

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

Criminal Case No. 20-cr-00152-PAB

UNITED STATES OF AMERICA,

Plaintiff,

v.

1. JAYSON JEFFREY PENN,
2. MIKELL REEVE FRIES,
3. SCOTT JAMES BRADY,
4. ROGER BORN AUSTIN,
5. TIMOTHY MULRENIN,
6. WILLIAM VINCENT KANTOLA,
7. JIMMIE LEE LITTLE,
8. WILLIAM WADE LOVETTE,
9. **GARY BRIAN ROBERTS**, and
10. RICKIE PATTERSON BLAKE,

Defendants.

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**DEFENDANT ROBERTS' MOTION TO DISMISS THE INDICTMENT  
AS BARRED BY THE STATUTE OF LIMITATIONS  
AND BRIEF IN SUPPORT THEREOF**

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Defendant Gary Brian Roberts respectfully moves the Court to dismiss the charges against him as barred by the statute of limitations pursuant to 18 U.S.C. § 3282(a) and the Fifth Amendment of the Constitution of the United States. In the event that the charges against Defendant are not dismissed on Defendant's motion, Defendant respectfully requests that an evidentiary hearing be held on the issue of whether the Government's prosecution of Defendant is barred by the statute of limitations, at which the prosecution should be required to produce evidence that Defendant participated in an alleged crime within the limitations period.

## **I. INTRODUCTION**

The Government alleges in its Superseding Indictment (Indictment) that, “beginning at least as early as 2012,” the Defendants and others allegedly “entered into and engaged in a continuing combination and conspiracy to suppress and eliminate competition by rigging bids and fixing prices and other price-related terms for broiler chicken products sold in the United States,” which was “per se unlawful.” Dkt. # 101, ¶ 1. The Government’s allegations and the nature of a Sherman Act, 15 U.S.C. § 1, conspiracy charge present *prima facie* grounds for dismissal of this prosecution as barred by the statute of limitations. The prosecution obtained its Indictment against Mr. Roberts and the other Defendants on October 6, 2020. *Id.* Based upon its own allegations, the prosecution indicted Mr. Roberts and the other Defendants 8 years after the offense was complete and the limitations period began to run. Dismissal of the Indictment and this prosecution as barred by the statute of limitations is warranted, and compelled by the Defendants’ right to due process.

Fully *three quarters* of the prosecution’s substantive allegations concern alleged conduct occurring outside of the limitations period. *See* Dkt. # 101, ¶¶ 51-119. In Mr. Roberts’ case, the last specific act alleged against him occurred over 6 years prior to the return of the Indictment. *Id.* at ¶ 106. Based upon the grounds set forth herein, the prosecution should not be permitted to proceed against Mr. Roberts, and the Indictment and charges should be dismissed as to him.

## **II. APPLICABLE LAW AND ARGUMENT**

### **A. The Charge Against Mr. Roberts Is Barred By The Statute of Limitations**

The Government alleges in its Indictment that the Defendants entered into and engaged in a “continuing” combination and conspiracy to suppress and eliminate competition by rigging bids and fixing prices and other price-related terms for broiler chicken products, in violation of Section

1 of the Sherman Act, 15 U.S.C. § 1, continuing through at least early 2019. Dkt. # 101, ¶ 1. Its specific allegations concerning Mr. Roberts consist of various alleged communications in relation to “QSR-4’s 2013 Freezing Charge,” “QSR-4’s Quality Assurance Costs for 2014,” and “QSR-1’s 8-Piece COB Supply for 2015.” *Id.* at ¶¶ 68(c), 69, 82, 91, 93, 98, 104. The most recent specific conduct alleged against Mr. Roberts are alleged communications between August 11 and September 3, 2014, in relation to “QSR-1’s 8-Piece COB Supply for 2015.” *Id.* at ¶¶ 91-95, 97-101, 103. The Government alleges more recent conduct in sections entitled “QSR-2’s 2015 Bone-In Promotional Discount,” “Distributor-1’s Line-of-Credit Term,” “QSR-1’s Broiler Chicken Products for 2018,” and “QSR-2’s 8-Piece COB Supply for 2018 and 2019,” however none of this conduct references Mr. Roberts. *Id.* at ¶¶ 120-143.

The Government’s Section 1 charge is subject to a five (5) year limitations period under 18 U.S.C. § 3282. *See United States v. Kemp & Assocs., Inc.*, 907 F.3d 1264, 1270 (10th Cir. 2018) (citing 18 U.S.C. § 3282(a); *United States v. Evans & Assocs. Const. Co.*, 839 F.2d 656, 661 (10th Cir. 1988)). The Court of Appeals has held that, when a defendant raises a statute of limitations defense, “the Government then bears the burden of establishing compliance with the statute of limitations by presenting evidence that the crime was committed within the limitations period or by establishing an exception to the limitations period.” *United States v. DeLia*, 906 F.3d 1212, 1217 (10th Cir. 2018) (quoting *Musacchio v. United States*, 136 S.Ct. 709, 718 (2016)); *see also Musacchio*, at 717 (“When a defendant introduces the limitations defense into the case, the Government then has ‘the right to reply or give evidence’ on the limitations claim”) (quoting *United States v. Cook*, 17 Wall. 168, 179 (1872)) (quoting *United States v. Cook*, 17 Wall. 168, 179 (1872)). Furthermore, in a criminal antitrust prosecution, the government must prove beyond

a reasonable doubt that each defendant “continued to be a member to a time within the period of the statute of limitations.” American Bar Association, *Model Jury Instructions in Criminal Antitrust Cases*, Ch. 4, § A(1) (2009).

Statutes of limitations provide a guarantee “against bringing overly stale criminal charges.” *United States v. Lovasco*, 431 U.S. 783, 789 (1977) (quoting *United States v. Marion*, 404 U.S. 307, 322 (1971); quoting *United States v. Ewell*, 383 U.S. 116, 122 (1966)). “[A]n act condoned by the expiration of the statute of limitations is no longer a punishable offense.” *Stogner v. California*, 539 U.S. 607, 613 (2003) (quoting H. Black, *American Constitutional Law* § 266, p. 700 (4th ed.1927)). Statutes of limitations “reflect[ ] a legislative judgment that, after a certain time, no quantum of evidence is sufficient to convict.” *Id.* at 615 (citing *Marion*, at 322); accord *DeLia*, 906 F.3d at 1217 (quoting *Stogner*, at 615). “The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.” *Marion*, at 325 (quoting *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 349 (1944)).

Given that the expiration of the statute of limitations prevents the bringing of stale criminal charges and renders the underlying conduct no longer punishable, in combination with the requirement that the Government bears the burden of proving that the offense was committed within the limitations period or the applicability of an exception to the statute when a statute of limitations defense is raised by the defendant, the Government should be required to establish why its prosecution of Mr. Roberts is not barred before its prosecution proceeds further. Requiring the Government to meet this burden before its prosecution of Mr. Roberts is allowed to continue is

further wholly consistent with “the law of this circuit [ ] that if the statute of limitations is to have any meaning in the administration of criminal justice, [it] must be held ... to operate as a jurisdictional limitation upon the power to prosecute and punish.” *United States v. Cooper*, 956 F.2d 960, 961–962 (10th Cir. 1992) (where the criminal information against the defendant was filed after the expiration of the statute of limitation in Section 3282, reversing the defendant’s conviction despite her guilty plea and holding that the statute of limitations was a bar to prosecution, and that the charge against the defendant was a nullity). Dismissals of indictments and charges brought in violation of the statute of limitations have been upheld in other cases, under similar circumstances. *See United States v. Dunne*, 324 F.3d 1158, 1166 (10th Cir. 2003) (affirming the district court’s dismissal of a superseding indictment for failure to charge within the applicable five-year statute of limitations); *United States v. Payne*, 978 F.2d 1177, 1181 (10th Cir. 1992) (reversing the defendant’s convictions for false representations of social security numbers as barred by the five-year statute of limitations under Section 3282 where the evidence was undisputed that the defendant’s last false representation of a social security number occurred in 1984, and the indictment was not returned until 1991).

Mr. Roberts accordingly requests that the Indictment be dismissed as to him or, in the event that the charges against him are not dismissed on this Motion, that an evidentiary hearing be held in which the prosecution should be required to meet its burden of proving that Mr. Roberts committed an alleged offense within the limitations period.

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