No. 02-13168-CC

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

ELMORE ROY ANDERSON,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

BRIEF FOR APPELLEE UNITED STATES OF AMERICA

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MISCELLANEOUS

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 02-13168-CC

UNITED STATES OF AMERICA

Appellee,

v.

ELMORE ROY ANDERSON

Appellant.

Certificate of Interested Persons and Corporate Disclosure Statement

Elmore Roy Anderson

Bilhar International Establishment

Bill Harbert International Construction, Inc.

James A. Crowell IV

William D. Dillon

James M. Griffin

Scott D. Hammond

Herbert H. Henry

Charles A. James

Johnston Barton Proctor & Powell LLP

Anthony A. Joseph

James J. Kurosad

Steven J. Mintz

Charles C. Murphy, Jr.

John T. Orr

John J. Powers, III

The Honorable Robert B. Propst

United States Agency for International Development

United States of America

Vaughan & Murphy

The victim in this case was the United States of America.

Respectfully submitted,

_____

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STATEMENT REGARDING ORAL ARGUMENT

The United States does not accept Anderson's Statement but believes that oral argument may be useful to clarify factual or other issues that are not clear from the record.

JURISDICTIONAL STATEMENT

The United States agrees with Anderson's jurisdictional statement, except to add that the district court's jurisdiction was based on 18 U.S.C. 3231.

STATEMENT OF THE ISSUES

The United States does not dispute Anderson's statement of the issues.

STATEMENT OF THE CASE

In the late 1990s, the government uncovered a pervasive conspiracy to rig bids and defraud the United States on millions of dollars of construction work from U.S. government-funded projects in Egypt, which resulted in an estimated loss to the United States of $40-80 million (R19-77). The government ultimately filed Informations against several U.S. and foreign businesses that pled guilty.[1]

On July 25, 2001, a federal grand jury sitting in Birmingham, Alabama returned a two-count indictment charging Bill Harbert International Construction, Inc. ("BHIC") of Birmingham, its foreign affiliate (but also headquartered in Birmingham) Bilhar International Establishment ("Bilhar"), and Bilhar's former

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[1] *United States v. ABB Middle East & Africa Participations AG*, CR-01-N-0135-S (N.D. Ala. April 11, 2001); *United States v. American International Contractors, Inc.,* CR-00-N-1298-S (N.D. Ala. Aug. 11, 2000); *United States v. Philipp Holzmann Aktiengesellschaft*, CR-00-N-0285-S (N.D. Ala. Aug. 11, 2000). Each of the companies charged in these cases pled guilty to violating 15 U.S.C. 1. Pursuant to plea agreements, they were sentenced to pay fines totalling more than $87 million.

president, defendant-appellant Anderson, with conspiring to rig bids and defraud the United States on U.S. government-funded construction contracts in Egypt from May 1988 until September 1996, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1, and 18 U.S.C. 371 (R1-1).[2]

On February 4, 2002, Bilhar pled guilty to violating 15 U.S.C. 1 and agreed to pay $54 million (R5-136). The United States agreed to dismiss the charges against BHIC. Anderson chose to go to trial, which also began on February 4 before Senior District Judge Robert B. Propst. On February 12, 2002, the jury returned a guilty verdict on both counts (R5-149). The district court subsequently denied Anderson's motion for judgment of acquittal and motion for new trial in a memorandum opinion entered April 2, 2002 (R6-179, 180).

On May 20, 2002, the district court sentenced Anderson to 36 months imprisonment on each count, to be served concurrently; a $25,000 fine; two years of supervised release; and a special assessment of $200. Based on the government's agreement, no restitution was imposed (R19-85). The district court stayed Anderson's report date, so Anderson currently is not incarcerated.

The district court entered final judgment on May 28, 2002 (R7-212). On

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[2] The grand jury returned a separate two-count indictment against Peter Schmidt, a German national and former executive of Philipp Holzmann AG, who remains a fugitive (R15-467).

May 30, 2002, Anderson filed a notice of appeal (R7-213).

STATEMENT OF FACTS

Following the Camp David Peace Accords between Israel and Egypt in the 1970s, the United States committed to fund extensive rehabilitation work on water treatment and waste disposal facilities in Egypt (R17-761). Under this commitment, the U.S. Agency for International Development ("USAID") funded nearly $1 billion in construction work by U.S. companies in the 1980s-1990s.

The bid rigging and fraud at issue here focused primarily on three contracts funded by USAID, referred to as Contracts 20A, 07, and 29. The contracts were designed to be awarded to prequalified U.S.-based contractors on the basis of competitive sealed bids (R17-761-62, 794, 847). Bidding took place in the late 1980s and early 1990s, but because performance of the contracts required several years, payments made by USAID to the winning contractors continued through September 1996.

Some, if not all, of the U.S. contractors prepared their bids in the United States (R14-303, 314, R17-772-73, 787). The joint venture of which Anderson was an agent was headquartered in Birmingham, Alabama. Anderson's company provided support services in the U.S. to the bidding and construction efforts, including estimators, engineers, accountants, and bookkeepers (R15-376-79). The

contracts also contained mandatory "Buy American" clauses, *e.g.*, 48 C.F.R. 752.7004 (1988), requiring that structural steel, pipe, electrical wiring, air conditioning systems, pumps, and heavy equipment be purchased in the U.S. (R15-382-83). The products purchased from U.S. suppliers were transported to a consolidation port (frequently New Orleans), containerized, and sent to Egypt on a U.S. flag carrier (R15-385-86). For each contract, Anderson's joint venture, by itself, spent "from . . . five hundred thousand dollars to tens of millions, twenty, thirty million dollars" on materials in the U.S. that were sent to Egypt (*id.*, GX17).[3]

The U.S. contractors that were the bidders and/or conspirators on these contracts were:

- Harbert-Jones Companies ("Harbert-Jones"), a series of 60/40 joint ventures between various Bill Harbert-controlled entities (BHIC and Bilhar) and J.A. Jones Construction Co. of Charlotte, North Carolina ("Jones"), that were created to bid on the USAID contracts at issue, among others (GX22, GX31). A Bill Harbert entity held the sixty percent share of each joint venture, and thus the controlling interest, during the prequalification stage of each contract (R14-279, R17-894,

[3] "GX" refers to government's exhibit; "DX" to Anderson's exhibit; and "Br." to Anderson's brief. At trial, the district court marked seven documents as "court exhibits," cited as "CX."

GX40). After USAID awarded Contracts 20A and 07 to Harbert-Jones, the Bill Harbert entity transferred its interest in the contracts to Bilhar. Jones held the forty percent share of each joint venture. Anderson, as vice-president of BHIC, controlled the joint venture's bid pricing by virtue of the Harbert side's dominant share (R15-380-81, R17-767, GX19, GX31).

- ABB SUSA, Inc. ("SUSA"), formerly Sadelmi U.S.A., Inc., a New York company headquartered in North Brunswick, New Jersey (R1-1-¶9);
- The George A. Fuller Company ("Fuller"), a Maryland company headquartered, in the late 1980s, in New York City (GX2);
- Fru-Con Construction, Inc. ("Fru-Con"), a Missouri corporation headquartered in Ballwin, Missouri (R1-1-¶11).

These U.S. contractors were subsidiaries of, or wholly owned by, foreign corporations that also were conspirators, as follows:

- Philipp Holzmann AG ("Holzmann"), a German company headquartered in Frankfurt, was the ultimate parent company of Jones and in the late 1980s owned all of the stock of Jones (R1-1-¶14, R14-277).

Peter Schmidt, repeatedly called the "ring leader" of the conspiracy by Anderson's counsel (R14-98, 107, 111, R16-618, R18-1014, 1045), was the supervisor of Holzmann's international operations and a member of its management board. Schmidt's responsibilities included supervising Holzmann's U.S. subsidiaries, including Jones (R14-277).

- ABB ASEA Brown Boveri, Ltd. ("ABB"), a Swedish/Swiss company headquartered in Zurich, Switzerland, was the ultimate parent company of SUSA (R1-1-¶9, R15-452-53).
- Archirodon Group, Inc. ("Archirodon"), a Panamanian company headquartered in Geneva, Switzerland, owned Fuller (R1-1-¶10, R14-115).
- Bilfinger + Berger BmbH ("B&B"), a German company headquartered in Mannheim, Germany, was the parent company of Fru-Con (R1-1-¶11, R15-508).

Anderson and other conspirators held meetings, orchestrated by Schmidt, to decide among themselves, before bidding on the three contracts, which company would be the winning low bidder. They arranged "loser's fees" or other cross-payments to co-conspirators that either would bid high or decline to bid at all, and disguised those fees with phony invoices. The evidence then showed that the

winning conspirators added the expenses of the "loser's fees" or other payments to the costs of the contracts. As a result, the cost of the contracts paid for by the United States was inflated substantially because the competitive bidding process was subverted. At sentencing, the district court estimated the loss to the United States at $40-80 million (R19-77).

A. Contract 20A

Contract 20A was a 15-18 mile sewer pipe line project for urban Cairo (R14-280).

Constantinos Iatrou, a former Archirodon manager responsible for construction projects in the Middle East, met with an agent of Holzmann's at its offices in Frankfurt prior to the bidding on Contract 20A in 1988. Archirodon already had decided that its U.S. subsidiary, Fuller, would not bid, but Iatrou did not think that Holzmann was aware of this decision, and he did not tell Holzmann (R14-140, 169). Holzmann and Archirodon negotiated a written agreement, dated August 3, 1988 -- the day before bids were due -- that Iatrou signed and that was admitted in evidence as GX1 (R14-117-121, 141).

Although portions of GX1 purport to be an agreement relating to a potential subcontract, Iatrou explained that GX1 was *not* a subcontract, because a bona fide subcontract would have been far more detailed (R14-123). Instead, the Frankfurt

meeting participants understood the agreement to provide that Archirodon would be paid a percentage of the contract amount by Holzmann in exchange for having Fuller not bid for Contract 20A (R14-125). Thus, paragraph 5(a) of the August 3 agreement states that Fuller "will make its existing and other construction capacity required for the subcontract exclusively available to the J.V. [the Harbert-Jones joint venture] and no other competitor (*including itself*) at the time of the tender" (emphasis added). Fuller thereby agreed not to bid.

The agreement was not limited to Contract 20A. Iatrou explained that for certain future Cairo wastewater contracts, the companies' roles would be reversed, so that Archirodon would pay Holzmann for keeping Holzmann's subsidiary Jones, and Harbert-Jones, out of the bidding (R14-137-39). Paragraph 4 of the agreement recites this understanding for future contracts of roughly "equal value" whereby Holzmann would cause Harbert-Jones to make itself "available exclusively" to Fuller "and to no other competitor, including themselves[.]" Paragraph 4 expressly names "Contract C29" as an example of future contracts to which the agreement will apply.

The Harbert-Jones bid price for Contract 20A was $124.9 million, as submitted on July 18, 1988 (R15-346-47, GX17 at 22). On August 3, 1988, the same date as the bid-rigging agreement (GX1), Harbert-Jones prepared a letter to

the Cairo wastewater authority, over Anderson's name, that raised the Harbert-Jones bid price by 3.5 percent "to account for evaluation of last minute price changes and other circumstances" (R15-352). *See* GX19 and R15-347.[4]

When the bids were opened, no bid was accepted because "the price was very high" (R14-141; *see also* R17-750, 766). Instead, the bidding authority engaged in competitive negotiations (R17-771), and a second round of best-and-final bids was held in December 1988 (R14-302-03, R17-791).

A few days before the December bidding, Iatrou met with Schmidt, Anderson and others (R14-143). The participants discussed the earlier August 3 agreement (R14-181-82). They negotiated a second agreement, and Anderson wrote it down.[5] The new agreement was dated December 7, 1988, titled "Addendum To Agreement Dated August 3rd 1988," and admitted as GX3 (R14-142-44).

Iatrou explained that the new agreement was in fact intended as an

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[4] GX19 is unsigned, but Harbert-Jones' final bid, as reflected in a contemporaneous Fru-Con document admitted as GX18a, was in fact $129,365,032, *i.e.*, very close to 3.5 percent higher than the original bid.

[5] Anderson does not dispute that he wrote GX3. Moreover, Gregory Floyd, a forensic document examiner with thirty years experience at the U.S. Secret Service (R16-599), testified without objection that GX3 is in Anderson's handwriting (R16-607).

addendum to the August 3 agreement (R14-144-45, 182) and, as with the initial agreement, "[t]here was no subcontract" (R14-146). Only the payoff amount due to Archirodon was changed. The upshot of the agreement was that Archirodon was to do "Nothing" (R14-147), *i.e.*, not have Fuller submit any bid, and when Harbert-Jones subsequently was awarded Contract 20A, Archirodon was paid $3 million by Holzmann (R14-148). Iatrou signed the addendum. Anderson also signed, but the others decided to cross out his signature and have Schmidt sign instead because Anderson was an "American and this agreement was between European companies" (R14-145).

Subsequent correspondence between Iatrou/Archirodon and Schmidt discussing arrangements for the payments described Anderson as Schmidt's "contact in the US" (R14-148-155 and GX5-C; *see also* GX4-A, 4-B, 5-A, 5-B, 5-D). When Holzmann had difficulty paying as agreed, additional meetings were arranged in Europe to set a new installment schedule. Anderson attended at least one of these meetings, in January 1990 (R14-158 and GX6). The government then introduced a series of documents that Iatrou identified as "credit advices" [sic] from Holzmann to Archirodon, *i.e.*, the payments made under the August 3 agreement as amended (R14-161-62, GX7-A to 7-E).

Dieter Kadenbach, a former member of the executive committee of B&B

and the top executive responsible for construction in the Middle East (R14-187), testified that in 1988, B&B's U.S. subsidiary, Fru-Con, was considering whether to bid on Contract 20A (R14-189-90). Schmidt invited Kadenbach to a meeting at Holzmann's offices in Frankfurt, where representatives of several competitors were present, including a representative of Harbert-Jones (R14-191). At this meeting, "Mr. Schmidt tried to convince the other bidders or all the other bidders that they should protect the Harbert-Jones joint venture by bidding higher prices than Harbert-Jones" (R14-192). No agreement was reached during the meeting, but a few weeks later "I got another call from Mr. Schmidt again who informed me that he convinced the other co-bidders to protect Holzmann and that he would like to finalize the matter with me" (R14-194).

Kadenbach then met with Schmidt again, "and we reached a verbal agreement that Fru-Con would protect Harbert-Jones by bidding higher" in exchange for "a settlement fee in favor of Bilfinger + Berger in the range of two to three percent of the contract value" (*id.*). A written agreement memorializing these terms was prepared later (R14-195).

Fru-Con inflated its bid on Contract 20A "by about twenty million dollars or equal to fifteen percent to make sure that the contract will not be awarded to us" (R14-198-99). *See also* R14-266 (testimony of Wolfgang Kaus of B&B that, after

a call from Schmidt, he "added twenty million to our contract [sic] to be sure that we won't get the contract"). Kadenbach also was told about a telephone call from Schmidt in which Schmidt told someone at either B&B or Fru-Con, in advance, what the Harbert-Jones bid was going to be (R14-199).

Rainer Herrmann, former managing director for foreign activities at B&B, was tasked by Kadenbach to collect B&B's payments from Holzmann under the agreement (R14-241). Herrmann contacted his counterpart at Holzmann to request payment (R14-242) and was told to prepare an invoice, to be sent to Holzmann, that would refer to a different, earlier project in Egypt and serve as a "cover" for the payment (R14-243). ". . . I wanted to keep it secret transaction. . . . We didn't want to make any reference to the basic project" (R14-243-44).

Herrmann ultimately used a project in Russia to disguise the first invoice for Holzmann that really concerned the payment to be made for Contract 20A (R14-244, 247 and GX9-A, 9-B). He later prepared a second invoice for Holzmann, this time using a project in China as the "cover" (R14-247 and GX10-A, 10-B) when, in fact, the real purpose "was the second payment or installment for the project in Egypt" (R14-250). Again, "[w]e wanted to keep the matter really strictly confidential and out of the area of Egypt, and didn't want to connect it [the payment] with the project in Egypt" (R14-248). B&B subsequently was paid by

Holzmann under the agreement (R14-210).

The payments made by Holzmann to Archirodon and/or B&B were reimbursed to Holzmann by funds drawn from Harbert-Jones. Money was transferred by wire from a Harbert-Jones account at SouthTrust Bank in Birmingham and to Holzmann regarding Contract 20A (R15-412-14, GX11-A for $908,740.36; GX11-B for $1,600,296.28). Holzmann sent invoices to Harbert-Jones, which Holzmann explained as "our expenses in relation to the bid preparation cost for Contract 20A, which occurred during the estimating phase, when we supported your J.V. partner J.A. Jones Construction Co." (GX14, R15-418). *See also* GX13 (summary of payments from Harbert to Holzmann).

Johnny R. Ollis, a longtime employee of Jones who was manager of the international division in the late 1980s (a position comparable to Anderson's position at Harbert, R14-275, 279), testified that by March 1993, Harbert-Jones had made $48 million in profits on Contract 20A (R15-357, GX12-A). The government introduced a summary of payments from the U.S. Treasury on Contracts 20A (more than $107 million) and 07 (more than $43 million) made out to the Harbert-Jones office in Egypt and then sent to Birmingham for deposit in SouthTrust Bank (R15-425-28) (GX16-A, 16-B).

B. Contract 07

Contract 07 involved building large sewer tunnels in Alexandria, Egypt (R15-367, R17-812). Bids for the contract were due November 25, 1990 (GX22, R14-293-94).

Werner Hoffmeister, Kadenbach's successor at B&B and thus the supervisor of all Fru-Con projects constructed outside the United States (R14-214), was called by Schmidt roughly two months before the bidding date and invited to a meeting, at the Holzmann offices, to discuss the bidding process on Contract 07 (R14-216). Anderson, as well as other representatives of B&B and Holzmann, attended this meeting (R14-218). The discussion was in both English and German (R14-229-30). "During this meeting Mr. Schmidt asked me if I would agree that we as the mother company of Fru-Con would allow that Philipp Holzmann should be or its bidding company should be protected to be the winner of project 07" (R14-217). Hoffmeister understood this to mean that Fru-Con should bid high so that Holzmann (*i.e.*, Harbert-Jones) would win the contract (R14-218).

When Hoffmeister asked whether all of the other prequalified bidders had been contacted in the same way, Schmidt assured him "that all the companys [sic] . . . will be contacted within the next weeks" (R14-219). Schmidt then asked Anderson, in front of everyone else, to contact Morrison Knudsen Corporation, a U.S. construction firm that also was a prequalified bidder (R14-220). Hoffmeister

recalled that Anderson did not respond, but also did not disagree with the request (R14-221), although Hoffmeister's "feeling" was that "Mr. Anderson agreed to make such contact" (R14-220).

Moreover, GX23, an internal Harbert travel expense report by Anderson (R15-422), includes expenses for a trip he made, less than a month before the bidding date on Contract 07, to Boise, Idaho -- the headquarters of Morrison Knudsen (R15-355). Anderson's hotel receipt for this trip (GX23 at 6) shows Morrison Knudsen's business address as the contact information for Anderson.

Roughly two weeks after the Frankfurt meeting, Schmidt called Hoffmeister again, this time to report that no agreement would be possible among all of the six prequalified bidders, and consequently "that Bilfinger + Berger and Philipp Holzmann should make an arrangement to include some amount and tender to cover the tendering costs for each company and the losing company should receive such money from the winner, either Bilfinger + Berger or Philipp Holzmann" (R14-222). The proposed loser's fee amount was one and half million, although Hoffmeister could not remember if this was U.S. dollars or German marks (R14-223). Hoffmeister agreed to Schmidt's proposal and informed his management (*id.*).

B&B subsequently prepared a bid on Contract 07 that included the proposed

loser's fee (R14-225), but Fru-Con ultimately did not submit a bid (*id.*). Contract 07 was awarded to Harbert-Jones (R14-225, R17-818). Hoffmeister charged Herrmann with collecting B&B's loser's fee (R14-255-56), and after a meeting with Schmidt in Frankfurt, Holzmann paid a reduced lump sum (R14-257-58). Herrmann admitted that, at the time, he knew that the agreements between B&B and Holzmann on Contracts 20A and 07 were illegal (R14-258).

Johnny R. Ollis testified that the bidding practice at Harbert-Jones was for the Harbert and Jones sides to make separate estimates of the value of the work, then hold a reconciliation meeting at which the companies agreed on a bid number (R14-282). There was also a joint venture operating committee that met roughly quarterly to review the progress of jobs (R14-283). Anderson was one of the committee members from the Harbert side (*id.*).

A joint venture operating committee meeting was held in Cairo in November 1990, three weeks before bids were due on Contract 07 (R14-285). Anderson was one of the Harbert representatives (R14-287). After the meeting, Anderson called Ollis aside outside a restaurant and "told me that he [Anderson] and Alf [Hill, the project manager] needed room to maneuver" (R14-287-88). When Ollis asked Anderson to explain this, Anderson "told me that these projects or this thing is set up" (R14-288). Ollis was "very disturbed" by this comment, "and I think my

comment to him was, you know, we still had to have competitive bids" (R14-288-89). Anderson responded by saying "that all of the contractors or all the bidders were part of the Frankfurt Club" (R14-289). Later, Ollis had another conversation with Anderson, in which Anderson "told me that basically that Holzmann, which was Jones' parent company, had set the -- set it up, I guess" (*id.*). Ollis then told Anderson "I didn't want to talk about it anymore" (R14-290).

Ollis further testified that as of March 1993 the expected profit for Harbert-Jones on Contract 07 was more than $15 million, and a document he wrote showed more than $6 million in profit already generated (R15-357, GX12-A).

C. Contract 29

Contract 29 was a USAID-funded wastewater treatment contract that was commonly referred to as Abu Rawash (R15-455, R17-783). Two companies ultimately bid for Contract 29: Harbert-Jones and SUSA, the U.S. subsidiary of the Italian construction company Sadelmi which, in turn, was owned by ABB. The bids were due July 2, 1989 (R17-784, GX33 at 2).

Giovanni Greselin, a former official of Sadelmi (R15-450-52) who in the late 1980s was responsible for supervising SUSA, testified that prior to "the bid date . . . our group was contacted by Philipp Holzmann, a . . . German engineering construction company; very big. They wanted to talk about Abu Rawash, because

an American company owned by them or majority owned by them was bidding" (R15-456). Greselin was "instructed to go to Frankfurt to meet a certain Mr. Schmidt who had to talk about this project" (*id.*). Before Greselin went, "I understood the meeting was, yeah, a meeting to they would propose us an agreement regarding the bid rigging scheme, an agreement" (R15-456-57).

At the Frankfurt meeting, Schmidt proposed that Holzmann and Sadelmi "exchang[e] the favors" by Holzmann/Harbert-Jones bidding high on Contract 29, thereby allowing Sadelmi/SUSA to win that bid, and in return ABB/Sadelmi would "quote high in a project in Europe" (R15-460-61). Schmidt's proposal that ABB/Sadelmi should win Contract 29 is consistent with the original bid-rigging agreement on Contract 20A (GX1), insofar as GX1 cited Contract 29 as a future contract that Holzmann would prevent Harbert-Jones from winning.

Schmidt "was a majority owner and made clear that Harbert-Jones would do what Mr. Schmidt said" (R15-464). Greselin responded favorably but said he would have to get authority from higher level management (R15-461-63).

Schmidt then introduced Greselin to a representative of Harbert-Jones (R15-463, R17-784). Greselin did not know, or could not remember, the name of the (male) Harbert-Jones representative. But Gordon Burles, who was one of Anderson's own witnesses, conceded at trial that a travel schedule document

written by Anderson showed that Anderson was to be in Frankfurt on June 14-15, 1989, for the purpose of "marketing," even though the Harbert companies had no construction jobs in Frankfurt (R17-780-81 and GX32).

Burles further identified a letter to Anderson, dated May 31, 1989, as relating to Contract 29 and testified that Anderson forwarded the letter to Schmidt, as confirmed by the facsimile cover sheet (R17-782, 786 and GX33). Correspondence shows that Burles kept Anderson informed about the progress of Contract 29 (GX30 at 2). As with the other projects, the Harbert companies, through Anderson, controlled Harbert-Jones' bid number (GX31).

The discussion in Frankfurt, which was in English and included the unnamed Harbert-Jones representative (R15-475), then turned to "how much money they wanted or would be prepared to pay as the compensation for they [Harbert-Jones] presenting a higher bid" (R15-465). Greselin admitted "I am not proud of what I did, but what I did is bargain. . . . then we arrived to a number which, from a business point of view at that time, looked reasonable compensation, apart from any ethical judgment, which I admit was wrong" (R15-466). The number was roughly $3 million (R15-474). The Harbert-Jones representative appeared in favor of the agreement (R15-476) but told Schmidt that he did not want to sign it (*id.*). This parallels Schmidt telling Anderson not to sign the second

agreement on Contract 20A only six months earlier. Greselin came away from the meeting with the understanding "that there was an agreement in principle between the two parties, that SAE Sadelmi USA would present the lowest bidder and that the Philipp Holzmann Harbert-Jones group would get us change [sic] a compensation either in kind or -- in kind meaning another project equivalent in Europe or in money at a later stage" (R15-478).

Greselin subsequently showed his boss, Luigi Ruggieri (R15-549-50), a handwritten memorialization of the agreement with Holzmann (R15-551-52). Ruggieri knew "in that document there was evidence of an agreement that was against some law. I couldn't pinpoint which law but it was against the law" (R15-554). So Ruggieri "destroyed it, put it in a shredder" (*id.*). Despite knowing that the agreement was illegal (R15-573), Ruggieri was persuaded by Greselin to give Greselin "the green light to liaise with Mr. Schmidt in the way that would secure the winning of the contract from ABB SUSA, and that's what happened" (R15-555).

SUSA later prepared its bid "through a normal process of cost estimating, and then Greselin, the supervisor of ABB SUSA, pushed the price up" (*id.*). Greselin also knew in advance the price that Harbert-Jones was going to bid, because Schmidt told him (R15-555-56). Ruggieri testified that the SUSA bid was

"inflated" because "we knew we were going to win" (R15-556).

After SUSA was awarded the contract, Schmidt called Ruggieri and asked for a meeting (R15-557). As ABB's "part of the agreement," (R15-558), Ruggieri and Schmidt negotiated a payment to Holzmann of $3.4 million (*id.*). To effect this payment, they agreed "that a Swiss company of Philipp Holzmann would send us an invoice for technical services" (R15-559). In July 1990, the Swiss company, called Sofitec, sent an invoice to Ruggieri's office under the name of an off-shore company owned by ABB (GX8-A). The purpose of this ruse, according to Ruggieri, was "because it was an invoice that referred to what I would call improper business dealings. And so we didn't want that invoice and that payment to be audited" (R15-560). ABB paid the invoice within a month (R15-564 and GX8-B).

As of April 4, 1996, SUSA had revenues on Contract 29, *i.e.*, accumulated billings to the United States, of more than $134 million (GX26 and R15-493). The gross profit was more than $58 million, which in the opinion of SUSA's vice president of finance and controller was a "high profit" (R15-495) unequalled by any comparable contract. The government also introduced SUSA requests for interim progress payments and checks from the U.S. Treasury (R15-498, 501) that were handled by SUSA's accounting department in New Jersey (R15-500),

including GX25, a U.S. Treasury check dated September 20, 1996 for $77,564 (R15-502) that represented one of the last USAID payments on the contract.

STATEMENT OF STANDARDS OF REVIEW

The United States does not dispute Anderson's statement of standards of review.

SUMMARY OF ARGUMENT

This was a classic case of bid rigging and submitting false certifications for the purpose of defrauding the United States on government-funded contracts. That the work site was in Egypt, and that some of the conspirators were foreign companies or individuals, does not negate the criminal liability of U.S. citizens like Anderson who were part of the conspiracy. Anderson's brief tries to deflect responsibility onto Schmidt as the "undisputed . . . driving force behind" the bid-rigging (Br. 18), but Schmidt could not have succeeded without the participation of Harbert-Jones -- the winning bidder on two of the three contracts, and a complementary bidder on the third. Harbert-Jones was 60 percent controlled by Bilhar, where Anderson was president. Because Anderson controlled the Harbert-Jones bids, the bid-rigging scheme could not have succeeded without his knowledge and assistance.

The evidence was more than sufficient to support the single conspiracy

charged in Count 1 and found by the jury as well as Anderson's knowing participation in the bid rigging. The bid rigging had a common goal -- stealing from U.S. government contracts -- and was orchestrated by a "key man," Schmidt, who hosted bid-rigging meetings and organized cross-payments and "loser's fees," using the same modus operandi on each contract. Anderson and the other conspirators were connected by the initial bid-rigging agreement on Contract 20A (GX1) that called for future reciprocation on Contract 29, among others; their overlap at Schmidt's meetings; and their payoffs to each other. Direct evidence connected Anderson to the Contract 20A bid-rigging agreement and its "Addendum," as well as to bid rigging on Contract 07 (where Anderson boasted to Ollis about the "Frankfurt Club" of bidders), and circumstantial evidence connected him to bid rigging on all three contracts.

The evidence also was sufficient for limitations purposes. The violations charged and found by the jury were timely because final payments on Contract 29 were made within the limitations period, a fact Anderson does not dispute, and settled precedent holds that conspiracies of this kind, the goal of which is to obtain fraudulent payments under the contracts, continue until final payment. Even had they been charged in separate counts, Contract 29 -- because of the final payments -- and Contract 07 -- because the district court suspended running of the statute of

limitations for almost three years under 18 U.S.C. 3292 -- would have supported timely prosecutions.

Anderson's argument for jurisdictional tests appropriate to "foreign conduct," as if the bid-rigging conspiracy was disembodied from U.S. commerce, is wrong, legally and factually. This was a prosecution of a U.S. citizen in which the bidders were U.S.-based companies, Anderson's employer was headquartered in Birmingham, the contracts were U.S. government-funded, bid-preparation and acts in furtherance of the conspiracy took place in the U.S., payments by the government and cross-payments by the conspirators were made into and out of U.S. bank accounts, and the equipment used to perform the work was purchased in the U.S. Tests for "foreign conduct" do not apply, but even if they did, the facts of this case satisfied them.

The district court did not err in instructing the jury on Sherman Act jurisdiction. The court gave the standard domestic jurisdiction instruction, and also gave the first sentence of Anderson's proposed instruction, which was the "effects test" for foreign conduct from *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993). The remainder of Anderson's proposed instruction was legally incorrect, unnecessary in light of the court's other instructions, and in any event, the refusal to give the remainder did not seriously impair Anderson's defense.

At sentencing, the district court properly chose U.S.S.G. § 2F1.1 (1995) to establish the base offense level because, consistent with guidelines policy, that guideline gave the highest available offense level. Guideline 2F1.1 also most aptly fit the charged conduct because the fundamental purpose of the conspiracy was to steal from -- defraud -- the United States. Bid rigging was a means to that end. Anderson offered no factual basis that would justify a "heartland" downward departure, so that the court would have abused its discretion to grant the departure regardless of whether the court believed it had the authority to do so. The sentence therefore should be affirmed.

ARGUMENT

I. There Was More Than Sufficient Evidence To Support the Jury's Verdict

A. There Was No Prejudicial Variance Between the Indictment and the Evidence Concerning the Number of Conspiracies

The jury convicted Anderson on the single bid-rigging conspiracy charged in Count 1 of the indictment, and that conviction is an implicit finding that the evidence proved the existence of the single charged conspiracy. *See United States v. Khoury*, 901 F.2d 948, 956 (11th Cir. 1990). The jury was instructed to determine whether or not that single conspiracy existed, *e.g.*, R18-1080, and the jury is presumed to follow the district court's instructions. *Richardson v. Marsh*,

481 U.S. 200, 206 (1987). Anderson, however, contends that the evidence showed multiple conspiracies.[6]

When reviewing the evidence to determine whether it supports the jury's verdict that a single conspiracy existed, "[t]he scope of our review is narrow" because "[w]hether there was one or were more conspiracies is a question for the jury." *United States v. Brito*, 721 F.2d 743, 747 (11th Cir. 1983); *accord, United States v. Taylor*, 17 F.3d 333, 337 (11th Cir. 1994). The relevant factors are whether there was a common goal; the nature of the scheme; and the overlap of participants. *See United States v. Chastain*, 198 F.3d 1338, 1349 (11th Cir. 1999). Additionally, the convicted defendant must show that he suffered "substantial prejudice" from any variance between the indictment and the evidence. *Id.*; *United States v. Coy*, 19 F.3d 629, 633 (11th Cir. 1994).

The common goal here was to steal from the United States by inflating the winning bids. GX1, the original bid-rigging agreement on Contract 20A, shows a common goal among Holzmann, Archirodon, Harbert-Jones, and Fuller that

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[6] Anderson's variance argument appears to relate only to Count 1, the Sherman Act violation. Br. 23 ("Whether alleged bid rigging on multiple contracts constitutes a single overall conspiracy . . ."); Br. 26 (arguing that bid-rigging on Contract 20A was impossible). But the government's response would be the same even if Anderson also claims a variance with respect to Count 2. Anderson's jurisdictional argument can relate only to the Sherman Act violation; neither 15 U.S.C. 6(a) nor *Hartford Fire* purport to apply to 18 U.S.C. 371.

encompassed multiple contracts, because the parties agreed to "reciprocate . . . in connection with future tenders relative C.W.O," and named Contract 29 as an example of where they would reciprocate. Anderson himself indicated the existence of a single enterprise when he told Ollis about the "Frankfurt Club" of bidders (R14-289). Indeed, *Coy*, 19 F.3d at 633, a case on which Anderson relies, cites Eleventh Circuit precedents in which fraud, or the importation or distribution of drugs, constituted a common goal sufficient to support a finding of a single conspiracy.

The nature of the scheme was consistent for each contract. Before the submission of bids, Schmidt orchestrated meetings with the participating bidders and/or the companies that owned them. The participants agreed on which company would be the low bidder, and further agreed on "loser's fees" or other compensation to be paid to the high bidders or non-bidders. Bid prices were then raised to guarantee that the agreed winner would win, and the winning bid typically was inflated because there was no real competition and to cover the added expenses of payoffs to competitors. The bid-rigging payments subsequently were disguised by phony invoices. *See Chastain*, 198 F.3d at 1349 ("nature of the underlying scheme was the same" because defendants repeatedly used an airplane as their method of drug importation); *Khoury*, 901 F.2d at 956 (nature of the

scheme "remained the same").

There also was significant overlap of bid riggers across the three contracts. Most prominently, Anderson's own brief concedes, repeatedly, that Schmidt "was shown to have been directly involved in, the purported illicit conduct on all three contracts." Br. 6; *see also* Br. 18. "A single conspiracy may be found where there is a 'key man' who directs the illegal activities, while various combinations of other people exert individual efforts towards the common goal." *Taylor*, 17 F.3d at 337 (quoting *United States v. Gonzalez*, 940 F.2d 1413, 1422 (11th Cir. 1991)). *See also United States v. Champion*, 813 F.2d 1154, 1167 (11th Cir. 1987) (jury could find single conspiracy where defendant "was the chief coordinator" of the scheme); *United States v. Stitzer*, 785 F.2d 1506, 1518 (11th Cir. 1986) (single conspiracy where one drug distributor was the "central hub" of five groups).

While Schmidt was the "key man" at the bid-rigging meetings, Anderson was connected to all three contracts as Schmidt's necessary deputy because the Harbert side controlled the Harbert-Jones joint venture. Anderson participated in the December 1988 meeting on Contract 20A at which the bid-rigging agreement was modified. Ollis' testimony incriminated Anderson on Contract 07, where Anderson "told me that these projects or this thing is set up" (R14-288) and then said "that all of the contractors or all the bidders were part of the Frankfurt Club"

(R14-289). And Burles' testimony, plus Anderson's travel records (GX32) and Anderson documents expressly relating to Contract 29 (GX30, GX31, GX33), support a reasonable inference that Anderson was involved in bid rigging on Contract 29 as well. Because of the actions of Schmidt and Anderson, Holzmann and Harbert-Jones were conspirators on all of the contracts. B&B and Fru-Con indisputably were involved on both Contract 20A and Contract 07.

Moreover, the conspirators were aware of each other: everyone knew who the bidders would be on each contract, because the USAID rules required the bidders to be prequalified, and Schmidt invited representatives of multiple contractors to the bid-rigging meetings. The conspirators also had much in common in addition to Schmidt: a common source of payment (USAID), a common source of materials and equipment (the United States), a common employer (the Cairo wastewater authority). And the different conspirators were connected by all of the payments made between them: from Holzmann/Harbert-Jones to Archirodon and Holzmann to B&B on Contract 20A; from Holzmann/Harbert-Jones to B&B on Contract 07; and from ABB to Holzmann on Contract 29. This is simply not analogous to a drug case in which a central importer or distributor deals separately with confederates who are utterly unconnected to each other.

Accordingly, even if the government was required to fit its proof into the "wheel" conspiracy model, which is not a requirement in this Circuit, *see Brito*, 721 F.2d at 747 ("wheel" and "chain" models "do not define the universe of criminal conspiracies"), there was more than sufficient interaction among the "spokes" here to complete the wheel. "To the extent there might have been subgroups operating pursuant to the general conspiracy, the evidence, viewed in the best light for the government, demonstrated they were all acting in furtherance of one overarching plan." *Chastain*, 198 F.3d at 1350.[7]

Given this law and evidence, Anderson's extensive discussion of how some conspirators did not talk to others or were involved with only one contract (Br. 24-31) is legally irrelevant. "In finding a single conspiracy, there is no requirement

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[7] *United States v. Glinton*, 154 F.3d 1245, 1251 (11th Cir. 1998) therefore is distinguishable on its facts. There, the defendants "functioned by themselves, separate and distinct from one another." Here, by contrast, the conspirators were orchestrated by Schmidt, attended meetings together, reached specific agreements among themselves as to which contractors would bid low and which high, and paid each other off. In *Glinton*, "[t]he only thing each defendant had in common was their supplier." Here, the conspirators bid, or agreed not to bid, on the same contracts for the same projects. The conspirators were intimately connected: each conspirator's bid determined whether another conspirator would win or lose each contract.

United States v. Coy is even less apposite. There was no "key man" in that case; no overlap of participants; and different methods of importing and distributing the illegal drugs, so that two conspiracies existed instead of one. 19 F.3d at 633-34.

that each conspirator participated in every transaction, knew the other conspirators, or knew the details of each venture making up the conspiracy." *Taylor*, 17 F.3d at 337.

Anderson's suggestion that there could be no bid rigging on Contract 20A because of a lack of actual or potential competitors (Br. 26) is meritless. Fuller, although it ultimately could not obtain the required bond, was a prequalified bidder (R16-678-79). Holzmann obviously considered Fuller to be a potential competitor, because otherwise there would have been no reason to pay $3 million to Fuller's owner Archirodon for doing no work. The gist of Iatrou's testimony was that Holzmann apparently did not know that Fuller did not intend to bid. When a company "h[olds] itself out as a competitor for the purposes of rigging what was supposed to be a competitive bidding process," bid rigging is established despite the company's ultimate inability to perform the contract. *United States v. Reicher*, 983 F.2d 168, 170 (10th Cir. 1992). *Cf. United States v. MMR Corp. (LA)*, 907 F.2d 489, 498 (5th Cir. 1990) (bid-rigging violation where defendant appeared on the relevant bid list but declined to submit a bid for lack of bonding; defendant was still a "competitive threat").

Fru-Con did bid for Contract 20A. Whether or not Fru-Con subjectively intended to win does not mean Fru-Con was not an actual or potential competitor.

See Reicher, 983 F.2d at 172 ("Having bid on the job, and having created the appearance of legitimate competition in an open bidding process, they cannot now escape the inevitable conclusion of dirty dealing by denying they were competitors."); *United States v. W.F. Brinkley & Son Constr. Co., Inc.*, 783 F.2d 1157, 1160 (4th Cir. 1986) (subjective intent of bidder to not submit a competitive bid did not negate bid rigging).[8]

Finally, even if the evidence did show multiple conspiracies, Anderson fails to prove that the variance adversely affected his substantial rights. The two recognized grounds for this claim are (1) unfair surprise, or (2) prejudicial spillover of evidence among co-defendants. *See Coy*, 19 F.3d at 634. Anderson cannot claim unfair surprise because the alleged variance "did not alter the crime charged, the requisite elements of proof or the appropriate defenses in a significant manner." *United States v. Caporale*, 806 F.2d 1487, 1500 (11th Cir. 1986). The indictment charged a conspiracy to rig bids, and the evidence showed the same crime.

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[8] *Reicher* and *MMR* distinguished Anderson's cited cases, *United States v. Sargent Electric Co.*, 785 F.2d 1123 (3d Cir. 1986) and *United States v. Ashland-Warren, Inc.*, 537 F. Supp. 433 (M.D. Tenn. 1982). *See* 983 F.2d at 170-71 & n.1 and 907 F.2d at 497-98. On close reading, *Sargent* actually implies that when a vendor's bid is accepted, it is a competitor for antitrust purposes. *Sargent* also supports the government's position when it notes that the very existence of an agreement supports an inference that the parties are actual or potential competitors: "If they were not, there would be no point to such an agreement." 785 F.2d at 1127.

Anderson plainly was on notice of the nature of the charges against him. Because Anderson was the sole defendant, there could be no prejudicial spillover from evidence pertaining to others. *See id.*; *Brito*, 721 F.2d at 748.

Anderson's claim of prejudice is far weaker than in his cited cases *United States v. Glinton*, 154 F.3d 1245, 1252 (11th Cir. 1998) and *Coy*, both of which found multiple conspiracies but no prejudicial variance, even when multiple defendants were grouped together in joint trials. If *Glinton* and *Coy* did not find substantial prejudice, Anderson's claim surely is meritless.

There is no factual basis to suggest that the jury "may have voted to convict on the basis of one of the separate agreements," as Anderson suggests (Br. 32). This is pure speculation. As noted above, the jury was instructed that it had to find the single conspiracy charged in the indictment, and the jury is presumed to have followed that instruction.[9]

B. The Conspiracies Alleged in the Indictment Were Not Time-Barred

The government charged an overarching conspiracy not for statute of

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[9] *United States v. Schlei*, 122 F.3d 944 (11th Cir. 1997) does not help Anderson. The rule of that case does not bar charging a single overarching conspiracy when the evidence supports a single conspiracy, as it did here. The duplicitous count in *Schlei* charged two separate securities fraud transactions, not a conspiracy, and the prejudicial effect was the creation of a venue problem, which does not apply here.

limitations purposes but because the evidence -- including the bid-rigging agreement on Contract 20A (GX1), Schmidt's orchestration of each bid rigging using the same modus operandi, the interaction and overlap among the conspirators, and Anderson's involvement in the bid rigging on each contract -- compelled that charge. As demonstrated above, Anderson's claim of multiple conspiracies is meritless.[10]

The conspiracies charged in Count 1 and Count 2 were not time-barred because, as Anderson concedes (Br. 33), the final payments on Contract 29 from the U.S. Treasury to SUSA were made in September 1996, within the five-year limitations period (GX25). Under settled Eleventh Circuit precedent, a criminal antitrust conspiracy "continues until the objectives of the conspiracy succeed or are abandoned[.]" *United States v. Dynalectric Co.*, 859 F.2d 1559, 1564 (11th Cir.

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[10] Anderson's reference to the charge against ABB Middle East & Africa Participations AG, Br. 32 n.6, is both misleading and meritless. The government filed an Information against ABB simultaneous with a plea agreement that was the product of negotiation. There is no inconsistency between that negotiated plea and the single conspiracy charged by the indictment here. Anderson's cited case, *Drake v. Kemp*, 762 F.2d 1449, 1451 (11th Cir. 1985) (en banc), expressly declined to reach the issue of allegedly inconsistent theories used to prosecute different defendants, and the vacated panel decision rejected defendant's argument. Judge Clark's individual concurring opinion (*id.* at 1479, referring to "flip flopping"), is not binding law. In any event, the purported inconsistency in that case, the prosecutor's inconsistent treatment of a witness in different trials, is not even remotely related to Anderson's case.

1988); *accord, United States v. Arnold*, 117 F.3d 1308, 1313 (11th Cir. 1997). More specifically, a bid-rigging conspiracy continues until the final payment is made pursuant to the rigged contract. *Dynalectric,* 859 F.2d at 1565 (citing cases from four circuits). *See also United States v. Girard*, 744 F.2d 1170 (5th Cir. 1984), holding that a bid-rigging conspiracy on a U.S. government-funded contract continued until receipt of a final payment adjustment. *Cf. United States v. Helmich,* 704 F.2d 547 (11th Cir. 1983) (receipt of final payment for espionage); *United States v. Loe*, 248 F.3d 449, 456 (5th Cir.) (receipt of fraudulently-procured money from insurance company "was an object, and not merely a collateral result, of the conspiracy"), *cert. denied*, 122 S. Ct. 397 (2001).

The objective of the conspiracies charged here was to defraud the United States by means of bid rigging so that the pre-selected conspirator would win the contract, at an inflated price, and earn profits from payments by USAID. There would have been no point to rigging bids but then not performing the work: the payments from the U.S. Treasury were integral to the conspiracies. "It is inconceivable to us that any business would conspire to restrain trade solely for the sake of restraining trade . . . without also having the further goal of financial self-enrichment by virtue of the restraint of trade." *Dynalectric,* 859 F.2d at 1568. *Accord, e.g., United States v. Rodgers*, 624 F.2d 1303, 1310 (5th Cir. 1980) (bid-

rigging scheme "would have been meaningless, incomplete, and futile without final award and payment"). The indictment thus alleged that the "terms" of the bid-rigging conspiracy were "to ensure that the designated winner would be awarded the contract and would receive payment from the United States Treasury" (R1-1-¶3). Similarly, Count 2 charged, among the overt acts, that SUSA submitted payment requests to USAID through September 1996 and received payments from the U.S. Treasury (R1-1-¶6(bb)). Even if considered separately, Contract 29 therefore would have supported a timely prosecution.

The same is true, contrary to Anderson's suggestion (Br. 33), for Contract 07. During its investigation, the Department of Justice requested assistance from authorities in Germany, in 1997, in the form of a letter rogatory issued by the U.S. District Court for the Western District of North Carolina. Subsequently, both that court and the District Court for the Northern District of Alabama (Judge Lynwood Smith) ordered that the running of the applicable statutes of limitations be suspended under 18 U.S.C. 3292. Limitations was suspended for three years less ten days, based on when the German Federal Ministry of Justice took final action on the request in December 2000. *See* CX2 (July 13, 1999 Order of Judge Smith), CX3-5 (letter from German government and translation), and R16-669-71. When three years are added to the date of final payments under Contract 07, December

1995, those payments must be considered, for limitations purposes, to have been made in December 1998, and therefore well within the five-year period preceding the indictment in July 2001.

C. There Was More Than Sufficient Evidence of Anderson's Knowledge of and Involvement In the Charged Conspiracies

Anderson's knowing participation in the charged conspiracies can be proved by direct evidence or by inference from a "development and collocation of circumstances." *United States v. Lyons*, 53 F.3d 1198, 1201 (11th Cir. 1995) (citation omitted). "Culpable participation need not be great. Guilt may exist even when the defendant plays only a minor role and does not know all the details of the conspiracy." *Id.* "The Government must only prove that the defendant knew the general nature and scope of the conspiracy." *United States v. Clark*, 732 F.2d 1536, 1539 (11th Cir. 1984). The government offered both direct and circumstantial proof that met this standard.

On Contract 20A, Anderson indisputably participated in the December 1988 meeting with Schmidt and Iatrou and drafted the "Addendum" (GX3) to the August 1988 bid-rigging agreement (GX1). The jury reasonably could infer that Anderson was aware of the August agreement from several facts:

- GX19, the August 3, 1988 letter raising Harbert-Jones' bid price that was written for Anderson's signature and dated the same day as GX1,

thereby inviting the inference that the bid was raised because of the costs incurred from the bid-rigging agreement;

- Iatrou's testimony that the August agreement "was on the table" at the December meeting and "was discussed. It was the subject of discussion, to amend the agreement, the original agreement" (R14-181) and "I believe he [Anderson] was participating in the discussion" (R14-176);

- Iatrou's testimony, plus a letter from Schmidt, referring to Anderson as Schmidt's "contact in the U.S." for purposes of arranging payment-related meetings with Archirodon (R14-155 and GX5-C);

- The payments made to Holzmann pertaining to Contract 20A from Harbert-Jones accounts (GX11-A, 11-B, GX13) and invoices to Harbert-Jones from Holzmann pertaining to Contract 20A (GX14). The jury reasonably could infer that Anderson, as president of Bilhar, and thus the dominant partner in Harbert-Jones, must have been aware of these payments.

Although Anderson attempts to portray himself as a "mere scribe" (Br. 36), his spin on the facts is both unpersuasive (the district court at sentencing commented "Well, it's not exactly like he was there as secretary," R19-86) and legally irrelevant. Following a jury verdict of guilty, the evidence must be viewed the light most favorable to the government and all reasonable inferences drawn in the government's favor.

Iatrou further testified that Anderson participated in a January 1990 meeting at which Schmidt and Archirodon discussed Holzmann's payments under the bid-rigging agreement (R14-158). While evidence of "mere presence" alone is not

sufficient for conviction, this Court has held that presence at meetings of conspirators "raises a permissible inference of participation in the conspiracy." *Lyons*, 53 F.3d at 1201. In *United States v. Rudisill*, 187 F.3d 1260 (11th Cir. 1999), the defendant, charged with conspiracy to defraud among other crimes, was present on two occasions while suspicious telemarketing calls were made. This Court held that "[t]he jury could reasonably infer that Tim overheard what was happening and was aware that unlawful telemarketing was taking place." *Id.* at 1267.[11]

"In most cases including this one . . . the evidence establishes not mere presence but presence under a particular set of circumstances." *United States v. Cruz-Valdez*, 773 F.2d 1541, 1545 (11th Cir. 1985). Anderson was not merely an uninvited onlooker or housekeeper, but an experienced contractor and a key officer in Harbert-Jones. Where, as here, the evidence includes the defendant participating in conversation and being found in proximity to physical evidence (GX1), the "mere presence" cases do not apply and there is a "reasonable inference that [defendant] had a deliberate, knowing, specific intent to join the conspiracy." *Clark*, 732 F.2d at 1539 (citation omitted).

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[11] Anderson attempts to portray himself as hard of hearing, but his alleged hearing problem did not prevent him from serving as president of Bilhar and conducting business all over the world.

On Contract 07, there was direct evidence that Anderson told Ollis "that these projects or this thing is set up" (R14-288). Anderson further told Ollis "that all of the contractors or all the bidders were part of the Frankfurt Club" (R14-289) and "basically that Holzmann . . . had set the -- set it up, I guess" (*id.*). Ollis understood these statements to mean that the competitive bidding process had been subverted (R14-288-89), and the jury reasonably could consider them inculpatory admissions by Anderson. The statements clearly demonstrate Anderson's awareness of the conspiracy. Amazingly, Anderson's brief does not even mention this testimony.[12]

The jury also could find both awareness and participation from Anderson's attendance at the meeting between Hoffmeister and Schmidt shortly before the bidding deadline for Contract 07. Schmidt brazenly proposed bid rigging: that "Holzmann should be or its bidding company should be protected to be the winner

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[12] Nor does Anderson mention the testimony offered by the government pertaining to bidding on a contemporaneous U.S. Army Corps of Engineers-funded contract for work in Egypt called Peace Vector IV, Phase II, for which Harbert-Jones was a bidder (R14-313-14). Ollis testified that in 1992, during a joint venture reconciliation meeting on this bid in Ollis' Charlotte, North Carolina office, "Mr. Anderson told us that he had tried to put together a deal with the other bidders for this project" (R14-314). Anderson said he had "stopped at the Holzmann office in Frankfurt" to talk to other bidders (*id.*). Ollis understood Anderson's statements to mean "that this was -- this would be an attempt to, I guess, set up a prebid arrangement to arrange who got the project" (R14-319).

of project 07" (R14-217). Schmidt asked Anderson to contact Morrison Knudsen with the same request (*i.e.*, would Morrison Knudsen be willing to "protect" Harbert-Jones as the winning bidder?) (R14-220). The jury reasonably could infer that Anderson did so, from Anderson's travel expense report that shows a contemporaneous trip to Boise, Idaho -- Morrison Knudsen's headquarters -- and his hotel bill that shows Morrison Knudsen's address as Anderson's contact information (GX23 and R15-422). Again, Anderson's brief completely ignores this evidence.[13]

On Contract 29, the jury reasonably could infer that Anderson was the unnamed (male) Harbert-Jones representative who participated in the bid-rigging meeting with Greselin and Schmidt. Anderson's travel schedule, which showed that Anderson was to be in Frankfurt on June 14-15, 1989 for "marketing," even though the Harbert companies had no construction jobs in Frankfurt, supports this inference (R17-780-81 and GX32). Greselin testified that the Harbert-Jones representative approved the bid-rigging agreement between Holzmann and

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[13] Two former Morrison Knudsen officers testified that Anderson never asked them to rig bids on Contract 07 (R17-821, 861). This testimony proves nothing: Anderson may have contacted someone else at Morrison Knudsen, or he may have attempted to contact these witnesses but not succeeded, which is still an act in furtherance of the conspiracy. In any event, the jury's verdict of guilty shows that the jury either did not believe Anderson's witnesses or gave the Morrison Knudsen episode no weight.

Sadelmi, but that he did not want to sign it, a fact that parallels Schmidt earlier telling Anderson not to sign GX3 and which allows the inference that the representative was Anderson (R15-476). Greselin's inability to remember the name of the Harbert-Jones representative, more than ten years after the meeting, is hardly surprising and does not weaken the inference.

D. The Evidence Was Sufficient to Establish Jurisdiction

Anderson contends that this was a case of "foreign conduct," so that jurisdiction over the Sherman Act violation should be determined by the standard of the Foreign Trade Antitrust Improvements Act, 15 U.S.C. 6(a) ("FTAIA") ("direct, substantial, and reasonably foreseeable effect" on U.S. "trade or commerce"), or the pre-FTAIA common law standard, *see Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993) ("foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States"). Anderson is wrong, but in any event, the facts would support jurisdiction under either standard.

This was a prosecution of a U.S. citizen who was an officer of a construction company headquarted in the U.S. and part of a joint venture of U.S.-based companies. All the bidders for the USAID contracts were required to be U.S.-based companies. Harbert-Jones' bid preparation efforts took place in part or in

whole at Harbert's offices in Alabama and Jones' offices in North Carolina (GX17). The contracts at issue were funded by USAID. USAID made payments to Harbert-Jones that were deposited into SouthTrust Bank in Birmingham (GX16-A, 16-B). Harbert-Jones made payments to other conspirators out of proceeds from its SouthTrust account (GX13). And the equipment and materials used to perform the USAID contracts were purchased in the U.S. and shipped on U.S. flag vessels (R15-382-86).

To suggest that the government must meet a more stringent jurisdictional test to prosecute a U.S. citizen, on these facts, is meritless. In *United States v. Concentrated Phosphate Export Ass'n, Inc.*, 393 U.S. 199, 208 (1968), the Supreme Court readily concluded that the "economic reality" of USAID-funded contracts for phosphate, supplied by U.S. companies and then shipped to Korea, was domestic and not foreign. "[A]lthough the fertilizer shipments were consigned to Korea and although in most cases Korea formally let the contracts, American participation was the overwhelmingly dominant feature. The burden of noncompetitive pricing fell, not on any foreign purchaser, but on the American taxpayer." *Cf. Carpet Group Int'l v. Oriental Rug Importers Ass'n, Inc.*, 227 F.3d 62, 75 (3d Cir. 2000) (lower domestic standard for jurisdiction applied where the case was "primarily" domestic in that defendants were U.S. companies and

individuals and conduct was intended to have effects in the U.S.).

Even worse, Anderson's argument would create "open season" for bid rigging and fraud on billions of dollars of USAID contracts because, as in this case, no country other than the United States would have a significant incentive to prosecute it. Egypt, for example, got the work called for by the contracts and was a very minor payor compared to USAID. Germany was not defrauded. Our government must have the jurisdiction to prosecute theft from the United States when no other country will do so.

Because the conspiracy in this case was domestic, the applicable standard was that the government could prove jurisdiction under either of two theories: "(1) the offending activities took place in the flow of interstate commerce (flow theory); or (2) the defendants' general business activities had or were likely to have a substantial effect on interstate commerce (effects theory)." *United States v. Giordano*, 261 F.3d 1134, 1138 (11th Cir. 2001). Anderson does not argue that this standard test for jurisdiction was not met. Both the flow of payments across state lines into and out of Harbert-Jones bank accounts and the purchase and shipment of equipment and supplies across state lines and on to Egypt, all of which resulted directly from the bid rigging, were sufficient to satisfy either or both theories.

The FTAIA does not apply to this case. First, on its face the statute applies "to conduct involving trade or commerce . . . with foreign nations[.]" The conduct at issue here was bid rigging and inflated costs submitted to USAID, not a restraint on any trade with Egypt, Germany, or any other foreign country.

Second, Congress did not intend the statute to change the law or the government's practice of prosecuting international cartels. As the House Report states, "[t]he Committee would expect the Department of Justice and the Federal Trade Commission to continue their vigilance concerning cartel activity and to use their enforcement powers appropriately." H.R. Rep. No. 97-686 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487, 2498. This reference to cartel activity, which the Department of Justice ordinarily prosecutes criminally, shows that the statute was not intended to restrict the government's criminal law enforcement.[14]

Nor does the common law standard for "wholly foreign" transactions apply here. As Anderson acknowledges (Br. 46), the only criminal antitrust case to consider this issue is *United States v. Nippon Paper Industries Co.*, 109 F.3d 1, 9

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[14] Anderson's reliance on *Kruman v. Christie's Int'l PLC*, 284 F.3d 384 (2d Cir. 2002) is curious. The decision in *Kruman* focused on price fixing directed at foreign auction markets, which is radically different from bid rigging and fraud directed squarely at the U.S. government and U.S. taxpayers. In any event, the court held that jurisdiction existed, despite the FTAIA, and the defendants did not dispute that the alleged conduct caused a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce. *Id.* at 399 n.5.

(1st Cir. 1997). The court held that the antitrust laws apply to "wholly foreign conduct which has an intended and substantial effect in the United States." Both the majority and the concurring opinion stated repeatedly that the facts presented a case of "wholly foreign" conduct, *see id.* at 4, 10, which made the "effects test" for jurisdiction appropriate. None of the defendants in that case were U.S. citizens or companies; there was no U.S. government involvement; no payments were made to or from U.S. bank accounts; and all of the price fixing occurred outside the U.S. Anderson's case is radically different, and certainly not "wholly foreign," but if jurisdiction for a criminal prosecution could be found on the facts of *Nippon Paper*, then by comparison, jurisdiction clearly was established here.[15]

Even if the jurisdictional standards for foreign conduct applied here, however, the government satisfied them. The conspirators' bid rigging and fraud indisputably was intended to have an effect in the United States -- to steal from the U.S. Treasury. The effect was "direct" and immediate -- the bid rigging inflated the winning bids and the payments made by USAID by millions of dollars. The role of USAID was critical. In terms directly applicable here, the court in *Pacific*

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[15] Both *Hartford Fire* and *Nippon Paper* refused to apply the FTAIA because of its ambiguity. *See* 109 F.3d at 4 ("The FTAIA is inelegantly phrased and the court in *Hartford Fire* declined to place any weight on it. . . . We emulate this example and do not rest our ultimate conclusion about Section One's scope upon the FTAIA.").

Seafarers, Inc. v. Pacific Far East Line, Inc., 404 F.2d 804, 816-17 (D.C. Cir. 1968) held the Sherman Act to apply to a restraint on USAID-funded shipping services, saying:

> We also do not accept or agree with defendant's argument that AID was but an incidental party to the transaction -- no more than the usual financing institution found in international transactions where there are problems of currency exchange. AID was at the center of the transactions, it was the force which initiated, directed, controlled and financed them. Without AID, there would have been no sale or purchase and the extent of the role it played was known in every detail to and relied on by both parties to the transactions[.]

(citation omitted). This was not a case where purely foreign firms implemented a restraint of trade that had only an incidental or remote effect in the United States.

Nor can anyone seriously dispute that the effect in the U.S. was "substantial." The contracts were worth many millions of dollars. At sentencing, the district court estimated the loss to the United States at $40-80 million (R19-77). And the effects in the U.S. indisputably were reasonably foreseeable by the conspirators: bid riggers know that their conduct will inflate the price of the winning bid, because subverting the competitive bidding process is the very purpose of bid rigging.

Anderson's argument that there must have been an effect on a private market cannot be the law in a criminal case. It would be highly anomalous to suggest that

the government cannot prosecute bid rigging -- which has been prosecuted as a crime for decades -- simply because the bid rigging occurs on government-funded contracts. Anderson's position amounts to a nonsensical "free pass" for bid rigging on all U.S. government-funded contracts for work that is done abroad.

In any event, by stealing from USAID the conspirators affected the government acting not in its sovereign capacity but in its commercial capacity. The FTAIA refers to conduct that has an effect on U.S. "trade or commerce," and when the government disburses money under contracts to private firms for purchases of goods and services, that is certainly "commerce." By inflating the contract costs, the conspiracy deprived USAID of money that could have been used to support existing, or new, contracts elsewhere, and also reduced the potential purchases of supplies in the U.S. that would be made under other contracts. There clearly is a private market among U.S. construction firms who compete for these contracts, including Harbert, Jones, Fru-Con, SUSA, and Morrison Knudsen, and the effect of the conspiracy was to rig that market. *Cf. Pacific Seafarers*, 404 F.2d at 816 ("there is an identifiable, distinctive market for American-flag shipping service where the American characteristic is dominant -- a market defined as involving the transportation of AID-financed cargoes, which has a definite nexus with significant interests of the United States").

II. The District Court Did Not Err When It Instructed the Jury Concerning Jurisdiction

"Generally, district courts have broad discretion in formulating jury instructions provided that the charge as a whole accurately reflects the law and the facts, and we will not reverse a conviction on the basis of a jury charge unless the issues of law were presented inaccurately, or the charge improperly guided the jury in a substantial way as to violate due process." *United States v. Moore*, 253 F.3d 607, 609 (11th Cir. 2001) (citation and internal quotations omitted).

The district court first instructed the jury on the "flow" and "effects" theories of Sherman Act jurisdiction (R18-1082-83). Anderson does not claim that this instruction was an incorrect statement of the law, *see* Br. 49 ("a standard charge appropriate in domestic antitrust cases"), only that it was inappropriate on the facts. In fact, the instruction was legally correct. *See McLain v. Real Estate Board of New Orleans*, 444 U.S. 232, 242 (1980). The instruction also was appropriate: as shown above, the jurisdictional tests for cases of wholly foreign conduct did not apply here.

The district court then gave the first sentence of Anderson's proposed instruction: "I further instruct you that the Sherman Act applies to foreign conduct if and only if that conduct was meant to produce and did, in fact, produce some

substantial effect upon trade or commerce in the United States" (R18-1083 & CX7). This sentence was unnecessary because, as explained above, this was not a "foreign conduct" case. In any event, Anderson could not have been prejudiced by an instruction he proposed.

The court's refusal to give the rest of the proposed instruction is error only if the omitted portion "(1) was correct, (2) was not substantially covered by the court's charge to the jury, and (3) dealt with some point in the trial so important that failure to give the requested instruction seriously impaired the defendant's ability to conduct his defense." *United States v. Cunningham*, 194 F.3d 1186, 1200 (11th Cir. 1999) (citation omitted). If Anderson fails to show any one of these elements, the district court did not commit reversible error. *See Lyons*, 53 F.3d at 1200.

The omitted portion of Anderson's instruction failed these tests. The first and second omitted paragraphs of CX7 were legally incorrect. These paragraphs would have required the jury to find geographic and product markets, but nothing in *Hartford Fire* or the First Circuit's opinion in *Nippon Paper* requires this. Anderson apparently drew these paragraphs from a civil monopolization case, *Associated Radio Services Co. v. Page Airways, Inc.*, 624 F.2d 1342, 1349 n.12 (5th Cir. 1980), but criminal price fixing and bid rigging is fundamentally

different. Bid rigging is *per se* illegal under the antitrust laws, *e.g.*, *Reicher*, 983 F.2d at 170-72; *United States v. Portsmouth Paving Corp.*, 694 F.2d 312, 317 (4th Cir. 1982), and therefore proof of geographic and product markets, which may be necessary in civil rule of reason cases, was irrelevant here. *E.g., National Collegiate Athletic Ass'n v. Board of Regents of Univ. of Oklahoma*, 468 U.S. 85, 109-110 (1984) ("when there is an agreement not to compete in terms of price or output, 'no elaborate industry analysis is required'") (citation omitted); *Retina Associates, P.A. v. Southern Baptist Hospital of Florida, Inc.*, 105 F.3d 1376, 1381 (11th Cir. 1997) (in *per se* cases "a deleterious effect on the market will be presumed and no detailed market analysis is required"); *Todorov v. DCH Healthcare Authority*, 921 F.2d 1438, 1455 n.28 (11th Cir. 1991) (in *per se* cases "the only inquiry is whether there was an agreement to restrain trade, since the unreasonableness of the restraint is presumed").

The third omitted paragraph would have required the jury to measure the "substantial effects" in the U.S. by reference to volume of commerce, market share, and effect on competition. Anderson apparently drew this paragraph from the district court opinion in *Nippon Paper*, 62 F. Supp.2d 173, 195 (D. Mass. 1999), which cites no supporting authority and, in any event, was not binding on the district court here. This language was not necessary in light of the *Hartford*

Fire language that was given to the jury, and it also is too narrow because it arguably excludes substantial effects on the government, and thereby would prevent the government from prosecuting antitrust conduct that results in stealing from U.S. taxpayers.

The fourth omitted paragraph would have required a finding that Anderson specifically intended that anticompetitive effects occur. That is not the law. *See, e.g., United States v. Alston*, 974 F.2d 1206, 1213 (9th Cir. 1992) ("In a criminal antitrust prosecution, the government need not prove specific intent to produce anticompetitive effects where a per se violation is alleged."); *United States v. Smith Grading and Paving, Inc.*, 760 F.2d 527, 533 (4th Cir. 1985) (government need not prove specific intent in *per se* Sherman Act cases); *United States v. Koppers Co., Inc.*, 652 F.2d 290, 295-96 n.6 (2d Cir. 1981) ("Where per se conduct is found, a finding of intent to conspire to commit the offense is sufficient; a requirement that intent go further and envision actual anti-competitive results would reopen the very questions of reasonableness which the per se rule is designed to avoid."). All the government needed to prove was that Anderson "accepted an invitation to join in a conspiracy whose object was unlawfully restraining trade." *MMR Corp.*, 907 F.2d at 495.

The fifth omitted paragraph erroneously required a finding that the effect

necessary to establish jurisdiction (as opposed to the conspiracy) occurred within the statute of limitations period. Nothing in the FTAIA or the "effects test," as explained in *Hartford Fire* or the First Circuit's opinion in *Nippon Paper*, makes any reference to limitations or provides any basis for melding the jurisdictional standard with limitations issues. The omitted language apparently was drawn from the district court opinion in *Nippon Paper*, which, again, cites no supporting authority and was not binding on the district court here. Moreover, the statute of limitations issue was covered elsewhere in the instructions (R18-1079, 1087).

Additionally, the district court's refusal to give the omitted paragraphs did not seriously impair Anderson's ability to conduct his defense. The *Hartford Fire* language that was given provided an adequate basis for Anderson to argue to the jury that there was no jurisdiction, and specifically no "substantial effect upon trade or commerce in the United States," and the court's instruction on the statute of limitations allowed Anderson to argue that the prosecution was untimely.

Finally, the jurisdictional instructions as given were not inconsistent or confusing. The first portion -- which Anderson does not dispute as legally correct -- told the jury "you must find beyond a reasonable doubt that the alleged Sherman Act conspiracy restrained interstate or foreign commerce" (R18-1082). The district court then explained that "Interstate or foreign commerce includes the

movement of products or services across state lines or between a state and a foreign country" (*id.*). This language, as well as the concept of "foreign commerce" by itself, communicated to the jury that some of the acts involved in the conspiracy might have occurred outside the United States.

The next portion of the instruction was Anderson's first proposed sentence and is virtually a verbatim quotation from *Hartford Fire*. This portion simply acted as a qualifier or narrowing of what foreign conduct properly could be considered -- foreign conduct that was meant to, and did, produce an effect in the United States. This is not an inconsistency. But even if the jury considered the two parts of the instruction as completely separate, there was nothing inconsistent about first giving the jury the correct legal standard should it find the conspiracy to have been domestic, and then giving the jury the correct standard should it find the conspiracy to have been foreign.

III. The District Court Did Not Err in Sentencing Anderson

The district court determined Anderson's prison sentence by grouping the counts under U.S.S.G. § 3D1.2 and applying § 2F1.1 (1995) -- the 1995 Guidelines were used by consent -- which, after adjustment, yielded a guideline range of 46-57 months (R19-84). The court then granted a downward departure, following Application Note 13 to former § 2F1.1, to an offense level that yielded a range of

30-37 months (R19-103). The court then imposed a sentence of 36 months (R19-105).

A. The District Court Properly Applied the Fraud Guideline to Calculate Anderson's Base Offense Level

There is no dispute that the district court correctly grouped the two counts under § 3D1.2. Nor is there any dispute that § 3D1.3 required the court to choose the highest offense level of the counts in the group. The district court selected § 2F1.1, which had the highest offense level of the two counts in the group, and that decision was correct.

Section 2X1.1, which Anderson concedes was the correct starting point for analyzing Count 2 (Br. 54), provides that the base offense level should be drawn "from the guideline for the substantive offense," and specifically cites 18 U.S.C. 371 in the Commentary. The substantive offense for conspiracy to defraud the United States was fraud, and the appropriate guideline therefore was § 2F1.1. That Anderson was not *charged* with the substantive offense of fraud is irrelevant. Nor does Anderson cite any support for his contention that 18 U.S.C. 371 somehow can be divided into separate clauses that are treated differently.

Anderson's argument based on § 2X1.1(c) also is baseless. That subsection states that when a conspiracy "is expressly covered by another offense guideline

section, apply that guideline section." But Application Note 1 to § 2X1.1 *excludes* § 2R1.1 from the list of offense guidelines that expressly cover conspiracy, thereby making § 2X1.1(c) inapplicable here. Nor does Application Note 3 to § 2X1.1 apply: that note refers the reader to § 2X5.1 "[i]f the substantive offense is not covered by a specific guideline," but here the substantive offense, fraud, *was* covered by § 2F1.1. Subsection 2X5.1 therefore was inapplicable.

Anderson next argues that § 2F1.1 itself, through Application Note 13, required that § 2R1.1 be used. But § 2R1.1 did not "more aptly" cover the conduct with which Anderson was charged. First, while Anderson did engage in a conspiracy to rig bids, that conduct was part and parcel of a conspiracy to defraud the United States. Anderson was charged with, and convicted of, participating in both conspiracies, and both § 2R1.1 and § 2F1.1 aptly cover certain aspects of the charged conduct. *See* Application Note 5 to § 1B1.1 ("Where two or more guideline provisions appear equally applicable, but the guidelines authorize the application of only one such provision, use the provision that results in the greater offense level."). Section § 2F1.1 foresaw application to cases of contract procurement fraud. *See* § 2F1.1. Application Note 7(b).

Second, the "loss-based method of sentence enhancement used by § 2F1.1," *United States v. Kuku*, 129 F.3d 1435, 1439 (11th Cir. 1997), perfectly suits the

offense conduct because the basic purpose of an 18 U.S.C. 371 conspiracy, and the real harm caused by it, was the loss to the United States. The critical issue for the fraud conspiracy was not the volume of commerce done by Anderson "in goods or services that were affected by the violation," § 2R1.1(b)(2), but the amounts by which USAID overpaid on the contracts.

Third, the two conspiracies in which Anderson participated should not be given equal weight in making the "more apt" determination suggested by Application Note 13. The fundamental purpose of Anderson's conduct was to steal from -- defraud -- the United States. Bid rigging was a means to that end, but as explained above with respect to statute of limitations issues, conspirators do not rig bids merely for amusement: the point is to have the government *pay them (too much) money*. *Cf. United States v. Henry,* 136 F.3d 12, 20 (1st Cir. 1998) (fraud guideline applied, notwithstanding Application Note 13, because "the main motivation for the criminal conduct was to obtain money," not commit environmental crimes); *United States v. Hauptman*, 111 F.3d 48, 50-51 (7th Cir. 1997) (Posner, J.) (fraud guideline applied, notwithstanding Application Note 13, where "bribery is the means used to defraud").

Fourth, the conduct alleged by the indictment for Count 1 and Count 2 was not identical. To defraud the United States, the conspirators, in addition to the bid

rigging, submitted (through the performing contractors, Harbert-Jones on Contracts 20A and 07, and SUSA on Contract 29) certifications in which they falsely represented that no one had been compensated in order to obtain the contract (R1-1-¶¶ 6(y), (z), (aa), (bb), (cc)). The 18 U.S.C. 371 violation was not dependent on the bid rigging and could have been brought as a separate prosecution standing alone. *E.g., United States v. Girard*, 744 F.2d 1170 (5th Cir. 1984).

United States v. Rubin, 999 F.2d 194, 197 (7th Cir. 1993) therefore is inapposite. In that case, the mail fraud was "designed to conceal" the price-fixing scheme and was "not separable from the price-fixing conspiracy[.]" The court expressly added, however, that the mail fraud *would* have been separable "had the defendants made fraudulent statements in letters concerning the quality or capacity of the new steel drums." The court thus emphasized that under different facts, the district court could have determined "that section 2F1.1 more aptly covers the conduct charged as mail fraud." *Id.* at 199. Here, the fraudulent conduct was not a means to perfect or conceal the antitrust violation; instead, the anticompetitive conduct was undertaken as a means to perfect the fraud against the United States. The conspirators *made fraudulent statements* in the contractors' certifications, conduct that was not part of the bid rigging. The *Rubin* court would have no difficulty finding, on the facts of this case, that § 2F1.1 more aptly covered the

charged conduct.

B. No "Heartland" Departure Could Have Been Granted

At sentencing, Anderson argued for a "heartland" downward departure under 18 U.S.C. 3553(b) that would result solely in home confinement, based on Anderson's age, medical condition, and caregiver status (R19-90-94). The district court first responded "I don't think there's been a prima facie case made" for the departure (R19-104), which suggests that the court believed the facts did not warrant it. In that event, the court's denial of the departure is not reviewable. *E.g.*, *United States v. Brenson*, 104 F.3d 1267, 1286-87 (11th Cir. 1997).

The court's further comments suggest that the court mistakenly may have believed that it lacked authority to grant the departure. On the particular facts of this case, however, because there was no valid basis for the departure, resentencing would serve no purpose and Anderson's sentence should be affirmed. *See United States v. Hirsch*, 280 F.3d 811, 814-15 (7th Cir. 2002) (sentence affirmed although district court did not consider defendant's alleged unusual circumstances).

The commentary to U.S.S.G. § 5K2.0 (1995) makes clear that this departure is limited to the "extraordinary case" that "differs significantly from the 'heartland' cases covered by the guidelines" and that "such cases will be extremely rare." Any suggestion that Anderson's case is "extraordinary" or "extremely rare" is frivolous:

If Anderson's position is accepted, any older defendant with non-serious physical ailments or an elderly spouse would qualify for a downward departure, and the exceptions would swallow the rule. Anderson's own cited case, *United States v. Milikowsky*, 65 F.3d 4, 7 (2d Cir. 1995) recognizes that the guidelines reflect the Sentencing Commission's belief that "antitrust offenders should generally be sentenced to prison."[16]

By his own admission, Anderson's condition is not serious. At most, he suffers from a mild or early stage dementia.[17] In any event, age and health are factors that *were* taken into account by the Sentencing Commission in formulating the guidelines, are "discouraged" factors that ordinarily are not relevant to a departure, *see Koon v. United States,* 518 U.S. 81, 94 (1996) and §§ 5H1.1, 5H1.4, and therefore are not extraordinary circumstances. *See United States v. Mogel*, 956 F.2d 1555, 1561 (11th Cir. 1992) ("offender characteristics should not ordinarily influence downward or upward departures") (citation and internal quotation

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[16] The unique or extraordinary factor present in *Milikowsky*, the adverse effect of imprisonment on the defendant's employees, is not present here.

[17] The medical reports submitted by Anderson for sentencing indicate that any slight dementia he may experience is the result of normal aging and abuse of alcohol (R19-99). In any event, "the Federal Bureau of Prisons will be able to address any of [defendant's] special needs." *Paradies*, 14 F. Supp.2d at 1321 (Bureau of Prisons has "two major referral centers . . . where Paradies could receive specialized treatment.").

omitted).

Likewise, family circumstances were considered by the Commission and are a "discouraged" factor for purposes of departure. *See* § 5H1.6. Anderson's wife's tremor does not show an extraordinary circumstance or that she could not be assisted by others. *See United States v. Allen*, 87 F.3d 1224, 1225 (11th Cir. 1996) (caring for parent with Alzheimer's and Parkinson's diseases was not extraordinary circumstance warranting departure).

United States v. Paradies, 14 F. Supp.2d 1315 (N.D. Ga. 1998) is not comparable. The court held that Paradies' age (77) and poor physical and mental health did *not* justify a downward departure. He had heart and prostate problems and, in general, a more serious condition than Anderson's. *See id.* at 1318 (Paradies "is unable to walk more than two blocks at a time"). The factors that tipped the scale in favor of the downward departure were Paradies' service to his country and substantial charitable activities -- neither of which was urged strongly by Anderson at sentencing or in his brief. And while the court reduced Paradies' sentence, it refused to excuse him from prison altogether as Anderson requested. Accordingly, under the circumstances of this case it would have been an abuse of discretion for the district court to grant the requested departure.

CONCLUSION

For the foregoing reasons, the judgment of conviction and sentence should be affirmed.

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Fed. R. App. P. 32(a)(7)(C) Certificate of Compliance

I, Steven J. Mintz, hereby certify that this brief complies with the type-volume limitation set forth in Fed. R. App. P. 32(a)(7)(B). This brief contains 13,938 words as counted by the Word Perfect 7.0 word processor used to prepare it.

Dated: August 21, 2002

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STEVEN J. MINTZ

CERTIFICATE OF SERVICE

I, Steven J. Mintz, hereby certify that today, August 21, 2002, I caused two copies of the accompanying BRIEF FOR APPELLEE UNITED STATES OF AMERICA, plus one IBM-formatted computer disk containing the same, to be served by Federal Express on each of the following:

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