No. 17-4148

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA
Plaintiff - Appellant,

v.

KEMP & ASSOCIATES, INC. AND DANIEL J. MANNIX,
Defendants - Appellees .

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF UTAH
Honorable David Sam
District Court No. 2:16-cr-00403-DS

OPENING BRIEF FOR THE UNITED STATES OF AMERICA (CORRECTED)

MAKAN DELRAHIM
Assistant Attorney General

ANDREW C. FINCH
Principal Deputy Assistant Attorney General

MARVIN N. PRICE, JR.
Acting Deputy Assistant Attorney General

KALINA M. TULLEY
ROBERT M. JACOBS
RUBEN MARTINEZ, JR.
MOLLY A. KELLEY
Attorneys
U.S. Department of Justice
Antitrust Division

KRISTEN C. LIMARZI
JAMES J. FREDRICKS
ADAM D. CHANDLER
JONATHAN H. LASKEN
Attorneys
U.S. Department of Justice
Antitrust Division
950 Pennsylvania Avenue, NW
Room 3224
Washington, DC 20530-0001
202-305-7420

Oral Argument Is Requested

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES, AND RULES

MISCELLANEOUS

STATEMENT OF PRIOR AND RELATED CASES

There are no prior or related cases to this appeal.

STATEMENT OF JURISDICTION

The district court had jurisdiction over this criminal prosecution under 18 U.S.C. § 3231. On August 28, 2017, the district court entered 1) an order dismissing the indictment as barred by the statute of limitations and 2) an order that the case is not subject to the per se rule (but is instead subject to the rule of reason) for purposes of determining whether the conduct charged in the indictment violates Section 1 of the Sherman Act, 15 U.S.C. § 1. A133-A143.[1] The government filed a timely notice of appeal from both orders on September 26, 2017. Fed. R. App. P. 4(b)(1)(B).

This Court has appellate jurisdiction to review the first order under 18 U.S.C. § 3731. Section 3731 also provides appellate jurisdiction over the second order. *See infra* pp. 47-51. If this Court concludes that it does not have appellate jurisdiction over the second order, the government respectfully requests that the Court construe the pertinent parts of this brief as a petition for a writ of mandamus, which

[1] Citations to the appellant's appendix take the form of A##.

the Court has the authority to issue under the All Writs Act, 28 U.S.C. § 1651. *See infra* pp. 52-57.

INTRODUCTION

This appeal arises from two orders erroneously dismissing an indictment charging a company, Kemp & Associates, Inc., and one of its executives, Daniel J. Mannix, with conspiring with a competitor to suppress and eliminate competition by allocating customers in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

In the first order, the district court dismissed the indictment as untimely based upon its erroneous conclusion that the conspiracy ceased when the last customer was allocated, even though the conspirators continued to collect payments under the allocated customer contracts and shared those payments with each other. The order is in direct conflict with this Court's precedents, which reject exactly that view. In *United States v. Evans & Associates Construction Co.*, this Court held that a Sherman Act conspiracy to suppress or eliminate competition for contracts continues until a conspirator accepts "the last payment on the contract." 839 F.2d 656, 661 (10th Cir. 1988). And thus, when a conspirator receives "any money" from an allocated

contract, "that [is] sufficient to delay the start of the statute" of limitations. *Id.* In *United States v. Morgan*, this Court held that conspiracy continues at least until the "distribution of the proceeds of a conspiracy" is complete. 748 F.3d 1024, 1036-37 (10th Cir. 2014). Here, the conspirators received payments and distributed the proceeds from the allocated contracts within the limitations period, as the defendants conceded below.

In the second order, the court wrongly precluded the government from proceeding to trial under its sole theory of liability: that the conduct alleged in the indictment is a per se illegal restraint of trade. It is well established that customer allocation agreements are subject to condemnation under the per se rule. *See Palmer v. BRG of Ga., Inc.*, 498 U.S. 46, 49-50 (1990) (per curiam); *United States v. Suntar Roofing, Inc.*, 897 F.2d 469, 473 (10th Cir. 1990). The district court identified no sound basis for ignoring controlling precedent and departing from the per se rule here, and there is none. Its order "quite obviously is inconsistent" with binding precedent. *Arizona v. Maricopa Cnty. Med. Soc'y*, 457 U.S. 332, 349 (1982).

STATEMENT OF ISSUES FOR REVIEW

1. Whether the district court erred in concluding that the five-year statute of limitations bars an indictment alleging that the members of a conspiracy to allocate customers received, and distributed among themselves, the proceeds from the allocated customer's contracts within five years of indictment.

2. Whether the district court erred in concluding that the per se rule does not apply to the alleged conspiracy to allocate customers because of the defendants' assertions that the conspiracy 1) applied only to new customers, 2) affected a small part of society, 3) arose in a unique and unusual industry, and 4) had efficiency-enhancing potential.

STATEMENT OF THE CASE

On August 17, 2016, a District of Utah grand jury returned a one-count indictment charging Kemp & Associates, Inc., and its Director of Operations and Vice President/COO, Daniel Mannix, with conspiring "to suppress and eliminate competition by agreeing to allocate customers of Heir Location Services sold in the United States," in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. A18. The

indictment alleged that the conspiracy lasted from at least September 1999 to January 29, 2014. *Id.*

I. The Conspiracy to Allocate Customers of Heir Location Services

Providers of heir location services offer individuals who may be heirs to intestate estates the services associated with securing their inheritance. The providers identify such heirs "and, in exchange for a contingency fee, develop evidence and prove [the] heirs' claims to an inheritance in probate court." A17. Potential heirs who have not yet signed contracts with, and thus are not yet a customer of, an heir location service provider may receive offers from one or more such providers. *Id.* If multiple providers identify the same unsigned potential heir, one of the ways they may compete to sign the heir is by offering "more attractive contingency fee rates." *Id.*

The defendants and a competing heir location service provider[2] conspired to suppress and eliminate competition between them for these

[2] Richard A. Blake, Jr., the owner and president of the other heir location service provider, pleaded guilty to the same conspiracy as charged in the indictment at issue in this appeal. *See United States v. Blake*, No. 1:16-cr-00025, Dkt. No. 21 (N.D. Ill. Mar. 8, 2016).

unsigned heirs, including competition on contingency fee rates, "by agreeing to allocate customers of Heir Location Services sold in the United States." A18. The conspirators "agreed . . . that when both co-conspirator companies contacted the same unsigned heir to an estate, the co-conspirator company that first contacted that heir would be allocated certain remaining heirs to that estate who had yet to sign a contract with an Heir Location Services provider." A19. In exchange for a portion of any contingency fees collected by the first company, the second company agreed not to compete for the business of that heir and certain other unsigned heirs to the same estate. *Id*. Pursuant to this allocation, the first company would "submit[] offers to provide Heir Location Services, which included contingency fee rate quotations, to potential heirs" it first contacted, while the second company would "refrain[] from submitting offers and quotations to potential heirs" allocated to the first company. *Id*. The first company signed the allocated customers at noncompetitive prices, proved the heirs' claim to the estate, and collected from them "collusive and noncompetitive" contingency fees. A19-A20. After the fees were collected, the first

company paid to the second "a portion of the contingency fees ultimately collected from those allocated heirs" pursuant to the agreement. A19.

The indictment charged that the conspiracy continued as late as January 29, 2014. A18. And it alleged that the conspirators "carr[ied] out the [charged] conspiracy" by, among other things, accepting payments for heir location services sold to heirs at collusive contingency fee rates and making payments to, and receiving payments from, each other. A18-A20. Defendants concede that such payments continued into the limitations period. *See also* A194.

II. Proceedings and Decisions Below

On March 31, 2017, the defendants filed a "Motion For Order That The Case Be Subject To The Rule Of Reason And To Dismiss The Indictment." A147-A203. The motion requested: 1) an order that the government cannot proceed to trial under the per se rule but must instead try the case under the rule of reason, 2) an order dismissing the indictment because the Due Process Clause precludes a criminal prosecution under the rule of reason, and 3) an order dismissing the indictment as barred by the statute of limitations. A153.

The motion invited the court to look beyond the indictment's allegations by including documentary exhibits and descriptions of the defendants' ongoing data analysis that defendants assert show the nature and effect of the conspirators' agreement. *See generally* A153, A184-A186, A213-A215, A216-A217, A226-A229. The government opposed the motion and the consideration of these factual matters outside the indictment. A239, A250; *see also* A56-A57.

On June 21, 2017, the district court (Sam, J.) held a hearing on the motion. At the hearing, the court stated that its ruling "will be" that this "is a Rule of Reason case because it is unique and unusual," "doesn't affect a very large part of our society," is "just very narrowly focused," and "doesn't seem to me to fit the classic Sherman Antitrust Act type cases." A81-A82. The court asked the defendants to prepare an order for the court to sign. A84. The court reserved ruling on the statute of limitations issue and did not mention the Due Process issue. A82-A84.

On July 14, 2017, the government filed a motion seeking reconsideration of the oral ruling, objecting to the defendants' proposed order, and requesting a ruling on the statute of limitations issue. In

particular, the government asked the court to "reconsider its holding that the per se rule does not apply to the conspiracy as charged" because it conflicted with binding precedent holding a customer allocation agreement is per se unlawful, and any decision that the conduct was something other than the charged, per se unlawful agreement improperly resolved factual disputes related to the ultimate issue in the case. A87-A98.

On August 28, 2017, the district court adopted the defendants' proposed order verbatim, A133-A136, denied the government's motion for reconsideration, and granted the defendants' motion to dismiss the indictment as time barred, A137-A143. In the Rule of Reason Order, the court concluded that the per se rule does not apply to this case because the challenged agreement 1) arose in a unique and unusual industry, 2) applied only to new customers, 3) affected a small part of society, and 4) contained efficiency-enhancing potential. A137-A143. In the Limitations Order, the court concluded that this case was time barred because the conspiracy ended in 2008, after the initial allocation of the last estate subject to the agreement. A137-A143. In the same

order, the court denied reconsideration based upon its reasoning at the hearing and in the Rule of Reason Order. *Id.*

On September 26, 2017, the government noticed its appeal of both orders.

SUMMARY OF ARGUMENT

Two erroneous rulings by the district court that contravene controlling precedent of this Court (and the Supreme Court) have brought the prosecution of this straightforward per se illegal customer allocation conspiracy to a halt.

First, the court dismissed the indictment as untimely, mistakenly concluding that it ended when the last customer was allocated and no additional competition was eliminated, even though the conspirators continued to collect payments under the contracts with allocated customers and to divide those payments within five years of indictment. In *United States v. Evans & Associates Construction Co.* (*Evans*), 839 F.2d 656, 661 (10th Cir. 1988), this Court reversed a district court for making the very same mistake. The Court unequivocally held that the conspirators' continued receipt of the proceeds of a Sherman Act conspiracy, including the last payment on an affected contract,

demonstrated that the conspiracy continued and thus delayed the commencement of the limitations period. Here, the district court and the defendants offered no valid basis to distinguish *Evans*, and there is none. In every relevant respect, the indictment in *Evans* parallels the indictment here.

The district court's dismissal also contravenes this Court's holding in *United States v. Morgan*, 748 F.3d 1024, 1036-37 (10th Cir. 2014), that a conspiracy continues at least until the distribution of its proceeds. The court and defendants again offered no valid reason (and there is none) why the distribution by the conspirators of the proceeds from the contracts with the allocated customers does not demonstrate that the conspiracy continued into the limitations period here.

Second, the district court erroneously concluded that the charged customer allocation conspiracy should be analyzed under the rule of reason and not condemned as per se illegal, if proven. But binding precedent holds that customer allocation agreements are, as a category, per se illegal and thus condemned without further inquiry into their reasonableness. *See Palmer v. BRG of Ga., Inc.*, 498 U.S. 46, 49-50 (1990) (per curiam); *United States v. Suntar Roofing, Inc.*, 897 F.2d 469,

473 (10th Cir. 1990). The charged customer allocation conspiracy cannot be removed from this per se category based on defendants' (disputed) assertions, even if true, that the allocation applied only to new customers, affected only a small number of estates, arose in an obscure industry, or contained purportedly efficiency-enhancing potential. By doing so, the district court contravened this Court's and the Supreme Court's precedent.

This Court has the power to correct the district court's errors under 18 U.S.C. § 3731. That section provides that an order is appealable if it formally dismisses an indictment (as the Limitations Order does), or if the order does not formally dismiss the indictment but is nonetheless tantamount to a dismissal by having that effect or foreclosing a distinct theory of liability (as the Rule of Reason Order does). But even if this Court concludes that Section 3731 does not provide jurisdiction over the Rule of Reason Order, the government respectfully requests that the Court treat the relevant parts of this brief as a petition for writ of mandamus. In this case, the antitrust issue is so fundamental, the error so manifest, and review otherwise so elusive, that the extraordinary remedy of mandamus is fully warranted.

STANDARD OF REVIEW

This Court reviews *de novo* a decision dismissing an indictment as barred by the statute of limitations, including "the district court's legal conclusion concerning the scope of the conspiracy." *United States v. Qayyum*, 451 F.3d 1214, 1218 (10th Cir. 2006). The grand jury "need not" charge facts establishing the timeliness of the action; the statute of limitations is an affirmative defense and not an element of the crime. *Smith v. United States*, 568 U.S. 106, 112 (2013).

This Court reviews *de novo* the district court's Rule of Reason Order as a dismissal for failure to allege a per se offense. *United States v. Giles*, 213 F.3d 1247, 1248-49 (10th Cir. 2000); *United States v. Hall*, 20 F.3d 1084, 1088 (10th Cir. 1994). (If the Court concludes that this order is not an appealable dismissal under 18 U.S.C. § 3731, then the standard applicable to a mandamus petition applies, *see infra* pp. 53-54.)

This Court "must" assume "the indictment's allegations are true" "at this stage of the proceedings." *Qayyum*, 451 F.3d at 1219. The indictment "should be read in its entirety, construed according to common sense and interpreted to include facts which are necessarily

implied." *United States v. Phillips*, 869 F.2d 1361, 1364 (10th Cir. 1988) (quoting *United States v. Martin*, 783 F.2d 1449, 1452 (9th Cir. 1986)).

ARGUMENT

I. The Indictment Was Timely Because the Conspiracy Continued Through January 2014 as Demonstrated by the Receipt and Division of the Conspiracy's Proceeds up to this Date

The district court erred in dismissing the indictment's single Sherman Act conspiracy count as untimely. The district court committed this error because it mistakenly concluded that the alleged conspiracy ended after the last customers were allocated, rather than continuing as long as the conspirators collected and distributed payments from the contracts with the allocated customers. This conclusion conflicts with well-established precedent in this Circuit and others holding that conspiracies continue as their members collect and distribute the conspiracies' proceeds, that is, until the last contractual payment is received or divided by the conspirators.

A. The Conspirators' Receipt and Division of the Conspiracy's Proceeds Continues the Conspiracy and Thus Delays the Start of the Statute of Limitations

The Sherman Act offense charged here is subject to the five-year statute of limitations provided by 18 U.S.C. § 3282(a). A Sherman Act

conspiracy prosecution is timely if the conspiracy exists within the relevant limitations period, which, in this case, is the five-year period beginning August 18, 2011, A16-A21. *See Grunewald v. United States*, 353 U.S. 391, 396-97 (1957). An indictment's allegations determine the scope of the conspiracy. *Qayyum*, 451 F.3d at 1218. The indictment here alleges a Sherman Act conspiracy to allocate customers by having one conspirator make the allocated customer a contractual offer while the other refrains from making a competing offer. Such a conspiracy "remains actionable until its purpose has been achieved or abandoned, and the statute of limitations does not run so long as the co-conspirators engage in overt acts designed to accomplish its objectives." *United States v. Inryco, Inc.*, 642 F.2d 290, 293 (9th Cir. 1981); *see United States v. Kissel*, 218 U.S. 601, 607 (1910).

"Every circuit," including this one, "that has addressed th[e] issue has concluded that a criminal conspiracy to restrain trade by collusive, anti-competitive bidding continues for the purposes of the five year statute of limitations until either the final payments are received under the illegal contract or the final distribution of illicit profits among the conspirators occurs." *United States v. Dynalectric Co.*, 859 F.2d 1559,

1565 (11th Cir. 1988).[3] In *United States v. Evans & Assocs. Const. Co.* (*Evans*), this Court held that a Sherman Act conspiracy to suppress or eliminate competition for contracts does not end when the contract or contracts are obtained, but continues until a conspirator "accepted the last payment on the contract." 839 F.2d 656, 661 (10th Cir. 1988). Thus, the receipt of "any money" by any conspirator from an allocated contract is "sufficient to delay the start of the statute" of limitations. *Id.*

Likewise, in *United States v. Morgan*, this Court held that "the distribution of the proceeds of a conspiracy is an act occurring during

---

[3] *See United States v. Anderson*, 326 F.3d 1319, 1328 (11th Cir. 2003); *United States v. N. Improvement Co.*, 814 F.2d 540, 541-44 (8th Cir. 1987); *United States v. A-A-A Elec. Co.*, 788 F.2d 242, 245-46 (4th Cir. 1986); *Inryco*, 642 F.2d at 293-95; *see also United States v. Walker*, 653 F.2d 1343, 1346-47 (9th Cir. 1981) (holding that a conspiracy to defraud the government by rigging bids for timber contract did not end with the contract's award "because the agreement itself aimed beyond merely defeating the government process of competitive bidding and encompassed the ultimate objective of making excess profits to be shared among the co-conspirators"); *United States v. Girard*, 744 F.2d 1170, 1172-74 (5th Cir. 1984) (holding that conspiracy to defraud by rigging bids to secure contract did not end with the contract's award but continued as conspirator accepted contractual payments because his "interest lay not in securing the contract itself, but in obtaining the money thereunder").

the pendency of the conspiracy." 748 F.3d 1024, 1036-37 (10th Cir. 2014) (quoting *United States v. Davis*, 766 F.2d 1452, 1458 (10th Cir. 1985)). And thus, the distribution of proceeds also delays the start of the statute of limitations.

The indictment alleged that defendants engaged in a conspiracy "to suppress and eliminate competition by agreeing to allocate customers of Heir Location Services," which continued until "January 29, 2014." A18. The indictment further alleged that the conspiracy's purpose was carried out by, among other things, the conspirators: 1) submitting offers and withholding offers to potential customers, 2) accepting payments for the services sold to the allocated customer at collusive and noncompetitive contingency fee rates, and 3) paying a portion of these payments to the co-conspirator company or receiving a portion of these payments from the co-conspirator company. A19-A20. In this way, the conspirators received payments on the allocated contracts and distributed those proceeds among themselves. Indeed, defendants do not dispute that some of these acts—receipt and division of the conspiracy's proceeds—were performed within five years of the indictment's filing. *See also* A194. Thus, under controlling precedent,

Evans, 839 F.2d at 661; *Morgan*, 748 F.3d at 1036-37, the indictment was timely.

B. The District Court Erred by Concluding that the Conspiracy Ended When a Conspirator Signed the Final Allocated Customer

In concluding that the indictment was untimely, the district court committed the same mistake that this Court corrected in *Evans*. The district court erroneously held that the conspiracy ended when the conspirators ceased allocating future customers because the court mistakenly believed that the conspiracy's purpose did not include collecting payments on contracts with allocated customers or dividing those payments. A141-A142. The district court in *Evans* likewise believed that the statute of limitations began to run at the moment competition was eliminated, which, in that bid-rigging case, was "when the bids were let." 839 F.2d at 661.

This Court reversed, holding that the statute does not begin to run on a criminal Sherman Act conspiracy "until after the successful contractor accepted the last payment on the contract." *Id.* The Court explained that the "Sherman Act violation was 'accomplished both by the submission of noncompetitive bids *and* by the request for and

receipt of payments at anti-competitive levels.'" *Id.* (quoting *Northern Improvement*, 814 F.2d 540 at 543 n.2); *see also Northern Improvement*, 814 F.2d at 542 ("[T]he object and purpose of this illegal agreement was 'illicit gain,' the receipt of payments, and we conclude that the district court erred in holding that the purpose of the conspiracy terminated the moment the bids were submitted.").

As in *Evans*, when the indictment here is "'read in its entirety'" and "'construed according to common sense,'" *Phillips*, 869 F.2d at 1364 (quoting *Martin*, 783 F.2d at 1452), it is apparent that the conspirators' receipt and distribution of the proceeds from the contracts with allocated customers were within the scope of the conspiracy. The Court is "not deal[ing] here with criminal behavior that is an end in itself," but rather "[c]ommon sense tells us that the conspirators' purpose was to reap the benefit of the conspiracy: to be awarded [the heir location service] contracts at anti-competitively high prices and to be paid for those contracts." *Northern Improvement*, 814 F.2d at 542; *see also Girard*, 744 F.2d at 1172-73. Indeed, courts have found it "inconceivable . . . that any business would conspire to restrain trade solely for the sake of restraining trade," as the "attendant battery of

civil and criminal penalties for antitrust violations simply is too threatening to convince us that anybody would attempt to restrain trade without also having the further goal of financial self-enrichment by virtue of the restraint of trade." *Dynalectric*, 859 F.2d at 1568; *see Anderson*, 326 F.3d at 1328 (holding that the "conspiracy continued until the conspirators received the full economic benefits anticipated by their bid-rigging scheme," including payment on a contract they bid on seven years earlier).

There is no basis for the district court's conclusion that "economic enrichment" was the purpose in *Evans* but not here. A141. Its conclusion cannot be based on "the evidence in *Evans*" showing "that the central purpose of the conspiracy was to obtain wrongful proceeds or money," *id.*, because there was no evidence in *Evans*: this Court reversed a pre-trial dismissal of the indictment.

The district court's conclusion also cannot be based on any difference between the indictments here and in *Evans*. The indictments in both cases charge a conspiracy to suppress competition whose substantial term was the mechanism by which the conspirators

eliminated competition.[4] And both indictments alleged that the conspirators suppressed and eliminated competition by coordinating their offers for contracts.[5] They both also identified receipt of payments as a means of effectuating the conspiracy, and neither explicitly alleged that the conspiracy's purpose was "economic enrichment." A141.[6]

---

[4] *Compare* A18 (*Kemp* Indictment ¶¶ 9-10) (alleging "conspiracy . . . in unreasonable restraint of" trade, in which defendants conspired "to suppress and eliminate competition by agreeing to allocate customers of Heir Location Services sold in the United States," and for which the "substantial terms" were "to allocate customers of Heir Location Services sold in the United States"), *with* Indictment ¶¶ 13-14, *United States v. Evans & Assocs. Constr. Co.*, 1987 WL 9899 (W.D. Okla. Jan. 22, 1987) (No. CR-86-77-E) ("*Evans* Indictment"), *available at* https://www.justice.gov/atr/page/file/1018136/download (alleging "conspiracy in unreasonable restraint of" trade, "a substantial term of which was to submit collusive, noncompetitive and rigged bids to, or to withhold bids from, the Oklahoma Department of Transportation").

[5] *Compare* A19 (*Kemp* Indictment ¶ 11(g)), *with Evans* Indictment ¶ 14.

[6] *Compare* A18, A20 (*Kemp* Indictment ¶ 11, 11(i)) (alleging that, "[f]or the purpose of forming and carrying out the combination and conspiracy alleged in this indictment," the defendants "accepted payment for Heir Location Services sold to heirs in the United States at collusive and noncompetitive contingency fee rates"), *with Evans* Indictment ¶ 15, 15(e) (alleging that acts done "[f]or the purpose of forming and effectuating the aforesaid combination and conspiracy" included "[r]eceiving and accepting from the Oklahoma Department of Transportation payments for work performed on the aforementioned Federal-Aid highway construction project").

Evans thus cannot be distinguished on the basis of the indictments' allegations because in all relevant respects the two indictments are parallel.[7]

The charged conspiracy in *Evans* also cannot be distinguished on the ground that it involved rigging "the bid for one contract which was bid, granted, completed and fully paid within the two years," while the customer allocation agreement here rigged the offers for "269 allegedly affected estates." A142. Nothing in *Evans* supports the notion that had the defendants there rigged the bidding for numerous contracts, their more extensive conspiracy would not have continued to the last payment received, but rather would have ended—perhaps earlier than the actual one-contract conspiracy—when the last of the contracts was let.

In any event, imposing artificial limits on the time for, or the number of, payments received that qualify as overt acts in furtherance

[7] A comparison with the indictment in *Northern Improvement* yields the same conclusion. *Compare* A18-A20 (*Kemp* Indictment ¶¶ 9-11), *with* Indictment ¶¶ 18-19, *United States v. N. Improvement Co.*, 632 F. Supp. 1576 (D.N.D. 1986) (Crim. No. C3-85-062), *available at* https://www.justice.gov/atr/page/file/1018141/download.

of a conspiracy makes no sense and has no statutory basis. It would have courts arbitrarily deciding case-by-case how many payments were too many or what period of time for payments was too long, thus depriving both the government and defendants of any certainty on when the statute of limitations ran.[8] This does not mean that there is "significant arbitrariness regarding the length of the limitations period." A142. The limitations period is five years.
18 U.S.C. § 3282(a). What varies is how long the conspiracy continues, which always depends on the conspirators' agreement and actions. For a Sherman Act conspiracy, this Court has held that the conspiracy continues at least until a conspirator commits the last act in furtherance, including a conspirator accepting the last payment on an affected contract. The number of contracts or the duration of their performance makes no difference.

---

[8] In fact, the payment period in several cases cited is comparable to or greater than here. *See Anderson*, 326 F.3d at 1325-26 (contract bid July 2, 1989; final payments received September 20, 1996); *Dynalectric*, 859 F.2d at 1562 (subcontract bid September 7, 1979; final payment received January 24, 1985); *Walker*, 653 F.2d at 1344 (contract bid June 23, 1972; timber cut and paid for in August and September 1975).

It would also make no difference if the district court were correct that the payments on their face appeared to be "ordinary, non-criminal events." A142. The receipt of the payment in *Evans* appears just as ordinary and non-criminal as the receipt of payments here. An act's superficially "ordinary" or "non-criminal" appearance is irrelevant because acts "innocent, indeed, of themselves" take on their "criminal taint from the purpose for which they were done." *Hyde v. United States*, 225 U.S. 347, 360 (1912); *see also Iannelli v. United States*, 420 U.S. 770, 785 n.17 (1975) ("[T]he act can be innocent in nature, provided it furthers the purpose of the conspiracy."); *Braverman v. United States*, 317 U.S. 49, 53 (1942) (explaining that an overt act "may be that of only a single one of the conspirators and need not be itself a crime"); *Girard*, 744 F.2d at 1174 ("Even though the acceptance [of payment], in and of itself, was perfectly legal, it still satisfies the requirement of an overt act because of the agreement's illegal purpose.").

Lastly, quoting out-of-circuit precedent, the district court purports to distinguish *Evans* because, in its view, the "'unique threats to society posed by a conspiracy'" here have passed. A141 (quoting *United States v. Doherty*, 867 F.2d 47, 62 (1st Cir. 1989)). But unlike *Doherty*—a case

about stolen police promotion exams and higher police salaries—*Evans* and the conspiracy charged here involve the collection of a final payment on an affected contract in furtherance of a Sherman Act conspiracy. If *Doherty* were interpreted to hold that the unilateral collection of such a payment cannot continue a conspiracy like the one here, then it would conflict with this Court's holding in *Evans*. Likewise, if *Doherty* were interpreted to hold that such payment's collection were the mere "results of [the] conspiracy" and not "actual conduct in furtherance of it," *id.*, *Doherty* would again conflict with *Evans*.[9]

In any event, even assuming *Doherty* were relevant here (which it is not), it does not support the district court's ruling. The "distinct danger[]" posed by conspiracy is "collective" or "[c]oncerted" action, which includes continued cooperation in the form of payoffs and

---

[9] *See also Anderson*, 326 F.3d at 1328 (rejecting defendant's contention that "payment was not an *overt act* in furtherance of the conspiracy but merely the *result* of the conspiracy"); *Walker*, 653 F.2d at 1347 (rejecting defendant's view of "payment . . . and division of profits on the [rigged contracts for] timber as merely the continuing *result* of the conspiracy" and concluding that "the conspiracy was a continuing one within the meaning of *Kissel* and *Fiswick* [*v. United States*, 329 U.S. 211 (1946)]").

distributions of proceeds among the conspirators. *Iannelli*, 420 U.S. at 778. *Doherty* itself recognized that the "special societal dangers of conspiracy" existed when "the payoff itself required cooperation; for instance . . . in *Walker*, 653 F.2d at 1347, the realization and division of profits required 'continuing cooperation.'"[10]

Indeed, while the *Evans* indictment alleged only that a single conspirator "received payments" within the limitations period and that "no division of these payments among the conspirators" was made, 839 F.2d at 661, the indictment here does allege division of spoils in addition to receipt of payments. A19-A20 (*Kemp* Indictment ¶ 11(f) (division of proceeds), ¶ 11(i) (receipt of payments)). It "'is well settled that the distribution of the proceeds of a conspiracy is an act occurring during the pendency of the conspiracy.'" *Morgan*, 748 F.3d at 1036 (quoting *Davis*, 766 F.2d at 1458). This well-established rule makes perfect sense: If conspirators are actively making payments to each

[10] 867 F.2d at 61-62; *see United States v. Grimm*, 738 F.3d 498, 504 n.6 (2d Cir. 2013) (explaining that *A-A-A Electric* and *Walker* are consistent with *Doherty*'s approach because they involve continued concerted action in the form of "payoffs to co-conspirators [that] continued after [the] award of [the] contract" and continued division by the conspirators of "profits from [the] scheme on a yearly basis").

other for their role in the conspiracy, then the conspiratorial agreement must still be in place.[11] For this reason too, the indictment was timely.

II. The District Court Erred by Dismissing the Grand Jury's Per Se Charge in Advance of Trial Because the Indictment Properly Charged a Per Se Violation

The district court erred when it barred the government from proceeding to trial on the charged per se offense. The indictment charges an agreement among horizontal competitors to allocate customers. The Supreme Court and this Court have long recognized that such an agreement "constitutes a *per se* violation of § 1 of the Sherman Act." *United States v. Suntar Roofing, Inc.*, 897 F.2d 469, 473 (10th Cir. 1990); *see Palmer v. BRG of Ga., Inc.*, 498 U.S. 46, 49-50 (1990) (per curiam). The district court's departure from the binding precedent of this Court and the Supreme Court is unjustified and threatens to undermine the government's ability to prosecute antitrust conspiracies that have long been condemned as per se illegal.

---

[11] *See Walker*, 653 F.2d at 1347-48 (recognizing that payoffs among conspirators are "a material element of the agreement" because failure to make such a payment would be a "breach[]" of the conspiratorial agreement); *cf. Kissel*, 218 U.S. at 607 (explaining that the statute of limitations does not begin to run so long as there is "continuous co-operation of the conspirators to keep [the conspiracy] up").

A. The Indictment Alleges a Per Se Unlawful Customer Allocation Agreement

Section 1 of the Sherman Act outlaws any "contract, combination . . . , or conspiracy, in restraint of trade or commerce." 15 U.S.C. § 1. Courts have long interpreted this language to prohibit only "unreasonable" restraints of trade. *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723 (1988); *United States v. Reicher*, 983 F.2d 168, 170 (10th Cir. 1992). Most restraints are analyzed under the rule of reason, which requires the plaintiff to present evidence of a restraint's anticompetitive effects and permits the defendant to present procompetitive justifications. Ultimately, the fact-finder weighs all the circumstances to determine whether the restraint is one that suppresses competition or promotes it. *See Bd. of Trade of City of Chi. v. United States*, 246 U.S. 231, 238 (1918).

Restraints that have been deemed to be unlawful per se—such as the customer allocation agreement at issue here—are not analyzed under the rule of reason. *See Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007). "The *per se* rule, treating categories of restraints as necessarily illegal, eliminates the need to study the reasonableness of an individual restraint." *Id.* Such

treatment is reserved for categories of restraints that are manifestly anticompetitive and "'would always or almost always tend to restrict competition.'" *Bus. Elecs. Corp.*, 485 U.S. at 723 (quoting *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 289-90 (1985)). "[N]o offsetting economic or efficiency justifications salvag[e]" a restraint that is deemed per se unlawful. *SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958, 963 (10th Cir. 1994).

Thus, "[u]nder a per se rule, plaintiffs prevail simply by proving that a particular contract or business arrangement . . . exists." *In re Cox Enters., Inc.*, 871 F.3d 1093, 1097 (10th Cir. 2017); *see also United States v. Koppers Co.*, 652 F.2d 290, 294 (2d Cir. 1981) ("In cases involving behavior such as bid rigging, which has been classified by courts as a per se violation, the Sherman Act will be read as simply saying: 'An agreement among competitors to rig bids is illegal.'" (quoting *United States v. Brighton Bldg. & Maint. Co.*, 598 F.2d 1101, 1106 (7th Cir. 1979))).

This Court—relying on "the analysis of the Supreme Court," its own prior holdings, and decisions of other circuits—has held that an "agreement to allocate or divide customers between competitors within

the same horizontal market" is a per se violation of the Sherman Act. *Suntar Roofing*, 897 F.2d at 473 (collecting cases). An agreement not to compete for certain customers is manifestly anticompetitive because it forces the allocated customer to "face[] a monopoly seller" rather than reap the benefits of competition between conspirators that would result in lower prices or better product offerings. *Hammes v. AAMCO Transmissions, Inc.*, 33 F.3d 774, 782 (7th Cir. 1994). Such an agreement to "rotate or otherwise allocate customers among the conspirators" has effects "almost identical to those of price-fixing and is treated the same by the law." *Id.*; *see also Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic*, 65 F.3d 1406, 1415 (7th Cir. 1995) ("It would be a strange interpretation of antitrust law that forbade competitors to agree on what price to charge, thus eliminating price competition among them, but allowed them to divide markets, thus eliminating all competition among them.").

In *Hammes*, a group of five transmission repair dealers allegedly agreed to jointly advertise their services and list five phantom dealers. 33 F.3d at 777. "A call to one of the five numbers is automatically forwarded, in accordance with a preexisting agreement, to one of the

dealers in the pool." *Id.* The court concluded that "[s]uch an out-and-out scheme of customer allocation would be a per se violation of section 1" because, absent this automatic call forwarding scheme, customers would "have a real and not merely theoretical choice between dealers." *Id.* at 782 (citing *Palmer*, 498 U.S. 46). Similarly, in *United States v. Flom*, the court held that it was "a per se violation of the Sherman Act" for re-bar suppliers to "allocate[] the business on upcoming construction contracts among their respective companies" by selecting the winning conspirator and having the others submit higher bids or no bids at all. 558 F.2d 1179, 1182-83 (5th Cir. 1977).

In the same way, defendants have entered into an equally straightforward customer allocation scheme. Defendants agreed that, "when both co-conspirator companies contacted the same unsigned heir to an estate, the co-conspirator company that first contacted that heir would be allocated certain remaining heirs to that estate." A19. The first company then submitted an offer, while the second company "refrained from submitting offers and quotations to potential heirs." *Id.* Like the defendants in *Hammes* and *Flom*, defendants have eliminated competition at precisely the point at which competition for unsigned

heirs might otherwise occur: when the co-conspirators each contact the same heir. Rather than reap the benefits of such competition, heirs are forced to face a single seller.

That the conspirators continued to compete to be the first company to contact an heir cannot save their agreement from per se condemnation. As the Supreme Court explained in *Catalano*, an agreement "extinguishing one form of competition among the sellers" is condemned as per se unlawful regardless of the potential for competition in other forms. *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 649 (1980) (per curiam). Defendants here have agreed to eliminate competition on contingency fee rates at the precise moment at which such competition would take place. That agreement falls into a category found to be manifestly anticompetitive and, thus, is illegal per se.

B. The District Court Erred in Holding that the Indictment Did Not Allege a "Classic Customer Allocation"

The district court recognized that the charged agreement was an agreement to allocate customers, A135, but erred by refusing to apply the per se rule, in contravention of binding precedent. The court said it could not "predict with any confidence, and does not believe, that the

[agreement] operated as a classic customer allocation" because it 1) was structured in an "unusual way" in that it applies to new customers, 2) impacted only a "small number of estates," and 3) occurred in a "relatively obscure industry." *Id.* But whatever doubts the district court may have about treating a particular customer allocation agreement as per se unlawful or about categorizing customer allocations as per se unlawful, the Supreme Court has held that such agreements are per se unlawful, and it is the Supreme Court's "prerogative alone to overrule one of its precedents." *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997).

The indictment alleges that defendants engaged in a prototypical customer allocation agreement. But even if it did not, the fact that a particular "agreement to divide the market" does "not fit precisely the characterization of a prototypical *per se* practice does not remove it from *per se* treatment." *See United States v. Andreas*, 216 F.3d 645, 666-67 (7th Cir. 2000). None of the features identified by the district court justify departure from the per se rule.

1. There is no exception to the per se rule for allocations of new customers, and thus the district court erred in refusing to apply the per

se rule to the charged agreement to allocate new, rather than existing, customers. A134-A135. Indeed, the *Hammes* court condemned as per se unlawful an agreement to allocate new customers, 33 F.3d at 782, and the *Flom* court held per se unlawful an agreement to allocate future construction contracts, 558 F.2d at 1182-83. *Cf. United States v. Consol. Laundries Corp.*, 291 F.2d 563, 575 (2d Cir. 1961) (reasoning that an "agreement to suppress all competition as to one phase of [a defendant's] business, i.e. old customers, should be *per se* illegal irrespective of their competition for new customers"). New customers are no less entitled to the benefits of competition, and the harm to competition is no less manifest in an allocation of new customers. Instead, in some cases, the only effective means to eliminate competition through customer allocation is to allocate new customers.

Likewise, the fact that defendants' allocation agreement was not based on geography does not make the per se rule inapplicable. As the Fifth Circuit explained in *United States v. Cadillac Overall Supply Co.*, that is "a distinction without substance." 568 F.2d 1078, 1088 (5th Cir. 1978). Customer allocation agreements "hamper[] the free choice of the consumer of the parties with whom the consumer would transact

business, and provide[] no incentive to achieve maximum efficiency on an industry wide basis." *Id.* at 1089. That is true regardless of the basis on which the customers are allocated.

Moreover, territorial allocation of customers would make little sense in this industry. Firms search for estates nationwide, and there is frequently no competition because only one firm identifies the potential heir. Whether the defendants would face competition for any particular heir thus has nothing to do with geography. Defendants needed to eliminate competition only when it existed, and that is what their conspiracy accomplished, allocating heirs just when those heirs should have had the benefit of competition. *See* A17-A20.

2. The district court erroneously thought the per se rule could not apply to an allocation agreement that "affected a small number of estates." A135; *but see* A142 (noting "269 allegedly affected estates"). The applicability of the per se rule does not depend on the number of victims of the challenged restraint. This Court has repeatedly applied the per se rule to conduct that harms only a single purchaser or is local in nature. *See, e.g.*, *Reicher*, 983 F.2d 168 (holding per se unlawful a conspiracy to rig bids for a single contract); *United States v. Metro.*

Enters., Inc., 728 F.2d 444 (10th Cir. 1984) (affirming conviction for conspiracy to rig bids to repave portions of a highway in Oklahoma). And while customer allocation agreements often harm many customers, there is no exception to the per se rule for agreements that are of a "limited nature." *United States v. Coop. Theatres of Ohio, Inc.*, 845 F.2d 1367, 1371-72 (6th Cir. 1988) (per curiam).

3. The district court was also wrong to conclude that the per se rule cannot apply because, in the district court's view, heir location services is a "relatively obscure industry." A135. The Supreme Court has long held that "the Sherman Act . . . establishes one uniform rule applicable to all industries alike," *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 222 (1940), and rejected "the argument that the *per se* rule must be rejustified for every industry that has not been subject to significant antitrust litigation," *Arizona v. Maricopa Cnty. Med. Soc'y*, 457 U.S. 332, 351 (1982). The district court's reasoning "ignores the rationale for *per se* rules, which in part is to avoid 'the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been

unreasonable—an inquiry so often wholly fruitless when undertaken.'" *Maricopa*, 457 U.S. at 351 (quoting *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958)).

In any event, the unusual aspect of the heir location business defendants asserted below—i.e., the upfront outlay of resources for a product only saleable to one or a handful of potential customers, A173—is not unique to this industry. Many businesses, for example real estate development, can require a substantial outlay of resources to prepare a bespoke proposal or bid to compete for a particular project or contract that cannot be reused for other projects or contracts.[12] Yet, "[w]hatever may be [an industry's] peculiar problems and characteristics," *Socony-Vacuum Oil Co.*, 310 U.S. at 222, the per se rule nonetheless applies if competitors agree with each other to allocate customers.

---

[12] *See, e.g.*, Jonathan O'Connell et al., *Halt to the Search for New FBI Building Prompts Frustration*, Wash. Post, July 11, 2017, at A11 (reporting that "[r]eal estate developers who devoted more than two years to their proposals and spent millions of dollars designing and planning a new [FBI headquarters] threw up their hands" when officials cancelled plans to build a new headquarters; an estimated "$50 million had been spent by local companies and jurisdictions on the now-dashed project"; one potential developer spent "$8 million on its plans").

C. The District Court Erred in Holding that the Per Se Rule Could Not Apply Based on Its Conclusion that the Agreement Has the "Potential for Increased Efficiency"

Lastly, the district court erred in refusing to apply the per se rule because, in the court's view, defendants' customer allocation agreement "contained efficiency-enhancing potential." A135. Claimed efficiencies cannot be used to justify a per se unlawful agreement, and in any event, none exist here. And to the extent the district court concluded that the charged agreement was ancillary to a productive joint venture, that conclusion is factually baseless and legally unjustified.

1. The district court's reasoning "indicates a misunderstanding of the *per se* concept." *Maricopa*, 457 U.S. at 351. The per se rule adopts a "categorical judgment[] with respect to certain business practices that have proved to be predominantly anticompetitive." *Nw. Wholesale Stationers, Inc.*, 472 U.S. at 289. Thus, when a restraint is within a category deemed per se unlawful, "no offsetting economic or efficiency justifications" can "salvag[e]" it. *SCFC*, 36 F.3d at 963. The rule "eliminates the need to study the reasonableness of an individual restraint" and thereby gives "clear guidance for certain conduct." *Leegin*, 551 U.S. at 886; *see also Maricopa*, 457 U.S. at 344 (explaining

that the Supreme Court adopted per se rules for "the sake of business certainty and litigation efficiency" by making clear that certain "kind[s] of restraint[s]" are categorically illegal).

Thus, defendants' claimed efficiencies cannot justify departure from the per se rule. "The per se rule would collapse if every claim of economies from restricting competition, however implausible, could be used to move a horizontal agreement not to compete from the per se to the Rule of Reason category." *Gen. Leaseways, Inc. v. Nat'l Truck Leasing Ass'n*, 744 F.2d 588, 595 (7th Cir. 1984). While it is doubtful that this, or any other, per se unlawful agreement among competitors would pass muster under the rule of reason, *see United States v. U.S. Gypsum Co.*, 438 U.S. 422, 476 (1978) (Stevens, J., concurring in part and dissenting in part), the per se rule prohibits courts from searching for such an agreement if it did exist. *See Catalano*, 446 U.S. at 649 ("[T]he fact that a practice may turn out to be harmless in a particular set of circumstances will not prevent its being declared unlawful *per se*.").

In any event, the "age-old cry of ruinous competition" is no defense, *Socony-Vacuum*, 310 U.S. at 221, and what defendants

mistakenly label "efficiencies" are nothing more than the avoidance of competition, *see* A183. For example, defendants claim that when two firms faced competition for a single estate, one firm could—absent the agreement—disclose enough information for the heir to circumvent both firms and work directly with the administrator for the estate without paying either conspirator. A182-A183. Defendants argue their agreement is "output-increasing" because it avoids this scenario. *Id.* But output is not increased; only the conspirators' revenue. If the conspirators just gave away the fruits of their efforts, the heir would still collect, retaining any legal or other services he or she needed to collect.

Similarly, defendants wrongly contend that their agreement has a "significant pro-competitive effect" because without it they would be forced to compete, would secure lower profits, and thus would be unable to research lower-value estates. A183-A184. But the Supreme Court has long held that "[t]he elimination of so-called competitive evils is no legal justification" for per se illegal conduct. *Socony-Vacuum*, 310 U.S. at 220. The Sherman Act rests on "[t]he assumption that competition is the best method of allocating resources in a free market[, which]

recognizes that all elements of a bargain . . . are favorably affected by the free opportunity to select among alternative offers." *Nat'l Soc. of Prof'l Engineers v. United States*, 435 U.S. 679, 695 (1978). This "statutory policy precludes inquiry into the question whether competition is good or bad." *Id.* at 695. Defendants' claims of efficiency ultimately boil down to concerns that competition will drive down their contingency fees. But low prices benefit consumers, and any "loss of profits to . . . competitors" that "result[s] only from continued competition" is "not of concern under the antitrust laws." *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 115 (1986).

2. The district court mistakenly relied on *Polk Bros., Inc. v. Forest City Enters., Inc.*, 776 F.2d 185, 187-90 (7th Cir. 1985), in support of its claim that the "potential for increased efficiency supports application of the rule of reason instead of the *per se* standard." A135. *Polk Brothers* involves application of the ancillary restraints doctrine, in which an otherwise per se unlawful agreement that is ancillary to a legitimate joint venture is analyzed under the rule of reason. That doctrine has no application here because the indictment charges a standalone customer allocation agreement.

In *Polk Brothers*, a retailer of appliances and home furnishings and a retailer of building materials and lumber agreed to build a single building and parking lot for their two stores. 776 F.2d at 187. In connection with their agreement to build and maintain the facility jointly, the two retailers agreed not compete in each other's core product lines. *Id.* The Seventh Circuit held that because the agreement not to compete was "an integral part" of productive cooperation to build the stores—the parties would not have cooperated without protection from competition from each other—the agreement should be evaluated under the rule of reason. *Id.* at 190. In doing so, the court distinguished such "ancillary" restraints that are "part of a larger endeavor whose success they promote," from "naked" restraints that do "nothing but suppress competition." *Id.* at 188-89. *See also Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 224 (D.C. Cir. 1986) (Bork, J.) (A customer allocation agreement is ancillary only if it is "subordinate and collateral to a separate, legitimate transaction" and reasonably necessary to make that separate transaction "more effective [or efficient] in accomplishing its purpose.").

The district court did not identify any legitimate collaboration to which the charged allocation agreement could have been ancillary, and defendants' claim below that their allocation agreement enabled them to work together and "limit the expenditure of resources," A182, is not credible; nor is it found in the indictment's factual allegations. Most of the resources to identify and evaluate estates and to locate the heirs are spent before defendants and their co-conspirators contact the heirs, before they know they will be in competition with each other, and before the customer is allocated under the agreement. To the extent that defendants want to pool resources with their competitors to administer the estates after the heirs are signed, that can be done without eliminating competition.

That is not to say that the defendants did not coordinate their efforts in any way. By definition, any conspiracy to eliminate competition will involve sufficient coordination between competitors to carry out the conspiracy. For example, in this case, the competitors needed to work together to develop a method for dividing the spoils of their conspiracy and then again when carrying out that portion of the agreement. A19. But parties to a per se unlawful conspiracy cannot

avoid the per se rule by styling their conspiracy as a joint venture if the purpose and effect of that venture is to eliminate competition.[13] *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 598 (1951) ("Nor do we find any support in reason or authority for the proposition that agreements between legally separate persons and companies to suppress competition among themselves and others can be justified by labeling the project a 'joint venture.' Perhaps every agreement and combination to restrain trade could be so labeled."), *overruled on other grounds by Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984); *Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 336 (2d Cir. 2008) (Sotomayor, J., concurring).

More fundamentally, the indictment does not charge an allocation agreement ancillary to some productive joint venture. Instead, the indictment charges a naked agreement to "suppress and eliminate

---

[13] Relatedly, *In re Sulfuric Acid Antitrust Litigation*, 703 F.3d 1004, 1013 (7th Cir. 2012), provides no basis for the district court's departure from the per se rule, A135. That case involved a claim of price fixing lodged against a "legitimate" joint venture that "enabled substantial economies in transportation and marketing" and led to price decreases for customers. 703 F.3d at 1011-13. The indictment contains nothing to suggest that there was a legitimate joint venture.

competition by agreeing to allocate customers of Heir Location Services sold in the United States." A18. At trial, the jury will be asked to decide whether the evidence proves beyond a reasonable doubt that the charged agreement existed and that defendants knowingly joined it. If the jury finds instead that the evidence proves something else—e.g., an agreement to engage in a legitimate joint venture to which the assignment of heirs was subordinate and collateral—then the jury must acquit because that is not the conspiracy charged in the indictment. *Cf. United States v. Green*, 592 F.3d 1057, 1068-69 (9th Cir. 2010) (affirming conviction under per se rule because evidence "was sufficient to support the jury's finding that [defendant] engaged in bid rigging," rather than merely organizing "legitimate teaming agreements" as defendant claimed).

Whether the evidence will prove the charged conspiracy goes to the ultimate merits. The district court may not supply its own answer to that question in response to a pre-trial motion. As this Court explained in *United States v. Pope*, Rule 12 does not permit a district court to decide in advance of trial questions that are relevant to guilt or innocence. 613 F.3d 1255, 1259 (10th Cir. 2010) (Gorsuch, J.) (citing

Fed. R. Crim. P. 12(b)(2)). Pre-trial decisions going to the ultimate merits "disserve[] judicial economy" and "risk trespassing on territory reserved to the jury as the ultimate finder of fact." *Id.* That risk is particularly acute where a pre-trial ruling is based on evidence outside the indictment. *Id.* Here, defendants in their motion made claims based on their "ongoing" data analysis and the documents submitted under seal purportedly showing the "efficiency-enhancing" potential of their customer allocation agreement. A163, A183-A186, A213-A217 & A226-A229, A260. To be sure, the district court stated that it "would reach the same result based solely on the conduct as it is described in the indictment,"[14] A135, but the district court tellingly did not cite the indictment in support of its conclusion. In any event, the assertion is

[14] The district court wrongly claimed that the government "never disputed" that the court could consider the written agreement attached to the defendants' motion. A135. The government disputed the consideration of factual material at every turn: in its opposition to the original motion, A239 & A250, at oral argument, A56-A57 ("The government objects to any consideration of factual material outside of the indictment at this phase . . . including the guidelines agreement."), and in its reconsideration motion, A97-A98. In any event, nothing in the written agreement indicates joint productive activity akin to the "larger endeavor" in *Polk Brothers*, let alone that the customer allocation was necessary to such an endeavor.

belied by the indictment, which contains no statements supporting the district court's conclusion.

In sum, the indictment charges that defendants conspired to eliminate competition by allocating customers—conduct that this Court and the Supreme Court have held is per se unlawful. The government should be permitted to proceed to trial on that charge.

D. Section 3731 Provides Jurisdiction to Review the Rule of Reason Order, and If It Does Not, this Court Should Issue a Writ of Mandamus Correcting the Order's Profound Departure from Governing Law

1. The District Court's Rule of Reason Order Is an Effective Dismissal Appealable Under Section 3731

This Court has appellate jurisdiction over the Rule of Reason Order under 18 U.S.C. § 3731 because that Order effectively dismissed the indictment. In relevant part, Section 3731 authorizes the government in a criminal case to appeal "a decision, judgment, or order of a district court dismissing an indictment . . . as to any one or more counts, or any part thereof" except "where the double jeopardy clause of the United States Constitution prohibits further prosecution." *Id*. Congress specified that this provision "shall be liberally construed to effectuate its purposes," *id.*, and the Supreme Court has repeatedly said

that Section 3731 reflects Congress's intent "to remove all statutory barriers to Government appeals and to allow appeals whenever the Constitution would permit." *United States v. Wilson*, 420 U.S. 332, 337 (1975); *see United States v. Scott*, 437 U.S. 82, 84-87 (1978); *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 568 (1977). Thus, "government appeals are not restricted to the specific categories set forth in 18 U.S.C. § 3731." *United States v. Prescon Corp.*, 695 F.2d 1236, 1241 (10th Cir. 1982).

This Court has recognized that an order is appealable under Section 3731 if it is "tantamount to" a dismissal of an indictment or one or more counts, even if it does "not formally 'dismiss' an indictment or happen to be labeled that way." *United States v. Bergman*, 746 F.3d 1128, 1131 (10th Cir. 2014); *see also United States v. Williams*, 449 F.3d 635, 643 (5th Cir. 2006) (explaining that a "district court judge cannot circumvent the government's right to appeal under § 3731 by taking action that has the effect of a dismissal yet never actually entering a 'decision, judgment, or order.'"). Under this test, jurisdiction is assessed by "examin[ing] the consequences of the ruling by the district court, unbounded by the label given it." *Id.*

The government brought this case solely under the per se rule.[15] In this case (and all Sherman Act cases for the past several decades), the government has exercised its prosecutorial discretion to limit criminal antitrust prosecutions to conduct that clearly violates the per se rule.[16] This sound policy exists to provide "clear, predictable boundaries for business" and businesspeople between conduct that is potentially subject to the severe sanctions that accompany criminal conviction and conduct that is subject only to civil equitable relief.[17]

There can be no dispute that a plaintiff can bring a Sherman Act case under the per se rule and elect not to pursue a claim under the rule of reason. *See In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 317 (3d Cir. 2010). And the decision of "what charge to file or bring before a

---

[15] The government disavowed any rule of reason theory before the district court. A249 (informing the district court that the government has "long eschewed prosecuting conduct subject to the rule of reason, and it has no interest in doing so here").

[16] U.S. Dep't of Justice, Antitrust Div., Antitrust Division Manual, at III-12 (5th ed. 2017), *available at* https://www.justice.gov/atr/file/761166/download.

[17] Thomas O. Barnett, Assistant Attorney Gen., Antitrust Div., U.S. Dep't of Justice, Criminal Enforcement of Antitrust Laws: The U.S. Model (Sept. 25, 2006), *available at* https://www.justice.gov/atr/speech/criminal-enforcement-antitrust-laws-us-model.

grand jury, generally rests entirely in [the prosecutor's] discretion." *United States v. Armstrong*, 517 U.S. 456, 464 (1996). Thus, the clear and immediate consequence of the district court's decision to bar the government from proceeding on a per se theory is that the indictment is effectively dismissed (not, as the district court thought, that the government must instead proceed under a previously disavowed theory). *Cf. Ins. Brokerage Antitrust Litig.*, 618 F.3d at 317 (noting that where plaintiff pleads conduct not governed by the rule of reason and fails to plead facts necessary to state a claim under the rule of reason, the claim will be dismissed); *Polk Bros.*, 776 F.2d at 191.

Even if the government could or would proceed on a rule of reason theory, the per se rule provides a discrete theory of liability, and a pre-trial order that precludes the government from arguing a discrete theory of liability is tantamount to a dismissal, thus making it appealable under Section 3731. *See United States v. Bloom*, 149 F.3d 649, 654 (7th Cir. 1998), *abrogated on other grounds*, *Skilling v. United States*, 561 U.S. 358 (2010);[18] *see also United States v. Levasseur*, 846

[18] In *United States v. Bloom*, the government charged a single fraudulent scheme to deprive the victim city of "revenues" and "honest services." 149 F.3d at 651. When the district court dismissed the count

F.2d 786, 790 (1st Cir. 1988); *United States v. Oakar*, 111 F.3d 146, 150 (D.C. Cir. 1997).

The fact that the district court did not "formally 'dismiss'" the indictment does not render its order any less of a dismissal under Section 3731. *Bergman*, 746 F.3d at 1131; *Williams*, 449 F.3d at 643. When its clear implication is understood, it is apparent the Rule of Reason Order dismissed the indictment in its entirety, and the district court simply failed to recognize the consequence of its decision. *Bergman*, 746 F.3d at 1131. At a minimum, the Rule of Reason Order dismissed a discrete theory of liability, and such a decision is appealable under Section 3731, as well. *Levasseur*, 846 F.2d at 790; *Bloom*, 149 F.3d at 653-54.

---

to the extent it was based on deprivation of honest services, the Seventh Circuit took jurisdiction over the appeal, because the honest-services theory provided a "discrete basis for the imposition of criminal liability." *Id.* at 654. Like the order in *Bloom*, the district court's Rule of Reason Order bars the government from proceeding on a "discrete basis for liability."

2. Alternatively, the All Writs Act Provides this Court Authority to Issue a Writ of Mandamus Correcting the Lower Court's Departure from Well-Established Law

If this Court concludes that Section 3731 does not provide appellate jurisdiction over the Rule of Reason Order, the United States respectfully requests that the Court construe the pertinent parts of this brief as a petition for a writ of mandamus and issue the writ under the authority provided by the All Writs Act, 28 U.S.C. § 1651.[19] The writ should direct the district court to recognize that the charged customer allocation agreement, if proved at trial, is subject to the per se rule, and

---

[19] In relevant part, Section 1651(a) provides that "all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." Concurrent with the filing of this brief in this Court, the government is providing a copy to the district court in compliance with Fed. R. App. P. 21(a)(1). Courts of appeals routinely entertain requests to construe opening briefs as mandamus petitions in the event that Section 3731 does not provide jurisdiction for appeal. *See, e.g.*, *United States v. Farnsworth*, 456 F.3d 394, 396 (3d Cir. 2006); *United States v. Cote*, 51 F.3d 178, 180-81 & n.1 (9th Cir. 1995); *In re United States*, 900 F.2d 800, 802-03 (5th Cir. 1990); *United States v. Kane*, 646 F.2d 4, 5 (1st Cir. 1981); *United States v. Hetrick*, 644 F.2d 752 (9th Cir. 1980); *see also, e.g.*, Brief for Appellant United States of America, *United States v. Farnsworth*, 456 F.3d 394 (No. 06-1425), 2006 WL 6221237 (raising Section 3731 jurisdiction and mandamus together as alternatives in the opening brief); Brief for the United States at 6-11, *United States v. Cote*, 51 F.3d 178 (No. 93-30411), 1994 WL 16122500, at *6-11 (same).

further direct the district court to conduct all future proceedings consistent with that understanding. The issue is so fundamental, the error so glaring, and the opportunity for review so elusive that an uncommon remedy is, under these circumstances, both warranted and necessary.

To be sure, a writ of mandamus "is to be invoked only in extraordinary circumstances," *In re Cooper Tire & Rubber Co.*, 568 F.3d 1180, 1186 (10th Cir. 2009), such as "'when the trial court has so clearly and indisputably abused its discretion as to compel prompt intervention by the appellate court,'" *In re United States*, 397 F.3d 274, 282 (5th Cir. 2005) (per curiam) (quoting *In re Dresser Indus., Inc.*, 972 F.2d 540, 543 (5th Cir. 1992)).[20] The Supreme Court has identified three criteria for

[20] The Court in *United States v. McVeigh* concluded that Section 3731 did not authorize an appeal from a pre-trial witness sequestration order and declined to exercise its mandamus authority, observing that it "may not be used to circumvent the policies effectuated by the restrictive provisions of § 3731." 106 F.3d 325, 333 (10th Cir. 1997) (per curiam). The Court, however, repeatedly emphasized in *McVeigh* that it did not "categorically rule out the possibility of mandamus relief" even in the context of "procedural orders." *Id.* at 328, 333. And, in fact, the Court has cited *McVeigh* in support of granting mandamus directed at a substantive ruling in circumstances like those here. *See infra* pp. 54.

issuing the writ: 1) "the party seeking issuance of the writ [has] no other adequate means to attain the relief he desires"; 2) the petitioner's "right to issuance of the writ is clear and indisputable"; and 3) "the issuing court, in the exercise of its discretion," is "satisfied that the writ is appropriate under the circumstances." *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380-81 (2004). All are met here.

First, if the Court concludes that Section 3731 does not apply, the United States has no other means to obtain relief. The order will "significantly influence how the case is tried" by expanding the government's burden beyond what the law requires, permitting evidence and argument on defenses the law forbids, and instructing the jury on a rule that does not apply. *In re United States*, 578 F.3d 1195, 1199 (10th Cir. 2009) (unpublished).[21] And yet, if Section 3731 is inapplicable, the government has no avenue of relief other than mandamus. *Id.* (citing *McVeigh*, 106 F.3d at 330; *United States v.*

[21] This Court's order granting a writ of mandamus in *In re United States* was unpublished, but it nevertheless appears in the Federal Reporter as an appendix to an opinion dissenting from it. For the Court's convenience, this brief cites the order as it appears in the Federal Reporter.

Wexler, 31 F.3d 117, 128 (3d Cir. 1994); *In re United States*, 397 F.3d 274 (5th Cir. 2005)). The government sought reconsideration in the district court, but reconsideration was denied. *See Wexler*, 31 F.3d at 128. If the defendant were acquitted under the rule of reason, the Double Jeopardy Clause would bar a government appeal; and if the defendant were found guilty under the rule of reason, the government would have no basis for appeal. *See In re United States*, 578 F.3d at 1199; *In re United States*, 397 F.3d at 283. Moreover, the ruling will effectively foreclose any trial whatsoever. The government has already renounced any intention of trying the case under a rule of reason theory, so the district court's ruling is the case's practical terminus. Thus, if Section 3731 does not apply, mandamus is the only route to correcting a grave error about the law governing this case.

Second, there is a "clear and indisputable" reason for this Court to intervene because the district court's Rule of Reason Order transparently contravenes multiple binding and longstanding precedents from this Circuit and the Supreme Court, *see supra* Part III. *See United States v. Higdon*, 638 F.3d 233, 245-47 (3d Cir. 2011) (issuing the writ because the lower "court's insistence on giving an

improper jury charge constitutes 'clear and indisputable' error") (quoting *Cheney*, 542 U.S. at 381). Disregarding controlling precedents and invading the prerogatives of the prosecution by choosing the theory of the case for them is why the order "represents [not just] clear legal error [but] also . . . a clear abuse of discretion." *In re United States*, 397 F.3d at 285.

Third, issuing the writ is appropriate to prevent the district court from adjudicating this criminal case based on a fundamental and clear misunderstanding of governing law. *See In re United States*, 578 F.3d at 1199-200 (issuing writ to prevent jury instruction on an impermissible defense); *United States v. Higdon*, 638 F.3d at 245-47 (issuing writ to ensure proper jury instruction on elements of an offense); *Wexler*, 31 F.3d at 121, 128 (issuing writ correcting erroneous jury instruction on "genuine indebtedness" which government claimed made certain criminal tax cases more difficult to prosecute and rendered it unable to proceed to trial).

As the court in *Wexler* explained, "the adoption of a clearly erroneous jury instruction that entails a high probability of failure of a prosecution—a failure the government could not then seek to remedy by

appeal or otherwise—constitutes the kind of extraordinary situation in which we are empowered to issue the writ of mandamus." 31 F.3d at 128. Here, not only is the entire architecture of the jury charge at issue, but so are innumerable evidentiary and other considerations that would not only significantly impact a trial, but also would likely scuttle the entire prosecution.

Accordingly, if Section 3731 does not provide jurisdiction for this appeal, then it is entirely appropriate, indeed essential, for this Court to use its mandamus authority to remedy this extraordinary situation and permit this case to proceed under the clear and controlling law of this Court and the Supreme Court.

CONCLUSION

This Court should reverse the order that the indictment is barred by the statute of limitations; reverse the order that the case is subject to the rule of reason or, alternatively, issue a writ of mandamus directing the district court to apply the per se rule; and remand for trial.

STATEMENT REGARDING ORAL ARGUMENT

This case presents issues that could have significant implications for the criminal enforcement of federal antitrust law, and oral argument would materially assist the Court in resolving those issues. For these reasons, the government respectfully requests oral argument in this case.

Respectfully submitted.

s/ Jonathan Lasken

MAKAN DELRAHIM
Assistant Attorney General

ANDREW C. FINCH
Principal Deputy Assistant Attorney General

MARVIN N. PRICE, JR.
Acting Deputy Assistant Attorney General

KALINA M. TULLEY
ROBERT M. JACOBS
RUBEN MARTINEZ, JR.
MOLLY A. KELLEY
Attorneys

U.S. Department of Justice
Antitrust Division

KRISTEN C. LIMARZI
JAMES J. FREDRICKS
ADAM D. CHANDLER
JONATHAN H. LASKEN
Attorneys

U.S. Department of Justice
Antitrust Division
950 Pennsylvania Avenue, NW
Room 3224
Washington, DC 20530-0001
202-353-6638

January 3, 2018

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 11,822 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2013 with 14-point New Century Schoolbook font.

January 3, 2018

s/ Jonathan Lasken
Attorney for the
United States of America

CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

I hereby certify that with respect to the foregoing:

(1) all required privacy redactions have been made;

(2) that the ECF submission is an exact copy of the hard copies of this document that are to be filed with the court;

(3) the digital submission has been scanned for viruses with Symantec Endpoint Protection Version 12.1.6 build 7004 (12.1.7004.6500) with current protection definitions, dated January 2, 2018 r19, and according to the program is free of viruses.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

January 3, 2018

s/ Jonathan Lasken
Attorney for the
United States of America

CERTIFICATE OF SERVICE

I, Jonathan Lasken, hereby certify that on January 3, 2018, I electronically filed the foregoing Opening Brief for the United States of America (Corrected) with the Clerk of the Court of the United States Court of Appeals for the Tenth Circuit by using the CM/ECF System.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

January 3, 2018

s/ Jonathan Lasken
Attorney for the
United States of America