No.

**IN THE SUPREME COURT OF THE UNITED STATES**

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THOMAS CAMPBELL BUTLER, MD

*Petitioner*

v.

UNITED STATES OF AMERICA

*Respondent*

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On Petition for Writ of Certiorari
To The United States Court of Appeals for the Fifth Circuit

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# PETITION FOR WRIT OF CERTIORARI

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Jonathan Turley
*Counsel of Record*
2000 H Street NW
Washington, DC 20052
(202) 994-7001

Of Counsel

Kevin J. Wolf
Jacob A. Kramer
Nikki A. Ott
BRYAN CAVE LLP
700 Thirteenth St. NW
Washington, D.C. 20005
(202) 508-6000

Daniel C. Schwartz
BRYAN CAVE LLP
700 Thirteenth St. NW
Washington, D.C. 20005
(202) 508-6000

## QUESTIONS PRESENTED

1. Whether a federal export control crime requiring proof of willfulness can be proven simply by showing imputed knowledge when the same law contains an alternative standard for negligent violations of the export control regulations.

2. Whether a defendant can be forced to defend against contract fraud counts involving university grants in the same case as national security counts alleging mishandling of plague samples in the absence of a clear theory of joinder under Federal Rule of Criminal Procedure 8(a).

3. Whether a defendant can be denied testimony of the only witnesses to alleged export control violations based on the unsupported assumption of the court that their testimony would not be able to contribute to a good-faith defense.

4. Whether a court must consider the relevant trial motion before determining that a defendant failed to properly request discovery of critical evidence.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### CASES

**STATUTES**



**RULES**



**MISCELLANEOUS AUTHORITY**

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## OPINIONS BELOW

The district court orders denying Petitioner's Motion to Sever (Pet. App. 1a) and Motion to Take Deposition of Tanzanian Witnesses (Pet. App. 2a-4a) are not reported. The district court orders granting the Motion to Quash (Pet. App. 5a-6a) and denying the discovery of e-mail evidence (Pet. App. 7a-9a) are not reported. The district court order imposing sentence (Pet. App. 10a-15a) is not reported. The opinion of the court of appeals (Pet. App. 16a-36a) is reported at 429 F.3d 140. The order of the court of appeals denying the Petition for Rehearing En Banc (Pet. App. 37a-38a) is not reported.

## STATEMENT OF JURISDICTION

Final judgment was entered in this case by the United States District Court for the Northern District of Texas, Lubbock Division, on March 10, 2004. The decision of the panel of the Court of Appeals for the Fifth Circuit was rendered on October 25, 2005. The denial of the petition for rehearing *en banc* was rendered on January 11, 2006. The

jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

The relevant sections of the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. §§ 1701-1707, and Federal Rule of Criminal Procedure 8(a) are reproduced in the appendix to this petition. (Pet. App. 39a-40a).

## STATEMENT OF THE CASE

### 1. Statement of Facts

Dr. Butler is an internationally renowned authority on the study and prevention of infectious diseases, including, in particular, plague.[1] As the world's leading expert on plague, Dr. Butler was in great demand from various governments, including the United States. During 2001, Dr. Butler conducted plague research in Tanzania during an outbreak of the disease with the encouragement of the Food and Drug Administration ("FDA"), the Centers for Disease Control and Prevention ("CDC"), and the United States Army. His goal was to develop a drug to treat plague without harmful side effects, such as blindness and birth defects.

In January 2003, Dr. Butler discovered 30 vials of plague-causing virus – *yersinia pestis* – missing from his laboratory at Texas Tech University Health Sciences Center ("TTUHSC") in Lubbock, Texas. When he could not confirm what happened to the vials, he notified his supervisors who then notified campus police. Soon after, the Federal Bureau of Investigation ("FBI") was informed of the

[1] The District Court found that Dr. Butler's research and discoveries have "led to the salvage of millions of lives throughout the world," and that his case "exemplif[ies] a great service to society as a whole." (Pet. App. 14a).

incident and government officials began to make statements about the missing vials and Dr. Butler, fueling an international media frenzy. Dr. Butler fully cooperated with the FBI, waived his right to counsel, and agreed to searches of his home and office.

After issuing the original indictment related to the missing vials of *yersinia pestis*, the government asked Dr. Butler to plead guilty to several of the counts in exchange for dropping the remainder of the counts. He was told that if he did not, the government was prepared to add fraud charges stemming from a series of administrative contract disputes with TTUHSC. When he asserted his innocence and refused to plead guilty, the government secured a superceding indictment that added dozens of contract counts unrelated to the plague counts.[2] The government then again demanded a guilty plea to some of the plague counts, and Dr. Butler again refused. Despite motions to sever the two sets of counts, he was then tried on both the contract counts related to his university and the national security and false statements counts related to the handling of plague samples.

### 2. Proceedings Below

On April 15, 2003, Dr. Butler was indicted on 15 counts related to the alleged improper importation, transportation, and exportation of *yersinia pestis*; two counts of making an alleged false statement to federal officials

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[2] Like academic programs at most universities, TTUHSC received a percentage of some of Dr. Butler's grants and contracts. TTUHSC and Dr. Butler, however, disputed which contracts or grants fell within TTUHSC's shared-fee policies, particularly with respect to consulting contracts. Such disputes are common among academic researchers and their universities. The government's own witnesses admitted that there is a long history of disputes over the requirements of university shared-fee policies governing research contracts, and that TTUHSC's policies were "vague."

(collectively, the "Plague Counts"); and one count alleging a tax violation (the "Tax Count").

A superseding indictment, issued on August 13, 2003, included 54 additional counts alleging misapplication and fraud under certain research and consulting contracts (the "Contract Counts"). The trial court denied motions to sever the Plague, Tax, and Contract Counts. (Pet. App. 1a). After a three-week jury trial, Dr. Butler was convicted on December 1, 2003 of 44 Contract Counts, including mail fraud, wire fraud, and programs fraud, based upon his alleged failure to comply with Texas Tech University policies. He was also convicted of three export control counts: (1) an unauthorized export to Tanzania; (2) illegal transportation of hazardous materials; and (3) making a false statement relating to his declaration on a shipping label. Dr. Butler was acquitted of 22 other counts in the superseding indictment, including the false statements charges.

The United States District Court for the Northern District of Texas entered judgment on March 10, 2004. Dr. Butler filed his notice of appeal on March 24, 2004 and, after completion of briefing, oral argument was held before an appellate panel on June 8, 2005. On October 25, 2005, the panel, in a *per curiam* decision, upheld the conviction.

On November 7, 2005, Dr. Butler filed a petition for a rehearing *en banc* raising four issues: (1) the use of an imputed knowledge standard to prove a willful criminal export control violation; (2) misjoinder of standard contract counts with national security counts involving plague samples; (3) the lower court's failure to address the relevant motion in reviewing the denial of e-mail evidence; and (4) the denial of testimony of the only witnesses to the export control violations based on the lower court's unsupported assumption that their testimony would not contribute to a good-faith defense. This petition was denied on January 11, 2006.

## REASONS FOR GRANTING THE WRIT

### I. THE DECISION BELOW CONFLICTS WITH PRIOR RULINGS BY DESTROYING THE EXPRESS DISTINCTION BETWEEN CRIMINALLY WILLFUL AND "KNOWING" EXPORT CONTROL VIOLATIONS.

The decision below contradicts this Court's prior holdings on the meaning of "willfulness" in criminal provisions, as explained in its trilogy of cases: *Bryan v. United States*, 524 U.S. 184 (1998); *Ratzlaf v. United States*, 510 U.S. 135 (1994); and *Cheek v. United States*, 498 U.S. 192 (1991). As such, it constitutes an important question of law that contradicts decisions of this Court. S. Ct. Rule 10(c). It further conflates the distinct standards that apply to willful and knowing violations – allowing the same standard of imputed knowledge for either provision. The result would effectively subject all exporters to criminal liability for conduct that is expressly subject to civil treatment under federal law. The potential impact on shippers, researchers, and businesses is obviously significant. If the separate criminal and civil provisions are to be merged at such potential cost, it should be done by a decision of Congress, not the courts. Finally, there is evidence of confusion among the circuit courts as to the applicability of the *Bryan*, *Ratzlaf*, and *Cheek* line of cases. S. Ct. Rule 10(a).

In *Bryan*, the Court established that willful violations generally require a showing that a criminal defendant "acted with an evil-meaning mind." *Bryan*, 524 U.S. at 193. While the Court held that specific knowledge of a federal licensing requirement is not necessary, it is necessary to show "knowledge that his conduct was unlawful." *Id.* The Court further held that specific knowledge is required in some instances where the statutory schemes are complex since, absent a required showing of specific knowledge, non-nefarious conduct could easily be drawn within the scope of

the criminal provision. It noted that some alleged crimes "involve[] highly technical statutes that present[] the danger of ensnaring individuals engaged in apparently innocent conduct." *Id.* at 194. Thus, the Court reaffirmed its holdings in *Cheek* and *Ratzlaf* requiring the higher showing of a "voluntary, intentional violation of a known legal duty." *Cheek*, 498 U.S. at 201. Where *Bryan* involved a simple and obvious firearms violation, *Cheek* and *Ratzlaf* involved more complex statutory schemes related to federal taxation and currency transaction structuring rules, respectively.

The decision below directly contradicts both of the standards laid out in this trilogy of cases that apply to complex and less complex statutory schemes. More importantly, it captures the lack of clarity and growing confusion in the application of these cases. The district court first failed to apply the correct specific intent standard as laid out in *Cheek* and *Ratzlaf*. Instead, despite the obvious complexity of the export control statutory scheme, the court applied the lower standard articulated in *Bryan* for less complex statutory schemes. The district court then compounded this legal error by allowing the type of imputed knowledge evidence used under the civil standard rather than the willfulness standard. Thus, the district court succeeded in violating both standards laid out in the *Bryan*, *Cheek*, and *Ratzlaf* trilogy. For its part, the lower court failed to address the appropriate standard in its opinion upholding the trial court. Given the determinative impact of which standard applies (the *Cheek/Ratzlaf* standard for complex statutory schemes, the *Bryan* standard for less complex statutory schemes, or the civil standard), the omission constitutes a glaring failure of appellate review.

Export control violations fall squarely within the scope of statutes described in *Cheek* and *Ratzlaf*.[3] The

[3] In a separate error raised on appeal but again not addressed in the decision below, the trial court failed to "instruct the jury on the effect and relevance of [Dr. Butler's] ignorance of the law," as required by prior

government charged Dr. Butler with violating export control regulations in effect under the authority of the IEEPA by exporting *yersinia pestis* on September 9, 2002 to Tanzania without first applying for and receiving a license to do so from the U.S. Commerce Department.

The export control statutory and regulatory scheme that governs such exports is extraordinarily complex. There is not one page, statute, statutory section, web page, government agency, or even a single set of regulations to which one can look to determine with certainty whether any particular item requires a U.S. Government license to export from the United States. Rather, to make a decision about whether a license is required – or even to know to ask whether a license is required – one must make many convoluted, often counterintuitive jumps between regulatory sections and schemes to come to a conclusion. Because most otherwise intelligent people, including most attorneys, are unable to navigate this "Rube Goldberg" approach to export controls, a small cadre of highly specialized subject matter experts has developed. *Cf. Cheek*, 498 U.S. at 199-200 ("[t]he proliferation of statutes and regulations has sometimes made it difficult for the average citizen to know and comprehend the extent of the duties and obligations imposed by [the federal law]").

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federal decisions. *See United States v. Hernandez*, 662 F.2d 289, 292 (5th Cir. 1981) (further emphasizing that a trial court must "put squarely before the jury the relevance of ignorance of the law"); *United States v. Dichne*, 612 F.2d 632, 636 (2d Cir. 1979) ("willful violation" for currency transportation requires proof of defendant's "'knowledge of the reporting requirement and his specific intent to commit the crime'") (quoting *United States v. Granda*, 565 F.2d 922, 926 (5th Cir. 1978)); *Granda*, 565 F.2d at 924-26 (overturning conviction for "willful violation" due to failure to give "proper instruction [that] would include some discussion of the defendant's ignorance of the law" and rejecting the argument that the statutory provisions "do not require that the defendant be aware of the fact that he is breaking the law").

Moreover, due to the various permits, licensing provisions, and licensing exemptions that might apply to an export of laboratory samples, the higher standard is needed to protect the "non-nefarious" actor. *Bryan*, 524 U.S. at 195 n.22 (noting that the complexity of some laws "may lead to the unfair result of criminally prosecuting individuals who subjectively and honestly believe they have not acted criminally"). Finally, courts have held that the higher standard of knowledge applies to statutes, as in *Cheek* and *Ratzlaf*, that "prescribed the legal duty that the defendant was charged with violating."[4] *United States v. Mattice*, 186 F.3d 219, 226 (2d Cir. 1999). Thus, in *Cheek*, the tax statute criminalized willful violations of the standards "imposed by this title." *Cheek*, 498 U.S. at 193. The IEEPA has a similar self-contained legal duty. *See* 50 U.S.C. § 1705(b) ("Whoever willfully violates, or willfully attempts to violate, any license, order, or regulation issued under this chapter . . . .").

Under the controlling standard, the government had to prove a "voluntary, intentional violation of a known legal duty" by Dr. Butler. *Cheek*, 498 U.S. at 201. The government had to show that Dr. Butler had actual knowledge of the specific obligation and intentionally violated that obligation. By allowing purely circumstantial evidence of possible knowledge, the court robbed the language of the export control law of any coherent meaning by conflating the criminal and civil standards. The IEEPA, the statutory authority for the Export Administration Regulations ("EAR"), distinguishes between criminal and

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[4] The circuit courts have been given no guidance on the importance of this factor since the Court last addressed the question of willful violation of complex statutory schemes. The result is that this factor, emphasized in the Second Circuit, is not addressed in cases from other circuits – despite its significance to case like Dr. Butler's. *See also Bryan*, 524 U.S. at 199 n.33 (discussing relevance of references to violations of a specific chapter).

civil violations by imposing distinctly different standards of proof. In the three export control counts on appeal, the government chose to charge "willful" violations that require a showing of actual knowledge and specific intent. Conversely, it chose not to charge under the "knowing" provision of that statute. *See* 50 U.S.C. § 1705(a) (the IEEPA's separate civil penalty provision). At trial, the government presented no evidence of Dr. Butler's actual knowledge or specific intent. Rather, the lower court concluded that actual knowledge and specific intent could be established merely by imputed evidence of knowledge.

The sweeping effect of the lower court's ruling is clear from the evidence that it accepted as proof of intent. While it is uncontested that the government did not introduce a single witness or document showing actual knowledge and specific intent, the court below accepted the government's argument that willfulness can be proven by the mere existence of a downloaded document in a communal laboratory that makes a passing reference to the license requirement.[5] (Pet. App. 32a). The government had introduced no evidence that Dr. Butler ever saw this document or read the single sentence in the document referencing export licenses, much less that he intentionally violated its requirement. Thus, according to the court below, intent to violate the regulation can be established without any proof that the defendant ever downloaded a document containing the regulation in a laboratory used by others, saw it, understood it, or intentionally violated the provisions it described.

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[5] This central piece of evidence was a one-sentence reference to a Commerce Department export requirement that crosses over from the bottom of the 112th page of an appendix to an article published more than a decade earlier (1989) in a massive laboratory safety manual containing more than 850 pages. This manual was found in a laboratory used by various researchers at the university.

The other "evidence" embraced by the court below is even more startling. The court held that the mere fact that someone has used boilerplate shipping documents from a private shipper can prove the actual knowledge and specific intent sufficient to establish "willfulness." For example, the court said that Dr. Butler "certified on the FedEx waybill that the samples were being 'exported . . . in accordance with Export Administration Regulations.'" (Pet. App. 32a). In reality, Dr. Butler merely signed a standard, non-government form beneath boilerplate references to various regulatory sources, U.S. State Department licensing requirements, and "international treaties, including the Warsaw Convention."[6] The logical implication of the lower court's decision in this regard is that *everyone* who signs a standard shipping document *per se* has the specific knowledge and intent sufficient to support a criminal conviction if it turns out that the export was not in compliance with applicable export control rules.

Likewise, the court held that actual knowledge and specific intent can be imputed by the mere fact that Dr. Butler had signed four prior air waybills and "checked the box indicating a Shipper's Export Declaration [("SED")] was not needed (which it is not in those circumstances)." (Pet. App. 32a-33a).[7] Yet, the Federal Express form merely asks

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[6] This includes actual knowledge and the specific criminal intent to violate the content and requirements of everything referred to therein, including all "international treaties, including the Warsaw Convention." Such a conclusion defies logic and is baseless. In any case, it is a textbook example of imputed, not actual, knowledge, and is, on its face, insufficient to establish the specific intent required to support a conviction under the criminal penalty provisions of the IEEPA.

[7] The government never put on any evidence proving beyond a reasonable doubt that Dr. Butler's signatures on these everyday shipping forms – documents that were not U.S. government forms or applications – somehow provided Dr. Butler with knowledge of the requirements of the EAR and that, in September 2002, he acted with specific intent to circumvent those requirements.

the shipper to "Check One" of two different boxes pertaining to SEDs. One box states "No SED required per Exemption." The second box states, "No SED required, value $2,500 or less per Schedule B Commodity number." Dr. Butler correctly identified the value of the shipment as being $5.00 and of "No Commercial Value," a valuation that was not contested by the government. Based on a plain reading of the form, Dr. Butler was required to do little more than a quick mathematical calculation to determine which of the two boxes to check. Determining that $5.00 is less than $2,500 does not require any knowledge of or reference to the EAR and cannot reasonably be said to constitute evidence of an intent to violate the EAR.

Finally, the court below held that actual knowledge and specific intent can be shown by the mere fact that Dr. Butler has shipped "infectious substances and other dangerous goods more than 30 times." (Pet. App. 33a). This simply shows, however, that Dr. Butler has used Federal Express. The court acknowledged that the past shipments did not require a license.

The absence of direct evidence in this case illustrates the real danger described by this Court in *Bryan* when it held that some statutory schemes demand a showing of specific knowledge. There is significant danger of non-nefarious actors being criminally prosecuted if exporters can be charged because they happen to work in a laboratory that contains a manual of hundreds of downloaded pages that includes a single line referencing a permit or because they sign an air waybill that correctly states the value of a shipment. *See United States v. Moran*, 757 F. Supp. 1046, 1051-52 (D. Neb. 1991) (rejecting boilerplate labeling in a willful copyright violation and acquitting after the government failed to offer evidence refuting defendant's denials of certain acts).

Such an interpretation destroys the distinction made in the IEEPA and Section 1705. Civil penalties are based on

a knowing standard and, at the time of Dr. Butler's conviction, were restricted to a fine "not to exceed $10,000." 50 U.S.C. § 1705(a). Criminal penalties could range up to ten years in prison and $50,000 fines.[8] 50 U.S.C. § 1705(b). To impose such heavy penalties, the drafters expressly required evidence of a willful violation. By allowing "knowing" evidence to satisfy either provision, the court below made future charges dependent not on the evidence, but on the whim of the prosecutors. As this case demonstrates, prosecutorial zeal, fueled by a desire to force a defendant to accept a plea bargain, would be sufficient cause to convert civil charges into criminal charges since no additional evidence would be required. The drafters of the enforcement provisions sought to avoid that circumstance by creating distinct criminal and civil provisions.

The lower court's holding on the export control counts would not only collapse the "willful" and "knowing" provisions of federal law; it also would radically alter the standard for all crimes requiring a showing of actual knowledge and specific intent. *See United States v. Tooker*, 957 F.2d 1209, 1213-14 (5th Cir. 1992); *United States v. Hernandez*, 662 F.2d 289, 291-92 (5th Cir. 1981); *United States v. Davis*, 583 F.2d 190, 192-94 (5th Cir. 1978). Indeed, the evidence in this case not only falls short of the higher standard laid out in *Cheek* and *Ratzlaf*; it also fails the standard described in *Bryan* for less complex statutory schemes. The Court in *Bryan* affirmed the need to show an intentional act, something greater than an act of negligence or a civil violation. Under that standard, the government must still establish that the defendant had "knowledge that his conduct was unlawful." *Bryan*, 524 U.S. at 193. The

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[8] Congress amended the IEEPA's penalty provisions on March 9, 2006. Under the current law, the limit for civil penalties is $50,000. Willful violators may now be imprisoned for up to twenty years. U.S. PATRIOT Improvement and Reauthorization Act, Pub. L. No. 109-177, § 402, 120 Stat. 192 (2006).

government offered no direct evidence of such knowledge. Instead, the government sought to secure a criminal penalty under Section 1705(b) with evidence only sufficient for a charge of a knowing civil violation under Section 1705(a).

In its decisions in *Bryan, Cheek,* and *Ratzlaf*, this Court expressly preserved the distinction between willful and non-willful offenses and further required specific knowledge in cases involving complex statutory schemes. The court below erred by ignoring these distinctions and allowing the same imputed evidence to support either criminal or civil charges – purely at the discretion of the government. This creates a fluid and arbitrary standard that would cause a chilling effect for all exporters who would never know whether a simple act or omission could be converted into criminal charges and proven with no more than the same evidence required for a civil charge.

## II. THE DECISION BELOW FAILS TO OFFER A THEORY OF JOINDER OF CONTRACT AND PLAGUE COUNTS IN CONTRADICTION WITH THE LANGUAGE OF FRCP 8(A) AND THE RULINGS OF OTHER CIRCUITS.

The decision below adopts an unprecedented approach to joinder that negates the express requirements of Federal Rule of Criminal Procedure 8(a). It further illustrates growing conflicts among the circuits on how courts should review challenges to the joinder of unrelated counts. *See* S. Ct. Rule 10(a), (c).

Rule 8(a) mandates that any joined counts must be "of the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan." Fed. R. Crim. P. 8(a). The government never stated such a theory of joinder in the superceding indictment and never developed such a theory during the trial. Indeed, during oral argument, the court

below asked the government four separate times to state a theory of joinder. Ultimately, the government could only respond that "it was a little of this and a little of that."

The government could not state a coherent theory of joinder because there was none. Indeed, the prosecutors openly threatened to add the dozens of Contract Counts solely in order to pressure Dr. Butler's acceptance of a plea bargain on the original Plague Counts.[9]

The introduction to the superseding indictment does not allege any connection between the two groups of charges.[10] Yet, the lower court allowed joinder without any government theory connecting all of the Contract Counts to the Plague Counts in the superceding indictment. (Pet. App. 22a-23a). Instead, the court said that it is sufficient that the FDA contracts (in Counts 49-54) involved plague. *Id.* On its face, this ruling would render Rule 8(a) meaningless. There is little conceivable connection between the Contract Counts and the Plague Counts other than Dr. Butler. As one court observed, "[i]f the mere fact that the offenses were allegedly committed by the same person were a sufficient reason for joinder, there would be no such thing as an improper joinder

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[9] The basis for these contract counts was a University policy that even government witnesses, including University officers, admitted was viewed as confusing by the faculty. Indeed, Ms. Melissa Marsh, the Senior Director of Clinical Research, found that 90 percent of the research trials done by other faculty members showed the same violations as Dr. Butler. The government could not cite a single case in history where it used such common disputes between a university and academics as the basis for a criminal prosecution.

[10] Of the fourteen Plague Counts, only four reference this introduction to the superseding indictment - counts 58, 62, 64, and 66. In addition, the superseding indictment contains a section called "The Scheme," which fails to describe any alleged connection between the Contract Counts and the Plague Counts. It only describes an alleged "Scheme" to defraud TTUHSC in connection with Contract Counts 1-22. It makes no mention at all of any conduct giving rise to, or resulting from, the Plague Counts.

and Rule 8 would be meaningless." *United States v. Braig*, 702 F. Supp. 547, 548 (E.D. Pa. 1989).

First, the lower court did not even attempt to find a theory of joinder in the superceding indictment of the Plague Counts to the vast majority of Contract Counts, which have no connection to either plague research or the specific conduct related to the disappearance of the 30 vials. Second, even the allegations about the five FDA-related contracts were not based on the manner in which Dr. Butler conducted his research but on Dr. Butler's alleged concealment from TTUHSC of the agreements with the FDA. The mere fact that the research involved plague is irrelevant to the alleged concealment; it does not establish that the two sets of charges are "based on the same act or transactions." Fed. R. Crim. P. 8(a).

The lower court conspicuously failed to find any connection between the Contract Counts and the Plague Counts. The court instead cited the description in the superceding indictment of Dr. Butler's contracts with various companies and agencies:

> The indictment specifically outlines Butler's research into non-plague-related diseases for Pharmacia and Chiron and his plague-related research for the FDA. The indictment's description of Butler's scheme to defraud explained how he failed to disclose material facts to HSC regarding not only the Pharmacia and Chiron contracts, but also the plague-related contracts with the FDA.

(Pet. App. 22a) (footnote omitted). This is merely the theory joining the various Contract Counts to each other, not to the Plague Counts. Dr. Butler does not contest that the Contract Counts are properly joined to each other, based on theories of fraud.

The court never explained the connection of the Contract Counts to the Plague Counts. It only referenced the fact that FDA Contract Counts that happened to deal with plague research. Because of the overlap in the subject of that research, the court summarily declared that all counts are properly joined:

> The superceding indictment clearly sets forth an alleged common scheme that connects both Butler's plague research and the Pharmacia/Chiron pharmaceutical contracts to the FDA fraud counts. In doing so, the superceding indictment, on its face, creates an overlap that logically intertwines the Contract Counts with the Plague Counts.

(Pet. App. 23a). Beyond noting the subject of the FDA contracts, the court offered no connection between the other 39 Contract Counts and the Plague Counts relating to the mishandling of plague samples and false statements. In both his briefs and oral argument, Dr. Butler noted that, while he contested any overlap with the FDA counts, the government had not claimed any cognizable theory connecting the Plague Counts to the dozens of Contract Counts. Despite this emphasis, the court upheld joinder of the Plague Counts with all of the Contract Counts.

The lower court's decision directly conflicts with the rulings of other courts that reject this type of loose connection between counts.[11] Thus, in *United States v. Chavis*, 296 F.3d 450, 458 (6th Cir. 2002), the court refused

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[11] Indeed, the ruling contradicts the lower court's own prior rulings on joinder. *See, e.g.*, *United States v. Lane*, 735 F.2d 799, 804 (5th Cir. 1984) (finding misjoinder in combining mail fraud counts with other fraud counts) *rev'd on other grounds*, 474 U.S. 438 (1986); *United States v. Diaz-Munoz*, 632 F.2d 1330, 1335-36 (5th Cir. 1980) (finding improper joinder of insurance fraud and embezzlement charges). *See also United States v. Lynch*, 198 F. Supp. 2d 827, 828-29 (N.D. Tex. 2001); *United States v. Braig*, 702 F. Supp. 547, 547-49 (E.D. Fla. 1989).

to adopt the same type of broad theory of joinder when the government claimed that drug and firearms offenses were sufficiently linked. Where the government in the instant case made loose suggestions that perhaps Dr. Butler's work with plague helped him attract more contracts, the government in *Chavis* argued that guns often help drug dealers in their work. Rule 8(a) requires more than such associational assumptions. *Chavis*, 296 F.3d at 460 (noting that it was not sufficient to show "there is some evidence that the purchase of the firearms was related to drug activity, since [one defendant] received crack cocaine for her assistance in purchasing the handguns"). *See also United States v. Hubbard*, 61 F.3d 1261, 1270 (7th Cir. 1995) (rejecting consolidation of drug and firearms counts even when the government can show "some evidentiary overlap" such as the use of the same secret compartment to hide both the drugs and gun); *United States v. Terry*, 911 F.2d 272, 276 (9th Cir. 1990) (same). These courts stand in sharp contrast to the government's argument here that it can dismiss its obligations under Rule 8(a) with the casual assurance that the connection stems from "a little of this and a little of that."

In addition to the *Butler* decision, circuits have now adopted sharply different approaches to misjoinder challenges. For example, Dr. Butler argued that his misjoinder claim was supported by the fact that the evidence of the Plague Counts would have been clearly inadmissible in any contract case and vice versa. While the lower court rejected this argument without comment, it is one of the tests used by other circuits.[12] *See, e.g.*, *United States v. Mackie*, 157 Fed. Appx. 378, 379 (2d Cir. 2005) (stressing that joinder was proper given the fact that the evidence of one set

[12] For example, the Fifth Circuit has noted that misjoinder may be sought in some cases to "get before the jury evidence that likely would be otherwise inadmissible." *United States v. Holloway*, 1 F.3d 307, 310 (5th Cir. 1993) (finding substantial prejudice in the joinder of felon-in-possession-of-a-weapon charge and charges of armed robbery).

of counts would have been admissible and relevant to the counts); *United States v. Robinson*, 560 F.2d 507, 509 (2d Cir. 1977) (same).[13]

Likewise, where many circuits, including the Fifth Circuit, confine the analysis to the face of an indictment, the Fourth Circuit considers both the indictment and the evidence presented at trial to test joinder claims. *See United States v. Cardwell*, 433 F.3d 378, 385 (4th Cir. 2005); *but see United States v. Coleman*, 22 F.3d 126, 134 (7th Cir. 1994) (rejecting consideration of trial evidence). As these cases illustrate, there is growing confusion over how to apply the prior joinder rulings of this Court and significant differences are appearing in the treatment of similar cases.

The lower court also erred in its dismissal of any notion of prejudice without addressing the specific arguments raised by Dr. Butler. The court failed to explain how Dr. Butler could prove prejudice beyond the obviously debilitating impact of being labeled as the man who brought the risk of black death to Lubbock. Other circuits have refused to allow even closely defined crimes to be joined without a sufficient nexus. For example, in *Drew v. United States*, 331 F.2d 85, 88 (D.C. Cir. 1964),[14] the Court of Appeals for the District of Columbia found that prejudice result from the joinder of charges of robbery and attempted

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[13] In Dr. Butler's case, the misjoinder of counts led to essentially two cases – a contracts case and a national security case – being litigated at the same time. Such cases belie any notion that joinder saves judicial resources since unrelated counts demand virtually two distinct cases to be going at one time. A review of the transcript shows this disconnect as plague and contract trials occurred simultaneously before the same jury. *See* Charles Alan Wright, 1A *Federal Practice & Procedure Criminal*, § 143, at 40 (3d ed. 1999) ("if offenses arise out of separate and unrelated transactions, there is likely to be little saving in time and money in having a single trial"). *See also United States v. Swift*, 809 F.2d 320, 322 (6th Cir. 1987); *United States v. Halper*, 590 F.2d 422, 430 (2d Cir. 1978).

[14] *Drew* was adopted by the Fifth Circuit in *United States v. Williamson*, 482 F.2d 508, 511 (5th Cir. 1973).

robbery and remanded defendant's convictions. In reaching its decision, the *Drew* court explained that misjoinder can prejudice a defendant because: (1) the jury may cumulate evidence of the various crimes and find guilt when, if considered separately, it would not have; (2) the jury may use evidence to infer criminal disposition from the evidence of one crime charged to find guilt of the other charges; and (3) a defendant may become embarrassed or confounded in presenting separate defenses for the joined charges. *Id.* Furthermore, "[a] less tangible, but perhaps equally persuasive, element of prejudice may reside in a latent feeling of hostility engendered by the charging of several crimes as distinct from only one." *Id.*

From the outset of the trial, the government openly sought to use the specter of plague to convince the jury that Dr. Butler was a "bad person." In its opening statement, the government promised the jurors that Dr. Butler's trial was "cloaked in the shadow of terrorism," and that Dr. Butler's conduct was "colored and darkened by the threat of terrorism." The government analogized the actions of Dr. Butler to the practice in the Middle Ages of catapulting plague-infested human cadavers into walled cities to cause panic and death, bringing widespread panic to the quiet town of Lubbock. Throughout its statements, the government repeatedly portrayed this case as a "post-9/11" case despite the majority of garden-variety contract claims and the absence of any terrorism link.

The misjoinder caused confusion, prevented the jurors from separating and applying the evidence to the proper offenses, and caused the jury to improperly infer criminal disposition.[15] *See United States v. Fortenberry*, 914 F.2d

[15] Examining the Contract Counts alone, it is clear that there was significant jury confusion. The jury convicted Dr. Butler on counts 1, 3, 4, and 8-22, but acquitted him on similar counts 2, and 5-7. There is no explanation for this verdict other than jury confusion since the contracts

671, 675 (5th Cir. 1990); *Drew*, 331 F.2d at 88-92. With proper severance, Dr. Butler would have been able to defend himself in a standard contract case without being accused of creating a risk to the nation's security. This evidence colored the entire trial and prejudiced Dr. Butler's defense. The lower court did not even address these concerns or the argument that much of the evidence introduced on the Plague Counts would have been inadmissible in a contract case.

Forcing Dr. Butler to defend against standard contractual disputes within the confines of a national security case is clearly prejudicial and makes a mockery of the guarantees of Rule 8(a). An "evil genius" trafficking in Black Death is hardly a compelling basis for a good-faith contractual defense. The fact that the lower court did not even articulate a cogent connection between the Contract Counts and the Plague Counts should be cause for review as not simply a ruling in conflict with prior rulings of this Court and other circuits, but a denial of basic judicial due process. *See* Sup. Ct. Rule 10(a), (c).

## III. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER FEDERAL CIRCUITS ON THE DENIAL OF MATERIAL WITNESSES BASED ON THE UNSUPPORTED ASSUMPTION OF THE COURT THAT THEY COULD NOT CONTRIBUTE TO A GOOD-FAITH DEFENSE.

The lower court failed to consider the specific basis for the trial court's denial of the deposition of critical witnesses in the export control counts, a failure that departs from basic judicial procedure and calls for the exercise of this Court's supervisory authority. Sup. Ct. Rule 10(a). Furthermore, the decision upheld the denial on the appellate

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were virtually identical. The underlying conduct for the contracts was the same; the only difference was the contracting entities.

court's unsupported assumption that these witnesses' testimony would not contribute to Dr. Butler's good-faith defense to the export control violations. Not only was the lower court in no position to make such a determination as a factual matter, it is facially incorrect as a legal matter that the witnesses' testimony would be immaterial to a good-faith defense to export control charges. This conclusion is contradicted by the holdings of other circuits, which recognize that a good-faith defense can be sustained based on the testimony of such witnesses. Sup. Ct. Rule 10(a), (b).

Under Federal Rule of Criminal Procedure l5(a)(1), motions requesting depositions should be granted "because of exceptional circumstances and in the interest of justice." Such circumstances exist "when the prospective deponent is unavailable for trial and the absence of his or her testimony would result in an injustice." *United States v. Drogoul*, 1 F.3d 1546, 1552 (11th Cir. 1993). The denial of a Rule 15 motion has been treated as a reversible error when the denial prevents a defendant from submitting testimony of material witnesses. *United States v. Farfan-Carreon*, 935 F.2d 678, 679-82 (5th Cir. 1991). The decision below stands in direct conflict with both Rule 15 and prior holdings on the good-faith defense. *See also United States v. Dillman*, 15 F.3d 384, 389 (5th Cir. 1994).

While the lower court correctly identified the basis for the denial of Dr. Butler's motion as a finding of untimeliness, it did not address that holding.[16] Since this was the basis of the trial court's denial, the omission of such a ruling represents a rather conspicuous error since the appellate court must determine if the trial court erred in its legal and factual determination.

Courts have ruled that "[a]bsent a serious lack of due diligence by the moving party . . . justice generally requires

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[16] During oral argument, the government was asked when this request was made and indicated that it was made "in a timely manner."

preservation of . . . testimony." *Drogoul,* 1 F.3d at 1556 (holding that "the district court grossly overweighed the government's dilatoriness in informing [the court and the defendant]" since the rule requires merely a reasonable written notice). Dr. Butler is entitled to appellate review of the trial court's ruling since he supplied undisputed evidence that his motion was timely filed. Dr. Butler moved for the deposition of four Tanzanian witnesses on August 25, 2003. The motion was made *three months* before the start of the trial in November 2003 – obviously sufficient time to conduct such a small number of depositions.[17] Notably, in the leading appellate case, *Drogoul,* the Eleventh Circuit held that a motion made for depositions to occur in a single month was timely and sufficient under the rules – involving *thirteen* possible deponents in a foreign country.[18] *Drogoul,* 1 F.3d at 1556.

Rather than address the trial court's finding of untimeliness, the appellate court dismissed Dr. Butler's challenge on the basis of an unsupported assumption that these witnesses' testimony would not have helped Dr. Butler. Obviously, the lower court was in no position to know how these witnesses would testify. The appropriate review would have assumed that the witnesses would have contributed to

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[17] Putting aside that three months is clearly sufficient time for such a motion, the delay noted by the lower court was due not to Dr. Butler but by the government's stated intention to present a superceding indictment unless Dr. Butler agreed to plead guilty to some of the Plague Counts. This is why both parties agreed to the second Joint Motion For Continuance. Thus, the lower court's reference to May 2003 is erroneous. The relevant indictment was not issued until August 2003, at which time Dr. Butler proceeded to argue issues of discovery, severance, and the issue of the Tanzanian witnesses.

[18] Conversely, cases where untimely challenges have been rejected involve clearly dilatory motions. *See, e.g., Farfan-Carreon,* 935 F.2d at 679 (Rule 15 motion filed on the morning of trial); *United States v. Dearden,* 546 F.2d 622, 625 (5th Cir. 1977) (Rule 15 motion filed three weeks after the start of trial); *Heflin v. United States*, 223 F.2d 371, 375 (5th Cir. 1955) (Rule 15 motion filed five days prior to the trial).

Dr. Butler's defense, not assumed that they would make no contribution. The decision below only states that the court agreed with the government that "this information would have had little material value as to Butler's convictions for mailing the plague samples *from the United States* to Tanzania." (Pet. App. 25a) (emphasis in the original). To the extent that this was a factual determination, it was clearly improper to make such a ruling without a record. Thus, the only basis for such a ruling is that, as a legal matter, these witnesses would not be relevant or material to Dr. Butler's defense.

As a legal matter, the lower court was simply wrong in concluding that these witnesses could have had no or little materiality to the case. The court based its decision on a facially incorrect assumption that "the only relevant information of which the Tanzanian witnesses presumably would have had knowledge" was the export of this material from Tanzania. (Pet. App. 26a). That conclusion has no basis in the record or logic, since these witnesses were the co-collaborators of the shipments back and forth to Tanzania as well as the research itself.[19] They were the only other individuals who could have discussed shipping and research issues related to these samples. Moreover, even accepting

[19] As also argued before the lower court, these four witnesses were also critical to other aspects of the case as well. For example, the government alleged that Dr. Butler had done work without the consent of the patients – a highly prejudicial allegation in a jury trial. The prosecution stressed that, while Dr. Butler insisted that Tanzanian officials like Dr. William Mwengee expressly assured him of patient consent for this work, there was no record in his notebook. This left the highly prejudicial suggestion that not only was Dr. Butler lying about statements from officials like Mr. Mwengee, but also that he had used sick Tanzanian villagers as unknowing guinea pigs for his personal research. These witnesses were also material to Dr. Butler's insistence that his work was consultative rather than clinical under the University rules. While repeatedly referencing these witnesses, however, the government vigorously opposed their actual testimony being admitted through Rule 15.

the court's limited view of a good-faith defense witness, these public health officials obviously would have been interested in shipping issues regardless of whether they related to plague samples leaving or entering their country.

Notably, the lower court did not address the case law on the basis of whether Dr. Butler had a good-faith defense or the types of evidence that can be marshaled in support of such a defense. The court also failed to address Dr. Butler's reasons for calling the witnesses: to support his account that he had an expressed and good-faith belief that such samples could be shipped in this fashion. Under the willful standard, the government had to prove a "voluntary, intentional violation of a known legal duty." *Cheek*, 498 U.S. at 201. If those witnesses could offer evidence of Dr. Butler's good-faith belief in his understanding that he was complying with export control requirements, or that his views were reinforced by these government officials, it would have been the single most effective piece of defense he could offer on these counts.[20]

The Tanzanian witnesses' understanding and conversations with Dr. Butler about the shipments were key to his good-faith defense. Dr. Butler insisted that he never knew about the specific permit requirements charged in the superceding indictment and that these officials could support his prior views on shipping requirements for this type of material. If these officials testified that they had discussed the shipping arrangements with Dr. Butler, recommended those arrangements, or routinely used those arrangements, it would have greatly advanced Dr. Butler's defense.[21] This

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[20] Of course, this is equally true under the civil standard of a knowing violation. There, the government must still prove "knowledge that his conduct was unlawful." *Bryan*, 524 U.S. at 193. These witnesses could have challenged evidence of such knowledge by confirming Dr. Butler's good-faith views of the shipping requirements.

[21] The significance of these witnesses is illustrated by the fact that, after the government fought access to their testimony, prosecutors

type of evidence has been routinely admitted as part of good-faith defenses to willful violation charges. *See, e.g.*, *United States v. Simkanin*, 420 F.3d 397, 402-03 (5th Cir. 2005) (admitting witness testimony to show that a defendant was told that he did not have to pay taxes on certain income), *petition for cert. filed*, 74 U.S.L.W. 3443 (U.S. Jan. 25, 2006) (No. 05-948). Indeed, the government relied extensively on such witness testimony to suggest knowledge on the part of Dr. Butler, referencing statements and other communications that could be viewed as reflecting knowledge. Likewise, in *Drogoul*, 1 F.3d at 1556, it was *the government* that sought depositions to rebut a good-faith defense. The government cannot have it both ways on witness testimony: arguing that such evidence is relevant when used to show knowledge, but entirely immaterial to support a defense of no knowledge or good-faith mistake.

These were not only the most material witnesses; they were the only knowledgeable witnesses to these events other than Dr. Butler himself. Thus, this testimony was not duplicative. *See United States v. Ruiz-Castro*, 92 F.3d 1519, 1533 (10th Cir. 1996) (ruling that a denial of a Rule 15(a) deposition was supported in part by the fact that the witnesses' testimony would have been duplicative of another witness who testified at trial). Without their depositions, Dr. Butler was left with no testimony other than his own to establish his good-faith belief and lack of criminal intent.

Prior holdings in the Fifth Circuit and other circuits recognize that witnesses' testimony can be essential to showing a good-faith belief, which can be established either through statements by the defendant or statements to the defendant on the legal obligation in question. Standard jury instructions emphasize that the jury must consider evidence that "defendant actually believed in good faith that she was

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questioned Dr. Butler on his dealings with these same witnesses. Indeed, throughout the trial, both the defense and prosecution made extensive references to these witnesses, as detailed in the briefs below.

acting properly, even if she was mistaken in that belief." *See, e.g., United States v. Goodchild*, 25 F.3d 55, 59 (1st Cir. 1994). It is a determination made from the totality of evidence, including witnesses who can offer testimony on the the defendant's prior understanding of a legal obligation. For that reason, "[t]he defendant is entitled to present evidence concerning his beliefs, motives, and intentions" relating to the legal obligation. *United States v. Martin-Trigona*, 684 F.2d 485, 492 (7th Cir. 1982).

As in *Simkanin*, witnesses routinely testify about their own communications with a defendant that support a claim of good-faith belief. Such testimony shows, beyond the defendant's known assertions, that third parties witnessed evidence of an "honest belief . . . and the intent to perform all lawful obligations." *United States v. Hirschfeld*, 964 F.2d 318, 322 (4th Cir. 1992). A jury's ability to find such an honest belief is necessarily influenced by whether the defendant articulated or demonstrated that belief before he was charged. The Tanzanian witnesses were the only individuals who could directly testify on the understandings and communications.

The decision below should be reversed on the simple ground that it did not review the actual finding of the district court that Dr. Butler's motion was untimely. If, however, the Court reaches the merits of the lower court's determination that the proposed testimony is immaterial, that holding is legally wrong and conflicts with cases permitting a good-faith defense to willful violations.

## IV. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER FEDERAL CIRCUITS IN REFUSING TO CONSIDER THE RELEVANT TRIAL MOTION DENYING ACCESS TO MATERIAL EVIDENCE.

The Petitioner asks this Court for an exercise of its supervisory power in light of a departure by the lower court from basic requirements of judicial review. Sup. Ct. Rule 10(a). The lower court upheld the denial of discovery of critical evidence on the basis that Dr. Butler had failed to properly move for discovery of University e-mails. The lower court, however, did not take into account the fact that Dr. Butler made two motions seeking the evidence. Whatever deficiencies were found in the first motion were cured by a perfectly valid and timely second motion for the discovery. When the obvious error was raised in a petition for rehearing, the court refused to amend its opinion to take into account the second motion.

The result is that Dr. Butler never received a ruling on his appeal from the denial of the second motion. This denial further contradicts decisions of this Court and various circuits that hold that evidence of the bias or motivation of witnesses is always relevant and material to a trial. *See* Sup. Ct. Rule 10(a).

The partiality of a witness is subject to exploration at trial and is "'always relevant as discrediting the witness and affecting the weight of his testimony.'" *Davis v. Alaska*, 415 U.S. 308, 316 (1974) (quoting 3A J. Wigmore, *Evidence* § 940, at 775 (Chadbourn rev. 1970)). *See also Redmond v. Kingston*, 240 F.3d 590, 593 (7th Cir. 2001) ("[W]hile 'generally applicable evidentiary rules limit inquiry into specific instances of conduct through the use of extrinsic evidence and through cross-examination with respect to general credibility attacks . . . no such limit applies to credibility attacks based upon motive or bias.'") (quoting

*Quinn v. Haynes*, 234 F.3d 837, 845 (4th Cir. 2000)); *United States v. Robinson*, 530 F.2d 1076, 1079 (D.C. Cir. 1976) (noting that courts tend to be "very liberal in accepting testimony relevant to showing of bias" and allowing such bias to be shown through extrinsic evidence) (citation omitted).

This is particularly true in Dr. Butler's case with regard to the Contract Counts. At the heart of Dr. Butler's prosecution on the Contract Counts were his dealings and relations with University administrators.[22] Given the central importance of these witnesses and the prosecution's use of motive and behavior evidence, Dr. Butler sought to establish that the government's witnesses had previously acted in an improper and retaliatory manner toward him. The trial court denied an initial motion to obtain that evidence before trial. (Pet. App. 5a-6a). The motion, however, was not denied with prejudice and the defense could renew the motion as a matter of law.

As witnesses continued to discuss their relationship with Dr. Butler and produced glaring contradictions[23] related

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[22] The government placed great emphasis on allegations that Dr. Butler was uncooperative in prior years with specific University administrators when they demanded information about his contracts, suggesting an effort to conceal the scope and details of his work. While witnesses described tense meetings in prior years, they did not discuss long personal feuds with Dr. Butler – a point that he wanted to establish through e-mails.

[23] The importance of this evidence was made obvious at trial during the testimony of Associate Professor Sandra Whelly, a member of the University Institutional Review Board. The defense questioned Dr. Whelly about her relationship with Dr. Barbara Pence, one of the key government witnesses and a long-time university foe of Dr. Butler's. Dr. Whelly denied any significant relationship. The defense then showed Dr. Whelly two inadvertently disclosed e-mails that show Dr. Whelly and Dr. Pence improperly discussing a grievance involving Dr. Pence and Dr. Butler. Dr. Whelly admitted the e-mails were between her and Dr. Pence but denied any memory of the communication. She admitted, however, that such a communication would violate University rules and constitute

to past internal communications regarding him, the defense again asked for production of the e-mail messages of various University administrators in a more narrow and focused motion, which was again denied. (Pet. App. 7a-9a). It is the denial of this second motion that was a basis for the petition for rehearing and the instant petition for a writ of certiorari.[24]

The requested e-mails would have represented precisely the type of evidence of bias and improper motives that Dr. Butler was entitled to discover in order to confront adverse witnesses. The denial of access to this critical discovery resulted in a significant limitation on the ability of Dr. Butler's right to cross examine government witnesses as protected under the Sixth Amendment. *See United States v. Smith*, 308 F.3d 726, 738 (7th Cir. 2002) ("[l]imitations on cross examination rise to the level of a Sixth Amendment violation when they prevent the exposure of a witness's bias and motivation to lie") (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 678-79 (1986)).

The lower court entirely ignored the specific discovery request for the e-mails by focusing only on the first of these motions, which was made before trial and was much broader in scope. Despite Dr. Butler's repeated emphasis on the second motion, the court held that the district court properly denied the first discovery request as too broad. (Pet. App. 26a-27a). As made clear in the written and oral arguments before the court below, however, the primary concern is Dr. Butler's subsequent request for University e-

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improper conduct on both of their parts. Despite these admissions, the trial court refused to allow Dr. Butler access to the e-mail communications from the University.

[24] The trial court's decision to bar discovery of these e-mails was in flagrant contradiction with its decision that these witnesses were relevant and material, including their examination on internal University e-mails. Thus, Dr. Butler was allowed to question them about their e-mails but the court prevented Dr. Butler from actually reading the communications – even after the central witnesses were contradicted by inadvertently disclosed e-mails.

mails, which the government did not challenge on the grounds of insufficient specificity.

Absent a reversal of the lower court's decision, Dr. Butler will be denied any appellate review of this critical claim, a denial of the most fundamental requirements of judicial proceedings.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,


Jonathan Turley
*Counsel of Record*
2000 H Street NW
Washington, DC 20052
(202) 994-7001

Of Counsel

Kevin J. Wolf
Jacob A. Kramer
Nikki A. Ott
BRYAN CAVE LLP
700 Thirteenth St. NW
Washington, D.C. 20005
(202) 508-6000

Daniel C. Schwartz
BRYAN CAVE LLP
700 Thirteenth St. NW
Washington, D.C. 20005
(202) 508-6000


April 11, 2006

**IN THE SUPREME COURT OF THE UNITED STATES**

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THOMAS CAMPBELL BUTLER, MD

*Petitioner*

v.

UNITED STATES OF AMERICA

*Respondent*

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On Petition for Writ of Certiorari
To The United States Court of Appeals for the Fifth Circuit

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# APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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## TABLE OF CONTENTS

**APPENDIX A**

**U.S. District Court**
**Northern District of Texas**
**FILED**
**AUG 26 2003**
**Clerk, U.S. District Court**

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

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|---|---|---|
| UNITED STATES OF AMERICA | § | |
| | § | |
| V. | § | CRIMINAL No. |
| | § | 5:03-CR-0037-C |
| THOMAS CAMPBELL BUTLER, M.D. | § | |

**ORDER**

The Court having considered the following motions, filed by Defendant on August 25, 2003, enters the following orders:

1. Motion to sever Tax Count and Contract Counts is **DENIED**
2. Motion for Additional Peremptory Strikes is **DENIED**; and
3. Motion for Bill of Particulars is **DENIED.**

**SO ORDERED**

Dated August 26, 2003

s/ Sam R. Cummings
United States District Judge

## APPENDIX B

**U.S. District Court**
**Northern District of Texas**
**FILED**
**SEP 11 2003**
**Clerk, U.S. District Court**

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

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| UNITED STATES OF AMERICA | § | |
| | § | |
| V. | § | CRIMINAL No. |
| | § | 5:03-CR-0037-C |
| THOMAS CAMPBELL BUTLER, M.D. | § | |

**ORDER DENYING DEFENDANT'S MOTION TO TAKE DEPOSITIONS OF TANZANIAN WITNESSES AND MOTION FOR LETTER ROGATORY**

THIS MATTER, having come before the Court on the 11th day of September, 2003, pursuant to Defendant Butler's Motion to Take Depositions of Tanzanian Witnesses and Motion for Letter Rogatory, filed August 25, 2003, which requests court authorization to take the depositions of four foreign witnesses, all located in the Republic of Tanzania, and to issue letter rogatory directed to the appropriate judicial authority in Tanzania requesting examination of the same four witnesses; and after having reviewed and considered the

entire record in this case including the particular circumstances of this case, and the government's response opposing the motions and exhibit submitted in support thereof, the Court, based upon the reasons set forth in the government's response, makes the following FINDINGS OF FACT AND LAW:

1. Defendant's Motion to Take Depositions of Tanzanian Witnesses and Motion for Letter Rogatory are untimely and dilatory;

2. Defendant has failed to demonstrate that the testimony of the proposed deponents or examinees by *letter rogatory* is material;

3. The taking of the requested depositions or issuance of *letter rogatory* would require a lengthy continuance of an indeterminate period of time;

4. The defendant has failed to show that the taking of the depositions or the issuance of letter *rogatory* is practicable; and

5. The defendant has failed to make the necessary showings that would entitle him to either take the depositions of the Tanzanian witnesses or to authorize this Court to issue *letter rogatory*.

THEREFORE, in view of all of the above, this Court finds that the defendant has failed to demonstrate that "exceptional circumstances" exist in this case that make the granting of the motion to take the requested depositions "in the interest of justice," as required by Rule 15(a) of the Federal Rules of Criminal Procedure. Consequently this Court cannot conclude that it would be in the interest of justice to order that depositions be taken of the proffered witnesses, or that letter *rogatory* be issued to the appropriate judicial authority in Tanzania.

IT IS THEREFORE ORDERED THAT Defendant Butler's motion for an order permitting the taking of foreign depositions under Rule 15, Federal Rules of Criminal

Procedure, and motion for Letter *Rogatory* are hereby **DENIED**.

s/ Sam R. Cummings
United States District Judge

**APPENDIX C**

**U.S. District Court**
**Northern District of Texas**
**FILED**
**SEP 17 2003**
**Clerk, U.S. District Court**

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

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| UNITED STATES OF AMERICA | § | |
| | § | |
| V. | § | CRIMINAL No. |
| | § | 5:03-CR-0037-C |
| THOMAS CAMPBELL BUTLER, M.D. | § | |

**ORDER**

Came on for consideration the Objections to a "Subpoena in a Criminal Case" filed by Texas Tech University Health Sciences Center, along with its Motion to Quash, in connection with a subpoena served on it concerning the above-styled and numbered cause. The Court has also considered the Responses filed by the Government and the Defendant to the Objections and Motion to Quash.

The Court concludes that the subpoena is too broad and vague and amounts to a fishing expedition and an attempt to conduct general discovery as against the Health

Sciences Center. The subpoena is therefore oppressive and unreasonable and must be quashed in its entirety.

**SO ORDERED**.
Dated September 17, 2003

s/ Sam R. Cummings
United States District Judge

## APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

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| UNITED STATES OF AMERICA | § | |
| | § | |
| V. | § | CRIMINAL No. |
| | § | 5:03-CR-0037-C |
| THOMAS CAMPBELL BUTLER, M.D. | § | |

## ORAL ORDER DENYING DISCOVERY OF E-MAIL EVIDENCE

MR. MEADOWS: Your Honor, the defendant previously made a request for any and all e-mails between Barbara Pence and Dr. Whelly in connection with our request. The court ruled on that request and ruled that we were not entitled to those documents from Texas Tech pretrial. Subsequent to that, yesterday, we located a single page of an e-mail request of an e-mail document between Dr. Pence and Dr. Whelly which she has now testified to would have been extremely improper for her to have participated in because it relates to the grievance and would show her bias and would also confirm the defense's main thrust of this case, which is, the reason we are not responding to anybody is because we believe that Dr. Pence is retaliating against us and is eliciting the aid of Dr. Whelly and others to do that. And this witness has now not identified that e-mail which we believe to be authentic and I think the government also

believes to be authentic – I can't speak for them, but that we got from the government.

We would request that three things happen. Number one, that Frank Coleman, who is an agent of – in the internal auditor for Texas Tech, be ordered by this court to obtain copies of any and all e-mails between Barbara Pence and Dr. Whelly from the date of the grievance until 30 days after the final grievance report was signed relating in any way to Dr. Butler or the grievance or Dr. Pence's response.

Also the attorney for Texas Tech is in the audience and has been in the audience during the trial as a participant, as a spectator, and we would request that the court order her to proceed and to assist Frank Coleman in obtaining those documents so that this trial can proceed in a timely, quick, and economical fashion.

THE COURT: That's funny. Go ahead.

MR. MEADOWS: And we think bias is always relevant, and I think the government was as surprised as we were when this lady did not identify that e-mail, whether she just simply forgot it – but subsequently she has testified that the – that it would have been improper for her to have done this and that is the best evidence of it and Texas Tech.

THE COURT: Okay. Let's see if we can't shorten this. You want copies of all the e-mails between this witness and Pence?

MR. MEADOWS: Yes.

THE COURT: All right. What's is the government's response.

MR. WEBSTER: Your Honor, it's a collateral matter. We didn't receive any of those e-mails. That document that the defendant tried to cross-examine her on was, at best guess, after talking with Mr. Meadows, was, in fact, attached as an appendix to the audit report that they have been cross-examining on. The defendant has been cross-examining on the issues, including the audit report.

They have also cross-examined this witness not only on this e-mail, but on many matters involving the Institutional Review Board, and we think it's a collateral matter, we think it's cumulative, and we think they have had the opportunity to impeach the witness suchly without going down this road in the way of a tangential collateral matter.

THE COURT: Well, anything further?

MR. MEADOWS: No.

THE COURT: All right. Request denied.

November 14, 2003

## APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

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| UNITED STATES OF AMERICA | § | |
| | § | |
| V. | § | CRIMINAL No. |
| | § | 5:03-CR-0037-C |
| THOMAS CAMPBELL BUTLER, M.D. | § | |

## ORAL ORDER IMPOSING SENTENCE

THE COURT: All right, sir. Dr. Butler, you were found not guilty on Counts 2, 5, 6, 7, 49 through 61, and 65 through 69, and you are now discharged as to those counts.

However, you were found guilty pursuant to a jury verdict on Counts 1, 3, 4, 8 through 48, and Counts 62 through 64. You having been found guilty of those counts pursuant to a jury verdict, I am now finding you guilty and adjudging you guilty of those offenses.

Having adjudged you guilty, I am now going to impose the following sentence:

First, I'm ordering that you pay a special assessment of $4,700, which is due immediately.

Next, I'm ordering that you be committed to the custody of the United States Bureau of Prisons for a term of 24 months as to each count, with the terms of imprisonment to run concurrently with each other. I will allow you to voluntarily surrender to the institution designated on or before April the 14th at 2:00 p.m.

Upon your release from incarceration, I'm ordering that you serve a 3-year term of supervised release. You will get a copy of the judgment so you will know what the conditions of supervision are. There are some standard conditions, as well as special conditions.

Some of those special conditions include the following:

First, you shall pay restitution in the amount of $38,675 payable to the United States District Clerk in Lubbock, Texas, for disbursement to the Texas Tech University Health Science Center. I will allow you to make restitution over a period of time as set forth in the judgment.

Another special condition of supervision is that you shall pay a fine to the United States in the amount of $15,000.

Another special condition is that you shall refrain from incurring any new credit charges or opening any additional lines of credit without first getting the approval of the United States Probation Office.

Next, you shall provide to the United States Probation Office any requested financial information.

Finally, you shall participate in any mental health treatment service as directed by the United States Probation Office.

I will now state on the record the specific reasons for imposing the sentence I have just imposed.

As to the term of incarceration, the guideline range is 78 to 97 months. I have made a substantial downward departure and have imposed a term of 24 months' incarceration as to each count, with that sentence to run concurrent as to each count. I believe this sentence does adequately address the sentencing objectives of punishment and deterrence, and I will state on the record the reasons for making my downward departure in just a minute.

The order of restitution and fine are made for the reason I believe that, under the record before me, such restitution and fine are justified and do meet the ends of justice in this case.

The supervised release is imposed for the reason I believe the defendant will need this amount of supervision to see that he reassimilates himself back in society, that he obtains suitable employment, that he maintains a law-abiding life-style, that he pays the restitution and the fine.

The special assessment of $4,700 is imposed because the law mandates that it be imposed. That's $100 as to each count of conviction.

I will now state on the record the reasons for making the downward departure that I have just made.

Very few cases brought before this court have the potential to impact not only science, education, medicine, and research, but society as a whole by the restrictions and limitations placed on the transportation of hazardous and biological material as they relate to medical and academic research.

This court in no fashion condones the actions taken by the defendant in his illegal transportation of yersinia pestis to Tanzania. However, the court is of the opinion that while the defendant's actions are covered by Section 2M5.1 of the guidelines, mitigating circumstances exist to such a degree that the court does not believe a base offense level of 26, adequately achieves the desired outcome of the United States Sentencing Commission in their formulation of the United States Sentencing Guidelines. As a result, the court considers that the defendant's conduct regarding his conviction for unauthorized export to Tanzania is outside the heartland of the guidelines as noted in Section 5K2.0 and the application notes to the guidelines, Section 2M5.1, and therefore, I have assessed a downward departure.

The court finds that several factors mitigate this high offense level of 26, including the following:

Number one, the defendant's conduct occurred on only one occasion. The export of yersinia pestis is not something that the defendant did on a regular basis, and there's been no proof offered to suggest it occurred on more than one occasion.

Number two, the volume of commerce involved was minute, especially considering the plethora of yersinia pestis available in Tanzania at any given time.

Number three, the method by which the yersinia pestis was exported from the United States required minor skills which do not require a great deal of education to acquire. In addition, the yersinia pestis was packaged and arrived safely, causing no harm to anyone along the way.

Number four, the defendant received no remuneration for shipping the yersinia pestis to Tanzania and, according to at least one other scientist, was providing a professional courtesy by sending to Tanzania the confirmed samples of yersinia pestis, where they had been originally obtained by the defendant.

Number five, although the United States does have a vested interest in the transportation of yersinia pestis to foreign countries, the defendant's export was not with evil or terroristic intent, but was done in the name of medical and academic research and was provided to medical and academic personnel.

Number six, as noted in testimony provided by Douglas Brown, the senior microbiologist and deputy director of the Chemical and Biological Controls Division, Bureau of Industry and Security, United States Department of Commerce, the defendant, in all likelihood, would have received permission to export the yersinia pestis to Tanzania.

Based upon these mitigating factors, which are present in extreme form, the court has departed downward 12 offense levels from the offense level of 26 regarding the conviction for unauthorized export to Tanzania, making a base offense level of 14 applicable before any enhancements

are added. Factoring in the 2-level enhancement for obstruction of justice, I find that the adjusted offense level for the export count is now 16. Pursuant to Sentencing Guidelines Section 3D1.4, the court assesses one unit to the theft/fraud-related counts, which is the offense group with the highest offense level, that being 18, and one unit to the export group for its offense level being within four levels of 18.

As noted in Section 3D1.4 of the guidelines, two units result in the assessment of two additional offense levels to the highest offense level, which, as previously noted, is 18, thereby resulting in a total offense level of 20. Based on a total offense level of 20 and a Criminal History Category of I, the court finds that the applicable guideline custody range at this point would have been 33 to 41 months.

However, the court has also made a second-tier departure on the total offense level of 20 based upon Sentencing Guidelines Section 5K2.11 regarding lesser harms based on the following findings:

Number one, Texas Tech University Health Sciences Center would likely never have received any of the monies in question had the defendant not been in their employ. The grants and contracts have followed and have been attributed to the defendant's research and abilities and not that of Texas Tech University. Texas Tech University Health Science Center has received great prestige and recognition as a result of the defendant's medical research abilities, which substantially outweighs any potential harm brought upon Texas Tech University as a result of the defendant's actions in this case.

Number two, as noted in trial and sentencing testimony, the defendant's research and discoveries have led to the salvage of millions of lives throughout the world. There is not a case on record that could better exemplify a great service to society as a whole that is substantially extraordinary and is outside of anything the United States Sentencing Commission could have formulated in their

devising of the guidelines governing departures regarding educational and vocational skills, as shown in Section 5H1.2 of the guidelines; the employment record, as stated in 5H1.5; and military, civic, charitable, or public service; employment-related contributions; and record of prior good works as referred to in Section 5H1.11 of the guidelines. It should be noted that the record adequately reflects these contributions to be exceptional in nature.

The court has therefore departed an additional three levels from the total offense level of 20, now finding that the total offense level is 17. With a Criminal History Category of I, the guideline custody range now becomes 24 to 30 months, and I have assessed a sentence of 24 months' incarceration.

Now, Dr. Butler, you have the right to appeal from the jury verdict and the sentence that the court has just imposed. Should you choose to appeal, you must file your notice of appeal within ten days from today. If you file that notice of appeal, you may also file a motion with the court seeking permission to appeal at no cost to yourself, but rather at the cost of the government. Should you file that motion, I will take it under advisement and rule on it just as soon as I can. You may stand aside.

Court will stand adjourned.

March 10, 2004

**APPENDIX F**

**United States Court of Appeals**
**Fifth Circuit**
**FILED**
**October 24, 2005**
**Charles R. Fulbruge III**
**Clerk**

**UNITED STATES COURT OF APPEALS**
**For the Fifth Circuit**

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No. 04-10364

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

THOMAS CAMPBELL BUTLER, MD,

Defendant-Appellant.

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Appeal from the United States District Court
For the Northern District of Texas, Lubbock Division

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Before WIENER, DeMOSS, and PRADO, Circuit Judges.
PER CURIAM:

Appellant Dr. Thomas Butler was convicted on 47 of 69 counts of various criminal activity relating to work he performed as a medical researcher at the Texas Tech University Health Sciences Center ("HSC"). Of these 47 counts, Butler was convicted of 44 counts of contract-related crimes, including theft, fraud, embezzlement, mail fraud, and wire fraud, (collectively, the "Contract Counts"). Butler was also convicted of three counts relating to the transportation of human plague bacteria ("*yersinia pestis*" or "YP"), including the illegal exportation of YP to Tanzania, the illegal transportation of hazardous materials, and making a false statement on the waybill accompanying the YP vials shipped to Tanzania, (collectively, the "Plague Counts"). The district court sentenced Butler to 24 months' imprisonment followed by 3 years' supervised release, a $15,000 fine, and ordered him to pay restitution to HSC in the amount of $38,675. Butler timely filed the instant appeal. For the reasons discussed below, we affirm.

## BACKGROUND AND PROCEDURAL HISTORY

Butler was a professor and Chief of Infectious Diseases in HSC's Internal Medicine Department since 1987. As part of Butler's pay structure, a percentage of his income was provided by the State of Texas while the remainder came from the Medical Practice Income Plan ("MPIP"). Under MPIP, a doctor earned money by seeing patients, receiving research grants, or conducting clinical studies under the auspices of HSC. The monies received from the patients a doctor treated and the funds paid out for the research/studies was remitted to HSC. Part of these monies paid for HSC's overhead costs and other expenses while another part was paid out as the non-state portion of the doctor's income. Any remaining funds from a clinical study was transferred to a

developmental account for the researcher's department or division. The money in this account was earmarked for expenses such as professional dues and business travel, none of which was related to any particular project.

When a researcher at HSC was in a position to obtain a research grant or conduct a clinical study, it was required that the accompanying documentation be submitted to the institution for approval. Moreover, any monies paid out as a result of the research grant or clinical study were required to be paid directly to the institution. Consulting contracts, however, received different treatment from research grants or clinical studies. Specifically, a consulting contract was viewed by HSC as a means for a doctor to sell his or her expertise or advice directly to a third party, such as in designing a drug study. The consulting would not involve patient care or patient safety issues, and the consultant would not be using HSC's resources such as labs and personnel. Because of these considerations, consulting contracts were permissible without HSC's financial involvement or approval, unlike contracts covering clinical studies.

Between 1998 and 2001, Butler entered into several clinical study contracts with two different pharmaceutical companies, Pharmacia and Chiron. The first contract entered into with Pharmacia occurred in March 1998. Under this contract, Pharmacia agreed to pay HSC $2,400 for each patient enrolled in the clinical study. Apparently unbeknownst to HSC, however, Pharmacia and Butler entered into another "shadow" or "split" contract that provided Butler with an additional $2,400 per patient enrolled in the same study. A similar contract was entered into between Pharmacia and Butler in the spring of 2000 and again in the fall of 2000.

With respect to the contract in the fall of 2000, there was another HSC researcher, Dr. Casner, who was working on the same study as Butler. Dr. Casner's contract with Pharmacia was not split, and therefore it appeared that he had

a budget twice the size of Butler's. A representative with HSC who was aware of Dr. Casner's contract, contacted Butler to inform him that she could get Butler a bigger budget. Butler allegedly refused the offer and informed the HSC representative that he would remain in charge of negotiating his own contracts. Butler had also negotiated two similar contracts with Chiron (another pharmaceutical company), using the contracts with Pharmacia as a template. The contracts with Chiron involved drug studies that were conducted in February 1999 and March 2000.[1] Butler received payments under the contracts with Pharmacia and Chiron until August 2001.

The existence of the shadow contracts first came to the attention of HSC in July 2002, when an HSC representative learned from a Pharmacia representative that Butler was getting one-half of the money from the Pharmacia studies, while HSC received the other half. HSC initiated a preliminary investigation into the split contracts that continued until January 9, 2003, when HSC informed Butler by letter that an additional investigation by authorities charged with compliance issues was to begin. In the letter, HSC sought a response from Butler by no later than January 21, 2003. For the reasons discussed below, HSC never received the requested response.

In addition to his work at HSC in Texas, Butler conducted plague research in Tanzania in 2001.[2] Then, in April 2002, Butler returned to Tanzania where, for approximately 10 days, he worked on research of plague in human patients at clinics there. Part of his research involved personally culturing and subculturing specimens that he

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[1] By all accounts, Butler was the only researcher to have split contracts with these pharmaceutical companies.

[2] This work was reportedly encouraged by the Food and Drug Administration (the "FDA"), the Center for Disease Control and Prevention ("CDC"), and the United States Army.

planned to bring back to the United States for additional studies.

Having returned to the United States with the *yersinia pestis* cultures, Butler continued his research. Then, on January 13, 2003, four days after receiving the letter from HSC auditors warning of the impending investigation into the alleged shadow contracts, Butler reported that 30 vials of the *yersinia pestis* were missing from his HSC laboratory in Lubbock. The FBI was immediately notified and within hours descended upon Lubbock, where Butler was questioned. Eventually, Butler revealed that the *yersinia pestis* was not actually missing, but that he had destroyed the vials accidentally.

In April 2003, a grand jury returned a 15-count indictment charging Butler with various crimes relating to his transporting of *yersinia pestis*, the providing of false statements to FBI agents regarding *yersinia pestis*, and a tax crime. A superceding indictment was returned by the grand jury in August 2003, in which Butler was charged with 54 additional criminal counts, including mail fraud, wire fraud, and embezzlement that arose out of Butler's agreements with the pharmaceutical companies and the Food and Drug Administration (the "FDA"). Butler filed a motion seeking to sever the Contract and Plague Counts, which the district court denied. After a three-week trial in November 2003, the jury returned a mixed-verdict against Butler, finding him guilty on most of the Contract Counts and not guilty on most of the Plague Counts and the tax count. On March 10, 2004, the district court sentenced Butler to 24 months' imprisonment, three years' supervised release, $15,000 in fines, and a $4,700 special assessment. Butler was also ordered to pay HSC restitution in the amount of $38,675. Butler timely filed the instant appeal.

## DISCUSSION

### I. Whether the district court erred by not severing the Contract Counts and the Plague Counts.

On appeal, Butler argues the Federal Rules of Criminal Procedure and this Circuit's case law prohibit the joinder of unrelated criminal categories charged; here, the Contract Counts and the Plague Counts. Butler contends that trying all the counts together caused him prejudice. Conversely, the Government maintains that joinder was proper because the charges in the superceding indictment were linked as transactions within a common scheme or plan.

We review a district court's denial of a motion to sever for an abuse of discretion. United States v. Booker, 334 F.3d 406, 415 (5th Cir. 2003). Whether the initial joinder of charges was improper under Rule 8 of the Federal Rules of Criminal Procedure is judged according to the allegations in the superceding indictment. See United States v. Kaufman, 858 F.2d 994, 1003 (5th Cir. 1988). Specifically, Rule 8(a) provides that:

> The indictment or information may charge a defendant in separate counts with 2 or more offenses if the offenses charged . . . are of the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan.

Fed. R. Crim. P. 8(a).

Butler argues that the superceding indictment alleges no connection between the groups of allegations, or any rationale for suggesting that the Contract Counts were based on the same conduct or motivation as the Plague Counts. Butler maintains the two sets of counts are neither connected nor constitute parts of a common scheme or plan. In support of his contention, Butler cites to several cases in which this Court and some district courts have identified improperly

joined charges. See, e.g., United States v. Diaz-Munoz, 632 F.2d 1330 (5th Cir. 1980); United States v. Lynch, 198 F. Supp. 2d 827 (N.D. Tex. 2001); United States v. Braig, 702 F. Supp. 547 (E.D. Pa. 1989). None of these cases, however, are particularly instructive. The counts involved in each of the cases cited by Butler were not tied in any meaningful way to each other. In contrast, the superceding indictment in the instant case sufficiently sets forth how Butler's handling of plague bacteria as part of his research efforts was ultimately related to his scheme to defraud HSC by concealing both his contracts with the FDA and the split contracts Butler maintained with the two pharmaceutical companies.

As a preliminary matter, we broadly construe Rule 8 in favor of initial joinder. United States v. Fortenberry, 914 F.2d 671, 675 (5th Cir. 1990) (citation omitted). This Circuit has also recognized that the transaction requirement in Rule 8 is flexible, holding that such a transaction "may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship." Id. (quoting United States v. Park, 531 F.2d 754, 761 (5th Cir. 1976)).

The superceding indictment sets out such a relationship, identifying HSC's need to generate funding through studies conducted by its researchers, including Butler. The indictment specifically outlines Butler's research into non-plague-related diseases for Pharmacia and Chiron and his plague-related research for the FDA.[3] The indictment's description of Butler's scheme to defraud explained how he failed to disclose material facts to HSC regarding not only the Pharmacia and Chiron contracts, but also the plague-related contracts with the FDA.

[3] The Government also points out that the superceding indictment reveals how the success of Butler's efforts to secure his clinical study contracts depended in large part on his plague research.

The introduction to the superceding indictment details how the FDA offered research opportunities to medical professionals regarding "the development and review of medications for the prevention and treatment of illness that could be caused by terrorists using biological agents." The FDA subsequently purchased Butler's professional service, and specifically, according to the indictment, "for the results of experimental research regarding the post-antibiotic effect of drugs on the microorganism *Yersinia pestis*," and later "to provide experimental results from [Butler]'s laboratory about the post-antibiotic effect of drugs on various strains of *Yersinia pestis* isolated from plague patients in Tanzania."

Meanwhile, the actual FDA fraud counts charged Butler with attempting to conceal the existence of his FDA contracts from HSC's administrative review and approval process. Butler was alleged to have subsequently obtained payments from the FDA without distributing any monies therefrom to HSC in accordance with HSC's relevant policies for doing so.

The superceding indictment clearly sets forth an alleged common scheme that connects both Butler's plague research and the Pharmacia/Chiron pharmaceutical contracts to the FDA fraud counts. In doing so, the superceding indictment, on its face, creates an overlap that logically intertwines the Contract Counts with the Plague Counts.

Even if this panel were to question the initial joinder of the Contract Counts and the Plague Counts, Butler must still demonstrate that he was prejudiced as a result. See United States v. Bieganowski, 313 F.3d 264, 287 (5th Cir. 2002). A district court should conduct separate trials if it appears that the defendant will be prejudiced by the joinder of offenses. Id. "To demonstrate reversible error, even where initial joinder was improper, a defendant must show clear, specific and compelling prejudice that resulted in an unfair trial." United States v. Simmons, 374 F.3d 313, 317 (5th Cir. 2004).

Butler maintains that the number of counts for which he was charged was prejudicial in and of itself. Citing Drew v. United States, 331 F.2d 85, 88 (D.C. Cir. 1964). This Court has, however, specifically rejected that assertion. United States v. Fagan, 821 F.2d 1002, 1007 (5th Cir. 1987) (noting that being tried on multiple counts, "standing alone is not grounds for a new trial"). We have also determined that any possible prejudice can be cured by proper jury instructions administered by the district court. United States v. Bullock, 71 F.3d 171, 175 (5th Cir. 1995). In this case, the district court instructed the jury as follows:

> A separate crime is charged in each count of the indictment. Each count, and the evidence pertaining to it, should be considered separately. The fact that you may find the defendant guilty as to one of the crimes charged should not control your verdict as to any other crime.

The jury acquitted Butler on ten of the fraud counts, nine of the illegal transportation of plague counts, both of the counts charging Butler with making false statements to FBI agents, and the one tax count. Such a verdict reveals that the jury was able to follow proper jury instructions, separately consider each charge independently, and avoid being swayed or confused by the sheer number of counts for which Butler was indicted. Because Butler has not established that the initial joinder was improper, nor that he was prejudiced by such joinder, the district court was within its discretion when it denied Butler's motion to sever the Contract and Plague Counts.

## II. Whether the district court erred by refusing to allow Butler to conduct discovery relating to foreign witnesses.

Butler argues the district court erred when it denied his request to take depositions of four witnesses in Tanzania

who allegedly had direct knowledge of his research in that country.

We review a district court's discovery rulings for an abuse of discretion. Wiwa v. Royal Dutch Petroleum Co., 392 F.3d 812, 817 (5th Cir. 2004). We will affirm unless the rulings are arbitrary or clearly unreasonable. Id. (citing Moore v. Willis Indep. Sch. Dist., 233 F.3d 871, 876 (5th Cir. 2000) (internal quotations omitted)). A court may grant a motion seeking to depose a prospective witness based only on "exceptional circumstances and in the interest of justice." Fed. R. Crim. P. 15(a)(1). Butler has not demonstrated exceptional circumstances or that taking these particular depositions would serve the interest of justice.

Butler had been under indictment, including charges of which the foreign witnesses would purportedly have had material knowledge, since April 2003. In May 2003 and again in August 2003, both parties sought a continuance of the trial, with Butler indicating in both instances the need to conduct discovery from these Tanzanian witnesses. Both of these motions were granted. Then, on August 25, 2003, Butler again sought leave to take the depositions of the foreign witnesses. The district court denied the motion on September 11, 2003, stating that the motion was "untimely and dilatory" in nature. The district court also noted that the evidence sought was not material and the lengthy and indeterminate continuance that would have resulted was impracticable.

Essentially, Butler maintains the foreign witnesses would have supported Butler's contention at trial that he had a good faith belief that he was in compliance with the rules of both U.S. and Tanzanian requirements for shipping *yersinia pestis*. As the Government points out, however, this information would have had little material value as to Butler's convictions for mailing the plague samples from the United States to Tanzania. Butler was convicted for violating U.S. export rules, not rules promulgated in Tanzania for

exporting items out of that country. In addition, the jury acquitted Butler of all charges relating to the transporting of *yersinia pestis* from Tanzania to the United States — the only relevant information of which the Tanzanian witnesses presumably would have had knowledge.

Based on the substance of the testimony Butler suggests the foreign witnesses would have provided, which materially relates to counts on which Butler was acquitted, the district court did not abuse its discretion when it denied Butler's motion.

## III. Whether the district court erred in quashing Butler's pretrial subpoena requesting the production of documents from HSC.

Butler argues the district court erred by refusing his request to obtain from HSC all emails relating to him. Specifically, Butler contends that because the Government placed Butler's dealings and relations with HSC administrators at the heart of its prosecution, it was an abuse of discretion for the district court not to allow Butler the opportunity to pursue his theory that there existed an animosity between he and HSC officials and that the testifying HSC officials had acted in an improper and retaliatory manner toward Butler.

According to the Government, Butler's subpoena requested documentation of any kind from September 2003 dating back to 1986 in 28 different subject matter categories. These requested documents included compensation agreements and personnel files for 15 different people; financial audits on Butler or his studies; internal correspondence regarding Butler; Butler's performance reviews; Butler's contributions to HSC; a grievance Butler filed against an HSC administrator; correspondence on Butler's grant funds, financial arrangements, audits, and

retaliation claims; "correspondence on communications"; and correspondence between criminal agents and HSC.[4]

The district court determined that Butler's subpoena was "too broad and vague" and amounted to "a fishing expedition and an attempt to conduct general discovery as against the Health Sciences Center." The court concluded that the subpoena was therefore "oppressive and unreasonable and must be quashed in its entirety."

We review a district court's granting of a motion to quash a subpoena for an abuse of discretion. United States v. Loe, 248 F.3d 449, 466 (5th Cir. 2001). An order quashing a subpoena is proper if "compliance would be unreasonable or oppressive." Fed. R. Crim. P. 17(c)(2). This Court has previously determined that a party seeking such a subpoena must establish: "(1) the subpoenaed document is relevant, (2) it is admissible, and (3) that it has been requested with adequate specificity." Loe, 248 F.3d at 466 (citation omitted). Based on a review of Butler's subpoena motion, Butler has failed to satisfy two of the three required conditions. First, the breadth of subject matter that Butler sought failed to evoke any real relevance to the particular counts for which he was charged, and second, many of the requested documentation clearly lacked the requisite specificity. Accordingly, the district court did not abuse its discretion when it quashed Butler's subpoena.

[4] The Government uses as further evidence of the broadness of Butler's subpoena motion his request for all correspondence amongst Frank Coleman, Glenda Helfrich, and Pat Campbell. Ms. Helfrich was an attorney for HSC and thus many, if not all, of her communications would have likely been privileged.

## IV. Whether the district court erred by allowing into evidence HSC policies and procedures relating to researchers' contracts with outside entities, including pharmaceutical companies.

Butler argues one of the controversies at trial involved identifying what contracts between HSC researchers and outside entities were covered by HSC's policies requiring researchers to pay HSC a percentage of monies received under those particular contracts. Butler maintains the district court erred when it denied his motion in limine that sought to bar the use of HSC's shared fee policies as evidence of Butler's alleged criminal conduct.

Butler contends that United States v. Christo, 614 F.2d 486 (5th Cir. 1980), which held that civil regulations cannot be used to establish criminal liability, bars the Government's use of HSC policies as a basis for finding criminal liability against Butler on the Contract Counts. Id. at 491-92. Butler suggests that the Government's violation of the principle enunciated in Christo is made even more egregious based on the fact that the Government used school policies to establish liability — a less formal and authoritative source than the prohibited civil regulations. Arguing that the Government blurred the distinction between criminal law and HSC policies, Butler asserts that the testimony elicited from HSC officials suggested it was Butler's failure to comply with HSC policies that would ultimately be determinative of Butler's guilt or innocence. Lastly, Butler cites Ninth Circuit case law for his contention that jury instructions, such as the one given in this case, cannot cure a Christo violation. See United States v. Wolf, 820 F.2d 1499 (9th Cir. 1987). Conversely, the Government maintains that it never presented to the jury a theory that violations of HSC policies automatically rendered Butler's conduct criminally fraudulent. Instead, argues the Government, it was saddled with the burden of establishing

that Butler acted intentionally and willfully in order to prove the fraud counts and simply used the policies to demonstrate such intent.

We review a district court's evidentiary rulings for an abuse of discretion. Kelly v. Boeing Petroleum Servs., Inc., 61 F.3d 350, 356 (5th Cir. 1995). Any erroneous evidentiary ruling is reversible error only if it affects a party's substantial rights. Id. at 361. In Christo, the case was remanded in large part because of the instruction to the jury that the legality of certain banking overdrafts had to be viewed in light of the civil banking restrictions on loans to officers. 614 F.2d at 491. This Court found problematic what it saw as the prosecution attempting to bootstrap a violation of a civil regulation into a criminal felony. Id. at 492. In this case, the Government persuasively argues that the testimony allowed by the district court was introduced to explain that HSC's policies simply governed Butler's conduct. The Government cites to two instances in the record where HSC officials, when asked by the defense whether violating the policies was itself a crime, both agreed that it was not. The introduction of the policies was for the purpose of establishing Butler's knowledge of the policies and his willfulness thereafter in defrauding HSC.

Moreover, the district court gave the jury a limiting instruction in which the court cautioned:

> You have heard testimony that Dr. Butler may have violated TTUHSC's Operating Policies and Procedures ("TTUHSC's Policies"). A violation of TTUHSC's Policies in itself is not a criminal offense.
>
> The government must prove all of the elements of the crimes charged, beyond a reasonable doubt. For example, even if you assume that Dr. Butler violated TTUHSC's Policies, the fact that TTUHSC's Policies were not followed does not necessarily mean that Dr. Butler possessed the requisite criminal intent to

> commit the offenses charged or that the government has proved the elements of the alleged crimes. If you find beyond a reasonable doubt from the other evidence in this case that Dr. Butler did commit the acts charged in the Indictment, then you may consider the evidence of a violation of TTUHSC's Policies for the limited purpose of determining whether Dr. Butler had the state of mind or intent necessary to commit the crimes charged in the Indictment.

This Court has previously determined that this type of limiting instruction is appropriate under these circumstances. In United States v. Brechtel, 997 F.2d 1108 (5th Cir. 1993), this Court stated that "we and our colleagues in other circuits have recognized the value of limiting instructions in attenuating any improper effect of such evidence when used for a permissible purpose." Id. at 1115 (citing United States v. Cordell, 912 F.2d 769, 777 (5th Cir. 1990); United States v. McElroy, 910 F.2d 1016, 1023-24 (2d Cir. 1990); United States v. Smith, 891 F.2d 703, 710 (9th Cir. 1989); United States v. Stefan, 784 F.2d 1093, 1098 (11th Cir. 1986)). The instruction issued by the district court clearly sets forth that any evidentiary reference to HSC policies made during the trial was for the limited purpose of establishing Butler's alleged criminal intent. Accordingly, even if we were to identify any error in the district court's decision to admit these policies into evidence, this particular instruction would cure any such error.

In sum, because the HSC policies were admitted for the limited purpose of establishing criminal intent on the part of Butler, and because the district court issued a comprehensive limiting instruction further clarifying the purpose of that evidence, we find no reversible error.

## V. Whether the Government presented sufficient evidence as to the Contract and Plague Counts.

Butler next argues there was insufficient evidence to support his conviction on the Contract Counts because the HSC policies were vague, thus casting doubt on the *mens rea* element of the crime. Butler also contends the Government failed to prove beyond a reasonable doubt that he willfully violated United States export control laws or hazardous material regulations.

We review a challenge to the sufficiency of the evidence in a criminal case to evaluate "whether a reasonable trier of fact could have found that the evidence established guilt beyond a reasonable doubt." Bieganowski, 313 F.3d at 275 (citation and internal quotations omitted). The jury retains the sole responsibility for determining the weight and credibility of the evidence. United States v. Jaramillo, 42 F.3d 920, 923 (5th Cir. 1995). In evaluating the evidence, we view all evidence and all reasonable inferences drawn from it in the light most favorable to the government. Bieganowski, 313 F.3d at 275. "It is not necessary that the evidence exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt." Id.

As to Butler's argument regarding the Contract Counts, and more specifically his contention that the HSC policies were vague and therefore subject to misinterpretation, there was evidence introduced at trial that HSC reminded Butler by memo six times that he was not to sign contracts with grantors for work done at HSC. The Government contends these memos prove Butler's state of mind regardless of whether he reviewed or understood HSC's posted policies. Butler also argues that he thought the agreements he entered into with Pharmacia and Chiron were

consulting contracts.[5] The Government points out, however, that it introduced at trial: (1) language in these agreements between Butler and the pharmaceutical companies indicating that the studies were for clinical work (and thus subject to HSC's policies); (2) differences between the agreements and other documents entered into evidence entitled "Consulting Agreements"; and (3) testimony from the pharmaceutical representatives themselves, who characterized the split contracts as clinical study agreements. Based on this evidence alone, the Government presented sufficient evidence of Butler's intent to defraud HSC such that a reasonable trier of fact could have found that the evidence established guilt beyond a reasonable doubt.

Next, Butler maintains there was insufficient evidence to support the jury's finding that he willfully: (1) exported *yersinia pestis* to Tanzania without a license; (2) described in a misleading manner the *yersinia pestis* as "laboratory materials" on the FedEx waybill; and (3) violated federal hazardous material regulations when he shipped the *yersinia pestis* to Tanzania.

As to the first sub-issue, the Government points this panel to evidence introduced at trial that Butler certified on the FedEx waybill that the samples were being "exported . . . in accordance with Export Administration Regulations," when in fact they were not. The Government notes that Butler had in his office a document downloaded from the Center for Disease Control website that clearly indicated a Department of Commerce permit was required to export *yersinia pestis*. As further evidence of Butler's knowledge of export requirements, the Government observes that Butler previously signed four waybills shipping hazardous materials

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[5] As stated previously, both parties stipulate that pure consulting contracts were not subject to the restrictions placed on clinical studies, research grants, or any other type of venture that involved use of HSC's resources.

to Canada and checked the box indicating a Shipper's Export Declaration was not needed (which it is not in those circumstances). Moreover, the Government introduced evidence that during the 1990s, Butler properly shipped infectious substances and other dangerous goods more than 30 times. Based on this evidence, Butler's argument here must fail.

With regard to Butler's conviction for making a false statement by labeling the *yersinia pestis* as "laboratory materials," he contends that because he did not intend to deceive anyone, he cannot be found to have acted willfully. The Government responds by noting that Butler also certified on that same label that he was not shipping dangerous goods. According to the Government, a reasonable person certainly could conclude that an accomplished researcher, who was the Chief of Infectious Diseases at HSC and had spent considerable time studying plague abroad, would have known that plague was a dangerous good requiring the proper identification thereof. Accordingly, Butler's sufficiency of the evidence argument on this sub-issue is also without merit.

Finally, Butler contends his conviction for violating hazardous material regulations required the Government to prove that his infraction could not have been due to a good faith mistake or misunderstanding of the law. The Government responds with an argument identical to its reason why there was sufficient evidence establishing Butler's unlawful export of *yersinia pestis* to Tanzania without a license: Butler had successfully and legally shipped hazardous materials at least 30 times before making this particular shipment. Importantly, Butler comes forward with no specific evidence of his own on appeal refuting the Government's evidence, or establishing what about his actions warranted a finding that he made a good faith mistake or misunderstood the law. Without more, a reasonable trier of fact could have found that the evidence established guilt beyond a reasonable doubt.

## VI. Whether the district court's use of the 2001 Sentencing Guidelines in sentencing Butler was in violation of the Ex Post Facto Clause.

Butler argues the district court erred in using the 2001 version of the Sentencing Guidelines, instead of the 2000 version, for purposes of his sentencing. Butler contends he was convicted on two sets of discrete charges that occurred during different time periods. Specifically, Butler notes that the events relating to the Contract Counts took place between August 1998 and August 2001, while the events underlying the Plague Counts transpired during 2002. Because the activities relating to the Contract Counts were completed by August 2001, argues Butler, the 2000 version should have been applied as it was in effect at that time. Butler explains that had the 2000 version been used, his offense level would have been reduced by four.

This Court reviews the district court's application of the Guidelines de novo and its findings of fact for clear error.[6] The district court shall apply the Guidelines in effect on the date the defendant was sentenced, U.S. Sentencing Guidelines Manual § 1B1.11(a) (2004), unless such application violates the *Ex Post Facto* Clause of the Constitution, and in that case, the district court shall apply the manual in effect on the date the offense of conviction was committed, id. § 1B1.11(b)(1).

In determining the appropriate version of the Guidelines for sentencing purposes, the district court appears to have employed the one-book rule, which provides that

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[6] We employ this standard of review even as to those limited cases on direct appeal at the time United States v. Booker, 125 S. Ct. 738 (2005), was issued where the district court sentenced under a mandatory guideline system. See United States v. Villegas, 404 F.3d 355, 359 (5th Cir. 2005).

where a "defendant is convicted of two offenses, the first committed before, and the second after, a revised edition of the Guidelines Manual became effective, the revised edition of the Guidelines Manual is to applied to both offenses." Id. § 1B1.11(b)(3). In following this clarifying provision, the district court applied the 2001 version of the Guidelines which was in effect on the date the events underlying Butler's last conviction occurred in September 2002. Moreover, the commentary to § 1B1.11(b)(3) provides that this approach:

> [S]hould be followed regardless of whether the offenses of conviction are the type in which the conduct is grouped under § 3D1.2(d). The ex post facto clause does not distinguish between groupable and nongroupable offenses.

Id. § 1B1.11(b)(3), cmt. background.[7] Moreover, this Court has previously concluded that application of § 1B1.11(b)(3) in instances similar to the one here is permissible and does not violate the Ex Post Facto Clause. See United States v. Kilmer, 167 F.3d 889, 895 (5th Cir. 1999). Based on the relevant guideline provisions and the applicable commentary, we reject Butler's *ex post facto* challenge to his sentence.

## CONCLUSION

Having carefully reviewed the entire record of this case, and having fully considered the parties' respective briefing and arguments, we conclude the district court did not commit reversible error by refusing to sever the Contract Counts from the Plague Counts. Moreover, the district court made appropriate discovery and evidentiary rulings. Also, there was sufficient evidence supporting Butler's convictions under the Contract Counts and the Plague Counts. Finally, the district court's application of the 2001 Sentencing

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[7] Butler's criminal convictions under the Contract Counts and Plague Counts are not identified in § 3D1.2(d) as groupable offenses.

Guidelines was not violative of the Ex Post Facto Clause. Accordingly, we AFFIRM Butler's conviction and sentence.

**AFFIRMED.**

**APPENDIX G**

**U.S. Court of Appeals**
**FILED**
**January 11, 2006**
**Charles R. Fulbruge III**
**Clerk**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

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No. 04-10364

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

V.

THOMAS CAMPBELL BUTLER, MD,

Defendant-Appellant.

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Appeal from the United States District Court for the
Northern District of Texas, Lubbock

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ON PETITION FOR REHEARING EN BANC

Before WIENER, DeMOSS, and PRADO, Circuit Judges.
PER CURIAM:

Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

s/ Harold R. DeMoss, Jr.
United States Circuit Judge

## APPENDIX H

## International Emergency Economic Powers Act
## 50 U.S.C. § 1705

### § 1705. Penalties

(a) A civil penalty of not to exceed $10,000 may be imposed on any person who violates, or attempts to violate, any license, order, or regulation issued under this chapter.

(b) Whoever willfully violates, or willfully attempts to violate, any license, order, or regulation issued under this chapter shall, upon conviction, be fined not more than $50,000, or, if a natural person, may be imprisoned for not more than ten years, or both; and any officer, director, or agent of any corporation who knowingly participates in such violation may be punished by a like fine, imprisonment, or both.

## APPENDIX I

### Federal Rule of Criminal Procedure 8

**(a) Joinder of Offenses.** The indictment or information may charge a defendant in separate counts with 2 or more offenses if the offenses charged--whether felonies or misdemeanors or both--are of the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan.

**(b) Joinder of Defendants.** The indictment or information may charge 2 or more defendants if they are alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense or offenses. The defendants may be charged in one or more counts together or separately. All defendants need not be charged in each count.