CASE NO. 11-15331-C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

vs.

JOEL ESQUENAZI,

Defendant - Appellant.

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

REPLY BRIEF OF APPELLANT JOEL ESQUENAZI

T. Markus Funk (CO Bar #43500)
Michael A. Sink (CO Bar #36064)
PERKINS COIE LLP
1900 Sixteenth Street, Suite 1400
Denver, CO 80202
Tel: 303-291-2300
Email: mfunk@perkinscoie.com
msink@perkinscoie.com

Michael J. Rosen (FL Bar #183719)
MICHAEL J. ROSEN, P.A.
2937 SW 27th Avenue, Suite 101
Miami, FL 33133
Tel: 305-446-6116
Email: mjr@mjrosenlaw.com

ATTORNEYS FOR APPELLANT
JOEL ESQUENAZI

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The Appellant, Joel Esquenazi, through his undersigned counsel and pursuant to 11th Circuit Rule 26.1-1, hereby submits the following list of all trial judge(s), all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this appeal, including subsidiaries, conglomerates, affiliates and parent corporations, including any publicly held corporation that owns 10% or more of the party's stock, and other identifiable legal entities related to a party:

Anderson, Rhonda Anne, trial counsel for Appellant Carlos Rodriguez;

Cirincione, James F., counsel for Appellant Carlos Rodriguez;

Diaz, Richard John, trial counsel for Appellant Joel Esquenazi;

Esquenazi, Joel, Appellant;

Fagan, Aurora, counsel for Appellee;

Ferrer, Wilfredo A., counsel for Appellee;

Funk, T. Markus, counsel for Appellant Joel Esquenazi;

Gerrity, Kevin B., counsel for Appellee;

Grove, Daren, counsel for Appellee;

Halfenger, G. Michael, counsel for Appellant Carlos Rodriguez;

Hernandez, Arturo V., trial counsel for Appellant Carlos Rodriguez;

Johnston, Pamela L., counsel for Appellant Carlos Rodriguez;

Koukios, James M., counsel for Appellee;

Martinez, Hon. Jose E., Trial Judge;

Mrazek, Nicola J., counsel for Appellee;

Republic of Haiti, victim;

Rodriguez, Carlos, Appellant;

Rosen, Michael James, counsel for Appellant Joel Esquenazi;

Schultz, Anne R., counsel for Appellee;

Simon, David W., counsel for Appellant Carlos Rodriguez;

Sink, Michael A., counsel for Appellant Joel Esquenazi;

Telecommunications D'Haiti, victim; and

Valiente, Lauren L., counsel for Appellant Carlos Rodriguez.

ARGUMENT

I. The Government's Late Tender Of Haitian Prime Minister's Dueling Declarations On The Critical Question Of Whether Teleco Was A "State Enterprise" Requires A Hearing

There can be little dispute that one outcome-determinative question drove most of the FCPA-related arguments below, and is central to this Court's final decision. As the Government's briefing acknowledges, the question is whether the evidence presented at trial proved beyond a reasonable doubt that phone company Haiti Teleco ("Teleco") was an "instrumentality" of the Haitian Government.[1] Indeed, the Government dedicates the bulk of its hefty 104-page Response Brief to this very issue.[2] In light of this backdrop, and considering the Government's thin evidence on this issue, the Government is particularly ill-positioned to now come before this Court and categorically argue that Haiti Minister of Justice and Prime Minister Jean Max Bellerive's formal declaration, stating in no uncertain terms that "Teleco *has never been* and until now *is not a State enterprise*," was completely immaterial to Esquenazi's case.[3]

The Government's protestations to the contrary notwithstanding, Esquenazi has established that the Government possessed material information clearly favorable to him. *See generally Stano v. Dugger*, 901 F.2d 898, 903-05 (11th Cir.

[1] *See generally* Brief of the United States ("Government's Response") at 28-51.

[2] *See, e.g.*, Government's Response at 26-51.

[3] *See Id.* at 65, 72 (emphasis added).

1990) (setting forth the *Brady* hearing prerequisites).[4] What is more, the unanticipated and highly unusual appearance of the subsequent, Government "sponsored", *second* declaration placed the onus on the district court to take the modest step of conducting an evidentiary *Brady* hearing to determine *what* the Government knew about the information in the declarations, *how* it came to know this information, and *when* it knew it. The Government's circular claims that this information purportedly was "equally available to defendants," "would not have affected the verdict," and was not suppressed by the Government fall flat.[5]

A. The Government's Otherwise Scant Evidence Of Haitian Governmental Involvement In Teleco Renders The Declarations Highly Probative And Material

The position of authority of the first declaration's author (the chief law enforcement officer for Haiti); the declaration's unambiguous, admissible statement that Teleco is and was *not* a state-owned enterprise; the centrality of this issue to the case's outcome; and the Government's otherwise exceptionally thin evidence all serve to establish the flaws in the Government's late assertions that the

[4] *Contra* Government's Response at 70 (citing *United States v. Naranjo*, 634 F.3d 1198, 1212 (11th Cir. 2011) ("mere speculation or allegations" insufficient for hearing) and *United States v. Aria-Izquierdo*, 449 F.3d 1168, 1189 (11th Cir. 2006) (same)).

[5] Government's Response at 65.

evidence was immaterial[6] and that the request is a mere "fishing expedition."[7] *See United States v. Fernandez*, 136 F.3d 1434, 1438-39 (11th Cir. 1998) (finding undisclosed information concerning possible Government link with suspected corrupt foreign official material where Government's case was "based almost exclusively on the testimony of co-defendants"). Indeed, if the declaration was such a non-issue, why did the Government immediately spring into action to "assist[]" in "clarify[ing]" the Prime Minister's (exculpatory) declaration and "prepar[ing]"[8] a second version?

That Bellerive was purportedly unaware that the first declaration would be (or, rather, should have been) used in a criminal proceeding in the U.S. hardly alters the analysis. In fact, Bellerive's supposed lack of knowledge on that point actually bolsters the first declaration's credibility, especially in light of the Government's admitted involvement in procuring the second declaration. The second Bellerive declaration, moreover, repeatedly affirms that the paramount facts in the first declaration were correct, and that "no Haitian law ever established [Teleco] as a publicly owned institution."

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[6] *Id.* at 22, 69-72.

[7] *Id*. at 69.

[8] *Id*. at 66.

B. Bellerive's Declarations Fatally Undermine Government Expert Lissade's Assumptions And Resulting Claims

Although ignored in the Government's Response, the first Bellerive declaration establishes more than just the official opinion of the Haitian Prime Minister that Teleco never was a state-owned enterprise (which, in itself, is of course patently probative). The first declaration *also* establishes that, because Teleco's bylaws were not amended, Haitian law flatly prevented Teleco from becoming a state enterprise (thus refuting a central claim made in the Government's Response).[9] Contrary to the Government's blanket assertions, neither Esquenazi's expert witness, nor Lissade's pre-trial affidavit, supported the Government's claim that Teleco's bylaws permitted it to legally convert to a state enterprise. To the contrary, Lissade's pre-trial affidavit without support asserted that, "[a]lthough Teleco never reincorporated to officially change its name [from 'S.A.' to 'S.A.M.'], the use by Teleco officials of the abbreviation S.A.M. shows their recognition of the fact that Teleco was 97% state-owned."[10]

Despite the Government's best semantic gymnastics, Lissade's assertion about Teleco's name change is not equivalent to undisputed factual evidence twice provided by Bellerive that Teleco's bylaws had never been changed, and that

[9] Government's Response at 72 (citing Dkt. 609 at 27-28 and Dkt. 417-2 at 3, 7-8).

[10] Dkt. 417 Ex. B at ¶ 16.

Teleco was, thus, *ab initio* prevented from becoming a state enterprise.[11] Compounding this problem for the Government, Lissade conceded that there were no available documents in the public record addressing how Teleco could have legally switched from a privately-held to a publicly-owned company.[12] In the absence of such probative documents in the public record, Lissade was unable to conclusively determine whether the bylaws had changed[13] – a critical weakness in Lissade's opinion.

C. The Government's Fall-Back Inadmissibility Argument Is Both Flawed And Irrelevant

The Government's newly-minted arguments that the first Bellerive declaration was inadmissible,[14] and that the circumstances of its production and subsequent government-aided revision are immaterial, also fall far short of the mark. Although post-trial the Government briefly raised the admissibility of the first Bellerive declaration, it not only failed to legally justify its position,[15] but the

[11] Dkt. 592 at 2 (conceding that "Mr. Lissade did not use the specific word 'by-laws'"). Interestingly, the Government argued to the district court after trial that Lissade had testified that Haiti "Teleco had become an 'S.A.M.' 'de facto', *not de jure*." *Id*. at 2 (emphasis added).

[12] Dkt. 493 at 68-69.

[13] *Cf. id.* at 38 ("I researched [the ownership of Teleco] in all documents, I reviewed all documents that has been published that was affordable, available.").

[14] *See* Government's Response at 22, 72.

[15] *See* Dkt. 561, at 20 n.7.

district court also never ruled on it.[16] The Government's claim of inadmissibility, in short, is grounded on little more than its speculative and self-serving admissibility analysis.

There are good reasons to believe that, in the context of this trial, the district court would have ruled the first Bellerive declaration admissible.[17] What is more, there are equally sound reasons for believing the second Bellerive declaration (which confirms the substance of the first) is similarly admissible. And in any event, it is well-settled that whether a *Brady* hearing should have been granted is not determined by the admissibility of the evidence supporting the. *See*, *e.g.*, *Fernandez*, 136 F.3d at 1438-39 (remanding for a *Brady* hearing where defendant submitted newspaper reports of alleged Government misconduct). After all, the whole point of the requested hearing was to determine whether the Government had material and favorable information in its possession.

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[16] *See* Dkt. 609, at 23-28. In fact, the district court upheld the Government's introduction of the foreign business records of Teleco over, among other things, a defense hearsay objection. *See id.* at 22-23. If the Government can use such foreign business records without testimony from a records custodian, then Esquenazi would similarly be permitted to use the first Bellerive declaration, especially given that the second Bellerive declaration (which was prepared and submitted by the Government) confirms the authenticity of the first declaration.

[17] *See*, *e.g.*, F.R.E. 803(6) (Records of a Regularly Conducted Activity) or (7) (Absence of a Record of a Regularly Conducted Activity), and 807. *See* Dkt. 581-2 at 3, ¶ 2 (claiming that the first Bellerive declaration was prepared for internal business purposes).

D. The Government Cannot Now Claim Esquenazi Should Have "Simply Asked For" The Declarations Provided To, And Prepared By, The Government

The Government, having acknowledged that it had in its possession (and helped, at least in part, create) the clearly material declarations, quickly retreats to the exceptional defense that Esquenazi should have taken the initiative to "procure" the documents "simply by asking [Prime Minister Bellerive]."[18] Perhaps the Government is correct that Esquenazi's trial counsel *could* have reached out to Prime Minister Bellerive separately (either informally or through the cumbersome letters rogatory process) to request his own copies of the declarations. But he did not, and there is no guarantee that the Prime Minister would have obliged.

Setting aside the Government's invitation to speculate on this point, and its inability to establish that Esquenazi even knew of the declarations' existence, the law is clear that the duty to disclose is on the Government. *Brady* requires that if the Government has material information in its possession (and the defendant does not), then the Government must disclose that information to the defendant. [19] *Brady* does not require as a precondition that defense counsel somehow guess what

[18] Government's Response at 72.

[19] *See, e.g.*, *Parker v. Allen*, 565 F.3d 1258, 1277 (11th Cir. 2009) ("The prosecutor has a duty not only to disclose such favorable evidence but also to learn of any favorable evidence known to others acting on the government's behalf[.]") (quotation omitted).

foreign evidence the Government might have access to, and then attempt to replicate how it (or anyone else) obtained it.

E. The Fact And Substance Of Bellerive's Potential Testimony Are Unknown

Whether Bellerive would have been available to testify at Esquenazi's trial will never be known. Perhaps Esquenazi's trial counsel could have sought his own declaration from Bellerive, or somehow attempted to compel his appearance. But the opportunity to exercise either option would only have presented itself *if* the Government had disclosed the substance of the first Bellerive declaration prior to closing arguments. In any event, the Government is now particularly ill-placed to point to the uncertainty caused by its own potential failure to timely disclose *Brady* material as a justification for barring reasonable inquiry into its actions and knowledge.

F. No "Evil Motive" Is Required

The prosecution team at the *Brady* hearing may have credibly claimed that it was unaware of the Prime Minister's first declaration prior to its receipt on August 9, 2011.[20] This argument, however, overlooks that it is not enough that the prosecution team was unaware of the existence of the first Bellerive declaration until August 9, 2011 – the U.S. Government, writ large, also had to be unaware of the critical *information contained within it*, namely, that the Prime Minister would

[20] *See generally* Government's Response at 65.

establish that Teleco "has never been and is not a State enterprise," and that Teleco's bylaws had never been changed (a precondition to it becoming a state enterprise under Haitian law). If the Government knew either of those two key facts (or others) prior to August 9, 2011, it had an indisputable duty to disclose this information, and its failure to do so violates *Brady*.

The Government is unable to refute that the only way to resolve these central issues was to convene the requested *Brady* evidentiary hearing during which the Government would be required to detail (1) the degree of its contact with Bellerive and the Haitian government over the course of its prosecution of Esquenazi, (2) the full extent of the Government's knowledge concerning the information contained in the first Bellerive declaration, and (3) when it knew of this information.

G. A *Brady* Hearing Is Also Needed to Determine Whether The Haitian Government's Knowledge Is Properly Imputed To The U.S. Government

The district court's failure to conduct a hearing is compounded because the prosecution team's "we knew nothing until August 9, 2011" explanation is rendered irrelevant if the evidence during the *Brady* hearing establishes that Bellerive's or the Haitian government's knowledge is properly imputed to the Government. *See generally United States v. Antone*, 603 F.2d 566, 569-70 (5th Cir. 1979) (state police officer's knowledge may be imputed to federal prosecutor); *see also Reyeros v. United States*, 2011 WL 5080308, *7 (D.N.J. Oct. 24, 2011)

(holding that foreign authorities' knowledge may be imputed to U.S. prosecutors) (citing *United States v. Reyeros*, 537 F.3d 270, 281-83 (3d Cir. 2008)).[21]

The Government simply asserts that, although the "cooperation" by the Haitian governmental officials "extended . . . to the prosecutors [in this case]," they did not become *de facto* agents of the United States.[22] But the Government makes this inherently fact-based assertion in the absence of any supporting evidence in the record, without having it tested in an adversarial hearing, and without judicial scrutiny. Indeed, Bellerive's second declaration, which the Government admittedly assisted Mr. Bellerive in preparing,[23] expressly states that "the Government of Haiti *has always supported and will continue to support the Government of the United States* in its efforts to fight against corruption, especially in light of the fact that such actions violate Haitian laws."[24] The second Bellerive declaration thus highlights extensive cooperation between the U.S. Government and the Haitian government, and the Government concedes that, immediately after

[21] The *Antone* case was decided before September 30, 1981, and is, therefore, binding precedent. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981).

[22] Government's Response at 70-71.

[23] *Id*. at 66, 73.

[24] Dkt. 581-2 at 4, ¶ 9 (emphasis added).

receiving the declaration, it "*consulted* Bellerive and other [Haitian] officials . . . and *assisted* Bellerive in preparing the second declaration."[25]

Only a *Brady* hearing would have allowed the district court to resolve key facts concerning (1) the circumstances and timing of what the Government knew regarding the content of Bellerive's critical declarations, and (2) whether this knowledge should properly be imputed to the Government. *See Antone*, 603 F.2d at 569 (holding that knowledge can be imputed if the court finds that the two sides pooled "their investigative energies to a considerable extent," or that their respective efforts were "marked by [a] spirit of cooperation").

II. The Government's Untethered Definition Of "Instrumentality" Cannot Stand

The FCPA prohibits making corrupt payments to a "foreign official" or a "foreign political party or official thereof or any candidate for political office."[26] "Foreign official," in turn, is defined as "any officer or employee of a foreign government or any department, agency, *or instrumentality thereof*[.]"[27] The Government concedes, as it must, that "the FCPA does not define the term 'instrumentality,'" and further " agrees with defendants that the instrumentality

[25] Government's Response at 73 (emphasis added).

[26] 15 U.S.C. § 78dd-2(a)(1)-(2).

[27] *Id.* at § 78dd-2(h)(2)(A) (emphasis added).

must perform a 'governmental function'. . . ."[28] The only remaining definitional challenge, then, is to determine what constitutes such a governmental function.[29]

Absent a statutory definition, both sides begin with a dictionary definition of "instrumentality" from *Black's Law Dictionary*. Esquenazi points to the definition of "instrumentality" as "[s]omething by which an end is achieved; a means, medium, agency," and explains that this definition is of little help because the FCPA fails to specify any such governmental ends or means. *Black's Law Dictionary* 801 (6th ed. 1990). The Government, in response, points to a largely unconstrained definition section in a later edition of *Black's Law Dictionary*, namely, "[a] means or agency through which a function of another entity is accomplished." In the Government's view, this definition provides all the guidance that is needed.

The most obvious flaw in the Government's definition is that it ignores the FCPA's failure to specify which particular "functions" or "means" turn a run-of-the-mill private business into an "instrumentality of a foreign government."

[28] Government's Response at 29.

[29] *Id*.

A. The Government Fails To Explain Why The FCPA's "Statutory Context" Requires "Instrumentality" Of A Government To Include State-Owned Enterprises Performing No Governmental Functions

According to the Government's reasoning, because *some* foreign governments "perform certain task through SOEs," *all* state-owned enterprises automatically are instrumentalities of foreign governments.[30] Further obscuring the meaning of "instrumentality," the Government rejects "looking to traditional governmental functions as the benchmark," points to the "statute's broad scope," and asserts that this Court should instead pay heed to "the foreign government's own determination of what its functions are and what entity should perform them."[31]

Despite its best efforts, the Government is unable to point to any persuasive textual or other basis for defining "instrumentality" so broadly, or why the term must encompasses any and all state-owned enterprises (and their employees), even if they do not perform a single governmental function similar to those performed by a political subdivision. As a matter of simple textual analysis, not only do the two preceding words in the statute ("department" and "agency") fatally undermine this position, but so does the word that all three seek to define (namely, "foreign *official*").

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[30] *Id*. at 31-32.

[31] *Id*. at 32-34.

The Government first attempts to evade this analytical shortfall by issuing a paean to legislative flexibility.[32] This argument is as true as it is beside the point. The Government's reasoning is grounded on a false dichotomy – either *all* state-owned enterprises or *no* state-owned enterprises are instrumentalities for a foreign government.[33]

What the Government overlooks is that Esquenazi never claimed that a government is somehow precluded from using a corporation to perform a government function. Rather, Esquenazi's textually and logically justified position is that governmental assistance does not automatically transform a previously private business into an "instrumentality of the government," and certainly not one akin to a department or agency. What must matter under the FCPA, then, is the actual government-assisting function the entity performs; in the case of an "instrumentality" of a foreign official, the state-owned enterprise must perform a governmental function similar to that of a political subdivision. In short, the "instrumentality" must be part of the government.

[32] *See id*. at 30-32.

[33] *See*, *e.g.*, *id*. at 31 ("Foreign governments similarly perform certain tasks through SOEs, and placing those functions in SOEs does not mean that they are not performed on behalf of the foreign government.").

The Government relies on the Supreme Court's decision in *Lebron v. Nat'l Railroad Passenger Corp.*[34] Although the Court in that case determined that Amtrak was an "instrumentality of the United States for the purpose of individual rights guaranteed against the Government by the Constitution," it did so only *after* affirming that Congress could declare Amtrak a "non-governmental entity" for purposes of a statute.[35] In short, the Court's decision highlights that a corporation can in one context be considered an "instrumentality," and in another context can qualify as a non-governmental entity. Critically here, what matters, then, is the *context* in which the term is used. The Government cannot get around the fact that the FCPA uses the word "instrumentality" to define a "foreign official," and places it after the words "department" and "agency." In that particular context, much like the statutory contexts at issue in *Lebron*, "instrumentality" must be read more narrowly.

The Government also claims the FCPA's repeated use of the word "any," including in the definition of "foreign official," establishes the statute's broad

[34] 513 U.S. 374 (1995). *See* Government's Response at 30-31.

[35] 513 U.S. at 392-94. *See also id.* at 392 ("Amtrak claims that, whatever its relationship with the Federal Government, its charter's disclaimer of agency status prevents it from being considered a Government entity in the present case. *This reliance on the statute is misplaced*. [Although Section 541 is dispositive for purposes of matters that are within Congress's control], it is not for Congress to make the final determination of Amtrak's status as a Government entity for purposes of determining the constitutional rights of citizens affected by its actions.") (statutory citations omitted) (emphasis added).

scope.[36] But the FCPA's use of the word "any" must be viewed in light of the particular word it modifies. In the case of "foreign official," Esquenazi agrees that the FCPA applies to "*any* foreign official" or "*any* . . . instrumentality." But this does not resolve the fundamental disagreement over *what*, in particular, qualifies as a foreign official or instrumentality in the first place.

The Government's view that the word "any" serves as a sort of statutory dry erase marker, removing any debate over the meaning of nouns, is mistaken. Instead, the other nouns surrounding "instrumentality" – such as "governmental function" – do provide an answer. The Government, indeed, has tried and lost this linguistic argument before, and, for the reasons just discussed, should lose it again.[37]

Instead of attempting to meaningfully construe the FCPA's words on the basis of the other words surrounding them, the Government argues that the Court should not apply the statutory canon of *ejusdem generis* ("of the same kind") to the

[36] Government's Response at 34 (citing *United States v. Townsend*, 630 F.3d 1003, 1011 (11th Cir. 2011)).

[37] *See, e.g.*, *Small v. United States*, 544 U.S. 385, 388-94 (2005); *see also Edison*, 604 F.3d at 1309 (construing definition of "public entity" narrowly despite presence of the word "any" in the definition); *Price v. Time, Inc.*, 416 F.3d 1327, 1336 (11th Cir. 2005) ("While the scope of the 'any' adjective is plenty wide to sweep in all of the noun category that follows, it ordinarily does not sweep beyond that category. The term 'any dog' does not mean 'any dog or cat' unless a cat is a dog. Likewise, the term 'any newspaper' does not mean 'any newspaper or magazine,' unless a magazine is a newspaper. So, we are back where we started, looking for the plain meaning of the word 'newspaper.'").

FCPA's use of "instrumentality."[38] Even a superficial reading of the Government-cited cases of *CSX Transportation, Inc. v. Alabama Dep't of Revenue*, 131 S. Ct. 1101, 1113 (2011) and *Garcia v. United States*, 469 U.S. 70, 75 (1984) demonstrate their inapplicability here.[39]

Pursuant to basic canons of construction, an indefinite term ("instrumentality") must be read both in light of the specific terms that precede it ("department" and "agency"), as well as the word it seeks to define ("foreign official"). And *Garcia* does not hold that the mere use of the disjunctive "or" in a statutory litany renders inapplicable the *ejusdem generis* canon.

The Government next claims that its strained reading of the FCPA's text is somehow supported by the canon of *noscitur a sociis* ("a word is known by the company it keeps"). According to the Government, "SOEs, *like departments and agencies*, are often government by public laws, directly managed by government-

[38] *Id.* at 36-37 (citing *CSX Transportation, Inc. v. Alabama Dep't of Revenue*, 131 S. Ct. 1101, 1113 (2011) and *Garcia v. United States*, 469 U.S. 70, 75 (1984)).

[39] *Compare CSX Transportation, Inc.*, 131 S. Ct. at 1113 (finding the *ejusdem generis* canon inapplicable to the statutory subsection that provided that states "may not" … "(4) Impose another tax that discriminates against a rail carrier") and *Garcia*, 469 U.S. at 75 (finding the *ejusdem generis* canon inapplicable to the statutory prohibition on assault with intent to rob a person with "custody of any mail matter or of any money or other property of the United States") with 15 U.S.C. § 78dd-2(h)(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.").

appointed officials, draw from and contribute to the public fisc, and carry out important government policies and functions."[40] But, again, this argument ignores the question at hand, namely, *which* state-owned enterprises rise to the level of an "instrumentality" of a foreign government? And the statutory context of the FCPA detailed above compels the answer that it is only those instrumentalities that exercise governmental functions akin to those of departments and agencies.

The Government's reliance on the Supreme Court's statement in *First National City Bank v. Banco Para El Comerico Exterior de Cuba* that "the concept of a 'usual' or a 'proper' governmental function changes over time and varies from nation to nation" is similarly unavailing.[41] As an initial matter, the statement is clearly *dicta*, made as an aside in a footnote in a non-criminal case. The Government's brief also fails to mention that the Court led into that sentence by noting that "[w]e decline to adopt such a standard *in this case*, as our decision is based on other grounds."[42] What is more, the question in *First National City Bank* was not what constituted a "governmental function," but, instead, was whether those functions were "proper" or "usual." Ultimately, the Supreme Court certainly

[40] Government's Response at 37.

[41] 462 U.S. 611, 633 n.27 (1983).

[42] *Id.* (emphasis added).

did not foreclose the possibility that an interpretation of "governmental function" might be useful, or even necessary, in another context, such as under the FCPA.

Moreover, accepting the Government's contention that a U.S. citizen's culpability under a domestic criminal statute should turn on the diverse and ever-evolving positions taken by foreign nations (without any objective U.S. standard)[43] would render the FCPA the exemplar of a unconstitutionally vague criminal statute.

Not only do various tools of statutory construction undercut the Government's interpretation, but the one court to address the issue, *United States v. Carson*, analyzed "instrumentality" in the context of other governmental departments and agencies listed in the statute."[44]

The Government asserts that *Carson* does not support Esquenazi's interpretation,[45] but offers no persuasive explanation as to why this purportedly is so. The Government's intonation that it agrees that an "instrumentality" must perform a "governmental function" does not mean that the Government means the

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[43] *See* Government's Response at 32.

[44] *United States v. Carson*, 2011 WL 5101701, *5 (C.D. Cal. May 18, 2011). *See also id.* ("The use of the term 'instrumentality' in the FCPA produces no such crisp exclusion of a state-owned entity. To the contrary, a state-owned entity – *just like an agency or department* – is a modality through which a government may conduct its business.") (emphasis added).

[45] *See* Government's Response at 29 n.8 & 48.

same thing the court did in *Carson* when it used the same term. The *Carson* court's examples are tied to entities like the FBI, FTC, SEC, and NLRB, not to companies like GM or AIG (in which the federal government has an ownership interest, and concerning which it has generalized commercial and public policy interests). And the *Carson* court also noted that "a mere monetary investment in a business entity by the government may not be sufficient to transform that entity into a governmental instrumentality,"[46] a point flatly at odds with the Government's present position.

The Government's citation to two other district court decisions likewise fails to help its cause.[47] Those decisions stand for nothing more remarkable than the fact that *some* state-owned enterprises *may* constitute instrumentalities – and that, in the absence of factual development, the courts could not dismiss the

[46] *Carson*, 2011 WL 5101701, at *5.

[47] *Id*. at 29 n.8 (citing *United States v. Aguilar*, 783 F. Supp. 2d 1108 (C.D. Cal. 2011) and *Aluminum Bahrain B.S.C. v. Alcoa, Inc.*, No. 8–299, 2012 WL 2094029 (W.D. Pa. June 11, 2012)). In these two criminal cases, the defendants argued that *under no circumstances* could a state-owned entity be an instrumentality. *See Carson*, 2011 WL 5101701 at *5 ("It does not follow, however, that state-owned companies should be categorically excluded from Defendants' non-exclusive list of hypothetical instrumentalities."); *Aguilar*, 783 F. Supp. 2d at 1110 ("[D]efendants argue that under no circumstances can such a person be a foreign official, because under no circumstances can a state-owned corporation be a department, agency, or instrumentality of a foreign government"). To be clear, Esquenazi's position is that a state-owned entity could be an "instrumentality," provided it performs a governmental function *akin to that of a department or agency*. There is no evidence that Teleco did so, and the Government has not argued such.

indictments.[48] Neither of those decisions, moreover, address whether *all* state-owned enterprises qualify as an "instrumentality," and, if not, which do. The *Carson* court, likewise, limited the breadth of the Government's definition of "instrumentality" by noting that not all state-owned enterprises qualify as "instrumentalities," while sensibly recognizing that the facts of the case might develop in a manner eventually supporting a conviction under a more restrained interpretation.

It is also instructive to contrast the Government's categorical approach in this appeal with its September 18, 2012, Opinion Procedure Release examining whether a member of a foreign government's royal family qualifies as a foreign official under the FCPA. Notably, the Opinion Procedure Release focused on the *duties* of the individual, rather than on the individual's *status*. After conducting a "fact-intensive, case-by-case determination," which included findings concerning the individual's lack of title or role in the government, power over governmental decision-making, and likely ascension to a governmental position,[49] the Government concluded that the member of the royal family did not "act . . . in any capacity for, or on behalf of, the Foreign Country, or any department, agency, or

[48] *See*, *e.g.*, *Carson*, 2011 WL 5101701, at *3 ("[T]he question of whether state-owned companies qualify as instrumentalities under the FCPA is a question of fact.").

[49] U.S. Dep't of Justice, Opinion Procedure Release (Sept. 18, 2012) at 5, available at http://www.justice.gov/criminal/fraud/fcpa/opinion/2012/1201.pdf.

instrumentality of the Foreign Country."[50] It is difficult to square the Opinion Release's more nuanced and action-oriented analysis with the Government's current categorical approach.

B. The Government Engages In A Selective And Misleading Reading Of The FCPA's Legislative History

If the Court deems the FCPA's use of the term "instrumentality" to be ambiguous, it may next consider the FCPA's legislative history.

The Government employs a flawed pick-and-chose approach to reading the FCPA's legislative history in service of its goal of demonstrating Congress' purported desire to enact "broad prohibitions against corporate bribery."[51] By simply stating that Congress was concerned about "corporate bribery," however, the Government's imprecise argument collapses under its own weight. After all, Congress's purpose in enacting the FCPA was to prohibit bribery *from* corporate entities *to* foreign governments, and not bribery of foreign companies by domestic companies (proscribing such commercial bribery is, in part, the job of the U.S. Travel Act, 18 U.S.C. § 1952). The legislative history the Government highlights proves this point.

The Government protests Esquenazi's citation to Professor Michael J. Koehler's declaration addressing the legislative history of the FCPA, which was

[50] *Id.* at 2.

[51] *See* Government's Response at 33-35.

filed in *United States v. Carson*.[52] Aside from the analysis contained in the Koehler declaration, the substance of the declaration is the legislative history of the FCPA. The Court can surely take notice of legislative history, and evaluate the utility and accuracy of Professor Koehler's declaration for itself. But the Government's claim that the declaration of a professor filed in another criminal proceeding and under penalty of perjury is somehow of lower status than a law-review article reviewed by law students strains credulity.[53]

The Government's argument that the legislative history includes some references to state-owned enterprises also does not advance its cause.[54] References to state-owned enterprises in the legislative history only serve to make the absence of that term in the statutory definition all the more compelling, especially when there is no statement indicating that the term "instrumentality" was designed to pull in such entities or their employees. Furthermore, the Government argues that the FCPA should be broadly interpreted merely because certain private payments were discussed by Congress; the error here is that, despite such discussions,

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[52] *Id*. at 42 n.13 ("That declaration is not part of the record in this case, and this Court should not consider it.").

[53] *See generally Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 143 n.47 (2d Cir. 2010) ("[W]e fail to see how statements made [by professors] in an affidavit, under penalty of perjury, are any less reliable than published works whose accuracy is confirmed only by efforts of the student staff of law journals.").

[54] *See* Government's Response at 42.

provisions criminalizing those payments never made their way into the statute.[55] Congress, indeed, also discussed making "grease"/facilitation payments illegal, but the FCPA never criminalized them.[56]

The Government next points in *dicta* in *United States v. Aguilar* that the legislative history "does not demonstrate that Congress intended to include all state-owned corporations within the ambit of the FCPA," but also does not "provide support for Defendants' insistence that Congress intended to exclude all such corporations."[57] If, as the *Aguilar* court stated and Esquenazi argues, not all state-owned enterprises fall within the definition of "instrumentality," then that term must be given a definition without reference to whether the state simply owns a share of the enterprise.

Additionally, the Government's assertion that the final version of the FCPA traded the phrase "corporation or other legal entity established or owned by . . . a foreign government" in an earlier draft for the word "instrumentality" is pure speculation.[58] Congress could have just as easily decided to drop the phrase altogether. Or, as the final location of the term makes more plausible, it could

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[55] *See id.* at 42-43.

[56] 15 U.S.C. §§ 78dd-1(b) & (f)(3); *see also* Professor M. Koehler declaration at ¶¶ 102, 200-208.

[57] Government's Response at 42 (quoting *United States v. Aguilar*, 783 F. Supp. 2d 1108, 1119 (C.D. Cal. 2011)).

[58] *Id.* at 43.

have intended the term "instrumentality" to replace the phrase "political subdivision," which it also dropped.

Finally, consider that Congress in Section 1504 of the Dodd-Frank Act defined "foreign government" to include departments, agencies, instrumentalities, *and state-owned entities*.[59] This means either that Congress in Dodd-Frank violated the rule against surplusage, or that Congress does not believe state-owned entities fall within the meaning of the word "instrumentality." Either way, the Government's claims here once again fail.

C. The Use Of The Term "Instrumentality" In Other Statutes Supports Construing The FCPA To Exclude State-Owned Enterprises That Do Not Perform Governmental Functions

Courts construing "instrumentality" under the Federal Tort Claims Act, ERISA, and the ADA have limited the term to entities that perform a governmental function, are subject to detailed day-to-day governmental direction, or are governmental units.[60] The FSIA and Dodd-Frank Act, in contrast, plainly illustrate that Congress can, when it so chooses, specifically include "state owned

[59] 15 U.S.C. § 78m(q)(1)(B).

[60] *See United States v. Orleans*, 425 U.S. 807, 814-16 (1976) (construing "instrumentalities" under the Federal Tort Claims Act); *Koval v. Washington Cty Redevelopment Auth.*, 574 F.3d 238, 240-41 (3d Cir. 2009) (construing "instrumentality" under ERISA); *Edison v. Duoberley*, 604 F.3d 1307, 1309 (11th Cir. 2010) (construing "instrumentality" under the ADA and citing *Green v. City of N.Y.*, 465 F.3d 65, 79 (2d Cir. 2006) in support).

enterprises" within the sweep of a statute. Such language is, of course, conspicuously absent from the FCPA.

In its response, the Government notes that these other acts interpret the term "instrumentality" in "contexts other than the FCPA."[61] That is, rather obviously, true; but it is also not disqualifying, and the Government cannot place doubt on their analogical force. For example, in the context of Dodd-Frank, the Government notes the ineluctable facts that (1) the Act was passed more recently than the FCPA, and (2) it is a different statute. Both are true, and both are irrelevant. What remains unanswered is why these differences matter, and why the Government is unable to offer up a *single* statute construing "instrumentality" as broadly as the Government now asks this Court to construe it under the FCPA.

D. Requiring An Instrumentality To Perform A Governmental Function Does Not Read "Instrumentality" Out Of The FCPA

The Government's next line of defense is to declare that Esquenazi's interpretation of instrumentalities "effectively reads the statutory term 'instrumentality' out of the FCPA," because "[e]ntities encompassed by defendants' definition will almost always fit under one of the other distinct prongs of § 78dd-2(h)(2)(A)."[62] This argument also misses the mark.

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[61] Government's Response at 37.

[62] *Id*. at 32.

First, the Government can only bring itself to say that such entities "will *almost* always" fit under one of the other distinct prongs in the FCPA.[63] That caveat effectively concedes that Esquenazi's interpretation of "instrumentality" does not render the term "mere surplusage." Conversely, the Government's proffered argument renders "agency" into mere surplusage, as that narrowly defined term could potentially "fit under one of the other distinct prongs of § 78dd-2(h)(2)(A)."[64]

E. The FCPA's "Grease Payments" Exception Lends No Support To The Government's Position

The Government next claims that the FCPA's "routine governmental action" exception to FCPA liability supports its broad reading of the statute, because "providing phone service is one of the items on that list, reflecting Congress's view that 'foreign officials' 'ordinarily and commonly perform[]' such actions."[65] But this argument also supports Esquenazi's position.

It is true that the FCPA defines "routine governmental action" to include the provision of phone service.[66] Fatal to the Government's argument, however, the FCPA then goes on to *exclude from culpability* otherwise corrupt payments to

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[63] *Id.* (emphasis added).

[64] *Id.* at 32.

[65] *Id.* at 34-35.

[66] *See* 15 U.S.C. § 78dd-1(f)(3)(A)(iv).

obtain such services.[67] As the Government points out, then, the FCPA itself states that providing telephone service does *not* rise to the level of traditional governmental action that Congress was seeking to protect through the prohibition on bribes to "foreign officials."

What is more, the "routine governmental action" exception has no bearing on whether the particular "governmental actions" listed are akin to those functions performed by a department or agency. The Government also ignores that even the "routine governmental action" exception requires a nuanced factual analysis as to *whether* the governmental service of a particular case is "ordinarily and commonly performed by a foreign official."

The Government's position, moreover, produces bizarre results. Grease payments could legally be made to some, but not other, state-owned enterprise employees.[68] A scheduling clerk at the state telephone company, for example, would be exempted, but a scheduling clerk at a state hospital would not. The Government briefing does not address this illogical disparate treatment of similarly-situated state-owned enterprise employees. Of course, if instead the test is whether the state-owned enterprise does, in fact, perform a governmental function akin to a department or agency, then this disparate treatment falls away.

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[67] *See id*. at § 78dd-1(b).

[68] *See id.* 35-36.

The Government also takes an internally inconsistent position in its effort to downplay the significant gap its interpretation of Section 78dd-2(c)(2) creates.[69] On the one hand, the Government criticizes Esquenazi's narrow definition of "instrumentality," arguing that it "effectively reads the statutory term [] out of the FCPA," and would "almost always fit under one of the other distinct prongs of § 78dd-2(h)(2)(A).[70] But then the Government turns around and asserts that removing "instrumentality" or "agency" from section 78dd-2(c)(2) is insignificant (presumably because the Government contends that "instrumentality" and "agency" are subsumed within "department").[71]

F. Esquenazi's Interpretation Of The FCPA Comports With U.S. Treaty Obligations

The Government claims Esquenazi's narrow interpretation of the FCPA is in conflict with the Organization of Economic Co-Operation and Development's 1997 Convention on Combating Bribery of Foreign Officials in International Business Transactions ("OECD Convention").[72] The OECD Convention, among other things, prohibits bribes to "foreign public officials," which are defined to include individuals exercising a "public function" for "a public enterprise"; such

[69] *See id*.

[70] See *id*. at 32.

[71] *See id.* at 36 n.11.

[72] *See id*. at 38-40.

public function or enterprise can, in turn, be established by governmental majority ownership or control. To the Government's thinking, because Congress amended the FCPA in 1998 in response to the Senate's ratification of the OECD Convention, but did not amend the statute to include a specific reference to "public enterprises," that must mean that the existing statute already covers "public enterprises." But the Government's OECD Convention argument suffers from several terminal deficiencies.

First, the 1998 amendment of the FCPA following ratification of the OECD Convention shines no light on what Congress intended when it defined "foreign official" in 1977. Moreover, the Government's premise that the purpose of the 1998 FCPA amendments were to bring the FCPA into complete conformity with the OECD Convention is unsupported and has been rejected at least twice.[73]

Moreover, even the OECD Convention definition of a "foreign public official" requires that person to "exercis[e] a public function," even if it is on behalf of a "public enterprise." Commentary 15 to the OECD Convention specifies that a person working for a public enterprise performs 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

[73] *See United States v. Kay*, 359 F.3d 738, 755 n.68 (5th Cir. 2004); *United States v. Kay*, 200 F. Supp. 2d 681, 686 (S.D. Tex. 2002), *rev'd on other grounds in Kay*, 359 F.3d at 761. *See also* Professor M. Koehler declaration at ¶¶ 390-98.

enterprise, without preferential subsidies or other privileges." In other words, the OECD Convention recognizes that not all enterprises owned or controlled by a government perform a public function. Even the OECD Convention, then, requires that the Government prove *something more* than employment by a government-owned enterprise.

G. The Rule Of Lenity Requires The Court To Construe The FCPA To Exclude State-Owned Enterprises That Do Not Perform Governmental Functions

If the Court determines that the FCPA's term "instrumentality" is susceptible to multiple reasonable interpretations – *i.e.*, that it is ambiguous – then it must apply the rule of lenity and strictly construe the term in Esquenazi's favor by limiting it to conduct "clearly prescribed" (namely, governmental functions akin to that of a governmental department or agency).[74]

The Government has certainly not established that its broad interpretation is "unambiguously correct."[75] Any "ties" must, of course, go to Esquenazi.[76]

The Government argues in two cursory paragraphs that the rule of lenity is limited to "cases involving a 'grievous ambiguity,'" rather than simple

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[74] *United States v. Santos*, 553 U.S. 507, 514 (2008).

[75] *United States v. Granderson*, 511 U.S. 39, 54 (1994).

[76] *Santos*, 553 U.S. at 514. *See also United States v. Bodmer*, 342 F. Supp. 2d 176, 189 (S.D.N.Y. 2004) (applying rule of lenity to FCPA).

"grammatical possibilit[ies]," and that "this Court need not guess as to what Congress intended when the statutory rules of construction are applied."[77]

But the Supreme Court stated clearly that the "grievous ambiguity" language from *Muscarello v. United States* is meant to distinguish material ambiguity from the run-of-the-mill ambiguity present to some degree in all statutes.[78] Esquenazi, in short, need establish no more than that "a reasonable doubt persists" about the meaning of "instrumentality" for the rule to apply.[79]

Here, Esquenazi has demonstrated that the term "instrumentality" must be construed in line with "department" and "agency," such that an "instrumentality" must perform a similar government function. That said, if the Court disagrees with Esquenazi and finds that Esquenazi and the Government's competing interpretations are in equipoise,[80] then it still must rule in Esquenazi's favor. Whatever the analysis, the Government has failed to establish that its position is "unambiguously correct."

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[77] Government's Response at 46 (citing *Muscarello v. United States*, 524 U.S. 125, 128 (1998)).

[78] *Muscarello*, 524 U.S. at 138.

[79] *See Moskal v. United States*, 498 U.S. 103, 108 (1990). *See also Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts*, at 299 (2012).

[80] *See Edison v. Douberly*, 604 F.3d 1307, 1309 (11th Cir. 2010) ("'Instrumentality' . . . is a word susceptible of more than one meaning.").

H. The Government Failed To Prove That Teleco Performed A Governmental Function Similar To That Performed By Political Subdivisions Like A Department Or Agency

In his opening brief, Esquenazi demonstrated the Government's failure to present evidence sufficient to prove that Teleco performed a governmental function similar to that performed by political subdivisions like a department or agency.[81] The Government now essentially concedes this point, and falls back to its claim that Esquenazi's legal interpretation "is incorrect and the government was not required to meet it."[82] The Government then spends the remainder of its brief arguing that there was sufficient evidence in the record to support Esquenazi's conviction under the Government's broader definition of "instrumentality."[83]

If the Court agrees with Esquenazi's narrower interpretation of "instrumentality" under the FCPA (which it should), [84] then Esquenazi's conviction

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[81] *See* Esquenazi's Corrected Initial Brief at 45-48.

[82] Government's Response at 49.

[83] The Government persists in its reliance on conclusory testimony from Lissade, Esquenazi, and others that Teleco was, in their own language, owned by or an "instrumentality" of the Haitian Government. *See*, *e.g.*, *id.* at 6, 12 n.3, and 50 n.18. While that testimony might be relevant to establish those individuals' *subjective* belief about the status and ownership of Teleco, such testimony cannot establish that Teleco met the *objective* legal standards of an "instrumentality" under the FCPA. Expert opinions and lay testimony cannot establish the proper legal interpretation of a statute or an ultimate legal issue.

[84] To be clear, Esquenazi does not concede that the evidence supports Esquenazi's conviction under a broader interpretation of the FCPA, only that there is clearly no evidence to support his conviction under the narrower view. Co-defendant Rodriguez has challenged the sufficiency of the evidence in support of

under the FCPA is without evidentiary support, and he is entitled to acquittal on all FCPA counts.

III. In The Alternative, The FCPA Is Unconstitutionally Vague As Applied To Esquenazi

A statute is unconstitutionally vague under the Due Process Clause of the Fifth Amendment if people "of common intelligence must necessarily guess at its meaning and differ as to its application."[85] The touchstone of the inquiry is whether it was "reasonably clear at the relevant time" that a defendant's conduct was criminal under "the statute, either standing alone or as construed."[86]

A. Esquenazi's Vagueness Challenge Is Governed By "Traditional" Standards

Relying on *Village of Hoffman Estates v. Flipside, Hoffman Estates*,[87] the Government claims Esquenazi must meet an especially rigorous vagueness standard because the FCPA regulates economic activity. *Village of Hoffman Estates*, however, does not establish the "rigorous standard" that the Government seeks to avail itself of. For one, the vagueness challenge in *Village of Hoffman Estates* was a facial challenge, not an as-applied challenge, and facial challenges

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Defendants' convictions under the broader interpretation of the FCPA, and Esquenazi joins in that challenge. *See* Rodriguez's Corrected Initial Brief at 47-50; Esquenazi's Corrected Initial Brief at 3.

[85] *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926).

[86] *United States v. Lanier*, 520 U.S. 259, 267 (1997).

[87] 455 U.S. 489 (1982).

face a higher burden. The constitutional right asserted by the *Village of Hoffman Estates* defendant, moreover, was one involving commercial speech, a right that has historically been subject to greater regulation, as opposed to a criminal defendant's liberty interest that is protected by the Due Process Clause.[88] The Supreme Court, indeed, expressly noted that the "Court has also expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe."[89] What we have here is, obviously, a criminal case with historically severe penalties.

B. The DOJ Opinion Procedure Cannot Save An Unconstitutionally Vague Statute

The Government, in a footnote, declares that any vagueness in the statutory language is cured by the availability of a written opinion from the Attorney General as to whether the inquirer's proposed hypothetical conduct "conforms with *the Department's present enforcement policy*."[90] Clearly, the DOJ issuing an opinion on the scope of its current enforcement policy cannot cure a statutory defect.[91]

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[88] *See, e.g., J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S. Ct. 2780, 2786 (2011).

[89] *Village of Hoffman Estates*, 455 U.S. at 498-99.

[90] Government's Response at 45 n.15 (emphasis added).

[91] *See, e.g., Benavides v. Drug Enforcement Admin.*, 968 F.2d 1243, 1248 (D.C. Cir. 1992).

C. The Government's Specific Intent Argument Is Unavailing

The Government next argues that the statute is not unconstitutionally vague because of the presence of a specific intent requirement.[92] This is true in some contexts, but not all (and not here). The district court's instructions on specific intent were seriously flawed. And, as discussed below, the Government failed to establish that, at the time the relevant money transfers were made, Esquenazi knew Teleco was an instrumentality of the Haitian government.

Further, in attempting to marshal evidence on specific intent, the Government tautologically asserts that Esquenazi knew Teleco was "government-owned."[93] But that only begs the question of whether mere state ownership is enough to convert a foreign entity into an "instrumentality."

Esquenazi's deposition testimony that he believed Teleco was an state-owned enterprise, moreover, was given years after the charged conduct occurred; such testimony hardly establishes Esquenazi's specific intent "at the time" he engaged in the relevant conduct.

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[92] Government's Response at 45.

[93] *See id.* at 45, 59.

D. The Government's Vehemence Proves Too Much

The Government spends a significant part of its brief arguing that its broad (and fatally flawed) definition of "instrumentality" is crystal clear.[94] First, few statutory terms have received such extensive governmental resuscitation efforts. Second, there is a difficult-to-ignore, growing consensus among observers (including two former United States Attorneys General) that the Government is misreading "instrumentality."[95] Finally, as discussed above, there are ample reasons to reject the Government's reading of "instrumentality." It is, in short, not unreasonable to conclude that the statute is unconstitutionally vague.

IV. The Jury Instructions On The FCPA Failed To Require The Requisite Governmental Function Necessary To Establish That Teleco Was An "Instrumentality" Of The Haitian Government

The district court's instructions broadly defined "instrumentality" as "a means or agency through which a function of the foreign government is accomplished," and then permitted the jury to find Teleco an "instrumentality" of the government if, among other things, it: (1) provided [undefined] "services" to

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[94] *See*, *e.g.*, *id*. at 28-51.

[95] In addition to the authorities cited in Esquenazi's initial brief, *see also* Former Attorney General, Alberto R. Gonzales, *In Pursuit of Justice*, Lawyers for Civil Justice Meeting (presented May 2012), available at: http://www.wallerlaw.com/portalresource/lookup/wosid/cp-base-4-13102/media.name=/TAP%20-%20Speech%20to%20LCJ%20by%20Judge%20Gonzales%202012%2005.pdf (last accessed Oct. 2, 2012).

the citizens of Haiti; (2) was owned by the Haitian government; *or* (3) "was widely perceived and understood" to be performing official or governmental functions.[96]

Suffice it to say that this jury instruction is so exceptionally broad as to be almost devoid of meaning; under these instructions, Teleco is an instrumentality if the jury – as one would expect – concluded that Teleco provided phone services to the citizens of Haiti (the Government, indeed, advanced this argument here).[97] Of course, while some governments have the capability to provide telephone service, so do private companies like Sprint, Verizon, AT&T, and T-Mobile.

This simply puts the bar far too low. Why should it matter that a company is "widely perceived and understood" to perform official functions (and what does that even mean)? To this point, consider that, based on Lissade's testimony, Teleco qualified as an "instrumentality" under almost every factor of the district court's jury instructions *while it was still a private company* because the instructions contain no requirement that Teleco *actually perform* a defined *governmental* function or service.[98]

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[96] Dkt. 527 at 23-34. Although the Government claims that the "instructions made clear that . . . state ownership of the entity, by itself, is not sufficient" [for it to be considered an "instrumentality"], Government's Response at 47, a plain reading of the instructions reveals that the opposite is true.

[97] *See* Government's Response at 30.

[98] Dkt. 493 at 39-40 (emphasis added).

Throughout the Government's brief, the Government does not contest that if the Court construes "instrumentality" more narrowly than the Government's overbroad interpretation, then Esquenazi's FCPA conviction is fatally flawed. The same extends to the Court's FCPA jury instructions.[99] If the Court construes "instrumentality" more narrowly, as it should, then the district court's FCPA instructions not only prejudicially misstated the law, but were plainly erroneous.[100]

V. Esquenazi Is Also Entitled To Acquittal On The Money Laundering And Wire Transfer Counts Because They Were Based On Unproven Or Inadequate Predicate Acts

If the Court narrowly construes the definition of "instrumentality," then all that remains of Esquenazi's underlying conviction are counts for conspiracy to commit wire fraud, conspiracy to commit money laundering, and concealment money laundering. The money laundering counts, in turn, depended on wire fraud counts and a Haitian Bribery count (aside from the alleged FCPA violation).

Moving from the general to the specific, the Government does not contest that if the Court agrees with Esquenazi's interpretation of the FCPA, then the related predicates also fall away and the conspiracy charges are invalid.

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[99] *See* Government's Response at 55-60 (arguing that jury instructions adequately instructed jury on whether Teleco was a state-owned entity).

[100] Esquenazi joined Rodriguez's alternative argument that, even under a broad interpretation of "instrumentality" under the FCPA, the district court's instructions were inadequate as given. *See* Rodriguez's Corrected Initial Brief at 29-38; 44-47. Defendants' arguments are, in short, not at odds as the Government has claimed, *see* Government's Response at 55 n.20.

As for the Haitian Bribery predicate act, 18 U.S.C. § 1956(c)(7)(B) requires that the bribery involve a "public official." The Government has failed to counter Esquenazi's argument that this term requires either that the person (1) be the "holder of a public office" or (2) exercises "some portion of the sovereign power." Mere public employment, without more, is simply insufficient.[101]

The Government, in fact, undermines its own position by citing to *Dixson v. United States*, 465 U.S. 482, 496 (1984). *Dixson* construes "public official" in the domestic bribery statute, 18 U.S.C. § 201, to include people acting on behalf of the Government pursuant to a "delegation of authority." The Government failed to show that the agents and employees of Teleco received any such delegation of governmental authority. Equally fatal to the Government's position, the district court did not define "public official" in the instructions, so the jury had no reason to know that a precondition for convicting Esquenazi was a finding that governmental authority was properly delegated to the Teleco agents/employees**.**

Notably, the Government seeks to analogize its Section 1956 "public official" definition with its interpretation of "foreign official" under the FCPA.[102] The net result of this interpretation would be to pull a wide swath of private sector

[101] Esquenazi's Corrected Initial Brief at 50 (citing *Black's Law Dictionary*). Esquenazi also adopted the additional bribery arguments of Rodriguez, which includes Rodriguez's argument that the money laundering counts merged with the bribery counts.

[102] Government's Response at 84-86.

actors within the ambit of "government officials." Little do the employees and executives of most major domestic corporations – the employees and executives of telephone companies like AT&T or Verizon, for example – know that they qualify as public officials of the United States. Yet that is precisely the unsupportable result of the Government's analysis.

VI. The District Court Erred By Improperly Applying The Sentencing Guidelines As To Leadership Role, Perjury And Loss Amount

A. Role

The Government's position regarding leadership is not supported by the facts. Specifically, the district court failed to consider the legitimate activity of Terra and Teleco, and the legitimate corporate role of Esquenazi and other Terra employees, resulting in an inappropriate leadership role enhancement.

Esquenazi was primarily responsible for business relations and dispute resolution between Terra and Teleco.[103] This is the "role" of the leader of a company. Esquenazi's claimed illegal leadership role with Teleco, on the other hand, was based on his purportedly asking Perez to approach Antoine with a side

[103] Dkt. 511 at 22-23.

payment offer.[104] This, in short, was unfair spillover between Esquenazi's legitimate and assertedly illegitimate roles.[105]

Vice president Rodriguez,[106] Terra comptroller Perez,[107] and in-house lawyer Dickey,[108] moreover, all had independent, self-starting roles in the alleged criminal conduct. Viewed in the light most favorable to the Government, the district court could fairly conclude that Esquenazi improperly managed or supervised Terra employees. But there is insufficient evidence that he assigned roles to any of the alleged co-conspirators or otherwise "organized" the scheme as suggested by the Government to justify the highest role assessment. Nor does Esquenazi's title as Terra's President and majority stockholder support such a finding, for title is not a legitimate consideration. *See United States v. Yates*, 990 F.2d 1179, 1182 (11th Cir. 1993).

The only Eleventh Circuit case cited by the Government[109] is inapplicable as it concerns the number of individuals required in a role assessment which is not an

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[104] Dkt. 496 at 80.

[105] *See* U.S.S.G. §3 B1.1, cmt. 4; *United States v. Martinez*, 584 F.3d 1022 (11th Cir. 2009) (applying the seven factors enumerated in comment 4).

[106] Dkt. 478 at 56-60; 63-68; Dkt. 495 at 8-9; Dkt. 498 at 68, 78; Dkt. 800 at 49.

[107] Dkt. 491 at 69, 77-79.

[108] Dkt. 495 at 8-9.

[109] *United States v. Benavides*, 470 Fed. App'x 782, 794-95 (11th Cir. 2012).

issue in this matter. The cases of *United States v. Tejeda-Beltran*, 50 F.3d 105, 107 (1st Cir. 1995) and *United States v. Dijan*, 37 F.3d 398, 400-02 (8th Cir. 1994), moreover, concern criminal conduct that is independent of any business activity of the defendants. *Tejeda-Beltran* involved bribery of an INS agent in an alien smuggling operation and *Dijan* concerned bribery of an IRS agent to abate a tax assessment.

Finally, the Government's argument that this Court should consider harmless any failure of the district court to properly distinguish between Esquenazi's purported role of leader/organizer versus manager/supervisor misses the mark.[110] It is neither possible nor appropriate for a reviewing court to "safely conclude" (*i.e.*, assume) that the trial court would reimpose the same sentence. Although involving only a one-level reduction, the sentence determination of Esquenazi's role was clearly erroneous, requiring a reversal of his sentence.[111]

B. Obstruction Of Justice

When asked about the payments between Terra and Teleco, Esquenazi testified to their legitimate business purpose. *United States v. Dunnigan*, 507 U.S. 94 (1993), supports the premise that a jury's rejection of the defendant's testimony is not a basis, without more, for adding an obstruction enhancement. *United States*

[110] Government's Response at 95.

[111] *See Dijan*, 37 F.3d at 403-404 (citing *United States v. Nelson*, 988 F.2d 798, 809 (8th Cir. 1993)).

v. Williams, 627 F.3d 839 (11th Cir. 2010), which involved assault on federal officer charges, is readily distinguishable.

To find obstruction of justice under the now-advisory Sentencing Guidelines, the trial court must make: (1) specific findings concerning the disputed issues in the pre-sentence investigation report; (2) specific factual findings; or (3) findings that would meet the factual predicates of perjury. The Government concedes that the district court failed to make these findings.[112] This requires re-sentencing.[113]

C. Loss Amount

Contrary to the Government's waiver/forfeiture claim, Esquenazi asserted his objection to the loss amount in his pre-sentence memorandum and argued value at sentencing.[114] Even if the specific issue of the benefit to Terra versus Esquenazi is reviewed for plain error, it qualifies as reversible error and must be remanded for re-sentencing. *See United States v. Monroe*, 353 F.3d 1346, 1353 (11th Cir. 2003).

The following facts are not in dispute: (1) Esquenazi was the majority owner of Terra, its president and CEO; and (2) there is no evidence that Terra was

[112] Government's Response at 97.

[113] Both *United States v. Vallejo*, 297 F.3d 1154 (11th Cir. 2002) and *United States v. Hubert*, 138 F.3d 912 (11th Cir. 1998) support this requirement.

[114] Dkt. 646 at 8-12.

Esquenazi's alter-ego, or that Esquenazi gained any more than his yearly salary from Terra's activity with Teleco; rather, it was Terra that benefited financially.

Esquenazi's personal financial benefit should be the proper consideration, not the benefit to the company that employed him.[115] The Government's reliance on *United States v. DeVegter*, 439 F.3d. 1299 (11th Cir. 2006), is misplaced. Not only did *DeVegter* involve different charging statutes and consequently different sentencing guidelines, it decided a different substantive issue, proper valuation amount (measure of the improper benefit), rather than the proper recipient of the benefit.

CONCLUSION

This Court should direct a judgment of acquittal in favor of Esquenazi or, in the alternative, reverse his convictions and remand for a new trial or resentencing.

[115] *United States v. Anderson*, 517 F.3d 953 (7th Cir. 2008); *United States v. Cohen*, 171 F.3d 796 (3d Cir. 1999).

Respectfully submitted this 4th day of October, 2012.

/s/ T. Markus Funk
T. Markus Funk, (CO Bar #43500)
Michael A. Sink (CO Bar #36064)
Perkins Coie LLP
1900 Sixteenth Street, Suite 1400
Denver, CO 80202-5255
Phone: (303) 291-2300
Fax: (303) 291-2400
Email: msink@perkinscoie.com

Michael J. Rosen, Esq.
Fla. Bar No.: 183719
MICHAEL J. ROSEN, P.A.
2937 SW 27th Avenue, Suite 101
Miami, Florida 33133
Tel: 305-446-6116
Fax: Michael Rosen@305-446-6150
Email: mjr@mjrosenlaw.com

Attorneys for Appellant, Joel Esquenazi

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Aurora Fagan
Richard J. Diaz
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Kenneth Bruce Winer
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Kathleen Mary Salyer
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Rhonda Anne Anderson
Kirby A. Heller
Pamela L. Johnston
Jaime B. Guerrero

With a copy mailed to the following:

Wifredo A. Ferrer
U.S. Attorney's Office
99 NE 4TH ST STE 521
MIAMI, FL 33132

James F. Cirincione
Foley & Lardner, LLP
777 E WISCONSIN AVE STE 3800
MILWAUKEE, WI 53202-5306

Arturo Virgilio Hernandez
Attorney at Law
2937 SW 27TH AVE STE 101
MIAMI, FL 33133-3772

James M. Koukios
U.S. Attorney's Office
99 NE 4TH ST STE 521
MIAMI, FL 33132

G. Michael Halfenger
Foley & Lardner, LLP
777 E WISCONSIN AVE STE 3800
MILWAUKEE, WI 53202-5306

Nicola J. Mrazek
US Department of Justice - Criminal Division
1400 NEW YORK AVE NW STE 600
WASHINGTON, DC 20005-2107

Daren Grove
U.S. Attorney's Office
99 NE 4TH ST STE 521
MIAMI, FL 33132

/s/ T. Markus Funk
T. Markus Funk, (CO Bar #43500)
Michael A. Sink (CO Bar #36064)
Perkins Coie LLP
1900 Sixteenth Street, Suite 1400
Denver, CO 80202-5255
Phone: (303) 291-2300
Fax: (303) 291-2400
Email: msink@perkinscoie.com
mfunk@perkinscoie.com