UNITED STATES v Joel ESQUENAZI and Carlos RODRIGUEZ
752 F.3d 912 (Eleventh Circuit 2014)

Synopsis

Background: Defendants were convicted in the United States District Court for the Southern District of Florida of conspiracy to violate the Foreign Corrupt Practices Act (FCPA) and to commit wire fraud, conspiracy to launder money, violations of the FCPA, and concealment money laundering. Defendants appealed.

MARTIN, Circuit Judge

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

I.

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

Trial

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

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

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

Mr. Lissade also testified that Teleco's business entity suffix, S.A.M., indicates "associate anonymous mixed," which means the "Government put money in the corporation." Teleco's suffix was attached not by statute, but "de facto" because "the government consider[ed] Teleco as its ... entity." In 1996, Haiti passed a "modernization" law, seeking to privatize many public institutions. As a result, Haiti privatized Teleco sometime between 2009 and 2010. Ultimately, Mr. Lissade opined that, during the years relevant to this case, "Teleco was part of the public administration." He explained: "There was no specific law that ... decided that at the beginning that Teleco is a public entity but government, officials, everyone consider[ed] Teleco as a public administration." And, he said, "if there was a doubt whatsoever, the [anti-corruption] law [that] came in 2008 vanish[ed] completely this doubt ... by citing Teleco as a public administration" and by requiring its agents—whom Mr. Lissade said were public agents—to declare all assets to avoid secret bribes.

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

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

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

In April 2003, President Aristide removed Mr. Antoine and named Alphonse Inevil as his replacement. Mr. Inevil soon replaced Mr. Joseph as Director General, and Jean Rene Duperval replaced Inevil. Later that year, with Terra still behind on its bills, Mr. Esquenazi helped Mr. Duperval form a shell company, Telecom Consulting Services Corporation (TCSC), through which Esquenazi ultimately would make side payments to Mr. Duperval. TCSC's president was Margurite Grandison, Mr. Duperval's sister; its incorporator and registered agent was Mr. Dickey; and the company's principal business address was a post office box that named Mr. Duperval as the person empowered to receive mail through it. Ms. Grandison executed a "commission agreement" with Terra, which Mr. Esquenazi signed. And on November 20, Mr. Rodriguez authorized the first transfer, $15,000, to TCSC. Over the next five months, although Terra received no invoices to reflect money owed TCSC, Terra made six additional transfers to TCSC totaling $60,000. Each of these seven transfers is the subject of the substantive FCPA counts. Ms. Grandison then disbursed money from TCSC's account to Mr. Duperval and his associates. She made a number of transfers, twelve of which constitute the substantive money-laundering counts.

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

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

Post-trial

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

With a criminal history category I, Mr. Esquenazi's guideline range was 292 to 365 months imprisonment. The district court ultimately imposed a below-guideline sentence of 180 months imprisonment. Mr. Rodriguez, with a guideline range of 151 to 188 months imprisonment, received 84 months. Before sentencing, the district court entered a forfeiture order holding Messrs. Esquenazi and

Rodriguez responsible for $3,093,818.50, which was ultimately made a part of the judgment entered against them.

II.

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

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

We begin, as we always do when construing statutory text, with the plain meaning of the word at issue. According to Black's Law Dictionary, an instrumentality is "[a] means or agency through which a function of another entity is accomplished, such as a branch of a governing body." *Webster's Third New International Dictionary* says the word means "something that serves as an intermediary or agent through which one or more functions of a controlling force are carried out: a part, organ, or subsidiary branch esp. of a governing body." These dictionary definitions foreclose Mr. Rodriguez's contention that only an actual part of the government would qualify as an instrumentality—that contention is too cramped and would impede the "wide net over foreign bribery" Congress sought to cast in enacting the FCPA. Beyond that argument, the parties do not quibble over the phrasing of these definitions, and they agree an instrumentality must perform a government function at the government's behest. The parties also agree, however, and we have noted in other cases interpreting similar provisions, that the dictionary definitions get us only part of the way there. Thus, we turn to other tools to decide what "instrumentality" means in the FCPA.

To interpret "instrumentality" as used in the Americans with Disabilities Act, we relied upon what the Supreme Court has called the "commonsense cannon of noscitur a sociis,"—that is, " 'a word is known by the company it keeps.' " In the FCPA, the company "instrumentality" keeps is "agency" and "department," entities through which the government performs its functions and that are controlled by the government. We therefore glean from that context that an entity must be under the control or dominion of the government to qualify as an "instrumentality" within the FCPA's meaning. And we can also surmise from the other words in the series along with "instrumentality" that an instrumentality must be doing the business of the government. What the defendants and the government disagree about, however, is what functions count as the government's business.

To answer that question, we examine the broader statutory context in which the word is used. In this respect, we find one other provision of the FCPA and Congress's relatively recent amendment of the statute particularly illustrative. First, the so-called "grease payment" provision establishes an "exception" to FCPA liability for "any facilitating or expediting payment to a foreign official ... the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official." 15 U.S.C. § 78dd–2(b). "Routine governmental action" is defined as "an action ... ordinarily and commonly performed by a foreign official in," among other things, "providing phone service." § 78dd–2(h)(4)(A). If an entity involved in providing phone service could never be a foreign official so as to fall under the FCPA's substantive prohibition, there would be no need to provide an express exclusion for payments to such an entity. In other words, if we read "instrumentality," as the defendants urge, to categorically exclude government-controlled entities that provide telephone service, like Teleco, then we would render meaningless a portion of the definition of "routine governmental action" in section 78dd–2(b). Thus, that a government-controlled entity provides a commercial service does not automatically mean it is not an instrumentality. In fact, the statute expressly contemplates that in some instances it would.

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

To implement the Convention's mandates, Congress amended the FCPA in 1998. The only change to the definition of "foreign official" in the FCPA that Congress thought necessary was the addition of "public international organization." 15 U.S.C. 78dd–2(h)(2)(A). This seems to demonstrate that Congress considered its preexisting definition already to cover a "foreign public official" of an "enterprise ... over which a government ... exercise[s] a dominant influence" that performs a "public function" because it does not "operate[ ] on a normal commercial basis ... substantially equivalent to that of ... private enterprise[s]" in the relevant market "without preferential subsidies or other privileges." Although we generally are wary of relying too much on later legislative developments to decide a prior Congress' legislative intent, the circumstances in this case cause us less concern in that regard. This is not an instance in which Congress merely discussed previously enacted legislation and possible changes to it. Rather, Congress did make a change to the FCPA, and it did so specifically to ensure that the FCPA fulfilled the promise the United States made to other nations when it joined the Convention. The FCPA after those amendments is a different law, and we may consider Congress's intent in passing those amendments as strongly suggestive of the meaning of "instrumentality" as it exists today.

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

Indeed, since the beginning of the republic, the Supreme Court has explained that construing federal statutes in such a way to ensure the United States is in compliance with the international obligations it voluntarily has undertaken is of paramount importance. We are thus constrained to interpret "instrumentality" under the FCPA so as to reach the types of officials the United States agreed to stop domestic interests from bribing when it ratified the OECD Convention.

Based upon this reading, we must also reject the invitation from Messrs. Esquenazi and Rodriguez to limit the term only to entities that perform traditional, core government functions. Nothing in the statute imposes this limitation. And were we to limit "instrumentality" in the FCPA in that way, we would put the United States out of compliance with its international obligations.

The Supreme Court has cautioned that "the concept of a 'usual' or a 'proper' governmental function changes over time and varies from nation to nation." *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 634 n. 27 (1983). That principle guides our construction of the term "instrumentality." Specifically, to decide in a given case whether a foreign entity to which a domestic concern makes a payment is an instrumentality of that foreign government, we ought to look to whether that foreign government considers the entity to be performing a governmental function. And the most objective way to make that decision is to examine the foreign sovereign's actions, namely, whether it treats the function the foreign entity performs as its own. Presumably, governments that mutually agree to quell bribes flowing between nations intend to prevent distortion of the business they conduct on behalf of their people. We ought to respect a foreign sovereign's definition of what that business is. Thus, for the United States government to hold up its end of the bargain under the OECD Convention, we ought to follow the lead of the foreign government itself in terms of which functions it treats as its own.

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

To decide if the government "controls" an entity, courts and juries should look to the foreign government's formal designation of that entity; whether the government has a majority interest in the entity; the government's ability to hire and fire the entity's principals; the extent to which the entity's profits, if any, go directly into the governmental fisc, and, by the same token, the extent to which the government funds the entity if it fails to break even; and the length of time these indicia have existed. We do not cut these factors from whole cloth. Rather, they are informed by the commentary to the OECD Convention the United States ratified. They are also consistent with the approach the Supreme Court has taken to decide if an entity is an agent or instrumentality of the government in analogous contexts.

We then turn to the second element relevant to deciding if an entity is an instrumentality of a foreign government under the FCPA—deciding if the entity performs a function the government treats as its own. Courts and juries should examine whether the entity has a monopoly over the function it exists to carry out; whether the government subsidizes the costs associated with the entity providing services; whether the entity provides services to the public at large in the foreign country; and whether the public and the government of that foreign country generally perceive the entity to be performing a governmental function. Just as with the factors indicating control, we draw these in part from the OECD Convention. And we draw them from Supreme Court cases discussing what entities properly can be considered carrying out governmental functions.