No. 16-2356

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

v.

FRANK PEAKE,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO
(JUDGE DANIEL R. DOMINGUEZ)

BRIEF FOR THE UNITED STATES OF AMERICA

BRENT SNYDER
Acting Assistant Attorney General

LISA M. PHELAN
Attorney
U.S. Department of Justice
Antitrust Division

JAMES J. FREDRICKS
SEAN SANDOLOSKI
Attorneys
U.S. Department of Justice
Antitrust Division
950 Pennsylvania Ave., NW
Room 3224
Washington, DC 20530
(202) 353-0093

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STATEMENT OF JURISDICTION

The U.S. District Court for the District of Puerto Rico had jurisdiction under 18 U.S.C. § 3231. This Court has jurisdiction to review the denial of Appellant Frank Peake's motion for a new trial based on newly discovered evidence under 28 U.S.C. § 1291. Peake incorrectly states that 18 U.S.C. § 3742 also gives this Court jurisdiction to hear his appeal, but that statute provides jurisdiction only for the review of an otherwise final sentence.

STATEMENT OF ISSUES PRESENTED

1. Whether the district court abused its discretion by denying a motion for new trial based on Peake's post-verdict discovery of a *qui tam* action filed during trial and under seal by a non-testifying cooperator when the *qui tam* action's existence and complaint: (a) were not suppressed by the prosecution; (b) were neither material nor favorable to the accused; and (c) do not create a reasonable probability that the result of the trial would have been different had that information been disclosed, given the robust evidence implicating the accused at trial.

2. Whether this Court can consider Peake's argument that Puerto Rico should not be deemed a state for purposes of the Sherman Act when that argument: (a) was not included in his new trial motion, which is all that is on appeal; (b) is neither jurisdictional, nor timely; (c) is not based on newly discovered evidence; (d) was rejected by this Court in Peake's prior appeal; (e) and does not establish plain error in light of this Court's prior, alternative holding that Peake's indictment was not defective, even if Puerto Rico were treated as a territory for purposes of the Sherman Act, because the charged price-fixing conspiracy affected commerce between the continental states.

STATEMENT OF THE CASE

On December 6, 2013, the U.S. District Court for the District of Puerto Rico entered a judgment of conviction against Frank Peake for conspiring to fix the price of freight services in restraint of interstate commerce, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and sentenced him to 60 months' imprisonment. This Court affirmed his conviction and sentence, 804 F.3d 81 (1st Cir. 2015), and denied rehearing en banc. Order, *United States v. Peake*, No. 14-1088 (1st Cir.

Dec. 15, 2015). The Supreme Court denied certiorari. 137 S. Ct. 36 (2016).

While his direct appeal was pending and within three years of the verdict against him, Peake filed a motion for a new trial based on newly discovered evidence under Federal Rule of Criminal Procedure 33(a), (b)(1). On October 18, 2016, the district court denied that motion. ADD 1.[1] The present appeal is from that denial.

1. On November 17, 2011, a federal grand jury returned an indictment charging Peake with one count of conspiracy to suppress and eliminate competition by agreeing to fix rates and surcharges for freight services in interstate commerce, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. APPX 28-32.

At a nine-day trial beginning on January 10, 2013, APPX 15, the government presented evidence of Peake's involvement in an "extensive" antitrust conspiracy, in which Sea Star and Horizon Lines, two of the four freight carriers that dominate freight shipping to Puerto

[1] Citations beginning "ADD" are to the addendum appended to Peake's opening brief pursuant to First Circuit Local Rule 28.0. Citations beginning "APPX" are to the Joint Appendix. Citations beginning "Dkt No." are to the docket in *United States v. Peake*, No. 11-cr-512 (D.P.R.).

Rico, "agreed not to undercut each other on price and allocated precise market share quotas" through "bid rigging and careful planning, coordination, and . . . self-enforcement." 804 F.3d at 85. Three of his co-conspirators testified,[2] recounting specific discussions with him about "setting surcharges, fees, and market share allocations." *Id.*

For instance, Peake's co-conspirators testified that he participated in an October 2006 meeting in Orlando, Florida, where employees of Horizon Lines and Sea Star discussed and agreed to prices and rates for shipping, fuel surcharges, and port surcharges and discussed the proper allocation of the market for shipping services between Florida and Puerto Rico. *See, e.g.*, APPX 373-78, 497-500. Peake's co-conspirators also explained how he and his counterpart at Horizon Lines, Gabriel Serra, would settle disputes related to the conspiracy that their subordinates (namely, Peter Baci at Sea Star and Greg Glova at

[2] Three of Peake's individual co-conspirators, as well as corporate co-conspirators (including both Sea Star and Horizon Lines), cooperated with the government and pleaded guilty to violations of the antitrust laws. *See United States v. Sea Star Line, LLC*, 11-cr-511 (D.P.R.); *United States v. Horizon Lines, LLC*, No. 11-cr-71 (D.P.R.); *United States v. Glova*, No. 08-cr-352 (M.D. Fla.); *United States v. Baci*, No. 08-cr-350 (M.D. Fla.); *United States v. Serra*, No. 08-cr-349 (M.D. Fla.).

Horizon Lines) were unable to, including pricing and customer disputes. APPX 112-15, 125-27, 141-42, 319-20, 325.

The government introduced contemporaneous emails, travel and phone records, and other documentary evidence to corroborate Peake's co-conspirators' testimony. *See, e.g.*, APPX 771, 774-75, 776-77. The government also presented two witnesses, Gabriel Lafitte and Ron Reynolds, who both testified about the effects of the conspiracy on interstate commerce—specifically, on the interstate procurement and transport of food and other supplies for fast food franchises (Lafitte) and federal food assistance programs (Reynolds). APPX 229-57, 397-412.

The defense presented no witnesses.

The jury returned a guilty verdict. The district court denied Peake's motion for a new trial and judgment of acquittal,[3] and sentenced him to 60 months' imprisonment, to be followed by three years of supervised

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[3] Peake later filed an additional motion for new trial, alleging that the government had improperly withheld a recording created by William Stallings, the government cooperator whose *qui tam* action is the basis for the new trial motion that is the subject of this appeal. The tape was not "exculpating," as Peake now claims, Peake Br. 16, and the government had previously turned over other recordings created by Stallings to Peake. Dkt. No. 228, at 35-36. The district court denied the motion, and Peake did not appeal that decision. *See* 804 F.3d at 93 n.9.

release. The court also ordered Peake to pay a $25,000 fine and $100 assessment. APPX 822-26.

Peake appealed and argued for the first time that "Puerto Rico is not a state," that Section 1 of the Sherman Act "prohibits agreements in restraint of trade or commerce 'among the several States,'" and "that his conviction must therefore be vacated." 804 F.3d at 86 (quoting 15 U.S.C. § 1). This Court rejected his argument on two independent grounds.

First, the Court held that "it is well-settled that, for purposes of the Sherman Act, Puerto Rico is 'to be treated like a state and not like a territory,' therefore, Section 1 fully applies to Puerto Rico." *Id.* (quoting *Cordova & Simonpietri Ins. Agency Inc. v. Chase Manhattan Bank N.A.*, 649 F.2d 36, 38, 44 (1st Cir. 1981)). Second, the Court determined that even if Puerto Rico is not considered a state for purposes of Section 1, Peake was nonetheless "correctly charged, and the indictment is not defective" because "part of the freight carried by the companies in the conspiracy originated in one state before being transported to a port in a second state to be shipped to Puerto Rico." *Id; see* APPX 102-05, 133-38 (co-conspirator testimony that all rate components were fixed, including

the "intermodal fuel surcharge"); *id.* at 277 (co-conspirator testimony that the conspiracy affected "[a]ll services" including "inland freight").

Peake also argued that a new trial was warranted based on allegedly improper prosecutor statements. This Court concluded that, although part of the prosecutor's opening statement improperly implied that the conspiracy impacted consumers, the error was harmless. 804 F.3d at 94. As part of its harmlessness analysis, the Court reviewed the trial evidence and determined that "the government's case was robust." *Id.* at 95. The "testimony of co-conspirators and direct customers of the shipping companies established that there was a conspiracy to fix prices, that Peake knowingly participated, that the conspiracy had the effect of increasing shipping rates and surcharges, and that this affected interstate commerce." *Id.* This testimony was supported by "numerous exhibits, including emails sent by Peake himself." *Id*.

This Court also rejected Peake's challenges to the two customer witnesses, Lafitte and Reynolds, who testified about the conspiracy's effect on interstate commerce. The Court found that the district court did not abuse its discretion "in permitting the testimony of representatives from the businesses affected by the conspiracy." *Id.* at

97. Those "witnesses never stated that the higher costs incurred by the direct customers of the shipping companies were indirectly transferred to their consumers." *Id.* Rather, the "testimony elicited by the government properly established the effects of fixing prices and rigging bids." *Id.* The "conspiracy's effect on interstate commerce was an element of the offense the government was required to establish," and "the government's examination of the witnesses was limited to establishing that element." *Id.; cf.* Peake Br. 11 (Lafitte's and Reynolds's "testimony was unrelated to any contested issue").[4]

Peake filed a petition for rehearing en banc and a petition for a writ of certiorari, arguing in each that Puerto Rico is not a state for purposes of the Sherman Act and that he was entitled to a new trial due to prosecutorial misconduct. Each was denied. Order, *United States v. Peake*, No. 14-1088 (1st Cir. Dec. 15, 2015) (denying rehearing en banc); 137 S. Ct. 36 (2016) (denying certiorari).

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[4] This Court also rejected Peake's arguments that the district court erred in: (1) denying his motion to suppress the government's search of his electronic devices, 804 F.3d at 90; (2) denying his motion for change of venue, *id.*; (3) denying his requested theory-of-defense jury instruction, *id.* at 98; (4) encouraging the jury to continue deliberations in response to notes stating it was not able to reach a unanimous verdict, *id.* at 99; and (5) determining his sentence, *id.* at 99-100.

2. On April 18, 2014, Peake filed a motion for a new trial based on newly discovered evidence, namely the existence of a *qui tam* action filed under seal during Peake's trial by a government cooperator. The motion did not raise the issue whether Puerto Rico is a state for purposes of the Sherman Act.

Specifically, on January 15, 2013—3 days into Peake's trial—William Stallings filed under seal a lawsuit against Sea Star and Horizon Lines (among others) under the *qui tam* provisions of the False Claims Act, 31 U.S.C. § 3730(b).[5] APPX 794-821. Stallings, a former Sea Star executive, was the government's first cooperator in its investigation into the shipping conspiracy, although he did not testify at Peake's trial. Stallings's lawsuit sought damages for "injuries to the United States Government resulting from Defendants' fraudulent course of conduct

[5] The *qui tam* provisions of the False Claims Act permit whistleblowers (known as "relators") to bring certain fraud claims on behalf of the United States. 31 U.S.C. § 3730(b). These actions "are filed under seal and remain that way for at least 60 days" to give "the government an opportunity to assess the relator's complaint and decide whether to intervene and assume primary responsibility for prosecuting the case." *United States ex rel. Heineman-Guta v. Guidant Corp.*, 718 F.3d 28, 30 (1st Cir. 2013) (citing 31 U.S.C. § 3730(b)(2), (b)(4), (c)(1)). Regardless of whether the government intervenes, a relator is entitled to a portion of the proceeds from the lawsuit. 31 U.S.C. § 3730(d).

and conspiracy to allocate customers, rig bids, fix rates, surcharges and other fees for Puerto Rican Cabotage which resulted in the submission of false or fraudulent claims to the Government." APPX 794.

The complaint identified Peake as member of the conspiracy. Consistent with the testimony of Peake's co-conspirators, *see supra* pp. 4-5 and *infra*. pp. 33-34, it identified Peake as a participant in the October 2006 meeting in Orlando, Florida, where Sea Star and Horizon Lines agreed on rate increases and discussed issues relating to their market share agreement. APPX 812-13; *see* APPX 373-78, 497-500. The complaint also described Peake's role managing disputes related to the conspiracy, resolving pricing issues with his counterpart at Horizon Lines when those issues could not be resolved by their subordinates. APPX 815; *see* APPX 112-15, 125-27, 141-42, 319-20, 325.

The lawsuit remained under seal until February 2014, when the government, represented by the Civil Division of the U.S. Department of Justice, intervened in the matter to effectuate settlements with Sea Star and Horizon Lines. Dkt. Nos. 2-4, *United States ex rel. Stallings v. Sea Star Line LLC, et al.*, No. 13-cv-52 (M.D. Fla.). Some time after the

qui tam action was unsealed, and while his direct appeal was pending, Peake discovered the *qui tam* action.

In his new trial motion based on this discovery, Peake argued that the *qui tam* action and complaint were exculpatory evidence, improperly withheld in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). He claimed that had he known about the *qui tam* action he would have called Stallings as a witness at trial. He also claimed that he would have used the *qui tam* action to impeach the testimony of Ron Reynolds, the Department of Agriculture employee who testified that the conspiracy affected interstate commerce.

On October 18, 2016, after the Supreme Court denied certiorari in his direct appeal, the district court denied Peake's motion. The court concluded that his arguments were "unpersuasive, both individually and cumulatively" and that these arguments failed to overcome the "simply overwhelming" evidence presented against him at trial. ADD 20; *see* ADD 11-17 (district court review of the "ample" trial evidence). The district court did not address the government's argument that it could not have suppressed evidence of the *qui tam* action because the

prosecutor had no actual or imputed knowledge of the *qui tam* action's existence.

Regarding Peake's claim that he would have called Stallings at trial had he known about the *qui tam* suit, the court rejected Peake's "speculation" that Stallings's testimony would have benefitted his case as "wishful thinking." ADD 19. The court similarly rejected Peake's argument that the *qui tam* action and complaint could be used to impeach Stallings's inculpatory testimony because Stallings "never provided *any* testimony during trial." *Id.* The court also pointed out that Stallings's testimony would have "opened the door to the admission of . . . guilty pleas and civil settlements that pre-dated the *qui tam* in order to demonstrate the validity of [his] initial complaint to the government in 2008." ADD 20 (internal quotations omitted).

As for Peake's claim that he would have used the newly discovered lawsuit to impeach Reynolds, the court concluded that the *qui tam* action was unrelated to Reynolds's "relatively insignificant" testimony, which only "prove[d] the interstate commerce element of a Sherman Act violation." ADD 18-19. And even if Reynolds's testimony was "rendered *entirely* incredible through impeachment, the effect on the case" would

have been "trivial" because Gabriel Lafitte's testimony was sufficient to establish the conspiracy's effect on interstate commerce. *Id*.

This appeal followed.

STANDARD OF REVIEW

This Court reviews the district court's ruling on a motion for a new trial on the basis of newly discovered evidence for manifest abuse of discretion. *United States v. Alicea*, 205 F.3d 480, 486 (1st Cir. 2000). "The trial judge, having seen and heard the witnesses at first hand, has a special sense of the ebb and flow of . . . trial," and "his views about the likely impact of newly discovered evidence deserve considerable deference." *United States v. Mathur*, 624 F.3d 498, 504 (1st Cir. 2010) (internal quotations omitted). The defendant "seek[ing] a new trial on the basis of newly discovered evidence bears [the] weighty burden" of proving that a new trial is warranted, including demonstrating that there exists a reasonable probability that the result of the trial would have been different had he possessed the evidence. *United States v. Del-Valle*, 566 F.3d 31, 38, 40 (1st Cir. 2009) (internal quotations omitted).

Whether Puerto Rico is a state for purposes of Section 1 of the Sherman Act is not properly before this Court. *See infra* pp. 40-45. If it were, this Court would review for plain error because the issue was never raised in the district court. Fed. R. Crim. P. 52(b); *United States v. Turner*, 684 F.3d 244, 260 (1st Cir. 2012).

SUMMARY OF ARGUMENT

Frank Peake is not entitled to a new trial on the basis of his claim that William Stallings's *qui tam* action is newly discovered evidence withheld in violation of *Brady v. Maryland*. A prosecutor cannot fail to disclose what he does not know, and, here, the prosecution team was unaware that Stallings had filed his *qui tam* action until long after trial. Moreover, the *qui tam* action is neither material nor favorable to Peake: nothing in the complaint exculpates Peake or makes it more likely that Stallings would have provided testimony favorable to Peake had the defense called him as a witness. Nor could it have been used to impeach Stallings—who the government never called to testify—or Ron Reynolds, who testified only about the effects of the conspiracy on interstate commerce. And in any event, Peake is not entitled to relief because he cannot overcome the "simply overwhelming" evidence of his

guilt presented at trial, ADD 20, to demonstrate a reasonable probability that disclosure of the *qui tam* suit would have led to a different outcome.

Peake's other argument—that his indictment was defective because Puerto Rico should not be considered a state for purposes of the Sherman Act—is not properly before this Court as part of this appeal. Peake failed to raise this issue in the district court, and it has nothing to do with the newly discovered evidence. The argument does not raise a jurisdictional question that can be raised at any time while the case is pending, and if it did, the time to raise such a question expired when this Court issued its mandate in Peake's direct appeal. Even if his argument were properly before this Court, it entitles him to no relief. This Court's previous, alternate holding that Peake was properly charged under Section 1 because his antitrust conspiracy affected transportation between continental states is law of the case and makes it impossible for Peake to satisfy the plain error standard.

ARGUMENT

I. Stallings's *Qui Tam* Action Does Not Entitle Peake to a New Trial.

To establish a claim that evidence was improperly withheld under *Brady v. Maryland*, a defendant must establish that evidence was suppressed by the prosecutor, either willfully or inadvertently; that the evidence is favorable to the accused, either because it is exculpatory or because it is impeaching; and that prejudice ensued. *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). To gain a new trial based on the belated disclosure of evidence that should have been made available to him in accordance with the imperatives of *Brady*, a defendant must show that: (1) the evidence was unknown or unavailable to him at the time of trial; (2) his failure to learn of it did not result from a lack of due diligence; and (3) there is a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Connolly*, 504 F.3d 206, 213 (1st Cir. 2007) (internal quotations omitted).

These two inquiries often collapse into one because evidence that the defendant claims is suppressed by the government is usually

unavailable to him at the time of trial through no fault of his own. The government agrees that Peake did not know about the *qui tam* action at the time of trial and that his failure to learn of it was not for lack of due diligence on his part. *See* Peake Br. 27-28. Thus, to prevail on his claim that newly discovered evidence should have been produced under *Brady*, Peake must establish that: (1) "the evidence was suppressed by the prosecution"; (2) "the evidence at issue is material and favorable to the accused"; and (3) he was "prejudiced by the suppression" in that there is "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Conley*, 249 F.3d 38, 45 (1st Cir. 2001).

A. The prosecutor did not suppress evidence regarding Stallings's *qui tam* action.

A prosecutor can neither disclose, nor suppress, what he does not know. Although suppression may occur, "irrespective of the good faith or bad faith of the prosecution," *Brady*, 373 U.S. at 87, its "obligations under *Brady* only extend to information in its possession, custody, or control." *United States v. Hall*, 434 F.3d 42, 55 (1st Cir. 2006).

Only evidence that the prosecutor either had actual knowledge of or imputed knowledge of, that is, evidence that was in the possession of

the prosecution team, is considered to be in the prosecutor's "possession, custody, or control." Thus, while the prosecutor has "a duty to learn of any favorable evidence known to others acting on the government's behalf in the case," *Kyles v. Whitley*, 514 U.S. 419, 437 (1995), this duty extends only as far as that information is known to members of the prosecution team, i.e. the agents, police officers, and others working on the case. *See United States v. Bender*, 304 F.3d 161, 164 (1st Cir. 2002).

Here, neither the prosecutor, nor anyone acting on the prosecutor's behalf, was aware that Stallings had filed his *qui tam* action during Peake's trial in January 2013. Stallings was not a member of the prosecution team. *See United States v. Garcia*, 509 F. App'x 40, 43 (2d Cir. 2013) ("prosecution team" does not include cooperating witnesses). Nor did the prosecution team include any attorneys from the Fraud Section of the Civil Division's Commercial Litigation Branch, who were responsible for reviewing the *qui tam* complaint after it was filed and for assessing whether the United States should intervene in case. U.S. Dep't of Justice, *Crim. Resource Manual* § 932 (describing role of Commercial Litigation Branch in processing *qui tam* suits).

Peake claims that the *qui tam* complaint was "created by attorneys within the same division as the prosecution team, who worked within the same office in which Peake's prosecution team worked." Peake Br. 23. This is not true. The criminal investigation and prosecution were handled by attorneys from the Antitrust Division's Washington Criminal I Section (formerly known as the National Criminal Enforcement Section) and the Antitrust Division's San Francisco Field Office. Stallings's *qui tam* complaint was drafted by his personal attorneys. APPX 821 (complaint signature page). And while the Civil Division was responsible for reviewing the complaint, the Civil Division is not the Antitrust Division, nor do Civil Division lawyers work in the same office as Antitrust Division lawyers.

In fact, the prosecution team did not learn of Stallings's *qui tam* action until June 2013, well after Peake's trial had ended, when attorneys for the Civil Division inquired whether the Antitrust Division had evidence that one of the ocean freight carriers serving Puerto Rico had colluded with competitors on government contracts. *See* Dkt. No. 101-1, *United States v. Farmer*, No. 13-cr-162 (D.P.R. Apr. 16, 2014).

Peake, relying on an out-of-context quote and the dictionary definition of the word, argues that the government is a "monolith" and that the entire federal government "with all its departments and divisions" should be treated as a single entity for *Brady* purposes. Peake Br. 24-25. Not only is this argument incorrect, but it is beyond cavil that the prosecution team does not include the whole federal government, such that the Constitution would require the production of all favorable information to a defendant no matter who possesses it. "[K]nowledge on the part of persons employed by a different office of the government does not in all instances warrant the imputation of knowledge to the prosecutor, for the imposition of an unlimited duty on a prosecutor to inquire of other offices not working with the prosecutor's office on the case in question would inappropriately require [the Court] to adopt 'a monolithic view of government' that would 'condemn the prosecution of criminal cases to a state of paralysis.'" *United States v. Avellino*, 136 F.3d 249, 255 (2d Cir. 1998) (quoting *United States v. Gambino,* 835 F. Supp. 74, 95 (E.D.N.Y.1993), *aff'd,* 59 F.3d 353 (2d Cir.1995)).

"[G]overnment agents not working with the prosecution" in a given case, therefore, are not acting on the government's behalf in the case in any way cognizable under *Brady*. *Hall*, 434 F.3d at 55. Even when parallel criminal and civil proceedings are ongoing, the fact that agents of a large federal agency "participated in [the criminal case] does not mean that the entire [agency] is properly considered part of the prosecution team." *United States v. Pelullo*, 399 F.3d 197, 218 (3d Cir. 2005) (finding no *Brady* violation where "civil investigators who possessed the documents at issue played no role in [the] criminal case" against the defendant); *cf. Moreno-Morales v. United States*, 334 F.3d 140, 146-47 (1st Cir. 2003) (finding state's knowledge and possession of potential impeachment evidence cannot be imputed to federal prosecutor).

Peake cites *United States v. Levasseur*, 846 F.2d 786 (1st Cir. 1988), and *United States v. Kattar*, 840 F.2d 118 (1st Cir. 1988), for the propositions that the government is a "monolith," 846 F.2d at 798, and that the Department of Justice's "various offices ordinarily should be treated as an entity, the left hand of which is presumed to know what the right hand is doing," 840 F.2d at 127. Both cases are inapposite.

Levasseur presented only the question whether judicial estoppel can be invoked against the government in a criminal prosecution; *Brady* was not at issue in the case at all.[6] 846 F.2d at 792-95. Nor did the *Kattar* Court address a *Brady* issue: it considered only whether the prosecution had knowingly elicited false testimony, contradicted by a footnote in the government's brief in an unrelated case. 840 F.2d at 125-27.

Peake also relies on internal Department of Justice guidance for prosecutors regarding criminal discovery that suggests prosecutors should review the files of parallel, ongoing civil proceedings for *Brady* evidence. Peake Br. 26 (citing Memorandum from David W. Ogden, Deputy Attorney General, for Department Prosecutors re: Guidance for Prosecutors Regarding Criminal Discovery (Jan. 4, 2010), at ¶B.4 ("*Brady* Memo")). This guidance does not apply to the situation presented here, however, when the prosecutors only learned of the existence of the civil action after the criminal trial had ended. And in any event, the guidance in the memorandum is nonbinding and creates

[6] The language Peake relies on was not from this Court's decision in that case, but was from the district court opinion being overturned by the panel in that case, appended to this Court's decision as part of Judge Bownes's dissent. 846 F.2d at 795 n.1 (Bownes, J., dissenting).

no enforceable right for defendants. *See Brady* Memo, at Intro. (the memorandum "provides prospective guidance only and is not intended to have the force of law or create or confer any rights, privileges, or benefits"); *see also United States v. Horne*, 714 F.2d 206, 207 (1st Cir. 1983).

Lastly, Peake argues that a *Brady* violation results "from the failure to disclose evidence of which the prosecution should have known," Peake Br. 23, and cites *United States v. Casas*, 356 F.3d 104 (1st Cir. 2004) in support. *Casas* does not support his argument. That case stands only for the proposition that the government is required to turn over evidence in its possession "when the prosecution or others acting on its behalf knew or should have known of its materiality." *Id.* at 116.

B. Evidence regarding Stallings's *qui tam* action is neither material nor favorable to Peake.

Even if the prosecutor had erroneously suppressed evidence of Stallings's *qui tam* action and complaint, Peake would still be required to prove that the action and complaint were "material and favorable" to him. *Conley*, 249 F.3d at 45. Peake fails to provide a coherent, let alone persuasive, explanation for how the *qui tam* suit would have benefitted him at trial.

1. Peake argues that he would have called Stallings to testify at trial had he been aware of the *qui tam* action and complaint. But as the district court found, "[t]he thought that" Stallings's "testimony would have saved the day sounds like wishful thinking. There is only speculation that" his "testimony would have benefitted [Peake's] case at all." ADD 19. Most of the evidence that Peake claims Stallings would have provided at trial is unrelated to the *qui tam* suit. And it was provided to Peake in discovery and was presented to the jury, anyway. The remainder of the evidence that relates to the *qui tam* action is either inculpatory or inconsequential.

The principal problem with Peake's position is that he claims Stallings would have testified on a raft of topics that have nothing to do with either the existence of the *qui tam* suit or the substance of the *qui tam* complaint. His brief includes a list of topics, Peake Br. 32, so untethered from the "newly discovered evidence" at issue here that he received extensive discovery on them and evidence about them was in the trial record already.

For instance, Peake claims that Stallings would have testified about "how the conspiracy began (in 2002 with [Leonard] Shapiro and

[Gabriel] Serra)." *Id.* The 2013 filing of a *qui tam* lawsuit does not constitute evidence about the start of a conspiracy 11 years earlier. And in any event, that information was not unknown to the defendant. To the contrary, one of Peake's co-conspirators testified that Shapiro and Serra first entered into an agreement to allocate the market for shipping services between Florida and Puerto Rico in 2002. APPX 348.

Peake also makes much of Stallings's ability to testify to Peake's absence from "any of the 17 undercover Stallings recordings made at the direction of the government" and how this absence demonstrates Peake's "lack of knowledge in the conspiracy." Peake Br. 32. Peake fails to explain, because he cannot explain, how the filing of a *qui tam* suit by Stallings or anything in the *qui tam* complaint makes this piece of evidence more favorable to his case—especially given that the government provided the recordings to the defense.[7] As Peake admits in his brief, he began his opening argument "by discussing Stallings and his failure to record Peake." Peake Br. 30; *see* APPX 56. The

[7] Peake asserts that the government erred in failing to timely produce one of the audio tapes to him. As noted, *supra* pp. 5 n.3, the tape was not "exculpating" and is not the subject of this appeal.

government, though, never played, let alone relied, on these tape recordings at trial. And Peake did not offer them either.

Most of the rest of Peake's list suffers from the same problems. *See* Peake Br. 32. The *qui tam* action and complaint were irrelevant to and evidence was already provided in discovery and admitted in the trial record regarding: "the involvement of Stallings and others in the conspiracy," *see* APPX 55; Stallings's involvement in the price-fixing investigation, *see* APPX 54-56; "the knowledge of Stallings as to the participants in the conspiracy," *see id.*; and the role of Peter Baci, Peake's subordinate, in the conspiracy, *see* APPX 289 (Baci testifying that he "managed the conspiracy on a day-to-day basis"). Peake had all of the evidence that he needed to make the arguments he claims that he would have made—and, in fact, did make.

Peake had the opportunity to call Stallings as a trial witness and chose not to, despite making him a central piece of his opening statement. APPX 54-56. He now claims that he was going to, Peake Br. 30, but abandoned that plan during trial because he grew concerned that "Stallings would be uncooperative[,] and it would be very difficult to pin him down based on the available impeachment material." Peake

Br. 31. This claim, though, cannot be squared with the facts: Peake never sought a trial subpoena for Stallings, who lives in Florida and would not otherwise be under any obligation to come to Puerto Rico to testify. And Peake did not identify Stallings as a trial witness on his final witness list exchanged with the government. *See* Dkt. No. 253-1, at 10-11.

Peake does claim that Stallings would have testified to one topic related to the *qui tam* complaint: "the stark absence of Frank Peake in the *qui tam* Complaint, except for two relatively inconsequential passing references." Peake Br. 32. But these "inconsequential" references are actually highly inculpatory and would not have been favorable to Peake. They identify him as an active member of the conspiracy and are consistent with the testimony of his co-conspirators at trial: (1) The complaint references Peake as a participant at the October 2006 meeting in Orlando where Sea Star and Horizon agreed on rate increases and discussed issues relating to their market share agreement. APPX 812-13; *see also* APPX 373-78, 497-500. And (2) it describes how he was called upon to address and resolve certain pricing issues with Serra, his counterpart at Horizon Lines, when those issues

could not be resolved by their subordinates. APPX 815; *see also* 804 F.3d at 85; APPX 112-15, 125-27, 141-42, 319-20, 325.

Peake's related argument that the *qui tam* complaint is favorable to him because it does not identify him as a defendant also fails. Peake Br. 31-32. The complaint names only one individual as a defendant, Leonard Shapiro. It does not name any of Peake's testifying co-conspirators as defendants, despite that all three of them pleaded guilty to participating in the charged conspiracy and implicated Peake in that conspiracy. The complaint itself, then, does Peake no favors.

Lastly, Peake claims that the existence of the *qui tam* action would have been favorable to him because it demonstrates the "close association between the government and Bill Stallings" and "the financial interest of Stallings in the outcome of Peake's trial." Peake Br. 32. While this evidence could go to Stallings's bias to testify in favor of the government, his argument suffers from an essential problem: the government never called Stallings to testify on its behalf. The government has "no obligation to turn over evidence that could impeach the testimony" of a witness that it "did not call . . . at trial." *Mosley v. City of Chi.*, 614 F.3d 391, 399 (7th Cir. 2010). *See also United States v.*

Cunan, 152 F.3d 29, 35 (1st Cir. 1998) (holding that "withheld information in th[e] case was not material for *Brady* purposes" because the "impeachment evidence would only have been valuable if a [nontestifying witness] had actually been called as a witness").

Regardless, even if the government had called Stallings to testify, his filing a *qui tam* suit would have been fairly weak impeachment evidence. It was well known to Peake that Stallings worked closely with the government and sought to gain through his cooperation with them. APPX 54-56. And any evidence that Stallings had a "financial interest . . . in the outcome of Peake's trial," Peake Br. 32, "pales in comparison to the standard impeachment he surely would have been subjected to as a result of his cooperation to avoid criminal charges." ADD 19-20.

2. Peake also attempts to prove the materiality and favorableness of the *qui tam* action and complaint by arguing that he would have used them to cross-examine Ron Reynolds, the Department of Agriculture employee who testified to the conspiracy's effect on interstate commerce, "as to his bias and motive to assist the Government." Peake

Br. 34. Reynolds's testimony at trial, however, was unrelated to Stallings's *qui tam* action.

Reynolds testified that the Department of Agriculture "used Sea Star and Horizon [Lines] to ship goods from the United States to Puerto Rico" during the conspiracy, and "explained that the shipping rates provided to the [Department of Agriculture] were final and nonnegotiable, which would arguably tend to make the price-fixing conspiracy simpler to carry out." ADD 18. The existence of the *qui tam* complaint does nothing to undermine this testimony about interstate commerce. And no jury would view his testimony—which Peake admits was not contested, Peake Br. 11—as less credible because of a then-under seal *qui tam* action, filed a mere 3 days earlier, that the witness could not have known about.

And even if Peake's cross-examination were to render Reynolds's testimony incredible, Gabriel Lafitte's uncontroverted testimony would have served the same purposes of establishing the conspiracy's effect on commerce. APPX 236, 241-42; *see also* ADD 18-19 ("[T]he government did not even require" Reynolds's "testimony to establish the price-fixing

conspiracy's *de minimis* effect on interstate commerce; that void was filled by the testimony of Gabriel Lafitte.").

3. Lastly, Peake attempts to prove the materiality and favorableness of the *qui tam* action and complaint by arguing that he would have renewed his motion to transfer the case to the U.S. District Court for the Middle District of Florida had he known about the lawsuit.[8] Peake Br. 34-35. (The *qui tam* lawsuit was filed in that court.) Peake did not make this argument below, and it is therefore waived. *Teamsters, Chauffeurs, Warehousemen & Helpers Union, Local No. 59 v. Superline Transp. Co.*, 953 F.2d 17, 21 (1st Cir.1992).

Even if he had made the argument before the district court, he would not be entitled to relief because the *qui tam* action's filing in the Middle District of Florida is not relevant to his guilt or punishment. *Brady*, 373 U.S. at 87; *see United States v. Bagley*, 473 U.S. 667, 674-75 (1985);

[8] In connection with this argument, Peake accuses the government of "snooker[ing]" the U.S. District Court for the Middle District of Florida "into imposing inappropriately high sentences." Peake Br. 4-5 (citing Dkt. No. 44, *United States v. Serra*, No. 08-cr-349 (M.D. Fla. May 12, 2009)). The district court in that case made clear that the government had requested and that it was imposing the "legally correct sentence" and stated on the record that it had "no reason to question the professionalism, integrity, or good faith of the government lawyers" in that case. Dkt. No. 44, at 123-24, *Serra* (M.D. Fla. May 12, 2009).

United States v. Halloran, 821 F.3d 321, 341-42 (2d Cir. 2016). The *qui tam* action's filing in that district is not even relevant to Peake's motion to change the venue for his criminal trial. *See* 804 F.3d at 90 (affirming the district court's denial of Peake's motion to change venue because he failed to "allege any outside influence or publicity that could have affected, from the outset of trial, the jury's consideration of the evidence presented"). And in any event, the *qui tam* action was filed long after the change of venue motion was filed and denied, and thus could not have affected that ruling. Indeed, it was filed after the trial had begun and jeopardy attached, and it is thus doubtful that the court would have—or could have—granted a renewed venue change motion even had Peake brought the *qui tam* action to the court's attention the moment the *qui tam* was filed.

C. The outcome of Peake's trial would have been the same even if he had known about Stallings's *qui tam* complaint.

Even if Peake were correct that the government had suppressed material, favorable, and exculpatory evidence, he would still have to demonstrate that he was "prejudiced by the suppression," that is, that there is a "reasonable probability that, had the evidence been disclosed

to the defense, the result of the proceeding would have been different." *Conley*, 249 F.3d at 45.[9] This he cannot do because "the government's case was robust," 804 F.3d at 95: a "devastating amount of evidence [was] presented against [Peake] during trial," ADD 17.

Three of Peake's co-conspirators testified against him, detailing his involvement in the conspiracy and recounting specific discussions with him about "setting surcharges, fees, and market share allocations." 804 F.3d at 85. And the government introduced contemporaneous emails, travel and phone records, and other documentary evidence to corroborate the co-conspirators' testimony.

"Although the evidence at trial showed that Sea Star's Peter Baci and Horizon[Line]'s Gregory Glova handled the day-to-day operations of the conspiracy," Peake—as Sea Star's President and Chief Operating Officer—and his counterpart at Horizon Lines, Gabriel Serra, were responsible for "ultimately resolv[ing] the difficult issues that confronted the conspiracy." ADD 11; *see also* 804 F.3d at 85; APPX 127-29, 316-20, 323-25, 435-38, 464-65. For instance, "[w]henever there was

[9] Because Peake cannot meet the prejudice standard which applies to motions for new trial based on newly discovered *Brady* evidence, he cannot meet the more stringent standard which applies to newly discovered non-*Brady* evidence. *Connolly*, 504 F.3d at 212-13.

a pricing dispute, it was [Peake] and Gabriel Serra who would converse and make a final determination." ADD 12.

Peake's co-conspirators testified to his participation at one meeting in Orlando where "the co-conspirators discussed and agreed in principle upon the prices and rates of shipping, fuel surcharges, and port surcharges for 2007" and hashed out details regarding which cargo would be included in their allocation of the market for shipping services between Florida and Puerto Rico and how "to let each other win certain accounts in order to make up for any market share imbalance." ADD 13; *see also* APPX 148-49, 179, 365-67, 373-75, 493-94, 497-500, 508-11, 761, 762, 763-64, 765, 768-70, 771-73.

This Court had a similar view of this evidence on direct appeal, describing how "during a meeting in Orlando in 2006, Peake coordinated with Horizon Lines executives to resolve existing disputes by agreeing to keep the market shares at their current levels." 804 F.3d at 85. And the Court also explained how "when Walgreens, a major importer of consumer goods to Puerto Rico, decided not to divide freight contracts between Horizon Lines and Sea Star, and instead allocated all of its freight to Horizon Lines," Peake "quickly agreed with an executive

from Horizon Lines" about how Horizon Lines "would compensate [Sea Star] by shifting cargo to Sea Star vessels." *Id.*; *see also* APPX 467-68.

Peake's co-conspirators also testified that Peake "advocated and obtained an agreement from Horizon [Lines] to charge higher fuel surcharges on longer routes." ADD 15. On Peake's urging, "Horizon [Lines] agreed to start charging higher fuel surcharges on longer routes, with Sea Star agreeing to match Horizon[Line's] May 2007 bunker fuel surcharge increase in return." *Id.*; *see also* APPX 191-93, 535-36; 778-79.

Nothing in the *qui tam* complaint undermines, let alone contradicts, this testimony or documentary evidence. To the contrary, they support each other. Stallings's *qui tam* complaint refers to Peake as a participant at the October 2006 meeting in Orlando. APPX 812-13. And it describes how he was called upon to address and resolve certain issues related to the conspiracy with his counterpart at Horizon Lines. APPX 815.

What's more, Peake does not engage with the mounds of evidence against him. Instead he chooses to rehash ancillary issues already decided against him. For instance, Peake makes much of the fact that

the district court once referred to this as a "close case." Peake Br. 35; *see* Dkt. No. 241, at 8 ("The Court thanks both of you for what I consider a very close case at the end . . ."). But the district court's polite, salutatory comment carries little, if any, weight compared to its detailed review of the evidence and its unequivocal finding, issued as part of a ruling in which it was required to consider the weight of the evidence, that the government presented a "devastating amount of evidence" against Peake, ADD 17, including the "voluminous record of emails to and from [Peake] relating to numerous conspiratorial actions," ADD 20. *See also* 804 F.3d at 93.

Peake also claims in a footnote that the district court erred in refusing to hold an evidentiary hearing on his motion for new trial for newly discovered evidence. Peake Br. 29 n.2. "[A]rguments raised only in a footnote . . . are waived." *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 60 n.17 (1st Cir. 1999). And in any event, "evidentiary hearings on new trial motions in criminal cases are the exception rather than the rule." *Connolly*, 504 F.3d at 220. There is nothing exceptional about this case warranting a hearing. The district court knew the record in the case, having presided over trial, and the *qui tam*

complaint was before it as an attachment to Peake's motion. Dkt. No. 246-1. The decision not to hold a hearing was an easy one, given the overwhelming evidence against Peake and the negligible, if any, value the complaint would have had for the defense. *Cf.* 804 F.3d at 95-96 (detailing evidence against Peake). In these circumstances, the district court did not abuse its discretion in declining to hold a hearing. *See United States v. Hall*, 557 F.3d 15, 20 (1st Cir. 2009) (affirming the denial of a new trial motion without a hearing when the court had access to supposedly impeaching evidence attached to the motion).

Lastly, Peake argues that the district court failed to account for "the prosecution's improper emphasis on the jurors as personal victims of the conspiracy" when performing its prejudice analysis. Peake Br. 29. In doing so, Peake relies on a distorted recounting of the proceedings. The jury was not "told over and over that they were personally harmed by the conspiracy." Peake Br. 36. The government never argued that the jurors or their families were victims of the conspiracy, *see* 804 F.3d at 93 (describing government's opening statement), and no witnesses testified that the conspiracy affected the prices paid by anyone other than companies purchasing freight services from the conspiring

carriers, *see id.* at 97 ("The witnesses never stated that the higher costs incurred by the direct customers of the shipping companies were indirectly transferred to their consumers."). This Court concluded that several remarks in the prosecutor's opening statement were "improper," *id.* at 94, but it held that those remarks were harmless based on "the extent and the level of detail the district court included in its curative instruction," given both on the heels of the prosecutor's remarks and before jury deliberations, *id.*, and the co-conspirator testimony and "overwhelming amount of corroborating documentary evidence that tied [Peake] to the conspiracy," *id.* at 95.

Moreover, nothing about the *qui tam* action would have aggravated the improper appeals in the prosecutor's opening statement or undermined the district court's curative instruction. Peake provides no authority standing for the proposition that a district court must explicitly account for unrelated, harmless errors when addressing a later-filed motion for new trial. And the district court, as the trial judge for the entirety of Peake's trial, was undoubtedly aware of the prosecutor's comments and this Court's decision in Peake's prior appeal

when it denied the motion for new trial. That it chose not to explicitly address the comments in its opinion is not error.

II. Whether Puerto Rico is a State for Purposes of the Sherman Act is Not Before this Court in this Appeal.

Peake was charged with violating Section 1 of the Sherman Act, which outlaws agreements in restraint of trade "among the several States." 15 U.S.C. § 1. On direct appeal, he argued that Section 1 does not reach his conduct because Puerto Rico is not a state for purposes of the Sherman Act. This Court rejected that argument for two, independent reasons: First, well-settled circuit precedent holds that "for purposes of the Sherman Act, Puerto Rico is 'to be treated like a state and not a territory,' [and] therefore Section 1 fully applies to Puerto Rico." 804 F.3d at 86 (quoting *Cordova & Simonpietri Ins. Agency Inc. v. Chase Manhattan Bank N.A.*, 649 F.2d 36, 38, 44 (1st Cir. 1981)). Second, and alternatively, "part of the freight carried by the companies in the conspiracy originated in one state before being transported to a port in a second state to be shipped to Puerto Rico," and, therefore, he was "correctly charged." *Id.; see* APPX 102-05, 133-38 (co-conspirator testimony that all rate components were fixed, including

the "intermodal fuel surcharge"); *id.* at 277 (co-conspirator testimony that the conspiracy affected "[a]ll services" including "inland freight").

Peake makes this argument again in this appeal. But this issue is not properly before this Court. And even if it were, it would not entitle him to any relief.

1. This appeal is from the district court's denial of Peake's motion for a new trial based on newly discovered evidence. APPX 33. Nowhere in that motion did he raise the issue whether Puerto Rico is to be treated as a state for purposes of the Sherman Act. Nor did he raise it with the district court at any other time. 804 F.3d at 85. "It is well established that a party may not unveil an argument in the court of appeals that he did not seasonably raise in the district court." *David v. United States*, 134 F.3d 470, 474 (1st Cir. 1998); *United States v. Slade*, 980 F.2d 27, 30 (1st Cir. 1992) (applying this principle in the context of a motion for new trial on the basis of newly discovered evidence). Peake failed to raise this issue with the district court, and he is procedurally defaulted from doing so here. *Singleton v. United States*, 26 F.3d 233, 239-240 (1st Cir. 1994) (claims not raised in motion collaterally attacking conviction will not be reviewed on appeal).

Peake claims his argument that the indictment was insufficient because Puerto Rico is not a state for purposes of the Sherman Act is a jurisdictional one and that, therefore, "the court may hear a claim that the indictment or information fails to invoke the court's jurisdiction" at "any time while the case is pending," including on collateral review and when the issue was not raised in the district court. Peake Br. 37 n.3. That claim is mistaken in several ways.

First, whether the government sufficiently alleged or proved conduct proscribed by a statute is a merits question, not a question of subject-matter jurisdiction. *See Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 253-254 (2010). And the Supreme Court has made clear that a defective indictment does not deprive a court of jurisdiction. *United States v. Cotton*, 535 U.S. 625, 630-31 (2002); *see also United States v. George*, 676 F.3d 249, 259-60 (1st Cir. 2012) ("Supreme Court precedent makes transparently clear that an indictment's factual insufficiency does not deprive a federal court of subject matter jurisdiction."); *United States v. Rayborn*, 312 F.3d 229, 231 (6th Cir. 2002) (holding that the interstate-commerce element of a criminal statute is not jurisdictional).

The difference is reflected in Rule 12 of the Federal Rules of Criminal Procedure, which distinguishes between "motion[s] that a court lacks jurisdiction," which may be filed "at any time while the case is pending," Fed. R. Crim. P. 12(b)(2), and motions alleging a "defect in the indictment or information, including . . . failure to state an offense," which must be brought before trial, Fed. R. Crim. P. 12(b)(3)(B)(v). Peake, though, incorrectly claims that motions brought under Rule 12(b)(3)(B) may be brought "while the case is pending." Peake Br. 37.[10]

Peake's reliance on *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232 (1980), and *United States v. Rosa-Ortiz*, 348 F.3d 33 (1st Cir. 2003), to argue that his argument sounds in jurisdiction fails. While the Supreme Court referred to the Sherman Act's interstate commerce element as "jurisdictional" in *McLain*, it has since acknowledged that "the word 'jurisdiction' has been used by courts, including [the Supreme] Court to convey many, too many, meanings" and clarified that "[s]ubject-matter jurisdiction properly comprehended" refers only to a "tribunal's power to hear a case." *Union Pac. R.R. v.*

[10] Rule 12(b)(2) was relocated from Rule 12(b)(3) when the Federal Rules of Criminal Procedure were amended in 2014.

Brotherhood of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment, 558 U.S. 67, 81-82 (2009) (internal quotations and citations omitted). *Rosa-Ortiz* is a prime example of this phenomenon, and the First Circuit has since clarified that the *Rosa-Ortiz* Court "akward[ly]" used the term "jurisdiction" when it meant to refer to a "non-waivable defect." *George*, 676 F.3d at 260.

Second, even if Peake's argument were jurisdictional, this appeal would not be the proper vehicle for it because it is out of time. While an "objection to subject matter jurisdiction is not waivable," *United States v. Vargas-De-Jesús*, 618 F.3d 59, 63 (1st Cir. 2010), and may be raised at any time "while the case is pending," Fed. R. Crim. P. 12(b)(2), a case is no longer pending for purposes of Rule 12(b)(2) when a mandate is issued on direct appeal. *See United States v. Elso*, 571 F.3d 1163, 1166 (11th Cir. 2009) (per curiam); *cf. Barreto-Barreto v. United States*, 551 F.3d 95, 100 (1st Cir. 2008) (holding that a case is no longer pending for purposes of Rule 12 after a final judgment has been entered and no direct appeal taken). The Court issued its mandate on Peake's direct appeal on December 24, 2015. Mandate, *United States v. Peake*, No. 14-1088 (1st Cir. Dec. 24, 2015). Peake's time to raise jurisdictional issues

expired on that day. Peake cannot, therefore, raise his argument as part of this appeal.[11]

This rule affords respect and finality to duly entered judgments. Peake's proposed gloss would allow convicted defendants to raise garden-variety arguments—that an element was not properly alleged in the indictment or sufficiently proven at trial—under the cloak of "jurisdiction" at any point.

Peake, though, could not even have raised the argument in the district court as part of the motion that serves as the basis for this appeal. No matter how grave the error alleged, a defendant proceeding with a claim that he is entitled to a new trial on the basis of newly discovered evidence must prove that there exists evidence that is newly discovered. *See United States v. Desir*, 273 F.3d 39, 44 (1st Cir. 2001). "An interpretation that would consider facts known at the time of trial to be 'newly discovered,' if cloaked in the garb of a" collateral attack on a conviction, "flies in the face of the plain meaning of the rule." *United States v. Lema*, 909 F.2d 561, 565-66 (1st Cir. 1990). While Peake

[11] While Peake filed his new trial motion before the mandate issued, *see* Dkt. No. 246, he did not include this issue in his motion. The first time this issue was raised in this collateral proceeding was in his brief to this Court filed on December 27, 2016.

argues that intervening Supreme Court precedent, *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863 (2016), abrogates this Court's prior reliance on *Cordova*, 649 F.2d 36, a "change in the law does not constitute newly discovered evidence for purposes of Rule 33." *United States v. King*, 735 F.3d 1098, 1109 (9th Cir. 2013). Peake's challenge to the indictment is thus not based on any new evidence at all—as demonstrated by the fact that he is not asking for a new trial, but rather to have his conviction vacated and indictment dismissed for lack of jurisdiction.

2. Even if Peake's claim that his conviction must be vacated because Puerto Rico is not a state for purposes of Section 1 were properly before this Court in the posture that he claims, he would not be entitled to any relief.

The law of the case doctrine "precludes relitigation of the legal issues presented in successive stages of a single case once those issues have been decided." *Cohen v. Brown Univ.*, 101 F.3d 155, 167 (1st Cir. 1996). A prior panel of this Court ruled on this exact issue and concluded that "Peake was correctly charged, and the indictment is not defective" on two independent grounds: (1) that Peake's arguments were

foreclosed by *Cordova*; and (2) that the government had pleaded and proved a conspiracy affecting interstate commerce in the more common state-to-state sense. 804 F.3d at 86. This Court denied en banc rehearing of that ruling. Order, *United States v. Peake*, No. 14-1088 (1st Cir. Dec. 15, 2015) (denying rehearing en banc). And the Supreme Court denied Peake's petition for certiorari seeking review of that ruling. 137 S. Ct. 36 (2016).

Peake argues that the Supreme Court's opinion in *Sanchez Valle*, 136 S. Ct. 1863, issued after this Court's ruling in his previous appeal, effectively overruled *Cordova* and makes this question ripe for reconsideration. Peake Br. 38; *see Ellis v. United States*, 313 F.3d 636, 648 (1st Cir. 2002) ("[R]econsideration may be warranted if there has been a material change in controlling law."). This panel, however, need not grapple with that argument because this Court's prior alternative holding in this case is independent of whether Puerto Rico is treated as a state for purposes of the Sherman Act. In the prior appeal, this Court held that Peake was properly charged under Section 1 because his antitrust conspiracy affected transportation between states, that is, states in the continental United States. That holding would not be

affected even if *Cordova* were actually overruled, nor is that holding subject to any of the exceptions to the law of the case doctrine. *Id.* at 647-48 (identifying exceptions). It cannot be jettisoned in this appeal. And that holding alone is enough to sustain Peake's conviction under Section 1 of the Sherman Act.

Moreover, because Peake never argued to the district court that the indictment was insufficient because Puerto Rico is not a state for purposes of the interstate-commerce element of Section 1, that argument would be reviewed only for plain error.[12] *See* Fed. R. Crim. P. 52(b); *see also* Fed. R. Crim. P. 12(b)(3)(B) (defect in the indictment must be raised in a pretrial motion). Plain error review would require a showing by appellant that the error (1) was "clear or obvious, rather than subject to reasonable dispute"; (2) "affected [his] substantial rights"; and (3) "seriously affect[ed] the fairness, integrity, or public

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[12] In his prior appeal, Peake conceded that he failed to raise this argument in the district court but contended that it was jurisdictional. See Reply Br. 25 n.9, *United States v. Peake*, No. 14-1088 (1st Cir.). As explained above, that is incorrect. *See supra* pp. 41-43; *Morrison*, 561 U.S. at 253-54 (holding that the question of a statute's reach is a "merits question," not a question of "subject-matter jurisdiction"). This Court did not decide whether the issue was jurisdictional because it rejected the argument on the merits. 804 F.3d at 85-86 n.1.

reputation of judicial proceedings." *United States v. Marcus*, 560 U.S. 258, 262 (2010) (citation omitted). He cannot make any of the required showings. In particular, as the alternative holding recognizes, the price-fixing conspiracy undeniably fixed prices for transportation between states in the continental United States. And all Section 1's interstate-commerce element requires is that the business activity at issue—here, the transportation whose prices the conspirators fixed—had a "substantial effect on interstate commerce" or that the illegal activity took place in the flow of interstate commerce. *McLain*, 444 U.S. at 242-43. Thus there was no clear, obvious error; no effect on Peake's substantive rights; and no basis to believe there has been an effect on the fairness, integrity, or public reputation of judicial proceedings. Peake was justly convicted for violating Section 1 of the Sherman Act.

CONCLUSION

This Court should affirm the judgment of the district court.

Respectfully submitted.

February 2, 2017 /s/ Sean Sandoloski

BRENT SNYDER
Acting Assistant Attorney General

LISA M. PHELAN
Attorney
U.S. Department of Justice
Antitrust Division

JAMES J. FREDRICKS
SEAN SANDOLOSKI
Attorneys
U.S. Department of Justice
Antitrust Division
950 Pennsylvania Ave., NW
Room 3224
Washington, DC 20530
(202) 353-0093

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 9,921 words, excluding the parts of the brief exempted by Rule 32(f).

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

February 2, 2017

/s/ Sean Sandoloski
Attorney

CERTIFICATE OF SERVICE

I, Sean Sandoloski, hereby certify that on February 2, 2017, I electronically filed the foregoing Brief for the United States of America with the Clerk of the Court of the United States Court of Appeals for the First Circuit by using the CM/ECF System. Upon notification of the paper copy due date, pursuant to Local Rule 31.0(a)(1), I will send nine copies to the Clerk of the Court by FedEx. I certify that service will be accomplished by the CM/ECF system.

February 2, 2017

/s/ Sean Sandoloski
Attorney