No. _____

In The

Supreme Court of the United States

FRANK PEAKE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

In *People of Puerto Rico v. Shell*, 302 U.S. 253, 259 (1937), this Court held that Puerto Rico's constitutional legal status dictates its statutory status under the Sherman Act. As Respondent United States itself has emphatically (and correctly) stated in a brief to this Court in another matter, and as the Supreme Court of Puerto Rico recently held, Puerto Rico's constitutional legal status is that of a territory and not a State. The first Question Presented, therefore, is:

> Whether the First Circuit erred in determining that Puerto Rico is a State for purposes of the Sherman Act.

The second Question Presented addresses the standard for harmless error analysis, an issue of the most critical importance to our criminal justice system. In the case below, after promising it would not do so, the prosecution repeatedly emphasized to the jury that the jurors, personally as Puerto Ricans, had suffered as a result of the defendant's antitrust conspiracy by paying more for virtually everything they purchased in Puerto Rico. Despite finding that the defendant had a "valid concern" over the "prosecutors' appeal to the jury's personal interest," the First Circuit found the error harmless without considering what effect the error had on the jurors. The second Question Presented is:

QUESTIONS PRESENTED FOR REVIEW – Continued

Whether the First Circuit erred in applying a "preponderates heavily against the verdict" standard rather than an "effect on the jury" standard in its harmless error analysis, thereby ignoring the prejudicial effect of the prosecution's repeated improper argument and questioning that followed the prosecution's assurances to the trial court that such arguments would not be made.

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PETITION FOR WRIT OF CERTIORARI

Frank Peake respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in the matter of *United States v. Frank Peake* (Case Number 14-1088, October 14, 2015), which affirmed the judgment of the United States District Court for the District of Puerto Rico.

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the First Circuit, which affirmed the judgment of the United States District Court for the District of Puerto Rico, is contained in the Appendix (App. 1).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. The decision of the court of appeals was entered on October 14, 2015, and the denial of Peake's petition for rehearing was entered on December 15, 2015. This petition is timely filed pursuant to Sup. Ct. R. 13.1. The district court had jurisdiction because petitioner was charged with violating federal criminal laws. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18

U.S.C. § 3742, which provide that courts of appeals shall have jurisdiction over all final decisions of United States district courts.

CONSTITUTIONAL, STATUTORY, AND OTHER PROVISIONS INVOLVED

Petitioner relies upon the following constitutional provisions, treaties, statutes, rules, ordinances and regulations:

Sherman Act, 15 U.S.C. § 1 (emphasis added)

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce *among the several States*, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

Sherman Act, 15 U.S.C. § 3(a) (emphasis added)

> Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia,

or in restraint of trade or commerce between any such Territory and another, or *between any such Territory or Territories and any State or States* or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or both said punishments, in the discretion of the court.

Sixth Amendment to the United States Constitution

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Federal Rule of Criminal Procedure 52(a)

Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

28 U.S.C. § 2111

On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

STATEMENT OF THE CASE

Background

Most of Puerto Rico's commercial and retail commodities are purchased in the United States or elsewhere and arrive via water transportation. This case stems from Petitioner Frank Peake's position as the Chief Operating Officer and then the President of Sea Star Line, which at that time was one of only four international shipping companies that was authorized under United States law to transport commercial and retail items to and from Puerto Rico.

As a result of a destructive rate war that drastically reduced prices below costs and threatened the existence of the companies, certain executives at Sea Star and competitor Horizon Lines agreed upon an anticompetitive arrangement pursuant to which they would not compete with one another on price. The conspiracy – which unquestionably existed – was hatched by other people, without Peake, long before Peake was employed by Sea Star. The question at

trial was *only* whether Peake joined the ongoing conspiracy when he joined Sea Star.

Long before Peake's indictment, a number of individuals were charged in the Middle District of Florida with antitrust violations based on this identical conspiracy, and pled guilty. During the sentencing proceedings, the Jacksonville trial judge expressed extreme irritation that he had been snookered by the prosecution into imposing inappropriately high sentences. (E.g., "I felt like – that I had not been dealt with in the straightforward manner that I would expect from an attorney from the Department of Justice.").

Indictment, Trial and Sentencing

Three years later, Peake was charged with a single count of conspiracy to suppress and eliminate competition "among the several States" in violation of the Sherman Act, Title 15 U.S.C. § 1. Even though the Government had investigated Peake with a Jacksonville grand jury, and even though the same division of the U.S. Department of Justice and two of the same trial attorneys who brought the case against the other conspirators in Jacksonville were now bringing nearly identical charges based on the exact same conspiracy against Peake, the Government indicted Peake in Puerto Rico rather than Jacksonville.

The forum-shopping, motivated by the desire to avoid a new trial in front of the irritated Jacksonville judge, coupled with the substantial inconvenience of

proceeding in Puerto Rico, caused Peake to move for a change of venue pursuant to Fed. R. Crim. P. 21(b). In the very first line of its response to Peake's 21(b) venue motion, the Government set forth that its theory of the case would be that Puerto Rico was the "singular focus of one of the largest domestic price-fixing conspiracies ever investigated by the United States." The Government argued that Peake was part of a massive "Puerto Rico conspiracy" whose objective was to victimize the citizenry of Puerto Rico, that "[b]illions of dollars of Puerto Rico freight services were affected," that "[n]early every product sold in Puerto Rico that comes from the continental United States" was subject to the conspiracy, and that the Puerto Rico conspiracy "targeted any company that shipped goods to or from Puerto Rico."

Upon learning that the Government intended to focus its case on the adverse consequences of Peake's alleged actions on the members of the jury themselves, Peake moved for a change of venue pursuant to Rule 21(a), arguing that Peake could not obtain a fair and impartial trial in Puerto Rico because of the Government's stated intention to emphasize to the jurors that the conspiracy had a direct deleterious effect on them personally. In response, the Government *assured the district court that it would not appeal to the jurors as victims*, and argued that it had "always contended" that the victims were the direct purchasers of freight services "as opposed to the upstream consumers and end consumers." The

district court denied both of Peake's venue-change motions.

Trial began on January 10, 2013. It quickly became obvious that Peake's concerns were highly warranted, and that the entire theme of the Government's case was that all Puerto Rican consumers were the victims of the conspiracy. The first words uttered by the Government in its opening were that "shipping is very important in Puerto Rico." The Government then stated in the first minute that "[f]ood for Pueblo Supermarket, medicine at Walgreens, most things at Walmart, most things made in Puerto Rico for sale in the states" are transported by water shipment. It followed up by arguing that costs at Burger King, Office Max, and Walgreens were all higher as a result of the conspiracy. It drove the point home by telling the jury that these businesses passed their price increases on to their customers. And then it went so far as to state that because the Government had to pay more for shipping, it "had less money in the school luncheon program to buy food for school children."

Peake moved, unsuccessfully, for a mistrial as a result of these improper arguments. Although the district court denied the motion, it "warned the prosecutors against eliciting testimony beyond [the scope of effect on interstate commerce], and noted that the implication in the government's opening that school lunch programs, and therefore children, had been affected by the conspiracy was 'really way out of bounds.'" App. 20.

Despite this warning, the Government upped the ante by calling, over objection, two "victim" witnesses whose testimony was unrelated to any contested issue (given that Peake readily conceded the existence of a conspiracy affecting interstate commerce). First, the Government called – over objection – a witness from the company that owned numerous Burger King restaurants throughout Puerto Rico, and used the witness to emphasize that Burger King retail prices were affected by the conspiracy. The name of the witness's employer was unknown Carribean Restaurants, and there was no relevance to mentioning Burger King at all, but the Government went out of its way to do so.

The Government also called, over vigorous defense objection, a representative of the U.S. Department of Agriculture named Ron Reynolds, who also had literally zero knowledge of Peake's involvement in the conspiracy. The Government represented that the purpose of the witness was to establish that the USDA was provided shipping rates on a take-it-or-leave-it basis (itself an undisputed and irrelevant point). The Government *expressly promised* that if Reynolds was permitted to testify, the Government "would not go into the effect on school lunch prices." The defense argued that the Government sought to use Reynolds to prejudice the jury with "a thinly veiled attempt to pull at the heart strings again, to talk about price effects for Puerto Ricans, talk about school lunches."

Based on the Government's representation that Reynolds' testimony would be brief and would *not* include reference to the prices of school lunches, the court permitted Reynolds' testimony. Yet the Government asked only three questions related to the take-it-or-leave-it nature of the contract, which was the alleged purpose of the testimony. Most of Reynolds' testimony was *focused on the very topic the Government had promised not to address* – irrelevant and highly prejudicial questioning regarding the types of everyday products that were imported by the USDA, and the effect of high shipping prices on the school lunch program. The Government asked at least ten questions directly geared to elicit that the conspiracy resulted in higher prices for school lunches. The Government capped off this inquiry with a number of irrelevant questions to elicit that the conspiracy also affected the availability of food for low income families. The defense objected repeatedly both before and throughout this testimony.

After beginning its deliberations, the jury sent two notes indicating it was hung; the latter note indicated the jury had reached a "final" non-unanimous verdict. The district court nonetheless sent them back for more deliberations, and the taint of the improper arguments won out. The jury found Peake guilty of the Indictment's sole count. Peake's motion for judgment of acquittal or new trial was denied. Peake was sentenced to 60 months in prison, followed by three years of supervised release, and a $25,000 fine. Peake remains out on bond.

Appeal

Peake timely filed a Notice of Appeal on December 20, 2013. In his appeal, Peake identified a number of substantial lower court errors. Among these, he pointed out that he cannot have violated Section One of the Sherman Act (prohibiting conspiracies "among the several States"), as charged in the Indictment, because Puerto Rico is not a State. The Government responded by arguing that Puerto Rico *is* a State, at least for Sherman Act purposes. Peake also challenged the district court's denial of his motions to change venue and for mistrial based on the prosecution's repeated prejudicial arguments to the jury in which the jurors were told in no uncertain terms that they were directly victimized by the conspiracy.

On October 14, 2015, the First Circuit issued its opinion denying Peake's appeal. On the statehood issue, the opinion cursorily stated that "[i]t is well-settled that, for purposes of the Sherman Act, Puerto Rico is to be treated like a State and not like a territory," citing *Cordova & Simonpietri Ins. Agency Inc. v. Chase Manhattan Bank N.A.*, 649 F.2d 36, 38, 44 (1st Cir. 1981).

On the issue of the Government's prejudicial arguments and questioning regarding the jurors and school children as victims, the First Circuit agreed that the prosecutor's remarks were improper. The court excused the impropriety as harmless, however, because of the district court's curative instructions and because of the appellate court's perception that

there was an "overwhelming amount" of evidence supporting the conviction. App. 25. *See also* App. 30 ("[W]e are conscious that we should not set guilty persons free simply to punish prosecutorial misconduct.") (internal quotation omitted). Mr. Peake's petition for rehearing and rehearing *en banc* was denied on December 15, 2015.

Commonwealth of Puerto Rico v. Sanchez Valle

In *People of Puerto Rico v. Sanchez Valle*, 192 DPR 594 (P.R. 2015), the Supreme Court of Puerto Rico held that Puerto Rico is a territory of the United States and not a State for purposes of the Double Jeopardy clause. *Id.* at 596. On October 1, 2015, this Court granted certiorari. *Commonwealth of Puerto Rico v. Sanchez Valle*, Case No. 15-108. The United States submitted a detailed brief, as *amicus curiae*, supporting the Respondents. The Government's brief offered vigorous support for the Puerto Rico Supreme Court's determination that Puerto Rico is not a State, arguing that "*as a constitutional matter*, Puerto Rico remains a territory subject to Congress's authority under the Territory Clause." Brief for the United States as Amicus Curiae Supporting Respondents, at 3-4, available at: http://www.scotusblog.com/wp-content/uploads/ 2015/12/US-amicus-brief-in-Valle-15-108.pdf (the "Sanchez Valle Brief for the United States"). The Government referenced "Puerto Rico's constitutional status as a U.S. territory" over and over. *See, e.g.*, *id.* at 7, 8, 9, 15, 19, 27. It emphasized that the "position of territories in the constitutional

framework categorically differs from that of the . . . States." *Id.* at 15. And it cited numerous decisions of this Court establishing that Puerto Rico, from a constitutional standpoint, is not a State. *See, e.g.*, *id.* at 28-30 (citing cases).

As of the time of filing this Brief, *Sanchez Valle* is pending before this Court.

REASONS FOR GRANTING THE WRIT

The Court should grant certiorari because the United States Court of Appeals for the First Circuit has decided the important question of Puerto Rico's statehood in a way that squarely conflicts with the decisions both of this Court in *People of Puerto Rico v. Shell*, 302 U.S. 253, 259 (1937), and of the Supreme Court of Puerto Rico in the matter of *People of Puerto Rico v. Sanchez Valle*, 192 DPR 594 (P.R. 2015).

In addition, this Court should grant certiorari on the proper standard for harmless error analysis, a critical question of federal law on which there are significant inter- and intra-circuit splits.

I. THIS COURT SHOULD GRANT CERTIORARI TO ADDRESS THE PRESSING QUESTION OF WHETHER PUERTO RICO IS A STATE FOR PURPOSES OF THE SHERMAN ACT.

This Court has recognized, in this very Term, the substantial importance of the question of Puerto Rico's status as a territory or a State. On October 1, 2015, this Court granted certiorari in the matter of *Commonwealth of Puerto Rico v. Sanchez Valle*, Case No. 15-108, which turns on the question of whether Puerto Rico is a State for double jeopardy purposes. This case presents the companion question of whether Puerto Rico is a State for Sherman Act purposes.[1]

Certiorari should be granted to provide consistency and integrity to our system of laws, which is ill-served when the identical question results in a different answer in different contexts.[2] In addition,

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[1] A finding that antitrust conspiracies between Puerto Rico and a State do not violate Section 1 of the Sherman Act would not shield antitrust conspirators from prosecution. It would mean only that such antitrust conspiracies must be charged and prosecuted under Section 3 of the Sherman Act, as contemplated in *Shell*, 302 U.S. at 259.

[2] Should this Court decide that Puerto Rico is not a State in *Sanchez Valle*, the appropriate result may be to grant certiorari, vacate the judgment, and remand for reconsideration in light of the decision. If, on the other hand, the Court holds that Puerto Rico is, in fact, a State for constitutional purposes when applying the double jeopardy clause, then it follows that Puerto Rico also should be treated as a State for purposes of the Sherman

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certiorari should be granted because the First Circuit's decision that Puerto Rico can be treated as a State for purposes of the Sherman Act squarely conflicts with the decision of this Court in *People of Puerto Rico v. Shell*, 302 U.S. 253, 259 (1937). It also conflicts with the decision of the Supreme Court of Puerto Rico in *People of Puerto Rico v. Sanchez Valle*, 192 DPR 594 (P.R. 2015),[3] and with the decision of the Eleventh Circuit in *United States v. Sanchez*, 992 F.2d 1143 (11th Cir. 1993), *reh'g granted,* 3 F.3d 366 (11th Cir. 1993).

The conflict between *Shell* and the First Circuit's opinion below is apparent. Section One of the Sherman

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Act. This would mean that the First Circuit correctly decided Peake's case on the Puerto Rican statehood question, and *certiorari* would not be appropriate on this Question.

[3] The First Circuit's conclusion that Puerto Rico is a State also is inconsistent with its own opinions in other areas of the law. In a controlling *en banc* holding in the context of federal voting rights, the First Circuit unequivocally held that Puerto Rico is not a State. *See Igartua v. United States*, 417 F.3d 145, 147 (1st Cir. 2005) (*en banc*). In a subsequent *Igartua* opinion, the First Circuit emphasized that under the Constitution "Puerto Rico is not a state. . . . Statehood is central to the very existence of the Constitution, which expressly distinguishes between states and territories." *Id.* Most recently, in *Franklin Calif. Tax-Free Trust v. Puerto Rico*, 805 F.3d 322 (1st Cir. 2015), the First Circuit confirmed that Puerto Rico is not a State in the context of applying the Tenth Amendment. *Id*. at 344-45 (Puerto Rico "is constitutionally a territory because Puerto Rico's powers are not those reserved to the States but those specifically granted to it by Congress under its constitution.") (internal quotations and citation omitted).

Act prohibits conspiracies only "among the several States." In *Shell*, this Court set up a simple test to determine, on an ongoing basis over time, whether Puerto Rico is a State for purposes of the Sherman Act. *Shell*, 302 U.S. at 259. It held that Puerto Rico's constitutional legal status dictates its statutory status under the Act. *Id. See also*, *e.g.*, *Harris v. Rosario*, 446 U.S. 651, 651-52 (1980); *Califano v. Torres*, 435 U.S. 1 (1978). No subsequent opinion of this Court has altered this simple test. The Sherman Act, which was enacted in 1890 before *Shell* was decided, has not been materially modified since that time.[4] And Puerto Rico's constitutional legal status has not changed since *Shell* was decided. Puerto Rico remains a territory and not a State under the Constitution. *See Harris*, 446 U.S. at 651-52; *Torres v. Puerto Rico*, 442 U.S. 465, 468-70 (1979); *Sanchez Valle*, 192 DPR 594.

In *Sanchez Valle*, which was decided just last year, the Puerto Rico Supreme Court held that Puerto Rico cannot pursue criminal charges against defendants who already have been convicted in federal court, because to do so would violate the defendants'

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[4] Because the statutory text of the Sherman Act has not been modified since *Shell* was decided in 1937, and *Shell* interpreted that statutory text to define Puerto Rico's Sherman Act status by reference to its general constitutional status, there is no principled basis for the Government's suggestion that the statutory interpretation of the Sherman Act permits Puerto Rican statehood to be interpreted differently than in other constitutional contexts.

right to be free from double jeopardy. *Id.* In reaching its conclusion, the Supreme Court of Puerto Rico reiterated that Puerto Rico is a territory and not a State. *Id.* at 596. This decision cannot be reconciled with the opinion of the First Circuit in *Peake*, as Puerto Rico either is a State or it is not a State. There is no middle ground.

This Court granted certiorari. In the proceedings now before this Court in *Sanchez Valle*, *no one* has taken the indefensible position that Puerto Rico is a State. Even the Petitioner (the Commonwealth of Puerto Rico) concedes that Puerto Rico is not a State, arguing only that Puerto Rico gained independent sovereignty upon achieving the status of commonwealth with its own constitution in 1952. *See* Brief for Petitioner, *Commonwealth of Puerto Rico v. Sanchez Valle*, No. 150108, at 1, 23, 28.

Significantly, the U.S. Government filed a brief in *Sanchez Valle* as *amicus curiae*, emphatically agreeing that Puerto Rico is not a State. The Government's brief argues that "as a constitutional matter, Puerto Rico remains a territory subject to Congress's authority under the Territory Clause," and that it is not a State. *See, e.g.*, Brief for the United States at 3-4. It also acknowledges that the position it took many years ago in the First Circuit on this issue does "not reflect the considered view of the Executive Branch" any longer. *See also id.* at fn. 6. The Government's "considered view" that Puerto Rico is not a State, which was made to this Court on December 2015, is impossible to square with the position the

Government has taken before the First Circuit in Peake's case (including, most recently, at oral argument in March 2015).

The Government's schizophrenic contortions regarding Puerto Rico's status are not new. Contrary to its position in Peake's case, the United States has stridently and consistently taken the position in a series of related cases in the matter of *Igartua v. United States* that Puerto Rico is not a State for purposes of federal voting rights. *See Igartua v. United States*, 417 F.3d 145, 147 (1st Cir. 2005) (*en banc*). *See also Igartua v. United States*, 626 F.3d 592, 599 (1st Cir. 2010); *Igartua v. United States*, 229 F.3d 80 (1st Cir. 2000); *Igartua v. United States*, 32 F.3d 8 (1st Cir. 1994).

And most recently, on January 28, 2016, the Government filed a Brief with the First Circuit in the matter of *United States v. Mercado-Flores*, Case No. 15-1859, Document Number 00116950970 (1st Cir. January 27, 2016). In this Brief, the Government directly referenced Puerto Rico's status in the antitrust context, and rather unbelievably argued to the First Circuit the *exact opposite* of what it argued in Peake regarding *Shell* and Puerto Rico's current status as a territory and not a State thereunder. The Government's own language merits quotation:

> In *Puerto Rico v. Shell Co.*, 302 U.S. 253 (1937), the Supreme Court addressed whether the Sherman Act, 15 U.S.C. § 1 *et seq.*, preempted a Puerto Rico antitrust law. *Shell Co.*, 302 U.S. at 255-57. The Court held that

> it did not, . . . concluding that Puerto Rico's antitrust law did not conflict with federal antitrust law. *Id.* at 260-64. Despite recognizing that Congress had conferred on Puerto Rico "full power of local self-determination," the Court noted that "legislative duplication gives rise to no danger of a second prosecution and conviction" because territorial and federal antitrust prosecutors represent the same sovereign. *Id.* at 261, 264. . . . *Shell Co. recognized that Puerto Rico remained a territory*. 302 U.S. at 261, 264. *Puerto Rico's transition to self-government in 1952 further increased its autonomy, but, as Torres, Harris, and Califano made clear, it did not change Puerto Rico's constitutional status as a U.S. territory*.

Mercado-Flores Brief at 23-24 (emphasis added). The Government's Brief includes many other strident assurances that Puerto Rico is a territory, and is not a State. *See, e.g.*, *id.* at 13 ("The position of the United States" is that there have been no events that changed Puerto Rico's status "as a territory under Article IV of the United States Constitution."); *id.* at 15 ("[A]s a constitutional matter, Puerto Rico remains a territory under the sovereignty of the United States."); *id.* at 18 ("Puerto Rico is a United States territory. . . . Residents of Puerto Rico have voted several times on whether to seek a change in Puerto Rico's constitutional status but have not sought statehood or independence from the United States."). And, significantly, the Government dismisses as "dicta" the very case on which it relied most heavily

when arguing to the First Circuit in Peake's case – *Cordova & Simonpietri Ins. Agency Inc. v. Chase Manhattan Bank N.A.*, 649 F.2d 36, 38, 44 (1st Cir. 1981). Mercado-Flores Brief at 13.

Given the United States' vociferous assertions in *Sanchez Valle*, the *Igartua* cases, and *Mercado-Flores* that as a constitutional matter Puerto Rico is not a State, it would seem that the Government would have no choice but to stop playing fast and loose the way it has with the First Circuit, and to concede that under *Shell*, Puerto Rico is not a State under the Sherman Act (as it directly stated in *Mercado-Flores*). Puerto Rico simply cannot be both a State and not a State for constitutional purposes under the very same Constitution.

Certiorari should be granted to eliminate this unprincipled inconsistency in an important area of law, to resolve the conflict between the First Circuit's opinion and that of the Supreme Court of Puerto Rico, and to correct the misapplication of *Shell* in the First Circuit.[5]

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[5] The panel also noted that because there was evidence in the record that part of the freight originated in one state before being transported to another state to be shipped to Puerto Rico, the "commerce affected by the conspiracy was not only between a state and Puerto Rico, but also among the states." App. 6. The reasoning in this dicta is untenable. First, the Indictment did not charge under this theory. The very first paragraph of the Indictment makes clear that the trade at issue is between the United States and Puerto Rico: "Freight was transported by

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II. THIS COURT SHOULD GRANT CERTIORARI TO UNIFY HARMLESS ERROR ANALYSIS AND TO REQUIRE CONSIDERATION OF THE EFFECT OF THE ERROR ON THE JURY, ESPECIALLY IN THE CONTEXT OF INTENTIONAL IMPROPER PROSECUTORIAL ARGUMENTS AND EVIDENCE THAT FLOUT DIRECT PRIOR COURT RULINGS AND THE PROSECUTION'S OWN ASSURANCES TO THE COURT.

In 2011, this Court granted certiorari in the matter of *Vasquez v. United States*, Case No. 11-199, to address the circuit split regarding the proper standard for a finding of harmless error. The petition for certiorari in *Vasquez* demonstrated the wide variety of harmless error tests applied by the various Circuits, and within the same Circuit, and asked the Court to clarify this critically important area of law. That circuit split still exists today.

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water on scheduled ocean voyages between the continental United States and Puerto Rico ('Puerto Rico freight services')." In addition, to constitute a Section 1 violation, the *conspiracy* must be "among the several States." The Government's case against Peake alleged solely a conspiracy to fix prices in maritime trade between the continental United States and Puerto Rico. *See* Indictment, Par. 5 (stating that the conspiracy was between Peake and others to "fix rates and surcharges for Puerto Rico freight services"). No one contends there was a conspiracy to fix the prices between or with any other states. Accordingly, the conduct charged properly falls under Section 3 and not Section 1.

After the case was fully briefed and argued, the Court dismissed the writ of certiorari as improvidently granted, 132 S. Ct. 1532 (April 2, 2012), presumably because the oral argument revealed a lack of clarity on which harmless error standard had been applied in the case and how application of a different standard might have affected the case.

This case presents no such lack of clarity. In the opinion below, the First Circuit found that the prosecutors had "improper[ly]" "appeal[ed] to the jury's personal interests," and that it was "concerned by the impropriety of the prosecutors' remarks." App. 25, 27, 30. This was an egregious constitutional error directly impinging on Peake's Sixth Amendment right to be tried by an impartial jury. Yet the First Circuit went on to hold, without any analysis of the effect of the error on the jury, that the improprieties were harmless because the district court gave curative instructions and because the evidence did not "preponderate heavily against the verdict." App. 26-28.

This standard strays substantially from this Court's jurisprudence on harmless error and is fundamentally inconsistent with the nature and purpose of harmless error review. For the question, as articulated by this Court, is *not* whether the reviewing court believes the defendant to be guilty:

> From presuming too often all errors to be prejudicial, the judicial pendulum need not swing to presuming all errors to be harmless if only the appellate court is left without

> doubt that one who claims its corrective process is, after all, guilty.

Bollenbach v. United States, 326 U.S. 607, 615 (1946) (internal quotations omitted). It is not the appellate court's role to "look at the printed record, resolve conflicting evidence, and reach the conclusion that the error was harmless because [they] think the defendant was guilty," because to do so "would be to substitute our judgment for that of the jury." *Weiler v. United States*, 323 U.S. 606, 611 (1945). As this Court further explained in *Kotteakos v. United States*, 328 U.S. 750 (1946), "the crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting." *Id.* at 746. *Kotteakos* rejected the suggestion that reviewing courts should "speculate upon probable reconviction and decide according to how the speculation comes out." *Id.*

In subsequent cases, the Court reemphasized that the focus should be on the error's effect on the jury, not the strength of other evidence. For example, in *Fiswick v. United States*, 329 U.S. 211 (1946), the Court stated that it "cannot say with fair assurance in this case that the jury was not substantially swayed by the use of these admissions against all petitioners." *Id.* at 218. *See also O'Neal v. McAninch*, 513 U.S. 432, 436 (1995) (articulating the standard as "Do I, the judge, think that the error substantially influenced the jury's decision?"); *Chapman v. California*, 368 U.S. 18, 23-24 (1967) (focusing on whether the error "possibly influenced the jury"); *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963) (focusing on

whether there was a reasonable possibility that the error could have contributed to the conviction); *Stewart v. United States*, 366 U.S. 1, 9 (1961) (focusing on whether the error could have affected the jury's deliberations). In *Chapman*, the Court emphasized that in the case of constitutional errors, like this one, the burden is on the Government to show that the error was "harmless beyond a reasonable doubt." *Chapman*, 386 U.S. at 24. It is hard to conceive of how a test that looks to whether the error "heavily" preponderates against the verdict could possibly meet this criteria.

The Court's jurisprudence does not contemplate a test that pays no mind to whether the errors had an effect on the jury, but only looks at whether the other evidence is deemed by the reviewing court to be substantial. The "preponderate heavily against the verdict" standard thus is impossible to square with this Court's jurisprudence. Yet variations of this standard are used by appellate courts with substantial frequency, anointing appellate courts with the power to act as the ultimate arbiters of guilt or innocence in lieu of juries, and inoculating prosecutors and lower courts from any real risk that their errors (even intentional ones) will have consequences.

Indeed, the outcome of Peake's case likely would have been quite different if he had been indicted in a different Circuit. It is difficult to sort the Circuits cleanly into two piles, because each Circuit applies a different version of harmless error review falling on a spectrum between those that focus on the weight of

other evidence (such as the standard that was applied below), and a pure "effect on the jury" test similar to that applied, for example, by the Second Circuit in *Wray v. Johnson*, 202 F.3d 515, 526 (2d Cir. 1998). In almost every circuit, harmless error jurisprudence within the circuit is muddled, variable, and outcome-driven. *Compare, e.g.*, *United States v. Nash*, 482 F.3d 1209 (10th Cir. 2007) (applying an effect on the jury test), *with United States v. Glass*, 128 F.3d 1398 (10th Cir. 1997) (applying a weight of other evidence test).

In most cases, though, the "preponderate heavily against the verdict" standard applied below is *not* the same standard that would have been applied in the Second, Third, Fourth, Fifth, Ninth, and D.C. Circuits, each of which typically apply some version of the "effect of the error" test. *See*, *e.g.*, *Wray*, 202 F.3d at 526; *Gov't of the V.A. v. Martinez*, 620 F.3d 321, 337-38 (3d Cir. 2010); *United States v. Mitchell*, 1 F.3d 235, 245 (4th Cir. 1993); *United States v. Simmons*, 374 F.3d 313 (5th Cir. 2004); *United States v. Lopez*, 500 F.3d 840 (9th Cir. 2007); *United States v. Cunningham*, 145 F.3d 1385 (D.C. Cir. 1998). Some of these Circuits do include some consideration of the weight of other evidence, but typically do so for the purpose of assessing the degree to which the error had an actual effect on the particular jury in question, rather than whether there would be ample evidence to convict in an error-free trial. *See, e.g.*, *Martinez*, 620 F.3d at 337. By way of contrast, a test focusing on the weight of other evidence, similar to a "preponderate against the verdict" test, often carries the day in the Sixth, Seventh, Eighth, and Eleventh

Circuits. *See, e.g.*, *United States v. Rogers*, 580 Fed. Appx. 347, 351 (6th Cir. 2014); *United States v. Vasquez*, 635 F.3d 889 (7th Cir. 2011); *United States v. Wiley*, 29 F.3d 345, 349 (8th Cir. 1994); *United States v. Willner*, 795 F.3d 1297, 1322 (11th Cir. 2015).

This Court should grant certiorari to clarify the substantial variation in the harmless error standard, and to provide that harmless error analysis must consider the errors' effect on the jury (regardless of whether a curative instruction was given) and not merely whether there was sufficient other evidence to support the verdict.

This is especially critical in cases similar to this one, where the error in question is intentional pervasive prosecutorial argument expressly designed to poison the jury against the defendant. Prosecutorial misconduct designed to prejudice the defendant necessarily affects the defendant's substantial rights, and therefore should never be considered harmless. Federal Rule of Criminal Procedure 52(a) and 28 U.S.C. § 2111. But the "preponderate heavily against the verdict" standard applied below does not consider the nature of the error or its likely effect on the jury *at all*. For this reason, this case presents an ideal vehicle for certiorari.

In assessing harmlessness, the First Circuit did not consider whether the Government's repeated "appeal[s] to the jury's personal interests," App. 27, had an effect on *this* Puerto Rican jury's assessment of the case. Instead, the First Circuit excused out of hand the Government's intentional choice to repeatedly

make *exactly* the improper arguments it promised not to make, based on the First Circuit's personal view that Peake is guilty. App. 30. Nor did it consider that the jury sent out two notes indicating it could not reach a unanimous verdict, or that the district court had concluded that it was a "very close case," not a slam dunk for the government by any means. Had the First Circuit instead applied a standard that looked to the effect of the error on the jury's analysis, the substantial prejudicial error found by the First Circuit (which caused the jurors to identify themselves as victims of the crime) could not have been deemed harmless. *See, e.g.*, *Cardona v. Florida*, ___ So. 3d ___, 2016 WL 636048, at *1, 4 (Fla. February 18, 2016) (vacating convictions based on pervasiveness and cumulative effect of prosecutor's improper arguments, which caused prejudice against the defendant).

The Government defeated Peake's motion to change venue by assuring the district court that it would not appeal to the jurors (the "end consumers") as victims, but rather that the case would focus only on the direct purchasers of freight services. Based on these assurances, the district court denied Peake's motion for change of venue. No doubt well aware of the permissive harmless error standard that would be applied in the First Circuit, however, the Government abandoned its assurances from the first moment of trial. Indeed, "harm to end consumers" was the primary theme of the Government's case.

From the first words out of the Government's mouth in Opening, all the way through trial, the

Government affirmatively and by design highlighted to the jury, over and over again, that as a result of this conspiracy the jurors themselves paid more for practically everything they purchased:

- Opening line: "Ladies and Gentlemen, shipping is very important in Puerto Rico. . . . Most consumer goods travel to Puerto Rico from the shipping lanes of Jacksonville, Florida, Elizabeth, New Jersey, and Houston, Texas. Food for Pueblo supermarkets, medicine at Walgreens, most things at Walmart. Most things made in Puerto Rico for sale in the states travel through those same shipping lanes, things like pharmaceuticals, electronics and rum."
- "It was so significant that it affected billions of dollars of freight to and from Puerto Rico. Billions of dollars. This case is about Puerto Rico because the conspiracy affected so much of what is sold here and what is exported from here."
- "Congress passed the Sherman Act because it was so concerned that consumers need to buy things to feed and clothe their families. . . . They [consumers] try to get the best price for what they buy, especially in times when money is tight."
- "Businesses like Burger King, Office Max and Walgreens, *businesses that have stores all over Puerto Rico*, they were all paying more than they should

have to ship freight to Puerto Rico because Sea Star and Horizon were conspiring, not competing." (emphasis added)

- "You will hear from a witness . . . who owns all the Burger Kings in Puerto Rico. He will tell you that the shipping costs are factored into the costs of the whoppers sold at Burger King."
- "[T]here will be evidence that the government used the shipping companies to ship food for the school lunch program. The federal program gives free and reduced price lunches to families who can't afford to pay for their lunches. You will hear from the Department of Agriculture, USDA which will tell you that *paying more for shipping meant that the government had less money in the school lunch program to buy food for school children*."

Peake immediately called the Government out on its improprieties. The district court agreed that the Government had crossed the line and warned against any further such arguments, but it allowed the trial to continue. Thus emboldened, the Government carried on with these improper arguments throughout the trial, simply ignoring its promise not to play the consumer card (and knowing that such a strategy would prevail in the end). With its conspirator witnesses, it brought out the names of popular consumer companies affected by the conspiracy (including

Walmart, Walgreens, Bacardi, and Johnson & Johnson) in contexts not relevant to the elements of the charge, and certainly not relevant to the only contested question of Peake's involvement.

Then came time for the Government's "victim" witnesses. Peake sought to preclude these witnesses on the basis that they had no information about Peake's involvement in the conspiracy, and were being called for the purpose of further prejudicing the jury against Peake. First, the Government called a witness who was asked about Burger King's menu items, the large number of Puerto Ricans employed by Burger King, and the fact that Burger King's prices were higher as a result of the conspiracy. All of this was highly prejudicial, and more relevantly, it was directly counter to the Government's assurances that it would not emphasize harm to end consumers or the citizens of Puerto Rico generally.

The next witness, over Peake's objection, was an employee of the United States Department of Agriculture (USDA) who likewise had no knowledge of Peake's involvement in the conspiracy. Peake argued once again that the Government's true purpose – indeed, its only purpose – in calling the witness was to prejudice the jury by emphasizing the effect of the conspiracy on school lunch prices. But the Government assured the court that it "wouldn't go into the effect on school lunch prices." With this assurance, the court allowed the Government to call the witness. Yet despite its promises, the Government very much *did* go into the effect on school lunch prices, asking the following questions:

- "You mentioned that the USDA has a need to transport goods to Puerto Rico and you mentioned some programs and one of those programs you mentioned was the school lunch program?"
- "Does the USDA purchase food for the school luncheon program?"
- (Again) "Does the USDA purchase food for the school lunch program?"
- "Does the USDA arrange for transportation for food of the school lunch program?"
- "And does the USDA receive funds to purchase the food for school lunch programs?"
- (Again) "Does the USDA receive funds to purchase food for the school lunch program?"
- "Does the USDA ever receive separate funding to arrange for the transportation of that program?"
- "From 2003 to 2008, was food for the school lunch program transported from the states, from Jacksonville to Puerto Rico, with a transport on ships operated by Sea Star and Horizon?"
- "Was food for the school lunch program transported from Jacksonville, Florida to San Juan, Puerto Rico on ships operated by Sea Star and Horizon?"

This examination, in the face of the Government's express promise not to address the effect of the conspiracy on school lunch prices, was unquestionably improper.

If the district court had conducted a typical Rule 403 balancing test before allowing these witnesses, they might well have been excluded because their relevance was low and the prejudice unduly high. But no balancing test was conducted, because the Government promised it would not do what it then squarely did. Yet because of the First Circuit's application of the "preponderate heavily against the verdict" standard, App. 27, Peake was left without a remedy and was deprived of his right to a fair trial in an impartial venue. Instead, he was tried by a jury which had been told over and over that it had personally suffered harm as a result of Peake's actions.

This case abundantly demonstrates that the harmless error standard applied in the First Circuit is not, in fact, harmless. It allows too great an incentive for prosecutors to cross the line. The Court should grant certiorari to eliminate the substantial variation in harmless error standards between and within Circuits, and should make clear that harmless error analysis cannot look merely to the weight of other evidence, but must look to what effect the error had on the jury. The standard applied below makes it too easy for prosecutors to act with impunity – knowing that the curative instruction that will follow will

cure nothing,[6] and that the misconduct will be washed away on appeal so long as there is adequate other evidence of the defendant's guilt. It is only when there is a consequence to the Government's action that it will stop flouting the rules, and the Sixth Amendment right to fair trial before an impartial jury will be protected.

[6] The problem of prejudicial prosecutorial misconduct, which has been the subject of much attention in recent years, is greatly exacerbated by systemic rules which pretend that the prejudice to a criminal defendant can be "cured" by the issuance of an instruction. Denying the realities of human nature – which precludes all but the most highly disciplined jurors from truly disregarding what they have heard – our system accepts this farce in furtherance of the admittedly necessary goal of preserving jury verdicts and avoiding costly retrials. But harm from pervasive intentional prejudicial argument and evidence is not, in reality, cured by an instruction to disregard. *See, e.g.*, *Bruton v. United States*, 391 U.S. 123, 132 (1968); *Richardson v. Marsh*, 481 U.S. 200, 206-08 (1987); *United States v. Ayala-Garcia*, 574 F.3d 5, 21-22 (1st Cir. 2009); *Blake v. Pellegrino*, 329 F.3d 43, 50 (1st Cir. 2003); *United States v. Sepulveda*, 15 F.3d 1161, 1185 (1st Cir. 1993). Prosecutors – in their heart of hearts – obviously agree that curative instructions do not obviate the arguments a jury already has heard, which is why they continue to repeatedly make arguments they know are improper.

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the First Circuit.

Respectfully submitted,

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Miami, Florida
March 9, 2016

United States Court of Appeals
For the First Circuit

No. 14-1088

UNITED STATES OF AMERICA,

Appellee,

v.

FRANK PEAKE,

Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

[Hon. Daniel R. Domínguez, *U.S. District Judge*]

Before

Torruella, Lynch, and Thompson,
Circuit Judges.

David Oscar Markus, with whom *Mona E. Markus*, *A. Margot Moss*, and *Markus & Markus, PLLC*, were on brief, for appellant.

Shana M. Wallace, Attorney, U.S. Department of Justice, Antitrust Division, with whom *William J. Baer*, Assistant Attorney General, *Brent Snyder*, Deputy Assistant Attorney General, *Craig Y. Lee* and *James J. Fredricks*, Attorneys, U.S. Department of

Justice, Antitrust Division, were on brief, for appellee.

October 14, 2015

TORRUELLA, *Circuit Judge*. As a result of his conviction for participating in one of the largest antitrust conspiracies in the history of the United States, Defendant-Appellant Frank Peake ("Peake") raises a number of claimed errors with respect to his trial and sentencing for a serious price-fixing offense in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1 ("Section 1"). Peake challenges: (1) the validity of his indictment; (2) the scope of the search warrant executed by the government; (3) the district court's denial of his pre-trial motion to change venue; (4) improper remarks made by the prosecutor during trial; (5) the district court's ruling permitting prejudicial testimony; (6) the district court's denial of his request for a theory-of-defense instruction; (7) the district court's denial of his request for a mistrial during jury deliberations, and (8) the length of his sentence, which was based on the amount of commerce affected by the charged conspiracy, and which Peake contends the court incorrectly computed. Finding no errors and concluding that the district court marshaled this trial in a commendable manner, we affirm. After a brief overview of the factual background, we will take each of the issues one by one.

I. Background

We recount the facts in the light most favorable to the jury verdict, as supported by the record. *See United States* v. *Andrade*, 94 F.3d 9, 10 (1st Cir. 1996). Since 2002, waterborne cabotage between Puerto Rico and the mainland has been dominated by four freight carriers: Horizon Lines, Sea Star, Crowley, and Trailer Bridge. *See In re Puerto Rican Cabotage Antitrust Litig.*, 815 F.Supp.2d 448, 454 n.3 (D.P.R. 2011). And, because of Puerto Rico's geographical situation, Puerto Rico's consumers rely on these carriers to transport most goods imported to the island. *See* Merchant Marine Act of 1920, Pub. L. No. 66-261, 41 Stat. 988, 999 (1920) (codified as amended at 46 U.S.C. §§ 55101, *et seq.*). Seeking to maximize revenues, Horizon Lines and Sea Star agreed not to undercut each other in price and allocated precise market share quotas through an extensive conspiracy that included bid rigging and careful planning, coordination, and the kinds of day-to-day self-enforcement common of illegal agreements.

This behavior constituted an agreement in restraint of trade forbidden by Section 1. Peake, the former President and Chief Operating Officer ("COO") of Sea Star, played a managing role in the conspiracy, coordinating with competitors through meetings, phone calls, and emails, and attending to pricing or consumer-allocation disputes that his subordinates could not resolve on their own.

For example, during a meeting in Orlando in 2006, Peake coordinated with Horizon Lines executives to resolve existing disputes by agreeing to keep the market shares at their current levels, rather than reinstating the split in effect prior to his joining the conspiracy in 2005. Later that year, the market allocation became imbalanced when Walgreens, a major importer of consumer goods to Puerto Rico, decided not to divide freight contracts between Horizon Lines and Sea Star, and instead allocated all of its freight to Horizon Lines. Peake quickly agreed with an executive from Horizon Lines that the company would compensate by shifting cargo to Sea Star vessels or using Transportation Service Agreements, whereby Horizon Lines would pay Sea Star to carry its cargo even though it had capacity to transport it in its own vessels.

While the conspiracy was in full swing, a Sea Star senior executive working with Peake became a government informant. Based on his description of the conspiracy, the government initiated an extensive investigation that included an FBI search of Sea Star's headquarters in 2008. Four of Peake's co-conspirators were charged with antitrust violations and pleaded guilty before the U.S. District Court for the Middle District of Florida, Jacksonville Division. Following these events, a grand jury in San Juan, Puerto Rico, returned an indictment against Peake in November 2011 on one charge of conspiracy to suppress and eliminate competition by agreeing to fix rates and surcharges for freight services in interstate

commerce between the United States and Puerto Rico.

Peake's co-conspirators testified against him at trial, revealing his involvement in the conspiracy and their discussions about setting surcharges, fees, and market share allocations. One such incident involved an email exchange between Peake and a competitor regarding prices offered to a client in an attempt to "avoid a price war."

After a nine-day trial, which took place over the course of three weeks, the jury found Peake guilty of participating in a conspiracy to fix the prices of Puerto Rico freight services, in violation of Section 1. The district court sentenced Peake to sixty months' imprisonment.

This appeal ensued.

II. The Indictment

Before addressing the main issues in this appeal, we briefly address an issue that, although Peake is raising on appeal for the first time, he claims would foreclose our jurisdiction on this matter.[1] Peake

[1] "[J]urisdictional challenges to an indictment may be raised at any time," *United States* v. *Rosa-Ortiz*, 348 F.3d 33, 36 (1st Cir. 2003), but all other motions regarding a defective indictment, such as failure to state an offense, must be made *before* trial, Fed. R. Crim. P. 12(b)(3)(B), and thus can only be reviewed for plain error if raised for the first time on appeal, *see United States* v. *Turner*, 684 F.3d 244, 255 (1st Cir. 2012). Here,

(Continued on following page)

argues that Puerto Rico is not a state, yet the indictment charges Peake under Section 1, which prohibits agreements in restraint of trade or commerce "among the several States," and that his conviction must therefore be vacated.[2] There are at least two insurmountable problems with this argument. First, it is well-settled that, for purposes of the Sherman Act, Puerto Rico is "to be treated like a state and not like a territory," therefore, Section 1 fully applies to Puerto Rico. *Córdova & Simonpietri Ins. Agency Inc.* v. *Chase Manhattan Bank N.A.*, 649 F.2d 36, 38, 44 (1st Cir. 1981). Second, the evidence in the record shows that part of the freight carried by the companies in the conspiracy originated in one state before being transported to a port in a second state to be shipped to Puerto Rico. Therefore, the commerce affected by the conspiracy was not only between a state and Puerto Rico, but also among the states. Thus, Peake was correctly charged, and the indictment is not defective.

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it matters not whether we treat Peake's argument as a jurisdictional challenge, or as an untimely-made failure-to-state-a-claim argument to be reviewed for plain error, because, as we explain, Peake was correctly charged under Section 1, so there was no error at all.

[2] Peake argues that he should instead have been charged under Section 3 of the Sherman Act, which contains the same prohibitions, but applies to territories. 15 U.S.C. § 3(a) ("Every . . . conspiracy[ ] in restraint of trade or commerce . . . between any such Territory and another, or between any such Territory or Territories and any State or States . . . is declared illegal.").

We now move on to Peake's appeal of the district court's denial of his motion to suppress, and then address his other trial-related claims, before finally turning to the appeal of his sentence.

III. Motion to Suppress

Peake appeals the district court's denial of his motion to suppress the government's search of his personal electronics. For the following reasons, we affirm the denial.

A. Standard of Review

In reviewing a challenge to the district court's denial of a motion to suppress, "we view the facts in the light most favorable to the district court's ruling," and "review the district court's findings of fact and credibility determinations for clear error." *United States* v. *Camacho*, 661 F.3d 718, 723 (1st Cir. 2011) (citation and internal quotation marks omitted). However, we review the lower court's legal conclusions, including its determination of whether the government exceeded the scope of the warrant, *de novo*. *United States* v. *Fagan*, 577 F.3d 10, 12-13 (1st Cir. 2009).

A search warrant must "describ[e] the place to be searched" and the "things to be seized." U.S. Const. amend. IV. The authority conferred by the warrant "is circumscribed by the particular places delineated in the warrant and does not extend to other or different

places." *Fagan*, 577 F.3d at 13. Search warrants also have a specificity requirement, meaning "that warrants shall particularly describe the things to be seized," which "prevents the seizure of one thing under a warrant describing another." *Marron* v. *United States*, 275 U.S. 192, 196 (1927). Even though search warrants are limited to the particular places and things described in them, there is some breathing room in our analysis, since "search warrants and affidavits should be considered in a common sense manner, and hypertechnical readings should be avoided." *United States* v. *Bonner*, 808 F.2d 864, 868 (1st Cir. 1986) (citing *Spinelli* v. *United States*, 393 U.S. 410, 419 (1969)).

A draft warrant presented to a magistrate judge may be altered or modified by the judicial officer or at his direction. *See United States* v. *Hang Le-Thy Tran*, 433 F.3d 472, 481 (6th Cir. 2006); *United States* v. *Katoa*, 379 F.3d 1203, 1208 (10th Cir. 2004); *United States* v. *Arenal*, 768 F.2d 263, 267 (8th Cir. 1985). When part of a warrant is considered invalid, "evidence seized under the valid portion may be admitted." *United States* v. *George*, 975 F.2d 72, 79 (2d Cir. 1992). Furthermore, when a warrant is limited to authorize the seizure of only certain objects, "container[s] situated within residential premises which are the subject of a validly-issued warrant may be searched if it is reasonable to believe that the container could conceal items of the kind portrayed in the warrant." *United States* v. *Rogers*, 521 F.3d 5, 9-10 (1st Cir. 2008).

B. The Search Warrants

In this case, a magistrate judge was presented with a draft warrant for his consideration. Upon reviewing it, he crossed out a paragraph under Attachment A, which described the premises to be searched. The stricken paragraph allowed the search of "briefcases, laptop computers, hand-held computers, cell phones, Blackberries, and other movable document containers found on the premises described."[3] In Attachment B, the magistrate judge also struck the following text from the description of the property to be seized: "memory calculators, pagers, personal digital assistants such as Palm Pilot hand-held computers." The magistrate judge left standing, however, other references to electronically stored documents and records. As amended, Attachment B described the property to be seized as follows:

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[3] The full text of the paragraph struck stated:

> In order to minimize the prospect of the removal and subsequent destruction of any of the documents and records identified in Exhibit B to the Search Warrant, the search will include the briefcases, laptop computers, hand-held computers, cell phones, Blackberries, and other movable document containers found on the premises described above, and in the possession of, or readily identifiable as belonging to SEA STAR management, pricing, and sales personnel including, but not limited to, FRANK PEAKE, PETER A. BACI, CARL FOX, NED LAGOY, NEIL PERLMUTTER, ALEX CHISHOLM, MIKE NICHOLSON, EDWARD PRETRE, and WILLIAM BYRNES.

> As used above, the terms records, documents, programs, documentation, applications or materials include but are not limited to records, documents, programs, applications or materials created, modified or stored in any form, including any optical, electrical, electronic, or magnetic form (such as any information on an optical, electrical, electronic or magnetic storage device), including floppy disks, hard disks, ZIP disks, CD-ROMs, optical disks, backup tapes, printer buffers or other device memory buffers, smart cards . . . email servers, as well as opened and unopened e-mail messages and any printouts or readouts from any optical, electrical, electronic, or magnetic storage device. . . .

Additionally, the magistrate judge added two handwritten passages to the portion of the draft warrant governing the seizure of computers and other electronic devices, and ordered that any seized computers or electronic devices within the scope of the warrant be returned within thirty days of seizure. Specifically, the following language was inserted:

> In the event that computer equipment and other electrical storage devices must be transported to the appropriate laboratory, rather than searched on the premises, the search of computer equipment and other electronic storage devices must be completed within 30 days of seizure.

and

> If no evidence is found in the computer equipment and electronic storage devices by the end of the 30 day period, or if any electronically stored information is outside of the scope of the warrant, such shall be returned promptly.

Following the guidance provided in the warrant, the FBI raided Sea Star's headquarters on April 17, 2008, and seized Peake's personal laptop and Blackberry. The items were imaged (the data was copied) and returned to Peake on-site the same day. This evidence was not immediately reviewed, as the FBI was under the impression that Sea Star's servers stored copies of all seized information relevant to the investigation. Images of Peake's computer and Blackberry were eventually sent to the Department of Justice in Washington, D.C. More than four years passed before the government sought and obtained another search warrant from a magistrate judge in Washington, D.C., authorizing a search of these data copies. Their review revealed emails tying Peake to the conspiracy, which the government submitted as evidence at trial.

C. Appeal of the Suppression Ruling

Peake argues that the information collected from his personal computer and Blackberry should be suppressed because the two items were outside the scope of the initial warrant, and therefore illegally seized. He contends that when the magistrate judge struck the paragraph in Attachment A specifying

computers and Blackberries as places that could be searched, doing so specifically disallowed any search and seizure of said items. A good faith exception to the purported violation of the initial warrant, Peake continues, cannot apply in the present case where the property seized was expressly disallowed by the issuing magistrate judge.

Peake also argues that the government did not have authority to image the seized electronics, and that the second warrant from the magistrate judge in Washington, D.C., did not cure the violation because it could not authorize a search of material outside the scope of the original warrant, especially after the thirty days permitted by the first warrant had passed.

1. The First Warrant

Applying *de novo* review, we conclude that the information collected from the computer and Blackberry was within the scope of the original search warrant. We think Peake is mistaken in his reliance on the stricken paragraph; other, intact passages in the warrant expressly demonstrate that the magistrate judge approved searching for all documents and records that pertained to the conspiracy stored in "an electronic or digital format." That the warrant listed documents stored in electronic form on an electronic storage device, including email messages, and referred in Attachment B to Blackberry address books, confirms the legality of the FBI's search.

This case is analogous to *United States* v. *Rogers*, where we held that the government's seizure of a videotape was valid, even though videotapes were not listed in the warrant, because the warrant mentioned "photos," and a videotape was a plausible repository for a photo. 521 F.3d at 10. Or *United States* v. *Giannetta*, 909 F.2d 571, 577 (1st Cir. 1990), where we held that the officers could look in movable containers and wherever they had reasonable suspicion to think "documents could be hidden, which would include pockets in clothing, boxes, file cabinets and files," because "[a]s to document searches especially, the easily concealed nature of the evidence means that quite broad searches are permitted."

Here, given that Peake's personal electronic devices were on the premises to be searched, and the warrant specifically mentioned electronically-stored documents, the FBI acted within the scope of the warrant when it searched Peake's devices. And the fact that the issuing magistrate judge had handwritten on the warrant that computers and electronic devices must be returned within thirty days is evidence enough that the scope of the warrant included these objected-to items. Furthermore, the government's imaging of the computer and Blackberry did not constitute a warrantless seizure because doing so was contemplated by the original warrant, which explicitly authorized the government to seize electronically-stored emails and documents.

Nor does the fact that the magistrate judge crossed out language in the warrant affect our

conclusion. The warrant authorized a search of the "premises" of Sea Star's headquarters; thus, as the district court held in denying the motion to suppress, the magistrate judge could have reasonably crossed out the items mentioned in Attachment A, "briefcases, laptop computers, hand-held computers, cell phones, Blackberries and other movable document containers," in order to indicate that the government should not be limited to searching solely in those places for records documenting the conspiracy, but should be permitted to search the entire premises. *See, e.g.*, *United States* v. *Bradley*, 644 F.3d 1213, 1266 (11th Cir. 2011) (observing that warrant to search "premises" permitted search of the entire building).

As to the magistrate judge's crossing out of "personal digital assistant" in Attachment B, we conclude that the crossed-out text should simply be treated as nonexistent.[4] Peake does not point us to any case law establishing that eliminating a part of the text from a draft warrant necessarily means that the crossed-out statements have continued significance. *Cf. United*

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[4] Alternatively, the magistrate judge may have intended to eliminate *personal* items from the search, and limit the agents to seizing *company* property only. *See Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 395 n.7 (1971) ("[T]he Fourth Amendment confines an officer executing a search warrant strictly within the bounds set by the warrant." (quoting *Marron*, 275 U.S. at 196)). But Peake does not appear to argue that the information from his computer and Blackberry should have been suppressed because they were personal, and not company property, so we will not go down this road.

States v. *Thomas*, 489 F.2d 664, 672-73 (5th Cir. 1973) (stating that where a magistrate judge crossed out "in the daytime" while leaving the phrase "at any time in the day or night," the warrant "could be served at any time, day or night"). Thus, the agents would have been permitted to seize Peake's Blackberry, so long as the remaining text of the warrant was valid and authorized them to do so. As we explained above, the seizure and search of the Blackberry was authorized by the intact paragraphs of the warrant. We therefore conclude that the Blackberry was also lawfully seized and searched.

2. The Second Warrant

Peake correctly argues that if his computer and Blackberry had been illegally seized, the government should not have been permitted to later obtain a more expansive warrant from an arguably friendlier forum in order to search previously-excluded items, as doing so would weaken important Fourth Amendment protections. But here, we have concluded that the seized and imaged evidence Peake seeks suppressed was within the scope of the first warrant. We do not find that the government used the second warrant to unlawfully sidestep the first one, and we need not consider whether the second warrant was invalid. Nor do we need to reach the question whether the good faith exception applies. In sum, the suppression motion was properly denied. We turn now to Peake's pre-trial motion for change of venue.

IV. Motion for Change of Venue

Because Peake was indicted in Puerto Rico – while his co-conspirators' cases were brought in Jacksonville, Florida – Peake filed a pre-trial motion for change of venue under Federal Rule of Criminal Procedure 21(b) "for the convenience of the parties, any victim, and the witnesses, and in the interest of justice." Fed. R. Crim. P. 21(b). In his motion, Peake discussed the factors considered in *Platt* v. *Minnesota Mining & Manufacturing Co.*, 376 U.S. 240, 243-45 (1964), stressing that it was impracticable to hold a trial in Puerto Rico, since most persons involved in the conspiracy and the investigation were in Jacksonville. *See also United States* v. *Quiles-Olivo*, 684 F.3d 177, 184 (1st Cir. 2012) (applying the *Platt* factors in a criminal case). Peake later filed supplemental briefing, arguing that change of venue was also proper under Federal Rule of Criminal Procedure 21(a) because it would be impossible to obtain a fair and impartial jury composed of Puerto Rican consumers.

The district court denied the motion, reasoning that any inconvenience suffered by Peake was outweighed by the interest of having the case heard in the jurisdiction most seriously affected by the conspiracy. It also explained that under Rule 21(a), transfer is a mandatory remedy if the court finds "an unacceptable level of prejudice," such as where "pervasive pretrial publicity has inflamed passions in the host community past the breaking point." *United States* v. *Walker*, 665 F.3d 212, 223 (1st Cir. 2011)

(citing *United States* v. *Angiulo*, 497 F.2d 440, 440-42 (1st Cir. 1974) (per curiam)). The district court concluded that there was no pervasive pre-trial publicity inflaming the passions in the community to the point that Peake could not have a fair and impartial trial in Puerto Rico, and thus the court allowed the government to exercise its right to choose the venue at its prosecutorial discretion.

A district court's denial of the request for a change of venue is reviewed for abuse of discretion. *Quiles-Olivo*, 684 F.3d at 181. We find no such abuse in the district court's denial. Peake did not allege any outside influence or publicity that could have affected, from the outset of trial, the jury's consideration of the evidence presented. Thus, we affirm the district court's ruling on the motion to change venue.

V. Trial

Peake's next set of issues on this appeal pertains to matters that arose at trial, and can be boiled down into four claims: the first is Peake's claim that he should have been granted a new trial on the basis of prosecutorial misconduct, the second is that the district court erred in permitting prejudicial testimony, the third is that the district court erred in denying his request for a jury instruction regarding his theory of defense, and the fourth is that the district court should have declared a mistrial when, during deliberations, the jury sent the judge a note stating that it could not come to a verdict. As we will explain, we

find no error in the district court's handling of each of these matters, but first, we begin by providing some additional background on what happened during the trial.

Peake's trial was held in San Juan, Puerto Rico, in January 2013, and lasted nine days. In its opening argument on the second day of trial, the government made references to multiple national retail chains and franchises whose businesses purportedly experienced artificially higher shipping costs as a result of the antitrust conspiracy, and stated that even the cost of school lunches had been affected by the conspiracy. Peake objected to these comments, which we will describe in more detail later, and filed a motion for mistrial. In his motion, he argued that the government had communicated to the jury that higher prices were being passed on to them as directly affected consumers, and reasoned that if jurors felt their personal financial interests were affected by the conspiracy, their judgment would be clouded. The district court took note of the motion on the morning of the third day of the trial, and granted the government three days to file its response.

As the trial continued, the government called Peake's co-conspirators, Gabriel Serra, Gregory Glova, and Peter Baci, to the stand to provide testimony that established the existence of a conspiracy. On cross-examination, Peake also elicited testimony from the co-conspirators that he argues was exculpatory, but contends that, because the jurors at this point believed themselves to be "affected consumers,"

they were unable to fairly consider this purported exculpatory testimony that was critical to his defense.[5]

On the fourth day of trial, the district judge had a discussion with the parties regarding the remarks made by the government during the opening statements when Peake raised an objection to the government calling witnesses whose retail and consumer business operations in Puerto Rico were affected by the higher shipping rates generated by the conspiracy. Peake argued that the effect on market prices for consumers had nothing to do with whether there was an agreement amongst competitors to fix their prices. That is, Peake contended that the issue before the jury should be limited to the agreement, regardless of its effects, and argued that allowing the testimony of witnesses from affected businesses was in line with

[5] For example, Baci testified that, during part of the conspiracy, Peake pushed for perfectly legal strategies that would negatively affect the stability of the "Florida 50/50" arrangement – the name given to the strategy of allocating equal market shares between Horizon Lines and Sea Star. One such pro-competition strategy that Peake had advocated for was for a third ship to serve the Puerto Rico-Jacksonville route; another was a "slap strategy" whereby Sea Star would pursue the business of any company that tried to steal their clients. In his testimony, Serra confirmed Baci's statement that Peake wanted to add a third ship. He also testified that Peake authorized competitive shipping rates and that their meetings were strictly legal. In addition, on the stand, Glova could not identify any direct references to Peake in his records of communications made in furtherance of the conspiracy.

the government's inappropriate remarks during opening statements that the conspiracy affected Puerto Rican consumers. The government argued that the witnesses' testimony was necessary to demonstrate the antitrust harm to *direct* consumers of the shipping companies (and not to imply that members of the public who patronized those businesses, or *indirect* consumers, were affected),[6] because the government needed to establish that the conspiracy affected interstate commerce, a required element of the charged offense.

The district judge agreed that testimony regarding the effect on the witnesses' companies showed that the conspiracy had impacted interstate commerce, which was an element of the offense, and thus ruled that testimony to that effect would be allowed. However, the district court warned the prosecutors against eliciting testimony beyond that scope, and noted that the implication in the government's opening that school lunch programs, and therefore children, had been affected by the conspiracy was "really way out of bounds." The district judge also offered,

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[6] Generally, there is a distinction between direct and indirect consumers in antitrust cases. *See Hanover Shoe, Inc.* v. *United Shoe Mach. Corp.*, 392 U.S. 481, 492-94 (1968). The harm to be considered is only that to direct consumers. *See Ill. Brick Co.* v. *Illinois*, 431 U.S. 720, 752 (1977) ("Limiting defendants' liability to the loss of profits suffered by direct purchasers would thus allow the antitrust offender to avoid having to pay the full social cost of his illegal conduct in many cases in which indirect purchasers failed to bring suit.").

notwithstanding the yet-undetermined outcome of the motion for mistrial, to give a curative instruction to the jury that day that would address Peake's concerns about the prosecutor's opening statement and clarify that jurors should not take into account the impact of the conspiracy on Puerto Rico's citizens. At the court's invitation, the parties submitted proposed curative instructions, and the district judge gave a version of the curative instruction to the jury that day.[7]

Over Peake's objections, the government then called to the stand Gabriel Lafitte, who worked for the operator of Burger King restaurants in Puerto Rico, who testified that the conspiracy affected the costs paid by Burger King for products it sold on the island. Later in the trial, Ron Reynolds, a U.S. Department of Agriculture representative, testified to being offered "take-it-or-leave-it" rates for shipping services for food for school lunch programs in Puerto Rico.

After closing arguments, the jury began deliberations on the afternoon of Friday, January 25, 2013. While deliberating on the following Monday – January 28 – the jury sent the district judge two notes, in

[7] Near the end of trial, the court issued a memorandum opinion and order denying Peake's motion for a new trial, finding no misconduct on the basis of the prosecutor's opening statement, but, even assuming misconduct, concluding that any prejudice was cured by the fact that the remarks were isolated, the jury was given a detailed curative instruction, and the objected-to statements did not bear on any elements of the charged offense.

which it stated that it could not reach a unanimous agreement. The second note, delivered on Monday evening after ten hours of deliberation, stated that each juror had reached a personal verdict, but that the jury as a whole was unable to reach unanimity. After the second note, Peake asked for a mistrial and the government asked for an *Allen* charge,[8] both of which the district court denied. Instead, the court asked the jury to "return [the next day] to continue deliberations." On Tuesday, the jury deliberated for another three hours and finally reached a unanimous guilty verdict.

After the verdict, Peake filed a Motion for New Trial and a Motion for Judgment of Acquittal under Federal Rules of Criminal Procedure 33 and 29 respectively, arguing, *inter alia*, that the district court erred in allowing the government to appeal to jury bias and prejudice, in refusing to give a theory-of-defense jury instruction, and in ordering the jury to continue deliberations.[9] The district court denied the

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[8] An *Allen* charge is "[a] supplemental jury instruction given by the court to encourage a deadlocked jury, after prolonged deliberations, to reach a verdict." Black's Law Dictionary (10th ed. 2014); *see Allen* v. *United States*, 164 U.S. 492 (1896).

[9] Peake does not appeal the district court's rulings on the other issues raised in the Rule 33 and 29 motions, which challenged the district court's denials of: (1) Peake's request to submit hearsay evidence from one of the co-conspirators; (2) Peake's objection to the admissibility of financial disclosures; and (3) Peake's request for a new trial on grounds that the government had failed to disclose exculpatory evidence in violation of *Brady* v. *Maryland*, 373 U.S. 83 (1963).

motions. We turn now to Peake's appeal of the district court's various trial-related rulings.

A. Prosecutorial Misconduct

We address first Peake's argument that the district court should have granted him a new trial on grounds that the government's opening statement implied the conspiracy had impacted consumers, and therefore the jurors themselves, thus "poisoning the well."[10]

In its opening statements, the government told the jury that "most consumer goods travel to Puerto Rico from the shipping lanes" affected by the conspiracy; that the conspiracy "was so significant that it affected billions of dollars of freight to and from Puerto Rico"; and that "[b]usinesses like Burger King, Office Max and Walgreens, businesses that have

[10] Peake additionally claims that he was incorrectly prohibited from diminishing the negative effects of those statements because the government moved successfully to prohibit him from arguing that – despite the antitrust conspiracy – shipping costs remained reasonable and fair. But whether the agreed-upon prices charged by the conspirators were nonetheless fair or reasonable does not affect our conclusion. A *per se* Section 1 violation is not excused by a showing that the supra-competitive prices were somehow still reasonable. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 212-13 (1940); *see also United States* v. *Topco Assoc., Inc.*, 405 U.S. 596, 610 (1972) ("[N]aked restraints of trade are [not] to be tolerated because they are well intended or because they are allegedly developed to increase competition.").

stores all over Puerto Rico, they were all paying more than they should have to ship freight to Puerto Rico because Sea Star and Horizon were conspiring, not competing." The government also told the jury that Burger King's shipping costs affected the price of hamburgers sold to customers, and that the federal government had incurred higher costs for the school lunch program, leaving it with "less money . . . to buy food for school children." The government added that the antitrust laws under which Peake was charged had been enacted out of the "concern[ ] that consumers need to buy things to feed and clothe their families."

Improper remarks by prosecutors are reviewed *de novo*. *United States* v. *Rodríguez*, 675 F.3d 48, 61 (1st Cir. 2012) (citing *United States* v. *Ayala-García*, 574 F.3d 5, 16 (1st Cir. 2009)). Even if misconduct occurred, we would still need to consider whether it was harmless. *United States* v. *González-Pérez*, 778 F.3d 3, 19 (1st Cir. 2015), *cert. denied*, 135 S. Ct. 1911 (2015). In doing so, we determine whether the misconduct "so poisoned the well that the trial's outcome was likely affected, thus warranting a new trial." *Id.* (quoting *Rodríguez*, 675 F.3d at 62). "In making this determination, we focus on (1) the severity of the misconduct, including whether it was isolated and/or deliberate; (2) whether curative instructions were given; and (3) the strength of the evidence against the defendant." *Id.* at 19 (citing *Rodríguez*, 675 F.3d at 62).

Here, we agree that the prosecutor's remarks were improper. We therefore direct our inquiry at whether these statements were nonetheless harmless. As we explain, because of the extent and the level of detail the district court included in its curative instruction; the fact that the district judge intervened repeatedly in the examination of witnesses to avoid any reference to end consumers; and the overwhelming amount of corroborating documentary evidence that tied Peake to the conspiracy, we conclude that the effects of the prosecutorial misconduct did not so poison the well that a new trial would be warranted.

First, the day after Peake filed his motion for a mistrial, the district court gave the jury the following comprehensive and detailed curative instruction:

> The fact that Puerto Rico may have potentially been affected or consumers and/or prices and/or business is not to be considered by [you] in your judgment as to the innocence or guilt of the defendant. The effect on prices or consumers in Puerto Rico is not per se an element of the [offense].
>
> You are not to decide this case based on pity and sympathy to Puerto Rican businesses, to Puerto Rico, or to Puerto Rican consumers.
>
> The effect on Puerto Rico only is material as to potentially establishing an effect on interstate commerce. This case is about a potential conspiracy in violation of the antitrust

> law, and whether or not the defendant, Mr. Frank Peake, joined the conspiracy.
>
> Sympathy to Puerto Rico is, therefore, to play absolutely no role in your consideration of this case. Any statement that may have implied or that you may have understood that this is a case relating to the effect on Puerto Rico is an erroneous interpretation, and I don't want you to have that interpretation. So, therefore, any effect on Puerto Rico is not to be considered at all.

The court's instruction was arguably more detailed than the proposed instruction Peake submitted.[11] In addition, the district judge intervened in the questioning of the government's witnesses to prevent undue reference to the conspiracy's effect on Puerto Rican consumers, and the instructions given to the

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[11] Peake's proposed curative instruction read as follows:

> I would like to instruct you that this case is not about pricing effects in Puerto Rico or whether prices in Puerto Rico have gone up or down. The only questions for you are whether there was a conspiracy as alleged in the indictment and whether Frank Peake knowingly and intentionally joined that conspiracy. I also instruct you that the prosecutor mentioned in opening statement that this case affected Puerto Rico and Puerto Ricans. This was improper. This case is not to be decided based on those factors. Therefore, I instruct you to disregard those comments. You should judge this case only on the evidence and not an appeal to sympathy or bias. Any such attempts by the prosecution in its opening statement or in the questioning of its witnesses should be disregarded.

jury after closing arguments again stressed these points. For example, they emphasized that the jury "must not be influenced by any personal likes or dislikes, prejudices or sympathy." The sixth instruction clarified that "[a]rguments and statements by lawyers are not evidence. The lawyers are not witnesses. What they say in their opening statements . . . and at other times . . . is not evidence." And the twenty-first instruction, labeled "What Not to Consider," contained the exact same curative instruction given to the jury on the fourth day of trial, with one important addition: instead of telling the jurors that the court did not want them to "have" an "erroneous interpretation" about statements implying that this case related to the effect on Puerto Rico, the court instructed, "I sternly order you not to take such statements into consideration."

We have stated that there is no miscarriage of justice requiring a new trial when there are curative instructions and the evidence does not "preponderate [ ] heavily against the verdict." *United States* v. *Mangual-García*, 505 F.3d 1, 14 (1st Cir. 2007) (quoting *United States* v. *Mooney*, 315 F.3d 54, 61 (1st Cir. 2002)). The degree of consideration and effort on the part of the district court to respond to the defendant's valid concern over the prosecutors' appeal to the jury's personal interests allows us to conclude that it cured any prejudice. Indeed, curative instructions are "ordinarily an appropriate method of preempting a mistrial." *United States* v. *Trinidad-Acosta*, 773 F.3d 298, 308 (1st Cir. 2014) (quoting *United States* v.

Sotomayor-Vázquez, 249 F.3d 1, 18 (1st Cir. 2001)). We presume that juries follow instructions, *United States* v. *Gonzalez-Vázquez*, 219 F.3d 37, 48 (1st Cir. 2000), and there is nothing in the record to suggest that the instruction regarding the government's remarks was disregarded by the jury.

The strength of the government's corroborating evidence against Peake also supports our conclusion in this matter. *See Mangual-García*, 505 F.3d at 14 ("Nor can we say that the cumulative effect of the alleged errors, given the curative instructions that were given and the strength of the other evidence, constitutes a miscarriage of justice."); *Mooney*, 315 F.3d at 60 ("[W]e note that any lingering prejudicial effect from the remarks pales in comparison with the overwhelming strength of the government's evidence against the defendant."). Here, the government's case was robust. The testimony of co-conspirators and direct customers of the shipping companies established that there was a conspiracy to fix prices, that Peake knowingly participated, that the conspiracy had the effect of increasing shipping rates and surcharges, and that this affected interstate commerce. The government also introduced numerous exhibits, including emails sent by Peake himself from his company email, establishing the existence of a conspiracy. For example, in one email from July 11, 2005, Peake told Baci, his co-conspirator and subordinate, that he had learned that Horizon Lines had told Sea Star's clients that Horizon Lines was willing to "work with them," and instructed Baci to come up with a

"slap." Baci sent Horizon Lines an email the next day, expressing concern about the "level of distrust" building between Sea Star and Horizon Lines.

In another exchange between Peake and Serra from March 22, 2008, Peake complained to Serra that Horizon Lines had been "hurting" him by negotiating with Sea Star clients "Flexi, Goya, Atek and BK." Peake added a warning: "If you're swinging at Crowley[, one of the other freight carriers,] you are missing and hitting me." Serra responded with detailed information about Horizon Lines targeting certain clients and mentioned where he thought Sea Star would set prices. He concluded, "I'll have to go with the best info I have. Not sure communication and availability is working as well as it used to." Peake responded:

> BK I am not all that concerned about (we don't have much of that).
>
> I am the only one that will lose on ATEC, If I lose it (10 loads a week) I will have to fire back.
>
> Agree that things aren't working as well as they were. Pete [Baci] has similar complaints.
>
> Flexi is about fuel and you gave them a BSC discount. Tisk tisk.
>
> Goya is about you not charging for the overweight permits. Again tisk tisk. Same as cutting the rate in my book.

Serra wrote back, "I'll check them all . . . you are certainly not the target."

Given this fairly direct evidence of the conspiracy's existence, aims, and objectives, we find that the evidence presented at trial did not preponderate against the verdict. To the contrary, the strength of the government's case weighs in favor of finding that the misconduct was harmless.[12] Thus, while we are concerned by the impropriety of the prosecutors' remarks, we are confident that the district court acted timely and decisively to instruct the jury in great detail to disregard the offending statements. And we are conscious that we should "not set guilty persons free simply to punish prosecutorial misconduct." *United States* v. *Vázquez-Botet*, 532 F.3d 37, 59 (1st Cir. 2008). The government's remarks did not so poison the well as to necessitate a new trial, and we affirm the district court's denial of a mistrial on grounds of prosecutorial misconduct.

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[12] On this final point, we cannot ignore that a *per se* violation of Section 1 only requires that "an antitrust plaintiff [present] either direct or circumstantial evidence of defendants' 'conscious commitment to a common scheme designed to achieve an unlawful objective.'" *Evergreen Partnering Grp., Inc.* v. *Pactiv Corp.*, 720 F.3d 33, 43 (1st Cir. 2013) (quoting *Monsanto Co.* v. *Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984)).

B. Irrelevant and Unfairly Prejudicial Evidence

Peake argues that the district court also erred in permitting the testimony from witnesses involved in businesses harmed by the conspiracy because the testimony implied that the conspiracy impacted Puerto Rican consumers, therefore again causing the jurors to consider themselves victims of the charged conspiracy. Peake claims the testimony should have been excluded under Federal Rules of Evidence 402 and 403 either as irrelevant or because it caused "unfair prejudice" and had an "undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." Fed. R. Evid. 403 advisory committee's note to 1972 proposed rules; *see also* Fed. R. Evid. 402 ("Irrelevant evidence is not admissible."); Fed. R. Evid. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice. . . .").

We review a trial court's objected-to evidentiary rulings for abuse of discretion. *United States* v. *Romero-López*, 695 F.3d 17, 22 (1st Cir. 2012); *United States* v. *Rodríguez-Berríos*, 573 F.3d 55, 60 (1st Cir. 2009). That includes a trial court's determination under Rule 403 that evidence is more probative than prejudicial. *See United States* v. *Ramírez-Rivera*, Nos. 13-2285, 13-2289, 13-2291, 13-2320, 2015 WL 5025225, at *26 (1st Cir. Aug. 26, 2015) (citing *Walker*, 665 F.3d at 229).

Rule 403 "requires the trial court to exclude the evidence if its probative value is substantially outweighed by 'the danger of unfair prejudice.'" *United States* v. *Varoudakis*, 233 F.3d 113, 121 (1st Cir. 2000) (quoting Fed. R. Evid. 403). This analysis "'is a quintessentially fact-sensitive enterprise' which the district court is in the best position to make." *United States* v. *Soto*, Nos. 13-2343, 13-2344, 13-2350, 2015 WL 5011456, at *17 (1st Cir. Aug. 25, 2015) (quoting *United States* v. *Joubert*, 778 F.3d 247, 255 (1st Cir. 2015), *cert. denied*, 135 S. Ct. 2874 (2015)). All evidence is by design prejudicial, *Varoudakis*, 233 F.3d at 122, but unfair prejudice refers "to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." *United States* v. *DiRosa*, 761 F.3d 144, 153 (1st Cir. 2014) (quoting *Old Chief* v. *United States*, 519 U.S. 172, 180 (1997)). One such example is when "the evidence 'invites the jury to render a verdict on an improper emotional basis.'" *United States* v. *Landry*, 631 F.3d 597, 604 (1st Cir. 2011) (quoting *Varoudakis*, 233 F.3d at 122).

An abuse of discretion finding on a Rule 403 ruling "is not an easy one to make" and "only in 'extraordinarily compelling circumstances'" would we reverse the judgment of the district court. *DiRosa*, 761 F.3d at 154 (quoting *United States* v. *Doe*, 741 F.3d 217, 229 (1st Cir. 2013)); *see also Landry*, 631 F.3d at 604 ("Rule 403 judgments are typically battlefield determinations, and great deference is owed to

the trial court's superior coign of vantage." (quoting *United States* v. *Shinderman*, 515 F.3d 5, 17 (1st Cir. 2008))).

Guided by the above framework, we do not find that the district court abused its discretion in permitting the testimony of representatives from businesses affected by the conspiracy. The witnesses never stated that the higher costs incurred by the direct customers of the shipping companies were indirectly transferred to their consumers, and the defense was also allowed to strike questions regarding the effect of the increased costs on the businesses' bottom line. The testimony elicited by the government properly established the effects of fixing prices and rigging bids. After all, the conspiracy's effect on interstate commerce was an element of the offense the government was required to establish. *See Nat'l Collegiate Athletic Ass'n* v. *Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 104 (1984) ("Under the Sherman Act the criterion to be used in judging the validity of a restraint on trade is its impact on competition."). The government's examination of the witnesses was limited to establishing that element. Therefore, we find no abuse of discretion, and affirm the district court's ruling permitting the witnesses' testimony.

C. Theory of Defense Instruction

Peake next argues that he is entitled to a new trial because he was improperly denied his requested

theory-of-defense jury instruction. Specifically, Peake requested the following instruction:

> Mr. Peake does not contest that there was a conspiracy that existed between Gabriel Serra, Kevin Gill, Gregory Glova, and Peter Baci. Rather, he contends that he did not knowingly and intentionally participate in this conspiracy and did not knowingly and intentionally join the conspiracy as a member. Mr. Peake further contends that any discussions he had with Gabriel Serra were legitimate and competitive discussions and not anti-competitive conspiracy related. Mr. Peake also contends that he was competing with Horizon, including on market share and price.
>
> Although this is Mr. Peake's defense, the burden always remains on the government to prove the elements of the offense beyond a reasonable doubt. If you do not believe the government has proven beyond a reasonable doubt that Mr. Peake intentionally and knowingly joined the conspiracy, you must find him not guilty.

A defendant is "entitled to an instruction on his theory of defense so long as the theory is a valid one and there is evidence in the record to support it." *United States* v. *McGill*, 953 F.2d 10, 12 (1st Cir. 1992) (internal citation omitted). However, "the defendant has no right to put words in the judge's mouth. So long as the charge sufficiently conveys the defendant's theory, it need not parrot the exact language

that the defendant prefers." *Id.* A district court's denial of a theory of defense instruction is reviewed *de novo. United States* v. *Baird*, 712 F.3d 623, 627-28 (1st Cir. 2013). But a trial court's refusal to give a particular instruction constitutes reversible error only if the requested instruction (1) was correct as a matter of law, (2) was not substantially incorporated into the charges as rendered, and (3) was integral to an important point in the case. *Id.* at 628.

Here, regardless of whether Peake should have been granted his instruction, there is no reversible error because the district court offered essentially the same instruction Peake requested, just in its own words. First, the instructions the district court gave stated that "the Government [must prove to the jury] that Mr. Peake is guilty of the crime with which he is charged beyond a reasonable doubt." Second, they mentioned that the government bears the burden of proving that Peake "knowingly and intentionally became a member of the conspiracy" and that the "conspiracy . . . affected interstate commerce." Third, the instructions referenced the possibility that "competitors may have legitimate, lawful reasons to have contact with each other," and that "similarity of conduct . . . does not necessarily establish the existence of a conspiracy," because "there would be no conspiracy . . . [i]f actions were taken independently by them solely as a matter of individual business judgment." Comparing these passages with Peake's proposed instruction, we cannot conclude that

anything Peake asked for was excluded. There is therefore no reversible error.

D. Jury Deliberations

The last trial-related argument Peake raises is that the district court erred in its response to the two notes from the jury, both received on the second day of deliberations, in which the jury stated it was not able to reach a unanimous verdict. Both times, the district judge sent a note back to the jury, asking the jurors to "continue deliberation." Peake argues that the district court should have declared a mistrial after the second note because it was clear that the jury was at an impasse. Peake also argues that, if the court was going to respond to the note, it was at least required to include in its reply the three elements normally required in an *Allen* charge.

For some background, when a jury is deadlocked, the trial court may deliver an *Allen* charge, directing the jury to decide the case if at all possible. Given the potential coerciveness of such an instruction, our case law holds that such a charge must be balanced by instructions that (1) communicate the possibility of the majority and minority of the jury reexamining their personal verdicts; (2) restate the government's maintenance of the burden of proof; and (3) inform the jury that they may fail to agree unanimously. *United States* v. *Angiulo*, 485 F.2d 37, 39 (1st Cir. 1973).

We review the district court's decision not to declare a mistrial or to provide additional guidance to a jury for abuse of discretion, *United States* v. *Vanvliet*, 542 F.3d 259, 266 (1st Cir. 2008), and we find there was no abuse of discretion here.

First, we note that the jury sent its notes on Monday afternoon and evening, during its first full day of deliberations, after having deliberated for only hours on Friday. It was thus not an abuse of discretion for the district court to conclude that, particularly after a nine-day trial, the jury needed more time to consider the evidence before a mistrial might be considered.

Second, the district judge's response to the jury, instructing it to "continue deliberations," was not an *Allen* charge, and therefore did not require the supplemental balancing instructions normally required in an *Allen* charge.[13] In a similar case, *United States* v. *Figueroa-Encarnación*, 343 F.3d 23, 31-32 (1st Cir. 2003), we held that a district judge's instruction to the jury to go home, relax, and continue deliberations the following day contained no coercive elements and, as such, was not an *Allen* charge requiring supplemental instructions. Likewise, here, the district court simply asked the jury to rest and come back in the morning to continue deliberations. This was no *Allen*

[13] Indeed, we agree that it would have been premature to give one at this early point in the deliberations, after a nine-day trial.

charge. Accordingly, we find no abuse of discretion in the district court's response to the jury's notes during deliberation.

VI. Sentencing

As a final matter, Peake argues that, even if his conviction is not overturned, he should be resentenced. Peake raises only one argument regarding his sentence: that the district court incorrectly calculated the volume of commerce affected by the conspiracy, and therefore improperly applied, among other offense-level enhancements, a twelve-level enhancement under section 2R1.1 of the United States Sentencing Guidelines (U.S.S.G.). We deny the appeal of the sentence, finding that the district court correctly applied the sentencing guidelines.

We review a district court's interpretation and application of the sentencing guidelines *de novo*. *United States* v. *Stoupis*, 530 F.3d 82, 84 (1st Cir. 2008). However, "we will not upset the sentencing court's fact-based application of the guidelines unless it is clearly erroneous." *United States* v. *Santos Batista*, 239 F.3d 16, 21 (1st Cir. 2001).

For antitrust offenses affecting a volume of commerce of more than $1 million, the sentencing guidelines provide that the offense level should be adjusted by a certain number of levels according to the volume of commerce that was affected by the conspiracy, as indicated by a table provided therein. *See* U.S.S.G. § 2R1.1(b)(2). The district court found

that more than $500 million in commerce was affected, and that a twelve-level enhancement applied under § 2R1.1(b)(2)(F). Peake argues the volume of commerce was, at most, approximately $386.2 million, and therefore only a ten-level enhancement should have been applied under § 2R1.1(b)(2)(E). He contends that, in calculating the volume of affected commerce, the district court erroneously included commercial activity that took place before 2005, which is when the indictment charged Peake with joining the conspiracy, and that the court also included commerce that was unaffected by the conspiracy.

After a thorough review of the sentencing record, we find that the district court did not err in determining that the affected volume of commerce was more than $500 million. First, the record shows that the district court would have reached its more-than-$500 million number for the volume of affected commerce even without including commerce that might have occurred before 2005, when Peake is charged with joining the conspiracy. So we will move on to Peake's second argument that the district court incorrectly included in its calculation what he contends was "unaffected" commerce.

In calculating the "volume of commerce," the district court is to consider not just "the damage caused or profit made by the defendant," but the overall amount of sales during the conspiracy. *Id.* at § 2R1.1(b)(2) & cmt. 7 ("[T]he volume of commerce attributable to an individual participant in a conspiracy is the volume of commerce done by him or his

principal in goods or services that were affected by the violation."); *see also United States* v. *Andreas*, 216 F.3d 645, 678 (7th Cir. 2000) ("[I]t is reasonable to conclude that *all sales* made by defendants during that period are 'affected.'" (quoting *United States* v. *SKW Metals & Alloys, Inc.*, 195 F.3d 83, 90 (2d Cir. 1999)) (emphasis added)). Although there is a presumption that all sales made during the conspiracy were affected, and should therefore be included in the volume of commerce calculation, this is a presumption that the defendant may rebut by offering evidence that some sales were not affected. *United States* v. *Giordano*, 261 F.3d 1134, 1146 (11th Cir. 2001).

In this case, the district court had before it data produced by Sea Star indicating that its total revenue between 2005 and 2008 amounted to over $565 million, and it used this number to conclude that the twelve-level enhancement applied. Peake argues that this was an error because the following revenue was "unaffected" commerce and should have been subtracted from the total: (1) revenue from non-container freight that he contends was not a part of the antitrust conspiracy, (2) revenue from 2,634 customers that were never discussed in the conspiracy, (3) revenue from fuel surcharges, which Peake argues would have been charged even if there had been no conspiracy, and (4) revenue from Transportation Services Agreements, which Peake claims were routine and entirely lawful, and did not affect interstate commerce. However, in order to exclude this revenue from the volume of affected commerce

calculations, Peake was required to show that these transactions were "completely unaffected" by the conspiracy. *Andreas*, 216 F.3d at 678-79. The district court found that Peake failed to do so.

This is essentially a factual question, and we find no clear error in the district court's findings that the objected-to revenue should have been included in the volume of commerce calculation. Testimony, particularly Baci's, and documentary evidence, including various emails, presented at trial showed that the conspirators had colluded to fix the fuel surcharges, and that revenue from the fuel surcharge was therefore a part of the conspiracy. The fixed surcharges affected all cargo transported, thus affecting all sales, including revenue from non-container freight and from all customers, even if that freight and those customers had never explicitly been made a part of the conspiracy. Finally, evidence at trial showed that Transportation Services Agreements were used in furtherance of the conspiracy. Thus, finding no error in the district court's computation of a volume of affected commerce in excess of $500 million, we affirm the sentence.

VII. Conclusion

For the foregoing reasons, the conviction and sentence of Defendant-Appellant Frank Peake is

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA, Plaintiff, v. FRANK PEAKE, Defendant.	Criminal No.:11-512 (DRD) (Filed Dec. 5, 2013)

OPINION AND ORDER

I. Factual & Procedural History

The instant matter involves a conspiracy amongst three freight carriers, Sea Star Line ("Sea Star"), Horizon Lines ("Horizon"), and Crowley Liner ("Crowley"), to suppress and eliminate competition by agreeing to fix rates and surcharges for Puerto Rico freight services. As part of the ongoing conspiracy, various high level employees of the freight carriers would meet and conspire to raise rates for the upcoming year and would scheme on how to handle upcoming contract negotiations with potential clients. Defendant Frank Peake ("Defendant" or "Peake"), the former President and CEO of Sea Star, was alleged to have participated in this conspiracy by acting primarily as one of the masterminds. On January 29, 2013, following a three week trial, Peake was convicted of violating U.S. Antitrust laws under 15 U.S.C. § 1.

On March 4, 2013, Defendant filed a *Motion for New Trial* under Fed.R.Crim.P. 33 ("Rule 33") and a *Motion for Judgment of Acquittal* under Fed.R.Crim.P. 29 ("Rule 29") (Docket No. 193), alleging, *inter alias*, that the Court erred in ordering the jury to continue deliberations, in refusing to give a theory of defense instruction to the jury, in allowing the United States to appeal to jury bias and prejudice, and in admitting/excluding various hearsay statements. On April 4, 2013, the United States duly opposed said motion (Docket No. 195), arguing that the evidence introduced at trial overwhelmingly supported the jury's verdict, and that Defendant's motion was a rehash of issues that were repeatedly and unsuccessfully raised at trial. On August 26, 2013, Defendant filed a *Second Motion for a New Trial* (Docket No. 209) contending that the Government had failed to timely produce exculpatory *Brady* evidence. On September 6, 2013, the Government opposed said motion (Docket No. 211), averring that the unproduced recording was not favorable to Peake and that his conviction was supported by overwhelming evidence.

II. <u>Rule 29 and 33 Standard of Review</u>

a) Rule 29

"Rule 29 of the Federal Rules of Criminal Procedure provides that a court may acquit a defendant after the close of the prosecution's case if the evidence is insufficient to sustain a conviction." *United States v. Alfonzo-Reyes*, 592 F.3d 280, 289 (1st Cir. 2010).

"[T]he tribunal must discern whether, after assaying all the evidence in the light most flattering to the government, and taking all reasonable inferences in its favor, a rational fact finder could find, beyond a reasonable doubt, that the prosecution successfully proved the essential elements of the crime." *United States v. Hernandez*, 146 F.3d 30, 32 (1st Cir. 1998) (citing *United States v. O'Brien*, 14 F.3d 703, 706 (1st Cir. 1994)); *see United States v. Marin*, 523 F.3d 24, 27 (1st Cir. 2008).

In analyzing a Rule 29 motion, "[v]iewing the evidence in the light most flattering to the jury's guilty verdict, [the Court must] assess whether a reasonable factfinder could have concluded that the defendant was guilty beyond a reasonable doubt." *United States v. Lipscomb*, 539 F.3d 32, 40 (1st Cir. 2008). Thus, "the jurisprudence of Rule 29 requires that a deciding court defer credibility determinations to the jury." *Hernandez*, 146 F.3d at 32 (citing *O'Brien*, 14 F.3d at 706); *United States v. Walker*, 665 F.3d 212, 224 (1st Cir. 2011) ("we take the facts and all reasonable inferences therefrom in the light most agreeable to the jury's verdict."). Additionally, the Court "must be satisfied that 'the guilty verdict finds support in a plausible rendition of the record.'" *United States v. Pelletier*, 666 F.3d 1, 12 (1st Cir. 2011) (quoting *United States v. Hatch*, 434 F.3d 1, 4 (1st Cir. 2006)). This standard is a "formidable" one, especially as "[t]he government need not present evidence that precludes every reasonable hypothesis inconsistent with guilt in order to sustain a conviction."

United States v. Loder, 23 F.3d 586, 589-90 (1st Cir. 1994) (internal quotation marks omitted). Moreover, there is no "special premium on direct evidence." *O'Brien*, 14 F.3d at 706. "[T]he prosecution may satisfy its burden of proof by direct evidence, circumstantial evidence or any combination of the two." *Id.* (citing *United States v. Echevarri*, 982 F.2d 675, 677 (1st Cir. 1993)). Expressed in alternate fashion, "no premium is placed on direct as opposed to circumstantial evidence; both types of proof can adequately ground a conviction." *United States v. Ortiz*, 966 F.2d 707, 711 (1st Cir. 1992). As to evidentiary conflicts, "the trial judge must resolve all evidentiary conflicts and credibility questions in the prosecution's favor; and moreover, as among competing inferences, two or more of which are plausible, the judge must choose the inference that best fits the prosecution's theory of guilt." *United States v. Olbres*, 61 F.3d 967, 970 (1st Cir. 1995); *see Hernandez*, 146 F.3d at 32 (the trial court is required to "consider all the evidence, direct and circumstantial, and resolve all evidentiary conflicts in favor of the verdict.") (citing *United States v. Carroll*, 105 F.3d 740, 742 (1st Cir. 1997)). On the other hand, "[t]he court must reject only those evidentiary interpretations that are unreasonable, unsupportable, or only speculative and must uphold any verdict that is supported by a plausible rendition of the record." *United States v. Ofray Campos*, 534 F.3d 1, 31-32 (1st Cir. 2008). *See also United States v. Cruz Laureano*, 404 F.3d 470, 480 (1st Cir. 2005) (urging the trial court "not to believe that no verdict other than a guilty verdict could sensibly be reached,

but must only satisfy itself that the guilty verdict finds support in a plausible rendition of the record.") (citing *United States v. Gomez*, 255 F.3d 31, 35 (1st Cir. 2001).

The First Circuit reiterated the above general standard in *United States v. Melendez Rivas*, 566 F.3d 41 (1st Cir. 2009) (citing *Lipscomb*, 539 F.3d at 40), holding that the sufficiency standard for a Motion for Acquittal under Rule 29 required the district court to determine whether, viewing the evidence in the light most favorable to the government, a reasonable fact finder could have concluded that the defendant was guilty beyond a reasonable doubt. The Court, therefore, is not to discard compliance with the requirement of the standard of "guilty beyond a reasonable doubt." However, a defendant challenging his conviction for insufficiency of the evidence faces an "uphill battle." *United States v. Hernandez*, 218 F.3d 58, 64 (1st Cir. 2000). Nevertheless, "despite the prosecution-friendly overtones of the standard of review, appellate oversight of sufficiency challenges is not an empty ritual." *United States v. De La Cruz Paulino*, 61 F.3d 986, 999 n.11 (1st Cir. 1995).

b) Rule 33

Rule 33 of the Federal Rules of Criminal Procedure provides that, "[u]pon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). A new trial is not warranted if the

court is "satisfied that competent, satisfactory and sufficient evidence in th[e] record supports the jury's finding that this defendant is guilty beyond a reasonable doubt[.]" *United States v. Sanchez*, 969 F.2d 1409, 1414 (2d Cir. 1992). "In making this assessment, the judge must examine the totality of the case. All the facts and circumstances must be taken into account," and there "must be a real concern that an innocent person may have been convicted" before the "interest of justice" requires a new trial. *Id.* The ultimate test in adjudicating a Rule 33 motion to vacate "is whether letting a guilty verdict stand would be a manifest injustice." *United States v. Snype*, 441 F.3d 119, 140 (2d Cir. 2006) (internal citation and quotation omitted)).

The Court may grant a new trial if the jury's "verdict is so contrary to the weight of the evidence that a new trial is required in the interest of justice." *United States v. Chambers*, 642 F.3d 588 (7th Cir. 2011); *see U.S. v. Washington*, 184 F.3d 653, 657 (7th Cir. 1999) ("The focus in a motion for a new trial is not on whether the testimony is so incredible that it should have been excluded. Rather, the court considers whether the verdict is against the manifest weight of the evidence, taking into account the credibility of the witnesses."). Restated, "[t]he court should grant a motion for a new trial only if the evidence 'preponderate[s] heavily against the verdict, such that it would be a miscarriage of justice to let the verdict stand.'" *U.S. v. Swan*, 486 F.3d 260, 266 (7th Cir. 2007) (quoting *U.S. v. Reed*, 875 F.2d 107, 113

(7th Cir. 1989)). "[C]ourts have interpreted [Rule 33] to require a new trial in the interests of justice in a variety of situations in which the substantial rights of the defendant have been jeopardized by errors or omissions during trial." *U.S. v. Kuzniar*, 881 F.2d 466, 470 (7th Cir. 1989), overruled on other grounds, 546 U.S. 12, 126 S. Ct. 403, 163 L. Ed. 2d 14 (2005); *see United States v. Munoz*, 605 F.3d 359, 373 (6th Cir. 2010) ("it is widely agreed that Rule 33's 'interest of justice' standard allows the grant of a new trial where substantial legal error has occurred.") (internal citations omitted).

In the final assessment, a "district court's disposition of a Rule 33 motion for a new trial in a criminal case is ordinarily a 'judgment call.'" *United States v. Connolly*, 504 F.3d 206, 211 (1st Cir. 2007) (quoting *United States v. Maldonado-Rivera*, 489 F.3d 60, 65 (1st Cir. 2007)). "[A]t least where the trial judge revisits the case to pass upon the new trial motion – an appreciable measure of respect [from the Circuit Court] is due to the 'presider's sense of the ebb and flow of the recently concluded trial.'" *Id.* (quoting *United States v. Natanel*, 938 F.2d 302, 313 (1st Cir. 1991)); *see United States v. Falu-Gonzalez*, 205 F.3d 436, 443 (1st Cir. 2000) ("We give considerable deference to the district court's broad power to weigh the evidence and assess the credibility of both the witnesses who testified at trial and those whose testimony constitutes "new" evidence.") (internal quotation omitted). In considering the weight of the evidence for purposes of adjudicating a motion for new trial, a

district judge "may act as a thirteenth juror, assessing the credibility of witnesses and the weight of the evidence." *United States v. Hughes*, 505 F.3d 578, 593 (6th Cir. 2007) (citation omitted). Yet, in reviewing such a request for a new trial, the Court remains ever mindful that "[t]he remedy of a new trial must be used sparingly, and only where a miscarriage of justice would otherwise result." *United States v. Conley*, 249 F.3d 38, 45 (1st Cir. 2001); *see U.S. v. Santos*, 20 F.3d 280, 285 (7th Cir. 1994) ("A jury verdict in a criminal case is not to be overturned lightly, and therefore a Rule 33 motion is not to be granted lightly.").

III. Analysis

a) Ordering the Jury To Continue Deliberations

The jury was charged late in the afternoon on Friday, January 25, 2013. On Monday, January 28th, the jury returned for its second day of deliberations. After conferring for a total of less than six hours, the jury sent a note to the judge at 2:45 PM that read: "Members of the jury have issued their respective verdicts. After discussions and revisions to the evidence we are not able to reach a unanimous verdict." (Docket No. 190, page 4).

At 3:04 PM, the undersigned sent the following note to the jury: "Please do not inform the judge how you stand numerically or otherwise. Please continue your deliberations." *Id*.

At 7:15 PM that same evening, the jury sent a note saying: "After strong debates and discussions, members of the jury have expressed a final individual verdict. We are still unable to reach a unanimous verdict." (Docket No. 190, page 7).

On the basis of this note, Peake moved for a mistrial outside of the presence of the jury. The Court orally denied this motion stating that it was too soon to declare a mistrial as the jury had deliberated for slightly longer than one day. The Court considered giving an *Allen* charge, *see Allen v. United States*, 164 U.S. 492, 501, 41 L. Ed. 528, 17 S. Ct. 154 (1896), but explicitly told counsel that it was too early to give such an instruction. After further consultation with the parties, the Court sent the following note to the jury at 7:25 PM: "The Court orders the jury to return tomorrow at 10:30 AM to continue deliberations. Please drive home carefully and safely." *Id.*

The following day, the Court informed the parties that it was considering giving an *Allen* charge to the jury in the afternoon if they had not heard from the jury. Defendant renewed his motion for a mistrial and objected to the Court giving any form of an *Allen* charge; the United States expressed concern about giving the *Allen* charge prior to the jury stating that they had reached an impasse.

At 2:25 PM, the jury indicated that they had reached a unanimous guilty verdict.[1]

In the pending Rule 29 and Rule 33 motion (Docket No. 193), Peake argues that the Court erred in instructing the jury to continue deliberating as the jury had informed the Court that they had reached their "final" verdict and as the Court did not inform the jury that the jury retains the right to fail to agree. Peake relies upon *United States v. Angiulo*, wherein the First Circuit stated:

> To mitigate these serious possibilities of prejudice [of ordering deadlocked jurors to continue deliberating], in *United States v.*

[1] The jury's first day of deliberations began at 4:30 PM and ended at 5:10 PM (*See* Jury Note # 1). The jury then returned on Monday, January 28, 2013 at 9:20 AM for their second day of deliberations (*See* Jury Note # 2). At 2:45 PM on that second day, barely 5 hours after starting their deliberations, the jury informed the Court that they had taken an initial vote and had failed to reach a unanimous verdict (*See* Jury Note # 4). Upon receiving said note, the Judge ordered the jury to continue deliberating. At 7:15 PM that same day, the jury once again advised the Court that they had taken a final individual verdict and were still unable to reach a unanimous decision. At 7:25 PM, the jury was discharged to continue deliberations the following morning. The jury then returned on Tuesday, January 29, 2013 at 11:35 AM for their third day of deliberations. At 2:25 PM, less than three hours later, the jury reached a final verdict. Hence, the jury deliberated less than one hour the first day, approximately ten hours the second day, and less than three hours the third and final day, for a grand total of around 13 and a half hours, in a trial that had nine full days of evidentiary hearings, including opening and closing statements.

> *Flannery*, [51 F.2d 880, 883 (1971)], we strongly advised trial courts to balance a supplementary charge so that (1) the onus of reexamination would not be on the minority alone, saying, whenever a court instructs jurors to reexamine their positions, it should expressly address its remarks to the majority as well as the minority; (2) a jury would not feel compelled to reach agreement, saying, we expressly disapprove the [ ] statement that the case must at some time be decided; [a] jury, any number of juries, have a right to fail to agree and (3) jurors would be reminded of the burden of proof. . . . We think, however, that whenever a jury first informs the court that it is deadlocked, any supplemental instruction which urges the jury to return to its deliberations must include the three balancing elements stated above.

485 F.2d at 39-40 (internal quotations and citations omitted).

This cited caselaw is applicable to remedy the coercive effects of an *Allen* charge, but is inapplicable in the present case as no *Allen* charge was provided.[2]

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[2] In a typical *Allen* charge, the jurors are told, *inter alia*, that absolute certainty cannot be expected in the vast majority of cases, that they have a duty to reach a unanimous verdict if they can conscientiously do so, and that dissenting jury members should accord some weight to the fact that a majority of jurors hold an opposing viewpoint." *United States v. Figueroa-Encarnacion*, 343 F.3d 23, 33 n.9 (1st Cir. 2003) (citing *Allen v. United States*, 164 U.S. at 501).

"The defining characteristic of an *Allen* charge is that it asks jurors to reexamine their own views and the views of others." *United States v. Haynes*, 2013 U.S. App. LEXIS 18453, at 30 (2d Cir. 2013) (quotation and citation omitted). Here, the Court did not request that the jurors examine neither their own positions nor those of their fellow jurors; in fact, the Court declined to provide an *Allen* charge because the Court did not understand the jury to be deadlocked after only deliberating for slightly longer than one day. The Court merely instructed the jury to continuing deliberating in a neutral manner. Such an instruction to continue deliberations cannot properly be considered an *Allen* charge. *See Figueroa-Encarnacion*, 343 F.3d at 32 (the Court's "instruction to continue deliberating did not contain the coercive elements of a garden-variety *Allen* charge, but was merely intended to prod the jury into continuing the effort to reach some unanimous resolution."); *see United States v. Prosperi*, 201 F.3d 1335, 1341 (11th Cir. 2000) ("The instruction given here.. cannot be properly considered an *Allen* charge. The judge's simple request that the jury continue deliberating, especially when unaware of the composition of the jury's nascent verdict, was routine and neutral. Nothing in the brief instruction suggested that a particular outcome was either desired or required and it was not 'inherently coercive.'"); *see also United States v. Akel*, 337 Fed. Appx. 843, 861 (11th Cir. 2009) ("Because the court's ["simple request to continue deliberating"] did not indicate that an ultimate outcome was desired or required, it was not

unduly coercive and does not constitute reversible error.”).

Hence, when no *Allen* charge is given, no curative language is required. In a case of nearly identical circumstance,[3] the First Circuit cogently and compelling stated:

> The salient principle is that such ‘counteractive’ language is only deemed necessary where a ‘dynamite charge’ is delivered to a deadlocked jury. Under these circumstances,

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[3] In *Figueroa-Encarnacion*, following a twelve day trial where the jury had deliberated for almost four hours, the jury sent the following note: “We wish to advise you that up to this moment we have not been able to reach an agreement. We understand that even if we stay deliberating for more time we will not be able to reach a verdict.”

The judge, who felt it was “too early to give them an *Allen* charge,” replied with the following note:

> The court received a note from you that basically says that you have not been able to reach an agreement. And you also state that even if you deliberate more time you’re not going to reach an agreement.
>
> Well, after a 12 day trial some days we worked eight hours, some days we only worked four hours. But it’s still 12 days of receiving evidence. I think it is too premature for the judge after 12 days of receiving evidence to accept that there is a deadlock. These matters do occur, and they occur sometimes more times than we would like, but they occur.
>
> So, what the Court is going to do is to send you home, relax, not think about the case and come back tomorrow at 9:30 AM and at which time I will provide you an instruction. Please do not begin any deliberation until you come back here tomorrow morning.

> mitigating instructions alleviate the prejudice to the defendant arising from the court's insistence that a presumably hung jury endeavor to reach consensus on either acquittal or conviction. Where, as here, the judge reasonably concludes that the jury is not deadlocked in the first instance, the defendant is not prejudiced by a simple instruction to continue deliberating. The district court's instruction in this case did not imply a duty to achieve unanimity, nor was it addressed to jurors holding a minority viewpoint. It stands to reason that if a district court's instruction lacks the coercive elements of an *Allen* charge, it need not include the *Allen* cure. Here, the requisite coercion is simply absent and, thus, reversal on this ground is unwarranted.

Figueroa-Encarnacion, 343 F.3d at 32 (internal quotations and citations omitted). We find this reasoning to be not only compelling, but also entirely dispositive of Peake's argument that the Court was required to supply additional mitigating language to the jury emphasizing the jury's right to fail to reach consensus. *See United States v. Clayton*, 172 F.3d 347, 352 (5th Cir. 1999). Further, the Court finds nothing coercive about merely requesting that the jury continue deliberating, especially in light of the length of the trial and the relative short duration of the jury's

deliberations.[4] The jury trial in the instant case lasted ten days, one day for jury selection and nine days of evidentiary hearings (including openings and closings).

Finding nothing improper with, or improperly omitted from, the Court's instructions to the jury, Peake's Rule 29 and Rule 33 motions are hereby **DENIED** on these grounds.

b) Refusal to Provide Theory of Defense Instruction

Peake additionally claims that the Court erred in not providing the jury with his theory of the defense instruction. Peake's proposed instruction was:

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[4] Peake cites a newspaper article of a post-trial interview with a juror wherein the juror states that they jury was unsure how long the Court would keep the jury deliberating if they were deadlocked. The Court notes that Federal Rule of Evidence 606(b), which bars juror testimony "as to any matter or statement occurring during the course of the jury's deliberations," prohibits the Court from delving into the interworking's of a jury outside of the context of purported juror misconduct.

Moreover, the Supreme Court has also discouraged courts from speculating into what transpired during deliberations. *See Yeager v. United States*, 557 U.S. 110, 122 (2009) ("Courts properly avoid such explorations into the jury's sovereign space and for good reason. The jury's deliberations are secret and not subject to outside examination.") (internal citations omitted). Further, as the United States rightly points out, the news article is hearsay, which indeed contains hearsay within the hearsay news article, and is thus entirely improper for the Court to consider.

> Mr. Peake does not contest that there was a conspiracy that existed between Gabriel Serra, Kevin Gill, Gregory Glova, and Peter Baci. Rather, he contends that he did not knowingly and intentionally participate in this conspiracy and did not knowingly and intentionally join the conspiracy as a member. Mr. Peake further contends that any discussions he had with Gabriel Serra were legitimate and competitive discussions and not anti-competitive conspiracy related. Mr. Peake also contends that he was competing with Horizon, including on market share and price.
>
> Although this is Mr. Peake's defense, the burden always remains on the government to prove the elements of the offense beyond a reasonable doubt. If you do not believe the government has proven beyond a reasonable doubt that Mr. Peake intentionally and knowingly joined the conspiracy, you must find him not guilty.

Peake avers that the instruction should have been provided as substantial documentary evidence and testimony from the government's own witnesses support the instruction. Peake cites documentary evidence detailing the specifics of the conspiracy in which Peake's involvement is absent as well as testimony of him having legitimate business related conversations with coconspirators. Peake also makes reference to his successful efforts to place a third Sea Star vessel in the route between Florida and Puerto Rico thereby increasing the shipping capacity available,

which benefitted Sea Star at the expense of its competitors. Peake additionally claims that the government's argument that providing the instruction would constitute hearsay testimony of Peake is erroneous and that by denying his instruction, the Court impermissibly penalized him for invoking his Fifth Amendment right not to testify.

"A criminal defendant is entitled to an instruction on his theory of defense so long as the theory is legally sound and supported by evidence in the record. When a district court decides whether to give a requested instruction, it must take the evidence in the light most favorable to the defendant, without making credibility determinations or weighing conflicting evidence." *United States v. Baird*, 712 F.3d 623, 627 (1st Cir. 2013) (internal citation omitted); *see U.S. v. Gamache*, 156 F.3d 1, 9 (1st Cir. 1998) ("[T]he district court is not allowed to weigh the evidence, make credibility determinations, or resolve conflicts in the proof. Rather, the court's function is to examine the evidence on the record and to draw those inferences as can reasonably be drawn therefrom, determining whether the proof, taken in the light most favorable to the defense can plausibly support the theory of the defense.").

Peake's proposed instruction is merely his theory of the case: there was a conspiracy, but Peake was not a part of said conspiracy. Peake was free to argue, and indeed did argue, this version to the jury. However, "defendants cannot couch their requested instructions as 'defense theories' and expect to get them read

verbatim to the jury." *United States v. Newton*, 891 F.2d 944, 950 (1st Cir. 1989). Peake's defense theory that he was not involved in the conspiracy is a legitimate defense, but inappropriate as a jury instruction. Albeit, the Court granted an instruction clearly requiring the jury to find that Peake "knowingly joined the conspiracy." (*See* Docket 186, Jury Instruction No. 17).

Furthermore, Peake's proposed instruction states that "*any* discussions" he had with co-conspirator Gabriel Serra were legitimate and competitive discussions. This statement is not supported by the evidence on the record. Gabriel Serra testified that while he did have some legitimate conversations with his competitor, Frank Peake, he also had numerous "inappropriate communications" and customer specific discussions of internal information on agreements of prices to be charged" with Peake. Serra also testified that approximately ten percent of his communications with Peake were inappropriate. Tr. Vol. 7 at 58:8-20; Tr. Vol. 8 at 111:6-13. In fact, throughout the trial, co-conspirators Greg Glova, Peter Baci, and Gabriel Serra repeatedly identified Peake as a member of the conspiracy and testified at length about his role within the conspiracy. Accordingly, the Court cannot conclude that the requested instruction was supported by the evidence and thus was a proper instruction. Hence, Peake's Rule 29 and Rule 33 motions are hereby **DENIED** on these grounds.

c) Appeal to Jury Bias & Prejudice

Similar to prior arguments made during trial, Peake posits that the United States improperly appealed to the jury's bias and prejudice and therefore a mistrial is warranted. Armed with the transcript, Peake heavily cites record to argue that the Government made, and elicited statements from witnesses, to the effect that the freight companies' customers, everyday household names like Burger King and Office Max, along with the U.S. federal government itself, paid higher shipping prices as a result of the conspiracy. Peake avers that the Government's efforts constituted "over-the-top and inappropriate appeals to sympathy and bias." (Docket No. 193, page 19).

The Court previously addressed most of Peake's argument on this front in an *Amended Opinion and Order* dated January 25, 2013 (Docket No. 178); the Court therefore adopts and incorporates by reference that *Amended Opinion and Order* into the instant *Opinion and Order*. Here, we briefly sketch the primary thrust of the Court's *Amended Opinion and Order* and, like Peake, add little to no new analysis.

As stated previously, Peake is unable to satisfy the three prong test for prejudice illuminated in *United States v. Azubike*, 504 F.3d 30, 39 (1st Cir. 2007). As an initial matter, the Court notes that the Government was very clear that the victims of the conspiracy were those who directly contracted with the maritime shipping companies-the Burger Kings

and Office Maxes of Puerto Rico. It was these entities who paid higher anti-competitive rates. The Government did not infer that those higher prices were passed onto the victims' customers, the general populace of Puerto Rico, in a secondary manner. Simply, the United States did not argue that hamburgers and paperclips cost more as a result of the conspiracy. Similarly, while the United States did present evidence that the U.S. Department of Agriculture paid higher food prices for the school lunch program as a result of the conspiracy, the Government did not argue that school children paid higher milk prices or went without milk as a result of the conspiracy.

Notwithstanding, to the extent that a juror may have made an inference that the conspiracy resulted in secondary consumers, the general Puerto Rican population, the Court provided, not one, but two curative instructions. First, on the third full day of trial, the Court instructed the jury as follows:

> Before we receive the remaining evidence I think it is critical that the Court provide you with an instruction. The fact that Puerto Rico may have potentially been affected or consumers and/or prices and/or business is not to be considered by [you] in your judgment as to the [guilt or not] guilt of the defendant. The effect on prices on consumers in Puerto Rico is not *per se* an element of the offense. You are not to decide this case based on pity and sympathy to Puerto Rican businesses, to Puerto Rico, or to Puerto Rican consumers.

> The effect on Puerto Rico only is material as to potentially establishing an effect on interstate commerce. This case is about a potential conspiracy in violation of the antitrust law, and whether or not, the defendant, Mr. Frank Peake, joined the conspiracy. Sympathy to Puerto Rico is, therefore, to play absolutely no role in your consideration of this case. Any statement that may have implied or that you have understood that this is a case relating to the effect on Puerto Rico is an erroneous interpretation. And I don't want you to have that interpretation. So, therefore, any effect on Puerto Rico is not to be considered at all.

Tr. Trans. (Jan. 16, 2013) at 101-02.The Court deems its instruction to have satisfactorily assuaged any concerns of improper prejudice. *See United States v. Sepulveda*, 15 F.3d 1161, 1185 (1st Cir. 1993) ("Swiftness in judicial response is an important element in alleviating prejudice once the jury has been exposed to improper testimony," and "appellate courts inquiring into the effectiveness of a trial judge's curative instructions should start with a presumption that jurors will follow a direct instruction to disregard matters improvidently brought before them."). Additionally, the Court also gave a second, similar cautionary instruction to the jury prior to beginning deliberations. Jury Instruction No. 21 (Docket No. 186, Pg. 37). The Court is confident that these two jury instructions adequately provided the necessary panacea to remedy any purported prejudice.

For the aforementioned reasons, the Court concludes that the Government did not engage in any misconduct and that the evidence presented at trial did not expose the jury to any cognizable prejudice which could not be eradicated by a curative jury instruction. Hence, Peake's Rule 29 and Rule 33 motions are hereby **DENIED** on these grounds.

d) *Admissibility of Recorded Calls and Written Interview Summary*

Defendant further argues that the Court erred by: (1) admitting audio recordings of two telephone conversations between Glova and Serra; (2) excluding recorded comments between Glova and an unidentified FBI agent after the telephone calls ended; and (3) precluding the defense from introducing Glova's written statement. We take each in turn.

i) Admissibility of Recorded Calls Between Glova and Serra

At trial, the Court admitted the audio recordings of two telephone conversations between two co-conspirators, Greg Glova and Gabriel Serra, after determining that said audio recordings were non-hearsay under Fed.R.Evid. 801(d)(2)(E). In the recordings, Glova and Serra are heard arguing about charging lower prices to clients in an attempt to decrease competition and increase profitability. At one point during the conversation, the parties briefly reference Frank Peake by name.

Defendant avers that Serra and Glova's statements in the recordings are inadmissible hearsay. The Court previously addressed most of Peake's arguments on this front in an *Opinion and Order* dated January 23, 2013 (Docket No. 174); the Court therefore adopts and incorporates by reference that *Opinion and Order* into the instant *Opinion and Order*. Here, we briefly sketch the primary thrust of the Court's *Opinion and Order* and, like Peake, add little to no new analysis.

Under Fed.R.Evid. 801(d)(2)(E), a statement offered against an opposing party is admissible if said statement was "made by the party's coconspirator during and in furtherance of the conspiracy." Therefore, a statement falls under the preamble of Rule 801(d)(2)(E) if it is "more likely than not that the declarant and the defendant were members of a conspiracy when the hearsay statement was made, and that the statement was in furtherance of the conspiracy." *United States v. Petrozziello*, 548 F.2d 20, 23 (1st Cir. 1977). It is irrelevant to whom the declarant directed said statement so long as the two elements outlined in *Petrozziello* are met. *See U.S. v. McCarthy*, 961 F.2d 972, 976-77 (1st Cir. 1992) (admitting numerous tape recorded conversations between an undercover officer and a co-conspirator); *See also U.S. v. Cianci*, 378 F.3d 71, 101 (1st Cir. 2004) (same). Hence, a statement made by a co-conspirator directed at an undercover law enforcement agent may nonetheless be admissible under FRE 801(d)(2)(E) if said statement is made in furtherance of the conspiracy

and if Defendant is still a member of the conspiracy at the time of the statement.

"A district court faced with a challenge to the admission of a co-conspirator's statement must consider whether, in light of all the evidence, the following four conditions are satisfied by a preponderance of the evidence: (1) a conspiracy existed; (2) the defendant was a member of the conspiracy; (3) the declarant was also a member of the conspiracy; and (4) the declarant's statement was made in furtherance of the conspiracy." *United States v. Diaz*, 670 F.3d 332, 348 (1st Cir. 2012). We briefly reiterate the most important facts regarding the admissibility of the recorded calls, given that this issue was also previously addressed in a prior *Opinion and Order* during trial.

As to the first element, the Court finds that there was ample evidence presented at trial that a conspiracy existed. Testimony was heard from several co-conspirators, including Serra, Glova, and Baci, all of which testified about the collusion and coordination of price fixing between the primary large-scale waterborne shippers of goods to and from Puerto Rico. Additionally, multiple emails sent between Peake, Baci, Serra, and Glova were presented at trial, showing that there was significant contact, communication, and coordination amongst members of the large-scale waterborne shippers to fix prices and discourage competition. Hence, the Court finds, by a preponderance of the evidence, that a conspiracy existed.

As to the second element, the Court finds that Peake was a member of the conspiracy at the time of the telephone calls. First, the Court heard testimony that Peake was a key member of the conspiracy, leading Sea Star's efforts to coordinate with competitors in setting shipping rates. The Government presented damaging emails of conversations between Peake and other coconspirators. The bulk of those emails show conversations pertaining to the shipping rates being offered to current and potential clients, how to achieve an equal market share of the shipping routes to Puerto Rico, and how best to maximize profitability while decreasing competition. Consequently, the Court determines that Peake was still a co-conspirator at the time the two telephone calls took place, given that he was unaware that the FBI was about to search Sea Star's offices and that Glova had already been apprehended by the FBI. Lastly, there is no evidence that Peake had properly withdrawn from the conspiracy, which typically "requires either a full confession to authorities or a communication by the accused to his co-conspirators that he has abandoned the enterprise and its goals." *United States v. Piper*, 298 F.3d 47, 53 (1st Cir. 2002).

The third factor in the analysis, Serra's membership in the conspiracy, is uncontested, as Serra himself testified that he was a member of the conspiracy and was involved in the price fixing scheme. The Court further finds that Serra, like Peake, was unaware of the FBI's search of Sea Star's offices for the simple fact that the search had not yet occurred at

the time the calls took place. When Serra returned Glova's call at 9:16 AM on April 17, 2008, he did not have had any reason to believe that the conspiracy had ended, most likely believing that it was business as usual between him and Glova.

With regards to the fourth and final element, the Court finds that the calls were clearly designed to advance the primary objective of the conspiracy: price-fixing amongst competitors. *See, e.g.*, *United States v. Rodriguez*, 525 F.3d 85, 101 (1st Cir. 2008) (holding that "[a] statement is in furtherance of the conspiracy if it tends to advance the objects of the conspiracy as opposed to thwarting its purpose") (citations and internal quotation marks omitted); *United States v. Fahey*, 769 F.2d 829, 839 (1st Cir. 1985) (holding that a statement "fabricated to convince the [FBI] agent that the project should be allowed to continue.. [is] made to further the object of the conspiracy"). During the calls, Glova is clearly seeking Serra's assistance in not having to offer lower prices to a prospective client, and asks him to enlist Peake's help in the matter. Serra specifically responds that he has already discussed the matter with Peake.

Accordingly, as the evidence presented at trial showed that both Serra and the Defendant were active participants in the same conspiracy at the time of the recordings and that the statements made by Serra in the recordings were made in furtherance of said conspiracy, the Court holds that Serra's statements were admissible under FRE 801(d)(2)(E).

Defendant further avers that Glova's statements on the recordings are inadmissible hearsay, emphasizing that Glova was no longer a co-conspirator, but rather an informant, when the conversations were recorded. As such, Defendant contends that Glova's statements, as an informant, do not fall within the realm of 801(d)(2)(E). While the Court agrees that said statements are not co-conspirator admissions, they are admissible nonetheless, as the statements are not being offered for their truth but rather to provide the appropriate context for Serra's statements. *See U.S. v. Santiago*, 566 F.3d 65, 69 (1st Cir. 2009) (admitting informants' statements for the limited purpose of providing the proper context for the conversations between the informants and the defendant); *United States v. Walter*, 434 F.3d 30, 34 (1st Cir. 2006) (concluding that informer's out-of-court statements during taped "sting" were admissible as context for defendant's taped responsive admissions); *United States v. Cruz-Diaz*, 550 F.3d 169, 178 (1st Cir. 2008) ("Out-of-court statements offered not to prove the truth of the matter asserted but merely to show context – such as a statement offered for the limited purpose of showing what effect the statement had on the listener – are not hearsay.") (citing *United States v. Bailey*, 270 F.3d 83, 87 (1st Cir. 2001)). Hence, the Court refuses to part from well-established First Circuit precedent regarding the admissibility of statements made by informants for the purpose of providing context to otherwise admissible statements.

For the aforementioned reasons, the Court concludes that the recorded telephone conversations between Glova and Serra were admissible. Hence, Peake's Rule 29 and Rule 33 motions are hereby **DENIED** on these grounds.

ii) Admissibility of Recorded Statements Between Glova and FBI Agent After Calls Ended

During Serra's cross-examination, Defendant sought to introduce two brief statements made by Glova and the FBI agent immediately after Glova left a message for Serra on April 17, 2008. After the call, an FBI agent is heard asking Glova: "Were you referring to Frank Peake?" In response, Glova stated: "Yes, is he on your list?" Defendant's objective in seeking to introduce the statements through Serra was to impeach Glova by showing that Glova had originally neglected to mentioned Frank Peake's name to the FBI during his initial interview.[5] Defendant averred that FRE 806 allowed him to impeach Glova's testimony through Serra. The Government objected to the admissibility of said statements during Serra's cross-examination, alleging that the statements were

[5] At trial, Glova testified that he mentioned Frank Peake's name to the FBI during his interview, thereby implicating Peake in the conspiracy from the outset. However, Defendant posits that Glova is being untruthful, contending that it was not until Glova was offered leniency that he decided to implicate Peake in the conspiracy.

inadmissible hearsay and that Serra lacked the requisite personal knowledge to authenticate and identify the voices on the recordings.

Rule 806 states, in part, that "when a hearsay statement – or a statement described in Rule 801(d)(2)(C), (D), or (E) – has been admitted in evidence, the declarant's credibility may be attacked . . . by any evidence that would be admissible for those purposes if the declarant had testified as a witness." Therefore, the recording would be admissible to impeach Glova's hearsay statement, or a statement described in Rule 801(d)(2)(C), (D), or (E), if the prior statement was in fact inconsistent with what transpired between Glova and the FBI agent.

Defendant's contention, that the recording should be admitted into evidence for impeachment purposes, is unavailing for two reasons: (1) Defendant failed to show that the statements in the recording contradicted Glova's prior testimony, thereby making said statements hearsay not falling within any of the exceptions prescribed in FRE 803; and (2) the recording could not be authenticated through Serra, as he lacked personal knowledge of the events in question.

First, Defendant's argument that Glova's brief question to the FBI agent is contradictory to his trial testimony is unpersuasive. Glova merely asks the FBI agent whether Frank Peake was on their list, referring to a list being compiled by the FBI of all the individuals involved in the conspiracy. No reasonable jury could infer that Glova's testimony at trial had

been inconsistent with what actual transpired during his interview simply from listening to Glova's question to the FBI.

Furthermore, Rule 806 only applies to situations where a party seeks to impeach a declarant's credibility through another witness when a declarant's statement has been admitted under FRE 801(d)(2)(C), (D), or (E) or FRE 803. The situation presented at trial was not one contemplated under FRE 806, as Defendant was merely seeking to impeach Glova's trial testimony that he mentioned Peake's name during the FBI interview. Glova's testimony that he mentioned Peake's name during the FBI interview is neither a hearsay statement nor a statement described in Rule 801(d)(2)(C), (D), or (E), as said declaration is not an out of court statement being offered for its truth, but rather a first-hand account of what transpired during the FBI interview.

Second, even if the Court determined that the statements in the recordings were contradictory to Glova's testimony at trial, it would have been impossible for Defendant to authenticate the recording through Serra, as Serra lacked the requisite firsthand knowledge to identify the FBI agent heard speaking in the recording. Notwithstanding, the Court advised Defendant that it had the option of recalling Glova to the stand in order to question him about the statements made in the recording, an option which Defendant failed to exercise. Tr. Vol. 8 at 10:11-19.

Accordingly, the Court concludes that the recorded comments between Glova and the unidentified FBI agent were inadmissible. Hence, Peake's Rule 29 and Rule 33 motions are hereby **DENIED** on these grounds.

iii) Admissibility of Glova's Written Statement

At trial, the defense sought to introduce Glova's written statement to the FBI in an attempt to impeach him. The United States objected to its admissibility, arguing that the statement was hearsay under FRE 801. The Court agreed with the Government that Glova's written statement was hearsay, but nonetheless accorded defense counsel wide discretion by allow him to cross examine Glova "line-by-line" with his written statement. Tr. Vol. 3 at 144:7-11. Although the Court has broad discretion in determining whether to admit a witness's prior inconsistent statement, and thus whether the witness may be impeached by the prior statement, the Court in the case at bar in unconvinced that Glova's testimony at trial was inconsistent with his written statement to the FBI. *Udemba v. Nicoli*, 237 F.3d 8, 18 (1st Cir. 2001) (internal citations omitted). In any event, by allowing Defendant to cross-examine Glova with his prior written statement, the Court cured any potential harm that Peake might have suffered from any alleged inconsistency in Glova's written statement.

Accordingly, the Court concludes that Glova's written statement to the FBI is inadmissible hearsay. Hence, Peake's Rule 29 and Rule 33 motions are hereby **DENIED** on these grounds.

e) *Admissibility of Defendant's Compensation and Sea Star's Profits and Losses*

Defendant further avers that the Court erred in admitting evidence regarding Peake's compensation and Sea Star's profitability. At trial, over Defendant's objection, the Government presented evidence of Peake's salary and compensation in an effort to show his financial motive for engaging in the price-fixing scheme. The Court finds that evidence of Defendant's salary and bonuses, particularly evidence showing an increase in compensation as a result of Sea Star's profitability, is relevant under Federal Rule of Evidence 401 and that said evidence's probative value is substantially outweighed by the dangers of unfair prejudice to the Defendant under FRE 403. Evidence of Peake's compensation is highly probative to show not only that he had a financial interest in the success of the corporation, but also to establish a motive for why Defendant allegedly participated in the conspiracy. To minimize any bias that said evidence might bestow on Defendant, the Government did not introduce evidence of Defendant's overall net worth, assets, or lifestyle.

Peake further contends that evidence pertaining to Sea Star's profitability was erroneously admitted

at trial, arguing that the Government failed to link Sea Star's profits to the conspiracy. The evidence presented at trial showed that Sea Star's profitability drastically increased after the alleged start of the conspiracy, making said evidence probative under Rules 401 and 403. Baci's testimony regarding Sea Star's finances both before and during the conspiracy provided a factual basis for the admissibility of said documents. Additionally, the financial records demonstrate that Sea Star was running a deficit before the conspiracy and subsequently turned a profit once the conspiracy commended. Hence, the evidence may have a tendency, under FRE 401, to make the existence of the conspiracy more or less probable.

Accordingly, the Court concludes that evidence pertaining to Peake's compensation and to Sea Star's profitability is substantially more relevant than prejudicial under FRE 403. Therefore, Peake's Rule 29 and Rule 33 motions are hereby **DENIED** on these grounds.

f) Brady Violation Regarding Non-Disclosure of Confidential Informant Recording # 5

Defendant, in its second motion for a new trial (Docket No. 209), alleges that the Government violated its obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), when it failed to timely produce an audio recording which it possessed for more than five years. The recording in question was made on April 8, 2008, nine days before the FBI raided Sea Star's offices,

and details a long conversation between Baci, Fox, LaGoy, and William Stallings, the confidential informant ("CI"). Baci, the head of Sea Star's pricing department, was in charge of setting the prices that Fox, LaGoy, and the CI could offer to their customers during pricing negotiations. Peake did not partake in the recorded conversation and was only briefly mentioned twice. The first reference pertains to a former business contact that Peake had at Home Depot. CI Red. 5 Tr. at 66. The second merely hints that Peake had a business lunch planned that same day with Fox.

To succeed on a post-trial *Brady* violation claim, Peake must show that: (1) the evidence at issue was favorable to him; (2) that the evidence was either willfully or inadvertently suppressed by the government; and (3) that he was prejudiced by the nondisclosure. *U.S. v. Mathur*, 624 F.3d 498, 503 (1st Cir. 2010); *U.S. v. Connolly*, 504 F.3d 206, 212 (1st Cir. 2007); *see Brady v. Maryland*, 373 U.S. 83 (1963). To establish that he was prejudiced by the nondisclosure, Peake must show that there is a reasonable probability that the outcome of the trial would have been different had CI Recording 5 been timely produced. *See Kyles v. Whitley*, 514 U.S. 419, 434 (1995). Furthermore, if the undisclosed evidence served to impeach one of the Government's witnesses, a new trial may be warranted if said evidence suffices "[t]o undermine confidence in the outcome of the trial." *See Connolly*, 504 F.3d at 213; *U.S. v. Bagley*, 473 U.S.

667, 682 (1985) (applying *Brady* test to impeachment evidence).

The first prong of the *Brady* analysis requires Peake to show that the undisclosed evidence was favorable to him, a burden which he has failed to meet. The defense posits a myriad of reasons as to why the audio recording is favorable to Peake. First, they aver that the fact that Peake was not present in the meeting, that he was not invited, and that he was not mentioned as being part of the conspiracy are all exculpatory. Second, Peake argues that his name was only referenced twice in the meeting, and that in both instances, Stallings, the CI, had the opportunity to inquire about his role in the conspiracy and failed to do so. Peake reasons that Stallings would have pushed on this point had he believed that Peake was part of the ongoing conspiracy. Third, Defendant contends that the recording clearly establishes that Baci, and not Peake, is the brains behind the operation, as Carl Fox is heard claiming on the recording that "[t]he hunt is according to what Peter [Baci] says we can hunt." CI Red. 5 Tr. at 95. Lastly, Defendant argues that it would have been able to impeach both Glova and Baci at trial with the recording, claiming that their respective testimonies with regards to numerous potential clients are inconsistent with the evidence heard in CI Recording 5.

The Government counters that the audio recording was merely a continuation of the discussion on CI Recording 2, which was provided to Peake during discovery, and that the neutral discussion focuses on

various customer accounts. The Government argues that the main reason why Peake's name was barely mentioned in the meeting was because only one of the four individuals present, Peter Baci, was a participant in the conspiracy. Hence, it would have been surprising for Baci to make explicit incriminating statements about the conspiracy or anyone involved therein to three non-conspirators. Lastly, the Government argues that the evidence contained in the recording is not *Brady* evidence, given that the meeting was not a conspiratorial discussion of the conspiracy's members and **no one stated that Peake was not a member of the conspiracy.**

The Court, in holding that CI Recording 5 is in no way favorable to Peake, agrees with the United States that the recording is cumulative evidence of the other CI recordings that were originally produced to Peake. CI Recording 5 contains references to certain accounts, such as Office Max, Aqua Golf, Caribbean Shipping, and Walgreens, which Peake avers could have been used for impeachment purposes. However, CI Recording 2 contains similar discussions about the aforementioned accounts, including an in depth discussion on Walgreens and references to Aqua Gold and Caribbean Shipping. CI Rec. 2 Tr. at 18-22 and 60:20-63:7. Had Peake wanted to cross-examine Baci about the Walgreens, Aqua Golf, and Caribbean Shipping accounts, he could have done so using CI Recording 2.

In deciding that the recording in question is not favorable to Peake, the Court strongly emphasizes that only one of the four members taking part in the sales team meeting was part of the price-fixing conspiracy. This would explain why Peake did not partake in the meeting, why there were no conversations implicating Peake in the conspiracy, and why Baci neglected to describe the conspiracy or its participants. **The Court finds no conversations in CI Recording 5 that are potentially exculpatory or, at the very least, somewhat favorable to Peake.** Although Peake's name is mentioned twice in the recording, said references bear no relevance as to his inclusion or exclusion from the conspiracy. Furthermore, Baci testified that he was tasked with managing the day-to-day pricing for Sea Star's customers, thereby explaining Peake's absence from the meeting.

With regards to the second prong, it is undisputed that the Government inadvertently suppressed the audio recording. According to the U.S. Department of Justice, the FBI did not disclose to them that there was an additional recording in connection to the Puerto Rico water freight investigation until August 5, 2013, more than five months after the conclusion of Peake's trial.

The third prong of the analysis requires Peake to show that there is a reasonable probability that the outcome of the trial would have been different had CI Recording 5 been timely produced. *See Kyles*, 514

U.S. at 434. The Court holds that the jury verdict was supported by overwhelming evidence, including written emails signed by or addressed to Defendant Peake. Further, there is no reasonable probability that the outcome of the case would have been different had CI Recording 5 been timely produced.

At trial, the jury heard testimony from Greg Glova, Horizons' Pricing Director for Puerto Rico Freight Services, who testified that he actively participated in the conspiracy from 2005-2008. When he was promoted to director, Kevin Gill, the previous director, explained to him that Sea Star, Horizon, and Crowley had been discussing the shipping rates between them since 2002 and that the main participants in those communications were Peter Baci and Frank Peake from Sea Star and Tom Farmer from Crowley. The co-conspirators would communicate via email, using Gmail accounts with coded names, and/or by telephone. Whenever there was a dispute as to pricing, Baci and Glova's respective bosses, Peake and Gabriel Serra, would converse and make a final determination. Glova further indicated that the four of them met twice in Orlando, Florida, once in October 2006 and once in August 2007, to strategize. According to Glova, the co-conspirators would discuss the prices and rates of shipping, fuel surcharges, and port surcharges, and would conspire to let each other win certain accounts in order to make up for market share imbalance. There was also an agreement between Horizon and Sea Star whereby neither company would undercut each other for house accounts.

Through Glova, the United States admitted several email communications incriminating Frank Peake in the conspiracy. Baci and Glova, tasked with handling the majority of the day-to-day price fixing activities, used secret email accounts in order to shield their identities.[6] The majority of the emails sent back and forth between Glova and Baci detail the inner-workings of the conspiracy, thereby demonstrating how Sea Star and Horizon were able to effectively decrease competition and increase their profitability. Baci and Glova would constantly plot how to handle bidding for new customer accounts and how to, in essence, maintain an equal market share of the freight shipping from Florida to Puerto Rico.

Peter Baci, who worked as the Senior Vice President of Sea Star Line in Jacksonville, Florida from 2002-2008, also took the stand, and testified that since 2003 he would report directly to Peake. Baci recounted how Horizon and Sea Star initially started to conspire to fix rates after Navieras' bankruptcy in 2002, and indicated that he dealt with both Kevin Gill and Glova. At first, they would communicate via telephone or fax, but they eventually began using secret email accounts with the hope of disguising their scheme.

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[6] Peter Baci's email was lighthouse123@gmail.com and Greg Glova's email was southorange@gmail.com.

Baci further testified that he would communicate face to face with Glova, and that Serra and Peake would communicate amongst themselves. On a number of occasions, Peake and Serra were summoned by Baci and Glova to resolve pricing disputes between Horizon and Sea Star. Additionally, Baci recounted how Peake became CEO and President of Sea Star in 2004 and how they would regularly discuss how to effectively increase prices in order to increase Sea Star's profitability.

Lastly, Baci attested that he, Serra, Glove, and Peake all met on at least three occasions to plan illicit antitrust conduct relating to their respective clients, thereby corroborating Glova's testimony to that effect. One of the meetings took place in Orlando, Florida in October 2006, where the parties met to discuss the 50/50 cargo shipments[7] and the planned rate increases for the following year. In 2007, all four met again in Jacksonville, Florida to discuss the handling of the upcoming contract negotiations with Aqua Golf. Similarly, Baci, Peake, and Glova met once more in 2008, this time in New York, to discuss the 50/50 rule. The testimony of Baci, standing alone, as to the three meetings, is technically sufficient to find Defendant

[7] The 50/50 Rule refers to an agreement between Sea Star and Horizon, whereby both companies would strive to maintain an equal market share of all goods being shipped to Puerto Rico.

guilty. However, there was corroborating evidence provided by other co-conspirators, as stated herein, coupled with emails signed by and received by Peake, as well as additional email communications between the other coconspirators implicating Peake as a participant in the conspiracy.

The members of the jury also heard testimony from Gabriel Serra, the former general manager of Horizon's Puerto Rico division. Serra testified that he and Peake would actively discuss price fixing in the Florida ship market, and that Peake even advocated and obtained an agreement from Horizon to charge higher fuel surcharges on longer routes. Serra also indicated that he had met with Baci, Peake, and Glova in Orlando, Florida in October 2006 to discuss the 50/50 market share agreement between Sea Star and Horizon and the rate increases for the following year.

Serra and Peake would communicate regularly via email and telephone, but, unlike Baci and Glova, they would use their work emails.[8] Numerous email conversations between Peake and Serra were admitted during the Government's case-in-chief, most of which show Defendant's involvement in the overall

[8] Frank Peake's email was fpeake@seastarline.com and Gabriel Serra's email was gserra@horizonlines.com.

scheme. Dozens of emails between Peake, Baci, Glova, and Serra illustrate that Peake was actively engaged in the decision-making process, and show how the Horizon and Sea Star executives communicated, quite frequently, about jointly raising shipping rates and maintaining a leveled playing field regarding the number of customer accounts.

For example, Exhibits 21, 22, 53, 67, 126, 149, 169, 176, 222, and 239 are all prime examples of email conversations between Baci and Glova detailing the inner-workings of the conspiracy. Said emails show how Sea Star and Horizon methodically planned out their proposals to potential clients, with the optimal goal of increasing profitability and maintaining a balanced market share between them. Both sides would email each other the proposals that they would submit to potential clients, and lay out their rate increase plans for the following years.

Additionally, Exhibits 26, 32, and 34 are email conversations involving Serra and Peake which further

implicate Peake in the price fixing conspiracy.[9] [10] [11] In said emails, Peake and Serra are seen arguing about client accounts, with Peake stating that "things aren't

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[9] Exhibit 26 contains two emails constituting circumstantial evidence as to an agreement relating to market sharing. The last email in the link, sent by Serra to Baci and Glova, with a copy to Peake, ends with "**Read and delete . . . of course!"**

[10] Exhibit 32 contains a three email conversation between Serra and Peake in March 2008. In the first email, dated March 6, 2008, Serra confronts Peake about Sea Star's shipping rates, telling Peake that "[he] is playing into AGT's and Transnow's hand . . . do you want me to react? . . . they've now given me Paul's numbers." The second email contains Peake's response, wherein he tells Serra "please do not ever send me an email like this again! I would like to think that **my/our performance** in the market over the past years would at least get me the benefit of the doubt. . . . **To my knowledge we have NOT exceeded our allocation in the NE this year. I am not sure about the reefers,** but I will check on that in the AM." **(emphasis ours)** The third and final email is Serra's response, urging Peake to "see the trend over the last few weeks and let's figure out a plan."

Hence, these three emails clearly portray that there was an already agreed upon allocation by the members of the conspiracy as to the types of services being offered in the North East and as to the reefers (refrigerated vans).

[11] Exhibit 34 also constitutes evidence of a conspiracy as to market sharing, wherein Peake informs Serra that in "the past 2 weeks you are hurting me. Flexi, Goya, Atek, and BK. If you are swinging at Crowley you are missing and hitting me. Not good!" This email is titled "Ouch!" In his second email to Serra, sent on March 22, 2008 at 7:19 PM, Peake is annoyed ("Ouch!") at the fact that "things aren't working as well as they were. Pete [Baci] has similar complaints. Flexi is about fuel and you gave them a BSC discount. Tisk tisk. Goya is about you not charging for the overweight permits. Again tisk tisk. **Same as cutting the rate in my book**." Serra replies that he will "check them all . . . you are certainly not the target."

working as well as they were" and that Baci had similar complaints, in reference to their price fixing endeavors.

Furthermore, the Court notes that from August 1, 2003 to April 10, 2008, Serra and Peake communicated a total of 319 times using their personal telephones (Exhibit 279), with 215 calls being initiated by Peake, circumstantial evidence further corroborating the testimony of the three cooperators.

Accordingly, the Court finds that there was overwhelming evidence presented at trial to support Peake's conviction. Even if the United States had timely produced CI Recording 5 to Defendant, there is no reasonable probability that the outcome of the trial would have been any different. Hence, Peake's *Second Motion for New Trial* (Docket No. 209) is hereby **DENIED** on these grounds.

IV. Conclusion

For the reasons stated herein, the Court hereby **DENIES** all of Defendant's Rule 29 and Rule 33 motions (Docket Nos. 193 and 209).

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 5th day of December, 2013.

/s/ DANIEL R. DOMINGUEZ

DANIEL R. DOMINGUEZ
U.S. District Judge

United States Court of Appeals
For the First Circuit

No. 141088

UNITED STATES

Appellee

v.

FRANK PEAKE

Defendant-Appellant

Before

Howard, *Chief Judge*,
Torruella, Lynch, Thompson,
Kayatta and Barron,
Circuit Judges.

ORDER OF COURT

Entered: December 15, 2015

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submittal to the active judges of this court and a majority of the judges not having voted that the case be heard

en banc, it is ordered that the petition for rehearing and the petition for rehearing en banc be *denied.*

By the Court:

/s/ Margaret Carter, Clerk

cc:
James Fredricks
Craig Lee
Nelson Perez-Sosa
Shana Wallace
David Markus
Francisco Rebollo-Casalduc
Nereida Melendez Rivera