

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

v.

VIKTOR KOZENY and  
FREDERIC BOURKE, JR.,

Defendants.

05 Crim. 518 (SAS)

**DECLARATION OF  
WILLIAM E. BUTLER**

I, WILLIAM E. BUTLER, pursuant to 28 U.S.C. § 1746, declare under penalty of perjury as follows:

**Introduction**

1. I am the same William E. Butler who submitted a Declaration on August 21, 2008 in the matter of the United States of America v. Viktor Kozeny, Frederic Bourke, Jr., and David Pinkerton.
2. I have been asked to comment upon the Memorandum of Law in Support of Defendant's Motion for Reconsideration of the Court's Ruling of Azeri Law Issues dated November 5, 2008.

**I. The Defendant's Contention That, Under Azeri Law, a Mere Offer To Bribe, Without More, Is Not a Criminal Offense.**

3. 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.
4. Acceptance of the offer on the part of the recipient, for example, would be sufficient in my view as a "specific action directed towards transferring the subject of the bribe". The essence of a bribe may be the transfer of remuneration in some form at a later time, after the bribe recipient has acted in the bribe giver's interest or failed to act in such a way that is in the bribe giver's interest. Under this example, if the bribe recipient did what was

expected and later the bribe giver did not perform what had been agreed, criminal responsibility would still lie because specific actions had been taken pursuant to the offer. The completed crime of giving and/or receiving a bribe cannot be “postponed” by agreeing to elements of subsequent performance or elements of part performance.

5. The foregoing follows from my statement in point 25 of my Declaration that “Whether the bribe or illegal remuneration is paid before or after the action or failure to act and irrespective of whether this was actually in the interests of the briber are immaterial”. Such an “action” also may comprise “general patronage or connivance with regard to service”.<sup>1</sup>

## **II. The Defendant’s Contention That, Under Azeri Law, Bribery Requires Direct Intent**

6. It is indeed the case that the crimes of giving a bribe and of receiving a bribe can be committed only with direct intent under the law of Azerbaidzhan and Russia. I so wrote in my Declaration of August 21, 2008 (point 23) and so testified at the evidentiary hearing. Russian and Azeri commentators whose works are known to me are unanimous on this point.
7. The Memorandum of Law dated November 5, 2008, (pp. 3-4) accurately quotes from my prior writings on the meaning of “direct intent” and the distinction between “direct” and “indirect” intent. However, the Memorandum places a slightly different spin on what I wrote when it says: “As Professor Butler recognizes, intent is ‘an element’ of the criminal offense under Russian (and logically, Azeri) law. Butler, *Russian Law* at 582”. What I said on p. 582 is: “The 1996 Criminal Code continues to incorporate an element omitted in the 1926 REFSR Criminal Code but introduced in the 1958 criminal law reforms: the moral guilt or fault of an accused”. Nothing in that sentence is related to issues of bribery, and the Memorandum’s next sentence which says that “Therefore ...”, whatever truth it may contain, does not follow from the prior sentence in anything that I have written.
8. In the second full paragraph on page 4 of the Memorandum the Court is said to have concluded (in my view correctly) that “being ‘relieved of criminal responsibility’ under those exceptions did not render the underlying conduct or payment ‘lawful’ under Azeri law”. It does not follow, as the Memorandum suggests, that “absent direct intent, the conduct is lawful under Azeri law ...”. The Memorandum is confusing the concept of “relieving from criminal responsibility” with a positive characterization of behavior, and there is no necessary linkage between the two; one does not follow from the other.
9. Absent direct intent, it may be that the crime of giving a bribe has not been committed, but that does not mean that: (a) another crime may not have been committed instead; or (b) that an administrative or other offense (disciplinary, labor, etc.) may not have been

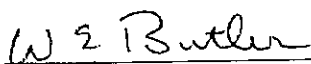
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<sup>1</sup> See A. V. Naumov, *Практика применения Уголовного кодекса Российской Федерации: Комментарий судебной практики и доктринальное толкование* [Practice of Application of Criminal Code of Russian Federation: Commentary on Judicial Practice and Doctrinal Interpretation] (2005), p. 776.

committed. The Memorandum in this formulation is in my view jumping to a conclusion that is wholly unwarranted under Azerbaidzhan and Russian law

10. So far as I am aware, neither Azeribaidzhan nor Russian legislation recognizes, and I have seen no discussion in doctrinal writings originating in Azerbaidzhan or Russia, that would recognize or distinguish between concepts of "conscious avoidance", or "willful blindness", nor is the term "specific intent" used. In the Russian and Azeri understanding "wishing" the harmful consequences of an act is part of "direct" intent and is not separable as "specific intent". In the instance of bribery, the person giving the bribe wishes to do so as evidenced by his doing so, and the person receiving the bribe also wishes to receive it.

Dated: Newville, Pennsylvania  
November 25, 2008

  
By: William Elliott Butler  
Dickinson School of Law  
Pennsylvania State University  
Carlisle, Pennsylvania