No. _____

In the Supreme Court of the United States

JOEL ESQUENAZI AND CARLOS RODRIGUEZ,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Eleventh Circuit's definition of "instrumentality" under the Foreign Corrupt Practices Act (FCPA), 15 U.S.C. § 78dd-2, as "an entity controlled by the government of a foreign country that performs a function the controlling government treats as its own" (1) fails to satisfy the constitutional requirement of adequate notice of what specific conduct violates the FCPA, and (2) is erroneously derived from commentary to an unrelated treaty that postdates the FCPA's enactment.

2. Whether the Eleventh Circuit erred by concluding the Petitioners' FCPA convictions did not merge with their convictions for violating the Act on the Laundering of Monetary Instruments, 18 U.S.C. § 1956, where both were based on the same payments made by third-party intermediaries to the alleged foreign officials employed by Haiti Teleco.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Joel Esquenazi and Carlos Rodriguez respectfully petition this Court to issue a writ of certiorari to review the May 16, 2014 judgment and opinion of the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

Petitioners seek review of the opinion and judgment of the United States Court of Appeals for the Eleventh Circuit on May 16, 2014 (App. 1-51) affirming their convictions entered in the United States District Court for the Southern District of Florida (App. 52-82). The Court of Appeals' decision was published at *United States v. Esquenazi*, 752 F.3d 912 (11th Cir. 2014).

JURISDICTION

The opinion of the Court of Appeals was filed and judgment entered on May 16, 2014. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Appendix to the petition reproduces the relevant provisions of the Constitution and the FCPA. (App. 164-191).

STATEMENT OF THE CASE

Few, if any, laws match the FCPA when it comes to the chasm between its profitability for the Government and the near-universal confusion concerning how far the statute actually reaches. The Eleventh Circuit's ruling below only amplified the problem by providing a

purported "definition" of key FCPA provisions that differs from all provided previously and deepens the confusion over the term "foreign official."

Enacted in 1977, the FCPA prohibits individuals and companies from corruptly paying anything of value to a "foreign official" in order to obtain or retain business. 15 U.S.C. §§ 78dd-2(a)(1). A "foreign official," in turn, is "any officer or employee of a foreign government or any department, agency, or instrumentality thereof." *Id.* § 78dd-2(h)(2)(A). The statute, however, leaves "instrumentality" undefined.

The Eleventh Circuit defined "instrumentality" under 15 U.S.C. § 78dd-2(h)(2)(A) as "an entity controlled by the government of a foreign country that performs a function the controlling government treats as its own." (App. 20). As a consequence, the Eleventh Circuit deemed an employee of a partially state-owned Haitian telephone company to be a "foreign official" for purposes of the FCPA.

1. Petitioners were co-owners and executives of Terra Telecommunications Company, a Miami-based telecommunications company. The Government indicted Petitioners under the FCPA for using various consultants to pay kick-backs to Robert Antoine and Jean Rene Duperval, two employees of the Haitian telecommunications company Telecommunications D'Haiti S.A. (Haiti Teleco), in exchange for reduced international telecommunications rates and unearned credits. (App. 3-7).

2. Petitioners were convicted by a jury on twenty-one counts in the indictment. Esquenazi was sentenced to a total of 180 months' imprisonment, of

which 60 months were imposed as to the FCPA convictions, as well as three years of supervised release, $2,200,000 in restitution, and a $2,100 special assessment. (App. 52-66). Rodriguez was sentenced to a total of 84 months' imprisonment, of which 60 months were imposed as to the FCPA convictions, $2,200,000 in restitution, and a $2,100 special assessment. (App. 67-82).

3. A few days after the jury returned its verdict, the Government disclosed a declaration from the then-current Haitian Minister of Justice stating that, because Teleco had never undergone an "essential" "legal change" in organizational form, it "*has never been and until now is not a State enterprise*." (App. 8, 150 (emphasis added)). In response to this exculpatory document, the Government obtained a second declaration from the Haitian Minister of Justice claiming that, despite his first declaration, Haiti Teleco was, in fact, part of "the Public Administration of Haiti" because it "belonged to" the Bank of the Republic of Haiti, "which is an institution of the Haitian state." (App. 150-51). The Haitian Minister of Justice, however, concurrently confirmed that "no Haitian law *ever established* [Haiti Teleco] as a publicly-owned institution." (App. 151). Petitioners' motion for a *Brady* hearing on this highly-suspicious turn of events was denied. (App. 154-55).

4. The Eleventh Circuit affirmed, holding that, despite the absence of a statutory definition of "instrumentality," Haiti Teleco "would qualify as a Haitian instrumentality under almost any definition we could craft." (App. 20). The court went on to define "instrumentality" as "an entity controlled by the

government of a foreign country that performs a function the controlling government treats as its own." (App. 20). The court, however, was also compelled to admit that "what constitutes control and what constitutes a function the government treats as its own are fact-bound questions," and opined that it "would be unwise and likely impossible to exhaustively answer" the general definitional question. (App. 20).

In the wake of its reluctance to address the FCPA's long-standing definitional shortcomings, the court offered a list of non-exhaustive factors that courts and juries should consider to "decide if the government 'controls' an entity" including "the foreign government's formal designation of that entity; whether the government has a majority interest in the entity; the government's ability to hire and fire the entity's principals; the extent to which the entity's profits, if any, go directly into the governmental fisc, and, by the same token, the extent to which the government funds the entity if it fails to break even; and the length of time these indicia have existed." (App. 20-21). Seeking to justify this definitional jumble, the court advised that it did "not cut these factors from whole cloth," but, rather, based them on "the commentary to the [("OECD Convention")] the United States ratified" in 1998. (App. 21).

REASONS FOR GRANTING THE PETITION

The FCPA leaves open the pivotal question of who qualifies as a "foreign official" by not defining what "instrumentality [of a foreign government]" means. Without a clear definition of "instrumentality," the scope of the term "foreign official" cannot be understood. So it comes as no surprise that, though the statute was enacted in 1977, persistent questions about the correct interpretations of these terms have plagued it in this case and others.[1]

Based on long-standing and straight-forward principles of statutory interpretation, Petitioners argued that instrumentalities should either be an actual part of the foreign government, or, at a bare minimum, perform core traditional governmental functions. (App. 10, 18). The Government has lobbied for, and received from the Eleventh Circuit, an unacceptably broad interpretation of the term "instrumentality" that expands the reach of the statute to include partially state-owned or state-controlled enterprises that are not a part of any foreign

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[1] A number of recent cases have involved challenges to the Government's sweeping (and frequently shifting) definitions of the FCPA's statutory terms, including *United States v. Carson*, No. 8:09-cr-00077-JVS (C.D. Cal.), *United States v. Aguilar*, No. 2:10-cr-01031-AHM (C.D. Cal.), and *United States v. O'Shea*, No. 4:09-cr-00629 (S.D. Tex.). The Government's convictions in *Aguilar* were vacated as a result of prosecutorial misconduct. *Aguilar*, (C.D. Cal. Dec. 1, 2011). In *O'Shea*, the district court granted O'Shea's motion for judgment of acquittal based on insufficient evidence. *O'Shea*, (S.D. Tex. Jan. 16, 2012). In *Carson*, the defendants pleaded guilty after the district court entered its final jury instruction on the "foreign official" element.

government, but whose employees *could* be considered "foreign officials" under the FCPA if they somehow fall into one or more of the court's open-ended definitional options. Demonstrating the illogic of the Eleventh Circuit's approach, consider that under its statutory construction, a janitor working for U.S. Government-subsidized General Motors could qualify as a "foreign official" if General Motors were located overseas.

Prosecutorial discretion is one thing, but permitting the Government to take a "we-know-it-when-we-see-it" approach to FCPA enforcement violates basic constitutional protections. In fact, the scope of the Government's enforcement efforts have broadened to the point that even former Assistant Attorney General Breuer conceded the uncertainty—and the breadth of the Government's interpretation—of who is a "foreign official" under the FCPA:

> [C]onsider the possible range of 'foreign officials' who are covered by the FCPA: Some are obvious, like health ministry and customs officials of other countries. But some others may not be, such as the doctors, pharmacists, lab technicians and other health professionals who are employed by state-owned facilities. Indeed, it is entirely possible, under certain circumstances and in certain countries, that nearly every aspect of the approval, manufacture, import, export, pricing, sale and marketing of a drug product in a foreign country

> will involve a 'foreign official' within the meaning of the FCPA.[2]

The Government's excessively broad (and now judicially sanctioned) interpretation of who is considered to be a "foreign official" stands in direct contrast to the stated purpose of the FCPA, namely, to prohibit payments to a "narrow recipient category of traditional government officials performing official or public functions." Decl. of Professor Michael J. Koehler In Support of Defendants' Motion to Dismiss Counts One Through Ten of the Indictment in *United States v. Carson*, No. 8:09-cr-00077, ¶ 16(b) (C.D. Cal. Feb. 21, 2011).

Recognizing this untenable state of affairs, there has been widespread commentary and concern about the Government's pursuit of "an increasingly expansive view of what makes an enterprise an 'instrumentality' of a foreign government, and, therefore, what makes employees of such enterprises 'foreign officials.'" Court E. Golumbic and Jonathan P. Adams, *The "Dominant Influence" Test: The FCPA's "Instrumentality" and "Foreign Official" Requirements and the Investment Activity of Sovereign Wealth Funds*, 39 Am. J. Crim. L. 1 at 27 (Fall 2011). Professor Koehler, for his part, has noted that no FCPA element "is more urgently in need of judicial scrutiny than the FCPA's 'foreign official' element." Michael J. Koehler, *The Façade of FCPA Enforcement*, 41 Geo. J. Int'l L. 907, 916 (2010).

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[2] Lanny A. Breuer, Asst. Att'y Gen., Prepared Keynote Address to the 10th Annual Pharmaceutical and Regulatory Compliance Congress and Best Practices Forum (Nov. 12, 2009), *available at* www.ehcca.com/presentations/pharmacongress10/breuer_2.pdf.

I. The Eleventh Circuit's Expansive and Erroneous Definition of "Instrumentality" Has Significant Adverse Effects on American Individuals and Companies Doing Business Overseas, and Is Unlikely to Be Subject to Additional Appellate Review in the Foreseeable Future.

The anti-bribery provisions of the FCPA prohibit individuals and companies from corruptly paying anything of value to foreign officials in order to obtain or retain business. *See* 15 U.S.C. § 78dd-2(a). While some elements of the statute are defined and their meanings are relatively clear, others, as noted above, are not. *See*, *e.g.*, *United States v. Kay*, 359 F.3d 738, 744 (5th Cir. 2004) (finding the phrase "obtain or retain business" in the FCPA to be ambiguous).

As relevant here, the definition of "foreign official" covers "any officer" of a "foreign government," which clearly includes foreign heads of state or other official or elected representatives acting in an official capacity on behalf of foreign governments.[3] That definition, however, also covers an "employee" of an "instrumentality" of a foreign government. The problem is that the FCPA leaves the relatively generic term "instrumentality" undefined, even though it obviously is capable of a wide array of interpretations (as the Eleventh Circuit acknowledged in its decision). (App. 10-11).

And this clear ambiguity carries with it an equally clear consequence. The penalties for violating the

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[3] 15 U.S.C. § 78dd-2(h)(2)(A).

FCPA are severe. Each violation of the anti-bribery provisions can result in up to five years' imprisonment, and a $250,000 fine for individuals; companies are subject to fines of up to $2 million.[4] In this case, Esquenazi was sentenced to a record-breaking 180 months' imprisonment, three years of supervised release, $2,200,000 in restitution, and a $2,100 special assessment. (App. 52-66). Rodriguez was sentenced to 84 months' imprisonment, $2,200,000 in restitution, and a $2,100 special assessment. (App. 67-82).

The ambiguity also directly impacts the area of greatest concern to the global business community—state-owned enterprises. Although enacted in 1977, the FCPA lay largely dormant until the mid-2000s.[5] Around 2004, however the SEC and DOJ suddenly began to prioritize investigating and prosecuting FCPA violations.[6] A brief review of the statistics reveals that FCPA enforcement over the last

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[4] 15 U.S.C. § 78dd-2(g)(2)(A); 18 U.S.C. § 3571(b)(3); 15 U.S.C. § 78dd-2(g)(1)(A).

[5] *See* Michael J. Koehler, *The Foreign Corrupt Practices Act in the Ultimate Year of Its Decade of Resurgence*, 43 Ind. L. Rev. 389, 389 (2010).

[6] *See generally* Claudius O. Sokenu, *FCPA Enforcement After* United States v. Kay: *SEC and DOJ Team Up to Increase Consequences of FCPA Violation*, *reprinted in* The Foreign Corrupt Practices Act: Coping with Heightened Enforcement Risks 189, 207-08 (Lucinda A. Low, *et al.*, eds., 2007); *see also* Andrew S. Boutros and T. Markus Funk, *"Carbon Copy" Prosecutions: A Growing Anticorruption Phenomenon in a Shrinking World*, 259 U. Chi. Legal F. 262-69 (2012) (analyzing the "uptick" in FCPA enforcement actions).

decade has not only dramatically increased,[7] but has done so primarily in the area suffering from the greatest ambiguity—state-owned enterprises.

For example, in 2013, 55% of the corporate enforcement actions involved employees of alleged state-owned enterprises; in 2012, 42% of such actions involved employees of alleged state-owned enterprises; and in 2011, 81% of such enforcement actions involved employees of alleged state-owned enterprises.[8]

What is more, despite (or, perhaps, because of) the near-universal agreement among those outside of the Government that the FCPA's scope and reach is singularly ambiguous, the FCPA finds few equals as a revenue source. Indeed, the 94 corporate defendant FCPA settlements from 2007 to 2013 totaled over $4.63 billion in fines and penalties that went to the U.S. Treasury.[9] In 2013 alone, total criminal and civil fines imposed on corporate defendants totaled over $720 million.[10] In a system of justice built on fair warning,

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[7] *See* Michael J. Koehler, *Big, Bold, and Bizarre: The Foreign Corrupt Practices Act Enters a New Era*, 43 U. Tol. L. Rev. 99 (2011); Michael J. Koehler, *A Foreign Corrupt Practices Act Narrative*, 22 Mich. State. Int'l L. Rev. 961, 964-70 (2014).

[8] Michael J. Koehler, *From Healthcare Providers To Customs Officials To SOE Employees – The Alleged "Foreign Officials" Of 2013*, (Jan. 13, 2014), available at http://www.fcpaprofessor.com/from-healthcare-providers-to-customs-officials-to-soe-employees-the-alleged-foreign-officials-of-2013.

[9] Michael J. Koehler, *A Foreign Corrupt Practices Act Narrative*, 22 Mich. State. Int'l L. Rev. 961, 964-70 (2014).

[10] *Id.* at 973-74 (2014).

it is intolerable that individuals and companies feel forced to submit to the governmental will because a key criminal statute is nearly devoid of meaning and law-enforcement discretion is correspondingly unbounded.

Although the FCPA was enacted over 37 years ago, the Eleventh Circuit's ruling represents the first time a federal appellate court has addressed the meaning of one of the statute's most fundamental terms. The Eleventh Circuit's decision, however, does little, if anything, to clarify the important and hotly debated question of when the FCPA criminalizes dealings with the employees and officers of state-owned enterprises.[11]

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[11] Roger M. Witten, *Eleventh Circuit Adopts Broad Definition of Government "Instrumentality" Under FCPA* (May 22, 2014), *available at* http://www.wilmerhale.com/pages/publicationsandnewsdetail.aspx?NewsPubId=17179872427; Tara K. Giunta, *Appellate Court Clarifies "Instrumentality" Definition* (May 19, 2014), *available at* http://www.paulhastings.com/publications-items/details/?id=c4f8e069-2334-6428-811c-ff00004cbded; Michelle J. Shapiro and Kiran Patel, *11th Circ. Leaves Room For Debate Over FCPA 'Instrumentality'* (May 20, 2014, 6:57 PM), *available at* http://www.law360.com/articles/539653/11th-circ-leaves-room-for-debate-over-fcpa-instrumentality; *Eleventh Circuit Endorses Broad Definition Of 'Foreign Official' Under The FCPA* (May 20, 2014) *available at* http://www.crowell.com/NewsEvents/All/Eleventh-Circuit-Endorses-Broad-Definition-of-Foreign-Official-Under-the-FCPA; U.S. v. Esquenazi*: The Eleventh Circuit Broadly Defines "Foreign Official" Under The FCPA* (May 20, 2014), available at http://www.sidley.com/files/News/35cff6fa-a45a-4950-898d-d7259ad59d0e/Presentation/NewsAttachment/e05b5b29-658d-4154-9413-d7d3a74e2d60/2014.05.20.%20FCPA%20Update%20-%20U.S.%20v.Esquenazi.pdf; David S. Hilzenrath, *U.S. firms say foreign-bribe law lacks clarity*, (July 23, 2011), *available at* http://www.washingtonpost.com/business/economy/us-firms-say-costly-foreign-bribe-law-lacks-clarity/2011/07/05/gIQAB50jTI_story.html; Joel M. Cohen, Michael P. Holland & Adam P. Wolf, *Under*

Thus, foreign entities that might qualify as instrumentalities under the Eleventh Circuit's test are legion. The decision below will accordingly have significant adverse effects on American individuals and qualifying companies worldwide conducting business outside of the United States.

The relatively recent rise in FCPA enforcement, coupled with the immense pressure to settle charges with potentially devastating penalties, helps explain why there are "surprisingly few decisions throughout the country on the FCPA over the course of the last thirty-years." *United States v. Kozeny*, 493 F. Supp. 2d 693, 697 (S.D.N.Y. 2007).[12] The decision below regrettably fails to provide adequate notice of what conduct violates the FCPA. While the FCPA has been in force for many years, the *in terrorem* effect of potential criminal sanctions likely has caused this issue not to ripen for review by this Court. Because this issue was preserved below and directly addressed by the court of appeals, this case presents an ideal, seldom-available vehicle to review the Government's overly-expansive enforcement of a murky federal statute. Given the same, and the error in the decision

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the FCPA, Who is a Foreign Official Anyway?, 63 Bus. Law. 1243 (2008).

[12] *See also* Andrew Ceresney, Co-Dir. of the Div. of Enforcement, SEC, Keynote Address at the International Conference on the Foreign Corrupt Practices Act (Nov. 19, 2013), *available at* http://www.sec.gov/News/Speech/Detail/Speech/1370540392284 ("[T]hese cases against individuals have also fleshed out some important areas of FCPA law, which — as many of you know — is not well developed. Companies typically enter settlements in FCPA cases, leading to a paucity of case law.").

below, the correct interpretation of "instrumentality" is an important question of federal law that should be settled by this Court.

II. Certiorari Should Be Granted Because the Eleventh Circuit's Decision Fails to Provide Constitutionally Adequate Notice of What Conduct Violates the FCPA.

"No one should have to ponder the totality of the circumstances in order to determine whether his conduct is a felony." *Bond v. United States*, 134 S. Ct. 2077, 2097 (2014) (Scalia, J., concurring in the judgment). Individuals and companies competing in the global marketplace are entitled to know beforehand whether their conduct could reasonably be construed as a crime under the anti-bribery provisions of the FCPA (and its exceptional extraterritorial reach). In fact, the Eleventh Circuit itself recognized that corporations and the Government need "*ex ante* direction about what an instrumentality is." (App. 20.)

Yet the Eleventh Circuit rejected Petitioners' proposed definitions of "instrumentality" under 15 U.S.C. § 78dd-2(h)(2)(A); namely, whether the entity is part of the government itself, or whether the entity performs traditional, core government functions. Either of these definitions would have provided a long-sought-after clear, objective test. The Eleventh Circuit opted instead to define an instrumentality of a foreign government as "an entity [1] controlled by the government of a foreign country [2] that performs a function the controlling government treats as its own." (App. 20). The court then set forth an open-ended totality-of-the-circumstances test lacking any dispositive factor (or set of factors) for determining

whether an entity in fact satisfies both elements of the definition. (App. 20-21). *Contra United States v. Castle*, 925 F.2d 831, 835-36 (5th Cir. 1991) ("foreign officials" under the FCPA are "a well-defined group of persons").

In its decision, the Eleventh Circuit notably side-stepped the pre-enactment legislative history of the FCPA to interpret "instrumentality." Instead, the court took the rather exceptional step of anchoring its instrumentality "definition" on "commentary" to the OECD Convention, which was ratified in 1998 (that is, some 20 years *after* Congress passed the FCPA), as well as Congress's contemporaneous amendment of the FCPA to enact certain, but not all, of the OECD Convention's mandates.

The Eleventh Circuit attempted to bolster its reliance on commentary to the OECD Convention by reference to the lofty-sounding principle that the FCPA must be interpreted in a manner ensuring that the U.S. "is in compliance with [its] international [treaty] obligations." (App. 17-18). The court, seeking support, cited *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, (1995), and *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 81, 118 (1804). But this argument is a red herring, and both cases are readily distinguishable. In both *Vimar* and *Murray*, this Court interpreted a statute in a manner ensuring that it would comply with the law of *nations in effect when the statute was enacted*, not so it would comply with treaties—much less commentary on treaties—adopted years later. *Sky Reefer*, 515 U.S. at 530, 538; *Charming Betsy*, 6 U.S. (2 Cranch) at 81, 118. Here, in sharp contrast, the Eleventh Circuit confessed

that it felt "constrained" to interpret "instrumentality" consistently with the OECD Convention, rather than the FCPA itself—but it identified no specific statutory guidance within the FCPA to support its contrived definition. (App. 18).

Rather than pointing to an explicit definition for the term "instrumentality," the court *inferred* the purported congressional intent through the amendment's addition of "public international organization" to the definition of "foreign official." (App. 16). In other words, in the court's view, the *subsequent* Congress's decision *not* to add any further clarification somehow proves that the *prior* Congress already believed the term "foreign official" to include a definition that was proffered in connection with the *OECD Convention*—not the actual amendment itself—again, some 20 years after the fact.

The Eleventh Circuit, in short, clearly erred in relying on what the 1998 amendment to the FCPA did *not* say in order to interpret Congress's true intent in 1977. That amendment did not relate to the portion of the definition of "foreign official" referring to "department, agency, or instrumentality" of a foreign government. In fact, the Eleventh Circuit itself does not appear convinced of its own interpretation of "instrumentality." The court conceded that the change to the definition of "foreign official" merely "*seems to demonstrate*" that the subsequent Congress believed the FCPA's definition of "foreign official" already covered a "foreign public official of an 'enterprise . . . over which a government exercises a dominant influence' that performs a 'public function' because it does not 'operate on a normal commercial basis

substantially equivalent to that of private enterprises' in the relevant market 'without preferential subsidies or other privileges.'" (App. 16 (alterations and ellipses omitted)).

Sewing together such an interpretative patchwork quilt from material purportedly *inferentially* provided by the OECD Convention's commentary is precisely the type of interpretive endeavor this Court for good reason has repeatedly cautioned against. *See, e.g., Cent. Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164, 185-86 (1994) ("[T]he interpretation given by one Congress (or a committee or Member thereof) to an earlier statute is of little assistance in discerning the meaning of that statute." (internal quotation marks and quoting citation omitted)); *United States v. Tex*, 507 U.S. 529, 535 (1993) (quoting *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) ("[S]ubsequent legislative history is a 'hazardous basis for inferring the intent of an earlier' Congress." (quoting citation omitted)).

Moving beyond this misguided statutory interpretation, the Eleventh Circuit muddied the waters even further when it went back to the well and relied on the OECD Convention commentary to introduce its newly-minted "two-prong" instrumentality test. Under this novel (and unworkable) approach–one that even the Government had not previously advanced–each prong requires the application of multiple factors to determine whether a foreign entity is, in fact, an "instrumentality" under the FCPA.

Put another way, the Eleventh Circuit's test requires a two-step, fact-specific analysis of the foreign

government, the entity, and the foreign public official (and the relationships among them). This approach fails to offer any insight into, or predictability concerning, precisely *how* that information is used to determine whether a given entity qualifies as an "instrumentality."

For example, to determine whether a government "controls" the entity, the Eleventh Circuit's approach requires investigation of a variety of complex factors, including "the foreign government's designation of that entity; whether the government has a majority interest in the entity; the government's ability to hire and fire the entity's principals; the extent to which the entity's profits, if any, go directly into the governmental fisc, and, by the same token, the extent to which the government funds the entity if it fails to break even; and the length of time these indicia have existed."[13] (App. 20-21). Next, to determine whether the entity

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[13] The Eleventh Circuit characterized these factors as consistent with the approach this Court "has taken to decide if an entity is an agent or instrumentality of the government in analogous contexts." (App. 21, citing *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374 (1995), *Cherry Cotton Mills, Inc. v. United States,* 327 U.S. 536 (1946), and *Reconstruction Fin. Corp. v. J.G. Menihan Corp.*, 312 U.S. 81 (1941).) Yet none of those cases is analogous. To begin, none involve the interpretation of a criminal statute providing for individual and corporate liability. Further, each of those cases involves an entity *created by* the Government. It is unsurprising that this Court concluded that AMTRAK and Reconstruction Finance Corporation are instrumentalities of the Government. Finally, under *Lebron*, an entity such as Haiti Teleco is *not* considered an instrumentality. *Lebron*, in fact, stressed that "Amtrak is not merely in the *temporary* control of the Government (as a private corporation whose stock comes into federal ownership might be. . .)." *Lebron*, 513 U.S. at 398 (emphasis added).

"performs a function the controlling government treats as its own," (App. 20), the Eleventh Circuit requires one to "examine whether the entity has a monopoly over the function it exists to carry out; whether the government subsidizes the costs associated with the entity providing services; whether the entity provides services to the public at large in the foreign country; and whether the public and the government of that foreign country generally perceive the entity to be performing a governmental function." (App. 22). The Eleventh Circuit notably does not even attempt to demonstrate how these extensive factual determinations could be made "*ex ante*." (App. 20).

Consider also that the decision below fails to explain how the factors should be weighed or compared. (For example, does a government's ability to "hire and fire" employees trump its sharing in any entity profits or provision of services to the public? What happens if factors are in conflict? How "much of" one factor is required for a determination? How long must a foreign government hold a majority interest in an entity before that factor weighs in favor of the entity constituting an instrumentality? What percentage of the profits can revert to the government without causing the entity to become an instrumentality? How much government financial support—whether in the form of "bailouts" or subsidies—is sufficient to trigger a finding that an entity is an instrumentality?) In fact, the Eleventh Circuit's approach of simply setting forth a non-exhaustive "list of factors," but not providing the analytic lens through which they are to be viewed, raises more questions than it answers. Identifying an "instrumentality," in short, remains as much of a riddle today as it was in 1977; and this state of affairs does

not comport with constitutional notice requirements. *See Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926).

The Eleventh Circuit additionally asserts that it will be "relatively easy" to determine if a foreign entity carries out a function that the government "treats as its own" (using its list of factors). But it does not explain why it considers this investigation to be so "easy." (App. 19, n.8). Despite the court's optimism, information necessary to conduct an analysis under the Eleventh Circuit's test can be expected to be hard or even impossible to obtain. Highlighting serious problems with its own analysis, the Eleventh Circuit recognized that: "[T]here *may* be entities near the definitional line of 'instrumentality' that *may* raise a vagueness concern." (App. 28 (emphasis added)). This candid concession alone supports granting this Petition.

Under the decision below, businesses and individuals remain unable to determine whether certain business activity is criminal. That is an unacceptable state of affairs. *See Bond*, 134 S. Ct. at 2097; *Skilling v. United States*, 561 U.S. 358, 402-03 (2010) ("To satisfy due process, a penal statute [must] define the criminal offense [1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement.") (quoting *Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983)); *City of Chi. v. Morales*, 527 U.S. 41, 58 (1999) (quoting *Lanzetta v. New Jersey*, 306 U.S. 451, 453, 618 (1939) ("[T]he purpose of the fair notice requirement is to enable the ordinary citizen to conform his or her

conduct to the law. 'No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes.'" (internal quotation marks, brackets and citation omitted)).

In light of the Government's recent increased enforcement action, and the span of time it has taken for just one federal appellate court to interpret this core statutory term, the time is now ripe for this Court to settle the meaning of instrumentality under the FCPA. This Court should not defer answering the question presented in this Petition until additional federal appellate courts reach conflicting decisions regarding whether state-owned enterprises are instrumentalities under the FCPA. By that time, the Government will have brought many more prosecutions or enforcement actions involving payments made, or benefits provided, to individuals who are not traditional government officials. Individuals and companies around the globe will be left to wonder whether the Government will unilaterally declare their conduct criminal. This Court should, therefore, settle the question of the meaning of "instrumentality" to clarify which of those enforcement actions Congress intended to sanction under the FCPA, and which it did not.

What is more, an acceptable answer to the definitional challenge lies near at hand. Congress is certainly capable of enacting language that applies to state-owned or state-controlled enterprises when it intends to do so. When Congress enacted the Foreign Sovereign Immunities Act (FSIA), for example, it specifically included within the definition of "agency or instrumentality of a foreign state" entities a "majority of whose shares or other ownership interest is owned

by a foreign state or political subdivisions." 28 U.S.C. § 1603(b). The presence of such an explicit definition in FSIA indicates that Congress knew how to include such language in the FCPA, but chose not to include it. *See Central Bank of Denver v. First Interstate Bank*, 511 U.S. 164, 176-77 (1994) (holding that "Congress knew how to impose aiding and abetting liability when it chose to do so," it did not use the words "aid" and "abet" in the statute, and hence did not impose aiding and abetting liability).

That absence is significant here and warrants construing "instrumentality" as excluding state-owned or state-controlled enterprises that are not political subdivisions and that do not perform core, traditional governmental functions. *See Dole Food Co. v. Patrickson*, 538 U.S. 468, 475-76 (2003) (contrasting the absence of language in FSIA with that used in other statutes and concluding that the absence of language was instructive). With regard to the FCPA, "[i]f Congress desires to go further . . . it must speak more clearly than it has." *Skilling*, 561 U.S. at 411 (quotation and citation omitted).

III. Certiorari Should Be Granted Because the Eleventh Circuit's Decision that the Money Laundering Convictions Did Not Violate the Double Jeopardy Clause of the Fifth Amendment by Merging with the Underlying FCPA Offenses Conflicts with This Court's Precedent and Creates an Inter-Circuit Conflict.

The FCPA punishes the payment of bribes to "*any person*, while knowing that all or a portion of such money or thing of value will be . . . given . . . *directly or indirectly*, to any foreign official." 15 U.S.C. § 78dd-2(a)(3) (emphasis added). Petitioners were convicted of conspiring to violate the FCPA and with committing substantive FCPA offenses based on Terra's payment of bribes to third-party intermediaries while knowing that all or a portion of such money would be given, directly or indirectly, to alleged foreign officials employed by Haiti Teleco. (App. 28-31, 38-39).

Petitioners were separately charged and convicted with conspiracy to commit money laundering, in violation of 18 U.S.C. § 1956(h), and substantive money laundering offenses, in violation of 18 U.S.C. § 1956(a)(1)(B)(i), based on the same third-party intermediaries' payments to the alleged foreign officials employed by Haiti Teleco. (App. 39-44). The money laundering convictions are based on payments that constitute the essential expenses of the underlying FCPA violation and encompass conduct squarely within the scope of the FCPA. Thus, the same bribe payments to the same alleged foreign officials, which served as the basis for the FCPA related offenses, were characterized as the "proceeds" of the specified

unlawful activity forming the basis of the money laundering charges. Accordingly, the same conduct, which Congress deems an FCPA violation punishable by a five year maximum prison sentence, was used separately to charge and convict Petitioners of money laundering, punishable by a 20 year maximum prison sentence.

By charging Petitioners with FCPA violations based on payments Terra made to alleged foreign officials through third-party intermediaries, while also charging them with money laundering based on those same payments, the Government charged the same conduct as violations of the FCPA, carrying a five year statutory maximum prison sentence, and money laundering violations, carrying a 20 year statutory maximum prison sentence. This raises the same double jeopardy concerns, and produces the same "perverse results," that greatly troubled this Court in *United States v. Santos*, 553 U.S. 507 (2008), and which led this Court to reverse a defendant's money laundering convictions based on payments constituting the "essential expenses" of operating the underlying criminal scheme. *Id.* at 528 (Stevens, J., concurring).

On appeal, Petitioners challenged the legal sufficiency of the money laundering charges, arguing that by charging the bribe payments as "proceeds" of the underlying FCPA offenses, the money laundering offenses merged with the underlying FCPA offenses.[14]

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[14] Both Petitioners moved to dismiss the indictment on this ground, which the district court denied. (App. 160-63). On appeal, Esquenazi adopted all of Rodriguez's arguments on "the Haitian

The Eleventh Circuit rejected the merger argument. The court concluded that no merger problem arose, and that the bribe payments could be "proceeds" of the FCPA offenses, because the FCPA offenses were complete before the bribes were paid and were "entirely unnecessary to the completion" of the FCPA offense. (App. 42-43).[15]

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bribery counts," (Esquenazi C.A. Br. at 3), including the argument that the money-laundering and bribery counts merged. (Rodriguez C.A. Br. at 67-72). The Eleventh Circuit, however, incorrectly held that Esquenazi only adopted the Haitian bribery arguments related to "the use of Haitian bribery law as an underlying lawful activity." (App. 39, n.15).

[15] The Eleventh Circuit also suggested that the merger analysis was somehow affected by the distinction between a promotional money laundering charge brought under 18 U.S.C. § 1956(a)(1)(A)(i), which was the charge at issue in *Santos,* and a concealment money laundering charge brought under 18 U.S.C. § 1956(a)(1)(B)(i), the charge asserted against Petitioners. (App. 42). However, this is a distinction without a difference. As Justice Scalia noted in *Santos,*553 U.S. at 512, "one can try to conceal the nature, location, etc. of either receipts or profits" just as "one can intend to promote the carrying on of a crime with either its receipts or its profits." *Id*. As borne out by the facts of this case, charges under the concealment prong of the money laundering statute are just as capable of raising the same double jeopardy issues as those raised in *Santos.* The Eleventh Circuit's analysis ignores the fact that the concealing conduct at issue in this case involved conduct that fell within the scope of conduct already punished by the FCPA. Specifically, under the FCPA, Congress has determined that the act of paying funds to a foreign official through a third-party intermediary is punishable by up to five years in prison. Charging and convicting Petitioners for concealment money laundering based upon the same concealing conduct that formed the basis of the FCPA charges, thereby increasing his maximum sentence from 5 to 20 years, presents the

By concluding that bribe payments paid by a third-party intermediary to an alleged foreign official constitute "proceeds" under the money laundering statute, the Eleventh Circuit essentially guaranteed that every violation of the FCPA involving payments made by a defendant to a third-party intermediary will also violate the money laundering statute because few intermediaries, if any, will not pay the bribes to the foreign officials. As this Court recognized in *Santos*, that result is "tantamount to double jeopardy" and leads to a "perverse effect." *Santos,* 553 U.S. at 527 (Stevens, J., concurring).

This outcome constitutes the very same "perverse result" that this Court sought to prevent in reversing the money laundering convictions in *Santos,* 553 U.S. at 526-28, 528 n.7 (Stevens, J., concurring). *Santos* was decided by a four-justice plurality opinion authored by Justice Scalia and a concurrence authored by Justice Stevens.[16] *Id.* at 509, 534. Both the plurality

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very same double jeopardy issue that troubled this Court in *Santos.*

[16] Courts of appeals have reached conflicting conclusions regarding the holding in *Santos. See generally Garland v. Roy*, 615 F.3d 391, 402-03 (5th Cir. 2010) (interpreting *Santos's* holding, in pertinent part, as "dictat[ing] that 'proceeds' must be defined as 'profits' in cases where defining 'proceeds' as 'gross receipts' would result in the 'perverse result' of the 'merger problem'" and summarizing the conflicting interpretations of *Santos's* holding taken by other circuit courts.) The Eleventh and Fourth Circuits take the narrowest view, concluding that *Santos* is only controlling in cases involving the specific facts at issue in that case – money laundering convictions predicated on the underlying crime of running an illegal gambling operation. *Id.* at 403; *see also Cloud*, 680 F.3d at 405; *United States v. Jennings*, 599 F.3d 1241, 1252

and concurring opinions recognized the troubling implications of defining the term "proceeds" in the money laundering statute to include "receipts" when it would result in turning every violation of the underlying crime into an automatic violation of the money laundering statue.[17] *Id.* at 515-17 (Scalia, J., plurality opinion), 526-28, 528 n.7 (Stevens, J., concurring). This "merger" problem, as Justice Stevens noted, was "tantamount to double jeopardy" and was "particularly unfair" in situations, such as here, where the penalties for money laundering are substantially more severe than those for the underlying offense. *Id.* at 527 (Stevens, J., concurring).

Further, the Eleventh Circuit's decision conflicts with the Fourth Circuit's holding in *United States v. Cloud,* 680 F.3d 396, 406-08 (4th Cir. 2012), that a "merger problem" can arise even when money

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(11th Cir. 2010). However, while the Eleventh Circuit has never recognized merger in cases not involving illegal gambling operations, the Fourth Circuit, recognizing within the *Santos* opinion a "clear" dictate that "when a merger problem arises, a judicial solution must be found to eliminate its unfairness" and has reversed several convictions on merger grounds in cases involving various other types of fraud. *See United States v. Simmons*, 737 F.3d 319 (4th Cir. 2013); *United States v. Abdulwahab*, 715 F.3d 521 (4th Cir. 2013); *Cloud*, 680 F.3d at 405, 409.

[17] In 2009, Congress effectively overruled *Santos* when it amended the money laundering statute by defining proceeds to include "gross receipts." Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 11-121, § 2(f)(1), 123 Stat. 1617, 1618 (2009) (codified at 18 U.S.C. § 1956(c)(9)). However, because the conduct that gave rise to Petitioners' convictions occurred prior to the enactment of the amendment, the amendment's expanded definition does not apply in this case.

laundering transactions occur *after* the completion of the underlying crime. In *Cloud*, the Fourth Circuit reversed a defendant's money laundering convictions that were based upon the defendant's payment of commissions, kickbacks, and other monies to his coconspirators in an underlying mortgage fraud scheme. *Id.* at 403, 405-06. In concluding that the money laundering convictions merged with the underlying mortgage fraud convictions, the Fourth Circuit explicitly rejected the Government's argument that the offenses could not merge because the underlying substantive crime was competed before the money laundering transactions occurred. *Id.* at 406-08. Relying on its earlier holding in *United States v. Halstead*, 634 F.3d 270, 279 (4th Cir. 2011), that "[a]n individual cannot be convicted of money laundering for paying the 'essential expenses of operating' the underlying crime, the Fourth Circuit concluded that whether or not the underlying crime was completed prior to the payment of "essential expenses" was immaterial to the merger analysis. *Cloud*, 680 F.3d at 406-08. Instead, the Fourth Circuit clarified that, regardless of when "essential expenses" are paid, a merger problem arises where a defendant is charged "with paying persons involved in the underlying [crime] for services necessary to the operation of the [crime]." *Id.* at 407. This analysis finds support in Justice Scalia's acknowledgment in *Santos* that the "merger problem" can arise in cases where the money laundering transactions follow the completion of the underlying crime given that:

> Few crimes are entirely free of cost, and costs are not always paid in advance. Anyone who pays for the costs of a crime with its proceeds –

> for example, the felon who uses the stolen money to pay for the getaway car – would violate the money-laundering statute. And any wealth-acquiring crime with multiple defendants would become money-laundering when the initial recipient of the wealth gives his confederates their share. Generally speaking, any specified unlawful activity, an episode of which includes transactions which are not elements of the offense and in which a participant passes receipts onto someone else, would merge with money laundering.

Id. at 516.

This Court should resolve the conflict between the Eleventh and Fourth Circuits in favor of the Fourth Circuit's merger analysis because the Fourth Circuit's analysis is consistent with this Court's reasoning in *Santos* and avoids producing the "perverse results" this Court sought to prevent in *Santos.* Because bribe payments are an essential expense of a bribery scheme, the Fourth Circuit's analysis precludes these payments from constituting "proceeds" under the money laundering statute, and requires reversal of Petitioners' money laundering convictions. Excluding bribe payments from the definition of "proceeds" eliminates the double jeopardy implications that results when the Government charges and convicts a defendant twice for the same conduct under two separate statutes, one of which carries a maximum prison sentence that is 15 years greater than the other. This Court should resolve the conflict between the Fourth and Eleventh Circuits, not only for the impact on Petitioners' particular case, but also because such a resolution will

help ensure fairness and uniformity in the treatment of criminal defendants facing similar circumstances across all circuits.

CONCLUSION

This Court should grant this Petition to bring much needed clarity to the correct definition of "instrumentality" under the FCPA and to resolve the circuit split created by the Eleventh Circuit.

RESPECTFULLY SUBMITTED, this 14th day of August, 2014.

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APPENDIX

APPENDIX

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APPENDIX A

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 11-15331
D.C. Docket No. 1:09-cr-21010-JEM-1

[Filed May 16, 2014]

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

JOEL ESQUENAZI,
CARLOS RODRIGUEZ,

Defendants - Appellants.

Appeals from the United States District Court
for the Southern District of Florida

(May 16, 2014)

Before MARTIN, JORDAN and SUHRHEINRICH,[*] Circuit Judges.

MARTIN, Circuit Judge:

Joel Esquenazi and Carlos Rodriguez appeal their convictions and sentences imposed after a jury convicted them of conspiracy, violating the Foreign Corrupt Practices Act, and money-laundering. After careful review, and with the benefit of oral argument, we affirm.

I.

In December 2009, a grand jury indicted Messrs. Esquenazi and Rodriguez on 21 counts. Two of these were conspiracy charges that spanned November 2001 through March 2005: conspiracy to violate the Foreign Corrupt Practices Act (FCPA) and commit wire fraud, all in violation of 18 U.S.C. § 371 (Count 1); and conspiracy to launder money, in violation of 18 U.S.C. § 1956 (Count 9). Counts 2 through 8 charged substantive violations of the FCPA, 15 U.S.C. § 78dd-2. And Counts 10 through 21 charged acts of concealment money laundering, in violation of 18 U.S.C. § 1956(a)(1)(B)(i).

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[*] Honorable Richard F. Suhrheinrich, United States Court of Appeals for the Sixth Circuit, sitting by designation.

A. Trial[1]

Messrs. Esquenazi and Rodriguez co-owned Terra Telecommunications Corp. (Terra), a Florida company that purchased phone time from foreign vendors and resold the minutes to customers in the United States. Mr. Esquenazi, Terra's majority owner, served as President and Chief Executive Officer. Mr. Rodriguez, the company's minority owner, served as Executive Vice President of Operations. James Dickey served as Terra's general counsel and Antonio Perez as the company's comptroller.

One of Terra's main vendors was Telecommunications D'Haiti, S.A.M. (Teleco). Because the relationship of Teleco to the Haitian government was, and remains, at issue in this case, the government presented evidence of Teleco's ties to Haiti. Former Teleco Director of International Relations Robert Antoine testified that Teleco was owned by Haiti. An insurance broker, John Marsha, testified that, when Messrs. Rodriguez and Esquenazi were involved in previous contract negotiations with Teleco, they sought political-risk insurance, a type of coverage that applies only when a foreign government is party to an agreement. In emails with Mr. Marsha copied to Messrs. Esquenazi and Rodríguez, Mr. Dickey called Teleco an "instrumentality" of the Haitian government.

An expert witness, Luis Gary Lissade, testified regarding Teleco's history. At Teleco's formation in

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[1] The facts relevant only to the challenges to the sufficiency of the evidence are recited in the light most favorable to the jury's verdict. United States v. Pacchioli, 718 F.3d 1294, 1299 (11th Cir. 2013).

1968, the Haitian government gave the company a monopoly on telecommunication services. Teleco had significant tax advantages and, at its inception, the government appointed two members of Teleco's board of directors. Haiti's President appointed Teleco's Director General, its top position, by an executive order that was also signed by the Haitian Prime Minister, the minister of public works, and the minister of economy and finance. In the early 1970s, the National Bank of Haiti gained 97 percent ownership of Teleco. From that time forward, the Haitian President appointed all of Teleco's board members. Sometime later, the National Bank of Haiti split into two separate entities, one of which was the Banque de la Republique d'Haiti (BRH). BRH, the central bank of Haiti, is roughly equivalent to the United States Federal Reserve. BRH retained ownership of Teleco. In Mr. Lissade's expert opinion, for the years relevant to this case, Teleco belonged "totally to the state" and "was considered . . . a public entity."

Mr. Lissade also testified that Teleco's business entity suffix, S.A.M., indicates "associate anonymous mixed," which means the "Government put money in the corporation." Teleco's suffix was attached not by statute, but "de facto" because "the government consider[ed] Teleco as its . . . entity." In 1996, Haiti passed a "modernization" law, seeking to privatize many public institutions. As a result, Haiti privatized Teleco sometime between 2009 and 2010. Ultimately, Mr. Lissade opined that, during the years relevant to this case, "Teleco was part of the public administration." He explained: "There was no specific law that . . . decided that at the beginning that Teleco is a public entity but government, officials, everyone

consider[ed] Teleco as a public administration." And, he said, "if there was a doubt whatsoever, the [anti-corruption] law [that] came in 2008 vanish[ed] completely this doubt . . . by citing Teleco as a public administration" and by requiring its agents — whom Mr. Lissade said were public agents — to declare all assets to avoid secret bribes.

In 2001 Terra contracted to buy minutes from Teleco directly. At that time, Teleco's Director General was Patrick Joseph (appointed by then-President Jean-Bertrand Aristide), and the Director of International Relations was Robert Antoine. Mr. Antoine had two friends and business associates who played a role in this case: Jean Fourcand, a grocery-store owner, and Juan Diaz.

By October 2001, Terra owed Teleco over $400,000. So Mr. Perez testified, Mr. Esquenazi asked him to contact Mr. Antoine and negotiate an amortization deal or, alternatively, to offer a side payment. Mr. Perez met with Mr. Antoine, who rejected the idea of amortization but agreed to a side payment to ease Terra's debt. The deal, according to Mr. Perez, was that Mr. Antoine would shave minutes from Terra's bills to Teleco in exchange for receiving from Terra fifty percent of what the company saved. Mr. Antoine suggested that Terra disguise the payments by making them to sham companies, which Terra ultimately did. Mr. Perez returned to Mr. Esquenazi and told him the news and later shared details of the deal in a meeting with Messrs. Esquenazi, Rodriguez, and Dickey. The four discussed "the fact that Robert Antoine had accepted an arrangement to accept . . . payments to him in exchange for reducing [Terra's] bills." Mr. Perez

testified: "[Mr. Esquenazi] was happy, and both James Dickey and Carlos Rodriguez also congratulated me on a job well done."[2]

The following month, in November 2001, Terra began funneling personal payments to Mr. Antoine using the following subterfuge. Mr. Dickey, on Terra's behalf, drafted a "consulting agreement" between Terra and a company Mr. Antoine had suggested called J.D. Locator. J.D. Locator, an otherwise insolvent company, was owned by Mr. Antoine's friend Juan Diaz. During the course of the next several months, Messrs. Rodriguez and Esquenazi authorized payments to J.D. Locator via "check requests," forms Terra used to write checks without invoices. Mr. Diaz testified that he knew the payments Terra made were not for legitimate consulting services and that he never intended to provide such services. Instead, Mr. Diaz retained ten percent of the funds Terra paid J.D. Locator and disbursed the remainder, usually either to Mr. Antoine or his business associate Mr. Fourcand. Mr. Fourcand testified that he knew he was receiving money from Terra (through J.D. Locator) that would ultimately go to Mr. Antoine and that Mr. Antoine asked him to be part of that deal. All told, while Mr. Antoine remained at Teleco, Terra paid him and his associates approximately $822,000. And, during that time, Terra's bills were reduced by over $2 million.

In April 2003, President Aristide removed Mr. Antoine and named Alphonse Inevil as his replacement. Mr. Inevil soon replaced Mr. Joseph as Director General, and Jean Rene Duperval replaced

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[2] Mr. Perez was fired by Terra in January 2002.

Inevil. Later that year, with Terra still behind on its bills, Mr. Esquenazi helped Mr. Duperval form a shell company, Telecom Consulting Services Corporation (TCSC), through which Esquenazi ultimately would make side payments to Mr. Duperval. TCSC's president was Margurite Grandison, Mr. Duperval's sister; its incorporator and registered agent was Mr. Dickey; and the company's principal business address was a post office box that named Mr. Duperval as the person empowered to receive mail through it. Ms. Grandison executed a "commission agreement" with Terra, which Mr. Esquenazi signed. And on November 20, Mr. Rodriguez authorized the first transfer, $15,000, to TCSC. Over the next five months, although Terra received no invoices to reflect money owed TCSC, Terra made six additional transfers to TCSC totaling $60,000. Each of these seven transfers is the subject of the substantive FCPA counts. Ms. Grandison then disbursed money from TCSC's account to Mr. Duperval and his associates. She made a number of transfers, twelve of which constitute the substantive money-laundering counts.

During the Internal Revenue Service's investigation of the case, Mr. Esquenazi admitted he had bribed Mr. Duperval and other Teleco officials. He and Mr. Rodriguez nonetheless pleaded not guilty, proceeded to trial, and were found guilty on all counts.[3]

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[3] Messrs. Rodriguez and Esquenazi were originally indicted along with Mr. Antoine, Mr. Duperval, and Ms. Grandison, but only Rodriguez and Esquenazi were tried together. Messrs. Perez, Diaz, and Joseph were also indicted and convicted for their roles in the offense.

B. Post-trial

Five days after the jury convicted Messrs. Esquenazi and Rodriguez, the government received from an attorney involved in Patrick Joseph's defense a declaration by the Haitian Prime Minister, Jean Max Bellerive. The declaration, marked with a date that fell in the middle of the jury trial, stated: "Teleco has never been and until now is not a State enterprise." In a second declaration, made later and provided by the government to defense counsel, Prime Minister Bellerive confirmed that "the facts mentioned in the [first] statement are truthful," but clarified: "The only legal point that should stand out in this statement is that there exists no law specifically designating Teleco as a public institution." In this second declaration, Prime Minister Bellerive also stated, "this does not mean that Haiti's public laws do not apply to Teleco even if no public law designates it as such." The second declaration detailed the public aspects of Teleco, many of which the government's expert had discussed at trial. Messrs. Esquenazi and Rodriguez moved for a judgment of acquittal and a new trial on the basis of the declarations, which the district court denied.

The presentence investigation report prepared in advance of Mr. Esquenazi's sentencing calculated a base offense level of 12, under United States Sentencing Commission, Guidelines Manual, (USSG) § 2C1.1(a)(2); a 2-level enhancement under because the offense involved more than one bribe, under USSG § 2C1.1(b)(1); a 16-level enhancement based on Terra's receipt of $2.2 million from the bribery scheme, under USSG § 2B1.1(b)(1)(I); a 4-level enhancement for Esquenazi's leadership role in the offense, under USSG

§ 3B1.1(a); and a 2-level obstruction-of-justice enhancement, under USSG § 3C1.1. With a criminal history category I, Mr. Esquenazi's guideline range was 292 to 365 months imprisonment. The district court ultimately imposed a below-guideline sentence of 180 months imprisonment. Mr. Rodriguez, with a guideline range of 151 to 188 months imprisonment, received 84 months. Before sentencing, the district court entered a forfeiture order holding Messrs. Esquenazi and Rodriguez responsible for $3,093,818.50, which was ultimately made a part of the judgment entered against them.

This is the appeal brought by Messrs. Esquenazi and Rodriguez.

II.

The FCPA prohibits "any domestic concern" from "mak[ing] use of the mails or any means . . . of interstate commerce corruptly in furtherance of" a bribe to "any foreign official," or to "any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official," for the purpose of "influencing any act or decision of such foreign official . . . in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person." 15 U.S.C. §§ 78dd-2(a)(1), (3). A "foreign official" is "any officer or employee of a foreign government or any department, agency, or instrumentality thereof." Id. § 78dd-2(h)(2)(A) (emphasis added). The central question before us, and the principal source of disagreement between the parties, is what "instrumentality" means (and whether Teleco qualifies as one).

The FCPA does not define the term "instrumentality," and this Court has not either. For that matter, we know of no other court of appeals who has. The definition matters in this case, in light of the challenges to the district court's jury instructions on "instrumentality"; to the sufficiency of the evidence that Teleco qualified as an instrumentality of the Haitian government; and to Mr. Esquenazi's contention that the statute is unconstitutionally vague. Before we address these challenges, however, we must define "instrumentality" for purposes of the FCPA.

We begin, as we always do when construing statutory text, with the plain meaning of the word at issue. See Harris v. Garner, 216 F.3d 970, 972 (11th Cir. 2000). According to Black's Law Dictionary, an instrumentality is "[a] means or agency through which a function of another entity is accomplished, such as a branch of a governing body." Id. at 870 (9th ed. 2009). Webster's Third New International Dictionary says the word means "something that serves as an intermediary or agent through which one or more functions of a controlling force are carried out: a part, organ, or subsidiary branch esp. of a governing body." Id. at 1172 (3d ed. 1993). These dictionary definitions foreclose Mr. Rodriguez's contention that only an actual part of the government would qualify as an instrumentality — that contention is too cramped and would impede the "wide net over foreign bribery" Congress sought to cast in enacting the FCPA. United States v. Kay, 359 F.3d 738, 749 (5th Cir. 2004). Beyond that argument, the parties do not quibble over the phrasing of these

definitions,[4] and they agree an instrumentality must perform a government function at the government's behest. The parties also agree, however, and we have noted in other cases interpreting similar provisions, that the dictionary definitions get us only part of the way there. See Edison v. Douberly, 604 F.3d 1307, 1309 (11th Cir. 2010) (recognizing the Second Circuit's conclusion that "instrumentality" is "a word susceptible of more than one meaning" (citing Green v. New York, 465 F.3d 65, 79 (2d Cir. 2006))). Thus, we turn to other tools to decide what "instrumentality" means in the FCPA.[5]

To interpret "instrumentality" as used in the Americans with Disabilities Act, we relied upon what the Supreme Court has called the "commonsense cannon of noscitur a sociis," United States v. Williams, 553 U.S. 285, 294, 128 S. Ct. 1830, 1839 (2008) — that is, "'a word is known by the company it keeps.'" Edison, 604 F.3d at 1309 (quoting Green, 465 F.3d at 79

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[4] In addition to his more hardline contention, Mr. Rodriguez also adopts Mr. Esquenazi's proposed definition.

[5] Both defendants urge us to apply the rule of lenity to cabin the definition of "instrumentality." That rule applies, however, only when there is a "grievous ambiguity" in the meaning of the statutory text. Muscarello v. United States, 524 U.S. 125, 138–39, 118 S. Ct. 1911, 1919 (1998) (internal quotation marks omitted). We concluded in Edison that we could derive the meaning of "instrumentality" from its "plain meaning and context," clearly indicating that, at least in the ADA, no such ambiguity existed. 604 F.3d at 1310. We find no reason to depart from that conclusion now. "[O]ur decision today is based on much more than a guess as to what Congress intended, [so] there is no grievous ambiguity here." Muscarello, 524 U.S. at 139, 118 S. Ct. at 1919 (internal quotation marks omitted).

(quoting, in turn, Jarecki v. G.D. Searle & Co., 367 U.S. 303, 307, 81 S. Ct. 1579, 1582 (1961))).[6] In the FCPA,

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[6] The defendants rely heavily upon our decision in Edison, arguing it dictates the definition of "instrumentality" they advocate. In that case, we held the word "instrumentality" under the ADA meant "governmental units or created by one." 604 F.3d at 1310. Although we recognize that decision should inform our construction of instrumentality in this case, it ultimately is of little help. First, Edison construed a different statute with a far different purpose. Id. at 1308; see also Perez–Arellano v. Smith, 279 F.3d 791, 794 (9th Cir. 2002) ("[T]he same words in different statutes may have different meanings if a different intention of Congress is manifest in the purpose, history, and overall design or context of the statute."), cited in Loggerhead Turtle v. Cnty. Council of Volusia Cnty., Fla., 307 F.3d 1318, 1325 n.8 (11th Cir. 2002). Second, Edison recognized that "instrumentality" had to be "constrained by the plain meaning of the statutory language in the context of the entire statute, as assisted by the canons of statutory construction." 604 F.3d at 1310. Although the meaning of the word "instrumentality," which the Edison court recognized was not entirely clear, might in isolation vary little if at all in this case, the context is vastly different. The ADA defines "public entity" to include "any department, agency, special purpose district, or other instrumentality of a State." 42 U.S.C. § 12131(1)(B). The word "other" preceding "instrumentality" in the ADA is a critical difference – "other" indicates that, in the ADA, instrumentality is intended as a general catchall for things very much like the preceding words. In Edison, we noted that the canon ejusdem generis produced the same result as noscitur a sociis. 604 F.3d at 1309 n.4 (citing Green, 465 F.3d at 79 n.10). In the FCPA, by contrast, the word preceding "instrumentality" is "any," not "other." Thus, "instrumentality" is not a generalized catchall in the FCPA as it is in the ADA, but instead a distinct class of entities. The Supreme Court has explained that the ejusdem generis canon does not apply where, as here, the term at issue "is not a general or collective term following a list of specific items to which a particular statutory command is applicable (e.g., 'fishing rods, nets, hooks, bobbers, sinkers, and other equipment')." CSX

the company "instrumentality" keeps is "agency" and "department," entities through which the government performs its functions and that are controlled by the government. We therefore glean from that context that an entity must be under the control or dominion of the government to qualify as an "instrumentality" within the FCPA's meaning. And we can also surmise from the other words in the series along with "instrumentality" that an instrumentality must be doing the business of the government. What the defendants and the government disagree about, however, is what functions count as the government's business.

To answer that question, we examine the broader statutory context in which the word is used. See Edison, 604 F.3d 1307 at1310 ("We have affirmed many times that we do not look at one word or term in isolation but rather look to the entire statute and its context."). In this respect, we find one other provision

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Transp., Inc. v. Ala. Dep't of Revenue, ___ U.S. ___, ___, 131 S. Ct. 1101, 1113 (2011) (emphasis in original) (internal quotation marks omitted). Just like in that example, the word "other" is critically important to construing the word "instrumentality" based on its context. In that vein, "[t]he United States Supreme Court and this Court have recognized on many occasions that the word 'any,'" which modifies "instrumentality" in the FCPA, "is a powerful and broad word, and that it does not mean 'some' or 'all but a few,' but instead means 'all.'" United States v. Townsend, 630 F.3d 1003, 1011 (11th Cir.) (internal quotation marks omitted), cert. denied, 131 S. Ct. 2472 (2011). Finally, Edison actually decided that "a private corporation is not a public entity merely because it contracts with a public entity to provide some service." 604 F.3d at 1310. Our interpretation of "instrumentality" under the FCPA here is, in this respect, fully consonant with Edison. It, too, would exclude a private contractor not controlled or created by the state that provided a service to the public.

of the FCPA and Congress's relatively recent amendment of the statute particularly illustrative. First, the so-called "grease payment" provision establishes an "exception" to FCPA liability for "any facilitating or expediting payment to a foreign official . . . the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official." 15 U.S.C. § 78dd-2(b). "Routine governmental action" is defined as "an action . . . ordinarily and commonly performed by a foreign official in," among other things, "providing phone service." Id. § 78dd-2(h)(4)(A). If an entity involved in providing phone service could never be a foreign official so as to fall under the FCPA's substantive prohibition, there would be no need to provide an express exclusion for payments to such an entity. In other words, if we read "instrumentality," as the defendants urge, to categorically exclude government-controlled entities that provide telephone service, like Teleco, then we would render meaningless a portion of the definition of "routine governmental action" in section 78dd-2(b). "It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word." Regions Hosp. v. Shalala, 522 U.S. 448, 467, 118 S. Ct. 909, 920 (1998) (citation omitted). Thus, that a government-controlled entity provides a commercial service does not automatically mean it is not an instrumentality. In fact, the statute expressly contemplates that in some instances it would.

Next, we turn to Congress's 1998 amendment of the FCPA, enacted to ensure the United States was in compliance with its treaty obligations. That year, the United States ratified the Organization for Economic Cooperation and Development's Convention on

Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention), Dec. 17, 1997, S. Treaty Doc. No. 105-43, 37 I.L.M. 1 (ratified Dec. 8, 1998, entered into force Feb. 15, 1999). See International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (implementing changes to the FCPA pursuant to the United States' obligations under the OECD Convention). In joining the OECD Convention, the United States agreed to "take such measures as may be necessary to establish that it is a criminal offence under [United States] law for any person intentionally to offer, promise or give . . . directly or through intermediaries, to a foreign public official . . . in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business." OECD Convention art. 1.1 (emphasis added). "Foreign public official" is defined to include "any person exercising a public function for a foreign country, including for a . . . public enterprise." Id. art. 1.4(a). The commentaries to the OECD Convention explain that: "A 'public enterprise' is any enterprise, regardless of its legal form, over which a government, or governments, may, directly or indirectly, exercise a dominant influence." Id. art. 1.4, cmt. 14. The commentary further explains: "An official of a public enterprise shall be deemed to perform a public function unless the enterprise operates on a normal commercial basis in the relevant market, i.e., on a basis which is substantially equivalent to that of a private enterprise, without preferential subsidies or other privileges." Id. art. 1.4, cmt. 15. In addition to this, the OECD Convention also requires signatories

make it a crime to pay bribes to agents of any "public international organisation." Id. art. 1.4(a).

To implement the Convention's mandates, Congress amended the FCPA in 1998. See Pub. L. No. 105-366, 112 Stat. 3302. The only change to the definition of "foreign official" in the FCPA that Congress thought necessary was the addition of "public international organization." 15 U.S.C. 78dd-2(h)(2)(A). This seems to demonstrate that Congress considered its preexisting definition already to cover a "foreign public official" of an "enterprise . . . over which a government . . . exercise[s] a dominant influence" that performs a "public function" because it does not "operate[] on a normal commercial basis . . . substantially equivalent to that of . . . private enterprise[s]" in the relevant market "without preferential subsidies or other privileges." OECD Convention art. 1.4(a) & cmt. 14, 15. Although we generally are wary of relying too much on later legislative developments to decide a prior Congress' legislative intent, the circumstances in this case cause us less concern in that regard.[7] This is not an instance in which Congress merely discussed previously enacted legislation and possible changes to it. Rather, Congress did make a change to the FCPA, and it did so specifically to ensure that the FCPA fulfilled the promise the United States made to other

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[7] See United States v. Price, 361 U.S. 304, 313, 80 S. Ct. 326, 332 (1960) (holding that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one"); but see Times Pub. Co. v. U.S. Dep't of Comm., 236 F.3d 1286, 1292 (11th Cir. 2001) (stating that subsequent legislative history accompanying an amendment to a statute can "specifically demonstrate Congress' intent").

nations when it joined the Convention. The FCPA after those amendments is a different law, and we may consider Congress's intent in passing those amendments as strongly suggestive of the meaning of "instrumentality" as it exists today.

We are not alone in finding instruction from the obligations the United States undertook in the OECD Convention and Congress's resulting amendment of the FCPA made in order to comply with those obligations. The Fifth Circuit, in United States v. Kay, concluded that, when Congress amended the FCPA to comply with the duties the United States assumed under the OECD Convention and left intact the FCPA's language outlawing bribery for the purpose of "obtaining or retaining business," the preexisting language should be construed to cover the Convention's mandate that signatories prohibit bribery "'to obtain or retain business or other improper advantage in the conduct of international business.'" 359 F.3d at 754 (quoting OECD Convention art. 1.1) (emphasis added). "Indeed, given the United States's ratification and implementation of the Convention without any reservation, understandings or alterations specifically pertaining to its scope," the Fifth Circuit concluded the defendants' narrow construction of the FCPA "would likely create a conflict with our international treaty obligations, with which we presume Congress meant to fully comply." Id. at 755 n.68.

Indeed, since the beginning of the republic, the Supreme Court has explained that construing federal statutes in such a way to ensure the United States is in compliance with the international obligations it voluntarily has undertaken is of paramount

importance. "If the United States is to be able to gain the benefits of international accords and have a role as a trusted partner in multilateral endeavors, its courts should be most cautious before interpreting its domestic legislation in such manner as to violate international agreements." Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 539, 115 S. Ct. 2322, 2329 (1995); see also Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) ("an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains"). We are thus constrained to interpret "instrumentality" under the FCPA so as to reach the types of officials the United States agreed to stop domestic interests from bribing when it ratified the OECD Convention.

Based upon this reading, we must also reject the invitation from Messrs. Esquenazi and Rodriguez to limit the term only to entities that perform traditional, core government functions. Nothing in the statute imposes this limitation. And were we to limit "instrumentality" in the FCPA in that way, we would put the United States out of compliance with its international obligations. See OECD Convention art. 1.4, cmt. 12 (designating as a "public function" "any activity in the public interest, delegated by a foreign country" (emphasis added)).

The Supreme Court has cautioned that "the concept of a 'usual' or a 'proper' governmental function changes over time and varies from nation to nation." First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba, 462 U.S. 611, 634 n.27, 103 S. Ct. 2591, 2603 n.27 (1983). That principle guides our construction of

the term "instrumentality." Specifically, to decide in a given case whether a foreign entity to which a domestic concern makes a payment is an instrumentality of that foreign government, we ought to look to whether that foreign government considers the entity to be performing a governmental function. And the most objective way to make that decision is to examine the foreign sovereign's actions, namely, whether it treats the function the foreign entity performs as its own. Presumably, governments that mutually agree to quell bribes flowing between nations intend to prevent distortion of the business they conduct on behalf of their people. We ought to respect a foreign sovereign's definition of what that business is.[8] Thus, for the

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[8] The logic of First National City Bank gives us another reason to reject the notion that "instrumentality" should encompass only entities that perform traditional, core governmental functions. If what constitutes a core function of a foreign government hews to the intent of that government, then the problems with providing adequate notice to businesses about which payments violate the FCPA would be magnified, not eliminated. We think it will be relatively easy to decide what functions a government treats as its own in the present tense by resort to objective factors, like control, exclusivity, governmental authority to hire and fire, subsidization, and whether an entity's finances are treated as part of the public fisc. Both courts and businesses subject to the FCPA have readily at hand the tools to conduct that inquiry (especially because the statute contains a mechanism by which the Attorney General will render opinions on request about what foreign entities constitute instrumentalities. See 15 U.S.C. § 78dd-2(f)(1); 28 C.F.R. §§ 80.1–80.6. It would be a much more difficult task — involving divining the subjective intentions of a foreign sovereign, parsing history, and interpreting significant amounts of foreign law — to decide what functions a foreign government considers core and traditional. Cf. South Carolina Educ. Ass'n v. Campbell, 883 F.2d 1251, 1262 (4th Cir. 1989) ("Determining the subjective intent of

United States government to hold up its end of the bargain under the OECD Convention, we ought to follow the lead of the foreign government itself in terms of which functions it treats as its own.

Although we believe Teleco would qualify as a Haitian instrumentality under almost any definition we could craft, we are mindful of the needs of both corporations and the government for ex ante direction about what an instrumentality is. With this guidance, we define instrumentality as follows. An "instrumentality" under section 78dd-2(h)(2)(A) of the FCPA is an entity controlled by the government of a foreign country that performs a function the controlling government treats as its own. Certainly, what constitutes control and what constitutes a function the government treats as its own are fact-bound questions. It would be unwise and likely impossible to exhaustively answer them in the abstract. Because we only have this case before us, we do not purport to list all of the factors that might prove relevant to deciding whether an entity is an instrumentality of a foreign government. For today, we provide a list of some factors that may be relevant to deciding the issue.

To decide if the government "controls" an entity, courts and juries should look to the foreign government's formal designation of that entity; whether the government has a majority interest in the entity; the government's ability to hire and fire the

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legislators and the collective motivation of legislatures is a perilous enterprise indeed."). Busy district courts and lay juries, not to mention companies in the midst of conducting business, would be ill-equipped to make such sensitive distinctions.

entity's principals; the extent to which the entity's profits, if any, go directly into the governmental fisc, and, by the same token, the extent to which the government funds the entity if it fails to break even; and the length of time these indicia have existed. We do not cut these factors from whole cloth. Rather, they are informed by the commentary to the OECD Convention the United States ratified. See OECD Convention, art. 1.4, cmt. 14 (stating that an entity is "deemed" to be under governmental control "inter alia, when the government or governments hold the majority of the enterprise's subscribed capital, control the majority of votes attaching to shares issued by the enterprise or can appoint a majority of the members of the enterprise's administrative or managerial body or supervisory board"). They are also consistent with the approach the Supreme Court has taken to decide if an entity is an agent or instrumentality of the government in analogous contexts. See Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 394, 397–99, 115 S. Ct. 961, 972–74 (1995) (concluding Amtrak was an "agency or instrumentality of the United States" because, among other things, it was created by federal statute and a majority of its directors were to be appointed by the President); Cherry Cotton Mills, Inc. v. United States, 327 U.S. 536, 539, 66 S. Ct. 729, 730 (1946) ("[Because Reconstruction Finance Corporation's (RFC)] Directors are appointed by the President and affirmed by the Senate; its activities are all aimed at accomplishing a public purpose; all of its money comes from the Government; its profits, if any, go to the Government; [and] its losses the Government must bear[, t]hat the Congress chose to call it a corporation does not alter its characteristics so as to make it something other than what it actually is, an agency

selected by Government to accomplish purely governmental purposes."); Reconstruction Fin. Corp. v. J.G. Menihan Corp., 312 U.S. 81, 83, 61 S. Ct. 485, 486 (1941) (concluding RFC was a "corporate agency of the government" because the United States was the "sole stockholder" and the entity was "managed by a board of directors appointed by the President," even though "its transactions [were] akin to those of private enterprises" and nothing in its organic statute indicated it was an instrumentality of the government).

We then turn to the second element relevant to deciding if an entity is an instrumentality of a foreign government under the FCPA — deciding if the entity performs a function the government treats as its own. Courts and juries should examine whether the entity has a monopoly over the function it exists to carry out; whether the government subsidizes the costs associated with the entity providing services; whether the entity provides services to the public at large in the foreign country; and whether the public and the government of that foreign country generally perceive the entity to be performing a governmental function. Just as with the factors indicating control, we draw these in part from the OECD Convention. See OECD Convention art. 1.4, cmt. 15 ("[A] public enterprise shall be deemed to perform a public function," if it does not "operate[ ] on a normal commercial basis in the relevant market, i.e., on a basis which is substantially equivalent to that of a private enterprise, without preferential subsidies or other privileges."); see also id. art. 1.4, cmt. 12 ("'Public function' includes any activity in the public interest, delegated by a foreign country . . . ."). And we draw them from Supreme Court cases discussing what entities properly can be considered carrying out

governmental functions. See Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295–97, 121 S. Ct. 924, 930–31 (2001) (describing situations in which the Court has held "seemingly private behavior may be fairly treated as that of the State itself," recognizing that decision as "a matter of normative judgment [whose] criteria lack rigid simplicity," and including among the relevant factors whether "the State provides significant encouragement, either overt or covert" and if the entity "serve[s a] public purpose [such as] providing community recreation" (internal quotation marks omitted)). Compare Reconstruction Fin. Corp., 312 U.S. at 83, 61 S. Ct. at 486 (recognizing that the RFC's function to make loans and investments to aid state and local governments, banks, railroads, mortgage companies, and other businesses were "transactions . . . akin to those of private enterprises"), with Cherry Cotton Mills, Inc., 327 U.S. at 539, 66 S. Ct. at 730 (stating that the RFC was "an agency selected by the Government to accomplish purely governmental purposes" (emphasis added)).

III.

A. The Foreign Corrupt Practices Act Convictions

We now turn to Esquenazi's and Rodriguez's specific challenges to their convictions under the FCPA.

1. The district court's "instrumentality" instruction

With the definition of "instrumentality" in mind, we now examine what Messrs. Esquenazi and Rodriguez assert was the district court's chief error with respect to whether Teleco was an instrumentality of the Haitian government — the jury instructions. Notably, the list of factors we identified, although a bit more

detailed, is not so different from what the district court laid out in its instructions to the jury here. We review de novo the district court's instructions to determine whether they misstated the law or prejudicially misled the jury. United States v. Felts, 579 F.3d 1341, 1342 (11th Cir. 2009). The district court instructed the jury:

> An instrumentality of a foreign government is a means or agency through which a function of the foreign government is accomplished. State-owned or state-controlled companies that provide services to the public may meet this definition.
>
> To decide whether Telecommunications D'Haiti or Teleco is an instrumentality of the government of Haiti, you may consider factors including, but not limited to:
>
> One, whether it provides services to the citizens and inhabitants of Haiti.
>
> Two, whether its key officers and directors are government officials or are appointed by government officials.
>
> Three, the extent of Haiti's ownership of Teleco, including whether the Haitian government owns a majority of Teleco's shares or provides financial support such as subsidies, special tax treatment, loans or revenue from government mandated fees.
>
> Four, Teleco's obligations and privileges under Haitian law, including whether Teleco exercises exclusive or controlling power to administer its designated functions.

> And five, whether Teleco is widely perceived and understood to be performing official or governmental functions.

Both Mr. Esquenazi and Mr. Rodriguez contend these instructions caused the jury to convict them based only on the fact that Teleco was a government-owned entity that performed a service, without any determination that the service it performed was a governmental function. We cannot agree. Read in context, the district court's instructions make plain that provision of a service by a government-owned or controlled entity is not by itself sufficient. The district court explained only that an entity that provides a public service "may" meet the definition of "instrumentality," thus indicating that providing a service is not categorically excluded from "a function of the foreign government." But the sentence just before explained with no equivocation that only "a means or agency [that performs] a function of the foreign government" would qualify as an instrumentality. Although, read in isolation, the portions of the instruction addressing the provision of services could sweep too broadly, when constrained by the actual definition of "instrumentality" the district court gave and the other guiding factors the district court outlined, we find no error in these instructions. Indeed, they substantially cover the factors we previously outlined.[9] The instructions, we conclude, neither

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[9] The only two factors we provide today that the court's instructions did not include were the length of the government's control over Teleco and whether Teleco was formally designated a government owned entity. As we have said, however, the factors we provide here are intended merely as a helpful, non-exhaustive

misstated the law nor prejudicially misled the jury regarding the definition of "instrumentality."[10] Felts, 579 F.3d at 1342.

2. Sufficiency of the evidence Teleco was a Haitian instrumentality

In addition to challenging the "instrumentality" jury instruction, Messrs. Esquenazi and Rodriguez also argue the evidence was insufficient to demonstrate that

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list. We observe that the facts relevant to these factors would be neutral at best in this case. For, although Haiti never specifically designated Teleco a government entity, the company had an entity suffix indicating that it was funded with government money because "the government consider[ed] Teleco as its . . . entity," and Haiti later passed a law expressly designating its officials as subject to a public anti-corruption law. . And Teleco came into being based upon a contract created by the government. Indeed, the Haitian government has owned almost all equity in the company and has appointed all board members and the chief officer for nearly 40 years, since shortly after it was created. . Ultimately, district courts have "wide discretion" in crafting jury instructions and we cannot say that omission of those two factors leave us "with a substantial and ineradicable doubt as to whether the jury was properly guided in its deliberations." United States v. Svete, 556 F.3d 1157, 1161 (11th Cir. 2009) (en banc) (citation omitted).

[10] Because we conclude the district court's instructions correctly stated the law and that Messrs. Esquenazi and Rodriguez define "instrumentality" too narrowly, we find no error in the district court's refusal to give their proposed instruction on "instrumentality." See Svete, 556 F.3d at 1161 (reviewing refusal to give requested instructions for an abuse of discretion, reversing only "if the requested instruction is correct, not adequately covered by the charge given, and involves a point so important that failure to give the instruction seriously impaired the party's ability to present an effective case" (citation omitted)).

Teleco was an instrumentality of the Haitian government. We review the sufficiency of the evidence de novo, "viewing the evidence and taking all reasonable inferences in favor of the jury's verdict." United States v. Fries, 725 F.3d 1286, 1291 (11th Cir. 2013). In light of our construction of the term, we have little difficulty concluding sufficient evidence supported the jury's necessary finding that Teleco was a Haitian instrumentality.

From Teleco's creation, Haiti granted the company a monopoly over telecommunications service and gave it various tax advantages. Beginning in early 1970s, and through the years Messrs. Esquenazi and Rodriguez were involved, Haiti's national bank owned 97 percent of Teleco. The company's Director General was chosen by the Haitian President with the consent of the Haitian Prime Minister and the ministers of public works and economic finance. And the Haitian President appointed all of Teleco's board members. The government's expert testified that Teleco belonged "totally to the state" and "was considered . . . a public entity." Although the expert also testified that "[t]here was no specific law that . . . decided that at the beginning that Teleco is a public entity," he maintained that "government, officials, everyone consider[ed] Teleco as a public administration." Construed in the light most favorable to the jury's verdict, that evidence was sufficient to show Teleco was controlled by the Haitian government and performed a function Haiti treated as its own, namely, nationalized telecommunication services.

3. Mr. Esquenazi's vagueness challenge

Mr. Esquenazi alone challenges the FCPA as unconstitutionally vague as applied to him. Mr. Esquenazi's only contention, however, is that the statute would be vague if we interpreted "instrumentality" to include state-owned enterprises that do not perform a governmental function. But we have not. Our definition of "instrumentality" requires that the entity perform a function the government treats as its own. Although we recognize there may be entities near the definitional line for "instrumentality" that may raise a vagueness concern, non-speech vagueness challenges are only cognizable as applied. See United States v. Mazurie, 419 U.S. 544, 550, 95 S. Ct. 710, 714 (1975) ("[V]agueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand."). Because the entity to which Mr. Esquenazi funneled bribes was overwhelmingly majority-owned by the state, had no fisc independent of the state, had a state-sanctioned monopoly for its activities, and was controlled by a board filled exclusively with government-appointed individuals, the FCPA is not vague as applied to his conduct. See Parker v. Levy, 417 U.S. 733, 756, 94 S. Ct. 2547, 2562 (1974) ("One to whose conduct a statute clearly applies may not successfully challenge it for vagueness.").

4. Whether Mr. Esquenazi and Mr. Rodriguez possessed the requisite knowledge

Messrs. Esquenazi and Rodriguez also aim challenges at the knowledge element of the FCPA. Both challenge the district court's jury instructions on the element. And Mr. Rodriguez challenges the district

court's decision to give the jury a deliberate-ignorance instruction as well as the sufficiency of the evidence that he knew Teleco was a Haitian instrumentality.[11] We address these in turn.

a. The district court's "knowledge" instructions

In its instructions, the district court told the jury that knowledge was an essential element of each FCPA charge, and that, to convict on the FCPA charges, the jury had to find each bribe payment was "made to any person while knowing that all or a portion of such money or thing of value will be offered, given or promised directly or indirectly to any foreign official." The district court explained that "knowing" meant actual knowledge or a firm belief of the existence of a particular circumstance or result. Messrs. Esquenazi

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[11] Mr. Esquenazi's brief states that he adopts his codefendant's FCPA challenges. With the exception of the court's "knowledge" instructions to the jury, we decline to permit him to do so. "Sufficiency arguments . . . are too individualized to be generally adopted." United States v. Cooper, 203 F.3d 1279, 1285 n.4 (11th Cir. 2000) (alteration and citation omitted). For the same reason — that the analysis is highly dependent on the factual circumstances — Mr. Esquenazi cannot generally adopt Mr. Rodriguez's deliberate-ignorance-instruction challenge. See United States v. Rivera, 944 F.2d 1563, 1570–71 (11th Cir. 1991) (recognizing "such a charge should not be given in every case in which a defendant claims a lack of knowledge, but only in those comparatively rare cases where there are facts that point in the direction of deliberate ignorance," and emphasizing that courts must determine "whether a deliberate ignorance instruction is proper in a particular case" (emphasis added and internal alterations and quotation marks omitted)). And, because Mr. Esquenazi fails to discuss what facts (or lack of facts) undermine the district court's decision to give the instruction, we do not address the propriety of the instruction as applied to him. See id.

and Rodriguez contend this instruction was erroneous because it misled the jury to believe it could convict if either knew their intermediary (namely, Grandison at TCSC) would make a payment to a person who just "happened" to be a foreign official without their prior knowledge. In other words, they argue, the instruction failed to make clear that they must have known the recipient of the bribe payment would be a foreign official.[12] Messrs. Esquenazi and Rodriguez failed to timely raise this argument before the district court, so we review only for plain error. See United States v. Wright, 392 F.3d 1269, 1277 (11th Cir. 2004) ("[T]o preserve an objection to jury instructions for appellate review, a party must object before the jury retired, stating distinctly the specific grounds for the objection." (citation omitted)). To surmount this standard of review, the challenger must show "instruction was an incorrect statement of the law and [that] it was probably responsible for an incorrect verdict, leading to substantial injustice." Id. at 1279 (citation omitted).

We conclude there was no error here, plain or otherwise. The court's instructions, read in their entirety, make clear the jury had to find Messrs. Esquenazi and Rodriguez knew or believed the bribes would ultimately reach the hands of a foreign official. The court listed as one of the essential elements of the FCPA charges "that the payment or gift was to a

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[12] To the extent Mr. Rodriguez contends only actual knowledge will suffice, that argument is flatly foreclosed by the text of the FCPA. See 15 U.S.C. § 78dd-2(h)(3)(A) ("A person's state of mind is 'knowing'" for purposes of the statute if he has actual knowledge or "a firm belief that such circumstance exists or that such result is substantially certain to occur.").

foreign official or to any person while the defendant knew that all or a portion of the payment or gift would be offered, given or promised, directly or indirectly to a foreign official." This statement, as well as the court's definition of "knowing," directly tracked the FCPA's language. See 15 U.S.C. § 78dd-2(a)(3), (h)(3)(A). The instruction was a correct legal statement, was clearly delivered, and nothing in its language was misleading to the jury.[13]

b. The deliberate-ignorance instruction

At the charge conference, the court considered whether to give the jury a deliberate-ignorance instruction, which would permit the jury to return a guilty verdict if it found "[d]eliberate avoidance of positive knowledge." Mr. Rodriguez objected to the instruction, arguing the evidence at trial showed he did not know about Terra's illegal activity, not that he simply ignored the unlawful transactions. The district court acknowledged that evidence of deliberate ignorance was "sparse," but gave the instruction, based on the government's argument that because testimony at trial showed Mr. Rodriguez was distracted from work by family obligations they needed to explain as a financial executive, Mr. Rodriguez was in a position to know the illegality of the payments he was authorizing. Mr. Rodriguez maintains this is error, and we agree. We have cautioned district courts against instructing juries on deliberate ignorance "when the evidence only

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[13] Because we conclude the district court's instructions were a correct statement of the law, we need not address the merit of the knowledge instruction proposed by these defendants at trial. See Svete, 556 F.3d at 1161.

points to either actual knowledge or no knowledge on the part of the defendant." United States v. Stone, 9 F.3d 934, 937 (11th Cir. 1993) (citing Rivera, 944 F.2d at 1570–71). "A deliberate ignorance instruction is appropriate only when there is evidence in the record showing the defendant purposely contrived to avoid learning the truth." Id. (internal quotation marks omitted). There is no such evidence for Mr. Rodriguez.

Nonetheless, in light of the overwhelming evidence Mr. Rodriguez had actual knowledge he was authorizing unlawful payments, and the district court's thorough instructions on the knowledge element, the error was harmless. See id. at 937–38 (reviewing erroneous deliberate-ignorance instruction for harmless error); see also United States v. Neder, 197 F.3d 1122, 1129 (11th Cir. 1999) (recognizing that, to show an instructional error was harmless, the government must show the evidence on the element the instruction targeted was so overwhelming "that no rational jury, properly instructed" on that element, could have acquitted the defendant). Mr. Perez testified that, after Mr. Antoine accepted an offer for side-payments in exchange for a reduction in Terra's bills, he told Mr. Rodriguez of the deal. Upon hearing the news, Mr. Rodriguez "congratulated [Mr. Perez] on a job well done." Mr. Rodriguez authorized a number of side payments to Mr. Antoine through J.D. Locator, and he continued this practice by authorizing payments to TCSC. In fact, Mr. Rodriguez's name is on every transfer to TCSC that corresponds to a substantive FCPA charge. Because overwhelming evidence supports the jury's finding that Mr. Rodriguez had actual knowledge of the unlawful nature of his

payments, we will not reverse on the basis of an erroneous deliberate-ignorance instruction. See id.

c. Sufficiency of the evidence that Mr. Rodriguez had the requisite knowledge

Mr. Rodriguez challenges the sufficiency of the evidence that he had knowledge the recipient of the payments he made was a foreign official. We review de novo his sufficiency challenge. Fries, 725 F.3d at 1291. "The relevant question in reviewing a sufficiency of the evidence claim is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." United States v. Demarest, 570 F.3d 1232, 1239 (11th Cir. 2009) (citation omitted and emphasis added).

Mr. Rodriguez asserts there was no evidence that he had actual knowledge of the ways Teleco was connected to the Haitian government making it an "instrumentality," or of the fact that Teleco employees were foreign officials. Although he presents these as distinct elements, they are the same. Provided Mr. Rodriguez knew (or believed) Teleco was a Haitian instrumentality, he knew any Teleco employee was a foreign official. See 15 U.S.C. § 78dd-2(h)(2)(A) (defining "foreign official" as "any officer or employee of a foreign government or any . . . instrumentality thereof"). Mr. Rodriguez concedes, based on Terra's previous political-risk insurance application for a Teleco contract, that he knew Teleco was government-owned. But he says this shows nothing more than that he knew Teleco employees worked for a state-owned enterprise. He says this is neither in dispute nor dispositive of whether he knew Teleco was

a Haitian instrumentality and, therefore, its employees were foreign officials.

As we pointed out above, Mr. Rodriguez's conception of "instrumentality" — and thus, what the government had to prove he knew — is too narrow. Actually, the government bore the burden of proving Teleco was controlled by the Haitian government and performed a function the government treated as its own. Our review of the record shows sufficient evidence of Mr. Rodriguez's knowledge of Teleco's status as an instrumentality (and thus Messrs. Antoine and Duperval's statuses as foreign officials) supports the jury's finding of guilt. For example, insurance broker John Marsha testified extensively at trial about the political-risk insurance policy Terra tried to obtain on a Teleco contract that ultimately fell through. According to Mr. Marsha, the type of policy Terra sought is only available when contracting with a foreign government. Mr. Marsha testified that he received a phone call from Messrs. Esquenazi, Rodriguez, and Dickey, who said they wanted to insure contracts with "foreign governments." After Mr. Marsha sent an application for political-risk insurance, Mr. Dickey emailed Marsha (copying Messrs. Rodriguez and Esquenazi) with an attached insurance application listing Teleco as a "government-owned entity." Later, when the insurer had doubts about what recourse it might have against the Haitian government if the proposed Teleco/Terra contract was breached, Mr. Dickey (again copying Messrs. Rodriguez and Esquenazi) emailed Mr. Marsha and said: "With respect to Haiti, we may be able to get a letter from the TELECO President to the effect that TELECO is an instrumentality of the Haitian government. Would this

help expedite matters?" And, when the insurer became concerned the policy's force majeure clause might permit "the Haitian government" to cancel the contract with Terra, Messrs. Dickey, Rodriguez, and Esquenazi discussed this possibility at length with Mr. Marsha. Also based on his status as a Terra executive directly involved in deals with Teleco, the jury reasonably could infer Mr. Rodriguez knew the company had a state-sanctioned monopoly over telecommunications in Haiti. That evidence was sufficient to support a jury finding that Mr. Rodriguez knew Teleco was an instrumentality of the Haitian government. And because it is undisputed that he knew Messrs. Antoine and Duperval were Teleco employees, that evidence supports a finding he knew they qualified as foreign officials under the FCPA. See 15 U.S.C. §§ 78dd-2(a)(3), (h)(2)(A).

5. Whether the declarations by Prime Minister Bellerive warranted a Brady hearing

Five days after the jury returned its verdict, counsel for Patrick Joseph, who was indicted along with Messrs. Esquenazi and Rodriguez but tried separately, gave the government a declaration from Haitian Prime Minister Jean Max Bellerive. In that declaration, Prime Minister Bellerive indicated Teleco was not a state enterprise of Haiti. On August 10, 2011, the day after receiving it, the government shared the Prime Minister's declaration with counsel for Messrs. Esquenazi and Rodriguez. The two sought a new trial, or at least an evidentiary hearing, based upon this newly discovered evidence, but the district court denied their motion. On appeal, Messrs. Esquenazi and Rodriguez contend the district court erred in denying

them a hearing on whether the fact that they did not have the declaration before trial violated Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196–97 (1963).

In Brady, the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment." Id. We review for an abuse of discretion the denial of an evidentiary hearing on an asserted Brady violation. United States v. Fernandez, 136 F.3d 1434, 1438 (11th Cir. 1998). To establish that the government has violated Brady, a defendant must show that:

> (1) the government possessed evidence, including impeachment evidence, favorable to the defense; (2) [the defense] did not possess the evidence nor could have obtained it with reasonable diligence; (3) the prosecution suppressed the favorable evidence; and (4) had the evidence been disclosed to the defense, a reasonable probability exists that the trial outcome would have been different, i.e., the evidence was material.

United States v. Arnold, 117 F.3d 1308, 1315 (11th Cir. 1997).

Even if we accept the assertions in the Prime Minister's declaration (which he later clarified to explain that Teleco was "fully funded and controlled by BRH, which is a public entity of the Haitian State") as material, the district court did not abuse its discretion in denying Messrs. Esquenazi and Rodriguez a hearing on their Brady claims because the evidence does not

qualify as Brady material. "Brady applies only to information possessed by the prosecutor or anyone over whom he has authority." United States v. Naranjo, 634 F.3d 1198, 1212 (11th Cir. 2011) (internal quotation marks omitted). And where the government does not have evidence in its possession, the prosecution cannot have suppressed it, either willfully or inadvertently. Id. In response to the motion for a new trial, a member of the prosecution team swore, under oath, that the government only learned of the declaration after Messrs. Rodriguez and Esquenazi were convicted. Neither defendant points to any contrary evidence.

Despite the complete absence of evidence to show the prosecution possessed the original declaration of the Prime Minister, Messrs. Esquenazi and Rodriguez assert they were still entitled to an evidentiary hearing on a possible Brady violation. They argue the government has not proved it did not know of the declaration's substance; that the government had unique access to the Haitian Prime Minister; and that the knowledge of Haitian officials should be imputed to the prosecution. None of these arguments convinces us the district court was required to hold an evidentiary hearing. First, the burden to show a Brady violation lies with the defendant, not the government, so the prosecution was not required to prove lack of knowledge of the declaration's contents on top of not having the declaration. See United States v. Vallejo, 297 F.3d 1154, 1164 (11th Cir. 2002). Second, there is no evidence that the government was so uniquely situated with respect to the information in the declaration that it was required to go out and learn what it did not know. See Naranjo, 634 F.3d at 1212 ("A prosecutor has no duty to undertake a fishing

expedition in other jurisdictions in an effort to find potentially impeaching evidence every time a criminal defendant makes a Brady request for information regarding a government witness." (citation omitted)). Indeed, the evidence was discovered by a codefendant, albeit one tried separately. Third, no court, to our knowledge, has held that information known to an independent foreign government may be imputed to prosecutors in the United States simply when the foreign government cooperates in an investigation. In fact, the case Messrs. Esquenazi and Rodriguez rely upon explained that imputation was appropriate because "the state investigators functioned as agents of the federal government under the principles of agency law." United States v. Antone, 603 F.2d 566, 570 (5th Cir. 1979) (emphasis added). Nothing approaching such a relationship between the Prime Minster of Haiti and federal prosecutors existed here. The district court did not abuse its discretion.

B. The Count 1 conspiracy conviction

For all of the reasons set forth above, Messrs. Esquenazi's and Rodriguez's challenges to their substantive FCPA convictions fail. And, because they do not attempt to rebut other elements of Count 1's conspiracy charge — the agreement to achieve an unlawful objective (the FCPA violations) itself, knowing and voluntary participation in the agreement, or commission of overt acts in furtherance of the agreement[14] — their conviction for conspiracy to violate the FCPA stands. For this reason, and because the jury

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[14] See United States v. Hasson, 333 F.3d 1264, 1270 (11th Cir. 2003) (listing elements of conspiracy under 18 U.S.C. § 371).

expressly found Messrs. Esquenazi and Rodriguez guilty on the FCPA object of the conspiracy, we need not address their challenges to the alternative wire-fraud object of the same conspiracy.

C. The money-laundering convictions

The jury convicted Mr. Rodriguez of, "knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity," "conduct[ing] . . . such a financial transaction which in fact involves the proceeds of specified unlawful activity" while knowing the transaction was designed to conceal the nature, location, source, ownership, or control of those proceeds. 18 U.S.C. § 1956(a)(1)(B)(i). Mr. Rodriguez[15] argues we must reverse his money-laundering convictions,[16] either

[15] In his reply brief, Mr. Esquenazi asserts that he adopted Mr. Rodriguez's contentions regarding the merger of the money-laundering counts in his initial brief. A careful review, however, conclusively shows Mr. Esquenazi's adoption of Mr. Rodriguez's argument with respect to the money-laundering convictions related only to the use of Haitian bribery law as an underlying unlawful activity. We therefore consider only Mr. Rodriguez to properly have raised a claim that his money-laundering convictions merged with the underlying offenses. See Jackson v. Comm'r of Soc. Sec., 601 F.3d 1268, 1274 n.4 (11th Cir. 2010) ("Normally, we will not address an argument raised for the first time in a reply brief." (citation omitted)).

[16] Messrs. Esquenazi and Rodriguez relatedly contend the money-laundering convictions must be reversed because they were not predicated on a proven "specified unlawful activity." They target the Haitian-bribery-law predicate the indictment lists

because they merged in the indictment with the underlying FCPA bribery charges or because the evidence at trial failed to show the transactions involved "proceeds" of the underlying FCPA offenses, resulting in impermissible merger.[17] Because he moved to dismiss the indictment based on merger, we review the denial of that motion for an abuse of discretion, examining the legal sufficiency of the indictment de novo. United States v. Schmitz, 634 F.3d 1247, 1259 (11th Cir. 2011). But Mr. Rodriguez did not seek a judgment of acquittal at trial based on the second contention he now makes.[18] Where the specific grounds upon which a defendant made his sufficiency-of-the-

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alongside FCPA violations and wire fraud. Because we affirm the FCPA convictions, however, this argument necessarily fails as those convictions are valid money-laundering predicates.

[17] We understand Mr. Rodriguez to argue that the evidence in a trial could be insufficient to show that two crimes were distinct offenses, requiring us to reverse based upon the sufficiency of the evidence. However, his brief does little to help us understand this theory. Yet, because the evidence clearly did demonstrate two distinct offenses, we address the contention as Mr. Rodriguez has framed it.

[18] We are wholly unconvinced by Mr. Rodriguez's contention that he properly preserved a challenge to the sufficiency of the evidence that the crimes were distinct offenses when he claimed, in his post-conviction motion for a new trial, that the district court erred in denying his motion to dismiss the indictment. See United States v. Bischel, 156 F.3d 1148, 1150 (11th Cir. 1998) (concluding that challenge to the sufficiency of the evidence must be raised at the close of the evidence to properly preserve it for appeal); see also United States v. Langford, 647 F.3d 1309, 1326 n.11 (11th Cir. 2011) ("To preserve an issue for appeal . . . an objection on other grounds will not suffice." (internal quotation marks omitted)).

evidence challenge at trial differ from those he asserts on appeal, we review under his new theory only for manifest miscarriage of justice. See Fries, 725 F.3d at 1291; see also United States v. Hurn, 368 F.3d 1359, 1368 (11th Cir. 2004) (treating as unpreserved a contention that evidence was insufficient where a different specific basis was raised in renewed motion for judgment of acquittal at trial). So we would reverse Mr. Rodriguez's money-laundering convictions for insufficient evidence only if they are "shocking." Fries, 725 F.3d at 1291.

We conclude there was no merger of the money-laundering charges with underlying offenses that generated the proceeds to be laundered, either in the indictment or as a result of the evidence adduced at trial. Mr. Rodriguez bases his contention on the Supreme Court's decision in United States v. Santos, 553 U.S. 507, 128 S. Ct. 2020 (2008). Because no majority of the Court agreed upon a rationale in Santos, we have recognized that the narrowest concurring opinion, that written by Justice Stevens, controls. United States v. Jennings, 599 F.3d 1241, 1252 (11th Cir. 2010); see also Marks v. United States, 430 U.S. 188, 193, 97 S. Ct. 990, 993 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . ." (internal quotation marks omitted)). With that in mind, Santos merely states that the gross receipts of an illegal gambling operation were not "proceeds" for purposes of a so-called "promotional" money-laundering offense

under 18 U.S.C. § 1956(a)(1)(A)(i). Jennings, 599 F.3d at 1252.

We first observe that there is a distinction between a promotional money-laundering conviction under § 1956(a)(1)(A)(i) (i.e., using funds from a criminal business to "promote the carrying on of [the] specified unlawful activity"), like the one at issue in Santos, and a concealment money-laundering conviction under 18 U.S.C. § 1956(a)(1)(B)(i), like Mr. Rodriguez's. This difference eliminates entirely for this case any double-punishment concern, like the one that motivated a majority of the Justices in Santos. See Santos, 553 U.S. at 514–19, 128 S. Ct. at 2026–28 (plurality opinion) (discussing the "merger problem" if funds used to pay an illegal business's expenses are proceeds laundered under § 1956(a)(1)(A)); id. at 527, 128 S. Ct. at 2033 (Stevens, J., concurring) ("Allowing the Government to treat the mere payment of the expense of operating an illegal gambling business as a separate offense is in practical effect tantamount to double jeopardy . . . ."). Conducting a criminal enterprise necessarily requires paying its essential expenses — doing so should not also be separately punishable as money-laundering, at least when the rule of lenity comes into play. Id., at 514–15, 528, 128 S. Ct. at 2033–34 ("As the plurality notes, there is 'no explanation for why Congress would have wanted a transaction that is a normal part of a crime it had duly considered and appropriately punished elsewhere in the Criminal Code to radically increase the sentence for that crime.' This conclusion dovetails with what common sense and the rule of lenity would require." (internal citation omitted)). No such problem of overlap arises where, as here, a money-laundering conviction

under the concealment prong involves conduct that was entirely unnecessary to the completion of the underlying specified unlawful activity. Funneling money through shell corporations was not necessary for Mr. Rodriguez to bribe a foreign official. It just made it less likely that conduct would be uncovered by "conceal[ing] the nature[and] source . . . of the proceeds" he and his coconspirators used to pay the bribes, precisely the distinct type of conduct 18 U.S.C. § 1956(a)(1)(B)(i) criminalizes.

Still, Mr. Rodriguez points to a supposed timing problem, which is that the funds pushed through the intermediary corporations, ultimately to Messrs. Duperval and Antoine or their associates, could not be "proceeds" because the underlying FCPA bribery was not complete. But this argument mistakes the basis for the underlying FCPA convictions. When Terra promised Messrs. Antoine and Duperval bribery payments in exchange for reducing the amounts Terra owed Teleco, the FCPA violation was already complete — an "offer" or a "promise to pay" a foreign official for a business benefit is just as unlawful as an actual "payment" under that statute. 15 U.S.C. § 78dd-2(a). Thus, the lowered debt Terra received in exchange for that promise constituted "proceeds" of a completed FCPA offense, which the company then funneled through intermediary companies "to conceal both the source and future ownership of the money," thereby completing several concealment money-laundering offenses. United States v. Wilkes, 662 F.3d 524, 547 (9th Cir. 2011), cert. denied 132 S. Ct. 2119 (2012).

For these reasons, we conclude the district court did not err in refusing to dismiss the money-laundering

counts of the indictment or in allowing the jury to decide these counts. Both the allegations and evidence supported the jury's finding that Messrs. Esquenazi and Rodriguez engaged in criminal acts distinct from, and which therefore did not merge with, the substantive FCPA counts.[19]

D. Sentencing Challenges

Messrs. Esquenazi and Rodriguez challenge various aspects of their sentences. We discuss each of these in turn.

1. Enhancement for "the value of the benefit received" by Terra

Section 2C1.1(b)(2) of the Sentencing Guidelines, and the corresponding tables in § 2B1.1(b)(1), provide for a 16-level enhancement if the value of "the benefit received or to be received in return for the payment" of a bribe — provided that value is greater than the value of the bribe payment itself — is more than $1 million but less than $2.5 million. USSG § 2B1.1(b)(1). The district court calculated that Terra received a total of $2.2 million in bill reductions and applied the enhancement. Messrs. Esquenazi and Rodriguez[20]

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[19] To the extent Mr. Rodriguez's merger contentions also relate to his money-laundering conspiracy conviction, we affirm that conviction as well for the same reasons we affirm the FCPA conspiracy conviction.

[20] The government contends, citing Cooper, 203 F.3d at 1285 n.4, that Mr. Rodriguez cannot generally adopt Mr. Esquenazi's argument on this point as he attempts to do in his brief. But Mr. Esquenazi's challenge is largely a legal, not a factual one, so we permit Mr. Rodriguez to adopt it.

argue the value of "the benefit received" should be the value they each received individually, not what Terra received. And, because that value is unclear, the correct calculation should be based on the value of the bribe payments, which, at a total of $839,815, triggers only a 14-level enhancement. Both defendants objected to the enhancement at sentencing, arguing only a 14-level enhancement should apply. They did not, however, advocate the 14-level enhancement for the reason they now assert. Counsel for Mr. Esquenazi requested the 14-level enhancement to maintain parity with his codefendants, who pleaded guilty. And Mr. Rodriguez's counsel argued the government's loss calculation was illusory because, due to valuable equipment that Terra owned and Teleco kept, there was no way to say for certain that Terra benefited to the tune of $2.2 million. Because the district court did not have the opportunity to examine and rule on the argument now before us, we are limited to reviewing only for plain error. See United States v. Massey, 443 F.3d 814, 819 (11th Cir. 2006) ("The defendant . . . fails to preserve a legal issue for appeal if the factual predicates of an objection are included in the sentencing record, but were presented to the district court under a different legal theory."). This being the case, we may reverse only if "there is: (1) error, (2) that is plain, and (3) that affects substantial rights[,] and then only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." Id. at 818 (alterations and internal quotation marks omitted). And nothing in our case law makes any error in this case plain. See United States v. Hernandez-Gonzalez, 318 F.3d 1299, 1302 (11th Cir. 2003) ("An error cannot be plain if such error is not obvious or clear under current law."). Indeed, we have

interpreted our own precedent to mean the loss calculation is based on the improper benefit to a company. See United States v. Huff, 609 F.3d 1240, 1245–46 (11th Cir. 2010) (interpreting United States v. DeVegter, 439 F.3d 1299 (11th Cir. 2006), to mean "the improper benefit to the investment firm should have been used as the loss amount" — rather than the amount of bribe payments — for purposes of a § 2B4.1 enhancement, and applying that case's reasoning to a § 2C1.1 enhancement (emphasis added)). Although we were not squarely presented with the issue of whether an entity or an individual's benefit should be calculated in Huff, its language forecloses the possibility that any error regarding the loss amount calculation in this case could be plain.

2. Mr. Esquenazi's 4-level leadership-role enhancement

Because it found him "an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive," the district court enhanced Mr. Esquenazi's guideline range by four levels. USSG § 3B1.1(a). We review the district court's finding that Mr. Esquenazi was an organizer or leader for clear error. United States v. Barner, 572 F.3d 1239, 1247 (11th Cir. 2009). Mr. Esquenazi contends he instead should have been characterized, at most, as a "manager or supervisor," which carries with it only a three-level enhancement under § 3B1.1(b). He argues that he was a leader only in Terra's legitimate business operations and points to the substantial independent roles of others like Messrs. Rodriguez, Perez, and Antoine in the bribery scheme.

As a preliminary matter, the roles of Mr. Esquenazi's co-conspirators do not change our analysis even if those individuals also played major roles in the offense conduct. See USSG § 3B1.1, comment. (n.4) ("There can, of course, be more than one person who qualifies as a leader or organizer of a criminal association or conspiracy."). The Sentencing Guidelines commentary provides several factors that distinguish a leadership role from a management role, including

> the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others.

Id. comment. (n.4). The district court considered many of these factors and concluded that Mr. Esquenazi was "in charge" of the bribery, served as "the boss of Mr. Rodriguez in addition to the others," and "was in fact the leader of the organization, and not just the president in name" because "he actually participated in many of the decisions" involving the bribery scheme. We cannot say, in light of extensive testimony at trial about Mr. Esquenazi's involvement in each step of the scheme, that the court's fact-findings are clearly erroneous. Thus, we find no error in the imposition of the enhancement.

3. Mr. Esquenazi's obstruction enhancement

The Sentencing Guidelines provide for a 2-level enhancement if the defendant "willfully obstructed or

impeded, or attempted to obstruct or impede, the administration of justice" with respect to the investigation or prosecution of the case. USSG § 3C1.1. This includes willful false sworn testimony on a material matter. United States v. Dunnigan, 507 U.S. 87, 93–94, 113 S. Ct. 1111, 1116 (1993). Mr. Esquenazi argues the district court failed to make findings of specific instances of perjury.[21] And he is right that, when applying an obstruction enhancement, "it is preferable for a district court to address each element of the alleged perjury in a separate and clear finding." Id. at 95, 113 S. Ct. at 1117. But Mr. Esquenazi never objected to the lack of specificity of the court's findings at sentencing or afterwards, and we have repeatedly outright declined to entertain such a complaint for the first time on appeal. See, e.g., United States v. Smith, 231 F.3d 800, 820 (11th Cir. 2000); United States v. Hubert, 138 F.3d 912, 915 (11th Cir. 1998) (citing United States v. Geffrard, 87 F.3d 448, 453 (11th Cir. 1996)). Beyond that, "[i]n the context of the record of the [sentencing] hearing," sometimes "detailed findings [are] not necessary and would [be] redundant." Hubert, 138 F.3d at 915. At sentencing, the government identified at least four instances in which Mr.

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[21] Mr. Esquenazi also contends the district court improperly commented on his demeanor when determining whether the enhancement was appropriate. But where the district court "must make a particularized assessment of the credibility or demeanor of the defendant, such as when applying the obstruction of justice enhancement for perjury, we accord special deference to the district court's credibility determinations." United States v. Banks, 347 F.3d 1266, 1269 (11th Cir. 2003). There was, therefore, no error in the district court's comments on Mr. Esquenazi's conduct at trial.

Esquenazi gave willful false testimony at trial: (1) when he denied that Teleco invoices were, in fact, invoices (that reflected reduced debt due to Terra's bribe payments); (2) when he denied having ever bribed Mr. Antoine; (3) when he denied sending Mr. Perez to discuss the bribes with Antoine; and (4) when he said the IRS agent who investigated him lied about his confession to bribing Mr. Duperval. Each of these statements, the government pointed out, was flatly contradicted by other witness testimony and documentary evidence. The district court acknowledged each of these instances and concluded, "we're not talking about one. We're not talking about two. We're talking about a bunch" of falsehoods. Taking these statements in context, we are satisfied that the district court's failure to make specific findings of perjury does not warrant reversal for resentencing.

4. Mr. Rodriguez's forfeiture order

Mr. Rodriguez contends his forfeiture order and the amended judgment that reflects the forfeiture amount must be vacated because the district court failed to order forfeiture at sentencing.[22] He cites the general rule that, where the orally imposed sentence conflicts with the written judgment, the court's orally pronounced sentence controls. But Federal Rule of Criminal Procedure 32.2 expressly requires only that the court announce the forfeiture amount "or . . . otherwise ensure that the defendant knows of the forfeiture at sentencing." Fed. R. Crim. P. 32.2(b)(4)(B).

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[22] Because Mr. Rodriguez did not object to the forfeiture order's entry, plain-error review applies. United States v. Aguillard, 217 F.3d 1319, 1320 (11th Cir. 2000).

Mr. Rodriguez's counsel objected to the forfeiture amount at sentencing, "ensuring" that he was on notice of the forfeiture. Further, Rule 32.2 explicitly provides that the court's failure to include the forfeiture order, directly or by reference, in the judgment "may be corrected at any time under Rule 36," which in turn permits the court to correct clerical errors. Id.; Fed. R. Crim. P. 36. This is precisely what the district court did in this case, so there was no error, plain or otherwise.

IV.

After careful consideration, and for all of these reasons, we conclude the convictions and sentences of both Messrs. Esquenazi and Rodriguez are due to be

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 11-15331
District Court Docket No.
1:09-cr-21010-JEM-1

[Filed May 16, 2014]

UNITED STATES OF AMERICA,	)
	)
Plaintiff - Appellee,	)
	)
versus	)
	)
JOEL ESQUENAZI,	)
CARLOS RODRIGUEZ,	)
	)
Defendants - Appellants.	)
	)

Appeals from the United States District Court for the Southern District of Florida

JUDGMENT

It is hereby ordered, adjudged, and decreed that the opinion issued on this date in this appeal is entered as the judgment of this Court.

Entered: May 16, 2014
For the Court: John Ley, Clerk of Court
By: Jeff R. Patch

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case Number - 1:09-21010-CR-MARTINEZ-1
USM Number: 57400-112

[Filed November 3, 2011]

UNITED STATES OF AMERICA	)
	)
v.	)
	)
JOEL ESQUENAZI	)
	)

AMENDED JUDGMENT IN A CRIMINAL CASE

Date of Original Judgment: OCTOBER 25, 2011
(Or Date of Last Amended Judgment)

Reason for Amendment:

☐ Correction of Sentence on Remand (18 U.S.C. 3742(f)(1) and (2))

☐ Reduction of Sentence for Changed Circumstances (Fed. R. Crim. P. 35(b))

☐ Correction of Sentence by Sentencing Court (Fed. R. Crim. P. 35(a))

☐ Correction of Sentence for Clerical Mistake (Fed. R. Crim. P. 36)

☐ Modification of Supervision Conditions (18 U.S.C. §§ 3563(c) or 3583(e))

☐ Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reasons (18 U.S.C. § 3582(c)(1))

☐ Modification of Imposed Term of Imprisonment for Retroactive to the Sentencing Guidelines (18 U.S.C. § 3582(c)(2))

☐ Direct Motion to District Court ☐ 28 U.S.C. § 2255 or ☐ 18 U.S.C. § 3559(c)(7)

☐ Modification of Restitution Order (18 U.S.C. § 3664)

***Government's Motion to Reflect the Order of Forfeiture**

Counsel For Defendant: Michael Rosen
Counsel For The United States: Aurora Fagan, James Koukios, Nicola Mrazck
Court Reporter: Dawn Whitmarsh

The defendant was found guilty on Count(s) 1 through 21 of the Indictment.
The defendant is adjudicated guilty of the following offense(s):

TITLE/ SECTION NUMBER	**NATURE OF OFFENSE**	**OFFENSE ENDED**	**COUNT**
18 U.S.C. § 371	Conspiracy to violate the Foreign Corrupt Practices Act and to commit wire fraud	March 2005	One
15 U.S.C. § 78dd-2	Violations of the Foreign Corrupt Practices Act	November 20, 2003	Two
15 U.S.C. § 78dd-2	Violations of the Foreign Corrupt Practices Act	December 16, 2003	Three
15 U.S.C. § 78dd-2	Violations of the Foreign Corrupt Practices Act	December 30, 2003	Four

15 U.S.C. § 78dd-2	Violations of the Foreign Corrupt Practices Act	January 23, 2004	Five
15 U.S.C. § 78dd-2	Violations of the Foreign Corrupt Practices Act	February 3, 2004	Six
15 U.S.C. § 78dd-2	Violations of the Foreign Corrupt Practices Act	February 19, 2004	Seven
15 U.S.C. § 78dd-2	Violations of the Foreign Corrupt Practices Act	March 25, 2004	Eight
18 U.S.C. § 1956(h)	Conspiracy to commit money laundering	March 2005	Nine
18 U.S.C. § 1956(a)(1)(B)(i).	Money laundering	March 1, 2004	Ten

18 U.S.C. § 1956(a)(1)(B)(i).	Money laundering	June 25, 2004	Eleven
18 U.S.C. § 1956(a)(1)(B)(i).	Money laundering	July 28, 2004	Twelve
18 U.S.C. § 1956(a)(1)(B)(i).	Money laundering	July 29, 2004	Thirteen
18 U.S.C. § 1956(a)(1)(B)(i).	Money laundering	August 6, 2004	Fourteen
18 U.S.C. § 1956(a)(1)(B)(i).	Money laundering	August 27, 2004	Fifteen
18 U.S.C. § 1956(a)(1)(B)(i).	Money laundering	August 27, 2004	Sixteen
18 U.S.C. § 1956(a)(1)(B)(i).	Money laundering	September 20, 2004	Seventeen
18 U.S.C. § 1956(a)(1)(B)(i).	Money laundering	September 20, 2004	Eighteen
18 U.S.C. § 1956(a)(1)(B)(i).	Money laundering	January 6, 2005	Nineteen

18 U.S.C. § 1956(a)(1)(B)(i).	Money laundering	January 6, 2005	Twenty
18 U.S.C. § 1956(a)(1)(B)(i).	Money laundering	March 29, 2005	Twenty One

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and the United States attorney of any material change in economic circumstances.

Date of Imposition of Sentence:
October 25, 2011

s/ Jose E. Martinez
JOSE E. MARTINEZ
United States District Judge

November 3, 2011

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **180 months**. The term consists of terms of 60 months as to Counts 1 through 8, to be served concurrently to each other and 120 months as to Counts 9 through 21, to be served concurrently to each other and **consecutively** to the term imposed as to Counts 1 through 8.

The Court makes the following recommendations to the Bureau of Prisons:

> This defendant shall be designated to a facility as close to South Florida as possible, consistent with defendants background and the offense in which the defendant is convicted of.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____

UNITED STATES MARSHAL

By: _____

Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **3 years**, as to Counts 1 through 21, all such terms to run concurrently.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

If this judgment imposes a fine or a restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer **at least ten (10) days prior** to any change in residence or employment;
7. The defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
11. The defendant shall notify the probation officer within **seventy-two (72) hours** of being arrested or questioned by a law enforcement officer;
12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall also comply with the following additional conditions of supervised release:

Financial Disclosure Requirement - The defendant shall provide complete access to financial information, including disclosure of all business and personal finances, to the U.S. Probation Officer.

No New Debt Restriction - The defendant shall not apply for, solicit or incur any further debt, included but not limited to loans, lines of credit or credit card charges, either as a principal or cosigner, as an

individual or through any corporate entity, without first obtaining permission from the United States Probation Officer.

Permissible Search - The defendant shall submit to a search of his/her person or property conducted in a reasonable manner and at a reasonable time by the U.S. Probation Officer.

Related Concern Restriction - The defendant shall not own, operate, act as a consultant, be employed in, or participate in any manner, in any related concern during the period of supervision.

Self-Employment Restriction - The defendant shall obtain prior written approval from the Court before entering into any self-employment.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on the Schedule of Payments sheet.

Total Assessment	**Total Fine**	**Total Restitution**
$2,100.	**$**	**$2,200,000**

Restitution with Imprisonment -
It is further ordered that the defendant shall pay restitution in the amount of $**2,200,000**. This restitution is owed jointly and severally among the co-defendants and with **Juan Diaz in Docket No. 09-20346-CR-Martinez**.

During the period of incarceration, payment shall be made as follows: (1) if the defendant earns wages in a Federal Prison Industries (UNICOR) job, then the defendant must pay 50% of wages earned toward the financial obligations imposed by this Judgment in a Criminal Case; (2) if the defendant does not work in a UNICOR job, then the defendant must pay $25.00 per quarter toward the financial obligations imposed in this order.

Upon release of incarceration, the defendant shall pay restitution at the rate of 10% of monthly gross earnings, until such time as the Court may alter that payment schedule in the interests of justice. The U.S. Bureau of Prisons, U.S. Probation Office and U.S. Attorney's Office shall monitor the payment of restitution and report to the Court any material change in the defendant's ability to pay. These payments do not preclude the government from using any other anticipated or unexpected financial gains, assets or income of the defendant to satisfy the restitution obligations. The restitution shall be made payable to Clerk, United States Courts, and forwarded to:

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
400 N. MIAMI AVENUE, RM 8N09
MIAMI, FL 33128

The restitution will be forwarded by the Clerk of the Court to the victims on the attached list.

The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(I), all nonfederal victims must be paid before the United States is paid.

Name of Payee	**Total Amount of Loss**	**Amount of Restitution Ordered**	**Priority Order or Percentage of Payment**
See Victims List	$ Amount of Loss	**$2,200,000**	

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A. Lump sum payment of **$2,100.** Due immediately, balance due

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of

Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

The assessment/fine/restitution is payable to the CLERK, UNITED STATES COURTS and is to be addressed to:

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
400 NORTH MIAMI AVENUE, ROOM 8N09
MIAMI, FLORIDA 33128-7716

The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

Joint and Several

Defendant and Co-Defendant Names and Case Numbers, Total Amount, Joint and Several Amount, and corresponding payee.

Antonio Perez	09-20347-CR-MARTINEZ	$2,200,000.
Jean Fourcand	10-20062-CR-MARTINEZ	$2,200,000.
Robert Antoine	09-21010-CR-MARTINEZ	$2,200,000.

The defendant's right, title and interest to the property identified in the order of forfeiture, which has

been entered by the Court and is incorporated by reference herein, is hereby forfeited. SEE (DE 623).

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case Number - 1:09-21010-CR-MARTINEZ-2
USM Number: 82805-004

[Filed November 3, 2011]

UNITED STATES OF AMERICA	)
	)
v.	)
	)
CARLOS RODRIGUEZ	)
	)

AMENDED JUDGMENT IN A CRIMINAL CASE

Date of Original Judgment: OCTOBER 25, 2011
(Or Date of Last Amended Judgment)

Reason for Amendment:

☐ Correction of Sentence on Remand (18 U.S.C. 3742(f)(1) and (2))

☐ Reduction of Sentence for Changed Circumstances (Fed. R. Crim. P. 35(b))

☐ Correction of Sentence by Sentencing Court (Fed. R. Crim. P. 35(a))

☐ Correction of Sentence for Clerical Mistake (Fed. R. Crim. P. 36)

☐ Modification of Supervision Conditions (18 U.S.C. §§ 3563(c) or 3583(e))

☐ Modification of Imposed Term of imprisonment for Extraordinary and Compelling Reasons (18 U.S.C. § 3582(c)(1))

☐ Modification of Imposed Term of Imprisonment for Retroactive to the Sentencing Guidelines (18 U.S.C. § 3582(c)(2))

☐ Direct Motion to District Court ☐ 28 U.S.C. § 2255 or ☐ 18 U.S.C. § 3559(c)(7)

☐ Modification of Restitution Order (18 U.S.C. § 3664)

*****Correction of Sentence per Government's Motion, and Government's Motion to Reflect the Order of Forfeiture**

Counsel For Defendant: Arturo Hernandez
Counsel For The United States: Aurora Fagan, James Koukios, Nicola Mrazck
Court Reporter: Dawn Whitmarsh

The defendant was found guilty on Count(s) 1 through 21 of the Indictment.
The defendant is adjudicated guilty of the following offense(s):

TITLE/ SECTION NUMBER	**NATURE OF OFFENSE**	**OFFENSE ENDED**	**COUNT**
18 U.S.C. § 371	Conspiracy to violate the Foreign Corrupt Practices Act and to commit wire fraud	March 2005	One
15 U.S.C. § 78dd-2	Violations of the Foreign Corrupt Practices Act	November 20, 2003	Two
15 U.S.C. § 78dd-2	Violations of the Foreign Corrupt Practices Act	December 16, 2003	Three
15 U.S.C. § 78dd-2	Violations of the Foreign Corrupt Practices Act	December 30, 2003	Four

15 U.S.C. § 78dd-2	Violations of the Foreign Corrupt Practices Act	January 23, 2004	Five
15 U.S.C. § 78dd-2	Violations of the Foreign Corrupt Practices Act	February 3, 2004	Six
15 U.S.C. § 78dd-2	Violations of the Foreign Corrupt Practices Act	February 19, 2004	Seven
15 U.S.C. § 78dd-2	Violations of the Foreign Corrupt Practices Act	March 25, 2004	Eight
18 U.S.C. § 1956(h)	Conspiracy to commit money laundering	March 2005	Nine
18 U.S.C. § 1956(a)(1)(B)(i).	Money laundering	March 1, 2004	Ten

18 U.S.C. § 1956(a)(1)(B)(i).	Money laundering	June 25, 2004	Eleven
18 U.S.C. § 1956(a)(1)(B)(i).	Money laundering	July 28, 2004	Twelve
18 U.S.C. § 1956(a)(1)(B)(i).	Money laundering	July 29, 2004	Thirteen
18 U.S.C. § 1956(a)(1)(B)(i).	Money laundering	August 6, 2004	Fourteen
18 U.S.C. § 1956(a)(1)(B)(i).	Money laundering	August 27, 2004	Fifteen
18 U.S.C. § 1956(a)(1)(B)(i).	Money laundering	August 27, 2004	Sixteen
18 U.S.C. § 1956(a)(1)(B)(i).	Money laundering	September 20, 2004	Seventeen
18 U.S.C. § 1956(a)(1)(B)(i).	Money laundering	September 20, 2004	Eighteen
18 U.S.C. § 1956(a)(1)(B)(i).	Money laundering	January 6, 2005	Nineteen

18 U.S.C. § 1956(a)(1)(B)(i).	Money laundering	January 6, 2005	Twenty
18 U.S.C. § 1956(a)(1)(B)(i).	Money laundering	March 29, 2005	Twenty One

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and the United States attorney of any material change in economic circumstances.

Date of Imposition of Sentence:
October 25, 2011

s/ Jose E. Martinez
JOSE E. MARTINEZ
United States District Judge

November 3, 2011

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **84 months**. The term consists of terms of 60 months as to Counts 1 through 8, to be served concurrently to each other, and 24 months as to Counts 9 through 21, to be served concurrently to each other, and **consecutively** to the term imposed as to Counts 1 through 8.

The Court makes the following recommendations to the Bureau of Prisons:

> This defendant shall be designated to a Prison Camp setting in South Florida, consistent with defendants background and the offense in which the defendant is convicted of.

The defendant shall surrender for service of sentence at the institution by the Bureau of Prisons or at the Atkins Building, 301 N. Miami Avenue, 2nd Floor on or **before 2:00 P.M. on November 30, 2011.**

RETURN

I have executed this judgment as follows:

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____

UNITED STATES MARSHAL

By: _____
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **3 years**. This term consists of 3 years as to each Counts 1 through 21, all such terms to run concurrently.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

If this judgment imposes a fine or a restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer **at least ten (10) days prior** to any change in residence or employment;
7. The defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9. The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
11. The defendant shall notify the probation officer within **seventy-two (72) hours** of being arrested or questioned by a law enforcement officer;
12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall also comply with the following additional conditions of supervised release:

Surrendering to Immigration for Removal After Imprisonment - At the completion of the defendant's term of imprisonment, the defendant shall be surrendered to the custody of the U.S. Immigration and

Customs Enforcement for removal proceedings consistent with the Immigration and Nationality Act. If removed, the defendant shall not reenter the United States without the prior written permission of the Undersecretary for Border and Transportation Security. The term of supervised release shall be non-reporting while the defendant is residing outside the United States. If the defendant reenters the United States within the term of supervised release, the defendant is to report to the nearest U.S. Probation Office within 72 hours of the defendant's arrival.

Financial Disclosure Requirement - The defendant shall provide complete access to financial information, including disclosure of all business and personal finances, to the U.S. Probation Officer.

No New Debt Restriction - The defendant shall not apply for, solicit or incur any further debt, included but not limited to loans, lines of credit or credit card charges, either as a principal or cosigner, as an individual or through any corporate entity, without first obtaining permission from the United States Probation Officer.

Employment Requirement - The defendant shall maintain full-time, legitimate employment and not be unemployed for a term of more than 30 days unless excused for schooling, training or other acceptable reasons. Further, the defendant shall provide documentation including, but not limited to pay stubs, contractual agreements, W-2 Wage and Earnings Statements, and other documentation requested by the U.S. Probation Officer.

Employment Solicitation Restriction - The defendant shall not be engaged in any business that offers securities, investments, or business opportunities to the public. The defendant is further prohibited from engaging in telemarketing, direct mail, or national advertising campaigns for business purposes without the permission of the Court.

Self-Employment Restriction - The defendant shall obtain prior written approval from the Court before entering into any self-employment.

Related Concern Restriction - The defendant shall not own, operate, act as a consultant, be employed in, or participate in any manner, in any related concern during the period of supervision.

Permissible Search - The defendant shall submit to a search of his/her person or property conducted in a reasonable manner and at a reasonable time by the U.S. Probation Officer.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on the Schedule of Payments sheet.

Total Assessment	**Total Fine**	**Total Restitution**
$2,100.	**$**	**$2,200,000.**

Restitution with Imprisonment -
It is further ordered that the defendant shall pay

restitution in the amount of $**2,200,000**. This restitution is owed jointly and severally among the co-defendants and with **Juan Diaz in Docket No. 09-20346-CR-Martinez**.

During the period of incarceration, payment shall be made as follows: (1) if the defendant earns wages in a Federal Prison Industries (UNICOR) job, then the defendant must pay 50% of wages earned toward the financial obligations imposed by this Judgment in a Criminal Case; (2) if the defendant does not work in a UNICOR job, then the defendant must pay $25.00 per quarter toward the financial obligations imposed in this order.

Upon release of incarceration, the defendant shall pay restitution at the rate of 10% of monthly gross earnings, until such time as the Court may alter that payment schedule in the interests of justice. The U.S. Bureau of Prisons, U.S. Probation Office and U.S. Attorney's Office shall monitor the payment of restitution and report to the Court any material change in the defendant's ability to pay. These payments do not preclude the government from using any other anticipated or unexpected financial gains, assets or income of the defendant to satisfy the restitution obligations. The restitution shall be made payable to Clerk, United States Courts, and forwarded to:

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
400 N. MIAMI AVENUE, RM 8N09
MIAMI, FL 33128

The restitution will be forwarded by the Clerk of the Court to the victim on the attached list.

The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(I), all nonfederal victims must be paid before the United States is paid.

Name of Payee	**Total Amount of Loss**	**Amount of Restitution Ordered**	**Priority Order or Percentage of Payment**
See Victims List	$ Amount of Loss	**$2,200,000**	

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A. Lump sum payment of **$2,100.** Due immediately, balance due

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of

criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

The assessment/fine/restitution is payable to the CLERK, UNITED STATES COURTS and is to be addressed to:

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
400 NORTH MIAMI AVENUE, ROOM 8N09
MIAMI, FLORIDA 33128-7716

The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

Joint and Several

Defendant and Co-Defendant Names and Case Numbers, Total Amount, Joint and Several Amount, and corresponding payee.

Antonio Perez	09-20347-CR-MARTINEZ	$2,200,000.
Jean Fourcand	10-20062-CR-MARTINEZ	$2,200,000.
Robert Antoine	09-21010-CR-MARTINEZ	$2,200,000.

The defendant's right, title and interest to the property identified in the order of forfeiture, which has been entered by the Court and is incorporated by reference herein, is hereby forfeited. SEE (DE 623).

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA MIAMI DIVISION

Case Number: 09-21010-CR-MARTINEZ

[Filed October 27, 2011]

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOEL ESQUENAZI, et al.,

Defendants.

ORDER

THIS CAUSE came before the Court upon Defendant Carlos Rodriguez's Motion in open court relating to unaddressed arguments in his motion for judgment of acquittal or new trial. These arguments, however, were not made in Defendant Rodriguez's motions but were raised in his reply brief filed on September 28, 2011 (D.E. No. 580). His reply brief raised new issues not in his original post-trial motions. These arguments were denied in footnote 1 of this Court's Order Denying Defendants' Motion for Judgment of Acquittal or New Trial (D.E. No. 609). See

United States v. Custodio, 141 F.3d 965, 966 (10th Cir. 1998); *United States v. Bramlett*, 116 F.3d 1403, 1405-06 (11th Cir. 1997).

DONE AND ORDERED in Chambers at Miami, Florida, this 27 day of October, 2011.

s/ Jose E. Martinez
JOSE E. MARTINEZ
UNITED STATES DISTRICT JUDGE

Copies provided to:
Magistrate Judge McAliley
All Counsel of Record

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case Number - 1:09-21010-CR-MARTINEZ-1
USM Number: 57400-112

[Filed October 26, 2011]

UNITED STATES OF AMERICA	)
	)
v.	)
	)
JOEL ESQUENAZI	)
	)

JUDGMENT IN A CRIMINAL CASE

Counsel For Defendant: Michael Rosen
Counsel For The United States: Aurora Fagan, James Koukios, Nicola Mrazck
Court Reporter: Dawn Whitmarsh

The defendant was found guilty on Count(s) 1 through 21 of the Indictment.
The defendant is adjudicated guilty of the following offense(s):

TITLE/ SECTION NUMBER	**NATURE OF OFFENSE**	**OFFENSE ENDED**	**COUNT**
18 U.S.C. § 371	Conspiracy to violate the Foreign Corrupt Practices Act and to commit wire fraud	March 2005	One
15 U.S.C. § 78dd-2	Violations of the Foreign Corrupt Practices Act	November 20, 2003	Two
15 U.S.C. § 78dd-2	Violations of the Foreign Corrupt Practices Act	December 16, 2003	Three
15 U.S.C. § 78dd-2	Violations of the Foreign Corrupt Practices Act	December 30, 2003	Four

15 U.S.C. § 78dd-2	Violations of the Foreign Corrupt Practices Act	January 23, 2004	Five
15 U.S.C. § 78dd-2	Violations of the Foreign Corrupt Practices Act	February 3, 2004	Six
15 U.S.C. § 78dd-2	Violations of the Foreign Corrupt Practices Act	February 19, 2004	Seven
15 U.S.C. § 78dd-2	Violations of the Foreign Corrupt Practices Act	March 25, 2004	Eight
18 U.S.C. § 1956(h)	Conspiracy to commit money laundering	March 2005	Nine
18 U.S.C. § 1956(a)(1)(B)(i).	Money laundering	March 1, 2004	Ten

18 U.S.C. § 1956(a)(1)(B)(i).	Money laundering	June 25, 2004	Eleven
18 U.S.C. § 1956(a)(1)(B)(i).	Money laundering	July 28, 2004	Twelve
18 U.S.C. § 1956(a)(1)(B)(i).	Money laundering	July 29, 2004	Thirteen
18 U.S.C. § 1956(a)(1)(B)(i).	Money laundering	August 6, 2004	Fourteen
18 U.S.C. § 1956(a)(1)(B)(i).	Money laundering	August 27, 2004	Fifteen
18 U.S.C. § 1956(a)(1)(B)(i).	Money laundering	August 27, 2004	Sixteen
18 U.S.C. § 1956(a)(1)(B)(i).	Money laundering	September 20, 2004	Seventeen
18 U.S.C. § 1956(a)(1)(B)(i).	Money laundering	September 20, 2004	Eighteen
18 U.S.C. § 1956(a)(1)(B)(i).	Money laundering	January 6, 2005	Nineteen

18 U.S.C. § 1956(a)(1)(B)(i).	Money laundering	January 6, 2005	Twenty
18 U.S.C. § 1956(a)(1)(B)(i).	Money laundering	March 29, 2005	Twenty One

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and the United States attorney of any material change in economic circumstances.

Date of Imposition of Sentence:
October 25, 2011

s/ Jose E. Martinez
JOSE E. MARTINEZ
United States District Judge

October 26, 2011

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **180 months**. The term consists of terms of 60 months as to Counts 1 through

8, to be served concurrently to each other and 120 months as to Counts 9 through 21, to be served concurrently to each other and **consecutively** to the term imposed as to Counts 1 through 8.

The Court makes the following recommendations to the Bureau of Prisons:

> This defendant shall be designated to a facility as close to South Florida as possible, consistent with defendants background and the offense in which the defendant is convicted of.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By: _____
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **3 years**, as to Counts 1 through 21, all such terms to run concurrently.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

If this judgment imposes a fine or a restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;

2. The defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer **at least ten (10) days prior** to any change in residence or employment;
7. The defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11. The defendant shall notify the probation officer within **seventy-two (72) hours** of being arrested or questioned by a law enforcement officer;
12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall also comply with the following additional conditions of supervised release:

Financial Disclosure Requirement - The defendant shall provide complete access to financial information, including disclosure of all business and personal finances, to the U.S. Probation Officer.

No New Debt Restriction - The defendant shall not apply for, solicit or incur any further debt, included but not limited to loans, lines of credit or credit card charges, either as a principal or cosigner, as an individual or through any corporate entity, without first obtaining permission from the United States Probation Officer.

Permissible Search - The defendant shall submit to a search of his/her person or property conducted in a

reasonable manner and at a reasonable time by the U.S. Probation Officer.

Related Concern Restriction - The defendant shall not own, operate, act as a consultant, be employed in, or participate in any manner, in any related concern during the period of supervision.

Self-Employment Restriction - The defendant shall obtain prior written approval from the Court before entering into any self-employment.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on the Schedule of Payments sheet.

Total Assessment	**Total Fine**	**Total Restitution**
$2,100.	**$**	**$2,200,000**

Restitution with Imprisonment -
It is further ordered that the defendant shall pay restitution in the amount of $**2,200,000**. This restitution is owed jointly and severally among the co-defendants and with **Juan Diaz in Docket No. 09-20346-CR-Martinez**.

During the period of incarceration, payment shall be made as follows: (1) if the defendant earns wages in a Federal Prison Industries (UNICOR) job, then the defendant must pay 50% of wages earned toward the financial obligations imposed by this Judgment in a

Criminal Case; (2) if the defendant does not work in a UNICOR job, then the defendant must pay $25.00 per quarter toward the financial obligations imposed in this order.

Upon release of incarceration, the defendant shall pay restitution at the rate of 10% of monthly gross earnings, until such time as the Court may alter that payment schedule in the interests of justice. The U.S. Bureau of Prisons, U.S. Probation Office and U.S. Attorney's Office shall monitor the payment of restitution and report to the Court any material change in the defendant's ability to pay. These payments do not preclude the government from using any other anticipated or unexpected financial gains, assets or income of the defendant to satisfy the restitution obligations. The restitution shall be made payable to Clerk, United States Courts, and forwarded to:

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
400 N. MIAMI AVENUE, RM 8N09
MIAMI, FL 33128

The restitution will be forwarded by the Clerk of the Court to the victims on the attached list.

The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(I), all nonfederal victims must be paid before the United States is paid.

Name of Payee	**Total Amount of Loss**	**Amount of Restitution Ordered**	**Priority Order or Percentage of Payment**
See Victims List	$ Amount of Loss	**$2,200,000**	

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A. Lump sum payment of **$2,100.** Due immediately, balance due

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

The assessment/fine/restitution is payable to the CLERK, UNITED STATES COURTS and is to be addressed to:

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
400 NORTH MIAMI AVENUE, ROOM 8N09
MIAMI, FLORIDA 33128-7716

The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

Joint and Several

Defendant and Co-Defendant Names and Case Numbers, Total Amount, Joint and Several Amount, and corresponding payee.

Antonio Perez	09-20347-CR-MARTINEZ	$2,200,000.
Jean Fourcand	10-20062-CR-MARTINEZ	$2,200,000.
Robert Antoine	09-21010-CR-MARTINEZ	$2,200,000.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case Number - 1:09-21010-CR-MARTINEZ-2
USM Number: 82805-004

[Filed October 26, 2011]

UNITED STATES OF AMERICA	)
	)
v.	)
	)
CARLOS RODRIGUEZ	)
	)

JUDGMENT IN A CRIMINAL CASE

Counsel For Defendant: Arturo Hernandez
Counsel For The United States: Aurora Fagan, James Koukios, Nicola Mrazck
Court Reporter: Dawn Whitmarsh

The defendant was found guilty on Count(s) 1 through 21 of the Indictment.
The defendant is adjudicated guilty of the following offense(s):

TITLE/ SECTION NUMBER	**NATURE OF OFFENSE**	**OFFENSE ENDED**	**COUNT**
18 U.S.C. § 371	Conspiracy to violate the Foreign Corrupt Practices Act and to commit wire fraud	March 2005	One
15 U.S.C. § 78dd-2	Violations of the Foreign Corrupt Practices Act	November 20, 2003	Two
15 U.S.C. § 78dd-2	Violations of the Foreign Corrupt Practices Act	December 16, 2003	Three
15 U.S.C. § 78dd-2	Violations of the Foreign Corrupt Practices Act	December 30, 2003	Four

15 U.S.C. § 78dd-2	Violations of the Foreign Corrupt Practices Act	January 23, 2004	Five
15 U.S.C. § 78dd-2	Violations of the Foreign Corrupt Practices Act	February 3, 2004	Six
15 U.S.C. § 78dd-2	Violations of the Foreign Corrupt Practices Act	February 19, 2004	Seven
15 U.S.C. § 78dd-2	Violations of the Foreign Corrupt Practices Act	March 25, 2004	Eight
18 U.S.C. § 1956(h)	Conspiracy to commit money laundering	March 2005	Nine
18 U.S.C. § 1956(a)(1)(B)(i).	Money laundering	March 1, 2004	Ten

18 U.S.C. § 1956(a)(1)(B)(i).	Money laundering	June 25, 2004	Eleven
18 U.S.C. § 1956(a)(1)(B)(i).	Money laundering	July 28, 2004	Twelve
18 U.S.C. § 1956(a)(1)(B)(i).	Money laundering	July 29, 2004	Thirteen
18 U.S.C. § 1956(a)(1)(B)(i).	Money laundering	August 6, 2004	Fourteen
18 U.S.C. § 1956(a)(1)(B)(i).	Money laundering	August 27, 2004	Fifteen
18 U.S.C. § 1956(a)(1)(B)(i).	Money laundering	August 27, 2004	Sixteen
18 U.S.C. § 1956(a)(1)(B)(i).	Money laundering	September 20, 2004	Seventeen
18 U.S.C. § 1956(a)(1)(B)(i).	Money laundering	September 20, 2004	Eighteen
18 U.S.C. § 1956(a)(1)(B)(i).	Money laundering	January 6, 2005	Nineteen

18 U.S.C. § 1956(a)(1)(B)(i).	Money laundering	January 6, 2005	Twenty
18 U.S.C. § 1956(a)(1)(B)(i).	Money laundering	March 29, 2005	Twenty One

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and the United States attorney of any material change in the defendant's economic circumstances.

Date of Imposition of Sentence:
October 25, 2011

s/ Jose E. Martinez
JOSE E. MARTINEZ
United States District Judge

October 26, 2011

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be

imprisoned for a term of **84 months**. The term consists of terms of 60 months as to each of Counts 1 through 8 and terms of 24 months as to each of Counts 9 through 21, all to be served concurrently.

The Court makes the following recommendations to the Bureau of Prisons:

> This defendant shall be designated to a Prison Camp setting in South Florida, consistent with defendants background and the offense in which the defendant is convicted of.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons or at the Atkins Building, 301 N. Miami Avenue, 2nd Floor on or **before 2:00 P.M. on November 30, 2011.**

RETURN

I have executed this judgment as follows:

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By: _____
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **3 years**. This

term consists of 3 years as to each of Counts 1 through 21, all such terms to run concurrently.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

If this judgment imposes a fine or a restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer **at least ten (10) days prior** to any change in residence or employment;
7. The defendant shall refrain from the excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
11. The defendant shall notify the probation officer within **seventy-two (72) hours** of being arrested or questioned by a law enforcement officer;
12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall also comply with the following additional conditions of supervised release:

Surrendering to Immigration for Removal After Imprisonment - At the completion of the defendant's term of imprisonment, the defendant shall be surrendered to the custody of the U.S. Immigration and Customs Enforcement for removal proceedings consistent with the Immigration and Nationality Act. If removed, the defendant shall not reenter the United States without the prior written permission of the Undersecretary for Border and Transportation

Security. The term of supervised release shall be non-reporting while the defendant is residing outside the United States. If the defendant reenters the United States within the term of supervised release, the defendant is to report to the nearest U.S. Probation Office within 72 hours of the defendant's arrival.

Financial Disclosure Requirement - The defendant shall provide complete access to financial information, including disclosure of all business and personal finances, to the U.S. Probation Officer.

No New Debt Restriction - The defendant shall not apply for, solicit or incur any further debt, included but not limited to loans, lines of credit or credit card charges, either as a principal or cosigner, as an individual or through any corporate entity, without first obtaining permission from the United States Probation Officer.

Employment Requirement - The defendant shall maintain full-time, legitimate employment and not be unemployed for a term of more than 30 days unless excused for schooling, training or other acceptable reasons. Further, the defendant shall provide documentation including, but not limited to pay stubs, contractual agreements, W-2 Wage and Earnings Statements, and other documentation requested by the U.S. Probation Officer.

Employment Solicitation Restriction - The defendant shall not be engaged in any business that offers securities, investments, or business opportunities to the public. The defendant is further prohibited from engaging in telemarketing, direct mail, or national

advertising campaigns for business purposes without the permission of the Court.

Self-Employment Restriction - The defendant shall obtain prior written approval from the Court before entering into any self-employment.

Related Concern Restriction - The defendant shall not own, operate, act as a consultant, be employed in, or participate in any manner, in any related concern during the period of supervision.

Permissible Search - The defendant shall submit to a search of his/her person or property conducted in a reasonable manner and at a reasonable time by the U.S. Probation Officer.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on the Schedule of Payments sheet.

Total Assessment	**Total Fine**	**Total Restitution**
$2,100.	**$**	**$2,200,000.**

Restitution with Imprisonment -
It is further ordered that the defendant shall pay restitution in the amount of $**2,200,000**. This restitution is owed jointly and severally among the co-defendants and with **Juan Diaz in Docket No. 09-20346-CR-Martinez**.

During the period of incarceration, payment shall be made as follows: (1) if the defendant earns wages in a Federal Prison Industries (UNICOR) job, then the defendant must pay 50% of wages earned toward the financial obligations imposed by this Judgment in a Criminal Case; (2) if the defendant does not work in a UNICOR job, then the defendant must pay $25.00 per quarter toward the financial obligations imposed in this order.

Upon release of incarceration, the defendant shall pay restitution at the rate of 10% of monthly gross earnings, until such time as the Court may alter that payment schedule in the interests of justice. The U.S. Bureau of Prisons, U.S. Probation Office and U.S. Attorney's Office shall monitor the payment of restitution and report to the Court any material change in the defendant's ability to pay. These payments do not preclude the government from using any other anticipated or unexpected financial gains, assets or income of the defendant to satisfy the restitution obligations. The restitution shall be made payable to Clerk, United States Courts, and forwarded to:

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
400 N. MIAMI AVENUE, RM 8N09
MIAMI, FL 33128

The restitution will be forwarded by the Clerk of the Court to the victim on the attached list.

The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(I), all nonfederal victims must be paid before the United States is paid.

Name of Payee	**Total Amount of Loss**	**Amount of Restitution Ordered**	**Priority Order or Percentage of Payment**
See Victims List	$ Amount of Loss	**$2,200,000.**	

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A. Lump sum payment of **$2,100.** Due immediately, balance due

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of

Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

The assessment/fine/restitution is payable to the CLERK, UNITED STATES COURTS and is to be addressed to:

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
400 NORTH MIAMI AVENUE, ROOM 8N09
MIAMI, FLORIDA 33128-7716

The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

Joint and Several

Defendant and Co-Defendant Names and Case Numbers, Total Amount, Joint and Several Amount, and corresponding payee.

Antonio Perez	09-20347-CR-MARTINEZ	$2,200,000.
Jean Fourcand	10-20062-CR-MARTINEZ	$2,200,000.
Robert Antoine	09-21010-CR-MARTINEZ	$2,200,000.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest,

(6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

APPENDIX G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
SENTENCING MINUTES
FOR HON. JOSE E. MARTINEZ

Case No: 09-21010-CR-MARTINEZ

[Filed October 25, 2011]

Deft: Joel Esquenazi

Clerk: Wanda Holston

Reporter: Dawn Whitmarsh

USA: Aurora Fagan, James Koukios
Nicola Mrazck

Interpreter:

Case No: 09-21010-CR-MARTINEZ

Date: October 25, 2011

USPO: Wendy Squitero

Counsel: Michael Rosen

JUDGEMENT AND RE-SENTENCE

Imprisonment:	Months	Count
	180	

The term consists of terms of 60 months as to Counts 1 through 8, to be served concurrently to each other and 120 months as to Counts 9 through 21, to be served

concurrently to each other and **consecutively** to the term imposed as to Counts 1 through 8.

Supervised Release/Probation

Years	Months	Count
3		1-21 all concur

Court grants motion for downward departure and/or variance (DE#620)
Special Conditions: Financial Disclosure Requirement; No New Debt Restriction; Self-Employment Restriction; Related Concern Restriction; Permissible Search.
Court advised defendant of right to appeal

Assessment: **$2,100** /Fine**: /Restitution: $2,200,000 jointly and severally among co-defendants and w/Juan Diaz in Docket No. 09-20346-CR-Martinez**

CUSTODY

____ Remanded to the Custody of the U.S. Marshal Service.

____ Release on Bond pending appeal.

____ Voluntary Surrender to designated facility or the U.S. Marshal Service in Miami, 301 N. Miami Ave 2nd Floor on

Commitment Recommendation: This defendant shall be designated to a facility as close to South Florida as possible, consistent with defendants background and the offense in which the defendant is convicted of.

APPENDIX H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 09-21010-CR-MARTINEZ

[Filed October 24, 2011]

UNITED STATES OF AMERICA,	)
	)
vs.	)
	)
JOEL ESQUENAZI, and	)
CARLOS RODRIGUEZ.	)
	)
Defendants.	)
	)

ORDER OF FORFEITURE

WHEREAS, on August 8, 2011, JOEL ESQUENAZI and CARLOS RODRIGUEZ (hereinafter, the "Defendants") were found guilty of all of the violations alleged in Counts 1 through 21 of the Indictment returned on December 8, 2009; and

WHEREAS, pursuant to Fed. R. Crim . P. 32.2, the United States moved for entry of a forfeiture money judgment against the Defendants, jointly and severally, in an amount equal in aggregate value to the property, real or personal, which constitutes or is derived from proceeds traceable to the violations alleged in Counts 1 through 8 of the Indictment and the property, real or personal, involved in the violations alleged in Counts 9

through 21 of the Indictment, or property traceable to such property.

WHEREAS, the Court finds that $2,200,000 in United States currency is an amount of money equal in value to the property, real or personal, which constitutes or is derived from proceeds traceable to the violations alleged in Counts 1 through 8 of the Indictment, of which the Defendants were convicted; and

WHEREAS, $893,818.50 in United States currency is an amount of money equal in value to the property, real or personal, involved in the violations alleged in Counts 9 through 21 of the Indictment, or property traceable to such property, of which the Defendants were convicted;

WHEREAS, Rule 32.2(c)(1) of the Federal Rules of Criminal Procedure provides that "no ancillary proceeding is required to the extent that forfeiture consists of a money judgment,"

NOW THEREFOR, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that JOEL ESQUENAZI and CARLOS RODRIGUEZ, shall pay, jointly and severally, $3,093,818.50 in United States currency to the United States;

IT IS FURTHER ORDERED that the United States District Court shall retain jurisdiction in this matter for the purpose of enforcing this Order of Forfeiture; and

IT IS FURTHER ORDERED that pursuant to Fed. R. Crim. P. 32.2(b)(3), this Order of Forfeiture shall become final as to the Defendants at the time of

their respective sentencing, shall be announced as part of each of the Defendants' respective sentence and shall be included in the Judgment in this cause; and

IT IS FURTHER ORDERED that the United States may, at any time, move pursuant to Fed. R. Crim. P. 32.2(e) to amend this Order of Forfeiture so as to substitute property having a value not to exceed the sum of $3,093,818.50 in United States currency in satisfaction of the forfeiture money judgment in whole or in part; and

IT IS FURTHER ORDERED that the Clerk of the Court shall forward four certified copies of this Order of Forfeiture to the United States Attorney's Office, Southern District of Florida, Asset Forfeiture Division, 99 N.E. 4th Street, Miami, Florida 33132, Attention Assistant U.S. Attorney Daren Grove.

DONE ORDERED in Miami, Florida on this 24 day of October, 2011.

/s/ Jose E. Martinez
JOSE. E. MARTINEZ
UNITED STATES DISTRICT JUDGE

cc: AUSA Daren Grove (2 certified copies)

APPENDIX I

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA
Miami Division

Case Number: 09-21010-CR-MARTINEZ

[Filed October 14, 2011]

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)
	)
vs.	)
	)
JOEL ESQUENAZI, et al.,	)
	)
Defendants.	)
	)

ORDER DENYING DEFENDANTS' MOTION FOR JUDGMENT OF ACQUITTAL OR NEW TRIAL

THIS CAUSE came before the Court upon Defendant Carlos Rodriguez's Motions for Judgment of Acquittal or New Trial (D.E. Nos. 542, 543). Defendant Joel Esquenazi filed Motions to Adopt Carlos Rodriquez's Motions for Judgment of Acquittal or New

Trial (D.E. Nos. 546, 547)[1] and a Motion to Adopt Rodriguez's Reply to Government's Response to Docket Entry Number 543 (D.E. No. 586), which this Court grants. After careful consideration and for the reasons set forth below, the Court denies Defendants' motions.

I. Background

On December 4, 2009, a federal grand jury returned a 21-count indictment against Joel Esquenazi, Carlos Rodriguez, Robert Antoine, Jean Rene Duperval and Marguerite Grandison (D.E. No. 3). Count 1 charged Esquenazi, Rodriguez, and others with conspiring to violate the Foreign Corrupt Practices Act ("FCPA") and to commit wire fraud, in violation of 18 U.S.C. § 371. Counts 2-8 charged Esquenazi, Rodriguez, and others with substantive FCPA offenses, in violation of 15 U.S.C. § 78dd-2 and 18 U.S.C. § 2. Count 9 charged Esquenazi, Rodriguez, and others with conspiring to commit money laundering, in violation of 18 U.S.C. § 1956(h). Counts 10-21 charged Esquenazi, Rodriguez, and others with substantive money laundering offenses, in violation of 18 U.S.C. §§ 1956 (a)(1)(B)(i) and 18 U.S.C. § 2.

Antoine pleaded guilty (D.E. No. 132), and the trial of Esquenazi and Rodriguez was severed from that of Duperval and Grandison. (D.E. No. 394).

---

[1] Esquenazi moved to adopt docket entry number 542 as it relates to the Motion for New Trial only, excepting the argument regarding severance, and docket entry number 543 in its entirety. *See* (D.E. Nos. 546, 547). This Court will address only those arguments timely made in Rodriguez's Motions. *See United States v. Bramlett*, 116 F.3d 1403, 1405-06 (11th Cir. 1997).

On July 12, 2011, a federal grand jury returned a 28-count superseding indictment against Washington Vasconez Cruz, Amadeus Richers, Cinergy Telecommunications, Inc., Patrick Joseph, Jean Rene Duperval, and Marguerite Grandison. (D.E. No. 419).

Defendants Esquenazi and Rodriguez were convicted by jury on August 4, 2011 on all counts of the indictment, including conspiring to violate the FCPA and to commit wire fraud and for violation of money laundering statutes. (D.E. Nos. 522, 523).

A. Evidence At Trial Regarding Agreements.

As accurately stated by the Government in its Consolidated Response in Opposition to Defendant's Motion for Judgment of Acquittal or New Trial (D.E. No. 561):[2]

> The Government introduced voluminous documentary evidence showing that the defendants entered into a similar agreement with Jean Rene Duperval, one of Antoine's successors as [Telecommunications D'Haiti's ("Teleco")] Director of International Relations. Duperval agreed to reduce [Terra Telecommunication's ("Terra")] rates after Terra agreed to make "consulting" payments to Telecom Consulting Services ("TCS"), a company which was incorporated by Terra's in-house attorney, James Dickey, on behalf of Duperval's sister, Marguerite Grandison, and whose bank

[2] The Court was present at the trial and checked the Government's citations and found them to be accurate.

account was set up by Terra's personal banker. *See, e.g.*, Gov. Exs. 2- 21, 127-137, 198-202, 601. Rodriguez set up recurring wire payments to TCS and authorized the majority of the "consulting" payments, which Grandison distributed to Duperval. *See, e.g.*, Gov. Exs. 2-21, 128, 603.

. . . .

[t]he Government's witnesses confirmed the details of these illegal agreements. Cooperating co-conspirators Robert Antoine, Jean Fourcand, and Juan Diaz testified that Esquenazi agreed with Antoine on the kickback scheme described above and that Fourcand and Diaz, along with other Antoine associates, agreed to launder the kickback payments by receiving checks and calling cards from Terra on Antoine's behalf. *See, e.g.*, Tr. 7/26/2011 AM pp. 34-35 (Antoine explaining his discussions with Esquenazi regarding the kickback scheme); Tr. 7/19/2011 AM pp. 69-70 (Diaz explaining that he agreed to launder the kickback payments from Terra to Antoine). Antoine explained that, per Esquenazi's instructions, he met with Antonio "Tony" Perez, Terra's controller, over lunch to work out the details of how the kickbacks would be paid. Tr. 7/26/2011 AM p. 36. After Terra fired Perez in January 2002, Antoine discussed the kickback arrangements with Esquenazi. Tr. 7/26/2011 PM p. 89.

Tony Perez corroborated Antoine's testimony and confirmed that Rodriguez and Dickey also agreed to pay kickbacks to Antoine in exchange

for reductions in the amounts Terra owed Haiti Teleco and for not disconnecting Terra's service despite non-payment. Perez explained that, around October 2001, Esquenazi instructed him to ask Antoine to agree to amortize Terra's debt to Haiti Teleco and, if that did not work, "to offer Antoine a side payment." Tr. 7/22/2011 AM pp. 74-76. During a lunch meeting, Antoine rejected Perez's amortization request but agreed to accept "side payments" laundered through third-party intermediaries. *Id.* Perez testified that he reported back on this lunch meeting to Esquenazi, Rodriguez, and Dickey:

> [A]fter that meeting, I mean, you know, I felt good. I felt like I made a huge contribution to the company, so I went back to my office and I had some stuff to do. And you know, later that afternoon, I ended back in Joel's office and James Dickey and Carlos Rodriguez were there and, you know, basically the news of that deal was shared with them.

Tr. 7/22/2011 AM pp. 79-81. Perez explained that he discussed with Esquenazi, Rodriguez, and Dickey "the fact that Robert Antoine had accepted an arrangement to accept, you know, payments to him in exchange for reducing our bills" and their reactions to his report: "Well, [Esquenazi] was happy, and both James Dickey and Carlos Rodriguez also congratulated me on a job well done." Tr. 7/22/2011 AM pp. 79-81. Perez also explained the advice he received from

Dickey when he later expressed his concern that they had entered into an illegal arrangement:

> James Dickey said, look Tony, you have nothing to worry [about], you're not an officer of the company, you're not an owner of the company, you don't have signatory authority to sign checks, to sign wires, to sign anything, you cannot bind the company contractually with your signature, you have nothing to worry about. This is Joel's and Carlos['s] problem. This is their decision, this is not your decision, don't worry about it.

Tr. 7/22/2011 AM pp. 79-[82].

The testimony of Terra accountant Jose Arroliga corroborated the testimony of the cooperating co-conspirators. For example, Juan Diaz testified that the "Consulting Agreement" he entered into with Terra (Ex. 301) was a sham contract created so that Terra would "have some documentation as to why money was being paid to [his company,] JD Locator." Tr. 7/19/2011 AM pp. [83-85]. Diaz never submitted invoices to justify the payments to him, even though the contract, which was signed by Rodriguez, required him to do so. Tr. 7/19/2011 AM pp. 80-81; Ex. 301 ¶ 7. Arroliga, who was responsible for Accounts Payable at Terra, confirmed that Terra never received any back-up documentation for the payments to JD Locator or any of the other third party "consultants." Tr. 7/20/2011 PM pp. 56-57, 60, 70, 76-77, 79, 82. Arroliga explained that the manner in which payments to

> JD Locator were initiated–by "check request" and without backup documentation–was "unusual" and not "normal." Tr. 7/21/2011 PM pp. 13, 15-17. Moreover, Arroliga testified, Rodriguez authorized the majority of the payments to JD Locator, A&G Distributors, and Telecom Consulting, three of the companies Terra used to launder funds to Teleco officials. *Id.*

(D.E. No. 561 at 2-5).

B. Evidence At Trial Regarding Teleco As A Public Entity.

As accurately stated by the Government in its Consolidated Response in Opposition to Defendant's Motion for Judgment of Acquittal or New Trial (D.E. No. 561), the Government called Gary Lissade to testify regarding Haitian law and public institutions:

> In support of the allegations regarding the FCPA and Haitian bribery law, the Government called Gary Lissade, Haiti's former Minister of Justice and the author of a book on Haiti's public administration, as an expert in Haitian law and Haitian public institutions.[1] Tr. 7/25/2011 PM pp. 34-37. Mr. Lissade explained that Teleco was widely considered to be a Haitian public entity during the relevant time period and that he had classified Teleco as part of the public administration in his 2000 book. *Id.* pp. 60, 61, 95, 97.
>
> FN1: Mr. Lissade explained that he conducted extensive research, including legal research and

interviews, in reaching his conclusions. *See, e.g.*, Tr. 7/25/2011 PM pp. 38, 82-83.

Mr. Lissade explained that Teleco was established as a private institution in 1968 but became a public entity when, around 1971-72, the state-owned National Bank of the Republic of Haiti ("BNRH") acquired 97% of its shares. *Id.* pp. 38, 40, 68. Mr. Lissade conceded that the exact time and circumstances of this acquisition were unclear but explained that the Government's actions and official documents from the time period reflected that the acquisition and assumption of control had occurred. *Id.* pp. 80-81, 96. Mr. Lissade also conceded that, although Teleco began to use the term "S.A.M," rather than "S.A.,"[2] to reflect its partial state-ownership after the acquisition, Teleco never underwent any legal process to change its name. *Id.* pp. 41-42, 96.

FN2: Mr. Lissade noted that S.A. designates a private corporation in Haiti and that the addition of the initial "M." indicates that the corporation is a mixed public/private enterprise.

Mr. Lissade testified that Teleco was 97% owned and 100% controlled by the BNRH's successor, the state-owned Bank of the Republic of Haiti ("BRH"), for many years, including during the time period charged in the indictment. *Id.* pp. 40-41, 49, 60, 95, 96. Teleco was run by a board of directors and a general director, all of whom were appointed by executive order signed by Haiti's President, Prime Minister, and relevant Ministers. *Id.* pp. 42, 44. The people

who worked under these political appointees were considered to be "public agents" working for the "public administration," *id.* pp. 61-62, which Mr. Lissade defined as "the entities that the state use[s] to perform and to give services to the people living in Haiti" and "as an instrument . . . for the state to reach its missions and objectives and goals." *Id.* pp. 36. Teleco was entitled to special treatment under Haitian tax laws, and its revenues were controlled by the BRH. *Id.* pp. 49, 53.

Mr. Lissade further testified that Haiti's bribery laws applied to Teleco officials during the relevant time period. *Id.* pp. 56-57. In 2008, Haiti passed an asset disclosure law, intended to combat public corruption, that required certain employees of Teleco and other public institutions to declare their assets, further confirming Mr. Lissade's opinion that Teleco had been considered a public entity during the relevant time period. *Id.* pp. 58-59, 60, 95.

Mr. Lissade also explained that, in 1996, Haiti passed a modernization law intended to privatize certain state-owned companies, including Teleco, but Teleco did not actually become partially privatized until 2009-2010. *Id.* pp. 54-55.

Mr. Lissade's testimony that Teleco was owned and controlled by the Haitian government was corroborated by numerous witnesses and voluminous documentary evidence. For example:

• Robert Antoine testified that Teleco was a state-owned company and that, when he worked there, he was a government employee whose supervisor, Patrick Joseph, had been appointed by the President of Haiti (Tr. 7/26/2011 AM pp. 11-12, 13, 15);

• Jean Fourcand testified that the President of Haiti appointed his cousin, Patrick Joseph, as General Director of Teleco, the "state owned" "national phone company" of Haiti (Tr. 7/21/2011 PM pp. 31-32);

• Juan Diaz testified that he learned while living in Haiti that Teleco was a "nationalized" company owned by the Haitian government (Tr. 7/19/2011 AM p. 64);

• Antonio Perez testified that Esquenazi, Dickey, and Terra's business partners at HAWAI told him that Haiti Teleco was owned and operated by the Haitian government and that he saw an Aon insurance application submitted by Terra to that effect (Tr. 7/25/2011 AM pp. 70-71); and

• John Marsha, who worked at Aon, testified that Esquenazi, Rodriguez, and Dickey told him that the contract they wanted to insure was with a foreign government and that the type of insurance they requested applied only to government contracts. Tr. 7/27/2011 AM pp.7 -8.

> *See also, e.g.*, Gov. Exs. 91-97, 185-187 (Aon insurance documents); Gov. Exs. 451 T-453T (executive orders appointing Teleco officials).

(D.E. No. 561 at 5-8).

II. Standard of Review

Defendants move for a judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29. Rule 29 permits a guilty verdict to be set aside and judgment of acquittal to be entered if there is insufficient evidence to sustain the verdict. *U.S. v. Williams*, 390 F.3d 1319, 1323 (11th Cir. 2004). The evidence must support that the defendant was guilty beyond a reasonable doubt and must be examined in a light most favorable to the Government. *Id.* "All credibility choices must be made in support of the jury's verdict." *Id.*

Defendants move for a new trial under Federal Rule of Criminal Procedure 33.[3] This rule permits a Court to vacate a judgment and "grant a new trial if the interest of justice so requires." FED. R. CRIM. P. 33. Such motions are "granted only with great caution." *U.S. v. Campa*, 459 F.3d 1121, 1151 (11th Cir. 2006). To grant a Rule 33 motion, "[t]he evidence must preponderate heavily against the verdict, such that it would be a miscarriage of justice to let the verdict stand." *U.S. v. Martinez*, 763 F.2d 1297, 1313 (11th Cir. 1985). These motions are granted only in exceptional cases. *Id.* A new trial based on newly discovered evidence "is

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[3] Esquenazi moved to adopt Rodriguez's Motion for New Trial with the exception of the argument regarding severance. *See* (D.E. No. 546).

warranted only if: (1) the evidence was in fact discovered after trial; (2) the defendant exercised due care to discover the evidence; (3) the evidence was not merely cumulative or impeaching; (4) the evidence was material; and (5) the evidence was of such a nature that a new trial would probably produce a different result." *U.S. v. Thompson*, 422 F.3d 1285, 1295 (11th Cir. 2005).

III. Analysis

A. Evidence to Establish Guilt.[4]

Rodriguez first argues that the "evidence failed to prove Carlos Rodriguez knew of the existence of the conspiracy charged in Count I of the Indictment, that Rodriguez committed a violation of the FCPA as charged in Counts 2 through 8 of the Indictment, or that Carlos Rodriguez knowingly laundered funds derived from the offenses charged in the Indictment as charged in Counts 9 through 21 of the Indictment." *See* (D.E. No. 542 at 1-2).

Rodriguez was the Executive Vice President of Terra and Esquenazi was the President and CEO. Mr. Rodriguez argues that only one witness at trial, Tony Perez, the controller of Terra, claimed that Mr. Rodriguez knew of the existence of an agreement to pay Robert Antoine, the Director of International Relations for Teleco, to receive side payments in exchange for reductions of the invoices owed to Teleco. *Id.* He claims Mr. Perez's testimony was heavily impeached at trial. *Id.*

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[4] Esquenazi did not move to adopt this portion of Rodriguez's motion. *See* (D.E. No. 546).

This Court disagrees. As discussed in Section I(A), above, the Government produced documentary evidence as well as witness confirmation (in addition to the testimony of Tony Perez which was corroborated by documentary evidence and witness testimony) regarding the agreements between Defendants and Teleco executives. Additionally, as accurately stated by the Government in its Consolidated Response in Opposition to Defendant's Motion for Judgment of Acquittal or New Trial (D.E. No. 561), the following was shown by the Government at trial:

> At trial, the Government produced both direct and circumstantial evidence to support the jury's verdict against Rodriguez on all counts. For example, Perez provided direct evidence that Rodriguez knew about and joined the conspiracy charged in Count 1. Perez testified that he specifically told Rodriguez (as well as Esquenazi and Dickey) that Antoine agreed to "accept . . . payments to him in exchange for reducing [Terra's] bills" and that Rodriguez then "congratulated [Perez] on a job well done." Tr. 7/22/2011 AM pp. 79-[82]. Perez further testified that Dickey told him that it was ultimately Rodriguez's and Esquenazi's decision to bribe Antoine. *Id.* Perez's testimony was corroborated by ample documentary evidence. *See, e.g.*, Gov. Exs. 101, 115-116, 119, 148.
>
> Following this conversation, Rodriguez authorized the majority of the payments to the third party intermediaries who were used to launder the bribes paid to Antoine and his successor, Duperval. *See, e.g.*, Tr. 7/21/2011 PM

pp. 16-17 (Arroliga testifying that Rodriguez authorized the majority of the payments). Bank and business records showed that Rodriguez signed 17 checks and authorized nine wire transfers to the third-party intermediaries; requested via check request forms and emails that checks be cut the third-party intermediaries; sent a letter canceling calling card debt owed by one of the third-party intermediaries; and signed the sham JD Locator "Consulting" Agreement, under which hundreds of thousands of dollars in bribe payments to Antoine were laundered. *See, e.g.*, 2-21, 128, 603. The testimony of Terra's accountant, Jose Arroliga, was particularly powerful in establishing that Rodriguez knew about the illicit nature of these payments: Arroliga testified that Rodriguez paid close attention to Terra's finances, decided which vendors to pay, and, by taking the "unusual" step of issuing check requests, instructed Terra's employees that no backup documentation was required to justify these payments. Tr. 7/21/2011 PM pp. 3-4,13, 15-17; Tr. 7/20/2011 PM pp. 41-42, 47-48, 56-57, 60, 70, 76-77, 79, 82. Similarly, Juan Diaz testified that Rodriguez signed the "Consulting" Agreement but never required him to submit any invoices and never asked him about his qualifications to perform the work described in the contract. Tr. 7/19/2011 AM pp. 77-81.

The testimony of Perez and John Marsha and the related Aon insurance documents, showed that Rodriguez knew that Teleco was owned by the Haitian government. Tr. 7/27/2011 AM pp.7-

> 8; Tr. 7/25/2011 AM pp. 70-71; Gov. Exs. 91-97, 185-187.

(D.E. No. 561 at 12, 13).

The evidence at trial was sufficient to support the jury's verdict of guilty beyond a reasonable doubt and also weighed heavily in favor of the jury's verdict. This is not a case in which the interests of justice require that the jury's verdict be set aside. The evidence supports the jury's verdict that Rodriguez was guilty beyond a reasonable doubt.

B. Jury Instructions.

Defendants also argue that the Court erred in instruction the jury.

1. Statute of Limitation Instruction.

Defendants first argue the Court "improperly denied the defense requested instructions regarding the running of the statute of limitations . . . ." *See* (D.E. No. 542 at 4). All counts of the indictment have a five year statute of limitations. 18 U.S.C. § 3282. However, tolling is permitted pursuant to 18 U.S.C. § 3292 when a request is made to a foreign country in order to obtain evidence of the offense contained in that country.

> Upon application of the United States, filed before return of an indictment, indicating that evidence of an offense is in a foreign country, the district court before which a grand jury is impaneled to investigate the offense shall suspend the running of the statute of limitations for the offense if the court finds by a

> preponderance of the evidence that an official request has been made for such evidence and that it reasonably appears, or reasonably appeared at the time the request was made, that such evidence is, or was, in such foreign country.

18 U.S.C. § 3292(a)(1). "[A] period of suspension under this section shall begin on the date on which the official request is made and end on the date on which the foreign court or authority takes final action on the request." 18 U.S.C. § 3292(b). The suspension is limited to three years and cannot exceed six months if final action by the foreign government is taken before the statute of limitations would have otherwise expired. 18 U.S.C. § 3292(c).

This Court permitted tolling pursuant to 18 U.S.C. § 3292 based upon the Office of International Affairs of the United States Department of Justice's official request to an "authority of a foreign country" in the Republic of Haiti on July 29, 2008. Accordingly, all conduct from and after July 31, 2003 would be within the five-year statute of limitations. This includes all counts in the Indictment since all occurred after July 31, 2003.

Defendants filed a motion to dismiss the indictment on statute of limitations grounds (D.E. No. 171) and challenged this Court's Order tolling the statute of limitations. (D.E. No. 204-2). Defendants' motion to dismiss was denied. (D.E. No. 240).

Defendants attempted to introduce a jury instruction relating to the statute of limitations and tolling. However, the validity of tolling orders are decided by judges and not juries and, as such,

Defendants' proposed instruction regarding the statute of limitations was properly rejected. *See United States v. Hudson*, 982 F.2d 160, 163 (5th Cir. 1993) (finding that claim presenting question of law is a question for the court, not question of fact for jury).

This Court properly determined the relevant date for the statute of limitations based on its tolling order and properly instructed the jury regarding same. *See* (D.E. No. 20 at 14). Because all counts occurred within the limitations period, there was no legal basis for providing a statute of limitations instruction as to the remaining substantive counts.

2. FCPA Instrumentality.

Defendants next argue the Court's instruction regarding a state owned enterprise pursuant to the FCPA was incorrect. (D.E. No. 542 at 4). Specifically, "whether the state owned enterprise the Government witnesses claimed existed in this case qualified based upon the charges in the Indictment." *See Id.* This Court instructed the jury that:

> An "instrumentality" of a foreign government is a means or agency through which a function of the foreign government is accomplished. State-owned or state-controlled companies that provide services to the public may meet this definition. To decide whether Telecommunications D'Haiti or Teleco is an instrumentality of the government of Haiti, you may consider factors including but not limited to:
>
> > (1) whether it provides services to the citizens and inhabitants of Haiti;

> (2) whether its key officers and directors are government officials or are appointed by government officials;
>
> (3) the extent of Haiti's ownership of Teleco, including whether the Haitian government owns a majority of Teleco's shares or provides financial support such as subsidies, special tax treatment, loans, or revenue from government-mandated fees;
>
> (4) Teleco's obligations and privileges under Haitian law, including whether Teleco exercises exclusive or controlling power to administer its designated functions; and
>
> (5) whether Teleco is widely perceived and understood to be performing official or governmental functions.
>
> These factors are not exclusive, and no single factor will determine whether Telecommunications D'Haiti or Teleco is an instrumentality of a foreign government. In addition, you do not need to find that all the factors listed above weigh in favor of Teleco being an instrumentality in order to find that Teleco is an instrumentality.

(D.E. No. 520 at 23, 24)

This Court properly instructed the jury through a non-exclusive multi-factor definition that permitted the jury to determine whether Teleco was an instrumentality of a foreign government. *See* (D.E. No. 520 at 23, 24).

3. Deliberate Ignorance.

Defendants, with nothing more, generally allege that "the Court erred in instructing the jury on deliberate ignorance." (D.E. No. 542 at 4). The Court's jury instructions included two references to deliberate ignorance. Within the FCPA instruction, the Court's instruction tracked the language of 15 U.S.C. § 78-dd-2(h)(3)(B) stating that:

> [A] person's state of mind is "knowing" with respect to conduct, a circumstance, or a result if (a) such person is aware that such person is engaging in such conduct, that such circumstance exists, or that such result is substantially certain to occur; or (b) such person has a firm belief that such circumstance exists or that such result is substantially certain to occur. A person is deemed to have such knowledge if the evidence shows that he or she was aware of a high probability of the existence of such circumstance, unless he or she actually believes that such circumstance does not exist.

(D.E. No. 520 at 26).

The Court's jury instruction on general deliberate ignorance was proper and followed Eleventh Circuit Pattern Special Instruction 8 stating that:

> If a Defendant's knowledge of a fact is an essential part of a crime, it's enough that the Defendant was aware of a high probability that the fact existed – unless the Defendant actually believed the fact didn't exist.

> "Deliberate avoidance of positive knowledge" – which is the equivalent of knowledge – occurs, for example, if a defendant engages in a financial transaction and believes the money or property involved in the transaction were the proceeds of an unlawful activity but deliberately avoids learning that the money or property did come from an unlawful activity so he can deny knowledge later.
>
> So you may find that a defendant knew about the unlawful activity if you determine beyond a reasonable doubt that the defendant (1) actually knew about the unlawful activity, or (2) had every reason to know but deliberately closed his eyes.
>
> But I must emphasize that negligence, carelessness, or foolishness isn't enough to prove that a Defendant knew about the unlawful activity.

(D.E. No. 520 at 36).

Including instructions as to deliberate ignorance was proper based on the factual predicate established during trial. "[A] deliberate ignorance instruction is appropriate when the facts support the inference that the defendant was aware of a high probability of the existence of the fact in question and purposely contrived to avoid learning all of the facts in order to have a defense in the event of a subsequent prosecution." *U.S. v. Patterson*, 231 F. App'x 878, 885 (11th Cir. 2007) (quoting *United States v. Perez-Tosta*, 36 F.3d 1552, 1564 (11th Cir.l994)). "The instruction is properly given if the evidence supports both actual

knowledge and deliberate ignorance." *Id.* (citing *U.S. v. Arias*, 984 F.2d 1139, 1143 (11th Cir. 1993)).

Although direct evidence was presented to establish Defendants' actual knowledge of the bribery scheme (*see, e.g.*, Tr. 7/21/11 PM pp. 3-4, 16-17; Tr. 7/22/2011 AM pp. 79-82), evidence was also adduced regarding deliberate ignorance including payments to specific parties without requiring the company's normal backup documentation to support the payments. (*See e.g.,* Tr. 7/21/2011 PM pp. 3-4, 13, 15-17; Tr. 7/20/2011 PM pp. 41-42, 47-48, 56-57, 60, 70, 76-77, 79, 82). Accordingly, it was proper to instruct the jury on deliberate ignorance. *See* 15 U.S.C. § 78- dd-2(h)(3)(B); *see also Patterson*, 231 F. App'x at 885.

C. Pre-Trial Rulings.

Defendants also move for a new trial based on several pre-trial rulings made by the Court.

1. Severance.[5]

Rodriguez moved to sever his trial from that of co-defendant Esquenazi based on: (i) Esquenazi's "pre-arrest statements that inferentially inculpate" Rodriguez; (ii) inconsistent defenses that "suggest a heightened risk of prejudice" to Rodriguez; and (iii) the theory that Esquenazi would "exercise his Fifth Amendment rights at his trial" but would subsequently testify truthfully to "clarify his pre arrest statements as well as affirmatively exculpate" Rodriguez in a separate trial. *See* (D.E. No. 181 at 1-2).

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[5] Esquenazi did not join in that portion of Rodriguez's motion relating to severance. *See* (D.E. No. 546).

"There is a preference in the federal system for joint trials of defendants who are indicted together." *Zafiro v. U.S.*, 506 U.S. 534, 537 (1993). This rule is particularly applicable to conspiracy cases. *United States v. Cassano*, 132 F.3d 646, 651 (11th Cir. 1998). Joint trials promote efficiency and "serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts." *Id.* (citing *Richardson v. March*, 481 U.S. 200, 210 (1987)). "[A] district court should grant a severance under Rule 14 [of the Federal Rules of Criminal Procedure] only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment of guilt or innocence. *Id.* at 539. This Court properly denied Rodriguez's motion for severance. *See* (D.E. No. 239).

i. *Bruton* Argument.

Rodriguez alleged that Esquenazi's pre-arrest statements "inferentially inculpate" Rodriguez and thus create a basis for severance under *Bruton v. United States*, 391 U.S. 123 (1968). (D.E. No. 181 at 1, 6-10). *Bruton* provides that limiting instructions to the jury should be used directing that the statements only be used against the co-defendant unless the co-defendant's statement is so "powerfully incriminating" against the non-testifying defendant that the jury is unable to follow limiting instructions. *See Bruton*, 391 U.S. at 135-36. *Bruton* excludes "only those statements by a non-testifying defendant which directly implicate a co-defendant." *United States v. Beale*, 921 F.2d 1412, 1425 (11th Cir. 1991).

The statements referenced in Rodriguez's *Bruton* argument do not directly implicate Rodriguez.[6] These statements alone are not incriminating and are not properly excluded under *Bruton*.

ii. Inconsistent Defenses.

Rodriguez asserted that his trial defenses and Esquenazi's trial defenses were mutually antagonistic. (D.E. No. 181 at 1, 10-11). To justify severance "[t]he defenses of co-defendants must be antagonistic to the point of being mutually exclusive." *United States v. Castillo-Valencia*, 917 F.2d 494, 498 (11th Cir. 1990). In reviewing denial of a motion for severance, a court will ask:

> (1) Do the alleged conflicts with co-defendants' defenses go to the essence of the appellant's defense?
>
> (2) Could the jury reasonably construct a sequence of events that accommodates the essence of both defendants' defenses?
>
> (3) Did the conflict subject the appellant to compelling prejudice?
>
> (4) Could the trial judge ameliorate the prejudice?

Id.

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[6] These statements include: (i) a 2006 statement by Esquenazi stating that Rodriguez "had more knowledge regarding the expenses [of Terra] than he did;" (ii) a 2009 statement by Esquenazi regarding Rodriguez confronting a contact at Teleco regarding payments; and (iii) Esquenazi's deposition from Terra's bankruptcy proceeding. *See* (D.E. No. 181 at 2-3).

Rodriguez asserted that he "signed the preponderant amount of checks that went to the 'shell corporations' cited in the Indictment" (D.E. No. 181 at 3) and that "he did so at the orders of . . . Esquenazi." *Id.* Rodriguez claimed he did not know about the bribery scheme because his "role did not require him to have knowledge of the details of the relationship with Haiti Teleco." *Id* at 4. Esquenazi's defense would be that no bribery occurred. These defenses are not mutually antagonistic. Hypothetically, the jury could have determined that the bribery did occur, but that, consistent with his defense, Rodriguez was unaware of it. As such, the defenses do not conflict. Severance on the grounds of inconsistent defenses was not appropriate.

iii. *Byrd* Grounds.

Rodriguez based his next argument on *Byrd v. Wainwright,* 428 F.2d 1017 (5th Cir. 1970). Rodriguez argues that Esquenazi would "exercise his Fifth Amendment rights at his trial" but would subsequently testify truthfully to "clarify his pre arrest statements as well as affirmatively exculpate" Rodriguez in a separate trial. (D.E. No. 181 at 2, 11-17).

In order to sever, a codefendant must show: "(1) a bona fide need for the testimony; (2) the substance of the desired testimony; (3) the exculpatory nature and effect of the desired testimony; and (4) that the codefendant would indeed have testified at a separate trial." *United States v. Machado*, 804 F.2d 1537, 1544 (11th Cir. 1986). "Once the defendant makes that threshold showing, the trial court must then: (1) examine the significance of the testimony in relation to the defendant's theory of the case; (2) assess the

extent of prejudice caused by the absence of the testimony; (3) consider judicial administration and economy; and (4) give weight to the timeliness of the motion." *Id.*

In his motion for severance, Rodriguez asserted that Esquenazi could "testify as to the lack of participation and knowledge of the Defendant with regard to the alleged bribery scheme." (D.E. No. 181 at 17). He speculated that Esquenazi would not testify at a joint trial, and that Esquenazi would testify at a separate, subsequent trial that Rodriguez was not involved in the bribery scheme. These unsupported assertions do not show prejudice under *Byrd* and severance on these grounds is not proper.

2. Spoliation.

Next, Defendants assert that the motion to dismiss for spoliation of evidence (D.E. No. 193) was improperly denied. (D.E. No. 542 at 4). This Court disagrees.

On February 22, 2005, Terra filed for bankruptcy in the Southern District of Florida. *In Re Terra Telecommunications Corp.*, 05-BKC-11212. On April 21, 2009, the trustee filed a motion with the bankruptcy court to approve the abandonment, destruction, and disposal of Terra's records. (D.E. No. 208-3). The bankruptcy court issued an order granting the motion and ordering the trustee to serve copies of the order on all interested parties. (D.E. No. 208-5). The bankruptcy trustee filed a certificate of service that the order had been electronically transmitted to those on the electronic mail notice list. (D.E. No. 208-6). The electronic mail notice list included Terra's corporate lawyer and Esquenazi and Rodriguez's

personal attorney. No objections were made by Terra, Esquenazi or Rodriguez to the document destruction even though they were aware of the Government's investigation relating to this action. The Government asserts that neither the Department of Justice nor the Internal Revenue Service – Criminal Investigation Division received notice of the destruction. (D.E. 225 at 2). They were not included on the electronic mail notice list. (D.E. No. 208-2).

i. Government Action.

Defendants claimed that the bankruptcy trustee was a member of the government and improperly destroyed the documents. (D.E. No. 193 at 5, Exs. 3, 4). A defendant's constitutional due process rights are implicated when dealing with destruction or loss of evidence. *See United States v. Nabors*, 707 F.2d 1294, 1296 (11th Cir. 1983). In ruling on a motion to dismiss for spoliation of evidence, a court must first consider whether the constitutional violations occurred through government actors rather than private third parties. *Colorado v. Connelly*, 479 U.S. 157, 165 (1986) (stating that it is "settled law requiring some sort of 'state action' to support a claim of violation of the Due Process Clause of the Fourteenth Amendment.").

Here, the bankruptcy trustee was responsible for destruction of the evidence. (D.E. No. 193 at 4; D.E. No. 208-3, 4). A bankruptcy trustee is not a government employee or agent. *Cromelin v. United States*, 177 F.2d 275, 277 (5th Cir. 1949). "The trustee, like a receiver, is an officer of court, appointed by the court, directed by the court, and paid by the court from the funds in the court. He is in no sense an agent or employee or officer of the United States." *Id.*

Also, the bankruptcy trustee acted on his own and without the knowledge of the Government. *See United States v. Simpson*, 904 F.2d 607 (11th Cir. 1990). He did not act as an agent of the Government. "[A] trustee or agent to a trustee is only subject to the Fourth Amendment if (1) the government knew of and acquiesced in the conduct and (2) the trustee acted with the intent to assist the government in its investigatory or administrative purposes." *In re Kerlo*, 311 B.R. 256, 265 (Bankr. C.D. Cal. 2004). Because the Government was without knowledge of the bankruptcy order on the destruction of documents, *see* (D.E. No. 208-2), it did not know of or acquiesce in the conduct of the bankruptcy trustee in destroying the documents, and the trustee did not act with the intent to assist the government in its investigation.

Even if the bankruptcy trustee acted as an agent of the Government, which the Court does not agree, Defendants must show the destroyed evidence meets the standard of constitutional materiality, *see California v. Trombetta*, 467 U.S. 479, 489 (1984), and that the destruction of evidence shows bad faith on the part of the Government. *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988).

> To meet this standard of constitutional materiality, *see United States v. Agurs*, 427 U.S., at 109-110, 96 S.Ct., at 2400, evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. Neither of these conditions is met on the facts of this case.

Trombetta, 467 U.S. at 489. Defendants' receiving notice of the destruction of evidence and their failure to make any objection or take any action to preserve the evidence demonstrates that the standard of constitutional materiality was not met.

Additionally, Defendants cannot prove bad faith on behalf of the Government because the Government was not even aware of the document destruction. As such, the motion to dismiss for spoliation of evidence was properly denied.

3. Failure to State a Criminal Offense.

Defendants moved the Court to dismiss the indictment for failure to state a criminal offense. (D.E. No. 273). Federal Rule of Criminal Procedure 7(c)(1) provides that "[t]he indictment or information must be a plain, concise, and definite written statement of the essential facts constituting the offense charged . . . ." FED. R. CRIM. P. 7(c)(1). Further,

> [t]he true test of the sufficiency of an indictment is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.

Hagner v. United States, 285 U.S. 427, 431 (1932).

Here, the Indictment states every element of the offense and descriptive information regarding the overt

acts. *See* (D.E. No. 3). The Indictment makes Defendants aware of the offenses for which they must defend, and Defendants' motion to dismiss the Indictment for failure to state a criminal offense was properly dismissed.

4. Statute of Limitations.

Finally, Defendants assert that the Court improperly denied their motion to dismiss regarding expiration of the statute of limitations and instructions to the jury regarding same. (D.E. No. 542 at 5). For the reasons stated in Section III(B)(1), this Court properly instructed the jury regarding the statute of limitations, tolling and expiration of the statute of limitations.

D. Rule 44 Objections.

Next, Rodriguez argues that the Court's "admission of foreign records [at trial] failed to satisfy Rule 44, Fed. R. Civ. Pro. and 18 U.S.C. § 3505(a)(1)(A)-(D)." (D.E. No. 542 at 5). Rodriguez asserted objections at trial that documents sent to Terra from Teleco (which documents included Terra Bates labels) should be excluded pursuant to Federal Rule of Civil Procedure 44 and 18 U.S.C. § 3505. *See* Tr. 7/19/2011 PM pp. 123-138. These documents consisted of invoices received from Teleco which were used by Terra for internal purposes including invoice payment. Tr. 7/20/2011 AM pp. 8-9.

In *United States v. Parker*, 749 F.2d 628, 633 (11th Cir. 1984), the court admitted into evidence customs certificates for spirits that were not prepared by the testifying witness or his company. To be admitted into evidence under the business record exception to the hearsay rule, "the person who actually prepared the

documents need not have testified so long as other circumstantial evidence and testimony suggest their trustworthiness." *Id.* (citing *Itel Capital Corp. v. Cups Coal Co.*, 707 F.2d 1253, 1259 (11th Cir. 1983)). "Nor is it required 'that the records be prepared by the business which has custody of them.'" *Id.* (citing *United States v. Veytia-Bravo*, 603 F.2d 1187, 1191-92 (5th Cir. 1979)).

Evidence may be admitted under Federal Rule of Evidence 803(6) even if the witness and his company did not prepare the records, nor had first-hand knowledge of preparation of the records. *Id.* So long as there is evidence of trustworthiness of the records and that they were prepared in the usual course of business, such records are admissible. *Id.* Specifically, when a firm takes custody of a document, that document is "made" by the firm for purposes of Rule 803(6). *United States v. Adefehinti*, 510 F.3d 319, 326 (D.C. Cir. 2007). If a company "acquired, used and filed" a document created by another party, then that document becomes the company's business record. *Id.* at 327.

Here, the Government established that Terra used the Teleco records for internal purposes, such as paying invoices, and kept them in their corporate records. Tr. 7/20/2011 AM pp. 8-9. These documents became Terra's business records and were properly introduced at trial. *See Parker*, 749 F.2d at 633.

E. Bellerive Declaration.

Defendants raise the issue of the declaration of Jean Max Bellerive, the current Prime Minister of Haiti, and assert it provides newly discovered evidence that

Teleco was not an instrumentality of the Haitian government. (D.E. Nos. 543, 566, 580, 581) Defendants believe the Bellerive declaration would have affected the jury verdict and thus, entitles them to a judgment of acquittal or new trial. *See id.* Specifically, Defendants argue that "[a]n essential element and factual predicate for each offense charged was that [Teleco] was a Haitian State owned instrumentality, and thus the individuals employed at [Teleco] were Haitian government officials whom the [sic] Esquenazi and Rodriguez allegedly bribed . . . ." (D.E. No. 543 at 1-2). Defendants contend that the declaration establishes that "the factual predicate for the FCPA offenses and related charges is absent and never existed." (D.E. No. 543 at 4). They also contend that the Government gave no reasons why it could not have obtained the Declaration prior to receiving it on August 9, 2011. *See* (D.E. No. 543 at 4). The Court however finds that the declaration provides no newly discovered evidence and would not have affected the jury verdict.

1. Receipt of Declaration.

According to the Government, on August 9, 2011, it received a copy of the declaration, dated July 26, 2011, from Paul Calli, who was then counsel for defendant Patrick Joseph. *See* (D.E. No. 561 at 9). On August 10, 2011, the Government forwarded the declaration to counsel for Esquenazi and Rodriguez. *Id.* Further:

> After receiving the letter from Mr. Calli, the Government reached out to representatives of the Haitian Government, including Mr. Bellerive, to ascertain the origin and purpose of the July 26th declaration. The Government learned that the letter was actually an internal

> document created in connection with Teleco's modernization and was not intended to convey a position that Teleco was not a government entity, as had been interpreted by Mr. Calli (and now Rodriguez and Esquenazi). The Haitian Government reiterated the position it has held throughout the course of this investigation and prosecution–that Haiti Teleco was part of the public administration during the relevant time period. The Haitian Government, and Mr. Bellerive in particular, offered to clarify its position on this issue. As a result of those conversations, the Government assisted Mr. Bellerive in preparing the declaration attached to this response as Exhibit 1 (hereinafter, the "second Bellerive declaration").

(D.E. No. 561 at 9).

Defendants assert that: "[t]he documentary evidence shows that the First Declaration was the result of a letter from counsel for Patrick Joseph, Richard Klugh, Esq. . . . requesting an official statement from the Republic of Haiti regarding the Haitian law and status of Haiti Teleco; not a request for a letter from anyone involved in the modernization process." (D.E. No. 581 at 4).

Thus, contrary to Defendants' claims, the Government did not receive the declaration until August 9, 2011 and was not responsible for procuring the declaration.

2. Contents of Declarations.

The first declaration provides that Téléco "is a Limited Company under common law, founded on

August 22, 1968 by private individuals under common law." (D.E. No. 581-1). It further states that:

> The law of September 16, 1963 grants the Haitian State or any other State body to acquire shares in Limited Companies. Once the State becomes a shareholder it must obtain a change in the bylaws to change the Limited Company (S.A.) to Limited Mixed Company (S.A.M). This change is essential to allow the State to appoint its representatives to the Board of Directors. As far as Téléco is concerned, the company never underwent legal change and kept its old bylaws of Limited Company.
>
> . . .
>
> Based on the foregoing, Téléco has never been and until now is not a State enterprise. Since its formation to date, it has and remains a Company under common law.

(D.E. No. 581-1).

Mr. Bellerive provided a second declaration clarifying his statements made in the first and explaining that he:

> did not know that it was going to be used in criminal legal proceedings in the United States or that it was going to be used in support of the argument that, after the takeover by BRH [Bank of the Republic of Haiti] and **before its modernization, Téléco was not part of the Public Administration of Haiti.** This is obviously not the case since, during that time, Téléco belonged to BRH, which is an institution

> of the Haitian state. That document had been signed strictly for internal purposes and to be used in support of the on-going modernization process of Téléco.

(D.E. No. 581-3) (emphasis in original).

Mr. Bellerive also explained that the statements in the first declaration were truthful, but he understands potential confusion. He clarified that:

> The statement of July 26, 2011 explains that:
>
> > (1) Téléco was started in 1968 as a private company;
> >
> > (2) The partial modernization of Téléco was completed in 2011; and
> >
> > (3) In the interval, no Haitian law ever established Téléco as a publicly-owned institution.
> >
> > All the facts in the July 26, 2011 statement are correct. However, the statement can be confusing if taken in its current context since it omits the fact that, after the initial creation of Téléco and prior to its modernization, it was fully funded and controlled by BRH, which is a public entity of the Haitian state.

(D.E. No. 581-3). The Government did assist Mr. Bellerive in preparing the second declaration. (D.E. No. 561 at 10).

Thus, this shows that Mr. Bellerive's second declaration simply clarified the contents of the first

declaration. Further, as discussed in (III)(E)(3), the contents of the first declaration were established throughout trial and were known to Defendants during trial preparation.

3. Declaration Contains No Newly Discovered Evidence And Does Not Affect Jury Verdict.

As detailed in Section I(B), above, the testimony of Mr. Lissade addressed many of the points raised in the first declaration. *See* (D.E. No. 417-B, ¶¶ 5, 16), Tr. 7/25/2011 PM pp. 38, 40-42, 68, 96. As accurately stated by the Government in its Response in Opposition to Defendants' Joint Request for Status Conference (D.E. No. 584), the Government also produced five fact witnesses that established Teleco was an instrumentality of the Haitian government:

- Robert Antoine testified that Teleco was a state-owned company and that, when he worked there, he was a government employee whose supervisor, Patrick Joseph, had been appointed by the President of Haiti (Tr. 7/26/2011 AM pp. 11-12, 13, 15);

- Jean Fourcand testified that the President of Haiti appointed his cousin, Patrick Joseph, as General Director of Teleco, the "state owned" "national phone company" of Haiti (Tr. 7/21/2011 PM pp. 31-32);

- Juan Diaz testified that he learned while living in Haiti that Teleco was a "nationalized" company owned by the Haitian government (Tr. 7/19/2011 AM p. 64);

> • Antonio Perez testified that Esquenazi, Terra's in-house attorney James Dickey, and Terra's Haitian business partners at HAWAI told him that Teleco was owned and operated by the Haitian government and that he saw an Aon insurance application submitted by Terra describing Teleco as a government owned entity (Tr. 7/25/2011 AM pp. 70-71); and
>
> • John Marsha, who worked at Aon, testified that Esquenazi, Rodriguez, and Dickey told him the contract they wanted to insure was with a foreign government and that the type of insurance they requested applied only to government contracts (Tr. 7/27/2011 AM pp. 7-8).

(D.E. No. 584 at 3).

Defendants retained an expert witness but did not call him at trial. According to the pre-trial Notice of Expert Witness Disclosure, Esquenazi's expert witness was prepared to testify that, among other things:

> • Teleco was established as a private company in 1968;
>
> • The Bank of Republic of Haiti's acquisition of Teleco "did not change the nature of a corporation that is governed by civil law;"
>
> • Teleco's "staff and employees are not public officials or public servants" and "are all under the jurisdiction of private law;"

- "neither Robert Antoine [n]or Jean Rene Duperval were officials of the government of Haiti during their employ at Teleco;" and

- "Teleco was, during the period of times in the indictment, a private entity under Haitian law."

(D.E. No. 360 at 1-2). The evidence Defendants' claim is newly discovered by the first Bellerive declaration was known to them during trial preparation as shown in their expert witness disclosure. Additionally, as discussed in Section I(B), Mr. Lissade testified as to many of the statements made in the first Bellerive declaration. The Bellerive declaration contains no newly discovered evidence and would not have affected the jury verdict. Accordingly, it is hereby:

ORDERED AND ADJUDGED that

1. Defendant Carlos Rodriguez's Motions for Judgment of Acquittal or New Trial (D.E. Nos. 542, 543) are **DENIED.**

2. Defendant Joel Esquenazi's Motions to Adopt Carlos Rodriquez's Motions for Judgment of Acquittal or New Trial (D.E. Nos. 546, 547) are **GRANTED.**

3. Esquenazi's Motion to Adopt Rodriguez's Reply to Government's Response to Docket Entry Number 543 (D.E. No. 586) is **GRANTED.**

4. Joel Esquenazi and Carlos Rodriguez's Joint Request for Status Conference and Briefing Schedule (D.E. No. 566) and Carlos Rodriguez's Motion to Compel Discovery and Renewed Request for Evidentiary Hearing (D.E. No. 581) are **DENIED.**

DONE AND ORDERED in Chambers at Miami, Florida, this 12 day of October, 2011.

/s/ Jose E. Martinez
JOSE E. MARTINEZ
UNITED STATES DISTRICT JUDGE

Copies provided to:
Magistrate Judge McAliley
All Counsel of Record

APPENDIX J

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA MIAMI DIVISION

Case Number: 09-21010-CR-MARTINEZ-BROWN

[Filed November 19, 2010]

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)
	)
vs.	)
	)
JOEL ESQUENAZI, et al.,	)
	)
Defendants.	)
	)

ORDER DENYING DEFENDANT JOEL ESQUENAZI'S (CORRECTED AND AMENDED) MOTION TO DISMISS INDICTMENT FOR FAILURE TO STATE A CRIMINAL OFFENSE AND FOR VAGUENESS

THIS CAUSE came before the Court upon Defendant Joel Esquenazi's (Corrected and Amended) Motion to Dismiss Indictment for Failure to State a Criminal Offense and for Vagueness (D.E. No. 283).[1] In

[1] Defendants Jean Rene Duperval and Marguerite Grandison have joined in this motion. *See* (D.E. No. 299, 301).

this motion, Defendant Joel Esquenazi ("Defendant") moves to dismiss the indictment for failure to state a criminal offense and in the alternative for vagueness "with respect to who would constitute a 'foreign official' within the meaning of the Foreign Corrupt Practices Act" ("FCPA"). After careful consideration and for the reasons set forth below, the Court denies this motion.

The FCPA prohibits "any officer, director, employee, or agent" of a domestic concern to offer payment to a foreign official for purposes of influencing that official acting in his official capacity. The FCPA defines a "foreign official" as

> any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.

15 U.S.C. § 78dd-2(h)(2)(A). The foreign officials in this case are alleged to be employees of Telecommunications D'Haiti ("Haiti Teleco"), which the government alleges "was the Republic of Haiti's state-owned national telecommunications company." (D.E. No.3 at 2). Specifically, the foreign officials at issue in this case are Robert Antoine ("Antoine") who was the Director of International Relations of Haiti Teleco and Jean Rene Duperval ("Duperval") who was Robert Antonine's successor and also acted as the Director of International Relations at Haiti Teleco (D.E. No. 3 at 3,5).

Defendant discusses a number of factual issues and argues that the indictment must be dismissed because Antoine and Duperval are not foreign officials under the FCPA "merely because . . . [they are] employed by an entity 'owned or partially owned' by a foreign government department, agency, or instrumentality as alleged in the indictment." (D.E. No. 283 at 3). Defendant also argues that the Court "cannot read into the statute an extension of the FCPA's definition of 'Department, Agency, or Instrumentality' to entities controlled or partially controlled by departments, agencies or instrumentalities." *Id.* at 4. Finally, Defendant argues that the phrase "department, agency, or instrumentality is unconstitutionally vague "if it is premised solely on government control of ownership." *Id.* at 14.

The Court, however, finds that the Government has sufficiently alleged that Antoine and Duperval were foreign officials by alleging that these individuals were directors in the state-owned Haiti Teleco. Any factual arguments Defendant has on this point may be addressed at trial. *See United States v. Torkington*, 812 F. 2d 1347, 1354 (11th Cir. 1987) (stating that "a court may not dismiss an indictment . . . on a determination of facts that should have been developed at trial." .)

The Court also disagrees that Haiti Teleco cannot be an instrumentality under the FCPA's definition of foreign official. The plain language of this statute and the plain meaning of this term show that as the facts are alleged in the indictment Haiti Teleco could be an instrumentality of the Haitian government. *See* 15 U.S.C. § 78dd-2(h)(2)(A).

Finally, the Court also disagrees that the phrase "department, agency, or instrumentality" in the definition of "foreign official" is unconstitutionally vague. "Vagueness arises when a statute is so unclear as to what conduct is applicable that persons of common intelligence must necessarily guess at its meaning and differ as to its application." *Mason v. Florida Bar*, 208 F. 3d 952, 958 (11th Cir. 2000). Defendant has not met this standard, and the Court finds that persons of common intelligence would have fair notice of this statute's prohibitions. Therefore, it is hereby:

ORDERED AND ADJUDGED that

Defendant Joel Esquenazi's (Corrected and Amended) Motion to Dismiss Indictment for Failure to State a Criminal Offense and for Vagueness (D.E. No. 283) is **DENIED.**

DONE AND ORDERED in Chambers at Miami, Florida, this 19 day of November, 2010.

s/ Jose E. Martinez
JOSE E. MARTINEZ
UNITED STATES DISTRICT JUDGE

Copies provided to:
Magistrate Judge Brown
All Counsel of Record

APPENDIX K

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA MIAMI DIVISION

Case Number: 09-21010-CR-MARTINEZ-BROWN

[Filed November 19, 2010]

UNITED STATES OF AMERICA,	)
	)
vs.	)
	)
JOEL ESQUENAZI, et al.,	)
	)
Defendants.	)
	)

ORDER DENYING DEFENDANT JOEL ESQUENAZI'S MOTION TO DISMISS COUNTS 9 THROUGH 21 OF THE INDICTMENT

THIS CAUSE came before the Court upon Defendant Joel Esquenazi's Motion to Dismiss Counts 9 Through 21 of the Indictment (D.E. No. 268).[1] In Count 9, the Government has charged Defendants with money laundering conspiracy in violation of 18 U.S.C. § 1956(h) and in Counts 10 through 21, the Government has charged Defendants with substantive money laundering in violation of 18 U.S.C.

[1] Defendants Jean Rene Duperval and Marguerite Grandison have joined in this motion. *See* (D.E. No. 299, 301).

§ 1956(a)(1)(B)(i) and aiding and abetting in violation of 18 U.S.C. § 2. Defendant Joel Esquenazi ("Defendant") argues that these counts should be dismissed because "the monies allegedly laundered were not 'proceeds' of any specified unlawful activity" and because "the charged transactions are exempt from prosecution" under *United States v. Santos*, 553 U.S. 507 (2008) and *Cuellar v. United States*, 553 U.S. 550 (2008). After careful consideration and for the reasons set forth below, the Court denies this motion.

I. Proceeds of Specified Unlawful Activity

First, Defendant argues that the money laundering counts should be dismissed because the money that was allegedly laundered was not proceeds of any unspecified unlawful activity. 18 U.S.C. § 1956(a)(1)(B)(i) provides:

> Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity--knowing that the transaction is designed in whole or in part-- to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity.

Here, upon review of the indictment, it sufficiently alleges that Defendants attempted to "conceal or disguise the nature, the location, the source, the ownership or the control" of money which were the proceeds of violations of the Foreign Corrupt Practices Act, Haitian bribery laws, and of committing wire

fraud. *See* (D.E. No.3, Indictment at 24-25, 27). Thus, the Court denies Defendant's motion on this ground.

II. Application of *Santos* and *Cuellar*

Next, Defendant argues that two Supreme Court cases, *United States v. Santos*, 553 U.S. 507 (2008) and *Cuellar v. United States*, 553 U.S. 550 (2008), require the dismissal of the indictment. The Eleventh Circuit has stated that "[t]he narrow holding in *Santos*, at most, was that the gross receipts of an unlicensed gambling operation were not 'proceeds' under section 1956." *United States v. Demarest*, 570 F.3d 1232, 1242 (11th Cir. 2009). The Eleventh Circuit then declined to apply this holding to a case where "[t]he evidence . . . established that the laundered funds were the proceeds of an enterprise engaged in illegal drug trafficking." *Id.* Here, as this case also does not involve an unlicensed gambling operation, this Court declines to apply the narrow holding of *Santos* to this case.

The Court also finds that *Cuellar* does not require the dismissal of the indictment in this case. In *Cuellar* the defendant was convicted of a violation of 18 U.S.C. § 1956(a)(2)(B)(i), which prohibits the transportation of proceeds of unlawful activity internationally where the transportation is designed to conceal the proceeds. *Cuellar*, 553 U.S. at 554. The Supreme Court held that this provision "requires poof that the transportation was 'designed in whole or in part to conceal or disguise the nature, the location, the source, the ownership or the control' of the funds." *Id.* at 568 (quoting 18 U.S.C. § 1956(a)(2)(B)(i)). It stated that "[a]lthough this element does not require proof that the defendant attempted to create the appearance of legitimate wealth, neither can it be satisfied solely by evidence

that a defendant concealed the funds during their transport." *Cuellar*, 553 U.S. at 568. The evidence must demonstrate that "such concealment was the purpose of the transportation" not just that a defendant's "transportation would have had the effect of concealing the funds." *Id.* at 567. Even assuming this holding applies to the money laundering charges at issue in this case, the indictment sufficiently alleges that Defendants' activities concealed the money for the purpose of hiding the nature or source of the funds. *See* (D.E. No. 3 at 8-11, 22-25). For example, the Government has alleged a scheme involving different bank accounts opened in the names of shell corporations, which the money was funneled through to obscure its nature and source. *Id.* at 23-24. The Government has also alleged that Defendants falsified certain records to obscure the nature and source of the money. *Id.* at 8-9. Thus, the Court also denies Defendant's motion to dismiss on this ground. Therefore, it is hereby:

ORDERED AND ADJUDGED that

Defendant Joel Esquenazi's Motion to Dismiss Counts 9 Through 21 of the Indictment (D.E. No. 268) is **DENIED.**

DONE AND ORDERED in Chambers at Miami, Florida, this 19 day of November, 2010.

s/ Jose E. Martinez
JOSE E. MARTINEZ
UNITED STATES DISTRICT JUDGE

Copies provided to:
Magistrate Judge Brown
All Counsel of Record

APPENDIX L

Constitutional and Statutory Provisions

U.S. Const. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

15 U.S.C. § 78dd-2. Prohibited foreign trade practices by domestic concerns

(a) Prohibition

It shall be unlawful for any domestic concern, other than an issuer which is subject to section 78dd–1 of this title, or for any officer, director, employee, or agent of such domestic concern or any stockholder thereof acting on behalf of such domestic concern, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to—

(1) any foreign official for purposes of—

(A)(i) influencing any act or decision of such foreign official in his official capacity, (ii) inducing such foreign official to do or omit to do any act in violation of the lawful duty of such official, or (iii) securing any improper advantage; or

(B) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person;

(2) any foreign political party or official thereof or any candidate for foreign political office for purposes of—

(A)(i) influencing any act or decision of such party, official, or candidate in its or his official capacity, (ii) inducing such party, official, or candidate to do or omit to do an act in violation of the lawful duty of such party, official, or candidate, or (iii) securing any improper advantage; or

(B) inducing such party, official, or candidate to use its or his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person; or

(3) any person, while knowing that all or a portion of such money or thing of value will be offered, given, or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office, for purposes of—

(A)(i) influencing any act or decision of such foreign official, political party, party official, or candidate in his or its official capacity, (ii) inducing such foreign official, political party, party official, or candidate to do or omit to do any act in violation of the lawful duty of such foreign official, political party, party official, or candidate, or (iii) securing any improper advantage; or

(B) inducing such foreign official, political party, party official, or candidate to use his or its influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality,

in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person.

(b) Exception for routine governmental action

Subsections (a) and (i) of this section shall not apply to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of

which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official.

(c) Affirmative defenses

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

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

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

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

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

(d) Injunctive relief

(1) When it appears to the Attorney General that any domestic concern to which this section applies, or officer, director, employee, agent, or stockholder thereof, is engaged, or about to engage, in any act or practice constituting a violation of subsection (a) or (i) of this section, the Attorney General may, in his discretion, bring a civil action in an appropriate district court of the United States to enjoin such act

or practice, and upon a proper showing, a permanent injunction or a temporary restraining order shall be granted without bond.

(2) For the purpose of any civil investigation which, in the opinion of the Attorney General, is necessary and proper to enforce this section, the Attorney General or his designee are empowered to administer oaths and affirmations, subpoena witnesses, take evidence, and require the production of any books, papers, or other documents which the Attorney General deems relevant or material to such investigation. The attendance of witnesses and the production of documentary evidence may be required from any place in the United States, or any territory, possession, or commonwealth of the United States, at any designated place of hearing.

(3) In case of contumacy by, or refusal to obey a subpoena issued to, any person, the Attorney General may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, or other documents. Any such court may issue an order requiring such person to appear before the Attorney General or his designee, there to produce records, if so ordered, or to give testimony touching the matter under investigation. Any failure to obey such order of the court may be punished by such court as a contempt thereof.

All process in any such case may be served in the judicial district in which such person resides or may be found. The Attorney General may make such rules relating to civil investigations as may be necessary or appropriate to implement the provisions of this subsection.

(e) Guidelines by Attorney General

Not later than 6 months after August 23, 1988, the Attorney General, after consultation with the Securities and Exchange Commission, the Secretary of Commerce, the United States Trade Representative, the Secretary of State, and the Secretary of the Treasury, and after obtaining the views of all interested persons through public notice and comment procedures, shall determine to what extent compliance with this section would be enhanced and the business community would be assisted by further clarification of the preceding provisions of this section and may, based on such determination and to the extent necessary and appropriate, issue—

(1) guidelines describing specific types of conduct, associated with common types of export sales arrangements and business contracts, which for purposes of the Department of Justice's present enforcement policy, the Attorney General determines would be in conformance with the preceding provisions of this section; and

(2) general precautionary procedures which domestic concerns may use on a voluntary basis to conform their conduct to the Department of Justice's present enforcement policy regarding the preceding provisions of this section.

The Attorney General shall issue the guidelines and procedures referred to in the preceding sentence in accordance with the provisions of subchapter II of chapter 5 of title 5 and those guidelines and procedures shall be subject to the provisions of chapter 7 of that title.

(f) Opinions of Attorney General

(1) The Attorney General, after consultation with appropriate departments and agencies of the United States and after obtaining the views of all interested persons through public notice and comment procedures, shall establish a procedure to provide responses to specific inquiries by domestic concerns concerning conformance of their conduct with the Department of Justice's present enforcement policy regarding the preceding provisions of this section. The Attorney General shall, within 30 days after receiving such a request, issue an opinion in response to that request. The opinion shall state whether or not certain specified prospective conduct would, for purposes of the Department of Justice's present enforcement policy, violate the preceding provisions of this section. Additional requests for opinions may be filed with the Attorney General regarding other specified prospective conduct that is beyond the scope of conduct specified in previous requests. In any action brought under the applicable provisions of this section, there shall be a rebuttable presumption that conduct, which is specified in a request by a domestic concern and for which the Attorney General has issued an opinion that such conduct is in conformity with the Department of Justice's

present enforcement policy, is in compliance with the preceding provisions of this section. Such a presumption may be rebutted by a preponderance of the evidence. In considering the presumption for purposes of this paragraph, a court shall weigh all relevant factors, including but not limited to whether the information submitted to the Attorney General was accurate and complete and whether it was within the scope of the conduct specified in any request received by the Attorney General. The Attorney General shall establish the procedure required by this paragraph in accordance with the provisions of subchapter II of chapter 5 of title 5 and that procedure shall be subject to the provisions of chapter 7 of that title.

(2) Any document or other material which is provided to, received by, or prepared in the Department of Justice or any other department or agency of the United States in connection with a request by a domestic concern under the procedure established under paragraph (1), shall be exempt from disclosure under section 552 of title 5 and shall not, except with the consent of the domestic concern, be made publicly available, regardless of whether the Attorney General responds to such a request or the domestic concern withdraws such request before receiving a response.

(3) Any domestic concern who has made a request to the Attorney General under paragraph (1) may withdraw such request prior to the time the Attorney General issues an opinion in response to such request. Any request so withdrawn shall have no force or effect.

(4) The Attorney General shall, to the maximum extent practicable, provide timely guidance concerning the Department of Justice's present enforcement policy with respect to the preceding provisions of this section to potential exporters and small businesses that are unable to obtain specialized counsel on issues pertaining to such provisions. Such guidance shall be limited to responses to requests under paragraph (1) concerning conformity of specified prospective conduct with the Department of Justice's present enforcement policy regarding the preceding provisions of this section and general explanations of compliance responsibilities and of potential liabilities under the preceding provisions of this section.

(g) Penalties

(1)(A) Any domestic concern that is not a natural person and that violates subsection (a) or (i) of this section shall be fined not more than $2,000,000.

(B) Any domestic concern that is not a natural person and that violates subsection (a) or (i) of this section shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Attorney General.

(2)(A)Any natural person that is an officer, director, employee, or agent of a domestic concern, or stockholder acting on behalf of such domestic concern, who willfully violates subsection (a) or (i) of this section shall be fined not more than $100,000 or imprisoned not more than 5 years, or both.

(B) Any natural person that is an officer, director, employee, or agent of a domestic concern, or stockholder acting on behalf of such domestic concern, who violates subsection (a) or (i) of this section shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Attorney General.

(3) Whenever a fine is imposed under paragraph (2) upon any officer, director, employee, agent, or stockholder of a domestic concern, such fine may not be paid, directly or indirectly, by such domestic concern.

(h) Definitions

For purposes of this section:

(1) The term "domestic concern" means—

(A) any individual who is a citizen, national, or resident of the United States; and

(B) any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, or which is organized under the laws of a State of the United States or a territory, possession, or commonwealth of the United States.

(2)(A) The term "foreign official" means any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any

such government or department, agency, or instrumentality, or for or on behalf of any such public international organization.

(B) For purposes of subparagraph (A), the term "public international organization" means—

(i) an organization that is designated by Executive order pursuant to section 288 of title 22; or

(ii) any other international organization that is designated by the President by Executive order for the purposes of this section, effective as of the date of publication of such order in the Federal Register.

(3)(A) A person's state of mind is "knowing" with respect to conduct, a circumstance, or a result if—

(i) such person is aware that such person is engaging in such conduct, that such circumstance exists, or that such result is substantially certain to occur; or

(ii) such person has a firm belief that such circumstance exists or that such result is substantially certain to occur.

(B) When knowledge of the existence of a particular circumstance is required for an offense, such knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist.

(4)(A) The term "routine governmental action" means only an action which is ordinarily and commonly performed by a foreign official in—

(i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;

(ii) processing governmental papers, such as visas and work orders;

(iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;

(iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or

(v) actions of a similar nature.

(B) The term "routine governmental action" does not include any decision by a foreign official whether, or on what terms, to award new business to or to continue business with a particular party, or any action taken by a foreign official involved in the decision-making process to encourage a decision to award new business to or continue business with a particular party.

(5) The term "interstate commerce" means trade, commerce, transportation, or communication among the several States, or between any foreign country and any State or between any State and any place

or ship outside thereof, and such term includes the intrastate use of—

(A) a telephone or other interstate means of communication, or

(B) any other interstate instrumentality.

(i) Alternative jurisdiction

(1) It shall also be unlawful for any United States person to corruptly do any act outside the United States in furtherance of an offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to any of the persons or entities set forth in paragraphs (1), (2), and (3) of subsection (a) of this section, for the purposes set forth therein, irrespective of whether such United States person makes use of the mails or any means or instrumentality of interstate commerce in furtherance of such offer, gift, payment, promise, or authorization.

(2) As used in this subsection, the term "United States person" means a national of the United States (as defined in section 1101 of title 8) or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship organized under the laws of the United States or any State, territory, possession, or commonwealth of the United States, or any political subdivision thereof.

18 U.S.C. § 1956. Laundering of monetary instruments

(a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity—

(A)(i) with the intent to promote the carrying on of specified unlawful activity; or

(ii) with intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986; or

(B) knowing that the transaction is designed in whole or in part—

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under State or Federal law,

shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both. For purposes of this paragraph, a financial transaction shall be considered to be one involving the proceeds of specified unlawful activity if it is part of a set of parallel or dependent transactions, any one of which involves the proceeds of specified unlawful activity, and all of which are part of a single plan or arrangement.

(2) Whoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States—

(A) with the intent to promote the carrying on of specified unlawful activity; or

(B) knowing that the monetary instrument or funds involved in the transportation, transmission, or transfer represent the proceeds of some form of unlawful activity and knowing that such transportation, transmission, or transfer is designed in whole or in part—

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under State or Federal law,

shall be sentenced to a fine of not more than $500,000 or twice the value of the monetary instrument or funds involved in the transportation, transmission, or transfer, whichever is greater, or imprisonment for not more than twenty years, or both. For the purpose of the offense described in subparagraph (B), the defendant's knowledge may be established by proof that a law enforcement officer represented the matter specified in subparagraph (B) as true, and the defendant's subsequent statements or actions indicate that the defendant believed such representations to be true.

(3) Whoever, with the intent—

(A) to promote the carrying on of specified unlawful activity;

(B) to conceal or disguise the nature, location, source, ownership, or control of property believed to be the proceeds of specified unlawful activity; or

(C) to avoid a transaction reporting requirement under State or Federal law,

conducts or attempts to conduct a financial transaction involving property represented to be the proceeds of specified unlawful activity, or property used to conduct or facilitate specified unlawful activity, shall be fined under this title or imprisoned for not more than 20 years, or both. For purposes of this paragraph and paragraph (2), the term "represented" means any representation made by a law enforcement officer or by another person at the direction of, or with the approval of, a Federal official authorized to investigate or prosecute violations of this section.

(b) Penalties.—

(1) In general.— Whoever conducts or attempts to conduct a transaction described in subsection (a)(1) or (a)(3), or section 1957, or a transportation, transmission, or transfer described in subsection (a)(2), is liable to the United States for a civil penalty of not more than the greater of—

(A) the value of the property, funds, or monetary instruments involved in the transaction; or

(B) $10,000.

(2) Jurisdiction over foreign persons.— For purposes of adjudicating an action filed or enforcing a penalty ordered under this section, the district courts shall have jurisdiction over any foreign person, including any financial institution authorized under the laws of a foreign country, against whom the action is brought, if service of process upon the foreign person is made under the Federal Rules of Civil Procedure or the laws of the country in which the foreign person is found, and—

(A) the foreign person commits an offense under subsection (a) involving a financial transaction that occurs in whole or in part in the United States;

(B) the foreign person converts, to his or her own use, property in which the United States has an ownership interest by virtue of the entry of an order of forfeiture by a court of the United States; or

(C) the foreign person is a financial institution that maintains a bank account at a financial institution in the United States.

(3) Court authority over assets.— A court may issue a pretrial restraining order or take any other action necessary to ensure that any bank account or other property held by the defendant in the United States is available to satisfy a judgment under this section.

(4) Federal receiver.—

(A) In general.— A court may appoint a Federal Receiver, in accordance with

subparagraph (B) of this paragraph, to collect, marshal, and take custody, control, and possession of all assets of the defendant, wherever located, to satisfy a civil judgment under this subsection, a forfeiture judgment under section 981 or 982, or a criminal sentence under section 1957 or subsection (a) of this section, including an order of restitution to any victim of a specified unlawful activity.

(B) Appointment and authority.— A Federal Receiver described in subparagraph (A)—

(i) may be appointed upon application of a Federal prosecutor or a Federal or State regulator, by the court having jurisdiction over the defendant in the case;

(ii) shall be an officer of the court, and the powers of the Federal Receiver shall include the powers set out in section 754 of title 28, United States Code; and

(iii) shall have standing equivalent to that of a Federal prosecutor for the purpose of submitting requests to obtain information regarding the assets of the defendant—

(I) from the Financial Crimes Enforcement Network of the Department of the Treasury; or

(II) from a foreign country pursuant to a mutual legal assistance treaty, multilateral agreement, or other arrangement for international law enforcement assistance, provided that

such requests are in accordance with the policies and procedures of the Attorney General.

(c) As used in this section—

(1) the term "knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity" means that the person knew the property involved in the transaction represented proceeds from some form, though not necessarily which form, of activity that constitutes a felony under State, Federal, or foreign law, regardless of whether or not such activity is specified in paragraph (7);

(2) the term "conducts" includes initiating, concluding, or participating in initiating, or concluding a transaction;

(3) the term "transaction" includes a purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition, and with respect to a financial institution includes a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, purchase or sale of any stock, bond, certificate of deposit, or other monetary instrument, use of a safe deposit box, or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means effected;

(4) the term "financial transaction" means (A) a transaction which in any way or degree affects interstate or foreign commerce (i) involving the movement of funds by wire or other means or (ii) involving one or more monetary instruments, or (iii) involving the transfer of title to any real

property, vehicle, vessel, or aircraft, or (B) a transaction involving the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree;

(5) the term "monetary instruments" means (i) coin or currency of the United States or of any other country, travelers' checks, personal checks, bank checks, and money orders, or (ii) investment securities or negotiable instruments, in bearer form or otherwise in such form that title thereto passes upon delivery;

(6) the term "financial institution" includes—

(A) any financial institution, as defined in section 5312(a)(2) of title 31, United States Code, or the regulations promulgated thereunder; and

(B) any foreign bank, as defined in section 1 of the International Banking Act of 1978 (12 U.S.C. 3101);

(7) the term "specified unlawful activity" means—

(A) any act or activity constituting an offense listed in section 1961(1) of this title except an act which is indictable under subchapter II of chapter 53 of title 31;

(B) with respect to a financial transaction occurring in whole or in part in the United States, an offense against a foreign nation involving—

(i) the manufacture, importation, sale, or distribution of a controlled substance (as such term is defined for the purposes of the Controlled Substances Act);

(ii) murder, kidnapping, robbery, extortion, destruction of property by means of explosive or fire, or a crime of violence (as defined in section 16);

(iii) fraud, or any scheme or attempt to defraud, by or against a foreign bank (as defined in paragraph 7 of section 1(b) of the International Banking Act of 1978));

(iv) bribery of a public official, or the misappropriation, theft, or embezzlement of public funds by or for the benefit of a public official;

(v) smuggling or export control violations involving—

(I) an item controlled on the United States Munitions List established under section 38 of the Arms Export Control Act (22 U.S.C. 2778); or

(II) an item controlled under regulations under the Export Administration Regulations (15 C.F.R. Parts 730–774);

(vi) an offense with respect to which the United States would be obligated by a multilateral treaty, either to extradite the alleged offender or to submit the case for

prosecution, if the offender were found within the territory of the United States; or

(vii) trafficking in persons, selling or buying of children, sexual exploitation of children, or transporting, recruiting or harboring a person, including a child, for commercial sex acts;

(C) any act or acts constituting a continuing criminal enterprise, as that term is defined in section 408 of the Controlled Substances Act (21 U.S.C. 848);

(D) an offense under section 32 (relating to the destruction of aircraft), section 37 (relating to violence at international airports), section 115 (relating to influencing, impeding, or retaliating against a Federal official by threatening or injuring a family member), section 152 (relating to concealment of assets; false oaths and claims; bribery), section 175c (relating to the variola virus), section 215 (relating to commissions or gifts for procuring loans), section 351 (relating to congressional or Cabinet officer assassination), any of sections 500 through 503 (relating to certain counterfeiting offenses), section 513 (relating to securities of States and private entities), section 541 (relating to goods falsely classified), section 542 (relating to entry of goods by means of false statements), section 545 (relating to smuggling goods into the United States), section 549 (relating to removing goods from Customs custody), section 554 (relating to smuggling goods from the United States), section 555 (relating to border tunnels), section

641 (relating to public money, property, or records), section 656 (relating to theft, embezzlement, or misapplication by bank officer or employee), section 657 (relating to lending, credit, and insurance institutions), section 658 (relating to property mortgaged or pledged to farm credit agencies), section 666 (relating to theft or bribery concerning programs receiving Federal funds), section 793, 794, or 798 (relating to espionage), section 831 (relating to prohibited transactions involving nuclear materials), section 844(f) or (i) (relating to destruction by explosives or fire of Government property or property affecting interstate or foreign commerce), section 875 (relating to interstate communications), section 922(l) (relating to the unlawful importation of firearms), section 924(n) (relating to firearms trafficking), section 956 (relating to conspiracy to kill, kidnap, maim, or injure certain property in a foreign country), section 1005 (relating to fraudulent bank entries), 1006 (relating to fraudulent Federal credit institution entries), 1007 (relating to Federal Deposit Insurance transactions), 1014 [2] (relating to fraudulent loan or credit applications), section 1030 (relating to computer fraud and abuse), 1032 (relating to concealment of assets from conservator, receiver, or liquidating agent of financial institution), section 1111 (relating to murder), section 1114 (relating to murder of United States law enforcement officials), section 1116 (relating to murder of foreign officials, official guests, or internationally protected persons), section 1201 (relating to kidnaping), section 1203 (relating to

hostage taking), section 1361 (relating to willful injury of Government property), section 1363 (relating to destruction of property within the special maritime and territorial jurisdiction), section 1708 (theft from the mail), section 1751 (relating to Presidential assassination), section 2113 or 2114 (relating to bank and postal robbery and theft), section 2252A (relating to child pornography) where the child pornography contains a visual depiction of an actual minor engaging in sexually explicit conduct, section 2260 (production of certain child pornography for importation into the United States), section 2280 (relating to violence against maritime navigation), section 2281 (relating to violence against maritime fixed platforms), section 2319 (relating to copyright infringement), section 2320 (relating to trafficking in counterfeit goods and services), section 2332 (relating to terrorist acts abroad against United States nationals), section 2332a (relating to use of weapons of mass destruction), section 2332b (relating to international terrorist acts transcending national boundaries), section 2332g (relating to missile systems designed to destroy aircraft), section 2332h (relating to radiological dispersal devices), section 2339A or 2339B (relating to providing material support to terrorists), section 2339C (relating to financing of terrorism), or section 2339D (relating to receiving military-type training from a foreign terrorist organization) of this title, section 46502 of title 49, United States Code, a felony violation of the Chemical Diversion and Trafficking Act of 1988 (relating to precursor and essential chemicals),

section 590 of the Tariff Act of 1930 (19 U.S.C. 1590) (relating to aviation smuggling), section 422 of the Controlled Substances Act (relating to transportation of drug paraphernalia), section 38(c) (relating to criminal violations) of the Arms Export Control Act, section 11 (relating to violations) of the Export Administration Act of 1979, section 206 (relating to penalties) of the International Emergency Economic Powers Act, section 16 (relating to offenses and punishment) of the Trading with the Enemy Act, any felony violation of section 15 of the Food and Nutrition Act of 2008 (relating to supplemental nutrition assistance program benefits fraud) involving a quantity of benefits having a value of not less than $5,000, any violation of section 543(a)(1) of the Housing Act of 1949 (relating to equity skimming), any felony violation of the Foreign Agents Registration Act of 1938, any felony violation of the Foreign Corrupt Practices Act, or section 92 of the Atomic Energy Act of 1954 (42 U.S.C. 2122) (relating to prohibitions governing atomic weapons)

ENVIRONMENTAL CRIMES

(E) a felony violation of the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.), the Ocean Dumping Act (33 U.S.C. 1401 et seq.), the Act to Prevent Pollution from Ships (33 U.S.C. 1901 et seq.), the Safe Drinking Water Act (42 U.S.C. 300f et seq.), or the Resources Conservation and Recovery Act (42 U.S.C. 6901 et seq.); or

(F) any act or activity constituting an offense involving a Federal health care offense;

(8) the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States; and

(9) the term "proceeds" means any property derived from or obtained or retained, directly or indirectly, through some form of unlawful activity, including the gross receipts of such activity.

(d) Nothing in this section shall supersede any provision of Federal, State, or other law imposing criminal penalties or affording civil remedies in addition to those provided for in this section.

(e) Violations of this section may be investigated by such components of the Department of Justice as the Attorney General may direct, and by such components of the Department of the Treasury as the Secretary of the Treasury may direct, as appropriate, and, with respect to offenses over which the Department of Homeland Security has jurisdiction, by such components of the Department of Homeland Security as the Secretary of Homeland Security may direct, and, with respect to offenses over which the United States Postal Service has jurisdiction, by the Postal Service. Such authority of the Secretary of the Treasury, the Secretary of Homeland Security, and the Postal Service shall be exercised in accordance with an agreement which shall be entered into by the Secretary of the Treasury, the Secretary of Homeland Security, the Postal Service, and the Attorney General. Violations of this section involving offenses described in paragraph

(c)(7)(E) may be investigated by such components of the Department of Justice as the Attorney General may direct, and the National Enforcement Investigations Center of the Environmental Protection Agency.

(f) There is extraterritorial jurisdiction over the conduct prohibited by this section if—

(1) the conduct is by a United States citizen or, in the case of a non-United States citizen, the conduct occurs in part in the United States; and

(2) the transaction or series of related transactions involves funds or monetary instruments of a value exceeding $10,000.

(g) Notice of Conviction of Financial Institutions.— If any financial institution or any officer, director, or employee of any financial institution has been found guilty of an offense under this section, section 1957 or 1960 of this title, or section 5322 or 5324 of title 31, the Attorney General shall provide written notice of such fact to the appropriate regulatory agency for the financial institution.

(h) Any person who conspires to commit any offense defined in this section or section 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

(i) Venue.— (1) Except as provided in paragraph (2), a prosecution for an offense under this section or section 1957 may be brought in—

(A) any district in which the financial or monetary transaction is conducted; or

(B) any district where a prosecution for the underlying specified unlawful activity could be brought, if the defendant participated in the transfer of the proceeds of the specified unlawful activity from that district to the district where the financial or monetary transaction is conducted.

(2) A prosecution for an attempt or conspiracy offense under this section or section 1957 may be brought in the district where venue would lie for the completed offense under paragraph (1), or in any other district where an act in furtherance of the attempt or conspiracy took place.

(3) For purposes of this section, a transfer of funds from 1 place to another, by wire or any other means, shall constitute a single, continuing transaction. Any person who conducts (as that term is defined in subsection (c)(2)) any portion of the transaction may be charged in any district in which the transaction takes place.