SUMMARY OF THE CASE

In the late 1990s, a group of Kansas City businessmen, including appellant Robert Richard King, joined together to develop a new port in Costa Rica, which would include commercial, residential, and resort facilities. To obtain the concession from the Costa Rican government on which to construct this development, the businessmen agreed to offer a $1 million bribe to Costa Rican officials and political parties. The scheme was discovered and investigated by the FBI, which used a series of cooperating witnesses to record conversations among the conspirators. These tapes were properly admitted at trial and they, as well as documentary evidence and the testimony of two conspirators who had pleaded guilty, provided a more than sufficient basis for the jury's verdict convicting King of conspiracy and substantive violations of the Foreign Corrupt Practices Act.

SUGGESTION CONCERNING ORAL ARGUMENT

This appeal presents no novel issues of law or fact, and the Court is not likely to benefit from oral argument.

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ISSUES PRESENTED

I. Whether the evidence at trial, which included recorded admissions of the defendant, the testimony of two of his conspirators, and his correspondence with potential investors, was sufficient to establish his participation in the conspiracy and his substantive violations of the FCPA, as charged in the Indictment.

II. Whether the district court properly admitted the recordings made by Kingsley of his conversations with the conspirators, including King and Barquero, where the government introduced sufficient evidence to authenticate the recordings and whether the district court properly refused to permit the defendant to introduce, in a wholesale fashion and without playing them for the jury, all of the recordings made by Kingsley.

III. Whether the district court properly instructed the jury that it could convict the defendant if it found that he had deliberately ignored clear evidence of the illegality of the payment to the Costa Rican officials.

IV. Whether the government's use of Kingsley to record conversations with the conspirators constituted outrageous misconduct sufficient to justify dismissing the indictment.

STATEMENT OF THE CASE

On June 27, 2001, a grand jury sitting in Kansas City, Missouri, returned a ten count Indictment against Robert Richard King ("the defendant") and Pablo Barquero Hernandez. (Joint Appendix ("J.A.") 1, 2.) The Indictment charged the defendant with conspiring, in violation of 18 U.S.C. § 371, with Barquero, Stephen Kingsley, Richard Halford, and Albert Reitz[1] to violate the Foreign Corrupt Practices Act ("FCPA"), 15 U.S.C. § 78dd-2, and the Interstate Travel in Aid of Racketeering Act ("Travel Act"), 18 U.S.C. § 1952, by agreeing to pay bribes to Costa Rican officials to obtain a valuable land concession. In addition, the Indictment charged the defendant and Barquero with six substantive violations of the FCPA and two substantive violations of the Travel Act, as well as aiding and abetting in violation of 18 U.S.C. § 2. *Id.* The defendant was arraigned and pleaded not guilty on July 10, 2001. (J.A. 1.)

On August 15, 2001, the defendant filed five motions to dismiss all or parts of the Indictment on various grounds, including failure to charge sufficient acts to establish a conspiracy and violations of the FCPA, multiplicity among the counts charging violations of the FCPA, improper application of co-conspirator vicarious

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[1]Halford and Reitz pleaded guilty to conspiracy to violate the FCPA and other charges in separate cases. (Tr. 145-46, 516-17.) Kingsley died prior to indictment (Tr. 655), and Barquero, who was charged in this case, remains a fugitive. (J.A. 1.)

liability, double jeopardy, and vagueness. *Id.* On December 21, 2001, the defendant supplemented these motions with a sixth motion to dismiss, this based on alleged governmental misconduct in using Kingsley as an informant and allegedly "targeting" the defendant, a theretofore innocent investor in Kingsley's business. (Appellant's Addendum ("A.A.") 1.) This latter motion also sought, in the alternative, a wholesale suppression of recordings of conversations between the co-conspirators made by Kingsley at the government's direction. *Id.*

On February 19, 2002, the district court held an evidentiary hearing on the defendant's motion to dismiss due to alleged governmental misconduct at which the defendant was given an opportunity, but failed, to establish governmental misconduct or any irregularities involving the recordings made by Kingsley. Subsequently, on May 30 and June 5, 2002, Magistrate Judge John T. Maughmer issued two reports recommending that the district court deny all of the defendant's motions to dismiss. (J.A. 1; A.A. 4.) On June 13, 2002, Chief Judge Dean Whipple entered two orders adopting Magistrate Judge Maughmer's recommendations and denying the defendant's motions to dismiss. (J.A. 1; A.A. 6.)

Trial commenced on June 17, 2002, before Senior District Judge Scott O. Wright, and testimony continued for five trial days. (J.A. 1.) At the close of the government's case, the defendant moved under Rule 29 of the Federal Rules of

Criminal Procedure to dismiss all counts. (Trial Transcript ("Tr.") 856.) After argument, Judge Wright denied the defendant's motion with respect to the conspiracy count and four of the substantive FCPA counts. The trial court granted the defendant's motion and dismissed three of the substantive FCPA counts, which related to facsimiles sent by Barquero to other conspirators, and the two Travel Act counts. (Tr. 863, 870.) The jury subsequently returned a verdict of guilty on the conspiracy count and the four remaining FCPA counts. (J.A. 1.)

Following the trial, the defendant moved for a new trial or an arrest of judgment. (J.A. 1.) On October 29, 2002, Judge Wright denied the defendant's motion. On November 12, 2002, the district court sentenced the defendant to thirty months imprisonment on each count, to run concurrently, two years of supervised release, a fine of $60,000, and a mandatory special assessment of $500. (J.A. 3.) The defendant timely filed his notice of appeal on the same day. (J.A. 1.)

STATEMENT OF THE FACTS

In the 1990s, Stephen Kingsley, a British national and a salvage expert, joined with others to attempt to develop a new port, which would include commercial, residential, and resort facilities, near Limon, Costa Rica. (Tr. 148-49, 324-35.) Through Owl Securities, Incorporated ("OSI"), a Kansas City based company of which Kingsley was chief executive officer and president, Kingsley, Richard Halford,

OSI's chief financial officer, and Albert Reitz, its vice president, attempted to raise funds from investors for this project. The defendant became one of OSI's largest investors, putting over $2 million into the company in the form of stock purchases and loans to Kingsley. (Tr. 158-59, 562.)

Both Halford and Reitz testified at trial that OSI, through its Costa Rican agent, Pablo Barquero, had made various small "political support" payments to Costa Rican officials. (Tr. 164-65, 363-65.) This testimony was corroborated by two lists of officials sent by Barquero in response to Kingsley's request for the names of the official who had been paid (J.A. 23; Government's Addendum 1), as well as Barquero's taped statements and Kingsley's statements to the FBI. (Tr. 610, 764-65; J.A. 23, 42.) It would appear that the defendant was not aware of these payments, and, when questioned by the FBI in November 1999, he stated that no bribes were paid. (Tr. 574.) In addition, in a recorded conversation with Kingsley and Halford in June 2000, he again stated that he understood that OSI had not paid any bribes in the past. (J.A. 8:7.)

Halford and Reitz testified, however, and recorded conversations involving the defendant corroborated this testimony, that OSI had long planned to pay a large bribe, initially calculated to be $1 million, to senior Costa Rican officials and political parties to obtain the concession for the land on which the new development was to

be built. (Tr. 170-75, 330-32.) Halford testified that the defendant was well aware of this prospective payment as early as late 1999. (Tr. 173-74.) Indeed, the defendant told Kingsley in May 2000 that he had known of the $1 million payment for "five years." (J.A. 6:6.) Further, the defendant stated that OSI's budgets had always included a $1 million payment which had been initially been described as a "political contribution," and later as a "pre-closing cost," and finally as a "closing cost." (Tr. 571, 573.)

The evidence at trial revealed that the defendant and the other conspirators used a variety of codewords to refer to the $1 million payment, including "closing costs," "toll," and "kiss." (Tr. 170-71, 174, 178, 333-34, 571, 573; J.A. 31, 43, 46, 65.) For instance, as early as August 10, 1999, the defendant wrote to a potential investor seeking funds and enclosed a "use of funds" list that included $1,000,000 for "kiss." (J.A. 43; Tr. 449-51.) Later, in October 1999, he met with Kingsley concerning the Costa Rica project, and, according to Kingsley's contemporaneous notes, discussed the "kiss" payment. (J.A. 36; Tr. 336-38.) In his communications with his potential investors, the defendant preferred to use the term "closing costs," and, on one occasion, he coached Barquero to use that term, rather than "toll," because "closing costs . . . sounds more legal." (J.A. 13:85-86.)

No matter what term was used, the evidence at trial showed that the defendant was aware of the nature, purpose, and the intended recipients of the $1 million future bribe. (Tr. 168, 173-74, 188-89, 325.) Halford testified at trial that everyone involved in OSI, including the defendant, understood that the future payment to the politicians, regardless of what it was called, was a bribe, and that this had been the common understanding for several years. (Tr. 170-75.) The defendant himself repeatedly used the term "bribe" to refer to the future payment. (J.A. 8:10, 11; 10:7, 9; 13:52, 53, 105.) For instance, on June 2, 2000, he stated to Halford, "what we're doing is . . . proving that we have the ability to bribe them properly." (J.A. 8:10.) Even when the defendant did not explicitly use the term "bribe," he repeatedly emphasized the *quid pro quo* nature of the payment, demanding that it not be made until the Costa Rican politicians had delivered the land concession and approved the required studies of the land (J.A. 8:11, 34, 65-66; 9:5-6, 18, 25; 10:12-13; 11:53-57; 13:11-12), and he sought assurances that the recipients of the bribe would protect the conspirators from constant demands for additional bribes by "petty politicians." (J.A. 9:26; 10:13; 11:14, 57; 13:53.)

Throughout the spring and summer of 2000, the defendant repeatedly met with or spoke on the telephone with Kingsley, who began cooperating with the FBI in April 2000, as well as with Halford. During these meetings, the defendant and the

others attempted to devise a mechanism that would enable them to demonstrate to the politicians that they could pay the bribe while ensuring that the payment would not actually be made until the land concession was granted. (J.A. 8:11, 34-35, 65-66; 9:16; 10:8, 12-13; 11:53-57; 13:11-12; Tr. 186-87, 199.) Thus, in one conversation, the defendant and Halford agreed to work together on drafting a letter of credit that would provide them with adequate protection. (J.A. 8:65-66; Tr. 197.) On other occasions, they discussed opening an escrow account. (J.A.8:11; 10:8, 12-13; 11:53-57; 13:11-12; Tr. 186-89.) Finally, in August 2000, Barquero suggested to Kingsley, who then discussed it with Halford, Reitz, and the defendant, that a Panamanian company be created, with a Panamanian bank account, that would act as a conduit to pay the bribe. (J.A. 12(Aug. 4):9-10; 12(Aug. 9):4-5.)

Throughout the summer of 2000, the defendant indicated his agreement to make the $1 million payment to the politicians. He repeatedly insisted, however, that the payment not be made until the concession was irreversibly granted to OSI. Thus, in early June, after discussing the issue with Halford, he directed Kingsley to tell Barquero that the payment would not be made until both the concession and any necessary environmental studies were completed. (J.A. 9:18; 14; 16.) Further, he emphasized that the payment would need to be paid to sufficiently senior officials to ensure that "petty" officials would not repeatedly hold up the project for new bribes.

(J.A. 9:26, 10:13; 11:14, 57; 13:53.) Finally, as a protection against changes in the government, he accepted Barquero's suggestion that OSI increase the bribe to $1.5 million so that there would be money to pay the leading opposition party as well as the current ruling party, stating, "We couldn't buy a cheaper insurance." (J.A. 13:52; *see also* J.A. 10:9, 28; 11:11, 14, 37; 13:10, 12.)

The evidence at trial also established the defendant actively sought to obtain funding for the Costa Rica project generally and for the $1 million payment in particular. At the end of May and in early June 2000, after being specifically and unambiguously told by Kingsley that the $1 million payment was a "kickback" (J.A. 6:5), the defendant drafted a short "History of the Costa Rica Project" which he distributed to his potential investors. (J.A. 41; Tr. 616, 620-21.) In this document, King stated, "the main requirement is that certain closing costs must be in place in escrow prior to our receiving control of the land." (*Id.* at p. 3.) In discussing this document with Kingsley, the defendant stated, "that's the only mention I made of it, in writing." (J.A. 7:10.) In addition, the defendant repeatedly sent letters to Tom Robbins, a potential investor, referring to the payment. For instance, on May 26, following his conversation with Kingsley, he wrote: "we agreed to give a contribution, (read 'closing costs'), to the party in power of $1M and at the same time receive our rights to the fifty square miles of land." (J.A. 14.) Again, when he

discussed this letter with Kingsley, the defendant stated, "I'm . . . putting quotation marks and . . calling it a certain closing cost." (J.A. 9:17.) *See also* J.A. 16, 24.

In the fall of 2000, Kingsley died and, without him, both the Costa Rican project and the conspiracy collapsed. (Tr. 208-09, 655.) As neither the defendant's investors, nor those solicited by Halford and Reitz, had yet provided the necessary funds, the $1 million bribe was never paid. However, the evidence at trial indicated that the bribe had been offered to Costa Rican officials. On August 9, 2000, Pablo Barquero told Kingsley that three or four high-ranking officials knew of the bribe and would be responsible for allocating it to various officials and that the payment would be disbursed by someone close the president. (J.A. 12(Aug. 9):12.) Thus, on August 17, when the defendant stated that he wanted to be sure they "bribed them high enough," Kingsley, based on his conversations with Barquero, asked the defendant, "Is the president high enough?" (J.A. 52-53.) The defendant agreed that bribing the president would be sufficient. *Id.*

In sum, the evidence showed that the defendant knew about the bribery scheme, that he agreed with Kingsley (prior to Kingsley's period of cooperation beginning in late April 2000), Halford, Reitz, and Barquero that the bribery should be pursued, and that he took substantial actions himself in furtherance of the bribery scheme.

SUMMARY OF THE ARGUMENT

The evidence established the defendant knowingly joined a conspiracy to bribe Costa Rican officials to obtain a land concession for OSI's Costa Rica project. He was under no illusions as to the nature and purpose of a $1 million payment to be paid to the officials in exchange for the land concession, and he actively sought investors to provide funds from which the bribe would be paid.

The district court properly admitted the tapes made by Kingsley of his conversations with the defendant and the other conspirators. He was given more than sufficient opportunity to attack the credibility of Kingsley and to explore his motives in making the tapes. Further, the district court properly refused to allow the defendant to introduce wholesale all of the tapes, particularly in the absence of any articulable evidentiary basis or any explanation under the rule of completeness as to how the proffered tapes corrected or provided a context for the recorded conversations introduced by the government.

The district court properly instructed the jury on deliberate ignorance in light of the defendant's argument that he believed the payments to be legal despite repeatedly being told that they were bribes. The district court's proper instruction did not invite the jury to return a verdict based on negligence rather than intent.

The government acted properly in using Kingsley as an informant and exerted proper controls over him. There is no evidence that Kingsley manufactured a FCPA scheme to entrap the defendant, nor is there any evidence that Kingsley deliberately failed to tape exculpatory conversations or destroyed tapes of such conversations.

ARGUMENT

I. THERE WAS MORE THAN SUFFICIENT EVIDENCE TO CONVICT THE DEFENDANT OF CONSPIRACY AND SUBSTANTIVE VIOLATIONS OF THE FOREIGN CORRUPT PRACTICES ACT.

The defendant challenges his conviction for conspiracy, arguing that the evidence established only mere talk that never "reached the level of a prosecutable agreement" and failed to show an agreement with anyone other than Kingsley, a government informant. (Br. 37-41.) In addition, he challenges his conviction for substantive violations of the FCPA, arguing that the evidence failed to prove acts sufficiently in furtherance of the unlawful payment and failed to identify the intended recipients of the bribe. (Br. 41-46.) The defendant acknowledges that this Court is obligated to view the evidence in the light most favorable to the verdict and to accept all reasonable inferences in favor of that verdict. (Br. 35, *citing United States v. Bass*, 121 F.3d 1218, 1220 (8th Cir. 1997)). Nevertheless, he urges the Court to ignore most of that evidence and to draw from the remaining evidence negative inferences unsupported by the evidence. Taken in full, however, the evidence is more than

sufficient for a reasonable jury to have found the defendant's guilt beyond a reasonable doubt, *see United States v. Stroh*, 176 F.3d 439, 440 (8th Cir. 1999), and this Court should affirm the verdict below.

A. THE DEFENDANT KNOWINGLY JOINED AND ACTIVELY PARTICIPATED IN THE CONSPIRACY TO VIOLATE THE FCPA.

To prove the defendant's membership in the charged conspiracy, the government was obligated to show, *inter alia*, an agreement to achieve some illegal purpose, the defendant's knowledge of the agreement, and that the defendant knowingly became a part of the conspiracy. *United States v. Holloway*, 128 F.3d 1254, 1257 (8th Cir. 1997). "[O]nly slight evidence connecting a defendant to a conspiracy is necessary to convict that defendant once an existing conspiracy is otherwise established, and the government does not have to prove that a defendant knows all the details of the conspiracy." *United States v. Navarrete-Barron*, 192 F.3d 786, 793 (8th Cir. 1999). Moreover, "[p]articipation by a defendant in a single act may in fact demonstrate membership in a conspiracy if the act itself will justify an inference of knowledge of the broader conspiracy." *United States v. Tran*, 16 F.3d 897, 904 (8th Cir. 1994).

The defendant's participation in the conspiracy was demonstrated at trial, in large part, through his own recorded conversations with other conspirators, including

Kingsley, Halford, Reitz, and Barquero. The defendant characterizes his statements during those conversations as "not an agreement to act as much as a cognitive process and a debate . . ." (Br. 37.) The debate, however, to the extent it existed, was never over whether to pay the $1,000,000 bribe but to whom and when. (J.A. 9:5 ("I'm going to insist that the closing costs not be paid until after the surveys are done."); J.A. 11:14 ("I'd like to . . . think we could pay the top people enough, that the rest of the people won't bother us any."); J.A. 13:10 ("What we decided is another fifty percent . . . would take care of everything.").) Indeed, even on August 17, 2000, the date of the last recorded conversation, when the defendant was confronted with evidence that Kingsley had misled him as to whether the concession would be granted before certain studies were done, the defendant still stated: "We're gonna have to put up a million dollars anyway for the bribe." (J.A. 13:105.)

Moreover, to argue, as the defendant does, that he did no more than "talk," ignores the substantial evidence that he *acted* on that talk. The evidence introduced at trial demonstrated that following almost every conversation with Kingsley and the other conspirators, the defendant called and wrote to various investors seeking new funds with which to pay the bribe. In each case, although he did not disclose to the investors that the funds would be used to pay a bribe, he described the necessity to pay a "closing cost" to obtain the concession. (J.A. 16, 24, 29, 33, 35, 43, and 45.)

This solicitation of funds was more than sufficient evidence to demonstrate that the defendant's participation in the conspiracy went well beyond "mere talk."[2]

The defendant is simply wrong in arguing that the evidence demonstrated, at most, his agreement with a government informant who, by law, cannot be deemed a conspirator. (Br. 39.) First, the evidence demonstrated that the defendant entered into the conspiracy with Kingsley long before Kingsley began cooperating with the government in April 2000. For example, Kingsley's contemporaneous notes of a meeting with the defendant on October 24, 1999, reflect that he and the defendant discussed the payment of the "kiss."[3] (*See* J.A. 36; Tr. 336-38.)

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[2]The defendant's list of actions he did not take (Br. 38.) is irrelevant and at times contradicted by the evidence. For instance, although he did not open a letter of credit, he sought a form from his bank. (J.A. 11:53; 47; Tr. 197-99, 622-24, 733.) The fact that he did not open a bank account expressly for the $1,000,000 is not due to a deliberate failure on his part but to the fact that his investors had not yet provided him with the funds and that it was Barquero, not the defendant, who the conspirators agreed would open the account in Panama once the funds were received. (J.A. 12(Aug. 4):9-10; 12(Aug. 9):4-5.) Moreover, that the defendant questioned and challenged Kingsley demonstrated not a lack of agreement as to means and ends, but a concern that the benefits be assured prior to the bribe being paid. (*See, e.g.*, J.A. 9:5-6.)

[3]The documentary evidence shows that King used the term "kiss" as early as August 10, 1999, when he sent a "use of funds" list to a potential investor. (J.A. 43.) In addition, the defendant himself equated "kiss" with the "closing cost" in his conversation with Kingsley on June 23, 2000. (J.A. 10:35-36.)

Further, the evidence at trial demonstrated that the defendant conspired with Pablo Barquero, Richard Halford, and, although he disliked and distrusted him, Albert Reitz. Halford testified at trial that everyone involved in OSI knew of and approved the payment of the $1 million to the politicians. (Tr. 170-75.) The conspirators' recorded conversations corroborated this testimony. For instance, on June 2, the defendant and Halford agreed to work together to draft a letter of credit that could be used to demonstrate to the politicians the conspirators' ability to pay the bribe. (J.A. 8:66.) Then, on June 5, the defendant told Kingsley that he had had separate discussions with Halford, without Kingsley being present, concerning the timing of the payment of the bribe. (J.A. 9:5.) With respect to Barquero, the defendant stated that he had spoken to Barquero frequently in the past and had sent him money for his expenses. (Tr. 578.) Further, the defendant often gave Kingsley directions to convey to Barquero in Costa Rica concerning assurances he wanted to obtain from the officials, and he agreed to Barquero's suggestion to pay both the ruling and opposition parties to ensure the cooperation of future governments. (J.A. 9:18, 10:9, 13:10, 51-52.)[4]

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[4]The defendant's argument that his investors are not alleged to be conspirators (Br. 40.) is a red herring. As noted above, there was sufficient evidence that the defendant conspired with Kingsley (prior to April 2000), Halford, Barquero, and Reitz. The unwitting involvement of third parties does not demonstrate the defendant's innocence; to the contrary, his attempts to induce them to fund the

B. THE DEFENDANT ACTED IN FURTHERANCE OF THE BRIBE PAYMENTS, THEREBY VIOLATING THE FCPA.

The defendant in essence makes up law in his attempt to minimize the evidence demonstrating his substantive violations of the FCPA. He argues that "to the extent FCPA violations are akin to 'attempt' crimes, the Eighth Circuit has held that a defendant must take a 'substantial step' towards the completion of the crime to constitute an attempt" and that, therefore, the government was required, and failed, to prove that his conduct was "such that if it had not been extraneously interrupted [it] would have resulted in a crime." (Br. 41, *quoting United States v. Carlisle*, 118 F.3d 1271, 1273 (8th Cir.), *cert. denied*, 522 U.S. 974 (1997).) The problem with this argument is that the FCPA is not an attempt crime: the crime is committed, not attempted, when a defendant takes any act in furtherance of an offer, promise, or payment to an official. *See* 15 U.S.C. § 78dd-2(a). The legislative history emphasizes this point, stating, "[The Act] does not require that the act be fully

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"closing costs," without explicitly disclosing the nature of those costs, demonstrated his awareness of the illegality of the payments. Moreover, although two potential investors, Robbins and Warne, testified at trial and denied knowing that bribes were to be paid, Warne admitted to being suspicious (Tr. 451-52), and the defendant himself stated that his investors knew. (J.A. 7:10-11 ("the guy I'm sending this to knows what's going on"); 9:16 ("they know what is it's for"); 10:66 ("They know because of a flip of an eyebrow . . . what these closing costs are accomplishing.").)

consummated or succeed in producing the desired outcome." H.R. Rep. 640, 95th Cong., 1st Sess. (1977) at 8.

Next, the defendant invents a requirement that "a prosecutable FCPA case requires proof of a specific intended recipient of the alleged bribe." (Br. 42.) Neither the statute nor any of the FCPA cases cited by the defendant address or support his claim that the official must be identified. Moreover, it is simply inaccurate to claim that no official was identified by the evidence at trial. To the contrary, the conspirators repeatedly discussed the necessity of bribing senior officials and, in August 2000, Pablo Barquero told Kingsley (who then told the others) that the bribe would be distributed to very senior officials by an official close to the president of Costa Rica. (J.A. 12 (Aug. 9): 9, 11, 12.) These conversations were followed by the August 17 meeting, at which the defendant agreed that a bribe of the president would be "high enough" to satisfy him. (J.A. 13:51-52.)

The defendant further argues that "[a]t worst, the evidence showed [the defendant] sought to arrange for hundreds of millions of dollars for the Costa Rica project with the intent thereafter to go to Costa Rica and negotiate his own agreement," presumably one that would not include the bribe. (Br. 42.) To the contrary, the defendant's own handwritten notes of his meetings in June and July 2000 show that he intended *first* to put the bribe money into escrow or to open a letter

of credit to pay the bribe and *then* to go to Costa Rica to negotiate the terms of the concession. (J.A. 25, 27, 46.) Further, the defendant discussed these plans in his recorded conversations with Kingsley and Halford. (J.A. 9:15; 10:13-14 (pt. 2); 11:53.) For example, on one occasion, he stated that he would need to go to Costa Rica to ensure there are no new surprises, but only after he had gathered the money to pay the closing costs. (J.A. 8:10-11.)

Finally, the defendant repeats his argument that the letters sent to the potential investors (the basis for three substantive counts) are innocent because (i) the investors understood the "closing costs" to be legitimate and (ii) the letters "do not mention anything improper." (Br. 44.) As to the latter argument, the defendant overlooks that the letters repeatedly refer to the necessity of making a payment to obtain the land concession, a classic *quid pro quo* bribe. As to the former, it is not what the investors understood but what the defendant understood that is relevant. The defendant's understanding that the closing costs were not legitimate but were instead a *quid pro quo* bribe to officials to obtain the concession is well established by his own statements to Kingsley and Halford. (J.A. 8:11, 34, 65-66; 9:5-6, 18, 25; 10:12-13; 11:53-57; 13:11-12.)

As to the August 17 telephone call to Barquero (the basis for another substantive count), the defendant argues that this call was made at the FBI's direction

and that he neither caused nor aided or abetted the telephone call. (Br. 45.) It is true, as Special Agent Herndon testified, that the FBI directed Kingsley to attempt to have all of the conspirators discuss the proposed payment at the same time. (Tr. 809.) The evidence, however, demonstrated that the defendant had talked to Barquero in the past (Tr. 578) and had used Kingsley as a conduit to Barquero to obtain information from Barquero and to direct Barquero in negotiating the terms of the bribe. (J.A. 9:18; 10:18, 22.) There is, therefore, nothing nefarious in arranging an opportunity for defendant King to discuss the matter directly with Barquero. Further, although defendant King expressed a reluctance to discuss on an open telephone line the specifics of the bribe, he actively participated in the conversation and coached Barquero to call the future bribe a "closing cost" because it "sounds more legal" than "toll." (J.A. 13:85, 86.)

Finally, although the defendant cites several cases that stand for the proposition that some acts are "too attenuated" to support a conviction under various federal statutes (Br. 45), he fails to explain how payments directly seeking funds with which to pay a bribe and a discussion with a co-conspirator of the manner and means of making a bribe payment can be characterized as "attenuated."

In short, the evidence at trial, which included the defendant's own spoken and written words, established his knowing, willful, and active participation in the FCPA

bribery scheme and his acts in furtherance of that scheme. This evidence was more than sufficient for a reasonable jury to have returned a guilty verdict, and this Court should affirm that verdict.

II. THE COURT'S DECISIONS TO ADMIT INTO EVIDENCE THE TAPES OFFERED BY THE GOVERNMENT AND TO REFUSE TO ADMIT THE TAPES OFFERED BY THE DEFENDANT WERE PROPER.

A. THE ADMISSION OF THE CONVERSATIONS RECORDED BY KINGSLEY DID NOT VIOLATE THE DEFENDANT'S CONFRONTATION CLAUSE RIGHTS.

The defendant argues that his Confrontation Clause rights were violated by the district court's admission of the recordings made by Kingsley because Kingsley was not available to be cross-examined. (Br. 47.) The Confrontation Clause guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. The Sixth Amendment, however, is not a wholesale prohibition on the admission of out-of-court statements against a defendant, *see, e.g., Idaho v. Wright*, 497 U.S. 805, 813 (1990), and the courts have long permitted the introduction of such statements for non-hearsay purposes. *Tennessee v. Street*, 471 U.S. 409 (1985). The district court properly admitted the tapes in this case for just such purposes.

The defendant does not challenge the admissibility of the statements on the tapes as non-hearsay under Rule 801 of the Federal Rules of Evidence. Thus, he does

not appear to contest that his own statements are admissible as party admissions, Fed. R. Evid. 801(d)(2)(A), and that some of Kingsley's statements are admissible as adoptive admissions, Fed. R. Evid. 801(d)(2)(B). *See United States v. Stelton*, 867 F.2d 453, 454 (8th Cir. 1988) (per curiam), *cert. denied*, 490 U.S. 1050 (1989). Similarly, he does not contest that Kingsley's pre-April 2000 statements and Halford's, Reitz', and Barquero's statements were properly introduced as co-conspirator statements under Rule 801(d)(2)(E). Finally, he does not appear to argue that Kingsley's post-April 2000 statements, *i.e.*, those made after he began cooperating with the government, may not be admitted as non-hearsay under Rule 801(c) to provide the context for the defendant's admissible statements and for those of his co-conspirators. *See Barrett v. Acevedo*, 169 F.3d 1155, 1163 (8th Cir.), *cert. denied*, 528 U.S. 846 (1999).

The defendant's sole claim on appeal is that he was somehow denied his Sixth Amendment right to confrontation by being deprived, by Kingsley's death, of an opportunity to cross-examine him concerning "the context of the conversations, the way Kingsley steered the conversations, the possibility of erased or omitted statements, and what was really being discussed." (Br. 47.) The caselaw is clear, however, that the admission of non-hearsay out-of-court statements raises no Confrontation Clause issues. Thus, in *Tennessee v. Street*, the Supreme Court held

that a trial court properly admitted an out-of-court confession by an individual who was not called as a government witness when that confession was offered for non-hearsay purposes. The Court concluded that "[t]he *nonhearsay* aspect of [the] . . . confession – not to prove what happened at the murder scene but to prove what happened when respondent confessed – raises no Confrontation Clause concerns." 471 U.S. at 414. *See also Barrett*, 169 F.3d at 1163-64 (finding that statements offered to reveal the recipient's state of mind are not hearsay and accordingly do not trigger a Sixth Amendment issue); *Lee v. McCaughtry*, 892 F.2d 1318, 1325 (7th Cir.) (concluding that statements not offered for their truth but to explain the context of the defendant's change in story were not hearsay and thus did not violate the Confrontation Clause), *cert. denied*, 497 U.S. 1006 (1990); *United States v. Peaden*, 727 F.2d 1493, 1500 n.11 (11th Cir.) (providing that the court could "find no cases indicating that the [C]onfrontation [C]lause protection extends to evidence that is not hearsay" and finding that statement offered not for its truth but to show *modus operandi* was not hearsay and thus presented no Sixth Amendment problem), *cert. denied*, 469 U.S. 857 (1984).

This Court has spoken on this issue, as well, and its decision directly supports the admission of Kingsley's statements. In *Stelten*, the Eighth Circuit considered whether the admission of tape recordings of conversations between the defendant, an

undercover IRS agent, and a third individual named Salisbury violated the Sixth Amendment when Salisbury was not called as a government witness at trial. The government offered Salisbury's tape recorded statements not for their truth but to make the defendant's responses intelligible to the jury and recognizable as admissions. 867 F.2d at 454. The court determined that because the statements were offered for non-hearsay purposes, "there is no reason to test Salisbury's credibility, [and] the introduction of his statements neither violated the hearsay rule nor the right of confrontation." *Id.* Salisbury's statements were admissible "to ensure the completeness and intelligibility" of the defendant's admissions. *Id.*; *see also United States v. Lemonakis,* 485 F.2d 941, 948-49 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 989 (1974). Kingsley's statements were admissible in this case for the same reasons.

None of the three cases on which the defendant relies supports his argument. *Johnson v. Brewer*, 521 F.2d 556 (8th Cir. 1975), involved improper limits on the cross-examination of a testifying witness. *United States v. McKinney*, 707 F.2d 381 (9th Cir. 1983), involved hearsay evidence offered for its truth when the declarant was not made available for cross-examination. *Maryland v. Craig*, 497 U.S. 836 (1990), involved whether a testifying witness could testify by one-way closed circuit television. Each of these cases involved testimony or hearsay offered for its truth, and they are therefore inapplicable to the case at hand, in which Kingsley's

statements were offered only to provide context for the defendant's replies and the surrounding conversation with other conspirators.

Finally, to the extent that Kingsley's motives and character were relevant to jury's ability to assess the recorded statements, the trial court afforded the defense wide latitude in its cross-examination of the government's other witnesses, including the case agent and the defendant's co-conspirators, to show, in the trial court's own words, that Kingsley was a "bum" and "sleezeball." (Tr. 31, 33.) Moreover, although the defense spent considerable time cross-examining the case agent about the possibility of erased or missing tapes, it failed to establish that Kingsley (or anyone else) erased any of the tapes or that Kingsley failed to turn over to the government any tapes containing exculpatory evidence. (Tr. 627, 771, 776, 836.)

B. THE DISTRICT COURT PROPERLY ADMITTED THE RECORDED CONVERSATIONS BETWEEN KINGSLEY AND BARQUERO.

The defendant further contends that the admission of the recorded conversations between Kingsley and Barquero was improper because neither was available for cross-examination and the government failed to show that there was a "sufficient indicia of reliability" for their admission. (Br. 49.) Since 1987, however, the "indicia of reliability" test is no longer applicable to determining the admissibility of co-conspirator statements. *See Bourjaily v. United States*, 483 U.S. 171 (1987).

Instead, as the trial court found and the Supreme Court held in *Bourjaily*, if the statements qualify as co-conspirator statements, *i.e.*, statements made by co-conspirators "during the course and in furtherance of the conspiracy," Fed. R. Evid. 802(d)(2)(E), there is no additional test of reliability under the Confrontation Clause. (Tr. 596.) *See Bourjaily*, 483 U.S. 183-84; Fed. R. Evid. 802(d)(2)(E). "[T]he requirements for admission under [Federal Rule of Evidence] 801(d)(2)(E) are identical to the requirements of the Confrontation Clause" and, therefore, "statements . . . admissible under the Rule . . . [present] no constitutional problem." *Bourjaily*, 483 U.S. at 182. The government laid a proper foundation for these tapes,[5] and the district court properly admitted them.

The defendant brushes aside *Bourjaily* and cites instead several cases which pre-dated it and applied the very tests rejected in *Bourjaily*. The one post-*Bourjaily* case the defendant cites does not support his position. *United States v. Ochoa*, 229 F.3d 631, 637 (7th Cir. 2000), pertains to statements a co-conspirator makes to law enforcement after the conclusion of the conspiracy and when the government's

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[5]Apart from his general objection, the defendant did not object to the admission of any of the recordings on the basis of lack of foundation. (*See, e.g.*, Tr. 614, 624.) Indeed, of the four Kingsley-Barquero tapes introduced at trial and an additional one summarized by the case agent, three were recorded in the presence of, or under the direct supervision of, the case agent, and the agent testified as to the circumstances under which he received the tapes from Kingsley. (Tr. 581, 607-09, 641.)

investigation is overt, not those made during the course of the conspiracy and in furtherance of the conspiracy.

Further, the defendant also fails to cite adverse precedent from this Court, namely *United States v. Beckman*, 222 F.3d 512, 523 n.7 (8th Cir. 2000), and *United States v. Roach*, 164 F.3d 403, 409 n.5 (8th Cir. 1998), *cert. denied*, 528 U.S. 845 (1999). In these cases, the Court recognized that the Supreme Court in *Bourjaily* rejected the "indicia of reliability" test that the defendant would have the Court apply here. *Id.*

The availability of the co-conspirator declarant is irrelevant to both the Rule 801(d)(2)(E) or the Confrontation Clause analysis. In *United States v. Chindwongse*, 771 F.2d 840 (4th Cir. 1985), *cert. denied*, 474 U.S. 1085, 1086 (1986), the Fourth Circuit found no Confrontation Clause violation where co-conspirator statements were admitted against Chindwongse even though he was not a party to the conversation and all of the participants in the recorded conversation were unavailable: the government informant who had made the recording had died, two of the co-conspirator declarants were fugitives, and the third co-conspirator declarant was a co-defendant who had invoked his Fifth Amendment privilege. *Id.* at 845 & n.5. Similarly, in *United States v. Singleton*, 125 F.3d 1097, 1106-07 (7th Cir. 1997), *cert. denied*, 522 U.S. 1098 (1998), the Seventh Circuit affirmed the admission of a

co-conspirator statement recorded by an informant who had since disappeared, and the tapes were therefore admitted through a police detective who had supervised the informant. *See also United States v. Ammar*, 714 F.2d 238, 255 (3d Cir.) (no Confrontation Clause violation where all of the declarants were "either physically unavailable because they had not yet been apprehended . . . or practically unavailable because they were co-defendants who chose not to testify"), *cert. denied*, 464 U.S. 936 (1983).

In short, the defendant has not demonstrated that the admission of the tape recorded conversations violated any of his constitutional rights.

C. ADMISSION OF THE TAPES DID NOT VIOLATE RULE 106.

The government offered the complete recordings of seven conversations between the defendant and Kingsley and four conversations between Barquero and Kingsley. Although it only played excerpts to the jury, the complete recorded conversations were introduced, and the defendant was permitted to play and introduce statements from these and other recordings. (*See, e.g.,* Tr. 273-74, 281-82, 681, 684, 691, 692, 714, 721, 736, 798, 799, 807.) The defendant argues, however, that the tapes should have been excluded under Federal Rule of Evidence 106 – the rule of completeness. (Br. 47.)

Rule 106 provides:

> When a . . . recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other . . . recorded statement which ought in fairness to be considered contemporaneously with it.

The rule of completeness may be invoked where additional portions of a conversation are necessary to explain an admitted portion, place it in context, avoid misleading the trier of fact, or insure a fair and impartial understanding of the admitted portion. *See United States v. Webber*, 255 F.3d 523, 526 (8th Cir. 2001).

There is no support in the caselaw for any argument that the government is barred from introducing recordings unless it can demonstrate, as the defendant demands, that all conversations between a defendant and an informant were recorded.[6] (Br. 48.) Further, although the defendant recites a laundry list of alleged flaws in the recordings made by Kingsley, he again fails, as he did at trial and during a pre-trial evidentiary hearing, to identify any exculpatory conversation that was not

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[6]The defendant quotes *United States v. Long*, 900 F.2d 1270, 1279 (8th Cir. 1990), out of context. (Br. 47-48.) It did not hold that "all recordings made by an informant [must] be introduced if 'admission of the statement in its edited form distorts the meaning of the statement or excludes information substantially exculpatory of the declarant.'" *Id.* (quoting *Long*, 900 F.2d at 1279). *Long* concerned when the rule of completeness is violated because a defendant's confession is redacted so as not to implicate a co-defendant. *Long*, 900 F.2d at 1278-79. The passage quoted by the defendant deals with when severance is required, not when a defendant can introduce every tape made by an informant. *Id.* at 1279.

recorded by Kingsley, nor has he identified any tapes that were altered or suppressed by Kingsley. *See* A.A. 4. Indeed, the only evidence that was before the trial court (and of which the United States is aware) is that Kingsley failed to record *one* conversation with the defendant (which was in the midst of several conversations on the same day in early June) because Kingsley's girlfriend was present when he received the call (Tr. 627, 726, 836), and that certain other calls, none of which involved the defendant, were only partially recorded due to technical issues (Tr. 771, 775-76). In short, there is no basis for concluding that the tapes introduced at trial misled the jury or provided an incomplete or distorted view of the relationship and communications between the defendant and Kingsley.

D. ADMISSION OF THE TAPES DID NOT VIOLATE RULE 403.

The defendant also purports to have an objection to the admission of the tapes based upon Rule 403 of the Federal Rules of Evidence, but he has failed to articulate what that objection is. Again, despite repeated opportunities, including an evidentiary hearing before Chief Magistrate Judge Maughmer in February 2000, *see* A.A. 4, and during the trial itself, the defendant failed to demonstrate that any of the tapes that were introduced were incomplete, nor has he proffered what might have been exculpatory in the sole conversation between himself and Kingsley that was not recorded. The tapes that were introduced, and particularly those portions played to

the jury, were proof specific to the offenses charged and contained no extraneous or prejudicial conversation that might have induced the jury to find guilt upon a different ground. There is no basis to find that any unfair prejudice resulting from the introduction of the tapes outweighed their probative value.

E. THE DISTRICT COURT PROPERLY REFUSED TO PERMIT THE WHOLESALE INTRODUCTION OF EVERY CONVERSATION BETWEEN THE DEFENDANT AND KINGSLEY.

Following the close of the government's case, the defendant unsuccessfully sought to introduce *all* of the Kingsley-King tapes, without playing them to the jury or identifying any portions that corrected or even amplified the eight tapes played to the jury during the government's case. (Tr. 943-956, 963.) The defendant now claims that these tapes were admissible as non-hearsay under Rule 106 to provide a context for the admitted portions.

"The rule of completeness is violated . . . only where admission of the statement in its edited form distorts the meaning of the statement or excludes information substantially exculpatory of the declarant." *See United States v. Kaminsky*, 692 F.2d 505, 522 (8th Cir. 1982) (citation omitted). The defendant has not made any allegation that the excluded tapes contained "substantially exculpatory" statements. *Id.* He has failed to articulate how the admission of some recordings and exclusion of others distorted his statements.

Further, the rule of completeness must be invoked at the time the allegedly misleading or incomplete portion is admitted, not at the end of the trial after the recording's proponent has rested. *See United States v. Larranaga*, 787 F.2d 489 (10th Cir. 1986). The defendant's efforts to bury the jury in tapes that he had no intention of playing was improper, and the trial court correctly refused to admit the tapes.

III. THE DELIBERATE IGNORANCE INSTRUCTION WAS INVITED BY THE DEFENDANT AND THE JURY INSTRUCTIONS AS A WHOLE CORRECTLY STATED THE LAW.

The defendant contends that it was error for the court to have instructed the jury on deliberate ignorance and that by doing so the Court suggested to the jury that it could return a guilty verdict based on a finding of negligence. (Br. 51.) The deliberate ignorance instruction was invited, however, by the defendant's own arguments. Its inclusion was proper because the jury instructions as a whole correctly stated the law.

The question of what the defendant knew about the proposed $1 million payment was the chief issue in the trial. In his opening, during cross-examination of the government's witnesses, and in his closing, the defendant suggested and then argued to the jury that he had a good faith belief that OSI's $1 million payment in Costa Rica was not a bribe but was some form of legal payment to the political parties. (Tr. 77, 81-82, 251-59, 280, 419-21, 1019-21, 1030, 1032-37, 1046-47,

1051-52; J.A. 4: Instructions 12, 13.) The government requested the deliberate ignorance instruction in response to this argument, to inform the jury that under the law, it could find the requisite criminal knowledge if it believed that the defendant had avoided knowing the purpose of the bribe by purposefully putting his head in the sand.[7]

As in *United States v. Regan*, 940 F.2d 1134, 1136 (8th Cir. 1991), the defendant here does not dispute that he acted in a certain way that furthered the goals of the charged conspiracy, only that he was unaware of those goals. The defendant in this case denied that he knew the $1 million payment was a bribe; in *Regan*, the defendant denied he understood he was transporting drugs. Here, while defendant argued that he believed the payment was a legal political donation, the evidence demonstrated that he had been presented with co-conspirators' statements, as well as Kingsley's unambiguous statements, that put him on notice that "criminal activity [was] probably afoot." *United States v. Barnhart*, 979 F.2d 647, 652 (8th Cir. 1992).

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[7] The defendant did not properly preserve his objection to the deliberate ignorance instruction. *See* Fed. R. Crim. P. 30(d). First, the objection was not made at the time the court engaged the two sides in a discussion of the proposed instructions (Tr. 875-929) but rather was mentioned in passing during the "summary" of objections to the instructions (Tr. 940), and defendant did not request that the trial court re-open the discussion of the instructions. Second, defense counsel did not state that the basis for his objection was that it might invite the jury to convict the defendant based on a negligence standard, which is his argument in this appeal. *See* Fed. R. Crim. P. 30(d).

The evidence further suggested that the defendant glossed over those instances by calling the payments political donations, "thereby deliberately declining to verify or discover the criminal activity." *Id.* Because the defense repeatedly emphasized the defendant's alleged good faith belief that the payment was legitimate in the face of strong evidence to the contrary, the government was entitled to a deliberate ignorance instruction. *See United States v. Massa*, 740 F.2d 629, 643 (8th Cir. 1984), *cert. denied*, 471 U.S. 1115 (1985).

The defendant further argues that the deliberate ignorance instruction "diluted" the reasonable doubt standard and the requirement that the defendant have acted knowingly. (Br. 51.) This Court has held that "[a] conviction will not be reversed due to allegedly erroneous jury instructions unless, viewed in their entirety, the instructions fail to correctly state the law." *United States v. Paul*, 217 F.3d 989, 997 (8th Cir. 2000) (citing *United States v. Webster*, 162 F.3d 308, 322 (5th Cir. 1998), *cert. denied*, 528 U.S. 829 (1999)), *cert. denied*, 534 U.S. 829 (2001). The jury instructions are to be evaluated not individually, in isolation, but rather in the context of the whole set of instructions. *Jones v. United States*, 527 U.S. 373, 391 (1999); *Paul*, 217 F.3d at 997. The jury is presumed to have followed the instructions given. *Jones*, 527 U.S. 394; *Paul*, 217 F.3d at 997.

The deliberate ignorance instruction did not weaken the reasonable doubt standard. The jury was instructed at least five times at the end of the trial, as well as during the *voir dire* process, that it was to apply the reasonable doubt standard. (Tr. 7; J.A. 4: Instructions 9, 14, 16, 19, 22.) Defense counsel emphasized the standard many times in his opening and closing, even using two charts to demonstrate it. (Tr. 67, 83, 1011, 1019-23, 1055.)

Moreover, the jury instructions specified that the jury must find that the defendant acted "voluntarily and intentionally" and not out of negligence or mistake. (J.A. 4: Instructions 16, 17, 22, 24, 27.) Instruction 27 specifically informed the jury that "[a] showing of negligence, mistake, or carelessness is not sufficient to support a finding of knowledge." (J.A. 4: Instruction 27.) Defense counsel highlighted this same point in his closing. (Tr. 1017.) The government never argued that it only had to prove defendant "should have known" he was involved in a bribery scheme.

There is no error in giving the deliberate ignorance instruction in a case such as this one where the instructions as a whole communicated to the jury that negligence is not a sufficient basis to find knowledge. *See Massa*, 740 F.2d at 643; *United States v. Graham*, 739 F.2d 351, 352-53 (8th Cir. 1984). Any risk that the jury convicted based on a negligence standard is particularly low when, as in this case, the defendant was convicted on a conspiracy count, which requires proof of a

conspiratorial agreement. *United States v. Covington*, 133 F.3d 639, 645 (8th Cir. 1998). Moreover, in view of the overwhelming evidence of the defendant's guilt, any error in giving the deliberate ignorance instruction was harmless. *See Regan*, 940 F.2d at 1136.

IV. THERE WAS NO EVIDENCE OF ANY GOVERNMENT MISCONDUCT, MUCH LESS "OUTRAGEOUS" MISCONDUCT SUFFICIENT TO JUSTIFY DISMISSAL OF THE INDICTMENT.

The defendant argues that the district court erred in refusing to dismiss the indictment due to the government's alleged outrageous misconduct. (Br. 53.) This "misconduct" amounts to no more than the use of an informant to elicit inculpatory statements that corroborated the informant's statements to the FBI and provided a context for documents and other evidence in the FBI's possession. The district court repeatedly rejected the defendant's argument, finding that the government had acted properly. (A.A. 4, 6.) This Court, too, should reject the defendant's argument.[8]

The defendant's argument hinges on *dicta* in *United States v. Russell*, 411 U.S. 423 (1973), in which the Court, while rejecting a theory of entrapment that focused

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[8]The defendant cites *United States v. Lard, 734 F.2d 1290, 1296-97 (8th Cir. 1984)*, in support of a *de novo* standard of review of the district court's decision. (Br. 35.) Although *Lard* at no point discusses the applicable standard of review, the government agrees that a *de novo* standard applies to the review of a district court's denial of a motion to dismiss an indictment on due process grounds. *See United States v. Two Eagle*, 318 F.3d 785, 793 (8th Cir. 2003).

on the government's conduct instead of the defendant's predisposition, stated, "[W]e may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." *Id.* at 431-32. In addressing lower court cases that had veered toward the so-called "objective" theory of entrapment, the Court warned, "[T]he defense of entrapment . . . was not intended to give the federal judiciary a 'chancellor's foot' veto over law enforcement practices of which it did not approve." *Id.* at 435.

The *Russell dicta* has "spawned" countless unsuccessful motions seeking dismissal of an indictment for "outrageous" government misconduct. *United States v. Tucker*, 28 F.3d 1420, 1422, 1423 (6th Cir. 1994), *cert. denied*, 514 U.S. 1049 (1995); *see also United States v. Santana*, 6 F.3d 1, 4 (1st Cir. 1993). However, as several courts have noted, *United States v. Twigg*, 588 F.2d 373 (3d Cir. 1978), the case upon which the defendant relies, is the single instance in which an appellate court has affirmed a dismissal based upon outrageous government misconduct, and that decision was later disavowed. *See United States v. Beverly,* 723 F.2d 11, 12 (3d Cir. 1983). For that reason, several courts of appeals have criticized, limited, or even rejected altogether the *Russell dicta*. *See Tucker*, 28 F.3d at 1428 (rejecting a defense based upon *Russell*); *United States v. Jones*, 13 F.3d 100, 104 (4th Cir. 1993)

(explaining that "[a]s a practical matter, only those claims alleging violation of particular constitutional guarantees are likely to succeed"); *Santana*, 6 F.3d at 4 (stating that "[t]he banner of outrageous misconduct is often raised but seldom saluted. . . . [T]he doctrine is moribund; in practice, courts have rejected its application with almost monotonous regularity"); *United States v. Miller*, 891 F.2d 1265, 1271-73 (7th Cir. 1989) (Easterbrook, J., concurring) (suggesting that the doctrine should be rejected).

In addressing the *Russell dicta*, this Court has stated:

> "The level of 'outrageousness' needed to prove such a due process violation . . . is quite high." And, like the Supreme Court, this Court has yet to see a case in which the government's conduct rose to the level of such outrageousness.

United States v. Berg, 178 F.3d 976, 979 (8th Cir. 1999) (*quoting Gunderson v. Schlueter*, 904 F.2d 407, 410 (8th Cir. 1990)). The defendant cites only one Eighth Circuit case, *United States v. Lard*, 734 F.2d 1290 (8th Cir. 1984), in support of his argument. However, in that case, although the Court noted, in *dicta*, that the agent's conduct "approached" the *Russell* standard, *id.* at 1296, it did not find any violation of due process. *See Berg*, 178 F.3d at 979 ("We did not find [in *Lard*] . . . a violation of the defendant's due-process rights.").

Kingsley, like most government informants, had faults, which the defendant explored at great length during the trial. The government's use of Kingsley, an insider, to determine whether the defendant was knowledgeable concerning the criminal nature of the payments and then to develop inculpatory statements was not misconduct. *See United States v. Davis*, 15 F.3d 1393, 1415-16 (7th Cir.) (explaining that "[t]he use of unsavory informants . . . in undercover police investigations is 'an unattractive business, but that is the nature of the beast.' . . . . The jury may consider such arrangements as evidence relating to the informant's credibility") (*quoting United States v. Kaminski*, 703 F.2d 1004, 1010 (7th Cir. 1983)), *cert. denied*, 513 U.S. 896 (1994).

Defendant wholly fails to allege any conduct that even approaches outrageous misconduct. There is simply no evidence that "[t]he FBI in this case allowed Kingsley to concoct a FCPA scheme and [to] manufacture a crime." (Br. 55.) To the contrary, the government learned of the FCPA bribery scheme as early as 1998, and a Criminal Division prosecutor was assigned to supervise that aspect of the investigation beginning in October 1999. (Tr. 553; A.A. 4 at 2.) The record reflects that the FBI did not authorize Kingsley to tape the conversations with the defendant until after the defendant's name had arisen in other conversations which corroborated Kingsley's statements. (Tr. 612-13, 689-90.) Further, the evidence established that

the "FCPA scheme" long pre-existed Kingsley's cooperation with the government, as did the defendant's participation in it. (J.A. 36, 43; Tr. 170-75, 330-32, 553.)

Although the defendant describes a scenario in which "the FBI . . . instructed Kingsley to try for two months . . . to get Mr. King to incriminate himself" (Br. 55), the evidence shows that the defendant acknowledged knowing of the $1,000,000 "kickback" for five years in the very first taped conversation on May 26, 2000. (J.A. 6:6.) In the conversations over the next two months, he actively pushed the bribery scheme, insisting on raising the amount to $1,500,000 to cover both political parties (J.A. 10:9, 28; 11:37; 13:10, 12, 52-53), exploring various mechanisms (escrow accounts, letters of credit) for ensuring that the bribe funds would not be released until the concession was granted (J.A. 8:10-12, 34; 9:5-6, 17-18; 10:8; 11:53-57), and demanding assurances that the recipients of the bribes would be high enough to protect the project from being held up by minor officials with their hands out for more. (J.A. 9:26; 10 (pt. 2):13; 11:14; 13:52-53.)

The defendant puts a great deal of weight on certain statements, taken out of context, from the June 2, 2000 conversation between himself, Halford and Kingsley. During that conversation, the defendant is indisputably upset upon learning that bribes had already been paid to Costa Rican officials despite alleged past assurances from Kingsley that no bribes had been paid. (J.A. 8:7-8.) However, within seconds

the defendant puts that issue behind him ("And, so much for that. Okay.") and begins to plan the payment of the $1,000,000 bribe ("What we're doing is . . . proving that we have the ability to bribe them properly."). (J.A. 8:8, 10-11.) The defendant would have had the government call a halt to its investigation solely upon the alleged fact that he did not know of past bribes and was only planning to pay a future bribe. In these circumstances, however, the government's decision to continue its investigation can hardly be characterized as misconduct.

CONCLUSION

The evidence introduced at trial established the defendant's participation in the charged conspiracy and substantive violations of the FCPA. The evidence was properly admitted, the jury properly instructed, and there was no evidence of governmental misconduct. Accordingly, for the reasons set forth above, the United States respectfully requests that this Court affirm the verdict and judgment below.

Respectfully submitted,

TODD P. GRAVES
UNITED STATES ATTORNEY
WESTERN DISTRICT OF MISSOURI

By: _____
Philip Urofsky
Special Counsel for International Litigation
Nancy Potts
Trial Attorney

United States Department of Justice
Fraud Section, Criminal Division
10th & Constitution Ave. NW
Bond Building, Rm. 4403
Washington, D.C. 20530
(202) 514-7023

CERTIFICATE OF COMPLIANCE

1. This brief has been prepared using: **WordPerfect 9, Times New Roman, 14 point.**

2. Exclusive of the corporate disclosure statement, table of contents, table of citations, statement with respect to oral argument, addendum, this certificate of compliance, and the certificate of service, this brief contains: **9,846 words.**

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17 April 2003 _____

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of the United States was served in both paper and electronic form on the following attorneys for the appellant by U.S. mail on this, the 17th day of April 2003:

Michael S. Pasano, Esq.
Zuckerman Spaeder LLP
201 South Biscayne Blvd., Ste. 900
Miami, FL 33131

Daniel V. Hiatt, Esq.
Swanson Midgley LLC
2420 Pershing Road, Ste. 400
Kansas City, MO 64108