No. 11-15331-C

IN THE

United States Court of Appeals

FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOEL ESQUENAZI AND CARLOS RODRIGUEZ,
Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Florida
Criminal No. 1:09-CR-21010-JEM

BRIEF FOR THE UNITED STATES

WILFREDO A. FERRER
United States Attorney
Southern District of Florida

AURORA FAGAN
Assistant U.S. Attorney
Southern District of Florida

NICOLA MRAZEK
Senior Trial Attorney
JAMES M. KOUKIOS
Assistant Chief
Fraud Section, Criminal Division

LANNY A. BREUER
Assistant Attorney General
Criminal Division

JOHN D. BURETTA
Acting Assistant Attorney General
Criminal Division

KIRBY A. HELLER
Attorney
Appellate Section, Criminal Division
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530
(202) 307-0085

No. 11-15331-C
United States v. Joel Esquenazi and Carlos Rodriguez

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 11th Cir. R. 26.1-1, undersigned counsel for the United States certifies that, in addition to the persons and entities identified in appellants' initial briefs, the following persons have an interest in the outcome of this case:

Lanny A. Breuer, counsel for Appellee

John D. Buretta, counsel for Appellee

Joseph Wyderko, counsel for Appellee

/s/ Kirby A. Heller
KIRBY A. HELLER
Attorney, U.S. Department of Justice

STATEMENT REGARDING ORAL ARGUMENT

The United States concurs in appellants' requests for oral argument.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES, RULES, AND REGULATIONS

UNITED STATES SENTENCING GUIDELINES

MISCELLANEOUS

JURISDICTIONAL STATEMENT

This is an appeal from judgments of conviction in a criminal case. The district court, which had jurisdiction under 18 U.S.C. § 3231, entered judgments against the defendants on October 26, 2011, Docs. 628, 629, and entered amended judgments on November 3, 2011, Docs. 637, 638. Defendants filed timely notices of appeal. Docs. 640, 642. The jurisdiction of this Court rests on 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

QUESTIONS PRESENTED

1. Whether (a) the district court properly instructed the jury on the definition of "instrumentality" under the Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-2, and (b) the evidence sufficiently established that Teleco was an instrumentality of the government of Haiti.

2. Whether (a) the district court plainly erred by not instructing the jury that defendants had to know that they were violating the FCPA when they bribed Teleco officials, (b) the court erred by giving a deliberate ignorance instruction, and (c) the evidence sufficiently established that Rodriguez knowingly bribed Teleco officials.

3. Whether the district court abused its discretion in denying defendants' requests for an evidentiary hearing and discovery on their allegations that the government violated its disclosure obligations in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963).

4. Whether (a) the district court plainly erred in instructing the jury on the interstate wire communication element of the wire-fraud object of the conspiracy, (b) the evidence on that element and on Rodriguez's intent to defraud was sufficient, and (c) the proof of foreign wire communications at trial impermissibly varied from the indictment.

5. Whether (a) the district court plainly erred in its money laundering instructions by not defining the statutory term "public official" and by not requiring the jury to find that the Haitian bribery predicate was a felony, and (b) Rodriguez's money laundering charges and convictions merged with the predicate offenses.

6. Whether (a) the district court clearly erred in enhancing Esquenazi's sentence for his role in the offense and for his perjurious testimony at trial, (b) Esquenazi waived his challenge to the calculation of the total value of the benefit of the bribery scheme (or the district court clearly erred in calculating that benefit), and (c) Rodriguez waived his challenge to the entry of the forfeiture order in the amended judgment (or the district court had the authority to amend the judgment to include the previously-entered forfeiture order).

STATEMENT OF THE CASE

1. Course Of Proceedings And Dispositions In The Court Below. After a jury trial in the United States District Court for the Southern District of Florida,

Esquenazi and Rodriguez were convicted of conspiring to violate the Foreign Corrupt Practices Act (FCPA) and to commit wire fraud, in violation of 18 U.S.C. § 371 (Count 1); seven counts of violating the FCPA, in violation of 15 U.S.C. §78dd-2 (Counts 2-8); conspiring to commit money laundering, in violation of 18 U.S.C. § 1956(h) (Count 9); and 12 counts of concealment money laundering, in violation of 18 U.S.C. § 1956(a)(1)(B)(i) (Counts 10-21). Docs. 637, 638. The district court sentenced Esquenazi to concurrent terms of five years of imprisonment on each of Counts 1-8, to be served consecutively to concurrent terms of ten years of imprisonment on each of Counts 9-21, to be followed by three years of supervised release. Doc. 638. It sentenced Rodriguez to concurrent terms of five years of imprisonment on each of Counts 1-9, to be served consecutively to concurrent terms of two years of imprisonment on each of Counts 9-21, to be followed by three years of supervised release. Doc. 637. The court held defendants jointly and severally liable for restitution payments totaling $2.2 million and ordered them to forfeit $3,093,818.50. Docs. 627, 637, 638.

2. Statement Of Facts. Esquenazi and Rodriguez owned Terra Telecommunications Corporation ("Terra"), a Florida corporation that purchased telephone time from vendors in other countries and resold the minutes on a wholesale basis or in the form of calling cards in the United States and elsewhere.

Esquenazi was the CEO and majority owner; Rodriguez was the executive Vice President of operations and owned a smaller share. Doc. 478-Pg. 38; Doc. 491-Pg. 49-50, 53, 61; Doc. 493-Pg. 41-42; Doc. 818-Pg. 50. From the fall of 2001 through early 2005, defendants bribed two foreign officials at the state-owned telecommunication company of Haiti ("Teleco") – Robert Antoine and Jean René Duperval – in exchange for financial benefits to Terra, including reducing Terra's overdue bills and the charged rate per minute. To conceal the bribery scheme, defendants paid the bribes through intermediaries and represented the payments as commissions or consulting fees. All told, defendants paid approximately $900,000 in bribes; in return, Terra obtained more than $2 million in benefits. *See* pages 11-16 *infra* and citations therein.

A. The Foreign Corrupt Practices Act.

As relevant here, the Foreign Corrupt Practices Act (FCPA) prohibits "domestic concerns" and their officers from making "use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of" a bribe to a "foreign official" or 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" for the purpose of influencing the foreign official's actions "in order to assist [the domestic concern] in obtaining or retaining business." 15 U.S.C. §§ 78dd-2(a)(1), (a)(3).

A "foreign official" is defined 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 statute specifies that actual knowledge "with respect to conduct, a circumstance, or a result" is not required. A "knowing state of mind" is established if a person "has a firm belief that such circumstance exists" and "knowledge of the existence of a particular circumstance" 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." 15 U.S.C. §§ 78dd-2(h)(3)(A)(ii), (B).

Finally, the statute provides a narrow exception from its prohibitions for payments to foreign officials to expedite or secure the performance of "routine governmental action." 15 U.S.C. § 78dd-2(b). "'Routine governmental action' means only an action which is ordinarily and commonly performed by a foreign official in," among other things, "providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration." 15 U.S.C. § 78dd-2(h)(4)(A).

B. The Republic Of Haiti Owns And Controls Teleco.

According to Luis Gary Lissade, a Haitian lawyer, former Minister of Justice, author of a book on public administration in Haiti, and the government's expert on "Haitian law and Haitian public institutions," Teleco was owned and controlled by the State of Haiti. Doc. 493-Pg. 34-37, 60; Doc. 417-2-Pg. 8. Before its privatization began in 2009, Teleco was considered part of the "public administration" of Haiti, which Lissade defined as "entities that the state used to perform and to give services to the people living in Haiti." Doc. 493-Pg. 36, 60.

Lissade explained that Teleco was created when the government of Haiti entered into a contract with two individuals and granted their company a monopoly over telecommunication services in Haiti. In 1971 or 1972, Haiti's state-owned bank acquired 97% of Teleco's stock, and Teleco became a state-owned company.[1/] Doc. 493-Pg. 38-40. The bank was subsequently divided into two entities, but the central bank ("BRH"), a "100% state institution," maintained its ownership of Teleco. *Id.* at 41. At some point, Teleco changed the acronym in its name from "S.A.," referring to private corporations, to "S.A.M.," reflecting its "mixed" private-public nature, although the change in designation was never officially authorized. Doc. 493-Pg. 41-42, 67-69, 96-97.

[1/] Lissade testified that the remaining 3% has never been claimed, and no one knows who owns it. Doc. 493-Pg. 40.

During the relevant time period, Teleco was controlled by its Board of Directors and General Director, and those individuals were appointed through an executive order issued by the President of Haiti and signed by Haiti's Prime Minister, the Minister of Public Works, Transportation and Communications, and the Minister of Economy and Finance. At least three of the five board members were public officials, including the Board's president and vice-president. In March 2001, President Jean-Bertrand Aristide appointed Patrick Joseph as General Manager of Teleco, and in June 2003, the Minister of Public Works appointed Duperval as Teleco's Deputy General Director and set his salary. Doc. 493-Pg. 42-49; GX 451T-453.

Haitian law recognized Teleco as a state-owned company. In 1996, Haiti passed a "modernization law" to partially privatize "public institutions" that were "not well managed by . . . [the] government" and "were losing money." Doc. 493-Pg. 53-54. One of the law's provisions specifically named "telephones" as a "State-owned compan[y]." Doc. 493-Pg. 54; GX 455T.

Teleco also enjoyed the benefits of a state-owned corporation. It did not pay corporate income tax or custom duties, and the bank paid its expenses and covered its losses when it failed to realize any profits. If Teleco had been profitable, Haitian law dictated that the profits would have been distributed to the public treasury and the bank's reserve funds. Doc. 493-Pg. 49-53.

As public agents, officials of Teleco were not allowed to receive bribes. To help combat corruption, a new law was enacted in 2008 requiring certain government employees of public institutions to declare their assets at the beginning and end of their government employment. The General Director, Deputy General Director, and members of the Board of Directors of Teleco were covered by the provisions of the new law. Lissade testified that the new law, by explicitly including Teleco within its provisions, confirmed that Teleco was a part of the public administration. Doc. 493-Pg. 55-60, 69-70.

In summary, Lissade opined that, between 2001 and 2004, Teleco was "100 percent controlled by the Government" and that the employees who worked for the government-appointed officials of the public administration (*e.g.*,Teleco's director) were also "public agents." Doc. 493-Pg. 60-62. *See also* pages 9-11 & n.3 *infra* (describing other evidence on Teleco's status).

C. Terra Enters Into Agreements With Teleco To Purchase Telephone Time And Is Continually Delinquent In Paying The Teleco Bills.

Terra initially did business with Teleco through a joint venture with another company. That arrangement changed in 2001 when Terra entered into a new contract with Teleco and purchased telephone minutes directly rather than through its joint venture. Doc. 491-Pg. 57-58; Doc. 716-Pg. 19, 23-25; GX 209.

In May 2001, Esquenazi negotiated a separate agreement with Patrick Joseph, who had recently been appointed as Teleco's General Manager by President Aristide. That separate agreement governed the parties' plan to develop and market a pre-paid telephone calling card ("108 cards") and required substantial investments by the parties. To that end, the parties also signed a "secured loan agreement," in which Terra agreed to loan Teleco $1.5 million (later increased to $2 million). To protect its investment in the project, Terra purchased "contract frustration insurance," which insures against the risk that a foreign government with whom the insured is contracting (in this case Haiti) breaches the agreement. Terra used an insurance broker, Aon Risk Services, to obtain the policy, and the Aon broker primarily dealt with Terra's in-house lawyer James Dickey and, to a lesser extent, with Rodriguez, but both defendants were always included in the e-mails concerning Terra's application for the insurance. Doc. 491-Pg. 58-61; Doc. 495-Pg. 40-48; Doc. 716-Pg. 20-22; Doc. 818-Pg. 5-11, 18, 21-22, 26-29; GX 452T. Those e-mails repeatedly referred to Teleco as a government-owned entity and the Haitian government as the party to the joint venture. *See* GX 91 (referring to "comprehensive frustration coverage for the Haitian loan/investment" and Aon's past success in "secur[ing] similar coverage in the recent past for other deals/contracts for our clients involving a percentage of Haitian governmental exposure"); *ibid.* (in response to inquiry on

Aon questionnaire about Teleco's status and requiring verification"if in doubt," Terra responds "Government Owned Entity"); GX 94 (insurer asking "what rights of recourse the Assured has against the foreign government, if the contract to supply the telephone service is breached"; Dickey offering to "get a letter from the TELECO President to the effect that TELECO is an instrumentality of the Haitian government" to expedite matters); GX 97 (e-mail attaching completed insurance application that describes Teleco's status as "Government owned telecommunications company" and executive summary referring to Teleco as "Haitian telephone company"); GX 187 (e-mail from Dickey to defendants attaching insurance policy for contracts with "public suppliers"; policy limits coverage if supplier "ceases to be public entity" and defines public entity as including "a nationalised undertaking (including a public corporation). . . provided always that the Government . . . has clear, explicit and constitutionally sanctioned financial responsibility and a fundamental commitment to the continuing existence of such undertaking (or corporation)."). At one point during the application process, the broker alerted Dickey and defendants to the insurer's concern about the "force majeure clause" in the joint venture contract because it included governmental actions as a basis for excusing Teleco's contractual obligations and "would seem to allow the Haitian government the ability to cancel the contract." GX 186; Doc. 818-Pg. 23. Esquenazi enclosed the broker's

e-mail in a letter to Patrick Joseph and proposed that they amend their agreement to "deal with the underwriters' concerns" by stating that "any action of the government of Haiti which would have the effect of contravening, annulling, or modifying any provision of this Agreement shall not constitute an event of Force Majeure hereunder." Doc. 818-Pg. 24-25; GX 186. Ultimately, Terra did not obtain the necessary funding and the "108-card" agreement fell through. Doc. 491-Pg. 60; Doc. 495-Pg. 55; Doc. 716-Pg. 21-22.

Terra's business relationship with Teleco was extremely important because it was Terra's only profitable route. Nonetheless, Terra was continually behind in its payments. Robert Antoine, Teleco's Director of International Affairs, informed Esquenazi that Terra's failure to pay the outstanding invoices could result in Teleco's disconnecting Terra's switch. Teleco made good on the threat at least twice in the late summer and early fall of 2001, but Esquenazi was able to persuade Antoine to reconnect almost immediately. Doc. 491-Pg. 62, 65-68, 72-73; Doc. 716-Pg. 32; Doc. 800-Pg. 69-70.

D. Defendants Bribe Antoine In Exchange For Reducing Terra's Debt To Teleco And Disguise The Bribe Payments As Payments to Sham Consultants.

By late October 2001, Terra owed Teleco more than $400,000, and Antoine insisted that Terra pay the overdue bills. When it was apparent that Terra's previous delaying tactics were no longer effective, Esquenazi took a different tack.

Convinced that Haitian officials were corrupt, he asked Terra's comptroller, Tony Perez, to approach Antoine and offer him a side payment to reduce Terra's debt.[2/] Antoine agreed to shave minutes from Terra's bills in exchange for Terra paying Antoine 50% of the amount that Terra saved. Doc. 491-Pg.74-79. Perez reported the good news back to Esquenazi, Rodriguez, and Dickey, and they congratulated Perez "on a job well done." *Id.* at 79-80.

Antoine subsequently provided the names of companies that Terra should pay on Antoine's behalf. Antoine needed to disguise the bribe payments because, as Teleco's Director of International Affairs, he was an employee of the government of Haiti[3/] and it was illegal for him to receive money from Terra in

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[2/] Antoine testified that before he met with Perez, his close friend, Jean Fourcand, called him and asked him to "go easy" on Terra. In exchange, Fourcand, who owned a grocery store in Miami, would get prepaid calling cards from Terra and invest the profit from the sale of the cards for Fourcand's and Antoine's benefit. Doc. 496-Pg. 80; Doc. 716-Pg. 33-34. Antoine then talked to Esquenazi about Fourcand's proposal and reached essentially the same agreement that Perez described in his testimony. According to Antoine, the meeting with Perez concerned the mechanics of the bribery scheme. Doc. 716-Pg. 34-36.

[3/] Antoine and other witnesses testified that the government of Haiti owned or controlled Teleco. *See* Doc. 716-Pg. 15; Doc. 496-Pg. 55 (Antoine testimony); Doc. 800-Pg. 64 (Juan Diaz testimony); Doc. 482-Pg. 31-32 (Jean Fourcand testimony); *see also* Doc. 491-Pg. 54-55; Doc. 492-Pg. 70-71; Doc. 495-Pg. 45, 49, 51, 53 (Tony Perez testifies that, based on information from Esquenazi, Rodriguez, and others, he knew that Teleco was government-owned and that he never heard Esquenazi, Rodriguez, or Dickey express any doubts about Teleco's status as a government-owned entity). In addition, Esquenazi testified at a deposition in connection with Terra's bankruptcy that Teleco was a government-

connection with Teleco business. Doc. 716-Pg. 15, 36-37; Doc. 496-Pg. 14.

The bribe payments began in November 2001. Dickey drafted a phony consulting agreement between Terra and J.D. Locator, an insolvent company owned by Fourcand's friend Juan Diaz, and Rodriguez signed the consulting agreement on behalf of Terra. Diaz, who had no experience in the telecommunications industry, knew that the agreement was designed to hide bribes to Antoine, and he collected 10% of each bribe payment as his fee. Doc. 491-Pg. 84; Doc. 716-Pg. 36, 44-45; Doc. 800-Pg. 70-76; GX 700A.

Between November 2001 and June 2003, Juan Diaz received bribe payments from Terra on Antoine's behalf totaling about $650,000. Because, with one exception, there were no invoices to support the payments to J.D. Locator and other intermediaries, Rodriguez signed "check request" forms that authorized his employees to generate the checks without the customary paperwork. Although Rodriguez authorized most of the payments to J.D. Locator, Esquenazi approved some as well. Diaz deposited the Terra checks into J.D. Locator's bank account, which was opened on the same day that the consulting agreement was executed, and he either gave cash to Antoine or Fourcand, wired money to Antoine's account, or wrote checks to Antoine and others based on Antoine's

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owned telecommunications company. Doc. 511-Pg. 120-121.

instructions. Doc. 478-Pg. 56-60, 63-68; Doc. 503-Pg. 53; Doc. 716-Pg. 45-47; Doc. 800-Pg. 76, 81, 85-95, 101-103.[4/]

Terra benefitted substantially from its bribes to Antoine. From September 2001 through February 2003, Antoine reduced Terra's bills by about $2.2 million, and Terra's service was not interrupted despite its failure to pay Teleco in full. Doc. 509-Pg. 10; Doc. 496-Pg. 69; GX 700N.

E. Antoine Is Fired And Defendants Bribe His Successor.

Antoine was fired in early 2003 after President Aristide told Joseph to appoint Alphonse Inevil as Director of International Affairs. Inevil became General Director of Teleco about three months later, and Jean Rene Duperval became the new International Affairs Director as well as Teleco's Deputy General Manager. Doc. 496-Pg. 5-6, 56.

While Inevil was Director of International Affairs, he sent two letters to Esquenazi complaining about Terra's overdue accounts of more than $1 million and threatening to terminate telephone service if Teleco did not receive payment in full by June 15, 2003. GX 193, 194. Defendants again solved the problem through bribery. Like Antoine, Duperval was willing to reduce Terra's financial

[4/] Terra also paid the bribes to Antoine through other intermediaries and through free prepaid calling cards to Fourcand. In one instance, Terra forgave Fourcand's grocery store's debt to Terra. The total amount of documented bribes (*e.g.*, not including undocumented cash bribes) was approximately $822,000. *See, e.g.*, Doc. 495-Pg. 11-12, 16-17, 21-23; Doc. 503-Pg. 55; Doc. 716-Pg. 37-40.

obligations in exchange for cash and gifts. During the fall of 2003, Esquenazi helped Duperval establish a shell company, Telecom Consulting Services Corporation ("Telecom Consulting"), to serve as the conduit for the bribes. Duperval's sister, Marguerite Grandison, a dietician at the University of Miami, was named as Telecom Consulting's president, and James Dickey, Terra's in-house counsel, was listed as its registered agent. With Esquenazi's assistance,[5/] Grandison opened a bank account in the name of Telecom Consulting on November 18, and, on that same day, a phony consulting agreement was executed between Terra and Telecom Consulting. On November 19, Rodriguez submitted a "Repetitive Funds Transfer Set-Up Request" to Terra's bank to facilitate ongoing payments for "consulting services" to Telecom Consulting, and on November 20, Rodriguez authorized a $15,000 transfer to Telecom Consulting's bank account. During the next four months, Rodriguez authorized six additional wire transfers despite never receiving any invoices. Doc. 478-Pg. 80-82; Doc. 498-Pg. 32-34, 39-44; Doc. 503-Pg. 10-11; Doc. 818-Pg. 51-63, 84-85; GX 2-8, 131. Terra paid Telecom Consulting $75,000 in total,[6/] and

[5/] For example, Esquenazi asked his banker to open an account "for a friend of mine that we are doing business with" and to take the documentation to Grandison's house for her to sign. Doc. 498-Pg. 33-34, 64.

[6/] The seven wire transfers from Terra to Telecom Consulting formed the basis for Counts 2-8.

Grandison transferred the money to Duperval and others on his behalf.[7/] Doc. 503-Pg. 59-65; Doc. 818-Pg. 63-66.

The benefits to Terra were immediate. Although Terra continued to owe substantial amounts to Teleco, its service was not disconnected as threatened. In addition, Terra's rate per minute was reduced and was lower than that charged to its competitors. On December 16, 2003, Esquenazi sent an e-mail to Duperval confirming the reduction in rates; twenty-two minutes later, Rodriguez, who had received a copy of the e-mail, wired the second bribe payment to Telecom Consulting. Between November 2003 and January 2004, Terra's bills were reduced by about $102,000, and it enjoyed the reduced rates through March 2004. Doc. 503-Pg. 12-13, 18, 25-30.

3. Standards Of Review.

Issue 1: Claims that a district court's jury instructions were incorrect are reviewed *de novo*. *United States v. Prather*, 205 F.3d 1265, 1270 (11th Cir. 2000). The district court's refusal to give a requested jury instruction is reviewed for abuse of discretion. *United States v. Svete*, 556 F.3d 1157, 1161 (11th Cir. 2009) (en banc). The court has "wide discretion" as to the wording of instructions, and this Court will reverse only if it is "left with a substantial and ineradicable doubt

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[7/] The transfers from Telecom Consulting's account to Duperval formed the basis for Counts 10-21.

as to whether the jury was properly guided in its deliberations." *Ibid.* (quotation marks omitted). The Court reviews the sufficiency of the evidence *de novo*, "viewing the evidence in the light most favorable to the government and drawing all reasonable inferences and credibility choices in favor of the jury's verdict." *United States v. Demarest*, 570 F.3d 1232, 1239 (11th Cir. 2009) (quotation marks omitted).

Issue 2: An unpreserved claim of instructional error is reviewed for plain error. *United States v. Merrill*, 513 F.3d 1293, 1305 (11th Cir. 2008); Fed. R. Crim. P. 30(d) and 52(b). "Under the plain error standard, before an appellate court can correct an error not raised at trial, there must be (1) error, (2) that is plain, and (3) that affects substantial rights. If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States v. Eckhardt*, 466 F.3d 938, 948 (11th Cir. 2006). The district court's decision to give a deliberate ignorance instruction is reviewed de novo. *United States v. Stone*, 9 F.3d 934, 937 (11th Cir. 1993). Challenges to the sufficiency of the evidence are reviewed *de novo*.

Issue 3: The denial of a request for discovery and a hearing on a claim that the government violated its disclosure obligations under *Brady v. Maryland*, 373

U.S. 83, 83 S. Ct. 1194 (1963), is reviewed for abuse of discretion. *United States v. Thompson*, 335 F. App'x 876, 882 (11th Cir. 2009).

Issue 4: An unpreserved claim of instructional error is reviewed for plain error. An unpreserved challenge to the sufficiency of the evidence is reviewed for plain error. *United States v. Snipes*, 611 F.3d 855, 867 n.7 (11th Cir. 2010), cert. denied, 131 S. Ct. 2962 (2011). An unpreserved claim that the proof at trial materially varied from the allegations in the indictment is also reviewed for plain error. *United States v. Dennis*, 237 F.3d 1295, 1300 (11th Cir. 2001). "To be reversible error, the facts proved at trial must materially differ from the facts alleged in the indictment and the defendant must suffer substantial prejudice as a result." *United States v. Weissman*, 899 F.2d 1111, 1114 (11th Cir. 1990).

Issue 5: An unpreserved claim of instructional error is reviewed for plain error. The denial of a motion to dismiss an indictment as legally insufficient is reviewed *de novo*. *United States v. Schmitz*, 634 F.3d 1247, 1259 (11th Cir. 2011). An unpreserved challenge to the sufficiency of the evidence is reviewed for plain error.

Issue 6: The district court's findings on role in the offense and obstruction of justice are reviewed for clear error. *United States v. De Varon*, 175 F.3d 930, 937 (11th Cir. 1999) (role in the offense); *United States v. Williams*, 627 F.3d 839, 844 (11th Cir. 2010) (obstruction of justice). Challenges to the specificity of the

district court's obstruction-of-justice finding are reviewed for plain error. *United States v. Hubert*, 138 F.3d 912, 915 (11th Cir.1998). This Court should not review Esquenazi's claim that the district court incorrectly calculated the benefit of the bribery scheme and Rodriguez's challenge to the forfeiture order because they are waived. In the alternative, those unpreserved claims are reviewed for plain error.

SUMMARY OF ARGUMENT

1. The district court's instructions on the meaning of "instrumentality of a foreign government" were correct. The instructions stated that an instrumentality must perform a governmental function and provided a non-exhaustive list of relevant factors for the jury to consider in deciding whether Teleco was an instrumentality of the government of Haiti. Courts have used similar tests to determine whether an entity is an instrumentality in other contexts and relied on many of the same factors.

The evidence sufficiently established that Teleco was an instrumentality of Haiti during the relevant time period. The government, through its national bank, owned 97% of Teleco's shares, and, if Teleco had been profitable, those profits would have accrued to the government and the national bank. Because it was not, the national bank subsidized Teleco. Haiti's president and high-level ministers controlled Teleco through their appointment of Teleco's board of directors and general director. Teleco's status as a government instrumentality

is also reflected in Haitian law that subjected Teleco officials to its prohibitions against official corruption.

Defendants' narrow construction of the term "instrumentality" is inconsistent with the terms of the FCPA and Congressional intent. The prohibitions in the FCPA are expressed broadly and reflect Congress's purpose to combat the problem of pervasive foreign bribery. Defendants' interpretation of the statute is also inconsistent with the provisions of an international treaty and with Congress's explicitly-stated intent, when amending the FCPA, to conform the statute to the treaty.

The term "instrumentality" is also not unconstitutionally vague. It provided fair notice that defendants' bribery scheme, which involved intentional conduct and had no innocent explanation, was illegal. Moreover, defendants cannot complain that they were left guessing about the legality of their actions when they could have requested an opinion on that question from the Attorney General but did not do so.

2. The instructions on the knowledge element of the FCPA were not plainly erroneous. The government was not required to prove that defendants knew that the recipients of the bribes were "foreign officials" under the statute's legal definition, and the instructions, when viewed as a whole and in the context of the entire trial, made clear that the jury had to find that defendants believed

they were bribing an employee of a foreign government instrumentality. Overwhelming evidence supported the jury's finding on that element. Defendants applied for political risk insurance, which was needed only because a foreign government was a party to the Terra-Teleco contract, and they repeatedly referred to Teleco as a government-owned entity during the application process. Esquenazi also testified that Teleco was government-owned at a deposition.

The court did not err in giving a deliberate ignorance instruction. It was appropriate as to the FCPA counts without a showing that defendants purposely avoided learning all the facts because the statute explicitly equates knowledge of a circumstance with awareness "of a high probability" that the circumstance exists. 15 U.S.C. § 78dd-2(h)(3)(B). The evidence also supported the instruction. Despite the highly suspicious circumstances surrounding the payments that Rodriguez authorized to the third-party intermediaries, he claimed that, although he was in charge of Terra's finances, he did not know their true purpose. Even if the court erred in giving the instruction, any error was harmless because the evidence also established that Rodriguez knew that the payments to the intermediaries were bribes.

3. The district court did not abuse its discretion in denying defendants' requests for an evidentiary hearing and discovery on their claim that the

government violated its *Brady* obligations when it disclosed, after trial but upon its receipt, a declaration from Haiti's Minister of Justice stating that Teleco was not a state enterprise or subject to public law. An evidentiary hearing and discovery were unwarranted because defendants' *Brady* claim had no merit. The government received the declaration from an attorney for defendants' co-conspirator after the jury had returned its verdict and promptly disclosed it to defendants. Defendants could have obtained the same declaration on their own, and, in any event, they were aware of the substance of the declaration from their expert witness and Lissade's pre-trial affidavit. The information also was not material. The declaration itself was inadmissible, and the jury was aware of its substance through Lissade's testimony. Moreover, the Minister of Justice signed a second declaration after he learned that his first declaration was used to support defendants' *Brady* claim, rather than for internal purposes as he had believed, and that declaration clarified his statements in the first declaration and further corroborated Lissade's testimony about the government's ownership and control of Teleco. Even if defendants were able to procure the Minister's testimony at trial, his testimony would not have materially differed from Lissade's.

4. The district court's instructions, taken as a whole, informed the jury that wire fraud requires the use of interstate wire communications. Defendants' claim that the court should have instructed the jury further on the interstate-wire

requirement is incorrect. Defendants were charged with conspiracy to commit wire fraud, which only requires proof that the use of interstate or foreign wires was reasonably foreseeable. The uncontested evidence of the co-conspirators' use of interstate and foreign telephone wires, faxes, and e-mail amply established that element.

The jury could reasonably conclude that Rodriguez intended to defraud Teleco of revenue. Perez testified that Rodriguez approved the scheme to bribe Teleco officials in exchange for reductions in Terra's bills, and Rodriguez's payments of the bribes through the intermediaries, when considered in the light most favorable to the government, also demonstrated that Rodriguez was aware of the scheme and intended to promote it.

Defendants have not established that the proof at trial materially varied from the allegations in the indictment. The indictment charged that defendants conspired to transmit interstate and foreign wires and specifically alleged as overt acts three interstate e-mails. The government proved those overt acts as well as the co-conspirators' use of numerous other foreign wires. There was no prejudicial variance merely because the government relied on proof that was not alleged in the indictment.

5. The district court's money-laundering instructions were not plainly erroneous. The district court was not required to instruct the jury on the

definition of the terms in the specified unlawful activity (SUA) of "an offense against a foreign nation involving . . . bribery of public official," 18 U.S.C. § 1956(c)(7)(B)(iv). Whether the statute's scope encompassed the charged Haitian bribery predicate is not a factual question for the court. Defendants' proposed instruction was also incorrect. Their definition was inconsistent with the meaning of "public official" under 18 U.S.C. § 201, and they have not provided any reason why Congress would have defined the foreign SUA more narrowly than the domestic counterpart.

The court's instruction on the officials covered by the Haitian bribery offense accurately reflected Haitian law. The district court did not plainly err by not requiring the jury to find that the Haitian bribery predicate was a felony. The classification of offenses is a legal question and, in any event, uncontested evidence established that Article 140 of the Haitian bribery law is punishable by a prison term of one to three years.

The district court correctly denied defendants' motion to dismiss the money-laundering counts under *United States v. Santos*, 553 U.S. 507, 128 S. Ct. 2020 (2008). The charges here involved concealment money laundering, rather than the promotional money laundering charges at issue in *Santos*, and this Court has limited the application of *Santos* to its particular facts. The evidence also

established that Rodriguez's conduct in disguising the source of the bribe payments was separately punishable from the bribery charges.

6. The district court did not clearly err in concluding that Esquenazi was a leader or organizer of the criminal activity. Esquenazi initiated the bribery scheme and oversaw its implementation. He controlled the criminal activities of Rodriguez, Perez, and Dickey and coordinated the criminal activities of other co-conspirators. He also was the primary beneficiary of the bribery scheme.

The district court also did not clearly err in finding that Esquenazi obstructed justice by committing perjury at trial. Esquenazi's testimony that he did not bribe Antoine and that the payments to the third parties were for legitimate services was contradicted by several witnesses and by the documentary evidence. This Court should not consider Esquenazi's claim that the district court's findings were not particularized because he raises it for the first time on appeal.

Esquenazi has waived his challenge to the benefit-of-the-bribe enhancement under U.S.S.G. § 2C1.1(b)(2) because he agreed below that the enhancement should be based on the amounts used in calculating his co-conspirators' Guidelines. Even if reviewed for plain error, his claim that the district could should not have used the total benefit to Terra is without merit. This Court has stated that the appropriate measure under § 2C1.1(b)(2) is the total benefit of the

bribery scheme to its beneficiary rather than the benefit directly attributable to the defendant. *United States v. Huff*, 609 F.3d 1240, 1246 (11th Cir. 2010). Moreover, the calculation is the same even if Esquenazi's share of the benefit to Terra is considered.

Rodriguez has waived his challenge to the forfeiture order in the amended judgment because he consented to the government's motion to amend the judgment to include the previously-entered forfeiture order. In any event, Fed. R. Crim. P. 32.2(b)(4)(B) explicitly authorizes amendment of the judgment for that purpose.

ARGUMENT

I. Teleco Was An Instrumentality Of Haiti, And Defendants Violated The FCPA When They Bribed Teleco's Officials.

Defendants contend that Teleco was not an "instrumentality" of the Republic of Haiti because it did not perform a "governmental function," and, accordingly, the jury instructions were erroneous and the evidence insufficient. Equenazi Br. 27-48; Rodriguez Br. 26-38, 47-51. Defendants' narrow interpretation of the FCPA contravenes bedrock principles of statutory construction and is unsupported by legislative history.

A. Background.

Defendants first raised their "instrumentality" claim in a pre-trial motion to dismiss the indictment, and the district court denied it. Doc. 283, 301, 309. The court concluded that "the plain language of [the FCPA] and the plain meaning of [instrumentality] show that as the facts are alleged in the indictment Haiti Teleco could be an instrumentality of the Haitian government" and that the indictment "sufficiently alleged that Antoine and Duperval were foreign officials by alleging that these individuals were directors in the state-owned Haiti Teleco." Doc. 309-Pg. 2-3. It also rejected defendants' argument that the phrase "'department, agency, or instrumentality' in the definition of 'foreign official'" is unconstitutionally vague. *Id.* at 3.

Defendants next pressed their claim in their proposed jury instructions. They first requested an instruction that flatly precluded instrumentality status to state-owned enterprises. Doc. 404-1. Their alternative instruction required the jury to find that "the business enterprise is part of the government itself," and they listed four qualifying criteria, including that the enterprise "exists for the sole and exclusive purpose of performing a public function traditionally carried out by the government," which defendants further defined as "a function that benefits only the foreign government (and its citizens)"and does not exist "to maximize

profits rather than pursue a public objective." Doc. 404-2. The district court modified the parties' proposed instructions and charged the jury as follows:

> 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 service 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.

Doc. 527-Pg. 23-24.

B. State-Owned Enterprises (SOEs), Like Teleco, Qualify As Instrumentalities Under The FCPA.

"When interpreting a statute, the starting point . . . is the language of the statute itself." *United States v. Zuniga-Arteaga*, 681 F.3d 1220, 2012 WL 1813388,

at *3 (11th Cir. 2012) (quotation marks omitted). "In conducting this interpretation, we analyze the language of the provision at issue, the specific context in which that language is used, and the broader context of the statute as a whole." *Ibid.* *See also, e.g., United States v. Ballinger*, 395 F.3d 1218, 1237 (11th Cir. 2005) ("statutory language must be read in the context of the purpose it was intended to serve").

Because the FCPA does not define the term "instrumentality," this Court construes it according to its ordinary meaning. *United States v. Frank*, 599 F.3d 1221, 1234 (11th Cir.), *cert. denied*, 131 S. Ct. 186 (2010). Black's Law Dictionary defines "instrumentality" as "[a] means or agency through which a function of another entity is accomplished," (9th ed. 2009), and, as applied here, an instrumentality of a foreign government is an entity through which the foreign government carries out one of its objectives or functions. The government therefore agrees with defendants that the instrumentality must perform a "governmental function," *see, e.g.*, Esquenazi Br. 29, 31-32, 34, but we disagree on what that means.[8/]

[8/] Contrary to defendants' claim, all the district courts that have considered similar arguments have rejected them. *See United States v. Aguilar*, 783 F. Supp. 2d 1108 (C.D. Cal. 2011); *Aluminum Bahrain B.S.C. v. Alcoa Inc.*, 2012 WL 2094029 (W.D. Pa. June 11, 2012); *United States v. Carson*, 2011 WL 5101701, (C.D. Cal. May 18, 2011). Although Esquenazi suggests that *Carson* supports his view, that court cited with approval the district court's ruling in this case denying

1. An SOE That Is Owned And Controlled By The Government And Holds A State-Granted Monopoly Over Landline Telephone Service To The State's Citizens Is An Instrumentality Under The FCPA.

Defendants contend that SOEs, like Teleco, are not instrumentalities under the FCPA because they do not perform a governmental function "similar to a political subdivision." Esquenazi Br. 32. That narrow interpretation of "instrumentality" ignores the fact that governments perform many functions, including selling commercial services to the public, and they do so through entities other than "departments" and "agencies." For example, the Supreme Court observed in *Lebron v. Nat'l Railroad Passenger Corp.*, 513 U.S. 374, 115 S. Ct. 961 (1995), that, even in this country, there is a "long history of corporations created and participated in by the United States for the achievement of governmental objectives," *id.* at 386, 115 S. Ct. at 968, and some of those entities "have brought the Government into the commercial sale of goods and services," *id.* at 388, 115 S. Ct. at 969. The governmental objective at issue in *Lebron* was decidedly commercial – providing improved railroad services to passengers – and the Court considered Amtrak's furtherance of that governmental goal in concluding that the for-profit corporation was an "instrumentality" of the federal

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defendants' motion to dismiss the indictment and concluded, consistent with the government's view, that "some business entities may be considered an 'instrumentality,' . . . depend[ing] on the nature and characteristics of the business entity." *Id.* at *8.

government for First Amendment purposes. *Id.* at 383-385, 397-398, 400, 115 S. Ct. at 967, 973-974. *See also, e.g.*, *Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U.S. 381, 389, 59 S. Ct. 516, 517-518 (1939) ("For more than a hundred years corporations have been used as agencies for doing work of the government. Congress may create them as appropriate means of executing the powers of government, as for instance, . . . a railroad corporation for the purpose of promoting commerce among the states.") (quotation marks omitted); *Cherry Cotton Mills v. United States*, 327 U.S. 536, 539, 66 S. Ct. 729, 730 (1946) ("That the Congress chose to call [the Reconstruction Finance Corporation] 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," which the Court earlier described as making loans to banks, insurance companies, railroads, and the like).

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 structure of those government instrumentalities enables them to function with a "greater degree of flexibility and independence from close political control than is generally enjoyed by government agencies," and "[t]hese same features frequently prompt governments in developing countries to establish separate juridical entities as the

vehicles through which to obtain the financial resources needed to make large-scale national investments" in the development of utilities and industries. *First National City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 624-625, 103 S. Ct. 2591, 2599 (1983). Although the entities may not perform the traditional functions of political subdivisions, they facilitate "the efforts of sovereign nations to structure their governmental activities in a manner deemed necessary to promote economic development and efficient administration." *Id.* at 626, 103 S. Ct. at 2600. By looking to traditional governmental functions as the benchmark, defendants ignore the Supreme Court's observation that "the concept of a 'usual' or a 'proper' governmental function . . . varies from nation to nation," *id.* at 634 n.27; 103 S. Ct. at 2603 n.27, and pay no heed to the foreign government's own determination of what its functions are and what entity should perform them.

Defendants' restrictive view of the scope of governmental functions effectively reads the statutory term "instrumentality" out of the FCPA. Entities encompassed by defendants' definition will almost always fit under one of the other distinct prongs of § 78dd-2(h)(2)(A). By not providing real meaning to "instrumentality," defendants "violate[] 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or

insignificant.'" *Ballinger*, 395 F.3d at 1236 (quoting *TRW, Inc. v. Andrews*, 534 U.S. 19, 31, 122 S. Ct. 441, 449 (2001)) (other quotation marks omitted).

Defendants' construction is also inconsistent with Congress's purpose in enacting broad prohibitions against corporate bribery. Congress was concerned with the problem of corporate bribery because, among other reasons, it was "bad business." S. Rep. 95-114, at 4 (1977). *See also, e.g., id.* at 3 (bribery "hamper[s]" the "efficient functioning of our capital markets"); H.R. Rep. 95-640, at 4 (1977) (Corporate bribery "erodes public confidence in the integrity of the free market system" and "short-circuits the marketplace by directing business to those companies too inefficient to compete . . . or too lazy to engage in honest salesmanship, or too intent upon unloading marginal products."); *United States v. Kay (Kay I)*, 359 F.3d 738, 749 (5th Cir. 2004) ("Congress was obviously distraught not only about high profile bribes to high ranking officials, but also by the pervasiveness of foreign bribery by United States businesses and businessmen."). As a result, the statute cast "a[] wide net over foreign bribery." *Ibid. See also id.* at 751 ("[T]he FCPA uses broad, general language in prohibiting payments to procure assistance for the payor in obtaining or retaining business, instead of employing . . . detailed language, such as applying the statute only to payments that attempt to secure or renew particular government contracts.").

The statute's broad scope is evident in several ways. It repeatedly uses the word "any" in the sections prohibiting corrupt payments by domestic concerns (27 times) and in its definition of "foreign official" (five times). *See United States v. Townsend*, 630 F.3d 1003, 1011 (11th Cir.) ("The United States Supreme Court and this Court have recognized on many occasions that the word 'any' is a powerful and broad word, and that it does not mean 'some' or 'all but a few,' but instead means 'all.'") (other quotation marks omitted), *cert. denied*, 131 S. Ct. 2472 (2011). In light of the significant role that foreign government instrumentalities played in their countries' developing economies at the time that the FCPA was enacted, *see First National City Bank*, 462 U.S. at 624-625, 103 S. Ct. at 2598-2599,[9/] it is illogical to conclude that Congress intended to exclude the mine run of government entities that were not agencies or departments when it used the term "*any* instrumentality." If Congress wished to limit the term in the manner that defendants advocate, it surely would have said so explicitly.[10/] *Cf.*

[9/] *See also Bureaucrats in Business*: *The Economics and Politics of Government Ownership*, World Bank Policy Research Report at 268, Table A.1 (1995) (showing that, according to World Bank data, state-owned enterprises in developing countries constituted about 10% of the GDP in 1978).

[10/] Defendants argue that Congress's explicit inclusion of SOEs in the definition of "an agency or instrumentality of a foreign state" in the Foreign Sovereign Immunities Act's (FSIA), 28 U.S.C. § 1603(b)(2), and in the definition of "foreign government" in a provision of the Dodd-Frank Wall Street Reform and Consumer Protection Act pertaining to the disclosure of payments to foreign governments by "resource extraction issuers," 15 U.S.C. § 78m(q)(1)(B), indicates

Townsend, 630 F.3d at 1011 ("If Congress had intended to exclude intangibles from the scope of 18 U.S.C. § 666, it easily could have done so.").

The "routine governmental action" exception in the FCPA, § 78dd-2(b), also supports the government's interpretation of the statute. Under that so-called "grease" exception, individuals and companies can pay foreign officials to perform certain governmental actions without running afoul of the FCPA, and the description of those routine governmental actions includes commercial activities. *See* § 78dd-2(h)(4)(A). Significantly, providing phone service is one of

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that Congress "knew how to include such language . . . but chose not to do so" in the FCPA. Esquenazi Br. 38-39. That argument does not hold up. The FSIA's detailed – and limited – definition of instrumentality was needed because the "restrictive" theory of sovereign immunity generally posits that a foreign state shall enjoy immunity from suit in actions involving the state's sovereign or public acts, but not its commercial activities. *See Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 151 (D.C. Cir. 1994) (summarizing Supreme Court cases). It was also important to define "agency and instrumentality" in the FSIA because, unlike the FCPA, the FSIA treats an agency and instrumentality differently from either a foreign state or its political subdivisions. *See* 28 U.S.C. §§ 1608, 1610. It therefore seems unlikely that, when Congress enacted the broadly-worded FCPA the year after it enacted the more restrictive FSIA, it intended to exclude SOEs from its coverage without explicitly saying so.

Section 78m(q)(1)(B)'s definition of "foreign government," enacted more than 30 years after the FCPA and in a very specific and unrelated context, has no bearing on the meaning of instrumentality in the FCPA.

the items on that list, reflecting Congress's view that "foreign officials" "ordinarily and commonly perform[]" such actions.[11/] *See ibid.*

Defendants invoke the statutory canons of *noscitur a sociis* and *ejusdem generis*, but those doctrines do not further their point. The Supreme Court has explained that the rule of *ejusdem generis*, "which limits general terms [that] follow specific ones to matters similar to those specified," 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." *CSX Transportation, Inc. v. Alabama Dept. of Revenue*, 131 S. Ct. 1101, 1113 (2011). *See*

[11/] Defendants also rely on the "routine governmental action" provision to argue that the government's theory creates "a gap" because the exception would not apply to employees of SOEs who are not "governmental" employees. Esquenazi Br. 33. They miss the point. Under the government's view, employees of SOEs like Teleco are foreign officials under the FCPA, and payments to them for their performance of "routine governmental actions" would fall under the exception. Defendants also argue that the government's position "would make a hash out of the FCPA's affirmative defense" in § 78dd-2(c)(2), which allows for specified payments related to "the execution or performance of a contract with a foreign government or agency thereof," because it would rule out the affirmative defense for similar payments to "instrumentalities." Esquenazi Br. 33. But that provision also does not list "departments," and it is illogical to assume that those omissions have significance. Accepting defendants' argument would also mean that when the FCPA prohibited payments to "any foreign official for purposes of . . . 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," 15 U.S.C. § 78dd-2(a)(1)(B), Congress deliberately excluded acts or decisions of the foreign government's "departments" and "agencies." Defendants sensibly do not argue that point.

also Garcia v. United States, 469 U.S. 70, 75, 105 S. Ct. 479, 482 (1984) (the *ejusdem generis* rule did not apply because "the terms in question are made separate and distinct from one another by Congress' use of the disjunctive."). As to the *noscitur a sociis* doctrine, the government does not disagree that the meaning of "instrumentality" should be informed by the other terms in the foreign-official definition, but, for the reasons discussed previously, defendants' application of that rule ignores the reality that SOEs, like departments and agencies, are often governed by public laws, directly managed by government-appointed officials, draw from and contribute to the public fisc, and carry out important government policies and functions.

Finally, the cases that defendants cite in support of their definition of instrumentality are inapposite because they interpret that term in contexts other than the FCPA. Indeed, the cases emphasize that context is critical in defining "instrumentality." For example, in *Hall v. American National Red Cross*, 86 F.3d 919 (9th Cir. 1996), the Ninth Circuit held that the Red Cross was not an "instrumentality" of the federal government for purposes of liability under the Religious Freedom Restoration Act, but stated that "[a]s with many other government-chartered corporations, the legal status of the Red Cross has varied depending on the context in which it has been examined." *Id.* at 921-922. In *Edison v. Douberly*, 604 F.3d 1307 (11th Cir. 2010), this Court interpreted the

words "instrumentality of a State" as used in the Americans With Disabilities Act "in a manner consistent with their plain meaning and context" to conclude that a private prison management corporation that operated a Florida state prison was not an "instrumentality of a State" merely because it contracted with a public entity to provide some services. *Id.* at 1310. *United States v. Orleans*, 425 U.S. 807, 96 S. Ct. 1971 (1976), addressed whether a local "community action agency" that was funded by federal grants and ran a neighborhood center was "a contractor with the federal government" or a federal agency or instrumentality under the Federal Torts Claim Act (FTCA). In holding that the agency was a contractor, the Supreme Court explained that "[i]t is inconceivable that Congress intended to have waiver of sovereign immunity follow congressional largesse and cover countless unidentifiable classes of 'beneficiaries.'" *Id.* at 816, 96 S. Ct. at 1977.

2. Defendants' Interpretation Of The Statute Does Not Comport With U.S. Treaty Obligations.

This Court should also reject defendants' narrow interpretation of "instrumentality" because it is inconsistent with the Organization of Economic Co-Operation and Development's (OECD) 1997 Convention on Combating Bribery of Foreign Officials in International Business Transactions (the "Convention"), which the Senate ratified in 1998. *See Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804) ("[A]n act of Congress ought never

to be construed to violate the law of nations if any other possible construction remain."); *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 539, 115 S. Ct. 2322, 2329 (1995) ("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."). "Because Congress legislates against the backdrop that includes those international norms that guide comity analysis, absent a contrary legislative direction the doctrine may properly be used to interpret any statute." *In re Maxwell Communication Corp.*, 93 F.3d 1036, 1048 (2d Cir. 1996).

As relevant here, the Convention required the parties to criminalize bribes to a "foreign public official," Convention, Art. 1.1., which it defined as, among other things, "any person exercising a public function for a foreign country, including for a public agency or public enterprise," *id.* at Art. 1.4(a). The Commentaries to the Convention, in turn, 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. This is deemed to be the case, *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.
>
> 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.[12/]

Id. at cmt. on Art. 1.4.

Congress implemented the Convention through its 1998 amendments to the FCPA. *See* The International Anti-Bribery and Fair Competition Act of 1998, Pub. L. 105-366 (1998); *see also* Presidential Statement on Signing the International Anti-Bribery and Fair Competition Act of 1998 ("This Act makes certain changes in existing law to implement the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions."). To conform the FCPA's definition of "foreign official" to the Convention, Congress added officials of "public international organizations," but did not otherwise expand the definition to include officials of "public enterprises."

Defendants' construction of the statute to exclude employees of SOEs like Teleco means that the United States is out of compliance with its treaty obligations under the Convention. Congress clearly did not intend such a result. It added a category (employee of a "public international organization") to the FCPA definition of "foreign official," which was included in the Convention but not previously covered by the FCPA, but otherwise saw no need to amend the

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[12/] Teleco is a "public enterprise" under the Convention because it is state-owned, state-controlled, holds a state-granted monopoly, and receives "preferential subsidies" and "other privileges."

statute to add employees of "public enterprises" because the FCPA already included them. As the Fifth Circuit explained in construing a different provision of the FCPA, "given the United States's ratification and implementation of the Convention without any reservation, understandings or alterations specifically pertaining to its scope, we would find it difficult to interpret the statute as narrowly as the defendants suggest." *Kay I*, 359 F.3d at 755 n.68. That conclusion is equally warranted here.

3. The Legislative History Should Not Be Considered, Nor Does It Support Defendants' Position.

This Court need not resort to the legislative history of the FCPA because the plain meaning of "instrumentality," when considered in the context of the statute's structure and purpose, is unambiguous. *See, e.g.*, *Ballinger*, 395 F.3d at 1239 (where "anomalous results produced by the Appellant's strained reading of [statute at issue] also plainly defeat the statute's clear purpose" and "statutory language is unambiguous," "resort to legislative history [is] unnecessary"). Consulting the legislative history is especially unwarranted in light of defendants' concession that the legislative history "does not offer a clear definition of the term 'instrumentality.'" Esquenazi Br. 36. *See Lamie v. United States Trustee*, 540 U.S. 526, 539, 124 S. Ct. 1023, 1033 (2004) ("Though we find it unnecessary to rely

on the legislative history behind the [statute at issue], we find it instructive that the history creates more confusion than clarity about the congressional intent.").

Even if the Court were to consider the legislative history, it does not support defendants' position.[13/] *See Aguilar*, 783 F. Supp. 2d at 1119 ("Although [the legislative history] does not demonstrate that Congress intended to include *all* state-owned corporations within the ambit of the FCPA, neither does it provide support for Defendants' insistence that Congress intended to *exclude* all such corporations within the ambit of the FCPA."). First, although the legislative history includes references to the impact of corruption on "traditional" government officials, Esquenazi Br. 36, defendants have not identified a single statement that supports their position that the FCPA does not apply to employees of SOEs. Moreover, Congress enacted the FCPA against a backdrop of foreign

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[13/] Defendants rely on a 144-page declaration by Professor Michael J. Koehler that was filed on behalf of the defendants in *Carson*, No. 09-00077-JVS (C.D. Cal.). That declaration is not part of the record in this case, and this Court should not consider it. Although defendants suggest that this Court may take judicial notice of the declaration because it relates to legislative history, the declaration selectively reviews the legislative history and draws inferences in support of a defense motion to dismiss the indictment. As such, it is not necessarily the statement of a disinterested expert, it was not reviewed as a scholarly article, and it was never subject to impeachment in the case below. Even the district court in *Carson* did not rely on the declaration because it concluded that "resort to the legislative history of the FCPA [was] unnecessary." *Carson*, 2011 WL 5101701, at *8. If the Court is inclined to consider the Koehler affidavit, the government asks the Court to similarly consider the declaration of FBI Special Agent Brian Smith, also filed in *Carson*, that discusses references to SOEs in the legislative history. *Carson* Doc. 334-Pg. 27-30.

governments' increasing use of SOEs to conduct their affairs, and it was also aware that companies were bribing SOE employees. *See* Esquenazi Br. at 36 and citations to Koehler affidavit therein; Smith Declaration at ¶¶ 56-60.

Defendants' comparison of earlier bills that included SOEs to the final bill that did not is misleading. In the earlier versions (which required reporting corrupt payments rather than prohibiting them and which never made it beyond being referred to committee), the bills defined "foreign government" as including four separate entities: the government of a foreign country; a department, agency, or branch of a foreign government; a political subdivision of a foreign government; and "a corporation or other legal entity established or owned by, and subject to control by, a foreign government." *See* S. 3741, 94th Cong. (1976); H.R. 7543, 95th Cong. (1977) (slightly modifying the description of "corporation or other legal entity"). The final version combined these categories under more general terms: it deleted the "political subdivision" language entirely and replaced the "corporation or other legal entity" description with the broader term "instrumentality." *See* H. Conf. Rep. 95-831, at 12 (1977). Contrary to defendants' contention, the covered entities, in substance, remained the same.[14/]

[14/] The subsequent amendments to the FCPA support the government's position. Congress amended the statute in 1988 to clarify the difference between prohibited bribes and permissible "grease" payments for "ministerial" actions. *See* S. Rep. 100-85, at 53 (1987). As described previously, it expressly excepted payments to procure "routine governmental action," and included, among those

4. The Statute Is Not Unconstitutionally Vague As Applied To Defendants And The Rule Of Lenity Does Not Apply.

Defendants further argue that, as applied to their conduct, the FCPA is unconstitutionally vague. In evaluating vagueness challenges to criminal statutes, this Court applies a "strong presumption supporting the constitutionality of legislation." *United States v. Duran*, 596 F.3d 1283, 1290 (11th Cir.), *cert. denied*, 131 S. Ct. 210 (2010). The "touchstone" of vagueness analysis "is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal." *United States v. Lanier*, 520 U.S. 259, 267, 117 S. Ct. 1219, 1225 (1997).

Defendants must meet an especially rigorous standard where, as here, the statute regulates economic activity. *Village of Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 498, 102 S. Ct. 1186, 1193 (1982). That is so because "its subject matter is often more narrow, and businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action. Indeed, [as was the case here], the regulated enterprise may have the ability to clarify the meaning of the regulation by its own

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actions, services frequently provided by SOEs (*e.g.*, phone service). *See* pages 35-36 *supra*. The 1998 amendments implementing the OECD Convention are also consistent with the government's position that the term "instrumentality" can include SOEs. *See* pages 40-41 *supra*.

inquiry." *Ibid.* (footnotes omitted).[15/] Vagueness concerns are also alleviated when the statute imposes a specific intent requirement. *See, e.g.*, *Colautti v. Franklin*, 439 U.S. 379, 395 & n.13, 99 S. Ct. 675, 685 & n.13 (1979); *United States v. Benner*, 442 F. App'x 417, 420 (11th Cir. 2011) (rejecting defendant's argument that bribery under 18 U.S.C. § 215(a)(1) is void for vagueness; "[T]he element of corrupt intent does much to destroy any force in the argument that application of the [statute] would be so unfair that it must be held invalid, especially with regard to the adequacy of notice to the complainant that his conduct is proscribed.") (quotation marks omitted).

On the facts of this case, defendants' contention that they lacked fair notice of the illegality of their conduct is unsupported. Defendants "willfully and corruptly" bribed two employees of Teleco, an entity that defendants, their in-house counsel, and others recognized as government-owned, to induce the employees to misuse their official position and reduce Terra's bills. There is no innocent explanation for defendants' bribes; unlike cases in which an expansive

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[15/] Pursuant to 15 U.S.C. § 78dd-2(f), the Attorney General has established a procedure "that enable[s] issuers and domestic concerns to obtain an opinion of the Attorney General as to whether certain specified, prospective – not hypothetical – conduct conforms with the Department's present enforcement policy regarding the antibribery provisions" of the FCPA. 28 C.F.R. § 80.1. *See* 28 C.F.R. § 80.1 *et seq.* Defendants can hardly complain that they were "left guessing," Esquenazi Br. 43, when they failed to avail themselves of the procedure that would have resolved any ambiguity.

reading of a statute criminalizes "a broad range of apparently innocent conduct, *Lanier*, 520 U.S. at 266, 117 S. Ct. at 1225, defendants here committed intentional acts readily recognized as criminal. *See Duran*, 596 F.3d at 1296 ("The case for upholding Duran's conviction under § 951 is particularly strong because the language is readily understandable by a person of ordinary intelligence, his conduct involved some form of bribery or extortion on behalf of the Venezuelan government, and Duran's conviction was not based on mere status as an agent of the Venezuelan government.").

There likewise is no reason to resort to the rule of lenity, which is reserved for cases involving a "grievous ambiguity" in the statutory text such that, "after seizing everything from which aid can be derived, [the Court] can make no more than a guess at what Congress intended." *Muscarello v. United States*, 524 U.S. 125, 138-139, 118 S. Ct. 1911, 1919 (1998) (quotation marks omitted). Even if a phrase is "open to some interpretation," "the rule of lenity is 'not invoked by a grammatical possibility.'" *United States v. Martinez-Gonzalez*, 663 F.3d 1305, 1309 (11th Cir. 2011) (quoting *Caron v. United States*, 524 U.S. 308, 316, 118 S. Ct. 2007, 2012 (1998)).

As discussed previously, this Court need not guess as to what Congress intended when the standard rules of statutory construction are applied. Although defendants cite *United States v. Bodmer*, 342 F. Supp. 2d 176 (S.D.N.Y. 2004), as

"one court [that] has previously applied the rule of lenity to the FCPA," Esquenazi Br. 40, that court considered an unrelated and subsequently-repealed provision.

C. The District Court's Instructions On Instrumentality Were Correct.

The district court correctly instructed the jury on the definition of instrumentality under the FCPA. The instructions made clear that the entity must perform "a function of the foreign government" and that state ownership of the entity, by itself, is not sufficient. The court provided several relevant but nonexclusive factors to guide the jury's consideration of Teleco's status, including factors that defendants themselves proposed in their alternative instructions.

Courts commonly use a flexible approach to determine whether an entity is an instrumentality under the statute at issue. For example, the *Lebron* Court considered whether Amtrak furthered a federal governmental goal, whether its directors were appointed by the President, whether it was "under the direction and control of federal governmental appointees," and whether the government's control was permanent. 513 U.S. at 397-397, 115 S. Ct. at 973-974. Similarly, in determining whether various SOEs were instrumentalities under the "organ-of-the-foreign-state" prong of the FSIA, courts of appeals have considered, among the relevant factors, "the purpose of [the entity's] activities," "the level of

government financial support," "obligations and privileges" under foreign law, "the degree of supervision by the government," "the ownership structure of the entity," and how that structure "might influence the degree to which an entity is performing a function on behalf of the foreign government." *USX Corp. v. Adriatic Insurance Co.*, 345 F.3d 190, 208-209 (3d Cir. 2003) (quotation marks omitted); *see also*, *e.g.*, *Kelly v. Syria Shell Petroleum Dev. B.V.,* 213 F.3d 841, 846-847 (5th Cir. 2000) (applying similar factors, although not requiring that "all . . . support an organ-determination" and not applying them "mechanically"). In addition, both *Carson* and *Aguilar* specified similar facts as relevant in determining whether an SOE is an instrumentality under the FCPA. *See Aguilar,* 783 F. Supp. 2d at 1115; *Carson*, 2011 WL 5101701, at *3-*4. Although defendants claim that the district court's "non-exhaustive list of factors" was "unhelpful," Rodriguez Br. 30, and that individual factors were "inadequate," Esquenazi Br. 53-54, they have not shown that the court abused its discretion in formulating its list.[16/]

[16/] Defendants provide far-fetched hypotheticals to support their claim that the court's instructions yield absurd results. For example, they posit that, under the court's instructions,"private companies that sold equipment to private companies that provided telephone cellular services in Haiti" would be an instrumentality, Rodriguez Br. 34. They ignore the instruction that directed the jury to decide whether the "state-owned" or "state-controlled" company was an instrumentality of the government of Haiti, and they similarly disregard the enumerated factors, which all weigh against a finding that their hypothetical private company is a government instrumentality.

The district court also did not abuse its discretion in refusing to give defendants' requested instructions on instrumentality that required the entity to perform "traditional" public functions. Defendants must first show that the requested instruction was a correct statement of law, *United States v. Dohan*, 508 F.3d 989, 993 (11th Cir. 2007), and, for the reasons stated above, they have not met that requirement.

D. The Evidence Established That Teleco Was An Instrumentality Of Haiti.

Defendants argue that the government did not prove that Teleco performed a governmental function "similar to that performed by political subdivisions like a department or agency." Esquenazi Br. 45. As previously discussed, that standard is incorrect and the government was not required to meet it.

Based on Lissade's testimony, a reasonable jury could conclude that Teleco was an instrumentality of Haiti. That foreign government, through its national bank, effectively owned Teleco in its entirety. If Teleco had been profitable, its profits would have been distributed to the public treasury and the national bank; because it was not, the bank had to subsidize the company. Teleco was managed and controlled by government appointees. Antoine also testified that, according to Patrick Joseph, President Aristide removed Antoine from his position and appointed Alphonse Inevil in his stead. Another high level government minister

appointed Duperval as Teleco's Deputy General Director. Haiti's public bribery laws applied to officials at Teleco, and the jury could conclude, from the passage of the 2008 anti-corruption law,[17/] that Teleco was part of the public administration because its general director, deputy general director, and board members were required to declare their assets.[18/] *See* pages 6-8, 14 *supra*.

The evidence also demonstrated that Terra's own in-house counsel considered Teleco an instrumentality of Haiti, and he even used that term when he offered to provide the Aon insurance broker with a letter from Teleco's president to that effect. Doc. 818-Pg. 21. The jury could reasonably infer that Dickey, as in-house counsel for a company primarily engaged in business with foreign governments, was familiar with the FCPA and that he used the term "instrumentality" to describe Teleco's legal status based on his knowledge of Teleco's relationship to the government of Haiti.

[17/] Defendants misconstrue Lissade's testimony about the significance of the 2008 anti-corruption law. Although they questioned Lissade about whether that law was passed to clarify Teleco's status as a public company, he testified that "[t]he law was not passed to make . . . it clear," but instead "confirmed what [Teleco] was before." Doc. 493-Pg. 69.

[18/] Contrary to defendants' claim, Lissade's conclusion that Teleco was part of the "public administration," which he defined as "the entities that the state used to perform and to give services to the people living in Haiti" and "an instrument . . . for the state to reach its missions and objectives and goals," Doc. 493-Pg. 36, was highly probative of whether Teleco performed a governmental function and constituted a government instrumentality.

Defendants' reference to "countervailing pieces of evidence," Esquenazi Br. 47, fails to account for the standard that governs sufficiency claims. Nor is that evidence persuasive. Although they focus on the fact that no law officially changed the status of Teleco from a private corporation to an "S.A.M.," Lissade testified that Teleco became a "de facto S.A.M. because the government consider[ed] Teleco as its . . . entity," and he was "confident" that Teleco was owned by the government and part of the public administration. Doc. 493-Pg. 62, 97. Esquenazi argued his point to the jury, Doc. 516-Pg. 7, and the jury reasonably rejected it.

Finally, even if this Court were to conclude that the evidence was not sufficient to support the FCPA charges (or that any of their other challenges to the FCPA convictions had merit), the multi-object conspiracy charged in Count 1 should still be upheld because the jury found that defendants also conspired to commit wire fraud. Doc. 522, 523 (verdict forms). *See United States v. Medina*, 485 F.3d 1291, 1301 (11th Cir. 2007) ("This Court has long held that where there is a conviction for a multi-object conspiracy, the evidence must only be sufficient to sustain a conviction for any one of the charged objectives."). As discussed below, defendants' challenges to that object of the conspiracy are without merit. *See* pages 73-82 *infra*.

II. The District Court's Instructions On The Knowledge Requirements Of The FCPA Were Not Plainly Erroneous, And The Evidence Sufficiently Established That Rodriguez Believed That He Was Bribing Employees Of A Government-Owned Entity.

Defendants contend that the district court's instructions on the knowledge element of the FCPA were incorrect and that the district court abused its discretion by refusing to give their proposed instructions. Rodriguez Br. 44-47; Esquenazi Br. 54. Rodriguez also argues that the evidence of his knowledge was insufficient and that the court erred by instructing the jury on a deliberate ignorance theory of knowledge. Rodriguez Br. 51-55. Defendants' claims are without merit.

A. Background.

Defendants proposed an instruction defining "willfully" as "act[ing] deliberately and with the intent to do something that he or she knows the law forbids. In other words a person must act with a bad purpose to disobey or disregard the law and, in doing so, must have the knowledge of the facts that constitute the offense." Doc. 403-1-Pg. 5. Their proposed instructions also required the jury to find that "the Defendant either paid, or offered, promised, or authorized the payment of, money or anything of value (directly or indirectly) to a person the Defendant knew to be a foreign official." *Id.* at 1.

During the discussion of the FCPA instructions at the charging conference, Rodriguez objected to the instruction on instrumentality and specifically stated that he wished to preserve the objection. The court overruled it. Doc. 513-Pg. 11-12. The court then asked whether counsel had "[a]nything else on this [FCPA] instruction," and, "[h]earing nothing further," directed the parties to the money laundering instructions. *Id.* at 12. Over defendants' objection, the court concluded that the evidence was sufficient to support the deliberate ignorance instruction. *Id.* at 13-16. Defendants did not object to the court's instruction on "willfully." *Id.* at 17.

The district court began its charge by advising the jury to "follow all of my instructions as a whole." Doc. 527-Pg. 8. In describing the elements of the FCPA offenses, the district court instructed the jury that it had to find that "the payment or gift [that the defendant offered, paid, promised to pay, or authorized] was to a 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." *Id.* at 21. It also required the jury to find that "the defendant acted corruptly and willfully," *ibid.*, and further defined those terms.

> An act is corruptly done if it's done voluntarily and intentionally and with bad purpose or evil motive of accomplishing either an unlawful end or result or a lawful end or result, but by some unlawful method or means.

> The term corruptly in the FCPA is intended to connote that the offer, payment or promise was intended to induce the foreign official to misuse his or her official position.
>
> The word "willfully" means that the act was committed voluntarily and purposely, with the intent to do something the law forbids; that is with the bad purpose to disobey or disregard the law.
>
> While a person must have acted with the intent to do something the law forbids, before you can find a person acted willfully, the person need not be aware of the specific law or rule that his conduct may be violating.

Id. at 22, 36. The court also instructed the jury on the meaning of the word "knowingly" as applied to all the charges, the definition of "knowing" under the FCPA, and the doctrine of deliberate ignorance. *Id.* at 25-26, 35-36.

Defendants did not object to any of the instructions before the jury retired for deliberations.[19/]

[19/] Rodriguez states, without a citation to the record, that he "raised below the defect in the 'knowledge' instruction." Rodriguez Br. 45. In fact, that specific objection was raised for the first time in his reply to the government's response to his post-trial motions for judgment of acquittal and new trial. Doc. 580-Pg.7-9. The motion stated that the claim was "[i]n addition to the arguments previously raised at trial," *id.* at 5, 7; it did not preserve his claim of instructional error. *See United States v. Wright*, 392 F.3d 1269, 1277 (11th Cir. 2004) ("In order to 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.") (quotation marks omitted).

B. Defendants Have Not Demonstrated That The Instructions Were Plainly Erroneous.

Defendants contend that the court's instructions on the knowledge element of the FCPA were erroneous because they did not require the jury to find that defendants knew that the recipient of the bribe "had characteristics that made the recipient a 'foreign official,'" or that Teleco "had characteristics that made it an instrumentality of the Haitian government."[20/] Rodriguez Br. 44, 46. Because they did not object to the court's instructions on that ground at the charging conference or before the jury began deliberating, they must show that the instructions were plainly erroneous, *Merrill*, 513 F.3d at 1305, and they have failed to do so.

So long as defendants believed they were bribing foreign officials (and the officials were, in fact, "foreign officials" under the FCPA), the source of their knowledge or belief is irrelevant. Defendants' argument that the jury must find that they knew the "characteristics" that made Antoine and Duperval "foreign officials" and Teleco an "instrumentality" is tantamount to a claim that the

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[20/] Esquenazi joined in Rodriguez's argument. He also asserts summarily, and contrary to Rodriguez, that the district court should have adopted the court's proposed instruction in *Carson* that the defendant "knew or believed" that he was bribing a foreign official. Esquenazi Br. 54. The instructions here, although worded somewhat differently from the court's proposed instructions in *Carson*, imposed a similar knowledge requirement, *see* page 57-58 *infra*, and Esquenazi has not established that the instructions were plainly erroneous.

government must prove that they knew that they were violating the FCPA. There is no support for that construction of the statute, and other circuits have rejected it.[21/] *See United States v. Kay* (*Kay II)*, 513 F.3d 432, 449 (5th Cir. 2007) ("Defendants need not have *specifically* known that they were violating the FCPA in this case."); *Stichting Ter Behartiging Van De Belangen Van Oudaandeelhouders In Het Kapitaal Van Saybolt International B.V. v. Schreiber*, 327 F.3d 173, 181 (2d Cir. 2003) ("Knowledge by a defendant that it is violating the FCPA-that it is committing all the elements of an FCPA violation-is not itself an element of the FCPA crime."); *id.* at 183 ("[T]here is nothing in that word [corruptly] or anything else in the FCPA that indicates that the government must establish that the defendant in fact knew that his or her conduct violated the FCPA to be guilty of such a violation."). As both those courts explained, it is only in the case of highly complex statutes that defendants must have specific knowledge that they are violating the statute, and "the FCPA is plainly not such a statute." *Stichting*, 327 F.3d at 181; *Kay II*, 513 F.3d at 448-451. The instructions here were almost

[21/] Defendants cite *United States v. Couto*, 119 F. App'x 345 (2d Cir. 2005), but that case does not involve the FCPA nor does it help them. In rejecting defendant's claim that the evidence did not establish that she knew that she bribed a public official, *Couto* cited *United States v. Jennings*, 472 F.2d 1310 (2d Cir. 1973), for the proposition that 18 U.S.C. § 201 does not require proof that a defendant knew of the bribed official's federal status, "but only proof that defendant has 'some form of knowledge that the person bribed was *an* official.'" *Id.* at 347 (quoting *Jennings*, 472 F.2d at 1313).

identical to those in *Kay II*, 513 F.3d at 446, and the Fifth Circuit held that those instructions "provided clear directions to the jury on all applicable principles of the FCPA," *id.* at 447.

Defendants also argue that, under the court's instructions, a jury "could reasonably have misunderstood" that defendants could be convicted if they "knew that the alleged intermediaries would make a payment to an individual and that individual *happened* to be a foreign official." Rodriguez Br. 44 (emphasis added). That interpretation of the charge is hardly "reasonable." The instructions as a whole ensured that accidental payments to foreign officials would not suffice. The jury had to find that the payment was made for the purpose of influencing "the foreign official in his or her official capacity" or "to induce the foreign official to do or omit to do any act in violation of the official's lawful duty," Doc. 527-Pg. 21, and that the defendant "intended to induce the foreign official to misuse his or her official position,"[22/] *id.* at 22. In addition, when payments were made to third parties, as was the case here, the jury had to find that defendants made the payments "while knowing" that they would be given "directly or indirectly to any foreign official." *Id.* at 25. Thus, the instructions made clear that defendants could not be convicted on the FCPA

[22/] Although defendants argue that the jury might have ignored that instruction, the accepted presumption is that "juries follow the instructions given to them." *United States v. Lopez*, 649 F.3d 1222, 1237 (11th Cir. 2011).

counts if they had a mistaken but genuine belief that they were bribing a private individual.

The parties also acknowledged during closing arguments that the government had to prove that defendants believed that they were bribing a foreign official. The government summarized the evidence that showed that defendants "believed in their own minds that Teleco was part of the government instrumentality," Doc. 513-Pg. 71, and Rodriguez explained that one of the elements of an FCPA violation is that "you have to know that it is [a] government official," Doc. 516-Pg. 67-68. *See also id.* at 5-6 (Esquenazi argues that he did not know that Teleco was owned by Haiti). Defendants contend that those arguments cannot "save" a defective instruction, Rodriguez Br. 47, but this Court has held otherwise. *See, e.g., United States v. Cochran*, 683 F.3d 1314, 1319-1320 (11th Cir. 2012) (in concluding that imprecise instruction did not mislead the jury or prejudice the defendant, court views instructions as a whole and "in light of the entire trial," including government summation). When the instructions are considered as a whole and in light of the parties' summations, there was no reasonable likelihood that the jury believed that it could convict defendants of the FCPA offenses if defendants did not believe that the recipients of the bribes worked for a foreign government instrumentality.

Even if the district court's instructions were so misleading as to be erroneous, defendants have not established that the error was plain. This Court has never interpreted the FCPA's knowledge requirement, and the district court's instructions were consistent with the Fifth Circuit's decision in *Kay II* and the Second Circuit's decision in *Stichting*. Nor have defendants shown that the purported error affected their substantial rights or resulted in a miscarriage of justice. Overwhelming evidence established that they believed that Teleco was government-owned. They applied for political risk insurance, which is only necessary when the insured is seeking to protect against actions of a foreign government and only issued when the other party to the contract is a "public entity." *See* pages 9-10 *supra*. Defendants repeatedly referred to Teleco as a government-owned entity and Haiti as the other party to the contract during the application process. *Ibid*. They received an e-mail in which their attorney offered to get a letter from Teleco attesting to its status as "an instrumentality of the Haitian government." Doc 818-Pg. 20-21. They were aware of the insurance company's concern that the *force majeure* clause in the contract would allow "the Haitian government" to cancel the contract, and Esquenazi renegotiated that provision with Patrick Joseph as a result. GX 186. According to the insurance broker and Perez, defendants never expressed any doubts about Teleco's status as a government-owned entity. Doc. 495-Pg. 45, 49, 51, 53; Doc. 818-Pg. 13. In

fact, Esquenazi admitted that Teleco was a government-owned telecommunications company at a deposition, Doc. 511-Pg. 120-121, and Rodriguez has conceded on appeal that the evidence established that he knew that Teleco's employees worked for a state-owned enterprise. Rodriguez Br. 53 ("That fact is not in dispute.").

For these reasons, defendants' related argument that the district court abused its discretion in rejecting their proposed instruction is also without merit. Their proposed instruction on "willfully" misstated the law, and the court's instructions substantially covered their other request.

C. The District Court Did Not Err In Giving A Deliberate Ignorance Instruction.

Rodriguez contends that the district court should not have given a deliberate ignorance instruction because "there is no evidence in the record that Mr. Rodriguez deliberately kept himself ignorant either of whether Teleco was an instrumentality of the Haitian government or whether the payments to Teleco were illegal." Rodriguez Br. 54. Although Rodriguez does not argue the first claim further, it is obvious from the charging conference, the summations, and the charge as a whole that the instruction did not apply to Rodriguez's knowledge of Teleco's status. To the contrary, the government argued that Rodriguez was well aware of that fact. Doc. 513-Pg. 71-74.

As to Rodriguez's second claim, we note, at the outset, that an instruction equating knowledge of an essential fact with a defendant's awareness of a "high probability" that the fact existed is permissible as applied to the FCPA counts without a further showing that the defendant deliberately avoided learning all the facts. The FCPA explicitly defines "knowledge of the existence of a particular circumstance" as "aware[ness] of the high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist." 15 U.S.C. § 78dd-2(h)(3)(B). The instructions reflected that statutory language and were correct, as to the FCPA counts, on that ground alone.

The evidence also amply supported the charge as to the remaining counts. 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." *United States v. Rivera*, 944 F.2d 1563, 1571 (11th Cir.1991) (quotation marks omitted). When "the evidence supports both actual knowledge and deliberate ignorance, the instruction is properly given." *United States v. Arias*, 984 F.2d 1139, 1143 (11th Cir. 1993) (quotation marks omitted).

The evidence established that Rodriguez was in charge of Terra's finances and requested the bulk of the payments to J.D. Locator and the other

intermediaries. The circumstances of those payments were suspicious. Contrary to Terra's usual practice, Rodriguez requested and signed checks for those third-party intermediaries even though there were no invoices or other supporting documentation. He also was aware that J.D. Locator, whose consulting agreement he had signed, was paid both "consulting fees" and "commissions," a practice that his subordinate in Terra's accounting department, Jose Arroliga, considered "unusual." Doc. 478-Pg. 61. Rodriguez authorized those questionable payments totaling close to one million dollars when Terra's cash flow problems prevented it from paying other bills on time. *See id.* at 70 (Arroliga testified that the amount of these payments was "suspicious"). Teleco also was the only vendor that Terra did not pay in full. Doc. 482-Pg. 12. By funneling money through third-party intermediaries, documenting the payments as consulting fees, and not investigating the suspicious payments further, Rodriguez could – and did – claim that he did not actually know that Terra was bribing Antoine and Duperval. *See, e.g.*, Doc. 516-Pg. 59 (Rodriguez "had no involvement in the Haiti project other than his obligations to run the accounting department. He never traveled to Haiti. He never negotiated the contracts with Haiti and he did not meet any of the Haitians").

Even if there were no evidentiary basis for the deliberate ignorance instruction, any error was harmless because the jury could have convicted

Rodriguez based on his actual knowledge. *United States v. Kennard*, 472 F.3d 851, 857-858 (11th Cir. 2006). Perez testified that he told Rodriguez, Esquenazi, and Dickey that Antoine had agreed to reduce Terra's outstanding bills in exchange for cash payments, and Rodriguez and the others congratulated Perez on "a job well done." Doc. 491-Pg. 80. Perez also testified that, when he expressed doubts about the bribery scheme to Dickey, the in-house attorney told him that "[t]his is [Equenazi's] and [Rodriguez's] problem. This is their decision." *Id.* at 82. Circumstantial evidence also supported the inference that Rodriguez knew the true purpose of the checks to the intermediaries. For example, Rodriguez told Arroliga to apply the J.D. Locator checks to the Teleco account, but those payments were never reflected as credits on Terra's settlement statements. Doc. 478-Pg. 71-72; Doc. 716-Pg. 73. In addition, although Arroliga and Rodriguez met weekly so that Rodriguez could decide which invoices to pay and which checks to sign, the two never discussed Teleco's bills. Doc. 438-Pg. 46-47, 55. On one occasion, Rodriguez signed a check request for J.D. Locator in the amount of $33,818.50 (an odd amount for a consultant), and his handwritten notes show that he arrived at that figure by deducting the value of the free prepaid phone cards that Terra gave to Fourcand from the $41,000 bribe that Terra owed Antoine. Doc. 478-Pg. 72-74; GX 303, 322. Those calculations make sense only if Rodriguez knew that the J.D. Locator payments were bribes rather than

legitimate consulting fees. Finally, the jury could infer from the same evidence that supported the deliberate ignorance instruction that Rodriguez actually knew about the bribes. *See United States v. Kozeny*, 667 F.3d 122, 133 (2d Cir. 2011) (a jury could infer from the same evidence that defendant knew or consciously avoided learning that individual with whom he invested was paying bribes to foreign government).

D. The Evidence Of Rodriguez's Knowledge Was Sufficient.

Finally, Rodriguez contends that there was insufficient evidence that he knew that Teleco was an "instrumentality" under the FCPA and that Teleco's employees were "foreign officials." Because knowledge that he was violating the FCPA is not an element of the offense, the government was not required to prove that he knew the legal status of the bribed Teleco employees. The evidence was sufficient, however, to establish that Rodriguez believed that Teleco was owned by the government of Haiti and that the disguised payments to the third-party intermediaries were to be passed along to Teleco officials to reduce Terra's bills. *See* pages 59-60 *supra*.

III. The District Court Did Not Abuse Its Discretion In Denying Defendants' Requests For An Evidentiary Hearing And Discovery On Their Motions For A New Trial Or Judgment Of Acquittal Based On Newly-Disclosed Information.

Defendants contend that they were entitled to a hearing and discovery to determine when the government became aware of information that was disclosed following the jury's verdict, whether the government sought to discover the information before trial, and the circumstances concerning the disclosure of the post-trial information. Esquenazi Br. 20-25; Rodriguez Br. 38-44. Defendants have not shown that the district court abused its discretion in denying their requests because the government did not suppress favorable information; the information in the post-trial disclosure was equally available to defendants; and the information would not have affected the verdict.

A. Background.

On August 9, 2011, four days after the jury returned the verdict, the attorney for Patrick Joseph, whose client still faced FCPA-related charges, forwarded a July 26, 2011 declaration from Haiti's Minister of Justice (and Prime Minister), Jean Max Bellerive to the government. That declaration concluded, in substance, that "Teleco has never been and until now is not a State enterprise." Doc. 543-1-Pg. 4. Bellerive primarily relied on the facts that Teleco did not revise its bylaws after the national bank acquired it; its legal status did not change as a

result of the bank's ownership; the State did not have the authority to appoint its representatives to the Board of Directors; and Teleco was not "an organization subject to public law." *Ibid.* The government promptly disclosed the declaration to defendants. Doc. 609-Pg. 24.

According to a government filing, the government contacted Haitian officials, including Bellerive, to determine the origin and purpose of the July 26 declaration. Doc. 561-Pg. 10. Bellerive offered to clarify his statements, and, with the government's assistance, he prepared another declaration that explained that he signed the July 26 declaration "strictly for internal purposes" relating to Teleco's modernization and "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 and before its modernization, Teleco was not part of the Public Administration in Haiti." Doc. 563-1-Pg. 4-5. The declaration corroborated Lissade's testimony about the government's ownership and control of Teleco and emphasized that "[t]he only legal point that should stand out in this [July 26] statement is that there exists no law specifically designating Teleco as a public institution. Yet this does not mean that Haiti's public laws do not apply to Teleco even if no public law designates it as such." *Id.* at 5.

Based on the information in the first Bellerive declaration, defendants moved for a new trial or judgment of acquittal, Docs. 543, 547, and, in the alternative, requested an evidentiary hearing to determine when the government learned from Bellerive or other Haitian government officials that "Teleco never was or has been a State enterprise and always was a company under common law," Doc. 543-Pg.7. After receiving the second Bellerive declaration, defendants renewed their request for an evidentiary hearing and for discovery on the circumstances leading to Bellerive's second declaration and the government's knowledge of the contents of the first. Docs. 581, 586. The motion challenged Bellerive's statement in the second declaration that the first declaration was prepared for internal purposes, and they attached to their motion the July 19, 2011 letter from Joseph's attorney to Bellerive, soliciting an official declaration about Teleco's status.[23/] Docs. 581-Pg. 4-6, 584-4.

The district court denied defendants' motions. Doc. 609. As relevant here, it relied on defendants' own assertion that the "First Declaration was the result

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[23/] The letter asked four questions: whether Teleco was private or government owned when it was created; did its status change; was it private during the period 2001-2004; and whether Teleco's corporate structure changed when the central bank became its majority shareholder. Doc. 581-4. Although the declaration answered those questions in part, it also included information that was not responsive, corroborating Bellerive's subsequent statement that he believed the declaration was to be used in connection with Teleco's modernization.

of a letter from counsel for Patrick Joseph," to conclude that the government was not responsible for procuring Bellerive's first declaration and did not receive it until August 9, 2011. *Id.* at 24. It then ruled that the declaration did not constitute newly-discovered evidence because its contents were "established throughout trial and were known to Defendants during trial preparation." *Id.* at 26. The court explained that defendants' pre-trial "Notice of Expert Witness Disclosure" stated that their expert witness was prepared to testify to many of the facts in the declaration, including that the national bank's acquisition of Teleco "'did not change the nature of a corporation that is governed by civil law,'" that Teleco was "'a private entity under Haitian law,'" and that Teleco's employees were not public officials. *Id.* at 27-28 (quoting Doc. 360). The court also noted that Lissade testified to "many of the points raised in the first declaration," including the fact that Teleco never legally changed its status from "S.A." to "S.A.M." *Id.* at 26, 28. It therefore concluded that the first declaration "contain[ed] no newly discovered evidence and would not have affected the jury verdict." *Id.* at 28.

B. The District Court Did Not Abuse Its Discretion In Denying Defendants' Requests For An Evidentiary Hearing And Discovery.

The district court did not abuse its discretion in denying defendants' requests for an evidentiary hearing and discovery. Defendants' *Brady* claim

lacked merit, and the court did not need additional evidence to reach that conclusion. *See United States v. Schlei*, 122 F.3d 944, 994 (11th Cir. 1997) ("In determining whether a motion for a new trial based on newly discovered evidence was properly denied, we are persuaded that the acumen gained by a trial judge over the course of the proceedings [makes her] well qualified to rule on the basis of affidavits without a hearing.") (quotation marks omitted); *United States v. Massey*, 89 F.3d 1433, 1443 (11th Cir. 1996) ("We find that Massey's allegations lack merit; therefore, they do not warrant a *Brady* evidentiary hearing."). To prevail on their *Brady* claim, defendants had to establish that: "(1) the government possessed evidence, including impeachment evidence, favorable to the defense; (2) they 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. 1995). Because defendants failed to show that the government suppressed favorable evidence that was unavailable to them or that disclosure of the first declaration would have changed the outcome of the trial, there was no reason to sanction a fishing expedition in support of their unsubstantiated *Brady* claim.

Defendants admit that "[t]here is no evidence that the Government had knowledge or was in possession of the [first] Declaration prior to August 9, 2011." Rodriguez Br. 39. Instead, they contend that, in light of the cooperation between the government of Haiti and the Department of Justice, the substance of the first declaration – that the Haitian Prime Minister did not believe that Teleco was a "state enterprise" and that Teleco's by-laws had never been changed – was either known to the government or should be imputed to it. Esquenazi Br. 24-25; Rodriguez Br. 39, 43. Their speculation that the government was aware of the opinion expressed in the first declaration, without any showing to back up that claim, is not sufficient to establish materiality and did not justify a hearing and discovery. *See, e.g., United States v. Naranjo*, 634 F.3d 1198, 1212 (11th Cir. 2011) ("[M]ere speculation or allegations that the prosecution possesses exculpatory information will not suffice to prove 'materiality.'") (alteration in original); *United States v. Arias-Izquierdo*, 449 F.3d 1168, 1189 (11th Cir. 2006) (denying request for discovery based upon defendant's speculation that government suppressed exculpatory evidence). Nor can the substance of Bellerive's first declaration be imputed to the government. "*Brady* applies only to information possessed by the prosecutor or anyone over whom he has authority," *Naranjo*, 634 F.3d at 1212 (quotation marks omitted), and the cooperation extended by the government of Haiti to the prosecutors does not

make that government an agent of the United States. *Compare United States v. Antone*, 603 F.2d 566, 570 (5th Cir. 1979) (federal prosecutors were required to disclose impeachment information known by state law enforcement team when "the state investigators functioned as agents of the federal government under the principles of agency law"). Imputing the information in Bellerive's first declaration to the prosecutors is especially unwarranted because Bellerive subsequently stated that the declaration was not made for purposes of the criminal proceedings.

Defendants also were not entitled to a hearing to establish "what, if any, efforts [the government] made to discover Haitian officials' opinions regarding the status of Haiti Teleco or whether the by-laws had been amended." Esquenazi Br. 25. *Brady* is not "a rule of discovery," *United States v. Quinn*, 123 F.3d 1415, 1421–1422 (11th Cir. 1997), nor does it "require[] a prosecutor to seek out and disclose exculpatory or impeaching material not in the government's possession," *United States v. Bender*, 304 F.3d 161, 164 (1st Cir. 2002); *cf. 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.") (quotation marks omitted).

The district court also did not need additional evidence to conclude that defendants could have acquired the information in Bellerive's first declaration through "reasonable diligence." According to defendants, Joseph's attorneys procured the declaration simply by asking, and defendants have not offered any reason why they could not have done the same. Moreover, defendants' own expert witness had provided them with similar information, and they were prepared to offer that evidence at trial. *See* Doc. 609-Pg. 27-28. And Lissade's pre-trial affidavit also put defendants on notice that Teleco's by-laws had not changed after the national bank acquired the company and that the President's appointments did not conform to Haitian law. *See* Doc. 417-2-Pg. 3, 7-8.

Finally, the district court properly concluded without conducting a hearing that the information in Bellerive's first declaration was not material. The declaration itself was inadmissible, s*ee Gilliam v. Secretary for Dept. of Corrections*, 480 F.3d 1027, 1032-1033 (11th Cir. 2007) (stating, in habeas case, that "the inadmissibility of the [purportedly exculpatory police] report supports the state court's conclusion that the report is not material."), and the jury was aware of its substance through Lissade's testimony. Indeed, Esquenazi argued in summation that he did not call an expert witness because "Mr. Lissade's cross-examination gave it to me." Doc. 516-Pg. 7. Moreover, even if defendants were able to procure Bellerive's presence at trial (and they have not proffered that they could

have), his testimony would not have helped them because, according to Bellerive's second declaration, he would have clarified the purportedly exculpatory statements in the first declaration and corroborated Lissade's testimony about Teleco's status.

The district court similarly did not abuse its discretion in denying defendants' request for a hearing and discovery on the circumstances that led Bellerive to prepare the second declaration. The government disclosed that it consulted Bellerive and other officials after it received a copy of the first declaration and assisted Bellerive in preparing the second declaration. Doc. 561-Pg. 10. Defendants do not explain why the district court needed additional information about the second declaration to decide whether the government violated its obligations under *Brady*.

IV. The District Court's Instructions On The Wire-Fraud Object Of The Conspiracy Were Not Plainly Erroneous, The Evidence Sufficiently Supported The Wire-Fraud Object Of The Conspiracy, And The Facts Proved At Trial Did Not Materially Vary From The Charges In The Indictment.

Defendants contend that the district court committed plain error by failing to instruct the jury that wire communications must cross state lines; that the evidence was insufficient on that element; and that there was a fatal variance between the charges in the indictment and evidence at trial if wires other than those listed in the overt acts were the bases for the conviction. Rodriguez Br. 55-

60, 64-67; Esquenazi Br. 49 & n.85. Rodriguez also argues that the evidence did not sufficiently establish his intent to defraud. Rodriguez Br. 60-64. Those claims are meritless.

A. Background.

The district court instructed the jury that the wire fraud statute "makes it a federal crime or offense for anyone to use interstate wire communications in carrying out a scheme to defraud." Doc. 527-Pg. 17. After describing the scheme-to-defraud and intent elements, the court explained that the phrase "to use interstate wire communications is to act so that something would normally be sent through wire, radio or television communications in the normal course of business." *Id.* at 19. Defendants did not object to the charge.

Rodriguez moved for a judgment of acquittal, pursuant to Fed. R. Crim. P. 29, on several specific grounds, but he did not challenge the sufficiency of the evidence on the interstate or foreign wire element of the wire-fraud object of the conspiracy. Doc. 509-Pg. 40-48; Doc. 513-Pg. 27-31; Doc. 542. Defendants did not argue in the district court that the proof at trial varied from the allegations in the indictment.

B. The District Court's Instructions Were Not Plainly Erroneous.

Although defendants acknowledge that the district court instructed the jury that wire fraud "makes it a federal crime or offense for anyone to use interstate

wire communications" in carrying out a scheme to defraud, they contend that the court "negated the 'interstate' part of its prior instruction" when it did not repeat that requirement when it explained what it means to "'use' interstate wire communications." Rodriguez Br. 58. The challenged instruction focused on the type of act that constitutes "use" of "interstate wire communications," and defendants' strained interpretation of the instructions takes a single phrase out of context and ignores the court's clear statement that the offense requires an interstate wire communication. *See United States v. Poirier*, 321 F.3d 1024, 1032 (11th Cir. 2003) ("We do not focus on any single sentence in jury instructions because, [i]f the instructions, taken together, properly express the law applicable to the case, no reversible error has occurred, even if an isolated clause may be inaccurate, ambiguous, incomplete, or otherwise subject to criticism.") (quotation marks omitted); *see also United States v. Galbraith*, 20 F.3d 1054, 1057 (10th Cir. 1994) (holding that the district court's instruction that "[t]he use of wire communication in interstate commerce means to use the telephone" was not plain error when considered with other instructions that stated that the communication had to be in interstate commerce).

Defendants also have not established that any error in the wording of the instruction was plain. The "use" instruction tracked the Eleventh Circuit's Criminal Pattern Jury Instruction for Wire Fraud (No. 51 (2010)), and neither

this Court nor the Supreme Court has ever held that the instruction is erroneous. Defendants therefore have not met their burden of establishing that any error was "so obvious and substantial that it should not have been permitted by the trial court even absent the defendant's timely assistance in detecting it." *United States v. Martinez*, 83 F.3d 371, 376 (11th Cir. 1996).

Defendants' contention that the district court plainly erred when it failed to instruct the jury that the "wire communications needed to cross state lines to qualify as federal 'wire fraud'" is also wrong. Rodriguez Br. 58. A conspiracy to commit wire fraud does not require proof of an actual interstate or foreign wire; "it is enough to prove that the defendant knowingly and voluntarily agreed to participate in a scheme to defraud and that the use of the interstate [or foreign] wires in furtherance of the scheme was reasonably foreseeable." *United States v. Hasson*, 333 F.3d 1264, 1270 (11th Cir. 2003); *see also United States v. Ross*, 131 F.3d 970, 981 (11th Cir. 1997) (same).

Defendants also have not satisfied the third and fourth prongs of the plain error test. The scheme involved bribes to employees of a foreign company, and defendants could anticipate, purely as a matter of common sense, that the co-conspirators would communicate through interstate and foreign telephone wires,

e-mails, and faxes. The evidence established that that was the case.[24/] Esquenazi and Antoine finalized the details of the scheme over the telephone while Esquenazi was in Florida and Antoine was in Haiti; co-conspirators routinely talked over foreign telephone wires about reducing Teleco's bills to Terra; and Antoine faxed Terra the original and reduced statements from Teleco's office in Haiti. Doc. 716-Pg. 34-36, 51-53, 55-56, 60-61. Inbound statements and other documents continued to be faxed from Teleco in Haiti to Terra in Miami when Duperval replaced Antoine. *See, e.g.*, GX 197-199, 201-202. And Esquenazi communicated with Duperval through interstate e-mail. GX 73, 200. *Cf. United States v. Lewis*, 554 F.3d 208, 213-215 (1st Cir. 2009) (noting that interstate commerce requirement in 18 U.S.C. § 2252(a)(2) is like that of 18 U.S.C. § 1343, and agreeing with other courts that use of the internet satisfies the interstate commerce element in child pornography statute).

[24/] Although the district court did not include the use of "foreign wire communications" in its instructions, defendants have not challenged that omission in the court's charge, and any claim is therefore abandoned. *United States v. Nealy*, 232 F.3d 825, 830-31 (11th Cir. 2000). Even if this Court were to consider whether the omission in the charge was error, uncontested evidence established that the conspiracy involved the use of wires in foreign commerce. *Cf. United States v. Griggs*, 569 F.3d 341, 344-345 (7th Cir. 2009) (court's failure to instruct the jury that the government had to prove the interstate use of wire transmissions was harmless; "There was never doubt that the conspiracy had involved the use of interstate communications by wire, which may be why the lawyers and the district judge didn't notice the omission from the instructions.").

C. The Evidence Sufficiently Established That Defendants Conspired To Commit Wire Fraud.

Defendants next argue that the evidence on the wire-fraud object of the conspiracy was insufficient because the evidence only established that intra-state wires were used.[25/] Because the government did not have to prove that defendants actually used interstate or foreign wires to convict them of the conspiracy charged in Count 1, their claim is without merit. In any event, uncontested evidence established that defendants transmitted, or caused to be transmitted, such wires.[26/] *See* page 77 *supra*.

Rodriguez also contends (Rodriguez Br. 60-64) that the government did not sufficiently prove that he intended to defraud Teleco of revenue. Although he correctly cites the standard governing review of sufficiency claims, he fails to

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[25/] Rodriguez did not include this ground in his otherwise specific motion for judgment of acquittal. His sufficiency claim is therefore reviewed for plain error. *United States v. Hunerlach*, 197 F.3d 1059, 1068 (11th Cir. 1999). Because his claim is without merit even under *de novo* review, we do not separately argue that he has failed to show that his convictions resulted in a miscarriage of justice.

[26/] Defendants rely solely on the evidence of the bank wires alleged in the overt acts to support their claim that the evidence was insufficient. They do not mention the proof of the interstate e-mails, which were alleged in overt acts 58, 59, and 83, or the evidence of the foreign wires. To the extent that defendants are suggesting that this Court cannot look beyond the proof of the overt acts in reviewing the sufficiency of the evidence, there is no basis for that claim. *United States v. Elliott*, 571 F.2d 880, 911 (5th Cir. 1978) ("We have long followed the rule that the government is not limited to overt acts pleaded in the indictment in proving a conspiracy; it may show other acts of the conspirators occurring during the life of the conspiracy."); *see also* page 80 *infra*.

apply it in practice. Thus, he argues that Perez's testimony that Rodriguez knew – and approved – the scheme to bribe Antoine in exchange for reduced rates should be discounted because Perez was "heavily impeached." Rodriguez Br. 61. Perez's credibility was a question for the jury, and Perez's testimony recounting Rodriguez's approval of the bribery scheme, based on Perez's firsthand knowledge, was not unbelievable as a matter of law. *See United States v. Thompson*, 422 F.3d 1285, 1291 (11th Cir. 2005) ("For testimony to be incredible as a matter of law, it must be unbelievable on its face, *i.e.*, testimony as to facts that [the witness] could not have possibly observed or events that could not have occurred under the laws of nature."). Other testimony corroborated that direct evidence, *see* pages 61-64 *supra*, and the jury could reasonably infer that Rodriguez intended to defraud Teleco of revenue when he agreed to bribe Antoine and Duperval in exchange for reductions in Terra's bills.

D. Defendants Have Not Established A Prejudicial Variance Between The Indictment And The Proof at Trial.

In their final challenge to their convictions under the wire-fraud object of the conspiracy, defendants contend that the government's reliance in its post-trial filings on foreign wire transmissions that were not alleged in the indictment or presented at trial as the jurisdictional basis for the wire-fraud conspiracy creates

an impermissible variance. They have not established that such a variance occurred or that they suffered substantial prejudice.

This Court has "made clear that properly understood . . . a variance exists where the evidence at trial proves facts *different* from those alleged in the indictment, as opposed to facts which, although not specifically mentioned in the indictment, are entirely consistent with its allegation." *United States v. Evans*, 910 F.2d 790, 801 (11th Cir. 1990) (quotation marks omitted). It also has "emphasize[d] that [v]ariance from an indictment is not always prejudicial, nor is prejudice assumed." *United States v. Alred*, 144 F.3d 1405, 1415 (11th Cir. 1998) (quotation marks omitted). To demonstrate substantial prejudice from a material variance, defendants must show that "the proof at trial differed so greatly from the charges that [each defendant] was unfairly surprised and was unable to prepare an adequate defense." *Ibid.* (internal quotation marks and citation omitted).

Count 1 of the indictment alleged that defendants conspired to commit wire fraud by "transmit[ing] and caus[ing] to be transmitted by means of wire communications in interstate and foreign commerce, certain signs, signals, and sounds, for the purpose of executing such scheme and artifice," and included, as overt acts 58, 59, and 83, "interstate electronic mail communications" from Esquenazi to Duperval and from Duperval to Grandison. Doc. 3-Pg. 7, 17, 19.

The proof at trial did not vary from these allegations. *See* pages 76-77 *supra*. Although the numerous foreign wire communications were not alleged in the indictment, a variance does not exist merely because the government relies upon proof at trial that was not listed as an overt act. *See, e.g.*, *United States v. Gold*, 743 F.2d 800, 813 (11th Cir. 1984) (rejecting defendant's argument that there was a constructive amendment when the government proved defendant's involvement in conspiracy by relying on proof not alleged in the overt acts section of the indictment); *United States v. Sdoulam*, 398 F.3d 981, 992 (8th Cir. 2005) ("The inclusion of some overt acts in an indictment does not bar proof of other acts, and proof of other acts in furtherance of the same conspiracy does not constitute a variance."). Defendants' claim that the jury could not have "understood" that the foreign faxes that were not alleged in the indictment "were the charged wires underlying the alleged conspiracy to commit wire fraud," Rodriguez Br. 64, is based on their erroneous view that the use of specific wires had to be alleged in the indictment and proved at trial. Their other arguments are without merit for the same reason. *See* Rodriguez Br. 65 (claiming that "[e]xhibits involving faxed invoices were peripheral and did not involve any substantive discussion that would have been sufficient for the jury to convict on the 'faxed invoices' theory"); Rodriguez Br. 66 (claiming that "jury of lay persons could [not] discern that the charged wires being relied upon as the basis for interstate wire fraud were faxed

invoices, rather than wire transfers that received the Government's complete focus at trial."). Nor is it the case that the government's "sole" or "complete" focus at trial was the wire payments to the third-party intermediaries. Rodriguez Br. 65, 66. Although those payments were significant evidence, so too were telephone conversations, e-mail correspondence, and faxed inbound statements that proved defendants devised a scheme to defraud Teleco of money. *See, e.g.*, Doc. 513-Pg. 65; Doc. 516-Pg. 93 (closing arguments about December 16, 2003 e-mail, fax regarding phone rates, and faxes and telephone conversations about original and reduced inbound statements). Defendants have failed to prove that there was a variance, let alone one that was prejudicial.

V. The Money Laundering Convictions Should Be Affirmed.

Defendants also contend that their money laundering convictions should be reversed because the FCPA and wire fraud predicates were not proven,[27/] and the district court's instructions on the Haitian bribery predicate were erroneous. Rodriguez Br. 67-69; Esquenazi Br. 50-51. In addition, Rodriguez contends that the bribery payments were not separately punishable under the money laundering

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[27/] Esquenazi argues that the wire fraud predicate is insufficient because, "[a]bsent an FCPA violation, no fraudulent conduct was alleged or proven with respect to the FCPA predicate act sufficient to constitute wire fraud." Esquenazi Br. 49. He is incorrect. There would be no "FCPA violation," for example, if Teleco were not an instrumentality under the statute, but that finding would have no bearing on whether defendants engaged in a scheme to defraud Teleco of money and property.

statute. Rodriguez Br. 70-72. For the reasons stated above, the evidence proved the underlying FCPA and wire fraud predicates, and defendants' remaining challenges are meritless.

A. Background.

Defendants filed a pretrial motion to dismiss the money laundering charges on the ground that the funds at issue were not "proceeds" from any specified unlawful activity (SUA), Docs. 268, 315, and the district court denied it, Doc. 307. Rodriguez did not raise the issue in his motions for judgment of acquittal, Doc. 509-Pg. 39-49; Doc. 513-Pg. 27-31.

In instructing the jury on the money laundering counts, the district court explained that "Haitian law makes it illegal for a public official or any agent or officer of a public authority to accept promises, offers, gifts or presents in return for performing actions or refraining from performing actions as a function of his or her position or job." Doc. 527-Pg. 30. The court also stated that "[i]n order to determine whether a violation of Haitian bribery law took place, you must determine whether . . . Teleco is a public authority of Haiti as that term is defined by Haitian law." *Ibid.* Defendants did not object to the charge. Doc. 513-Pg. 12-13.

B. The District Court's Instructions Were Not Plainly Erroneous.

Section 1956(c)(7)(B)(iv) of Title 18 includes as an SUA "an offense against a foreign nation involving . . . bribery of a public official." Defendants contend that the district court erred by failing to instruct the jury on the definition of "public official," and that a correct instruction would have defined "public official" as "'one who holds or is invested with a public office; a person elected or appointed to carry out some portion of a government's sovereign powers.'" Rodriguez Br. 68 (quoting Black's Law Dictionary (9th ed. 2009)). Referring to their arguments on the meaning of "public official" under the FCPA, they also contend that the district court should have limited the term "public official" to "individuals who had been appointed or elected to a position within a part, organ, or subsidiary branch of the Haitian government" and specifically excluded "employees of state-owned entities like Teleco." Rodriguez Br. 68-69. Defendants have not demonstrated that the district court erred, let alone plainly so.

First, the court was not required to define "public official" at all. Whether the foreign "bribery of a public official" SUA listed in § 1956(c)(7)(B)(iv) covers the charged Haitian bribery SUA is not a factual question for the jury. Instead, it concerns "the scope of the conduct covered by the statute" and is a legal question for the court. *United States v. Lazarenko*, 564 F.3d 1026, 1038 (9th Cir.

2009) (quotation marks omitted). If defendants had properly raised their claim below, the district court would have been called upon to interpret the terms of the statute to decide whether the SUA includes the charged Haitian offenses. *Cf. id.* (applying *de novo* review and concluding that the meaning of the foreign extortion SUA under Section 1956(c)(7)(B)(ii) included the extortion SUA charged in indictment).

Defendants' argument also fails because they have defined "public official" too narrowly. The term "public official," as used in the domestic bribery statute, 18 U.S.C. § 201, has been broadly construed to cover "all persons performing activities for or on behalf of the United States, whatever the form of delegation of authority." *Dixson v. United States*, 465 U.S. 482, 496, 104 S. Ct. 1172, 1180 (1984) (quotation marks omitted). Defendants have not explained why Congress would have defined the foreign bribery SUA more narrowly than its domestic SUA counterpart[28/] nor have they pointed to any statute where "public official" is defined in the terms they propose.

The district court's inclusion of "any agent or officer of a public authority" in its description of persons who may not accept bribes under the Haitian bribery predicate also was not error. The instruction accurately described the foreign law,

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[28/] Bribery under 18 U.S.C. § 201 is an SUA. 18 U.S.C. § 1956(c)(7)(A); 18 U.S.C. § 1961(1)(B).

see GX 457T (translation of Haitian bribery statute, which includes "any agent or officer of a public authority" as "public officials"), and defendants' proposed instruction would have excluded crimes that Haitian law defines as "corruption of public officials." *See ibid.*

Defendants also summarily argue that the district court's failure to instruct the jury that the SUA must be a felony was prejudicial error. Rodriguez Br. 69. The classification of a criminal offense is also a legal question, and defendants have not cited any cases that hold otherwise. *See, e g.*, *United States v. Golb*, 69 F.3d 1417, 1429 (9th Cir. 1995) (approving instruction that drug offense was SUA as a matter of law); *United States v. Sutera*, 933 F.2d 641, 646 (8th Cir. 1991) (finding no error in money laundering instructions that defined SUA as felony). Defendants have not even attempted to show that the instructions "seriously impaired [their] ability to defend [themselves]," *United States v. Martinelli*, 454 F.3d 1300, 1314 (11th Cir. 2006), and that failure is "fatal to [their] arguments," *ibid.* In any event, any argument would be unavailing. Lissade's testimony that Article 140 of the Haitian bribery law is punishable by a prison term of one to three years was uncontested, and the statute was admitted into evidence. Doc. 493-Pg. 57-58; GX 457T.

C. Rodriguez's Convictions For Concealment Money Laundering Do Not Present A Merger Problem.

The district court did not err in denying Rodriguez's motion to dismiss the indictment based on defendants' claim that the laundered funds were not proceeds from the prior bribery scheme. The indictment was legally sufficient on its face; the money laundering counts alleged that defendants conducted financial transactions with proceeds from SUAs (violations of the FCPA, wire fraud, and criminal bribery laws of Haiti), and the charged financial transactions were checks from Telecom Consulting to Duperval or others on his behalf that were negotiated more than two years after the bribery scheme began. *See* Doc. 307-Pg. 2 (denying pre-trial motion to dismiss indictment because indictment sufficiently alleged that money laundering transactions were proceeds of an SUA). Although Rodriguez relies on *United States v. Santos*, 553 U.S. 507, 128 S. Ct. 2020 (2008), that case involved "promotional" rather than "concealment" money laundering, and this Court has interpreted it as holding only that "the gross receipts of an unlicensed gambling operation [are] not 'proceeds' under section 1956." *United States v. Jennings*, 599 F.3d 1241, 1252 (11th Cir. 2010).

The proof at trial confirmed that there was no merger problem.[29/] Defendants did not bribe Duperval directly; if they had, Rodriguez's contention would have some force. Instead, they disguised the bribe payments to Duperval through the use of shell companies and phony consulting agreements. The payments from Telecom to Duperval were the last step in defendants' scheme to conceal the connection between Terra and Duperval, and the jury could reasonably infer that the primary purpose of the charged transactions was to conceal "both the source and the future ownership of the money." *United States v. Wilkes*, 662 F.3d 524, 547 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 2119 (2012); *see also United States v. Pretty*, 98 F.3d 1213, 1220-1221 (6th Cir. 1996) ("A direct payment from [individual providing kickback] to public official would have violated [18 U.S.C.] § 666 without constituting money laundering. The effort to disguise the source of the money was an additional act that is separately punishable under § 1956(a)(1)(B)(i), notwithstanding the simultaneity of the two crimes."). Rodriguez's efforts to disguise the source of the money were therefore separately punishable from the conduct that generated the proceeds. *See Wilkes*, 662 F.3d at 544-547 (concluding that bribery and money laundering convictions did not merge because defendant's multi-layered transaction that disguised the

[29/] Contrary to Rodriguez's claim, he did not preserve this issue because he never raised it in his motions for judgment of acquittal. As we discuss below, the evidence was sufficient even under *de novo* review.

source of payment to congressman was separately punishable under Section 1956(a)(1)(B)(i) from bribery charges); *Pretty*, 98 F.3d at 1220-1221 (same; transactions through sham trust that were designed to conceal kickbacks to public official were separately punishable as money laundering).

VI. Defendants' Sentences Should Be Affirmed.

Defendants challenge the calculation of the advisory Sentencing Guidelines.[30/] Esquenazi Br. 55-64. Rodriguez additionally contends that the order of forfeiture and amended judgment incorporating the forfeiture order should be vacated because the district court did not orally announce the forfeiture at sentencing. Rodriguez Br. 73-75. None of their claims has merit, and this Court should affirm defendants' sentences.

A. Background.

1. The Advisory Guidelines Calculations.

As relevant here, Esquenazi's and Rodriguez's Presentence Investigation Reports (PSRs) added 16 levels to the base offense level of 12 based on Terra's receipt of $2.2 million in benefits from the bribery scheme. Esquenazi PSR ¶ 69,

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[30/] Rodriguez adopts generally Esquenazi's challenges to the Guidelines calculations, Rodriguez Br. 72, but only one of Esquenazi's claims – the calculation of the value of the bribe – applies to Rodriguez. And even that claim is "too individualized to be generally adopted," *United States v. Cooper*, 203 F.3d 1279, 1285 n.4 (11th Cir. 2000) (quotation marks omitted), because it is reviewed for plain error, which is a case-specific determination.

Rodriguez PSR ¶ 65 (applying U.S.S.G. §§ 2C1.1(b)(2), 2B1.1(b)(1)(I)). Esquenazi's PSR also recommended a four-level enhancement for his role in the offense, Esquenazi PSR ¶ 73 (applying U.S.S.G. § 3B1.1(a)), and a two-level enhancement for obstruction of justice based on Esquenazi's perjurious testimony at trial, Esquenazi PSR ¶¶ 66, 74 (applying U.S.S.G. § 3C1.1). The PSR listed several examples of Esquenazi's perjury, including his testimony that the third-party intermediaries performed legitimate services and that he did not bribe Antoine. PSR ¶¶ 62-65. Esquenazi's advisory Guidelines range was 292-365 months of imprisonment, Esquenazi PSR ¶ 113; Rodriguez's advisory Guidelines range was 151-188 months of imprisonment, Rodriguez PSR ¶ 124.

Esquenazi objected to those (and other) calculations in the PSR. Docs. 565, 646. As to the value-of-the-bribe enhancement, he contended that the court should use the total of the bribe payments ($893,818), rather than the value of the benefit to Terra ($2.2 million), because the court applied the lower amount to Esquenazi's previously-sentenced co-defendants. Doc. 646-Pg. 8-9. After the government explained that the factual predicate for Esquenazi's argument was wrong – Diaz was held accountable for approximately $1 million and Antoine was held responsible for $1.8 million – Esquenazi conceded that those numbers should apply to his case as well. *Id.* at 11-13. In contesting the enhancement for

his role in the offense, Esquenazi admitted that he led the Terra "side of this" and his position "perhaps lends itself to one of orchestration." Doc. 646-Pg. 24-25.

The district court rejected Esquenazi's arguments and adopted the calculations in the PSR. Doc. 646-Pg. 25-26, 37-38. It explained that "the evidence [at trial] conclusively showed that Mr. Esquenazi was in fact the leader of the organization, and not just the president in name, but that he actually participated in many of the decisions that took place that involved this." *Id.* at 26. *See also ibid.* ("Mr. Esquenazi was . . . the boss of Mr. Rodriguez in addition to the others."). It also concluded that "the enhancement for obstruction of justice is appropriate in this case, based on the overall statement," *id.* at 33, because "we're not talking about one [perjurious statement]. We're not talking about two. We're talking about a bunch," *id.* at 35. *See also id.* at 28 ("Mr. Esquenazi was not a believable witness, in my opinion."). The court acknowledged that the enhancement "should [not] be done on a regular basis" and that "most defendants do have the right to stand up and contest the charges, *id.* at 28-29, but that "this is one of the few cases where the obstruction [enhancement] is appropriate," *id.* at 38. Finally, the court rejected Esquenazi's arguments about the value-of-the-bribe enhancement and adopted the PSR's finding of $2.2 million. *Id.* at 37-38.

2. Rodriguez's Forfeiture Order. On October 24, 2011, the district court entered an order of forfeiture against both defendants in the amount of $3,093,818.50. Doc. 623. The order stated that it would become final at sentencing, announced as part of sentencing, and included in the judgment, pursuant to Fed. R. Crim. P. 32.2(b)(4). *Ibid.*

Defendants' sentencings took place the following day, and the district court neglected to announce the forfeiture. Nonetheless, after imposing Esquenazi's sentence, the court asked whether there were any objections to the "manner in which sentence was pronounced," and Equenazi objected to the forfeiture on several grounds. Doc. 646-Pg. 70. When the court asked the same question at Rodriguez's sentencing, counsel stated that "just for the record, we object, as did [Esquenazi's counsel], to the forfeiture order on the same grounds and we would adopt his position with regard to that." Doc. 651-Pg. 34. Rodriguez's October 26 judgment of conviction did not include the forfeiture money judgment.

On October 31, 2011, the government filed a motion to amend Rodriguez's judgment of conviction because it omitted the forfeiture money judgment. Doc. 633. The motion represented that the government had conferred with opposing counsel, who continued to object "to the entry of the Order of Forfeiture," but did not object "to the instant motion, which merely seeks to have . . . the Rodriguez J & C amended to reflect the Order of Forfeiture." Doc. 633-Pg. 2. The court

granted the motion and amended the judgment of conviction accordingly. Doc. 637-Pg. 8.

B. The District Court Did Not Clearly Or Plainly Err In Calculating The Guidelines.

1. Role In The Offense.

Esquenazi contends that "his true factual role" was that of "manager or supervisor" and that the district court erroneously enhanced his sentence by four levels instead of three. Esquenazi Br. 56. Esquenazi has not established that the district court's finding was clearly erroneous.

Section 3B1.1(a) assigns a four-level enhancement for "an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive." "In distinguishing a leadership and organizational role from one of mere management or supervision," the commentary provides a list of non-exhaustive factors for the district court to consider, U.S.S.G. § 3B1.1, comment. (n.4), and the evidence easily satisfied almost all those criteria. Esquenazi was the president of Terra, and the bribery scheme was his idea. He also organized the scheme and assigned roles to his co-conspirators. He directed Perez to negotiate the details with Antoine and directed Dickey to draft the Telecom Consulting incorporation papers and consulting agreement. Based on Esquenazi's admission that Rodriguez reported to him and that he told Rodriguez

about the third-party payments, Doc. 511-Pg. 15, 24-25, the court could reasonably conclude that Esquenazi directed Rodriguez's criminal conduct as well. Esquenazi negotiated the amount of the bribes with Antoine and the lower phone rates with Duperval. And, as the majority shareholder of Terra, Esquenazi was the primary beneficiary of the scheme. *Cf. United States v. Tejeda-Beltran*, 50 F.3d 105, 113 (1st Cir. 1995) ("[W]e think it is nose-on-the-face plain that the sentencing court did not err in ranking appellant as an organizer. The record attests, directly or by fair inference, that appellant orchestrated the entire [bribery] scheme, played a pivotal role in committing the crimes, made decisions about when and where unlawful entries [of illegal aliens] would be attempted, recruited accomplices, and retained a degree of control over at least one of them ."); *United States v. Dijan*, 37 F.3d 398, 401-405 (8th Cir. 1994) (record supported trial court's finding that defendants were organizers or leaders: defendants made decision to bribe IRS agent, arranged the payments, prepared the fraudulent return, and provided it to others). Contrary to Esquenazi's contention, the fact that he did not directly control the criminal activities of the Haitian officials is not significant in light of Esquenazi's control over Terra's employees and his role as an organizer of the scheme as a whole. *See United States v. Benavides*, 470 F. App'x 782, *11-*12 (11th Cir. April 24, 2012) (four-level enhancement under Section 3B1.1(a)

does not require that defendant exercise "direct authority" over all the participants in the criminal activity).

Even if the district court clearly erred in finding that Esquenazi was a leader or organizer rather than a manger or supervisor, the one-level mistake was harmless. *See United States v. Barner*, 572 F.3d 1239, 1247–1248 (11th Cir. 2009). Although the district court did not state that its sentence was independent of the Guidelines calculations, Esquenazi's variance sentence was 112 months lower than the bottom of the advisory Guidelines range. If Esquenazi's offense level had been enhanced by three levels, as he concedes is justified, rather than four, the advisory Guidelines range would have been 262-327 months of imprisonment,[31/] and his 15-year sentence would still be significantly lower than the bottom of that range. In light of this substantial variance and the court's explanation that the 15-year sentence was "sufficient and appropriate to punish the defendant and deter future criminal conduct," Doc. 646-Pg. 67, this Court can safely conclude that the district court would have imposed the same sentence.

[31/] If this Court were to remand for resentencing, Esquenazi's advisory Guidelines range could be higher because he is now in criminal history category II as a result of a recently-imposed 46-month sentence for conspiracy to commit bank and wire fraud. *See* Judgment in 11-20112; PSR ¶ 80.

2. Obstruction Of Justice.

Esquenazi also has failed to show that the district court clearly erred in enhancing his offense level for obstruction of justice. The district court agreed with his general proposition that "protestation of [] innocence, notwithstanding the jury verdict" is insufficient to support the enhancement, Esquenazi Br. 62, but found it inapplicable in this case. Doc. 646-Pg. 34-35. The false statements at issue here were not simple denials of culpability; instead, Esquenazi testified to material facts that were contradicted by his co-conspirators, uninvolved Terra employees, and the documentary evidence. Most importantly, he asserted that he did not bribe Teleco officials and that Terra paid the intermediaries for legitimate services.[32/] *See Williams*, 627 F.3d at 845 (concluding that district court clearly erred in not enhancing defendant's sentence for obstruction of justice when defendant's testimony was "irreconcilable" with the record). And, although Esquenazi criticizes the district court for focusing on Esquenazi's demeanor as a basis for disbelieving his testimony, a court's credibility determination is entitled to "special deference" precisely because the court has the

[32/] Esquenazi argues (Br. 60 n.111) that his testimony that Agent Smith asked him only a handful of questions during his pre-arrest interview was not material. If the jury believed Esquenazi's version of events, however, it would have undermined the agent's contrary – and significant – testimony that Esquenazi admitted that he bribed Duperval to keep Terra in business. *Compare* Doc. 818-Pg. 85; Doc. 515-Pg. 115-116 (Agent Smith testimony) with Doc. 504-Pg. 33-35 (Esquenazi testimony).

opportunity to judge the defendant's demeanor firsthand. *United States v. Banks*, 347 F.3d 1266, 1269 (11th Cir. 2003).

Esquenazi also argues that the district court erred by failing to enter specific findings as to each instance of perjury. Although this Court prefers "that the district court make specific findings as to each instance of obstruction by identifying the materially false statements individually, . . . [i]t is sufficient . . . that the district court makes a general finding of obstruction of justice that encompasses all of the factual predicates of perjury." *United States v. Vallejo*, 297 F.3d 1154, 1168 (11th Cir. 2002) (quotation marks omitted). When considered in the context of the recitations of the perjurious statements in the PSR and the lengthy colloquy on the application of the enhancement at sentencing, the district court's general findings were sufficient. As this Court explained under similar circumstances in *Hubert*, 138 F.3d at 915:

> [D]etailed findings were not necessary and would have been redundant. The Pre–Sentence Investigation Report, which the district court adopted, spelled out the perjurious statements and the government elaborated on these perjurious statements during the sentencing hearing. More importantly, [the defendant] did not request any particularized findings regarding the perjurious statements at the sentencing hearing. Having failed to do so, [the defendant] cannot now complain to this court.

3. Value Of The Benefit Received As A Result Of The Bribery Scheme.

Esquenazi argues, for the first time, that the district court's calculation of the § 2C.1.1(b)(2) enhancement was erroneous because the court considered the value of the benefit to Terra rather than its value to Terra's "individual employee." Esquenazi Br. 62. He further contends that, because the value of the personal benefit is unclear, the enhancement should be based on the total amount of the bribes. Esquenazi Br. 64. Esquenazi waived his claim when he agreed at sentencing that the enhancement that was applied to his co-conspirators' Guidelines calculations (more than $1 million but less than $2.5 million) applied to him as well. Doc. 636-Pg. 12-13.

Even if reviewed for plain error, Esquenazi's claim fails. Section 2C1.1(b)(2) states that the enhancement is determined by "the value of the benefit received or to be received in return for the payment" if it is greater than "the value of the payment," and the example in the commentary (comment. n.3) demonstrates that "the value of the benefit received" is the reduction in costs to the company benefitting from the bribe. There is no suggestion in this Guideline or the related provisions in U.S.S.G. § 2B4.1(b)(1), which apply to commercial bribery and cross reference § 2C1.1(b)(2), that the enhancement is based on the value to the individual rather than to the entity.

This Court agrees. In *United States v. DeVegter*, 439 F.3d 1299, 1304 n.2 (11th Cir. 2006), the Court explained that, in applying § 2B4.1, "[t]he appropriate measure of the improper benefit should be the benefit to [the company] as opposed to merely any benefit directly attributable to [the defendant]." The Court subsequently applied *DeVegter* to a § 2C1.1 enhancement. *United States v. Huff*, 609 F.3d 1240, 1246 (11th Cir. 2010). Those cases foreclose Esquenazi's claim.[33/]

Esquenazi's claim also fails on its own merits. As 75% owner of Terra, his share of the $2.2 million in benefits to Terra was $1.5 million. Because the applicable Guidelines provision increases the offense level by 16 for a loss of more than $1 million, U.S.S.G. § 2B1.1(b)(1)(I), Esquenazi's offense level remains the same.

[33/] Esquenazi relies on *United States v. Anderson*, 517 F.3d 953 (7th Cir. 2008), but that case did not consider the issue. In a case more directly on point, the Seventh Circuit stated that "the value should be considered as a whole, not as individual shares to each co-conspirator." *United States v. Montani*, 204 F.3d 761, 770 (7th Cir. 2000). Other circuits are in accord. *See, e.g.*, *United States v. Cohen*, 171 F.3d 796, 803 (3d Cir. 1999); *United States v. Kinter*, 235 F.3d 192, 194-195 (4th Cir. 2000), reversed on other grounds by *United States v. Booker*, 543 U.S. 220. 125 S. Ct. 738 (2005). Those consistent decisions also demonstrate that, even if there were error, it was not plain.

C. Rodriguez Has Waived His Challenge To The Forfeiture; In The Alternative, The District Court Did Not Commit Plain Error In Amending The Judgment To Include The Forfeiture.

Rodriguez consented to the government's motion to amend the judgment of conviction to reflect the previously-entered Order of Forfeiture. Doc. 633-Pg. 2. As a result, he has waived his claim to the validity of the amended judgment.

There is also no merit to Rodriguez's claim. By entering its forfeiture order before sentencing, the district court "ensure[d] that [Rodriguez] kn[ew] of the forfeiture at sentencing," as required under Fed. R. Crim. P. 32.2(b)(4)(B), and Rodriguez's objection to the forfeiture at sentencing further demonstrates that he was well aware of its terms. Rule 32.2(b)(4)(B) also 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." That subsection was added in the 2009 amendments to the rule to respond to a conflict in the circuits on whether Fed. R. Crim. P. 36, which generally cannot be used to make substantive changes to a sentence, nonetheless allows amendment when the judgment (and, in many cases, the oral sentence) omitted the forfeiture order. *See* Advisory Committee's Notes (2009 amendment); *see also United States v. Bennett*, 423 F.3d 271, 279, 281 (3d Cir. 2005) (discussing pre-amendment conflict). Thus, the rule that Rodriguez cites – that the oral sentence controls when it conflicts with the judgment of conviction – is inapplicable in the forfeiture context. Because the

district court had the authority to amend the judgment to include the forfeiture order, there was no error, plain or otherwise.

CONCLUSION

The judgments of the district court should be affirmed.

Respectfully submitted,

WILFREDO A. FERRER
United States Attorney
Southern District of Florida

AURORA FAGAN
Assistant U.S. Attorney
Southern District of Florida

LANNY A. BREUER
Assistant Attorney General
Criminal Division

JOHN BURETTA
Acting Deputy Assistant Attorney General
Criminal Division

NICOLA MRAZEK
Senior Trial Attorney
Fraud Section, Criminal Division

JAMES M. KOUKIOS
Assistant Chief
Fraud Section, Criminal Division

/s/Kirby A. Heller
KIRBY A. HELLER
Attorney
United States Department of Justice
Criminal Division, Appellate Section
950 Pennsylvania Ave., NW Room 1264
Washington, D.C. 20530
(202) 307-0085

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared in a 14-point proportionally spaced font (Calisto MT) using WordPerfect X4, that the brief contains 23,931 words, excluding the parts of the brief exempted by 11th Cir. R. 32-4, and therefore, that the brief complies with the Court's August 3, 2012 order allowing the government to file a brief of no more than 24,000 words.

/s/ Kirby A. Heller
KIRBY A. HELLER
Attorney
United States Department of Justice

CERTIFICATE OF SERVICE

I, Kirby A. Heller, do hereby certify that on August 21, 2012, I caused to be served by Federal Express one paper copy of the foregoing Brief for the United States upon the following counsel who are not served through the ECF system:

Counsel for Carlos Rodriguez:

David W. Simon, Esq.
G. Michael Halfenger, Esq.
James F. Cirincione, Esq.
Foley & Lardner, LLP
777 E. Wisconsin Avenue
Milwaukee, WI 53202-5306
(414) 271-2400

The brief was also electronically filed through the ECF system on this date.

/s/ Kirby A. Heller
KIRBY A. HELLER
Appellate Section, Criminal Division
U.S. Department of Justice