No. 09-30742

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

KERN WILSON, ET AL.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

BRIEF FOR APPELLEE THE UNITED STATES OF AMERICA

CHRISTINE A. VARNEY
Assistant Attorney General

SCOTT D. HAMMOND
Deputy Assistant Attorney General

JOAN E. MARSHALL
STEPHEN D. BOOKER
Attorneys
U.S. Department of Justice
Antitrust Division
1700 Pacific Avenue
Suite 3000
Dallas, Texas 75201
(214) 661-8600

JOHN J. POWERS, III
JOHN P. FONTE
Attorneys
U.S. Department of Justice
Antitrust Division
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
(202) 514-2435

STATEMENT REGARDING ORAL ARGUMENT

Given the facts of the case and the issues raised on appeal, the United States believes that the Court may find oral argument helpful.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES AND RULES

LEGISLATIVE HISTORY

MISCELLANEOUS

STATEMENT OF JURISDICTION

The District Court's jurisdiction rested on 18 U.S.C. § 3231. This Court's jurdiction rests on 18 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether defendant Wilson, as a contract consulting engineer to the U.S. Army Corps of Engineers working as a construction manager on hurricane reconstruction projects, was a "public official" within the meaning of 18 U.S.C. § 201(a)(1).
2. Whether a jury instruction that defendant Wilson was a public official within the meaning of 18 U.S.C. § 201(a)(1) was harmless, because his status as a contract employee for the Corps was not disputed, and the only arguments appellants made presented legal issues.
3. Whether the district court abused its discretion in prohibiting cross-examination into the precise sentencing benefits that Raul Miranda who, like appellants, was charged with bribery, stood to receive under his plea agreement.
4. Whether the district court erred in admitting or excluding certain evidence.

STATEMENT OF THE CASE

On May 15, 2008, a federal grand jury sitting in the Eastern District of Louisiana returned a four-count Indictment, R13,[1] that charged, in Count 1, Durwanda Elizabeth Morgan Heinrich and Kern Carver Bernard Wilson with conspiring to commit bribery in violation of 18 U.S.C. § 371. Heinrich was also charged with bribing Raul Miranda (Count 2) and Wilson (Count 3), who at the time were United States Army Corps of Engineer contract consultants, in violation of 18 U.S.C. § 201(b)(1)(B). Count 4 charged Wilson with soliciting and accepting a bribe in violation of 18 U.S.C. § 201(b)(2)(B). The Indictment charged that in September and October 2006, Wilson and Miranda agreed to accept money from Heinrich with the intent to commit a fraud on the United States: providing Heinrich with confidential information concerning a bid and proposal for the reconstruction and enlargement of the Lake Cataouatche Levee,

[1] The District Court prepared one record for Wilson's appeal and a second record for Heinrich. Both records contain many of the same pleadings and the same three-day trial transcript, but the corresponding pages of the identical record items have different USCA5 page numbers in each record. For example, the Indictment begins on USCA5 13 in Wilson but begins on USCA5 15 in Heinrich. Similarly, page 1 of the trial transcript is USCA5 486 in Wilson but USCA5 641 in Heinrich. For consistency, all record citations in this brief are to the Wilson record whenever possible and are denoted by an "R" followed by the USCA5 page number. For example, page 1 of the trail transcript is cited as "R486." When citations to the Heinrich record are necessary they are denoted as "H-Rec."

south of New Orleans, Louisiana, following the destruction caused by Hurricane Katrina.

On April 1, 2009, after a three-day trial, the jury convicted on all counts. R1132. On April 9, 2009, the court denied Heinrich's and Wilson's Rule 29 motions for judgment of acquittal. R351. On August 5, 2009, the court sentenced Wilson to 60 months imprisonment on Count 1 and 70 months imprisonment on Count 4, both terms to run concurrently, followed by three years supervised release, a $15,000 fine on Count 1, and a $200 special assessment. R1196-97. After judgment was entered on August 7, 2009, R478, Wilson timely filed a notice of appeal on August 18, 2009. R482. Wilson currently is incarcerated.

On August 26, 2009, the court sentenced Heinrich to 60 months imprisonment on each of Counts 1, 2 and 3, the terms to run concurrently, followed by three years supervised release, a $5,000 fine on Count 1, and a $300 special assessment. H-Rec.1344-46. Heinrich filed her notice of appeal the next day, H-Rec.619, and the court entered Judgment on August 31, 2009. H-Rec.622. Heinrich currently is incarcerated.

STATEMENT OF THE FACTS

1. Background

After Hurricane Katrina devastated New Orleans, the Army Corps of Engineers ("Corps") undertook to reconstruct and improve the hurricane protection system and levees on the West Bank of the greater New Orleans area. R650-51. As part of this effort the Corps hired contractor consultants to supplement its permanent workforce. R716. Among such consultants hired in the summer of 2006 were Raul Miranda and Defendant Wilson. R716-17.

In June 2006, Miranda was hired by Integrated Logistical Support, Inc. ("ILSI"), an architect engineer contractor that provided contract engineers to the Corps. Supp.R93, 95; R720.[2] ILSI placed Miranda with the Corps as a consulting engineer "to manage certain construction projects" during the levee reconstruction. R716.

Wilson is a retired U.S. Army Major with a civil engineering degree. During part of his twenty years in the Army, Wilson worked for the Corps' emergency management disaster response system. He also managed the Corps' contract requirements training program. After his retirement from the military, he became

[2] Volume II of the trial transcript is a supplemental record volume labeled "Supplement Transcript" and begins in the Wilson record with USAC5 5. Citations to that volume are denoted "Supp.R".

Tampa, Florida's coordinator for emergency management programs and retired from that position in May 2005. R954-55, 960-61, 964; Supp.R219-20; GX60.

After Katrina, Wilson bought a travel trailer, left his wife behind in Florida, and moved to the New Orleans area in early 2006 to participate in the hurricane clean-up effort. R966. There he joined ADD/CROCO, "a consortium of contractors and professional people that . . . . were pooling their talents and going after contracts." Supp.R281; R938, 967. ADD/CROCO, however, never won a contract, Supp.R282, 302; R936, and during his four months at ADD/CROCO Wilson "[d]idn't make any money." R968. Thus, in July 2006, Wilson went to work for ILSI that, as it had with Miranda, placed him as a contract consulting engineer with the Corps. R717, 720, 968. In his own words: "my job at the Corps . . . I was a construction manager, and I was responsible for stone contracts . . . . All I dealt with was stone." R974-75.

Heinrich was a supplier of dirt and sand who also was affiliated with ADD/CROCO. R973. During Wilson's brief stay with ADD/CROCO he and Heinrich became friends, and that friendship developed into a sexual relationship. R968. Wilson also was a mentor to Heinrich and helped her with her bids and

proposals to sell dirt.[3] R940, 973, 992-93; Supp.R213-15. However, just as he had been unsuccessful in making money himself while at ADD/CROCO, Wilson was similarly unsuccessful in moving Heinrich's dirt. Supp.R213-15; GX31.

After he began working at the Corps, Wilson rented a duplex apartment. At the Corps, Wilson was given a desk next to Miranda, and they became close friends. Wilson convinced Miranda to rent the other half of his duplex. R969-70. Miranda met Heinrich during her frequent visits to Wilson's apartment. Supp.R44.

2. The Conspiracy

On August 18, 2006, the Corps solicited proposals for the first phase of the Lake Cataouatche levee reconstruction project. Supp.R45; R655-56; GX48A-E. Levee construction projects "use a lot of dirt," and that phase of the project would require 1.7 million cubic yards of dirt. R662. The Corps decided to let this first contract using a "best value" approach instead of a sealed low-bid process. This approach allows the Corps to evaluate more information than simply price and to assign value to other factors, such as technical approach and timing, and to award the contract to the proposal judged the best overall value. R663-64, 710-12.

---

[3] For example, GX31 is an e-mail that Wilson sent Heinrich in July 2006 prior to joining the Corps. The e-mail forwarded a spreadsheet (GX32) that, the e-mail explains, Wilson "developed . . . a while back in an effort to get people to start working on the plans for moving [her] dirt."

Unlike the low-bid process where the bids are opened and made public, with the best value process the proposals are not made public. R711. This is so because after the proposals are evaluated and deficiencies are identified, the contractors are given an opportunity to address those deficiencies. R669-70, 675-77, 711-12. And if the Corps decides to issue an amendment requiring the contractors to revise and resubmit their proposals, the contractors can raise their bid price at that time. R669, 693-94, 713-15. Thus, if a contractor had access to the Corps' highly confidential information it would gain "an unfair advantage." Supp.R35. To prevent this, the Corps has all their engineers, whether government employees or contractor employees, sign a Procurement Integrity Act statement that instructs them that source selection information and bid proposal information is "proprietary government information" and that they are to "keep it out of the public." R717-18. Miranda and Wilson each signed such a statement.[4] *Id.*; GX15-16.

Miranda was assigned as a technical advisor to the source selection committee that would evaluate the Lake Cataouatche proposals because he was an

[4] Those signed statements provided in part: "A person acting for or on behalf of, or who is advising or has advised the United States with respect to, a Federal agency procurement, must not, other than as provided by law, knowingly disclose contractor bid or proposal information or source selection information before the award of a Federal agency procurement contract to which the information relates." GX16.

expert in scheduling the various stages of construction contracts. R687-88. His job was to identify deficiencies within the proposals so the selection committee could discuss those issues during oral presentations by the various contractors. R669-70, 675-77.

During her visits with Wilson and Miranda at Wilson's apartment, Heinrich revealed that she was trying to qualify a prime contractor for the Lake Cataouatche project. Supp.R44-45. Her interest was in selling the sand and dirt that the project would require. R727; Supp.R232. Wilson and Heinrich wanted Miranda to look at her prime contractor's proposal "and make sure that it met all of the technical qualifications to make sure that it won the day." Supp.R46. When Heinrich decided to support a proposal that prime contractor Manson Gulf was going to submit, she told Miranda and Wilson, and Miranda agreed that after he "reviewed Mason Gulf's bid and noted all the technical deficiencies, [he] promised to provide Mr. Wilson and Ms. Heinrich the information necessary for Manson Gulf to correct its technical deficiencies." Supp.R52. Miranda expected to be paid for this information, and the three of them agreed that "if this one didn't come through from a - - from a money perspective, that [they] would look to the next phase of the

Lake Cataouatche project."[5] *Id*.

The contractors' proposals were due on Friday, September 22, 2006. R665. Manson Gulf was one of six contractors that submitted a proposal. R667. The Corps planned to evaluate those proposals on September 25-27, and "on the 28th and 29th, the contractors were given an opportunity to give oral presentations." R669. Mason Gulf's presentation was scheduled for Friday, September 29th. *Id.* Prior to the oral presentations, however, the Corps had decided it would request revised proposals which would be due the following Tuesday, October 3, 2006. R668-69; GX59.

When the source selection committee met on Monday, September 25th, it evaluated the proposals for technical deficiencies. R685-86. The following day, Miranda met with Wilson and Heinrich in Wilson's apartment, and he "dictated to both Mr. Wilson and Ms. Heinrich the summary of the findings or technical deficiencies in Manson Gulf's proposal." Supp.R56. Wilson "was helping Ms. Heinrich understand" what Miranda was saying, and Heinrich typed the information into her laptop. Supp.R57-60; GX2. The next day, Wednesday, Wilson and Miranda called Heinrich and gave her "[a]dditional details regarding

[5] Ultimately there would be a total of eight contracts to reconstruct the Lake Cataouatche levee. R658.

the technical deficiencies and how to correct them." Supp.R59-60. On Thursday, Miranda and Wilson developed a spreadsheet further addressing Mason Gulf's proposal. Supp.R65-66; GX3-4. Miranda gave all this information to Heinrich "[t]o ensure Mason Gulf, in its oral presentation, would correct these technical deficiencies." Supp.R61.

When Mason Gulf began "taking [Heinrich's] proposal more seriously," Heinrich decided to pay Wilson and Miranda each 25 cents per cubic yard that she sold to Mason Gulf under the contract. Miranda expected "close to $300,000."[6] Supp.R63. Miranda explained he acted out of "a combination of greed and stupidity." Supp.R52-53. Wilson told Miranda that for "that amount of money, he could do that type of thing everyday." Supp.R64.

The head of Manson Gulf's levee division, Michael Mayeux, explained that after he submitted his proposal to the Corps, Heinrich called him, said the proposal had a fatal flaw, and "offered to help [him] correct this fatal flaw." R725, 728-29. On Thursday and Friday morning prior to Manson Gulf's oral presentation at the Corps, Heinrich sent him faxes and e-mails detailing the technical deficiencies with his proposal and offering solutions to correct them. R731-38; GX2-5.

---

[6] Ultimately, although the project required 1.7 million cubic yards of dirt, 1 million would be available on site and only 700,000 would need to be purchased. R684-85.

Miranda explained that those e-mails and faxes contained the information, including the spreadsheet, that he and Wilson had given to Heinrich.[7] Supp.R60-61, 65-69. He said that this information was passed on to Mayeux "to prepare Manson Gulf for their oral presentation." Supp.R67. In her last fax to Mayeux, Heinrich told him "I can and am willing to put the schedules in exactly the form and sequence the Corps wants it in this weekend." Supp.R67-68; GX5, p.2. Heinrich also told Mayeux that he had "left money on the table."[8] R730. During Manson Gulf's presentation that Friday, Mayeux was questioned about the technical issues that Heinrich had pointed out to him, and he used her suggestions to respond. R738. In fact, Miranda had prepared the questions for the source selection committee. R677; Supp.R69.

The weekend following Manson Gulf's oral presentation, Miranda prepared several documents and spreadsheets correcting Mason Gulf's technical deficiencies. He saved the documents on a flash drive that he gave to Wilson Sunday evening, and told him to pass the information to Heinrich. Supp.R70-71.

---

[7] The spreadsheet Heinrich e-mailed to Mayeux on September 29th (GX3, 34) was "last saved" by "Kern Wilson," just like the spreadsheet Wilson had e-mailed to Heinrich in July for "moving [her] dirt." Supp.R209-15; GX1, 12; *see* note 3, *supra*.

[8] Manson Gulf had submitted the lowest bid, and the next lowest was nearly $5 million higher than Manson Gulf's. R678-80.

Wilson testified that he e-mailed those documents to Heinrich with his Corps computer "suspect[ing] what it would be." R981, 1005-06. Heinrich e-mailed them to Mayeux that Monday morning. Supp.R71-75; GX6-8.

Because he strongly suspected Heinrich was obtaining confidential information from someone at the Corps, Mayeux reported the matter to the Corps' chief of construction, and the Corps alerted the Army's Criminal Investigation Division ("CID"). R729; Supp.R193-94. Mayeux then taped a conversation with Heinrich for the CID. R745. During that taped conversation, when Mayeux said there was "obviously somebody . . . at the Corps that's . . . helping me out," Heinrich admitted there was, but she told him "you don't have to worry about them" because "I got my guys at the Corps covered." GX11 at 11. When he asked for their names she replied "[y]ou don't wanna know." *Id*. at 12. When Mayeux said he thought he had figured it out during the oral presentation and joked "Hablo Espanol?" she replied: "you got it on the head." That they were referring to Raul Miranda is clear from her further explanation that he is "going to be the project manager" and that he was "a contracting consultant . . . to the Corp." *Id*. at 12-13. When Mayeux excused himself and asked her to "just sit tight," she joked "don't bring the FBI [back] with you." *Id*. at 15. In fact, he brought back the CID who interviewed her that afternoon. Supp.R196. The CID interviewed Miranda later

that same day. Supp.R228.

The co-conspirators' telephone records showed that Heinrich communicated almost exclusively with Wilson. Thus, between August 1, 2006, and October 25, 2006, there were 348 telephone calls between Wilson and Heinrich, 82 calls between Wilson and Miranda, but only 12 calls between Heinrich and Miranda. Supp.R175-79; GX27-29. During the critical time between September 22, 2006, when the proposals were submitted, and October 5, 2006, when Army CID questioned both Heinrich and Miranda, there were 68 calls between Heinrich and Wilson, 25 calls between Wilson and Miranda, but only one call between Heinrich and Miranda. *Ibid*. Many of the calls between Heinrich and Wilson occurred immediately before or after Heinrich called Mayeux. Supp.R180-82, 216-17, 262-65; GX30. Additionally, for Wilson's Corps e-mail account, its sent e-mail folder contained no e-mails from August 1, 2006, until October 4, 2006, although his inbox contained e-mails that were replies to e-mails he had sent during that time period. Supp.R202-04.

SUMMARY OF ARGUMENT

After a three-day trial the jury correctly concluded that Wilson and Miranda unlawfully colluded with Heinrich to use their positions of public trust for their own personal gain. None of appellants' arguments, either individually or

collectively, warrants disturbing those guilty verdicts.

1. Appellants' claim that Wilson was not a "public official" within the meaning of 18 U.S.C. § 201(a)(1) is without merit. In *Dixson v. United States*, 465 U.S. 482, 496 (1984), the Court interpreted the statute's term "person acting for or on behalf of the United States . . . in any official function" to mean any "person [that] occupies a position of public trust with official federal responsibilities." As a contract engineer for the Corps working as a construction manager, Wilson fit that definition. Indeed, one of Wilson's public trust responsibilities was guarding the confidential nature of the Corps' source selection information, a trust he blantently violated.

The Court must reject appellants' contention that Wilson was not a public official with respect to the Lake Cataouatche project because he had no job responsibilities for that project. Appellants' proposed rule is not only contrary to the intentionally broad wording and reach of the statute as interpreted by the courts, it would produce absurd results by allowing bribers to avoid liability simply by choosing public officials to do their dirty deeds based upon their specific job responsibilities.

2. Any error in the court's instruction dealing with the status of Wilson and Miranda as public officials was harmless. Appellants never disputed that Miranda

and Wilson were contract engineers working for the Corps as construction managers. Rather, they claimed that Wilson was not a public official in this matter because he had no job responsibilities for Lake Cataouatche. But that claim presented an issue of statutory interpretation for the court. Moreover, because Miranda's and Wilson's status as consulting engineers working as construction managers was not disputed, there can be no doubt the jury would have found them to be public officials if it had been told to determine that issue after being correctly instructed concerning how Section 201 defines "public official."

3. The court did not abuse its discretion by limiting the scope of Miranda's cross-examination. In fact, appellants elicited significant impeachment testimony that established Miranda's motive to testify against them in hopes of a lower sentence. The Confrontation Clause of the Sixth Amendment requires no more.

Additionally, appellants and Miranda were each charged with bribery. The court correctly reasoned that allowing Miranda to testify about his statutory maximum sentence, or the guidelines reduction he stood to gain under his plea agreement, would "bootstrap [Miranda] into telling the jury what these defendants would be facing." Supp.R36. Because doing so would have "open[ed] the door to compromise[d] verdicts and to confus[ion]," *Pope v. United States*, 298 F.2d 507, 508 (5th Cir. 1962), the court's refusal to allow those questions was sound.

4. The court did not abuse its discretion in admitting or excluding evidence. Agent Clayton's testimony that Wilson deleted e-mails from his sent-box was corroborated by Wilson's testimony. Moreover, because it was based on knowledge of the underlying facts and was a conclusion that an average person would draw from those facts, it was proper lay testimony. The court's conclusion that Wilson's proffered expert would be neither relevant nor reliable is firmly rooted in that expert's testimony that he had no experience with the Corps' computer system and could not conclude whether Wilson intentionally deleted e-mails from his computer without performing a forensic investigation. Finally, the court did not abuse its discretion by preventing four character witnesses from testifying about what they thought Wilson's motive was for going to New Orleans, after two witnesses did so testify. The court was correct that such testimony was pure speculation.

ARGUMENT

I. WILSON WAS A "PUBLIC OFFICIAL" WITHIN THE MEANING OF 18 U.S.C. § 201(a)(1)

A. Standard of Review

The meaning of the term "public official" in 18 U.S.C § 201(a)(1) is a question of statutory construction and is reviewed by this Court *de novo*. *United*

States v. Jackson, 559 F.3d 368, 370 (5th Cir. 2009).

B. As A Contract Engineer Working For The Corps As A Construction Manager, Wilson Occupied A Position Of Public Trust With Official Federal Responsibilities

By his own admission, Wilson was working for the Corps as "a construction manager . . . responsible for stone contracts." R974. Nonetheless, Wilson challenges his conviction for agreeing to accept a bribe from Heinrich, and Heinrich challenges her conviction for offering a bribe to Wilson.[9] They claim that Wilson was not a public official for purposes of the Lake Cataouatche contract because he was not assigned to that project and, therefore, was not acting in an official capacity with respect to any of his actions related to that project. To that end, during the jury charge conference Wilson asked the court to charge the jury that Wilson and Miranda had to be "'acting in the course and scope of their official duties.'" R1052. In rejecting that proposal, however, the court responded "that's adding an element to the offense that's not contained in the statute." *Id.* That conclusion is consistent with the statutory language, decisions of the Supreme Court and this Court, and the statute's legislative history.

In its definitional provisions, Section 201(a)(1) provides in relevant part:

---

[9] Heinrich does not challenge her conviction for bribing Miranda, who was the construction manager for the Lake Cataouatche project. Supp.R40, 45.

"(1) the term 'public official' *means* . . . an officer or employee or person acting for or on behalf of the United States . . . in *any* official function." (Emphasis added). Once a person meets this definition by being either an officer, an employee, or a person acting for or on behalf of the United States in any official function, then that person is a public official for purposes of the Act. Indeed, the operational provisions of Section 201 – subsections (b) and (c) – not the definitional provisions in subsection (a), set out what conduct constitutes a violation of the Act. *See United States v. Gjieli*, 717 F.2d 968, 973-74 (6th Cir. 1983) (distinguishing "definitional provisions" of Section 201 from the statute's "operational provisions").

As appellants correctly note, since Wilson was neither an officer nor employee of the Corps, his status as a public official depended on whether he was a person acting for the Corps in an official function. In *Dixson v. United States*, 465 U.S. 482 (1984), the Court interpreted the meaning of the statute's language "person acting for or on behalf of the United States . . . in any official function." 465 U.S. at 490. The Court noted that "[f]rom the start, Congress drafted its bribery statutes with broad jurisdictional language," and that "the federal judiciary interpreted . . . the phrase 'person acting for or on behalf of the United States' to have a broad jurisdictional reach." *Id*. at 491-92 (footnotes omitted). Noting that

"§ 201(a) has been accurately characterized as a 'comprehensive statute applicable to all persons performing activities for or on behalf of the United States,' whatever the form of delegation of authority," the Court concluded that:

> To determine whether any particular individual falls within this category, the proper inquiry is . . . whether the person occupies a position of public trust with official federal responsibilities. *Persons who hold such positions are public officials* within the meaning of § 201 and liable for prosecution under the federal bribery statute.

Id. at 496 (footnote and citation omitted) (emphasis added); *see also United States v. Baymon*, 312 F.3d 725, 728 (5th Cir. 2002) (quoting *Dixson*). The limiting principle, the Court explained, was that "an individual must possess some degree of official responsibility for carrying out a federal program or policy." 465 U.S. at 499.

Thus, the Court treated the question whether someone is a public official as a jurisdictional question. *See United States v. Romano*, 879 F.2d 1056, 1060 (2d Cir. 1989) (in *Dixson* "[t]he Court stressed that the bribery statute was drafted with broad jurisdictional language . . . to reach all people performing activities for the federal government") (citations omitted). Section 201's legislative history also supports this conclusion. For example, the House Judiciary Committee Report, cited in *Dixson*, 465 U.S. at 494, explained that the term "[p]ublic official is given a comprehensive definition, covering *all* Government officers and employees . . . .

The phrase – 'person acting for or on behalf of the United States . . .' is used . . . to include *within the statutory coverage* those persons who perform activities for the Government, as, for example, *through a contractual arrangement*." H.R. Rep. No. 87-748, at 17-18 (1961) (emphasis added); *accord* S. Rep. No. 87-2213, at 7-8 (1962), *reprinted in* 1962 U.S.C.C.A.N. 3852, 3856 ("'public official' is broadly defined to include . . . persons carrying on activities for or on behalf of the Government"). As a contract engineer for the Corps, Wilson "performed activities for the Government . . . through a contractual arrangement."

Since *Dixson*, two courts of appeals have concluded that "whether an individual is a public official within the meaning of the statute is a question of law, and as such, a matter for judicial resolution." *United States v. Madeoy*, 912 F.2d 1486, 1994 (D.C. Cir. 1990);[10] *accord United States v. Hang*, 75 F.3d 1275, 1279 (8th Cir. 1996). In *Madeoy*, the Court applied *Dixson* to find that a private property appraiser approved by the Veterans Administration to submit VA Residential Appraisal Reports to the agency was a public official under Section 201 because the government guaranteed loans on his recommendation. 912 F.2d at 1488, 1494. And in *Hang*, the court found that an "eligibility technician" working

[10] The district court followed *Madeoy* in concluding that "Wilson was a public official in the context of the crimes charged as a matter of law." R448-50.

for a public corporation that administered the Federal Low Income Housing Program was a public official because he effectively approved applicants with only pro forma supervision. 75 F.3d at 1277-78, 1280.

Similarly, when this Court applied *Dixson* to a guard employed by a private contractor operating a detention center for the Immigration and Naturalization Service, it spoke in terms of the statute's jurisdictional reach: "Obviously, the Government has just as strong an interest in the integrity of private correction officers charged with guarding federal detainees as it has in the integrity of federal corrections officers employed in federal facilities." *United States v. Thomas*, 240 F.3d 445, 448-49 (5th Cir. 2001). Accordingly, it found the guard a public official. *Id.*

Appellants do not contend that Wilson did not hold a position of public trust with official federal responsibilities. As a contract engineer working as a construction manager, Wilson unequivocally "possess[ed] some degree of official responsibility for carrying out a federal program or policy," *Dixson*, 465 U.S. at 499 – managing construction contracts for the reconstruction and improvement of the greater New Orleans area hurricane protection system. In fact, one of Wilson's public trust responsibilities, as evidenced by the Public Integrity Act statement that he signed, was to "not, other than as provided by law, knowingly disclose

contractor bid or proposal information or source selection information before the award of a Federal agency procurement contract to which the information relates." GX16.

Appellants argue, however, that Wilson had no official responsibilities for the Lake Cataouatche contract, and that *Gjieli* "establishes that a person acts in an official function for purposes of § 201(a)(1) only if he acts on behalf of the United States *to effect the object of the bribe*." HeinrichBr. 13 (emphasis added); *accord* WilsonBr. 32. But that is not the holding of *Gjieli*. Instead, *Gjieli* concerned bribes to a government *employee*, and the court expressly held that such an employee did *not* have to be acting within his official functions to effect a bribe under Section 201. 717 F.2d at 972. *Romano*, also cited by Wilson (Br. 30), holds the same. 879 F.2d at 1059-60. In fact, *Gjieli* concluded that reading the statute to require an employee to be acting within his official functions would "in effect add[] an element to the crime through the statutory definition of public official."[11] 717

[11] To the extent that *Hurley v. United States*, 192 F.2d 297, 299 (4th Cir. 1951) (WilsonBr. 30), suggests "that for an offense to be made out under § 201, a person acting for the United States must be doing so in his official capacity," that statement is *dicta* because the court held "that since Sergeant Nichols was an officer of the United States, it was not necessary to allege or prove that he was acting in an official function." 192 F.2d at 300. Moreover, *Hurley* predated both the 1962 revision to Section 201 (*see Gjieli*, 717 F.2d at 973 & n.6) and the Supreme Court's decision in *Dixson*.

F.2d at 973. And in *United States v. Parker*, 133 F.3d 322, 326 (5th Cir. 1998), this Court held that an "official act" under Section 201 includes use of a government computer to fraudulently create documents benefitting a third party "even when the employee's scope of authority does not formally encompass the act." Thus, if Wilson had been a Corps employee, he would have been a public official under Section 201 even though he had no official responsibilities for Lake Cataouatche.

The result should be no different because Wilson was a contract engineer instead of a government engineer. First, requiring persons acting for the United States to be officially responsible for the matter at issue is contrary to the intentionally broad wording and reach of the statute. *Dixson*, 465 U.S. at 491-92. Second, such a rule would lead to absurd results. In this case, for example, if Heinrich had directly approached Miranda for the confidential information and he refused, under appellants' theory she could instead pay Wilson, who worked next to Miranda, to lift the desired information from his desk and not be guilty of bribery. Indeed, under their theory Heinrich could pay Miranda to obtain information on Wilson's projects and pay Wilson to obtain information on Miranda's projects, and no one would be guilty of bribery. Such a result would be totally contrary to "Congress' longstanding commitment to a broadly-drafted

federal bribery statue." *Dixson*, 465 U.S. at 496.

Lastly, appellants' position is contrary to the well-settled rule that it is irrelevant if the object of the bribe is outside of the bribee's authority to accomplish. *See, e.g.*, *Gjieli*, 717 F.2d at 976-77 (collecting cases); *United States v. Dobson*, 609 F.2d 840, 842 (5th Cir. 1980). In this regard, the *Gjieli* court noted that the "focus" of Section 201 "is upon the briber's intent to corrupt, not upon prevention, per se, of the briber's ultimate ends," and that "[t]he deterrent value of punishing the bad intent of bribers is the same regardless of whether or not the acts to be accomplished are within the scope of the actual lawful duties of the bribed public official.'" 717 F.2d at 976.

Thus, the gist of the offense is offering something of value to a person occupying a position of public trust to impede a lawful function of the government. That is exactly what happened here. As a construction manager in charge of stone contracts Wilson was an integral part of the Corps reconstruction effort. His official functions included safeguarding the integrity of that reconstruction effort, including maintaining the confidential nature of source selection information. His duty was to report Miranda's indiscretions to stop them, not to help them along by playing "delivery boy." HeinrichBr. 12. Instead, he colluded with Miranda on Corps property during Corps workdays. Supp.R62. And by his own admission he

furthered the conspiracy by using his government computer to e-mail Heinrich source selection committee information. R981, 1005-06. As this court concluded in *Thomas*: "Under such circumstances, and for purposes of the federal bribery statute, there is simply *no* basis for differentiating between" government engineers and contract engineers. 240 F.3d at 449. The district court therefore correctly concluded that Wilson was a public official.

C. If The Court Erred In Instructing The Jury That Wilson And Miranda Were Public Officials, That Error Was Harmless

Suspecting that appellants would try to present to the jury a defense based on their erroneous interpretation of the term "public official" addressed in section I.B above, prior to trial the government filed a motion *in limine* asking the court to order appellants not to question the status of Wilson or Miranda as public officials, or argue their status as contract employees of the Corps as a defense. R141. The court granted that motion. R182. At the conclusion of trial, and consistent with its pre-trial ruling, the district court gave the following instruction to the jury with respect to the "public official" issue:

> The term "public official" includes any employee of the United States Government, as well as any person who is performing work for or acting on behalf of the United States Government. I instruct you that Raul Miranda and Kern Wilson are public officials *within the context of this statute*.

R1120 (emphasis added). Appellants claim that this instruction was erroneous

because whether Miranda and Wilson were public officials "was a matter for the jury to decide." HeinrichBr. 16, citing *United States v. Gaudin*, 515 U.S. 506 (1995).

Even assuming appellants are correct, the harmless error rule of *Chapman v. California*, 386 U.S. 18 (1967), applies to jury instructions that omit or have a conclusive presumption on an element of the offense. *Neder v. United States*, 527 U.S. 1, 4 (1999); *Robertson v. Cain*, 324 F.3d 297, 306 (5th Cir. 2003). An error is harmless if "it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" 527 U.S. at 15 (citation omitted). In this case, any error was harmless beyond a reasonable doubt because while appellants claimed that Miranda and Wilson were not public officials as defined in Section 201, their argument was essentially a legal one, not a factual one for the jury to resolve, and they did not dispute that Wilson (and Miranda) were contract consultants for the Corps.

Appellants have never argued that Wilson and Miranda were not contract consultants working for the Corps. Indeed, when Wilson testified at trial, he admitted that he had been a contract consultant working for the Corps as a construction manager. R974. Nor was it disputed that both Wilson and Miranda were still contract consultants for the Corps at the time of the bribery. If either of

these facts had been disputed during the trial, the jury would have been required to resolve the dispute. Instead, the focus of appellants' argument was the claim that while Wilson and Miranda were contract consultants, they were not public officials as defined in Section 201.

Specifically, with respect to whether Miranda and Wilson were public officials, appellants argue, as they did in the district court, that Wilson had to have official responsibilities for the Lake Cataouatche contract to "fit the definition of a public official."[12] HeinrichBr. 16-17; WilsonBr. 32. As noted earlier, however, that argument presented a legal question of statutory interpretation not a factual question. Thus, appellants could not have been prejudiced by a jury instruction that correctly interpreted Section 201.[13]

Similarly, Wilson's claim (not joined by Heinrich) that "Miranda [was not] actually acting as a public official in providing bid information to Heinrich if his intent was not to interfere with the [Corps'] bidding process, but was actually

---

[12] Apparently recognizing the harmlessness of any error in the court's instruction that Miranda was a public official, R1120, given that he was the construction manager for Lake Cataouatche, Heinrich does not challenge her conviction for bribing Miranda.

[13] The district court recognized that appellants' position is based on an erroneous interpretation of Section 201 and correctly refused to give their proposed instruction reflecting that erroneous interpretation. R1052.

intended to enhance the bid submitted by Manson Gulf," also raises a legal issue. WilsonBr. 37-38; *id*. at 35, 37 ("[n]ot everything done at work by a person working under contract for the government is an official function;" "not all manner of acts by those in public positions are official acts"). As the Supreme Court noted in *Dixson*, the question of whether someone is a public official turns "on the relationship between [the defendant] and the Federal Government," 465 U.S. at 486, not on the defendant's intent. And it held that all persons that "occup[y] a position of public trust with federal responsibilities . . . are public officials within the meaning of § 201." *Id*. at 496. The public official's intent in doing any particular act, therefore, like conveying confidential proposal information, while relevant to whether he possessed the requisite intent to "corruptly" agree to a bribe, does not affect his status as a public official.[14]

Thus, while the question whether a particular individual held a job position that qualified him as a public official – in this case, the historical question whether Wilson was a contract consultant engineer working for the Corps as a construction manager – is a question for the jury, the question whether that job position fits

[14] Wilson argued to the jury that what "Raul Miranda is, what he's trying to do is take the person, the company that is going to get the contract anyway, and make them do it better, make them agree to adhere to a schedule so it's going to be done right. That's not an attempt to defraud the United States." R1096.

within the statute's definition of public official is a question of statutory interpretation for the court. *E.g.*, *Madeoy*, 912 F.2d at 1494 (explaining that in *Dixson* "the Court reached its conclusion [about petitioners' status as public officials] through an exercise in statuary interpretation"). Since appellants did not dispute the historical question of whether Wilson and Miranda were contract consultants for the Corps at the time of the offense, and only made what were effectively legal arguments as to why Wilson and Miranda should not be viewed as public officials notwithstanding their employment status, appellants could not have been prejudiced by a jury instruction that correctly stated the law and did not resolve any relevant disputed factual issue.

Indeed, even if the jury had been told to decide the public official issue after being properly instructed that contract consulting engineers can be public officials within the meaning of Section 201, given that Miranda's and Wilson's status as such was indisputable, there can be no doubt that a rational jury would have found that they were public officials.[15] Therefore, any jury instruction error in this case

---

[15] This is the approach taken in several circuits. The Eleventh Circuit's model jury instructions, for example, contain the following instruction on the "public official" issue:

5.1 Bribery Of Public Official (Or Juror) 18 USC § 201(b)(1)

You are instructed that anyone holding the position of _____,

was harmless beyond a reasonable doubt.

II. THE DISTRICT COURT DID NOT IMPROPERLY LIMIT MIRANDA'S CROSS-EXAMINATION

A. Standard Of Review

Review of a district court's limitation of cross-examination is for abuse of discretion. *United States v. Davis*, 393 F.3d 540, 548 (5th Cir. 2004). Cross-examination of a witness must be sufficient to satisfy the Confrontation Clause of the Sixth Amendment. *Id.* This requirement is met when defense counsel has been allowed to expose facts from which the jury could draw inferences as to the witness's reliability. *Id.*; *accord United States v. Restivo*, 8 F.3d 274, 278 (5th Cir. 1993). To demonstrate an abuse of discretion a defendant must establish clear prejudice, *i.e.*, "that a reasonable jury might have had a significantly different impression of the witness's credibility if defense counsel had been allowed to purse the questioning." *Davis*, 393 F.3d at 548 (citing *United States v. Maceo*, 947 F.2d 1191, 1200 (5th Cir. 1991)).

> as described in the indictment, would be a [public official] [juror] as that term has been used in these instructions.

Eleventh Circuit Pattern Jury Instructions (Criminal) 105 (2003). *See also* Manual of Model Criminal Jury Instructions for the District Courts of the Eight Circuit 162 (2009). Given the facts of this case, the practical effect of the instruction charged below was not materially different than these model instructions.

B. Appellants Were Able To Effectively Cross-Examine Miranda And Expose His Potential Bias As A Government Witness To The Jury

Appellants contend the court improperly limited Miranda's cross-examination by preventing them from showing precisely how Miranda benefitted from his plea agreement, including quantification of the Sentencing Guidelines level enhancements he allegedly avoided by entering his plea. HeinrichBr. 7-10; WilsonBr. 43-47. Wilson further claims that he should have been "permitted to delve into the complex plea negotiations between Miranda and the government in order to show how Miranda benefitted from his cooperation with the government."[16] WilsonBr. 39 (footnote omitted). The record shows, however, that significant impeachment testimony was presented during Miranda's cross-examination that

[16] Wilson speculates that in October 2006 "Miranda knew that he could be convicted for having violated the Procurement Integrity Act . . . [and] knew that he could go to jail," but when he "calculated his criminal sentencing exposure" he recognized that for an Integrity Act violation "the guideline calculations are unpredictable because of an unusual provision in the USSG," which, given "months to think about" it, "motivated Miranda to plead guilty in a way which substantially reduced, if not eliminated, sentencing uncertainties," by "agree[ing] to plead to bribery – something he didn't do." WilsonBr. 40-43. Wilson's speculation is refuted by the record. When asked on cross-examination whether "your lawyer . . . had advised you about consequences, penalties, charges, all kinds of things" before he met with prosecutors for the first time Miranda answered: "No, ma'am. Not before the meeting." Supp.R113-15; *accord id.* at 87 (Miranda explaining that when he first met with prosecutors "I had no idea the extent of the punishment at that point"). Thus, Miranda did not know the consequences of his actions when he first reported his crime.

established his motive to testify against Heinrich and Wilson in hopes of getting a lower sentence.

Heinrich is wrong that "the only question that the court allowed about the plea agreement was what sentence Miranda expected to get." HeinrichBr. 6. During Miranda's cross-examination, the jury learned that when he first met with prosecutors he did not have an agreement with the government, Supp.R113; that he "and the government had agreed on what the charge would be that [he] would be pleading guilty to," Supp.R115-16; that he was "only charged with bribery," Supp.R116; and that the government had agreed not to bring charges for any other crimes he committed "before this plea of guilty." Supp.R121. The jury also was told that Miranda had lied to federal agents in his October 5, 2006 interview, which was "[t]he same thing that Martha Stewart got convicted of, lying to a federal agent," and that even though "every single lie that [he] told would have been five years," he was "not charged with . . . lying to a federal agent." Supp.R116. And from the Indictment itself the jury knew that Miranda was an uncharged member of the conspiracy charged against Heinrich and Wilson.[17]

[17] For example, paragraph 8 of the Indictment states that "[i]t was the purpose of the conspiracy to unlawfully enrich Miranda and Defendant Wilson," and paragraph 13 states "[i]t was further part of the conspiracy that Defendants Wilson and Heinrich received confidential bid, proposal, and source selection information from Miranda." R15, 17.

The jury also heard that when Miranda pled guilty in August 2007 the court set his sentencing for April 2008, but that it "got continued about three or four more times" "[b]ecause the government wanted to continue [his] sentencing until after [he] testified at this trial." Supp.R117-18. Additionally, the jury knew Miranda faced a "maximum sentence of 15 years" with a guidelines range of "18 to 24 months," Supp.R124; that the government had agreed to notify his sentencing judge "regarding [his] testimony and cooperation here today," *id.*; and that the sentencing "judge can sentence someone below or above the guidelines for certain reasons." Supp.R125.

Finally, in its jury instructions, the court expressly referred to Miranda's plea agreement when it instructed the jury that it should be skeptical of his testimony. Specifically, the court stated that because Miranda's agreement "provid[ed] for the government's agreement not to bring additional charges, and the possibility of a lesser sentence than [Miranda] would otherwise be exposed to," Miranda's testimony must "be viewed - - or received with caution and weighed with great care." R1112.

"[T]he Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Fensterer*, 474 U.S. 15, 20

(1985). A district court may cut off cross-examination that would cause prejudice or confusion. *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986). And providing sentencing information to a jury that has no sentencing function "open[s] the door to compromise[d] verdicts and to confus[ion]." *Pope v. United States*, 298 F.2d 507, 508 (5th Cir. 1962), *cited with approval in Shannon v. United States*, 512 U.S. 573, 579 (1994).

Here, appellants and Miranda each were charged with bribery, a crime with a maximum sentence of 15 years. 15 U.S.C. § 201(b). Before Miranda testified, the court, recognizing that questioning Miranda about what sentence he would face without a plea agreement would "bootstrap [Miranda] into telling the jury what these defendants would be facing," instructed defense counsel not to do so.[18] Supp.R36. Nonetheless, defense counsel asked Miranda if "the maximum penalty for your charge is 15 years." Supp.R121. The court stopped her and said: "That's highly improper, and if you do it again, I'm going to hold you in contempt of court . . . . you didn't have to blurt out the 15 years." Supp.R121-22. The court similarly stopped defense counsel from trying to elicit the guidelines level increase that Miranda's plea agreement potentially insulated him from but which defendants both

[18] The court also opined that discussion of guidelines ranges at that point would be "speculative." R317.

faced. Supp.R122-23; *see* WilsonBr. 45-46.

The court did not abuse its discretion in refusing to allow counsel to ask about the statutory maximum sentence. *See United States v. Luciano-Mosquera*, 63 F.3d 1142, 1153 (1st Cir. 1995) (affirming disallowance of "information about the precise number of years [cooperating witness] would have faced had he been charged [with the same offense as defendant]" because of "the potential for prejudice"); *accord United States v. Cropp*, 127 F.3d 354, 359 (4th Cir. 1997) (same).[19] And the court's "bootstrap" reasoning applies with equal force to appellants' claim that they had to inform the jury that without his plea agreement Miranda "would have faced th[e] same 14-level enhancement, which translates into a five or six year increase in the sentence," that Heinrich and Miranda faced. HeinrichBr. 9; WilsonBr. 45-47. Doing so would have informed the jury that both Heinrich and Wilson faced an "offense level 28 . . . [where] the range is 78-97 months," HeinrichBr. 9 n.35, and as such, would have been equally improper. *See* WilsonBr. 46 (arguing that the jury should have "known that Miranda's manipulations saved him from the sort of sentence (eventually to be) imposed on

[19] In *Cropp*, "the district court ruled that the defense could not ask about the specific penalties that the cooperators would have received absent cooperation, or about the specific penalties they hoped to receive due to their cooperation," even though "[t]he credibility of those witnesses was very relevant to the case against all defendants." 127 F.3d at 358.

Wilson").

Moreover, this case is similar to *United States v. Ramirez*, 339 Fed. App. 361 (5th Cir. 2009). There, like here, the trial court prohibited the defendant from quantifying the benefit that the cooperating co-defendant received from her plea agreement by questioning "the co-defendant about her exact sentencing range or about the exact sentence reduction she might receive in exchange for entering into a plea agreement and testifying against [defendant]." 339 Fed. App. at 363. Noting that the defendant was able to question the witness about her motives for entering her plea, "including the possibility of receiving a reduced sentence," this Court concluded that, "[t]he testimony elicited through cross examination was sufficient to apprise the jury of codefendant's possible motives for testifying against [the defendant]." *Id*. In this case, not only did the court allow the defense to elicit Miranda's exact sentencing range of 18-24 months under the agreement, it also explicitly permitted defense counsel to ask Miranda "if he expects or hopes to get a reduced sentence because of his testimony." Supp.R123-24.

Also instructive is *United States v. Restivo, supra*, a case cited by both appellants. HeinrichBr. 7-8; WilsonBr. 48. In *Restivo,* the trial court prohibited the defense from asking a co-conspirator testifying pursuant to a plea agreement "whether a 'cap' existed on [his] sentence as a result of his plea agreement." 8 F.3d

at 278. In affirming the conviction, this Court emphasized that the defense had informed the jury that the witness had a plea agreement, without which he could have been charged with additional, more serious crimes. *Id.* The Court also noted that the jury had been instructed that the witness had testified pursuant to an agreement "providing for the dismissal of some charges and lesser sentence[] than [he] would otherwise be exposed to or for the offense[] to which [he] pled guilty." *Id.* n.11.

In this case, the jury similarly knew that Miranda could have been charged with additional crimes – conspiracy and lying to a federal agent – and the court gave the same instruction as in *Restivo*. *See* R1112; page 33, *supra*. Thus, as in *Restivo*, "[b]ased upon these facts, the jury could have inferred that [Miranda] was a biased witness." 8 F.3d at 278 (footnote omitted); *accord United States v. Nelson*, 39 F.3d 705, 708-09 (7th Cir. 1994) (no abuse of discretion for disallowing questions "about the penalties [cooperating witnesses] faced without their plea-bargains," because "[t]he jury knew those plea bargains could have moved the witnesses to lie, to please the government so they might spend less time in prison").

This case law also refutes Wilson's claim that the jury had to know "that Miranda's plea agreement kept him from exposure to an increased guideline sentencing level" so "the jury would have understood that Miranda had a motive to

fabricate the bribery scheme which he claimed existed." WilsonBr. 45-46. Wilson argued at length to the jury his speculative theory that Miranda fabricated his bribery story and implicated Wilson to save his own neck.[20] Given what the jury already knew about Miranda's plea agreement, "[a]ny probative value of information about the precise number of years [Miranda] would have faced [without

---

[20] In closing argument Wilson told the jury:

> Now, to me, the most remarkable thing about a case like this is that someone who didn't do something goes in and pleads guilty to it. That's the most remarkable thing.
>
> Now, he did something wrong. Raul Miranda did this wrong. And he knew it. He knew it. He knew he confessed to it. He called the lawyer, he found out he could go jail for it. And then he starts planning about what he's going to do to get this under control. And he admits that he did something that he didn't do. And that Kern Wilson didn't do. It wasn't about bribery. It wasn't about money.
>
> Now, how in the world can somebody do that? Well, he did it because what counted was not what came out of his mouth, I did this or I did that. What counted was the end result, and the end result was, he got a very clever lawyer from Miami who came to New Orleans and negotiated a really great deal for him and left open the possibility of his being able to stay out of jail entirely. That's what he did. That's how he could do it.
>
> And why did it have to be bribery that he pled to? Because he had to give them somebody, he had to give them somebody. He had to give them somebody in a big way, because it's results that count when you cooperate with the prosecution. That's how they calculate what sort of recommendation they make to the sentencing court. That's why.

R1099-1100. In rebuttal, the government responded: "Really? You think Mr. Miranda would plead to something that he didn't do? . . . [s]omething a whole lot worse? . . . No, no one would do that." R1104-05.

his plea agreement] was slight." *Luciano-Mosquera*, 63 F.3d at 1153; *accord Cropp*, 127 F.3d at 359 (only "slight additional margin of probative information [would be] gained by quantitative questions").

Moreover, the defense also brought out additional impeachment testimony. For example, it established that when he first spoke to the prosecutors in March 2007, Miranda said he had told Heinrich that he would not supply the source selection information without compensation, which conflicted with his trial testimony that he first talked about money with Wilson. Supp.R137-38, 141. It also established that even though he was "the one who earns the money in the family" and that his "family depends on [him] for their support," Supp.R142, Miranda was nevertheless "risking [his] future" without ever having discussed how he was going to receive payment of the bribe. Supp.R146.

From this evidence, the defense argued to the jury that when it considered Miranda's testimony it could consider "what he had to gain, what he had to lose." R1081. And relying on Miranda's conflicting statements about whether he ever discussed money with Wilson, the defense argued it was only when Miranda "is being called to testify does he now, all of a sudden, remember another thing to help him, to help him when he has to go up to the fourth floor to be sentenced by Judge Fallon. To help him so that he can please the government and tell the government,

look, I'm doing everything I can." R1083-84. Heinrich also emphasized the lack of any payment plan: "What do you do with $299,000? Do you just show up at your local Whitney and say I want to deposit this?" R1087. Wilson did the same:

> And what he wants us to believe is that he's involved in a bribery scheme, where he hadn't talked to the person who is supposed to pay him the money, about her paying him the money. He didn't talk about that. He's going to risk his livelihood, he's going to risk his ability to support his family, he's going to risk his liberty, this careful man, this planner, and he's not going to nail that sort of thing down? He's not going to say, well, how are you going to pay me? After all, it's a little tricky transmitting large sums of money. Shouldn't we talk about that?

R1098-99.

In sum, given this record, appellants have failed to show "that a reasonable jury might have had a significantly different impression of [Miranda's] credibility if defense counsel had been allowed to pursue the questioning." *Davis*, 393 F.3d at 548.

III. THE COURT DID NOT ERR EITHER IN ADMITTING OR EXCLUDING EVIDENCE

A. Standard Of Review

A district court enjoys broad discretion over the admission and exclusion of evidence, and its evidentiary rulings will be reversed only for "a clear abuse of discretion." *DIJO, Inc. v. Hilton Hotels Corp*., 351 F.3d 679, 685 (5th Cir. 2003) (footnote omitted). Lay opinion testimony is properly admitted when it is based on

personal knowledge of the facts from which it derives and the opinion is one that an average person would form from those facts. *E.g*., *Soden v. Freightliner Corp*., 714 F.2d 498, 511 (5th Cir. 1983). A district court's exclusion of expert testimony must be upheld "'unless manifestly erroneous.'" *United States v. Norris*, 217 F.3d 262, 268 (5th Cir. 2000) (citation omitted). "'Manifest error' is one that is 'plain and indisputable, and that amounts to complete disregard of the controlling law."' *Guy v. Crown Equip. Corp.*, 394 F.3d 320, 325 (5th Cir. 2004) (citation omitted). Only pertinent, *i.e.*, relevant, traits of an accused's character are admissible under Fed. R. Evid. 404(a)(1). *United States v. Hewitt*, 634 F.2d 277, 278-79 (5th Cir. 1981).

Finally, even if a district court abused its discretion in admitting or excluding evidence, the error will be held harmless unless it affected a substantial right of the defendant, *Norris*, 217 F.3d at 268, *i.e*., "'there is a reasonable possibly that the improperly admitted [or excluded] evidence contributed to the conviction.'" *United States v. Yanez Sosa*, 513 F.3d 194, 201 (5th Cir. 2008) (citation omitted).

B. Wilson's E-mails

1. Sean Clayton, an Army CID agent assigned to the Lake Cataouatche investigation, testified that he obtained from the Corps the e-mail accounts of the seven people working on or for the Lake Cataouatche source selection committee, and also Kern Wilson's as a "person of interest," for the period August 1, 2006,

prior to the Corps issuing the request for proposals, to October 6, 2006, the day after the CID interviewed Heinrich and Miranda. Supp.R200-01. His review of that data showed that everybody except Wilson had e-mails in their sent- and deleted-boxes dated prior to October 4, 2006. Supp.R202-03. Wilson's inbox, however, contained e-mails that were responses to e-mails Wilson had sent between August 1, 2006, and October 4, 2006, "[b]ut none of those sent messages were in his sent folder." Supp.R204. From these facts Agent Clayton concluded that Wilson "deleted the sent folder of all the e-mails prior to [October 4, 2006]." *Id.*

During cross-examination by Wilson, Agent Clayton was asked: "So you're saying that . . . he intentionally deleted [his sent e-mails]," to which he responded "[w]hen you press the delete button, it is intentional, yes." Supp.R238. However, when specifically asked whether it was possible that "e-mails are erased without an act of intentional deletion by the individual operating that e-mail account," Agent Clayton agreed: "It's possible." Supp.R239.

Agent Clayton testified that he was not "a computer forensic examiner," that he did not use forensic software to perform his e-mail review, that he was not a computer expert, and that his computer background was that of "a normal computer user of Microsoft Office products." Supp.R267-68.

Prior to Agent Clayton taking the stand, Wilson objected to him testifying

that Wilson deleted e-mails, arguing that it amounted to expert testimony. Supp.R186. The court reasoned, however, that "deleted" was a proper inference that Agent Clayton could make from the facts of this case:

> [I]f you inspect my laptop and . . . it shows that there are no e-mails sent or received for a period of time, and then you find other evidence that I sent or received an e-mail during that time frame, the only inference is that I deleted them at some point. They were deleted. I don't know what other inference you can make on that.
> . . . .
> I think everybody who uses a computer knows, you press the little delete button.

Supp.R190. When Wilson insisted that "there were other ways that they could be gone," the court responded: "You can ask him about that if that's a possibility," but it concluded: "I don't view this as expert testimony. I view this as factual testimony by an agent, who is going to testify about what he found, did find on the computer." Supp.R190-91.

Wilson also testified. He expressly acknowledged: "*I have deleted* Corps e-mail." Supp. R1016 (emphasis added). He said that "some two weeks after [he] got to the Corps" he started receiving "'Mailbox is full'" messages. R1016. He contacted Information Technology ("IT"), "and they basically told [him to] delete unnecessary files," which he did. *Id.* To avoid deleting "necessary" e-mails, Wilson said he created folders "that were based upon the projects, and . . . placed those there." *Id.*

Wilson then claimed: "the Corps requested my computer . . . several times . . . to upgrade it [and] [i]t came back with all of my files deleted, all of my e-mail files." R1017. He said he tried to get IT "to restore those files. They were not able to be." *Id.* He said he therefore found a way to save his important files on the e-mail server by duplicating his project folders on the server and transferring his important information there before he deleted it from his Outlook folders:

> Subsequent to [IT deleting my files], I continued the same process as I used, in which I maintain project folders, e-mails, as well as I found a way to map so I could save my important files on the division's e-mail server.
>
> So I started duplicating my files so I could keep it on the server. Every once in a while, when I got that . . . dialogue box that says my box is over full, I will either make sure that I transfer all of that information, the critical information there, and then allow this one to . . . delete the contents of that one.

Id. He insisted, however, that "most of [his] files were deleted as a result of IT, and if you could get the records as to the work done on [his] computer, you would probably recognize that." *Id.*

At a *Daubert* hearing, R1019-35, Wilson proffered a Microsoft Outlook expert who was going to testify that e-mail "information is maintained at the server level," and that a user cannot remove that information from the server, "even if it's deleted from the [user's] computer." R1023-24. He acknowledged, however, that he had "not had the opportunity to look at the Outlook – at the Corps of Engineers." R1026. He also had no personal experience with any federal agency, did not know

the retention policies of the Corps' system, and could not know without a forensic investigation whether Wilson intentionally deleted e-mails from his laptop. R1030-32. Based on these facts, the court ruled that the proffered expert's testimony would not be "relevant or reliable." R1034. The court explained:

> First of all, he's got no personal experience dealing with the U.S. Government, the U.S. Army Corps of Engineers, or any other large government agency.
>
> Secondly, he doesn't know what their policies are or retention policies or how their computer system operates or doesn't operate, and he's candidly admitted that he would have to know what particular operating system they were running, what particular version of Exchange system they are running, and that there are any number of variables to where, he says, "I can't say with complete and total certainty what the situation would be."
>
> Finally, in response to my questions, he admitted that there was no way for him, sitting here today or testifying here today, to be able to testify to the – or the real issue here on this point is whether or not Mr. Wilson at any time during the time frame in question intentionally deleted e-mails from his desktop or his laptop, and he said that would be impossible for him to answer.

R1034-35.

2. Claiming "that only an expert could give an opinion as to whether Wilson's email was intentionally deleted," WilsonBr. 59-60, Wilson argues at length that the court erred in allowing Agent Clayton to say Wilson deleted the e-mails in his sent-box, and in not permitting his expert to testify. WilsonBr. 50-63. Because Wilson admitted he had deleted e-mails, however, Wilson's argument is much ado about nothing. In any event, Wilson's claims of error are wrong.

Wilson testified that two weeks after he began working for the Corps in July

2006, he began deleting e-mails at IT's direction, to avoid the "mailbox over full" warnings. R970, 1016-17. Thus, Wilson largely verified what Agent Clayton had inferred.[21] To the extent that Wilson claims he was archiving e-mails in project folders, the jury heard that testimony and was free to believe it or not, and weigh it as it saw fit. *E.g.*, *United States v. McCall*, 553 F.3d 821, 835 (5th Cir. 2008); *United States v. Estrada-Fernandez*, 150 F.3d 491, 496 n.3 (5th Cir. 1998). If Wilson believed more of the story needed to be placed in evidence, for example, to show that his sent e-mails were actually stored in project folders, he had the opportunity to do so.[22]

---

[21] Referring to a post-trial exhibit, R473, Wilson argues that he first reported the mailbox full problem to IT on October 4, 2006. WilsonBr. 58-59, 62 n.14. At trial, however, Wilson, who arrived at the Corps on July 10, 2006, R970, testified that he reported the problem to IT "two weeks after [he] got to the Corps," and thereafter, at IT's direction, he began deleting unnecessary e-mails. R1017. The post-trial exhibit he relies on states that on October 4, 2006, Wilson reported to IT that he had received a "mail box in [sic] full" message, but that he was "unable to delete" e-mails as IT previously suggested. R473. Thus, that exhibit corroborates Agent Clayton's testimony that starting on October 4, 2006, Wilson's sent-box contained e-mails, and that he had deleted them "prior to that date." Supp.R202-04.

[22] Wilson erroneously claims that he was surprised by the "opinion testimony of Clayton." WilsonBr. 61-62 & n.14. In fact, Wilson should have known that e-mail was going to be an issue at trial since, "suspect[ing] what it would be," he sent Heinrich documents that contained source selection information using his Corps computer. R981-82, 1004-06. Additionally, on June 4, 2008, nearly 10 months prior to the beginning of trial, Wilson was provided with a copy of his e-mail account that the Corps produced to the Army CID. That

In any event, the court was correct that Agent Clayton's inference was proper lay testimony. Supp.R190-91. "[L]ay testimony 'results from a process of reasoning familiar in everyday life.'" *Yanez Sosa*, 513 F.3d at 200 (quoting Fed. R. Evid. 701, Advisory Committee Notes to 2000 Amendments). "In particular, the witness must have personalized knowledge of the facts underlying the opinion and the opinion must have a rational connection to those facts." *Mississippi Chemical Corp. v. Dresser-Rand Co.*, 287 F.3d 359, 373 (5th Cir. 2002). Here, as the district court explained, Agent Clayton was drawing a reasonable inference that because Wilson's inbox contained responses to e-mails he sent but that were not in his sent-box, Wilson must have deleted them from his sent-box. Supp.R190.

Agent Clayton's conclusion certainly was "'the product of reasoning processes familiar to the average person in everyday life.'" *United States v. Cooks*, 589 F.3d 173, 180 (5th Cir. 2009) (citation omitted). Even Wilson acknowledges that "computer savvy lay people [comprise] a majority of adults in the United States." WilsonBr. 52; *accord* Supp.R190 (court explaining that "everybody who uses a computer knows, you press the little delete button"). Agent Clayton specifically told the jury that he was not a computer expert and that his knowledge

---

same data was again provided to Wilson on November 11, 2008, along with the e-mail accounts of the people working for the source selection committee.

was that of a "normal computer user." Supp.R267-68. Moreover, Agent Clayton never claimed Wilson's deleted e-mails were not stored somewhere on the server, and he expressly agreed that e-mails can be "erased without an act of intentional deletion by the individual operating that e-mail account." Supp.R239. Under these circumstances, Agent Clayton was properly testifying as a lay witness.

Nor did the court err in excluding Wilson's expert. Rather, the court correctly concluded that his testimony would be neither relevant nor reliable. R1034-35. First, the thrust of his testimony would have been that Wilson could not have permanently deleted e-mails from the server because the server would have backed them up. R1019, 1025-26. But the issue was not whether Wilson's e-mails were stored on some magnetic back-up tape under whatever "requirements for data retention are in place" at the server, R1026, but whether Wilson had deleted them from the sent-box on his computer, a fact Wilson readily admitted. R1016. And when the court asked "[p]utting aside whether copies might be maintained somewhere else, could you tell whether [Wilson] intentionally deleted e-mails from his desktop or his laptop," the proffered expert answered that he could not without "go[ing] through and do[ing] heavy, heavy searches." R1032. Thus, the court did not abuse its discretion in refusing to let him testify.

Finally, even if the court did abuse its discretion, any such error would have been harmless. The issue in the case was not whether Wilson deleted e-mails but, rather, whether he agreed to provide source selection information to Heinrich in exchange for money. He admitted he passed such information to Heinrich, R981-82, but denied doing it for money. Miranda testified they did it for money. Whether or not Wilson deleted e-mails from his sent-box, as he testified he did, could not have affected the jury's decision whether or not to believe Miranda.

C. Wilson's Character Witnesses

Wilson produced six character witnesses at trial. In addition to testifying to his honestly, integrity, and good moral character, the first two witnesses were asked on direct what "motivated" Wilson to go to New Orleans and participate in the Hurricane clean-up. Supp.R284, 293. Both testified he did so to do something good, to help and make a difference, not to make money. Supp.R284-85, 293-94. After the first two witnesses testified, the court cautioned defense counsel that he "went way beyond what's allowed under Rule 405 in terms of offering character evidence." R926. Specifically, with respect to questions about Wilson's motivation, the court noted "how could somebody else know what somebody else's motivation is to doing something," and instructed him not to ask that question again. *Id.* Thus, the next four witness were limited to vouching for Wilson's honesty,

integrity and high moral character. R929, 936, 944, 949. Relying on this evidence in closing, Wilson argued to the jury: "Does [Wilson] come here to make a killing? Well, no one who testified about him thought so. They thought that he came here to make a difference, and that's what he told us, too." R1092.

The court put no limitation on the jury's consideration of any of the character testimony. In fact, when instructing the jury, the court expressly charged it to "consider such evidence along with all the other evidence in the case." R1041-42. It further charged: "Evidence of a defendant's reputation, inconsistent with those traits of character ordinarily involved in the commission of the crime charged, may give rise to a reasonable doubt, since you may think it improbable that a person of good character in respect to those traits would commit such a crime." R1042.

Wilson nonetheless argues that the court committed reversible error because "the court severely restricted testimony as to Wilson's not being motivated by a desire for profit." WilsonBr. 64. This is so, he argues, because the two witnesses who were allowed to so testify knew Wilson "for only a few months," while the four who were not permitted to so testify knew him for "many years." WilsonBr. 70.

The court did not abuse its discretion when it limited the testimony of Wilson's four other character witnesses. The court was correct that none of those witnesses could know Wilson's motivation for participating in the Katrina clean-up

effort – short of Wilson telling them so. And neither of the two who testified about Wilson's motivation mentioned ever having discussed Wilson's motive with him.

In any event, on this record there is no reason to believe the verdict would have been any different had four more witness testified about Wilson's motivation for going to New Orleans. In fact, the two who did so testify were more likely to know Wilson's motivation for going to New Orleans, if that were possible without him telling them, because they both worked with him at ADD/CROCO on the hurricane clean-up. Supp.R282, 292. Three of the other four witnesses had broken their association with Wilson months before he went to New Orleans. R929, 944, 948. Thus, Wilson could not have been prejudiced by the court's ruling.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgments of conviction.

Respectfully submitted.

/s/ John P. Fonte

JOAN E. MARSHALL
STEPHEN D. BOOKER
Attorneys
U.S. Department of Justice
Antitrust Division
1700 Pacific Avenue
Suite 3000
Dallas, Texas 75201
(214) 661-8600

CHRISTINE A. VARNEY
Assistant Attorney General

SCOTT D. HAMMOND
Deputy Assistant Attorney General

JOHN J. POWERS, III
JOHN P. FONTE
Attorneys
U.S. Department of Justice
Antitrust Division
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
(202) 514-2435

May 11, 2010

CERTIFICATE OF SERVICE

I hereby certify that on May 11, 2010, I electronically filed the foregoing Brief for Appellee United States of America with the Clerk of Court by using the CM/ECF system, which will send a notice of electronic filing to the following: Robin E. Schulberg and Steven Lemoine.

I further certify the foregoing document meets with the required privacy redactions; that it is an exact copy of the paper document; and the document has been scanned with the most recent version of a commercial virus scanning program and is virus free.

/s/ John P. Fonte
JOHN P. FONTE
Attorney

CERTIFICATE OF COMPLIANCE

Pursuant to 5th Cir. Rule 32.27(c), the undersigned certifies this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7) because, exclusive of the exempted portions in 5th Cir. Rule 32.2, the brief contains 12,114 words.

The undersigned further certifies that the brief has been prepared in proportionally spaced typeface using Work Perfect X4 in Times New Roman 14.

Respectfully submitted this 11th day of May, 2010.

/s/ John P. Fonte
JOHN P. FONTE
Attorney