UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

UNITED STATES OF AMERICA :

-v.- :

VIKTOR KOZENY and :
FREDERIC BOURKE, JR., :

Defendants. :

- X

05 Cr. 518 (SAS)

GOVERNMENT'S MEMORANDUM OF LAW IN OPPOSITION TO FREDERIC BOURKE'S MOTION FOR RECONSIDERATION OF THE COURT'S RULING ON AZERI LAW ISSUES

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GOVERNMENT'S MEMORANDUM OF LAW IN OPPOSITION TO FREDERIC BOURKE'S MOTION FOR RECONSIDERATION OF THE COURT'S RULING ON AZERI LAW ISSUES

The Government respectfully submits this memorandum in opposition to defendant Frederic Bourke's motion for reconsideration of the Court's ruling on Azeri law issues, by which Bourke requests that the Court charge the jury (i) that an offer to give a bribe is not a crime under Azeri law, and therefore is not punishable under the Foreign Corrupt Practices Act ("the FCPA"); and (ii) that under Azeri law, the offense of bribery requires "direct intent," and therefore bribes made without such intent are lawful under Azeri law. Because Bourke misapprehends both the FCPA and Azeri law, neither charge should be given.

Although Bourke styles his motion as one for reconsideration, it is not: the instant motion makes two new requests, both of which purport to be based on statements made, both in the prior proceedings and elsewhere in published works, by the Government's expert, William Butler.[1] As set forth below, Bourke misconstrues Professor Butler's opinions on the matters in question. More importantly, even if Azeri law failed to criminalize Bourke's own conduct in the ways that Bourke chooses to describe it, that does not make the payments on his behalf by his co-conspirators charged in the indictment "lawful under the written laws and regulations" of Azerbaijan, and therefore the affirmative defense would fail. Accordingly, none of the requested instructions should be given.

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[1] The request for an instruction on mere "offers" to bribe was not contained in the defendant's previous motion, but was made in Professor Paul Stephan's final submission, an instruction purportedly adopting a statement made by Professor Butler; the request for an instruction on "direct intent" was not previously made.

Background

Bourke's underlying motion was premised on his request for jury charges based on (i) purported extortion of the bribes in question, and (ii) purported reporting to authorities of the bribery scheme. In either scenario, Bourke contended that he was "relieved from criminal responsibility," and therefore the payments were "lawful under the written laws and regulations" of Azerbaijan, creating an affirmative defense under the FCPA.

The Court rejected the request for Azeri law charges based on either of the two proffered bases, observing that "[f]or purposes of the FCPA's affirmative defense, the focus is on the *payment*, not the payer." *United States* v. *Kozeny*, --- F. Supp. 2d ---, 05 Cr. 518 (SAS), 2008 WL 4658807 at *3 (S.D.N.Y. Oct. 21, 2008) ("Opinion and Order"). The Court ruled that, with respect to the question of whether the bribes were extorted, if Bourke could show that "he was the victim of 'true extortion,'" then he could argue to the jury that "he cannot be guilty of violating the FCPA by making a payment to an official who extorted the payment because he lacked the requisite corrupt intent to make a bribe." *Id.* Citing Judge Sand's *Modern Federal Jury Instructions*, the Court further ruled that:

> In any event, the jury will be instructed regarding the "corrupt" intent that the Government must prove he possessed beyond a reasonable doubt . . . . The charge will also emphasize that the proper focus is on Bourke's intent and that the Government is not required to show that "the official accepted the bribe," that the "official [ ] had the power or authority to perform the act [ ] sought" or that the "defendant intended to influence an official act which was lawful."

Id. at *4.

The instant motion makes two new requests, both of which purport to be based on

Professor Butler's opinions. Accordingly, the Government forwarded to Professor Butler the defendant's memorandum of law, which quotes extensively from Butler's published work, and requested, without further instruction, that he comment however he deemed appropriate. His Declaration is attached hereto as Exhibit A. As described therein, Bourke's motion is based on certain misapprehensions concerning Azeri law.

As an initial matter, however, the motion also suffers from a significant misunderstanding of the FCPA, one which Bourke took care not to press on his initial motion, but which he attempts to advance in this fallback position: that rather than basing his affirmative defense on payments that were expressly permitted under Azeri law, his defense can be based on payments that were not expressly criminalized. As set forth below, this is wrong.

Argument

I. THE FCPA'S SCOPE IS NOT DEFINED BY LOCAL CRIMINAL LAWS.

Bourke's memorandum correctly sets forth the conduct that is criminalized by the FCPA: in short, the FCPA criminalizes corrupt offers of anything of value 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" to obtain or retain business. 18 U.S.C. § 78dd-2(a)(1988). (Def. Mem. at 5). Bourke next correctly states that, according to the legislative history, conscious disregard of the possibility of bribery can violate the statute. (Def. Mem. at 5-6). He then asserts that therefore the FCPA "sweeps in a broad swathe of activity that would not satisfy Azeri law's 'direct intent' element." (Def. Mem. at 6). Even if this were correct, Bourke draws from it the following erroneous conclusion: "The universe of conduct that is unlawful under Azeri law is smaller than the universe of conduct that is covered, on its face, by the FCPA"

and therefore conduct that is not illegal in Azerbaijan "could not serve as the predicate for an FCPA violation." (Def. Mem at 8).

In enacting the FCPA, Congress did not limit criminalized conduct to that which is prohibited in a given foreign country. Simply put, the statute does not make payments to foreign officials criminal only if they are also criminalized in the associated foreign country. Rather, Congress in 1988 amended the statute to include an affirmative defense only for payments that were "lawful under the written laws and regulations" of the given foreign country. Thus, if, as the defendant has asserted, Azeri law actually rendered payments that were subsequently reported *lawful*, an affirmative defense could be asserted.

There is a difference, however, which Bourke ignores, between conduct being made affirmatively lawful and conduct which is not criminalized, wholly or in some part. Congress was very clear that the affirmative defense it adopted was a limited exception,[2] and that the "the absence of written laws in a foreign official's country would not by itself be sufficient to satisfy this defense." H.R. Conf. Rep. 100-576 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1955). Thus, to use the most extreme hypothetical, payments to a foreign official in a country that had no laws or regulations whatsoever would not remove those payments from the ambit of the FCPA. Similarly, even if Bourke were correct in asserting that, for instance, Azerbaijan has not criminalized attempted bribery, that would not render such conduct "lawful" within the meaning of the affirmative defense to the FCPA, which explicitly criminalizes "offers" of bribes. These

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[2] "[T]hese 1988 amendments illustrate an intention by Congress to identify very limited exceptions to the kinds of bribes to which the FCPA does not apply." *United States* v. *Kay*, 359 F. 3d 738, 750 (5th Cir. 2004). "Both houses insisted that their proposed amendments only clarified ambiguities 'without changing the basic intent or effectiveness of the law.'" *Id.* (citing S. Rep. No. 100-85, at 53 (1987) and H.R. Rep. No. 100-40, pt.2, at 77).

same points were made at pages 1 through 2 and in footnote 2 of the Government's previous memorandum, submitted following the Azeri law hearing, but the defendant ignores them entirely in his motion for reconsideration.[3]

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[3] Scholarly commentary uniformly adopts the view that the affirmative defense is narrowly limited to payments that are affirmatively legalized. *See, e.g.,* Donald Zarin, *Doing Business Under the Foreign Corrupt Practices Act*, § 5:3 (Practicing Law Institute 2008) ("However, this defense is narrowly circumscribed. To fall within its limits, the conduct must be explicitly permitted under the 'written laws and regulations' of a country. The mere absence of a law prohibiting the conduct is not sufficient. . . . As a practical matter, therefore, this defense is of little, if any, utility."); Kenneth U. Surjadinata, *Revisiting Corrupt Practices from a Market Perspective*, 12 EMORY INT'L L. REV. 1021, 1035 (1998) ("To take advantage of the lawful payments affirmative defense, the transaction must be expressly sanctioned by the 'written laws and regulations' of a country . . . and mere absence of a law prohibiting the conduct is not sufficient."); Philip M. Nichols, *Regulating Transnational Bribery in Times of Globalization and Fragmentation*, 24 YALE J. INT'L L. 257, 288 (1999) ("The exception states that payments that are 'lawful under the written laws and regulations' of a host country are not actionable under the Foreign Corrupt Practices Act. As written, however, the exception requires an affirmative statement that the payment is in fact allowable. The vast majority of laws, however, simply state what payments are not allowable. The lack of affirmative language guts the exception."); Juselino F. Colares, *The Evolving Domestic and International Law against Foreign Corruption: Some New and Old Dilemmas Facing the International Lawyer*, 5 WASH. U. GLOBAL STUD. L. REV. 1, 13 (2006) ("Pursuant to this affirmative defense, the FCPA is inapplicable when a country permits bribes in its legal code. Notably, the exception requires that the law be written, which is rarely the case. Typically, countries that accept bribery do so by not outlawing bribes. . . . Corporations and individuals subject to FCPA coverage are well advised not to neglect narrowness of this exception."); Todd Swanson, *Greasing the Wheels: British Deficiencies in Relation to American Clarity in International Anti-Corruption Law*, 35 GA. J. INT'L & COMP. L. 397, 413 (2007) ("The first affirmative defense under the FCPA is that the gift is lawful under the written laws of the foreign official's country. This affirmative defense is narrow in its scope. A payment or gratuity is only allowed if the written laws of the foreign official's state specifically permit it. Furthermore, silence within the foreign statute will not satisfy the affirmative defense."); Robert C. Blume and J. Taylor McConkie, *Navigating the Foreign Corrupt Practices Act: The Increasing Cost of Overseas Bribery*, 36-AUG COLO. LAW. 91 (2007) ("The first affirmative defense applies where the payment at issue 'was lawful under the written laws and regulations of the foreign official's . . . country.' For this defense to apply, there must be a written law in the foreign country permitting the conduct. . . . Because foreign countries generally do not have written laws permitting payments to government officials, this defense rarely succeeds.").

Moreover, regardless of what *mens rea* Azeri law requires to be guilty of paying bribes, Congress obviously gave substantial thought to what *mens rea* would be required to violate the FCPA, or to conspire to do so, when Congress enacted the provision that "knowledge is established if a person is aware of the high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist." 18 U.S.C. § 78dd-2(h)(3)(B) (1988). Bourke's memorandum sets forth the relevant legislative history of this provision, which was enacted at the same time as the affirmative defense. (Def. Mem. at 5-6). Whatever local law might provide, Congress explicitly ruled out the possibility that conscious avoidance would go unpunished under the FCPA.

Accordingly, unless Azeri written law affirmatively makes lawful some kind of payment that would otherwise be criminalized under the FCPA, the conduct can be prosecuted. It is not enough for a defendant to contend that foreign law does not squarely criminalize his actions. If it were, Congress would instead have enacted a statute that punished Americans for violations of foreign bribery laws in pursuit of business, rather than setting forth explicitly what kinds of offers of payment to foreign officials or their agents are illegal under American law.

II. NO INSTRUCTION ON "MERE OFFERS" TO BRIBE SHOULD BE GIVEN.

As the Court ruled in the Opinion and Order, to make out an FCPA violation, "the Government is not required to show that 'the official accepted the bribe." Opinion and Order at *4.

Nonetheless, Bourke contends, purportedly based "largely [on] Professor Butler's own declaration," (Def. Mem. at 2) that "Under Azeri Law, a Mere Offer To Bribe, Without More, Is

Not a Criminal Offense." (*Id.*). Not only is this irrelevant, for the reasons set forth above in Point I, this interpretation of Professor Butler's Declaration is incorrect.

What Professor Butler actually said, in context, before the final sentence the defendant excerpts from a paragraph, is the following:

> Completion of the crime occurs from the moment that the recipient of the bribe accepts the money, other material valuables, or services of a material character. *If the official does not accept the bribe, the person giving the bribe is considered to have committed the crime of attempted giving of a bribe.* However, merely an offer to give a bribe on the part of the interested person without performing any specific actions directed towards transferring the subject of the bribe to the official does not entail criminal responsibility.

(Declaration of William E. Butler, dated August 21, 2008, at ¶ 21 (emphasis added)). Professor Butler clarifies further in his most recent Declaration:

> In my Declaration of August 21, 2008, I did say that ". . . merely an offer to give a bribe on the part of the interested person without performing any specific actions directed towards transferring the subject of the bribe to the official does not entail criminal responsibility" (point 21). My statement is formulated passively, and *I would not want it to be understood to mean that "specific actions" must mean something additional to the offer on the part of the person proposing a bribe.*

(Declaration of William E. Butler, dated November 25, 2008, at ¶ 3 (emphasis added)).

For his part, Professor Stephan cited no authority whatsoever for the proposition that a "mere offer" to bribe is not a crime, other than lifting a statement of Professor Butler's out of context. Since Professor Butler has now further clarified that the bribe offer itself can be the "specific action" to which he earlier referred, there is simply no support for the proposed instruction, which takes only a portion of Professor Butler's statement. *See* Declaration of Paul

B. Stephan, dated Sept. 8, 2008, Ex. 21 ("A mere offer to give a bribe on the part of the bribe giver, without the bribe giver performing any specific actions directed toward transferring the subject of the bribe to the government official, is not a crime under Azeri law."). Giving such an instruction would simply confuse the jury and would not accurately reflect Azeri law.

Moreover, although Bourke is correct that the FCPA does make criminal a mere "offer" or "promise to pay," 18 U.S.C. § 78-dd2(a) (1998) (Def. Mem. at 2), this is not a case involving a "mere offer" to pay a bribe. "A defendant is entitled to an instruction on an affirmative defense only if the defense has a foundation in the evidence." Opinion and Order at 13 n. 38 (citations and quotation marks omitted). Regardless of whether what Bourke deems "the most significant purported bribe," the two-third share capital increase (Def. Mem. at 3), was actually transferred to an Azeri official, the share capital increase was offered and accepted,[4] after over $10 million in cash and other things of value had actually been transferred. *See* Indictment ¶ 69. None of the bribes are cast in the indictment as mere offers, and Bourke's request to charge the jury on Azeri law in this regard is meritless for this reason as well.

III. NO INSTRUCTION ON "DIRECT INTENT" SHOULD BE GIVEN.

Aware that the FCPA explicitly provides for conscious-avoidance liability, Bourke attempts to erect a *mens rea* requirement that purportedly lies in Azeri law. For the reasons set

[4] Bourke actually submitted an affidavit in civil litigation against Vicktor Kozeny in the United Kingdom in which Bourke stated that he was directly advised by Kozeny of the two-third share increase, to which Bourke purportedly objected, to be issued "to the 'big boy,' by which I assumed he was talking about the President of Azerbaijan." Second Witness Statement of Frederic A. Bourke, *Marlwood Commercial, Inc.* v. *Viktor Kozeny et al.*, dated September 2000, Exhibit D to the Declaration of John D. Cline, Esq., in support of Bourke's Motion for Disocvery, dated September 4, 2008.

forth above, this conflation is contrary to the FCPA: the *mens rea* for an FCPA violation is not defined by local law, which provides a defense only if something is made explicitly "lawful" under written laws or regulations. As Professor Butler explains, "it does not follow that, 'absent direct intent, the conduct is lawful under Azeri law . . . .' The [Defendant's] Memorandum is confusing the concept of 'relieving from criminal responsibility' with a positive characterization of behavior. . . ." (Butler Declaration, Nov. 25, 2008, at ¶ 8).

Whether Bourke could be prosecuted under Azeri law is not the relevant question. Bourke is charged with FCPA violations because he participated in an investment scheme in which others, chiefly Viktor Kozeny, paid bribes from which Bourke benefitted. The proof will undoubtedly show -- although it need not -- that Kozeny had the direct intent to pay the bribes, and the bribe recipients had the direct intent to receive them, and accordingly these parties violated Azeri law. But regardless of whether Bourke also personally violated Azeri law by paying bribes directly, Bourke joined Kozeny in violating the FCPA even if Bourke merely was "aware of the high probability of the existence of [bribes being paid to Azeri officials], unless [Bourke] actually believe[d] that such circumstance d[id] not exist." 18 U.S.C. § 78dd-2(h)(3)(B) (1988). The question is not whether Bourke can be prosecuted under Azeri law, but whether he can be prosecuted under the FCPA, and there the *mens rea* is clearly set forth in the statute, without any indication that resort to local law is required or permitted. The instruction that the Court articulated in the Opinion and Order concerning corrupt intent sets forth all the intent that the Government must prove.

Conclusion

Accordingly, the defendant's request for jury instructions reflecting his interpretations of Azeri law should be rejected in their entirety, and the motion for reconsideration should be denied.

Dated: New York, New York
December 4, 2008

Respectfully submitted,

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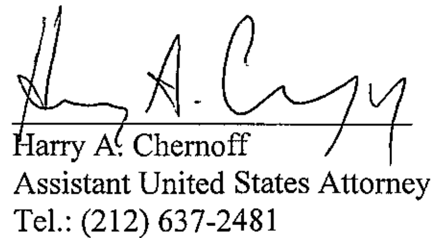
By: 
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