UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA	)	
	)	Case No. 97-0853-CR-Middlebrooks
v.	)	
	)	
ATLAS IRON PROCESSORS, INC.,	)	
et al.,	)	**RESPONSE OF THE UNITED STATES**
	)	**TO MOTION OF DEFENDANT WEIL**
Defendants.	)	**FOR RELEASE ON BAIL PENDING APPEAL**

The United States submits this Memorandum in response to the *Motion of Defendant Weil for Release on Bail Pending Appeal*. For the reasons provided below, this Court should deny the Weil's motion.

I

BOND PENDING APPEAL IS DISCOURAGED BY LAW

The Bail Reform Act of 1984, 18 U.S.C. § 3143(b) (1998), governs the release of defendants on bond pending appeal. The Bail Reform Act requires that (1) the appeal raise a "substantial question of law or fact" and (2) "if that substantial question is determined favorably to the defendant on appeal, that decision is likely to result in reversal or an order for a new trial on all counts on which imprisonment has been imposed." United States v. Giancola, 754 F.2d 898, 900 (11th Cir. 1985). In Giancola, the Eleventh Circuit adopted the Third Circuit's interpretation of the Bail Reform Act set forth in United States v. Miller, 753 F.2d 19 (3rd Cir. 1985). The Eleventh Circuit explained that the Third Circuit's interpretation of the 1984 Bail Reform Act achieved Congress' intent to limit the availability of bail pending appeal and to reverse the previous presumption in favor of bail. Giancola, 754 F.2d at 900. The Eleventh Circuit stressed the Bail Reform Act "was intended to change the presumption so that the conviction is presumed correct and the burden is on the convicted defendant to overcome that presumption." Id. at 900, 901 (internal citations omitted).

With respect to the Bail Reform Act's first requirement, that the appeal raise a substantial question of law or fact, Miller defined a substantial question as "one which is either novel . . . has not been decided by controlling precedent, or . . . is fairly doubtful." Miller, 753 F.2d at 23. The Eleventh Circuit observed, however, that an issue without controlling precedent may nonetheless be an insubstantial question.[1] Giancola tightened the Miller standard in yet another way, holding that "a substantial question is one of more substance than would be necessary to a finding that it was not frivolous. It is a 'close' question or one that very well could be decided the other way." Giancola, 754 F.2d at 901.

With respect to the Bail Reform Act's second requirement, that a decision is likely to result in reversal or an order for a new trial of all counts, Giancola held that it goes to the "significance of the substantial issue to the ultimate disposition of the appeal." Giancola, 754 F.2d at 900. A question may be substantial yet harmless, having nonprejudicial effect, or insufficiently preserved. Id. A reversal or new trial is "likely" only if a court concludes the question is "so integral to the merits of the conviction" that an appellate holding to the contrary will likely require reversal of the conviction or a new trial. Id.

Though Weil cites the relevant law, i.e., the Bail Reform Act of 1984 and the seminal Giancola case, the implication of Giancola seems lost on him. Weil's contention appears to be that, if he raises a "substantial" question which would result in reversal if he were to prevail on it on appeal, then he is entitled to bond pending appeal.[2] This ignores Giancola's dictate that the defendant must raise a "'close' question or one that very well could be decided the other way." 754 F.2d at 901. While some issues Weil raises might result in reversal on appeal, none of his

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[1] Such a case occurs if an issue is "so patently without merit that it has not been found necessary for it to have been resolved," or if a question is without precedent simply because there is no reason to believe the Eleventh Circuit would depart from unanimous resolution of the issue by other circuits. Giancola, 754 F.2d at 901.

[2] Weil also cites many other cases where the court granted the defendant(s) bond pending appeal. It is not enough for him to simply cite other cases where bond pending appeal was appropriate. To bolster his argument, Weil must demonstrate that the issues raised by the defendants in his examples share significant legal similarities with the issues he raises in this motion. He has not done this. Weil, therefore, has proved no more than that bond pending appeal is appropriate in circumstances not resembling his.

issues can fairly be described as "close," such that they "could very well be decided the other way." Ignoring Giancola would result in the presumption that convictions are incorrect — exactly the presumption that the Bail Reform Act of 1984 sought to reverse. The remainder of this memorandum explains why none of Weil's issues are "close" questions and, therefore, there is no basis to grant his request for bond pending appeal.

II

DEFENDANT WEIL CANNOT MEET THE HIGH STANDARD WHICH DISCOURAGES BOND PENDING APPEAL

Weil makes eight arguments, each of which he believes entitle him to bond pending appeal. For the most part, Weil's strategy is to raise an issue, cite cases where courts have reversed convictions based on that issue, and then ask this Court to reverse his conviction on that issue. What Weil generally does not do is draw similarities between the cases he cites and the issues he raises in this motion. Weil also fails to support the issues he raises with citations from the record. In fact, on some issues, Weil's allegations are so broad and his specifics so loose, knowing exactly what he objects to is impossible. Because Weil cannot prove that anything that occurred in his trial merits reversal, there is no basis to grant his request for bond pending appeal.

A. THE UNITED STATES PRESENTED SUFFICIENT EVIDENCE FOR A REASONABLE JURY TO CONVICT WEIL OF VIOLATING THE SHERMAN ACT

Weil's first issue is that the government did not present sufficient evidence to show that Weil voluntarily and intentionally agreed to the charged conspiracy. In fact, the United States presented overwhelming evidence on this point. This testimony from Henry Kovinsky as Mr. Binder questioned him is a good example:

> A. I remember Randy really accusing, almost, the Miami River Recycling, Giordanos and Sheila, mainly, for running after Danielli, for example, and giving prices or suggesting prices that were higher than what the marketplace should be. I think a lot of the discussion was the Hurricane has produced so much scrap on the marketplace and it was still very young, I believe it happened in August of that year, and it was now October, and the Hurricane was just building, and I don't think anyone realized how much scrap there was available. But the Hurricane was driving the market to some degree,

and that was evolving, and there was no need to go out and pay the kind of prices that are being offered for some of the larger auto wrecking yards, such as Danielli, especially in light of the Hurricane.

Q. How did the discussion end with regard to these customers?

A. How did the meeting — resolve of the meeting?

Q. How did the discussion end with regard to the customers, one of the subjects you mentioned?

A. It ended with a — with an agreement or an understanding that prices would be lowered to select customers.

Tr. Trans. 1506-07. This colloquy is strong evidence that Weil not only entered the conspiracy, but he was its instigator. Later, during the same questioning, this colloquy occurred:

Q. What — do you recall what Mr. Weil said to Tony Giordano, Junior about the offer to reduce prices if Miami River received tonnages?

A. Whatever that figure turned out to be, whether it was 3,000 or 4,000 tons, Mr. Weil agreed to source them that type of material or that amount of material. I can't tell you if that sourcing came from one supplier or ten suppliers, but the tonnage that was ultimately agreed to satisfied Miami River Recycling to the extent where, when we left that meeting, there was an agreement reached.

Tr. Trans. 1513. Again, this testimony shows that Weil not only a willingly joined the conspiracy, but negotiated its terms. A more thorough review of the evidence supporting Weil's leadership role in the formation and implementation of the illegal agreement is provided in the *Sentencing Recommendation of the United States* and in the government's response to Weil's objections to the presentence investigation report of the U.S. Probation Office.

In addition, Sheila McConnell testified extensively about Weil's knowing participation in the formation and implementation of the Sea Ranch agreement. McConnell testified that in addition to herself, Randy Weil; Henry Kovinsky; Anthony J. Giordano, Sr.; and Anthony J.

Giordano, Jr. were at the Sea Ranch meeting October 24, 1992. Tr. Trans. 151. A few minutes later, while Mr. Hamilton questioned McConnell, she testified:

> Q. How did this [Sea Ranch] meeting end?
>
> A. Basically, after everyone was in agreement that we had covered all of the geographic areas and the specific accounts necessary to lower the pricing, everybody sort of got up and shook hands and the meeting disbursed at that point.
>
> Q. You say lower the pricing?
>
> A. Yes.

Tr. Trans. 156. McConnell also testified:

> Q: Ms. McConnell, you were there, you were at this Sea Ranch meeting on October 24, 1992. What was the purpose of that meeting?
>
> A: The purpose of the meeting was to lower the overall pricing of the raw material that went to both shredders, the shippers of whole cars, and the shippers of flats, to get the price down.

Tr. Trans. 243.

Taken together, the testimony of eyewitness co-conspirators (Kovinsky and McConnell) is overwhelming evidence that Randy Weil knowingly joined the price-fixing and market allocation conspiracy with the Giordanos. Indeed, the business records of Sunshine and Atlas admitted at trial also show overwhelmingly that the agreement was not only made, but implemented. Nowhere in the transcript is their any evidence to refute, or even cast doubt, on this conclusion.[3] Because the evidence on this question is so one sided, this is absolutely not the type of "close" question Giancola envisions as justifying bond pending appeal. The Court, therefore, should deny Weil's motion.

B. WEIL WAS NOT PREJUDICED BY THE ADMISSION OF 404(B) EVIDENCE

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[3] Weil did not testify at trial. Accordingly, Weil's statement that at trial he denied knowingly or intentionally participating in the illegal agreement is false. Weil Motion, p. 4. Of course, the jury found otherwise.

Weil's second issue is that the Court admitted evidence of uncharged misconduct, i.e., 404(b) evidence, which substantially prejudiced his right to a fair trial. To prevail on this issue, Weil must show the Court abused its discretion by admitting certain evidence under Fed. R. Evid. 404(b). While the Court did allow 404(b) evidence that was unrelated to Weil, it also gave an instruction that made it clear that the evidence could not be considered against Weil. The Court's instruction refers to a singular "defendant."[4] If the instruction referred to "defendants" then it is at least imaginable that the jury may have believed it could hold the "other acts" of a single defendant against his co-defendants. As the Court worded the instruction, however, reading it to allow the jury to hold one defendant's "other acts" against each of his co-defendants is simply not possible.

Moreover, although the Court was not obligated to provide any additional admonition, it did so during the second of two times it gave the limiting instruction.[5] In other words, only once

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[4] The Court's instruction is reproduced below:

> If you find beyond a reasonable doubt, from other evidence in this case, that the 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 the defendant had the state of mind or intent necessary to commit the crime charged in the indictment, or whether the defendant acted according to a plan or in preparation for commission of a crime, or whether the defendant committed the acts for which the defendant is on trial by accident or mistake.

Tr. Trans. 1474-75.

[5] The Court further admonished the jury:

> I further instruct you 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.

Tr. Trans. 1475. This instruction cured any potential prejudice Weil may have suffered because some of the 404(b) evidence was admissible against his fellow conspirators but not against him. See United States v. Morrow, 537 F.2d 120, 136 (5th Cir. 1976) ("A joint trial of twenty-three defendants, charged with conspiracy and numerous substantive counts, clearly raised the possibility that the jury might cumulate the evidence introduced by the Government . . . to find

during the three-week trial did 404(b) evidence unrelated to Weil come in without the Court also giving a special admonition. And, on that one occasion, the evidence concerned activities in Cleveland. As Weil had no involvement in the 404(b) evidence admitted, it was impossible for the jury to link Randy Weil to that evidence. Accordingly, this 404(b) issue does not raise the type of "close" question Giancola describes. The Court, therefore, should deny Weil's motion for bond pending appeal.

C. THE CONSPIRACY WAS IN THE UNINTERRUPTED FLOW OF COMMERCE

Weil's third issue is that the government did not prove that the defendants' anticompetitive behavior was "in the uninterrupted flow of interstate of foreign commerce, as required by 15 U.S.C. § 1." This argument, rests on a fundamental misunderstanding of the substantive law of antitrust. Weil incorrectly assumes the law requires the United States to prove the co-conspirators' anticompetitive behavior was "in the flow" of interstate commerce. Weil is wrong. As explained more fully in the United States' *Trial Brief*, an element of every Sherman Act case is that the alleged illegal activities have a relationship to interstate commerce. The United States could meet this requirement with proof that either one or more of the conspirators' business activities took place in the flow of interstate commerce (the "in the flow of commerce" theory), or that their activities had or were likely to have "an effect on some other appreciable activity demonstrably in interstate commerce" (the "effect on commerce" theory). McLain v. Real Estate Bd. of New Orleans, 444 U.S. 232, 242 (1980). Accordingly, this issue ignores the existing law which holds that, if the United States fulfilled the requirements of the "effect on commerce" theory, then that alone is sufficient to sustain Weil's conviction.

In this case, however, the United States introduced evidence proving that Weil's activities were both "in the flow of commerce" and had an "effect on commerce." For example, Sheila McConnell, a co-conspirator who attended the Sea Ranch on October 24, 1992, testified that the Sea Ranch agreement involved price fixing and customer allocation. Besides fixing prices, the

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guilty a defendant whose connection with the conspiracy was at best marginal. The pernicious effect of cumulation, however, is best avoided by precise instructions to the jury on the admissibility and proper uses of the evidence introduced by the Government."). Unlike, Morrow, however, Weil's involvement in the Miami conspiracy was not "as best marginal," it was integral.

defendants agreed that, in return for Atlas' (and McConnell's) not soliciting customers on Cairo Lane (a principal source of scrap for Sunshine), Sunshine would ship cars originating on the Bahamas Islands to Atlas. As proved at trial, this transaction took place on November 18, 1992. McConnell testified at trial as follows:

> Q. Do you know if — well, let me just ask you, what was — was there any agreement or understanding as to Cairo Lane?
>
> A. Yes. It was agreed that by, Mr. Weil and by Tony Giordano, Junior, that if I was kept off of Cairo Lane, that They would be given the Bahama cars.
>
> Q. Do you know if Atlas ever received any cars from the Bahamas Islands?
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> A. Yes, they did.
>
> Q. And is it your understanding that that was part of the agreement reached at Sea Ranch on October 24th, 1992?
>
> A. Yes, it is.

Tr. Trans. 164-65. This colloquy is direct evidence that the defendants' anticompetitive behavior was "in the flow" of interstate or foreign commerce.

In addition, the United States introduced ample evidence proving that the defendants' anticompetitive conspiracy had an "effect" on interstate or foreign commerce. Howard Luterman, a former employee of Sunshine, testified when questioned by Mr. Binder that Sunshine shipped its scrap from the State of Florida into other states and also exported its scrap to other countries. Luterman testified as follows:

> Q. What were some of the locations that you remember over the period of time that you were at Sunshine Metal Processing that Sunshine Metal Processing shipped processed scrap?
>
> A. We shipped scrap into Georgia, Alabama, Indiana.

Tr. Trans. 1179-80. Earlier in his testimony, Luterman testified:

> Q. From time to time, did you discuss with Mr. Weil where

the ships were going?

A. There were times, yes, where in most cases we knew where the material was going.

Q. Can you give us — name some of the destinations that you were told where the scrap was going?

A. India, Korea. That's a good generalization.

Tr. Trans. 1165. These colloquies are direct evidence that the defendants' anticompetitive behavior had an "effect on [interstate and foreign] commerce."

In addition, the interstate nature of this conspiracy is also found in the interstate communications between Weil's co-conspirators in carrying out the conspiracy.[6] See, e.g., Chatham Condominium Ass'n v. Century Village, 597 F.2d 1002, 1011 (5th 1979) (Interstate telephone calls and letters are two of multiple factors helping to establish interstate commerce for purpose of the Sherman and Clayton Acts.) McConnell testified about interstate communications she had with Anthony J. Giordano, Jr. concerning the collusive agreement — McConnell was in Miami and Anthony J. Giordano, Jr. was in Cleveland. McConnell also testified about interstate communications between Anthony Giordano, Jr. and his brother, David, concerning the agreement. Tr. Trans. 280-82. Finally, McConnell testified that Anthony Giordano, Jr. monitored the agreement in Miami by, among other things, reviewing daily business records faxed to him from Miami to Cleveland. Tr. Trans. 287.

Weil also forgets that the Sherman Act embodies a Congressional policy to exercise "the utmost extent of [Congress'] Constitutional power in restraining trust and monopoly . . . ." United States v. Cargo Service Stations, Inc., 657 F.2d 676 (5th Cir. 1981) (quoting Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 194-95 (1974)). Congress' power to regulate interstate commerce is a broad power, even reaching the growing of wheat for consumption by one's family. Id. Weil's suggestion that his interstate or foreign business activities were interrupted enough to break the interstate or foreign nexus required under the Sherman Act is simply wrong.

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[6] Proof of interstate commerce as to one defendant or co-conspirator brings the activities of the entire group within the ambit of the Sherman Act. United States v. Foley, 598 F.2d 1323, 1328 (4th Cir. 1979); Safeway Stores Inc. v. FTC, 366 F.2d 795, 797-98 (9th Cir. 1966).

See, e.g., Hammes v. Aamco Transmissions, Inc., 33 F.3d 774, 780-83 (7th Cir. 1994); Cargo Service Stations, 657 F.2d at 680; United States v. Cadillac Overall Supply Co., 568 F.2d 1078, 1983-85 (5th Cir. 1978).

Accordingly, though the Sherman Act did not require the United States to prove that the defendants' anticompetitive behavior was in the uninterrupted flow of interstate or foreign commerce, the United States proved exactly that. In addition, at trial the United States proved the defendants' anticompetitive conduct had an effect on interstate commerce. Therefore, this issue is not the type of "close" question that Giancola envisions as requiring a court to grant bond pending appeal.

D. THE INDICTMENT CORRECTLY ALLEGED INTERSTATE COMMERCE

Weil's fourth argument is that the Indictment did not correctly allege that the defendants were engaged in interstate commerce.[7] The Indictment alleged that the defendants "business activities of the defendants and co-defendants that are the subject of the Indictment were within the flow of, and substantially affected, interstate and foreign trade and commerce." Indictment, ¶16. Weil argues, however, the Indictment is defective because it must allege that a defendant's anticompetitive conduct, not merely the general business activities, had an "effect" on interstate commerce.

This argument is not valid in the Eleventh Circuit. The case law makes it clear that, in the Eleventh Circuit, an indictment need only allege that a defendant's general business activities had an effect on interstate commerce. See United States v. Shahawy, 778 F.2d 636, 640 (11th Cir. 1985); Sweeney v. Athens Regional Med. Ctr., 709 F. Supp. 1563, 1570 (M.D. Ga. 1989) ("Jurisdiction under the Sherman Act does not require that the alleged unlawful activities actually occur in interstate commerce. Rather, jurisdiction is established if the defendant's business

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[7] This argument merits consideration only if the Court also finds that the United States did not prove the defendants' anticompetitive activities were "in the flow" of interstate or foreign commerce. As provided above, at a minimum, the defendants' agreement to allow Atlas to import Bahamian cars is sufficient to meet the "in the flow" requirement. If the Court finds either that the United States proved the "flow" or the "effect" test for interstate commerce, Weil's conviction should stand on this ground. See McLain v. Real Estate Bd. of New Orleans, 444 U.S. 232, 242 (1980)

activities as a whole have a substantial or not insubstantial effect on interstate commerce markets.”). Therefore, the Indictment correctly alleged the defendants' anticompetitive “business activities” had an “effect” on interstate or foreign commerce. This issue is, therefore, precisely not the type of “close” question that Giancola envisions as one that requires a court to grant bond pending appeal.

E. THE COURT DID NOT CONSTRUCTIVELY AMEND THE INDICTMENT

Weil's fifth issue is that the Court constructively amended the Indictment because its jury instructions fit the United States' “altered” theory with regard to “picked up” and “delivered” prices. Weil argues Court rulings materially altered and expanded the conspiratorial agreement thereby constructively amending the indictment. Weil's argument has no merit. As he did throughout the trial, Weil confuses the difference between the illegal agreement and the implementation of the agreement. At trial, the defendants' worked hard to suggest to the jury that McConnell's “cheating” on the alleged agreement proved they had not struck an agreement at Sea Ranch. The jury found otherwise.

The Indictment charged an illegal agreement. That is what the grand jury voted on in returning the Indictment. As discussed more fully below, nowhere does the Indictment refer to “picked up” or “delivered” pricing. The Court did not amend the Indictment with its jury instructions or any other rulings. The Court simply followed the Eleventh Circuit's pattern jury instructions.

The law governing amending an indictment is well-settled. When the evidence at trial or a court's jury instructions deviate from what is alleged in an indictment, one of two problems may result. United States v. Keller, 916 F.2d 628, 633 (11th Cir. 1990); United States v. Flynt, 15 F.3d 1002, 1005 (11th Cir. 1994). “When a defendant is convicted of charges not included in the indictment, an amendment of the indictment has occurred. If, however, the evidence produced at trial differs from what is alleged in the indictment, then a variance has occurred.” Keller, 916 F.2d at 633 (citing United States v. Figueroa, 666 F.2d 1375, 1379 (11th Cir. 1982)) (emphasis added). An amendment is a *per se* reversible error, while a variance requires a defendant to show that his rights were substantially prejudiced by the variance before he is entitled to a reversal. Id. See also United States v. McCrary, 699 F.2d 1308, 1310 (11th Cir. 1983); United Sates v.

Caporale, 806 F.2d 1487 (11th Cir. 1986), cert. denied, 482 U.S. 917 (1987). The distinction between a variance and a constructive amendment is crucial.[8]

In Keller, the Eleventh Circuit discussed the difference between an amendment of and a variance from the indictment. Relying on the Supreme Court's decision in Miller, the Eleventh Circuit concluded:

> After Miller, we believe the proper distinction between an amendment and a variance is that an amendment occurs when the essential elements of the offense contained in the indictment are altered to broaden the possible bases for conviction beyond what is contained in the indictment. A variance occurs when the facts proved at trial deviate from the facts contained in the indictment but the essential elements of the offense are the same.

916 F.2d at 634. Applying this standard, the Keller court found the jury instructions "allowed the jury to convict the defendant on grounds not alleged in the indictment, thereby modifying an essential element of the offense charged and broadening the possible bases for conviction." Id. at 636.

In United States v. Atrip, 942 F.2d 1568 (11th Cir. 1991), The Eleventh Circuit reemphasized that, "To justify reversal of a conviction, the court's instructions, viewed in context, must have expanded the indictment either literally or in effect." Id. at 1570 (internal citations omitted). Subsequent Eleventh Circuit cases follow Keller and Atrip. See United States v. Castro, 89 F.3d 1443, 1453 (11th 1996); United States v. Cancelliere, 69 F.3d 1116, 1121 (11th Cir. 1995); United States v. Flynt, 15 F.3d 1002, 1005 (11th Cir. 1994); United States v. Behety, 32 F.3d 503, 509 (11th Cir. 1994), cert. denied, 515 U.S. 1137 (1995).

Here, the defendants cannot show there was an amendment to the indictment. The Indictment charged as follows:

> Beginning at least as early as October 24, 1992, and continuing at least until November 23, 1992, the exact dates being unknown to the Grand Jury, the defendants and co-conspirators entered into a combination and conspiracy to suppress and restrain competition by fixing the price of scrap metal, and allocating suppliers of scrap

[8] Weil does not raise the issue of variance in this motion. This is because there was no variance.

> metal, in southern Florida. The combination and conspiracy engaged in by the defendants and co-conspirators is an unreasonable restraint of interstate and foreign trade and commerce in violation of Section 1 of the Sherman Act (15 U.S.C. §1).

Indictment, ¶2 (emphasis added). The Indictment further alleged:

> The charged combination and conspiracy consisted of a continuing agreement, understanding, and concert of action among the defendants and co-conspirators, the substantial terms of which were: (a) <u>to fix and maintain prices paid for scrap metal</u>; (2) <u>to coordinate price decreases for the purchase of scrap metal</u>; and (3) to allocate suppliers of scrap metal.

Indictment, ¶ 3 (emphasis added). Nowhere in these paragraphs, nor in paragraph 4 of the Indictment outlining the "Means and Methods of the Conspiracy," did the Indictment mention "delivered" or "picked up" prices. Nor did the Bill of Particulars mention any such distinction.

Clearly, the United States proved at trial what it alleged in the Indictment. Pursuant to the Sea Ranch agreement, the United States overwhelmingly proved that the defendants entered into an agreement to fix and maintain the price of scrap and to allocate suppliers of scrap metal. Though the law did not require it to prove anything more than that the defendants made an agreement which continued into the statute of limitations period, the United States also proved that the defendants carried out all the substantial terms of their agreement. <u>First</u>, the defendants fixed and maintained the prices they paid for scrap. The evidence adduced at trial showed that Sunshine followed the price-fixing agreement to the letter. Though McConnell cheated on the agreement, the evidence at trial showed unequivocally that she used the agreed-upon pricing as her benchmark. <u>Second</u>, as the result of the Sea Ranch agreement, the defendants coordinated price decreases to their suppliers. <u>See</u> Govt. Trial Ex.'s 6-121. Importantly, although McConnell may have cheated on the agreement, she initiated significant price decreases to each of Atlas's suppliers pursuant to the Sea Ranch agreement. <u>Third</u>, the evidence adduced at trial proved conclusively that the defendants allocated suppliers.

Just because Atlas subtracted freight from the price it paid to its suppliers in no way means that "the essential elements of the offense contained in the indictment are altered to broaden the possible bases for conviction beyond what is contained in the indictment." <u>Keller</u>,

916 F.2d at 634. Here, because the Indictment did not specify between "picked up" or "delivered" prices, it allowed for both. It is incorrect, therefore, to say this Court's jury instructions "broaden[ed] the possible bases for conviction." Given the broadly-worded Indictment, one cannot fairly say the defendants have raised a "close" question whether the Court abused its discretion with its jury instructions or any other rulings. Under Giancola, therefore, Weil is not entitled to bond pending appeal.

F. THE UNITED STATES MET ITS *BRADY* OBLIGATIONS

Weil's sixth argument is that the United States did not produce Brady material on time, thereby violating his right to due process. Weil points to two instances to support his argument. First, Weil argues that Sheila McConnell's testimony regarding the prices fixed at the Sea Ranch meeting varied from the government's allegations in the Indictment. Second, Weil argues the government did not timely disclose that a grand jury witness had testified that an unidentified source told him that Wooster Iron & Metal allegedly fired Sheila McConnell for taking kickbacks.

To prove a Brady violation, a defendant must show each of the following elements: "(1) that the Government possessed evidence favorable to the defendant (including impeachment evidence); (2) that the defendant did not possess the evidence nor could he have obtained it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been revealed to the defense, there is a reasonable probability that the outcome of the proceedings would have been different." United States v. Schlei, 122 F.3d 944, 989 (11th Cir. 1997) (citing United States v. Newton, 44 F.3d 913, 918 (11th Cir. 1994)).

Neither the variance Weil alleges to exist between Sheila McConnell's testimony and the Indictment, nor the information related to McConnell's termination from Wooster Iron & Metal, constitute Brady violations. At the outset, the government notes that Weil's Brady assault is fundamentally flawed. Here, there was no suppression.

1. No *Brady* Violation Resulted From McConnell's Testimony at Trial

The United States disputes the suggestion that McConnell "changed" her testimony at trial. The United States also disputes that it "altered" its theory of the case as the result of

McConnell's trial testimony. McConnell never said — either at trial, in the grand jury, or outside the grand jury — that she followed the Sea Ranch agreement completely. Never. Weil knows this. Moreover, even cursory review of the government's opening argument shows that it previewed for the jury that Atlas cheated on the agreement. Tr. Trans. p. 44.[9] In its case-in-chief, the United States also brought out in McConnell's direct examination that she cheated on the agreement. At trial, McConnell testified that she did not follow the Sea Ranch agreement fully. Instead, McConnell testified that she modified the price-fixing agreement by not deducting freight costs for all of her customers, though the Atlas business records show she did quote "delivered" prices to some suppliers (e.g., Bubba's). The United States put the defendants on notice that McConnell cheated on the price-fixing agreement at least a year before the trial. Pursuant to the standing discovery order and its Brady obligations, the United States supplied the defendants with McConnell's grand jury transcript a year before trial. On pages 215 and 216 of McConnell's transcript, McConnell testified as follows:

> And then they [the Giordanos] saw that the pricing wasn't coming down and asked me what prices I was quoting. And I said I was not quoting the prices they had given me [at Sea Ranch], and they asked me why. And I just said because I'm not quoting the prices. I left it at that.

McConnell Grand Jury Transcript, pp. 215-16. It is thus difficult to conceive of Weil's basis for now arguing that he was unaware, before the trial began, that McConnell cheated on the agreement.

What makes Weil's argument even more frivolous is that all of Atlas' business records were available for his inspection more than a year before the trial. These business documents

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[9] During the government's opening statement, Mr. Hamilton said:

> But you are going to have, and we are going to present the business records of these two companies, and what they show is that, by and large, this price fixing agreement at the Sea Ranch was followed. Was it followed completely? No. Cheaters cheat. That is a good rule of thumb. So it wasn't followed completely.

Trial Tr. 44.

(e.g., scale tickets and checks) which the government introduced in its in case-in-chief clearly showed that Atlas (hence, McConnell) did not deduct freight hauling charges from all of its suppliers. Moreover, these business records contained all the necessary information for the defendants to attack McConnell and suggest there was no agreement — which is exactly what the defendants did at trial.

Finally, as this Court well recalls, at trial the defendants drove home the difference between "picked-up" and "delivered" pricing *ad nauseam*. The defendants devoted a substantial part of McConnell's week-long cross-examination to the supposed difference and impact between "picked-up" and "delivered" pricing. See, e.g., Tr. Trans. 672-681, 692-706. The defendants also pursued this issue with other witnesses, including Howard Luterman and Debbie Farren. In their closing arguments, the defendants also made a big deal out of the supposed difference between "picked-up" and "delivered" pricing — making it a focal point of their argument that there they had not made an agreement made at Sea Ranch after all. Unfortunately for the defendants, the jury found otherwise and dismissed their "picked-up" versus "delivered" rhetoric.

Weil appears to forget that the Court already ruled against him on this issue. In an oral ruling on the morning of the third day of trial, the Court rejected the defendants' argument that the manner in which the government handled McConnell's testimony on the "picked-up" versus "delivered" prices amounted to a Brady violation. The Court held,

> I reviewed last evening the grand jury testimony, and also the letter of Mr. Hamilton dated January 21st, 1998. My review of those documents, particularly the grand jury testimony, does not support a claim of a change in testimony giving rise to a Brady obligation on the part of the government with respect to the October 24th agreement. The statement on page 184, and I know the grand jury testimony, more of it is about Cleveland than Miami, agreement was provided by the government in its January 21st, 1998, letter. I refer to pages 11, 13 and 14. And on page 11, the fact that the differential was the freight charge was discussed. And since all the pricing information is contained in the defendant's own records, it appears to me that the only conceivable Brady issue would be a change in Ms. McConnell's testimony. I don't see any substantial inconsistency on the point raised by the defendants, but if there is, I think the defendants are in a position to cross examine Ms.

> McConnell on any inconsistencies. And so I, from a review of these records, do not see no indication of a <u>Brady</u> violation, and for that reason I deny the motion for mistrial.

Tr. Trans. 540-41.

Accordingly, since the government did <u>not</u> suppress that McConnell cheated on the agreement, there can be no <u>Brady</u> violation. Nor can Weil fairly argue that the defendants did not fully exploit the difference between "picked-up" and "delivered"pricing during the trial. The purpose of this line of questioning was to suggest to the jury that McConnell fabricated her entire testimony about the Sea Ranch meeting and the conspiracy. The defendants took their best shot at the issue and were unsuccessful.

2. The Information Related to Wooster Iron & Metal Was Not Suppressed; Nor Is There a Reasonable <u>Probability the Outcome Would Have Been Different</u>

Weil also argues the government violated <u>Brady</u> by not timely disclosing that a grand jury witness testified that an unidentified source told him that Wooster Iron & Metal fired Sheila McConnell for allegedly taking kickbacks. <u>First</u>, the government disclosed the information to the defendants, so there was no suppression. <u>Second</u>, this third-hand information would in no way have affected the outcome of the trial. <u>Brady</u> material is "evidence [which] is material either to guilt or to punishment." <u>Brady v. Maryland</u>, 373 U.S. 83, 87 (1963). "[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." <u>United States v. Bagley</u>, 473 U.S. 667, 682 (1985). A "reasonable probability" is the fourth factor listed in <u>Schlei</u> as necessary for a <u>Brady</u> violation.

Here, even if the disclosure of the information related to McConnell's leaving Wooster Iron & Metal was not as timely the defendants preferred, it was at best cumulative. The failure to turn over cumulative information has been long held not to be fatal to a conviction. As Justice Fortas wrote in a 1967 concurrence,

> This is not to say that convictions ought to be reversed on the ground that information merely repetitious, cumulative, or embellishing of facts otherwise known to the defense or presented to the court, or without importance to the defense for purposes of

> the preparation of the case or for trial was not disclosed to defense counsel. It is not to say that the State has an obligation to communicate preliminary, challenged, or speculative information.

Giles v. State of Maryland, 386 U.S. 66, 96 (1967) (emphasis added). See also United States v. Agurs, 427 U.S. 97, 109 n.16 (1976) (citing with approval Justice Fortas's concurrence in Giles). A more recent federal court ruling held, "A conviction need not be vacated where the prosecution has not disclosed repetitious or cumulative evidence to the accused." Getz v. Snyder, No. CIV. A. 97-176-SLR, 1999 WL 127247, at *31 (D. Del. Feb. 18, 1999) (citing United States ex rel. Marzeno v. Gengler, 574 F.2d 730, 735 (3d Cir. 1978)).

At trial, the defendants confronted McConnell with a vengeance in suggesting Atlas fired her for taking kickbacks. See e.g., Tr. Trans. pp. 543-58. Counsel for Atlas, John McCaffrey, even put in evidence a series of canceled checks which he used to try to show McConnell was a deceitful, dishonest, untrustworthy person who the jury should not believe. Of course, McConnell denied ever taking any kickbacks and explained the existence of the canceled checks. Even so, in his closing argument McCaffrey returned to his "McConnell is a liar" theme and urged the jury that the "evidence" showed Atlas fired her because she took kickbacks. McCaffrey also called in question McConnell's credibility by suggesting Luria Brothers (a former employer) fired her for cheating on her expense accounts. Tr. Trans. 571-72.

Granted the cumulative nature of this third-hand information about Wooster Iron & Metal, this information could have had no impact on the outcome of this trial, especially in view of the overwhelming evidence proving the conspiracy. At trial, two eyewitness co-conspirators (McConnell and Henry Kovinsky) testified about the agreement struck at Sea Ranch. The evidence admitted at trial included, among other things: (1) contemporaneous notes of the Sea Ranch meeting, laying out the scope of the conspiracy in detail; (2) calendar entries of Kovinsky, showing the dates, purpose and attendees at various conspiratorial meetings; and (3) business records of Atlas and Sunshine, unequivocally proving the defendants carried out the conspiracy they struck at Sea Ranch. There is no reasonable probability the outcome of the trial would have been different had the defendants had earlier notice of the unfounded, third-hand rumor.

Moreover, as the Court pointed out to the defendants, they chose not to investigate Sheila McConnell's employment history for themselves. Tr. Trans. 1071. Weil's neglect means no Brady violation occurred because he could have, through "reasonable diligence," discovered whatever information there was to discover on his own. Schlei, 122 F.3d at 989. Weil's failure to investigate McConnell's employment history at Wooster Iron & Metal is even harder to explain since he was on notice that McConnell allegedly had been terminated from Atlas for taking kickbacks and was also aware that she had been terminated from Luria Brothers.

Finally, Weil's claim that only after McConnell testified did he learn of this information is false. As this Court recalls, the Court offered Weil and his co-defendants a chance to cross-examine McConnell about her employment and departure at Wooster, but they declined to do so. Tr. Trans. 1071-72. If this bit of cross-examination would have made a difference in the trial, Weil has only himself to blame for not engaging in it. As a collateral matter, Weil could do no more with this information than to ask McConnell if Wooster Iron & Metal had fired her for taking kickbacks. He would have been stuck with her answer. Knowing this, and perhaps anticipating she would deny this third-hand rumor, Weil chose not to pursue it. The Court should not now reward his neglect.

There were no Brady violations. For the above reasons, this issue neither raises the type of "close" question Giancola describes, nor is it the type of issue Giancola envisions as "so integral to the merits of the conviction" that an appellate holding to the contrary will likely require reversal of the conviction or a new trial. The Court, therefore, should deny Weil's motion for bond pending appeal.

G. THE PROSECUTOR'S CLOSING REMARKS WERE NOT IMPROPER

Weil's seventh argument is that the prosecutor's closing remarks were improper and prejudicial. Weil argues that the prosecutor "demeaned the defendants, suggested a pattern of undisclosed criminal conduct, and personally vouched for the government's witnesses and investigation." Weil does not, however, cite to the portions of the record to substantiate his claims. More difficult than taking aim at a moving target, responding to Weil's seventh issue requires the government to hit an invisible target. The government will make its best guess at to what it is Weil objects, and then try to answer his objections.

To justify a new trial based on a prosecutor's closing argument, "the argument must be both improper and prejudicial to a substantial right of the defendant." United States v. Rodriguez, 765 F.2d 1546, 1559 (11th Cir. 1985) (citations omitted). See also United States v. Delgado, 56 F.3d 1357, 1363 (11th Cir. 1995); United States v. Blakey, 14 F.3d 1557, 1561 (11th Cir. 1994). The relevant question is whether the prosecutor's statements "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Darden v. Wainwright, 477 U.S. 168, 181 (1985) (quoting Donnelly v. DeChristoforo, 416 U.S. 637 (1974)). In Brooks v. Kemp, 762 F.2d 1383, 1413 (11th Cir. 1985), the Eleventh Circuit reasoned that in determining whether the improper argument rendered a proceeding fundamentally unfair, the court must evaluate whether there is a reasonable probability that, but for the alleged improper arguments, the result would have been different.

With regard to the "improper" prong of the standard, Cunningham v. Zant, 928 F.2d 1006, 1020 (11th Cir.1991), is instructive. In Cunningham, the court reversed a conviction because the prosecutor remarked he was "offended" by a defendant's choice to exercise his Sixth Amendment right to a jury trial. The Eleventh Circuit explained why a prosecutor's remark is improper, holding, "A prosecutor may not make an appeal to the jury that is directed to passion or prejudice rather than to reason and to an understanding of the law." Or, as the Eleventh Circuit held in United States v. Rodriguez, "A prosecutor is . . . forbidden to make improper suggestions, insinuations and assertions calculated to mislead the jury, and may not appeal to the jury's passion or prejudice." 765 F.2d 1546, 1560 (11th Cir. 1985) (citing United States v. Phillips, 664 F.2d 971, 1030 (5th Cir. 1981)), cert. denied, 457 U.S. 1136 (1982).

The second prong of the standard requires that, if a prosecutor's remark is improper, then, to justify a new trial, the statement must also be prejudicial to a substantial right of a defendant. In assessing whether the improper argument prejudiced the accused, the court must consider both the presence of curative instructions and the strength of the government's case. Rodriguez, 765 F.2d at 1560.

In United States v. Young, 470 U.S. 1, 18 (1984), the Supreme Court instructed that any evaluation of a prosecutor's statements must take place within the context of the entire trial. Accordingly, inappropriate statements made by a prosecutor, standing alone, do not justify a finding that an otherwise fair proceeding requires reversal. Young, 470 U.S. at 11. Thus, "defense counsel's conduct, as well as the nature of the prosecutor's response, is relevant." Id. The Young Court stated:

> In order to make an appropriate assessment, the reviewing court must not only weigh the impact of the prosecutor's remarks, but must also take into account defense counsel's opening salvo. Thus the import of the evaluation has been that if the prosecutor's remarks were 'invited,' and did no more than respond substantially in order to 'right the scale,' such comments would not warrant reversing a conviction.

Id. at 12-13.

With respect to statements to which Weil appears take issue, he made no contemporaneous objection at trial, thus the standard of review is "plain error." Young, 470 U.S. at 14-15.

In the instant case, Weil's first complaint appears to be that the prosecutor demeaned him by comparing him to an animal in a zoo, specifically, a leopard.[10] An instructive case is Hall v.

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[10] In context, the prosecutor's complete statement was:

> 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.

United States, 419 F.2d 582 (5th Cir. 1969). In Hall, the court found the prosecutor's description of the defendant as a "hoodlum" improper, reasoning that this kind of "shorthand characterization" of an accused is likely to stick in the minds of the jury and influence its decisions. Id. at 587. The instant case differs substantially from Hall. First, the prosecutor did not use "leopard" as a "shorthand characterization" of the Weil. It is inconceivable that, having listened to hours of closing arguments, that the jurors' overriding impression of Randy Weil was that he is a leopard. Viewed in context, the prosecutor's reference to leopards was simply one word in a familiar bromide used to explain why the defendants did not always follow their conspiracy to the letter.

Even if the jurors did draw some connection between a leopard and Weil, calling a defendant a "leopard" is a far cry from labeling him a "hoodlum" as happened in Hall. Synonyms for "hoodlum" include the ominous terms "gangster" and "criminal." A leopard, on the other hand, is a large, spotted cat of southern Asia and Africa, also known as a panther. The term "leopard" does not appeal to a jury's "passion or prejudice." Rodriguez, 765 F.2d at 1560. The prosecutor's isolated reference to "leopards not changing their spots" was simply within the context of explaining to the jury that "cheaters" (here the defendants) cheat. This was an important point to make because it rebutted the defendants' argument that they did not reach an agreement at Sea Ranch because McConnell cheated on the agreement.

Weil's second objection appears to be that the prosecutor told the jury he was "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." Tr. Trans. 2500. Weil argues the prosecutor personally vouched for the government's witnesses and asserted his own credibility as a basis for conviction. The prosecutor did no such thing.

In the Eleventh Circuit, it is a reversible error for a prosecutor to assert his own credibility as a basis for conviction. United Sates v. Weinrich, 586 F.2d 481, 496-97 (5th Cir. 1978); United States v. Corona, 551 F.2d 1386, 1389 (5th Cir. 1977). Almost invariably, these cases involve situations where the prosecutor has vouched for the credibility of one of his witnesses.

Tr. Trans. 2350.

In the instant case, however, one cannot construe the prosecutor's remark as vouching for the government witnesses, because he was not talking about the credibility of the witnesses at all. Rather, the prosecutor remarked about the manner in which the government presented the evidence to the jury, namely, an efficient and understandable manner. Weil simply misreads the prosecutor's statement.

Here, the prosecutor's remarks, delivered in his rebuttal, were in fact a response to the defendants' suggestion in their closing argument that the government attorneys had suborned perjury. See, e.g., Tr. Trans. pp. 2390, 2434, 2440. The defendants, in their argument to the jury, stated the "government has not fairly presented the evidence to you," emphasizing that the government's evidence was "incomplete and inconsistent." Tr. Trans. 2398. In his opening argument, counsel for Atlas, John McCaffrey, chided the government for "rush[ing] to judgement," arguing that the evidence against the defendants was simply manufactured to fit the government's case. Tr. Trans. 72. In United States v. Ochoa, 564 F.2d 1155 (5th Cir. 1977), the court gave the prosecutor almost untrammeled leeway to respond to a similar accusation. The court held that the prosecutor's remark, "If you think the agents conspired to enter into some kind of hideous plot and put me in it, too some kind of plot against these poor defendants, then by all means come back with your verdict of not guilty," 564 F.2d 1158, did not warrant reversal. None of the prosecutor's remarks in this case even come close to putting his own credibility on the line as was done by the prosecutor in Ochoa. As the Supreme Court stated in Young, the jury here "surely understood the comment for what it was — a defense of [the prosecutor's] decision and his integrity — in bringing criminal charges on the basis of the very evidence the jury heard during the trial." Young, 470 U.S. at 19.

Finally, Weil argues that the prosecutor suggested a pattern of undisclosed criminal conduct. As best the government can tell, this is an objection to the 404(b) evidence admitted at trial. As provided above, and as provided in the previously-filed *Response of the United States to Defendants' Joint Motion for Bond Pending Appeal*, the Court did not abuse its discretion in admitting the proffered 404(b) evidence.

In sum, none of the prosecutors' remarks in the closing argument raise the type of "close" question Giancola describes as necessary for granting bond pending appeal. When viewed in

context, none of the alleged improper remarks were directed to the jury's "passion or prejudice." Even if, for argument's sake, the Court deemed these remarks "improper," the defendants have not shown prejudice to their substantial rights. Given the overwhelming strength of the government's case, the defendants cannot possibly make the requisite showing that the challenged remarks prejudiced their substantial rights and constitute plain error.[11] See Rodriguez, 765 F.2d at 1559. The Court should deny Weil's motion.

H. THE COURT DID NOT ERR IN GRANTING WEIL AN ADJUSTMENT FOR HIS ROLE IN THE OFFENSE

Finally, Weil's eighth issue is that the Court erred in granting him an upward adjustment for his role in the criminal conduct. Weil does not elaborate on this claim, making it difficult to respond. Nonetheless, the Court clearly did not err in sentencing Weil under the guidelines. At sentencing, the Court gave Weil a two-level increase to his base offense level pursuant to U.S.S.G. § 3B1.1© because he was an "organizer, leader, manager, or supervisor in any criminal activity" involving less than five participants. As explained earlier in this brief in Section II-A, Weil was not only a member of the conspiracy, but he was its instigator.[12] Indeed, at the Sea Ranch meeting, it was Weil who castigated the Giordanos for paying too much money for scrap. Tr. Trans. 1506-07. Moreover, it was Weil who arranged to ship the Bahamas cars to Atlas in return for the Giordanos agreeing to keep Sheila McConnell off of Cairo Lane. Tr. Trans. 1513. From this testimony Weil's involvement in the conspiracy obviously was beyond that of a mere supervisor or manager, he was a full-fledged leader and organizer. Given Weil's crucial role in the conspiracy, it cannot have been error for the Court to have assigned him a two-level point increase for being an "organizer, leader, manager, or supervisor." Given the overwhelming evidence of Weil's extensive involvement in the conspiracy, it is not a Giancola-type "close"

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[11] Rodriguez also requires the Court to consider the presence of curative instructions. Rodriguez, 765 F.2d at 1560. As defense counsel did not object to these specific remarks during closing arguments, the trial court never had the opportunity to decide if curative instructions were warranted.

[12] Weil's role as a "leader" or "organizer" in the criminal conduct is discussed fully in the *Sentencing Recommendation of the United States*.

question whether Weil deserved this two-point adjustment. Indeed, the United States believes Weil should have been given four-level enhancement pursuant to U.S.S.G. §3B1.1(a). Therefore, the Court should deny Weil's motion on this issue and not grant him bond pending appeal.

III

CONCLUSION

The United States respectfully requests that this Court deny the *Motion of Defendant Weil for Release on Bail Pending Appeal*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was sent via Federal Express to the Office of the Clerk of Court on this 1st day of September 1999. In addition, a copy was sent by regular mail to the defendants on this 1st day of September 1999.

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