CASE NO. 11-15331-C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

vs.

CARLOS RODRIGUEZ,

Defendant - Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

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United States v. Rodriguez
Appeal No. 11-15331-C

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

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

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Rodriguez, Carlos, Appellant;

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ARGUMENT

I. RODRIGUEZ'S FCPA CONVICTIONS SHOULD BE EITHER VACATED OR REVERSED

The Government has conceded that: Teleco was created as a private company; Haiti's central bank owned 97% of Teleco's stock; the bank's ownership of that stock was only temporary; and the Government of Haiti had decided before the relevant period to sell its interests in Teleco. (Resp. at 6-7). The Government further concedes that the acronym in Teleco's name ("S.A.M.", which designates a "mixed" public-private nature) was never officially authorized. (Resp. at 6). Moreover, the Government does not point to any statutory or executive pronouncement that provided that in Haiti the provision of telecommunication services was a government function. (*Id.*)

A. This Court Should Hold That the Jury Instructions Provided an Incorrect Definition of "Instrumentality" and Vacate Rodriguez's FCPA Convictions

In his initial brief, Rodriguez explained that the District Court incorrectly instructed the jury that "[a]n 'instrumentality of a foreign government' is a means or agency through which a function of the foreign government is accomplished." Rodriguez explained that this Court had (1) determined that the term "instrumentality" is "susceptible of more than one meaning"; and (2) interpreted the term to mean a ***governmental unit***. *Edison v. Douberly*, 604 F.3d 1307, 1309 (11th Cir. 2010) (citing *Green v. City of N.Y.*, 465 F.3d 65, 79 (2d Cir. 2006) (both

interpreting the meaning of "instrumentality of a State" for the purpose of the ADA)).

The Government argues that the ordinary understanding of "instrumentality" unambiguously captures any entity through which a government function is accomplished. (Resp. at 29.) Remarkably, the Government barely addresses *Edison* and *Green*, fleetingly dismissing this Court's *Edison* decision as irrelevant because it (1) interprets the identical phrase of "instrumentality" in an ADA, rather than an FCPA, context and (2) supposedly decides nothing more than that an "instrumentality" cannot exist based upon mere "contract[ing] with a public entity to provide some service." (Resp. at 37-38.) This Court should reject both arguments and follow *Edison* here.

1. *Edison* Is On Point and Persuasive

As an initial matter, this Court should reject the Government's cavalier attempt to brush away *Edison* and *Green* as cases arising in a context "other than the FCPA." (Resp. at 37.) The ADA's context is similar to the FCPA's context. Both the ADA and the FCPA use "instrumentality" in defining a key term. The ADA uses "instrumentality of a State" in defining what is a "public entity." Similarly, the FCPA uses "instrumentality" in defining who is a "foreign official."

Edison's construction of the ADA is especially informative because the two definitions have parallel constructions. The ADA defines "public entity" as "any department, agency, special purpose district, or other instrumentality of a State or States or local government," 42 U.S.C. § 12131(1)(B). The FCPA's definition of "foreign official" similarly starts with "department" and "agency" and includes "instrumentality." The only difference is that the ADA definition also includes a fourth type of governmental unit—"special purpose district."

In *Edison*, this Court agreed with the Second Circuit that "[i]nstrumentality … is a word susceptible of more than one meaning," including "a part, organ, or subsidiary branch, esp. of a governing body." *Id*. at 1309 (citing *Green*, 465 F.3d at 79). This Court reasoned that the ambiguous word "instrumentality" should be evaluated using a standard canon of construction – *noscitur a sociis* – which employs the common sense approach that "'a word is known by the company it keeps.'" *Id.* (quoting *Green*, 465 F.3d at 79).

The Government challenges the application of this canon on two grounds. First, relying on Black's Law Dictionary, the Government argues that "instrumentality" has only one "ordinary meaning." (Resp. at 29.) The *Edison* Court, however, concluded just the opposite: "'[i]nstrumentality' … is a word

susceptible of more than one meaning." 604 F.3d at 1309 (citing *Green*, 465 F.3d at 79). Further, both *Edison* and *United States v. Frank*, 599 F.3d 1221 (11th Cir. 2010) (cited at Resp. at 29) rely on Webster's Third New International Dictionary that contained the "part, organ, or subsidiary branch" definition cited in *Edison*. The American Heritage Dictionary's definitions similarly include "a subsidiary branch, as of a government, by means of which functions or policies are carried out."[1]

The Government's alternative argument, that *Edison* and *Green* misapplied the canon of *noscitur a sociis* (Resp. at 37), is incorrect. *Edison* and *Green* concluded that: (1) the defining characteristic shared by special districts, government departments, and government agencies is that they are governmental ***units***; and (2) the term "instrumentality" should be interpreted in light of that shared governmental unit characteristic. 604 F.3d at 1309; 465 F.3d at 79. According to the Government, because there also are *additional* characteristics that state-owned enterprises, departments, and agencies "often" share, the *Edison* and *Green* courts should not have focused on the fact that agencies and departments are

[1] Available at http://ahdictionary.com/word/search.html?q=instrumentality (last visited Oct. 4, 2012).

both governmental units. The Government provides no persuasive reason, however, why its grab bag of additional characteristics suggests that the defining characteristic noted in *Edison* and *Green* should be disregarded.

2. *Lebron* Conflicts With the Government's Position

The Government's reliance on *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374 (1995), is misplaced. (Resp. at 30-31.) In *Lebron*, the Supreme Court considered factors such as the nature of government-created-and-controlled corporations in the United States, before holding that where, as with Amtrak, "the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment." *Id*. at 400.

Under *Lebron*, an entity such as Teleco is not a government instrumentality. *Lebron* stressed that "Amtrak is not merely in the *temporary* control of the Government (as a private corporation whose stock comes into federal ownership might be ….)" *Id*. at 398 (emphasis added). This distinction between temporary and permanent ownership is important; for example, even when the U.S. Government owned a majority of AIG, AIG clearly was not an instrumentality of the U.S. Government. It was not a governmental unit. Here, as the Government

concedes, the Haitian Government's control of Teleco was temporary. (Dckt. 493, PG. 38-40, 54). Accordingly, Teleco was not an instrumentality of the Haitian Government.

Moreover, in concluding that Amtrak was created for the furtherance of governmental objectives, the Supreme Court relied on explicit congressional findings, not general and undefined notions of government functionality. *Id.* at 384. Indeed, *Lebron* illustrates a serious defect in the jury instruction that an entity is an instrumentality if it accomplishes a government function. Under that test, a finding that providing passenger rail service is a government function means that private companies that provide passenger rail service are government instrumentalities, an absurd conclusion that this Court should avoid. *See United States v. Granderson*, 511 U.S. 39, 56 (1994).

Furthermore, *Lebron* supports *Edison*'s "governmental unit" interpretation by treating its conclusion that Amtrak was an "agency or instrumentality of the United States" as equivalent to concluding that Amtrak was "a Government entity for First Amendment purposes." 513 U.S. at 394, 383.

3. Canons of Construction

There is no merit to the Government's reliance on the "'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 would be superfluous, void, or insignificant." (Resp. at 32-33.) Contrary to the Government's argument, *Edison*'s interpretation of "instrumentality" gives meaning to each of the terms "department," "agency," and "instrumentality," rather than rendering any of those terms superfluous. Under *Edison*'s "governmental unit" interpretation, "instrumentality" encompasses entities such as a central bank that are not departments or agencies.

In contrast, the Government's "government function" interpretation does the very harm it accuses *Edison*'s interpretation of doing because it would read the terms "departments" and "agencies" out of the statute. Under the Government's expansive interpretation, instrumentality is so broad that it covers any "department" or "agency."

Edison's "governmental unit" interpretation is further supported by the canon that "statutory construction . . . is a holistic endeavor." *United Sav. Ass'n v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988). The FCPA prohibits *the payment of* bribes not only by officers, employees, and agents of an issuer, but also by its directors. *See, e.g.*, 15 U.S.C. § 78dd-1(a) (prohibiting payments by "any officer, director, employee, or agent" of an issuer). By contrast, when it

comes to the *receipt of a bribe*, the FCPA specifies that it is illegal to bribe "any officer or employee of [an] instrumentality," but not a "director" of an instrumentality. If state-owned commercial enterprises were encompassed by this provision, one would expect a prohibition on bribing their directors.

The routine governmental action exception in §78dd-1(b) similarly supports the governmental unit interpretation, not the government function interpretation. By its terms the "routine *governmental* action" exception applies only to "governmental" actions. Tautologically, only a governmental unit can engage in these kinds of "governmental" actions. Accordingly, §78dd-1(b) strongly indicates that an entity can be an instrumentality of a foreign government only if it is part of that government.

Contrary to the Government's Response at 35, the reference to telephone service in the "routine government action" exception in the FCPA, §78dd-1(f)(3)(A)(iii), does not support the Government's position. This reference conforms with the reality that, unlike in this matter, the *government itself* might provide such routine services.[2] Just because an entity might supply the electricity

[2] The prohibition in § 78dd-1(a), for example "shall not apply to any facilitating or expediting payment to a foreign official, political party, or party

in a city or might unload cargo in a port town does not mean that that entity is a government unit. The list in §78dd-1(f)(3)(A)(iii) is meant to be merely illustrative of the types of simple functions a government might do, not that such functions are always governmental in nature. The definition in §78dd-1(f)(3)(A)(iii) is fully consistent with the "governmental unit" interpretation of §78dd-1(f)(1)(A).

The Government argues that its "government function" interpretation is appropriate because the definition of "foreign official" includes several uses of the word "any." (Resp. at 33-34.) Nothing about the term "any" or the scope of the FCPA, however, suggests that the FCPA encompasses officers of entities that are not foreign governments, departments, agencies or instrumentalities thereof. Furthermore, the *Edison* Court rejected the government function interpretation even though the ADA's definition of public entity used the term "any" in defining public entity to mean "any department, agency, special purpose district or other

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official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official." The term "routine governmental action" in this context can mean but does not necessarily mean, for example, "providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration."

instrumentality of a State[.]" Thus, the presence of the term, "any" in the FCPA is not a reason for departing from *Edison*.

The Government emphasizes that the scope of a proper governmental function varies from time to time and from nation to nation and can include commercial services. (Resp. at 30-31, citing in part, *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983)). This characteristic is exactly what makes the government function interpretation unworkable, particularly in a criminal prosecution. Such vagueness is inconsistent with due process. Indeed, the Supreme Court's point in *National City* was that a government function test is not a "dependable legal criterion" for establishing legal distinctions because it is so variable. 462 U.S. at 634 n.27 (quoting *New York v. United States*, 326 U.S. 572, 580 (1946)).

The unworkability of the "government function" interpretation is demonstrated by the Government's argument that Rodriguez "pay[s] no heed to the foreign government's own determination of what its functions are and what entity should perform them." (Resp. at 32). In contrast to the legislative findings regarding Amtrak in *Lebron*, the record contains no determination by the Haitian government (*e.g.*, a constitutional or statutory provision or executive order) that the

provision of telephone services was a government function in Haiti. Thus, the Government is urging that a service that can be carried out by a private entity or a government agency, such as telephone services, can be deemed a government function in the absence of any evidence that the Haitian government made that determination.

This Court should reject the Government's assertion that the OECD Anti-Bribery Convention requires that this Court affirm the jury instruction incorporating the government function interpretation. (Resp. at 38-39). In *Murray* v. *Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 81, 118 (1804), the Supreme Court interpreted a statute so that it would comply with the law of nations in effect when the statute was enacted—not to comply with treaties adopted years later.

Before the United States adopted the OECD 1997 Convention on Combating Bribery in 1998, the United States had no obligation to prohibit foreign bribery. Thus, the law of nations sheds no light on what Congress intended when it adopted the relevant definition of foreign official in 1977.

In 1998, when Congress amended the FCPA in light of the OECD's Convention, Congress did not add "public enterprise" to the definition of foreign official. This Court should not apply terms from the Convention that Congress

chose not to adopt into the FCPA. *See Hopson v. Kreps*, 622 F.2d 1375, 1380 (9th Cir. 1980) (holding that terms of implementing legislation govern even if inconsistent with treaty).

This Court should reject the Government's assertion that Congress did not add employees of public enterprises to the definition of foreign officials in 1998 "because the FCPA already included them." (Resp. at 41.) The FCPA as amended was not intended to encompass public enterprises. When an SEC official was asked during hearings on the amendments whether the FCPA covered payments to "a decision maker within a foreign company," he did not respond that the FCPA covered "public enterprises." Rather, he equivocated that he "can imagine certain scenarios where substantial governmental involvement in a commercial enterprise could provide us the basis for arguing that an official of that enterprise qualifies as a foreign government official." (Decl. of Michael Koehler ¶ 421.) If the intention was that the FCPA as amended would cover employees of a "public enterprise," the SEC official presumably would have said so. Moreover, employees of public enterprises are not covered by the FCPA under the Government's own "government function" interpretation of "instrumentality." Under the Government's "government function" interpretation, an entity dominated by a

government is not an "instrumentality," unless a government function is accomplished through it. Indeed, the Government has conceded that "state ownership, by itself, is not sufficient." (Resp. at 47.) Thus, even as now interpreted by the Government, the FCPA applies a different legal standard to foreign officials than the OECD Convention applies to persons exercising a public function for a public enterprise.

Indeed, there are other respects in which the 1998 amendments did not bring the FCPA into complete conformity with the OECD Convention on Combating Bribery. The OECD Convention did not include an exception for routine government functions, yet Congress retained that exception in §§78dd-1(f)(3). Similarly, the OECD Convention was not limited to bribes "to obtain or retain business," yet Congress retained that limitation too.

4. Legislative History

Given that the canons of statutory construction resolve the ambiguity in the term "instrumentality," this Court need not consult legislative history. But if legislative history is consulted, it supports *Edison*'s governmental unit interpretation. For example, Congress used the terms "foreign government official," "foreign public official," and "foreign official" interchangeably to refer to the same class of persons: traditional foreign government officials.

Contrary to the Government's argument, the references to corporate bribery in the FCPA's legislative history clearly do not support the conclusion that Congress intended for the FCPA to cover state-owned corporations such as Teleco. The FCPA was enacted to prevent bribery of foreign officials, not corporate personnel. The references in the legislative history to "corporate bribery" refer to bribes *by* corporations, not bribes *to* corporations. *See*, *e.g.*, S. Rep. 95-114, at 2 (1977) (referring to "corporate bribery of foreign officials"). The Government cites no authority establishing that Congress intended the broad definition it advances.

The Government cites no evidence to support its contention that because an earlier bill included the phrase "corporation or other legal entity established or owned by, and subject to control by, a foreign government," Congress must have intended the term "instrumentality" to have a "broader" meaning than that phrase. In addition, this contention conflicts with the jury instruction's definition of "instrumentality," which the Government contends is correct. (Resp. at 19.)

5. Rule of Lenity

If this Court believes that the canons of construction and the legislative history of the FCPA do not resolve the ambiguity, then the ambiguity must "be

resolved in favor of lenity." *Skilling v. United States*, 561 U.S. ---, 130 S. Ct. 2896, 2905-06 (2010).

* * *

Consistent with *Edison*, this Court should hold that an entity is an instrumentality of a foreign government only if it is a unit of that government. Therefore, this Court should conclude that the District Court's instructions were erroneous and vacate Rodriguez's convictions under the FCPA.

B. The Evidence Was Insufficient to Support a Finding that Teleco Was an Instrumentality of the Haitian Government.

The Government's Response demonstrates that, under either the "government function" test or the "governmental unit" test, a jury could not reasonably have found beyond a reasonable doubt that Teleco was an instrumentality. The Government's Response does not identify any testimony by Lissade that Teleco was (1) a governmental unit or (2) a means or agency through which a function of the Haitian government was performed. Lissade's testimony established that Teleco was founded as a private company, at some point (probably because the owners defaulted on loans extended by the central bank of Haiti) the Haitian central bank acquired most of the stock in Teleco, before the relevant period the Haitian Government had enacted a law calling for the disposition of its

Teleco stock, and the central bank later sold that stock. (Rodriguez Br. at 38-40, 53-54, 68.) Lissade further testified that while Teleco was privately owned, it received a monopoly and certain tax benefits and retained those benefits once the central bank had acquired its ownership interest. (Dckt. 493, PG. 39-41, 53.)

The email in which James Dickey (Terra's counsel) suggested that Terra "may be able to get a letter from the Teleco president that Teleco is an instrumentality of the Haitian government" also does not establish that Teleco either was, in fact, a governmental unit or a means or agency through which a function of the Haitian government was accomplished. Regardless of whether the test is that Teleco was a governmental unit or that a government function was accomplished through Teleco, Dickey's suggestion is merely evidence that *Dickey* thought he "*may* be able to get a letter" concerning Teleco, not that the FCPA's standard was met.[3]

[3] Nor is Teleco shown to be an instrumentality under either interpretation by Lissade's testimony that Teleco was part of Haiti's "public administration" which was comprised of "entities that the state used to perform and to give services to the people living in Haiti. And also as an instrument. . . for the country, the state, to reach its missions, objectives, and goals." The FCPA does not use the term, "public administration." Lissade's definition of public administration does not refer to governmental units, government functions or government ownership. Presumably, the missions, objectives and goals of the Haitian government include

C. The District Court Abused Its Discretion by Rejecting the Jury Instruction That Rodriguez Proposed on the FCPA's "Knowing" Element.

Rodriguez correctly argued that this Court reviews for abuse of discretion the District Court's rejection of his proposed jury instruction as to the "knowing" element. (Br. at 33.) In *United States v. Morris*, this Court held that "[t]here is no need to object to a court's specific denial of a request for a jury instruction" because "[t]he presentation of the request and its denial is sufficient to preserve the issue for appeal." 20 F.3d 1111, 1114 n.3 (11th Cir. 1994); *United States v. Solomon*, 856 F.2d 1572, 1577 (11th Cir. 1988) (holding that Rule 52(b) plain error review applies "in absence of a request or objection at trial"). This case is directly analogous to *Morris*, in which this Court characterized the Government's suggestion of plain error review as "spurious."[4] *Morris*, 20 F.3d at 1114 n.3.

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increasing the prosperity and health of the people living in Haiti. That does not mean, however, that every entity—such as Teleco—that increased the prosperity and health of the Haitian populace performed a government function.

[4] The case cited by the Government, *United States v. Wright*, 392 F.3d 1269, 1277 (11th Cir. 2004), is inapplicable. (Resp. at 54 n.19.) In *Wright*, plain error review was proper because the defendant did not propose any jury instructions that were rejected by the district court, and the argument advanced by the defendant on appeal was not the same objection he had made at trial.

Rodriguez proposed a jury instruction that a defendant may be convicted under the FCPA only if the Government proves beyond a reasonable doubt 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*." (Dckt. 403-1, Ex. A (Rodriguez's Proposed Jury Instructions (emphasis added)). By clearly instructing the jury that conviction was appropriate *only if Rodriguez knew* that the individual receiving the payment from the intermediary was a foreign official, Rodriguez's proposed jury instruction clearly and correctly stated the law. In contrast, the jury instruction below could reasonably be interpreted as requiring *not that Rodriguez knew* that Antoine and/or Duperval were "foreign officials," but simply that Mr. Rodriguez made payments that he knew were received by a person, regardless of whether Rodriguez knew that person was a foreign official.

Rodriguez's proposed jury instruction followed the Supreme Court's directive that, unless the text of a statute dictates a different result, the term "knowingly" requires "proof of knowledge of the facts that constitute the offense." *Bryan v. United States*, 524 U.S. 184, 193 (1998). In *Bryan*, the Supreme Court held "that a charge that the defendant's possession of an unregistered machinegun

was unlawful required proof 'that he knew the weapon he possessed had the characteristics that brought it within the statutory definition of a machinegun.'" *Id*. (quoting *Staples v. United States*, 511 U.S. 600, 602 (1994)).

The Government incorrectly asserts that Rodriguez's proposed instruction is "tantamount to a claim that the government must prove that they knew that they were violating the FCPA." (Resp. at 55-56.) In fact, his proposed instruction does not even require that Rodriguez was aware of the FCPA or even that the United States has outlawed bribery of foreign officials. The instruction would merely have required that Rodriguez knew Antoine and/or Duperval (a "recipient") had the characteristics that brought them within the statutory definition of "foreign official" (that is, they were employees of Teleco and (1) Teleco was part of the Haitian government or (2) under the jury instruction as given, Teleco was "a means or agency through which a function of the foreign government is accomplished").

This Court should dismiss as a red herring the Government's argument that "[s]o 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." (Resp. at 55.) Rodriguez's point is that the jury could reasonably have interpreted the jury instruction as not requiring a

finding that Rodriguez knew that a recipient had the characteristics that brought him within the statutory definition of "foreign official." If Rodriguez knew that Teleco was part of the Haitian government, the source of his knowledge would be irrelevant.

The Government argues that other aspects of the trial cured the defect in the knowledge instruction. (Resp. at 57-58 (citing *United States v. Cochran*, 683 F.3d 1314 (11th Cir. 2012)). In *Cochran*, this Court found an instruction defining "constructive possession" omitted an element but was cured because (1) "other provisions of the jury instructions laid out the proper elements of the offense;" (2) the *Government repeatedly* emphasized both at trial and in summation that it had to prove the missing element; and (3) the charges on which the jury had acquitted the defendant "demonstrate[ed] an understanding of that instruction." *Id.* at 1320-21. In *Cochran*, this Court did not address whether any of these features would be sufficient in the absence of the other two features. As set forth below, none of these features is present here.[5]

[5] Contrary to Government Response at 57 n.22, Rodriguez does not argue that the jury might have ignored the jury instructions. Rather, he argues that the jury could reasonably have understood the jury instructions not to require that he

The Government's attempt to identify a curing instruction is unavailing. The jury could have found that Rodriguez knew that payment would be given directly or indirectly to a recipient and that the payments were made for the purpose of influencing a recipient in his official capacity without knowing that the recipient had the characteristics that brought them within the statutory definition of "foreign official." Similarly, the jury could have found independently of the FCPA that Rodriguez acted with a bad purpose to disregard the law. Thus, the jury could have followed the jury instructions that the Government identifies as having cured the defect in the knowledge instruction and convicted Rodriguez without finding that he knew that a recipient had the characteristics that brought him within the statutory definition of "foreign official."

The Government did not repeatedly emphasize that it had to prove that Rodriguez knew that Teleco had the characteristics that made it an instrumentality of the Haitian government within the meaning of the FCPA. Indeed, when the Government spelled out the elements of the FCPA, the Government completely omitted the knowledge requirement. Under the FCPA, when a defendant makes a

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have known that a recipient had the characteristics that brought him within the statutory definition of "foreign official."

payment to an intermediary who then gives the payment to a recipient who is a foreign official, the defendant can be convicted only if the defendant knows the recipient is a foreign official. Yet, the Government did not mention the knowledge requirement:

> In addition, there's an element that the payment must go directly or indirectly to a foreign official and that indirectly is important because that's often what happens and it's in fact what happened here. That instead of giving the money directly to the foreign officials, they used intermediary companies.

(Dckt. 513, PG. 70.) Only later, when purporting to summarize the elements in dispute in three questions, did the Government identify one of the questions as, "Did Esquenazi and Mr. Rodriquez make these payments believing that Antoine and Duperval worked for the Haitian government?" and then described relevant evidence. (Dckt. 513, PG. 70-71.) Thus, far from repeatedly emphasizing that knowledge was required, the Government omitted the requirement from its initial description of the elements of the FCPA and then referred to the requirement only when summarizing the elements purportedly in dispute. This case falls squarely within the principle that argument of counsel cannot save a jury instruction that is defective. *United States v. Wolfson*, 573 F.2d 216, 221 (5th Cir. 1978).

Finally, there are no acquittals demonstrating that the jury understood that the FCPA permitted a conviction only if Rodriguez knew that Teleco had the characteristics that made it an instrumentality of the Haitian government for the purpose of the FCPA.[6]

D. The Evidence Is Not Sufficient to Support a Finding that Rodriguez Had the Requisite Knowledge

The record contains no evidence that Rodriguez knew that Antoine and/or Duperval had the characteristics that brought them within the statutory definition of a "foreign official." Indeed, the Government does not contend otherwise. Rather, the Government contends the evidence shows that Rodriguez believed that

[6] The purpose of the Government's citation to *United States v. Jennings*, 471 F.2d 1310 (2d Cir. 1973), is unclear. (Resp. at 56 n.21.) *Jennings* involved a conviction under 18 U.S.C. § 201, "Bribery of public officials and witnesses." A defendant can be convicted under that statute if he or she paid a bribe to a person who is a public official *without knowing* that the recipient of the bribe is a public official within the meaning of that statute. The relevant provisions of the FCPA, however, contain an explicit knowledge requirement. Thus, *Jennings* has no bearing on whether the jury instruction was defective. The Government's reliance on *United States v. Kay*, 513 F.3d 432 (5th Cir. 2007) (*Kay II*), is misplaced. (Resp. at 57.) In *Kay II*, the defendant did not challenge and the Court therefore did not assess the jury instruction regarding knowledge.

Teleco was "government-owned," which is not the characteristic that brought Teleco within the statutory definition of "instrumentality." (Resp. at 59-60.)[7]

II. THE DISTRICT COURT ERRED IN DENYING RODRIGUEZ'S REQUEST FOR DISCOVERY AND AN EVIDENTIARY HEARING REGARDING THE FIRST BELLERIVE DECLARATION.

The First Bellerive Declaration, which indisputably existed before the case went to the jury and was not disclosed to Rodriguez until after his conviction, goes to the heart of the question of whether Teleco employees were "foreign officials" under the FCPA. While the Government suggests that this declaration is immaterial, that position is hard to take seriously—it is a sworn statement by the Prime Minister of Haiti that Teleco "has never been and until now is not a State enterprise." (Dckt. 543-1, PG. 4.) If the jury had had this information, it certainly could have reached a different conclusion about whether the Teleco employees were "foreign officials" and thus whether Rodriguez violated the FCPA.

There is no real question but that the First Bellerive Declaration qualifies as *Brady* material. It is exculpatory and goes to the heart of whether Rodriguez was

[7] Dickey's email suggesting that he might be able to obtain a letter stating that Teleco is an instrumentality of the Haitian government does not provide a basis for jury to conclude beyond a reasonable doubt that Rodriguez knew that Teleco was part of the Government of Haiti or a means through which a function of the Haitian government was accomplished.

innocent. Nor is there any question that it was not disclosed to Rodriguez prior to his conviction. The only question is whether the Government had the declaration or the information in it earlier. There is no evidence in the record on this point – only the assertion by the Government in a brief that it did not receive the declaration until August 9, 2011. (Dckt. 561, PG. 9.) That is why the District Court's decision not to grant an evidentiary hearing on this issue was an abuse of discretion. *Bolender v. Singletary*, 16 F.3d 1547, 1555 n.9 (11th Cir. 1994). It is imperative that this Court, and the District Court, have a full evidentiary record to rely upon regarding this crucial *Brady* evidence.

The Government's reliance on *United States v. Naranjo*, 634 F.3d 1198 (11th Cir. 2011), and *United States v. Arias-Izquierdo*,449 F.3d 1168 (11th Cir. 2006), are misplaced. In *Naranjo*, the report in question was never in possession of government prosecutors. Even during the appeal process, the content of the report was unknown; defendants could only speculate on its contents and, unlike here, could not establish that it was exculpatory. *Naranjo*, 634 F.3d at 1212. In *Arias-Izquierdo*, the defendants could only speculate that the alleged *Brady* evidence was actually exculpatory and, even if it was, it went to a new theory of the case that was not raised at trial. 449 F.3d at 1189. In this case, the evidence is

unquestionably exculpatory and directly related to the theory Rodriguez offered at trial.

The Government also claims that Rodriguez could have acquired the declaration through reasonable diligence on his own. But Rodriguez was totally unaware of the existence of the first declaration. If it was in the Government's possession, the Government was obliged to provide it to him. It is certainly not reasonable to expect that Rodriguez should have contacted the Prime Minister himself to obtain a sworn statement from him.

The Government also asserts that the Bellerive Declaration would not have been admissible at trial. But the Declaration would likely fit within the discretionary exception to the hearsay rule created by Federal Rule of Evidence 807. Even if the declaration itself were not admissible, Rodriguez was entitled to know of its existence and content. Had he been aware of it, he could have sought to obtain live testimony from Bellerive and could have used the declaration to cross-examine Lissade, the Government's expert witness.

It was a clear abuse of discretion not to develop the record here regarding this exculpatory evidence, particularly when one considers whose declaration this was – it was from the Prime Minister of Haiti, who was also the acting Minister of

Justice and Public Safety. The odor around this declaration needs a thorough factual exploration so that a robust factual record can be developed for the District Court's and this Court's consideration.

III. RODRIGUEZ'S WIRE FRAUD CONVICTIONS SHOULD BE VACATED OR REVERSED

In the second object of the conspiracy count, the Government charged Rodriguez with conspiring to commit wire fraud in violation of 18 U.S.C. § 1343. Section 1343 does not criminalize all frauds. Instead, it criminalizes frauds carried out by means of interstate wire communications that cross state lines. Wire communications that remain inside of one state—or wire communications where the Government failed to prove the crossing of state lines—are local frauds and therefore cannot support the conspiracy charged here.

A. Jury Instruction on Wire Fraud Was Plainly Erroneous and Misled the Jury

The District Court's jury instruction was plainly erroneous and, to Rodriguez's prejudice, failed to distinguish between ***interstate*** and ***intrastate*** communications, despite the plethora of ***intrastate*** communications alleged in the overt acts of the conspiracy count and the evidence admitted at trial. By failing to instruct the jury that only wires that crossed state lines qualify as a wire communication that could support a federal wire fraud theory, the jury was

permitted to return a verdict based on local wires communications. The jury had to be instructed that local wires do not qualify and that only wires that cross state lines can support a federal wire fraud case. This charging error was magnified when the District Court told the jury: "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." A juror could conclude from this instruction that if an email or wire transfer was normally sent through a wire communication in the normal course of business, that was enough to find that the communication qualified as an interstate wire communication. The jury instruction error was a plain and substantial error that prejudiced Rodriguez.

The Government had to prove beyond a reasonable doubt that the wires charged crossed state lines—that is, were "interstate"—as opposed to merely traveling "intrastate." *United States v. Phillips*, 376 F. Supp. 2d 6, 7-9 (D. Mass. 2005) (wire must cross state lines); *see United States v. Izydore*, 167 F.3d 213, 219 (5th Cir. 1999); 1A Kevin O'Malley, Jay. E. Grenig & William C. Lee, *Federal Jury Practice and Instructions, Criminal*, § 47.08 (6th ed. 2009). "Transmits by means of wire, radio or television communication in interstate commerce" -- Defined (6th ed. 2009). **This interstate requirement** is "the linchpin for federal

jurisdiction," *United States v. Richards*, 204 F.3d 177, 207 (5th Cir. 2000), *overruled on other grounds by United States v. Cotton*, 535 U.S. 625, 122 (2002) (emphasis added), and necessary to provide the federal jurisdiction that makes the activity a federal crime. *United States v. Lindemann*, 85 F.3d 1232, 1240-41 (7th Cir. 1996).

The Government does not contest that the involved wires must cross state lines. Instead, the Government argues that because it is a conspiracy count, the Government does not need to prove any actual interstate or foreign wire. (Resp. at 76.) This misses the point because the Government did charge (and try to prove) interstate wire communications as overt acts. The Indictment charged 83 specific overt acts with respect to the fraud conspiracy. (Dckt. 3, PGS. 11-19). Of those, 75 overt acts related to alleged payments. (*Id.*) Many were checks, not wire transfers. Of those payments, only 21 were described as domestic wire transfers, with dates that ranged from January 8, 2002 to March 24, 2004.[8] (*Id.*) This means that several of these overt act fell beyond the statute of limitations. The eight overt acts that did not relate to payments were comprised of four alleged "interstate

[8] Assuming that the District Court properly tolled the statute of limitations, the five year statute of limitations applicable to this case ran on July 31, 2003. *See* 18 U.S.C. § 3282(a); Dckt. 204-2.

electronic communications," that is, interstate emails and four corporate actions that did not involve wires. (*Id.*) The wires charged were thus all domestic wire transfers and domestic emails. For those acts to show that there was a conspiracy to commit wire fraud, those wires and emails needed to quality as interstate wire communications.

In contrast, if Rodriguez and his alleged co-conspirators had agreed to commit fraud by use of wires that all, in fact, traveled inside of the State of Florida, they would not be guilty of a conspiracy count that charged federal wire fraud as its object. The jury needed to be instructed as to what it needed to find regarding the interstate nature of the actual wires charged as overt acts in this wire fraud conspiracy.

The widely-used jury instruction book edited by Judge Lee and his two co-authors (previously the Devitt & Blackmar book) includes an instruction on the need to show that the communication cross state lines. It states that the "phrase 'transmits by means of wire, radio, or television communication in interstate commerce' means to send from one state to another by means of telephone or telegraph lines or by means of radio or television. The phrase …[also] includes a telephone conversation by a person in one state with a person in another state." 1A

O'Malley *et al.*, *supra*, § 47.08, "Transmits by means of wire, radio or television communication in interstate commerce." These definitions make clear that the jury should have been instructed that the wire communications at issue crossed state lines. The jury was incorrectly instructed, and Rodriguez's conspiracy count should be reversed as a result.

1. The Wire Transfers

The Government's trial exhibits show that all 21 wire transfers asserted in the overt acts of the Indictment were either intrastate wires—persons sent money from one Florida bank to another Florida bank—or were outside of the statute of limitations. (Overt act 23 – Government Exs. 31, 32, 503; overt acts 40-43 – Government Exs. 32, 37; overt act 46 – Government Exs. 30, 36, 120; overt act 47 – Government Exs. 30, 36, 121; overt act 48 – Government Exs. 31, 36, 122; overt act 49 – Government Exs. 31, 36, 123; overt act 50 – Government Exs. 31, 36, 124; overt acts 51-54 – Government Exs. 36, 37; overt act 64 – Government Exs. 2, 131; overt act 65 – Government Exs. 2, 132; overt act 66 – Government Exs. 2, 133; overt act 67 – Government Exs. 2, 134; overt act 68 – Government Exs. 2, 135; overt act 69 – Government Exs. 2, 136; overt act 70 – Government Exs. 2, 137). The overt acts that pertained to wire transfers that were outside the statute of limitations included overt acts 23, 40, 41, 42, 43, 46, 47, 48, 49, 50, 51, 52, 53, and

54. The wire transfer overt acts that were within the statute of limitations (overt acts 64, 65, 66, 67, 68, 69 and 70) all pertained to internal transfers within Southtrust Bank – none was an interstate wire transfer. (Government Tr. Exs. 131-137). Thus, the jury needed to be provided with the definition of what constituted the type of wire transfer that qualified as an interstate wire communication. The jury needed to be instructed on this point so that it could sort out the wheat from the chaff.

2. The "Interstate" Electronic Mail Communications

Overt acts 58, 59, 60, and 83 refer to four purported "interstate electronic mail communications." (Dckt. 3, PGS. 16-19). Overt act 60 refers to an October 24, 2003 message between Esquenazi and Camelia Martinez of Southtrust Bank in Miami, with copy to "DOCPED02@aol.com." (Government Tr. Ex. 128). The email address DOCPED02@aol.com belongs to Nigel Grandison, husband of Marguerite Grandison. (Dckt. 703, PG. 61, Ln. 13-19). Esquenazi, Martinez, and the Grandisons were all located in Florida. (Dckt. 509, PG. 53, ln. 19-22; Dckt. 498, PG. 35, ln. 18-20; Government Exs. 127 and 128). The trial testimony regarding this email centers around its content. The Government did not prove that this communication left the State of Florida. (Dckt. 498, PG. 35, ln. 3 – PG. 38, ln.

1; Dckt. 503, PG. 9, ln. 14 – PG. 10, ln. 12; Dckt. 512, PG. 18, ln. 17 – PG. 19, ln. 9).

The emails referred to in overt acts 58 and 59 refer, respectively, to an October 17, 2003 email from Esquenazi to Jean Rene Duperval, and Duperval's forwarding of that email to Marguerite Grandison on October 19, 2003. (*see* Government Tr. Ex. 73 at PGS. 5-6; Dckt. 703, PG. 59, ln. 1 – PG. 61, ln. 25). The testimony regarding those emails identified the senders, the recipients, and the substance of the communications but did not address the location of any of the senders or recipients during the transmission of the communications, or whether either communication was made interstate. (Dckt. 703, PG. 59, ln. 1 – PG. 61, ln. 25). The Government did not prove that this communication left the State of Florida.

Overt act 83 charged that on or about "December 16, 2003, …, JOEL ESQUENAZI confirmed with Jean Rene Dupreval via interstate electronic mail communication and with CARLOS RODRIGUEZ that the billing rate for Corporation X would be reduced from $0.15 per minute to $0.07 per minute." Thus, the grand jury charged that Esquenazi had sent an interstate electronic mail communication. Like the other emails, the trial testimony surrounding this

communication focused on its substance and failed to prove that this email was sent from one state to another state (did not show it was an "interstate" email), as it had been charged in the Indictment. (Dckt. 503 PG. 25, ln. 20 – pg. 26, ln. 19; Dckt. 509, PG. 35, ln. 5 – PG. 36, ln. 10). There was testimony from a government agent that a fax transmission sheet had been found with the email,[9] but no other testimony about the locations of the transmission of the email was introduced. (Dckt. 503 pp. 25-26; Dckt. 509, pp. 35-36).

Moreover, the Government's brief erroneously suggests that emails, by their nature, constitute interstate communications. For this proposition, the Government relies on *United States v. Lewis*, 554 F.3d 208, 213-15 (1st Cir. 2009), a case involving a conviction for receipt of child pornography under 18 U.S.C. § 2252(a)(2). To the extent that *Lewis* is relevant, it actually favors Rodriguez. The First Circuit likens the 18 U.S.C. § 2252 interstate commerce requirement to that of 18 U.S.C. § 1343 and other statutes; it does so in the context of ruling that

[9] The Government argues in footnote 24 that Mr. Rodriguez has abandoned a challenge to the absence of a foreign wire instruction. There was no instruction on the topic. It is impossible for Mr. Rodriguez to have abandoned a challenge to something that did not exist. It was the Government (and by extension the District Court in its jury instructions) that abandoned the foreign wire communication theory when the jury was not instructed on foreign wire communications. This is not a basis upon which to uphold the convictions here.

the Government was in fact required to show that child pornography had actually crossed state lines – not whether the existence of emails, by their very nature, satisfied that burden. *See Lewis*, 554 F.3d at 214.[10] Accordingly, if anything, *Lewis* emphasizes the requirement that the Government prove that a transmission actually has crossed state lines. *See also Mattel, Inc v. MGA Entm't, Inc.*, 782 F. Supp. 2d 911, 1029 at n.39 (C.D. Cal. 2010).

The Government's closing argument likewise did not show that any of the charged communications alleged within the statute of limitations traveled between two states. (*See* Dckt. 513, PGS. 38-81 and Dckt. 516, PGS. 87-133). While the Government does refer to various communications in closing, none of the references identifies communications in an effort to prove a transmission across state lines. (*Id.*)

The Government set forth its theory of the case in the overt acts. The Government chose to charge certain wires as overt acts. The need for a definition

[10] Based on precedent specific to child pornography and 18 U.S.C. § 2252, and the specific facts of that case, the First Circuit ultimately found that the transmission of the images at issue over the internet did satisfy the interstate commerce requirement of 18 U.S.C. § 2252. *Id*. at 215. This, again, has nothing to do with email communications satisfying an interstate communication requirement by their very nature.

of what was a qualifying interstate wire communication was obvious, and the absence of one—particularly on the factual record here—was an error that was plain and obvious and affected Rodriguez's substantial rights.

B. The Government Failed to Present Evidence from Which the Jury Could Have Found Interstate Wire Communications.

As shown above, the evidence relied upon to prove the wire fraud object of the conspiracy was insufficient. To prove a section 371 conspiracy, including a conspiracy to commit wire fraud, the Government was required to prove at least one overt act described in the Indictment that occurred after July 31, 2003 and was in furtherance of the wire fraud object of the conspiracy. Here, the Government failed to prove that Rodriguez caused or that it was reasonable foreseeable to him that another caused any interstate wire communication, sent after July 31, 2003, to be sent in furtherance of the alleged wire fraud object of the conspiracy. The Government's failure is likely the result of the manner in which it chose to present its case. As the Government admitted in its closing statement, "wire fraud was not discussed as much in this trial." (Dckt. 513, PGS. 18-19). Review of the trial transcripts shows that to be true and also shows that where the Government did attempt to make its case on that charge. It focused on trying to show that there was an illegal agreement that sought to defraud others, and it failed to prove that the

charged wire communications in fact traveled across state lines. This is also reflected in the Government's closing argument. The Government did not mention the interstate communication requirement whatsoever or argue the evidence to support this object of the conspiracy. (*See* Dckt. 513, PGS. 38-81 and Dckt. 516, PGS. 87-133).

With regard to the sufficiency of the evidence on the issue of Rodriguez's intent, the slim reed of Perez's impeached testimony is insufficient to uphold this conviction. During the first six months of being debriefed by the agents in this case, Perez never mentioned that Rodriguez knew about anything illegal. (Dckt. 715, PGS 52-53). Perez testified that he met only with Antoine to discuss making a side payment that someone other than Rodriguez had authorized. (Dckt. 491, PGS 778-78). When he returned from meeting with Antoine, he came back and told Esquenazi, not Rodriguez, what side payment arrangement he had made with Antoine. (Dckt. 491, PG 79). Later that afternoon, Perez was again in Esquenazi's office with the company's lawyer and Rodriguez. Perez testified that news of reaching a deal with Antoine was shared with them stating specifically that the "fact that Robert Antoine had accepted an arrangement to accept, you know, payments to him in exchange for reducing our bills." (Dckt. 491, PG 80.) This is

it. There is nothing else. This does not prove that Rodriguez intended to defraud Haiti. All it proves is that Rodriguez learned that Perez had reached some kind of arrangement or accommodation with Antoine that would get Terra back on track regarding its debt. In its Response, the Government did not identify any specific evidence that supports its conviction. There is no evidence that Rodriguez intended to defraud Haiti.

C. The Government's Variance from the Indictment Is Impermissible

The overt acts relevant to the wire fraud object of the conspiracy consisted of several interstate wire transfers and several interstate emails. No foreign wires or foreign emails were charged. The jury instructions did not instruct the jury about what type of foreign communication could qualify for the wire fraud statute. The Government did not argue to the jury that a foreign fax was the wire communication that it was asking the jury to rely upon to return its verdict for the wire fraud conspiracy.

Now, the Government wants to rely on appeal on a foreign fax to try to save the conviction. (Resp. 80-81).[11] "A variance arises when the evidence adduced at

[11] Overt act 83 was charged as an interstate email, not a foreign fax. *See* discussion *infra*.

trial establishes facts different from those alleged in an indictment." *Dunn v. United States*, 442 U.S. 100, 105 (1979). "To uphold a conviction on a charge that was neither alleged in an indictment nor presented to a jury at trial offends the most basic notions of due process. Few constitutional principles are more firmly established than a defendant's right to be heard on the specific charges of which he is accused." *Id.* at 106. "'[It] is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made.'" *Id.* at 107 (quoting *Cole v. Arkansas*, 333 U.S. 196, 201 (1948)).

This Court has long held that it "cannot affirm a criminal conviction based on a theory not contained in the indictment, or not presented to the jury." *United States v. Elkins*, 885 F.2d 775, 782 (11th Cir. 1989); *United States v. Hill*, 643 F.3d 807, 859 (11th Cir. 2011). The grand jury did not charge any foreign faxes as the charged theory of the wire fraud conspiracy. This switch on appeal to try to save this case should be rejected because the jury did not convict Rodriguez for such conduct. No jury instruction supports the theory. The Indictment is devoid of such a theory. Finally, that is not how the Government argued the case to the jury. Such an after-the-fact justification by the Government should be rejected.

IV. THE MONEY LAUNDERING CONVICTIONS MUST BE REVERSED BECAUSE (A) THE MONEY LAUNDERING COUNTS MERGE WITH THE UNDERLYING SPECIFIED UNLAWFUL ACTIVITIES, AND (B) REVERSIBLE ERRORS EXIST AS TO ALL THE CHARGED SPECIFIED UNLAWFUL ACTIVITIES.

A. The District Court Erred in Failing to Grant Rodriguez's Motion for Judgment of Acquittal as to the Money Laundering Counts Because Those Counts Violated the Merger Doctrine.

1. The Standard of Review Is *De Novo*

The Government acknowledges that the denial of a motion to dismiss an indictment as legally insufficient is reviewed *de novo*. (Resp. at 18) (citing *United States v. Schmitz*, 634 F.3d 1247, 1259 (11th Cir. 2011)). Nevertheless, the Government advocates for the application of a plain error standard based on its incorrect assertion that Rodriguez failed to preserve the issue by not raising it in his motion for judgment of acquittal. *Id.* at 88 n.29. Rodriguez did raise the issue in his motion for judgment of acquittal, arguing in his motion that "a new trial is required based upon the improper denial of . . . Mr. Rodriguez's motion to dismiss [for] . . . failure to state a criminal offense (ECF Nos. 273, 268, 278, 315) . . . ." (Dckt. 542, PGS. 4-5.) The citation to ECF No. 268 corresponds to the District Court's docket entry for the motion to dismiss the money laundering counts. Accordingly, Rodriguez preserved the issue, and the appropriate standard of review is *de novo.*

2. The Transactions Underlying the Money Laundering Convictions Did Not Involve Proceeds of Unlawful Activity.

There is insufficient evidence to support the money laundering convictions because the transactions at issue do not involve "proceeds" of a specified unlawful activity ("SUA"). The term "proceeds" is not defined in the money laundering statute, but this Court in 2005 defined the term to mean "what is produced by or derived from something (as a sale, investment, levy, business) by way of total revenue; the total amount brought in." *Unites States v. Silverstri*, 409 F.3d 1311, 1333 (11th Cir. 2005). After *Silverstri*, the Supreme Court reviewed how to define the term "proceeds" in *United States v. Santos*, 553 U.S. 507 (2008). The payments in *Santos* were expenses from an illegal gambling operation, including salary and commission payments made by the defendant to (a) runners whose job was to gather bets from gamblers; (b) collectors who collected money from the runners and delivered that money to the defendant; and (c) the winners. *Id*. at 509. *Santos* was decided by a four-justice plurality opinion and a concurrence by Justice Stevens. This Court has limited the holding of *Santos* to the position taken by Justice Stevens. *United States v. Demarest*, 570 F.3d 1232, 1242 (11th Cir. 2009).

Justice Stevens rejected a single definition of the term "proceeds" and instead concluded that the term's definition can change depending on the particular

SUA underlying the money laundering charge. *Santos*, 553 U.S. at 525 (Stevens, J. concurring). Justice Stevens held that the payments at issue did not involve proceeds of an illegal gambling operation because treating such payments as "proceeds" ran squarely into what he characterized as the "merger" problem. *Id.* at 527-28 (citations omitted).

Under *Santos*, there must be separate "proceeds" from the SUA before those proceeds can be concealed. The bribe payments at issue here create the very same merger problem identified by Justice Stevens in *Santos*, and this Court should adopt Justice Stevens' reasoning and rule that the bribe payments here are not "proceeds" within the meaning of the money laundering statute because of the merger problem.[12]

After Rodriguez filed his principal brief, the Fourth Circuit decided *United States v. Cloud*, 680 F.3d 396 (4th Cir. 2012). *Cloud* extended Justice Stevens' reasoning in *Santos* to a case not involving an illegal gambling operation. Until

[12] The Government tries to distinguish *Santos* because the crime charged in *Santos* was promotional money laundering as opposed to concealment money laundering, which was charged here. (Resp. at 88.) Both types of money laundering violations require proof by the Government of actions conducted with the ***proceeds*** of unlawful activity. *See United States v. Adefehinti*, 510 F.3d 319, 322 (D.C. Cir. 2007) (setting forth the elements of concealment money laundering).

Cloud, the Fourth Circuit had refused to extend *Santos* to cases not involving illegal gambling operations, like this Court. *Id*. at 405. Nevertheless, in *Cloud*, the court extended *Santos* to a mortgage fraud scheme and overturned the defendant's money laundering convictions arising out of that scheme after the court determined that the transactions at issue involved expenses of the SUA rather than proceeds, which created the same *Santos* merger problem present here. *Id.* at 403.

Like in *Santos* and *Cloud*, the payments here[13] are part of, and not distinct from, the underlying SUA, and thus there is an illegal merger here. Just as the payment of salaries, commissions, and winnings in *Santos* were essential expenses of an illegal gambling operation, and just as payments of commission and kickbacks in *Cloud* were essential expenses of mortgage fraud, there can be no

[13] The transactions which form the basis of the substantive money laundering counts (Counts 10-21), are payments made to Duperval by Telecom Consulting, the company owned by Duperval's sister that received bribe payments from Terra on Duperval's behalf. (Dckt. 3, PGS. 25-26.) Each payment was in the form of a check, which was either cashed by Duperval or deposited into Duperval's personal bank account. *Id.* The transactions which form the basis of the conspiracy to commit money laundering count (Count 9) include (a) payments made by Terra to several companies for the benefit of Antoine and Duperval; (b) payments made by those same companies to Antoine or Duperval; and (c) two payments made from one intermediary company to another intermediary company, which were then used by a coconspirator to purchase real property in the name of himself and Antoine, which property was subsequently sold, and the profits split between the coconspirator and Antoine. (Dckt. 3, PGS 23-25.)

question that the bribe payments at issue here are an essential expense of a bribery scheme. Just as an illegal gambling operation and a mortgage fraud scheme depend upon paying salaries, commissions, and kickbacks to the coconspirators who are necessary to the functioning of that operation, a bribery scheme necessarily depends upon paying bribes to coconspirators who make the execution of the scheme possible. Thus, convicting Rodriguez of both money laundering and of the underlying bribery scheme based on same bribe payments violates double jeopardy and, as in *Santos*, has the perverse effect of increasing the statutory maximum penalties applicable here.[14] There is no explanation for why Congress would have wanted a transaction that is a normal part of a bribery scheme, which it had duly considered and appropriately punished under the FCPA, to radically increase the sentence for that crime through the improper application of the money laundering statute.[15]

The Government attempts to justify its approach by pointing to the fact that the payments at issue were paid to Antoine and Duperval through an intermediary

[14] The FCPA and conspiracy counts carry a maximum penalty of 5 years, while the money laundering counts carry a maximum penalty of 20 years.

[15] This argument applies with equal force to the wire fraud SUA. The fraud at issue in that SUA is the bribery scheme. Thus, payments to Duperval and Antoine were also essential expenses of the wire fraud.

company rather than directly by Terra. (Resp. at 88.) Specifically, the Government argues that the money laundering charges should be affirmed because a payment made from an intermediary company evidences an intent "to 'conceal both the source and the future ownership of the money.'" (Resp. at 88 (citing *Unites States v. Wilkes*, 662 F.3d 524, 547 (9th Cir. 2011); *United States v. Pretty*, 98 F.3d 1213, 1220-21 (10th Cir. 1996)).

This argument is flawed, however, because it confuses the "concealment" element of money laundering with the separate and distinct "proceeds" element.

The element requiring the charged transactions to "involve[] the proceeds of specified unlawful activity" and the element requiring that the transaction be "designed in whole or in part … to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds" are two separate and distinct elements of money laundering. 18 U.S.C. § 1956(a)(1)(B)(i); *see also Adefehinti*, 510 F.3d at 322 (setting forth the elements of concealment money laundering). In short, there must be proceeds of the bribery scheme (that crime must be complete) before those proceeds can then be concealed and therefore laundered. Because the charged transactions in this case involve paying the essential expenses of bribery and wire fraud, they cannot constitute proceeds due to the *Santos* merger problem.

The Government relies on *Pretty* and *Wilkes*. (Resp. at 88.) *Pretty*, while also involving a bribery scheme, was decided prior to *Santos* so the court in *Pretty* did not consider the *Santos* merger problem. *Pretty*, 98 F.3d at 1219-21. *Wilkes*, a Ninth Circuit opinion also involving a bribery scheme, should not be followed as it conflicts with Justice Stevens' reasoning in *Santos*, which this Court has adopted. *Wilkes*, 662 F.3d at 544-47.

Accordingly, the money laundering convictions must be overturned.

B. The Money Laundering Convictions Must Be Reversed Due to Reversible Errors in the Three SUAs Underlying Those Convictions.

The Government does not dispute that the money laundering convictions must be overturned if the Court finds reversible error with respect to the three SUAs underlying those convictions. Reversible error exists with respect to the FCPA and wire fraud SUAs for all the reasons discussed above and in the Initial Brief. Reversible error also exists with respect to the Haitian Bribery Law SUA, which requires proof of "an offense against a foreign nation involving . . . bribery of a *public official*." 18 U.S.C. § 1956(c)(7)(B)(iv) (emphasis added). Specifically, the District Court erred by failing to properly define the term "public official" in the jury instructions and including language in the jury instructions that impermissibly broadened the scope of the statute to reach beyond public officials.

Relying on the Ninth Circuit's *Lazarenko* decision, the Government incorrectly contends that the District Court was not required to define the term "public official," and argues that the scope of that term was not a factual question for the jury. (Resp. at 84 (citing *United States v. Lazarenko*, 564 F.3d 1026, 1038 (9th Cir. 2009)). *Lazarenko*, however, does not address the issue of whether a statutory term is required to be defined in jury instructions. The portion of *Lazarenko* cited by the Government deals only with the issue of whether the definition of "extortion" under the money laundering statute should be limited to violent activities. *Id.*

As argued in the Initial Brief, the term "public official" should have been defined as "[o]ne 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." Black's Law Dictionary (9th ed. 2009). The Government argues that this definition is too narrow, and that the proper definition is the one given to the term "public official" in the domestic bribery statute, which has been construed to mean "all persons performing activities for or on behalf of the United States, whatever the form of delegation of authority." (Resp. at 85 (citing *Dixson v. United States*, 465 U.S. 482, 496 (1984)). However, even this definition would not apply to Antoine or

Duperval, the persons at issue in this case, because they were not performing activities for or on behalf of Haiti, but rather were performing activities on behalf of a purely commercial enterprise.

Finally, in instructing the jury that the foreign bribery SUA could be satisfied by a finding that the person bribed was a "public official or any agent or officer of a public authority" the jury was allowed to convict Rodriguez based on a finding that the recipient of the bribe could be an agent or officer of a public authority, which is not permitted by the money laundering statute.

The Government argues that the instruction was not plainly erroneous because it accurately described Haitian law. (Resp. at 85.) That argument misses the point. The foreign bribery SUA in the money laundering statute only applies to bribery of public officials regardless of what other forms of bribery are prohibited by Haitian law. The jury instruction was plainly erroneous because it impermissible broadened the scope of the money laundering statute to reach bribes paid to persons other than "public officials."

V. RODRIGUEZ'S SENTENCE AND FORFEITURE ORDER MUST BE VACATED.

The Government disputes an argument, incorporated by Rodriguez from Esquenazi's Corrected Brief, that the amount of loss used to determine the

sentencing level under Section 2C1.1 of the Sentencing Guidelines should have been measured by the personal benefit to the sentenced individual, not the benefit to Terra. (*See* Esquenazi Br. at 62-64.) The Government asserts on this latter point that Esquenazi's argument on this point is inconsequential; even if the argument succeeds, Esquenazi's benefit, based on his ownership of 75% of Terra, would exceed $1 million and still result in an increase to the offense level by 16. (Resp. at 99.) This does not hold true for Rodriguez who owned 25% of Terra. Based on the Government's own reasoning, Rodriguez's personal benefit from the $2.2 million in benefit to Terra could not exceed $550,000, which is well below the $1 million mark that increased Rodriguez's offense level by 16 pursuant to Section 2B1.1. Based on the Government's own reasoning, this case should be vacated and remanded so that Rodriguez can be resentenced using a lesser amount for the loss amount.

As to illegality of the amended judgment and commitment order, the Government misses the point. Rule 36 does permit amendment to conform the written judgment to the sentence orally imposed, but it is the oral sentence that must control. *United States v. Bonilla*, 579 F.3d 1233, 1245 (11th Cir. 2009). Here, the sentence imposed by the District Court during the sentencing did not

include forfeiture. The final judgment must reflect that sentence, and, thus, a new judgment and commitment order must be entered without any forfeiture language.

CONCLUSION

For the reasons stated above, this Court should (a) reverse each of Rodriguez's convictions under the FCPA or vacate such convictions and remand this case for a new trial with instructions to the District Court to hold an evidentiary hearing regarding the Bellerive Declarations; (b) reverse or vacate Rodriguez's wire-fraud convictions; (c) reverse or vacate Rodriguez's money laundering convictions; (d) vacate the forfeiture portion of Rodriguez's sentence;

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and (e) remand this case for resentencing, if some, but not all, of Rodriguez's convictions are affirmed.

Dated October 4, 2012.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that: (1) this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), as modified by this Court's order dated August 3, 2012, because it contains 9,918 words (according to the word-count function of the word-processing program used to prepare this brief), excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and (2) this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word version 2003, in 14-point, Times New Roman style.

/s/ Pamela L. Johnston
Pamela L. Johnston

CERTIFICATE OF SERVICE

I, Pamela L. Johnston, do hereby certify that on October 4, 2012, I dispatched for delivery by Federal Express one paper copy of the foregoing REPLY BRIEF OF APPELLANT CARLOS RODRIGUEZ upon the following counsel who are not served through the ECF system:

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I further certify that a seven (7) true and correct copies of the foregoing has been dispatched for delivery by Federal Express, this 4th day of October, 2012, to the Clerk of Court, United States Court of Appeals for the Eleventh Circuit, 56 Forsyth Street, N.W., Atlanta, Georgia, 30303

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

/s/ Pamela L. Johnston
Pamela L. Johnston