172 Ill.App.3d 694
Appellate Court of Illinois,
Fifth District.

Thomas L. SIMS and Lanita Sims, Plaintiffs-Appellants,
v.
CITY OF ALTON, Defendant-Appellee.

No. 5–87–0441.
|
July 26, 1988.

Victim who slipped and fell on snowy sidewalk filed personal injury action against property owner and city. The Circuit Court, Madison County, Andreas Matoesian, J., denied plaintiffs' motion to admit facts and entered directed verdict for city, and plaintiffs appealed. The Appellate Court, Lewis, J., held that: (1) rule governing whether facts were deemed admitted upon party's failure to timely respond to requests to admit facts did not apply automatically, but was matter of court's discretion, and (2) allowing city to file late response was appropriate where plaintiffs had requested admission of conclusions of law and plaintiffs failed to show that allowing late response to be filed would prejudice them.

Affirmed.

West Headnotes (4)

[1] **Pretrial Procedure**
Time for response

Pretrial Procedure
Admission by failure to respond

Application of rule providing that facts can be deemed to be admitted if a party fails to timely respond to another party's request to admit facts did not occur automatically whenever party failed to timely respond to request to admit facts, but was within the wide discretion of the circuit court, which could allow a late filing in order to prevent injustice. S.H.A. ch. 110A, ¶¶ 183, 216(c).

10 Cases that cite this headnote

[2] **Pretrial Procedure**
Time for response

It is appropriate for court to allow a late response to a request to admit facts where the late filing is due to circumstances beyond the control of the litigant or where the request to admit facts concerns the central issues of the case and the late filing would not prejudice the party requesting admission of the facts. S.H.A. ch. 110A, ¶ 216.

6 Cases that cite this headnote

[3] **Pretrial Procedure**
Time for response

Allowing defendant to file late response to plaintiffs' requests for admission was proper where requests asked the defendant to concede to the plaintiffs' entire case, including conclusions of law, not merely uncontroverted facts. S.H.A. ch. 110A, ¶¶ 216, 216(a).

Cases that cite this headnote

[4] **Pretrial Procedure**
Time for response

Personal injury plaintiffs were not prejudiced by allowing defendant in slip-and-fall case to file late response to requests for admissions, where considerable discovery had been obtained in the three years the case had been pending and, although at time of trial the slip-and-fall victim was in poor health, the “facts” relied upon in request to admit facts were facts which were essential elements of their complaint, which should have been investigated and supported by necessary evidence at a much earlier date. S.H.A. ch. 110A, ¶¶ 216, 216(a).

5 Cases that cite this headnote

Attorneys and Law Firms

****932 *695 ***539** Amiel Cueto, Thomas M. Daley, Cueto, Daley, Williams, Moore & Cueto, Ltd., Belleville, for plaintiffs-appellants.

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G. Edward Moorman, Williamson, Webster, Groshong, Moorman & Falb, Alton, for defendant-appellee.

Opinion

Justice LEWIS delivered the opinion of the court:

Plaintiffs Thomas and Lanita Sims appeal an order of the circuit court in which the circuit court denied their motion to admit facts, a result of which defendant, the City of Alton, received a directed verdict. Plaintiffs' amended complaint sought damages from defendant for a negligence action. Plaintiffs alleged that defendant failed to keep a sidewalk in a safe and reasonable condition, and that because of defendant's failure, Thomas Sims fell and received a blow to his head that subsequently caused him to have two strokes that paralyzed him physically and left him mentally diminished. While plaintiffs' contention in their brief is that the circuit court erred in not granting their motion to admit facts, the main thrust of their argument is that the circuit court erred in allowing defendant to file a late response to plaintiffs' request to admit facts. Therefore, we will confine our decision to this argument. Before considering plaintiffs' argument, a ***696** statement of facts provides the necessary background.

On March 12, 1984, plaintiff Thomas Sims had walked up a sidewalk, approximately 30 feet in length, to enter a Firestone store. It had snowed that day and was still snowing when plaintiff approached the front door of the Firestone ****933** *****540** store. There were approximately two to three inches of snow on the sidewalk. As he reached the front door, his left foot, upon which his weight rested, slid and he fell onto the left side of his back and hit the right side of the back of his head on the concrete. He got up and went inside the store, got his car which he had left there that morning, and drove home. An hour or so later, he developed a headache, so he took some aspirin and went to bed. His headache persisted throughout the next day but he did not seek medical treatment. On March 14, 1984, plaintiff Thomas Sims suffered a slight stroke. He went into the hospital and underwent testing and while he was in the hospital, on March 16, 1984, he suffered a second, debilitating stroke.

On June 7, 1984, plaintiffs filed a petition for damages for personal injury alleging that the Firestone store was negligent for keeping its sidewalk in a dangerous and unsafe condition and alleging that the City of Alton was also negligent, and that this negligence was the proximate cause of plaintiff Thomas Sims' injuries. Two other counts alleged that, due to Firestone's or to the City of Alton's negligence, plaintiff Lanita Sims had lost the care, support and consortium of her husband. From the time of the filing of this complaint, considerable discovery was had in the nature of requests for production of documents and of written interrogatories. Additionally, numerous depositions were taken. On February 13, 1987, plaintiffs filed three documents with the circuit court: supplemental interrogatories, a supplemental motion to produce, and a request to admit facts. These three documents were file stamped by the clerk of the circuit court on February 13, 1987, but no proof of service of process accompanied these documents. However, on February 20, 1987, plaintiffs filed an affidavit of Robert Romanik in the circuit court. It does not appear from the record that defendant received a copy of Romanik's affidavit. In his affidavit Romanik stated under oath that he had personally served defendant's attorney with the three documents. Defendant filed an answer to the supplemental interrogatories on March 11, 1987, but failed to respond to plaintiffs' request to admit facts within the 28–day time limit stated in Supreme Court Rule 216(c) (107 Ill.2d R. 216(c)).

Plaintiffs' petition for damages came on for trial on April 20, 1987, and at that time, prior to *voir dire* and opening statements, ***697** plaintiffs advised the circuit court that they intended to make oral motions that the facts admitted by defendant by its failure to respond to their request to admit facts be admitted and that a directed verdict be entered in favor of plaintiffs as to defendant's liability. The plaintiffs stated that they were prepared to present evidence on the issue of damages. Defendant's attorney asserted that he had never seen the request to admit facts until that date when plaintiffs presented their motions to admit facts and for a directed verdict. After hearing the testimony of the special process server who delivered the documents to defendant's attorney, the circuit court reserved ruling on plaintiffs' motions until April 21, 1987, in order for the circuit court to review the cases presented and to give defendant an opportunity to respond to plaintiffs' motions.

On April 21, 1987, defendant filed a written motion for leave to file a late response to plaintiffs' request to admit facts and an answer to the request to admit facts. The reasons for this motion were that defendant was unaware of the plaintiffs' filing of the request to admit facts until April 20, 1987, that plaintiffs would suffer no prejudice as the result of the filing of defendant's late response, that the facts sought to be admitted by the plaintiffs were not facts but conclusions of law, and that the facts sought to be admitted concerned

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the central issues of the case. The circuit court allowed defendant's motion over plaintiffs' objections. The circuit court offered to continue the case so that plaintiffs could have additional time to prepare their evidence or to present evidence of prejudice to the plaintiffs, but the plaintiffs refused to accept the continuance. The plaintiffs' presented evidence of plaintiff Thomas Sims' deteriorating condition. Defendant then moved that plaintiffs be granted a continuance for the purpose of obtaining proof but the plaintiffs objected to this motion and the circuit court denied defendant's motion. The plaintiffs then moved to ****934 ***541** have admitted the request to admit facts, which was objected to by the defendant, and which the circuit court denied. Plaintiffs stated that they had no further evidence and rested their case. Defendant moved for a directed verdict which was granted. Plaintiffs filed a post-trial motion on May 8, 1987, but no order regarding plaintiffs' post-trial motion appears in the record. However, plaintiffs' notice of appeal was filed on May 19, 1987, which may explain why no order was entered on the post-trial motion.

On appeal, plaintiffs contend that Supreme Court Rule 216(c) mandates that if a party fails to respond to another party's request to admit facts within 28 days from the date of service, that the facts must be deemed to be admitted. They further contend that the only circumstances ***698** in which the circuit court has discretion to permit the filing of a late response are when (1) a party's late response was the result of circumstances beyond the litigant's control, or (2) the facts sought to be admitted concerned the central issues of the case and the requesting party was unable to show prejudice to its case as a result of the late filing. Plaintiffs assert that the facts of this case do not meet either of these conditions. We do not agree with either of plaintiffs' contentions.

[1] Supreme Court Rule 216(c) is not to be applied automatically whenever a party fails to timely respond to a request to admit facts, but a circuit court has wide discretion with regard to the requests to admit and may allow a late filing in order to prevent injustice. (*Thomas v. Village of Westchester* (1985), 132 Ill.App.3d 190, 87 Ill.Dec. 448, 477 N.E.2d 49.) Supreme Court Rule 183 provides a circuit court with the authority regarding the circuit court's discretion to permit the late filing of a response to a request to admit facts, as does the case law. (107 Ill.2d R. 183; *Kismer v. Antonovich* (1986), 148 Ill.App.3d 508, 102 Ill.Dec. 150, 499 N.E.2d 707; *Thomas v. Village of Westchester,* 132 Ill.App.3d 190, 87 Ill.Dec. 448, 477 N.E.2d 49; *Homer G. Dickson & Co. v. Barraza* (1983), 115 Ill.App.3d 5, 70 Ill.Dec. 643, 449 N.E.2d 990; *Daleanes v. Board of Education* (1983), 120 Ill.App.3d 505, 75 Ill.Dec. 823, 457 N.E.2d 1382; *Bluestein v. Upjohn Co.* (1981), 102 Ill.App.3d 672, 58 Ill.Dec. 548, 430 N.E.2d 580.) From these authorities it is clear that the circuit court did have the discretion to permit defendant to file a late response to plaintiffs' request to admit facts.

[2] We next address plaintiffs' contention that the circuit court can only exercise its discretion to permit the filing of a late response in certain circumstances, *i.e.,* that the circuit court can only allow the late filing of a response to those circumstances where the late filing is due to circumstances beyond the control of the litigant or where the request to admit facts concerns the central issues of a case and the late filing of a response would not prejudice the party requesting the admission of the facts. Both *Kismer* and *Thomas* held that these are appropriate circumstances to allow a late response to a request to admit facts. Without conceding that these are the only circumstances which may give rise to the circuit court's authority to exercise its discretion and to allow a tardy response to be filed, we will confine our decision to the determination that the facts of this case do fall within the circumstances set forth in *Kismer* and *Thomas.* Here plaintiffs' request to admit facts went to the central issues of the case and the plaintiffs failed to show that the filing of defendant's late response prejudiced their case.

[3] Plaintiffs request to admit facts stated as follows:

***699** "1. On March 12, 1984, the defendant was the owner of the sidewalk located between 502–512 East Broadway, Alton, Madison County, Illinois; said sidewalk being adjacent to the building presently occupied by the Firestone Fire (sic) and Rubber Company.

2. On March 12, 1984, the sidewalk was in a defective, dangerous condition; and that the danger was increased when snow and/or ice was on the sidewalk.

3. Before March 12, 1984, the defendant had actual knowledge and/or notice of the condition described in Paragraph 2.

4. On March 12, 1984, the plaintiff walked on the sidewalk described in ****935 ***542** Paragraph 1 which was in the condition described in Paragraph 2; and that the plaintiff was caused to fall because of the condition described in Paragraph 2; and that as a direct result of the fall, the plaintiff has suffered two strokes, brain damage, and permanent pain and disability."

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This request clearly encompasses all the issues needed to be proved by the plaintiffs in order to establish their claim for negligence, thus it cannot be said that this request did not pertain to central issues of this case. This request for facts did not request defendant to concede to the admission of uncontroverted facts, but asked defendant to concede to plaintiffs' entire case. This is not the purpose of Supreme Court Rule 216(a) (107 Ill.2d R. 216(a)). The purpose of Supreme Court Rule 216 is noted in the Historical and Practice Notes found under this rule, where it is stated: "But the request to admit should be used to obviate the necessity of proof of facts as to which there is no real dispute, such as delivery of a deed or ownership of property. Using it to blanket the case and to cover matters that are fairly disputed is a waste of the time of counsel for both sides and the court." (107 Ill.2d R. 216, Historical and Practice Notes at 366 (Smith-Hurd 1985).) In defendant's answer to plaintiffs' request, defendant admitted that it was the owner of the sidewalk but all other "facts" stated by the plaintiffs in the request were thoroughly disputed. To permit a party to obtain admissions of conclusions of law, as plaintiffs attempt to in this case, would not be in conformance with the purpose of the statute.

[4] Further, plaintiffs have not shown that the allowing of defendant to file a late response would prejudice them. The circuit court offered to allow plaintiffs a continuance so that plaintiffs would have a chance to obtain any evidence necessary to present their case, but plaintiffs declined this offer. Plaintiffs' contention that they were prejudiced was based on their claim that further depositions would be ***700** needed as they were unfairly surprised by not being permitted to proceed on the admitted facts and that they had no evidence upon which to proceed. This appears to be an untenable claim as this case has been ongoing since 1984. Considerable discovery had been obtained in the three years this case was pending. Although at the time of trial plaintiff Thomas Sims was in poor health, the "facts" that plaintiffs relied on in the request to admit facts were facts that were essential elements of their complaint. Plaintiffs should have investigated and obtained the necessary evidence to support their claim at a much earlier date in order for plaintiffs to proceed. Additionally, the information needed by plaintiffs was of the type that was obtainable from sources other than the plaintiff Thomas Sims, *i.e.*, medical testimony and testimony of persons regarding the unsafe condition of the sidewalk at the time of the accident. We cannot determine that plaintiffs were prejudiced by the defendant's late filing of the answer to plaintiffs' request to admit facts.

For the foregoing reasons, the judgment of the circuit court of Madison County is affirmed.

AFFIRMED.

HARRISON, P.J., and CALVO, J., concur.

All Citations

172 Ill.App.3d 694, 526 N.E.2d 931, 122 Ill.Dec. 538

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394 Ill.App.3d 458
Appellate Court of Illinois,
Fifth District.

Wanda Mae SMITH, Individually and as Special Administrator of the Estate of Crystal Smith, Deceased, Plaintiff–Appellant,
v.
James J. PAVLOVICH, M.D., Kathryn A. Churling, M.D., and Patricia G. Dillard, R.N., Defendants–Appellees,
and
Renato R. Katubig, M.D., and Ajay K. Gopalka, M.D., Defendants.

No. 5–08–0256.
|
Sept. 10, 2009.

Synopsis
Background: Mother of patient who died from infection at age three brought medical malpractice action against licensed advanced practice nurse (APN) and two doctors for failing to recommend and administer a particular vaccine during clinic visits. The Circuit Court, Jackson County, E. Dan Kimmel, J., directed verdicts in favor of defendants. Mother appealed.

Holdings: The Appellate Court, Welch, J., held that:

[1] pediatrician was not qualified to testify for APN regarding standard of care applicable to her;

[2] physicians owed no duty of care to patient because no physician-patient relationship existed; and

[3] one physician's answer to complaint was not a judicial admission of a physician-patient relationship.

Affirmed.

West Headnotes (23)

[1] Evidence
Due care and proper conduct in general

Advanced practice nurse (APN) was not acting as a pediatrician when she saw patient at clinic, and therefore a medical doctor specializing in pediatrics was not qualified to testify regarding standard of care applicable to APN in medical malpractice action involving failure to recommend and administer a particular vaccine that purportedly would have prevented patient's death from infection at age three; nurse was licensed as an APN, not a pediatrician, was subject to statutes and regulations concerning APNs, and was acting under a collaborative agreement with a physician, as was required of APNs but not of pediatricians. S.H.A. 225 ILCS 65/15–5 et seq.

Cases that cite this headnote

[2] Health
Standard of practice and departure therefrom

In medical malpractice suits, the plaintiff must establish the applicable standard of care through expert testimony.

Cases that cite this headnote

[3] Evidence
Due care and proper conduct in general

In order to testify as an expert on the standard of care in a given school of medicine, the witness must be licensed therein.

1 Cases that cite this headnote

[4] Health
School of medicine

A defendant has the right in a medical malpractice action to have his competence judged by the standards of his own school of medicine and not by those of any other.

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Cases that cite this headnote

[5] Evidence

Due care and proper conduct in general

A pediatrician is not competent to testify to the standard of care applicable to advanced practice nurses, even if those nurses are working in pediatrics, any more than an advanced practice nurse working in pediatrics is competent to testify to the standard of care applicable to a pediatrician.

Cases that cite this headnote

[6] Appeal and Error

Cases Triable in Appellate Court

Review of directed verdict is de novo because, in directing a verdict, the circuit court determines as a matter of law that there are no evidentiary facts out of which the jury may construe the necessary fact essential to recovery.

Cases that cite this headnote

[7] Appeal and Error

Appeal from ruling on motion to direct verdict

A directed verdict will be upheld where all the evidence, viewed in the light most favorable to the opponent, so overwhelmingly favors the movant that no contrary verdict based on that evidence could ever stand.

Cases that cite this headnote

[8] Trial

Sufficiency to warrant recovery, or to establish cause of action or defense

If the plaintiff fails to produce a required element of proof in support of her cause of action, then no cause is presented for the jury's consideration and the entry of a directed verdict for the defendant is proper.

Cases that cite this headnote

[9] Health

Vaccination or immunization

Defendant physicians owed no duty of care to patient because no physician-patient relationship existed, thus precluding recovery in medical malpractice action in which patient's mother alleged that those physicians and an advanced practice nurse negligently failed to recommend and administer a particular vaccine that purportedly could have prevented infection from which patient died at age three; physicians provided no services to or on behalf of patient, and were not involved in any way with the medical decisions made with respect to patient.

Cases that cite this headnote

[10] Health

Elements of malpractice or negligence in general

In a medical malpractice action, a plaintiff must prove a duty owed by the defendant physician, a breach of that duty, an injury proximately caused by the breach, and resultant damages.

1 Cases that cite this headnote

[11] Health

Professional-patient relationship as requisite to duty

A physician's duty is limited to those situations in which a direct physician-patient relationship exists or there is a special relationship, such as when a physician is asked by another physician to provide a service to a patient, conduct laboratory tests, or review test results.

Cases that cite this headnote

[12] Health

Nature and existence of relation

The “physician-patient relationship” is a consensual relationship in which the patient knowingly seeks the physician's assistance and in which the physician knowingly accepts the person as a patient.

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Cases that cite this headnote

[13] Health

Nature and existence of relation

A physician-patient or special relationship may exist even in the absence of any meetings between the physician and patient, where the physician performs services for the patient.

Cases that cite this headnote

[14] Evidence

Construction

Physician's answer to malpractice complaint, admitting that "at all times relevant hereto, [he] undertook to provide diagnosis, care[,] and treatment to" patient, was not a binding "judicial admission" of a patient-physician relationship at the time of patient's visits to clinic, when physician and two other defendants allegedly should have administered vaccine that purportedly would have prevented patient's death at age three; while physician was called to emergency room of hospital when patient was brought in with infection that claimed her life, he had never seen, examined, or treated patient before.

1 Cases that cite this headnote

[15] Evidence

Judicial Admissions

"Judicial admissions" are deliberate, clear, unequivocal statements by a party about a concrete fact within that party's knowledge.

13 Cases that cite this headnote

[16] Evidence

Judicial admissions in general

Where made, a judicial admission may not be contradicted in a motion for a summary judgment or at a trial.

3 Cases that cite this headnote

[17] Evidence

Judicial Admissions

In order to constitute a judicial admission, a statement must not be a matter of opinion, estimate, appearance, inference, or uncertain summary.

6 Cases that cite this headnote

[18] Evidence

Judicial Admissions

A judicial statement must be an intentional statement that relates to concrete facts and not an unclear summary.

2 Cases that cite this headnote

[19] Evidence

Judicial Admissions

Evidence

Construction

What constitutes a judicial admission must be decided under the circumstances in each case, and before a statement can be held to be such an admission, it must be given a meaning consistent with the context in which it was found.

13 Cases that cite this headnote

[20] Evidence

Judicial Admissions

In determining whether a statement constitutes a judicial admission, it must be considered in relation to the other testimony and evidence presented.

7 Cases that cite this headnote

[21] Evidence

Judicial Admissions

The doctrine of judicial admissions requires thoughtful study for its application so that justice not be done on the strength of a chance statement made by a nervous party.

6 Cases that cite this headnote

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[22] Appeal and Error
Allowance of remedy and matters of procedure in general

An abuse-of-discretion standard applies when reviewing a circuit court's treatment of judicial admissions.

2 Cases that cite this headnote

[23] Appeal and Error
Of declaration, petition, or complaint

Any error in denying plaintiff's motion to amend complaint to allege a new theory of negligence against advanced practice nurse (APN) and two doctors was harmless in medical malpractice action that culminated in directed verdicts for defendants; plaintiff had no expert witness to testify to APN's alleged negligence, and she could not establish any duty owed by doctors because there was no physician-patient relationship.

Cases that cite this headnote

Attorneys and Law Firms

****1261** Eric C. Young, Kevin J. Newton, William Berry & Associates, LLC, Belleville, IL, for Appellant.

Charles E. Schmidt, Penny J. Pierson, Brandon, Schmidt & Goffinet, Carbondale, IL, for Appellees.

Opinion

Justice WELCH delivered the opinion of the court:

***460 ***449** This is a medical malpractice action brought by the plaintiff, Wanda Mae Smith, individually and as the special administrator of the estate of her deceased daughter, Crystal Smith, against a licensed advanced practice nurse, Patricia G. Dillard, R.N., and two doctors, James J. Pavlovich, M.D., and Kathryn A. Churling, M.D., all of whom practiced at the Carbondale Clinic.[1] Crystal was born December 2, 1998, and died March 18, 2002, at the approximate age of three years, from what is believed to have been bacterial meningitis that attacked her brain. In her complaint filed in the circuit court of Jackson County on February 2, 2004, the plaintiff alleges that the defendants were negligent in failing to recommend and administer the vaccine PCV7, known as Prevnar, which she alleges would have prevented the infection.

Crystal visited the Carbondale Clinic as a patient a total of six times. On each occasion she saw only nurse Dillard. Each of these visits was a "focused visit," that is, it was made to address a particular problem such as a cold or a sore throat. None of the visits was for a "well-baby" checkup, which was typically of broader scope than a focused visit. Crystal never saw Dr. Pavlovich or Dr. Churling on any of these focused visits. Crystal was in the presence of Dr. Pavlovich on occasion when she accompanied her mother and her younger sister, Gabrielle, on Gabrielle's well-baby visits with Dr. Pavlovich. Dr. Pavlovich was Gabrielle's pediatrician. He never examined or treated Crystal. Dr. Churling never saw Crystal. Crystal's mother was never offered the vaccine Prevnar for Crystal on any of these focused visits with nurse Dillard or while in the presence of Dr. Pavlovich during Gabrielle's visits.

After several days of a jury trial, upon the motion of the defendants, the circuit court entered several orders that resulted in directed verdicts in favor of each defendant and against the plaintiff. The circuit court granted the defendants' motion to bar the testimony of Dr. Marc Weber regarding the standard of care applicable to advanced practice nurses, because Weber was a physician and not an advanced practice nurse. Because the plaintiff had no *****450 **1262** other expert witness to testify to the applicable standard of care of an advanced ***461** practice nurse and because nurse Dillard had testified that she had met the standard of care, the circuit court directed a verdict in her favor. With respect to the physician defendants, Dr. Pavlovich and Dr. Churling, the circuit court held that the plaintiff was unable to establish a physician-patient relationship and therefore could not prove that the defendant physicians owed Crystal a duty of care. Accordingly, the court directed verdicts in favor of the physician defendants.

The plaintiff appeals these orders, as well as the circuit court's denial of her motion to amend her complaint to add a new theory of negligence—that the defendants were negligent in failing to prescribe high dose amoxicillin to Crystal when she first became sick. For reasons that follow, we affirm.

[1] We turn first to the circuit court's orders barring the testimony of Dr. Marc Weber regarding the standard of

care of an advanced practice nurse and directing a verdict in favor of nurse Dillard. Dillard was a registered nurse who was also certified and licensed as an advanced practice nurse in accordance with the Nursing and Advanced Practice Nursing Act (225 ILCS 65/15–5 *et seq.* (West 2006)). In order to be so licensed, an individual must be a licensed registered nurse and hold a current national certification from an appropriate national certifying body and have obtained a graduate degree appropriate for national certification in a clinical advanced practice nursing specialty or a graduate degree or postmaster's certificate from a graduate-level program in a clinical advanced practice nursing specialty. 225 ILCS 65/15–10(a) (West 2006). Although Dillard had a specialty certification in obstetrics/gynecology, she was working at the Carbondale Clinic in pediatrics.

As an advanced practice nurse, Dillard worked independently of any doctor. She could independently see and care for patients, order and interpret tests, and write prescriptions without being required to confer with or seek the approval of a doctor. She was, however, required to work under a written collaborative agreement with a collaborating physician which, among other things, authorizes the categories of care, treatment, or procedures to be performed by the advanced practice nurse. 225 ILCS 65/15–15 (West 2006). An advanced practice nurse works under the medical direction of the collaborating physician. 225 ILCS 65/15–15 (West 2006). The Carbondale Clinic billed patients the same rate when they saw Dillard as they did when patients saw doctors.

Marc Weber is a medical doctor who is board-certified in pediatrics. He is not a nurse or an advanced practice nurse. He was designated by the plaintiff as her expert witness on the standard of care applicable to Dillard as an advanced practice nurse.

***462** Dillard filed a motion *in limine* to bar the expert testimony of Dr. Weber regarding the standard of care applicable to her as an advanced practice nurse, because in Illinois, in order to offer expert opinion testimony on the standard of care in a given school of medicine, an expert must be licensed in that school of medicine. Because Dr. Weber was licensed as a medical doctor and not a nurse, he was not qualified to offer expert opinion testimony on the standard of care applicable to the nursing profession or advanced practice nurses.

The plaintiff responded that where the defendant was acting essentially as a pediatrician and not as a nurse, she should be subject to the standard of care of a pediatrician and that a pediatrician was competent to offer an expert opinion on the *****451 **1263** standard of care applicable to pediatricians. The plaintiff argued that Dillard was in reality practicing pediatrics and not nursing.

The circuit court granted Dillard's motion *in limine*, barring the expert testimony of Dr. Marc Weber regarding the standard of care applicable to advanced practice nurse Dillard. Accordingly, Dillard filed a motion for a judgment in her favor because the plaintiff had no other expert witness competent to offer opinion testimony on the applicable standard of care and could not, therefore, establish a *prima facie* case of negligence. Furthermore, Dillard herself had testified that she had not violated the applicable standard of care. The circuit court granted Dillard's motion and directed a verdict in her favor. The plaintiff's posttrial motion was denied.

[2] [3] [4] In medical malpractice suits such as the one at bar, the plaintiff must establish the applicable standard of care through expert testimony. *Dolan v. Galluzzo*, 77 Ill.2d 279, 282, 32 Ill.Dec. 900, 396 N.E.2d 13 (1979). It is well-established that, in order to testify as an expert on the standard of care in a given school of medicine, the witness must be licensed therein. *Dolan*, 77 Ill.2d at 285, 32 Ill.Dec. 900, 396 N.E.2d 13; *Sullivan v. Edward Hospital*, 209 Ill.2d 100, 123, 282 Ill.Dec. 348, 806 N.E.2d 645 (2004). A " 'defendant has the right to have his competence judged by the standards of his own distinct profession and not by those of any other.' " *Dolan*, 77 Ill.2d at 282, 32 Ill.Dec. 900, 396 N.E.2d 13 (quoting *Dolan v. Galluzzo*, 62 Ill.App.3d 832, 836, 19 Ill.Dec. 923, 379 N.E.2d 795 (1978)). Accordingly, " 'a practitioner of one school of medicine is not competent to testify as an expert in a malpractice action against a practitioner of another school of medicine.' " *Dolan*, 77 Ill.2d at 282, 32 Ill.Dec. 900, 396 N.E.2d 13 (quoting J. Vance, Annotation, *Competency of Physician or Surgeon of School of Practice Other Than That to Which Defendant Belongs to Testify in Malpractice Case*, 85 A.L.R.2d 1022, 1023 (1962)).

In *Dolan*, 77 Ill.2d at 283, 32 Ill.Dec. 900, 396 N.E.2d 13, the supreme court explained as follows:

> "The rationale of the general rule restricting expert testimony regarding the standard of care owed by a practitioner of a certain ***463** school of medicine is that 'there are different schools of medicine with varying tenets

and practices[ ] and that inequities would be occasioned by testing the care and skill of a practitioner of one school of medicine by the opinion of a practitioner of another school' [citation]."

The court further explained as follows:

"Illinois statutes [citations] provide for the regulation of practitioners of medicine and surgery, physical therapy, nursing, pharmacy, dental surgery, podiatry, optometry, etc. This is a clear expression by the legislature of public policy to recognize and regulate various schools of medicine. The various acts regulating the health professions [citations] provide for different training[ ] and regulate the treatment each profession may offer. * * * We simply are not disposed to provide for what, in effect, may result in a higher standard of care when the legislature, by recognizing various schools of medicine, has not done so." *Dolan,* 77 Ill.2d at 284, 32 Ill.Dec. 900, 396 N.E.2d 13. While the court in *Dolan* barred the expert testimony of an orthopedic surgeon regarding the standard of care applicable to a podiatrist, the same rationale has been applied to bar the expert testimony of a physician regarding the standard of care applicable to the nursing profession. ****1264** *Sullivan,* 209 Ill.2d at 111–23, 282 Ill.Dec. 348, 806 N.E.2d 645. In *Sullivan,* the plaintiff offered the expert testimony of a board-certified physician specializing in internal medicine to establish the standard of care applicable to nurses. *****452** 209 Ill.2d at 105, 282 Ill.Dec. 348, 806 N.E.2d 645. The circuit court struck the expert's testimony and the supreme court affirmed. *Sullivan,* 209 Ill.2d at 118–19, 282 Ill.Dec. 348, 806 N.E.2d 645.

In *Sullivan,* 209 Ill.2d at 114, 282 Ill.Dec. 348, 806 N.E.2d 645, the court explicitly refused to retreat from the rule that a health professional expert witness must be a licensed member of the school of medicine about which the witness proposes to testify, despite language in *Jones v. O'Young,* 154 Ill.2d 39, 43, 180 Ill.Dec. 330, 607 N.E.2d 224 (1992), which the plaintiff had argued implied otherwise. The court explained that there are two foundational requirements before an expert witness may testify to the standard of care: the witness must be a licensed member of the school of medicine about which he proposes to testify, and the witness must be familiar with the methods, procedures, and treatments ordinarily observed by other health-care providers in the defendant's community or a similar community. *Sullivan,* 209 Ill.2d at 114–15, 282 Ill.Dec. 348, 806 N.E.2d 645. It is only after these two foundational requirements are met that the court goes on to determine whether the allegations of negligence concern matters within the expert's knowledge and observation. *Sullivan,* 209 Ill.2d at 115, 282 Ill.Dec. 348, 806 N.E.2d 645. The language in *Jones,* 154 Ill.2d at 43, 180 Ill.Dec. 330, 607 N.E.2d 224, on which the plaintiff had relied—"Whether the expert is qualified to testify is not dependent on whether he is a member of the same specialty or subspecialty as the defendant ***464** but, rather, whether the allegations of negligence concern matters within his knowledge and observation"—refers to this final question after the two foundational requirements had been met. *Sullivan,* 209 Ill.2d at 115, 282 Ill.Dec. 348, 806 N.E.2d 645. Accordingly, the court held that, instead of retreating from the license requirement, *Jones* clearly reaffirmed it. *Sullivan,* 209 Ill.2d at 115, 282 Ill.Dec. 348, 806 N.E.2d 645. Accordingly, the court held that the physician was not competent to testify regarding the standard of care for the nursing profession. *Sullivan,* 209 Ill.2d at 119, 282 Ill.Dec. 348, 806 N.E.2d 645.

The court held that the legislature had established nursing as a unique school of medicine distinct from that of a physician. *Sullivan,* 209 Ill.2d at 119, 282 Ill.Dec. 348, 806 N.E.2d 645. The court stated as follows:

"By enacting the Nursing and Advanced Practice Nursing Act [citation], the legislature has set forth a unique licensing and regulatory scheme for the nursing profession. * * * [U]nder the nursing act, a person with a medical degree, who is licensed to practice medicine, would not meet the qualification for licensure as a registered nurse, nor would that person be competent to sit for the nursing license examination, unless that person completed an accredited program in nursing." *Sullivan,* 209 Ill.2d at 122, 282 Ill.Dec. 348, 806 N.E.2d 645.

The court expressly reaffirmed the licensing requirement of *Dolan* and declined the plaintiff's invitation to deviate therefrom. *Sullivan,* 209 Ill.2d at 123, 282 Ill.Dec. 348, 806 N.E.2d 645; see also *Garley v. Columbia LaGrange Memorial Hospital,* 351 Ill.App.3d 398, 286 Ill.Dec. 337, 813 N.E.2d 1030 (2004).

[5] Despite this clear precedent from the supreme court, the plaintiff argues that advanced practice nurse Dillard was acting as a pediatrician with respect to *****453** ****1265** Crystal and that therefore a medical doctor specializing in pediatrics was qualified to testify regarding the standard of care applicable to nurse Dillard. We reject the plaintiff's argument. Nurse Dillard was licensed as an advanced practice

nurse, not a pediatrician. She was acting in accordance with the statutes and regulations applicable to advanced practice nurses, not those applicable to pediatricians. She was acting under a collaborative agreement with Dr. Churling, as is required of advanced practice nurses but not of pediatricians. Nurse Dillard was performing the duties of an advanced practice nurse. She was subject to the standard of care applicable to advanced practice nurses, not the standard of care applicable to pediatricians. A pediatrician is not competent to testify to the standard of care applicable to advanced practice nurses, even if those nurses are working in pediatrics, any more than an advanced practice nurse working in pediatrics is competent to testify to the standard of care applicable to a pediatrician. The circuit court did not err in granting the defendants' third motion *in limine* to bar the expert opinion testimony of Dr. Marc Weber regarding the standard of care applicable to advanced practice nurses.

[6] [7] [8] ***465** Because the plaintiff was left with no expert witness to establish the standard of care under which nurse Dillard was required to act and because Dillard herself testified that she had met the applicable standard of care, the circuit court directed a verdict in her favor. Because in directing a verdict the circuit court determines as a matter of law that there are no evidentiary facts out of which the jury may construe the necessary fact essential to recovery, our review is *de novo*. *Sullivan,* 209 Ill.2d at 112, 282 Ill.Dec. 348, 806 N.E.2d 645. A directed verdict will be upheld where all the evidence, viewed in the light most favorable to the opponent, so overwhelmingly favors the movant that no contrary verdict based on that evidence could ever stand. *Sullivan,* 209 Ill.2d at 123, 282 Ill.Dec. 348, 806 N.E.2d 645. If the plaintiff fails to produce a required element of proof in support of her cause of action, then no cause is presented for the jury's consideration and the entry of a directed verdict for the defendant is proper. *Sullivan,* 209 Ill.2d at 123, 282 Ill.Dec. 348, 806 N.E.2d 645. Here, the plaintiff was unable to establish the standard of care applicable to Dillard, a required element of proof in support of her cause of action. Accordingly, a directed verdict for Dillard was properly entered.

[9] We turn now to the directed verdicts entered in favor of the physician defendants. The circuit court found that the physician defendants owed no duty of care to Crystal because no physician-patient relationship was ever established between them. The plaintiff argues that there was sufficient evidence to submit to the jury the question of whether there was a physician-patient relationship between the defendants and Crystal.

Because in directing a verdict the circuit court determines as a matter of law that there are no evidentiary facts out of which the jury may construe the necessary fact essential to recovery, our review is *de novo*. *Sullivan,* 209 Ill.2d at 112, 282 Ill.Dec. 348, 806 N.E.2d 645. A directed verdict will be upheld where all the evidence, viewed in the light most favorable to the opponent, so overwhelmingly favors the movant that no contrary verdict based on that evidence could ever stand. *Sullivan,* 209 Ill.2d at 123, 282 Ill.Dec. 348, 806 N.E.2d 645. If the plaintiff fails to produce a required element of proof in support of her cause of action, then no cause is presented for the jury's consideration and the entry of a directed verdict for the *****454 **1266** defendant is proper. *Sullivan,* 209 Ill.2d at 123, 282 Ill.Dec. 348, 806 N.E.2d 645.

It is undisputed that neither physician ever saw Crystal as a patient. Neither physician examined or treated Crystal, nor did either physician consult with any other practitioner with respect to Crystal. Neither physician provided any services to Crystal, conducted any laboratory tests, or reviewed any test results. The only contact Dr. Pavlovich had with Crystal was when she was present in the room with her sister, Gabrielle, who was Dr. Pavlovich's patient. Dr. Pavlovich ***466** did not examine, treat, or otherwise have any contact with Crystal during these visits.

The only other connection between these defendants and Crystal is that their names appear in the clinic's electronic records indicating that Crystal was their patient, and they sometimes signed off on those records. The defendants explained that their names appeared on clinic records because they were the physicians supervising nurse Dillard on the dates on which she saw Crystal and their signatures were necessary to store nurse Dillard's electronic notes in the clinic's computer system. There is no evidence that either physician defendant discussed any aspect of Crystal's care with nurse Dillard or consulted with her in any way with respect to Crystal. Dr. Churling's only other connection to Crystal was that she was nurse Dillard's collaborating physician.

[10] [11] [12] In a medical malpractice action, a plaintiff must prove a duty owed by the defendant physician, a breach of that duty, an injury proximately caused by the breach, and resultant damages. *Lenahan v. University of Chicago,*

348 Ill.App.3d 155, 163, 283 Ill.Dec. 790, 808 N.E.2d 1078 (2004). A physician's duty is limited to those situations in which a direct physician-patient relationship exists or there is a special relationship, such as when a physician is asked by another physician to provide a service to a patient, conduct laboratory tests, or review test results. *Lenahan,* 348 Ill.App.3d at 163, 283 Ill.Dec. 790, 808 N.E.2d 1078. The physician-patient relationship is a consensual relationship in which the patient knowingly seeks the physician's assistance and in which the physician knowingly accepts the person as a patient. *Bovara v. St. Francis Hospital,* 298 Ill.App.3d 1025, 1030, 233 Ill.Dec. 42, 700 N.E.2d 143 (1998).

[13] A physician-patient or special relationship may exist even in the absence of any meetings between the physician and patient, where the physician performs services for the patient. *Lenahan,* 348 Ill.App.3d at 164, 283 Ill.Dec. 790, 808 N.E.2d 1078. Thus, it is not necessary that the patient and physician have actual contact with each other in order for a physician-patient relationship to exist. A physician-patient or special relationship may result when a physician is asked by another physician to provide a service to a patient, conduct laboratory tests, or review test results and does so without ever having contact with the actual patient. *Lenahan,* 348 Ill.App.3d at 163, 283 Ill.Dec. 790, 808 N.E.2d 1078.

In *Bovara v. St. Francis Hospital,* 298 Ill.App.3d 1025, 1030, 233 Ill.Dec. 42, 700 N.E.2d 143 (1998), the court found a question of fact precluding a summary judgment regarding whether a physician-patient relationship existed, where the physicians were asked by another physician to render a medical opinion on whether the patient was eligible for angioplasty, and they reviewed test results and interpreted them, met and ***467** discussed the case with the treating physician, and rendered a medical opinion. However, it has also been held that a physician who gives an informal opinion at the request of the treating physician, but who provides *****455 **1267** no services, conducts no laboratory tests, reviews no test results, and charges no fee, does not owe a duty of care to the patient whose case was discussed. *Reynolds v. Decatur Memorial Hospital,* 277 Ill.App.3d 80, 85, 214 Ill.Dec. 44, 660 N.E.2d 235 (1996).

In the case at bar, not only did the defendant physicians have no actual contact with Crystal, they also were not asked to, and did not, render any medical opinion with respect to her, did not conduct any laboratory tests, and did not review or interpret any test results, as did the physicians in *Bovara.* Indeed, the defendant physicians in the case at bar provided absolutely no services to or on behalf of Crystal. They were not involved in any way with the medical decisions made with respect to Crystal. The physicians' involvement with Crystal in the case at bar was even less than that of the physician in *Reynolds v. Decatur Memorial Hospital,* 277 Ill.App.3d 80, 85, 214 Ill.Dec. 44, 660 N.E.2d 235 (1996), and *Gillespie v. University of Chicago Hospitals,* 387 Ill.App.3d 540, 326 Ill.Dec. 840, 900 N.E.2d 737 (2008), where the courts found as a matter of law that no physician-patient relationship existed sufficient to impose a duty upon the physician in negligence. Accordingly, the circuit court did not err in directing a verdict in favor of the defendant physicians on the ground that they owed no duty to Crystal because there was no physician-patient relationship between them.

[14] Nevertheless, the plaintiff argues that in his answer to the plaintiff's complaint, Dr. Pavlovich admitted that, "at all times relevant hereto, [he] undertook to provide diagnosis, care[,] and treatment to" Crystal and that this constitutes a binding judicial admission of a physician-patient relationship.

In her complaint, the plaintiff alleges that Crystal was born December 2, 1998, and died March 18, 2002, "as a result of overwhelming infection caused or contributed to be caused by the carelessness and negligence of the Defendants as hereinafter set forth." These are the only dates or "relevant times" set forth in the complaint. The complaint further alleges that, "at all relevant times hereto, Defendant James J. Pavlovich undertook to provide diagnosis, care [,] and treatment" to Crystal and that, "in undertaking such diagnosis, care [,] and treatment, in spite of various and sundry signs and symptoms, the Defendant James J. Pavlovich failed to administer the vaccine PCV 7 (Prevnar)."

In his answer, the defendant admitted the paragraph alleging that at all relevant times he had undertaken to provide diagnosis, care, and treatment to Crystal. The plaintiff argues on appeal that this ***468** constitutes a binding judicial admission which he could not deny that a physician-patient relationship existed between Dr. Pavlovich and Crystal during her visits to the Carbondale Clinic.

[15] [16] [17] [18] Judicial admissions are defined as deliberate, clear, unequivocal statements by a party about a concrete fact within that party's knowledge. *In re Estate of Rennick,* 181 Ill.2d 395, 406, 229 Ill.Dec. 939, 692 N.E.2d 1150 (1998). Where made, a judicial admission may not be contradicted in a motion for a summary judgment or at a trial. *In re Estate of Rennick,* 181 Ill.2d at 406, 229 Ill.Dec. 939,

692 N.E.2d 1150. In order to constitute a judicial admission, a statement must not be a matter of opinion, estimate, appearance, inference, or uncertain summary. *Thomas v. Northington,* 134 Ill.App.3d 141, 147, 88 Ill.Dec. 956, 479 N.E.2d 976 (1985). It must be an intentional statement that relates to concrete facts and not an unclear summary. *Williams Nationalease, Ltd. v.* *****456 **1268** *Motter,* 271 Ill.App.3d 594, 597, 207 Ill.Dec. 914, 648 N.E.2d 614 (1995).

[19] [20] [21] What constitutes a judicial admission must be decided under the circumstances in each case, and before a statement can be held to be such an admission, it must be given a meaning consistent with the context in which it was found. *Dremco, Inc. v. Hartz Construction Co.,* 261 Ill.App.3d 531, 536, 199 Ill.Dec. 88, 633 N.E.2d 884 (1994). It must also be considered in relation to the other testimony and evidence presented. *Thomas,* 134 Ill.App.3d at 147, 88 Ill.Dec. 956, 479 N.E.2d 976. "[T]he doctrine of judicial admissions requires thoughtful study for its application so that justice not be done on the strength of a chance statement made by a nervous party." *Thomas,* 134 Ill.App.3d at 147, 88 Ill.Dec. 956, 479 N.E.2d 976.

[22] An abuse-of-discretion standard applies when reviewing a circuit court's treatment of judicial admissions. *Dremco, Inc.,* 261 Ill.App.3d at 536, 199 Ill.Dec. 88, 633 N.E.2d 884. An abuse of discretion may be found only where no reasonable person would take the view adopted by the circuit court. *Dremco, Inc.,* 261 Ill.App.3d at 536, 199 Ill.Dec. 88, 633 N.E.2d 884.

In the circumstances of this case we cannot conclude that the circuit court abused its discretion in ruling that Dr. Pavlovich's answer did not constitute a binding judicial admission that a physician-patient relationship existed during Crystal's visits to the Carbondale Clinic. The only relevant date mentioned in the plaintiff's complaint was the date of Crystal's death as a result of infection. At that time, Dr. Pavlovich was actually Crystal's physician; he had been called to the emergency room of the hospital when Crystal was brought in suffering from the infection that claimed her life. Accordingly, he admitted that he did undertake to diagnose, care for, and treat Crystal. He had never before seen, examined, or treated Crystal. The complaint made no mention of any other dates, nor did it refer to Crystal's visits to the Carbondale Clinic. Before a statement can be held to be a binding judicial admission, it must be given a meaning consistent with the ***469** context in which it was found *(Dremco, Inc.,* 261 Ill.App.3d at 536, 199 Ill.Dec. 88, 633 N.E.2d 884), and it must be considered in relation to the other testimony and evidence presented. *Thomas,* 134 Ill.App.3d at 147, 88 Ill.Dec. 956, 479 N.E.2d 976. The circuit court did not abuse its discretion in refusing to treat Dr. Pavlovich's answer as a binding judicial admission.

Because the plaintiff was unable to establish a physician-patient relationship between Crystal and the defendant physicians, the circuit court found no duty on which to base a claim of negligence. If a plaintiff is unable to produce a required element of proof in support of her cause of action, then no cause is presented for the jury's consideration and the entry of a directed verdict for the defendant is proper. *Sullivan,* 209 Ill.2d at 123, 282 Ill.Dec. 348, 806 N.E.2d 645. The circuit court did not err in entering a directed verdict in favor of the physician defendants.

[23] We turn now to the final argument presented by the plaintiff: that the circuit court erred in denying her motion to amend her complaint. Crystal died on March 18, 2002. The original complaint was filed February 2, 2004. On October 22, 2007, long after the expiration of the statute of limitations, the plaintiff filed a motion for leave to file an amended complaint. The proposed amended complaint sought to add a new theory of negligence—that the defendants were negligent in failing to prescribe high-dose amoxicillin when Crystal first became sick with the infection which presumably caused her *****457 **1269** death. The defendants objected on the ground that the statute of limitations had expired almost three years prior and the motion to amend was not timely. The circuit court denied the plaintiff leave to file the amended complaint.

We conclude that, in light of our disposition of the first two issues raised, we need not address this issue. Even had the amendment been allowed, the plaintiff would not have prevailed on the new theory of negligence for the same reason she could not prevail on the theory advanced in the original complaint. The plaintiff had no expert witness to testify to nurse Dillard's alleged negligence, and she could not establish any duty owed by the defendant physicians to Crystal because there was no physician-patient relationship between them. Any error in the circuit court's denial of the plaintiff's motion for leave to file an amended complaint was harmless.

For the foregoing reasons, the judgment of the circuit court of Jackson County is hereby affirmed.

Affirmed.

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WEXSTTEN, P.J., and STEWART, J., concur.

All Citations

394 Ill.App.3d 458, 914 N.E.2d 1258, 333 Ill.Dec. 446

Footnotes

1 While the original action included two other doctors who at various times had treated Crystal, those doctors were dismissed out of the cause and are not parties to this appeal.

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KeyCite Yellow Flag - Negative Treatment
Distinguished by U.S. v. Arutunoff, 10th Cir.(Okla.), August 3, 1993

853 F.2d 805
United States Court of Appeals,
Tenth Circuit.

O. George SPECHT, Jr., and June B. Specht, Plaintiffs–Appellees,
v.
Roger JENSEN, Doug Martin, and Don Owens, Defendants–Appellants,
and
Pat Tellier and Ken Jacobs, Defendants.
O. George SPECHT, Jr., and June B. Specht, Plaintiffs–Appellants,
v.
Roger JENSEN, Doug Martin, Don Owens, Pat Tellier, and Ken Jacobs, Defendants–Appellees.

Nos. 85–1457, 85–1533.
|
Aug. 3, 1988.

Plaintiffs brought civil rights action under § 1983 to recover for defendants' alleged unlawful searches of plaintiffs' home and office. The United States District Court for the District of Colorado, Zita L. Weinshienk, J., entered judgment in favor of plaintiffs, and defendants appealed. The Court of Appeals, 832 F.2d 1516, affirmed. On petition for rehearing en banc, the Court of Appeals, John P. Moore, Circuit Judge, held that: (1) legal expert should not have been allowed to testify as to legal conclusions he would draw from evidence presented in case (e.g., as to whether there had been "search" of plaintiffs' home) as such testimony interfered with judge's role as sole arbiter of law, and (2) allowing legal expert to testify in this fashion constituted reversible error, notwithstanding any subsequent disclaimers by expert that trial court's instructions would govern.

Remanded.

Seymour, Circuit Judge, dissented and filed opinion in which McKay, Circuit Judge, joined.

West Headnotes (5)

[1] Evidence
Matters directly in issue

Legal expert should not have been allowed to testify as to legal conclusions he would draw from evidence presented in civil rights case (e.g., as to whether there had been "search" of plaintiffs' residence), as such testimony interfered with role of judge as sole arbiter of law. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

106 Cases that cite this headnote

[2] Federal Courts
Expert and opinion testimony

Allowing legal expert to testify as to legal conclusions he would draw from evidence presented in civil rights case (e.g., as to whether there had been "search" of plaintiffs' residence) constituted reversible error, notwithstanding any subsequent disclaimers by expert that court's instructions would govern. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

50 Cases that cite this headnote

[3] Evidence
Matters directly in issue

Witness may properly be called upon to aid jury in understanding facts and evidence, even though reference to facts is couched in legal terms. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

30 Cases that cite this headnote

[4] Evidence
Matters directly in issue

Legal expert cannot be called as witness to direct jury's understanding of legal standards upon which verdict must be based. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

74 Cases that cite this headnote

[5] Evidence

Matters directly in issue

In no instance can witness be permitted to define law of case.

39 Cases that cite this headnote

Attorneys and Law Firms

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Theodore S. Halaby (Robert Mark Liechty, with him on the briefs), of Halaby & McCrea, Denver, Colo., for defendant-appellant Jensen.

Before HOLLOWAY, Chief Judge, and McKAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK and BRORBY, Circuit Judges.

***806** ON REHEARING EN BANC

JOHN P. MOORE, Circuit Judge.

This case is before the court for rehearing *en banc* of one issue; in all other respects the panel opinion[1] stands. The question considered is whether Fed.R.Evid. 702 will permit an attorney, called as an expert witness, to state his views of the law which governs the verdict and opine whether defendants' conduct violated that law. We conclude the testimony was beyond the scope of the rule and thus inadmissible.

I.

This case is an action for damages pursuant to 42 U.S.C. § 1983 grounded upon allegedly invalid searches of the plaintiffs' home and office. The underlying facts are set forth in the panel opinion and need not be restated here.[2] What is germane for present consideration is whether defendants' conduct involved a "search" within the meaning of the Fourth Amendment and whether plaintiffs consented to the search were issues to be determined by the jury.

After testimony had been presented by the plaintiffs to establish the underlying facts, plaintiffs' counsel informed the court he wished to call an attorney who, after being given "a hypothetical of the facts that are in evidence in this case," would be asked if he believed that a search took place in the plaintiffs' home and business. Counsel stated that the witness would then be asked "based on the same facts in evidence whether he believed a consent search of either the business or the residence had been taken or undertaken." Finally, counsel proposed to ask the witness:

> [B]ased on his knowledge in these areas what would constitute a proper search, or the proper documents constituting or allowing a search and would expect that he would say as follows: That if there is no search warrant, if there is no consent, if there are no exigent circumstances, that the search is illegal per se. And that would be the extent of his testimony.[3]

Defense counsel objected to the propriety of the testimony, suggesting that the subject was beyond the scope of Rule 702. He argued, "here we have an issue involving whether or not this [testimony] intrudes on the province of this court in terms of the law." Counsel continued:

> [W]hat constitutes [a] reasonable or unreasonable search is a matter of law. How the jury applies that law to these facts is the province of the jury. But the law must be defined by the Court, not by an expert witness. ... [I]n order for [the expert] to testify, he must first presume what the Court is going to instruct as to the law; and if he doesn't presume what he thinks the Court is going to instruct as to the law, he must ... define his own definitions of the law; and that's where the intrusion of the Court is germane.
>
> ....
>
> Now, is [the expert] going to tell the jury what the law is upon which he is going to apply a hypothetical set of facts, or is this court going to tell the jury what the standard is?

Following those remarks, the court ruled:

> THE COURT: Although the Court doesn't have the precise instruction that it intends to give, the instruction would be along the line that the Constitution protects citizens against unreasonable searches; that this means

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> that a search warrant must be obtained from a judicial ***807** officer before a search can be made of a home or an office; that there are exceptions to this requirement, one being a search by consent. Where there is consent, the law enforcement officers may reasonably conduct a search to the extent of the consent.

With this ruling, the expert was allowed to testify, and he did so at length. On the basis of hypothetical questions tailored to reflect plaintiffs' view of the evidence, the expert concluded there had been no consent given, and illegal searches had occurred.

II.

A.

[1] We begin our analysis with a careful look at the contents and purpose of Fed.R.Evid. 702. It states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

As noted by the advisory committee:

> There is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute.

(Citation omitted.) Judge Weinstein expressed a similar point:

> The test expressed in Rule 702—will the expert testimony "assist the trier of fact to understand the evidence or to determine a fact in issue"—emerges as the central concern of Article VII [of the Federal Rules of Evidence]. Although there were more restrictions on opinion evidence before the enactment of the Federal Rules, helpfulness to the trier of fact was seen then as an essential condition of admissibility.

3 *Weinstein's Evidence,* ¶ 702[01] (1985).

Our judgment must therefore be guided by consideration of whether the testimony of the attorney expert aided the jury in its determination of critical issues in this case. We must also consider, however, whether the expert encroached upon the trial court's authority to instruct the jury on the applicable law, for it is axiomatic that the judge is the sole arbiter of the law and its applicability. As one scholar noted:

> A witness cannot be allowed to give an opinion on a question of law.... In order to justify having courts resolve disputes between litigants, it must be posited as an a priori assumption that there is one, but only one, legal answer for every cognizable dispute. There being only one applicable legal rule for each dispute or issue, it requires only one spokesman of the law, who of course is the judge.... To allow anyone other than the judge to state the law would violate the basic concept. Reducing the proposition to a more practical level, it would be a waste of time if witnesses or counsel should duplicate the judge's statement of the law, and it would intolerably confound the jury to have it stated differently.

Stoebuck, *Opinions on Ultimate Facts: Status, Trends, and a Note of Caution,* 41 Den.L.Cent.J. 226, 237 (1964) (footnote omitted).

The concern that an expert should not be allowed to instruct the jury is also emphasized in Fed.R.Evid. 704, which allows witnesses to give their opinions on ultimate issues. In the advisory notes to this rule, the committee stated:

> The abolition of the ultimate issue rule does not lower the bars so as to admit all opinions. Under Rules 701 and 702, opinions must be helpful to the trier of fact, and Rule 403 provides for exclusion of evidence which wastes

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> time. These provisions afford ample assurances against the admission of opinions which would merely tell the jury what result to reach, somewhat in the manner of the oath-helpers of an earlier day. They also stand ready to exclude opinions phrased in terms of inadequately explored legal criteria. Thus the question, "Did T have ***808** capacity to make a will?" would be excluded, while the question, "Did T have sufficient mental capacity to know the nature and extent of his property and the natural object of his bounty to formulate a rational scheme of distribution?" would be allowed.

The committee's illustration establishes the starting point for analysis of admissibility by distinguishing between testimony on issues of law and testimony on ultimate facts. While testimony on ultimate facts is authorized under Rule 704, the committee's comments emphasize that testimony on ultimate questions of law is not favored. The basis for this distinction is that testimony on the ultimate factual questions aids the jury in reaching a verdict; testimony which articulates and applies the relevant law, however, circumvents the jury's decision-making function by telling it how to decide the case.

Following the advisory committee's comments, a number of federal circuits have held that an expert witness may not give an opinion on ultimate issues of law. In *Marx & Co. v. Diners' Club, Inc.*, 550 F.2d 505 (2d Cir.), *cert. denied*, 434 U.S. 861, 98 S.Ct. 188, 54 L.Ed.2d 134 (1977), for example, the Second Circuit held it was error for the trial court to allow a lawyer to render his opinions on the legal obligations arising from a contract and on the legal significance of various facts in evidence. The court stated, "legal opinions as to the meaning of the contract terms at issue ... was testimony concerning matters outside [the witness's] area of expertise.... It is not for witnesses to instruct the jury as to the applicable principles of law, but for the judge." 550 F.2d at 509–10. Similarly, the Fourth Circuit decided the testimony of an attorney on the meaning and applicability of "domestic" (as opposed to foreign) law would be inadmissible as an invasion of the province of the judge. *See Adalman v. Baker, Watts & Co.*, 807 F.2d 359, 366 (4th Cir.1986). In *Owen v. Kerr–McGee Corp.*, 698 F.2d 236, 240 (5th Cir.1983), the Fifth Circuit held that a witness's offering a legal conclusion on the contributory negligence of a party infringed upon the jury's role in deciding the case. Finally, in *United States v. Zipkin*, 729 F.2d 384 (6th Cir.1984), the Sixth Circuit reversed the trial court's decision to allow a bankruptcy judge to testify regarding his interpretation of the Bankruptcy Act and his own orders. "It is the function of the trial judge to determine the law of the case," the court stated. "It is impermissible to delegate that function to a jury through the submission of testimony on controlling legal principles." 729 F.2d at 387.

The courts in these decisions draw a clear line between permissible testimony on issues of fact and testimony that articulates the ultimate principles of law governing the deliberations of the jury. These courts have decried the latter kind of testimony as directing a verdict, rather than assisting the jury's understanding and weighing of the evidence. In keeping with these decisions, we conclude the expert in this case was improperly allowed to instruct the jury on how it should decide the case. The expert's testimony painstakingly developed over an entire day the conclusion that defendants violated plaintiffs' constitutional rights. He told the jury that warrantless searches are unlawful, that defendants committed a warrantless search on plaintiffs' property, and that the only applicable exception to the warrant requirement, search by consent, should not vindicate the defendants because no authorized person voluntarily consented to allow a search of the premises. He also stated that the acts of the private individual could be imputed to the accompanying police officer to constitute sufficient "state action" for a § 1983 claim. By permitting the jury to hear this array of legal conclusions touching upon nearly every element of the plaintiffs' burden of proof under § 1983, the trial court allowed the expert to supplant both the court's duty to set forth the law and the jury's ability to apply this law to the evidence.

[2] Given the pervasive nature of this testimony, we cannot conclude its admission was harmless. There is a significant difference between an attorney who states his belief of what law should govern the case and any other expert witness. While ***809** other experts may aid a jury by rendering opinions on ultimate issues, our system reserves to the trial judge the role of adjudicating the law for the benefit of the jury. When an attorney is allowed to usurp that function, harm is manifest in at least two ways.

First, as articulated in *Marx & Co. v. Diners' Club, Inc.*, the jury may believe the attorney-witness, who is presented to them imbued with all the mystique inherent in the title "expert," is more knowledgeable than the judge in a given area of the law. *Marx*, 550 F.2d at 512. Indeed, in this case, the expert's knowledge and experience was made known to the jury by both the court and counsel in a manner which gave his testimony an aura of trustworthiness and reliability. Thus, there is a substantial danger the jury simply adopted the expert's conclusions rather than making its own decision.

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Notwithstanding any subsequent disclaimers by the witness that the court's instructions would govern, a practical and experienced view of the trial world strongly suggests the jury's deliberation was unduly prejudiced by the expert's testimony. [4]

Second, testimony on ultimate issues of law by the legal expert is inadmissible because it is detrimental to the trial process. If one side is allowed the right to call an attorney to define and apply the law, one can reasonably expect the other side to do the same. Given the proclivity of our brothers and sisters at the bar, it can be expected that both legal experts will differ over the principles applicable to the case. The potential is great that jurors will be confused by these differing opinions, and that confusion may be compounded by different instructions given by the court, *see United States v. Curtis,* 782 F.2d 593, 599 (6th Cir.1986); *United States v. Ingredient Technology Corp.,* 698 F.2d 88, 97 (2d Cir.1983). We therefore conclude the expert's testimony on the ultimate issues of law was not harmless as contended by the dissent.

B.

[3] The line we draw here is narrow. We do not exclude all testimony regarding legal issues. We recognize that a witness may refer to the law in expressing an opinion without that reference rendering the testimony inadmissible. Indeed, a witness may properly be called upon to aid the jury in understanding the facts in evidence even though reference to those facts is couched in legal terms. For example, we have previously held that a court may permit an expert to testify that a certain weapon had to be registered with the Bureau of Alcohol, Tobacco, and Firearms. *United States v. Buchanan,* 787 F.2d 477, 483 (10th Cir.1986). In that case, however, the witness did not invade the court's authority by discoursing broadly over the entire range of the applicable law. Rather, the expert's opinion focused on a specific question of fact. [5] *See also Huddleston v. Herman & MacLean,* 640 F.2d 534, 552 (5th Cir.1981), *modified on other grounds,* 459 U.S. 375, 103 S.Ct. 683, 74 L.Ed.2d 548 (1983) (attorney expert in securities law allowed to testify that a statement in a prospectus was standard language for the issuance of a new security because this information helped the jury weigh the evidence of defendants' scienter); *United States v. Garber,* 607 F.2d 92 (5th Cir.1979) (trial court erred in refusing to let experts on income tax law testify regarding whether failure to report funds received for sale of blood plasma constituted income tax evasion).

[4] **[5]** These cases demonstrate that an expert's testimony is proper under Rule 702 if the expert does not attempt to define the legal parameters within which the jury ***810** must exercise its fact-finding function. However, when the purpose of testimony is to direct the jury's understanding of the legal standards upon which their verdict must be based, the testimony cannot be allowed. In no instance can a witness be permitted to define the law of the case.

Plaintiffs seek to avoid this conclusion by arguing the expert testimony here was no different from a medical expert testifying that specific conduct constitutes medical malpractice. We do not believe, however, there is an analog between the testimony of the medical expert and that of the legal expert because the former does not usurp the function of the court. The testimony of the medical expert in plaintiffs' hypothesis is more like that of the legal expert who explains a discrete point of law which is helpful to the jury's understanding of the facts.

The cross appeal in this case has been left unresolved owing to the panel's disposition. We therefore remand this matter to the original panel for further consideration.

SEYMOUR, Circuit Judge, with whom McKAY, Circuit Judge, joins, dissenting.

In testifying here, the expert, Daniel Sears, followed a format which is expressly contemplated by the Federal Rules of Evidence and is typical of expert testimony in general: Sears gave "a dissertation or exposition of ... principles relevant to the case," and he took "the further step of suggesting the inference which should be drawn from applying the specialized knowledge to the facts." Fed.R.Evid. 702 advisory committee's note. Although the majority opinion concludes that the admission of this testimony is reversible error, the opinion does not clearly articulate the ground upon which it holds the testimony inadmissible. The rationale upon which the majority then holds the error prejudicial is correspondingly murky, is without persuasive support, and is contrary to the weight of authority. In my view, when the expert testimony is considered in light of the record below and in the context of the rules governing the admissibility of such testimony, the error in its admission, if any, must be considered harmless. Accordingly, I respectfully dissent.

I.

STANDARD OF REVIEW

It is important to begin a review of the allegedly erroneous admission of this evidence by recognizing that "the trial judge has broad discretion in the matter of the admission or exclusion of expert evidence, and his action is to be sustained unless *manifestly erroneous.*" *Salem v. U.S. Lines Co.,* 370 U.S. 31, 35, 82 S.Ct. 1119, 1122, 8 L.Ed.2d 313 (1962) (emphasis added). "Moreover, error in the admission or exclusion of evidence is harmless if it does not affect the substantial rights of the parties, and the burden of demonstrating that substantial rights were affected rests with the party asserting error." *K–B Trucking Co. v. Riss Int'l Corp.,* 763 F.2d 1148, 1155–56 (10th Cir.1985).

> "The cases clearly indicate that the trial judge's ruling either excluding or admitting evidence will not be disturbed, except in rare instances. For example, in automobile accident cases, the trial judge has been affirmed regardless of whether he admitted or excluded the proffered expert testimony of an 'accidentologist.' For as the Fourth Circuit stated:
>
> > 'Whether, in any given case, the expert testimony is necessary to aid the jury in its search for the truth depends upon such a variety of factors readily apparent only to the trial judge that we must depend heavily upon his judgment.'
>
> "Numerous other cases indicate that trial courts may differ in their assessment of the helpfulness of particular kinds of expert testimony. Because of the Federal Rules emphasis on liberalizing expert testimony, doubts about whether an expert's testimony will be useful should generally be resolved in favor of admissibility unless there are strong factors such as time or surprise favoring exclusions. The jury is intelligent ***811** enough, aided by counsel, to ignore what is unhelpful in its deliberations."

3 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 702[02], at 702–13 to –15 (1987) (footnotes omitted) (quoting *Krizak v. W.C. Brooks & Sons, Inc.,* 320 F.2d 37, 42 (4th Cir.1963)).

II.

PROVINCE OF THE COURT

In this case, the only reason offered by defendants at trial for excluding Sears' testimony was that, in giving his opinion on the issues of search and consent, Sears would articulate the law applicable to those issues and would thereby usurp the province of the court. I agree with the majority opinion to the extent that it holds excludable expert testimony which merely sets out for the jury the applicable principles of law. Although the Federal Rules of Evidence generally permit an expert to state principles of "specialized knowledge" within his area of expertise, *see* Fed.R.Evid. 702 advisory committee's note, when a lawyer/expert does so he sets out legal principles. Because it is the law as articulated by the court that governs the jury's deliberations, the expert's evidence on the law may be excludable under Fed.R.Evid. 702 because it is not helpful to the jury. [1]

The admission of excludable evidence is not per se prejudicial error requiring reversal, however. The majority opinion here simply does not consider how, or even whether, Sears' articulation of his understanding of the law *in fact* prejudiced defendants. The two cases cited by the majority in which the admission of expert testimony on the law was held to be reversible error shed little light on the finding of such error here.

In *United States v. Zipkin,* 729 F.2d 384 (6th Cir.1984), the court concluded that allowing a bankruptcy judge to testify on principles of bankruptcy law was prejudicial error. Central to the court's ruling was the fact that the expert's view of the law was erroneous, and the court's belief that a "jury listening to a bankruptcy judge testify as to a question of bankruptcy law would be expected to give special credence to such testimony." *Id.* at 387. The court noted the particular prejudice arising from the testimony of an expert who was "cloaked with the authority of his position as a bankruptcy judge." *Id.* at 387 n. 2. *Zipkin* is thus clearly distinguishable from the case before us.

In *Marx & Co. v. Diners' Club, Inc.,* 550 F.2d 505 (2d Cir.1977), an expert in securities law was permitted to give his opinion on the legal standards imposed by a contract to use best efforts to register stock. The court concluded that this testimony was objectionable because it did not concern practices in the securities business, on which the witness was qualified as an expert, "but were rather legal opinions as to the meaning of the contract terms at issue. It was testimony

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concerning matters outside his area of expertise." *Id.* at 509. The court held the admission to be prejudicial error because of the danger that "the jury may think that the 'expert' in the particular branch of the law knows more than the judge." *Id.* at 512. The majority relies on this conclusion, but neither the court in *Marx* nor the majority here describe how this potential danger created *actual prejudice*, and, in particular, do not consider whether the expert's view of the law conflicted with the law set out in the trial court's instructions.

***812** Furthermore, the discussion in *Marx* indicates that the court failed to distinguish between testimony that arguably invades the province of the court by instructing on the law, and testimony that, by applying the law to the facts, can be described as invading the province of the jury. For example, the court states the following non sequitur: "It is for the jury to evaluate the facts in the light of the applicable rules of law, and it is therefore erroneous for a witness to state his opinion on the law of the forum." 550 F.2d at 510. The distinction between stating the law and applying it to the facts, a distinction not clearly made by either the court in *Marx* or the majority here, is a subtle but critical factor in evaluating both admissibility under Fed.R.Evid. 704 and prejudice.

Significantly, in neither *Zipkin* nor *Marx* did the court indicate whether the jury was instructed to follow the law as given by the court and to give expert testimony only that weight, if any, the jury thought it deserved. In this case, to the contrary, the jury was in fact so instructed. *Zipkin* and *Marx* are simply not persuasive authority for concluding that reversible error occurred in the instant case. [2]

A review of the record here establishes that defendants cannot sustain their burden of demonstrating a prejudicial effect on their substantial rights arising from Sears' testimony on his view of the law. Defendants pointed out on cross-examination that Sears' opinions were based on his own view of the law, and that Sears did not know what the court's instructions on the law would be. Although Sears agreed that his view of the law in the area of search and seizure could very well differ from that of the trial judge, his definition of an illegal search was essentially the same as the one the judge gave to the jury. [3] *Cf. Karns v. Emerson Elec. Co.*, 817 F.2d 1452, 1459 (10th Cir.1987). Significantly, Sears himself further stated that the trial court's "understanding of the law is controlling in this case." Rec., vol. III, at 133. The court instructed the jury that it must apply the law as stated in the court's instructions, and also informed the jury that it should determine what weight, if any, to give to the expert testimony.

Under these circumstances, I do not see how we can assume that, contrary to the court's instruction and Sears' own testimony, the jury turned to Sears rather than the judge for guidance on the applicable law. Moreover, even if the jury had done so, defendants still could not establish that they were thereby prejudiced, given the fact that Sears' legal definitions did not materially differ from those given by the court. [4] In analogous circumstances courts have concluded that any error in the admission of testimony on legal principles is harmless. *See, e.g., Karns,* 817 F.2d at 1459; *United States v. Gold,* 743 F.2d 800, 816–17 (11th Cir.1984), *cert. denied,* 469 U.S. 1217, 105 S.Ct. 1196, 84 L.Ed.2d 341 (1985); *United States v. Fogg,* 652 F.2d 551, 556–57 (5th Cir.1981), *cert. denied,* 456 U.S. 905, 102 S.Ct. 1751, 72 L.Ed.2d 162 (1982); *cf. Weinstein's Evidence* ¶ 704 [02] (jury confusion by or undue reliance on expert not a problem when court appropriately instructs jury and no conflict exists between expert testimony and court instruction).

***813** Rather than addressing these specifics, the majority simply speculates that the jury will give more weight to the views of a legal expert than the instructions of the judge, without telling us how this could have been prejudicial here when the legal views expressed were the same. The majority then expresses concern that premitting a legal expert to define the law will evoke a similar response from the opposing party's legal expert, thereby confusing the jury even more. *See* maj. op. at 808–809. Of course, that did not happen in this trial, and has nothing to do with whether the error was harmless here. The majority's abstract assumptions of prejudice clearly do not meet the standards for assessing whether the admission of evidence is prejudicial. *See supra* at 810.

III.

PROVINCE OF THE JURY

Although they did not make this argument to the trial court, [5] defendants contend on appeal that the admission of Sears' testimony was also prejudicial error because it invaded the province of the jury. The majority opinion appears to agree, stating that the testimony was improper because it instructed "the jury on how it should decide the case," and allowed the expert to "supplant ... the jury's ability to apply this law to the evidence." Maj. op. at 808. In so doing, the majority reveals

a fundamental misconception of the grounds on which expert testimony is properly excludable.

An expert opinion which embraces an ultimate fact issue is *not* objectionable on the ground that it usurps the province of the jury by telling it how to decide the case. Indeed, the undisputed purpose of Rule 704 is to eliminate an objection to expert testimony on this basis. *See* Fed.R.Evid. 704 advisory committee's note. In order to achieve this aim, Rule 704 specifically abolishes the "so-called 'ultimate issue' " rule. *Id.*

> "The older cases often contained strictures against allowing witnesses to express opinions upon ultimate issues, as a particular aspect of the rule against opinions. The rule was unduly restrictive, difficult of application, and generally served only to deprive the trier of fact of useful information. 7 Wigmore §§ 1920, 1921; McCormick § 12. The basis usually assigned for the rule, to prevent the witness from 'usurping the province of the jury,' is aptly characterized as 'empty rhetoric.' 7 Wigmore § 1920, p. 17."

Id.

Although courts have discretion to exclude expert testimony on other grounds, *see* 3 *Weinstein's Evidence* ¶ 704[02], at 704–11, it is significant that the trial court here did not do so. Thus, our focus must be on whether this failure to exclude on other grounds was an abuse of discretion. The law and the record simply do not support such a conclusion.

Rule 702 allows expert opinion testimony that "will assist the trier of fact to understand the evidence or to determine a fact in issue." Accordingly, some courts have held that "Rule 702 makes inadmissible expert testimony as to a matter which obviously is within the common knowledge of jurors because such testimony, almost by definition, can be of no assistance." *Scott v. Sears, Roebuck & Co.,* 789 F.2d 1052, 1055 (4th Cir.1986); *see also Zimmer v. Miller Trucking Co.,* 743 F.2d 601, 604 (8th Cir.1984) *United States v. Brown,* 501 F.2d 146, 149–50 (9th Cir.1974). However, a leading commentator argues that a trial court is not required to exclude expert testimony if the subject is within the comprehension of the average juror, because any blanket rule requiring exclusion in such situations

> "is incompatible with the standard of helpfulness expressed in Rule 702. ***814** First, it assumes wrongly that there is a bright line separating issues within the comprehension of jurors from those that are not. Secondly, even when jurors are well equipped to make judgments on the basis of their common knowledge and experience, experts may have specialized knowledge to bring to bear on the same issue which would be helpful."

3 *Weinstein's Evidence* ¶ 702[02], at 702–9 to –10. Moreover, those cases holding expert testimony excludable on this ground have observed that "the admission of such testimony, though technical error, will almost invariably be harmless." *Scott,* 789 F.2d at 1055; *Brown,* 501 F.2d at 150.

In the instant case, defendants have not argued that the expert's opinion was inadmissible because the issues to be decided were ones on which the jury did not need the help of an expert. To the contrary, at trial defendants characterized the issues as "of quite substantial complexity, not only as to the law but in terms of the particular facts as determined in this case." Rec., vol. III, at 63.

When an ultimate fact issue is one on which expert testimony would be helpful to the jury, an expert opinion may nonetheless be excludable if it does not convey information which is in a form useful to the jury.

> "Under Rules 701 and 702, opinions must be helpful to the trier of fact, and Rule 403 provides for exclusion of evidence which wastes time. These provisions afford ample assurances against the admission of opinions which would merely tell the jury what result to reach, somewhat in the manner of the oath-helpers of an earlier day. They also stand ready to exclude opinions phrased in terms of inadequately explored legal criteria."

Rule 704 advisory committee's note. Such expert opinions are excludable not because they tell the jury how to decide the case, but because they do not provide the jury with information the jury needs to make an independent assessment of the ultimate issue. Thus, an opinion couched in inadequately explored legal criteria is not helpful because it uses terminology the meaning of which is not reasonably clear to laymen. *See United States v. Hearst,* 563 F.2d 1331,

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1351 (9th Cir.1977); *see also* 3 *Weinstein's Evidence* ¶ 704 [01]. For example, telling a jury that a testator did not have the capacity to make a will is not helpful to a jury when the jury is not told what elements comprise the capacity to make a will. The legal term "capacity" by itself provides no assistance to jurors, unversed in the jargon of probate law. The record in the instant case reveals that the legal criteria used by Sears were adequately defined for the jury and defendants do not argue to the contrary. His opinion testimony was therefore not objectionable on that ground.

Occasionally, expert opinions framed in terms of inadequate legal criteria have been confusingly condemned as expressing legal conclusions. "A court which does not ban opinion on the ultimate issue as such may nevertheless condemn a question phrased in terms of a legal criterion not adequately defined by the questioner so as to be correctly understood by laymen, the question being interpreted by the court as calling for a legal conclusion." *McCormick on Evidence* § 12, at 32. Labeling evidence as a legal conclusion and holding it excludable on that ground obscures the real reason for its inadmissibility—lack of helpfulness—and frustrates a proper inquiry into that issue. When an expert gives an opinion that applies the principles of his expertise to the facts in evidence, thereby testifying to his view of the ultimate issue, his opinion will often be in the form of a "legal conclusion", i.e., a conclusion as to the legal result in the case. When jurors understand the legal criteria upon which the opinion is founded, such a "legal conclusion" may nonetheless be helpful to them. Thus, a standard that focuses on a label rather than on the value of the evidence to the jury may well exclude helpful evidence that is properly admissible, a result contrary to Rules 702 and 704. *See Moore's Federal Practice* § 704.10; *cf. McCormick on Evidence* § 12, at 32 & n. 24. In addition, denominating testimony as a "legal conclusion" opens the door to confusing an opinion arguably usurping the province of the ***815** court with an opinion applying the law to the facts. Failure to carefully identify the ground on which evidence is objectionable renders impossible the required assessment of whether its admission actually caused the prejudice that its inadmissibility was designed to prevent.

The majority opinion in this case makes these very mistakes. Although the opinion pays lip service to the Federal Rules of Evidence by recognizing that expert opinions on the ultimate issue are admissible if helpful to the factfinder, it condemns the expert testimony here as embodying inadmissible legal conclusions, a characterization that does not explain why the testimony is not helpful or is otherwise inadmissible.[6] Labeling testimony as a legal conclusion in and of itself provides no meaningful guidance on either its admissibility or any resulting prejudice.

Finally, I must address the majority's concern that the evidence circumvented "the jury's decision-making function by telling it how to decide the case." Maj. op. at 808. The majority finds error because "the expert in this case was improperly allowed to instruct the jury on how it should decide the case", thereby supplanting "the jury's ability to apply this law to the evidence." *Id.* at 808. In so doing, the majority fails to recognize both that any expert who gives an opinion on the ultimate issue is in effect telling the jury how to decide the case, and that such testimony is specifically permitted by Rule 704. *See, e.g., Nielson v. Armstrong Rubber Co.,* 570 F.2d 272, 276–77 (8th Cir.1978) (expert testimony that manufacturing process caused product defect admissible under Rule 704). The *only* exception to allowing an expert opinion on the ultimate issue of fact is set out in Rule 704(b), which provides:

> "(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone."

We are not at liberty to create another exception for legal expert testimony when the Rules do not do so. Moreover, as the majority acknowledges, this court and other circuits allow an opinion by a legal expert in which the expert applies the principles of his expertise, the law, to the facts in evidence. *See, e.g., United States v. Buchanan,* 787 F.2d 477, 483 (10th Cir.1986); *see also Gold,* 743 F.2d at 816–17; *United States v. Bednar,* 728 F.2d 1043, 1048 (8th Cir.1984); *Fogg,* 652 F.2d at 556.

The majority's statement that Sears' testimony was excludable because it supplanted the jury's ability to apply the law to the evidence may be meant as a holding that this testimony created the danger that the jury would rely on the expert rather than make an independent determination of the ultimate issues. However, the jury in this case was instructed that it should determine what weight, if any, to give the expert testimony, as with the testimony of any other witness. The

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jury was further instructed that it was the judge of the facts, that it was to follow the law as stated in the court's instructions, and that it was to apply this law to the facts as the jury found them. Courts and commentators have overwhelmingly concluded that such instructions preclude a finding of prejudice because they eliminate any possibility that expert testimony on the ultimate fact could overbear the jury's independence. *See, e.g., Karns,* 817 F.2d at 1459; *Gold,* 743 F.2d at 817; *Davis v. Combustion Engineering, Inc.,* 742 F.2d 916, 919 (6th Cir.1984); *Fogg,* 652 F.2d at 557; *United States v. Scavo,* 593 F.2d 837, 844 (8th Cir.1979); 3 *Weinstein's Evidence* ¶ 04[02], at 704–15 to –16; *cf.* 11 *Moore's Federal Practice* § 704.10, at VII–66 (helpful expert testimony on ultimate issues does not invade jury's province "since it is trier of fact who ultimately determines what weight to give the opinion testimony of the ***816** witness"); *McCormick on Evidence* § 12, at 31 (notion that opinions on ultimate facts usurp function of jury is illogical).

Although the majority states that its holding is a narrow one, and that expert legal testimony is still admissible, the opinion provides no meaningful standard by which to distinguish proper testimony from that giving rise to reversible error. It is therefore difficult to see how any prudent trial judge will risk reversal by admitting such testimony after today's ruling. If the expert is allowed to give his opinion without articulating the underlying legal principles, the opinion is objectionable as based on inadequately explored legal criteria. *See* Rule 704 advisory committee's note. If the expert does define the legal principles upon which his opinion is based, under the majority opinion he usurps the province of the court, or the jury, or both. Moreover, although in virtually every other context this court presumes that a jury will follow the court's instructions, under today's decision even the most explicitly limiting jury instructions will not prevent a finding of prejudice.

IV.

CONCLUSION

In sum, even assuming the majority could reasonably conclude the trial judge abused her discretion in admitting the evidence, the admission simply did not give rise to prejudicial error. In reversing, the majority disregards the deference with which we view trial court evidentiary rulings, fails to provide meaningful guidance on either admissibility or prejudice, and reintroduces "quibbles over the meaning of ultimate fact, and the distinction between fact and law" which the Federal Rules of Evidence were meant to eliminate. 3 *Weinstein's Evidence* ¶ 704[02], at 704–17. Accordingly, I dissent.

All Citations

853 F.2d 805, 26 Fed. R. Evid. Serv. 718

Footnotes

1 *Specht v. Jensen,* 832 F.2d 1516 (10th Cir.1987).

2 *See Specht,* 832 F.2d at 1519–20.

3 When questioned by the court whether the witness would be testifying on "an area of fact," plaintiffs' counsel did not directly answer but explained the witness would render opinions on whether there had been a search, whether there had been consent to the search, whether the consent was voluntary, and whether there were exigent circumstances to permit a warrantless search. Because the testimony was to be based upon hypothetical questions which assumed the existence of the essential facts, we believe there could be no "area of fact" involved. Thus, contrary to the plaintiffs' present assertions, counsel's representation clearly indicated the expert's testimony would cover only questions of law.

4 Indeed, one is constrained to ask why it is helpful to the jury to present expert testimony on the law if the witness himself states, as he did here, that anything he says is subject to correction by the judge. Is this not more confusing than helpful? The question is rhetorical and stands as further example why a lawyer's testimony on ultimate issues of law is improper.

5 By contrast, the expert in the instant case did not testify on issues of fact because he based his opinions on hypothetical facts. The expert added nothing to resolve the salient factual issues of the case.

1 An interesting contrary view on presenting expert legal testimony to the trier of fact is found in Note, *Expert Legal Testimony,* 97 Harv.L.Rev. 797, 811–12 (1984) (footnotes omitted).

> "Expert testimony in harmony with the judge's view of the law may be completely appropriate. Allowing legal testimony before the jury only when the testimony is consistent with the judge's view of the law will eliminate the concern that such testimony may usurp the role of the judge or jury. As long as an expert does not present a legal conclusion that merely tells the jury what

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> result to reach, expert legal testimony does not impinge upon the jury's function of applying the law to the facts of the case. Moreover, although there is a danger that such testimony will partially usurp the judge's role of instructing the jury on the law, such testimony may enhance rather than interfere with the judge's charge to the jury if the expert testifies consistently with the judge's view of the law."

2 The majority also cites *Adalman v. Baker, Watts & Co.,* 807 F.2d 359 (4th Cir.1986), and *Owen v. Kerr–McGee Corp.,* 698 F.2d 236 (5th Cir.1983). In those cases, however, the court affirmed the trial judge's decision to *exclude* an expert opinion. In view of the deference to be accorded a trial court's evidentiary rulings, they provide little help in determining whether the admission of such evidence constitutes reversible error.

3 In their brief filed *after* rehearing was granted, defendants for the first time asserted that Sears misstated the law in two material respects. A careful examination of the record reveals that any discrepency between Sears' articulation of the law and the court's instructions is so de minimis as to be irrelevant, which perhaps explains why defendants did not raise this argument in a timely manner.

4 The majority's conclusion that Sears' testimony was not helpful to the jury is grounded on the conclusion that it was superfluous because it was cumulative to the court's instructions. However, the admission of evidence is not prejudicial error merely because that evidence is cumulative. *See Fortier v. Dona Anna Plaza Partners,* 747 F.2d 1324, 1332 (10th Cir.1984).

5 Fed.R.Evid. 103(a)(1) provides

> "(a) Effect of erroneous ruling
>
> Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
>
> (1) Objection
>
> In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context...."

6 In rejecting the expert testimony here as inadmissible legal opinion, the majority opinion appears to hold that it usurped the province of the court, and was not helpful to the jury, and told the jury how to decide the case.

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163 F.3d 238
United States Court of Appeals,
Fifth Circuit.

UNITED STATES of America, Plaintiff–Appellee,
v.
$9,041,598.68 (NINE MILLION FORTY ONE THOUSAND FIVE HUNDRED NINETY EIGHT DOLLARS AND SIXTY EIGHT CENTS), Defendant,
Mario Ruiz MASSIEU, Claimant–Appellant.

No. 97–20413.
|
Dec. 15, 1998.
|
Rehearing Denied Feb. 18, 1999.

United States brought forfeiture proceeding alleging that $9,041,598.68 from bank account of claimant, a former Deputy Attorney General for the Republic of Mexico, constituted narcotics trafficking proceeds. Following jury determination that claimant was entitled to $1,100,000 of the currency, the United States District Court for the Southern District of Texas, Nancy F. Atlas, J., 976 F.Supp. 642, granted United States' motion for judgment as a matter of law, entered judgment of forfeiture as to the entire $9,041,598.68, and found that claimant lacked standing to challenge forfeiture. Claimant appealed. The Court of Appeals, Benavides, Circuit Judge, held that: (1) District Court's post-verdict discussion of standing would not be viewed as determination that claimant lacked standing; (2) probable cause existed to believe that currency was connected to criminal activity; (3) District Court properly exercised its discretion in interpreting jury's interrogatory answers; (4) claimant was not prejudiced by denial of request for unredacted copy of seizure affidavit; (5) District Court did not abuse its discretion in examining sealed affidavits in camera; (6) District Court did not abuse its discretion in failing to exclude testimony of witnesses disclosed less than five days before trial; (7) District Court did not abuse its discretion when it failed to bifurcate trial; (8) informant's testimony regarding alleged pay-offs to Mexican officials was more probative than prejudicial; and (9) testimony of money laundering expert was not inadmissible legal conclusion.

Affirmed.

West Headnotes (37)

[1] Federal Civil Procedure
In general; injury or interest

As a predicate to any action before a federal court, parties must establish that they have proper standing to raise a claim.

1 Cases that cite this headnote

[2] Federal Courts
Standing

Issue of standing is one of law, and review is plenary.

1 Cases that cite this headnote

[3] Forfeitures
Standing; Parties

All forfeitures are governed by principle that claimant need not prove the merit of his or her underlying claim to establish standing to challenge forfeiture, but must be able to show at least a facially colorable interest in the proceedings sufficient to satisfy the constitutional case-or-controversy requirement and the prudential considerations defining and limiting the role of the court. U.S.C.A. Const. Art. 3, § 2, cl. 1.

13 Cases that cite this headnote

[4] Federal Civil Procedure
In general; injury or interest

Standing is an indispensable part of plaintiff's case, and plaintiff must demonstrate standing in the same way as any other matter on which plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of litigation.

Cases that cite this headnote

[5] **Forfeitures**
Findings and conclusions

District court's post-verdict discussion of standing would be viewed merely as recognition of fact that jury verdict defeated all possible claims of forfeiture claimant on the merits, rather than as determination that claimant lacked standing; allowing district court to revisit question of standing post-verdict would invite Court of Appeals to "chase its tail" in that Court would be obligated to review standing as a threshold matter but would be required to review the merits in order to do so.

4 Cases that cite this headnote

[6] **Forfeitures**
Presumptions and Burden of Proof

In a forfeiture action, the United States bears the initial burden of demonstrating probable cause for belief that a substantial connection exists between the property to be forfeited and the criminal activity defined by the statute.

1 Cases that cite this headnote

[7] **Forfeitures**
Factors and standards of application in general

Forfeitures
Property connected to, involved in, or facilitating wrongdoing in general

Forfeitures
Standard of proof in general

In forfeiture action, threshold for demonstrating probable cause for belief that substantial connection exists between property and criminal activity is the same as that which applies elsewhere, i.e., a reasonable ground for belief of guilt, supported by less than prima facie proof but more than mere suspicion.

1 Cases that cite this headnote

[8] **Forfeitures**
Direct or circumstantial evidence

Forfeitures
Hearsay evidence

United States may prove requisite probable cause in forfeiture action by both circumstantial and hearsay evidence.

1 Cases that cite this headnote

[9] **Forfeitures**
Plenary or de novo review

Forfeitures
Questions of fact and evidence

Although Court of Appeals reviews district court's findings of fact in forfeiture proceeding for clear error, whether the facts are sufficient to constitute probable cause is a question of law reviewed de novo.

1 Cases that cite this headnote

[10] **Forfeitures**
Money, funds, and accounts in general

United States had probable cause, as of time it issued forfeiture complaint against former Deputy Attorney General for the Republic of Mexico, to believe that currency in bank account was connected to criminal activity; bank representative testified that some deposited cash was packaged in cellophane and did not contain any 100-dollar bills, and informant testified that certain drug organization had practice of paying bribes to Mexican law enforcement.

Cases that cite this headnote

[11] **Federal Courts**
Taking case or question from jury; judgment as a matter of law

In reviewing district court's decision to grant a judgment as a matter of law, Court of Appeals employs the same standard that guided the district court. Fed.Rules Civ.Proc.Rule 50, 28 U.S.C.A.

Cases that cite this headnote

[12] **Federal Courts**

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Taking case or question from jury; judgment as a matter of law

In reviewing grant of judgment as a matter of law, Court of Appeals considers all the evidence with all reasonable inferences in the light most favorable to party opposed to motion. Fed.Rules Civ.Proc.Rule 50, 28 U.S.C.A.

1 Cases that cite this headnote

[13] Federal Civil Procedure
Weight and Sufficiency of Evidence

Federal Civil Procedure
Conclusions or inferences from evidence

If facts and inferences point so strongly and overwhelmingly in favor of movant that reasonable jurors could not arrive at contrary verdict, motion for judgment as a matter of law was properly granted; however, if there is substantial evidence, that is, evidence of such quality and weight that reasonable and fair-minded jurors might reach a different conclusion, motion should have been denied. Fed.Rules Civ.Proc.Rule 50, 28 U.S.C.A.

Cases that cite this headnote

[14] Federal Civil Procedure
Construction and operation

Federal district courts are granted considerable latitude in interpreting special interrogatories because a judge is in the best position to analyze the jury's intention and thus is charged, in the first instance, with the obligation of giving effect to those intentions in light of the surrounding circumstances.

2 Cases that cite this headnote

[15] Controlled Substances
Trial or hearing and determination

District court properly exercised its discretion in forfeiture action in interpreting jury's interrogatory answers, which indicated that all defendant currency came from drug-related sources but which could be construed as awarding portion of such currency to claimant, so as to make them consistent; court reconciled the answers by determining apparent award to claimant applied to only one of United States' four theories of forfeiture and thus was academic.

1 Cases that cite this headnote

[16] Constitutional Law
Forfeitures and proceedings therefor

Claimants whose property is subject to forfeiture are entitled to due process including the right to reasonable notice of the basis on which forfeiture is sought and a reasonable opportunity to defend. U.S.C.A. Const.Amend. 5.

Cases that cite this headnote

[17] Federal Courts
Preliminary proceedings

Federal Courts
Depositions and discovery

Standard of review for due process challenges to individual discovery and procedural rulings is abuse of discretion. U.S.C.A. Const.Amend. 5.

Cases that cite this headnote

[18] Federal Courts
Reversal or Vacation of Judgment in General

Cumulative error analysis is employed in due process challenges only in those cases where individual rulings are erroneous, that is, where the appellant has something to cumulate. U.S.C.A. Const.Amend. 5.

6 Cases that cite this headnote

[19] Forfeitures
Evidence

Forfeiture claimant's substantial rights were not prejudiced by denial of his request for unredacted copy of court-sealed seizure affidavit; even assuming illegal seizure of defendant currency, United States did not seek to introduce the actual currency at trial, and there thus was no evidence that claimant could have sought to suppress. Fed.Rules Civ.Proc.Rules 26(c), 61, 28 U.S.C.A.

1 Cases that cite this headnote

[20] Records

Court records

Once district court has sealed a document, it is within its discretion to deny a party's request for an unredacted copy of that same document. Fed.Rules Civ.Proc.Rule 26(c), 28 U.S.C.A.

Cases that cite this headnote

[21] Action

Stay of Proceedings

Generally, the power to stay a pending matter derives from a trial court's wide discretion to control the course of litigation.

4 Cases that cite this headnote

[22] Action

Nature and subject matter of actions in general

District court must find two elements to grant a stay in forfeiture proceedings: (1) that proceedings be related to an offense for which there has been an indictment, and (2) that the United States show good cause for the stay. 18 U.S.C.A. § 981(g); Comprehensive Drug Abuse Prevention and Control Act of 1970, § 511(i), 21 U.S.C.A. § 881(i).

Cases that cite this headnote

[23] Action

Nature and subject matter of actions in general

In granting stay of forfeiture proceedings, district court must make express findings of fact and conclusions of law concerning the existence of statutory prerequisites. 18 U.S.C.A. § 981(g); Comprehensive Drug Abuse Prevention and Control Act of 1970, § 511(i), 21 U.S.C.A. § 881(i).

Cases that cite this headnote

[24] Action

Nature and subject matter of actions in general

District court did not abuse its discretion when, in considering motion for stay of forfeiture litigation until conclusion of criminal drug trial, it examined United States' sealed affidavits in camera.

1 Cases that cite this headnote

[25] Federal Civil Procedure

Reception of Evidence

Records

Court records

District courts have an inherent power to receive in camera evidence and place such evidence under seal.

Cases that cite this headnote

[26] Forfeitures

Procedure in general

Unlike criminal defendants, civil forfeiture claimants are not afforded the protections of Sixth Amendment's confrontation clause. U.S.C.A. Const.Amend. 6.

1 Cases that cite this headnote

[27] Action

Actions and administrative proceedings

Forfeiture claimant's substantial rights were not prejudiced when district court, in considering motion for stay of forfeiture litigation until conclusion of criminal drug trial, examined United States' sealed affidavits in camera; claimant moved for speedy trial less than one month after seeking relief from alleged court-indulged non-disclosure by United States. Fed.Rules Civ.Proc.Rule 61, 28 U.S.C.A.

Cases that cite this headnote

[28] Federal Civil Procedure

Failure to respond; sanctions

District court did not abuse its discretion in failing to exclude testimony of government witnesses disclosed less than five days before forfeiture trial arising from allegations that seized currency constituted proceeds of drug trafficking; court cited witness safety concerns and minimal prejudice. Fed.Rules Civ.Proc.Rules 26(a), (e)(1), 37(c)(1), 28 U.S.C.A.

15 Cases that cite this headnote

[29] Federal Civil Procedure
Failure to respond; sanctions

In determination whether violation of rule requiring disclosure of witness is harmless, such that witness may be used at trial despite nondisclosure, trial court's discretion is to be guided by consideration of four factors: (1) the importance of the witness's testimony; (2) the prejudice to the opposing party of allowing the witness to testify; (3) the possibility of curing such prejudice by granting a continuance; and (4) the explanation, if any, for the party's failure to identify the witness. Fed.Rules Civ.Proc.Rules 26(a), (e)(1), 37(c)(1), 28 U.S.C.A.

37 Cases that cite this headnote

[30] Federal Courts
Depositions and discovery

Standard of review for a trial court's decision in a matter relating to discovery is abuse of discretion.

1 Cases that cite this headnote

[31] Federal Courts
Depositions and discovery

In applying abuse of discretion standard to trial court's decision in a matter relating to discovery, Court of Appeals will not substitute its judgment for that of trial judge; instead, Court must only decide whether district court could have entered the order which it did.

Cases that cite this headnote

[32] Federal Courts
Trial

Motion to bifurcate is a matter within the sole discretion of the trial court, and Court of Appeals will not reverse decision to bifurcate absent an abuse of that discretion.

1 Cases that cite this headnote

[33] Federal Civil Procedure
Separate Trial of Particular Issues

District court did not abuse its discretion when it failed to bifurcate forfeiture proceeding into bench trial to determine probable cause and subsequent jury trial on defenses to forfeiture, notwithstanding that hearsay testimony was admitted during probable cause phase of trial; district court restricted hearsay before jury to only those instances where a hearsay exception applied, and all hearsay that was not otherwise admissible but for purposes of probable cause was heard outside presence of jury. Fed.Rules Evid.Rules 803, 804, 28 U.S.C.A.

1 Cases that cite this headnote

[34] Federal Courts
Taking case or question from jury; judgment as a matter of law

Evidentiary rulings are accorded considerable deference on appeal. Fed.Rules Evid.Rule 103(a), 28 U.S.C.A.

3 Cases that cite this headnote

[35] Evidence
Tendency to mislead or confuse

Any prejudice resulting from informant's testimony regarding alleged pay-offs to Mexican officials to facilitate drug trafficking was outweighed by its probative value in forfeiture trial in which United States alleged that former Mexican official acquired currency through drug trafficking; testimony was relevant to whether there was transfer of funds into United States from outside United States. 18 U.S.C.A. §

1956(a)(2)(A); Fed.Rules Evid.Rules 401, 403, 28 U.S.C.A.

Cases that cite this headnote

[36] Evidence

Matters directly in issue

Testimony of money laundering expert, that the testimony he had heard in forfeiture case was consistent with money laundering, was not inadmissible legal conclusion; testimony included bases for expert's conclusion, and the conclusion was supported by overwhelming evidence. Fed.Rules Evid.Rules 702, 704, 28 U.S.C.A.

24 Cases that cite this headnote

[37] Federal Courts

Expert evidence and witnesses

Admission or exclusion of expert testimony will not be disturbed on appeal unless it is manifestly erroneous.

Cases that cite this headnote

Attorneys and Law Firms

***242** Susan Beth Kempner, Paula Camille Offenhauser, Asst. U.S. Atty., Houston, TX, for Plaintiff–Appellee.

J.A. Canales, Namcy M. Simonson, Canales & Simonson, Corpus Christi, TX, Cathy Fleming, Fischbein, Badillo, Wagner & Harding, New York City, for Claimant–Appellant.

Appeal from the United States District Court for the Southern District of Texas.

Before JOLLY, BARKSDALE and BENAVIDES, Circuit Judges.

Opinion

BENAVIDES, Circuit Judge:

This is an appeal from a judgment of forfeiture, pursuant to 21 U.S.C. § 881(a)(6) and 18 U.S.C. § 981, of $9,041,598.68 in United States currency. Appellant, Mario Ruiz Massieu ("Massieu"), contends that he is the owner of the forfeited funds and that the district court erred in (1) entering judgment in favor of the Government as to the entire amount of the defendant currency, (2) finding post-verdict that he had no standing to contest the forfeiture, and (3) determining that the Government established probable cause for the forfeiture. Additionally, he argues that the cumulative effect of the district court's discovery and procedural rulings—e.g., denial of Massieu's request for an unredacted copy of the seizure affidavit (in order to seek suppression), ex parte examination of materials presented in support of Government's application for stay, failure to exclude testimony of last-minute Government witnesses, and failure to bifurcate the trial—deprived him of due process. For the reasons set forth below, we AFFIRM the district court's April 25, 1997 order for forfeiture.

I. PROCEDURAL BACKGROUND

On March 13, 1995, United States Magistrate Judge Frances Stacy, acting pursuant to a sealed affidavit, issued a warrant for the seizure of $9,041,598.68 in U.S. currency from an account at Texas Commerce Bank (TCB). Approximately three months later, on June 15, 1995, the United States filed a complaint for forfeiture *in rem* against the seized currency. The complaint alleged that the money constituted narcotics trafficking proceeds given to facilitate the movement of drugs into the United States. At the time the complaint was filed, Massieu, a former Deputy Attorney General for the Republic of Mexico, was in federal custody in New Jersey. [1]

On June 26, 1995, Massieu filed a Notice of Claim. He served the United States with 18 multi-part interrogatories and a request to produce 52 categories of documents. [2] He followed this on July 6, 1995 with his answer denying the factual recitations in the United States' complaint and a motion to dismiss for failure to state a claim. He also moved for a ***243** protective order to relieve him of the duty to respond to the United States' interrogatories, which was denied on July 28, 1995. Massieu alleged ownership of the seized currency, claiming that he had received the money from his brother.

On July 28, 1995, the United States moved for a protective order and to quash the interrogatories served by Massieu. United States District Judge Nancy Atlas granted both motions on November 6, 1995. On the same day, the Government requested that it be permitted to take Massieu's

deposition to determine his claim of ownership. Judge Atlas ordered the deposition to occur forthwith.

On March 31, 1996, the district court found that Massieu had standing and granted his February 20, 1996, motion to expedite. The court further addressed his motion to reconsider a January 11, 1996, order that sealed a United States' affidavit which had acquainted the court with informant information. The court found that the interests of the United States in ongoing criminal investigations continued to justify the *ex parte* filing of the sealed affidavit.

On April 12, 1996, the Government moved the district court pursuant to 21 U.S.C. § 881(i) to stay civil discovery pending the criminal trial of narcotics trafficker Juan Garcia Abrego in *United States v. Abrego.* At the May 31, hearing on the stay, Massieu's counsel requested copies of the sealed affidavits that had formed the basis for the stay. Judge Atlas denied the request and granted the United States' motion to stay.

The Abrego prosecution was completed in October 1996. Massieu moved on November 18, 1996, to vacate the stay, to unseal documents, for an expedited pretrial conference, and for a speedy trial. The court vacated its stay on December 11, 1996, granted the request for a speedy trial, and set the case for trial on March 10, 1997. The court further advised the parties that discovery disputes would be resolved promptly.

The Government filed its amended complaint on December 16, 1996, and one week later apprised the district court that it had answered Massieu's interrogatories and produced over 350 documents. The Government also supplemented its production with additional documents in January 1997.

In a hearing on January 31, 1997, Judge Atlas ordered the Government to list its witnesses and to provide detailed witness information to Massieu. The Government provided Massieu with a witness list on February 9, 1997. The next day, on February 10, 1997, the district court ordered that depositions of the Government's witnesses begin on February 11, 1997, with the Government making a rolling production of documents. At the February 10 hearing, the parties agreed that discovery would not be disclosed outside their respective staffs.

On February 18, 1997, the court held a hearing on the Government's motion for sanctions based on the dissemination of the Government's discovery, including the identity of its informants and agency reports, which was the subject of a cover story of "Processo," a weekly Mexican magazine.[3] Both parties asserted prejudice from the leak and attributed responsibility for the leak to the other party. Judge Atlas stated that she could not make a decision as to the source of leaks based on the current record and that as far as she was concerned the leak was of unknown origin. As a security precaution, the court ordered that the Government witnesses' depositions be taken and filed under seal, without copy to either party. The court, however, did authorize both parties to review the sealed transcript in the courthouse. Although such a limitation was no hardship for the Government, which had offices in the courthouse, Massieu charged that the court-imposed limitation was an enormous burden on his out-of-town counsel. Consequently, on February 26, 1997, he moved to obtain copies of the sealed witness depositions. The court approved release of only those portions of informant depositions that the Government designated as no longer necessary to keep under seal.

The following day, February 27, 1997, Massieu moved to exclude evidence obtained ***244** after June 15, 1995 (the date the forfeiture complaint was filed). On March 3, 1997, he moved to bifurcate the proceeding into a bench trial to determine probable cause and a subsequent jury trial on defenses to the forfeiture. The court denied the motion but did require that the Government present its hearsay evidence, admissible only for the purposes of probable cause, outside the presence of the jury.

At 5:00 p.m. on March 5, 1997, two business days and less than five full days before trial, the United States disclosed the names of four additional informant witnesses, two of whom would testify at trial. On March 7, Massieu moved to exclude the witnesses. The court denied the motion and limited the depositions of the new witnesses to four hours if in Spanish or three hours if in English.

The jury trial proceeded on March 10, 1997. The morning of trial, the district judge denied Massieu's motion to limit the Government's proof to June 15, 1995, yet informed the parties that she would make two probable cause rulings, one based on the Government's pre-complaint evidence and the other based on the evidence in its entirety.

During trial, the court found that probable cause to forfeit the currency existed both as of June 15, 1995, and as of the forfeiture hearing. The jury returned what appeared to be a mixed verdict, awarding Massieu $1,100,000 despite having resolved most issues in favor of the Government. On April

25, 1997, the district court granted the Government's motion for judgment as a matter of law and set aside the $1,100,000 jury award. Massieu appeals from that judgment.

II. FACTUAL BACKGROUND

Massieu was Deputy Attorney General of Mexico from June 1993 to January 1994 and then from July 1994 through November 1994. Initially, he was in charge of "delegations," the delegates to the 31 United Mexican States (the equivalent of United States Attorneys).[4] Massieu's duties, however, expanded in August 1993 when the Director of the Mexican Federal Judicial Police (MFJP) began reporting to him.[5]

Sometime after his return to the Attorney General's Office in July 1994, Claimant instructed his associate, Jorge Stergios, to begin special investigations of drug cartel leaders. Stergios sought out Agent Stanley Pimentel of the Federal Bureau of Investigation (FBI), who at that time was assigned as the legal attache to the United States embassy in Mexico City, and requested FBI agency intelligence on drug cartels. Stergios' request was unusual given that the Drug Enforcement Administration, not the FBI, was in charge of drug matters in coordination with the Mexican National Institute to Combat Drugs.

More than unusual, Stergios' request, in hindsight, was suspect. Earlier in December 1993, Stergios had accompanied Massieu to Houston, where Massieu opened an account at Texas Commerce Bank. Between March 2, 1994, and February 14, 1995, Stergios made 25 cash deposits to Massieu's account, depositing more than $9 million. The currency bundles that Stergios deposited at TCB were secured by paper wrapper, rubber bands, or cellophane. Of the 25 deposits, 18 deposits did not contain any $100 bills; the majority of the currency was in $20 dollar bills.

On March 2, 1995, Massieu was questioned by Mexican authorities. After the interview, he, his wife, and his daughter flew from Mexico to Houston. Their baggage declaration stated that they would be at a Holiday Inn in Houston for three weeks for pleasure. However, the Massieus checked into the Holiday Inn and left the next day.

On March 3, 1995, U.S. Customs Agent Marcy Foreman was contacted by FBI Agent George Smith and asked to maintain a lookout for Massieu. According to Foreman, the request for assistance in locating Massieu originated from the FBI office in Mexico ***245** City. In checking flight manifests, Customs determined that Massieu was traveling to Spain via Newark, New Jersey. He was arrested in Newark after he failed to declare the amount of currency he was carrying in excess of $10,000. The charges were later dismissed.

III. DISCUSSION

A. Standing

[1] **[2]** **[3]** As a predicate to any action before a federal court, parties must establish that they have proper standing to raise a claim. *See United States v. $321,470 in U.S. Currency,* 874 F.2d 298, 302 (5th Cir.1989). The issue of standing is one of law, and review is plenary. *See United States v. $38,570 in U.S. Currency,* 950 F.2d 1108, 1111 (5th Cir.1992). "This Circuit has held that the burden of establishing standing to contest forfeiture is on the claimant seeking to come before the court." *United States v. One 18th Century Colombian Monstrance,* 797 F.2d 1370, 1374–75 (5th Cir.1986). A claimant need not prove the merit of his underlying claim. *See id.* He must, however, be able to show at least a facially colorable interest in the proceedings sufficient to satisfy the case-or-controversy requirement and the "prudential considerations defining and limiting the role of the court." *Id.* This principle applies to all forfeitures.

The present appeal is complicated by the district court's post-verdict determination that Claimant lacked standing. Prior to trial, Judge Atlas had twice found that Massieu had standing to contest the forfeiture of the $9,041,598.68. It was only after the court submitted the case to the jury, reconciled the jury's facially inconsistent verdict, and granted judgment in favor of the Government as to the entire amount of the defendant currency that the district court inexplicably revisited the issue of Article III standing.

[4] **[5]** Although we recognize that standing is "an indispensable part of the plaintiff's case" and as such, the plaintiff must demonstrate standing in "the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of litigation," *Meadowbriar Home For Children Inc. v. G.B. Gunn,* 81 F.3d 521, 529 (5th Cir.1996) (quoting *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–61, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992)), we note that a tension exists between a district court's post-verdict, merits-based determination of standing and the requirement

that an appellate court review standing as a threshold matter. In finding that Massieu lacked standing, the district court reasoned that the jury's responses to Special Interrogatories 1, 2, and 4—its finding that the $9,041,598.68 in its entirety constituted illegally acquired funds—necessarily negated any theory of ownership which Massieu might have offered. In other words, because the jury believed that all the money was in some way tied to the facilitation of narcotics trafficking, the court reasoned that the jury could not have, at the same time, believed that Massieu had acquired the funds from his family members apart from any illegal conduct.

Because the district court's determination that Massieu did not have standing to contest the forfeiture was based entirely on the jury's verdict, that finding can only be upheld if this Court were to determine: (1) that the district court properly interpreted the jury's responses to the Special Interrogatories as supporting a finding that the total sum of $9 million U.S. currency was tied to illegal narcotics activity, and (2) that none of Massieu's claims on appeal require reversing or invalidating the jury verdict. And so, in the present case, a threshold review of the issue of standing without a consideration of the merits becomes an impossibility. Allowing a district court to revisit the question of standing post-verdict necessarily invites this Court to chase its tail—we ought review standing as a threshold matter yet in order to do so we must review the merits. For this reason, we consider Judge Atlas' post-verdict discussion of standing as no more than a recognition of the fact that the jury verdict defeated all possible claims of Massieu on the merits, and we find the trial court's earlier determinations that Massieu had standing to be dispositive of that issue. [6]

***246** *B. Probable Cause*

[6] [7] [8] [9] In a forfeiture action, the Government bears the initial burden of demonstrating probable cause for belief that a substantial connection exists between the property to be forfeited and the criminal activity defined by the statute. *See United States v. One 1986 Nissan Maxima GL,* 895 F.2d 1063, 1064 (5th Cir.1990). The probable cause threshold in this context is the same as that which applies elsewhere: "reasonable ground for belief of guilt, supported by less than prima facie proof but more than mere suspicion." *United States v. $364,960 in United States Currency,* 661 F.2d 319, 323 (5th Cir.1981). The government may prove the requisite probable cause by both circumstantial and hearsay evidence. *See One 1986 Nissan,* 895 F.2d at 1065. Although this Court reviews the district court's findings of fact for clear error, "[whether] the facts [are] sufficient to constitute probable cause is a question of law," which we review de novo. *United States v. 1988 Oldsmobile Supreme,* 983 F.2d 670, 674 (5th Cir.1993).

Here, the Government proceeded to trial on four separate theories of forfeiture. First, the Government argued that the currency represented proceeds of drug trafficking activities in the United States and was thus forfeitable under § 881(a)(6). Second and third, the Government argued that the proceeds were involved in financial transactions in violation of § 1956(a) that occurred in the United States in furtherance of an overarching conspiracy and were thus forfeitable pursuant to § 981. The fourth theory was based on Stergios' transportation of the drug proceeds from Mexico City for deposit to the TCB account, which would again make the money forfeitable under § 981 as involved in an § 1957(a) offense.

Massieu argues first that the Government should have been required to establish probable cause utilizing only that evidence which the Government had obtained prior to June 15, 1995, the date the complaint was filed, and second that the evidence at trial was insufficient to support the district court's findings of probable cause. In denying Massieu's motion to limit the Government's proof to pre-complaint evidence, the district court relied upon *United States v. Monkey,* 725 F.2d 1007 (5th Cir.1984). The district court's reliance, however, is misplaced. This Court in *United States v. Monkey* did not have before it the issue with which we are presently confronted—whether post-complaint evidence is admissible to establish probable cause for forfeiture.

In *United States v. Monkey,* the Government sought forfeiture of a vessel on the grounds that it was used for importing controlled substances. *See id.* The issue before the court in that case was whether probable cause existed for the warrantless seizure and what effect, if any, an unlawful seizure would have on the forfeiture proceeding. *See id.* at 1011–12. We held that improper seizure does not jeopardize the Government's right to secure forfeiture if probable cause to forfeit the vessel can be supported with untainted evidence. *See id.* at 1012. The unlawful seizure would only result in the inadmissibility of evidence obtained through the seizure. *See id.*

The confusion over the precedential effect of the *Monkey* decision results from the fact that, in finding probable cause for the forfeiture, we explicitly relied on evidence obtained by

the Government after the forfeiture complaint was filed. This Court's past reliance on post-complaint evidence, although instructive, is not binding. The issue of the admissibility of post-complaint evidence was not subjected to scrutiny in *Monkey*. We also note that here, unlike in *Monkey*, the defendant currency was seized pursuant to a valid warrant, and the Government at no time sought to introduce evidence obtained from the seizure, namely the $9 million U.S. currency.

In the thirteen years since *Monkey*, we have not addressed the precise issue of whether the Government may rely upon evidence acquired after institution of forfeiture proceedings in showing probable cause. Because this is a matter of first impression in ***247** this Circuit, we look to our sister circuits for guidance. At present, there is a split on the issue of the admissibility of post-complaint evidence with respect to the probable cause showing. The Ninth, First, and Eighth Circuits have held that the Government is restricted to evidence acquired at the time of the complaint, while the Second and Sixth Circuits have reached the opposite conclusion.[7]

[10] In the instant case, however, we do not reach the issue of whether post-complaint evidence is admissible to establish probable cause for forfeiture and, therefore, do not take sides in this circuit conflict. Because the district court separately considered whether probable cause existed as of June 15 and because we agree with its conclusion that probable cause existed as of that date, we address only the district court's finding of probable cause as of June 15, 1995.

The district court based its probable cause determination on the following factual findings:

> First of all, the circumstances of the $9 million.... I rely on Jose Nieto's testimony with respect to the manner in which the money was delivered to the bank, the way it was bundled ... and at least on one or more occasions wrapped in cellophane ... and that the cash deposits did not contain any 100–dollar bills, in Nieto's experience, was unusual. The cash deposits he said of more than $100,000 were extremely unusual and the number of 20s he found unusual in commercial matters....
>
> Robert Rutt testified that ... there were different stories given by Stergios and absolutely no documentation for his explanations....
>
> With respect to the TCB deposits ... within one week ... three deposits of almost $1 million were made ... Mr. Massieu was Deputy Attorney General of PGR delegates ... from June 1993, to January, 1994, and, in March the substantial deposits began ... The fact that the money was not immediately deposited is not material for the purposes of probable cause....
>
> With respect, though, to the timing of the money, in March, 1994, 1.5 million was deposited; in April, 1,650,000; in May, 650,000; in June, 500,000; in August, 300,000 [listing several more deposits] ...
>
> There is no meaningful explanation to the bankers or the Customs Service for the vast sums of money deposited.... And, so, the size of the deposits in such a short period of time in the condition it existed would be one factor to consider on probable cause to believe the money was drug proceeds....
>
> Mr. Menger testified that he was in the Customs Service and ... that it was very rare for people to carry over $100,000 and the only people doing so were money exchangers....
>
> As to Massieu's taking of payments, the payments-the testimony of Robert Rutt and the matters in which he relied are of great significance. The Court does rely on Agent Munks' work prior to June 15 ... who met with informants [like] Juan Antonio Ortiz.... Munks met with informants and learned that Carrera Fuentes ... had delivered bribe money from drug traffickers ... to Massieu.... Munks told Rutt that those informants were reliable. Rutt also said that he had information from an informant in touch with Agent Hanna that drug trafficking organizations in Mexico were paying bribes to Mexican law enforcement, although Mr. Massieu was not specifically mentioned....
>
> The other evidence is Adrian Carrera Funetes' statement ... [that] implicates Massieu and Stergios having information ***248** from traffickers or others with knowledge of the [cocaine] shipment....
>
> Stergios' odd request for assistance and information on the cartels to Pimentel, the FBI Agent ... was known to the Government prior to June, 1995....
>
> In sum, while this evidence clearly would be insufficient for any finding other than probable cause ... it just barely gets over the line as to this defendant currency, but I find that it is sufficient as of June 15, 1995.

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We agree with the district court's conclusion. Our review of the record leaves us with no doubt that the testimony of TCB bank representative Nieto with respect to the manner in which the money was bundled, the testimony of informant Tony Ortiz regarding his first-hand knowledge of the Abrego drug organization's practice of paying bribes to Mexican law enforcement, the hearsay testimony of Agent Rutt that bribe money had been paid from drug traffickers to Massieu, the statement of Adrian Carrera Fuentes implicating Massieu with knowledge of a cocaine shipment, and the records of Massieu's bank deposits revealing substantial cash deposits of largely twenty dollar bills could reasonably support a belief that the seized currency was derived from illicit drug transactions. This Court has found probable cause under less implicating circumstances. *See, e.g., United States v. $400,000.00 in United States Currency,* 831 F.2d 84 (5th Cir.1987) (affirming the district court's determination of probable cause on the basis of the defendant's failure to report currency transported into the United States, a lack of evidence of any completed report, and nervousness while currency was being counted). Accordingly, we hold that the district court did not err in finding that the Government's evidence as of June 15 satisfied the requirement of probable cause.

C. Judgment as to Entire Amount of Defendant Currency

[11] **[12]** **[13]** Post-verdict judgments as a matter of law are examined de novo. *See* Fed.R.Civ.P. 50. In reviewing the district court's decision to grant a judgment as a matter of law, this Court employs the same standard that guided the district court:

> We consider all the evidence with all reasonable inferences in the light most favorable to the party opposed to the motion. If the facts and the inferences point so strongly and overwhelmingly in favor of [the movant] that reasonable jurors could not arrive at a contrary verdict, then the motion was properly granted. If there is substantial evidence—that is, evidence of such quality and weight that reasonable and fair-minded jurors might reach a different conclusion—then the motion should have been denied.

Robertson v. Bell Helicopter Textron, Inc., 32 F.3d 948 (5th Cir.1994) (citations omitted).

Massieu asserts that the district court erred in denying his Motion For Judgment on Jury Question 5 and in entering judgment in favor of the Government as to the entire amount of the defendant currency. He claims that Judge Atlas disregarded the jury's finding in response to Special Interrogatory Number 5. The Government, in response, argues that the district court did not disregard the jury's response to Special Interrogatory Number 5. Instead, it argues the court attempted to reconcile the apparently inconsistent answers provided by the jury to the five submitted special interrogatories. [8]

***249** **[14]** This Circuit has long held that a district court judge has a duty to attempt to reconcile a jury's apparently inconsistent responses to special interrogatories. *See Davis v. West Community Hosp.,* 755 F.2d 455, 465 (5th Cir.1985). Federal district courts are granted considerable latitude in interpreting special interrogatories because a judge is in the best position "to analyze the jury's intention and thus is charged, in the first instance, with the obligation of giving effect to those intentions in light of the surrounding circumstances." *P & L Contractors, Inc. v. American Norit Co., Inc.,* 5 F.3d 133, 138 (5th Cir.1993) (citing *McVey v. Phillips Petroleum Co.,* 288 F.2d 53, 59 (5th Cir.1961)).

[15] In the present case, the district court properly exercised its discretion by adopting a view of the case which made the jury's answers consistent. *See, e.g., Mercer v. Long Mfg. N.C., Inc.,* 671 F.2d 946, 948 n. 1 (5th Cir.1982) (explaining that "[i]f there is a view of the case which makes the jury's answers consistent, the court must adopt that view and enter judgment accordingly"). In order to give proper effect to all of the jury's responses, the court had to reconcile the jury's negative responses to Questions No. 1, 2, and 4, indicating that all of the defendant currency came from drug-related sources, with the jury's answer to Special Interrogatory Number 5 which could be construed as awarding Claimant $1,100,000. Because the jury was not to answer Question No. 5 unless it had answered "yes" to any of the previous interrogatories, the court properly reasoned that the jury's answer to Question No. 5 served as an explanation of its answer to Question No. 3, the only interrogatory to which the jury had answered "yes." According to the court, the response to Special Interrogatory Number 5 therefore only indicated that Massieu proved to the jury's satisfaction that $1,100,000 was not money

"transported or transferred from a place inside the United States to or through a place outside the United States with the intent to promote drug trafficking activity," as referenced in Question No. 3. Thus, the court reasoned that because the answer of $1,100,000 to Question No. 5 applied to only one of the government's four theories of forfeiture, it was academic and Massieu was not entitled to the $1,100,000.

Furthermore, Judge Atlas properly reconciled the jury's responses "in light of the surrounding circumstances, including the instructions of the court." *Davis v. West Community Hosp.,* 755 F.2d 455, 465 (5th Cir.1985). Here, the court supplied the parties with a copy of the "Court's Instructions to the Jury" and the Verdict Form prior to closing arguments. The Government and Massieu both argued directly from the Verdict Form during their closing arguments, going so far as to indicate to the jury whether they desired a "yes" or "no" response to each question. For these reasons, Judge ***250** Atlas upheld the jury verdict and entered judgment in favor of the Government as to the entire $9,041,598.68.

Because we find the district court's reconciliation persuasive, we hold that the district court properly denied Massieu's Motion For Judgment on Jury Question 5 and properly entered judgment in favor of the Government as to the entire amount of the defendant currency.

D. Due Process

[16] The Due Process Clause of the Fifth Amendment guarantees that "[n]o person shall ... be deprived of life, liberty, or property, without due process of law." U.S. Const. Amend. V. The established rule is that claimants whose property is subject to forfeiture are entitled to due process including the right to reasonable notice of the basis on which forfeiture is sought and a reasonable opportunity to defend. *See United States v. James Daniel Good Real Property,* 510 U.S. 43, 48–63, 114 S.Ct. 492, 498–506, 126 L.Ed.2d 490 (1993); *United States v. Marsh,* 105 F.3d 927, 930–31 (4th Cir.1997). This Court has held, "[w]here the Government seeks the traditionally disfavored remedy of forfeiture, due process protections ought to be diligently enforced, and by no means relaxed...." *Armendariz–Mata v. U.S. Dept. of Justice,* 82 F.3d 679, 683 (5th Cir.) *cert. denied,* 519 U.S. 937, 117 S.Ct. 317, 136 L.Ed.2d 232 (1996).

[17] Massieu submits that the district court's discovery and procedural rulings, either individually or cumulatively, deprived him of due process and asks this Court to review those rulings de novo. Massieu, however, provides no authority for altering the usual abuse of discretion standard. We note that a ruling which does not rise to the level of an abuse of discretion cannot alone constitute a due process deprivation. Therefore, the appropriate standard of review for the individual discovery and procedural rulings remains an abuse of discretion. *See Mills v. Beech Aircraft Corp.,* 886 F.2d 758, 761 (5th Cir.1989).

[18] Moreover, Massieu requests that this Court utilize a cumulative error analysis. Such an approach, however, is employed only in those cases where individual rulings are erroneous—where the appellant has "... [some]thing to cumulate." *Derden v. McNeel,* 938 F.2d 605, 609 (5th Cir.1991) (applying cumulative error analysis in the context of a habeas proceeding). In Massieu's view, the district court committed reversible error in denying his request for an unredacted copy of the seizure affidavit (in order to seek suppression), conducting *ex parte* examination of Government exhibits presented in support of its application for stay, failing to exclude testimony of last-minute Government witnesses, and failing to bifurcate the trial. We shall examine each of these claims of error in turn.

1. Denial of request for unredacted copy of the seizure affidavit.

[19] **[20]** Massieu argues that the district court erred in denying his request for an unredacted copy of the court-sealed seizure affidavit. He claims that without access to the affidavit he was unable to ascertain the basis for the seizure in order to contest its legality. Massieu's claim lacks merit. First, Federal Rule of Civil Procedure 26(c) provides for the sealing of records upon a showing of "good cause" by the moving party. Fed.R.Civ.P. Rule 26(c). A corollary to Rule 26(c) is that, once a district court has sealed a document, it is well within its discretion to deny a party's request for an unredacted copy of that same document. Second, even assuming *arguendo* an "illegal" seizure of the defendant currency, because the Government did not seek to introduce the actual currency at trial, there was no evidence in the present case that Massieu could have sought to suppress. *See United States v. Monkey,* 725 F.2d 1007, 1011–12 (5th Cir.1984) (explaining that a lack of probable cause for the seizure would "only result in the suppression of evidence obtained by the wrongful seizure

and would have no further bearing on the forfeitability of the property.”). Accordingly, Massieu cannot show any prejudice to his “substantial rights” that would justify reversal. *See* Fed.R.Civ.P. Rule 61.

***251** *2. Ex parte examination of materials in support of application for stay.*

[21] **[22]** **[23]** Generally, the power to stay a pending matter derives from a trial court's wide discretion to control the course of litigation. In the present case, however, this inherent discretion has been explicitly circumscribed by statute. The plain language of both 18 U.S.C. § 981(g) and 21 U.S.C. § 881(i) requires a district court to find two elements in order to grant a stay: (1) that forfeiture proceedings be “related to” an offense for which there has been an indictment, [9] and (2) that the Government show “good cause” for the stay. *See In re Ramu,* 903 F.2d 312, 319 (5th Cir.1990) (considering appropriateness of stay in context of 21 U.S.C. § 881(i)). Fifth Circuit precedent additionally mandates that a district court make express findings of fact and conclusions of law concerning the existence of the statutory prerequisites. *See Id.*

[24] The district court granted a stay of litigation until the conclusion of the Abrego trial on the basis of oral argument by both the Government and Massieu, as well as two sealed affidavits which the court examined *ex parte.* Massieu argues that the district court's denial of his request for copies of the two sealed affidavits deprived him of the opportunity to rebut meaningfully the contentions of the Government at the May 31, 1996, hearing.

[25] **[26]** It is well established in this Circuit that district courts have an inherent power to receive *in camera* evidence and place such evidence under seal. *See United States v. De Los Santos,* 810 F.2d 1326, 1331–1333 (5th Cir.1987). In the criminal context, we have recognized that the receipt of evidence *ex parte* permits the court to balance the interests of the Government—in safeguarding its confidential informants and in ensuring the viability of its ongoing investigations—against the interests of defendants in confronting adverse witnesses. *See United States v. Singh,* 922 F.2d 1169, 1172 (5th Cir.1991) (holding that district court's in camera review was appropriate, and that furnishing the appellant with a copy of the transcript of that review “would defeat the very purpose of the in camera procedure.”). Unlike criminal defendants, civil forfeiture claimants are not afforded the protections of the Sixth Amendment's Confrontation Clause. *See Austin v. United States,* 509 U.S. 602, 608 n. 4, 113 S.Ct. 2801, 2804 n. 4, 125 L.Ed.2d 488 (1993). As a result, submission of evidence *ex parte* is more readily justified in a civil forfeiture action than in a criminal case.

Because courts routinely balance the interests of the Government in anonymity against that of civil litigants in full disclosure and have permitted the submission of evidence *ex parte, see, e.g., Abell v. Potomac Insurance Co.,* 858 F.2d 1104, 1143 (5th Cir.1988), vacated on other grounds, 492 U.S. 914, 109 S.Ct. 3236, 106 L.Ed.2d 584 (1989) (sealing the record of in camera discussions with FBI agent about attempts to bribe jury members); *In re Grand Jury Witness,* 835 F.2d 437, 441 (2d Cir.1987) (permitting Government to file a sealed *ex parte* affidavit and to adjourn to chambers for ex parte discussion in closed civil contempt hearing), we find no abuse of discretion in the present case.

[27] Moreover, Massieu has not demonstrated any prejudice to his “substantial rights” that resulted from the imposition of the stay. See Fed.R.Civ.P. Rule 61. In particular, it is interesting to note that less than one month after he unsuccessfully sought a writ of mandamus from this Court to be relieved of the hardship of what he deemed court-indulged blanket non-disclosure by the Government, Massieu moved the district court for a speedy trial. Upon agreement of the parties, the case was set for trial on March 10, 1997, approximately three months following the district court's lift of the stay.

3. Failure to exclude testimony of last-minute witnesses.

[28] Massieu's next point of error is that the district court erred in failing to exclude ***252** the trial testimony of Cesar Dominguez [10] and Raul Macias, [11] who were two of the four prospective witnesses that the Government disclosed less than five full days before trial. According to Massieu, the last-minute witness disclosure violated Federal Rule of Civil Procedure 26(a)(3)(A) [12] and should have prompted mandatory exclusion under Rule 37. Specifically, he complains that the late disclosure forced inadequate depositions of other witnesses and precluded investigation of the witnesses' allegations as well as development of impeachment and rebuttal testimony.

[29] Federal Rule of Civil Procedure 37(c)(1) provides that a party who “without substantial justification fails to

disclose information required by Rule 26(a) or 26(e)(1) shall not, unless such failure is harmless, be permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed." Fed.R.Civ.P. 37(c)(1). In determining whether a violation of Rule 26(a) or (e)(1) is harmless, the trial court's discretion is to be guided by the consideration of four factors: (1) the importance of the witness's testimony; (2) the prejudice to the opposing party of allowing the witness to testify; (3) the possibility of curing such prejudice by granting a continuance; and (4) the explanation, if any, for the party's failure to identify the witness. *See Bradley v. United States,* 866 F.2d 120, 125 (5th Cir.1989).

[30] **[31]** We uphold the district court's decision not to exclude the witness testimony. First, the applicable standard of review for a trial court's decision in a matter relating to discovery is abuse of discretion. *See Harris v. Amoco Production Co.,* 768 F.2d 669, 684 (5th Cir.1985). We will not substitute our judgment for that of Judge Atlas; instead, we must only decide whether the district court "could have entered the order which [it] did." *See id.* Second, neither Rule 37 and the Advisory Committee Notes to Rule 37 nor Fifth Circuit case law requires that a district court make express findings of fact or conclusions of law concerning the existence of substantial justification or harmless failure to disclose. Accordingly, Judge Atlas' ***253** statements in open court on March 10, 1997, regarding witness safety concerns and minimal prejudice as well as the reasons asserted by the Government in justification for its three week delay in providing the discovery, which was nonetheless disclosed in advance of trial, are sufficient to support the district court's determination that Rule 37 sanctions were not in order. [13]

4. Failure to bifurcate the trial.

[32] **[33]** A motion to bifurcate "is a matter within the sole discretion of the trial court, and we will not reverse the court's decision absent an abuse of that discretion." *First Tex. Sav. Ass'n v. Reliance Ins. Co.,* 950 F.2d 1171, 1174 n. 2 (5th Cir.1992). Massieu asserts that the district court abused its discretion when it failed to bifurcate the proceeding into a bench trial to determine probable cause and a subsequent jury trial on defenses to the forfeiture. Massieu argues that, as a result of the one proceeding, hearsay evidence offered to show probable cause was placed before the jury. According to Massieu, the admission of this otherwise inadmissible evidence was highly prejudicial and deprived him of a fair trial.

Massieu's argument is without merit. Judge Atlas restricted hearsay before the jury to only those instances where an exception under Rules 803 or 804 of the Federal Rules of Evidence applied. All hearsay, which was not otherwise admissible but for purposes of probable cause, was heard outside the presence of the jury. Accordingly, the district court's failure to bifurcate Massieu's forfeiture proceeding was not an abuse of discretion.

5. 0 + 0 + 0 + 0 = 0

In order for cumulative error analysis to apply, Massieu must have "... [some]thing to cumulate." *Derden v. McNeel,* 938 F.2d at 609. Because the foregoing analysis has revealed no ground for reversal, he has nothing to cumulate. Accordingly, we deny Massieu relief on his cumulative due process claim.

E. Admissibility of Ortiz and Iglio Testimony

[34] Massieu additionally claims that the district court erred in admitting the testimony of two witnesses: Government informant "Tony" Ortiz and money laundering expert Agent Vincent Iglio. Evidentiary rulings are accorded considerable deference on appeal; "error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected." Fed.R.Evid. 103(a); *see General Electric Co. v. Joiner,* 522 U.S. 136, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997); *Mills v. Beech Aircraft Corp.,* 886 F.2d 758 (5th Cir.1989). We first examine the testimony of Tony Ortiz.

1. Testimony of Tony Ortiz

[35] Massieu argues that the district court erred by failing to exclude "Tony" Ortiz's testimony and that the admission of such testimony invited the conclusion that all Mexican law enforcement officials are corrupt. Specifically, he asserts that Ortiz's testimony was irrelevant and unfairly prejudicial. *See* Fed.R.Evid. 402 and 403.

At trial, Ortiz testified about the payment of drug proceeds to Mexican officials for the purpose of facilitating the movement of cocaine through Mexico into the United States.

He explained that he had joined the Juan Garcia Abrego drug trafficking organization in 1989 and had been in charge of a transportation arm of the organization until his arrest in 1993. According to Ortiz, his job included responsibility for transporting cocaine from Brownsville to Houston and then to New York as well as responsibility for transporting the drug proceeds from the United States to Matamoros, Mexico.

Ortiz also testified that his ability to move drugs without incident in Mexico depended upon paying commandants and other Mexican officials. He testified that there were ***254** times that he would have to wait for cocaine to arrive in Brownsville because the commandants of the district had not yet been paid. According to Ortiz, when commandants changed, payment would not stop. Other arrangements would be made. As to the mode of payment, Ortiz explained that commandants would be paid from the drug proceeds which Ortiz would collect in the United States. He testified that he knows that Abrego continued to move cocaine after Ortiz's arrest and that the only way to stay in business was to pay bribes "all the way to the top."

Rule 401 of the Federal Rules of Evidence defines relevant evidence as evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed.R.Evid. 401. Rule 403, however, provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice...." Fed.R.Evid. 403. In *United States v. Pace,* 10 F.3d 1106, 1115–16 (5th Cir.1993), the Fifth Circuit explained, however, that "[u]nless trials are to be conducted on scenarios, on unreal facts tailored and sanitized for the occasion, the application of Rule 403 must be cautious and sparing. Its major function is limited to excluding matters of scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect." *Id.*

There is no doubt that the testimony of Tony Ortiz was relevant to the forfeiture proceeding. Under 18 U.S.C. § 981(a)(1), the seized currency would be forfeitable if it was involved in a transaction violating 18 U.S.C. § 1956. With regard to § 1956(a)(2)(A), the Government must demonstrate that there was a transportation or transfer or attempt to transfer "monetary instruments or funds from a place ... outside the United States to a place inside the United States with the intent to promote the carrying on of specified unlawful activity." Ortiz's testimony was relevant to whether money and cocaine readily flowed between Mexico and the United States and that some Mexican officials were given pay-offs in order to facilitate narcotics trafficking. Additionally, Ortiz provided first-hand knowledge about the operation of the Abrego drug organization—one of the groups from which the Government alleged Massieu received pay-off money. In order for the district court to properly find Ortiz's testimony to be relevant, it was not necessary for Ortiz to provide the conclusive link between Abrego and Massieu.

Furthermore, Ortiz's testimony was not so unfairly prejudicial that it should have been excluded. In conducting an inquiry into the prejudicial effect of contested testimony, we have recognized that "[t]estimony presented by the Government will invariably be prejudicial to a criminal defendant or forfeiture claimant. But Rule 403 only excludes evidence that would be unfairly prejudicial to the defendant." *United States v. Townsend,* 31 F.3d 262, 270 (5th Cir.1994). While there is no doubt that Tony Ortiz's testimony was harmful to Massieu, its prejudicial effect did not substantially outweigh its probative value.

For the reasons stated above in analyzing the relevance of Ortiz's testimony, the district court properly found that it was not unfairly prejudicial.

2. Testimony of Vincent Iglio.

[36] Claimant next argues that the district court erred by admitting the testimony of Vincent Iglio as an expert on money laundering. Massieu does not contest Iglio's qualifications to testify as an expert, rather he asserts that Iglio's testimony constituted inadmissible legal conclusion. *See* Fed.R.Evid. 702 and 704.

[37] The admission or exclusion of expert testimony will not be disturbed on appeal unless it is "manifestly erroneous." *First Natl. Bank of Durant v. Trans Terra Corp. Intl.,* 142 F.3d 802, 811 (5th Cir.1998). Rule 702 of the Federal Rules of Evidence states: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill experience, training, or education, may testify thereto in the form of ***255** an opinion or otherwise." Fed.R.Evid. 702. With regard to the permissible scope of expert testimony, Rule 704 explicitly provides that "testimony in the form of an opinion or inference otherwise admissible is not objectionable because it

embraces an ultimate issue to be decided by the trier of fact." Fed.R.Evid. 704. This Court, however, has repeatedly held that Rule 704 does not allow an expert to render conclusions of law. *See Snap–Drape, Inc. v. Commissioner of Internal Revenue,* 98 F.3d 194 (5th Cir.1996).

Massieu charges that Iglio's statement to the jury—that the testimony he had heard so far in the case was consistent with money laundering—supplanted Iglio's judgment for their own. Where an expert's trial testimony included the bases for the expert's conclusion, and the conclusion was supported by the overwhelming evidence, as is true in the present matter, Fifth Circuit case law supports a determination that there was not significant risk that the expert's testimony "supplant[ed the] jury's independent exercise of common sense." *United States v. Willey,* 57 F.3d 1374, 1389 (5th Cir.1995) (quoting *Scott v. Sears, Roebuck & Co.,* 789 F.2d 1052, 1055 (4th Cir.1986)). We find no error in allowing Iglio's testimony.

Cases from the Fourth and Eighth circuits bolster the determination that the district court properly allowed Agent Iglio to testify. The Fourth and Eighth Circuits when confronted with the admissibility of expert testimony on questions involving money laundering each found that such testimony was admissible and did not present problems of experts acting as an additional juror. *See United States v. Barber,* 80 F.3d 964 (4th Cir.1995) (noting that the district court did not abuse its discretion in allowing the Government's agent to testify and explain how the defendant's activities constituted concealment for purposes of money laundering); *United States v. Acty,* 969 F.2d 652 (8th Cir.1992), aff'd on other grounds, 511 U.S. 513, 114 S.Ct. 1747, 128 L.Ed.2d 539 (1994) (admitting, as permissible under rule 704(a), expert testimony that deposited checks affect interstate commerce under § 1956(a)(1)(B), that banks into which defendant deposited money were financial institutions under statute and that defendant's activities constituted concealment of money under § 1956(a)(1)(B)). Accordingly, we hold that the district court properly admitted the expert testimony of Agent Vincent Iglio.

CONCLUSION

For the foregoing reasons, the judgment of the district court is AFFIRMED.

All Citations

163 F.3d 238, 167 A.L.R. Fed. 781, 42 Fed.R.Serv.3d 1019, 50 Fed. R. Evid. Serv. 1475

Footnotes

1 Massieu had been arrested in Newark on March 3, 1995, for violating 31 U.S.C. § 5316 by failing to declare that he was carrying currency in excess of $10,000.

2 The Government, in comparison, served Massieu with nine interrogatories with the complaint.

3 The article featured an interview with Juan Collado, Massieu's lawyer in Mexico, who received the Government's discovery from Mr. Canales, Massieu's trial attorney.

4 Jorge Stergios, Massieu's trusted associate, served as a coordinator between Massieu and the delegates.

5 On August 25, 1993, Adrian Carrera Fuentes was appointed Director of the MFJP.

6 As such, it is unnecessary for this Court to address Massieu's claim on appeal that the district court erroneously granted the Government's Motion for Summary Judgment on the issue of gift.

7 For the proposition that post-complaint evidence is not admissible, *see e.g., United States v. $191,910.00 in United States Currency,* 16 F.3d 1051, 1066–67 (9th Cir.1994); *United States v. One Lot of U.S. Currency ($36,634),* 103 F.3d 1048, 1053–54 (1st Cir.1997); *United States v. Parcels of Property,* 9 F.3d 1000, 1003 (1st Cir.1993); *United States v. $91,960.00,* 897 F.2d 1457, 1462 (8th Cir.1990).

For the proposition that evidence acquired up to trial could be used to show probable cause, *see, e.g., United States v. $67,220.00 in United States Currency,* 957 F.2d 280, 284 (6th Cir.1992); *United States v. Premises and Real Property at 4492 S. Livonia Rd.,* 889 F.2d 1258, 1268 (2d Cir.1989).

8 *Question No. 1*

Do you find from a preponderance of the evidence that the Defendant $9,041,598.68, in whole or in part, was *not* the proceeds of and was not used to facilitate drug trafficking activity?

Answer "yes" or "no": _____

Proceed to Question No. 2.

Question No. 2

Do you find from a preponderance of the evidence that the Defendant $9,041,598.68, in whole or in part, was *not* involved in a financial transaction that was conducted or attempted to be conducted with the intent to promote the carrying on of drug trafficking activity?

Answer "yes" or "no": _____

Proceed to Question No. 3.

Question No. 3

Do you find by a preponderance of the evidence that the Defendant $9,041,598.68, in whole or in part, was *not* transported or transferred from a place inside the United States to or through a place outside the United States with the intent to promote drug trafficking activity?

Answer "yes" or "no": _____

Proceed to Question No. 4.

Question No. 4

Do you find by a preponderance of the evidence that any one or more of the deposits to the account at Texas Commerce Bank is/are *not* a monetary transaction in criminally derived property of a value greater than $10,000.00 in United States currency derived from drug trafficking activity?

Answer "yes" or "no": _____

Proceed to Question No. 5.

Question No. 5

If you have answered "yes" to any of the above questions, then answer Question No. 5. If you have answered "no" to all of the above questions, then do not answer Question No. 5.

Question No. 5

To the extent, and only to the extent, you have found in answer to the foregoing questions

that all or part of the defendant $9,041,598.68, if any, was:

• money used to facilitate drug trafficking activities or the proceeds of drug trafficking activities;

• a financial transaction that was conducted or attempted to be conducted with the intent to promote the carrying on of drug trafficking activity;

• money transported or transferred from a place inside the United States to or through a place outside the United States with the intent to promote drug trafficking activity; and/or,

• monetary transaction(s) in criminally derived property of a value greater than $10,000.00 in United States currency derived from drug trafficking activity,

what amount of the Defendant $9,041,598.68, if any, do you find from a preponderance of the evidence was from a source *other than* the above sources?

Answer in dollars and cents: _____

9 21 U.S.C. § 881(i) requires that the indictment be for a drug offense. 18 U.S.C. § 981(g) mandates that the indicted offense be a violation of federal, state, or local law.

10 Cesar Dominguez was a city policeman commissioned by the MFJP until 1995. As a police officer assigned to the MFJP, Dominguez would deliver "quotas" (payoffs in the form of either cash or drugs) from drug traffickers to the MFJP office. He testified that drug traffickers also delivered money to the office in boxes, briefcases, or bags. The money was wrapped in cellophane or secured by rubber bands. The most money Dominguez was involved in counting was a little more than $6 million.

Beginning in 1991, Dominguez began working for the Amado Carillo Fuentes organization. In 1993, Dominguez on four different occasions transported money to the airport. Once at the airport the money would be loaded onto a plane belonging to the Attorney General's office. While Dominguez was a police officer, money continued to be brought to the airport destined for the Attorney General's office regardless of who held the position. Dominguez quit in 1995 because over 17 of his co-workers were murdered.

11 Raul Macias was a police officer in Mexico from 1989 to 1995. In 1994, he was assigned to work under the direction of Commander David Grajeda Lara in Zacatecas, Mexico. Macias testified that on August 4, 1994, an airplane loaded with cocaine landed at an airstrip near the city of Sombrerete, Mexico, where the cocaine was unloaded and taken to the local MFJP's office in two trucks. At the office the cocaine was weighed. Eight tons of the approximately 10 tons of cocaine were loaded into a truck and driven away by Commander Lara under escort. The remaining two tons along with bricks of fake cocaine were taken elsewhere and burned the next day.

Macias returned to the airport that same night and observed approximately 15 Suburbans parked near the airport entrance. Lara instructed Macias to load 12–15 suitcases into Lara's Suburban. While guarding two of the suitcases at

a hotel that night, Macias opened the suitcases and saw that they contained United States Currency in denominations of 50's, 20's, and 10's.

The following day, Lara picked up Macias, the suitcases, two other agents and they went to Mexico City. The next morning the men drove to the offices of the MFJP where Lara began talking to the passenger of a blue Marquis. Lara signaled to Macias, who took the suitcases with the currency from the Suburban and placed them in the trunk of the Marquis. Macias recognized the passenger who Lara was speaking with in the blue Marquis as Massieu.

12 According to Rule 26(a)(3)(A), a party shall provide to other parties the name, address, and telephone number of each witness that it may present at trial other than solely for impeachment purposes, "separately identifying those whom the party expects to present and those whom the party may call if the need arises...." Fed.R.Civ.P. Rule 26(a)(3)(A).

13 Before the district court, the Government justified its tardy disclosure of Cesar Dominguez and Raul Macias as follows: (1) the loss of anticipated trial witnesses as a result of the leaked "Processo" story and (2) the difficulty in arranging the lawful entrance of Dominguez and Macias, both Mexican citizens, into the United States.

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787 F.2d 477
United States Court of Appeals,
Tenth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Jessie BUCHANAN, Defendant-Appellant.

No. 84–1558.
|
March 18, 1986.

Defendant was convicted in the United States District Court for the Eastern District of Oklahoma, Frank Howell Seay, Chief Judge, of manufacture and possession of an unregistered firearm and conspiracy to commit those offenses, and he appealed. The Court of Appeals, Holloway, Chief Judge, held that: (1) testimony of an officer of the Bureau of Alcohol, Tobacco and Firearms concerning whether the type of device allegedly used to burn victim's trailer home was the type which had to be registered with the Department of Treasury was not inadmissible on the ground that it constituted an improper legal conclusion; (2) prosecutor's alleged misstatement of law made to grand jury in response to a question did not constitute grounds for dismissal of the indictment; and (3) agreement to burn victim's trailer home and agreement to manufacture and possess an unregistered firearm constituted one basic conspiracy.

Affirmed.

West Headnotes (17)

[1] **Criminal Law**
Selection and impaneling

Absent an abuse of discretion, trial court's determination of qualifications of jurors will not be disturbed.

1 Cases that cite this headnote

[2] **Jury**
Trial and determination

Venireman's remarks that his mobile home had been vandalized three times in the past five years and that he had real estate burned did not constitute an opinion on defendant's guilt on charges based on allegation that he hired others to burn a trailer home or on the veracity of anyone involved in the case and therefore trial court, which excused the venireman for cause and admonished remaining panel members to disregard his statement, did not err in failing to dismiss the entire jury panel.

6 Cases that cite this headnote

[3] **Criminal Law**
Showing bad character or criminal propensity in general
Criminal Law
Other Misconduct Showing Motive
Criminal Law
Other Misconduct Showing Intent

Evidence regarding prior misconduct, other than that charged, is inadmissible to show that defendant had a criminal disposition; however, rule does not require exclusion when the evidence is also probative of the defendant's motive or intent. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

Cases that cite this headnote

[4] **Criminal Law**
Arson and malicious mischief
Criminal Law
Arson and malicious mischief

Evidence of defendant's threats against victim was admissible in prosecution based on allegations that defendant hired others to burn victim's trailer home since the evidence was probative of defendant's motive or intent and the evidence was more probative than prejudicial. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

1 Cases that cite this headnote

[5] **Criminal Law**

In absence or out of hearing of accused

Criminal Law

Weight and sufficiency

There was sufficient proof of the existence of a conspiracy to burn a trailer home and therefore statements made by one coconspirator to another outside defendant's presence concerning the amount of money given to him by the defendant for the job were admissible under the coconspirator exception to the hearsay rule. Fed.Rules Evid.Rule 801(d)(2)(E), 28 U.S.C.A.

1 Cases that cite this headnote

[6] Criminal Law

Questions of law

Testimony of an officer of the Bureau of Alcohol, Tobacco and Firearms concerning whether the type of device allegedly used to burn victim's trailer home was the type which had to be registered with the Department of Treasury was not inadmissible in prosecution for the manufacture and possession of an unregistered firearm on the ground that it constituted an improper legal conclusion.

9 Cases that cite this headnote

[7] Criminal Law

What constitutes violation of rule

Witness did not directly violate court's sequestration order where the court had failed to give the proper full instruction when the rule was invoked.

6 Cases that cite this headnote

[8] Criminal Law

Enforcement of rule

Even if violation of a proper sequestration order occurs, that alone does not render the witness' testimony inadmissible and its admission or exclusion is within court's sound discretion.

10 Cases that cite this headnote

[9] Criminal Law

Enforcement of rule

Even if there was a violation of a proper sequestration order, there was no showing of probable prejudice so as to require exclusion of the witness' testimony, which did not involve any substantive aspects of the case.

13 Cases that cite this headnote

[10] Criminal Law

Witnesses

Prosecutor's questioning of defense witness, which implied that prosecutor was learning about witness' story for the first time, was not designed to mislead the jury; Government's questioning was not prejudicial since defense counsel's statement in open court effectively rebutted that notion.

Cases that cite this headnote

[11] Criminal Law

Remarks and conduct as to argument and conduct of counsel

Trial judge's admonitions to defense counsel about the numerous bench conferences did not constitute an abuse of discretion.

Cases that cite this headnote

[12] Indictment and Information

Form and contents in general

An indictment returned by a legally constituted and unbiased grand jury, if valid on its face, is enough to call for trial of the charge on the merits.

3 Cases that cite this headnote

[13] Indictment and Information

Grand or petit jury irregularities

Remedy of dismissal of indictment is an extraordinary one applied to insure proper standards of conduct by the prosecution; an indictment may be dismissed for prosecutorial misconduct so flagrant that there is some

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significant infringement on the grand jury's ability to exercise independent judgment.

9 Cases that cite this headnote

[14] Indictment and Information
Irregularities in finding indictment in general

Challenges going only to the instructions given to grand jury as to elements of the offenses are not grounds for dismissal of an indictment that is valid on its face.

9 Cases that cite this headnote

[15] Indictment and Information
Irregularities in finding indictment in general

Prosecutor's alleged misstatement of law made to grand jury in response to a question did not constitute grounds for dismissal of the indictment.

6 Cases that cite this headnote

[16] Conspiracy
Single or multiple conspiracies

Agreement to burn victim's trailer home and agreement to manufacture and possess an unregistered firearm constituted one basic conspiracy; conspirators had the one basic objective of burning the trailer and the use of an explosive was merely one facet of the scheme.

Cases that cite this headnote

[17] Internal Revenue
Weight and sufficiency of evidence in general

Evidence that defendant hired a coconspirator to burn a trailer home and that defendant anticipated use of some sort of destructive device was sufficient to support defendant's conviction for manufacture and possession of an unregistered firearm. 26 U.S.C.A. § 5861(d, f).

2 Cases that cite this headnote

Attorneys and Law Firms

***479** Ronald H. Mook, Tulsa, Okl. (Thomas E. Salisbury, Sand Springs, Okl., was also on brief), for defendant-appellant.

Sara Criscitelli, Atty., Dept. of Justice, Washington, D.C. (Donn F. Baker, Acting U.S. Atty., E.D. of Okl., was also on brief), for plaintiff-appellee.

Before HOLLOWAY, Chief Judge, and McWILLIAMS and DOYLE,[*] Circuit Judges.

Opinion

HOLLOWAY, Chief Judge.

The defendant, Jessie Buchanan, timely appeals his conviction for manufacture and possession of an unregistered firearm, 26 U.S.C. § 5861(d) & (f);[1] and for conspiracy to commit these offenses, 18 U.S.C. § 371 (1982). We affirm.

I

The factual background

This case arises from an explosion at Joann Huffman's trailer home in Broken Bow, Oklahoma, on September 3, 1982. According to the Government's evidence, Eric Elrod and John Omstead burned the house at the defendant's instructions. Considered in the light most favorable to the Government at this juncture, the record tends to show the following facts:

Elrod was driving Omstead and another companion, Kathy Bunch, in his father's truck on September 1, 1982. The defendant Buchanan saw them outside a convenience store and invited Elrod into his car. Elrod got in and talked with the defendant. During that conversation, the defendant offered Elrod $800 to burn Huffman's trailer. Elrod accepted, receiving $400 as a down-payment. Tr. 128, 130–31, 139, 201.

A few minutes later, Elrod left the car and rejoined his friends in the truck. Elrod waved the money in Omstead's face, telling him that they were going to do a job for the defendant. Tr. 138–39, 233, 318–19. As Kathy Bunch later testified, the job

involved "something like [the] flick of a light switch and then blow something." Tr. 319.

Two days later, Elrod drove Omstead to Bonnie Hyslope's house. The two men went in her backyard and built a firebomb, which consisted of a plastic milk container filled with gasoline and charcoal fluid. Tr. 148–49, 238. Elrod sealed the device with a fuse made out of rags. They placed the device in the truck and drove to Huffman's trailer. Tr. 151, 238. Elrod knocked on the door to see if she was home, and Omstead checked with her neighbors. Satisfied that the trailer was unoccupied, Elrod lit the bomb and dropped it through a broken window. Tr. 153–54, 238, 240. They drove away as the trailer burned.

The defendant Buchanan took the stand and denied having offered money to Elrod or Omstead, or suggesting that Huffman's trailer be burned. He thus vigorously denied his guilt in any transactions charged in the three counts of the indictment.

On appeal, the defendant argues that the trial court erred: (1) by failing to dismiss the entire jury panel after it was exposed to prejudicial remarks by a venireman and denying a mistrial; (2) by allowing the Government to attack the defendant's character during its case-in-chief; (3) by failing to dismiss the indictment due to an Assistant United States Attorney's misstatements of law to the grand jury that returned the indictment; (4) by failing to order a judgment of acquittal due to insufficient evidence; (5) by improperly admitting hearsay testimony under the co-conspirator exception of Fed.R.Evid. 801(d)(2)(E); (6) by refusing to strike Kathy Bunch's testimony after she admitted discussing the case with other witnesses who ***480** had been sequestered under Fed.R.Evid. 615; (7) by allowing a Government witness to testify regarding a legal conclusion that the explosive device was a "firearm" requiring registration; and (8) by failing to order a mistrial due to prosecutorial and judicial misconduct.

II

Comments by the juror during voir dire

During voir dire of the jury, the court asked a panel member whether he "kn [e]w of any reason [he] couldn't be fair and impartial in this matter." Tr. 38. He answered "yes," explaining as follows: "In the last five years my mobile home has been vandalized three times and I have had real estate burned." Tr. 38. There was some laughter by spectators. Defense counsel moved for a mistrial, arguing at the bench that prejudice from the remarks was irreparable. The trial judge denied the motion for a mistrial, excusing the venireman for cause and admonishing the remaining panel members to disregard his statement. Tr. 39.

[1] **[2]** Absent an abuse of discretion, the trial court's determination of the qualifications of jurors will not be disturbed. *E.g., United States v. Wilburn,* 549 F.2d 734, 739 (10th Cir.1977); *United States v. Mason,* 440 F.2d 1293, 1298 (10th Cir.), *cert. denied,* 404 U.S. 883, 92 S.Ct. 219, 30 L.Ed.2d 165 (1971). We do not think a showing of abuse of discretion has been made here. The venireman's remark did not constitute an opinion on the defendant's guilt or the veracity of anyone involved in the case. *See United States v. Teqzes,* 715 F.2d 505, 508 (11th Cir.1983); *United States v. Vargas-Rios,* 607 F.2d 831, 837 (9th Cir.1979). The trial judge admonished the other panel members to disregard the remark. *See United States v. Warren,* 594 F.2d 1046, 1049 (5th Cir.1979). Under these circumstances, we think the trial court did not err in refusing to grant a mistrial. [2]

III

Evidentiary rulings

The defendant challenges four evidentiary rulings by the trial court.

A.

Character evidence

First, the defendant argues that the trial court improperly admitted evidence regarding his character. The evidence in question was introduced during the direct examination of Gwen Whitten and her mother. The two women testified generally about the defendant's hostility toward them. Tr. 60, 62, 73, 83, 102. They also testified about three incidents that occurred shortly before Huffman's trailer was burned, including the spanking of his step-daughter. [3] The defendant argues that the evidence was an inadmissible effort to show a criminal disposition and unduly prejudicial. We reject both contentions.

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***481** **[3]** **[4]** Evidence regarding prior misconduct, other than that charged, is inadmissible to show that the defendant had a criminal disposition. Fed.R.Evid. 404(b); [4] *see Michelson v. United States,* 335 U.S. 469, 475–76, 69 S.Ct. 213, 218, 93 L.Ed. 168 (1948). The rule does not require exclusion, however, when the evidence is also probative of the defendant's motive or intent. Fed.R.Evid. 404(b); *see, e.g., United States v. Haskins,* 737 F.2d 844, 848 (10th Cir.1984). The court relied on this exception in admitting evidence of the defendant's prior misconduct. Tr. 575. We think the ruling was within the trial court's discretion.

The trial court was also justified in holding that the evidence was more probative than prejudicial. *See United States v. Shepherd,* 739 F.2d 510, 512 (10th Cir.1984) (evidence admitted under Fed.R.Evid. 404(b) must also satisfy balancing test contained in Fed.R.Evid. 403). The threats against Ms. Huffman had substantial probative value, for they had some relevance to the defendant's alleged solicitation of Elrod. *See United States v. Naranjo,* 710 F.2d 1465, 1468 (10th Cir.1983) (evidence that defendant previously beat ex-wife properly admitted in murder prosecution); *United States v. Bufalino,* 683 F.2d 639, 647 (2d Cir.1982) (extortion threat properly admitted), *cert. denied,* 459 U.S. 1104, 103 S.Ct. 727, 74 L.Ed.2d 952 (1983). The prior misconduct occurred within one year of the fire. [5] *See United States v. Franklin,* 704 F.2d 1183, 1189 (10th Cir.1983) (misconduct occurring over three years earlier not too remote), *cert. denied,* 464 U.S. 845, 104 S.Ct. 146, 78 L.Ed.2d 137 (1983). Further, the trial court instructed the jury that the evidence was relevant only insofar as it shed light on the defendant's "intent, motive, knowledge, plan, absence of mistake or accident." Tr. 575. We think the admonition alleviated any danger that the jury would consider the evidence as relevant to the defendant's criminal disposition.

We conclude that the trial court acted within its discretion in admitting the evidence here regarding the defendant's prior misconduct.

B.

Hearsay evidence

The defendant argues that the trial court improperly allowed Elrod and Omstead to give hearsay testimony. We will consider the claims of error separately.

[5] First, defendant says that over his objection on hearsay grounds, Elrod was permitted to testify about statements he had made to Omstead outside of the defendant's presence. Tr. 132–38; Brief of Appellant at 28. Elrod had earlier testified that the defendant Buchanan had called Elrod over to his car several nights before the fire, told him he wanted Elrod to burn Huffman's trailer, promised to give him $800 for this job, and then gave him $400. Tr. 125–31.

When Elrod turned to testifying about returning to his truck and his statements made to Omstead and Bunch, specifically the prosecuting attorney asked Elrod whether he had told Omstead and Bunch about how much money he had gotten, and at that point defense counsel objected that this would be hearsay. Tr. 132. After ***482** argument for some time on the law, the trial judge made findings and announced his ruling. He found that there was substantial evidence that it is more likely than not that a conspiracy existed, that the declarant Elrod and the defendant against whom the co-conspirator's statement was offered were members of the conspiracy, and that the statement was made during the course of and in furtherance of the objects of the conspiracy. The court ruled that the evidence could be presented. Then Elrod related that he had told Omstead and Bunch that he had gotten $40 from the defendant, and Elrod said that he had put the money in his pocket. Tr. 139.

After the evidence was concluded, the trial judge stated that no motion had been made (for further findings), but that he had earlier found as a factual matter that the Government had shown by a preponderance of the evidence, independent of the statements, that a conspiracy existed. The judge then found again that the co-conspirators and the defendant against whom the statements were offered were members of the conspiracy, and that the statements were made during the course of and in furtherance of the conspiracy. Tr. 582–83.

The appellate argument made by the defendant with respect to this testimony was that there was not sufficient proof of the existence of the conspiracy alleged to support the court's findings and the ruling admitting the hearsay statement by Elrod. More specifically the defendant argues that there was no proof of a "federal conspiracy," particularly arguing that there was no evidence of a conspiracy to use a destructive

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device that would be classified as a firearm requiring federal registration.

The statement by Elrod in the truck about the money paid by the defendant is perhaps questionable as not, at that point, being shown to be in furtherance of the conspiracy. Nevertheless, the circumstances point in that direction and we conclude that the evidence as a whole supports the findings made and the admission of Elrod's statements complained of in accordance with the procedure of *United States v. Petersen,* 611 F.2d 1313, 1330–31 (10th Cir.1979). Moreover, we feel there is no substance to the argument that the conspiracy found by the judge as a basis for application of the co-conspirator exception, under Rule 801(d)(2)(E), must be a "federal conspiracy." *See United States v. Kendall,* 665 F.2d 126, 131 (7th Cir.1981), *cert. denied,* 455 U.S. 1021, 102 S.Ct. 1719, 72 L.Ed.2d 140 (1982); *see also United States v. Magnuson,* 680 F.2d 56, 58 (8th Cir.1982) (per curiam) (holding that hearsay declarations were properly admitted under Rule 801(d)(2)(E) where evidence linked co-defendants to arson conspiracy). The rationale for the co-conspirator hearsay exception would apply without such special proof that a "federal conspiracy" had been demonstrated. *See United States v. Coppola,* 526 F.2d 764, 770–71 (10th Cir.1975). In sum, we reject the objections to the statement made by Elrod.

We turn now to the statement made by Omstead. During the direct examination of Omstead, he was asked about the first time that anything was said about the trailer and its burning. He began to testify that they (Elrod, Omstead and Bunch) stopped and that Elrod had gotten out and talked to the defendant Buchanan, and that Elrod came back and said that "we was going to make some money." Tr. 233. At that point, defense counsel objected to anything which Mr. Elrod had said on the same hearsay grounds, with the same arguments previously discussed in detail with the trial judge. Tr. 233.

We have related earlier the first findings and ruling on the co-conspirator exception made by the judge. Tr. 138. Those findings addressed the participation by defendant Buchanan and Elrod in a conspiracy. The trial court, however, extended the findings to include Omstead under a procedure he announced later during Omstead's testimony that if the evidence brought him within that conspiracy concerning burning of the trailer, then the further finding was not explicitly needed. That proof was made and thus the findings were extended ***483** to include a conspiracy by defendant Buchanan, Elrod and Omstead. Tr. 231–32.

We again reject the hearsay argument. The statement that was related by Omstead was that Elrod had come back to the truck where Omstead and Bunch were waiting, and that Elrod said they were going to make some money. Tr. 233. We again are satisfied that the trial court's preliminary findings on admission of the evidence under the co-conspirator exception, and then the additional findings made at the end of the trial to the same effect, were all supported by the record as a whole. Therefore, the findings required by the *Petersen* case relating to the co-conspirator exception were not in error. As noted, at the first of the conversations by defendant Buchanan with Elrod, defendant Buchanan had promised to pay Elrod $800 for burning the trailer. This evidence was before the court when the initial findings were made. Then when his ultimate findings were made at the conclusion of the trial, more damaging evidence had been admitted, such as Elrod's later testimony that the defendant had actually paid him more than $800 and congratulated him on doing a "good job." Tr. 160.

In sum, we feel that the record amply supports the trial court's findings and rulings on the hearsay objections.

C.

Testimony on a legal conclusion

[6] The defendant also argues that the trial court erred in allowing Officer Tilley of the Bureau of Alcohol, Tobacco and Firearms to testify regarding a legal conclusion. The colloquy was as follows:

> Q. The type of device that they have described here in the courtroom, would that type of a device have to be registered with the Department of Treasury, the Bureau of Alcohol, Tobacco and Firearms?
>
> A. Yes.

Tr. 344. We conclude that the trial court acted within its discretion in admitting this testimony.

Whether the nature of a particular device is such that it must be registered is an ultimate fact question. *See United States v. Homa,* 608 F.2d 407, 409 (10th Cir.1979); *United States v. Markley,* 567 F.2d 523, 527 (1st Cir.1977), *cert. denied,* 435 U.S. 951, 98 S.Ct. 1578, 55 L.Ed.2d 801 (1978); *United*

States v. Kiliyan, 456 F.2d 555, 557 (8th Cir.1972); *Bryan v. United States*, 373 F.2d 403, 407 (5th Cir.1967). Officer Tilley's testimony is not objectionable simply because it goes to an "ultimate issue to be decided by the trier of fact." Fed.R.Evid. 704; *see United States v. Logan*, 641 F.2d 860, 863 (10th Cir.1981). Instead, the proper inquiry is whether the testimony would "assist the trier of fact to understand the evidence or to determine a fact in issue." Fed.R.Evid. 702. Such a determination rests within the sound discretion of the trial court. *See United States v. Barton*, 731 F.2d 669, 672 (10th Cir.1984). The question before the jury involved the consideration of a particular homemade device against an array of statutory definitions. [6] Under such circumstances, the courts have admitted this sort of testimony. [7] *United States v. McCauley*, 601 F.2d 336, 339 (8th Cir.1979) (per curiam); *Bryan v. United States*, 373 F.2d 403, 406–07 (5th Cir.1967).

***484** The defendant argues, however, that Officer Tilley's testimony constituted an improper legal conclusion. While unadorned legal conclusions are impermissible, *see Frase v. Henry*, 444 F.2d 1228, 1231 (10th Cir.1971), courts have allowed the expression of expert opinions on ultimate issues of fact. *See, e.g., United States v. Logan*, 641 F.2d 860, 863 (10th Cir.1981). Experts are allowed to testify that certain drugs come within a particular statutory classification, *see United States v. Carroll*, 518 F.2d 187, 188 (6th Cir.1975), and that certain expenses are deductible under the federal tax laws, *see United States v. Fogg*, 652 F.2d 551, 556–57 (5th Cir.1981), *cert. denied*, 456 U.S. 905, 102 S.Ct. 1751, 72 L.Ed.2d 162 (1982).

The trial court properly instructed the jury on the statutory definition of "firearms," Tr. 566–67, and the weight to be afforded expert testimony, Tr. 575–76. No error occurred in the admission of the testimony.

D.

The sequestration of witnesses under Fed.R.Evid. 615

The defendant argues that the trial court erred in allowing Kathy Bunch to testify after defense counsel had invoked the rule on sequestration of witnesses and the witness had later discussed trial testimony with other witnesses.

When the first Government witness took the stand, defense counsel invoked "the rule of sequestration." Tr. 57. The judge announced that the witnesses not testifying should leave the courtroom. [8] Later Bunch, a Government witness, admitted on cross-examination that she had spoken with Elrod and Omstead during the trial about their testimony. Tr. 328. The defendant then moved to strike her testimony because she had violated the sequestration rule. Tr. 328. The trial court denied the motion, reasoning that its sequestration order properly did not prohibit discussion among the witnesses about their testimony. Tr. 328–30.

The trial judge in the instant case did not feel that the Rule or any cases prohibited the witnesses from discussing their testimony among themselves. The court was in error. While such a prohibition is not within the Rule's explicit wording, [9] we have held that it is necessary to prevent a circumvention of the Rule. *United States v. Johnston*, 578 F.2d 1352, 1355 (10th Cir.), ***485** *cert. denied*, 439 U.S. 931, 99 S.Ct. 321, 58 L.Ed.2d 325 (1978); *United States v. Prichard*, 781 F.2d 179, 183 (10th Cir.1986). We explained in *Johnston* that "a circumvention of the Rule does occur where witnesses indirectly defeat its purpose by discussing testimony they have given and events in the courtroom with other witnesses who are to testify." We further explained in *Johnston* that Rule 615 has changed the law and makes exclusion demandable as of right, instead of being merely discretionary with the trial court. 578 F.2d at 1355; *see also* 3 Weinstein's Evidence 615–16, with stated exceptions as to certain persons.

[7] A failure to instruct the witnesses fully after the Rule is invoked may cause reversal. The witnesses should be clearly directed, when the Rule is invoked, that they must all leave the courtroom (with the exceptions the Rule permits), and that they are not to discuss the case or what their testimony has been or would be or what occurs in the courtroom with anyone other than counsel for either side. *See* 3 Weinstein's Evidence 615–13. Counsel know, and are responsible to the court, not to cause any indirect violation of the Rule by themselves discussing what has occurred in the courtroom with the witnesses.

[8] Of course, here the witness did not directly violate the court's order because the court had failed to give the proper full instruction when the Rule was invoked. As explained, the order given was in error. We do not, however, feel that reversal is required. [10] Even if violation of a proper order under this Rule occurs, this alone does not render

the witness' testimony inadmissible and its admission or exclusion is within the court's sound discretion. 3 Weinstein's Evidence 615–17. Probable prejudice should be shown for such exclusion to occur. *United States v. Prichard,* 781 F.2d at 183; *Johnston,* 578 F.2d at 1355–56.

[9] Here the conversation did not involve any substantive aspects of the case. Bunch explained that the sole topic of conversation was the place of the original meeting between the defendant and Elrod. Elrod and Omstead said that the meeting had occurred outside Burke's Convenience Store, while Bunch insisted that it had taken place outside the Sonic Drive-In, Tr. 331. The three witnesses reaffirmed their original beliefs at trial. Elrod and Omstead continued to assert that the original meeting had taken place outside Burke's store, Tr. 125–27, 234, and Bunch continued to insist that it had occurred outside the Sonic Drive-In. Tr. 317, 328. The conversation did not seem to have any effect on their testimony. Finally, the trial court allowed the defense to fully explore the scope of the conversation in its cross-examination of Bunch, the deputy marshal and the case agent. Tr. 328, 331–34, 352–54, 356. Thus, the jury became fully aware of the conversation and the degree of possible effect it had on the testimony.

In sum, there was no showing of probable prejudice so as to require exclusion of Bunch's testimony and its admission was not in error.

IV

The claims of prejudice from actions of the trial judge and the prosecutor

The defendant argues that the prosecutor deliberately misled the jury and that ***486** the trial judge improperly rebuked defense counsel when they sought to remedy the situation. We disagree.

[10] The incident occurred during the testimony of defense witness Perry Gatlin. On direct examination, Gatlin testified that he had overheard a conversation between Elrod and his father the day after the fire. According to Gatlin, Elrod told his father to pay him for burning the trailer or he would not do another job for him. Tr. 504–05. On recross examination, Gatlin admitted that he had refused to be interviewed by Officer Tilley, the Government's case agent, prior to trial. Tr. 519–20. The prosecutor then asked Gatlin: "Well, you do realize, don't you, if you would have come forward and told this agent this story sometime before today and submitted to an interview that we could have checked a little of this out?" Tr. 520.

The defense attorney objected, stating in open court that the question did not accurately reflect "the state of facts in this case." He added that "[t]his interview was given to the prosecuting office many, many months ago." Tr. 520. The prosecutor protested the remark, and defense counsel asked to approach the bench. The trial judge responded: "No, you don't need to do that, you've been coming up here too much. Now you just make your objection, and I know how to rule on these things without coming up here. If that's true, then you may question him about it on your direct examination." Tr. 520.

A few minutes later, Gatlin left the stand and defense counsel again asked to approach the bench. This time the judge agreed. Tr. 522. At the bench, the judge began by telling defense counsel: "I hope this is more useful than the other times we have been coming up here." Tr. 522. One of the defendant's two attorneys then explained that he had given the prosecutor a copy of Gatlin's sworn statement at least three months before the trial. Counsel then complained that the prosecutor had created the false impression that he was learning about Gatlin's story for the first time. Tr. 522–23. The prosecutor agreed that he had received the statement, but said that he had been unable to question Gatlin about the statement before the trial. Tr. 523.

The judge suggested to defense counsel that they could call Tilley to the stand to explain what had happened. Tr. 523. Counsel replied, however, that Tilley had no knowledge about their handling of Gatlin's statement. The only persons with such knowledge were the two defense attorneys and the prosecutor. The defense attorneys, however, elected not to testify so that they could continue working on the case. Tr. 525. They suggested no other remedy to the court, and the matter was ultimately dropped.

We conclude that the prosecutor's questioning of Gatlin was not designed to mislead the jury. *See United States v. Pinto,* 755 F.2d 150, 153 (10th Cir.1985) (quoting *United States v. Harris,* 542 F.2d 1283, 1307 (7th Cir.1976), *cert. denied,* 430 U.S. 934, 97 S.Ct. 1558, 51 L.Ed.2d 779 (1977)); *United States v. Silverstein,* 737 F.2d 864, 868 (10th Cir.1984). The prosecutor was simply eliciting from Gatlin an admission that he had not submitted to cross-examination prior to trial. The questioning did not refer to Gatlin's sworn

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statement or suggest recent fabrication. Even though the question had implied that the prosecutor was learning about Gatlin's story for the first time, defense counsel's statement in open court effectively rebutted that notion. Under these circumstances, we do not think the Government's questioning was prejudicial. *See United States v. James,* 728 F.2d 465, 467–68 (10th Cir.), *cert. denied,* 469 U.S. 826, 105 S.Ct. 106, 83 L.Ed.2d 50 (1984); *Marks v. United States,* 260 F.2d 377, 383 (10th Cir.1958), *cert. denied,* 358 U.S. 929, 79 S.Ct. 315, 3 L.Ed.2d 302 (1959).

[11] Similarly, we find no impropriety in the actions of the trial judge in question. The defendant points to the trial judge's two admonitions about the numerous bench conferences. The second remark was made at the bench and, hence, could not have influenced the jury. *See United* ***487** *States v. Worthington,* 698 F.2d 820, 827 (6th Cir.1983).

Nor do we attach any significance to the first remark. The comment was brief and did not indicate a belief in the defendant's guilt. *See United States v. Shelton,* 736 F.2d 1397, 1404 (10th Cir.), *cert. denied,* 469 U.S. 857, 105 S.Ct. 185, 83 L.Ed.2d 119 (1984). Similarly, we do not believe that the statement reflected a bias against defense counsel, for the judge had earlier denied a prosecutorial request for a bench conference in similar fashion. Tr. 266.

We find no error in these respects and feel that the admonitions to counsel were within the trial court's discretion. *United States v. Shelton,* 736 F.2d at 1404–05.

V

The claim of error by misstatement of law to the grand jury by the prosecuting attorney

The defendant complains of the refusal of the district court to dismiss the indictment because of a misstatement of law to the grand jury. The gist of the argument is that the prosecuting attorney advised the grand jury, in response to a question, that if one person procures another or causes him to do a particular act, then the person procuring such acts could be considered an aider and abettor even though he may not have known whether the other party used a particular means to commit the act. Brief of Appellant at 19–20.

[12] **[13]** We find no substance to the claim of error. Such an attempt to prevent trial by attacking alleged legal errors in the grand jury proceedings is generally rejected. An indictment returned by a legally constituted and unbiased grand jury, if valid on its face, is enough to call for trial of the charge on the merits. *Costello v. United States,* 350 U.S. 359, 363, 76 S.Ct. 406, 408, 100 L.Ed. 397 (1956); *United States v. Addington,* 471 F.2d 560, 568 (10th Cir.1973). The remedy of dismissal of indictment is an extraordinary one applied to insure proper standards of conduct by the prosecution. An indictment may be dismissed for prosecutorial misconduct so flagrant that there is some significant infringement on the grand jury's ability to exercise independent judgment. *United States v. Pino,* 708 F.2d 523, 530 (10th Cir.1983).

[14] **[15]** Challenges going only to the instructions given to the grand jury as to the elements of the offenses are not grounds for dismissal of an indictment that is valid on its face. *United States v. Addington,* 471 F.2d at 568. We likewise feel that the complaints made here would not justify dismissal of an indictment. Accordingly the claim of error is rejected.

VI

The sufficiency of the evidence

Finally, the defendant contends that the evidence was insufficient to support his convictions. With respect to this claim, we must examine the entire record in the light most favorable to the Government to determine whether there is evidence, direct and circumstantial, together with the reasonable inferences, from which a jury could have found the defendant guilty beyond a reasonable doubt. *United States v. Yates,* 470 F.2d 968, 970 (10th Cir.1972).

A.

The conspiracy charge

[16] Arguably, the testimony showed the existence of two conspiracies: that the defendant Buchanan and Elrod initially agreed that Elrod would burn Huffman's trailer and be paid for this job, and then that Elrod and Omstead conspired to manufacture and possess an unregistered firearm. Defendant says that taking the evidence in the best light for the Government, as to the defendant Buchanan, there was only a showing of a conspiracy to commit arson in violation of the Oklahoma Statutes (21 O.S.1981 §§ 421(A)(1) and

1402), but not of conspiracy to commit the federal offenses of manufacturing and possessing an unregistered firearm. *See United States v. Poulos,* 667 F.2d 939, 942 (10th Cir.1982); ***488** *see also Jordan v. United States,* 370 F.2d 126, 128 (10th Cir.1966) ("gist of a criminal conspiracy is an agreement to violate a law of the United States"), *cert. denied,* 386 U.S. 1033, 87 S.Ct. 1484, 18 L.Ed.2d 595 (1967).

We disagree. We feel that the two agreements constituted but one basic conspiracy. The attempted distinction between the two agreements is misleading, for the three men had the one basic objective of burning Huffman's trailer. Tr. 125–30, 236–37. The use of an explosive was merely one facet of the scheme. Moreover, even if the defendant did not agree to the method, he remains an integral member of the conspiracy. *See United States v. Parnell,* 581 F.2d 1374, 1382 (10th Cir.1978). In *United States v. Johnson,* 645 F.2d 865, 868 n. 2 (10th Cir.1981), we stated:

> [T]he conviction of a co-conspirator may be sustained upon a sufficient showing of the plan and the individual's connection with it. It is not necessary that each member of the conspiracy know all of the details or be acquainted with all of the parties to the illegal scheme, as long as he is aware of its general scope.

See also Blumenthal v. United States, 332 U.S. 539, 557, 68 S.Ct. 248, 256, 92 L.Ed. 154 (1947) (conspiracy conviction does not require proof that defendant knew all of its details).

We note that there is evidence in the record that the defendant Buchanan did anticipate the use of some sort of destructive device. Kathy Bunch testified that the defendant had paid Elrod for a job involving "something like [the] flick of a light switch and then blow something." Tr. 319. Furthermore, after Elrod and Omstead destroyed the trailer with the device, the defendant paid them the balance of their "fee." Tr. 157. The next day the defendant paid an additional $200 and congratulated them on doing a "good job." Tr. 160, 243, 257–58.

In sum, the evidence supports the inference of a conspiracy including the manufacture and possession of a "destructive device" in violation of § 5861.

B.

The substantive offenses

[17] We also hold that the evidence was sufficient to support the convictions on the substantive counts. The Government bore the burden of proving that the defendant knowingly manufactured and possessed an unregistered firearm in violation of 26 U.S.C. § 5861(d) & (f) (1982); *see United States v. Freed,* 401 U.S. 601, 607, 91 S.Ct. 1112, 1117, 28 L.Ed.2d 356 (1971).

Since the defendant did not personally handle the device, the Government proceeded on a theory by its proof that the defendant induced or procured the commission of the offenses. *See* 18 U.S.C. § 2(a) (1982) ("[w]hoever commits an offense against the United States or ... induces or procures its commission, is punishable as a principal"). We feel that the proof was sufficient under this theory to support the substantive convictions. The evidence showed the actions of defendant Buchanan in inducing and procuring the criminal venture, and we have noted the evidence which would support an inference of his realizing that there would be a destructive device used. *See United States v. Poulos,* 667 F.2d 939, 942 (10th Cir.1982) ("common knowledge that gasoline is highly combustible and capable of exploding"); *United States v. Beldin,* 737 F.2d 450, 453–54 (5th Cir.1984) ("common knowledge ... that gasoline, when ignited, not only burns but may explode"). [11]

***489 VII**

We conclude that the defendant has not demonstrated any reversible error and the judgment on the charges is accordingly

AFFIRMED.

All Citations

787 F.2d 477, 20 Fed. R. Evid. Serv. 402

Footnotes

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* The Honorable William E. Doyle heard the argument of the appeal but has not participated in this matter since December 31, 1985.

1 This statute provides in pertinent part: "It shall be unlawful for any person ... (d) to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record; or ... (f) to make a firearm in violation of the provisions of this chapter...." 26 U.S.C. § 5861(d) & (f) (1982).

2 We addressed a similar situation in *United States v. Wilburn,* 549 F.2d 734 (10th Cir.1977). In *Wilburn,* a prospective juror stated during voir dire that his wife had been victimized by arson and that the defendant had been released although the judge and both lawyers knew that he was guilty. The trial court excused the individual and admonished the panel to disregard his statement. *Id.* at 738. We held that the trial court acted within its discretion in refusing to strike the entire panel. *Id.* at 739.

3 The first incident took place in the trailer about a year earlier. Tr. 86–87. The defendant quarrelled with his step-daughter and began to spank her. Huffman intervened, telling him to stop "because she wasn't his and he didn't support her and he was not going to whip her, not in [Huffman's] house." Tr. 87–88. According to Huffman, the defendant stopped and left the house. Tr. 88.

The second incident occurred about three months before the fire. Tr. 67, 89. Whitten had checked into a local hospital to have a tubal ligation. Tr. 67, 89. The defendant rushed to her room, arguing with the two women in an effort to stop the operation. Tr. 69, 90. After Huffman told the defendant to leave, he held up a roll of money and said "I've got you right here." Tr. 69, 90.

About a month later, the defendant told Whitten: "I love you and I'm going to get to you through someone you love." Tr. 66.

4 Rule 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Fed.R.Evid. 404(b).

5 In his brief, the defendant asserts that the acts took place more than one year before the fire. He cites no examples, however, and we have found none in the record. On one occasion, the Government began to introduce testimony about an incident that occurred some three years before the fire. Tr. 83–84. The trial court, however, promptly instructed the prosecution to discontinue this line of questioning, reasoning that the incident was too remote. Tr. 84. Similarly, Elrod testified that Buchanan had once asked him to vandalize Whitten and Huffman's gas tanks. Tr. 164. No time period was fixed, however, and the defendant did not object. Tr. 164.

6 The National Firearms Act prohibits the manufacture or possession of an unregistered "firearm." 26 U.S.C. § 5861(d) & (f) (1982); *see supra* note 1. The term "firearm" is defined in § 5845. Subsection (a) states that the term includes any "destructive device." 26 U.S.C. § 5845(a) (1982). Subsection (f) defines the term "destructive device." It includes "any explosive [or] incendiary ... (A) bomb, (B) grenade, ... or (F) similar device," as well as "any combination of parts either designed or intended for use in converting any device into a destructive device ... and from which a destructive device may be readily assembled." 26 U.S.C. § 5845(f) (1982). This subsection contains a caveat: "The term 'destructive device' shall not include any device which is neither designed nor redesigned for use as a weapon...." 26 U.S.C. § 5845(f) (1982).

7 Federal officers have given this type of testimony in other cases involving statutory classifications of firearms. *See, e.g., United States v. Mann,* 712 F.2d 941, 942 (4th Cir.1983) (per curiam) (Government expert testified that the alleged weapon was a "machine gun" under 26 U.S.C. § 5845(b)); *United States v. Neal,* 692 F.2d 1296, 1300 (10th Cir.1982) (law enforcement officer with the Bureau of Alcohol, Tobacco and Firearms testified that the alleged weapons were "firearms" under 26 U.S.C. § 5845(a)); *United States v. Hernandez,* 668 F.2d 824, 829 (5th Cir.1982) (Customs Service Agent identified the alleged weapon as a "machine gun" under 26 U.S.C. § 5845(b)); *United States v. Hewitt,* 663 F.2d 1381, 1389 (11th Cir.1981) (Government's expert testified that the alleged weapon was an "explosive" under 18 U.S.C. § 844(h)); *United States v. Markley,* 567 F.2d 523, 525 (1st Cir.1977) (officer with the Bureau of Alcohol, Tobacco and Firearms testified that the alleged weapons were "explosive bombs" under 26 U.S.C. § 5845(f)), *cert. denied,* 435 U.S. 951, 98 S.Ct. 1578, 55 L.Ed.2d 801 (1978); *United States v. Peterson,* 475 F.2d 806, 809–810 (9th Cir.) (Treasury Department official testified that the alleged weapon was an "incendiary device" within the coverage of 26 U.S.C. § 5845(f)), *cert. denied,* 414 U.S. 846, 94 S.Ct. 111, 38 L.Ed.2d 93 (1973); *United States v. Fisher,* 353 F.2d 396, 397 (5th Cir.1965) (Government officer testified that weapon was a "pistol" under 26 U.S.C. § 5848). Apart from *Bryan* and *McCauley,* however, the courts of appeals have rarely addressed the propriety of such testimony.

8 The court stated as follows:

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> The rule of exclusion has been asked for by counsel, which means that he has asked that all witnesses who are not presently testifying will need to leave the courtroom, anybody who is here who is going to be a witness will have to leave the courtroom. The reason for that is so that no one accidentally adopts the testimony of any other witness. I think it's a good rule.
>
> You gentlemen will be responsible for seeing that none of your witnesses are here in the courtroom during the trial.
>
> Tr. 57.

9 Rule 615 provides:

> **Exclusion of Witnesses**
>
> At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of his cause.

10 The previous day, the Government had completed its direct examination of Elrod before the lunch recess. *See* Tr. 167. After lunch the defense began its cross-examination, and the Government then called Omstead to the stand. Tr. 167. Bunch testified that the conversation had occurred before Elrod or Omstead testified, although she "thought" it was after lunch, Tr. 333–34. The prosecution probed the matter further in its questioning of a deputy United States marshal and the Government's case agent. The deputy marshal testified that Bunch did not visit Omstead or Elrod during the lunch recess the previous day, Tr. 355, and the agent said that the conversation occurred before Elrod or Omstead had testified, Tr. 346.

We do not think the timing of the conversation relevant to our decision. In either event, the conversation clearly occurred after the defendant's invocation of the sequestration rule. Tr. 57.

11 Of course, the defendant might have expected Elrod to start the fire with just gasoline and matches, without the help of a mechanism to delay ignition. Such a method is so dangerous, however, that we regard this possibility as relatively insignificant. Two arson experts have explained: "Frequently a match is struck by the arsonist, but only the juvenile arsonists and the pyros—the mental cases—seem to favor this method. Other fire-setters want some delay, so they adapt the ordinary match to some timing mechanism." B. Battle & P. Weston, *Arson: A Handbook of Detection and Investigation* 20 (1954).

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KeyCite Yellow Flag - Negative Treatment
Rejected by U.S. v. Curtis, 6th Cir.(Ky.), January 28, 1986

607 F.2d 92
United States Court of Appeals,
Fifth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Dorothy R. GARBER, Defendant-Appellant.

No. 78-5024.
|
Nov. 19, 1979.

Defendant was convicted in the United States District Court for the Southern District of Florida, Charles B. Fulton, J., of one count of a three-count indictment charging income tax evasion arising from defendant's failure to report funds received by her for the sale of her blood plasma. On appeal, the Court of Appeals, Ainsworth, Circuit Judge, 589 F.2d 843, affirmed. On rehearing en banc, the Court of Appeals, Charles Clark, Circuit Judge, held that failure of district court to permit experts for Government and defense to testify as to controversy which existed as to taxability of receipt of such funds and district court's refusal to instruct jury that reasonable misconception of tax law on defendant's part would negate necessary intent for crime rendered defendant's trial fundamentally unfair.

Reversed and remanded.

James C. Hill, Circuit Judge, concurred specially and filed opinion.

Ainsworth, Circuit Judge, dissented and filed opinion in which Godbold, Tjoflat and Alvin B. Rubin, Circuit Judges, joined.

Tjoflat, Circuit Judge, dissented and filed opinion in which Ainsworth and Alvin B. Rubin, Circuit Judges, joined.

West Headnotes (8)

[1] Internal Revenue
Evasion of Taxes, Weight and Sufficiency

In prosecution for felony of willful evasion of income taxes, Government has burden of proving every element of crime beyond reasonable doubt, including proof of tax deficiency, an affirmative act constituting evasion or attempted evasion of tax due, and willfulness. 26 U.S.C.A. (I.R.C.1954) § 7201.

1 Cases that cite this headnote

[2] Criminal Law
Miscellaneous Matters

Internal Revenue
Instructions

In income tax evasion prosecution arising from defendant's failure to report funds received by her from the sale of her blood plasma, failure of district court to permit experts for Government and defense to testify as to controversy which existed as to taxability of receipt of such funds and district court's refusal to instruct jury that reasonable misconception of tax law on defendant's part would negate necessary intent for crime rendered defendant's trial fundamentally unfair. 26 U.S.C.A. (I.R.C.1954) § 7201.

39 Cases that cite this headnote

[3] Internal Revenue
Attempts to Evade or Defeat Tax

A tax return is not criminally fraudulent simply because it is erroneous. 26 U.S.C.A. (I.R.C.1954) § 7201.

Cases that cite this headnote

[4] Internal Revenue
Willfulness, Intent or Knowledge

Willfulness is an essential element of crime of income tax evasion and, as such, Government must prove beyond reasonable doubt that defendant willfully and intentionally attempted to evade and defeat income taxes for each year in question by filing with IRS tax returns which she knew were false. 26 U.S.C.A. (I.R.C.1954) § 7201.

7 Cases that cite this headnote

[5] Internal Revenue
Willfulness, Intent or Knowledge

To sustain conviction for income tax evasion, it is not enough to show merely that a lesser tax was paid than was due, nor is a negligent, careless, or unintentional understatement of income sufficient; Government must demonstrate that defendant willfully concealed and omitted from her return income which she knew was taxable. 26 U.S.C.A. (I.R.C.1954) § 7201.

10 Cases that cite this headnote

[6] Internal Revenue
Admissibility of Evidence

When taxability of unreported income is problematic as a matter of law, unresolved nature of law is relevant to show that defendant in income tax evasion prosecution may not have been aware of tax liability or may have simply made an error in judgment. 26 U.S.C.A. (I.R.C.1954) § 7201.

13 Cases that cite this headnote

[7] Internal Revenue
Admissibility of Evidence

For purposes of income tax evasion prosecution, relevancy of dispute in tax law does not depend on whether defendant actually knew of conflict. 26 U.S.C.A. (I.R.C.1954) § 7201.

4 Cases that cite this headnote

[8] Internal Revenue
Attempts to Evade or Defeat Tax

Criminal proceeding for income tax evasion is an inappropriate vehicle for pioneering interpretations of tax law. 26 U.S.C.A. (I.R.C.1954) § 7201.

3 Cases that cite this headnote

Attorneys and Law Firms

***93** Samuel S. Forman, Hollywood, Fla., Lawrence R. Metsch, Stanley A. Beiley, Miami, Fla. (co-counsel), for defendant-appellant.

Marsha L. Lyons, Asst. U. S. Atty., Miami, Fla., Charles E. Brookhart, Daniel F. Ross, Attys., Dept. of Justice, Tax Div., Washington, D.C., for plaintiff-appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before BROWN, Chief Judge, and COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, CHARLES CLARK, RONEY, GEE, TJOFLAT, HILL, FAY, RUBIN, VANCE and KRAVITCH, Circuit Judges. *

Opinion

CHARLES CLARK, Circuit Judge:

Dorothy Clark Garber was indicted for willfully and knowingly attempting to evade a portion of her income tax liability for the years 1970, 1971, and 1972 by filing a false and fraudulent income tax return on behalf of herself and her husband. A jury found her innocent of the charges for 1970 and 1971 but convicted her under 26 U.S.C.A. s 7201 for knowingly misstating her income on her 1972 tax return. She was sentenced to 18 months imprisonment all but 60 days of which was suspended placed on probation for 21 months, and fined $5,000 exclusive of any civil tax liability. The taxability of the money received by Garber presents a unique legal question. Because of trial errors which deprived defendant of her defense on the element of willfulness, we reverse the conviction.

Some time in the late 1960's after the birth of her third child, Dorothy Garber was told that her blood contained a rare antibody useful in the production of blood group typing serum. Dade Reagents, Inc. (Dade Reagents), a manufacturer of diagnostic reagents used in clinical laboratories and blood banks, had made the discovery and in 1967 induced her to enter into a contract for the sale of her blood plasma. By a technique called plasmapheresis, a pint of whole blood was extracted from her arm, plasma was centrifugally separated, and the red cells were returned to her body. The process was then repeated. The two bleeds ***94** produced one pint of plasma from two pints of blood, and took a total of from one and a half to two and a half hours.

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Plasmapheresis is often preceded by a stimulation of the donor whereby the titre or concentration of the desired antibody in the blood is artifically increased by an injection of an incompatible blood type. Both stimulation and plasmapheresis are accompanied by pain and discomfort and carry the risks of hepatitis and blood clotting.

In exchange for Garber's blood plasma, Dade Reagents agreed to pay her for each bleed on a sliding scale dependent on the titre or strength of the plasma obtained. Dade Reagents then marketed the substance for the production of blood group typing serum.

Because Garber's blood is so rare she is one of only two or three known persons in the world with this antibody she was approached by other laboratories which lured her away from Dade Reagents by offering an increasingly attractive price for her plasma. By 1970, 1971, and 1972, the three years covered in the indictment, she was receiving substantial sums of money in exchange for her plasma.[1] For two of those years she was selling her blood under separate contract to Associated Biologicals, Inc. (Associated) and to Biomedical Industries, Inc. (Biomedical), in both cases receiving in exchange a sum of money dependent on the strength of the antibody in each unit sold. In addition, Biomedical offered a weekly salary of $200, provided a leased automobile, and in 1972 added a $25,000 bonus. In that last year Garber sold her plasma to Biomedical exclusively, producing the coveted body fluid as often as six times a month.

For all three years involved, Biomedical had treated the regular $200 weekly payments as a salary subject to withholding taxes and provided Garber with a yearly W-2 form noting the taxes withheld. Every year, Garber attached those W-2 forms to her income tax return (which was filed jointly with her husband whom she has since divorced), declared the $200 per week as income, and paid the taxes due. All other payments, both from Biomedical and from Associated, had been paid directly to defendant by check. No income taxes were withheld by the companies; she received no W-2 forms, and paid no taxes on the money received. Biomedical did, however, file a Form 1099 Information Return with the IRS which showed a portion of Garber's donor fees not subject to withholding. Garber was provided a copy of each 1099, which plainly states that it is for information only and is not to be attached to the income tax return. She had never before received Information Returns, and, while she was receiving checks from both Biomedical and Associated, only Biomedical provided this information.

[1] In this prosecution for the felony of willful evasion of income taxes the government had the burden of proving every element of the crime beyond a reasonable doubt. Holland v. United States, 348 U.S. 121, 75 S.Ct. 127, 99 L.Ed. 150 (1954); United States v. England, 347 F.2d 425 (7th Cir. 1965). This required proof of a tax deficiency, an affirmative act constituting evasion or attempted evasion of the tax due, and willfulness. Sansone v. United States, 380 U.S. 343, 85 S.Ct. 1004, 13 L.Ed.2d 882 (1965); United States v. Callahan, 588 F.2d 1078 (5th Cir. 1979); United States v. Buckley, 586 F.2d 498 (5th Cir. 1978). The element we find lacking here was willfulness.

At trial, outside the presence of the jury, the government proffered the testimony of Jacquin Bierman, a professor of law and practicing attorney in the City of New York, who stated his opinion that Garber had made available her bodily functions or products for a consideration which constituted taxable gross income. His conclusion was based on section 61(a) of the Internal Revenue Code (Code) which defines gross income as

> ***95** all income from whatever source derived, including (but not limited to) the following items:
>
> (1) Compensation for services, including fees, commissions, and similar items;
>
> (3) Gains derived from dealings in property;

26 U.S.C.A. s 61(a). While admitting that this case is the first of its kind, Bierman opined that if the exchanges were considered the sale of a product, there would be no tax basis or original cost for the product sold, and the entire sales price would constitute gain subject to tax under section 61(a) (3). Alternatively, he considered categorizing the transactions as the rendition of a service, in which case he was of the opinion that the entire sales price similarly would be fully taxable under section 61(a)(1).

The defense proffered to the court the testimony of Daniel Nall, a Certified Public Accountant and former revenue agent, who concluded that the money received by Garber was not within the legal definition of income in section 61(a) and that she had therefore participated in tax-free exchanges. He patterned his reasoning on early case law resting on Doyle v. Mitchell Brothers, 247 U.S. 179, 38 S.Ct. 467, 62 L.Ed. 1054

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(1918), which held that funds obtained by the conversion of capital assets and which represented only the actual value of such assets was not taxable income. According to Nall, the Attorney General in a 1918 opinion considered the human body a kind of capital asset. Following the reasoning in Doyle, the opinion held that the proceeds of an accident insurance policy were not subject to tax because the proceeds of the insurance policy represented a conversion of the capital loss which the injured taxpayer had suffered. Nall mentioned similar opinions finding settlements received for personal injury not taxable income. Eventually the Code was amended to include a specific provision covering the tax consequences of compensation for injuries or sickness. [2] Nevertheless, Nall explained, the theory has reappeared in situations involving the exchange of something so personal that its value is not susceptible to measurement. In these transactions such as property settlements in divorce actions or damage awards for alienation of affection or for defamation of character the value received is deemed equal to the value given, resulting in no taxable gain. Nall compared blood plasma, a part of the body which no one can value, and concluded that it too must be worth its market value. He therefore reasoned that its exchange produces no gain.

The district court heard the testimony of these two experts but refused to admit either opinion in the evidence which went to the jury because it considered the question of taxability to be one of law for the court and not the jury to decide. However, the court did permit the government to introduce testimony by an Internal Revenue Service agent who qualified as an expert in the field of accounting and taxation. This agent offered his opinion that additional taxable income was due but not reported in the years in question. His testimony was received over defense objection that it was based on his conclusion that the compensation received was income and taxable. During cross examination, the witness conceded that the taxability of money received ***96** for giving up a part of one's body is a unique and undecided question in tax law. He also agreed that money received as a return on a capital product is not subject to tax. Yet, he based his calculations on his opinion that the blood plasma donations here were taxable personal services. His view was, in turn, based solely on a Revenue Ruling which declared donations of whole blood to be a service for purposes of determining the deductibility of a charitable contribution. The court sustained objections to the relevancy of further inquiry regarding the nature or value of blood plasma.

The defense argued to the court that the expert testimony of Daniel Nall should be presented to the jury to rebut the government's expert IRS agent, to show that doubt existed as to whether a tax was due because it was incapable of being computed, and to demonstrate the vagueness of the law, which would preclude a willful intent to violate it. The court recognized that Nall's theory could be relevant to its judicial resolution of the legal conflict. It ruled however that since Nall had never discussed his opinion of the law with the defendant, it had no relevancy to the fact issue of Garber's intent. The jury never heard the testimony. It did, however, hear considerable factual evidence relating to Garber's actual intent. [3]

After hearing all the evidence, the court ruled as a matter of law that the moneys Garber received for her blood plasma, whether considered a personal service or a product, were income subject to federal income taxation. Consistent with that ruling the jury was instructed that the funds Garber received from the sale of her blood plasma were taxable income. The court also instructed the jury extensively on good faith and willfulness but refused the instructions requested by defense to the effect that a misunderstanding as to defendant's liability for the tax is a valid defense to the charge of income tax evasion, saying:

> I have said over and over again (to the jury) that she must act willfully, knowingly and willfully, in an effort to evade and defeat a tax by filing a false return, and that tells it all as far as I am concerned. This business about doubt and all these debatable things I have listened to around here for several days, and I'm not going to charge the jury that way, so as to confuse them. I think that would do more harm than good, and I think it would be error.

***97** We hold that the combined effect of the trial court's evidentiary rulings excluding defendant's proffered expert testimony and its requested jury charge prejudicially deprived the defendant of a valid theory of her defense. No court has yet determined whether payments received by a donor of blood or blood components are taxable as income. If, as the government contends, by subjecting herself to the plasmapheresis process Garber has performed a service, her compensation would be taxable under section 61(a)(1) of the Code. In some ways, Garber's activity does resemble work:

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artificial stimulation, which is not a necessary prerequisite to plasma extraction, causes nausea and dizziness; the ordeal of plasmapheresis can be extremely painful if a nerve is struck, can cause nausea, blackouts, dizziness and scarring, and increases the risks of blood clotting and hepatitis. These efforts of production may logically compare to the performance of a service.

On the other hand, blood plasma, like a chicken's eggs, a sheep's wool, or like any salable part of the human body, is tangible property which in this case commanded a selling price dependent on its value. The amount of Garber's compensation for any given pint of plasma was directly related to the strength of the desired antibodies. The greater their concentration, the more she was paid; her earnings were in no way related to the amount of work done, pain incurred, or time spent producing one pint of plasma.

Of course, the product/service distinction is relevant only if the sale of the product results in no taxable gain. The experts testifying for both parties here concede that section 61(a)(3) includes in income only the profit gained through the sale or conversion of capital assets. They do not, however, agree on the computation of gain, because they differ in their theories as to how the value of the product before its sale is to be established. The cost of Garber's blood plasma, containing its rare antibody, cannot be mathematically computed by aggregating the market cost of its components such as salt and water. That would be equivalent to calculating the basis in a master artist's portrait by costing the canvas and paints. No evidence of any original cost exists in the case of Garber's unusual natural body fluid.

[2] In such a situation it may well be that its value should be deemed equal to the price a willing buyer would pay a willing seller on the open market. See United States v. Davis, 370 U.S. 65, 82 S.Ct. 1190, 8 L.Ed.2d 335 (1962); Bar L Ranch, Inc. v. Phinney, 426 F.2d 995 (5th Cir. 1970); Raytheon Production Corp. v. CIR, 144 F.2d 110 (1st Cir.), Cert. denied, 323 U.S. 779, 65 S.Ct. 192, 89 L.Ed. 622 (1944); Farmers' & Merchants' Bank v. CIR, 59 F.2d 912 (6th Cir. 1932). If this were the proper basis, the exchange would be a wash resulting in no tax consequences. However, we need not and do not undertake the complex task of resolving what the law should be, nor is it necessary to decide whether, as the trial court concluded, the question is purely one of law for the court and not the jury to resolve. Rather, because the district court refused to permit Bierman, the expert for the government, and Nall, the expert for the defense, to testify and because it reserved to itself the job of unriddling the tax law, thus completely obscuring from the jury the most important theory of Garber's defense that she could not have willfully evaded a tax if there existed a reasonable doubt in the law that a tax was due her trial was rendered fundamentally unfair.

[3] **[4]** **[5]** A tax return is not criminally fraudulent simply because it is erroneous. Willfulness is an essential element of the crime charged. As such, the government must prove beyond a reasonable doubt that the defendant willfully and intentionally attempted to evade and defeat income taxes for each year in question by filing with the IRS tax returns which she knew were false. United States v. Pomponio, 429 U.S. 10, 97 S.Ct. 22, 50 L.Ed.2d 12 (1976); United States v. Bishop, 412 U.S. 346, 93 S.Ct. 2008, 36 L.Ed.2d 941 (1973). It is not enough to show merely that a lesser tax was paid than was due. Nor is a negligent, careless, or unintentional understatement of income ***98** sufficient. Holland v. United States, 348 U.S. 121, 75 S.Ct. 127, 99 L.Ed. 50 (1954); United States v. Murdock, 290 U.S. 389, 54 S.Ct. 223, 78 L.Ed. 381 (1933); United States v. Pechenik, 236 F.2d 844 (3d Cir. 1956). The government must demonstrate that the defendant willfully concealed and omitted from her return income which she knew was taxable.

[6] **[7]** When the taxability of unreported income is problematical as a matter of law, the unresolved nature of the law is relevant to show that defendant may not have been aware of a tax liability or may have simply made an error in judgment. Nordstrom v. United States, 360 F.2d 734 (8th Cir.), Cert. denied, 385 U.S. 826, 87 S.Ct. 59, 17 L.Ed.2d 63 (1966); United States v. Bridell, 180 F.Supp. 268 (N.D.Ill.1960). Furthermore, the relevance of a dispute in the law does not depend on whether the defendant actually knew of the conflict. In United States v. Critzer, 498 F.2d 1160 (4th Cir. 1974), the Fourth Circuit reversed a criminal tax fraud conviction against an Eastern Cherokee Indian who failed to report a portion of her income derived from land held by the United States in trust for the Eastern Cherokee Band. The evidence clearly established that the underreporting was intentional. Whether the income was taxable, however, was a disputed question dependent on the interpretation of certain land allotment statutes, which the court did not resolve. Instead, it reversed the conviction because of the absence of authority definitively governing the situation. The court's language is particularly apt here:

> As a matter of law, defendant cannot be guilty of willfully evading and defeating income taxes on income, the

> taxability of which is so uncertain that even co-ordinate branches of the United States Government plausibly reach directly opposing conclusions. As a matter of law, the requisite intent to evade and defeat income taxes is missing. The obligation to pay is so problematical that defendant's actual intent is irrelevant. Even if she had consulted the law and sought to guide herself accordingly, she could have had no certainty as to what the law required.

498 F.2d at 1162 (emphasis added).

Critzer differs from this case in that the defendant there had been advised by the Bureau of Indian Affairs that the income received from the transactions on the Reservation was exempt from taxation. The fact that Garber did not have the benefit of such official advice does not persuade us that the result here should be different. The Critzer court did not so limit its holding:

> It is settled that when the law is vague or highly debatable, a defendant actually or imputedly lacks the requisite intent to violate it.

498 F.2d at 1162. To hold otherwise would advocate convicting an unsophisticated taxpayer who failed to seek expert advice as to whether certain income was taxable while setting free a wise taxpayer who could find advice that taxes were not due on the identical type of debatably taxable income.

That Critzer was not decided on the basis of the defendant's actual intent is further evidenced by the reasoning of the court and its reliance on James v. United States, 366 U.S. 213, 81 S.Ct. 1052, 6 L.Ed.2d 246 (1961). In James, the Supreme Court put to rest a dispute over the taxability of embezzled funds. Fifteen years before James, the Court had held such funds non-taxable. CIR v. Wilcox, 327 U.S. 404, 66 S.Ct. 546, 90 L.Ed. 752 (1946). Subsequently a realigned Court undermined the viability of Wilcox by deciding that extortion money was taxable, distinguishing Wilcox on tenuous grounds. Rutkin v. United States, 343 U.S. 130, 72 S.Ct. 571, 96 L.Ed. 833 (1952). When the taxability of embezzled funds again reached the Court in James, it decided that Rutkin had in effect overruled Wilcox and that embezzled monies were taxable. Nevertheless, the court reversed James' conviction for willfully failing to report embezzled funds in violation of section 7201 because of the uncertainty of the law created by Wilcox. Significantly, neither James nor the cases following James required actual reliance on Wilcox to negate ***99** willful intent.[4] Kahr v. CIR, 414 F.2d 621 (2d Cir. 1969); United States v. Dawson, 400 F.2d 194 (2d Cir. 1968); Cert. denied, 393 U.S. 1023, 89 S.Ct. 632, 21 L.Ed.2d 567 (1969); Nordstrom v. United States, 360 F.2d 734 (8th Cir. 1966), cert. denied, 385 U.S. 826, 87 S.Ct. 59, 17 L.Ed.2d 63 (1966). As noted in Critzer :

> the uncertainty created by Wilcox as a matter of law precluded a demonstration of "willfulness," without regard to the defendant's actual state of mind with respect to his knowledge or reliance on Wilcox.
> 498 F.2d at 1163.

Both Critzer and James involved disagreements among recognized authorities which were more clearly documented than the theories presented here. James involved conflicting Supreme Court decisions, and in Critzer the Bureau of Indian Affairs and the Internal Revenue Service strongly disagreed on the taxability of the income. In the case presently before us, as conceded by all the experts who testified, there is a dearth of authority directly supporting either argument. However, the fact that the question has never before evoked anything more than theories on either side adds to rather than detracts from the critical conflict upon which defendant's criminal liability hinges. Neither position is frivolous, and the fact that both are urged without clear precedential support in law demonstrates that the court should not have restricted the evidence or instructed as it did.

The tax treatment of earnings from the sale of blood plasma or other parts of the human body is an uncharted area in tax law. The parties in this case presented divergent opinions as to the ultimate taxability by analogy to two legitimate theories in tax law. The trial court should not have withheld this fact, and its powerful impact on the issue of Garber's willfulness, from the jury. Morissette v. United States, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952); United States v. Pomponio, 563 F.2d 659 (4th Cir. 1977). In a case such as this where the element of willfulness is critical to the defense, the defendant is entitled to wide latitude in the introduction of evidence tending to show lack of intent. United States v. Brown, 411 F.2d 1134 (10th Cir. 1969); Petersen v. United States, 268 F.2d 87 (10th Cir. 1959); Miller v. United States, 120 F.2d 968 (10th Cir. 1941). The defendant testified that she

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subjectively thought that proceeds from the sale of part of her body were not taxable. By disallowing Nall's testimony that a recognized theory of tax law supports Garber's feelings, the court deprived the defendant of evidence showing her state of mind to be reasonable.

This error was compounded by the court's instructions to the jury which took from them the question of the validity of the tax. In effect, the court adopted the government's position that a tax was owing as a matter of law. Garber admitted receiving unreported money and disclosed its source; the defense in this case rested entirely on a denial of the necessary criminal intent to evade taxes. The court erred by refusing to instruct the jury that a reasonable misconception of the tax law on her part would negate the necessary intent. See Morissette v. United States, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952); ***100** Mann v. United States, 319 F.2d 404 (5th Cir. 1963); United States v. Tadio, 223 F.2d 759 (2d Cir. 1955); Wardlaw v. United States, 203 F.2d 884 (5th Cir. 1953). By withholding this theory, the court left the jury with the impression that a tax was clearly due and that Garber simply refused to pay it.[5] A panel of this court in United States v. McClain, 593 F.2d 658 (5th Cir. 1979), recently reached a similar conclusion when criminal liability for importing stolen Mexican artifacts depended on an interpretation of complicated, uncertain, and changing Mexican law declaring national ownership of artifacts. At the first trial, the district court heard In camera expert testimony interpreting the Mexican Constitution and relevant statutes, and instructed the jury on its determination of the foreign law. On appeal this was held to be error and the case remanded:

> The court's instruction that the Mexican government had owned the artifacts for over seventy-five years was highly prejudicial to the defendants. It could have been the decisive factor in the jury's inferring that the defendants must have known that the artifacts in question were stolen. United States v. McClain, 545 F.2d 988, 1000 (5th Cir. 1977). The second trial was replete with historians, professors, and others expressing their views on the changing Mexican laws, based for the most part on independent review of the Mexican Constitution and relevant statutes. After hearing all the experts, the jury was given the task of first deciding whether and when Mexico actually enacted national ownership of the artifacts, and then determining the defendants' guilt based on that law. The defendants were convicted. Despite the "near overwhelming" evidence of guilt and intent to violate the law, the panel reversed the substantive convictions
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> > because the most likely jury construction of Mexican law upon the evidence at trial is that Mexico declared itself owner of all artifacts at least as early as 1897. And under this view of Mexican law, we believe the defendants may have suffered the prejudice of being convicted pursuant to laws that were too vague to be a predicate for criminal liability under our jurisprudential standards.
>
> 593 F.2d at 670.

[8] Similarly in the case before us, the government presented persuasive evidence showing that the defendant knowingly and willfully evaded her taxes. She received a significant amount of money over a three year period, but reported none of it. The proof also showed that those with whom she dealt advised her that they thought the proceeds were taxable. Nevertheless, the tax question was completely novel and unsettled by any clearly relevant precedent. A criminal proceeding pursuant to section 7201 is an inappropriate vehicle for pioneering interpretations of tax law. The conviction is reversed and the cause is remanded for retrial.

REVERSED and REMANDED.

JAMES C. HILL, Circuit Judge, specially concurring:
Because I conclude that the transactions under investigation constituted services and the income derived therefrom taxable under 61(a)(1), I should have preferred that the court say so in positive terms. The question would thus cease to be a novel one for those considering it in the future.

It was a novel question when it arose here, however, and the defendant should have been permitted to demonstrate its novelty, not so that the jury could pass upon the tax consequences of the transactions, but so that the jurors could better determine the question of willfulness. The case should be sent back for retrial with the willfulness issue determined upon consideration of all the evidence.

I take it that, at some length, the majority winds up by doing just that. So, I concur.

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***101** AINSWORTH, Circuit Judge, with whom GODBOLD, TJOFLAT and ALVIN B. RUBIN, Circuit Judges, join, dissenting:

This dissent to the majority opinion is made on the basis of two principal issues involved in the trial in district court. The first of these follows.

> 1) Did the trial judge err in ruling, as a matter of law, that the income derived by defendant Garber was taxable?

The majority's statement of the facts is fairly complete, but a brief additional review of the evidence taken in light of the jury's guilty verdict is warranted. Plasmapheresis, the process in which appellant Garber was involved as a blood donor, is painful but does not result in permanent injury, since the body regenerates the removed plasma. Further, it is undisputed that appellant received large amounts of money for her plasma during the taxable years in question and that she did not report these amounts as income. The record demonstrates a continuing escalation in the amount received by appellant for her bleeds. Originally paid $200 per bleed, appellant increased that figure to $1,600 per bleed plus fringe benefits and a weekly salary of $200.

The evidence bearing on her intent to evade taxes is substantial. In her first engagement with Dade Reagents, Inc., appellant was advised by company officials on the tax consequences of her receipts. In accordance with that advice, a savings account was established in appellant's name for the purpose of creating a fund to cover her income tax liability. One quarter of the money paid for the bleeds was deposited by Dade into the savings account in Garber's name. Checks from Dade to appellant bore the notation "less accrual for taxes," that is, for the amount placed in the savings account. Appellant did not pay those funds, accrued for taxes, to the Government, but withdrew them for her personal use. Later, while employed by another company, appellant received a weekly salary which was declared by her as income. Appellant performed no services for the company beyond that as a plasma donor. Defendant Garber testified in her own defense that she did not think the funds were taxable since they were obtained by giving up something from her body. However, appellant was not told by any official of the Internal Revenue Service that the funds were not taxable, nor did she seek IRS advice in that regard. Moreover, appellant never sought any professional advice from a lawyer or an accountant on the taxability of the income. [1]

The majority opinion does not resolve the issue of whether defendant Garber's income as a blood donor was taxable but seemingly avoids a clear decision in this regard. It is true that considerable doubt is cast by the opinion on the taxability of the income. If, however, it is the majority's real view that the income was not taxable, it seems the opinion should say so and dismiss the indictment. However, the conviction is reversed ***102** and the case remanded for a retrial, a conclusion which thereby impliedly decides that defendant Garber's income was taxable though it holds that the question of willfulness was not properly submitted to the jury by the district court.

It is our view that defendant Garber's income was taxable and that Judge Fulton correctly ruled, as a matter of law, that it was. Further, his instruction to the jury that the income was taxable and withdrawal of that issue from the jury was a correct trial ruling.

Unfortunately, under the majority opinion, when the case goes back to Judge Fulton for retrial, he will be unable to tell from the majority opinion whether he correctly ruled that defendant Garber's income was taxable. The trial court should not be left in such a dilemma.

The primary legal issue involved in this matter is the construction of section 61 of the Internal Revenue Code, the basic provision of which states that "gross income means all income from whatever source derived." [2] The case law has often considered the reach of section 61 and its statutory predecessors in early versions of the Code. In adopting the income provision of the Code, Congress intended "to use the full measure of its taxing power." Helvering v. Clifford, 309 U.S. 331, 334, 60 S.Ct. 554, 556, 84 L.Ed. 788 (1940); Blassie v. Commissioner, 8 Cir., 1968, 394 F.2d 628. Accordingly, "Congress applied no limitations as to the source of taxable receipts, nor restrictive labels as to their nature . . . to tax all gains except those specifically exempted." Commissioner v. Kowalski, 434 U.S. 77, 82, 83, 98 S.Ct. 315, 319, 54 L.Ed.2d 252 (1978) (Citing Commissioner v. Glenshaw Glass Co., 348 U.S. 426, 429-30, 75 S.Ct. 473, 476, 90 L.Ed. 483 (1955)). The test to determine if certain receipts constitute income is whether there exist "undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion." Commissioner v. Glenshaw Glass Co., 348 U.S. 426, 431, 75 S.Ct. 473, 477, 99 L.Ed. 483 (1955).

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See United States v. Allen, 8 Cir., 1977, 551 F.2d 208. This court, in line with Glenshaw Glass, has stated that the key to understanding the term income as used in the Code is whether the receipts reflect "economic gain." United States v. Gotcher, 5 Cir., 1968, 401 F.2d 118. See United States v. Rochelle, 5 Cir., 1967, 384 F.2d 748, Cert. denied, 390 U.S. 946, 88 S.Ct. 1032, 19 L.Ed.2d 1135 (1968).

Given its sweeping language, section 61 must be construed broadly "in accordance with an obvious purpose to tax income comprehensively." Commissioner v. Jacobson, 336 U.S. 28, 49, 69 S.Ct. 358, 369, 93 L.Ed. 477 (1949). See Commissioner v. Smith, 324 U.S. 177, 181, 65 S.Ct. 591, 593, 89 L.Ed. 830 (1945); Ritter v. United States, 393 F.2d 823, 826-27, 183 Ct.Cl. 875, Cert. denied, 393 U.S. 844, 89 S.Ct. 127, 21 L.Ed.2d 115 (1968). It is recognized that section 61 is especially flexible since the concept of income must necessarily be adapted to changing circumstances.

> The term "income" is particularly open to the well-known statement of the Court that:
>
> > A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.
>
> . . . (T)he Supreme Court . . . (has expressed) . . . the flexible attitude that the term "income" is to be given a broad meaning.

1 Mertens, Law of Federal Income Taxation, s 5.03, ch. 5, p. 5 (Citing Towne v. Eisner, 245 U.S. 418, 425, 38 S.Ct. 158, 159, 62 L.Ed. 372 (1918)) (footnotes omitted). The legal principle governing the meaning of income as used in section 61 is thus well established.

***103** The above cases provide ample support for upholding Judge Fulton's decision that appellant's receipt of money in payment for her plasma was taxable income under section 61. While not addressing the precise fact situation presented here, they establish a working definition of income that is both comprehensive and broad. Nevertheless, the majority concludes that the reasoning which supports the taxability of the income is "without clear precedential support in the law." The definition of taxable income is well established, and the income in this case falls within the confines of the income definition enunciated in Glenshaw Glass. Undeniably, the funds represented an accession to wealth for appellant's economic benefit. The money was definitely realized; there is no issue as to the fact that the funds were received. Appellant had total control over the use of the money. The payments were not loans. The amount and value of the funds is uncontroverted; this is not a case where the taxpayer has received something of uncertain value. Thus, the applicable principles stated in the Supreme Court and Fifth Circuit decisions clearly establish that the funds were for appellant's economic benefit and accordingly constituted taxable income under the provisions of section 61.

The majority suggests that considerable doubt exists about the tax consequences of the income because the money could be considered as having been received in return for the sale of a product. "(B)lood plasma, like a chicken's eggs, a sheep's wool, or like any salable part of the human body, is a tangible property which in this case commanded a selling price dependent on its value." 607 F.2d at 97. If her plasma is treated as a product, appellant is entitled to deduct her cost basis in the plasma from her gross receipts in order to determine her taxable income. Yet, the distinction between an exchange for services and the sale of a product is only significant if defendant has a substantial basis in her plasma. If the basis is zero or minimal, then virtually all of the funds would be gain and hence taxable. [3]

Neither the appellant nor the majority has persuasively shown that appellant had anything but a zero basis in her plasma. [4]

***104** The majority suggests that appellant may have had a basis equal to the money received for the plasma. But none of the cases cited for this proposition are in point. For example, in United States v. Davis, 370 U.S. 65, 82 S.Ct. 1190, 8 L.Ed.2d 335 (1962), cited by the majority, a husband, pursuant to a property settlement agreement executed prior to a divorce, exchanged certain properties for his wife's release of her inchoate marital rights. At issue was whether the husband was required to realize the gain on the properties exchanged. The Court held that since the transaction was conducted at arm's length, the indeterminate value of the wife's marital rights was no bar to taxing the husband's exchange. The marital rights were deemed to be equal in value to the market value of the property received by the wife. As a result, the husband paid tax on the excess of market value over his original cost basis. Accordingly, the wife received a basis equal to the market value of the property since the husband had already been taxed on the appreciation over his original basis. There is no valuation issue in the instant case. As has long been recognized, Davis is a valuation case whose principles are most useful when no market exists for the product or item being exchanged. See Bar L Ranch, Inc.

v. Phinney, 5 Cir., 1970, 426 F.2d 995; Seas Shipping Co. v. Commissioner, 2 Cir., 371 F.2d 528, Cert. denied, 387 U.S. 943, 87 S.Ct. 2076, 18 L.Ed.2d 1330 (1967). However, the value of the plasma here is equal to the money paid for it to appellant.

This case contains none of the characteristics of Davis or the other cases cited by the majority. [5] The only explanation for the majority's allegiance to them is a misunderstanding between the concepts of value and basis. Basis, as defined in section 1012 of the Internal Revenue Code, is equal to "the cost of such property . . . ." Value, on the other hand, is set by the market. Gain is the difference between that value realized in a sale, and the cost basis of the property. Uniqueness is not ground for a tax exemption and the fact that appellant may be one of only a few persons with valuable plasma does not entitle her to immunity from payment of taxes on the large and substantial amounts paid to her each year. Her basis in the plasma is the cost of its constituent parts, which in this case is zero.

Our conclusion is reinforced by a number of cases holding that the burden of proving setoffs to income either in the form of expense deductions or cost basis adjustments is on the defendant. See, e. g., Siravo v. United States, 1 Cir., 1967, 377 F.2d 469, 473 ("evidence of unexplained receipts shifts to the taxpayer the burden of coming forward with evidence as to the amount of offsetting expenses, if any"); United States v. Stayback, 3 Cir., 1954, 212 F.2d 313 (no burden on government to prove defendant's cost basis in the goods sold), Cert. denied, 348 U.S. 911, 75 S.Ct. 289, 99 L.Ed. 714 (1955); ***105** United States v. Hornstein, 7 Cir., 1949, 176 F.2d 217, 220 (same). See Burnet v. Houston, 283 U.S. 223, 227-28, 51 S.Ct. 413, 415, 75 L.Ed. 991 (1931). Indeed, this court, in United States v. Hiett, 5 Cir., 1978, 581 F.2d 1199, 1202, stated in an analogous context that, "(i)n a prosecution for income tax evasion, once the government has established the defendant's unreported income . . ., it is not then required to prove that the defendant has no other deductions. The burden of proving additional deductions is on the defendant." See McClanahan v. United States, 5 Cir., 1961, 292 F.2d 630 (gambler must prove any offsetting gambling losses). In the present action, appellant has made no attempt whatever to demonstrate any ascertainable basis in her plasma, preferring to rely on the fallacious theory that her basis is hopelessly uncertain. [6]

The majority's holding is also unwise as a practical matter given the likely result of requiring the jury to consider the state of the law. "Obviously, it would be most confusing to a jury to have legal material introduced as evidence and then argued as to what the law is or ought to be." Cooley v. United States, 9 Cir., 1974, 501 F.2d 1249, 1254, Cert. denied, 419 U.S. 1123, 95 S.Ct. 809, 42 L.Ed.2d 824 (1975). The jury is not composed of lawyers; the typical juror is untrained in legal affairs. To attempt to explain the myriad rules of judicial construction, the complexity of legal principles, or the function of precedent would hopelessly divert the jury from their preeminent duty of assessing appellant's guilt.

The second principal issue follows.

> 2) Did the trial judge properly submit the question of willfulness to the jury?

On the issue of willfulness, we first consider whether the trial judge erred in declining to permit the proffered testimony of defendant Garber's so-called expert Nall to go to the jury. The majority argues strenuously that this was probably the most serious of the errors committed in the trial since Nall's testimony would have shown that the law was so uncertain as to whether defendant Garber's income was taxable that she could not have had criminal intent to evade payment of taxes.

Our view is that receipt of opinion testimony of this kind as to pure issues of law invades the province of the district court. It is the trial judge who must make rulings on the law involved in the case, and boilerplate jury instructions have since time immemorial stated that the jury takes the law only from the court. Now a new rule is attempted by the majority which in effect states that the jury must take its instructions on the law from expert witnesses as well as the trial judge.

The majority's views concerning the admissibility of the proffered expert testimony is in conflict with existing precedent. Initially we point out that the district court ***106** has "broad discretion in the matter of the admission or exclusion of expert evidence, and his action is to be sustained unless manifestly erroneous." Salem v. United States Lines Co., 370 U.S. 31, 35, 82 S.Ct. 1119, 1122, 8 L.Ed.2d 313 (1962). See Perkins v. Volkswagen of America, Inc., 5 Cir., 1979, 596 F.2d 681. The purpose of expert testimony is to "assist the trier of fact to understand the evidence or to determine a fact in issue . . . ." Fed.R.Evid. 702. The expert's testimony here involved a question of law properly reserved for the court's decision. Since there was no showing that appellant had consulted the expert or relied on his view,

or views of any other accountant or lawyer, the testimony was unrelated to a determination of defendant's intent or willfulness.

Of course, a defendant is "entitled to wide latitude in the introduction of evidence tending to show lack of intent." 607 F.2d at 99. But the cases cited by the majority for this principle do not support the proposition that evidence unrelated to appellant's actual intent should be admitted. Indeed, the cases are to the contrary. See, e. g., United States v. Brown, 10 Cir., 1969, 411 F.2d 1134, 1137 (transcript of unavailable witness should have been admitted despite minor hearsay objection since theory of defendant's defense was reliance upon that witness' representations); Miller v. United States, 10 Cir., 1941, 120 F.2d 968, 970 (defendant may buttress personal statements of no intent "with testimony of relevant circumstances, including conversations had with third persons or statements made by them, tending to support his statement that he had no intent to defraud"); Petersen v. United States, 10 Cir., 1959, 268 F.2d 87 (when relying on lack of willfulness, defendant is entitled to character witnesses and proper instructions since character of defendant is directly at issue). The expert's testimony on the state of the law does not explain any of appellant's actions in this case and thus is not directly relevant to her actual intent or character. Thus, the evidence does not fall under the principles in those cases cited by the majority.

Indeed, other precedent directly supports the inadmissibility of the expert's testimony on the law. The question should be controlled by this court's decision in White v. United States, 5 Cir., 1954, 216 F.2d 1. In White, the trial judge refused to allow the defendant's experts to testify that certain funds should be treated as capital gains rather than ordinary income as the Government argued. On appeal, the court held that the testimony was properly excluded since the defendant had not relied upon the expert's opinion. "(T)he defendant not having acted in accordance with the witness' opinion and hence that opinion not being relevant on the question of intention, we think that the opinion of the witness as to the law of the case could not be substituted for that of the court . . . ." Id. at 5. Cf. United States v. Caserta, 3 Cir., 1952, 199 F.2d 905, 909 (where the purpose of expert testimony is "criticism of the government's legal theory," such evidence should be excluded).

The White decision is supported by precedents from other circuits. In Cooley v. United States, 9 Cir., 1974, 501 F.2d 1249, Cert. denied, 419 U.S. 1123, 95 S.Ct. 809, 42 L.Ed.2d 824 (1975), defendant attempted to introduce into evidence a number of legal documents, including Supreme Court opinions, which allegedly supported his position that he had not acted willfully. The trial judge excluded the evidence, and on appeal the Ninth Circuit agreed. Since the defendant was not attempting to show that he had relied on those legal documents, the Court held that the "offered material was immaterial and should not have been admitted as evidence. In the orderly trial of a case, the law is given to the jury by the court and not introduced as evidence." 501 F.2d at 1253. Similarly, in Lisansky v. United States, 4 Cir., 31 F.2d 846, Cert. denied, 279 U.S. 873, 49 S.Ct. 514, 73 L.Ed. 1008 (1929), the trial court excluded evidence from the defendant's expert witness that purported to demonstrate that profits from certain loans should not be taken into income until the loans themselves were repaid. The Fourth Circuit upheld the trial court's action by finding that the testimony ***107** on the taxability involved a question of law reserved for the judge.

> By the same experts, defendants offered to prove that in their opinion, based upon the decisions of the Revenue Department and of the courts as they understood them, it was proper for defendants not to report profits realized upon usurious loans until the loans themselves had been repaid. This also was properly excluded. The witnesses did not propose to testify that they advised defendants not to report these profits, nor did defendants testify that they relied upon the opinion of the experts in failing to report the same. What was required to be reported as income was a matter of law to be covered by the charge of the court, not by the testimony of experts.

31 F.2d at 851. Thus, under existing precedents it is clear that the inherent confusion which would result from receipt of expert testimony on the state of the law precludes such testimony where the defendant's actual reliance on the expert opinion is not involved. [7]

We next point out that the majority's view concerning the supposed impropriety of the judge's instruction on willfulness is similarly mistaken. An examination of the relevant authority relied upon by the majority demonstrates that those cases are not applicable in the circumstances here. Morissette v. United States, 342 U.S. 246, 72 S.Ct. 240, 96

L.Ed. 288 (1952), involved a defendant who had taken bomb casings from government property thinking that they were abandoned scrap. The trial court ruled that the defendant had conclusively demonstrated the requisite intent merely by taking the casings. Thus, the defendant was unable to argue that he had a good faith belief that the casings were abandoned by the Government and the question of intent was taken away from the jury. In reversing the conviction, the Supreme Court held that the matter of intent was a question of fact which must be submitted to the jury. Similarly, in Mann v. United States, 5 Cir., 1963, 319 F.2d 404, Cert. denied, 375 U.S. 986, 84 S.Ct. 520, 11 L.Ed.2d 474 (1964), the trial judge instructed the jury that an actor intends the natural and probable consequences of his acts. The court held that the result of this instruction was that the jury was essentially told that it could presume intent from the mere fact that an incorrect tax return had been filed. We held that it was "error to give a charge in a criminal case of this nature, the overall effect of which is to place a burden upon the defendant to produce evidence to overcome a presumption of guilt." 319 F.2d at 410. See Wardlaw v. United States, 5 Cir., 1953, 203 F.2d 884, 887 (instruction permitting presumption of intent held erroneous since effect was "to impress the jury with the belief that there was no good faith defense"). Cf. United States v. Tadio, 2 Cir., 223 F.2d 759 (asserting that it was error for trial court to instruct jury that particular accounting technique was unjustified, but upholding conviction since the overall instruction on intent clearly indicated that it was the Government's duty to demonstrate intent), Cert. denied, 350 U.S. 874, 76 S.Ct. 119, 100 L.Ed. 772 (1955). In summary, the cases cited by the majority stand for the proposition that the trial judge may not refuse the defense of lack of intent or hinder its usefulness by creating a ***108** presumption which lowers the Government's burden of proof. The jury must be instructed that it is a defense to the charge if the defendant acted with a good faith belief in the propriety of his or her conduct.

The district judge in this case did not hamper appellant's right to a defense based upon her lack of criminal intent and he properly stated the applicable law. Cf. United States v. Callahan, 5 Cir., 1979, 588 F.2d 1078. The judge made clear that it was the jury's responsibility to determine intent from its consideration of all the evidence. He instructed that the appellant could not be convicted if her actions were "not voluntary and intentional on her part but (were) the result of a mistake or inadvertence or some other innocent reason. . . ." Thus, the good faith defense was not taken from the appellant as in Morissette. Furthermore, the judge did not create any presumptions which lowered the Government's burden of proof. Cf. Mann v. United States, supra, 319 F.2d 404. On the crucial issue of the relationship between the taxability of the income and the issue of appellant's willfulness, the trial judge made it absolutely clear that his ruling that the income was taxable in no way affected the jury's responsibility for determining intent. Directly after instructing that the income was taxable, the trial judge stated:

> Whether the defendant wilfully and intentionally attempted to evade and defeat her income tax is a fact question which must be determined by the jury.
>
> You are instructed that if a person in good faith believes that she has filed a correct tax return, she cannot be guilty of criminal intent to evade the tax law; but if a person acts without any ground for belief that her conduct is lawful, it is for the jury to decide whether she acted in good faith or whether she wilfully intended to evade her tax. This issue of whether the defendant wilfully attempted to evade her tax is one which the jury must determine from all of the evidence in the case which bears upon the defendant's state of mind at the time in question.

Thus, the jury was explicitly and correctly informed that regardless of the taxability of the income, the question of willfulness was solely their responsibility to be determined from the totality of the circumstances.

The majority somehow reads this instruction as creating an impression in the minds of the jury that appellant had simply refused to pay a tax clearly owed. This observation is unfounded. Appellant's testimony that she did not think the income to be taxable was still before the jury and represented the primary basis of her defense. Moreover, the judge had not cast any aspersions on appellant's character by instructing the jury that the income was taxable. As the trial judge instructed:

> Now, during the trial of this case, there has been some evidence upon the issue of whether a blood plasma donor for pay is required to include monies thus received in a federal income tax return of the taxpayer. That issue involves an interpretation of the Internal Revenue Code and is, therefore, an issue of law for the Court and not an issue of fact for the jury.
>
> Having considered this issue of law, the Court has determined and instructs you that any monies paid to the defendant in exchange for her blood plasma constitutes gross income, and, as such, is subject to federal income taxation.

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His statement to the jury was direct and devoid of any excess or gratuitous remarks which may have implied guilt or misbehavior on the part of the appellant. The only interpretation possible from the instruction was there had been debate over a legal issue which the judge resolved in favor of the Government. It is clear that the jury was independently to assess the existence of willfulness. Certainly, this situation is not unique in tax evasion cases. Without taxable income, there would be no prosecution. Thus, the majority's point proves too much; most cases necessarily involve a situation where the taxability of the funds is "clear" to the jury and stated to be so by the court with the primary issue being whether the ***109** defendant received those funds and possessed the requisite intent. In summary, the trial judge's instructions stated the law properly and gave appellant every right to a good faith defense.

We believe the original panel opinion in this case which affirmed defendant Garber's conviction was correct and for the reasons there expressed and expanded here. No valid reason has been shown to change that result.

TJOFLAT, Circuit Judge, with whom AINSWORTH and ALVIN B. RUBIN, Circuit Judges, join, dissenting:
I would affirm the conviction of defendant Garber for essentially the reasons stated by Judge Ainsworth. The majority opinion disturbs me more by its analysis than by its result, however. The majority says that the Government should never have prosecuted Garber for tax evasion. The criminal proceedings were "inappropriate," the majority intimates, because it is an open question whether the proceeds of her blood plasma constituted taxable income and because even if they were taxable, the doubt surrounding the taxability issue suggests that Garber could not have had the willfulness that is an essential element of the crime of tax evasion. Notwithstanding the majority's belief that the prosecution was a mistake, it apparently feels trapped by an assumption that the Government is Entitled to prosecute Garber. The majority's response is to manufacture a rule of evidence that might permit Garber to extricate herself.

The new rule of evidence embraces Any case where someone is charged with an offense involving willfulness. If the defendant avers that the requirements of the law were too vague to give adequate notice, the trial court must permit the parties to call to the stand "experts" to give their opinions about the state of the law. I have no doubt that this innovation in trial procedure, by allowing the jury to consider matters irrelevant to factual issues, will spawn unfair convictions and acquittals. In addition, the rule will inevitably lead to a protracted and unmanageable sequence of impeachment and rehabilitation of every expert allowed to present such testimony. My intention is first to demonstrate that this new rule springs from the majority's failure to confront straightforwardly certain legal questions that this court has the responsibility to resolve and second to define exactly why I think the majority's holding will have such a pernicious effect.

The case before us involves three distinct issues that are present in every tax evasion prosecution. The threshold issue is whether the "income" in question is subject to federal income taxation. If the "income" is taxable, the trial court next must determine whether the civil obligation to pay taxes was sufficiently clear to support a criminal prosecution for tax evasion. Finally there arises the factual issue whether the defendant acted with the willfulness that is an essential element of the crime. The majority's analysis goes astray, in my view, by confusing the legal issues of taxability and sufficiency of notice with the factual issue of intent. For the court to dispose of this appeal properly, it is essential that these three issues be sorted out and considered individually.

I

Dorothy Garber was charged under section 7201 of the Internal Revenue Code with willfully attempting to evade her obligation to pay taxes on "income" she received for her blood plasma. This allegation is premised on the notion that Garber actually had such an obligation. Of course, section 7201 does not itself create any duty to pay taxes; it merely sets out criminal sanctions that enforce the tax liability imposed by other sections of the Internal Revenue Code. Whether Garber was actually liable for taxes on the sums in question depends on whether those sums are a part of her "gross income" within the meaning of section 61(a) of the Internal Revenue Code. This question of the meaning of "gross income" is purely a legal one, a matter of statutory construction. See, e. g., Haverly v. United States, 513 F.2d 224 (7th Cir.), Cert. denied, ***110** 423 U.S. 912, 96 S.Ct. 216, 46 L.Ed.2d 140 (1975). Such a question of law is for the court alone, United States v. Seaboard Coast Line Railroad, 368 F.Supp. 1079, 1083 (M.D.Fla.1973), although the court would certainly be free to consider the opinions of the parties' experts or any other sources of authority in making this threshold determination.

At the outset of the trial, Judge Fulton endeavored to determine whether the defense intended to challenge the indictment by contending that the proceeds from the plasma sales were not "income." Record, vol. 2, at 2-12. If the monies were not "income" he would have had no choice but to dismiss the indictment under Fed.R.Crim.P. 12(b)(2) for failure to charge an offense. Strangely, the defendant's attorney ignored this opportunity to move for a dismissal; rather, he expressed the view that the taxability of the sale proceeds was not a question of law for the court but a factual issue for the jury. Counsel implied that he would introduce proof that in the defendant's mind, the proceeds were not taxable. Judge Fulton responded:

> Well, we are talking about two different things. I think I understand your position. Certainly your client can contend in this case and you can argue, if the facts justify and support that argument, that your client did not have the requisite intent . . . but I think that whether it is income or not is a question of law for the Court.

Record, vol. 2, at 11. Although counsel declined to address the legal question whether the indictment charged an offense, the trial court clearly could have dismissed the indictment sua sponte. United States v. Purvis, 580 F.2d 853, 858 (5th Cir. 1978), Cert. denied, 440 U.S. 914, 99 S.Ct. 1229, 59 L.Ed.2d 463 (1979). The court effectively sustained the indictment on this point, however, when it ruled that the proceeds Were income. [1] I believe Judge Ainsworth's analysis conclusively shows that this ruling was correct. The majority casts doubt on the ruling but purportedly declines to settle the issue. Nevertheless, the majority apparently Assumes that the sales proceeds are taxable income and that the indictment is sufficient, for the opinion hinges on an evidentiary question that would otherwise never arise. If the court really believes that the monies are not taxable, it is unfortunate that it does not so hold and avoid an unnecessary retrial.

II

After ruling on the taxability issue, the district court was confronted with a second question of law: whether, at the time of the alleged tax evasions, the taxability of the monies was so uncertain as to make it fundamentally unfair to prosecute Garber. Due process requires that the language of a criminal statute convey "sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." Jordan v. De George, 341 U.S. 223, 231-32, 71 S.Ct. 703, 708, 95 L.Ed. 886 (1951). At the commencement of trial, Garber's attorney argued to the court that the taxability of the monies is "so uncertain" that "defendant cannot be guilty of willfully evading and defeating taxes on income." Record, vol. 2, at 16. This argument contained the essential elements of the vagueness challenge, although it was not put squarely in those terms or in the ***111** form of a motion to dismiss the indictment. [2] Here the vagueness issue is whether the obligation to pay taxes on monies received for plasmapheresis was too uncertain to give notice that a taxpayer who willfully evaded such taxes would be subject to prosecution under section 7201. The question narrows to the consideration whether it was or should have been reasonably clear to Garber that those monies were a part of her "gross income" within the meaning of section 61(a). Although "common understanding and practices" are the standards by which the adequacy of the notice given by a criminal statute is to be measured, it is settled that the question of vagueness is for the court rather than the jury. The question is separate from the court's threshold inquiry whether the monies are taxable at all. The court might well have held that although the monies are taxable, their taxability was so uncertain at the times when Garber filed her returns that she did not have constitutionally sufficient notice of the conduct proscribed by section 7201. If this had been the court's conclusion, the proper disposition of the case would, again, have been to have dismissed the indictment under rule 12(b)(2). Whereas the trial judge did not rule specifically that the obligation to pay taxes was not unconstitutionally vague, he effectively rejected any vagueness challenge when he sent the case to the jury.

United States v. Critzer, 498 F.2d 1160 (4th Cir. 1974), relied on by the majority, suggests what is essentially another approach to the vagueness issue. Critzer is premised on the proposition that "when the law is vague or highly debatable, a defendant actually or imputedly lacks the requisite intent to violate it." Id. at 1162. The court held that "willfulness" could not be shown in a prosecution under section 7201 given the uncertainty concerning whether the sums in question were taxable:

> As a matter of law, defendant cannot be guilty of willfully evading and defeating income taxes on income, the taxability of which is so uncertain

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> that even co-ordinate branches of the United States Government plausibly reach directly opposing conclusions. As a matter of law, the requisite intent to evade and defeat income taxes is missing.

Id. (emphasis added). As under the conventional "vagueness" analysis, the inquiry focuses on the certainty of the obligation to pay taxes at the time the tax return was filed. Id. at 1164. Under either approach, if the obligation was unclear, the defendant Cannot be guilty as a matter of law, so the indictment should be dismissed for failure to charge an offense.

Just after discussing Critzer, the majority opinion says:

> The tax treatment of earnings from the sale of blood plasma or other parts of the human body is an unchartered area in tax law. The parties in this case presented divergent opinions as to the ultimate taxability by analogy to two legitimate theories in tax law. The trial court should not have withheld this fact, and its powerful impact on the issue of Garber's willfulness, from the jury.

Ante at 99. While I agree that Critzer says that the clarity of the law has an impact on Garber's willfulness, Critzer does not support the suggestion that confusion in the tax laws is a "defense" that should be considered by the jury. The Critzer court reiterates that the impact of any vagueness of the law on the defendant's intent is a matter of law a determination to be made by the court alone.

Under either the conventional vagueness analysis or the Critzer analysis, the question on appeal is whether Judge Fulton Should have dismissed the indictment on the ground that the taxability of the monies was too unclear to support criminal liability. My view is that the monies were so clearly a part of Garber's "gross income" that no reasonable person could have supposed otherwise. ***112** The majority, on the other hand, appears to give much credence to Garber's contention that she reasonably supposed the monies to be nontaxable.[3] If this is the majority's persuasion, the proper resolution of the case would be to dismiss the charges as the court did in Critzer, not to remand for a new trial. Since the certainty of the law would be assessed as of a past date, a dismissal on this ground would be perfectly consistent with a ruling that money received for blood plasma is indeed taxable. Thus, no future defendant in Garber's position could escape under the same vagueness challenge.

The majority's mysterious refusal to follow the logic of its reasoning and dismiss the indictment leads to certain inconsistencies. The opinion, like the opinion in the Critzer case, ends with the observation that "(a) criminal proceeding pursuant to section 7201 is an inappropriate vehicle for pioneering interpretations of tax law." Ante at 100. This conclusion makes sense in Critzer, but in the present case it is blatantly inconsistent with the court's decision that there should be a New "criminal proceeding" that will allow the jury to hear evidence concerning the certainty of the tax laws.

III

The court need consider the propriety of Judge Fulton's refusal to admit the testimony of Nall, Garber's expert, only if we find that Judge Fulton correctly declined to dismiss the indictment. Assuming that the indictment Is sufficient, the critical issue in the case becomes a factual one: whether Garber acted with the requisite willfulness in failing to pay taxes on the sums in question. To be admissible, the proffered testimony must be relevant to this issue, Fed.R.Evid. 402,[4] and its probative value must outweigh the danger of unfair prejudice, confusion of the issues, or misleading the jury. Fed.R.Evid. 403.[5] I conclude that Nall's testimony is not relevant to Garber's intent, and that it certainly fails the weighing test. I would hold, therefore, that Judge Fulton properly excluded the evidence.[6] It is necessary to examine closely this relevance issue to show the dangers created by the majority opinion.

A

The factual question for the jury, narrowly stated, was whether Garber had an honest belief that the money she had received for her blood plasma was nontaxable. The inquiry is a subjective one. Garber's belief does not have to have been reasonable; in fact, if her asserted belief had been Reasonable, presumably the indictment should be dismissed for failure to charge an offense. The majority opinion obscures the subjective nature of the issue: "The court erred by refusing to instruct the jury that A reasonable misconception of the

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tax law on her part would negate the necessary intent." ***113** Ante at 99, (emphasis added).[7] By drawing the notion of reasonableness into the inquiry, the majority improperly broadens the scope of relevancy, causing certain evidence to appear admissible although it would be excluded if the factual issue were correctly identified.

Fed.R.Evid. 401 defines relevant evidence as evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." See, e. g., United States v. Madera, 574 F.2d 1320, 1322 (5th Cir. 1978). Garber sought to introduce expert testimony that the taxability of the plasma sales proceeds was in doubt. Conceivably, there are two ways in which such testimony might be relevant. It might provide evidence of the defendant's state of mind, or it might indirectly buttress her explanation of her actions. Concededly, there was never any communication between Garber and Nall. Record, vol. 3, at 430. Since Nall neither influenced Garber's opinion nor learned of her opinion, it follows that he could have nothing to say that would bear directly on Garber's intent. So if Nall's proffered testimony is relevant at all, it can only be relevant through reinforcing the credibility of Garber's explanation.

On direct examination, Garber was asked whether, at the time she entered into the plasma sale contracts, she had come to any conclusion concerning whether the monies she was to receive were taxable. She replied:

> I had arrived in my own mind that it was definitely not taxable, that this was their gain, a part of me, it was my body, it was a very human element . . ., and I felt that it definitely was not taxable, that it was like I said, part of me, something

Id. at 370. Garber testified that she had discussed this idea that sales of portions of the human body are inherently nontaxable with fellow donors and with her husband, but that she had never sought any professional advice about her theory. Id. at 370-80.

On the proffer of his testimony, Nall, like Garber, stated that he considered the proceeds of the plasma sales nontaxable, but that is the extent of the similarity between his testimony and Garber's. Nall bases his opinion solely on his reading of the law. For example, when he was asked, "Sir, when would you say that, if somebody, based upon what you say, sold his plasma, that there is no income because there is no way of determining the basis?", he responded:

> Under this particular concept of the Supreme Court definition of income, the amount received for the part of the body . . . if a person did sell a part of their body, no, there would not be a taxable transaction.
>
> I might add, if I may . . . that the Solicitor's Opinion 132 said, "No, these things are not income by reason of the definition of income . . . ."

Id. at 425.

In deciding the relevancy of this testimony, the trial judge should have, in essence, asked himself whether a reasonable juror could believe that the proffered testimony makes it more probable that Garber actually ***114** believed no tax was due on the money. See, e. g., McCormick, Evidence s 185, at 438 (2d ed. 1972). I am certain that what this professional accountant concluded after studying the law could not make one whit more or less probable the truth of Garber's explanation that she had not paid taxes on what she had received for plasmapheresis because "in my heart I did not feel it was taxable . . . ." Id. at 361. Therefore, the proffer does not pass the rule 401 test, and the testimony should be excluded.

The relevance issue could possibly be resolved differently if the expert's testimony bore some relation to the context of the defendant's explanation. For example, an accountant might testify, "I have advised twenty laypeople concerning the taxability of transactions analogous to the ones in the instant case. None of them have communicated with Mrs. Garber, and none of them have had any more legal training than Mrs. Garber. Seventeen of the twenty told me that they had a gut feeling like the feeling Mrs. Garber testified she had that the monies they had received were not taxable." Putting aside the hearsay problem, it appears that a juror might reasonably infer from this statement that since other people have the belief that Garber says she had, it is slightly more likely that Garber did indeed have the belief.[8] On the other hand, such an inference would not be reasonable if it could be shown: that the expert was somehow not qualified to present the proffered testimony; that the seventeen people did not state their opinions in good faith; or that the situations were not truly analogous. Consequently, on the proffer of such testimony, the Government would have been entitled to cross-examine the expert in an effort to exclude his opinion altogether. Failing that, the Government would have the

option to call each of the seventeen people and to cross-examine them in order to destroy the foundation of the expert's testimony and thus to demonstrate its irrelevancy for lack of probative value. Cross-examination and rehabilitation could go on forever, and the principal issues in the trial would be lost in this sea of collateral nonsense.

B

Even if the relevancy of this hypothetical testimony is established, the testimony should still not be admitted into evidence because the danger of prejudice and confusion manifestly outweighs the mere scintilla of probative value. The process of impeachment and rehabilitation before the jury would be just as wide-ranging as in the voir dire hearing on relevancy. In fact, even if the problem could be escaped in the voir dire hearing, it would certainly surface in the presence of the jury. The trial would no longer be focused on the defendant's intent, but on the intent of each of the people embraced by the expert's testimony. The case would quickly become untriable.

The majority's holding is so broad that it would require the admission of testimony that is even more destructive of the trial process than my hypothetical testimony. The majority opinion says that the trial court should have permitted Nall to testify simply as to the “unresolved nature of the law,” Ante at 98, or as to the “reasonableness” of Garber's belief, Ante at 99. This testimony is less relevant than testimony referring to the opinions of a particular number or percentage of people because it requires an additional inference. The testimony is not probative unless the jury can ***115** assume: (a) since this “expert” says there was doubt as to the state of the law, it is likely that a number of people believe that money such as that received by Garber is not taxable; (b) since other people have the belief that Garber says she had, it is somewhat more likely that she actually had the belief.

My major concern here is that these inferences are so questionable that it is reckless to permit a jury to indulge them. The danger is that the jury will see the relationship between Nall's opinion and Garber's belief as much more substantial than it could possibly be. The risk of confusion inherent in juror unfamiliarity with the assessment of probabilities is here compounded by the intellectual, abstract character of the evidence; it has no place in the factual context of the case. Jurors can draw on their own experience in assessing most circumstantial evidence. They will be traveling without a map, however, when they attempt to determine the impact of one man's legal theories on the probability that Garber's story about her state of mind, when she declined to report the monies as income, is the truth.

An even more serious problem results from the jury's being asked to assess the Merits of Nall's legal opinion. In essence, Nall's testimony is that Garber's asserted belief is reasonable. Presumably, the more meritorious Nall's opinion, the greater the number of people likely to share the opinion and the greater the probability that Garber is telling the truth. But however persuasive Nall may be, the court has already concluded in deciding the vagueness issue that the belief Nall is defending is Not reasonable. The risk is that the jurors, who lack the training necessary to assess legal arguments, will too willingly accept the expert's opinion. To permit the jury to base its verdict on an interpretation of the law that is at odds with the court's will inevitably create the appearance of injustice. Assuming that the testimony is relevant, I believe that it would be foolhardy to lead the jury onto such treacherous ground when the possible benefits are so miniscule. [9]

IV

Expert testimony about the state of the law will not only befuddle the jury; it will, in my view, utterly undermine the usual constraints on expert testimony, creating the potential for intolerable abuses. Until today, there has been a requirement that expert opinion testimony be founded on facts or data that comprise the context of the alleged offense. See Fed.R.Evid. 703. Under the majority's approach, however, the expert may ignore the factual context and say nearly anything he desires about the legal issues in the case. Opposing counsel will find it impossible to lock him into a particular interpretation of the law because the range of his interpretation is practically infinite. The bestowal of such freedom on expert witnesses creates the opportunity for a well-coached expert to “manufacture” testimony while he is on the stand, shaping ***116** his testimony to fit the facts that counsel has succeeded in eliciting from the defendant.

I think it manifest that the danger of prejudice and confusion that would result from the admission of testimony like that proffered by Nall outweighs any probative value. But even if this court should weigh the probative value and prejudice elements differently, we should affirm Judge Fulton's ruling as clearly within the broad discretion a trial judge has under

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rule 403. See United States v. Johnson, 558 F.2d 744, 746 (5th Cir. 1977), Cert. denied, 434 U.S. 1065, 98 S.Ct. 1241, 55 L.Ed.2d 766 (1978). Unfortunately, however, the majority has avoided the rule 403 weighing process altogether.

A further difficulty with the majority's holding is that it apparently Requires the district court in a case like this to permit practically anyone professing expertise in the subject to give his opinion about the law. The trial is likely to degenerate into a confused battle among experts. Such a situation can benefit no one but the experts themselves.

The majority's failure adequately to consider the consequences of the rule of evidence that it has fashioned is particularly grave because what we decide today may prove irretrievable. I suspect that in future criminal trials involving the defendant's state of mind, the introduction of expert testimony concerning the state of the law will be initiated by the defense.[10] Once the trial judge has upheld the sufficiency of the indictment, the Government can have no interest in showing the clarity of the law unless the defense first presents testimony that it is vague or that the defendant's misunderstanding of the law was reasonable. If the defense introduces such testimony and the defendant is acquitted, that will be the end of the matter, since the Government has no right of appeal.

Alternatively, suppose that the defendant introduces expert testimony that the law is vague or that the defendant's misconception was reasonable and that the Government counters with expert testimony to the contrary. If the defendant is convicted, he may choose to argue on appeal that the trial court committed reversible error when it permitted the Government's expert to testify. He can hardly object to the nature of the testimony to its relevance to any fact in issue because he put in testimony of the same character. Thus, his complaint on appeal will have to be that the court should have excluded the Government's testimony, even assuming that it was relevant, on grounds of prejudice, confusion, or waste of time. Fed.R.Evid. 403. The trial court has broad discretion in deciding whether to exclude evidence on these grounds, however, and this court "may not disturb his ruling unless he has clearly abused his discretion." United States v. Johnson, 558 F.2d at 746. In my opinion, this restricted standard of review will prove an inadequate tool for repairing the damage made possible by the majority's holding.

Because I conclude that the district court correctly decided the issues of law before it and properly excluded "expert" testimony concerning the state of the law, I would affirm Garber's conviction.

All Citations

607 F.2d 92, 44 A.F.T.R.2d 79-6095, 79-2 USTC P 9709

Footnotes

* Judges Frank M. Johnson, Jr., Garza, Henderson, Reavley, Politz, Hatchett, Anderson, Randall, Tate, Sam D. Johnson and Thomas A. Clark, did not participate in the consideration of or decision in this case. The case was taken under submission by the court en banc on June 5, 1979.

1 Sale of her plasma allegedly brought her $80,200 in 1970, $71,400 in 1971, and $87,200 in 1972.

2 Section 104 of the Code, 26 U.S.C.A. s 104, now expressly excludes from taxable income certain insurance proceeds and

(2) the amount of any damages received (whether by suit or agreement) on account of personal injuries or sickness; 26 U.S.C.A. s 104(a)(2).

The defendant has alternatively argued that the payments here in question fall within this exclusion from taxable income. Section 104(a)(2) has consistently been applied only to payments resulting from the settlement or prosecution of a tort claim. Knuckles v. CIR, 349 F.2d 610 (10th Cir. 1965); Starrels v. CIR, 304 F.2d 574 (9th Cir. 1962); Agar v. CIR, 290 F.2d 283 (2d Cir. 1961). The only evidence in the record which could possibly support a claim that the payments to Garber were in settlement of a tort liability were medical release of liability forms she signed. We express no opinion on the ultimate merits of this contention.

3 To prove that Garber had to have been actually aware of her tax liability, the government offered testimony from an employee of Dade Reagents, contradicted by defendant's own statements, that in Garber's early dealings with that company not only had she been advised of the taxable element of her payments but the company had also opened a savings account in her name and regularly deposited a portion of her earnings allegedly for income tax purposes. The IRS agent who first investigated the Garbers took the stand and testified that, in his initial interview with both Mr. and Mrs. Garber concerning their 1971 joint return, defendant denied having received any income other than the reported $200 per week salary from Biomedical. However, that same afternoon following the interview, defendant called the agent,

explained that she and her husband were about to be divorced, and arranged a second interview in which she discussed her plasma donations and disclosed all monies received. The agent admitted that Garber was cooperative in the absence of her husband; she produced all relevant records including the 1099 forms received from Biomedical.

The defense offered affirmative evidence to show that Garber did not willfully misstate her income. An accountant had prepared all three joint returns from information supplied by Mr. Garber, who was not indicted, without consulting with defendant. Furthermore, it was undisputed that all payments to defendant were made by check, payable to her, and deposited in her bank account. Payments were never made in cash; there was no duplicative bookkeeping or other clandestine financial dealings indicative of an attempt to secrete earnings. Her returns for the years in question disclosed Biomedical as a source of income. In addition, Garber produced a copy of her 1969 tax return on which she declared no taxable income but noted "I have no W-2 forms as my income was made up entirely from donating blood plasma from various blood banks." The defendant herself testified that she thought, after speaking with other blood donors, that because she was selling a part of her body the money received was not taxable.

4 The plurality opinion in James stated:

> We believe that the element of willfulness could not be proven in a criminal prosecution for failing to include embezzled funds in gross income in the year of misappropriation so long as the statute contained the gloss placed upon it by Wilcox at the time the alleged crime was committed. Therefore, we feel that petitioner's conviction may not stand and that the indictment against him must be dismissed. 366 U.S. at 221-222, 81 S.Ct. at 1057.

Justices Black and Douglas were of the opinion that Wilcox still represented the controlling law, but agreed with the plurality that the new determination finding embezzled funds taxable should not be applied to past conduct:

> (A) criminal statute that is so ambiguous in scope that an interpretation of it brings about totally unexpected results, thereby subjecting people to penalties and punishments for conduct which they could not know was criminal under existing law, raises serious questions of unconstitutional vagueness. 366 U.S. at 224, 81 S.Ct. at 1058.

The two dissenting Justices argued that a remand was necessary for a jury to determine the factual question of actual reliance on Wilcox.

5 During its deliberations, the jury asked the court whether any effort was made by the government to settle the case in any other way previous to filing an indictment. Obviously they were not aware that the taxability of the sums was still a disputed question.

1 As we said in the panel opinion:

> Joseph N. Potts, a former Dade superintendent, testified at trial that, when appellant first began selling blood plasma to Dade, he wanted her to be informed concerning the taxability of the payments made to her. A memorandum dealing with taxation was prepared for Garber, and Potts discussed the matter with her in his office. At Dade's suggestion a savings account was opened in Garber's name in which Dade was to deposit a portion of the payments to her so there would be funds available to pay income taxes. Dade made deposits in this account from 1967 to 1969 and the statements of earnings accompanying the checks issued to Garber during this period bore the notation "less accrual for taxes." She did not, however, pay the money in the account to the Government but gradually withdrew it for a variety of personal uses. Appellant testified at trial that she did not recall Potts telling her anything about taxes and, although she remembered the savings account, she stated that she did not recall that the account was for taxes or that the statements were marked "less accrual for taxes." She also testified that she filed a return for the 1969 tax year on which she had written: "I have no W-2 forms as my income was made up entirely from donating blood plasma from various blood banks." An employee of the IRS District Director's Office, however, later testified that the IRS had no record of a return for 1969 having been filed.

589 F.2d at 845-46.

2 In pertinent part, 26 U.S.C. s 61(a) reads:

> Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:
>
> (1) Compensation for services, including fees, commissions, and similar items;
> (2) Gross income derived from business;
> (3) Gains derived from dealings in property;

3 Appellant may be entitled to deduct the cost of any special incidental expenses which she required to promote plasma regeneration such as vitamins. There is no evidence, however, suggesting that such incidental expense would offset anything more than an insignificant proportion of her total receipts. The possible existence of a minimal basis in her plasma is irrelevant since the Government need not prove the amount of tax due with mathematical precision, but need only show that a substantial tax is owing. See, e. g., United States v. Miller, 9 Cir., 1976, 545 F.2d 1204, Cert. denied, 430

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U.S. 930, 97 S.Ct. 1549, 51 L.Ed.2d 774 (1977); United States v. Allen, 6 Cir., 1975, 522 F.2d 1229, Cert. denied, 423 U.S. 1072, 96 S.Ct. 854, 47 L.Ed.2d 82 (1976). Since the amount of tax owing under either the personal service or sale of a product theory is essentially the same, testimony concerning which theory is in fact proper in this case is irrelevant and would serve only to confuse the jury. Cf. White v. United States, 5 Cir., 1954, 216 F.2d 1, 4-5 (expert testimony whether income should be considered capital gain or ordinary income irrelevant since substantial tax would still be owing, and thus "defendant's guilt or innocence" would be unaffected).

4 Actually, appellant's primary argument has been that the income should be excluded from income by virtue of the operation of 26 U.S.C. s 104(a)(2) which permits a taxpayer to exclude "the amount of any damages received (whether by suit or agreement) on account of personal injuries or sickness." The majority, finding that a reversal was justified on other grounds, failed to address the section 104 issue. It is clear, however, that the provision does not apply to this case. The focus of section 104 pertains to funds received from tort claims. See 26 C.F.R. s 1.104-1(c) (1978) (damages as used in section 104 means "an amount received (other than workmen's compensation) through prosecution of a legal suit or action based upon tort or tort type rights, or through a settlement agreement entered into in lieu of such prosecution.") Federal courts have uniformly assumed that the section 104 exclusion applies only to payments resulting from the prosecution or settlement of tort claims. See, e. g., Knuckles v. Commissioner, 10 Cir., 1965, 349 F.2d 610; Agar v. Commissioner, 2 Cir., 1961, 290 F.2d 283. The touchstone of the exclusion is the notion that the funds received represent a restoration of funds rather than an accession to wealth. Starrels v. Commissioner, 9 Cir., 1962, 304 F.2d 574, 576. In this case, there is no evidence that any tort or tort-related claim is involved. To be sure, appellant suffered from pain and discomfort associated with the process. Yet, appellant chose to earn a living in this fashion and consented to the process, thus restricting the application of section 104. Cf. Starrels v. Commissioner, supra, 304 F.2d at 576. Thus, the funds were not excludable under section 104. Judge Clark conceded as much in his dissent to the original panel decision. See 589 F.2d at 849.

5 The majority's reliance on Raytheon Production Corp. v. Commissioner, 1 Cir., 144 F.2d 110, Cert. denied, 323 U.S. 779, 65 S.Ct. 192, 89 L.Ed. 622 (1944), is especially misplaced. At issue in Raytheon was whether the money paid for settlement of an antitrust suit represented compensation for lost profits or for lost capital, i. e., Raytheon's goodwill in the injured business. The First Circuit held that the entire recovery in the case was taxable despite the inability of the taxpayer to ascertain whatever basis may have existed in the goodwill lost. See generally Messer v. Commissioner, 3 Cir., 1971, 438 F.2d 774, 780. The dicta quoted by the majority, given the holding that the funds were taxable, thus occurred in a totally dissimilar factual pattern involving the dynamics of the settlement process. Here, there is no doubt concerning the source of the funds or the reasons why appellant received them. On the other hand, Raytheon involved a situation where the origin of the receipts was the primary question in the case. Thus, the situations are not at all similar, and the majority's use of Raytheon is difficult to fathom, except that it contains language, albeit dicta, that loosely speaks to the question presented here in a most indirect and imprecise manner.

6 The majority's reliance on United States v. Critzer, 4 Cir., 1974, 498 F.2d 1160, and James v. United States, 366 U.S. 213, 81 S.Ct. 1052, 6 L.Ed.2d 246 (1961), for their view that appellant is entitled to a reversal is misplaced. Critzer involved the conviction of an Eastern Cherokee Indian for failing to report income from a business conducted on the Eastern Cherokee Reservation. The tax question was inordinately complex and required the construction of a 1924 statute which provided that the Reservation's property would be exempt from taxation. The question thus involved whether the business operations constituted income directly related to the property. The case law was obscure, although it generally favored the defendant. Moreover, the Bureau of Indian Affairs had advised the defendant on two separate occasions that the receipts were tax exempt. Indeed, the Department of Interior maintained at the time of trial that the monies were not taxable. The Fourth Circuit found that, as a matter of law, defendant was entitled to an acquittal since the taxability was "so uncertain that even co-ordinate branches of the United States Government plausibly reach directly opposing conclusions." Critzer, 498 F.2d at 1162.

In James, the genesis of the controversy was the Court's earlier holding in Commissioner v. Wilcox, 327 U.S. 404, 66 S.Ct. 546, 90 L.Ed. 752 (1946), wherein the Court held embezzled funds to be tax exempt. Wilcox was undercut, but not explicitly overruled in Rutkin v. United States, 343 U.S. 130, 72 S.Ct. 571, 96 L.Ed. 833 (1952). The defendant in James had received embezzled funds and as a result fell into the legal abyss of uncertainty created by the two contradictory Supreme Court opinions. In James, the Court explicitly overruled Wilcox, but the conviction for willful evasion was reversed.

7 A brief review of the testimony offered by appellant's expert demonstrates the extreme risk of confusion which would likely occur if introduced to the jury. The expert was not a lawyer, although he was an accountant with some experience in the Internal Revenue Service. In summary, his testimony was vague, and the only direct legal precedent offered involved

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personal injury cases and other allegedly analogous situations. The precedent cited is relatively old by tax law standards; most are from the beginning years of income tax adjudication. These materials are connected with the evolution of section 104 and thus only marginally related to the legal confusion the majority seemed to find since they left open the section 104 issue. Noticeably absent from the so-called expert's testimony is any mention of the host of more recent Supreme Court opinions construing section 61 broadly to reach any and all accession to wealth. Thus, the proffered testimony is at best a legal jumble whose introduction would in no way serve to edify the jury as to the issue of uncertainty which the majority addressed.

1 Judge Fulton indicated in the colloquy at the beginning of the trial that he considered the monies in question to be income. Since the defense made no motion for a judgment of acquittal at the conclusion of the Government's case-in-chief, he was not called upon to rule on the issue at that time. It was not until the defense proffered the testimony of Nall that the issue was disposed of as a matter of law. Record, vol. 3, at 431.

The Government agreed with Judge Fulton that the taxability of the monies is a question of law for the court. Id., vol. 2, at 3. The prosecutor proffered the testimony of the Government's expert, Bierman, Ante 607 F.2d at 94-95, solely as a precautionary measure. At the close of Bierman's proffer, the prosecutor told the court: "(T)he Government . . . would not request that this witness testify to the Jury unless the Court plans on allowing expert witnesses to testify for the Defense on the law." Record, vol. 3, at 332.

2 Whether or not the question was properly raised below, this court may consider the sufficiency of the indictment on appeal. United States v. Seuss, 474 F.2d 385, 387 n.2 (1st Cir.) Cert. denied, 412 U.S. 928, 93 S.Ct. 2751, 37 L.Ed.2d 155 (1973); 8 Moore's Federal Practice P 12.03(1), at 12-16 & n.9 (2d ed. 1978).

3 For example, at the conclusion of the opinion the court states that "the tax question was completely novel and unsettled by any clearly relevant precedent" and suggests that the case involves "pioneering interpretations of tax law." Ante at 100.

4 Rule 402 states:

> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

5 Rule 403 provides that:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

6 This court has sometimes made the distinction between "logical relevance" and "legal relevance." See, e. g., Rozier v. Ford Motor Co., 573 F.2d 1332, 1347 (5th Cir. 1978). Evidence is said to be "logically relevant" if it has any probative value and "legally relevant" if that probative value outweighs the counter factors of prejudice, confusion, and repetition. In this discussion I have adopted Professor McCormick's view that it makes for clearer thinking to discard the term "legal relevancy" altogether and use "relevancy" to refer to what has been called "logical relevancy." See McCormick, Evidence s 185, at 441 (2d ed. 1972).

7 None of the cases cited by the majority in support of this proposition suggest that the Reasonableness of the defendant's belief is material. Rather, they make it clear that there is No requirement of reasonableness. For example, in Mann v. United States, 319 F.2d 404, 409 (5th Cir. 1963), Cert. denied, 375 U.S. 986, 84 S.Ct. 520, 11 L.Ed.2d 474 (1964), the court held erroneous a jury instruction that imported the notion of reasonableness:

> (Section 7201) specifically provides that the crime of income tax evasion must be accompanied by a specific intent on the part of the accused to defeat or evade the tax, which must be proved by independent evidence. . . . Under the instruction here involved, the jury is invited to speculate as to what any other person similarly situated to (the defendant) and with like knowledge, would reasonably have expected to be the consequences of the conduct under consideration as shown by the evidence. The test is whether (the defendant) himself wilfully attempted to evade or defeat the tax.

Id. at 409 (citation omitted).

8 Cf. Haigler v. United States, 172 F.2d 986 (10th Cir. 1949), where a rancher defended a prosecution for willful evasion of income tax with the argument that he had acted in accordance with what was "generally understood among sheepmen." Id. at 988. The court apparently assumed that testimony concerning the beliefs of the other sheepmen would be relevant and admissible. Note that the Haigler case differs from my hypothetical in that I am assuming that none of the seventeen people communicated with Garber. There may well have been communication about the issue between the Haigler defendant and the other sheepmen, so the testimony could be seen as directly probative of the defendant's state of mind.

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The testimony that I hypothesize, like the pure opinion testimony the majority holds should come in, goes only to the question of the credibility of the defendant's exculpative explanation.

9 Neither Nordstrom v. United States, 360 F.2d 734 (8th Cir.), Cert. denied, 385 U.S. 826, 87 S.Ct. 59, 17 L.Ed.2d 63 (1966), nor United States v. Bridell, 180 F.Supp. 268 (N.D.Ill.1960), cited by the majority, support the admissibility of this expert testimony. In Nordstrom, the defendant did not argue that the alleged vagueness in the law was relevant to his actual intent. Rather, he argued that due to the vagueness "the Court cannot attribute to him the requisite intent to violate the tax law." 360 F.2d at 735. The court admitted that for the defendant to be convicted, "his civil liability must have been so clearly the law at the time the erroneous return was filed that failure to report the embezzled funds amounted to a willful evasion," Id., but held that the law had been clear. Certainly, the court did not address the question whether the state of the law was relevant to the defendant's intent. It was talking about the sufficiency of the indictment, a purely legal question. See United States v. Mann, 517 F.2d 259, 266 (5th Cir. 1975), Cert. denied, 423 U.S. 1087, 96 S.Ct. 878, 47 L.Ed.2d 97 (1976). In Bridell, another tax evasion case, the court said: ". . . I have taken into consideration the fact that the law is more clearly delineated today, as to the offense charged, than it was during the years in question . . . ." Bridell, 180 F.Supp. at 279. Bridell must be distinguished, however, on the ground that the trial in that case was a bench trial, so there was no need for the court to be concerned about the danger of prejudice and confusion as it must be in a jury trial.

10 For example, in a criminal antitrust prosecution arising from a complex series of business transactions, a defendant may admit the alleged transactions but contend that he had not believed his actions unlawfully anticompetitive. The defense is that the defendant has not acted with the mens rea required for a criminal conviction. See United States v. United States Gypsum Co., 438 U.S. 422, 431-433, 98 S.Ct. 2864, 2876-78, 57 L.Ed.2d 854 (1978). The antitrust defendant would surely welcome the opportunity to put a law professor or some other expert on the stand to testify as to vagueness in the law or to the reasonableness of the defendant's belief in the legality of his conduct.

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