No. 99-12788-G

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ANTHONY J. GIORDANO, SR., ANTHONY J. GIORDANO, JR., RANDOLPH J. WEIL, ATLAS IRON PROCESSING INC., DAVID GIORDANO,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF FOR THE APPELLEE

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UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	CASE NO. 99-12788-G
Plaintiff/Appellee,	)	
	)	
v.	)	
	)	**CERTIFICATE OF INTERESTED PERSONS**
ANTHONY J. GIORDANO, SR., ANTHONY J. GIORDANO, JR., and DAVID GIORDANO, *et al.*,	)	
	)	
Defendants/Appellants.	)	
	)	

The undersigned, counsel for the United States, hereby certifies that the following is a complete list of persons and entities who have an interest in the outcome of this case:

ATLAS IRON PROCESSORS, INC.: appellant

PAUL BINDER: U.S. Department of Justice; counsel for United States

RALPH E. CASCARILLA: counsel for appellant Anthony J. Giordano, Jr.

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ANTHONY J. GIORDANO, SR.: appellant

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RANDOLPH J. WEIL: appellant

Respectfully submitted,

_____

Christopher Sprigman

STATEMENT REGARDING ORAL ARGUMENT

The United States believes that oral argument in this case would be helpful to the Court and respectfully requests that oral argument be scheduled.

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STATEMENT OF JURISDICTION

The district court had jurisdiction in this matter pursuant to 15 U.S.C. § 1 and 18 U.S.C. § 3231. This Court has jurisdiction over this appeal under 18 U.S.C. § 3742(a) and 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. Whether the evidence supports Randolph Weil's conviction.

II. Whether the district court had jurisdiction over the charge against appellants.

III. Whether the district court abused its discretion in refusing to admit appellants' polygraph examinations.

IV. Whether the district court abused its discretion in denying appellants' motion for a bill of particulars.

V. Whether the district court erred in concluding that the government had met its Brady obligations.

VI. Whether the district court abused its discretion by admitting evidence of uncharged misconduct under Fed. R. Crim. P. 404(b).

VII. Whether the government constructively amended the indictment

VIII. Whether the per se rule applicable to price fixing is constitutional.

IX. Whether the district court committed plain error in holding that nothing in the government's closing argument was improper.

X. Whether the district court erred in adding one point to appellants' base offense levels under U.S.S.G. § 2R1.1(b)(2).

STATEMENT OF THE CASE

On February 11, 1999, a jury found Anthony Giordano, Sr., Anthony Giordano, Jr., David Giordano, and their company, Atlas Iron Processors, Inc. (Atlas), as well as Sunshine Metal Processing, Inc. (Sunshine) and its president, Randolph Weil, guilty of conspiring to fix the price of scrap metal purchased by Atlas and Sunshine from scrap suppliers in and around Miami, Florida, and to allocate suppliers in that market, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. R8-327. On July 30, 1999, the court sentenced all individual defendants to 12 months imprisonment. The Giordanos were fined $31,800 each; Weil was fined $41,950. The court also ordered payment of joint and several restitution totaling $74,009.42 (Weil and Sunshine), and $42,930.57 (the Giordanos and Atlas). The corporate defendants were placed on probation and fined $469,864.52 (Sunshine) and $390,310.51 (Atlas). R9-378; R10-380, 382, 384, 386, 388. The district court denied defendants' motions for bail pending appeal. R11-427. On October 7, 1999, this Court denied defendants' emergency motion for bail pending appeal.

STATEMENT OF FACTS

The Giordanos were officers and owners of Atlas, a scrap metal recycling company operating in Cleveland, Ohio and Miami, Florida.[1] Anthony Giordano, Sr. was the Chairman, Anthony Giordano, Jr. the President and CEO, and David Giordano the Treasurer. Sunshine was a scrap metal recycling company in Opa-Locka, of which Weil was President and also an owner.

A. *Background of the Conspiracy*

In late 1992, Atlas and Sunshine competed to purchase scrap for their Miami recycling operations from a large number of suppliers. R15-429-119, 120. In fact, testimony at trial indicated that Atlas and Sunshine were the *only* competitors in the Miami market with respect to the purchase of many types and grades of scrap. Id.

Appellants' conspiracy was provoked by the Giordanos' decision, in mid-1992, to transfer to Miami their chief automobile scrap buyer in Cleveland, Sheila McConnell. McConnell was sent to Miami in order to "straighten out" Atlas' business there, which had been beset with problems under previous management. R15-429-106, 107, 110. Upon her arrival in Miami, McConnell quickly determined that Atlas' business problems were largely due to insufficient purchases of flattened and whole (hulk) cars. Atlas, like Sunshine, operated a shredder, and cars

[1]Atlas did business in Miami as Miami River Recyclers, Inc. ("Miami River"). R15-429-98. Atlas began its Miami operation in 1989. When Atlas entered the market, Sunshine had already established its shredding operation in the Miami area.

provided the most desirable source of scrap. R15-429-121. Thus, McConnell met personally with scrap dealers selling flattened and whole cars in the Miami area to expand Atlas's market base and achieve a better product mix for its shredding operation. Id. at 121-22. McConnell was successful in buying more auto scrap for Atlas, in part by routinely quoting prices $10 to $20 more than Sunshine Id. at 118 to 119, 125. Indeed, soon after McConnell began her buying program in Miami, Atlas and Sunshine became engaged in a "price war." Id. at 191.

McConnell's competitiveness quickly brought her into contact with both Sunshine and Weil. McConnell testified that soon after arriving in Miami she began soliciting scrap from the many auto junkyards located on Cairo Lane in Opa-Locka, which McConnell described as a "gold mine" for car buyers. R15-429-122 to 123. Sunshine's recycling facility was also located on Cairo Lane, which gave it a competitive advantage because the Atlas facility was 10 miles away. Id. at 122, 125. And so McConnell offered more money for scrap from the auto junkyards in Sunshine's "own backyard". Id. at 124 to 125. She even sat in front of Sunshine's facility and quoted higher prices to every truck and wrecker that came down the street. Id. Eventually, one of the biggest scrap dealers on the street agreed to sell a truckload of scrap to Atlas, and McConnell believed that she had made a significant breakthrough in the market. Id.

Randy Weil disliked McConnell's attempts to break in and compete with Sunshine for the purchase of scrap. On one occasion when McConnell sent a

truck from the Atlas yard to pick up scrap she had just purchased on Cairo Lane, Weil became upset and confronted her, demanding to know whether she had sent the truck. R15-429-125 to 126. McConnell then called David Giordano and "told him how panic stricken Randy was." Id.

B. *The Conspiratorial Meeting at Sea Ranch*

On October 24, 1992, McConnell was summoned by her boss, Anthony Giordano, Jr., and told that they would be attending a meeting in Fort Lauderdale that day "with Sunshine Metal[,] Randy Weil in particular," "to see what we can do about these prices." He added that he, Anthony Giordano, Sr. and Randy Weil had "grave reservations" about McConnell attending the meeting, because she was not a principal of either of the companies involved. Anthony Giordano, Jr. made clear, however, that because he was not familiar with prices in the Miami market he wanted McConnell at the meeting to ensure that he understood the prices the participants would be discussing there. He then laughed when McConnell told him that "to have that kind of meeting is illegal." R15-429-134 to 137.

Giordano, Jr. drove McConnell to the Sea Ranch condominium complex in Fort Lauderdale. There, she met Anthony Giordano, Sr., Randy Weil, and Henry "Skip" Kovinsky, a part owner of Sunshine. Both McConnell and Kovinsky testified about the Sea Ranch meeting[2] at trial and McConnell's notes, taken at the

[2] There had been prior meetings between Atlas and Sunshine on September 21, 1992 at Charcoal's restaurant in Miami Lakes, and on October 14, 1992 at La

meeting, were introduced into evidence. GX1. Anthony Giordano, Jr. began the meeting by stating (R15-429-152):

> We all know why we are here. We need to get these prices down. We are competing with one another. The only one making any money is the auto wrecker and we need to get these prices in line.

The conspirators first agreed to lower the prices to be paid to specific suppliers and within specific geographic areas for flattened and whole cars. R15-429-154. Using a computer print-out of a price list, Weil read out "prices and geographic areas to" Anthony Giordano, Jr., Anthony Giordano, Sr. and McConnell. R15-429-152 to 153. At Anthony Giordano, Jr.'s instruction, McConnell wrote down the prices, dealers and geographic areas in her notebook. According to McConnell, Weil gave her "two or three geographic areas and the price [she] was to pay in those areas." Id. at 153 to 154. Weil then discussed the "scope of individual auto wreckers and other various grades of scrap." Id. It was understood that Atlas and Sunshine were setting a maximum buying price. Id. at 156; GX1. See also R15-429-198 to 236. The agreement was to go into effect on

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Costa D'Oro restaurant in Boca Raton, as part of a "feeling out" process that Kovinsky hoped eventually would lead to a joint venture for the processing of hurricane scrap, or perhaps even a merger. Pricing for hurricane scrap was also discussed, although Kovinsky maintains that no "definitive agreements or understandings" were reached at those meetings. R20-434-1521 to 1530, 1562. The Giordanos were cool to Kovinsky's joint venture proposal; Anthony Giordano, Jr. stated that the companies should "crawl before they run." R20-434-1529 to 1530. And McConnell testified that there was no mention of joint venture or merger at the Sea Ranch meeting, which focused exclusively on fixing prices. R15-429-167 to 168.

the following Tuesday. R15-429-183; GX1.

After fixing prices for flattened and whole cars, the appellants turned to Randy Weil's demand that McConnell not quote prices to the Cairo Lane dealers again. R15-429-163 to 165. Anthony Giordano, Jr. initially objected, noting that Atlas needed more scrap tonnage (R20-434-1504 to 1508) and that, unlike Sunshine, Atlas was not conveniently located near numerous auto wrecking yards (R15-429-163 to 165). Ultimately, he agreed to keep McConnell "off of Cairo Lane" in exchange for "some cars that [Weil] had accumulated in the Bahamas." R15-429-163 to 165, 222. Atlas in fact did receive those cars from the Bahamas pursuant to the Sea Ranch agreement. Id.

Finally, at the behest of Anthony Giordano, Sr., the conspirators also fixed the maximum price that Atlas and Sunshine would pay for various grades of prepared and unprepared scrap supplied by the public and small dealers -- commonly known as "scale pricing." R15-429-223 to 231. Anthony Giordano, Sr. stated:

> [I]n as much as we have gotten this far, why don't we just -- just discuss the scale and see what we can do there. We might as well do the whole thing.

R15-429-223.[3]

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[3]The agreement on scale pricing required extensive discussion, as Atlas and Sunshine met difficulties reconciling their different systems for classifying certain prepared and unprepared grades of scrap. R15-429-224 to 225. Nonetheless, an agreement eventually was reached covering the price of "various grades coming across the scale". R21-434-1544.

The meeting ended "after everyone was in agreement that we had covered all of the geographic areas and the specific accounts necessary to lower the pricing." Id. at 156. McConnell and Kovinsky testified that they understood that the agreement would result in both lower, uniform prices and the division of customers between Atlas and Sunshine:

> The goal of the meeting was to get the pricing down to the -- from the, you know, to the immediate shippers and so that we would quit competing with one other, and that they agreed that there should be a natural attrition of scrap if we all had the same price.
>
> Q. What do you mean by natural attrition?
>
> A. The scrap that was closest and most conducive to Sunshine's yard would go to Sunshine, and the scrap most conducive and closest to Atlas Iron in the Miami operation would go there. Just the natural flow of things.

R15-429-157. Accord R21-434-1505 to 1508, 1517; R22-435-1538 to 1540, 1545 to 1547 (Kovinsky testimony).

In the car driving back to Miami, McConnell complained to Giordano, Jr. that the agreement would prevent her from competing effectively with Sunshine, "was illegal," and that Weil could not be trusted. He responded that McConnell should "drop the prices" and "[j]ust see what happens. Just see how it goes." R15-429-159 to 160.

On arriving back in Miami Anthony Giordano, Jr. met privately with his brother, David. After that meeting, David Giordano ordered McConnell to "[d]rop the prices." R15-429-183. He also gave her Randy Weil's phone number and told

her to call Weil if she had any questions about the agreement. R15-429-236.

For his part, Weil felt the Sea Ranch agreement was "worthwhile" -- especially since Hurricane Andrew had created a surplus of scrap metal that could be obtained at cheap prices (R21-434-1504 to 1508) -- and wanted to "see how far it runs for the moment." R21-434-1518. Later, Weil and Kovinsky briefed their business partner, Daniel Allen, on some of the details of the Sea Ranch agreement. Id. at 1519.

C. *The Implementation of the Sea Ranch Agreement*

McConnell lowered the prices that she paid to auto scrap suppliers in accordance with the agreement. Weil also lowered Sunshine's prices. Purchase receipts issued by both firms confirm that prices paid to sellers of auto scrap declined consistent with the prices that had been agreed to at the Sea Ranch meeting and recorded in McConnell's notebook. The receipts also show that Sunshine followed the agreement with respect to other kinds of prepared and unprepared scrap. See, e.g., R16-430-324 to 329, 346 to 348, 377 to 388; GX6, GX7, GX14, GX15, GX18, GX23. Accord R20-434-1540 to 1541 (Kovinsky testimony).

Nevertheless, McConnell was concerned both because the agreement "was illegal" (R16-430-282 to 283) and because the fixed prices were so low that Atlas could lose customers. R15-429-159, R16-430-388, 396. So McConnell decided to

cheat a bit. While keeping prices at the agreed-upon levels, she quoted prices to many of her suppliers as "picked up" (i.e., including transport to Atlas' facility), rather than as "delivered" (i.e., not including transport), despite the conspirators' agreement that quotes would always be in the form of "delivered" prices. Thus, McConnell subtly raised the actual post-agreement price quoted by Atlas to the scrap dealers by including shipping: "I quoted the number that was agreed upon, but I quoted it picked up, which gave me the advantage." R15-429-176. See also R16-430-280, 283, 318 to 320, 323.

Weil detected McConnell's cheating and complained to Anthony Giordano, Jr., who called McConnell and asked her if she was following "the agreement as it was discussed." R16-430-282 to 283. McConnell "basically lied to him" and said that she was complying with the agreement. Id. In her view, the agreement "was illegal" and she did not want to be a "party to it." Id. Nevertheless, she recognized that her bosses had ordered her to comply with the agreement: "I did the best that I could to appease them by saying, yes, I dropped the prices, which I did, but I did not drop them to the delivered level. I dropped them to a picked up level. So, in fact, I could argue that, yes, I just dropped the prices. It was a generic answer I gave them to try to appease him at that point." Id.

On November 23, 1992 Anthony Giordano, Jr., David Giordano, Henry Kovinsky, and Randy Weil met at Don Shula's Steakhouse in Hialeah, while McConnell was ordered to stand outside in the restaurant's entrance hall.

Kovinsky testified that the Giordanos angrily accused Randy Weil of cheating on the Sea Ranch agreement. R21-435-1566. Eventually the Giordanos came out, and they and McConnell drove to a nearby Italian restaurant. R15-429-170 to 171. The Giordanos then told McConnell they believed that Randy Weil was cheating on the Sea Ranch agreement. Id. At that time, Atlas was not "getting a lot of scrap" because McConnell "had dropped the prices" and Anthony Giordano, Jr. instructed McConnell to "buy whatever scrap you need just to get us going." Id.

However, despite the Giordanos' conviction that Weil was cheating, they were not yet ready to abandon the conspiracy. R15-429-177 to 178. Anthony Giordano, Jr. instructed McConnell to raise the price paid to two large scrap dealers in an effort to regain their business. Id. But prices to other customers would stay at the level agreed at Sea Ranch. Id. Indeed, Anthony Giordano, Jr. and David Giordano "became more actively involved in what [McConnell] was quoting as far as price was concerned." Id. Thus, McConnell "was unable to raise the general agreed upon price back to where it was originally, to promote the whole car shippers to come into the yard to increase the volume." Id.

Sunshine and Atlas pricing documents introduced at trial established that prices quoted by them followed the Sea Ranch price fixing agreement until at least December 31, 1992. See, e.g., R22-436-1882 to 1886, 1888 to 1889, 1894 to 1899, GX117, GX123, GX128. The district court held that the conspiracy endured until that date. R11-444 to 450.

STANDARDS OF REVIEW

I. A criminal conviction will be affirmed on appeal if a reasonable trier of fact, viewing the evidence in the light most favorable to the government, could have found the essential elements of the offense beyond a reasonable doubt. United States v. Mount, 161 F.3d 675, 678 (11th Cir. 1998).

II. Whether a district court had jurisdiction is a question of law subject to plenary review. United States v. Maduno, 40 F.3d 1212, 1215 (11th Cir. 1994).

III. The district court's decision on the admissibility of polygraph evidence is reviewed under an abuse of discretion standard. United States v. Gilliard, 133 F.3d 809 (11th Cir. 1998). Even where an abuse of discretion is shown, non-constitutional evidentiary errors are not grounds for reversal absent a reasonable likelihood that the defendant's substantial rights were affected. United States v. Range, 94 F.3d 614, 620 (11th Cir. 1996).

IV. The appellate court reviews the indictment's sufficiency to ensure that it contains every element of the offense charged and adequately informs the accused of the charge being lodged. United States v. Cannon, 41 F.3d 1462, 1466 (11th Cir. 1995). The denial of a motion for a bill of particulars is reviewable under an abuse of discretion standard. United States v. Barnes, 158 F.3d 662, 665-66 (2d Cir. 1998).

V. The district court's conclusion that no Brady violation occurred is subject to de novo review. United States v. Schlei, 122 F.3d 944, 989 (11th Cir. 1997), cert. denied 523 U.S. 1077 (1998). The district court's denial of a motion for new trial based on a Brady violation is reviewed for abuse of discretion. United States v. Kersey, 130 F.3d 1463, 1465 (11th Cir. 1997).

VI. The district court's decisions on the admissibility of evidence of uncharged misconduct under Fed. R. Crim. P. 404(b) are reviewed under an abuse of discretion standard. United States v. Chirinos, 112 F.3d 1089, 1097 (11th Cir. 1997), cert. denied 522 U.S. 1052 (1998). Even where an abuse of discretion is shown, non-constitutional evidentiary errors are not grounds for reversal absent a reasonable likelihood that the defendant's substantial rights were affected. United States v. Range, 94 F.3d 614, 620 (11th Cir. 1996).

VII. A conviction will not be overturned based on a variance in the indictment unless, viewing the evidence in the light most favorable to the government, the variance (1) was material and (2) substantially prejudiced the defendant. United States v. Castro, 89 F.3d 1443, 1450 (11th Cir. 1996). A trial judge's denial of a motion for new trial based on an alleged material variance between the allegations in the indictment and the proof at trial is subject to review under the abuse of discretion standard. United States v. Reed, 887 F.2d 1398, 1403 (11th Cir. 1989).

VIII. Whether price fixing is a per se offense under the Sherman Act, and whether

the per se rule violates the Due Process Clause, are issues of statutory interpretation and constitutional law subject to plenary review. See United States v. Lawson, 809 F.2d 1514, 1517 (11th Cir. 1987).

IX. Prosecutorial misconduct is a basis for reversal only if, in the context of the entire trial, the misconduct may have prejudiced the substantial rights of the accused. United States v. Calderon, 127 F.3d 1314, 1335 (11th Cir. 1997). Moreover, where no contemporaneous objection is made to a statement in closing argument, review is only for plain error. United States v. Young, 470 U.S. 1, 15 (1985).

X. Interpretation of the sentencing guidelines is subject to de novo review on appeal. United States v. Goolsby, 908 F.2d 861, 863 (11th Cir. 1990). However, all factual findings under the sentencing guidelines made by the district court are entitled to deference and can be reversed only if they are clearly erroneous. United States v. Smith, 918 F.2d 1501, 1514 (11th Cir. 1990).

SUMMARY OF THE ARGUMENT

I. Appellant Weil's challenge to the sufficiency of the evidence supporting his conviction is meritless. Weil admits that the evidence establishes that he discussed pricing with his competitor at the Sea Ranch meeting. And the testimony of McConnell and Kovinsky confirms that Weil (1) played a key

role at that meeting by dictating the agreed-upon prices for different grades and suppliers from a price list that he had brought with him, and (2) specifically requested at that meeting that Anthony Giordano, Jr. prevent McConnell from quoting to auto scrap dealers on Cairo Lane. In addition, the evidence shows that the prices paid for scrap by Weil's company, Sunshine, declined in accordance with the appellants' price fixing agreement.

II. The government clearly established the "interstate or foreign commerce" element of Sherman Act jurisdiction. Appellants admit that "the indictment did state an offense under the 'effects' theory." The indictment also properly pleaded jurisdiction under the flow theory, and the evidence clearly establishes that the conspiracy involved goods in the flow of interstate or foreign commerce. Atlas and Sunshine bought scrap from Florida dealers (as well as one shipment of cars from the Bahamas), shredded that scrap, and shipped it to other states and abroad. Neither the companies' brief storage nor the shredding of the scrap before shipping it out of state interrupted the flow of commerce.

III. The district court properly excluded appellants' polygraph examinations. Appellants' failure to invite the government to attend their polygraph examinations, or to provide the government with an audio or video record of those examinations, created a substantial risk of unfair prejudice stemming from the government's inability to cross-examine the defendants' polygraph

expert. Further, because certain questions asked during appellants' polygraph examinations were not reliable indicators of innocence, the unfair prejudice that would be created by the admission of the evidence substantially outweighed its probative value.

IV. The district court did not abuse its discretion in denying appellants' motion for a bill of particulars. The indictment in this case adequately informed appellants of the charge against them, and, in any event, the government voluntarily provided a bill of particulars that gave appellants far more information than was required for them to prepare their defense.

V. The government met all of its Brady obligations. Appellants complain that the government did not notify them of the fact that McConnell would testify at trial that she dropped prices to the "picked up" level, as opposed to some other level that was marginally higher than what the agreement contemplated. But such information was immaterial to the price fixing charge and could not have prejudiced appellants. Appellants also complain that the government did not disclose until after the close of Sheila McConnell's testimony that Chip Hering, an employee of one of McConnell's former employers, Luria Brothers, Inc., testified in front of the grand jury that he had heard from an unnamed source that McConnell had been fired by another previous employer, Wooster Iron & Metal, for taking kickbacks from suppliers. In fact, appellants were aware of Hering's allegations before McConnell

finished testifying and elected not to pursue the issue. Accordingly, there was no Brady violation.

VI. The district court did not abuse its discretion by admitting under Fed. R. Crim. P. 404(b) evidence that the Giordanos had participated in a scrap price fixing and customer allocation conspiracy in Cleveland, Ohio. This evidence was properly admitted under the test laid down in United States v. Miller, 959 F.2d 1535, 1538 (11th Cir. 1992), for the purpose of establishing the Giordanos' intent to enter into a price fixing conspiracy in Miami.

VII. Appellants' contend that McConnell's testimony (1) that she quoted "picked up" prices, despite the fact that the Sea Ranch agreement contemplated that scrap suppliers would be quoted "delivered" prices, and (2) that scale prices were not dropped, were at odds with her grand jury testimony and thus constituted a constructive amendment of the indictment. But neither the indictment nor the bill of particulars says anything about whether the prices fixed by defendants' conspiracy were "picked up" or "delivered" prices or whether scale prices were dropped. This is not surprising, for the essence of any violation of §1 of the Sherman Act is the illegal agreement itself -- rather than the overt acts performed in furtherance of it.

VIII. Appellant's argument that the per se rule constitutes an unconstitutional evidentiary presumption has been expressly rejected by this Court's predecessor, by the Supreme Court, and by every other appellate court that

has considered the issue.

IX. None of appellants' objections to the prosecutor's closing argument has any force. The prosecutor's statement that leopards do not change their spots was a reasonable reminder to the jury that although the participants in the Sea Ranch agreement sometimes may have cheated on that agreement, the evidence showed that prices paid for scrap by the conspirators fell after the Sea Ranch meeting to the levels agreed to at that meeting. Nor did the prosecutor's remarks (to which appellants did not object at trial) constitute vouching. Rather, they were a fair response to the false accusations of appellants' counsel that the prosecutor had suborned perjury. Finally, the prosecutor never derided the reasonable doubt standard as a "cheap defense trick." Rather, he directed that accusation to a graphic shown to the jury by defense counsel which the prosecutor felt misrepresented the meaning of that standard of proof.

X. Finally, the district court's decision to add one point to appellants' base offense levels pursuant to U.S.S.G. §2R1.1(b)(2), based on its finding that appellants' price-fixing conspiracy affected more than $400,000 of commerce, was entirely correct. The volume of commerce "affected" by a price-fixing conspiracy includes all sales of the goods and services within the scope of the conspiracy, even if the conspiracy is not always completely successful in obtaining the target, or fixed, price.

ARGUMENT

I. THE EVIDENCE WAS SUFFICIENT TO SUPPORT WEIL'S CONVICTION

Only Weil challenges the sufficiency of the evidence for conviction. WBr. 13-15. He admits that the evidence establishes that he discussed pricing with his competitor, but insists that he "never agreed to fix prices or allocate customers." Rather, he "intended to use his superior knowledge of the scrap metal market to take advantage of the pricing information learned from the Atlas competitors." WBr. 13. But there was abundant evidence that Weil participated fully in the price fixing conspiracy. Viewing the evidence in the light most favorable to the government, as this Court must, there is no reason to disturb the jury's finding. United States v. Mount, 161 F.3d 675, 678 (11th Cir. 1998); United States v. Ramsdale, 61 F.3d 825, 828-29 (11th Cir. 1995) ("evidence need not exclude every reasonable hypothesis of innocence").

McConnell and Kovinsky testified that Weil attended the meeting at the Sea Ranch condominium complex where specific prices for various grades of scrap were agreed to by appellants. R15-429-134 to 135; R20-434-1496 to 1497. Weil took an active part in this meeting and dictated the agreed-upon prices for different grades and suppliers from a price list that he had brought with him. McConnell recorded these prices in her notebook. R15-429-152 to 153. Kovinsky's testimony corroborated McConnell's account (R20-434-1503 to 1506), and McConnell's notebook containing these prices was introduced into evidence

(GX1). Moreover, McConnell testified that following the Sea Ranch meeting she lowered the price she paid for scrap in accordance with the prices given her by Weil.[4] Indeed, receipts issued by both Atlas and Sunshine documenting purchases of various grades of auto scrap both before and after appellants' agreement at the Sea Ranch meeting to fix prices confirm that prices paid by Atlas and Sunshine to sellers of auto scrap declined consistent with the prices that had been dictated to McConnell by Weil at the Sea Ranch meeting and recorded in McConnell's notebook. See, e.g., R16-430-324 to 329, 346 to 348, 377 to 388; GX6, GX7, GX14, GX15, GX18, GX23. All of this evidence indicates that Weil was a participant in the conspiracy -- indeed, as the conspirator who actually dictated the fixed prices, Weil was perhaps the *key* participant.

Weil was also clearly responsible for the Cairo Lane/Bahamas cars aspect of the Sea Ranch agreement; he was the one who complained about McConnell's activities on Cairo Lane, and he was the one who agreed to give Atlas the Bahamas cars in exchange for Anthony Giordano, Jr.'s promise to restrain McConnell. R15-429-163 to 165.

Moreover, Weil had objected to McConnell's attendance at the Sea Ranch

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[4]As explained above (see p. 10, supra), McConnell dropped the prices paid to scrap dealers to the levels appellants had agreed to, but quoted those prices to many of her suppliers as "picked up" (i.e., a price including transport to Atlas' facility), rather than as "delivered" (i.e., a price not including transport), even though appellants' agreement contemplated that quotes would always be in the form of "delivered" prices.

meeting, because she was not a principal of either of the two companies involved. R15-429-135 to 137. This is evidence that Weil understood the illegal purpose of that meeting. Likewise, McConnell's testimony that Weil contacted Anthony Giordano, Jr. on at least one occasion to complain that McConnell was cheating on the Sea Ranch agreement is also evidence that Weil knowingly participated in the agreement. R16-430-282 to 283.

Given the abundance of evidence that Weil was an active member of the conspiracy, the jury's conclusion that Weil was guilty of price fixing is unassailable.

II. THE DISTRICT COURT HAD JURISDICTION OVER APPELLANTS' PRICE FIXING CONSPIRACY

Section 1 of the Sherman Act prohibits conspiracies "in restraint of trade or commerce among the several States, or with foreign nations." 15 U.S.C. § 1. This language has been interpreted to permit jurisdiction under either of two theories: (1) where the defendant's anticompetitive activities took place within the flow of interstate or foreign commerce (the "flow theory"), or (2) where the defendant's general business activities had or were likely to have a not insubstantial effect on interstate commerce (the "effects theory"). See McLain v. Real Estate Board of New Orleans, Inc., 444 U.S. 232, 241-46 (1980); United States v. Fitapelli, 786 F.2d 1461, 1462 (11th Cir. 1986).

The indictment in this case asserted jurisdiction on the basis of both the flow and effects theories: "The business activities of the defendants and co-conspirators

that are the subject of this Indictment were *within the flow of, and substantially affected*, interstate and foreign trade and commerce." R1-1-6 (emphasis added). The district court instructed the jury with respect to both theories. R25-439-24 to 25. At trial, the government was required to prove only one of the two bases of jurisdiction asserted in the indictment in order to support jurisdiction. See United States v. Cargo Service Stations, Inc., 657 F.2d 676, 679 (5th Cir. 1981) ("Although in the instant case the indictment alleged that the restraint substantially affected interstate commerce and that it occurred in the flow of interstate commerce, proof of either theory is sufficient to sustain the convictions"). Accord Battle v. Liberty National Life Ins. Co., 493 F.2d 39, 48 (5th Cir. 1974).

A. *Effects Theory*

In Shahawy v. Harrison, 778 F.2d 636 (11th Cir. 1985), this Court held that establishing jurisdiction under the effects theory does not require a showing that the specific anticompetitive conduct complained of had an effect on interstate or foreign commerce. Rather, a showing that the defendant's general business activities had the requisite effect is enough. 778 F.2d at 640-41. Appellants admit that "the indictment did state an offense under the 'effects' theory, as currently defined in this Circuit by Shahawy." Since they acknowledge that this Court is bound by that decision (ABr. 52 and n.12) unless it is overruled en banc and they have not even requested an en banc hearing, there is no need to consider the point

any further.

In any event their argument is unsound. First, the indictment in this case charged that appellants' *specific anticompetitive conduct* affected interstate and foreign commerce,[5] and the district court instructed the jury that in order to find jurisdiction it must determine whether "*the allegedly illegal conduct as charged in the indictment* has a direct impact on goods moving in interstate or foreign commerce . . . or on goods which are in the flow of commerce." R25-439-24 to 25 (emphasis added). In other words, both the indictment and the district court's instructions to the jury read as if the narrower version of the effects theory that appellants prefer were the law, and therefore the jury's finding of jurisdiction was based on that narrower version of the effects theory. Moreover, the evidence fully supports the jury's verdict even when examined using such a theory, since scrap metal subject to the appellants' price fixing agreement was both exported to countries such as India and Korea (R19-433-1164 to 1165) and shipped interstate to Alabama, Indiana and Georgia. R19-433-1180. In addition, pursuant to the Sea Ranch agreement, Sunshine shipped to Atlas auto scrap from the Bahamas islands. R16-430-407 to 409.

Second, Shahawy is entirely consistent with the law as set forth by the

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[5]The indictment charged that "[t]he business activities of the defendants and co-conspirators *that are the subject of this Indictment* were within the flow of, and substantially affected, interstate and foreign trade and commerce." R1-1-6 (emphasis added).

Supreme Court in McLain, 444 U.S. at 241-46. In McLain, the defendant real estate brokers who were fixing their fees claimed that their brokerage activities were purely intrastate. The Supreme Court disagreed, holding that Sherman Act jurisdiction could be established by proof that the general business activities of the brokers affected interstate commerce. The Court held expressly that a particularized showing that the defendants' unlawful activity affected interstate commerce was not required. 444 U.S. at 242-43. And see Summit Health Ltd. v. Pinhas, 500 U.S. 322, 331-32 (1991) (reaffirming McLain).

B. *Flow Theory*

Appellants assert that the indictment failed to properly allege jurisdiction under the flow theory because it sought to base jurisdiction on the defendants' general business activities, rather than the specific anticompetitive conduct at issue. ABr. 51. As discussed above, this argument is dependent on appellants' misreading of the indictment, which alleges jurisdiction pursuant to the flow and effects theories based on "[t]he business activities of the defendants and co-conspirators *that are the subject of this Indictment*." R1-1-6 (emphasis added). In any event, as appellants admit (ABr. 52), the district court's instructions to the jury on jurisdiction directed that the jury should determine the existence of jurisdiction under both theories based only on the "allegedly illegal conduct, as charged in the indictment," rather than on defendants' general business activities.

R8-325-18.

Finally, appellants cite United States v. Fitapelli, 786 F.2d 1461 (11th Cir. 1986), in support of their argument that the flow of interstate commerce, whereby scrap was purchased in Florida by Atlas and Sunshine and then sold in other states and abroad, was interrupted here because (1) "[a]s a general rule, the flow of commerce from manufacturer to consumer stops when goods arrive at an intermediary (*e.g.* wholesaler)" (ABr. 55-57), and (2) the scrap "had to be substantially processed . . . before any shipping, domestic or export, took place." WBr. 18. There are several problems with these arguments.

First, the Court need not address the sufficiency of the evidence proving a flow of commerce if it concludes that the evidence was sufficient to prove a substantial effect on commerce. Cargo Service Stations, 657 F.2d at 680 and n. 2; United States v. Cadillac Overall Supply Co., 568 F.2d 1078, 1085 (5th Cir. 1978).

Second, appellants waived the argument because they failed to request any jury instruction asking the jury to determine whether the scrap had "come to rest" or been "substantially processed" and was thus not in, or no longer in, the flow of commerce. Nor did they object to the district court's instructions, which do not address these issues. Since the determination of whether a particular interruption in the flow serves to halt its continuity and thus remove it from the stream of commerce is an issue for the jury as finder of fact (Cadillac Overall Supply, 568 F.2d at 1083; United States v. South Florida Asphalt Co., 329 F.2d 860, 866-67

(5th Cir. 1964)), appellants should not be permitted to ask this Court to make a factual determination that the jury should have been asked to make if appellants had wished to preserve this issue for appeal.

In any event, appellants' argument is incorrect. When Congress passed the Sherman Act, it "'left no area of its constitutional power [over commerce] unoccupied.'" Pinhas, 500 U.S. at 329 n.10. Moreover, during the past century, "as the dimensions and complexity of our economy have grown, the federal power over commerce, and the concomitant coverage of the Sherman Act, have experienced similar expansion." Pinhas, 500 U.S. at 328-29. Atlas and Sunshine clearly were engaged in interstate and foreign commerce. The companies bought scrap from Florida dealers (as well as one shipment of cars from the Bahamas), shredded that scrap, and shipped it to other states and abroad. The fact that it may have been stored temporarily before being shipped interstate and abroad does not interrupt the flow of interstate commerce. South Florida Asphalt, 329 F.2d at 866-67. In Walling v. Jacksonville Paper Co., 317 U.S. 564, 568 (1942), the Supreme Court noted:

> The entry of goods into the warehouse interrupts but does not necessarily terminate their interstate journey. A temporary pause in their transit does not mean that they are no longer "in commerce" within the meaning of the Act. . . . if the halt in the movement of the goods is a convenient intermediate step in the process of getting them to their final destinations, they remain "in commerce" until they reach those points. Then there is a practical continuity of movement of the goods until they reach the customers for whom they are intended. That is sufficient. Any other test would allow formalities to conceal

> the continuous nature of the interstate transit which constitutes commerce.

Atlas and Sunshine stored scrap at their yards for the purpose of assembling it for interstate and foreign shipment via rail cars and ocean freighters. The scrap never "came to rest" at the Atlas and Sunshine yards; rather, a brief period of storage was but a "convenient intermediate step" in the process of shipping the scrap to its final destination. See Cadillac Overall Supply, 568 F.2d at 1081-86 (flow of interstate commerce not terminated where an industrial garment manufacturer purchased garments from out-of-state and then warehoused them before renting them to its customers).

Likewise, the fact that the scrap purchased by Atlas and Sunshine was shredded before being shipped out-of-state did not terminate the flow of interstate commerce. In United States v. Flom, 558 F.2d 1179 (5th Cir. 1977), this Court examined a price-fixing conspiracy that involved the purchase of steel from out-of-state, the fabrication of that steel into re-bar subsequent to its arrival at a warehouse in-state, and the shipment of that re-bar to various contractors. The Court refused to hold that the processing of the steel into re-bar resulted in the removal of the product from the flow of interstate commerce. Id. at 1184-85. Here, the type of processing involved -- i.e., the shredding of different grades of scrap metal for shipment -- is an alteration of the "raw material" shipped interstate that is considerably less significant than the forging of steel into re-bar that was held in

Flom not to break the flow of interstate commerce.[6]

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING THE RESULTS OF APPELLANTS' POLYGRAPH EXAMINATIONS

Under this Court's ruling in United States v. Piccinonna, 885 F.2d 1529, 1535 (11th Cir. 1989), polygraph evidence is not per se inadmissible. However, Piccinonna makes clear that polygraph evidence may be admitted only under certain limited circumstances and cautions that its departure from the per se rule of inadmissibility should not "be construed to preempt or limit in any way the trial court's discretion to exclude polygraph expert testimony." Id. at 1536. Moreover, in Piccinonna the Court offered as a guideline three situations in which a trial court might exercise its "wide discretion" to exclude polygraph evidence: (1) where "the polygraph examiner's qualifications are unacceptable"; (2) where "the test procedure was unfairly prejudicial or the test was poorly administered"; and (3) where "the questions were irrelevant or improper." Id. at 1537.

The district court in this case applied the Piccinonna guidelines and excluded the Giordanos' polygraph evidence, ruling (1) that the defendants, who had neither invited the government to attend the polygraph examinations nor provided any video or audio record of those examinations, had failed to minimize the risk of

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[6]See also United States v. Robertson, 514 U.S. 669 (1995) (Alaskan gold mine that was allegedly purchased with proceeds of unlawful activity held to be engaged in interstate or foreign commerce because at least some of the equipment and supplies used at the mine were purchased out of state, the mine hired some out of state workers, and $30,000 worth of gold was taken out of state).

unfair prejudice; and (2) that the tests themselves were flawed and therefore the probative value of defendants' polygraph examinations was substantially outweighed by the risk of unfair prejudice. R4-198-3 to 8.

Appellants suggest that the district court's order excluding the evidence was based solely on the fact that the government had been prejudiced because it had not been invited to witness or participate in the tests.[7] GBr. 37-39. But this characterization of the district court's order is incorrect. Although the district court did state, quoting United States v. Gilliard, 133 F.3d 809, 816 (11th Cir. 1998), that "the absence of such notice and opportunity may be a factor in determining whether admission of the polygraph evidence would unduly prejudice the adverse party," and held on that basis that the government would be unfairly prejudiced due to its inability to cross-examine the defendants' polygraph expert, that was not the only basis for its holding. R4-198-4 to 5. The district court also noted problems with the questions asked of the Giordanos by the polygraph expert. For example, the Giordanos were asked if they ever "agree[d] . . . to fix prices", to which they responded "no". But a formal agreement to "fix prices" was not required for the Giordanos to have violated the Sherman Act. Indeed, even a informal understanding between competitors on a common course of action concerning

[7]Since the Giordanos did not notify the government in advance of the tests, and did not invite the government to participate (R4-198-2), the district court's finding that the government would be prejudiced by the admission of the Giordanos' polygraph evidence was entirely correct.

prices can be a Sherman Act violation. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 179 (1940) (inferring per se illegal Sherman Act violation from "gentlemen's agreement" among competitors to purchase unspecified quantities of "distress" oil when necessary at prevailing prices); see generally Phillip E. Areeda, Antitrust Law ¶¶1404, 1410c, 1418 (1986). Accordingly, the court found that "the questions posed to the Giordano defendants were not unequivocally dispositive of guilt or innocence, but were fraught with enough qualifying terms that the Giordano defendants could have answered the questions truthfully and still be guilty." R4-198-7 to 8.

In sum, the district court's order excluding the Giordanos' polygraph evidence is soundly reasoned and appellants offer no plausible argument why this Court should overturn it as an abuse of discretion. See also United States v. Scheffer, 523 U.S. 303, 309 (1998) (upholding rule making polygraph evidence inadmissible in court-martial cases and noting that "there is simply no consensus that polygraph evidence is reliable"); United States v. Cordoba, 194 F.3d 1053 (9th Cir. 1999) (district court did not abuse its discretion in holding unstipulated polygraph evidence inadmissible under Fed. R. Evid. 702 and 403).

IV. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANTS' MOTION FOR A BILL OF PARTICULARS

Appellants assert that the district court abused its discretion in denying their pretrial motion for a supplemental bill of particulars concerning "the precise nature

of the agreement" to fix prices charged in the indictment. ABr. 42. See R3-188-1. There was no abuse of discretion. The indictment in this case adequately put appellants on notice of the charge against them, and, in any event, the government voluntarily provided a bill of particulars that gave appellants far more information than was required for them to prepare their defense.

A defendant "possesses no right to a bill of particulars," United States v. Burgin, 621 F.2d 1352, 1358 (5th Cir. 1980); rather, the matter rests within the sound discretion of the trial court. United States v. Draine, 811 F.2d 1419, 1421 (11th Cir. 1987), United States v. Colson, 662 F.2d 1389, 1391 (11th Cir. 1981). The function of a bill of particulars is to inform a defendant of the nature of the charge in the indictment with sufficient precision to enable the defendant to prepare his defense, or to plead double jeopardy in the event of a later prosecution for the same offense. United States v. Anderson, 799 F.2d 1438, 1441 (11th Cir. 1986); United States v. Cole, 755 F.2d 748, 760 (11th Cir. 1985). This Court has made clear that a bill of particulars is not intended to function as a discovery device, United States v. Rosenthal, 793 F.2d 1214, 1227 (11th Cir. 1986), "nor is the defendant entitled to a bill of particulars with respect to information which is already available through other sources such as the indictment or discovery and inspection." Id. See also United States v. Martell, 906 F.2d 555, 558 (11th Cir. 1990) (same).

In this case, the indictment charged the defendants with entering into an

entirely ordinary conspiracy to fix prices and allocate suppliers, and adequately put defendants on notice of the charge against them. The indictment charged that the defendants had conspired to fix scrap metal prices and to allocate scrap metal suppliers in the Miami area. It specified the approximate dates that the conspiracy began and ended. It specified that the defendants had "met at various restaurants" to fix prices and allocate suppliers, that they had "agreed to reduce the prices to be paid for scrap metal" and to establish maximum prices to be paid to scrap dealers, and that they fixed prices for "specific geographic areas of southern Florida" and for "various categories and grades of scrap metal (e.g., sheet metal, appliances and white goods, whole cars, unprepared #2 scrap, prepared #2 scrap, unprepared #1 scrap, and [scrap metal] 'logs')." R1-1-2 to 3. The indictment also alleged that defendants had "discussed and agreed upon the price to be paid for scrap metal resulting from the destruction caused by Hurricane Andrew," that they had "enlisted the support of others to help carry out the collusive agreement," and that unindicted co-conspirators had performed acts in furtherance of defendants' conspiracy. Id. at 3, 5. In short, based on the indictment alone, appellants knew that they were being charged with price fixing and supplier allocation, and they were provided with enough information about the details of the conspiracy alleged that they could prepare their defense.

But the government subsequently provided much more detail. On January 7, 1998, the government gave appellants' counsel the grand jury testimony of Sheila

McConnell and eight other witnesses. See January 21, 1998 letter from Richard Hamilton to Patrick M. McLaughlin, et. al (attached as Tab A), at p. 1. So more than a year prior to trial, appellants were aware of virtually all of the details of the conspiracy about which the government's main witness would testify at trial. Moreover, on January 21, 1998, the government gave to appellants' counsel its notes from four interviews with McConnell. Id. The notes disclosed that in one of her post-grand jury interviews with the government McConnell had given a slightly different account of the extent of her compliance with Sea Ranch agreement than she had provided to the grand jury. Id. at 13, 14.

Finally, when the appellants moved for a bill of particulars (R1-87; R2-97) the government, though opposing the motion, voluntarily provided what the appellants had asked for. R2-135. The bill of particulars, which appellants' counsel received on May 18, 1998, provided the names and addresses of all defendants and unindicted co-conspirators. Id. at 2-3. It provided the names and addresses of the scrap metal suppliers with respect to whom the defendants were accused of fixing prices. Id. at 3-5. It specified the geographic areas affected by the price fixing agreement. Id. at 5-6. It specified that the defendants had agreed to maximum pricing for the specific suppliers and geographic areas listed, as well as for scale purchases of particular grades of scrap including sheet metal, appliances and white goods, unprepared and prepared scrap, whole cars, and scrap metal logs. Id. at 6. It specified that defendants had met on five occasions, and

provided the dates of those meetings, the locations of those meetings, and the attendees of those meetings. Id. at 7. It specified that the government would allege at trial that in addition to agreeing to fix prices, defendants had agreed to allocate suppliers and to refrain from quoting prices to certain of each others' suppliers. Id. at 8-9.

Thus, long before trial commenced, appellants were aware of virtually *every* important allegation that the government would seek to prove at trial. Accordingly, their contention that they were somehow prejudiced by some lack of disclosure is frivolous.

V. THE UNITED STATES MET ITS BRADY OBLIGATIONS

A. Disclosure of McConnell's change in testimony.

Appellants complain that in violation of Brady v. Maryland, 373 U.S. 83, 87 (1963), they were not notified that "numerous" -- but unspecified -- aspects of McConnell's testimony at trial would differ from her grand jury testimony. GBr. 32. This contention is unsound.

On January 21, 1998, the government sent appellants' counsel notes taken by government lawyers at a number of interviews with McConnell. On page 13 of that document, McConnell is quoted as saying that she "dropped most of the prices consistent with the agreement," but that she "built in some safeguards" and did not drop some prices "as far as what had been agreed to." See January 21, 1998 letter

from Richard Hamilton to Patrick M. McLaughlin, et. al (attached as Tab A), p. 13. Accordingly, the appellants were on notice that McConnell had given different versions of her compliance with the Sea Ranch agreement -- not necessarily conflicting versions (as the district court acknowledged (see R17-431-540 to 541)), but different versions.[8] United States v. Valera, 845 F.2d 923, 927-28 (11th Cir. 1988) (no Brady violation where defense is aware of allegedly exculpatory information or can obtain it with reasonable diligence). Thus, while the government did not disclose to appellants prior to trial that McConnell would testify that she dropped prices but only to "picked up", rather than "delivered" levels, appellants already knew that McConnell did not drop some prices "as far as what had been agreed to" (Tab A at 13). The fact that she testified at trial that she dropped prices to the "picked up" level, as opposed to some other level that was marginally higher than what the agreement contemplated, was immaterial to the price fixing charge and could not have prejudiced appellants. In any event, as the district court noted, the exact extent of McConnell's compliance with the agreement was available to appellants through their own business records, which contained receipts stating the prices paid by McConnell to various scrap dealers during the period of the conspiracy. R17-431-541. Valera, 845 F.2d at 927-28. Moreover, to the extent that McConnell's grand jury and trial testimony differed on the question of her

[8]As has been stated above, appellants received McConnell's grand jury testimony on January 7, 1998. See p. 35, supra.

compliance with the agreement, appellants' counsel were able to exploit this difference to their advantage, as they did during McConnell's lengthy cross-examination. Appellants certainly suffered no prejudice.

McConnell testified at trial that Atlas' scale prices had not dropped. This conflicted with her grand jury testimony that the Giordanos had dropped Atlas' scale price. McConnell had no direct role in scale pricing -- the Giordanos were in control of the scale -- and McConnell's mistaken grand jury testimony was based on her assumption that David Giordano's instruction to her immediately following the Sea Ranch meeting to "drop the prices" meant that David Giordano had also dropped scale prices. See p. 9, supra. See also R15-429-182 to 183; R17-431-747. Of course, the Giordanos were aware all along whether they did or did not drop the scale prices. And at trial the Giordanos' counsel emphasized repeatedly that Atlas' scale pricing, over which the Giordanos had direct control, had not been dropped. Valera, 845 F.2d at 927-28. Moreover, given the Giordanos' knowledge of their own actions as well as the content of their own documents, they should have realized that in the course of her witness preparation McConnell might well examine documents demonstrating that her grand jury testimony had in fact been mistaken. Id. In any event, McConnell's testimony at trial that the Giordanos had not dropped the scale price was actually *helpful* to the defense in that they could then impeach McConnell with her grand jury testimony. So again, appellants suffered no prejudice.

B. *Accusations that McConnell had taken kickbacks.*

Appellants wrongly complain that the government did not disclose until "after Sheila McConnell's testimony was over" that Chip Hering, an employee of one of McConnell's former employers, Luria Brothers, Inc., testified in front of the grand jury that he had heard from an unnamed source that McConnell had been fired by another previous employer, Wooster Iron & Metal, for taking kickbacks from suppliers. GBr. 33. In fact, appellants were aware of Hering's allegations before McConnell finished testifying and elected not to pursue the issue. Accordingly, there was no Brady violation. United States v. Beale, 921 F.2d 1412, 1426 (11th Cir. 1991) (Brady not violated by government's delay in transmitting allegedly exculpatory evidence to defense during trial unless "the material came so late that it could not be effectively used").

At the time the government notified appellants of Hering's statement, McConnell was still on the stand, awaiting the prosecutor's re-direct examination. The government offered to allow the defendants' counsel to cross-examine McConnell on the subject of Hering's statement, and offered to agree to a continuance if defendants' counsel needed time to prepare. R19-433-1067. The district judge also indicated his willingness to allow defendants' counsel another shot at cross-examination, although he noted that Hering's account of the statement of an unnamed accuser wasn't likely to be much help to the defense and that in any

event the defense should have investigated McConnell's employment background themselves. Id. at 1070 to 1071. Defendants' counsel turned down the judge's offer to continue cross-examination and did not request a continuance to further investigate Hering's allegations. Id. at 1072.

Appellants also neglect to mention that on November 5, 1998, the government had informed them that Hering had testified before the grand jury that McConnell had been fired from Luria Brothers "in part[] because of rumors that she was taking kickbacks and 'dealing for her personal account'." See November 5, 1998 letter from Richard Hamilton to Patrick M. McLaughlin, et. al (attached as Tab B), pp. 3-4. So appellants were on notice that Hering had accused McConnell of taking kickbacks from former employers. Not surprisingly, they cross-examined her at trial on this point extensively. R17-431-571 to 572, 640 to 641; R18-432-861 to 862. They even accused her of having been fired from Atlas for taking kickbacks. R17-431-543 to 544, 656. They could, of course, have subpoenaed Hering to testify in person at trial, and he doubtless would have passed along the same unspecified, uncorroborated statement of an unnamed person that he related to the grand jury. They chose not to do so, however, and the consequence of that choice under this Court's decision in United States v. Schlei, 122 F.3d 944, 989 (11th Cir. 1997), cert. denied 523 U.S. 1077 (1998), is that they cannot claim a Brady violation since they could have obtained the evidence themselves with the exercise of reasonable diligence.

Finally, given the strength of the evidence against them and the accommodations offered to defendants to allow them to use the statement in further cross-examination, there is no reasonable probability that the defendants would have been acquitted had the statement been produced earlier. In the absence of the "reasonable probability" of an acquittal had the evidence been disclosed earlier, this Court should not disturb appellants' price fixing convictions. See United States v. Bagley, 473 U.S. 667, 682 (1985).

VI. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING EVIDENCE OF UNCHARGED MISCONDUCT UNDER FED. R. CRIM. P. 404(b)

Appellants contend that the district court abused its discretion by admitting under Fed. R. Crim. P. 404(b) evidence that the Giordanos had participated in a scrap price fixing and customer allocation conspiracy in Cleveland, Ohio with Luria Brothers, Inc., a former employer of McConnell. GBr. 8-19; WBr. 19-23. The conspiracy began in 1987 and continued at least until March, 1991. R15-429-144 to 145, 147 to 150; R16-430-425 to 428; R20-434-1429 to 1434. McConnell testified that during 1987 and 1988, when she worked as Luria's scrap buyer, she and other Luria managers had held approximately ten telephone conferences with Anthony Giordano, Jr. where Giordano complained that McConnell was buying scrap from dealers he considered "his" and "raising [the] price of cars". R15-429-148; R19-433-1092 to 1094. McConnell stated that her managers at Luria had

instructed her to stop soliciting Atlas' accounts. Id. at 149. McConnell also testified that she was fired from Luria in 1988 for refusing to follow her superiors' instructions not to solicit Atlas' accounts. R19-433-1098. Benedetto Tripodo, who also served as a Luria scrap buyer, testified that in March, 1991 he attended a meeting in Cleveland with principals of Luria, Anthony Giordano, Sr. and Anthony Giordano, Jr., in which Anthony Giordano, Sr. accused Tripodo and Luria of not following their agreement to "stay away" from Atlas' accounts.[9] R20-434-1430 to 1436.

The district court did not abuse its discretion in admitting this evidence. United States v. Edwards, 696 F.2d 1277, 1280 (11th Cir. 1983) (admission of 404(b) evidence reviewed for abuse of discretion). Rule 404(b) states that evidence of "other crimes, wrongs or acts" is not admissible to prove character, but is admissible "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Fed. R. Crim. P. 404(b). Rule 404(b) is a rule of inclusion, not of exclusion, United States

[9]Appellants assert that testimony by McConnell that the Giordanos were annoyed at having to comply with various regulations of the Environmental Protection Agency (R15-429-134), and that she could no longer work in the scrap business because of her role in the Giordanos' prosecution (R19-433-1082), was also objectionable 404(b) evidence. That assertion is incorrect. There is nothing legally or morally wrong with expressing annoyance at having to comply with environmental regulations. Accordingly, McConnell's testimony on this point does not involve "misconduct" and does not implicate Rule 404(b). Likewise, McConnell's testimony regarding her diminished employment prospects included no assertion that the Giordanos were responsible. In the absence of any allegation of misconduct aimed at the Giordanos, Rule 404(b) simply does not apply.

v. Perez-Tosta, 36 F.3d 1552, 1562 (11th Cir. 1994), and it "admits evidence of other crimes or acts relevant to any issue in the trial, unless it tends to prove only criminal disposition." United States v. DeLuna, 763 F.2d 897, 912 (8th Cir. 1985) (internal quotations omitted). Accord Cherry v. Crow, 845 F. Supp. 1520, 1525 (M.D. Fla. 1994).

There is a three-prong test for the admissibility of evidence under Rule 404(b). First, the evidence must be relevant to an issue other than the defendant's character. Second, there must be sufficient proof such that a reasonable juror could conclude by a preponderance of the evidence that the uncharged acts were committed. Third, the evidence must possess probative value that is not substantially outweighed by undue prejudice. United States v. Miller, 959 F.2d 1535, 1538 (11th Cir. 1992). See also United States v. Beechum, 582 F.2d 898 (5th Cir. 1978); United States v. Guerrero, 650 F.2d 728 (5th Cir. 1981).

Prior to trial, the government proffered this evidence and the district court applied the proper three-prong test. With respect to the first prong -- i.e., that the evidence not be offered only to show defendants' bad character -- the district court concluded that it was satisfied that the government was offering the evidence to show that the charged conspiracy was not the result of mistake or inadvertence, and that defendants had knowledge of the conspiracy and a motive to conspire. R4-198-11. The district court's ruling on this point makes perfect sense. Appellants were offering as an explanation for their behavior that they were not

fixing prices at their various meetings, but simply trying to reach agreement on some sort of joint venture between Atlas and Sunshine. See, e.g., ABr. 17; R15-429-83 to 84; R24-438-2441 to 2442, 2462. The district court correctly found that evidence of the Giordano's prior involvement in price fixing tended to undermine that version of the facts and make clear that the appellants' intent was not to form an innocent joint venture but to agree to fix prices:

> The alleged acts committed in South Florida and the alleged acts committed in Cleveland share common characteristics: both allege entry into a market dominated by a single competitor; both allege Atlas' struggle in the marketplace; and both allege a scheme to artificially depress prices of raw materials. The Cleveland acts, if proven, provide substantial insight and context to the acts alleged in the indictment; they render any arguments of mistake or lack of knowledge less effective.

R4-198-11.

With respect to the second prong, the district court noted (citing Huddleston v. United States, 485 U.S. 681, 686-88 (1988)) that it was not required to make a preliminary finding that the uncharged conduct occurred before allowing the government witnesses to describe it to the jury. R4-198-14. The court stated that it would allow the defendants to renew their motion to exclude the government's 404(b) evidence after the government's witnesses had been examined. Appellants' counsel did renew their motion at that time, and the district court denied it, finding that the evidence of the Cleveland conspiracy was sufficient to go to the jury. R22-436-2049. This finding is surely correct, as the government's allegations regarding

the Cleveland conspiracy were amply supported by the testimony of McConnell and Tripodo, against which appellants offered nothing.

Finally, with respect to the third prong, the district court noted the "substantial similarity between the acts alleged in the indictment and the Cleveland acts," and found that the Cleveland conspiracy, which endured to at least March, 1991, was sufficiently close in time to the allegations in the indictment that the probative value of the evidence outweighed any prejudicial effect it might have. R4-198-12. Again, this finding is unimpeachable. The evidence shows that in two different markets, on two occasions close in time, the Giordanos resorted to price fixing agreements with their main competitor when competition began to drive up the price they paid for scrap. As this Court made clear in United States v. Zapata, 139 F.3d 1355, 1358 (11th Cir. 1998), "[e]xtrinsic evidence which is 'very similar' to the charged offenses as to their 'overall purposes' may be highly probative." And, as the district court noted (R4-198-12), the prior conspiracy alleged was not the type of "heinous conduct" likely to "incite the jury to an irrational action." Zapata, 139 F.3d at 1358. Accord United States v. Eirin, 778 F.2d 722, 732 (11th Cir. 1985).

Moreover, even after deciding to admit this evidence the district court bent over backwards trying to minimize any residual chance, however small, that the evidence could create undue prejudice. Twice during McConnell's testimony, again at the close of Tripodo's testimony, and then a fourth time during jury

instructions at the close of the trial, the district judge cautioned the jurors that they could use the evidence of the Cleveland conspiracy only for one, narrow purpose:

> During the course of the trial, as you know from instructions I gave you then, you heard evidence of acts of a defendant which may be similar to those charged in the indictment, but which were committed on other occasions.
>
> *You must not consider any of this evidence in deciding if a defendant committed the acts charged in the indictment.* However, you may consider this evidence for other very limited purposes.
>
> If you find beyond a reasonable doubt from other evidence in the case that a defendant did commit the acts charged in the indictment, then you may consider evidence of the similar acts allegedly committed on other occasions *to determine whether a defendant had the state of mind or intent necessary to commit the crime charged in the indictment,* or whether a defendant committed the acts for which the defendant is on trial by accident or mistake.

R25-439-17 to 18 (emphasis added).[10] See also R16-430-278 to 279, 448 to 449; R20-434-1474 to 1475. Additionally, following Tripodo's testimony the district court specifically admonished the jury that "with respect to the evidence elicited from Mr. Tripodo, you can't consider that evidence with respect to Mr. Weil, David Giordano or Tony Giordano, Junior." (R20-434-1475).

Thus the district judge imposed a clear restraint on the jury designed to ensure that 404(b) evidence would be used only for its proper purpose. And

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[10]The district court's instruction to the jury was based on this Court's Pattern Jury Instructions and on United States v. Cardenas, 895 F.2d 1338, 1341 (11th Cir. 1990), in which this Court found that an identical instruction "helped to allay the prejudicial impact of the evidence of prior extrinsic acts by informing the jury of the limited purpose for which it could be used."

although appellants complain that the jury was invited to apply 404(b) evidence involving only certain defendants against all defendants (WBr. 19; GBr. 19), the district judge also made clear in his final admonition to the jury that each defendant must be judged only according to the evidence properly applicable to him:

> The case for each defendant and the evidence pertaining to each defendant should be considered separately and individually. The fact that you may find any one of the defendants guilty or not guilty should not affect your verdict as to any other defendant.
>
> I caution you, members of the jury, that you are here to determine from the evidence in this case whether each defendant is guilty or not guilty. Each defendant is on trial only for the specific offense charged, alleged in the indictment.

R25-439-17 to 18.

VII. THERE WAS NO CONSTRUCTIVE AMENDMENT OF THE INDICTMENT

Appellants contend that the government indicted them on one "theory of prosecution" (ABr. 38) but tried them on a different theory and thus made a "constructive amendment" of the indictment. ABr. 40.

Purporting to rely on the indictment, Sheila McConnell's grand jury testimony, and the government's bill of particulars, appellants contend that the government's original theory was that: (1) the conspirators fixed prices specifically on a "delivered" basis (i.e., that the fixed prices to be charged did not include shipping), (2) "scale" prices were dropped consistent with the agreement, and (3) McConnell did not drop the prices she paid for automobile scrap. ABr. 39.

But the indictment contained no such theory, the government's bill of particulars did not limit the government's proof in any way relevant to appellants' argument, and McConnell's grand jury testimony, even assuming it is relevant to a "constructive amendment of the indictment" argument, accurately describes both the conspiracy charged in the indictment and proved at trial.

The indictment charged that appellants entered into a "combination and conspiracy" consisting of a

> continuing agreement, understanding, and concert of action among the defendants and co-conspirators, the substantial terms of which were:
>
> (a) to fix and maintain prices paid for scrap metal;
>
> (b) to coordinate price decreases for the purchase of scrap metal; and
>
> (c) to allocate suppliers of scrap metal.

R1-1-2.

The indictment did not say *anything* about whether the prices fixed by defendants' conspiracy were "picked up" or "delivered" prices. Nor did the indictment say anything about whether scale prices were dropped, or whether McConnell had complied with the agreement. Thus, the premise of appellants' "constructive amendment" argument is all wrong because the indictment does not even address these topics and, accordingly, the constructive amendment cases on which they rely (see ABr. 35-37) are simply irrelevant.

The government's bill of particulars did not provide any information on these

points either. And unlike United States v. Flom, 558 F.2d 1179, 1185-86 (5th Cir. 1977), on which appellants rely (ABr. 38), the government's bill of particulars did not contain any promise by the government that it would refrain from offering any particular evidence relevant to the conspiracy actually charged in the indictment.

The silence of the indictment and bill of particulars on these points should not be surprising, for "the essence of any violation of §1 [of the Sherman Act] is the illegal agreement itself -- rather than the overt acts performed in furtherance of it." Pinhas, 500 U.S. at 330. Simply put, whether prices were quoted as "picked up" or "delivered", whether scale prices were dropped, and whether McConnell followed the agreement, were not essential elements of the offense that is charged in the indictment and fleshed out in the bill of particulars. While evidence concerning these matters could be relied on by the jury in determining whether the government had proved beyond a reasonable doubt the price fixing agreement charged in the indictment, the indictment itself did not require the government to prove any of them. Accordingly, appellants' assertion that the indictment was based in a "theory of prosecution" that included all those elements has absolutely no foundation.

Indeed, such a "theory of prosecution" never existed. McConnell testified before the grand jury on March 14, 1997, more than 4 years after the events leading to the indictment took place, and she did not have the opportunity to look at any documents prior to her grand jury testimony. R17-431-749 to 750. Despite the passage of time, the bulk of McConnell's grand jury testimony is consistent with

her testimony at trial, including her recollection of the details of the Sea Ranch meeting, and her recollection that the agreement reached at that meeting contemplated that the fixed prices would be "delivered" prices (R8-340, Exhibit A, p. 184). She also testified that she believed that scale prices had been dropped (id. at p. 215),[11] and that she had not complied with the agreement (id. at 206).[12]

To the limited extent that McConnell's testimony at trial differed from her grand jury testimony, appellants have not shown that they were prejudiced in any way. As the district court noted, "all the pricing information is contained in the defendants' own records," and appellants had been put on notice by the government over a year prior to trial that McConnell's testimony would be that while she dropped prices, she did not always drop them to the level contemplated by the agreement. R17-431-541. See January 21, 1998 letter from Richard Hamilton to Patrick M. McLaughlin, et. al (attached as Tab A), p. 13. Accordingly, appellants were able to cross examine McConnell respecting her grand jury testimony, and they did so -- on many subjects -- exhaustively. See, e.g., R16-430-489 to 496, 502 to 507; R17-431-559 to 566, 710 to 714, 746 to 751, 772 to 775, 788 to 792, 794 to 796, 809 to 811; R18-432-869 to 870, 927 to 930, 933, 939 to

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[11]This testimony turned out to be mistaken. See p. 39, supra.

[12]The district court found that McConnell's testimony on this last point, that she did not comply with the agreement, "does not appear . . . to be inconsistent with the testimony at trial," which was that she dropped prices in accordance with the agreement but cheated by quoting "picked up" rather than "delivered" prices. R17-431-540 to 541.

940, 989 to 990, 1016 to 1017.

Finally, appellants also claim that the government constructively amended the indictment by failing to prove that prices were fixed rather than "suggested", and by failing to show that the geographic area affected by the conspiracy was as big as that mentioned in the bill or particulars. ABr. 38. These claims are frivolous. First, the jury was instructed that it could not convict unless it found that the defendants had conspired to *fix* prices. R25-439-19 to 20. Since the jury convicted appellants, it necessarily determined that they had been fixing prices, not simply "suggesting" prices, and there could have been no constructive amendment of the indictment. See pp. 5-9, 21-23, supra. Second, even if appellants are correct that the government proved at trial a conspiracy affecting a smaller geographic area than that mentioned in the bill of particulars (and that is not correct), appellants cannot claim that the government's proof at trial of a *narrower* conspiracy than that supposedly specified in the bill of particulars constructively amended the indictment or otherwise prejudiced them. United States v. Miller, 471 U.S. 130 (1985) (the narrowing of an indictment at trial does not constitute the amendment of that indictment).

VIII. THE PER SE RULE APPLICABLE TO PRICE-FIXING CLAIMS IS NOT AN UNCONSTITUTIONAL EVIDENTIARY PRESUMPTION

Appellants contend that because the per se rule relieves the government of any need to prove that appellants' price-fixing conspiracy was "unreasonable", it

establishes an irrebuttable evidentiary presumption in violation of the Due Process Clause of the Constitution. ABr. 58-62, WBr. 15-17.

Appellants not only fail to cite any cases supporting this proposition, but they also do not disclose that their argument was expressly rejected in United States v. Cargo Service Stations, Inc., 657 F.2d 676 (5th Cir. 1981). In that case, independent retail marketers of gasoline who had been convicted of price fixing argued that their due process rights were violated by the district court's instruction to the jury that if it found that defendants intended to fix prices, it could presume that defendants intended to unreasonably restrain commerce. The Court flatly rejected defendants' due process argument, holding specifically that price fixing "is an activity with inevitable anticompetitive effects." 657 F.2d at 683. Accordingly, it reasoned that (id. at 684.):

> [B]ecause fixing prices is by itself an unreasonable restraint of trade, an intent to fix prices is equivalent to an intent to unreasonably restrain trade; therefore, a finding that appellants intended to fix prices supplies the criminal intent necessary for a conviction of a criminal antitrust offense. There was no denial of due process.

This Court's holding in Cargo Service Stations is completely consistent with the holdings of every other court that has considered the issue. The Supreme Court has long held that price fixing is a per se violation of the Sherman Act. United States v. Trenton Potteries Co., 273 U.S. 392, 397 (1927); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940); Catalano, Inc. v. Target Sales,

Inc., 446 U.S. 643, 646-47 (1980).[13] And every court of appeals that has considered the question has expressly rejected the argument that the per se rule establishes an unconstitutional evidentiary presumption. See, e.g., United States v. Mfr.s' Assn. of the Relocatable Bldg. Indus., 462 F.2d 49, 52 (9th Cir. 1972) ("per se rule does not operate to deny a jury decision as to an element of the crime charged, since 'unreasonableness' is an element of the crime only when no per se violation has occurred . . . . The per se rule does not establish a presumption. It is not even a rule of evidence"); United States v. Brighton Building & Maintenance Co., 598 F.2d 1101, 1106 (7th Cir. 1979) ("[s]ince the per se rules define types of restraints that are illegal without further inquiry into the competitive reasonableness, they are substantive rules of law, not evidentiary presumptions. It is as if the Sherman Act read: 'An agreement among competitors to rig bids is illegal'"

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[13] Indeed, Trenton Potteries and Socony-Vacuum were criminal cases. And the Court noted in Socony-Vacuum that even a conspiracy that fails is a per se violation of the Sherman Act. 310 U.S. at 225 n.59. Such a conspiracy obviously would have no anticompetitive effects. Yet, it is still illegal.

Moreover, in FTC v. Superior Court Trial Lawyers Assn., 493 U.S. 411, 432-434 (1990), the Court expressly endorsed the application of the per se rule to price fixing and group boycotts, noting that while the per se rules are the product of judicial interpretations of the Sherman Act, "the rules nevertheless have the same force and effect as any other statutory commands." The reason for this is simple: "The per se rules [ ] reflect a longstanding judgment that the prohibited practices by their nature have "a substantial potential for impact on competition." (citing Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 16 (1984)). See also United States v. United States Gypsum Co., 438 U.S. 422, 440-441 (1978) (expressly noting the per se illegality of certain conduct with "unquestionably anticompetitive effects" and citing with approval Socony-Vacuum as an example of the application of that doctrine).

(internal quotations and cite omitted)); United States v. Gillen, 599 F.2d 541, 545 (3d Cir. 1979) ("The act of agreeing to fix prices is in itself illegal; the criminal act is the agreement.").

These holdings all make perfect sense. The per se rule applicable to criminal price fixing is a substantive principle of law that defines the elements of the criminal offense. It reflects an authoritative interpretation of the Sherman Act by the Supreme Court, which Congress has never questioned. Under this interpretation, certain types of conspiracies are illegal as a matter of law just as if Congress had stated expressly in the Sherman Act that such conspiracies are illegal. Thus, the per se rule serves to render unnecessary any further inquiry into the "unreasonableness" of a price fixing conspiracy, once the government has proven beyond a reasonable doubt that the defendant intentionally engaged in the conspiracy. Where the conspiracy at issue is subject to the per se rule, the factual question for the jury to resolve is whether the defendant knowingly and intentionally engaged in that conspiracy.[14] The per se rule does not relieve the government of this burden of proof. But because such a conspiracy is illegal as a matter of law, once the jury resolves this factual issue adversely to the defendant, no further proof of anticompetitive effects is required. Socony-Vacuum Oil Co., 310 U.S. at 150.

[14]"Behavior is illegal per se when the plaintiff need prove only that it occurred in order to win his case, there being no other elements to the offense and no allowable defense." R. Bork, The Antitrust Paradox 18 (1978).

IX. THE GOVERNMENT'S CLOSING ARGUMENT WAS NOT IMPROPER

Appellants complain that several brief remarks made by the prosecutor during his lengthy closing arguments were improper and violated their right to a fair trial. GBr. 20-28; WBr. 23-26. None of these complaints has any merit.

Appellants' first complaint is that the prosecutor allegedly "dehumanized" them by comparing them to leopards in a cage. GBr. 22; WBr. 23. The remarks occurred in the context of the prosecutor's explanation that the fact that the conspirators may sometimes have cheated on the Sea Ranch agreement does not mean that they did not violate the law (R24-438-2349 to 2350):

> Prices fell to the agreed-upon levels. Was there some modification? Of course, there was. Cheaters cheat. By their nature, people that cheat will cheat. You have all heard that there is no honor among thieves. And I challenge anyone to walk down to the local zoo and stand in front of a leopard cage, and you can stand there all day, and you will see that the spots on that leopard, they are not going to change. The agreement was made at Sea Ranch. Pricing documents overwhelmingly corroborate Sheila McConnell's testimony, the testimony of Henry Kovinsky, and you can look at the notes of Sheila McConnell and Henry Kovinsky's calendar entries, and you can see how they all fit together.

As an initial matter, none of the appellants made a contemporaneous objection to this remark. Accordingly, their claim should be examined only for plain error. United States v. Young, 470 U.S. 1, 15 (1985). In any event, the statement was a wholly legitimate and inoffensive response to the repeated assertions of appellants' counsel at trial that the government had failed to show consistent changes in "delivered" pricing in accordance with the Sea Ranch

agreement and, as a result, had failed to prove the existence of that agreement. See, e.g., R22-436-2064 to 2066, 2070 to 2071. The prosecutor's statement was a reminder to the jury that although the participants in the Sea Ranch agreement sometimes may have cheated on that agreement, the evidence showed that prices paid for scrap by the conspirators fell after the Sea Ranch meeting to the levels agreed to at that meeting. Whether those fixed prices were quoted as "picked up" or "delivered", the customers victimized by the price fixing agreement were paid lower prices as a result of that agreement.

Moreover, this statement is not even remotely like the prosecutor's characterization of a defendant as a "hoodlum" that was ruled improper in Hall v. United States, 419 F.2d 582, 587 (5th Cir. 1969), or references to a defendant as a "madman" and a "violent animal" in Alvarez v. State, 574 So.2d 1119, 1120 (Fla. 3d DCA 1991). These two cases -- the only cases on which appellants rely -- involved obviously derogatory and prejudicial epithets expressly directed at a defendant. Here, nothing the prosecutor said was derogatory, nor were the prosecutor's statements expressly directed at the defendants, nor did the prosecutor seek to unfairly prejudice the jury. Rather, the bromides invoked by the prosecutor -- that "cheaters cheat", that "there is no honor among thieves", that "leopards don't change their spots" -- were merely a means of pointing out that no one should be surprised that people who were willing to cheat their customers by agreeing to fix prices would also cheat on their own illegal agreement. That is a fair

inference; indeed, price fixers frequently cheat on their fellow co-conspirators. See, e.g., United States v. Misle Bus & Equip. Co., 967 F.2d 1227, 1231 (8th Cir. 1992); United States v. Hayter Oil Co., Inc. of Greeneville, Tenn., 51 F.3d 1265, 1275 (6th Cir. 1995).

Appellants also complain that the prosecutor vouched for the credibility of the government's witnesses and its entire case. But the remarks (to which appellants did not object at trial), when examined in context, simply do not constitute vouching. The prosecutor, responding to defense counsel's accusation that the government had in effect suborned perjury, stated (R24-438-2499 to 2501):

> [Defense counsel] also want to suggest to you that, because [McConnell's] notebook on 10/24 doesn't have the names of all the people there, somehow her testimony is incredible or not to be believed?
>
> Well, if she is wrong, then Henry Kovinsky is wrong. What they are suggesting is that these two people have made up some fantastic tale, and have conspired among themselves to come before you and lie together, deceivers in arms, and put themselves at risk for perjury.
>
> And the defendants don't even stop at that. They go much further. To add insult to injury, they suggest that the United States, the government lawyers on this case, somehow spoon fed them, Henry Kovinsky, that somehow we tailored his testimony or force fed him on what to say.
>
> That is an insult. I have been involved in this case from day one, and I am proud of the case, I am proud of the investigation, and I am proud to be sitting here with Paul Binder and Ion (sic) Hoffman. And I am proud of the team of people that have helped put this case together, and have helped present the evidence to you in a clean, efficient, understandable manner.

> Now, what they are suggesting to you simply can't be true. [. . .] And the suggestion that somehow the government or its lawyers in this case suborned perjury is outrageous and it is insulting. That is what it is. But I guess that falls within the bin of just doing your job.
>
> Remember what Sheila McConnell and Henry Kovinsky say that is the same on the important details: A meeting took place at Sea Ranch. It was on October 24th, 1992. There were five participants there: Tony Giordano, Senior, Junior, Sheila McConnell, Henry Kovinsky and Randy Weil. That's the evidence in this record.

The prosecutor's statement clearly was not error, whether plain or otherwise. A lawyer accused of suborning perjury in front of a jury is not required to stand mute, ignore the insult and thus risk prejudice to his case. And in this case, the prosecutor properly responded to the defense attack by emphasizing the strength and consistency of the evidence against the defendants. He did not vouch for the credibility of the witnesses at all; rather, he commented, correctly, that the testimony given by McConnell and Kovinsky was consistent on all of the important points. The prosecutor did express his outrage at the accusation that he and his colleagues had suborned perjury, and, in denying that accusation, stated that he was proud of the job they had done. But neither his denial of defendants' accusation nor his expression of pride in the job he and his colleagues had done prejudiced the defendants, and therefore the prosecutor's statement was not improper. See United States v. Ochoa, 564 F.2d 1155, 1158-59 (5th Cir. 1977) (prosecutor's statements in closing denying involvement in "hideous plot" to suborn perjury and his expressions of admiration for his colleagues' commitment to their work not

improper).[15]

Finally, appellants complain that the prosecutor during closing argument derided as a "cheap defense trick" defense counsels' reminders to the jury that they could not convict unless they found defendants guilty beyond a reasonable doubt. GBr. 26. But appellants misstate what the prosecutor said. The "trick" referred to by the prosecutor was defense counsels' display to the jury of charts with the phrase "beyond a reasonable doubt" located at the pinnacle of what looked like a thermometer and highlighted in red ink. The prosecutor told the jury that he believed that the charts were designed to mislead them (R24-438-2518 to 2519):

> Now, they have talked to you about the burden of proof. And you saw the charts. And they are desperate. They had three of them up here with charts and figures. And the old cheap defense trick of making the topic beyond "a reasonable doubt" in red that these guys used. They want to suggest to you that somehow beyond a reasonable doubt is such an insurmountable hurdle that you can't find that in this case. Well, the evidence is overwhelming, and we have never once shied from the burden of proof. I told you in our opening

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[15]Appellants contend that two other remarks constituted vouching. In his opening remarks, the prosecutor told the jury that his family, including his six-month old son, who was sick, were back in Cleveland, "but we are down here because the defendants in this case agreed at the Sea Ranch to fix prices and divide up customers." R15-429-48 to 49; GBr. 23. This statement was not vouching, and, in any event, clearly was not prejudicial. Appellants also wrongly contend that the prosecutor invited the jury to convict with evidence not introduced at trial when he stated in closing that "[w]e could have been here for nine months." R24-438-2478; GBr. 24. Again, defense counsel did not object, but in any event appellants have misconstrued this statement. Immediately following the sentence objected to by appellants, the prosecutor goes on to say that "[t]he evidence we put before you is the evidence that matters. [. . .] It is the evidence of the agreement at Sea Ranch. It is the evidence that shows that the conspiracy was followed." Id. Again, there was neither vouching nor prejudice.

> statement, we welcome it, we embrace it. We embrace it still, because we have satisfied each of the elements beyond a reasonable doubt. [. . .]
>
> Reasonable doubt is not doubt beyond all possibility. It is what the defendants want you to believe. That was the suggestion with this stacked up chart with the red zone up at the top. With the cherry on the top, the thing that is so hard to strife (sic) to and achieve.

The prosecutor's reference to "the cheap old defense trick" was not intended as, and could not have been interpreted by the jury as, an attack on the reasonable doubt standard. Rather, this statement was intended to respond to a graphic shown to the jury by defense counsel which the prosecutor felt misrepresented the meaning of that standard of proof. Indeed, the prosecutor made clear that he had no problem with being held to the "beyond a reasonable doubt" standard -- but wanted to make sure the jury understood that the reasonable doubt standard did not mean "no doubt". In any event, the court reminded the jury during closing argument that he would instruct them on the meaning of the reasonable doubt standard (R24-438-2519), and following closing argument the court did so. R25-439-13 to 14. There is no reason to believe that anything the prosecutor said in closing would have affected the jury's ability to understand or follow this instruction. Richardson v. Marsh, 481 U.S. 200, 206 (1987) (jurors presumed to obey court's instructions).

X. THE DISTRICT COURT CORRECTLY COMPUTED THE VOLUME OF COMMERCE AFFECTED BY THE VIOLATION

A defendant's sentence under the Antitrust Guideline, U.S.S.G. §2R1.1(b)(2) (1999), is based on "the volume of commerce done by him . . . in goods or services that were affected by the violation." In this case, the district court added one point to appellants' base offense levels pursuant to §2R1.1(b)(2), based on its finding that appellants' price-fixing conspiracy affected more than $400,000 of commerce. R27-173.

Appellants argue (GBr. 40-44) that the district court incorrectly calculated the volume of commerce affected by their conspiracy because, following United States v. Hayter Oil Co., Inc. of Greeneville, Tenn., 51 F.3d 1265 (6th Cir. 1995), it included as commerce "affected" by the conspiracy all purchases made by Atlas and Sunshine of the various grades of scrap metal subject to appellants' price-fixing agreement, an amount totaling $636,153.66 for Atlas and $839,043.80 for Sunshine. In appellants' view, Hayter Oil was wrongly decided and, relying on United States v. SKW Metals & Alloys, Inc., 195 F.3d 83 (2d Cir. 1999), they argue that the court should have included only those sales for which the conspirators successfully achieved their illegally-fixed target price. GBr. 44.

The district court's decision to add one point pursuant to §2R1.1(b)(2) was correct. In Hayter Oil, the court examined the plain language and commentary to that Guideline and concluded that both supported its view that the volume of commerce "affected" by a price-fixing conspiracy includes all sales of the goods and services within the scope of the conspiracy, even if the conspiracy is not

always completely successful in obtaining the target, or fixed, price. The Hayter Oil court noted that the Guidelines commentary confirms that the Sentencing Commission refused to base antitrust offense levels on the damage caused or profits made by the defendants because such calculations are difficult and that it intended the government to have the benefit at sentencing of the per se rule, which makes the success of a conspiracy irrelevant. See 51 F.3d at 1274. See also U.S.S.G. §2R1.1 (Comment n.3) (Bkgrd.) (1999).

SKW is not to the contrary. That case involved a conspiracy to fix the price of ferrosilicon. The conspirators contended that because their price fixing agreement was subject to cheating and therefore often fell short of realizing the conspirators' target prices, the volume of commerce "affected" by their conspiracy under §2R1.1 should include only those sales made at the target price. The Second Circuit rejected this argument and held, citing Hayter Oil, that "[w]hile a price-fixing conspiracy is operating and has any influence on sales, it is reasonable to conclude that all sales made by defendants during that period are 'affected' by the conspiracy." 195 F.3d at 90.

Appellants rely on language in SKW indicating that a price fixing conspiracy will not "affect" commerce where the conspiracy was "a non-starter", or "had no effect or influence on prices." Id. at 91. See GBr. 43. But as we have already noted, there was ample evidence in this case proving that appellants' price fixing conspiracy was effective, and that it did have a substantial effect on prices. See

pp. 8-9, supra. Thus, this is not a case in which a price fixing conspiracy was a "non-starter" or "had no effect or influence on prices." Id.

Accordingly, the district court in this case correctly included all purchases of scrap metal made by Atlas and Sunshine during the course of the conspiracy in its volume of commerce calculations, and its decision to add one point to appellants' base offense levels was not error.[16]

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

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[16]Randy Weil also complains that the court erred in finding that his role in the Sea Ranch conspiracy warranted a two-level increase in his base offense level under U.S.S.G. § 3B1.1(c). WBr. 28-31. He asserts that he should not have been deemed an "organizer, leader, manager, or supervisor"of the conspiracy, because his "participation in the offense was equal to that of the other conspirators." WBr. 29. What Weil fails to mention, however, is that the district court also imposed the same two-level enhancement on the Giordanos, based on its finding that each of these men had a role in organizing the conspiracy and in directing activities of others in furtherance of the conspiracy. R9-378; R10-380, 382, 384, 386, 388. With respect to Weil in particular, the evidence shows (1) that Weil took a lead role at the Sea Ranch meeting and dictated the fixed prices to McConnell, (2) that Weil was in control of pricing at Sunshine and dropped prices in accordance with the agreement, and (3) that Weil attempted to "police" the agreement by complaining to Anthony Giordano, Jr. about McConnell's cheating. See pp. 20-23, supra. In sum, it is perfectly clear that Weil helped lead, organize, manage and supervise the conspiracy, and therefore the district court's two-level enhancement of his base offense level under § 3B1.1(c) was entirely correct.

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January 18, 2000

CERTIFICATE OF COMPLIANCE

The United States hereby certifies that this brief contains 15,854 words. This brief is accordingly in compliance with the 16,000 word limit agreed to on January 14, 2000 by the Clerk of the 11th Circuit Court of Appeals. This brief is set in the Times New Roman typeface with a 14-point typesize.

CERTIFICATE OF SERVICE

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