No. _____

In The Supreme Court of the United States

FREDERIC BOURKE, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In light of this Court's decision in *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060 (2011), must the jury in a federal criminal case be instructed that willful blindness substitutes for actual knowledge only when (a) the defendant subjectively believes that there is a high probability that a fact exists and takes "deliberate actions" to avoid learning of that fact, and (b) the defendant's conduct surpasses recklessness with respect to the fact.

2. Must jurors agree unanimously on a specific overt act to return a guilty verdict under the general federal conspiracy statute, 18 U.S.C. § 371, or is it sufficient if all jurors agree that some overt act was committed even if they cannot agree on which act.

3. In a criminal trial, when the prosecution seeks to bolster the inculpatory testimony of a principal cooperating witness with portions of a hearsay memorandum by the witness' associate, does exclusion of exculpatory and explanatory portions of the same memorandum violate Fed. R. Evid. 106 as interpreted in light of *Beech Aircraft v. Rainey*, 488 U.S. 153 (1988), and this Court's compulsory process and due process decisions.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the United States Court of Appeals for the Second Circuit were Petitioner Frederic Bourke, Jr. and Respondent United States.

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PETITION FOR A WRIT OF CERTIORARI

Frederic Bourke, Jr. petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The court of appeals' opinion (App. 1-36) is reported at 667 F.3d 122. The court of appeals' denial of rehearing (App. 131) is unreported. The district court's denial of Bourke's motion in limine (App. 114) is reported at 643 F. Supp. 2d 415. The district court's denial of Bourke's motions for judgment of acquittal and new trial (App. 48) is reported at 664 F. Supp. 2d 369. The district court's order concerning Government Exhibit 181 (App. 112) is unreported. The district court's oral rulings (App. 168) are unreported.

JURISDICTION

The court of appeals entered judgment on December 14, 2011. App. 1. The court denied a timely petition for rehearing on July 27, 2012. App. 131. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

Section 371 of Title 18, United States Code, provides in relevant part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

Rule 106 of the Federal Rules of Evidence provides:

> If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part--or any other writing or recorded statement--that in fairness ought to be considered with it.

INTRODUCTION

This case presents three questions that warrant certiorari.

First, in *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060 (2011), this Court set the standards under which willful blindness can substitute for knowledge in the civil patent context. The Court held that "(1) the defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact." *Id*.

at 2070. The Court declared that, under this standard, willful blindness "surpasses recklessness and negligence." *Id.*

The courts of appeals have splintered in determining *Global-Tech*'s application to criminal cases. The Third Circuit modified its pattern willful blindness instruction to require "deliberate actions" to avoid knowledge and to make clear that recklessness does not suffice. A recent Fourth Circuit decision takes the same position. The Eighth Circuit modified its model instruction to include "deliberate actions," but does not require an instruction on recklessness. Other circuits, including the Second Circuit here, take the position that even after *Global-Tech* the jury need not be instructed that it must find "deliberate actions" to avoid knowledge or that willful blindness surpasses recklessness.

The issue is important here, because Bourke's knowledge that his alleged co-conspirators were bribing officials of Azerbaijan was the central battleground at trial, and the government relied heavily on a willful blindness instruction that did not meet *Global-Tech*'s requirements. The Court should take this case to clarify the application of *Global-Tech* in the criminal context.

Second, following the Court's decision in *Richardson v. United States*, 526 U.S. 813 (1999), the circuits are deeply divided on whether the jury must agree unanimously on at least one overt act to return a guilty verdict under the general federal conspiracy statute, 18 U.S.C. § 371. The pattern

instructions of the Third, Eighth, and Ninth Circuits require the jury to reach unanimous agreement on a specific overt act (although a recent Ninth Circuit case expresses doubt that the instruction is required). The Fifth and Seventh Circuits, joined by the Second Circuit in this case, hold that unanimity on a specific act is not required. The District of Columbia Circuit and the Sixth Circuit have expressly left the issue open. The remaining circuits have not taken a definitive position. This case presents the perfect vehicle for resolving the question; the issue was preserved below and is potentially decisive on Count One.

Third, the case presents an important question concerning the rule of completeness, Fed. R. Evid. 106, as interpreted in light of *Beech Aircraft v. Rainey*, 488 U.S. 153 (1988), and this Court's compulsory process and due process decisions. The courts below failed to apply Rule 106 in accordance with its text and purpose, thus allowing false prosecution evidence to go unchallenged.

STATEMENT OF THE CASE

I. FACTS.

Bourke is an inventor, investor in biomedical research, and philanthropist. He co-founded the accessory company Dooney & Bourke. In the mid-1990s, Bourke met Viktor Kozeny, a Czech citizen living in the Bahamas. JA134.[1]

[1] The Joint Appendix in the court of appeals is cited as "JA" and the Special Appendix as "SA." Transcripts are cited as "T."

In May 1997, Kozeny invited Bourke to travel abroad with him to examine potential investments. At a brief stop in Baku, capital of Azerbaijan, Bourke and Kozeny learned about the country's privatization program. Under that program, the State Property Committee ("SPC"), auctioned state-owned assets to Azeri citizens and private investors. The auction worked through "vouchers," which were distributed in books of four to Azeri citizens. The Azeris could either sell their vouchers in a secondary market or use them to bid on state-owned assets. Foreign investors could purchase vouchers, but they also had to buy "options" from the Azeri government to participate in the auction. A foreign investor had to purchase one option per voucher, or four options per voucher booklet.

Following the trip, Bourke and Kozeny fell out based on Kozeny's failure to invest in a biomedical project that Bourke recommended. The two men had no contact from July 1997 until late December 1997. JA864-65.

During the period that Bourke and Kozeny were estranged, Kozeny decided to invest in Azeri privatization. He wanted to acquire SOCAR, the state-owned oil company. In July 1997--after he and Bourke had broken off contact--Kozeny established a company in Baku called Oily Rock, Ltd. Oily Rock was headed by Tom Farrell, an expatriate American from St. Petersburg, Russia. Farrell's task was to

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(continued…)

and government exhibits as "GX." The appendix to the petition is cited as "App."

purchase the vouchers and options necessary to acquire SOCAR. Kozeny engaged Hans Bodmer, a Swiss lawyer, to establish the structure for the privatization investment. Farrell and Bodmer later pleaded guilty and became key government cooperating witnesses.

Kozeny and Farrell had trouble purchasing enough vouchers to acquire SOCAR. In fall 1997, Kozeny met with Ilham Aliyev, the son of Azerbaijan's president. Ilham Aliyev referred him to Nadir Nasibov and Barat Nuriyev, the two top SPC officials. In October 1997, Nuriyev allegedly demanded that Kozeny provide an up-front payment of millions of dollars, JA163, 170; that Kozeny give President Aliyev two-thirds of the vouchers and options that Oily Rock acquired, JA159, 262; T.458; and that Oily Rock purchase its vouchers through Nuriyev's sources, JA165-66. In return, Nuriyev promised that Oily Rock could acquire vouchers without interference and bid on SOCAR when it was privatized. JA162-64.

Farrell testified that he brought Nuriyev a dufflebag with millions of dollars in cash and thereafter purchased vouchers through Nuriyev's sources. JA172. Bodmer established offshore trusts to hold President Aliyev's two-thirds interest in the Oily Rock vouchers and options and prepared sham "credit facility agreements" to make it appear that Aliyev had borrowed funds to purchase the vouchers and options. JA324-39.

Nuriyev initially told Kozeny and Farrell that one million voucher books would be required to

obtain SOCAR at auction. In mid-December 1997, however, he allegedly told Farrell that the price had doubled. JA184-86. Nuriyev also told Farrell that Oily Rock would benefit from having a reputable, well-known figure associated with it. JA257-58.

Kozeny devised a plan to meet Nuriyev's demands. In late December 1997, he held a lavish Christmas party in Aspen to which he invited Bourke and other wealthy Americans. In the days following the party, Kozeny touted his Azeri investment to Bourke and others. Bourke made an inviting target; not only was he wealthy, but he also was a longtime friend of former Senator George Mitchell, who could lend Oily Rock respectability. JA258.

By mid-January 1998, Kozeny convinced Bourke and others to travel to Baku to see the Oily Rock operation. Bourke was impressed but not yet ready to invest. He returned to the United States, consulted advisors, and, on February 6, 1998, flew back to Baku with Kozeny and his friend and potential investor Bobby Evans. During that brief visit, Bodmer and Grant Thornton accountant Rolf Hess--who did work for Oily Rock--told Bourke and Evans that they had just met with President Aliyev, and he would also be investing in privatization. Bodmer and Hess presented Aliyev's participation as a positive development. JA606-07, 868-69; T.2537-40. In early March 1998, after consulting counsel and obtaining their view that President Aliyev's participation was lawful, JA607-09, 630-31, 870-71; T.1953-54, Bourke invested $5.3 million of his own money and $1.7 million from friends and family,

T.1063, 1077-78; GX 218. The March 1998 investment--made through a company that Bourke's lawyers formed called Blueport--was Bourke's only investment of his own money in Oily Rock. JA633-34.[2]

Senator Mitchell invested in Oily Rock through Blueport in March 1998. Bourke had introduced Mitchell to Kozeny at a dinner in London in January 1998, and Mitchell soon decided to invest. JA494-98. Mitchell also accepted a position on the Oily Rock board and spoke at the grand opening of another Kozeny company in Baku in late April 1998. JA498-502; T.1092-97.

The government sought to prove that Bourke knew of Kozeny's bribery before he invested. The prosecution relied heavily on cooperating witness Bodmer's testimony about a conversation he claimed to have had with Bourke during Bourke's brief February 1998 visit to Baku. Bodmer testified that on the late afternoon of February 5, 1998 Bourke approached him in the lobby of the Baku Hyatt and asked about the "arrangement" with the Azeris; that Bodmer obtained permission from Kozeny that evening to tell Bourke about the agreement to give President Aliyev two-thirds of the Oily Rock vouchers and options; and that at 8 am on February 6, Bodmer and Bourke took a fifteen-minute walk near the Hyatt during which Bodmer told Bourke about that agreement. JA344-54, 377-78; T.1305-09. According to Bodmer, "[a]bout two weeks" after the

[2] Bourke's friends invested another $1 million on July 13, 1998. GX525. They, like Bourke, lost their entire investment to Kozeny. JA633-34.

February 6 walk, Bourke agreed to invest. JA355-56.

The defense attacked Bodmer's February 6 "walk talk" story in two principal ways: by proving through flight records for Kozeny's plane and other evidence that Bourke was not in Baku when Bodmer said the walk talk occurred, and by emphasizing the incentive that Bodmer's plea agreement gave him to favor the prosecution.[3] To bolster Bodmer's testimony, the government called his law partner, Rolf Schmid. The government introduced through Schmid a fragment of a memorandum that Schmid, then an associate at Bodmer's law firm, wrote in October 2001 in response to questions from plaintiffs in a London lawsuit against Kozeny. JA407-09, 426, 1210. The fragment--GX 181A (App. 152)--purported to reflect what Bodmer had told Schmid in early 1998 about the alleged "walk talk" with Bourke. Other portions of this same memorandum, by contrast, contradicted Bodmer's trial testimony. Those portions indicated that Bodmer had no guilty knowledge that he could have imparted to Bourke, *e.g.*, App. 164, and that the arrangements with Azeri officials were "arm's length," App. 162. The defense

[3] In August 2003, Bodmer was arrested in South Korea and imprisoned there for five months until he was sent to the United States. He remained in jail in Manhattan for two weeks until, over the prosecution's objection, he was released to house arrest near Washington, D.C. He stayed there for nine months. In October 2004, he pled guilty to money laundering conspiracy and agreed to cooperate. Only after Bodmer reached his agreement with the government, more than a year after his arrest, was he permitted to return to Switzerland, where he currently resides and maintains a law practice. JA360-65. Eight years after his guilty plea, he has yet to be sentenced.

therefore moved for admission of the entire memo under Fed. R. Evid. 106 and as prior inconsistent statements of Bodmer, JA385-90, 431. The district court denied the defense motion and admitted the redacted exhibit. App. 112, 169-77; SA33, 36, 42-44. The court barred cross-examination of Schmid about the redacted portion of the memo and about the contradictions it showed with Bodmer's testimony. App. 172-77; SA36, 38.

Farrell was the only other witness who claimed to have told Bourke about Kozeny's bribes to Azeri officials. Like Bodmer, Farrell testified about one-on-one "walk talks" with Bourke in Baku, during which he claimed that they discussed the bribery. The defense challenged Farrell's testimony, both because he (like Bodmer) received a lenient deal[4] and because travel records refuted key aspects of his story.

In April 1998, Kozeny told Bourke and other investors that he wanted them on the Oily Rock board. Bourke consulted his lawyers about his potential liability as an Oily Rock board member,

[4] In March 2003, Farrell pled guilty to violating the FCPA and conspiring to violate the FCPA. Farrell's plea did not require him to return $700,000 of investor money that he obtained through Kozeny's fraud and concealed with Bodmer's assistance in off-shore companies. T.694. Nor did he have to forfeit the boat and the bar that he bought with the money. JA295. As of trial, he had paid only $8000 out of $500,000 in taxes and penalties on the money he received from Kozeny. JA248-49, 787-88. The government has not prosecuted Farrell for filing a false 1998 tax return, which omits the $700,000 he received through Kozeny's fraud. JA295-96, 787-88. Farrell has not been sentenced more than nine years after his plea. JA297.

given his inability to monitor Kozeny's activities abroad. JA635; T.2146-49. He and other investors and their counsel had conference calls in which they discussed these risks. Bourke's counsel recorded one such call, on May 18, 1998, in which Bourke mentioned the possibility that Kozeny was paying bribes as an example of conduct that could occur without the directors' knowledge and subject them to liability. JA639, 1193-94; T.2168-72. The court of appeals cited Bourke's remarks on this call as evidence that he knew Kozeny was paying bribes--and, paradoxically, as evidence that he consciously avoided such knowledge. App. 18-20. Two lawyers who participated in the call testified that they did not interpret Bourke's remarks as indicating knowledge of bribery. JA641-42, 664-68; T.2514-17.

On advice of counsel, Bourke and the other American investors in Oily Rock declined to join the Oily Rock board. Instead, the lawyers formed a separate company, Oily Rock U.S. Advisors, and the investors served on that company's board. The court of appeals cited this step as further evidence that Bourke willfully blinded himself to knowledge of Kozeny's bribery. App. 18-19.

In May or June 1998, Bourke learned that Kozeny planned to issue 300,000,000 shares in Oily Rock to President Aliyev or other Azeri interests, leaving the Azeris with two-thirds of the outstanding shares. Bourke was furious. JA878-79; T.2185. He instructed his lawyers to obtain assurances from Bodmer that existing Oily Rock shareholders would not be diluted--that is, that the Azeris would provide full value for the shares they received. Bodmer

repeatedly assured Bourke's lawyers, Bourke himself, and other investors and their counsel that the American investors would not be diluted. JA380-81, 613-15, 619-29, 652-54, 669-70, 677-78, 691-95, 773-75, 879-81, 1216, 1248; T.1161-62, 1570-71; DXO-2.

As the summer of 1998 passed without SOCAR privatized, Bourke and other investors became increasingly concerned. In October 1998, Bourke returned to Baku, where he found the Oily Rock offices largely deserted. Farrell and another employee explained that they intended to pursue other business until privatization occurred.

On the same trip, Bourke obtained documents which suggested that Kozeny had engaged in a massive fraud against some of the investors, including a hedge fund called the Omega Group. JA886-87; T.2702-04. Bourke insisted that Omega report Kozeny's fraud to law enforcement. He worked with Omega's counsel, Eric Vincent, to compile documents proving the fraud, and he demanded that Omega provide those documents to the United States Attorney's Office. Omega refused. JA643-44, 798-800, 890-91. Bourke flew to Baku in February 1999 with Vincent to disclose the options fraud directly to President Aliyev.

Bourke cooperated fully with law enforcement in his effort to bring Kozeny to justice. In 2001, he testified before the New York state grand jury investigating Kozeny's fraud. The grand jury later indicted Kozeny for defrauding investors. JA706. In 2002, Bourke submitted voluntarily to four days of

interviews with prosecutors and FBI agents. JA756-57; T.1913, 2392. He instructed his lawyers to waive the attorney-client privilege and submit to interviews with the prosecution. JA598; T.1528-29, 2132. He produced his lawyers' notes and other documents, including the May 18, 1998 tape that the government introduced at trial. T.1529, 2395-98.

II. PROCEEDINGS BELOW.

The grand jury indicted Bourke and two other defendants--Kozeny and David Pinkerton of AIG--on May 12, 2005. Kozeny remains a fugitive in the Bahamas and has successfully resisted extradition. The government dismissed charges against Pinkerton in 2008. The case went to trial against Bourke alone on charges of conspiracy to violate the FCPA and the Travel Act under 18 U.S.C. § 371; money laundering conspiracy; and false statements to the FBI during Bourke's four days of interviews in 2002.

The district court gave a general unanimity instruction, App. 150, but rejected Bourke's requested specific unanimity instruction on the overt act element of the § 371 charge, App. 101-03, 204-06. On willful blindness, the court--without benefit of *Global-Tech*, which was decided two years later--did not require the jury to find that Bourke took "deliberate actions" to avoid knowledge or that Bourke's conduct surpassed recklessness. App. 140-41. The court permitted the government to introduce a fragment of the Schmid memorandum, but rejected Bourke's effort to introduce the entire document and barred Bourke from cross-examining

Schmid about the excluded portion. *E.g.*, App. 74-81, 112, 169-77.

The jury acquitted Bourke on money laundering conspiracy and found him guilty on the other two charges. The district court sentenced Bourke to a year and a day incarceration and a $1 million fine. App. 39, 43. The court recounted Bourke's good works and declared that "[a]fter years of supervising this case, it is still not entirely clear to me whether Mr. Bourke was a victim, or a crook, or a little bit of both." JA1183.

The court of appeals affirmed. The court held that the overt act element of § 371 does not require the jurors to agree unanimously on the same act. App. 12-16. The court approved the district court's willful blindness instruction, without addressing or even citing *Global-Tech*, which was decided while Bourke's appeal was pending. App. 16-23. The court held that Fed. R. Evid. 106 did not require admission of the remainder of the Schmid memorandum, on the mistaken theory that the excluded portions represented Schmid's prior statement, when in fact the government had offered the memo fragment as a Bodmer prior statement. App. 31-34.

On July 27, 2012 the court of appeals denied Bourke's petition for rehearing. App. 131.[5]

[5] While this case was before the court of appeals, Bourke filed a motion for new trial based on newly discovered evidence. The district court denied the motion, and Bourke appealed. The appeal from the denial of the motion for new trial is pending before the Second Circuit.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT THE WRIT TO RESOLVE THE SPLIT IN THE CIRCUITS OVER THE "WILLFUL BLINDNESS" DOCTRINE IN THE WAKE OF *GLOBAL-TECH*.

In *Global-Tech*, this Court held that, for a defendant to be willfully blind, "(1) the defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact." 131 S. Ct. at 2070. The Court made clear that willful blindness "surpasses recklessness and negligence," with recklessness defined as "know[ing] of a substantial and unjustified risk" of the fact at issue. *Id*. at 2070-71. The *Global-Tech* Court faulted the court of appeals in that case for requiring only "deliberate indifference," rather than "active efforts" to avoid knowledge of the fact at issue. *Id*. at 2071.

Global-Tech was a civil patent case. In the more than sixteen months since the Court rendered its decision, the courts of appeals have splintered over its application in the criminal context. This case provides an ideal opportunity to provide clarity and establish a uniform standard for the judge-made willful blindness doctrine.

A. The Courts of Appeals Have Split Over the Proper Application of *Global-Tech* in Criminal Cases.

Following *Global-Tech*, the Third Circuit modified its pattern willful blindness instruction to require "deliberate actions" to avoid knowledge and to make clear that recklessness does not suffice.[6] The Eighth Circuit modified its model instruction to require "deliberate actions," but the instruction does not mention recklessness.[7] The Fourth Circuit holds that *Global-Tech* requires conduct that exceeds recklessness, and it has adopted the two-part *Global-Tech* standard for willful blindness instructions, including the requirement of "deliberate actions" to avoid knowledge.[8]

By contrast, the Fifth Circuit approved an instruction in the wake of *Global-Tech* that did not require "deliberate actions" to avoid knowledge and did not require that the defendant's conduct surpass recklessness.[9] The Second Circuit here similarly approved such an instruction. App. 16-23, 140-41;

[6] Third Circuit Model Criminal Jury Instructions § 5.06 (2011).

[7] Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit § 7.04 (2012).

[8] *United States v. Jinwright*, 683 F.3d 471, 480-81 (4th Cir. 2012), *petition for writ of certiorari filed* (Sept. 20, 2012). *But cf. United States v. Orta-Rosario*, 469 Fed. Appx. 140, 147 (4th Cir. 2012) (equating "deliberate actions" to avoid knowledge of a fact with "actively ignor[ing]" signs that the fact existed).

[9] *United States v. Brooks*, 681 F.3d 678, 701-03 (5th Cir. 2012), *petition for writ of certiorari filed* (Aug. 16, 2012). The First Circuit has similarly approved an instruction, post-*Global-Tech*, that did not comply with its "deliberate actions" and "surpass recklessness" requirements. *United States v. Denson*, 689 F.3d 21, 24-25 (1st Cir. 2012).

see United States v. Ferguson, 676 F.3d 260, 277-78 (2d Cir. 2011) (approving similar willful blindness instruction).

A clear conflict has thus arisen between the Third, Fourth, and Eighth Circuits, which require that the jury find "deliberate actions" to avoid knowledge as a predicate for willful blindness, and the Second and Fifth Circuits, which do not. A further split exists between the Third and Fourth Circuits, which require an instruction that recklessness does not suffice to establish willful blindness, and the Second, Fifth, and Eighth Circuits, which do not. This split will only deepen as more courts of appeals have occasion to address *Global-Tech*, either through decisions or through revisions to pattern instructions.

B. This Case Is an Appropriate Vehicle for Clarifying the Application of *Global-Tech*.

This case is an appropriate vehicle to resolve the application of *Global-Tech* in the criminal context. Bourke objected from start to finish to the giving of a willful blindness instruction. He maintained from before trial in the district court through his petition for rehearing in the court of appeals that the evidence did not support it.

Bourke did not address the *Global-Tech* standard in the district court, because the trial occurred two years before the case was decided. But Bourke squarely and repeatedly presented the

Global-Tech issue to the court of appeals.[10] Because briefing had been completed by May 2011, when this Court rendered the decision, Bourke sought leave to file a supplemental brief addressing its significance. After the court of appeals denied Bourke permission to file the brief, he submitted a letter under Fed. R. App. P. 28(j) bringing the decision to the court's attention. Following the court of appeals' decision, Bourke raised the *Global-Tech* issue again in his petition for rehearing. The court of appeals thus had ample opportunity to assess the application of *Global-Tech* to the willful blindness instruction given here.

The *Global-Tech* issue is outcome determinative. As noted, at all stages of the district court proceedings and again on appeal, the parties vigorously contested whether a willful blindness instruction should be given. A ruling in Bourke's favor will produce a reversal of his conviction. *See, e.g., United States v. Kaiser*, 609 F.3d 556, 564-67 (2d Cir. 2010) (reversing conviction because of erroneous willful blindness instruction).

C. The Scope of the Willful Blindness Doctrine Presents an Important and Recurring Issue.

In the early years of the willful blindness doctrine, courts worried about expanding the concept of knowledge to include the avoidance of knowledge.

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[10] Although *Global-Tech* was decided after the trial, it indisputably applies on direct appeal. *See Johnson v. United States*, 520 U.S. 461, 467 (1997); *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987).

They warned that willful blindness should be "rarely" invoked, because it might cause the jury to convict based on negligence or recklessness. *E.g., United States v. Lara-Velasquez*, 919 F.2d 946, 951 (5th Cir. 1990). The courts of appeal have now largely abandoned that early caution. *E.g., United States v. Heredia*, 483 F.3d 913, 924 n.16 (9th Cir. 2007) (en banc) (disavowing statements in past cases that the willful blindness instruction should rarely be given). Willful blindness instructions have become routine in any federal criminal case where the defendant's knowledge is contested.

Because of the prevalence of willful blindness instructions in federal criminal cases, the confusion that engulfs the doctrine cannot be allowed to continue. This Court's intervention is especially appropriate for two reasons. First, willful blindness is a judge-made doctrine; although Congress has enacted statutory willful blindness provisions in a few instances, the doctrine is overwhelmingly a creature of common law decisionmaking. If the willful blindness doctrine is to be tolerated in a criminal system that eschews common law theories of liability,[11] it is the Court's province to shape it.

Second, the Court has insisted for decades that the mens rea elements of federal criminal statutes be strictly enforced. It has not hesitated to review and reverse lower court decisions that watered down the knowledge and intent elements of criminal provisions. *See, e.g., Arthur Andersen LLP*

[11] All federal crimes are statutory. *See, e.g., United States v. Hudson*, 11 U.S. 32, 34 (1812). Courts have no power to detract from what Congress has provided.

v. United States, 544 U.S. 696 (2005); *Staples v. United States*, 511 U.S. 600 (1994); *Ratzlaf v. United States*, 510 U.S. 135 (1994; *Cheek v. United States*, 498 U.S. 192 (1991; *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978; *Morissette v. United States*, 342 U.S. 246 (1952. The Court's focus on mens rea recognizes that in the federal criminal system the requisite mental state is often what separates innocent conduct from criminality deserving of punishment.

The willful blindness doctrine, particularly as applied in the Second and Fifth Circuits, obscures the line between innocence and criminality. Whatever latitude judges have in construing mens rea provisions, they are not free to weaken the statutory elements that Congress has enacted.[12] *Global-Tech*, consistent with this Court's other mens rea decisions, cabins the doctrine to reduce the risk that it will undermine the "knowingly" element of many federal criminal statutes. Here, as it has done in the past, the Court should grant the writ to prevent the watering-down of mens rea by the lower federal courts.

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[12] In his dissent in *United States v. Jewell*, 532 F.2d 697 (9th Cir. 1976) (en banc), then-Judge Kennedy pointed out serious difficulties with a jury instruction that risks converting the mens rea element of "knowledge" into something less, such as recklessness or even negligence. *See id.* at 705-08 (Kennedy, J., dissenting). Justice Kennedy reiterated those concerns thirty-five years later, in his *Global-Tech* dissent. *See* 131 S. Ct. at 2072-73 (Kennedy, J., dissenting); *see also Heredia*, 483 F.3d at 930-33 (Graber, J., dissenting) (raising similar concerns); Ira P. Robbins, *The Ostrich Instruction: Deliberate Ignorance as a Criminal Mens Rea*, 81 J. Crim. L. & Criminology 191 (1990) (same).

D. The District Court's Willful Blindness Instruction Did Not Satisfy the *Global-Tech* Standard.

The court of appeals erred under *Global-Tech* in finding a sufficient evidentiary basis to support a willful blindness instruction and in approving the district court's formulation of the instruction.

1. There is no evidence that Bourke took "deliberate actions" or made "active efforts" to avoid learning of the alleged bribes, as *Global-Tech* requires.

The facts of *Global-Tech* show how far short of willful blindness the evidence falls here. The question there was whether the defendant (Pentalpha) had caused its United States distributor (Sunbeam) to infringe the patent of the plaintiff (SEB). The Court found that Pentalpha had copied all but the cosmetic features of SEB's product (a cool-touch fryer); Pentalpha knew that SEB's fryer embodied advanced features that would be valuable in the US market; it copied those features from an overseas version of the SEB fryer, knowing that overseas products usually do not bear US patent markings; and, in an effort to establish "plausible deniability," Pentalpha hired an attorney to conduct a right-to-use study, but deliberately chose not to tell the attorney that it had copied the fryer directly from SEB's. 131 S. Ct. at 2071.

This case involves no such "active efforts" by Bourke to avoid learning about Kozeny's bribery. Far from keeping his lawyers in the dark in the hope

of eliciting a favorable opinion, as Pentalpha did, Bourke involved them in virtually every aspect of his investment with Kozeny. He sought their advice on the lawfulness of Azeri officials as co-investors; he had them obtain assurances from Bodmer that the Azeris receiving Oily Rock shares would provide full value for them; and, on the lawyers' advice, he authorized them to establish the US advisory companies as a means of limiting liability he might incur from any improprieties by Kozeny of which he was unaware. As the prosecutor put it, Bourke "asked questions. He asked them again. Mr. Hempstead, his lawyer, testified he sometimes asked the questions three times. And that's what he did here." JA942.

The court of appeals' summary of the evidence that, in its view, supports the willful blindness instruction reveals no "deliberate actions" or "active efforts" by Bourke to shield himself from knowledge. App. 18-19. The court cites only one arguably "active effort" by Bourke; it asserts that he "created the American advisory companies to shield himself and the other American investors from potential liability for payments made in violation of the FCPA, and joined the boards of the American companies instead of joining the Oily Rock board." App. 18.

But Bourke did not "create" the American advisory companies. The advice to set them up came jointly from Hale and Dorr partner William Benjamin and Proskauer Rose partner Arnold Levine. As Levine testified, "[I]t was a recommend-ation made by me and a recommendation made by Bill Benjamin, kind of--a respected Boston lawyer

who represented another investor, Dick Friedman, that that would be an appropriate course of conduct to take considering all of the circumstances." T.1583. The Hale and Dorr and Proskauer partners were not blind, let alone willfully blind. The structure the lawyers proposed might have shielded Bourke from potential *liability* for the conduct of the Azeri entities, but it was not designed to shield him from *knowledge*, the relevant point here. The court of appeals takes prudent action, done on advice of counsel to reduce the risk of the unknown, and turns it into evidence of willful blindness. *Global-Tech* does not permit the mens rea of knowledge to be reduced in this manner.

2. The district court's willful blindness instruction departs from the *Global-Tech* standard in two significant ways. First, it omits the requirement that the defendant take "deliberate actions" or make "active efforts" to avoid knowledge. The court's instruction requires a finding that Bourke "consciously and intentionally avoided confirming" that Kozeny was bribing the Azeris (or that he "refrained from obtaining the final confirmation" of the bribery). App. 140-41. But one can *passively* avoid confirming something, while *Global-Tech* requires *deliberate, affirmative steps* to avoid knowledge. The district court's instruction fails to draw the critical distinction between deciding not to look and covering one's eyes.

Second, the district court's instruction tells the jury that *negligence* does not amount to willful blindness, but it omits that even *recklessness* is not enough. *Global-Tech* defines the reckless defendant

as "one who merely knows of a substantial and unjustified risk of such wrongdoing." 131 S. Ct. at 2071. To avoid the inevitable risk of confusion between conscious avoidance of knowledge of a fact and awareness of a "substantial and unjustifiable risk" that the fact exists, the district court should have made clear that recklessness does not amount to willful blindness.

The district court's failure to include the "deliberate actions" requirement in its instruction or to tell the jury that "one who merely knows of a substantial and unjustified risk" that a fact exists does not willfully blind himself to knowledge of the fact goes to the heart of the case. At most the evidence permitted a factfinder to conclude that Bourke was reckless. Had the jury been told that it had to find, beyond a reasonable doubt, "deliberate actions" to avoid knowledge and that recklessness would not suffice, it could not have found willful blindness. And the jurors likely would have had a reasonable doubt about Bourke's actual knowledge of the alleged bribery, given that the government's case rested on Bodmer and Farrell, both of whom were heavily impeached.

II. THE COURT SHOULD GRANT THE WRIT TO RESOLVE THE SPLIT IN THE CIRCUITS OVER THE NEED FOR UNANIMITY ON A SPECIFIC OVERT ACT.

The Court should grant the writ to resolve a second question that has divided the circuits: whether the jury must agree unanimously on a

specific overt act to return a guilty verdict under the general federal conspiracy statute, 18 U.S.C. § 371.

A. The Circuits Are Deeply Divided on Whether Jurors Must Agree Unanimously on a Specific Overt Act.

The circuits are deeply divided on whether the jury must agree unanimously on a particular overt act to return a guilty verdict under § 371. The pattern instructions of the Third, Eighth, and Ninth Circuits require the jury to reach unanimous agreement on a specific overt act,[13] although a recent Ninth Circuit case expresses doubt that the instruction is required.[14] The Fifth and Seventh Circuits, joined by the Second Circuit in this case, hold that unanimity on a specific act is not required.[15] The District of Columbia Circuit and the

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[13] Third Circuit Model Criminal Jury Instructions § 6.18.371F (2011) ("You must unanimously agree on the overt act that was committed."); Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit § 5.06D (2012) ("It is sufficient if the Government proves beyond a reasonable doubt, *one* such act; but in that event, in order to return a verdict of guilty, you must unanimously agree upon which act was done."); Ninth Circuit Model Criminal Jury Instructions § 8.20 (2010) ("Third, one of the members of the conspiracy performed at least one overt act . . . for the purpose of carrying out the conspiracy, with all of you agreeing on a particular overt act that you find was committed.").

[14] *United States v. Liu*, 631 F.3d 993, 1000 n.7 (9th Cir. 2011).

[15] *United States v. Griggs*, 569 F.3d 341 (7th Cir. 2009) ("We don't think the judge was required (or indeed permitted) to tell the jury that, to convict Moore, it had to agree unanimously on an overt act that at least one of the conspirators had committed. "); *United States v. Sutherland*, 656 F.2d 1181, 1202 (5th Cir. 1981) ("We are convinced that in this case the jury

Sixth Circuit (in its pattern instructions) have expressly left the issue open.[16] The remaining circuits have not taken a definitive position. *See Dougherty v. State*, 21 A.3d 1, 5-6 (Del. 2011) (surveying split in federal and state courts).

This deep and entrenched split in the circuits has developed over many years and shows no sign of abating. Further percolation will merely prolong the confusion.

B. This Case Is the Ideal Vehicle To Resolve the Circuit Split.

For two reasons, this case presents the perfect vehicle for resolving the circuit split. First, Bourke preserved the issue in the district court by requesting a specific unanimity instruction on the overt act element of Count One. JA57, 225; SA75-77. The district court gave the issue careful consideration and rejected the proposed instruction. App. 204-06. The court of appeals as well squarely confronted the issue and chose to join the Fifth and Seventh Circuits in holding that the jury need not unanimously agree on a particular overt act. App. 12-16.

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need not specifically have considered and agreed as to which of a large number of potential overt acts of bribery were established by the government.").

[16] *United States v. Hubbard*, 889 F.2d 277, 279-80 (D.C. Cir. 1989); Sixth Circuit Pattern Criminal Jury Instructions, Instruction 3.04 Use Note (2011) ("It is unclear whether an augmented unanimity instruction specifically requiring unanimous agreement on the same overt act is necessary.").

Second, the specific unanimity instruction was potentially decisive on Count 1. Because of a statute of limitations issue, the district court instructed the jury that it had to find an overt act on or after July 22, 1998. App. 149-50. By that point, Bourke and his family had made their one and only investment in Oily Rock, and his friends had made their final investment. Kozeny's massive options fraud was just months away from exposure by Bourke. The privatization of SOCAR was in doubt, and Oily Rock employees had begun to depart Baku. The indictment alleges a handful of overt acts on and after July 22 (and thus within the limitations period), JA87-89, but there was scant evidence that any of those acts furthered Kozeny's conspiracy to bribe Azeri officials. Under these circumstances, where the prosecution was hard-pressed to prove an overt act in furtherance of the conspiracy within the limitations period, the specific unanimity instruction that Bourke requested may well have made the difference between conviction and acquittal on Count One.

C. The Need for Unanimity on a Specific Overt Act Is an Important and Recurring Question.

The specific unanimity question presented here recurs daily in federal courts across the country. Many federal indictments include a conspiracy charge under § 371, which requires proof of an overt act.[17] The typical indictment alleges

[17] A Lexis search reveals that 503 cases in the courts of appeals since the beginning of 2011 have involved charges under § 371. Not all of these cases involved trials, of course, and thus not all

multiple overt acts, thus raising the unanimity question presented here.

As matters stand, a defendant facing a § 371 charge with multiple overt acts in the Third, Eighth, and Ninth Circuits will receive a specific unanimity instruction upon request. A defendant facing such a charge in the Second, Fifth, and Seventh Circuits runs the risk of a patchwork verdict, with the jurors agreeing that an overt act was committed but unable to agree on a particular act. Whether a defendant in the remaining circuits receives a unanimous verdict on a specific overt act depends on the practice of the district judge who draws the case. This Court should grant the writ to establish a uniform rule.

D. The Court of Appeals Misread This Court's Decisions in Holding That Unanimity Is Not Required on a Particular Overt Act.

It has long been settled that "a jury in a federal criminal case cannot convict unless it unanimously finds that the Government has proved each element." *Richardson v. United States*, 526 U.S. 813, 817 (1999). An overt act is indisputably an element of the conspiracy offense under 18 U.S.C. § 371. *See United States v. Shabani*, 513 U.S. 10, 14 (1994); App. 149-50. By contrast, "a federal jury need not always decide unanimously which of

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raised the unanimity problem addressed here. But the number of appellate cases in which § 371 charges appear gives a rough indication of the prevalence of that offense in the federal courts.

several possible sets of underlying brute facts make up a particular element, say, which of several possible means the defendant used to commit an element of the crime." *Richardson*, 526 U.S. at 817.

The court of appeals relied on *Richardson* to hold that a federal jury does not have to agree unanimously on a particular overt act. App. 14-15. But that case points in the opposite direction. In *Richardson*, the statute at issue--21 U.S.C. § 848(a)--made it a crime for a person to "engage in a continuing criminal enterprise." The statute defined "continuing criminal enterprise" as a violation of the drug laws where "such violation is a part of a continuing series of violations." *Id.* § 848(c). The question for the Court was "whether a jury has to agree unanimously about which specific violations make up the 'continuing series of violations.'" *Richardson*, 526 U.S. at 815. The Court "h[e]ld that the jury must do so. That is to say, a jury in a federal criminal case brought under § 848 must unanimously agree not only that the defendant committed some 'continuing series of violations' but also that the defendant committed each of the individual 'violations' necessary to make up that 'continuing series.'" *Id.*

The *Richardson* rationale supports a requirement of jury unanimity on a specific overt act under § 371. Conspiracy, like the CCE statute in *Richardson*, has great breadth; this Court has cautioned against the "pervasive and wide-sweeping nets of conspiracy prosecutions." *Grunewald v. United States*, 353 U.S. 391, 404 (1957). "[T]hat breadth aggravates the dangers of unfairness" that

permitting a conviction without agreement on a specific overt act would risk. *Richardson*, 526 U.S. at 818. That is particularly so because an overt act, like a "violation" in the CCE statute, "covers many different kinds of behavior of varying degrees of seriousness." *Id*. And as with "violations" under the CCE statute, the government may allege "numerous" overt acts, thus increasing the risk that treating the acts as alternative "means" will "cover-up wide disagreement among the jurors" about which specific act in furtherance of the conspiracy--if any--the government has proven beyond a reasonable doubt. *Id*. at 819. Thus, just as the jury must be given a specific unanimity instruction when a single CCE count charges multiple underlying violations, it must be given a specific unanimity instruction when--as here--a single conspiracy count charges multiple overt acts.

III. THE COURT SHOULD GRANT THE WRIT TO ADDRESS THE IMPORTANCE OF RULE 106 IN CRIMINAL CASES, WHERE CONSTITUTIONAL CONCERNS UNDERSCORE ITS TRUTH-SEEKING PURPOSE.

The district judge excluded evidence that a principal government witness had testified falsely. Fed. R. Evid. 106, properly applied, would have provided a contemporaneous adversary correction. T.1315, 1344, 1349, 1350. The confusion that has surrounded Rule 106, particularly in criminal cases, ought now to be dispelled.

As noted above, cooperating witness Bodmer testified for the prosecution that he told Bourke of the corrupt arrangements with Azeri officials. Bodmer said that this conversation took place during a walk near the Hyatt in Baku on the morning of February 6, 1998. The defense cross-examined Bodmer about this alleged conversation.[18] The government then called Bodmer's law partner Rolf Schmid, who wrote a 2001 memorandum that summarized what Bodmer and his law firm knew and did about the Azeri officials. Schmid said this memorandum was based in part on his conversations with Bodmer, and in part on other information generated within Bodmer's law firm.

The government offered only the portions of the memorandum that corroborated Bodmer's version (App. 152-53), saying that these were Fed. R. Evid. 801(d)(1)(B) consistent statements. T.1348-49, 1380-81. The defense, citing Rule 106, demanded that the entire memorandum be admitted because it contained assertions that contradicted Bodmer's version. App. 169, 173-74; JA385-90. One excluded portion said that Bodmer had no "specific knowledge" of "corrupt payments." App. 164. If this were so, then he could not have imparted any such knowledge to Bourke. Another portion characterized the credit facilities for Azeri officials as "arm's length," thus negating any corrupt purpose. App.

[18] T.1382-83. Later in the trial, flight records surfaced that showed Bourke had not been in Baku at the time Bodmer said the conversation occurred. The government stipulated that this was so, but then claimed that the conversation must have taken place on another date. This issue--which is the subject of Bourke's pending appeal--does not affect the Rule 106 question presented here.

162. These two excluded portions took any incriminating content out of any Bodmer-Bourke conversation, whenever and wherever the conversation might have happened.

This scenario echoes the Rule 106 error that the Court addressed in *Beech Aircraft*, but in the context of a criminal trial where constitutional principles of the Sixth Amendment must bear upon the Rule's application. The district judge's focus on admissibility rather than upon the rule-based commitment to "fairness" also raises the issue implicit in the *Beech* holding but still controversial in the lower courts--that is, whether Rule 106 requires that the additional matter be independently admissible.

The court of appeals evaluated the fairness issue by looking solely at the theory of the government's case, using the wrong test of fairness and admissibility. Rule 106 gives jurors contradictory and explanatory information that allows them to evaluate the prosecution and defense versions of a significant event in a single context. This interpretation of Rule 106 is evident from *Beech Aircraft*, which the court of appeals did not even cite. In *Beech*, the manufacturer called Captain Rainey as an adverse witness, and used his memorandum, to support its theory of pilot error. This Court held that Rule 106 required admission of the memorandum's statement that a manufacturing defect was a possible cause of the accident. Thus, *Beech* requires that when a litigant offers a document in support of its case theory--or narrative--"fairness" requires that any portions of the same

document that advance the opponent's case theory must at that time be admitted.

The court of appeals, in contrast, required that the omitted portions be "explanatory" of the admitted portions. App. 33-34. Having set out an unduly narrow test, it then made a significant factual error that undermined its Rule 106 analysis. Rolf Schmid was called, and the portions of his memorandum offered, to bolster the testimony of Hans Bodmer, the most significant government witness. The court of appeals wrongly said that the memo was offered as Schmid's prior statement. App. 34. This was not so. Schmid was a minor player in this drama, his only purpose being to shore up Bodmer's version.[19] The omitted portions included two statements that undermined Bodmer's testimony and were significantly exculpatory. The court did not cite *Beech Aircraft*, and, as we show below, adopted a test at odds with the language of the *Beech* opinion.

The importance of this issue may be seen from four perspectives: text, independent admissibility, constitutional principle, and adversary truth-seeking.

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[19] The government twice announced its intention to offer the memo fragment--once during Bodmer's cross and again just before Schmid took the stand. *E.g.*, T.1344-50; JA385-90. The goverment made the offer (and the district court admitted the fragment) during Schmid's direct examination. App. 168-70. Thus, the fragment could not have been a Schmid prior consistent statement because Schmid had not yet been cross-examined. The fragment was indisputably designed to bolster Bodmer, and therefore the excluded portions had a clear relationship to the portion that was admitted.

A. Text.

Rule 106 provides:

> If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part--or any other writing or recorded statement--that in fairness ought to be considered at the same time.

The rule contains language drawn from what is now Fed. R. Civ. P. 32(a)(6), which deals with depositions, though Rule 106 obviously has a broader sweep.

The text makes "fairness" the touchstone.

B. Independent Admissibility.

Wright, et al., *Federal Practice & Procedure* § 5078.1, puts this issue pithily: "[W]hether evidence that is inadmissible under one of the other Evidence Rules can be admitted for completeness under Rule 106 has proved to be one of the most contentious issues among the writers and courts. [Citing authorities.]" The authors note that when Rule 106 was proposed, the Justice Department sought to have the words "which is otherwise admissible" added as a qualifying phrase. This effort failed in the drafting phase and in the debates over Congressional approval of the Rules. *Id.*[20]

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[20] Professor Kenneth Broun notes that the requirement of independent admissibility is particularly inapt when the

Rule 106 says that "any other part" should be admitted if the fairness standard is met. The court of appeals did not cite or discuss *Beech*, even though petitioner cited it in briefing and emphasized it at argument. Thus, the court of appeals' conclusion that the excluded matter was not relevant ignored and fell afoul of the *Beech* dictum that when "misunderstanding or distortion can be averted only through presentation of another portion, the material required for completeness is ipso facto relevant and admissible." 488 U.S. at 172.

Beech can and should be read to say that other admissibility issues, such as the hearsay concern that the trial judge voiced, must also fall before the textual mandate that "any" portion is to be admitted in the interest of fairness.

The rule expresses a principle about "door opening" that is familiar to advocates and courts. In criminal cases, the prosecution has a case-law "rule of completeness" that allows otherwise inadmissible evidence when the defendant has "opened the door." *See, e.g., Harris v. New York*, 401 U.S. 222 (1971) (impeaching defendant with otherwise inadmissible non-*Miranda* statement when defendant takes the stand and denies guilt).[21]

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omitted portion is said to be inadmissible hearsay. McCormick, *Evidence* § 56.

[21] Other cases are collected in LaFave, Israel & King, *Criminal Procedure* § 9.6 (4th ed. 2004). Indeed, the Arizona Supreme Court, revisiting a confrontation issue on remand in light of *Crawford*, held that an equitable rule of completeness overrides

C. Constitutional Principle.

It is surprising to hear that necessary correctives to falsehood in a criminal trial should be withheld through the mechanistic application of limiting rules. Rule 106 safeguards the defendant's confrontation and due process, and is proof against such assertions.

Beech was a civil case; the Rule's text and evident purpose were enough guidance to resolve the issues. But in a criminal trial, a defendant's invocation of Rule 106 brings into play the values that the Sixth Amendment enshrines. The Sixth Amendment is based on the adversary system for truth-seeking--a fair jury to hear the case, an advocate to present the evidence and argument, confrontation and cross-examination to rebut the prosecution's narrative, and compulsory process to obtain the necessary evidence to complete the picture. The due process clause is also relevant in this connection.

The due process and compulsory process clauses compel admission of reliable exculpatory evidence. In *Holmes v. South Carolina*, 547 U.S. 319 (2006), the Court held that the constitution "prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are

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and defeats a defendant's confrontation rights, when the defendant offered a portion of an out-of-court statement. *State v. Prasertphong*, 114 P.3d 828 (Ariz. 2005), *on remand from Prasertphong v. Arizona*, 541 U.S. 1039 (2004), *vacating* 75 P.3d 675 (Ariz. 2003).

disproportionate to the ends that they are asserted to promote." *Id.* at 325 (citing, *e.g., Chambers v. Mississippi*, 410 U.S. 284 (1973)); *see also* Peter Westen, *The Compulsory Process Clause*, 74 Mich. L. Rev. 71, 149-50 (1974).

Holmes and the cases it cites teach that limiting Rule 106 by invoking ordinary evidence rules, or by trivializing its role in giving the jurors a full picture of disputed events, is impermissible.

D. Adversary Truth-Seeking.

By mandating that what *Beech Aircraft* termed "misunderstanding and distortion" be corrected immediately, Rule 106 respects a fundamental truth-seeking function of the adversary process.

As Professors Brian Leiter and Ronald Allen have written, the law of evidence is most useful when it assists triers in assessing "relative plausibility" of competing narratives. This function is performed by several kinds of evidence rules, particularly including Rule 106.[22] Allen & Leiter,

[22] "The relative plausibility theory also explains many discrete aspects of the rules of evidence, a point deserving some elaboration. Many aspects of trial implicitly embrace the relative plausibility theory in order to advance the veritistic consequences at the heart of naturalized epistemology. For example, various rules of completeness override technical regulatory or exclusionary rules of evidence. These rules provide data to factfinders in conventional story form by admitting surrounding material relevant to specific testimony. One example is Federal Rule 106 . . . ." Professors Leiter and Allen note that at common law, this completeness function was also performed by the res gestae doctrine. 87 Va. L. Rev. at 1535. Their basic proposition about the truth-seeking aspects of evidence rules is summarized at 87 Va. L. Rev. at 1537-50.

Naturalized Epistemology and the Law of Evidence, 87 Va. L. Rev. 1491, 1534-35 (2001). Rule 106 plays its role by permitting an advocate immediately to place competing evidence alongside that introduced by her opponent. That is, the rule's textual commitment to fairness makes it an interpretive canon for the entire set of Federal Rules, an observation supported by its inclusion in the 100 series of rules that deal with general interpretive principles.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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