Nos. 18-1189 & 18-1395; 18-1258

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

v.

LUCIANO VEGA-MARTINEZ, a/k/a Lucio, and
RENE GARAY-RODRIGUEZ, a/k/a Gary,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO
(JUDGE GUSTAVO A. GELPI)

BRIEF FOR APPELLEE UNITED STATES OF AMERICA

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STATEMENT OF JURISDICTION

These are appeals from final judgments of conviction. Docs.354, 356.[1] This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

Garay-Rodriguez's Sherman Act Conviction

1. Whether the indictment adequately alleged that the conspiracy was in the flow of or affected interstate commerce, as required by 15 U.S.C. § 1; whether sufficient evidence supports the jury's determination that the conspiracy was in the flow of or affected interstate commerce; and whether the district court plainly erred in its instructions to the jury on the interstate-commerce element.

2. Whether the district court plainly erred in its instructions to the jury on the nature of the crime charged—a bid-rigging and market-allocation conspiracy; and whether the government or the

[1] Citations are to appellants' briefs (Br.), the government's supplemental appendix (SA:[page number]), the district court docket number (*e.g.*, Doc.197:[page number]), and government trial exhibits (*e.g.*, GX1:[page number]).

district court constructively amended or prejudicially varied that charge.

3. Whether the district court abused its discretion in controlling the scope of Garay-Rodriguez's cross-examination of a government witness.

4. Whether the district court abused its discretion by admitting a summary of telephone calls made at critical times in the auction process among numbers assigned to the defendants.

Garay-Rodriguez's Mail-Fraud Convictions

5. Whether the district court plainly erred in its instructions to the jury on the elements of conspiracy to commit mail fraud and substantive mail fraud; and whether the evidence supporting those convictions was plainly insufficient.

The Restitution Orders

6. Whether the district court plainly erred by finding the facts necessary to impose Garay-Rodriguez's restitution order; and, as to both appellants, whether the district court clearly erred in its calculation of the victim's loss.

STATEMENT OF THE CASE

I. Procedural History

On May 20, 2015, a federal grand jury returned a seven-count indictment charging appellants Luciano Vega-Martinez and Rene Garay-Rodriguez with conspiracy to restrain trade, in violation of the Sherman Act, 15 U.S.C. § 1 (Count I); conspiracy to commit mail fraud, in violation of 18 U.S.C. § 1349 (Count II); and mail fraud, in violation of 18 U.S.C. § 1341 (Counts III-VII). Doc.3:4-14.[2] The charges arose from appellants' participation in a scheme to rig bids and allocate bus routes in connection with a 2013 auction held by the Municipality of Caguas, Puerto Rico ("Caguas"), to award new school-transportation contracts. *Ibid*.

Trial began on January 18, 2017. The government called eight witnesses, including two members of the conspiracy. The defense called only character witnesses. On January 26, 2017, the jury found

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[2] Co-defendants Alfonso Gonzalez-Nevarez and Gavino Rivera-Herrera did not appeal. On the government's pretrial motions, the district court dismissed the case against co-defendant Jose Arroyo-Quinones and the related mail-fraud count (Count V) against the remaining defendants. Docs.145, 161, 181.

appellants and their co-defendants guilty as charged. Doc.236:18-24 (referring to re-numbered indictment).

The Probation Office determined that Vega-Martinez and Garay-Rodriguez faced Guidelines ranges of 30-37 months and 37-46 months, respectively. Doc.367:56. On February 6, 2018, the district court sentenced appellants to terms of twelve months and one day of imprisonment, followed by one year of supervised release. The court did not impose any fines. Docs.310, 312. The court deferred restitution pending supplemental briefing. Docs.314-317, 325, 336, 338.

On April 12, 2018, the district court ordered Vega-Martinez and Garay-Rodriguez to pay $93,055 and $114,181 in restitution, respectively. Doc.341:7-8. On June 7, 2018, the district court granted Garay-Rodriguez's motion for bail pending appeal. Doc.374. Vega-Martinez was released from prison on March 15, 2019.

Appellants filed timely notices of appeal from the initial Judgments and timely amended notices of appeal from the Amended Judgments imposing restitution. Docs.303, 343; Docs.321, 350. (This

Court did not assign a separate appeal number to Garay-Rodriguez's amended notice of appeal.)

II. Statement of Facts

Vega-Martinez, Garay-Rodriguez, Gonzalez-Nevarez, and Rivera-Herrera ("the defendants") held school-transportation contracts with Caguas. Doc.215:61-64; GX84A:1-2; GX85A:1-2; GX86A:1-2; GX87A:1-2 (SA:415-16; SA:419-20; SA:423-24; SA:427-28). When, in 2013, Caguas announced a public auction for new school-transportation contracts, and newcomers sought to compete in that auction, the defendants conspired to rig the bidding to ensure that they retained the routes they had served and did not have to "work for cheap." Doc.197:103-05; Doc.234:66-69, 71-73, 75-76, 141-42, 144-46; GX1:14 (SA:14); *see infra*.

A. Caguas Advertises an Auction for School-Transportation Contracts.

In fall 2013, Caguas publicly invited competitive bids for an auction, No. 2014-49, awarding four-year school-transportation contracts ("the 2013 auction"). Doc.208:150; Doc.215:26-27; GX15A:1-2, 19 (SA:127-28, 145). Bidding was organized by bus routes, and

transportation companies could bid for one or more of 34 routes. Doc.215:29-31; GX15A:19-21 (SA:145-47).

The invitation specified that each bidder would be required to submit a signed certification that its proposal was (1) "submitted without previously having made an agreement with any other company or natural person or legal entity[] submitting quotes for the items requested in this invitation"; and (2) "fair and free of collusion or fraud." Doc.215:31-32; GX15A:2 (SA:128). According to Luz Ortiz-Peña, an official of Caguas's Purchasing and Auctions Department, the certification requirement was designed to ensure that Caguas "secur[ed] the best prices." Doc.215:32. Specifically, "[i]f parties were reaching agreements among themselves . . . then the people would be deprived from receiving the best prices possible." *Id.* at 32-33.

On October 10, 2013, Caguas held a mandatory pre-auction instructional meeting. Doc.197:96, 102-03; GX15A:1 (SA:127). The defendants attended, as did several bus owners who had not previously done business with Caguas. Doc.197:90-91, 96-97; Doc.208:150-51; Doc.234:66-67.

B. Defendants Conspire to Rig Bids and Allocate Routes.

Bids for the 2013 auction were due by 4:00 p.m. on October 23, 2013. Doc.215:35. Bidders were required to submit their bids in sealed envelopes "[t]o prevent any other party in the auction bidding process from having access to the bid information that was being submitted by another party." *Ibid*.

1. Defendants Meet Separately With New Competitors Before the Submission of Bids.

Raquel Aldea-Rodriguez and her husband Victor Santaliz owned and operated Santaliz Bus Line, a transportation company that, before 2013, did not have contracts with Caguas. Doc.197:90-91. They sought to enter the Caguas market by participating in the 2013 auction; their company, which owned 12 buses, could have serviced "several" of the Caguas routes. *Id.* at 92-93, 95-96.[3]

[3] Santaliz Bus Line entered into an agreement with the government providing that, in return for Aldea-Rodriguez's cooperation, the government would not prosecute her for violations of the antitrust or related laws concerning the 2013 auction. Doc.197:91-92; Doc.208:130-32.

On October 16, 2013, appellant Garay-Rodriguez, along with co-defendants Rivera-Herrera and Gonzalez-Nevarez, came to Aldea-Rodriguez's home to talk to her and her husband about the auction. According to Aldea-Rodriguez, "[t]hey wanted to invite us to a meeting so that we could distribute the routes and set the prices." Doc.197:103-04. The three defendants explained that they wanted to "give to the new bus owners [who] were coming into the municipality" the routes the defendants had acquired through a special auction "so that there wouldn't be any conflict between those routes and the routes [the defendants] had been servicing for years." *Id.* at 104. Garay-Rodriguez offered Aldea-Rodriguez two routes—one each in the San Antonio and Rio Cañas wards—in exchange for her agreement "that we wouldn't compete with them with the routes that they had before." *Id*. at 104-05.

Aldea-Rodriguez rejected this offer, because she and her husband were "interested in more routes in the area." Doc.197:106. Gonzalez-Nevarez suggested meeting again before the auction, and the group agreed to meet at the La Barra community center. *Id.* at 106-07. Gonzalez-Nevarez said the defendants would approach other

newcomers—Eduardo Trilla, Walberto Lara, and a company called La Esperanza—"to see if they would agree to meet in order to verify the routes and set prices." *Id.* at 108-09, 134-35.

2. Defendants Hold a Pre-Bid Conspirators' Meeting.

On October 22, 2013, the day before bids were due, Aldea-Rodriguez and her husband met the defendants and other bus owners at the La Barra community center. Doc.197:110-11. About 25 people attended the meeting. Doc.208:186. No one from the Caguas government or the Puerto Rico Department of Education ("PRDE") was present. *Ibid*.; Doc.197:111-12.

Using a tablet computer, Aldea-Rodriguez secretly made an audio recording of the entire, hour-long meeting (which was played for the jury). Doc.197:112-15; GX1 (SA:1). The defendants opened the meeting by confirming that its purpose was to "divid[e] up the routes and set[] the prices for each route." Doc.197:127; *see* GX1:12-21 (SA:12-21). Appellant Vega-Martinez explained the need for such an agreement. As he put it, "[t]his auction . . . has hit us hard[,]" because "you see such a big group" and "what is to be auctioned" is "not a lot"—"these three

measly pages" of the auction invitation. GX1:14 (SA:14). For this reason, he said, "[t]he only way . . . to be successful . . . is what we are doing now, coming to a consensus. Because if we go, that he put this, another, and the rest, what happens? We have to work for cheap." *Ibid.* But, he continued, if instead "we . . . divide the cake in different pieces . . .," then "everybody gets to cook." *Ibid.*; *see* Doc.197:128-29.

Gonzalez-Nevarez, too, emphasized the need to ensure that "instead of the government benefitting from [the auction], . . . we be the ones to benefit from it." GX1:18 (SA:18); *see* Doc.197:131. And he reported that he previously had spoken to bus owners Trilla, Lara, and La Esperanza; he had offered them certain routes; and "everyone [had] agreed." GX1:19-20 (SA:19-20); *see* Doc.197:131-37. Appellant Garay-Rodriguez echoed that "there's already . . . an agreement," adding: "About to almost, put a wedding ring on it." GX1:13 (SA:13); *see* Doc.197:127-28.

Once "[e]verybody agreed" on the general plan to allocate routes, the participants broke into two groups—owners of large buses and owners of small buses—to discuss specific routes. Doc.197:129-30, 137-

38. Aldea-Rodriguez (who was in the large-bus group, along with Trilla, Lara, and the defendants) took notes on the route list provided by Caguas, memorializing the owner the group selected to win each large-bus route and "the prices the bus owners were going to set" for some routes. *Id*. at 130, 138-48; GX4; GX4A (SA:121-23; SA:124-26) (*see* "Sector(s)" and "Quote for round-trip per day" columns); *see also* Doc.208:187. In discussing the prices that should be bid, Vega-Martinez cautioned that Caguas might ask bidders to "negotiate later on." GX1:29 (SA:29).

After "all of the routes for the large bus owners [had] been discussed and divided up," the bus owners agreed to submit sham bids for some of the routes to create the false appearance of competition. Doc.197:148-50; *see* GX1:78, 85 (SA:78, 85). As Aldea-Rodriguez explained, a "runner[-up] bidder" would deliberately bid higher than the pre-selected winner so that the bidding "could be seen as competition" by Caguas. Doc.197:149-50. Aldea-Rodriguez herself agreed to submit such bids for routes that had been "assigned" at the meeting to other owners. Doc.197:150-54; *see* GX4:1 & GX31A:1 (SA:121; SA:172).

Eduardo Trilla, who testified at trial without a cooperation agreement, confirmed this sham-bidding scheme. Doc.208:149-50, 191-94. According to Trilla, the large-bus owners agreed on "who should service the route" and on "another person who was selected at the meeting who was supposed to put in a higher price." Doc.208:187, 193-94. The purpose of bidding "in pairs" was to avoid "someone becoming suspicious." *Id.* at 192, 197.

The bus owners also agreed to keep their meeting secret. Doc.197:151-52. Rivera-Herrera told the group, "Listen, don't anyone have the idea tomorrow to raise their hand and say . . . 'that's not what we said last night at the meeting.'" GX1:88 (SA:88). Aldea-Rodriguez understood this to mean "[t]hat nobody should even think about saying the next day that we had met." Doc.197:152.

At the end of the meeting, Gonzalez-Nevarez suggested to some participants that the next day, "each one of us bring the prices and when we get to the location . . . [w]e look at them, compare them, everything looks good, boom[,] we seal them and take off." GX1:117

(SA:117). Garay-Rodriguez agreed, saying, "We go look and then take off." *Id*.

3. Defendants Submit Their Rigged Bids.

Consistent with Gonzalez-Nevarez's suggestion, on October 23, 2013, he, Garay-Rodriguez, Trilla, and Lara met in the parking lot of the Plaza Del Carmen Mall before submitting their bids. Doc.208:199. According to Trilla, they "talk[ed] about the auction," and some of them "sign[ed] the papers and put[] [the papers] in the envelopes and put[] all the information that you have to put in the front of the envelope[.]" *Id*. at 200-01. The group then "went and submitted [their] papers to the municipality." *Id.* at 201.

The defendants, along with 11 other bus owners (all but one of whom had attended the La Barra meeting), timely submitted bids for the 2013 auction. Doc.215:38-41, 44-46; GX23A-33A; GX34A; GX39A; GX44A; GX49A; GX1:2 (SA:148-180; SA:181-220; SA:221-267; SA:268-309; SA:310-390; SA:2). Each defendant certified that his proposal was "submitted without previously having made an agreement" with another bidder and was "fair and free of collusion." Doc.215:59-60. The

defendants' bids, however, corresponded with the allocations made at the La Barra meeting. Specifically, Vega-Martinez had been allocated two routes (one in Borinquen, one in San Salvador); Garay-Rodriguez seven (one in Bairoa, two in Borinquen, one in Borinquen-Turabo, one in San Salvador, and two in Tomas de Castro); Gonzalez-Nevarez six (three in Canabon-Canaboncito, two in Beatriz, one in Borinquen-Turabo); and Rivera-Herrera two (in Rio Cañas). GX1:23, 25-26, 29-30, 42-44, 45 ("The one after [Mercedes Palma] belongs to Lucio"), 47-52 (SA:23, 25-26, 29-30, 42-44, 45, 47-52); GX4 (referring to the defendants as "Lucio," "Gary," "Junito," and "Gavino")(SA:121-123). And for each of those routes, the defendant in question submitted either the low or the sole bid. GX23A-33A; GX34A:19-21; GX39A:19-21; GX44A:19-21; GX49A:19-21 (SA:148-180; SA:199-201; SA:239-241; SA:286-288; SA:328-30). For example:

- For the San Salvador route allocated to *Vega-Martinez*, there were only two bidders: Vega-Martinez at $160 a day, and Garay-Rodriguez at $175. GX44A:21; GX49A:21 (SA:288; SA:330);

- For the Bairoa La 25 route allocated to *Garay-Rodriguez*, there were only two bidders: Garay-Rodriguez at $175, and

Victor Santaliz at $250. GX49A:19; GX31A:1 (SA:328; SA:172);

- For one of the Borinquen routes (serving "Elem. Cornelio Ayala"), the Borinquen-Turabo route, and the two Tomas de Castro routes allocated to Garay-Rodriguez, he was the sole bidder. GX49A:20-21 (SA:329-30);

- For one of the Canabon-Canaboncito routes (serving "Elem. Oscar L. Bunker") allocated to *Gonzalez-Nevarez*, there were only two bidders: Gonzalez-Nevarez at $200, and Walberto Lara at $220. GX39A:19; GX27A:1 (SA:239; SA:160);

- For the two Beatriz routes allocated to Gonzalez-Nevarez, he was the sole bidder. GX39A:20 (SA:240); and

- For one of the Rio Cañas routes allocated to *Rivera-Herrera*, there were only two bidders: Rivera-Herrera at $80, and Victor Santaliz at $175. GX34A:19; GX31A:1 (SA:199; SA:172).

As required, *see* GX15A:17 (SA:143), each defendant's bid package identified the school buses to be used to carry out the contracts. Doc.208:210; *see* GX44A:36-38; GX49A:37-79 (SA:303-05; SA:346-88). All of those buses had been shipped from Jacksonville, Florida, to Puerto Rico. Doc.208:211-17; *see* GX131A; GX132A (SA:431-34; SA:435-54).

C. Caguas Awards Contracts by Mail.

After reviewing the bids, Caguas's Department of Education recommended against accepting them, because the prices were too high. Doc.215:46; *see* GX71A:1 (SA:391). The Purchasing and Auctions Department notified all bidders, including each defendant, by certified mail. Doc.215:47, 51-53; *see* GX80A; GX82A (SA:397-99; SA:406-08). Caguas then negotiated with the low bidders and obtained lower prices on some routes. Doc.215:53, 127-30. On January 17, 2014, the Purchasing and Auctions Department sent the winning bidders, including each defendant, award letters by certified mail. *Id*. at 54-58; *see* GX81A; GX83A (SA:400-05; SA409-14). (The award-letter mailings to the defendants were the basis for Counts III-IV and VI-VII. Doc.3:13-14.) The award letters specifically referenced Auction No. 2014-49. *Ibid.* The defendants won almost every route they had been allocated at the La Barra meeting; and Garay-Rodriguez and Gonzalez-Nevarez won some additional routes. *Compare* GX1:45 & GX4:1-3 (SA:45; SA:121-23) *with* GX71A:2-4 (SA:392-394). Had the Purchasing

and Auctions Department known that the defendants colluded in their bidding, the department would have disqualified them. Doc.215:174.

The defendants' contracts began in February 2014. Doc.234:8-12. Through May 2015 (the end of the charged conspiracy period), Caguas paid the defendants close to a million dollars, including $139,952 to Vega-Martinez and $427,820 to Garay-Rodriguez. *Id.* at 12-13; GX172 (SA:466-70).

In the 2013-14 school year, Caguas paid for its school-transportation contracts in part with federal funds received through the PRDE from the U.S. Department of Education, which is in Washington, D.C. Doc.206:89-90, 92-97. Specifically, 95% of Caguas's schools qualified for No Child Left Behind Act funds, and, for those schools, such funds accounted for $436,566 of Caguas's school-transportation expenditures. *Id.* at 94, 97-103; GX171 (SA:465).

D. Defendants Admit Their Conspiracy.

In interviews with the FBI, several of the defendants admitted their conduct. Appellant Vega-Martinez admitted that he attended the La Barra meeting; the purpose of the meeting "was to ensure that the

bus owners kept their previous routes"; and "there was an understanding that the new bus owners would not bid on the other routes that the other bus owners already had." Doc.234:75-76. Appellant Garay-Rodriguez admitted that "before the auction he met with several of the other school bus transportation company owners at a meeting place and . . . they discussed the routes and which routes each company was going to bid on." *Id*. at 141-42. Gonzalez-Nevarez admitted that, before the La Barra meeting, he met with Victor Santaliz and spoke to Walberto Lara by telephone about route allocations. He also admitted that he attended the La Barra meeting, where participants "discussed which routes each company was going to bid on [and] divide[d] them up." He acknowledged that "what happened at the owner's meeting was wrong." *Id*. at 66-69, 71-73, 144-46.

III. Caguas's Loss

At sentencing, the district court determined by a preponderance of the evidence that the defendants' conspiracy caused Caguas significant loss. Specifically, from February 2014 through December 2016, Caguas paid the defendants under the contracts awarded through the 2013

auction. Doc.341:2. In 2016, Caguas held a new auction for school-transportation services—this one free of bid rigging—and, in 2017, it awarded contracts at daily prices below those it had paid under the 2014 contracts. Doc.273 ¶¶53-54; Doc.341:2. Considering just the routes the defendants serviced, Caguas overpaid by $342,094, including $114,181 on appellant Garay-Rodriguez's contract and $93,055 on appellant Vega-Martinez's contract. Doc.341:3-10.

SUMMARY OF ARGUMENT

Faced with the recording of the La Barra meeting, the testimony of co-conspirators Aldea-Rodriguez and Trilla, the documentary evidence showing that the defendants' bids matched the route allocations they had agreed to, and the defendants' admissions to the FBI, neither Garay-Rodriguez nor Vega-Martinez denies that he conspired to rig bids and allocate the market. Instead, Garay-Rodriguez asserts a potpourri of alleged errors, many for the first time on appeal, and Vega-Martinez challenges only the restitution award. Appellants' contentions are meritless.

1. Garay-Rodriguez first incorrectly argues, in three different ways, that his prosecution is inconsistent with the Sherman Act's interstate-commerce requirement on the ground that the conspiracy occurred entirely within Puerto Rico. As an initial matter, the conspiracy was not purely local. Further, all three iterations of Garay-Rodriguez's argument are incorrect. The district court did not abuse its discretion by refusing to dismiss the indictment, because the indictment adequately alleged that the conspiracy both was in the flow of and affected interstate commerce. In addition, the government's evidence supported those allegations by showing that Caguas paid for the rigged contracts in part with out-of-state federal funds and that the buses the defendants used to carry out the contracts were shipped from Florida to Puerto Rico, which is treated as a state for Sherman Act purposes. Finally, the district court did not plainly err in its jury instructions on interstate commerce. To the contrary, those instructions were correct.

2. Garay-Rodriguez also argues, for the first time, and incorrectly, that the jury instructions did not explain the meaning of bid rigging and market allocation, and that a curative instruction either

confused the jury or permitted it to convict him for the uncharged substantive offense of price fixing. The district court, however, did explain the nature of bid rigging and market allocation, and there is no basis to conclude that the jury was confused.

Contrary to Garay-Rodriguez's contention, neither the government nor the district court constructively amended the indictment. The government did not argue that the defendants had committed the crime of price fixing, and the district court repeatedly instructed the jury that the defendants were charged with bid rigging and market allocation and could not be convicted of price fixing or convicted of bid rigging/market allocation on the basis of evidence of price fixing. There also was no variance, prejudicial or otherwise, because the evidence did not differ materially from the indictment. The government's references to bid prices were appropriate in a bid-rigging case and consistent with the indictment, which alleged that the defendants discussed the "pricing of contracts for school bus transportation services" and agreed to "raise the price on the winning bids to be submitted by the co-

conspirators." In any event, the district court's repeated instructions prevented any possible prejudice.

3. Garay-Rodriguez contends that the district court improperly implemented a correct pretrial ruling—precluding evidence of economic justifications for the conspiracy—by preventing him from cross-examining a Caguas auction official about Caguas's renegotiation procedure and the prices resulting from it. But he identifies only one of his questions that was disallowed, and that question went to whether Caguas was harmed, an impermissible consideration. In addition, any error was harmless.

4. The district court did not abuse its discretion under Fed. R. Evid. 403 by admitting a chart summarizing telephone calls made at critical times in the auction process among numbers assigned to the defendants. The chart supported the inference that the defendants were discussing the bidding with each other, and it was not unfairly prejudicial because it did not suggest an improper basis for decision. Further, any error was harmless.

5. The district court did not plainly err in instructing the jury on the substantive mail-fraud charges. To the contrary, the court's instructions were correct. Nor was the evidence plainly insufficient to support the mail-fraud-conspiracy and substantive mail-fraud convictions. The evidence showed overwhelmingly that: the defendants made bid-rigging and market-allocation agreements that were intended to defraud Caguas; the defendants made false certifications to Caguas as part of the bidding process; and the success of the scheme depended on use of the mail.

6. The district court did not plainly err, under controlling circuit precedent, by using post-conviction judicial fact-finding to determine Caguas's actual loss for purposes of restitution. Nor did the court clearly err in estimating that loss, which had a rational basis in the record: the difference between (1) what Caguas paid the defendants under the 2014 contracts tainted by bid rigging and (2) the lower prices Caguas paid for the same routes under the 2017 contracts, which resulted from the next, collusion-free auction. The court reasonably inferred that Caguas would have obtained the lower prices absent the

defendants' bid-rigging conspiracy. In addition, the court followed the restitution statute and reasonably found that the alleged factual complexities did not outweigh Caguas's need for restitution.[4]

ARGUMENT

I. Garay-Rodriguez Shows No Reversible Error as to the Pleading, Proof, or Instructions on the Interstate-Commerce Element of the Sherman Act Count.

A. The District Court Did Not Abuse its Discretion in Declining to Dismiss the Sherman Act Count.

Garay-Rodriguez wrongly argues (Br. 16-23) that the district court should have dismissed the Sherman Act count (Count I) because it did not adequately allege a nexus to interstate commerce.

1. Background

Garay-Rodriguez moved pretrial to dismiss Count I, arguing (*inter alia*) that it failed to allege sufficient facts to "show a nexus between

[4] Garay-Rodriguez's Summary of Argument (Br. 9-10) suggests that the district court mistakenly instructed the jury "that they should know that the possible jail sentence was either so low or probably inexistent[sic] if [the defendants] were found guilty[.]" But he provides neither argument nor authority for this assertion, so the issue is not before the Court. *See Echevarria v. AstraZeneca Pharmaceutical LP*, 856 F.3d 119, 139-40 (1st Cir. 2017).

[his] business activities and interstate commerce." Doc.41:32. The district court denied the motion. Doc.65:9. As the court explained, an indictment may adequately plead the interstate-commerce element by alleging "that the offending activities took place in the flow of interstate commerce, or that the alleged business activities had a substantial effect on interstate commerce." *Id*. at 8 (citing, *e.g.*, *McLain v. Real Estate Bd. of New Orleans*, 444 U.S. 232 (1980)). Here, the court observed, the indictment alleged that the affected school-transportation contracts were supported by federal funds within the flow of interstate commerce and that the defendants operated buses that were shipped in interstate commerce and fueled by gasoline that traveled in interstate commerce. *Id*. at 8-9. These allegations, the court concluded, sufficed to permit a reasonable inference that the alleged conspiracy "implicated materials and funds that were both in the flow of interstate commerce and had a substantial effect on interstate commerce." *Id.* at 9.

2. Standard of Review

A district court's denial of a motion to dismiss an indictment is reviewed for abuse of discretion, with any ancillary factual findings

reviewed for clear error and legal determinations reviewed de novo. *United States v. Bucci*, 582 F.3d 108, 115 (1st Cir. 2009). Abuse of discretion is a "deferential standard," *id*., and this Court will reverse only when the district court "indulged a serious error of law or suffered a meaningful lapse of judgment, resulting in substantial prejudice to the movant." *West v. United States*, 631 F.3d 563, 568 (1st Cir. 2011) (citation omitted)

3. Discussion

Section 1 of the Sherman Act proscribes "[e]very . . . conspiracy, in restraint of trade or commerce among the several states," which include Puerto Rico as a matter of statutory interpretation. 15 U.S.C. § 1; *Cordova & Simonpietri Ins. Agency Inc. v. Chase Manhattan Bank N.A.*, 649 F.2d 36, 38, 44 (1st Cir. 1981). The Sherman Act reflects Congress's intent "to go to the utmost extent of its constitutional power" to preserve competition in or affecting U.S. commerce. *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 194-95 (1974). The Sherman Act thus applies to both activities *in* interstate commerce (the "flow" theory) and

"wholly local" activities that have some substantial *effect* on interstate commerce (the "effects" theory). *McLain*, 444 U.S. at 241-42.

Count I alleged both theories, asserting that "[d]uring the period covered by this Indictment, the business activities of the defendants and co-conspirators were within the flow of, and substantially affected, interstate trade and commerce." Doc.3:6 (¶20). The indictment also alleged facts to support both theories. It alleged that Caguas school-transportation contracts were "funded in substantial part by . . . federal funding from the U.S. Department of Education," and that "[t]hese funds were within the flow of interstate commerce." *Id*. at 6-7 ¶21. The indictment also alleged that "the defendants operated buses that were shipped in interstate commerce and fueled by gasoline that traveled in interstate trade and commerce." *Id*. ¶22.[5]

A court reviewing an indictment "look[s] to see whether the document sketches out the elements of the crime and the nature of the charge so that the defendant can prepare a defense and plead double

[5] At trial, the government did not adduce evidence that the busing companies used gasoline shipped from the continental United States.

jeopardy in any future prosecution for the same offense." *United States v. Guerrier*, 669 F.3d 1, 3 (1st Cir. 2011); *see also* Fed. R. Crim. P. 7(c)(1) (requiring an indictment to contain "a plain, concise, and definite written statement of the essential facts constituting the offense charged"). The indictment here met that standard, not only alleging that the conspiracy was in the flow of and affected interstate commerce, but also presenting facts supporting those allegations.

To the extent Garay-Rodriguez challenges (Br. 22-23) the correctness of the allegations, such an argument cannot warrant pretrial dismissal of an indictment. *Guerrier*, 669 F.3d at 3. Rather, in the ordinary course of events, "a technically sufficient indictment handed down by a duly empaneled grand jury 'is enough to call for trial of the charge on the merits.'" *Id.* at 4 (quoting *Costello v. United States*, 350 U.S. 359, 363 (1956)). To be sure, if the interstate-commerce element is not established at trial, "then [the defendant] is not guilty; but the court is not by the failure of proof on that element deprived of

judicial jurisdiction."[6] *Awon v. United States*, 308 F.3d 133, 142 (1st Cir. 2002). Garay-Rodriguez cites no cases to the contrary. The district court, then, did not abuse its discretion in declining to dismiss Count I.

Garay-Rodriguez at times seems to suggest (Br. 19-20) that the district court should not have denied his motion to dismiss without first making a "specific finding[]" that the indictment alleged a *per se* violation of the Sherman Act—a finding (he implies) that would have allowed the court to "understand" the "uniquely local nature of . . . the underlying commerce." Having failed to make this argument in district court (Doc.41), he has waived it. *See* Fed. R. Crim. P. 12(b)(3). In any event, it is incorrect. To be actionable, any violation of the Sherman Act—whether subject to the *per se* rule or the rule of reason—requires a nexus to interstate or foreign commerce. 15 U.S.C. § 1.

To the extent Garay-Rodriguez instead suggests that the district court independently erred by allowing the case to proceed on a *per se*

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[6] "[W]hether the facts of a given case present a sufficient nexus to interstate commerce to be regulated by Congress is not an issue of the federal courts' subject matter jurisdiction" but of "the constitutional limits on Congress's power." *United States v. Cruz-Rivera*, 357 F.3d 10, 14 (1st Cir. 2004).

theory without analyzing the school-transportation "industry," that suggestion too is wrong. As the Tenth Circuit recently explained in *United States v. Kemp & Assocs., Inc.*, 907 F.3d 1264 (10th Cir. 2018), "in assessing whether the judicial system has enough 'experience' to determine the anticompetitive effects of an action we focus on the particular practice involved, rather than the industry in which the allegedly unlawful practice was used." *Id.* at 1273 (emphases in original). *Per se* offenses like bid rigging and market allocation are illegal in every industry. *See Arizona v. Maricopa Cty. Med. Soc'y*, 457 U.S. 332, 351 (1982); *see also, e.g.*, *United States v. Misle Bus & Equip. Co.*, 967 F.2d 1227, 1235 (8th Cir. 1992) (agreement allocating bids for school-bus equipment).

B. Sufficient Evidence Supports the Jury's Interstate-Commerce Finding.

Garay-Rodriguez next wrongly argues (Br. 16-23) that the evidence was insufficient to support his conviction, because the school-bus routes were wholly intrastate and thus the conspiracy was neither in the flow of, nor substantially affected, interstate commerce.

1. Standard of Review

This Court reviews preserved sufficiency challenges de novo. *United States v. Hatch*, 434 F.3d 1, 4 (1st Cir. 2006). The Court considers all the evidence, direct and circumstantial, in the light most favorable to the government, "drawing all reasonable inferences consistent with the verdict, and avoiding credibility judgments, to determine whether a rational jury could have found the defendants guilty beyond a reasonable doubt." *United States v. Negron-Sostre*, 790 F.3d 295, 307 (1st Cir. 2015) (internal quotation marks and brackets omitted). "Essentially, [this Court] will reverse only if the verdict is irrational." *United States v. Ramirez-Rivera*, 800 F.3d 1, 16 (1st Cir. 2015) (internal quotation marks omitted).

2. Discussion

The evidence satisfied both the flow and effects theories. First, the school-transportation services were in the flow of commerce because they were paid for in part with federal funds that crossed state lines. Second, the likely (and actual) result of the defendants' conspiracy would have been to raise the price of such services. A higher price

would have caused Caguas either to spend less of its federal funding on other interstate goods and services, or to buy fewer bus services—with the result that Puerto Rico bus companies, in turn, would buy fewer buses from the continental United States.

1. Even conduct that occurs within a state is in the flow of interstate commerce if the conduct is "an inseparable element of a larger program dependent for its success upon activity which affects commerce between the states." *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 784 (1975) (citation omitted); *see also Cordova & Simonpietri*, 649 F.2d at 44 (accord). In *Goldfarb*, a local Virginia bar association set a minimum fee schedule for lawyer-performed title examinations. Although the conspiracy involved only lawyers within a single county in Virginia, and although the title examinations themselves occurred within the state's borders, the Supreme Court found that the underlying real-estate transactions involved "a significant portion of funds" from outside Virginia and also loans guaranteed by the federal Veterans Administration and Department of Housing and Urban Development, "both headquartered in the District of Columbia." 421

U.S. at 783. Because the restrained legal services were "inseparab[le] . . . from the interstate aspects of real estate transactions[,]" the Court concluded that the interstate-commerce element was met. *Id*. at 785; *see also McLain*, 444 U.S. at 244 (describing "the *Goldfarb* holding" as that "the activities of the attorneys were within the stream of interstate commerce").[7]

Likewise, the evidence here established that even though the conspiracy was orchestrated by local school-bus operators and involved bus routes entirely within Puerto Rico, the school-transportation contracts were paid for in part with federal funds, which flowed from the U.S. Department of Education to the PRDE and then to Caguas. In particular, Rivera-Pacheco testified that in 2013-14, Caguas used $436,566.32 in federal No Child Left Behind Act funds to pay for school

[7] Courts have reached similar conclusions under the Hobbs Act, which, like the Sherman Act, "exercise[s] the full measure of Congress's commerce power." *Taylor v. United States*, 136 S. Ct. 2074, 2081 (2016). *See, e.g.*, *United States v. Huynh*, 60 F.3d 1386, 1389 (9th Cir. 1995) (extorted federal funds were "moving in interstate commerce" for purposes of Hobbs Act); *United States v. Davis*, 707 F.2d 880, 884 (6th Cir. 1983) (federal funds diverted as result of extortion "plainly were in interstate commerce").

transportation. Doc.206:102-03; GX171 (SA:465). The jury reasonably could infer from these facts that the school-transportation contracts were within the flow of interstate commerce.

Indeed, the commerce restrained here is even more closely linked to interstate commerce than in *Goldfarb*. The *Goldfarb* Court relied not on evidence that the restrained legal services themselves (title examinations) were funded by money crossing state lines, but instead on evidence that the those services were a part of underlying commercial transactions (real-estate deals) that were funded by money crossing state lines. By contrast, here, the restrained services themselves—school-transportation services—were funded by interstate monies.

2. With respect to "effects," "[w]holly local business restraints can produce the effects condemned by the Sherman Act." *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 743 (1976) (quotation, citation omitted). As the Supreme Court emphasized in *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322 (1991), "[i]n cases involving horizontal agreements to fix prices or allocate territories

within a single State, we have based jurisdiction on a general conclusion that the defendants' agreement 'almost surely' had a marketwide impact and therefore an effect on interstate commerce." *Id.* at 331 (citing *Burke v. Ford*, 389 U.S. 320, 322 (1967)). That is because the effects test focuses on the potential harm that would ensue, "as a matter of practical economics," if the conspiracy were successful, considering not just the victim of the restraint but also "other participants and potential participants in the [relevant] market." *Id.* at 330-32 (internal quotation marks omitted); *see also id.* at 336 (Scalia, J., dissenting) (under majority's opinion, "the test of Sherman Act jurisdiction is whether the entire line of commerce from which Dr. Pinhas has been excluded affects interstate commerce").

An effect can be substantial, of course, "even if its impact on interstate commerce falls far short of causing enterprises to fold or affecting market price." *Hospital Building Co.*, 425 U.S. at 745. To the contrary, "a not insubstantial effect" suffices, and a party need not "quantify the adverse impact." *McLain*, 444 U.S. at 243, 246; *see also Apex Hosiery Co. v. Leader*, 310 U.S. 469, 485 (1940) ("it is the nature of

the restraint and its effect on interstate commerce and not the amount of the commerce which are the tests of violation"). As this Court has explained, a party may meet the "liberal[]" effects test simply by "point[ing] to the relevant channels of interstate commerce logically affected by the defendant's unlawful conduct." *Cordova & Simonpietri*, 649 F.2d at 45 (internal quotation marks omitted); *see also ibid.* (noting that this standard "allow[s] plaintiffs to proceed against those local price fixing agreements (and similar restraints of trade) that are most likely to affect interstate commerce without imposing . . . a 'proof of effects' test that, in a turbulent, ever-changing economy, may be difficult, or impossible, to meet").

Here, the government showed, through the defendants' own words, that a goal of the bid-rigging conspiracy was to raise the prices Caguas would pay for bus services—as Vega-Martinez put it, to ensure that the defendants did not have to "work for cheap." GX1:14 (SA:14). From this evidence, and from the evidence that the rigged auction in fact resulted in unacceptably high bids, *supra* at 16, the jury reasonably could infer that the conspiracy, if successful, would have raised the

price of school transportation. And because Caguas paid for its transportation contracts in part with federal funds that could be used for other aspects of school operations, including "purchasing materials and equipment," Doc.206:92 (*see also supra* at 17), the jury likewise could infer that higher transportation costs would reduce the funding available to Caguas for purchases of other goods and services—at least some of which would have been purchased in interstate commerce. *See United States v. Finis P. Ernest, Inc.*, 509 F.2d 1256, 1261 (7th Cir. 1975) (holding that bid-rigging conspiracy had restraining effect on interstate commerce, because "where bids are rigged, the price the city will have to pay for the project is artificially increased," and "where the city must use more of its available funds to complete the sewer project it will have less money to expend for other projects requiring use of goods shipped in interstate commerce."); *J.P. Mascaro & Sons, Inc. v. William J. O'Hara, Inc.*, 565 F.2d 264, 267 (3d Cir. 1977) ("Since the alleged conspiracy, if effective, would have reduced the amount of supplies

purchased [from out of state], interstate commerce would have been affected in a very real sense.").[8]

By the same token, given the evidence that the defendants obtained (and carried out) their transportation contracts using buses that had been shipped to Puerto Rico from Florida, *supra* at 15, the jury also reasonably could infer that a higher school-transportation price would, as a matter of practical economics, depress future demand for school buses; specifically, instead of spending less on other purchases, Caguas could respond to higher prices by buying fewer bus services (such as by merging routes, *see, e.g.*, Doc.215:164), and with less business available from Caguas, over time bus companies would buy fewer buses from the continental United States. *Cf. McLain*, 444 U.S.

[8] Many courts recognize the involvement of federal funds as indicative of the required nexus. *See Marrese v. Interqual, Inc.*, 748 F.2d 373, 382 (7th Cir. 1984) (in Sherman Act suits by doctors against hospitals, "Federal courts have relied upon . . . the receipt of Medicare [and] Medicaid . . . by the plaintiff doctor and/or the defendant hospital," among other factors, to find that complaints adequately allege interstate-commerce nexus), *abrogation on other grounds recognized in Hammes v. AAMCO Transmissions, Inc.*, 33 F.3d 774, 779 (7th Cir. 1994) (stating that complaints need no longer include such particularized interstate-commerce allegations).

at 246 (holding that Sherman Act extended to conspiracy among New Orleans brokers to fix commission rate on sales of residential property, because "whatever stimulates or retards the volume of residential sales, or has an impact on the purchase price, affects the demand for financing and title insurance, those two commercial activities that on this record are shown to have occurred in interstate commerce").

The evidence thus readily showed that the bid-rigging conspiracy had a substantial effect on interstate commerce.

3. In arguing to the contrary, Garay-Rodriguez primarily relies (Br. 21-23) on *Adams v. Davis County*, 30 F. Supp. 3d 1267 (D. Utah 2014). But *Adams* does not help him. In *Adams*, the district court dismissed (with leave to amend) a Sherman Act complaint alleging in conclusory fashion that, "because Plaintiff provides towing services on the interstate highway, its business is therefore in interstate commerce." *Id.* at 1272-73. That assertion, the court found, "rests essentially on a purely formal 'nexus' to commerce," under which "any conduct . . . with respect to an ingredient of a highway" would qualify. *Id.* at 1273 (internal quotation marks omitted). By contrast, the

connection here is not tenuous; rather, the government proved that the defendants, using school buses purchased in interstate commerce, conspired to rig bids and allocate routes for school-transportation contracts funded by out-of-state federal monies.

C. The District Court's Interstate-Commerce Instructions Were Not Plainly Erroneous.

For the first time on appeal, Garay-Rodriguez challenges (Br. 28-30) the district court's interstate-commerce instructions. The court did not err, much less plainly so.

1. Standard of Review

Appellate review of claimed instructional error is "ordinarily de novo as to questions of substantive law, while issues of phrasing and emphasis are reviewed for abuse of discretion." *United States v. Allen*, 670 F.3d 12, 15 (1st Cir. 2012) (citation omitted). But when a defendant fails to object to an instruction, review is for plain error. *See Ramirez-Burgos v. United States*, 313 F.3d 23, 28 (1st Cir. 2002). To establish reversible plain error, a defendant must show "(1) that an error occurred (2) which was clear or obvious and which not only (3) affected the defendant's substantial rights, but also (4) seriously impaired the

fairness, integrity, or public reputation of judicial proceedings." *United States v. Gordon*, 875 F.3d 26, 30 (1st Cir. 2017) (internal quotation marks omitted). The plain-error exception "is cold comfort to most defendants pursuing claims of instructional error." *United States v. Gomez*, 255 F.3d 31, 37 (1st Cir. 2001).

2. Discussion

The district court defined the term "interstate commerce" and explained the "flow" and "effects" theories in detail. Doc.235:161, 168, 182-85. Garay-Rodriguez now argues that these instructions were inadequate, because the district court ostensibly did not define the term "substantial effect." The defendants[9] made no such objection below (Doc.235:63, 202-03; Doc.162-1:17), and, in any event, Garay-Rodriguez is wrong. The district court explained to the jury that in considering "substantial effect," "[t]he precise amount, quantity, or value of interstate commerce involved is unimportant so long as you find that the restraint charged in the indictment or the activities of the parties to

[9] We refer to "the defendants" because the district court treated an objection by one defendant as an objection by all. Doc.197:6.

the conspiracy had some no[t] [in]substantial effect upon interstate commerce." Doc.235:184; *see* Doc. 162-1:17 & Doc. 235:63. That instruction was correct: As the Supreme Court has explained, a restraint of trade sufficiently affects interstate commerce if there is a "not insubstantial effect." *McLain*, 444 U.S. at 246. The court's instruction was not error, let alone obvious error.

Garay-Rodriguez also incorrectly argues that specific instructions on other elements of Count I did not include the interstate-commerce requirement. Although the defendants objected that the government's proposed instruction summarizing 15 U.S.C. § 1 should have included the words "among the several States," Doc.210:1, they never argued that every instruction pertaining to Count I must include the interstate-commerce requirement. Such repetition is unnecessary. The jury instructions, considered "as a whole," *United States v. McGill*, 953 F.2d 10, 12 (1st Cir. 1992), sufficiently explained the requirement.

In any event, even if the district court's jury instructions were plainly erroneous (which they were not), Garay-Rodriguez could not show prejudice, let alone a miscarriage of justice, given the undisputed

evidence that (1) Caguas paid for the school-transportation contracts using out-of-state federal funds, and (2) the defendants effectuated their conspiracy using school buses purchased in interstate commerce.

II. The District Court Did Not Plainly Err in Its Instructions on the Nature of the Sherman Act Conspiracy, and Neither the Government Nor the Court Constructively Amended or Prejudicially Varied That Charge.

For the first time on appeal, Garay-Rodriguez argues (Br. 30-32, 36-37) that the district court (1) failed to instruct the jury on the meaning of bid rigging and market allocation; and (2) gave a confusing curative instruction during defendants' closing argument. He also argues (Br. 53-54) that the government and the court constructively amended or prejudicially varied the charged conspiracy. He is wrong.

A. Background

The indictment charged a conspiracy to restrain trade "by rigging bids and allocating the market for school bus transportation contracts." Doc.3:4 (¶13). The indictment alleged as *means* of the conspiracy (*inter alia*) that the defendants met to discuss "pricing of contracts for school bus transportation services in Caguas" and agreed "to raise the price on the winning bids." *Id.* at 5-6 (¶17). During trial, the defendants

proposed instructions on price fixing as a substantive violation of 15 U.S.C. § 1. Doc.209 (Nos. 2, 6, 8, 10, 11, 13, 28, 29, 33). The court rejected those instructions, because "the indictment does not charge price fixing." Doc.235:19. The court instead instructed that the crime charged was "conspir[acy] to allocate the market and bid rig," and it explained those terms in detail. *Id.* at 175-76.

In response, however, to defense complaints that the government's evidence tended to prove price fixing rather than bid rigging or market allocation, Doc.235:19-35, the court instructed the jury repeatedly that it could not convict the defendants of price fixing *or* convict them of bid rigging/market allocation based on *evidence* of price fixing. For example, the court instructed: "Again, price fixing is not alleged in the indictment, so you are not to determine beyond a reasonable doubt if the defendants committed price fixing. And even if there's evidence or you see any evidence that could point to price fixing, that is not something that you have to determine to convict defendants." Doc.235:164. *See id*. at 161-62, 163-64, 168, 174, 175 (similar cautions). In addition, in instructing the jury on the nature of bid rigging, the

court omitted standard language to the effect that bid rigging may take the form of "an agreement about the prices to be bid." *Id.* at 51-53, 175-76; *see* Doc.162-1:12. (The court gave these instructions over the government's objection that agreeing on bid prices can be a means of bid rigging. Doc.235:26-27, 31, 55. *See also infra* at 51.)

Consistent with these instructions, the court restricted the government from arguing that the defendants had engaged in price-fixing. Doc.235:33-35. The court specified, however, that the government was free to argue all price-related evidence as probative of bid rigging and market allocation. *Ibid.*; *see also id.* at 27-28, 56-58. As the court explained, "prices are relevant in that every time you see the request for particular bids, you're also going to see prices because you can't bid without a price." *Id.* at 33. The government hewed to this guidance in closing argument, describing the La Barra discussions, and the bid prices that resulted, as evidence that the defendants "conspire[ed] to rig the auction and to allocate the contracts." *Id.* at 229-35.

In Rivera-Herrera's closing argument, counsel argued that the government had proved "price fixing" and not bid rigging. Doc.235:280, 288; *see also id.* at 281. Recognizing that this argument "could confuse the jury" given the court's repeated admonitions that the jury "should not even concern [itself] with any matters as to price fixing," *id.* at 290-94, the court gave the following curative instruction: "[T]o constitute [il]legal bid rigging and contract allocation, it is not required that the co-conspirators agree on the exact prices that they will submit. In other words, it is not necessary that there be . . . price fixing in order for you to find illegal bid rigging and contract allocation." *Id.* at 295-96. The court also reiterated: "You cannot convict any of the defendants on price fixing." *Id.* at 296.

B. There Was No Plain Instructional Error.

1. Standard of Review

Defendants did not object to the district court's bid-rigging and market-allocation instruction on the ground Garay-Rodriguez now asserts—that it "lacked essential definitions." Br. 31-32. *See* Doc.235:51-61 (objecting only to inclusion of language about prices),

202-03. His claim, then, may be reviewed for plain error only. *See United States v. Glenn*, 828 F.2d 855, 862 (1st Cir. 1987) (instructional claim not preserved where, although counsel objected to instruction in question, he "did not clearly object to the matter he now raises").

The court's curative instruction likewise should be reviewed for plain error because the defendants objected only generally to it, Doc.235:294 (defense counsel asks only, "And our objections are noted?"), without specifying any error in the proposed language. In addition, the defendants objected before the instruction was given, but this Court has interpreted Fed. R. Crim. P. 30(d) to require a litigant to "lodge a specific objection and state the grounds for the objection *after* the court has charged the jury and before the jury begins deliberations." *United States v. Roberson*, 459 F.3d 39, 45 (1st Cir. 2006) (emphasis in original). Thus, "[o]bjections registered during pre-charge hearings are insufficient to preserve the issue." *Id*. Defendants did not object after the court gave the curative instruction, much less specify the basis for any objection. Doc.235:296.

2. Discussion

a. The Bid-Rigging and Market-Allocation Instruction

Garay-Rodriguez speciously asserts (Br. 31) that the district court made "no attempt to explain what bid rigging is or what market allocation is." To the contrary, the court explained that "[b]id rigging is an agreement between two or more competitors to eliminate, reduce, or interfere with competition for a job or contract that is to be awarded on the basis of competitive bids." Doc.235:175-76. The court specified (*inter alia*) that "[b]id rigging may take many forms, for example, who should be the successful bidder, who should bid high, who should bid low, or who should refrain from bidding." *Id.* at 176. As for market allocation, the court explained that "[a]llocating contracts is one form of allocating the market"; and that "[a] conspiracy to allocate contracts is an agreement or mutual understanding between two or more competitors not to compete for a particular contract or contracts." *Id.* at 175. These statements were correct, *see, e.g.*, *United States v. Portsmouth Paving Corp.*, 694 F.2d 312, 325 (4th Cir. 1982) (bid rigging); *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 49 (1990) (market

allocation), and Garay-Rodriguez fails to explain how they were inadequate. He thus shows no error, much less plain error.

In any event, Garay-Rodriguez could show neither prejudice nor a miscarriage of justice, given the overwhelming evidence—the defendants' recorded conversations at the La Barra meeting, the congruence between the agreements they reached and the bids they submitted, and the defendants' admissions to the FBI—that he and his co-defendants rigged the bidding to ensure that they kept the routes they previously had served.

b. The Curative Instruction

Garay-Rodriguez also argues (Br. 30-31) that the curative instruction presented the jury with "confusing alternative theories." Not so. As shown *supra* (43-46), the curative instruction simply reiterated the point that the jury could not convict him based on price fixing (a point Garay-Rodriguez does not dispute) and clarified that the government likewise need not *prove* price fixing in order to convict. The latter point was correct, as bid rigging may occur in any number of ways, including, for example, by conspirators' agreeing to refrain from

bidding. *See, e.g.*, *United States v. Flom*, 558 F.2d 1179, 1183 (5th Cir. 1977) (firms' bidding agents conducted regular meetings to allocate winners at upcoming bidding projects; designated losers agreed either to submit higher bid or no bid). This Court "will not assume jury confusion" when, as here, "the jury heard a legally adequate instruction, which was supported by competent evidence." *Massachusetts Eye & Ear Infirmary v. QLT Phototherapeutics, Inc.*, 552 F.3d 47, 73, *decision clarified on denial of reh'g*, 559 F.3d 1 (1st Cir. 2009). And here of course, there is evidence that the jury was *not* confused; indeed, while the jury sent notes seeking clarification on other instructions, such as conspiracy to commit mail fraud, it sent no such notes regarding the Sherman Act instructions. Doc.236:14-16.[10]

[10] Garay-Rodriguez asserts (Br. 36) that the district court denied an instruction "to exclude prices and price rigging from the consideration[] of the means of the conspiracy." In fact, the defendants requested no such instruction; instead, they moved at the pre-charge conference to *strike* "all the evidence that has to do with prices." Doc.235:32. Garay-Rodriguez makes no argument, and therefore has abandoned any claim, that the court abused its discretion in denying that motion. *See United States v. Pinkham*, 896 F.3d 133, 141 (1st Cir. 2018).

In any event, Garay-Rodriguez could show neither prejudice nor a miscarriage of justice. Contrary to the district court's assumption, bid rigging is simply a "more harmful" form of price fixing. 12 Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶2005b (3d Ed. 2012) (citing cases); *see also United States v. Joyce*, 895 F.3d 673, 677 (9th Cir. 2018) ("bid rigging is a form of horizontal price fixing"); *Misle Bus & Equip. Co.*, 967 F.2d at 1235 (same). Thus, had the jury in fact been confused and thought—despite the court's repeated instructions to the contrary—that it could convict based on evidence of defendants' price fixing, that result would have been correct.

C. There Was No Constructive Amendment or Prejudicial Variance.

1. Standard of Review

Claims of constructive amendment and prejudicial variance are reviewed de novo. *United States v. Godfrey*, 787 F.3d 72, 78 (1st Cir. 2015).

2. Discussion

"[A] constructive amendment occurs when the charging terms of an indictment are altered, either literally or in effect, by prosecution or court after the grand jury has last passed upon them." *United States v. McIvery*, 806 F.3d 645, 652 (1st Cir. 2015) (citation omitted). Garay-Rodriguez argues (Br. 53) that the government constructively amended Count I in closing argument to "include the uncharged means of price fixing," but he does not cite any specific statements from the government's closing. Instead, he cites a sidebar discussion during *the defendants'* closing arguments *that the jury did not hear*. Br. 53 (citing Doc.235:283-84).

In any event, he is wrong because the government argued the pricing evidence as proof of the charged "conspiracy to rig the auction and allocate the contracts," not as proof that the defendants committed the crime of price fixing. Doc.235:235; *see also id.* at 221-25, 229-38. This argument was fully consistent with the indictment, which alleged that the defendants met to discuss bid prices and agreed to "raise the price on the winning bids to be submitted" as means of committing the

charged bid-rigging and market-allocation conspiracy. Doc.3:4-6 (¶¶13, 17).

Nor did the district court constructively amend the indictment. To the contrary, the court instructed the jury repeatedly that the indictment did not charge price fixing as a substantive crime, and that the jury therefore could not convict the defendants of that crime or convict them of bid rigging and market allocation based on evidence of price fixing. "In short, the jury convicted [the defendants] for precisely the [bid rigging and market allocation conspiracy] for which they were charged." *Godfrey*, 787 F.3d at 79.

Garay-Rodriguez cites *United States v. Taylor*, 848 F.3d 476 (1st Cir. 2017), but in that case the district court's instructions allowed the jury to consider a predicate crime (assault) not alleged in the indictment. Nothing comparable occurred here, because the court instructed the jury *not* to convict the defendants of price fixing, while pricing conduct *was* alleged in the indictment. Garay-Rodriguez also cites *United States v. Fitapelli*, 786 F.2d 1461 (11th Cir. 1986), but in

that case the court instructed on a theory of jurisdiction that did not appear in the indictment. That did not happen here.

There was also no variance. A variance occurs when the proof at trial differs materially from the terms of the indictment. *United States v. Reeder*, 170 F.3d 93, 105 (1st Cir. 1999). A variance requires reversal of a conviction, moreover, "only if it is both material and prejudicial." *Id*. To the extent Garay-Rodriguez makes a variance argument (his only mention of such an argument, as distinct from his constructive-amendment argument, is in a single sentence (Br. 14) in the summary of argument),[11] he seems to base the argument (Br. 34-37, 53) on the government's use of PowerPoint slides in closing argument, some of which showed the defendants' bid prices. Doc.235:234-35. But the bid-price evidence did not differ at all, let alone materially, from the indictment. The indictment alleged that the means and methods of the conspiracy included discussing "the allocation *and pricing* of contracts for school bus transportation" and agreeing "to *raise the price* on the

[11] By failing to elaborate this argument, he has abandoned it. *See Pinkham*, 896 F.3d at 141.

winning bids to be submitted by the co-conspirators." Doc.3 ¶17(a, c) (emphases added). Thus, it was proper for the government to discuss this evidence as proof of the charged bid-rigging and route-allocation conspiracy.

In any event, the district court cured any possible prejudice by limiting the jury precisely to bid rigging and market allocation. Doc.235:161-62, 163-164, 174, 175, 296. Jurors are presumed to follow their instructions. *See United States v. Gonzalez-Vazquez*, 219 F.3d 37, 48 (1st Cir. 2000). These cautionary instructions, coupled with the government's overwhelming evidence, ensured that any conceivable variance was not prejudicial.

III. The District Court Did Not Abuse Its Discretion by Restricting Garay-Rodriguez's Cross-Examination of Ortiz-Peña.

Garay-Rodriguez incorrectly argues (Br. 24-28) that the district court abused its discretion by restricting his cross-examination of

Caguas auction official Ortiz-Peña about the post-bid negotiation procedure and resulting contract prices.[12]

A. Background

1. The *Per Se* Rule

Although Section 1 of the Sherman Act outlaws "unreasonable" restraints of trade, *see State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997), the law has been settled for over a century that certain horizontal restraints, such as bid-rigging and market-allocation agreements, are invariably so harmful to competition that they are illegal *per se*. *See Ford Motor Co. v. Webster's Auto Sales, Inc*., 361 F.2d 874, 878 (1st Cir. 1966) (citing *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899)); *United States v. Azzarelli Const. Co.*, 612 F.2d 292, 294 (7th Cir. 1979) ("[D]ivision of markets or allocation of business by bid-rigging . . . has been recognized as a Per se violation since the Taft opinion in Addyston Pipe"); *see also Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007) (same re price fixing).

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[12] Although Garay-Rodriguez claims that he was prevented from "introduc[ing]" evidence on these subjects, the only (alleged) limitations he points to (Br. 24-25) are from his cross-examination of Ortiz-Peña.

In a *per se* case, arguments defending such agreements as reasonable or economically justifiable are irrelevant. *See, e.g.*, *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 432-36 (1990); *United States v. Peake*, 804 F.3d 81, 93 n.10 (1st Cir. 2015) ("A *per se* Section 1 violation is not excused by a showing that the supra-competitive prices were somehow still reasonable."). As the Supreme Court put it in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), for *per se* unlawful agreements, "the law does not permit an inquiry into their reasonableness. They are all banned because of their actual or potential threat to the central nervous system of the economy." *Id.* at 224 n.59; *see also Albert Pic-Barth Co. v. Mitchell Woodbury Corp.*, 57 F.2d 96, 102 (1st Cir. 1932) ("it is not a question to be proven whether the prices fixed are reasonable; . . . as a matter of law it is a conspiracy or combination in unreasonable restraint of trade, because it restricts competition to which the public is entitled").

2. The Pretrial Order and the Cross-Examination

The government moved before trial to exclude evidence or argument that the defendants' "agreements to rig bids and allocate the

market for public school bus transportation contracts were reasonable, or that such agreements had economic, business, or personal justifications." Doc.83:1. The district court granted the motion, finding that the "indictment charges defendants with a per se violation of Section 1 of the Sherman Act," and that under the *per se* rule it is no defense that an agreement to rig bids, or the prices resulting therefrom, are reasonable or justifiable. Doc.104 (citing *United States v. Coop. Theatres of Ohio*, 845 F.2d 1367 (6th Cir. 1988)); *see also* Doc.105:1 (listing excluded categories of evidence and argument).

In cross-examining Ortiz-Peña, Garay-Rodriguez explored in detail the "renegotiation" process, eliciting (*inter alia*) that the Caguas Department of Education recommended rejecting all the bids as excessive and negotiating directly with the low bidders; the Caguas Auction Board authorized those negotiations; the four-member renegotiation committee (which included Ortiz-Peña) negotiated with the low bidders individually; Ortiz-Peña first saw Garay-Rodriguez's bid documents in the renegotiation process; after the renegotiation, Garay-Rodriguez was awarded the routes identified in GX83A (SA:409-414);

Garay-Rodriguez then received a contract; and, although a "bid process" may be cancelled for collusion, this one was not. Doc.215:158-67.

The court disallowed only one question during Garay-Rodriguez's cross-examination. Specifically, in questioning Ortiz-Peña about what she told an FBI agent about the renegotiation process, Garay-Rodriguez asked whether she said that in some instances it was more "cost-effective" to merge two routes. Doc.215:164. Ortiz-Peña answered, "[T]hat is correct." When Garay-Rodriguez followed up, "To pay for just one," the court said "move on," citing its pretrial order. *Id.* at 164.

B. Standard of Review

This Court's review of a district court's decision to limit cross-examination generally "involves a two-step inquiry." *United States v. Jimenez-Bencevi*, 788 F.3d 7, 21 (1st Cir. 2015). First, the Court reviews de novo whether the cross-examination as a whole "afforded [the defendant] sufficient leeway to establish a reasonably complete picture of the witness' veracity, bias, and motivation," *i.e.*, to satisfy the Confrontation Clause. *Id.* at 21-22 (internal quotation marks

omitted).[13] Then, if this initial threshold is met, the Court "review[s] the particular limitations only for abuse of discretion." *Id.* at 21 (internal quotation marks omitted). To establish an abuse of discretion, the defendant must show that the jury was "left without sufficient information concerning formative events to make a discriminating appraisal of a witness's motives and bias." *Id.* at 22 (internal quotation marks omitted).

A non-constitutional error "is harmless . . . if it can be said with fair assurance that the error did not have a substantial and injurious effect upon the verdict." *United States v. Perez-Ruiz*, 353 F.3d 1, 17 (1st Cir. 2003) (citing *Kotteakos v. United States*, 328 U.S. 750, 764-65, 776 (1946)).

C. Discussion

Garay-Rodriguez does not challenge the correctness of the district court's *in limine* ruling that economic justifications were impermissible; nor could he given the above-cited authority. He instead attacks the

[13] Garay-Rodriguez does not develop an argument, and therefore has abandoned any claim, *Pinkham*, 896 F.3d at 141, that the cross-examination did not satisfy this standard.

"implement[ation]" of that ruling, arguing that the court "abuse[d] [its] discretion" by relying on the ruling to prevent him from cross-examining Ortiz-Peña about the renegotiation process and contract prices. Br. 26-28. This argument fails for two reasons.

First, Garay-Rodriguez significantly overstates the limitations imposed. Although he cites (Br. 24-25) five instances—Doc.215:140, 160, 164, 165, and 167—in which the court allegedly disallowed his questions, four of those involved no limitation at all. At page 140, the court (in a colloquy following Gonzalez-Nevarez's cross-examination of Ortiz-Peña) noted that it was "allowing leeway" in questioning about the renegotiation process but asked counsel to be "careful" in that questioning. On page 160 (and continuing through page 162), Garay-Rodriguez explored the renegotiation process without interruption. On pages 165-66, Garay-Rodriguez elicited that there were "[t]wo auctions]" in 2013—the first was cancelled after the pre-auction meeting (Doc.208:162)—but then *withdrew* a question about whether any documents he submitted for the first auction were "the same." And at page 167, Garay-Rodriguez asked whether the prices reflected in his

award letter were "the same as . . . or shall be the same as . . . or similar to" the prices he bid. On the government's objection that the question was "confusing" and "getting into" impermissible territory, the court told Garay-Rodriguez to "[r]ephrase or move on." Garay-Rodriguez chose to move on.

Second, the one question disallowed—whether merging two routes in the renegotiation process would have allowed Caguas to "pay for just one" (page 164)—went to whether Caguas actually was financially harmed by the conspiracy, an impermissible consideration. *See Superior Court Trial Lawyers Ass'n*, 493 U.S. at 432-36. The court therefore correctly disallowed the question as irrelevant. *Cf. Perez-Ruiz*, 353 F.3d at 11 (stating that trial judges retain "wide latitude" to impose reasonable limits on cross-examination "that is repetitive or only marginally relevant") (internal quotation marks omitted).

Garay-Rodriguez's suggestion (Br. 27-28) that the court allowed the government to argue price fixing as a substantive crime, while denying him the opportunity to present unspecified evidence to rebut that theory, is refuted by the record. As shown *supra*, the government

argued the bid prices as evidence of the charged big-rigging and market-allocation conspiracy, and the court repeatedly instructed the jury that it could not convict defendants *of* price fixing or based on *evidence* of price fixing.

In any event, even if there were an error (which there was not), it would be harmless. The evidence of the Sherman Act conspiracy was overwhelming, and Garay-Rodriguez identifies no excluded evidence which could have weakened the government's showing. It thus readily can be said "with fair assurance" that any error did not contribute to the verdict. *Perez-Ruiz*, 353 F.3d at 17.

IV. The District Court Did Not Abuse Its Broad Discretion by Admitting the Summary of Telephone Calls.

Garay-Rodriguez incorrectly argues that the district court violated Fed. R. Evid. 403 by admitting a summary chart (GX170, SA:455-64), which showed the frequency and duration of telephone calls made from October 4, 2013 (the date of the auction notice) through December 5,

2013 (the last day of renegotiation meetings) among numbers assigned to the defendants.[14]

A. Background

The government gave pretrial notice of its intent to introduce GX170, Doc.152-2:1, and the district court ruled it admissible under Fed. R. Evid. 1006, Doc.186 (minute order). At trial, the defendants objected to the chart (*inter alia*) under Rule 403. Doc.208:234. After supplemental briefing (Docs.199, 200, 201), the court overruled the objection. Doc.203 (minute order). The court instructed the jury that the purpose of the chart was to show the frequency and duration of calls among the defendants' numbers. "But whoever made the call or received the call, that is not in those charts, so, again, the parties can argue accordingly." Doc.235:197-98.

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[14] In his Statement of Issues (Br. 3-4), Garay-Rodriguez suggests that a table heading in the government's PowerPoint slides also violated Rule 403. Because he provides no argument for this claim, he has waived it. *See Echevarria*, 856 F.3d at 139. The argument section entitled "Error 8" (Br. 34-38) makes a different claim: that the inclusion of bid prices in the slides constituted a constructive amendment or variance. We address that argument *supra* (52-55).

B. Legal Principles and Standard of Review

Rule 403 permits the exclusion of relevant evidence if, among other things, "its probative value is substantially outweighed by the danger of . . . unfair prejudice[.]" As this Court has cautioned, to be inadmissible on this ground, relevant evidence "must not only be prejudicial, but be unfairly prejudicial," and the unfair prejudice must "not only outweigh relevance but substantially outweigh relevance." *United States v. Rivera*, 83 F.3d 542, 545 (1st Cir. 1996). "'Unfair prejudice' . . . means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *Old Chief v. United States*, 519 U.S. 172, 180 (1997) (internal quotation marks omitted).

This Court reviews Rule 403 rulings for abuse of discretion, and it "usually defer[s] to the district court's balancing." *United States v. Whitney*, 524 F.3d 134, 141 (1st Cir. 2008). "Only rarely—and in extraordinarily compelling circumstances—will [this Court], from the vista of a cold appellate record, reverse a district court's on-the-spot judgment concerning the relative weighing of probative value and

unfair effect." *United States v. Sabetta*, 373 F.3d 75, 82-83 (1st Cir. 2004) (internal quotation marks omitted).

C. Discussion

The government's chart showed that the frequency of calls among telephone numbers assigned to the defendants spiked upward on or around the days of auction-related activity, such as the auction-notice date, the pre-auction meeting, the meeting at Aldea-Rodriguez's house, the La Barra meeting, and the bid-submission date. GX170:1 (SA:455).[15] This evidence was probative. To be sure, there was no *direct* evidence that the persons making the calls were the defendants, but the fact that the numbers were assigned to them permitted that inference. And the fact that the calls spiked around the key events—16, for instance, the day before the meeting at Aldea-Rodriguez's house, another 16 the day before the La Barra meeting—permitted the

[15] Garay-Rodriguez's suggestion that the underlying business records "were not provided to the jury" (Br. 39) is wrong. Those records were admitted into evidence. Doc.206:19 (admitting GX110, 110.1, 114, 115). (We have not appended them given their length.) In any event, Rule 1006 does not require the records summarized to be admitted. *United States v. Milkiewicz*, 470 F.3d 390, 396 (1st Cir. 2006).

inference that the defendants were talking to each other about those events and coordinating their actions. *See* Fed. R. Evid. 401 ("Evidence is relevant if: (a) it has *any* tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.") (emphasis added); *United States v. Sanchez*, 725 F.3d 1243, 1250 (10th Cir. 2013) (evidence of calls between a phone subscribed to a marijuana smuggler and two cell phones found in defendant's home were relevant, because "[o]ne could infer from the frequent calls to a marijuana smuggler that it was unlikely that Defendant was unaware of the marijuana operation being conducted at his home"). At the same time, Garay-Rodriguez identifies nothing about the pattern of calls that would tend to suggest decision on an emotional or other improper basis. The chart's probative value, then, cannot possibly have been *substantially* outweighed by a danger of unfair prejudice.

Other factors buttress this conclusion. The defendants were free to—and did, repeatedly (Doc.235:273-74, 302, 329-330)—attack the government's inference by arguing (correctly) that the chart did not

show who participated in the calls or the content of the calls. The defendants were free to—and did—cross-examine the FBI agent who introduced the chart about what it did and did not show. Doc.206:34-44, 56-63, 76-83. And the district court gave a limiting instruction to ensure the jury was not misled. *See United States v. Taylor*, 284 F.3d 95, 104 (1st Cir. 2002) (instructions limited risk of unfair prejudice).

In any event, even if admission of the chart were error (which it was not), any such error would be harmless. The evidence of guilt—including Aldea-Rodriguez's and Trilla's testimony, the recording of the La Barra meeting, the congruence between the La Barra allocations and the bids submitted, and the defendants' admissions to the FBI—was overwhelming. The chart was, at most, but a minor addition to that evidence and cannot have had a "substantial and injurious" effect on the verdict. *Perez-Ruiz*, 353 F.3d at 17.

V. Garay-Rodriguez Shows No Plain Error in His Mail-Fraud Convictions.

For the first time on appeal, Garay-Rodriguez incorrectly argues (Br. 32-34, 41-44) that the district court erred in its instructions on the

substantive mail-fraud counts and that the evidence was insufficient to support conviction on those counts and the related conspiracy count.

A. Standard of Review

Unpreserved claims of instructional error are reviewed for plain error. Sufficiency challenges not preserved in a Rule 29 motion are reviewed under "a particularly exacting variant of plain error review." *United States v. Foley*, 783 F.3d 7, 12-13 (1st Cir. 2015). This Court will not reverse unless the record is devoid of evidence supporting guilt or conviction would result in a "clear and gross injustice." *United States v. Pena-Lora*, 225 F.3d 17, 26 (1st Cir. 2000).

B. The District Court Did Not Plainly Err in Its Instructions on the Mail-Fraud Counts.

The district court instructed the jury that, to convict of substantive mail fraud, it must find an agreement or scheme to commit mail fraud substantially as charged in the indictment; that each defendant knowingly and willingly participated in the scheme with the intent to defraud; and that the United States mail was used in furtherance of the conspiracy. Doc.235:185-90 & Doc.236:14-16. The instructions were based on this Court's precedents and First Circuit

Pattern Criminal Jury Instruction 4.12 (1998). The district court adopted the government's proposed instructions (Doc.162-1, Nos. 13 & 14), to which the defendants did not object except as to the words "Municipality of Caguas" in proposed instruction No. 13. Doc.235:63-64.

The instructions included all the elements of mail fraud cited in Garay-Rodriguez's brief (Br. 32). He nonetheless seems to argue (Br. 33; *see also* Br. 13) that the district court should have instructed the jury to find a scheme to defraud separate from the bid-rigging and route-allocation scheme. This was not error, much less obvious, prejudicial error, because evidence of bid rigging may simultaneously establish both an antitrust and a mail-fraud violation. *See, e.g.*, *United States v. Rodgers*, 624 F.2d 1303, 1307-08 (5th Cir. 1980) (scheme to "arrang[e] bids in order to allocate the river construction work" was also mail-fraud scheme); *see also United States v. Valdes-Ayala*, 900 F.3d 20, 33 (1st Cir. 2018) (scheme to commit bankruptcy fraud was also wire-fraud scheme). Garay-Rodriguez cites no authority to the contrary.

C. The Evidence Amply Supports the Convictions.

"There are two elements in mail fraud: (1) having devised or intending to devise a scheme to defraud (or to perform specified fraudulent acts), and (2) use of the mail for the purpose of executing, or attempting to execute, the scheme (or specified fraudulent acts)." *Schmuck v. United States*, 489 U.S. 705, 721 (1989); *see also Pereira v. United States*, 347 U.S. 1, 8 (1954) (same). A conspiracy to commit mail fraud requires that the scheme to defraud be an agreement knowingly joined by two or more persons, including the defendant, regardless of whether the agreed-upon crime was committed. *Cf. United States v. Iwuala*, 789 F.3d 1, 9 (1st Cir. 2015).

For substantive mail fraud, the government proved the scheme-to-defraud element by showing that the defendants formed and implemented an agreement to defraud Caguas by obtaining bus routes at collusive prices and concealing that collusion, thereby subverting the auction process. *See Rodgers*, 624 F.2d at 1310 ("the scheme defrauded the government of its right to depend upon the competitive process to allocate the jobs and to set the cost of those jobs"). Aldea-Rodriguez's

testimony, her notes from and recording of the La Barra meeting, Trilla's testimony, the documentary evidence of the bids submitted, and the defendants' admissions were sufficient for the jury to find that scheme. The government also proved a scheme to perform specific fraudulent acts: each defendant stipulated that he submitted a signed certification that his bids were free from collusion and fraud. GX15A (SA:127-47); Doc.215:31-32, 59-60. The evidence overwhelmingly showed the falsity and materiality of those certifications.

The government proved the use-of-the-mail element of substantive mail fraud by showing that the scheme's completion depended on the mail. Each defendant received, by certified mail, a letter notifying him of his award of a contract as a winning bidder for the 2013 auction, No. 2014-49. GX81A; GX83A (SA:400-05; SA:409-14). That mailing was a direct consequence of the defendants' scheme, and it made possible payment to the defendants on the rigged contracts. "The scheme would have been meaningless, incomplete, and futile without final award and payment which were accomplished through the mail. Clearly, the mails were used 'in furtherance' of the scheme." *Rodgers*, 624 F.2d at 1310.

Moreover, the evidence demonstrated that the defendants knew their scheme required use of the mail. Aldea-Rodriguez testified that bidders expected notification by certified mail because Caguas historically communicated the results of auctions that way. Doc.197:156. Puerto Rico law required the notifications to be sent by mail. Doc.215:47, 53. And the defendants previously had received award letters from Caguas, sent by certified mail, as a result of a 2010 auction. Doc.215:60-64 & GX84A; GX85A (SA:415-18; SA419-22).

Finally, the defendants need not have sent the mailings themselves. Instead, they need only have "cause[d] the use of the mails, which includes reasonably foreseeable mailings." *United States v. Hebshie*, 549 F.3d 30, 36 (1st Cir. 2008). Awards of contracts that follow from bid rigging are reasonably foreseeable to bidders. *See United States v. Brighton Building & Maintenance Co.*, 598 F.2d 1101, 1104 (7th Cir. 1979) (third-party mailings, including contract awards, were "virtually inevitable results" of defendants' bid-rigging scheme).

The same evidence showed that the scheme to commit mail fraud was an agreement and that each defendant knowingly joined it, thereby

satisfying the elements of conspiracy to commit mail fraud. Garay-Rodriguez seems to argue (Br. 34) that the government failed to prove an agreement because there was no scheme to commit mail fraud separate from the (conceded) bid-rigging and market-allocation scheme, but as shown *supra*, there need not have been a separate scheme.

VI. The District Court Neither Plainly Violated *Apprendi* Nor Clearly Erred in Its Restitution Awards.

For the first time on appeal, Garay-Rodriguez argues (Br. 47-53) that the jury should have determined the loss underlying the restitution order. In the alternative, he argues (*id.*), as does Vega-Martinez (Br. 7-16), that insufficient evidence supported the district court's loss calculation. Both arguments are incorrect.

A. Background

The Presentence Investigation Reports ("PSR") calculated Caguas's total loss as $719,790.75, based on the difference between what Caguas paid on the contracts for all the routes awarded through the rigged 2013 auction and what Caguas paid on the contracts awarded through the 2016 auction, which was "free of collusion and bid-rigging." Doc.273 ¶¶53-55; Doc.274 ¶¶53-55.

Taking a more conservative approach, the government asked for restitution based only on routes won by the defendants. Doc.315:8 n.4; Doc.317:8 n.4. The government submitted an affidavit from Caguas's Purchasing and Auctions Department providing alternative loss calculations: (1) a comparison between the daily prices paid by Caguas under the defendants' 2014 contracts and the lowest daily bid prices *submitted* in the 2016 auction for the same routes, for a loss of $667,000.27; and (2) a comparison between the daily prices paid by Caguas under the defendants' 2014 contracts and the daily prices *paid* under the 2017 contracts for the same routes, for a loss of $342,094. Doc.315-4:2-3, 13-14; Doc.317-4:2-3, 13-14.[16] The government recommended the higher amount, and asked that it be apportioned equally among the defendants—for a restitution award of $166,750.06 each. Doc.315:10; Doc.317:10.

Garay-Rodriguez opposed the government's restitution request, arguing that Caguas suffered no loss because it received the services for

[16] In some instances, the prices paid in 2017 were higher than the lowest bid prices because the low bidders were disqualified. Doc.315:7; Doc.317:7.

which it paid; that Caguas knowingly agreed to the prices to be paid; and that determining restitution would entail "intricate issues of proof of complex factual issues." Doc.336:1-10. Vega-Martinez argued that "[r]estitution should not be imposed because no loss occurred." Doc.335:2; *see also* Doc.333.

"[O]ut of an abundance of caution," the district court chose the smaller of the government's loss estimates. Doc.341:7. The court found that "[t]he Government's proposed method is not scientifically precise, but it is based on a modicum of reliable evidence. It is rational to determine Caguas's loss due to Defendants' fraud by comparing the contract amounts when fraud existed and when fraud did not exist." *Id*. at 6. But rather than apportioning the loss equally among the defendants, the court attributed to each defendant only the loss from that defendant's routes. *Id.* at 7. The court accordingly calculated Garay-Rodriguez's restitution amount as $114,181 and Vega-Martinez's as $93,055. *Id*. at 7-8.

B. Legal Principles and Standard of Review

The Mandatory Victims Restitution Act (MVRA), 18 U.S.C. § 3663A, requires restitution from defendants convicted of "an offense against property . . . including any offense committed by fraud or deceit." Restitution is "based on actual loss, not intended or expected loss." *United States v. Innarelli*, 524 F.3d 286, 295 (1st Cir. 2008). The government must demonstrate the loss amount by a preponderance of the evidence, 18 U.S.C. § 3664(e), based on the PSR and the parties' evidentiary submissions at sentencing. 18 U.S.C. § 3664(a); *United States v. Salas-Fernandez*, 620 F.3d 45, 48 (1st Cir. 2010). The government need only support a calculation with a "modicum of reliable evidence." *Id*. Essentially, "the restitutionary amount must have a rational basis in the record." *Id*.

This Court "review[s] an order of restitution for abuse of discretion, and findings of fact subsidiary to the order for clear error. Legal conclusions associated with restitution orders are reviewed de novo." *Innarelli*, 524 F.3d at 293. If not waived, claims of error not

made in the district court are reviewed only for plain error. *United States v. Milkiewicz*, 470 F.3d 390, 402 (1st Cir. 2006).

Vega-Martinez acknowledges that restitution orders are reviewed for abuse of discretion (Br. 8), but he quotes language from two cases suggesting that the calculation of actual loss is reviewed de novo. Those cases, *United States v. Appolon*, 695 F.3d 44, 67 (1st Cir. 2012), and *United States v. Walker*, 234 F.3d 780, 783 (1st Cir. 2000), however, concerned "loss" for purposes of determining the offense level under U.S.S.G. § 2B1.1. By contrast, for purposes of restitution under the MVRA, a district court's loss calculation is reviewed "for clear error." *United States v. Prochner*, 417 F.3d 54, 65-66 (1st Cir. 2005).

C. Restitution Is Not a Jury Issue.

Citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and its progeny, Garay-Rodriguez incorrectly argues that the district court should have required the jury to determine the loss suffered by Caguas. He made no such argument in the district court (Docs. 299, 336), and the argument is foreclosed by this Court's precedent.

Under *Apprendi*, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. In *Milkiewicz*, this Court ruled that *Apprendi* principles "have no application to orders of restitution." 470 F.3d at 404 (internal quotation marks omitted). As the Court reasoned, "[p]ost-conviction judicial fact-finding to determine [the] amount [of restitution] by no means imposes a punishment beyond that authorized by jury-found or admitted facts, or beyond the statutory maximum as that term has evolved in the Supreme Court's Sixth Amendment jurisprudence." *Ibid*. (internal quotation marks and alteration omitted). Instead, "the single amount triggered by the conviction under the MVRA . . . is the full amount of loss." *Id*. The Court therefore joined "all of the other circuits to consider this question" in holding that *Apprendi* and its progeny "do not bar judges from finding the facts necessary to impose a restitution order." *Id*. at 403. *See also United States v. Ziskind*, 471 F.3d 266, 269 (1st Cir. 2006)

(same). The district court thus did not err, much less plainly err, by determining Caguas's loss itself.

Citing *Southern Union Co. v. United States*, 567 U.S. 343 (2012), Garay-Rodriguez asserts that judicial fact-finding violated his right to have a jury find "facts that determine a fine's maximum amount." Br. 53. *Southern Union*, however, is inapposite. First, *Southern Union* considered only criminal fines. 567 U.S. at 350, 360. The Court had no occasion to, and did not, address restitution, which has compensatory and remedial purposes that fines do not. *See United States v. Naphaeng*, 906 F.3d 173, 179 (1st Cir. 2018) (describing restitution as "designed to compensate the victim, not to punish the offender"). Second, the statute at issue in *Southern Union* prescribed a $50,000 maximum fine for each day of violation. 567 U.S. at 347. By contrast, restitution under the MVRA is imposed pursuant to an indeterminate scheme that lacks a statutory maximum; the amount authorized by the jury's verdict is simply "the full amount of loss." *Milkiewicz*, 470 F.3d at 404. *Southern Union* thus does not "contradict[]" this Court's precedent, *United States v. Santiago-Colon*, 917 F.3d 43, 58 (1st Cir.

2019), much less do so obviously. Indeed, since *Southern Union*, seven circuits have concluded, in published opinions, that it does not implicitly overrule their prior precedents holding that the *Apprendi* rule does not apply to restitution. *See United States v. Green*, 722 F.3d 1146, 1149-50 (9th Cir. 2013) (reasoning: (1) "*Southern Union* deals with criminal fines, not restitution"; and (2) "A judge can't exceed the non-existent statutory maximum no matter what he finds, so *Apprendi*'s not implicated"); *see also United States v. Sawyer*, 825 F.3d 287, 297 (6th Cir. 2016); *United States v. Thunderhawk*, 799 F.3d 1203, 1209 (8th Cir. 2015); *United States v. Bengis*, 783 F.3d 407, 412-413 (2d Cir. 2015); *United States v. Rossbottom*, 763 F.3d 408, 420 (5th Cir. 2014); *United States v. Wolfe*, 701 F.3d 1206, 1216-17 (7th Cir. 2012); *United States v. Day*, 700 F.3d 713, 732 (4th Cir. 2012).

Since it was proper for the district court to calculate restitution based on its own fact-finding, there is no merit to Garay-Rodriguez's related claim (Br. 55-57) that the government had to offer evidence *at trial* of the value of the "work performed" under the contracts and how his buses contributed to the loss as compared to companies that used

different-sized buses. As the Court explained in *Milkiewicz*, "[t]he statutory procedure for fixing a restitution amount calls for fact-gathering by the probation officer after conviction, with any disputes to be resolved by the court by the preponderance of the evidence." 470 F.3d at 403 (internal quotation marks and citations omitted). The district court thus did not err, much less plainly err, by relying on loss evidence adduced post-conviction.

D. The Record Supports the Restitution Awards.

The district court found that although the government's proposed method for calculating actual loss was "imperfect," the method rationally compared "the contract amounts when fraud existed and when fraud did not exist." Doc.341:6-7.

Garay-Rodriguez's argument (Br. 50) that *no* restitution was warranted because of "intricate issues of facts related to the determination . . . of the losses" therefore misses the mark. The court's "calculation of restitution is not held to standards of scientific precision." *United States v. Sanchez-Maldonado*, 737 F.3d 826, 828 (1st Cir. 2013). Because the government's proposed method had a rational

basis, was supported by evidence, and was not difficult to apply, the court reasonably could find that determining the loss amount would *not* "complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process." 18 U.S.C. § 366A(c)(3)(B). The court balanced the asserted "factual complexities" against Caguas's need for restitution and reasonably found, in light of Puerto Rico's "unprecedented fiscal and economic crisis," that the burden on the sentencing process did not outweigh the need for restitution. Doc.341:6-7.

Garay-Rodriguez frequently mentions the district court's *in limine* ruling (Docs. 104, 105), which properly excluded loss-related evidence for the purpose of the *guilt determination*. The court's ruling, and its application during trial, did not contemplate or apply to restitution because, as explained *supra*, the amount of the victim's loss is determined by post-trial fact-finding. Post-conviction, the defendants were free to introduce their own evidence of Caguas's loss, and they did submit memoranda and evidence opposing the government's restitution calculations. *See, e.g.*, Docs.325, 336, 338. Garay-Rodriguez was free to

include evidence of "payments for work performed" and how the payments to him "compared with any other time period" (Br. 50-51).[17]

Garay-Rodriguez also seems to argue (Br. 51-52) that the district court's apportionment of restitution among the defendants was improper because he serviced only large-bus routes. This contention is meritless, because "the court is not required to use any particular formula for apportionment or, indeed, to apportion the loss at all." *Salas-Fernandez*, 620 F.3d at 49. In any event, the court's apportionment had a rational basis: For each defendant, the court multiplied the daily price difference (*i.e.,* the difference between the 2014 and 2017 daily rates for the routes the defendant serviced) by the number of days he provided services to Caguas under his 2014 contract. Doc.341:5,7 (citing Doc.314); *see also* Doc.315-4:2-3, 13-14; Doc.317-4:2-3, 13-14. The resulting figures represent how much each defendant

[17] Garay-Rodriguez asserts that he "requested an evidentiary hearing" on restitution (Br. 50). The restitution memorandum he cites (Doc.336), however, makes no such request. In any event, the court "may," but is not required, to hear testimony. 18 U.S.C. § 3664(d)(4).

exploited the price difference and, thus, "the level of [his] contribution to the victim's loss." *Sanchez-Maldonado*, 737 F.3d at 828.[18]

Vega-Martinez concedes (Br. 14) that Caguas obtained lower prices in 2017 for the same routes awarded to the defendants in 2014, and he does not dispute that the bid rigging raised the prices to Caguas resulting from the 2013 auction (which is why Caguas rejected the initial bids as too high). He argues, however, that the government had to show that the winner(s) of the 2017 contracts would have offered the same prices in 2014 had the defendants not perpetrated their bid-rigging conspiracy.

No clear error occurred, because the government did not have to make that showing. The district court reasonably could infer that the

[18] Garay-Rodriguez cites *United States v. Valdes-Ayala*, 900 F.3d 20 (1st Cir. 2018), and, in Fed. R. App. P. 28(j) letters, *Naphaeng* and *United States v. Gonzalez-Calderon*, 2019 WL 1466940 (1st Cir. Apr. 3, 2019). Nothing in those decisions (all three of which affirmed restitution orders), however, changes the government's burden of providing only a "modicum of reliable evidence" to support restitution; or requires the government to offer evidence (much less *trial* evidence) of the value of work performed by the defendant; or shows that the district court did not reasonably estimate Caguas's actual loss caused by each defendant.

collusion-free 2017 prices—from the next auction to follow the tainted 2013 auction, and which encompassed the same schools and routes—were a fair indication of the prices Caguas would have obtained in 2014 absent the bid rigging. Vega-Martinez does not point to any materially different circumstances between 2014 and 2017 that would make this inference unreasonable. *See* Doc.273 ¶¶52-55 (in total, Caguas was overcharged $1,371.03 a day "[d]espite inflation since the rigged 2013 auction").

Vega-Martinez also argues (Br. 13) that Caguas suffered no loss because the prices paid to him were less than what Caguas had budgeted internally for those routes. No clear error occurred, however, because no authority requires a court to calculate a victim's loss by reference to the victim's internal budgeting. The district court reasonably could infer, regardless of what Caguas budgeted, that Caguas still lost money because absent the defendants' bid rigging, Caguas would have obtained the lower prices it in fact obtained from

the collusion-free auction in 2016.[19] *Cf. United States v. Petruk*, 484 F.3d 1035, 1038 (8th Cir. 2007) (upholding restitution for amount of housing subsidies Department of Housing and Urban Development paid defendants less amount it would have paid had truth been known); *United States v. Gordon*, 393 F.3d 1044, 1051-54 (9th Cir. 2004) (where defendant embezzled shares of stock from employer, upholding restitution at price employer sold comparable shares).

Vega-Martinez's reliance (Br. 14-15) on *United States v. Kilpatrick*, 798 F.3d 365 (6th Cir. 2015), is misplaced. The government in that case "essentially conceded that its [proposed amount of restitution] did not represent the [victim's] 'actual loss,'" *id*. at 390, but was instead based on the "Probation Department's calculations (for Guidelines range purposes) of defendants' profits from the contracts that underlie the RICO and extortion counts." *Id*. at 388. The court

[19] Vega-Martinez asserts, without citation, that he "had been servicing the same route for around 27 years for basically the same price." Even if this were true, however, the evidence showed that the purpose of the conspiracy was to protect the defendants' longstanding routes from competitive bidding that would have forced them to reduce their prices. *Supra* at 9-10.

found an abuse of discretion because restitution under 18 U.S.C. § 3663A cannot be based on a defendant's gain. (The other cases Vega-Martinez cites (Br. 15) are to the same effect.)

Nothing comparable occurred here. The government did not propose, and the district court did not determine, restitution based on the defendants' ill-gotten profits as a substitute for Caguas's loss. Instead, the district court based restitution on the *difference* between what Caguas paid the defendants (which is not the same as their profits) and what Caguas paid for contracts not tainted by bid rigging for the same services. That difference was a reasonable (likely low) estimate of Caguas's "actual loss," as required by the MVRA. *Innarelli*, 524 F.3d at 295.

CONCLUSION

This Court should affirm appellant Garay-Rodriguez's convictions and both appellants' restitution awards.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 15,626 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii). *See* Court's order of April 1, 2019 (granting the government 15,630 words).

2. This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 with 14-point New Century Schoolbook font.

April 30, 2019

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CERTIFICATE OF SERVICE

I, Steven J. Mintz, hereby certify that on April 30, 2019, I electronically filed the foregoing Brief for the United States of America with the Clerk of the Court of the United States Court of Appeals for the First Circuit by using the CM/ECF System. Upon notification of the paper copy due date, pursuant to Local Rule 31.0(a)(1), I will send nine (9) copies to the Clerk of the Court by FedEx.

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