA violation.

JA930-31; *see* JA968. The government even argued that Bourke's due diligence was inadequate because he used his Detroit lawyers for the transaction instead of a New York lawyer. JA968-69; *see* JA898.

The government's evidence and argument about the inadequacy of Bourke's due diligence compared to TPG's had no bearing either on Bourke's actual knowledge of Kozeny's bribes or on his conscious avoidance of knowledge. There is no evidence, for example, that Bourke decided not to conduct more thorough due diligence because he did not want to know about Kozeny's corrupt activities. The contrast the government drew between Bourke's due diligence and TPG's showed at most that Bourke was negligent or reckless--that he could have or should have done more to determine whether Kozeny was bribing the Azeris. But conscious avoidance is not established merely because the defendant was "negligen[t], mistake[n], or even foolish[]." *Rodriguez*, 983 F.2d at 458.

The government's tactic had its intended effect on the jury.[14] The foreman told the press: "It was Kozeny, it was Azerbaijan, it was a foreign country. . . . We

[14] The district court gave the standard instruction that conscious avoidance is not established "if the person merely failed to learn the fact through negligence." JA984. But under circumstances such as these--where there is no evidence of a deliberate decision to avoid knowledge and the prosecution emphasizes steps the defendant should have taken--this standard language does not cure the error in giving the instruction. *See United States v. Cavin*, 39 F.3d 1299, 1310 n.33 (5th Cir. 1994) (reversing conviction for conscious avoidance instruction despite

thought he knew *and definitely could have known.* He's an investor. *It's his job to know.*" JA1048-49 (emphasis added). The jury's blending of what Bourke *knew* with what he *could have known* speaks eloquently to the danger of a conscious avoidance instruction. That danger may be acceptable where the evidence shows that the defendant "*decided* not to learn" the facts at issue. *Rodriguez*, 983 F.2d at 458 (emphasis in original). But where, as here, there is no such evidence and the government exploits the jury's confusion of conscious avoidance and negligence or recklessness, the instruction requires reversal.

C. The District Court Erred in Refusing to Instruct the Jury That to Convict on the Conspiracy Charge It Had to Find That Bourke Acted "Corruptly" and "Willfully" as Those Terms Are Used in the FCPA.

The district court compounded its error in giving the conscious avoidance instruction by rejecting Bourke's requested instruction on Count One that the government had to prove that he acted "corruptly" and "willfully."

It is settled that "in order to sustain a judgment of conviction on a charge of conspiracy to violate a federal statute, the Government must prove at least the degree of criminal intent necessary for the substantive offense itself." *United States v. Feola*, 420 U.S. 671, 686 (1975); *see Ingram v. United States*, 360 U.S.

(continued...)

standard language); *United States v. Barnhart*, 979 F.2d 647, 650 (8th Cir. 1992) (same); *United States v. Mapelli*, 971 F.2d 284, 286 (9th Cir. 1992) (same); *United States v. Ojebode*, 957 F.2d 1218, 1228 (5th Cir. 1992) (same).

672, 678 (1959); *United States v. Pinckney*, 85 F.3d 4, 8 (2d Cir. 1996); *see also United States v. Alston*, 77 F.3d 713, 718 (3d Cir. 1996) (reversing conviction); *United States v. Harrelson*, 766 F.2d 186, 188 (5th Cir. 1985) (per curiam) (reversing conviction).

Bourke requested an instruction on Count One that reflected the *Feola* principle. That proposed instruction required the government to prove "that Mr. Bourke acted willfully and corruptly, as I have defined those terms in these instructions." JA56. These are the mens rea requirements for a substantive FCPA offense. 15 U.S.C. §§ 78dd-2(a), 78dd-2(g)(2)(A); *see United States v. Kay*, 513 F.3d 432, 449-50 (5th Cir. 2007), *on petition for rehearing*, 513 F.3d 461 (5th Cir. 2008); *Stichting Ter Behartiging v. Schreiber*, 327 F.3d 173, 183 (2d Cir. 2003). Under *Feola*, therefore, the jury should have been instructed on Count One that, to find Bourke guilty of conspiracy to violate the FCPA, it had to find that he acted both "willfully" and "corruptly."

Over objection, JA204, 209-10, 216, SA74, the district court declined to give Bourke's proposed mens rea instruction on Count One, SA74. The court instructed the jury correctly on the "willfully" and "corruptly" elements of a *substantive* FCPA offense, JA981, but it prefaced the substantive FCPA instructions with the following disclaimer: "You should note that the government need not prove each of the following elements in order to prove that the defendant

engaged in a conspiracy to violate the FCPA. I am instructing you on the elements only [so] that they will aid you in your determination as to whether the government has sustained its proof, burden of proof, with respect to this count," JA980. Thus, the court told the jury that it was *not* required to find the elements of a substantive FCPA offense, including the mens rea elements.

When the district court turned to the mens rea required for the conspiracy offense, rather than for a substantive FCPA offense, it omitted the requirement that the defendant act "corruptly." JA987-90. And although the conspiracy instruction required proof that the defendant was "aware of the generally unlawful nature of his acts," JA987, the "willfully" instruction for the conspiracy offense omitted the crucial "intent to do something that the law forbids" and "bad purpose to disobey or disregard the law" language that appears in the "willfully" instruction for the substantive FCPA offense, JA981. The court instead instructed the jury that, for purposes of the conspiracy offense, "an act is done knowingly and willfully if it is done deliberately and voluntarily, that is, the defendant's act or acts must have been the product of his conscious objective, rather than the product of a mistake or accident or mere negligence or some other innocent reason." JA987.

This watering-down of the mens rea requirement for the conspiracy charged in Count One--particularly in conjunction with the erroneous conscious avoidance instruction and district court's rejection of Bourke's proposed good faith

instructions--undermined Bourke's defense, which rested on his state of mind. The Court should reverse his conviction.

D. The District Court Erred in Refusing to Give Bourke's Proposed Good Faith Instructions.

Bourke requested good faith instructions on the conspiracy and false statement counts. JA58-59, 229-30. The district court refused the instructions. SA82. That error, in combination with the court's other errors on the mens rea instructions, requires reversal.

First, Bourke's proposed good faith instructions--adapted from Judge Sand's treatise--were "legally correct." *United States v. Vasquez*, 82 F.3d 574, 576 (2d Cir. 1996) (quotation omitted). The proposed instruction on Count One accurately reflected the principle that a defendant's good faith belief that he acted lawfully negates the mens rea for specific intent offenses. *See Cheek v. United States*, 498 U.S. 192, 202 (1991); *United States v. Doyle*, 130 F.3d 523, 540-41 (2d Cir. 1997); *see also United States v. Bowling*, 343 Fed. Appx. 359 (10th Cir. 2009) (reversing conviction for refusal to give good faith instruction); *United States v. Casperson*, 773 F.2d 216, 223 (8th Cir. 1985) (same). The proposed instruction on Count Three correctly states the analogous principle that a defendant's good faith belief in the accuracy of his allegedly false statements negates the mens rea required for a conviction under 18 U.S.C. § 1001.

Second, Bourke's proposed good faith instructions "represent[ed] a theory of defense with basis in the record that would lead to acquittal." *Vasquez*, 82 F.3d at 576 (quotation omitted). The evidence shows that Bourke sought to ensure that the Oily Rock investment complied with the law. He traveled twice to Baku before investing and spoke with Michael Dingman, a former member of the Ford board who had invested previously with Kozeny. T.2583-84. He made inquiries of his attorneys. JA612-15, 619-24, 631, 638-43, 646, 676-80, 684-85; T.2212-30. Attorney David Hempstead testified that "[w]e believed that it was a legitimate deal." JA623. When Bourke learned that Kozeny intended to issue 300,000,000 shares of Oily Rock to Azeri interests, he and his lawyers confirmed with Bodmer that the Azeris would pay full value--meaning that the existing shareholders would not have the value of their shares diluted and that the shares were an exchange of equal value rather than a bribe. JA380-81, 613-15, 619-29, 652-54, 669-70, 677-78, 691-95, 773-75, 879-81, 1216, 1248; T.1161-62, 1570-71; DXO-2. Bourke's efforts to investigate the Oily Rock investment were not as extensive as TPG's, but they suffice for a good faith instruction. *See, e.g., United States v. Dove*, 916 F.2d 41, 47 (2d Cir. 1990) ("[A] criminal defendant is entitled to instructions relating to his theory of defense, for which there is some foundation in the proof, no matter how tenuous that defense may appear to the trial court."). And, in a case that

turned on Bourke's state of mind, there is no doubt that the good faith defense, if accepted by the jury, would have produced an acquittal.

Third, nothing in the district court's charge "effectively presented" Bourke's good faith defense. *Vasquez*, 82 F.3d at 576 (quotation omitted). Most strikingly, the court rejected Bourke's proposed "corruptly" and "willfully" instructions on Count One, which would have required the jury to find (among other things) that Bourke acted "with a bad purpose to disobey or disregard the law." *See United States v. McElroy*, 910 F.2d 1016, 1026 (2d Cir. 1990). Because the district court failed either to give Bourke's good faith instruction or to otherwise "effectively present" his good faith defense to the jury, his conviction must be reversed.

II. THE DISTRICT COURT ERRED IN ADMITTING THE WHEELER AND ROSSMAN TESTIMONY ABOUT THEIR DUE DILIGENCE AND IN EXCLUDING THE TESTIMONY OF BRUCE DRESNER.

The district court should have excluded the Wheeler and Rossman testimony about their due diligence for TPG, given its irrelevance to Bourke's state of mind. But having erroneously admitted their testimony, the court should have permitted Bourke to present the contrasting testimony of Bruce Dresner, who would have established that Columbia University invested $15 million with Kozeny in Azeri privatization with due diligence comparable to Bourke's.

A. The Standard of Review.

This Court reviews decisions to admit or exclude evidence for abuse of discretion. *See United States v. McCallum*, 584 F.3d 471, 474 (2d Cir. 2009); *Kaplan*, 490 F.3d at 117-22; *United States v. Blum*, 62 F.3d 63, 67-68 (2d Cir. 1995); *United States v. Dwyer*, 539 F.2d 924, 927-28 (2d Cir. 1976).

B. The Court Erred in Admitting the Wheeler and Rossman Due Diligence Testimony.

As described above, the district court admitted extensive testimony from Wheeler and Rossman about due diligence they performed for TPG. Because Rossman never communicated with Bourke at all, JA590, and Wheeler never communicated with him about her due diligence, JA527-28, the court should have excluded the evidence as irrelevant and as unfairly prejudicial under Fed. R. Evid. 403.[15]

The government offered the Wheeler and Rossman due diligence testimony to have the jury compare their efforts with the due diligence that Bourke and his lawyers conducted. As the government explained:

> [W]e're both sort of calling Mr. Bourke's lawyers who are going to testify about what they did at Mr. Bourke's direction to look into this deal. And they are impressive lawyers from big law firms, the head of the corporate department at Proskauer, who the jury will be left with

[15] Bourke moved to exclude the Wheeler and Rossman testimony about their knowledge or suspicion of corruption with respect to Kozeny's privatization venture. DE214, DE215. The district court excluded portions of their proposed testimony but permitted them to testify about their due diligence. SA21-29.

> the impression that what he did is what people normally do in due diligence.
>
> And I think that needs to be compared to a client like Carrie Wheeler and her boss, David Bonderman, who are using Mr. Rossman of Cleary Gottlieb to really find out what this deal was about, because our argument is that Mr. Bourke didn't want the lawyers to find out what it is about.

SA25; *see* JA316. The district court approved use of the Wheeler and Rossman testimony for this purpose: "If you want to show [Rossman's] own efforts of due diligence, to contrast them with the lawyers for Mr. Bourke's efforts, fine. Ask him what he did." SA25; *see* SA26 (court says: "Ask [Rossman] what he did. . . . How did you conduct your due diligence? What efforts did you make? What documents did you ask to see? . . . That's a big argument, that's it's less [sic] than Mr. Bourke's lawyers did.").

This colloquy confirms the irrelevance of the Wheeler and Rossman due diligence testimony. There was no evidence--and no basis to infer--that "Mr. Bourke didn't want the lawyers to find out" about Kozeny's privatization investment. Bourke's lawyers did not testify, for example, that Bourke did anything to restrict their inquiry into the investment. No document supported that contention. And nothing about the Wheeler and Rossman due diligence--of which Bourke knew nothing--showed that Bourke sought to prevent his lawyers from learning the truth.

Kaplan demonstrates the error in admitting the Wheeler and Rossman testimony. This Court held that the district court abused its discretion in admitting testimony about third persons' knowledge of a fraud, where "the Government failed to offer evidence that would explain how defendant Kaplan would have obtained the third parties' knowledge" of the criminal scheme. 490 F.3d at 121. Similarly here, where neither Wheeler nor Rossman communicated the fact or results of the due diligence to Bourke, their testimony was irrelevant.

As described in Part I.B.2. above, the government elicited the Wheeler and Rossman due diligence testimony and contrasted it with Bourke's efforts to exploit the danger inherent in the conscious avoidance instruction that the jury would convict Bourke for negligence or recklessness--for what he (or his lawyers) *should* or *could* have known, rather than for what he *actually* knew.[16] This Court recognized this prejudice in reversing the conviction in *Kaplan*; it noted "the risk of *unfair* prejudice here--in particular, the likelihood that jurors would render a decision on an improper basis by giving this testimony undue weight or improperly holding Kaplan liable because they believed he should have known of the fraud--was great." 490 F.3d at 122. Similarly here, the unfair prejudice from the Wheeler and Rossman testimony substantially outweighed its minimal probative value.

[16] Although the government asserted that "we're both sort of calling Mr. Bourke's lawyers" to testify about their due diligence, SA25, in fact it was the government that called the lawyers and elicited those efforts.

C. The Court Should Have Permitted Bourke to Respond to the Government's Due Diligence Evidence with the Testimony of Bruce Dresner.

The district court compounded its error in admitting the Wheeler and Rossman testimony by excluding the contrasting testimony of Bruce Dresner. SA48-54, 57, 61, 137-42. Even if the Dresner testimony would not otherwise have been admissible, the government's introduction of the Wheeler and Rossman testimony opened the door. *See, e.g., Bah*, 574 F.3d at 117 n.8.

The Constitution guarantees a defendant a "meaningful opportunity to present a complete defense." *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) (quotation omitted); *see Crane v. Kentucky*, 476 U.S. 683, 690 (1986). The Supreme Court recognizes that "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973); *see Washington v. Texas*, 388 U.S. 14, 19 (1967) ("[T]he right to present a defense . . . is a fundamental element of due process of law.").

The district court's exclusion of Dresner's testimony violated these principles. Dresner would have testified that in 1998 he had primary responsibility for recommending investment of Columbia's endowment. Leon Cooperman and Clayton Lewis of Omega contacted him about investing in Azeri privatization. On April 6, 1998, Dresner and his coworkers took part in a conference call with Lewis in which the Columbia participants expressed concern about whether the

investment involved bribes or payoffs or presented any FCPA issues. On April 9, 1998, Lewis and a colleague presented the investment to members of Columbia's Finance and Investment Steering Committees, which consisted of highly reputable finance and investment professionals. University counsel also attended the meeting. Committee members asked questions about the risks of doing business in the former Soviet republics and whether the investment involved bribes, corrupt practices, or FCPA risks. Lewis assured them that Omega had done due diligence and that there were no FCPA problems with the investment. Columbia then invested (and lost) $15 million through Omega. JA809-57 (defense proffer).

Dresner's testimony was relevant on two grounds. First, once the district court permitted the government to present TPG's due diligence as a benchmark for measuring Bourke's inquiry, fairness demanded that Bourke be allowed to present the contrasting picture of Columbia's due diligence, which resembled his own. Dresner's testimony would have provided a powerful counterweight to the Wheeler and Rossman testimony: Columbia was a reputable and sophisticated investor that placed (and lost) $15 million in Azerbaijan on the word of Clayton Lewis, who (like Bodmer and Farrell) turned out to be one of Kozeny's corrupt henchmen. Columbia--like Bourke but unlike TPG--did not send a lawyer to Zurich to meet with Bodmer and review his files. If the district court had permitted Bourke to call

Dresner, the contrast the government drew between TPG's due diligence and Bourke's would have been far less damaging.

Second, Dresner's testimony would have rebutted the government's argument, based on the May 18, 1998 tape, that Bourke's questions about the possibility that Kozeny was paying bribes abroad showed guilty knowledge (or, as the district court erroneously concluded, SA70, conscious avoidance). Dresner and his fellow Columbia investment professionals did not know that Kozeny was bribing the Azeris, but they nonetheless raised questions about possible FCPA violations as a matter of prudence--just as Bourke did on the May 18 call. Had Dresner been permitted to testify, the government's efforts to put Bourke's questions in a sinister light would have failed.

The error in excluding Dresner's testimony violated Bourke's Fifth and Sixth Amendment rights and--because it left the government free to argue impermissible inferences from the Wheeler and Rossman testimony and the May 18 tape--was not harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18, 22-24 (1967); *Rosario v. Kuhlman*, 839 F.2d 918, 924 (2d Cir. 1988).

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

IV. THE DISTRICT COURT ERRED IN ADMITTING A MISLEADING FRAGMENT OF A MEMORANDUM CONCERNING BODMER'S ALLEGED "WALK TALK."

The government introduced, as a prior consistent statement by Bodmer, a misleading fragment of a memorandum that Schmid, then an associate at Bodmer's law firm, wrote in October 2001 in response to questions from plaintiffs in a London lawsuit arising from Kozeny's options fraud. JA407-09, 426, 1210; T.1191-92, 1310-15. The fragment purported to reflect what Bodmer had told Schmid in 1998 about the alleged walk talk with Bourke. The defense objected to the fragment, JA411, and moved for admission of the entire memo under the rule of completeness (Fed. R. Evid. 106) and as prior inconsistent statements of Bodmer, JA385-90, 431; DE218, DE219. The district court denied the defense

motion and admitted the redacted exhibit. SA33, 36, 42-44. The court barred cross-examination of Schmid about the redacted portion of the memo. SA36, 38.

The district court abused its discretion in admitting the government's selected fragment of GX181 and excluding the remainder. It should have admitted the entire memorandum under Rule 106 to avoid misleading the jury. That rule provides that "[w]hen a writing . . . or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part . . . which ought in fairness to be considered contemporaneously with it." Fed. R. Evid. 106. Under the principle of completeness, "even though a statement may be hearsay, an omitted portion of [the] statement must be placed in evidence if necessary to explain the admitted portion, to place the admitted portion in context, to avoid misleading the jury, or to ensure fair and impartial understanding of the admitted portion." *United States v. Johnson*, 507 F.3d 793, 796 (2d Cir. 2007) (quotation omitted), *cert. denied*, 552 U.S. 1031 (2008); *see Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 172 (1988) ("[W]hen one party has made use of a portion of a document, such that misunderstanding or distortion can be averted only through a presentation of another portion, the material required for completeness is *ipso facto* relevant and admissible under Rules 401 and 402."); Fed. R. Evid. 106, Advisory Committee Note (rule prevents "the misleading impression created by taking matters out of context").

The omitted portions of GX181 were necessary to explain the admitted portion and to place it in context--to prevent it, in other words, from misleading the jury. The government introduced its selected portion of GX181 to corroborate Bodmer's testimony about the alleged February 6, 1998 walk talk. According to Schmid, Bodmer returned from a trip to Baku "at the beginning of 1998" and told Schmid that he had talked with Bourke about the "two-third/one-third investment, participation of the Azeri interests in the Oily Rock structure." JA395-97, 425. Schmid made no notes or memoranda of the conversation. JA397-98, 425-26.

Following the collapse of the privatization investment, Omega and AIG sued Kozeny in London. By letter dated October 3, 2001, their lawyers requested that Von Meiss Blum, the law firm to which Bodmer and Schmid belonged, provide information about the investment, including the firm's role in Kozeny's operation. JA406-08, 1210. At Bodmer's request, Schmid began drafting a response. JA408-12, 427. In a portion of the memo headed "Knowledge of claimants," he included a version of the walk talk, purportedly provided by Bodmer. JA412-15, 1211-12. That portion states:

> Ricky Bourke asked Hans Bodmer about the legal structure of Oily Rock and its subsidiaries, the ownership of vouchers and options by the holding companies etc. Hans Bodmer remembers that--probably at the beginning of 1998--he left together with Ricky Bourke the Hyatt Regency Hotel in Baku and went for a walk together with Ricky Bourke. During this walk he briefed Ricky Bourke in detail about the involvement of the Azeri Interests by way of the credit facility agreements, the 2:3/1:3 arrangement (i.e. the ownership of the

> voucher and option holding companies by the Azeri Interest and Oily Rock etc.). [what about the merger?]

JA1211-12.[21]

Taken in isolation and out of context, this passage appears to corroborate Bodmer's trial testimony about the walk talk. But the remainder of the memorandum puts the passage in an entirely different light--a light at odds with Bodmer's trial testimony. At trial, for example, Bodmer portrayed the "credit facility agreements" with the Azeris--under which an Oily Rock subsidiary purported to loan the Azeris the money necessary to acquire two-thirds of the vouchers and options--as not "at arm's length" and as interest-free, unsecured shams. JA329-40. The jury undoubtedly concluded from the admitted portion of the memorandum that when Bodmer claimed to have "briefed Ricky Bourke in detail about the involvement of the Azeri Interests by way of the credit facility agreements," JA1211, he told Bourke (just as he testified at trial, JA348-50; T. 1309) that the agreements were risk-free shams.

But a portion of the memorandum that the jury was *not* permitted to see tells a different story. The excluded portion of the memorandum states in part:

> At the time [Von Meiss Blum] drafted the credit facility agreements it was our understanding that the credit facility agreements should be the

[21] The memo originally named the hotel from which Bodmer and Bourke allegedly left as "the Hilton Hotel." Someone--Schmid professed not to know who--wrote in "Hyatt Regency" by hand. JA1211.

> basis for an arm's length transaction. If Viktor Kozeny and/or the Azeri interests had other intentions is unknown to us.

JA1206. This omitted passage entirely changes the meaning of the portion of the memo that addresses the walk talk. A jury reading the entire memorandum, rather than the misleading fragment that the government offered and the district court admitted, would conclude that Bodmer had described the credit facility agreements to Bourke as "arm's length transaction[s]," rather than in the opposite, sinister way that he portrayed them at trial.

A second passage from the excluded portion of the memorandum similarly casts the admitted part in a significantly different light. In his trial testimony, Bodmer characterized Kozeny's arrangement with the Azeris as a "form of a bribe," JA340--a two-thirds interest in tens of millions of dollars worth of vouchers and options acquired "without risk or without personal commitment." JA333. He described researching the arrangement under Swiss criminal law and concluding it was lawful because Swiss law did not prohibit bribery of foreign officials. JA340-41. The jury no doubt concluded that when Bodmer "briefed Ricky Bourke in detail about the involvement of the Azeri Interests by way of the credit facility agreements, the 2:3/1:3 arrangement," as the admitted fragment of GX181A states, he told Bourke--as he had told the jury--that the arrangement was corrupt.

Again, a portion of the memorandum that the court excluded presents a far more benign picture. In that portion, the memo states:

> Neither Hans Bodmer nor anyone else of [Von Meiss Blum] has specific knowledge of corrupt payments. Whether there is such an agreement between Viktor Kozeny and Barat Nuriyev is not known to [Von Meiss Blum] and if such payments were in fact discussed Hans Bodmer did not attend such meetings.

JA1208. This omitted passage directly contradicts the clear implication of the admitted portion of the memorandum read in conjunction with Bodmer's trial testimony.

The omitted portions of GX181 are essential to prevent "the misleading impression created by taking matters out of context." Fed. R. Evid. 106, Advisory Committee Note. In the words of this Court, the omitted portions of the Schmid memo are "necessary to explain the admitted portion, to place the admitted portion in context, to avoid misleading the jury, [and] to ensure fair and impartial understanding of the admitted portion." *Johnson*, 507 F.3d at 796 (quotation omitted). The district court abused its discretion in admitting the memo in redacted form and overruling the defense proffer of the entire document. *See, e.g., Beech Aircraft Corp.*, 488 U.S. at 172 (finding "clear abuse of discretion" where court admitted misleading fragment of document and excluded remainder); *Phoenix Associates III v. Stone*, 60 F.3d 95, 102-03 (2d Cir. 1995) (court abused discretion in excluding workpaper offered under Rule 106 to put admitted financial statements in context).

The court's error prejudiced Bourke on the two counts of conviction. A crucial contested issue on both counts was Bourke's knowledge of Kozeny's bribery. Bodmer was one of only two witnesses who claimed to have told Bourke about the bribery. Bodmer's testimony about the walk talk was shown to be false. In closing argument, the government relied extensively on the redacted Schmid memorandum to rehabilitate him. JA921 (government argues that Schmid "provided important corroboration" of Bodmer's walk talk testimony); *see* JA923 ("Now, the content of this memo [GX181A] is entirely consistent with what Hans Bodmer testified to."), 923-24 (the memo "came into evidence from a witness who is not a part of the Oily Rock conspiracy, who is just a junior lawyer getting [a] report in 1998 from his boss"), 943 (government rebuttal; "That memo recites the very substance of the conversation that Bodmer had with Mr. Bourke . . . ."), 956 ("In 2001, Ralph [sic] Schmid was doing his best to answer truthfully questions that the plaintiffs were posing to his law firm."). Given the government's extraordinary emphasis on GX181A to rehabilitate one of its two key witnesses, the district court's exclusion of portions of the memo that would have placed it in an entirely different light and contradicted Bodmer's trial testimony violated Bourke's substantial rights.

V. THE CUMULATIVE EFFECT OF THE DISTRICT COURT'S ERRORS ON ISSUES CONCERNING BOURKE'S MENS REA REQUIRES REVERSAL.

For the reasons discussed above, any one of the errors concerning Bourke's knowledge of Kozeny's bribes and his specific criminal intent, standing alone, warrants reversal. But even if the Court finds those errors harmless in isolation, their cumulative effect profoundly damaged Bourke's defense. This Court recognizes that "the cumulative effect of a trial court's errors, even if they are harmless when considered singly, may amount to a violation of due process requiring reversal of a conviction." *United States v. Al-Moayad*, 545 F.3d 139, 178 (2d Cir. 2008); *see, e.g., United States v. Guglielmini*, 384 F.2d 602, 607 (2d Cir. 1967) (no single error required reversal, but "the total effect of the errors we have found was to cast such a serious doubt on the fairness of the trial that the convictions must be reversed").

The errors here had a cascading effect that casts grave doubt on the convictions on both counts. The district court's error in giving the conscious avoidance instruction, combined with its errors in admitting the Wheeler and Rossman due diligence testimony and excluding the Dresner testimony, created a grave risk that the jury would convict Bourke because it thought he *should have known* or *could have known* about Kozeny's bribes, even if it had a reasonable doubt about his *actual* knowledge. The court's erroneous refusal to instruct the

jury on good faith (and, on Count One, on the requisite "willfully" and "corruptly" elements) further watered down the requisite mens rea.

REDACTED and its error in permitting the government to introduce a misleading fragment of the Schmid memo, while excluding other portions that would have further impeached Bodmer, prevented the defense from fully discrediting the only two government witnesses who claimed to have told Bourke about the bribery. Absent the errors in admission and exclusion of evidence, and absent the significant instructional errors, an acquittal would have been required.

By the end of the case, the district court--with full knowledge of all of the evidence and the correct legal principles--was not sure whether Bourke was "a victim, or a crook, or a little bit of both." JA1183. The jury, on the other hand, having received erroneous instructions that improperly diluted the mens rea requirement, and having formed a distorted view of the facts from the district court's evidentiary errors, found Bourke guilty on two counts beyond a reasonable doubt. Under these circumstances, "the total effect of the errors" is "to cast such a serious doubt on the fairness of the trial that the convictions must be reversed." *Guglielmini*, 384 F.2d at 607.

VI. THE EVIDENCE IS INSUFFICIENT ON COUNT THREE.

The evidence is insufficient to convict Bourke on Count Three for knowingly making false statements to the FBI during his four days of voluntary interviews in April and May 2002. The Court should direct entry of a judgment of acquittal or grant a new trial on that count.

A. The Standard of Review.

This Court reviews de novo a district court's denial of a motion for judgment of acquittal under Fed. R. Crim. P. 29. In conducting that de novo review, the Court views the evidence in the light most favorable to the prosecution. But if "at the end of the day . . . the evidence viewed in the light most favorable to the prosecution gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence, then a reasonable jury must necessarily entertain a reasonable doubt" and judgment of acquittal must be granted. *United States v. Cassese*, 428 F.3d 92, 99 (2d Cir. 2005) (quotation omitted); *see United States v. Lorenzo*, 534 F.3d 153, 159 (2d Cir. 2008) (same). To affirm the denial of a motion for judgment of acquittal, "it is not enough that the inferences in the government's favor are permissible." *United States v. Triumph Capital Group*, 544 F.3d 149, 159 (2d Cir. 2008). Rather, the court must be satisfied that "the inferences are sufficiently supported to permit a rational juror to find that the element, like all elements, is established beyond a reasonable doubt." *Id.* And

while circumstantial evidence may support a conviction, "a conviction may not be based on mere speculation and conjecture." *United States v. Pinckney*, 85 F.3d 4, 7 (2d Cir. 1996); *see United States v. D'Amato*, 39 F.3d 1249, 1256 (2d Cir. 1994) ("[A] conviction based on speculation and surmise alone cannot stand.").

The standard for reviewing a district court's denial of a motion for new trial under Fed. R. Crim. P. 33 is whether the court abused its discretion in a situation where there is "'a real concern that an innocent person may have been convicted.'" *United States v. McCourty*, 562 F.3d 458, 475 (2d Cir.) (quoting *United States v. Ferguson*, 246 F.3d 129, 134 (2d Cir. 2001), and *United States v. Sanchez*, 969 F.2d 1409, 1414 (2d Cir. 1992)), *cert. denied*, 130 S. Ct. 1012 (2009).

B. The Conviction on Count Three Rests on Impermissible Inferences and Speculation.

Count Three charges a violation of 18 U.S.C. § 1001. It begins by incorporating 47 earlier paragraphs and deals with four days of interviews that Bourke voluntarily gave to the FBI agents and prosecutors in 2002. The FBI 302 concerning this series of interviews runs 131 pages and covers more than 70 subjects. JA756-77.[22] We have discussed the context of these interviews above.

[22] The dangers of the process by which the FBI memorializes witness interviews--here by notes later reduced to a memorandum (which in this case was revised to narrative topical form), rather than verbatim with a tape recorder or a court reporter--have often been chronicled. The context of the questions and answers is lost by this practice. *See* Danny O. Coulson & Elaine Shannon, *No Heroes: Inside the FBI's Secret Anti-Terror Force* 461-62 (1999); Lisa Kern

The charging portion of Count Three says that Bourke "falsely stated in substance that he was not aware that Victor Kozeny had made various corrupt payments, transfers and gifts to Azeri government officials," when in fact he knew and believed the contrary. JA92.

Thus, the government assumed the burden of proving that the entirety of the four days of interviews, taken in context, showed that Bourke actually knew--as distinct from, for example, having retrospective suspicions by the time of his interviews, *e.g.*, JA733-34, 757-58--that Kozeny had made payments and other arrangements with the Azeris.

The prosecution claimed that Bourke's knowledge arose from conversations with Bodmer and Farrell. As we have shown, Bodmer and Farrell were both extensively prepared for their testimony and both described meetings with Bourke before the April 1998 Minaret office opening that could not have occurred. The Schmid memorandum purported to describe Bodmer's alleged walk talk with Bourke, but the district court erroneously excluded the portions of that memo which described the credit facility agreements as "arms length" and denied knowledge of corrupt payments. Farrell also testified that at the Minaret opening, some time after his claim of an earlier fictitious meeting with Bourke, he had said

---

(continued...)

Griffin, *Criminal Lying, Prosecutorial Power, and Social Meaning*, 97 Calif. L. Rev. 1515 (2009).

that there were payments to the Azeris but that Bourke should ask Kozeny for details. JA188, 191, 195-96.

At several points during the four days of interviews, Bourke acknowledged that he was aware and had been told that there were financial arrangements between Kozeny and the Azeri government officials. For example, he stated in his interview that Kozeny had told him that the share capital increase "was a prearranged deal with the big boy." JA738. His "personal interpretation" of what he had been told was that Kozeny was really issuing the stock to himself while telling investors it was going to President Aliyev, JA738-39, 741--an interpretation that was supported by Bodmer's repeated assurances that Bourke's stock would not be "diluted" by any two-thirds arrangement, JA741-43. Similarly, Bourke's counsel told the government in 2002 that Bourke's understanding since the inception of his investment was that Azeri officials would also be investing in the privatization of SOCAR. T.2408-09.

With respect to the so-called "medical bribes," involving trips and treatment for Nasibov and Nuriyev, Bourke readily acknowledged that Kozeny had arranged the trips and he (Bourke) had recommended doctors, but denied knowledge that Kozeny had paid for them. JA735-36, 759-60, 768-69. There was no evidence at trial that Bourke knew who had paid for these trips and treatments.

These acknowledgements demonstrate that Bourke's statements during the four-day interrogation in 2002 were not, in full context, materially or literally false. The "substance" of his statements was an acknowledgement of arrangements between Kozeny and the Azeris that he *in retrospect* concluded were corrupt. His personal opinion that these arrangements were designed by Kozeny to further the fraud was subjective and does not dilute the literal truth of the factual statements themselves.

The government's late-trial abandonment of its claim that the "walk-talks" with Bodmer and Farrell occurred earlier than the Minaret opening on April 24, 1998 is important to an analysis of the literal truth of Bourke's responses. The most pointed question that Bourke denied was "whether *by the time of the opening of Minaret's offices* in Baku, Azerbaijan in late April of 1998, whether [he] had any reason to suspect that Mr. Kozeny had paid bribes or made corrupt payments to Azeri government officials." JA736 (emphasis added). This temporal limitation on the question posed, coupled with the government's closing argument suggestion that perhaps the Bodmer walk talk occurred *at*, and not "*by the time of*" the Minaret opening, renders a denial of that question literally true even ignoring the totality of Bourke's statements. The question posed suggests to a reasonable person that it is referring to "reason[s] to suspect" which arose before the Minaret opening.

In false statement and perjury cases, this Court has emphasized the importance of considering the relevant statements in context, and not in isolation. In *United States v. Lighte*, 782 F.2d 367 (2d Cir. 1986), the Court warned against analyzing a statement removed from its context and "giving it in this manner a meaning entirely different from that which it has when the testimony is considered as a whole." *Id.* at 375. Often, "it is the context that fixes the meaning of the question posed or statement made." *United States v. Watts*, 72 F. Supp. 2d 106, 110 (E.D.N.Y. 1999) (discussing *Lighte* in granting motion for judgment of acquittal on false statement charge, holding that question and statement at issue were ambiguous and, even if not ambiguous, the government had failed to sufficiently establish the statement's falsity).

Where there is no direct evidence at trial on the defendant's intended meaning of the statements, "it is incumbent upon the Government to negate any reasonable interpretation that would make the defendant's statement factually correct." *United States v. Diogo*, 320 F.2d 898, 907 (2d Cir. 1963); *see also, e.g., United States v. Gatewood*, 173 F.3d 983 (6th Cir. 1999) (evidence insufficient to support a conviction for false statements where the meaning of "payment" as used in the statement was susceptible to differing interpretations, one of which could have been true); *United States v. Gahagan*, 881 F.2d 1380 (6th Cir. 1989) (evidence insufficient to support a conviction for false statements where the

statements were subject to more than one interpretation, one of which might have been true); *United States v. Steinhilber*, 484 F.2d 386 (8th Cir. 1973) (evidence insufficient to support false statement conviction where certain phrases subject to differing interpretations). In addition, the government must prove that any statement alleged to be false was not "literally true," even if false by implication or omission, and even if meant to misdirect. *See, e.g., Bronston v. United States*, 409 U.S. 352, 357-59 (1973); *United States v. Mandanici*, 729 F.2d 914, 921 (2d Cir. 1984).

The statements attributed to Bourke are not demonstrably false in context and are at most ambiguous, which warrants a judgment of acquittal or a new trial.[23]

VII. THE DISTRICT COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON COUNT ONE THAT IT HAD TO AGREE UNANIMOUSLY ON A PARTICULAR OVERT ACT.

Bourke requested an instruction on the conspiracy charge that the jury had to agree unanimously on a particular overt act. *E.g.*, SA75-77. The district court refused the instruction. SA109-11. That error requires reversal on Count One.

It has long been settled that "a jury in a federal criminal case cannot convict unless it unanimously finds that the Government has proved each element." *Richardson v. United States*, 526 U.S. 813, 817 (1999). By contrast, "a federal jury need not always decide unanimously which of several possible sets of

[23] The insufficiency of the evidence on Count Three is particularly apparent in light of the cascade of instructional and evidentiary errors outlined above.

underlying brute facts make up a particular element, say, which of several possible means the defendant used to commit an element of the crime." *Id.* The courts of appeals are split on whether the jury must agree unanimously on a particular overt act; that is, the courts disagree on whether a particular overt act constitutes an element of a conspiracy offense under 18 U.S.C. § 371 or merely a "means the defendant used to commit" the overt act element. The Eighth and Ninth Circuits require unanimity. *See United States v. Haskell*, 468 F.3d 1064, 1074-75 (8th Cir. 2006); *United States v. Jones*, 712 F.2d 1316, 1322 (9th Cir. 1983). The Fifth, Seventh, and D.C. Circuits do not. *See United States v. Griggs*, 569 F.3d 341, 343-44 (7th Cir.), *cert. denied*, 130 S. Ct. 817 (2009); *United States v. Hubbard*, 889 F.2d 277, 279 (D.C. Cir. 1989) (no unanimity instruction when overt acts fall in "same conceptual grouping"); *United States v. Sunderland*, 656 F.2d 1181, 1202 (5th Cir. 1981) (same). This Court has not yet decided the issue. *See United States v. Shaoul*, 41 F.3d 811, 817 (2d Cir. 1994) (not plain error to refuse a specific unanimity instruction on overt acts); *United States v. Armone*, 363 F.2d 385, 398 (2d Cir. 1966) (declining to reach issue).

An overt act is indisputably an element of the conspiracy offense under 18 U.S.C. § 371. *See United States v. Salmonese*, 352 F.3d 608, 618 (2d Cir. 2003); *United States v. Smith*, 939 F.2d 9, 11 (2d Cir. 1991). The district court itself instructed the jury that an overt act was one of the elements that the government

had to prove on Count One. JA990. Each overt act charged in the indictment, standing alone, would (if proven) satisfy the overt act element on count One, just as (for example) each of a series of allegedly perjurious statements charged in a single count would satisfy the falsity element of a perjury charge. And just as the jury must be given a specific unanimity instruction when a single perjury count charges multiple statements, *see, e.g., United States v. Frawley*, 137 F.3d 458, 470-72 (7th Cir. 1998); *United States v. Holley*, 942 F.2d 916, 927-29 (5th Cir. 1991), it must be given a specific unanimity instruction when a single conspiracy count charges multiple overt acts.

The absence of a specific unanimity instruction was especially problematic here, because Count One presented a significant statute of limitations issue. To satisfy the statute, the government had to prove that an overt act occurred after July 22, 1998. *See Kozeny*, 493 F. Supp. 2d at 714. By that point, Bourke had made his one and only investment in Oily Rock and his family and friends had made their final investment. Kozeny's massive options fraud was just months away from exposure. The privatization of SOCAR was in doubt, and Oily Rock employees had begun to depart Baku. The indictment alleges a handful of overt acts after July 22 (and thus within the limitations period), but there was scant evidence that any of those acts furthered Kozeny's conspiracy to bribe Azeri officials. JA87-89. Under these circumstances, where the prosecution was hard-pressed to prove an overt act

in furtherance of the conspiracy within the limitations period, the specific unanimity instruction that Bourke requested may well have made the difference between conviction and acquittal on Count One. The district court's refusal to give the instruction requires reversal.

CONCLUSION

For the foregoing reasons, the Court should reverse Bourke's conviction. On Count One, the Court should order a new trial at which Bourke will have a fair opportunity to meet the government's allegations and have the issues decided under proper legal principles. On Count Three, the Court should direct entry of a judgment of acquittal or, in the alternative, order a new trial.

DATED: April 1, 2010

Respectfully submitted,

John D. Cline
LAW OFFICE OF JOHN D. CLINE
5A Funston Ave.
San Francisco, CA 94129
Phone: 415.747.8287
Fax: 415.524.8265
Email: cline@johndclinelaw.com

Harold A. Haddon
Saskia A. Jordan
Jason C. Middleton
HADDON, MORGAN AND FOREMAN, P.C.
150 East 10th Avenue
Denver, CO 80203
Phone: 303.831.7364
Fax: 303.832.2628
Email: hhaddon@hmflaw.com;
sjordan@hmflaw.com
jmiddleton@hmflaw.com

Michael E. Tigar
552 Fearrington Post
Pittsboro, NC 27312
Phone: 202.549.4229
Email: metigar@gmail.com

Attorneys for Frederic Bourke, Jr.

CERTIFICATE OF COMPLIANCE WITH FRAP 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 18,740 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman, 14 point font.

_____

John D. Cline
Attorney for Defendant-Appellant

ANTI-VIRUS CERTIFICATION FORM

See Second Circuit Interim Local Rule 25(a)6.

CASE NAME: United States of America v. Viktor Kozeny

DOCKET NUMBER: 09-4704-cr(L)

I, (please print your name) Joseph Alvarez, certify that I have scanned for viruses the PDF version of the attached document that was submitted in this case as an email attachment to

- ☐ <agencycases@ca2.uscourts.gov>.
- ☑ <criminalcases@ca2.uscourts.gov>.
- ☐ <civilcases@ca2.uscourts.gov>.
- ☐ <newcases@ca2.uscourts.gov>.
- ☐ <prosecases@ca2.uscourts.gov>.

and that no viruses were detected.

Please print the **name** and the **version** of the anti-virus detector that you used Symantec Endpoint Protection, Version: 11.0.780.1109

If you know, please print the version of revision and/or the anti-virus signature files _____

(Your Signature) _____

Date: 04/01/2010