Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

November 1, 2012

Mr. Michael M. Essmyer
Essmyer, Tritico & Rainey, LLP
5111 Center Street
Houston, TX 77707

Re: Donald Ray Womack
v. United States
No. 12-6988

Dear Mr. Essmyer:

The petition for a writ of certiorari in the above entitled case was filed on October 26, 2012 and placed on the docket November 1, 2012 as No. 12-6988.

A form is enclosed for notifying opposing counsel that the case was docketed.

Sincerely,

William K. Suter, Clerk

by

Erik Fossum
Case Analyst

Enclosures

Supreme Court of the United States

Donald Ray Womack
(Petitioner)

v. No. 12-6988

United States
(Respondent)

To _____ Counsel for Respondent:

NOTICE IS HEREBY GIVEN pursuant to Rule 12.3 that a petition for a writ of certiorari in the above-entitled case was filed in the Supreme Court of the United States on October 26, 2012, and placed on the docket November 1, 2012. Pursuant to Rule 15.3, the due date for a brief in opposition is Monday, December 03, 2012. If the due date is a Saturday, Sunday, or federal legal holiday, the brief is due on the next day that is not a Saturday, Sunday or federal legal holiday.

Unless the Solicitor General of the United States represents the respondent, a waiver form is enclosed and should be sent to the Clerk only in the event you do not intend to file a response to the petition.

Only counsel of record will receive notification of the Court's action in this case. Counsel of record must be a member of the Bar of this Court.

Mr. Michael M. Essmyer
Essmyer, Tritico & Rainey, LLP
5111 Center Street
Houston, TX 77707
(713) 869-1155

NOTE: This notice is for notification purposes only, and neither the original nor a copy should be filed in the Supreme Court.

NO. 12-6988

IN THE SUPREME COURT OF THE UNITED STATES

DONALD RAY WOMACK,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent,

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Pursuant to Rule 39 and 18 U.S.C. § 3006A(d)(7), Petitioner **DONALD RAY WOMACK** asks leave to file the accompanying Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit without prepayment of costs and to proceed in forma pauperis. Petitioner was represented by counsel appointed under the Criminal Justice Act, 18 U.S.C. § 3006A(b) and (c), on appeal to the United States Court of Appeals for the Fifth Circuit.

Date: October 26, 2012

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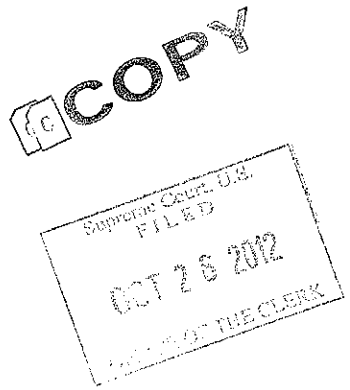
12-6988

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES



DONALD RAY WOMACK,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent,

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented is:

"Whether Petitioner was erroneously denied his Fifth and Sixth Amendment Constitutional rights to present his defensive theory of lack of specific intent or *mens rea?"*

The lower Courts' denied Petitioner the use of an expert and prohibited Petitioner from placing into evidence multiple correct tax returns before the jury.

On December 17, 2008 the Defendant Donald Ray Womack was indicted along with his wife Ms. Tonya Buckner Womack in a twenty-six count indictment.[1] The indictment as to Mr. Womack consisted of one count of Conspiracy under 18 U.S.C. §371 in committing alleged acts of aiding and assisting in the preparation and presentation of false tax returns, and thirteen substantive acts of aiding and assisting in the preparation and presentation of false tax returns in violation of 26 U.S.C. §7206.[2] Mr. and Mrs. Womack both separately retained counsel in the District Court for trial.

[1] Court's Record at 18-42.
[2] *Id.* at 99.

On June 22, 2009, a pretrial conference was held and the Womacks' first motion to continue was granted.[3] On September 8, 2009 a second order to continue in the "interest of justice" was entered.[4] On November 9, 2009, another pretrial conference was held and a third motion, this time oral, to continue was granted "in the interest of justice."[5] On December 10, 2009 another pretrial conference was held wherein the court denied the Womacks' motion for CJA funds in the amount of $3,000.00 to $5,000.00 to hire an expert so that counsel could effectively represent them. Counsel explained that the expert would review a percentage of the tax files to support the defense that the twenty five (25) returns in question were negligence, aberrant mistakes or sloppy work and to support counsel's argument that there thus was no specific intent, *mens rea* to commit the crime charged. The Court granted another oral motion to continue.[6] On February 26, 2010, the District Court held a pretrial conference on the substitution of trial counsel for the Defendant Donald Ray Womack and on a motion to continue made by possible substitute counsel, Mr. Mike DeGeurin. These motions

[3] *Id.* at 6.
[4] *Id.* at 6.
[5] *Id.* at 7.
[6] *Id.*

were both denied.[7] Mr. DeGeurin, Mr. Womack's desired retained trial counsel of choice therefore could not substitute into the case.[8]

Trial began on March 1, 2010, wherein opening statements were given, exhibits were admitted and the Government began its case.[9] The Womacks moved for an instructed verdict at the close of the Government's evidence.[10] Defendant Tonya Womack presented a case, but Defendant Donald Ray Womack did not.[11] After a five day jury trial the Defendant Donald Ray Womack was convicted on March 5, 2010 on all 14 counts levied against him.[12] Tonya Womack was also convicted on all her counts. The Womacks filed a motion for a new trial,[13] which motion was subsequently denied on July 21, 2010.[14] On March 29, 2011 Donald Ray Womack was sentenced, and the judgment and sentence was entered on April 10, 2011.[15]

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[7] *Id.* at 8.
[8] *Id.* at 293-309.
[9] *Id.*
[10] *Id* at 1353-54 and 1548-49.
[11] *Id.* at 1354-1420.
[12] *Id.* at 10.
[13] *Id.* at 244-250.
[14] *Id.* at 10-11.
[15] *Id.* at 13.

On April 21, 2011, Donald Ray Womack timely filed his notice of appeal to the U.S. Court of Appeals for the Fifth Circuit.[16] Donald Ray Womack was granted appointed CJA counsel on appeal.[17]

The Fifth Circuit affirmed that appeal on July 19, 2012, and on August 31, 2012 The Fifth Circuit denied the Womacks' Joint Motion for Rehearing. Petitioner urges that, particularly in light of the denial of an expert and the improper Government jury arguments in closing statements, that Petitioner was denied his Fifth and Sixth Amendment rights to present a defense and the right to a fair trial.

[16] *Id.* at 14.
[17] *Id.* at 14.

PARTIES TO THE PROCEEDING

All parties to the proceeding are named in the caption of the case before the Court except for Petitioner's wife, Tonya Buckner Womack, who was also convicted and who is also filing her own Petition for Writ of Certiorari.

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PRAYER

The Petitioner, Donald Ray Womack, respectfully prays that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Fifth Circuit issued on July 19, 2012.

OPINION BELOW

On July 19, 2012, the United States Court of Appeals for the Fifth Circuit entered its judgment and opinion affirming the judgment of conviction and sentence. *See United States v. Tonya Buckner Womack; Donald Ray Womack*, No. 11-20210 (5th Cir. Jul. 19, 2012) (unpublished). A copy of that slip opinion is attached as Appendix A to this Petition. The United States Court of Appeals for the Fifth Circuit then denied Petitioner's Joint Motion for Rehearing on August 31, 2012. A copy of that denial is attached as Appendix B to this Petition. The district court did not issue a published written opinion.

JURISDICTION

On July 19, 2012, the United States Court of Appeals for the Fifth Circuit entered its judgment and opinion affirming the judgment of conviction and sentence. *See Tonya Buckner Womack; Donald Ray Womack*, No. 11-20210 (5th Cir. July 19, 2012) (unpublished). Petitioner's Joint Motion for Rehearing was denied on August 31, 2012. This Petition is

filed within ninety days after denial of the timely filed Motion for Rehearing. *See* Supt. Cr. R. 13.3. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The question presented involves, besides the Fifth and Sixth Amendments:

18 U.S.C. §371 which provides:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both. If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

And, 26 U.S.C. § 7206 which states:

> Any person who--
> **(1) Declaration under penalties of perjury.**--Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or
> **(2) Aid or assistance.**--Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document; or

(3) Fraudulent bonds, permits, and entries.--Simulates or falsely or fraudulently executes or signs any bond, permit, entry,or other document required by the provisions of the internal revenue laws, or by any regulation made in pursuance thereof, or procures the same to be falsely or fraudulently executed, or advises, aids in, or connives at such execution thereof; or

(4) Removal or concealment with intent to defraud.--Removes, deposits, or conceals, or is concerned in removing,depositing, or concealing, any goods or commodities for or in respect whereof any tax is or shall be imposed, or any property upon which levy is authorized by section 6331, with intent to evade or defeat the assessment or collection of any tax imposed by this title; or

(5) Compromises and closing agreements.--In connection with any compromise under section 7122, or offer of such compromise, or in connection with any closing agreement under section 7121, or offer to enter into any such agreement, willfully--

(A) Concealment of property.--Conceals from any officer or employee of the United States any property belonging to the estate of a taxpayer or other person liable in respect of the tax, or

(B) Withholding, falsifying, and destroying records.--Receives, withholds, destroys, mutilates, or falsifies any book, document, or record, or makes any false statement, relating to the estate or financial condition of the taxpayer or other person liable in respect of the tax; shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 3 years, or both, together with the costs of prosecution."

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS.

On December 17, 2008 the Defendant Donald Ray Womack was indicted along with his wife Ms. Tonya Buckner Womack in a twenty-six count indictment. The indictment as to Mr. Womack consisted of one count

of Conspiracy under 18 U.S.C. §371 in committing alleged acts of aiding and assisting in the preparation and presentation of false tax returns, and thirteen substantive acts of aiding and assisting in the preparation and presentation of false tax returns in violation of 26 U.S.C. §7206. Mr. Womack retained counsel in the District Court for trial, as did Mrs. Womack.

On June 22, 2009, a pretrial conference was held and the Womacks' first motion to continue was granted. On September 8, 2009 a second order to continue in the "interest of justice" was entered. On November 9, 2009, another pretrial conference was held and a third motion, this time oral, to continue was granted "in the interest of justice," On December 10, 2009 another pretrial conference was held wherein the court denied the Womacks' motion for CJA funds in the amount of $3,000.00 to $5,000.00 to hire an expert so that defense counsel could effectively represent them. The Womacks' two counsel explained that the expert would review a percentage of the tax files to support the defense that the twenty five (25) returns in question were aberrant mistakes or sloppy work and to support the Womacks' and counsels' argument that there thus was no specific intent or *mens rea* to commit the crime charged. The Court not only denied the motion for expert, but also would not allow the defense. The Court granted

another oral motion to continue. On February 26, 2010, the District Court held a pretrial conference on the substitution of trial counsel for the Defendant Donald Ray Womack and on a motion to continue made by possible substitute counsel, Mr. Mike DeGeurin. These motions were both denied. Mr. DeGeurin, Mr. Womack's retained trial counsel of choice therefore could not substitute into the case.

Trial began on March 1, 2010, wherein opening statements were given, exhibits were admitted and the Government began its case. The Womacks moved for an instructed verdict at the close of the Government's evidence. Defendant Tonya Womack presented a case, but Defendant Womack did not. After a five day jury trial the Defendant Donald Ray Womack was convicted on March 5, 2010 on all 14 counts levied against him.[18] His wife was also convicted on all counts. The Womacks filed a motion for a new trial, which was subsequently denied on July 21, 2010.[19] On March 29, 2011 the Defendant Donald Ray Womack was sentenced, and the judgment and sentence was entered on April 10, 2011.

On April 21, 2011, the Defendant Donald Ray Womack timely filed his notice of appeal to the U.S. Court of Appeals for the Fifth Circuit. Defendant Donald Ray Womack was allowed appointed CJA counsel on

[18] *Id.* at 10.
[19] *Id.* at 10-11.

appeal. The Fifth Circuit denied that appeal on July 19, 2012, and on August 31, 2012 denied the Joint Motion for Rehearing.

B. STATEMENT OF THE RELEVANT FACTS

The crux of the United States' case was that the Womacks as tax preparers conspired with each other and aided and assisted each other in the preparation and presentation of false tax returns in violation of both 18 U.S.C. §371, and 26 U.S.C. §7206. The root of the Womacks' defense is that they are unsophisticated tax preparers who may have made some mistakes, but the vast majority of their approximately 5,000 returns, (over 3,000 per year), are accurate; and, thus, while mistakes may have been made on some returns, the Womacks lacked the specific intent, especially that specific intent demanded in tax offenses, to commit the offenses charged.

Before the jury trial began, the Womacks, who by then qualified as indigent, requested an expert to support their defense. The District Court, largely on a promise of the Government not to go into the approximately 5,000 other returns, did not grant this Womacks' request, and also fully disallowed the specific intent, *mens rea*, defense, ruling it was solely inadmissible reverse 404b. The Womacks urge this ruling was improper and prevented the Womacks from presenting their lack of specific intent (*mens rea)* defense to the jury. The Womacks point out that this is particularly

egregious based on both the denial of their expert and the Government's improper jury argument in final argument wherein the Government argued that all the couple's prepared returns were illegal and false.

BASIS OF FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

Petitioner was convicted and sentenced under 18 U.S.C. §371 and 26 U.S.C. §7206(2. The district court therefore had jurisdiction pursuant to 18 U.S.C. §3231.

REASONS FOR GRANTING THE WRIT

> The Supreme Court should grant certiorari because the Fifth Circuit's opinion and the trial court's ruling conflict with this Court's decisions in *Holmes v. South Carolina,* 547 U.S. 319(2006) (in which this Court held that the Sixth Amendment grants the right to present a defense), and *Chambers v. Mississippi,* 410 U.S. 284(1973) (in which case this Court held that a Defendant has a Fifth and Sixth Amendment right to present a defense). Further, the Fifth and Sixth Amendment prohibits exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote. This Court should also grant certiorari as a conflict exists with *Ake v. Oklahoma,* 470 U.S. 68(1985)(the Womacks have a due process right and an equal protection right to receive assistance to assure that a defendant can present his or her defense).

A. INTRODUCTION

Prior to the trial the Womacks requested funds to hire an expert to evaluate the tax returns prepared by the Womacks over the two years alleged

in the indictment.[20] During this hearing the trial court ruled that evidence of returns that were correctly filed, which would have been used to prove that the Womacks' incorrect returns were done incorrectly out of negligence, mistake or otherwise would not be admissible in the trial before the jury.[21] The Womacks were also prohibited from going into the number of returns filed and the percentage of returns that the Government analyzed for evidence of fraud.[22]

After trial the Womacks filed their motion for a new trial. The Womacks provided a list of witnesses that they were willing to put on to show that the Womacks normally did a good job and filed correct returns.[23] These proposed significant witnesses included the following:

Gwen Tinner
Rita Bennet
Melanie Richmond
Shannon Irvan
Tommy Woodard
Roy Parker
Sieffon Isaac
Delores Hammond
Timothy Smith
Danic Guillary
Mark Vierkart
Juanita Murchison.[24]
Bonnie Beachy
Margo Johnson
Cab Boston
Theodore Kelly
Michael Mosely
Thai Hoang
Bobby Irvan, Jr.
Joe Dela Rosa
Rory Robertson
Ricky Attaway
Toccara Randle

[20] *Id.* at 245.
[21] *Id.*
[22] *Id.*
[23] *Id.* at 244-250.
[24] *Id.* at 246-47.

This issue was caused by the fact that while the Trial Court had not allowed the defense of a large number of legitimate returns, in the prosecutor's closing argument the prosecutor referred to the number of tax returns the Womacks filed in a particular year, alleging that the reason that the Womacks prepared incorrect tax returns was in order to create business for themselves, and noting that the Womacks did not actually take a percentage of the amount of money that the error saved the Womacks' clients.[25] In denying the Womacks' motion for a new trial, the Trial Court held that said ruling was based in part on the Court's refusal to allow "reverse 404(b) evidence" to refute the above claim, consisting of evidence of all the correctly filed tax returns which would establish an argument that the incorrect returns were the result of negligence or mistake instead of having been created intentionally, the District Court simply stated:

> "In this case, there is no basis to find that the prosecutor's argument was improper. The argument was based on record evidence that the Womacks obtained from friends and coworkers who spread the word of the results of the Womacks' work. The argument also responded to the Womacks' argument that they had no financial incentive to submit false returns. In addition, there was ample evidence of the Womacks' guilt. There is no basis to grant a new trial."[26]

[25] *Id.* at 257.
[26] *Id.* at 258.

Yet, during the December 10, 2009 pretrial conference the court characterized this evidence as evidence "to show what the Government agrees," which the Court based on the position that the Government was not "taking the position that every return that your clients worked on during the relevant period was fraudulent."[27] The Court further went on to explain that the Government's own expert witness would make this same point clear thus eliminating the need for the Womacks to present this specific evidence."[28]

B. THE WOMACKS WERE PREVENTED FROM ASSERTING THEIR DEFENSIVE THEORY

The Womacks were ready to present evidence that they successfully prepared over 5,000 tax returns during the relevant time. They were willing to put on tax payers whose returns were not questioned. They also desired to have an expert review these files and expound that they were properly prepared. This evidentiary showing by the Womacks was to negate particularly specific intent, *mens rea,* and to show that the few examples the Government had cobbled together were the result of accident, negligence, mistake or ignorance, not fraud. The Womacks wanted to demonstrate a pattern of legal activity that rebutted the *mens rea* to commit tax fraud. The Womacks wished to present their defense.

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[27] *Id.* at 348.
[28] *Id.* at 350.

Rule 404(b) is usually applied in the context of a prosecution attempting to introduce "bad act" evidence against a Defendant. However, evidence of a pattern of non-criminal activity is sometimes admitted by a Defendant to rebut allegations of criminality or criminal intent. If attempting to offer prior good acts, the courts have generally limited such evidence to acts that would constitute exculpatory evidence. *United States v. Shavin*, 287 F2d 647, 654 (7 Cir. 1961). As is true for "bad acts" under 404(b), "good acts" under a reverse 404(b) are generally inadmissible if that evidence is used to establish the Defendant's good character. However, as is true with bad act evidence, evidence of good acts is also admissible for a proper purpose such as motive, intent, absence of mistake, etc. *See, United States v. Hayes*, 219 Fed.Appx. 114, 116 (3d Cir. 2007) (unpublished opinion). Appendix C hereto. *See also, United States v. Garvin*, 565 F.2d 519 (8 Cir. 1977); *United States v. Marlinga*, 457 F.Supp.2d 769 (E.D. Mich 2006); and *Ansell v. Green Acres Contracting Co.Inc.*, 347 F.3d 515,520 (3d Cir. 2003).

The Fifth Circuit accepts the concept of reverse 404(b), but restricts its use to "appropriate cases" where the Government has alleged a conspiracy and is attempting to show a scheme to defraud. *United States v. Dobbs*, 506 F.2d 445, 446 (5th Cir. 1975). In *Dobbs*, a father and son were preparing income tax returns for others and they were convicted of overstating

deductions. The Dobbs were not charged with a scheme to defraud but with separate instances of criminal conduct. The Fifth Circuit affirmed the exclusion of routine non-criminal conduct because the Dobbs:

> Were not charged with a scheme but with separate instances of criminal conduct and evidence of non-criminal conduct to negate the inference of criminal conduct is generally irrelevant.
>
> *Dobbs*, 506 F.2d at 447.

In two sentences, the *Dobbs* court rejected the proffer of evidence under 404(b) because the Dobbs were charged with separate instances of criminal conduct. In the present case, the Government alleges a conspiracy and leaves the impression with the jury that the incidents alleged are part and partial of the normal operation of the Womacks' business; i.e. a scheme to defraud. Unlike *Hayes*, the defendant in *Dobbs* did not attempt to introduce evidence that would negate the *mens rea* for conspiracy. The nexus between the offense and the other purpose for which the evidence was offered was lacking. Had the defendants in *Dobbs*, been charged with a scheme (conspiracy), then evidence that would negate the *mens rea* should have been admissible. The Fifth Circuit's reasoning indicates that the evidence would be admissible because it is introduced not as character evidence but as evidence of the defendant's lack of intent to commit the alleged criminal conspiracy.

Additionally, a review of the cases cited by the Fifth Circuit in *Dobbs* does not indicate that, as in the present case, the Womacks should not be allowed to offer evidence of non-criminal conduct to negate the *mens rea* of the offense. The *Dobbs* case relied on *United States v. Null*, 415 F.2d 1178, 1181 (4th Cir. 1969): *United States v. Stoehr*, 196 F.2d 276, 282 (3 Cir. 1952); and *Herzog v. U.S.*, 226 F.2d 561, 565 (9th Cir. 1955). All these cases go to the inadmissibility of the defendant's evidence based on relevancy, not based on a proffer that it negates the specific intent requirements of the Government allegations. In the present case, the non-admitted evidence is relevant, and was discussed by the prosecution in its final argument.

In *United States v. Lambert*, 580 F.2d 740 (5th Cir. 1978) the Fifth Circuit ruled that a trial court did not err by refusing to admit evidence of routine practice of an automobile dealership in a "possession of stolen auto parts charge." Citing *Dobbs*, the trial court ruled that evidence of non-criminal conduct to negate the inference of criminal conduct is generally irrelevant. The Fifth Circuit Court of Appeals used an abuse of discretion standard to uphold the trial court's ruling, and noted the trial court had already permitted the Defendant to introduce testimony, documentary evidence, and summary exhibits relating to all sales both criminal and non-criminal (*Lambert,* 580 F.2d at 746). That is not the present case.

While it appears that the Fifth Circuit normally leaves it to the sound discretion of the trial court to determine the relevance of non-criminal conduct in negating the inference of criminal conduct, when a scheme to defraud is alleged by the Government, as in the present case, the Government has to establish knowledge and specific intent and it is a constitutional abuse of discretion to negate the Womacks' defenses. This is particularly true when, as here, there appears to be a swearing match between the tax preparer and the tax payer.

By alleging a conspiracy and twenty-four (24) separate acts of criminal behavior, the Government is, in effect, offering a pattern of illegal behavior. By presenting such acts in a single indictment the Government is able to reap the benefits of 404(b) evidence without having to forgo the requirements of relevancy and prejudice. The Womacks, on the other hand, are left before the jury with the impression that repeated mistakes on tax returns are the norm and thus, criminal, with no way to refute such an assumption other than to show the true nature of the Womacks' business, which defense the trial and appellate court did not allow.

In the present case, the "doctrine of chances" is in effect what the Government is presenting in the conspiracy charge of the indictment, and what the Womacks are asking the Court to admit is a defense to that

allegation. The "doctrine of chances" teaches us that the more often an actor performs the act, the smaller is the likelihood that the actor acted with an innocent state of mind. In showing the Womacks' requested evidence, the mathematical probability of such acts being criminal is tempered with a comparison of how many acts an actor may perform. Or, by simply putting in perspective what may be mathematically isolated examples of behavior.

Professor Wigmore explains the theory:

> §302. "Theory of evidencing Intent. To prove Intent, as a generic notion of criminal volition or willfulness, including the various non-innocent mental states accompanying different criminal acts, there is employed an entirely different process of thought. The argument here is purely from the point of view of the doctrine of chances – the instinctive recognition of that logical process which eliminates the element of innocent intent by multiplying instances of the same result until it is perceived that this element cannot explain them all. Without formulating any accurate test and without attempting by numerous instances to secure absolute certainty of inference, the mind applies this rough and instinctive process of reasoning, namely, that an unusual and abnormal element might perhaps be present in one instance, but the oftener similar instances occur with similar results, the less likely is the abnormal element likely to be the true explanation of them."
>
> (2 Wigmore, Evidence § 302 (3 Ed). rd)

What we see in the cases represented by *Shavin* and *Garvin* is recognition that in some instances the doctrine of chances needs to be placed into context. By allowing the Womacks to show how many times a defendant actually performs the act, and does so correctly, we can increase the chances

that the perceived criminal act does not possess willfulness but instead is a mistake or accident (*Hayes* at 114).

Additionally, a criminal defendant has a Fifth and Sixth Amendment, constitutional right to present his or her defense. *Chambers v. Mississippi*, 410 U.S. 284 (1973). Though the right to a defense is not unlimited, relevant evidence that supports a defensive theory cannot be excluded absent compelling justification. *Rock v. Arkansas,* 483 U.S. 44 (1987); *United States v. Scheffer*, 523 U.S. 303 (1998).

Generally, "all relevant evidence is admissible." Fed.R.Evid. 402. Relevant evidence is 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. Evidence that is relevant to a defendant's theory of the defense should be excluded "sparingly;" if the evidence is otherwise admissible, its exclusion violates the defendant's constitutional rights. *United States v. Potwin*, 136 Fed.Appx. 609 (5th Cir. 2005). The Government was allowed to use experts, summary charts, and multiple tax returns to present its version of the case; the Womacks should have been allowed to use an expert and other witnesses and multiple tax returns to present summary charts of their defense and/or supporting testimony.

When defense evidence is excluded, the appellate court examines "what effect the error had or reasonably may be taken to have had upon the jury's decision. *United States v. Hays*, 872 F.2d 582, 587 (5th Cir. 1989) (quoting) *Kotteakos v. United States*, 328 U.S. 750, 764 (1946). Here a jury was asked to assess whether a tax preparer in the Womacks' position "had to know" that their method of tax preparation as alleged by the Government and allegedly supported by the Government's charts and graphs and the manner in which the case was indicted, and thus had specific intent and an agreement to violate the law; or whether there was some tax returns to which there was simple negligence and/or ignorance. The rejection of evidence negating that specific intent is harmful and reversible.

Indeed, in *Holmes v. South Carolina*, 547 U.S. 319(2006) (a murder, criminal sexual conduct, and burglary and robbery case), this Court held that the Constitution prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote. While the rules of evidence permit a trial judge to exclude evidence if its probative value is outweighed by certain other factors, such as unfair prejudice, Fed.R.Evid. 403, confusion of the issues, or the potential to mislead the jury; such is not the present case. The defense proffered went to the heart of the case – the specific intent, *mens rea*, that

the Government was required to prove. Indeed, it can be argued that the Government alleged the 23 specific counts in the indictment solely to bolster its argument that there was a scheme to defraud.

Thus, presently, just like in *Holmes,* the exclusion of the defense evidence as to no specific intent, no *mens rea*, denied the Womacks a fair trial. Such evidence would have raised a reasonable inference as to the Womacks' innocence, especially in light of the nature of the manner in which the Government concocted the indictment and then argued its case. The Trial Court focused on the Government's promise not to abuse its position, rather than on the Womacks' right to present their defense. The Trial Court failed to focus on the probative value of the Womacks' defensive theory and defensive case. Therefore, the Trial Court, and the 5th Circuit, improperly excluded the Womack's defense and this Petition for Writ of Certiorari should be granted.

C. IMPERMISSIBLE FINAL ARUGMENTS EXACERBATE THE CONSTITUTIONAL VIOLATION.

In its final argument the Government did not confine its argument to the twenty-five tax returns mentioned in the indictment or to evidence in the case, as it had promised the Court pretrial. Instead, the Government argued

in the opening part of its argument that large scale fraud was endemic to Front Door Tax Service:

> Mr. and Mrs. Womack, the defendants in this case, ran the business Front Door Tax Services. And they used that business to defraud the United States. They prepared false fraudulent income tax returns and amended income tax returns, they impaired the IRS's ability to collect taxes, revenue for the Government, and they cost the United States a significant amount of tax loss in this case.
>
> Together, they operated this business, and together they benefitted from their fraud. ***That's how they built their business, and they took home the income from their business at the end of the day.***

R. 1467-1468 (emphasis added).

The Government again emphasized this theme later in the first part of its closing argument:

> The benefit to the Womacks were happy customers, repeat business, client who gets a big refund this year is liable to go back next prepared amended returns, that is, they took the taxpayers back to prior tax years and had them change what they had reported one, two or three years in the past. They charged fees, and this was a way for the Womacks ***to build the clientele, build revenue, get people in the door, get people coming back next year.***
>
> And because of this, of course, they ***obtained a competitive advantage.*** Their competitors in the tax preparation field, imagine being an honest tax preparer trying to build a clientele. The honest tax preparer ***can't promise a large refund every year. Sometimes an honest tax return preparer has to tell the client the way it is. And an honest tax preparer cannot compete with a false and fraudulent tax preparer.*** You can see the ***advantage that the defendants have.*** Of course, who wouldn't want a $4,000 refund when in fact maybe you owed $300? You see how the Womacks motivated people to use their business and pay them their fees.

> Now, the income that Mr. and Mrs. Womack generated was just fine. If you do a little simple math that they prepared ***3,000 returns a year and charged approximately $150 per return, that comes out to a revenue of over – about $450,000***. For a small business, that's a lot of money. ***And we know that some of that money went into the swimming pool in the backyard of the Womacks' home.***

R. 1476-1477 (emphasis added).

And, in the final part of the Government's closing argument, after defense counsel had argued, the Government continued the theme of large-scale fraud:

> The way to make money at ***this operation is a volume business***. You get them in, you charge them $150, you run up how many thousands of returns you can do in a year. And they're mostly crammed in that tax season. You heard Mrs. Womack say that. Before April 15th, ***you're just churning them out like it's a factory***, 20 to 25 a day in a slow day, she says. It gets worse than that. The only way you can churn them out like that is if you cookie-cutter, ***churning out the same Schedule A and the same Form 2106 over and over again***, just tinkering a little bit with the numbers. ***That's how you are make money***. It's not the bald [sic] way. ***It's the sneaky way, the dishonest way***.

R. 1505-1506 (emphasis added).

Indeed, the Womacks' request for the allowance of such evidence began before trial, was the basis for their motion for new trial, was a basis for their appeal to the Fifth Circuit, and is a basis for their Petition before this Court. The prosecutors' usage of the argument in final argument as to other tax preparation files not in the indictment not only exacerbated the error, but necessitated the granting of a new trial.

D. DENIAL OF EXPERT EXACERBATED THE CONSTITUTIONAL VIOLATION

In the present case the Womacks were unable to afford the fees, even reduced fees, for an expert. The Womacks have a due process right and an equal protection right to receive this assistance. *See Ake v. Oklahoma*, 470 U.S. 68 (1985). "[W]hen a state brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his [or her] defense." 470 U.S. at 76. The Supreme Court "recognized long ago that mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and that a criminal trial is fundamentally unfair if the state proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense." *Id.* at 77.

The CJA provides the procedure both for an indigent defendant to request expert appointment and for the district court to resolve the motion. Section 3006A(e) provides in relevant part,

> Counsel for a person who is financially unable to obtain ... expert ... services necessary for adequate representation may request them in an ex parte application. Upon finding, after appropriate inquiry in an ex parte proceeding, that the services are necessary and that the person is financially unable to obtain them, the court ... shall authorize counsel to obtain the services. 18 U.S.C. § 3006A(e)(1) (2000 & Supp. 2005).

United States v. Hardin, 437 F.3d 463, 468 (5th Cir. 2006).

> District courts must "grant the defendant the assistance of an independent expert under § 3006A when necessary to respond to the Government's case against him, where the Government's case 'rests heavily on a theory most competently addressed by expert testimony.'" *Williams*, 998 F.2d at 263 (quoting *United States v. Patterson*, 724 F.2d 1128, 1130 (5th Cir. 1984).

Regarding the dollar amount of expert fees requested, in the case of *United States v. Jamieson*, 427 F.3d 394 (6th Cir. 2005) where the district court authorized $100,000.00 in expert fees. The Sixth Circuit stated: "We have directed the district courts to authorize services under §3006A upon a determination that (1) such services are necessary to mount a plausible defense, and (2) without such authorization, the defendant's case would be prejudiced." 427 F.3d at 407-408. It is respectfully submitted that the denial of the Womacks' request further constituted a violation of due process and equal protection guaranteed by the United States Constitution.

The Womacks' constitutional claims are reviewed *de novo*. *United States v. Green,* 508 F. 3d 195, 199 (5th Cir. 2007). While the decision to exclude evidence is reviewed for abuse of discretion, "a district court by definition abuses its discretion when it makes an error of law. *United States v. Colomb,* 419 F3d 292, 297 (5th Cir. 2005), (quoting) *Koon v. United States,* 518 U.S. 81, 100 (1996). Under the record before this Court, on these issues, the case should be reversed and remanded.

E. ADOPTION AND INCORPORATION

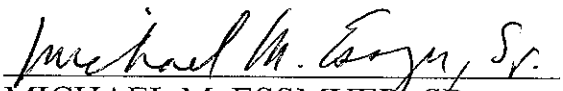
Pursuant to Federal Rules of Appellate Procedure 28(1), DONALD RAY WOMACK respectfully adopts all issues raised by his wife, fellow potential Petitioner TONYA BUCKNER WOMACK in which he shares a common factual and legal basis.

CONCLUSION

For the foregoing reasons, Petitioner Donald Ray Womack, respectfully prays that this Court grant certiorari to review the judgment of the Fifth Circuit in this case.

Date: October 26, 2012

Respectfully submitted,



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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

DONALD RAY WOMACK,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent,

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PROOF OF SERVICE

I MICHAEL M. ESSMYER, SR. do swear that on this date, October 26, 2012, as required by the Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and PETITION FOR WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States Mail properly address to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

Mr. James L. Turner
Chief of the Appellate Division
Mr. John Richard Berry, Assistant United States Attorney
United States Attorney's Office
Southern District of Texas
P.O. Box 61129
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Donald B. Verrilli, Jr.
Office of the Solicitor General
950 Pennsylvania Avenue
Washington, D.C. 20530
3 Copies

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 26, 2012.

MICHAEL M. ESSMYER, SR.

State of Texas §
County of Harris §

Sworn and subscribed before me on the 26th day of October, 2012, by Michael M. Essmyer, Sr..

LONNIE ROBERT WESTEEN NOTARY PUBLIC STATE OF TEXAS EXPIRES 10-6-2014

Notary Public
Commission expires: 10/6/2014

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
July 19, 2012
Lyle W. Cayce
Clerk

No. 11-20210

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

TONYA BUCKNER WOMACK; DONALD RAY WOMACK,

Defendants-Appellants

Appeals from the United States District Court
for the Southern District of Texas
USDC No. 4:08-CR-822-2

Before STEWART, ELROD, and SOUTHWICK, Circuit Judges.

PER CURIAM:*

A husband and wife were indicted for offenses arising out of their business of preparing federal income tax returns. The indictment alleged one count of conspiring to defraud the United States by obstructing the collection of income taxes and by assisting in the preparation of false income tax returns, *see* 18 U.S.C. § 371, and 25 counts of aiding and assisting in the preparation of false income tax returns. *See* 26 U.S.C. § 7206(2). Thirteen of the counts charged the

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

husband, while the remaining twelve charged the wife. A jury convicted them on every count. We AFFIRM.

FACTS

Donald and Tonya Womack were the owners and operators of Front Door Tax Services, a small company that prepared personal income tax returns in Houston, Texas. Originally, Donald was the only person who prepared returns for the business. Donald misrepresented that he was an accountant who had worked previously for the IRS. As business grew, he sought assistance in preparing the returns from his wife, Tonya. At first, Tonya only provided support services to Donald. Her responsibilities progressed until she registered with the IRS to obtain an electronic filing identification number so that she could file client returns electronically. Donald used this identification number as well. At some point, Tonya began to prepare tax returns for customers. To learn the proper methods for preparing a return, she attended a tax preparation course provided by a national tax-preparation business.

The Womacks came to the attention of the Internal Revenue Service due to unusual deductions claimed on returns they prepared. A federal grand jury returned a 26-count indictment against the couple, alleging a conspiracy and aiding and assisting in the preparation of false tax returns. A jury trial was held in the United States District Court for the Southern District of Texas.

The government's case concerned 26 of the thousands of returns the Womacks prepared. One government witness was Robert Walenta. Front Door prepared his return, which prompted an IRS inquiry because it claimed a substantial deduction for vehicle mileage. The IRS told Walenta he needed to submit documentation to support the deduction. When Walenta told Donald, Donald offered to provide fraudulent mileage logs that could be given to the IRS.

Other taxpayers also testified. They explained how their returns claimed deductions that were not permitted, such as charitable deductions although the

taxpayer never donated to charity or mortgage-interest deductions although the taxpayer did not own a home. The taxpayers all testified that they never provided the Womacks with any information that would justify the inclusion of those deductions on their tax returns. Tonya testified that any errors contained in the tax returns she prepared were honest mistakes due to her unfamiliarity with the specific requirements of the tax code.

The government also called an undercover IRS agent. As part of the investigation, the agent went to Front Door to have a tax return prepared. He brought along the necessary paperwork. The agent calculated he legitimately would owe about $300 in taxes. He testified that Front Door offered him a choice of three refunds: $3,200, $3,500, or $4,200.

At the close of the government's case, both Donald and Tonya moved for acquittal. This motion was denied. Tonya, but not Donald, put on evidence. Her theory was that each of her errors were accidental mistakes.

The jury found Donald and Tonya guilty on all counts. The district court sentenced Donald to 60 months imprisonment and three years of supervised release. Tonya was sentenced to 33 months of imprisonment and three years of supervised release. Both were ordered to pay restitution of $161,855, for which they are jointly and severally liable. They appeal.

DISCUSSION

There are five issues: (1) Were jurors improperly allowed to consider, in deciding Tonya's guilt, the fact that Donald prepared false mileage logs; (2) did the district court err in denying funding to the defense for an expert witness; (3) was there reversible error in the government's closing statement; (4) was there sufficient evidence to convict Donald; and (5) did the district court err by denying Donald's motion for a fifth continuance?

I. District Court's Jury Instruction Regarding Fraudulent Mileage Logs

Tonya argues the district court erred by informing the jurors that they could consider, when determining her criminal intent, that Donald attempted to give false mileage logs to a customer. She did not object at trial, which leads us to review the instruction for plain error only. *See United States v. Smith*, 354 F.3d 390, 396 n.7 (5th Cir. 2003). To establish plain error, Tonya must demonstrate the district court committed (1) an error, (2) that was clear or obvious, and (3) that affected her substantial rights. *United States v. Burns*, 526 F.3d 852, 858 (5th Cir. 2008). In the context of jury instructions, "[p]lain error occurs only when the instruction, considered as a whole, was so clearly erroneous as to result in the likelihood of a grave miscarriage of justice." *United States v. Garcia*, 567 F.3d 721, 728 (5th Cir. 2009) (quotation marks and citation omitted).

The instruction Tonya challenges related to the use of the evidence under Rule 404(b). Under that rule, evidence of other acts may be introduced to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Fed. R. Evid. 404(b)(2). Generally, these other acts are only relevant to the actor. For this reason, the other acts of one person usually cannot be used to show the intent of another. *See United States v. Cihak*, 137 F.3d 252, 258 & n.3 (5th Cir. 1998). There is an exception when the individuals are part of a conspiracy, but the alleged conspiracy here ended before Donald offered the false logs. *See United States v. Mann*, 161 F.3d 840, 859-60 (5th Cir. 1998).

Prior to the testimony, the district court provided the following instruction:

> The evidence that you are hearing, ladies and gentlemen, is evidence of -- that pertains to acts of the defendants that may be similar to those charged in the indictment but which were committed on other occasions.
>
> You must not consider any of this evidence in deciding if either of the defendants committed the acts that are charged in the indictment. You may, however, consider this evidence for other limited purposes. If you find beyond a reasonable doubt from other

> evidence in this case that either of the -- or both of the defendants did commit the acts charged in the indictment, then you may consider the evidence that you are now hearing of similar acts allegedly committed on other occasions to determine whether either or both of the defendants had the state of mind or intent necessary to commit the crimes charged in the indictment, or whether either or both of the defendants committed the acts for which they are on trial by accident or mistake.

Tonya believes the instruction was erroneous because it referred to "the defendants" collectively instead of only to Donald. She argues the instruction impermissibly linked her to Donald's bad act.

The district court gave this instruction before it knew the scope or implication of the testimony. Because of the uncertainty, there was a chance the testimony would apply to Tonya as well as to Donald. Although it is now clear that the testimony only implicated Donald, the district court did not have the benefit of being in our position. We neither expect nor require the district court to be omniscient. At the time the instruction was given, it was not clearly erroneous for the district court to refer to both defendants.

Even if there had been error, the district court's later instruction mitigated any prejudice. At the end of the trial, when it was known that the testimony only concerned Donald, the district court instructed the jury that it could use the evidence only against him. This instruction limited any prejudice that may have existed. *See United States v. Duffaut*, 314 F.3d 203, 210 (5th Cir. 2002).

There was no plain error on this issue.

II. Denial of a Motion for Employing an Expert Witness

The Womacks appeal the district court's denial of funds to retain an expert witness. The Womacks wanted an expert who could testify that most of the returns they prepared were not fraudulent. The district court refused. We review that ruling for an abuse of discretion. *United States v. Hardin*, 437 F.3d

463, 468 (5th Cir. 2006).

The Womacks are considered indigent defendants. Counsel for an indigent defendant may request expert services and, "[u]pon finding . . . that the services are necessary and that the person is financially unable to obtain them, the court . . . shall authorize counsel to obtain the services." 18 U.S.C. § 3006A(e)(1). This statutory command requires district courts to "grant the defendant the assistance of an independent expert under § 3006A when necessary to respond to the government's case against him, where the government's case rests heavily on a theory most competently addressed by expert testimony." *Hardin*, 437 F.3d at 468 (quotation marks and citation omitted). If the expert's testimony would be irrelevant, however, it would not be necessary and the district court may deny the request. *See* 18 U.S.C. § 3006A(e)(1).

This issue consumed a good deal of time before trial. It was discussed at a pre-trial conference and the court then requested briefing. After the briefs were submitted, the district court held another conference on the question.

In their brief and during the conferences, the Womacks did not identify any binding precedent to support their position. On multiple occasions, the Womacks explained that the evidence would only be relevant if the government strayed from the indictment and alleged that most of the returns the Womacks prepared were fraudulent. The government advised that it was not its intent to make those types of allegations. Given this assurance, the Womacks noted that the need for an expert may not be ripe for determination pretrial and instead could be addressed later.

With this understanding, the district court concluded that expert testimony would be irrelevant. Its ruling reflects the understanding that prior good acts, like bad acts, can be relevant but generally are not. *See United States v. Dobbs*, 506 F.2d 445, 447 (5th Cir. 1975). The court shared the Womacks' concern that there was some chance that the government's case could drift off

course, but concluded that it would be possible to limit this danger without incurring the large costs associated with their request. The record reflects agreement by the Womacks on this point. Under these circumstances, the Womacks have not shown that the district court abused its discretion.

The Womacks argue that the government did wander off course during trial and violated this pretrial understanding. If that occurred, it creates an issue that is independent of what we have just concluded was a valid decision not to fund an expert. We examine next what occurred during trial.

III. Government's Closing Statement

Tonya asserts that the government's closing statement materially misstated the evidence presented at trial in two ways. First, she argues that the government impermissibly linked her to the false mileage logs offered by Donald. Second, she contends the government claimed that every tax return prepared by Front Door was fraudulent.

Because she did not object to the statements at the time they were made, we review for plain error. *United States v. Mares*, 402 F.3d 511, 515 (5th Cir. 2005). "Plain error exists if (1) there was error; (2) the error was clear and obvious; and (3) the error affected a substantial right." *Burns*, 526 F.3d at 858. An error is clear if its existence cannot be reasonably debated. *See United States v. Bohuchot*, 625 F.3d 892, 897 (5th Cir. 2010). Generally, an error affects a defendant's substantial rights "if there is a reasonable probability that the result of the proceedings would have been different but for the error." *United States v. Montes-Salas*, 669 F.3d 240, 247 (5th Cir. 2012).

When reviewing the propriety of closing remarks, context matters. *Burns*, 526 F.3d at 858. A statement that could appear defective if analyzed in isolation may lose its tarnish once it is viewed in the light of the entire trial. Moreover,

because closing statements are not evidence, counsel are provided generous leeway. *United States v. Thompson*, 482 F.3d 781, 785 (5th Cir. 2007).

The first asserted error concerns the government's statement that both Tonya and Donald offered false mileage logs to a customer. Because there was no objection made at the time, Tonya must show more than the existence of error; she must also prove prejudice. *See Burns*, 526 F.3d at 858. Generally, any prejudicial impact attributable to a closing statement can be contained by the district court's instructions to the jury. *See United States v. Turner*, 674 F.3d 420, 439-40 (5th Cir. 2012). The district court's instructions here, which we presume the jury followed, reminded the jury that it could only consider certain evidence when determining guilt. *See id.* at 430. Tonya has not expressed any objection to these instructions. With these safeguards in place, Tonya has not shown that there is a reasonable probability that she would have been acquitted had the government not made the remark. *See id.* at 439-40.

Tonya also contends that the government committed plain error when it commented on the manner in which Front Door was run. She focuses on two different portions of the closing. The government, after recounting an instance of alleged fraud, stated that:

> The benefit to the Womacks were happy customers, repeat business, client who gets a big refund this year is liable to go back next year. And once in the door, what did Mr. and Mrs. Womack do? They prepared amended returns, that is, they took the taxpayers back to prior tax years and had them change what they had reported one, two or three years in the past. They charged fees, and this was a way for the Womacks to build the clientele, build revenue, get people in the door, get people coming back next year.
>
> And because of this, of course, they obtained a competitive advantage. Their competitors in the tax preparation field, imagine being an honest tax preparer trying to build a clientele. The honest tax preparer can't promise a large refund every year. Sometimes an honest tax return preparer has to tell the client the way it is. And

> an honest tax preparer cannot compete with a false and fraudulent tax preparer. You can see the advantage that the defendants have. Of course, who wouldn't want a $4,000 refund when in fact maybe you owed $300? You see how the Womacks motivated people to use their business and pay them their fees.
>
> Now, the income that Mr. and Mrs. Womack generated was just fine. If you do a little simple math that they prepared 3,000 returns a year and charged approximately $150 per return, that comes out to a revenue of over -- about $450,000.

Towards the end of its closing statement, the government returned to this issue:

> The way to make money at this operation is a volume business. You get them in, you charge them $150, you run up how many thousands of returns you can do in a year. And they're mostly crammed in that tax season. You heard Mrs. Womack say that. Before April 15th, you're just churning them out like it's a factory, 20 to 25 a day in a slow day, she says. It gets worse than that. The only way you can churn them out like that is if you cookie-cutter, churning out the same Schedule A and the same Form 2106 over and over again, just tinkering a little bit with the numbers. That's how you are make money.

These statements are vague. The interpretation pressed by Tonya is that the government argued that almost all the returns prepared by the Womacks were fraudulent. If that is so, the government's statement is not supported by the evidence presented. It is a reasonable interpretation, especially when certain sentences are read in isolation. It is not, however, the only reasonable interpretation.

Placed in the broader context, the government's statement may also be seen as a description of how the Womacks acquired customers. Under this theory, a few fraudulent returns played a small yet critical role in attracting new business. Testimony established that under Front Door's pricing structure, a customer was charged a fee of $140 regardless the size of the refund secured. The most efficient way of acquiring new business was by referrals from pleased customers. These customers were generally unfamiliar with the tax code and,

by preparing similar fraudulent tax returns for some of them, the Womacks could establish a reputation for obtaining large refunds. The fraud therefore was limited to the extent necessary to maintain a reputation for finding large deductions for clients. Under this interpretation of the government's remarks, there was no erroneous allegation of systematic fraud. Rather, the allegation was that some fraudulent returns helped keep business coming through the door. That argument is not devoid of evidentiary support.

Our standard of review does not require us to decide which of the competing interpretations is most reasonable. Because the statement can be interpreted in two ways, one of which is free of error, Tonya cannot establish plain error. *See Bohuchot*, 625 F.3d at 897.

IV. Sufficiency of the Evidence Against Donald

Donald argues that the evidence presented by the government was insufficient for a jury to convict. He preserved this challenge by moving for a judgment of acquittal at the end of the government's case-in-chief. *See United States v. DeLeon*, 247 F.3d 593, 596 & n.1 (5th Cir. 2001).

We review *de novo* a properly preserved challenge to the sufficiency of the evidence. *United States v. McElwee*, 646 F.3d 328, 340 (5th Cir. 2011). We construe "all the evidence, direct and circumstantial, in the light most favorable to the jury's verdict, accepting all reasonable inferences and credibility choices in favor of that verdict." *United States v. Griffin*, 324 F.3d 330, 356 (5th Cir. 2003) (quotation marks and citation omitted). We will affirm "if a rational trier of fact could have found that the government proved all essential elements of a crime beyond a reasonable doubt." *United States v. Thompson*, 647 F.3d 180, 183 (5th Cir. 2011). For the evidence to be sufficient, it "need not exclude every reasonable hypothesis of innocence or be wholly inconsistent with every

conclusion except that of guilt." *United States v. Anderson*, 174 F.3d 515, 522 (5th Cir. 1999) (quotation marks and citation omitted).

Donald challenges the sufficiency of the evidence for the conspiracy count as well as for aiding and assisting the preparation of false tax returns. To obtain a conviction for conspiracy under 18 U.S.C. § 371, the government had to prove beyond a reasonable doubt that there was (1) an agreement between Donald and Tonya, (2) to commit a crime, (3) an overt act by one of the conspirators in furtherance of the agreement, and (4) the specific intent to commit the crime. *See United States v. Garza*, 429 F.3d 165, 168-69 (5th Cir. 2005); *see also Cheek v. United States*, 498 U.S. 192, 200-01 (1991). Donald contends there was insufficient evidence to prove an agreement or to prove that the Womacks knew they were claiming illegal deductions for their customers. We first address the evidence of an agreement.

A "jury may infer the existence of an agreement to a conspiracy from testimony and the other circumstantial evidence." *United States v. Zamora*, 661 F.3d 200, 209 (5th Cir. 2011) (marks and citation omitted). This evidence includes the conduct of the alleged co-conspirators. *United States v. Garcia*, 917 F.2d 1370, 1376 (5th Cir. 1990). The evidence presented here, viewed in its proper light, was sufficient to prove the existence of an agreement. The record establishes that Front Door was a small business operated by a husband and wife. Donald and Tonya were the only two people who prepared tax returns, they discussed the details of their business with each other, used the same electronic filing identification number to file returns, and made similar errors in the preparation of the relevant tax returns. It was reasonable for the jury to infer an agreement from this evidence.

There was also sufficient evidence to prove the requisite intent. "Intent may, and generally must, be proven circumstantially." *United States v. O'Banion*, 943 F.2d 1422, 1429 (5th Cir. 1991) (quotation marks and citation

omitted). Usually, "[p]roof of such intent . . . can arise by inference from all of the facts and circumstances surrounding the transaction." *United States v. Rivera*, 295 F.3d 461, 466-67 (5th Cir. 2002) (quotation marks and citation omitted). Donald stresses that specific intent is a high degree of *mens rea*. While this is true, it still may be proven by circumstantial evidence. *United States v. Nguyen*, 493 F.3d 613, 624 (5th Cir. 2007).

The evidence at trial established that Donald was relatively knowledgeable about federal tax practices and allowable deductions. There was also evidence that he used this knowledge to fraudulently claim a mileage deduction for a client and then offered fictitious logs as supportive evidence. Furthermore, he lied to his clients by assuring them that he was an accountant. This evidence, coupled with the type of deductions claimed, was sufficient to prove his intent.[1]

To find Donald guilty of conspiracy, the jury must have found that Tonya intended to violate the law as well. She testified that she attended a tax-preparation course in which she was taught how to prepare federal income tax returns. That course included discussion on the legality of certain deductions. Despite this class and her on-the-job experience, she frequently inflated the size of deductions claimed by her clients. Although Tonya testified that these were all honest mistakes, the jury did not need to believe her. *See United States v. Bernegger*, 661 F.3d 232, 240-41 (5th Cir. 2011). There was enough evidence from which the jury could infer specific intent.

Donald also challenges the sufficiency of the evidence presented for the thirteen substantive counts of aiding and assisting in the preparation of a false

[1] Donald also asks that we hold, as a general matter, that IRS Form 8453 creates a presumption that the information provided to the tax preparer is correct and that this presumption should preclude the jury from finding that Donald intended to commit fraud. Assuming without deciding that the presumption exists, the evidence presented was sufficient to overcome the presumption.

return. *See* 26 U.S.C. § 7206(2). To establish a violation, the government needed to prove that Donald "willfully aided, assisted, counseled, or advised another in the preparation or presentation under the internal revenue laws of a document that is fraudulent or false as to any material matter." *United States v. Mudekunye*, 646 F.3d 281, 285 (5th Cir. 2011) (quotation marks and citation omitted). Donald argues that there was insufficient evidence linking him to the relevant returns because witnesses did not see him inputting each detail. His argument misstates what the government must prove.

"[A] person need not actually sign or prepare a false tax return to either conspire to or actually aid and abet the filing of a false income tax return." *United States v. Clark*, 577 F.3d 273, 285 (5th Cir. 2009) (quotation marks and citation omitted). Rather, the statute reaches a person who willfully "advises the preparation or presentation" of a return. 26 U.S.C. § 7206(2). The evidence presented clearly demonstrates, either directly or by reasonable inference, that Donald took part in the preparation of the returns for which he was convicted. The evidence was sufficient.

V. Donald's Request for a Continuance

Finally, Donald argues that the district court erred by refusing to grant him a fifth continuance on the eve of trial to give him time to retain a different attorney. We review the district court's decision for abuse of discretion. *United States v. Lewis*, 476 F.3d 369, 387 (5th Cir. 2007). The district court has wide discretion when considering these motions so long as the defendant had a reasonable opportunity to secure counsel of his choice. *Newton v. Dretke*, 371 F.3d 250, 255 (5th Cir. 2004). There is little doubt that Donald had enough time here. The grand jury indicted Donald in December 2008. By January 2009, Donald had secured counsel. Throughout the next year, he was granted four continuances. Eventually, a trial date was set: Monday, March 1, 2010. The

Friday afternoon before, Donald made his last request for continuance. Noting that his request for a fifth continuance came at the eleventh hour and that it risked prejudicing the government, the district court denied his motion. This was not an abuse of discretion. *See United States v. Hughey*, 147 F.3d 423, 432 (5th Cir. 1998).

AFFIRMED.

JENNIFER WALKER ELROD, Circuit Judge, concurring in part and concurring in the judgment:

A jury convicted Donald and Tonya Womack and I agree that we must affirm its verdict. I also agree with much of the reasoning of the majority opinion and join that opinion except for Part III. I write separately because I would hold that the government's closing argument went well beyond the evidence admitted at trial and thus was plainly improper. We must affirm because the trial record contains ample evidence of guilt. Still, the government's improper remarks are troubling, especially in light of our many recent reminders to prosecutors to stick to the evidence during closing arguments.[1]

It is well-settled that "[a] prosecutor is confined in closing argument to discussing properly admitted evidence and any reasonable inferences or conclusions that can be drawn from that evidence." *United States v. Vargas*, 580 F.3d 274, 277–78 (5th Cir. 2009). Here, the government transgressed this limitation in two important ways.

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[1] This circuit has confronted too many improper closing arguments in recent years. *See, e.g., United States v. Jefferson*, 432 F. App'x 382, 389–93 (5th Cir. 2011) (unpublished) (clearly improper prosecutorial remarks did not affect substantial rights given other evidence of guilt); *United States v. Aguilar*, 645 F.3d 319, 322–27 (5th Cir. 2011) (reversing on plain error review due to improper remarks); *United States v. Raney*, 633 F.3d 385, 395–96 (5th Cir. 2011) (per curiam) (reversing on other grounds but noting that "[d]espite our precedent clearly condemning such remarks, the government continues to disregard our admonishments"); *United States v. Pittman*, 401 F. App'x 895, 898–901 (5th Cir. 2010) (unpublished) (clearly improper remarks did not affect substantial rights); *United States v. Gracia*, 522 F.3d 597 (5th Cir. 2008) (reversing on plain error review due to improper remarks).

Although the government quibbled at oral argument as to whether its closing remarks were improper, it unquestionably should have known that it was inappropriate to refer to items that were not in evidence and that it told the court it would not use. It has long been recognized as "verboten" for a prosecutor to "directly refer to or even allude to evidence that was not adduced at trial." *United States v. Murrah*, 888 F.2d 24, 26 (5th Cir. 1989) (citing *United States v. Morris*, 568 F.2d 396 (5th Cir. 1978)). As the Supreme Court put it more than 75 years ago: "[W]hile [the United States Attorney] may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger v. United States*, 295 U.S. 78, 88 (1935).

First, the government improperly used the fake mileage logs evidence against Mrs. Womack during its closing argument—not just once, but twice.[2] These remarks were improper because, as the majority opinion correctly concludes, the false mileage logs were evidence only of Mr. Womack's intent, not Mrs. Womack's.

Second, the government repeatedly insinuated in its closing that the Womacks were engaged in a large-scale fraud far beyond the 25 fraudulent tax returns introduced at trial—despite assuring the district court that it would not and that it lacked the evidence to do so. The Womacks filed a pre-trial motion requesting funds for an expert to testify that the vast majority of returns they prepared were honest and accurate. After a lengthy hearing, the district court denied the motion. But the district court conditioned its denial on the government's representation—as "an officer of the court"—that it would not argue that the thousands of returns outside of its investigation were illegal. Indeed, the government told the district court that it did not even have the evidence to support such an argument. At trial, the government put on evidence of 25 false returns. In its closing, however, it repeatedly suggested that those 25 returns were just a sampling of thousands more false returns, as the following closing argument excerpts reveal:[3]

- "The way to make money at this operation is a volume business. You get them in, you charge them $150, you run up how many thousands of returns you can do in a year. . . . It gets worse than that. The only way you can churn them out like that is if you cookie-cutter, churning out the same

[2] One of the Womacks' former customers, Robert Walenta, testified at trial that the IRS informed him in 2007 that he owed thousands of dollars related to tax returns prepared by Front Door. Mr. Walenta contacted Mr. Womack, who gave him two amended tax returns with falsified mileage logs attached to submit to the IRS. This "other acts" evidence was admissible under Rule 404(b)(2) as evidence of Mr. Womack's intent, but it was not admissible against Mrs. Womack.

[3] The majority opinion only quotes some of these excerpts.

> Schedule A and the same Form 2106 over and over again, just tinkering a little bit with the numbers. *That's how you are [sic] make money. It's not the bald way. It's the sneaky way, the dishonest way.*" (Emphasis added).

- "Together, [the Womacks] operated this business, and together they benefitted from their fraud. *That's how they built their business*, and they took home the income from their business at the end of the day." (Emphasis added).

- "The benefit to the Womacks were happy customers, repeat business . . . . [T]his was a way for the Womacks to build the clientele, build revenue, get people in the door, get people coming back next year. And because of this, of course, they obtained a competitive advantage. Their competitors in the tax preparation field, imagine being an honest tax preparer trying to build a clientele. *The honest tax preparer can't promise a large refund every year.*" (Emphasis added).

- "If you do a little simple math that they prepared 3,000 returns a year and charged approximately $150 per return, that comes out to a revenue of over -- about $450,000. For a small business, that's a lot of money. And we know that some of that money went into the swimming pool in the backyard of the Womacks' home."

- "As husband and wife they ran this business, as husband and wife they were there in the business day in and day out. As husband and wife they reap the reward. As husband and wife they spent the money and lived the life."

These statements are not vague, as the majority opinion would have it. They plainly suggest, again and again, that fraud permeated the Womacks' tax preparation business, although the government had assured the court and defense counsel that it would not do this. These remarks were clearly improper.

But our appellate review does not end here. "[W]hether the prosecutor's remark was legally improper" is only the first step in reviewing an improper closing argument claim. *United States v. Mendoza*, 522 F.3d 482, 491 (5th Cir.

2008). Second, we ask "whether the remark 'prejudiced the defendant's substantive rights.'"[4] *Id.* (quoting *United States v. Morganfield*, 501 F.3d 453, 467 (5th Cir. 2007)). In making this prejudice determination, we consider "(1) the magnitude of the statement's prejudice, (2) the effect of any cautionary instructions given, and (3) the strength of the evidence of the defendant's guilt." *Raney*, 633 F.3d at 394 (internal quotation marks omitted).

Applying this three-factor prejudice standard, reversal is unwarranted. As for the false mileage logs testimony, the magnitude of prejudicial effect was high because the evidence was perhaps the most damning *mens rea* evidence presented at trial. But the district court issued a cautionary instruction and, more importantly, the trial record contains ample evidence of Mrs. Womack's guilt. The jury heard the testimony of numerous Front Door customers that the Womacks repeatedly claimed the same itemized deductions for their customers, regardless of the customer's individual financial situation. The jury also heard the testimony of Special Agent Rosalez, that when he visited Front Door undercover, posing as a customer, a receptionist asked him if he would like a refund of $3,200, $3,500, or $4,200, and explained that the larger the refund he selected, the longer he would have to wait. He selected $4,200, paid an up-front fee of $148, and left. He later received from Front Door a tax return that yielded a $4,200 refund. It is rather incredible that Tonya could have been unaware of this practice while working in Front Door's small office. Having weighed the pertinent prejudice factors, I cannot conclude that the government's improper comments about the mileage logs "cast[] doubt on the correctness of the jury verdict." *Vargas*, 580 F.3d at 278.

Nor was there prejudice on the basis of the government's remarks about the Womacks being engaged in a large-scale fraud. The first two prejudice

[4] When, as here, our review is for plain error, this second step "overlaps with the third prong of plain error review." Vargas, 580 F.3d at 278.

factors weigh in favor of reversal because the prejudicial effect was high and no cautionary instructions were issued. But the evidence of guilt was strong enough that the prosecution's improper remarks do not undermine confidence in the verdict.

For the foregoing reasons, I respectfully concur in part and concur in the judgment.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 11-20210

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

TONYA BUCKNER WOMACK; DONALD RAY WOMACK,

Defendants - Appellants

Appeal from the United States District Court for the
Southern District of Texas, Houston

ON PETITION FOR REHEARING

Before STEWART, ELROD, and SOUTHWICK Circuit Judges.

PER CURIAM:

IT IS ORDERED that the appellants' joint petition for panel rehearing is DENIED

ENTERED FOR THE COURT:

United States Circuit Judge

APPENDIX C

219 Fed.Appx. 114
This case was not selected for publication in the Federal Reporter.
Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Third Circuit LAR, App. I, IOP 5.7. (Find CTA3 App. I, IOP 5.7)
United States Court of Appeals, Third Circuit.

UNITED STATES of America
v.
Thomas HAYES, Appellant.

No. 04-1430. | Argued Nov. 9, 2006. | Opinion Filed March 8, 2007.

Synopsis

Background: Defendant was convicted in a jury trial in the United States District Court for the District of New Jersey, William H. Walls, J., for conspiring with fellow employees to falsify test results for various petroleum products. Defendant appealed.

Holdings: The Court of Appeals, McKee, Circuit Judge, held that:

[1] evidence showing that defendant's conduct as high-ranking employee of petroleum testing company was inconsistent with alleged conduct of conspiring to falsify test results was admissible;

[2] probative value of evidence was not substantially outweighed by unfair prejudice against government's case;

[3] error was not harmless; and

[4] district court's response to jury question was reversible error.

Vacated and remanded for new trial.

West Headnotes (4)

[1] **Conspiracy**
Admissibility in General

Evidence showing that defendant's conduct as high-ranking employee of petroleum testing company was inconsistent with alleged conduct of conspiring to falsify test results, rather than evidence of good acts to establish defendant's good character, was admissible as relevant to whether defendant's actions were consistent with conspiring to fabricate test results, which evidence could have raised a reasonable doubt about whether defendant was part of the charged conspiracy. Fed.Rules Evid.Rules 401, 404(b), 28 U.S.C.A.

1 Cases that cite this headnote

[2] **Criminal Law**
Evidence Calculated to Create Prejudice Against or Sympathy for Accused

Probative value of evidence showing that defendant's conduct as high-ranking employee of petroleum testing company was inconsistent with alleged conduct of conspiring to falsify test results was not substantially outweighed by danger of unfair prejudice against government's case, and evidence was thus admissible; principal issue was whether defendant was part of a company-wide, top-down conspiracy to falsify test results, and his directives and statements to subordinates in various regions regarding the company's policy on testing was relevant to his intent and involvement in that conspiracy. Fed.Rules Evid.Rule 403, 28 U.S.C.A.

1 Cases that cite this headnote

[3] **Criminal Law**
Exclusion of Evidence

Exclusion of admissible evidence showing that defendant's conduct as high-ranking employee of petroleum testing company was inconsistent with alleged conduct of conspiring to falsify test results was not harmless but rather necessitated

remand for new trial, as evidence was the only means by which defendant could rebut government's case.

1 Cases that cite this headnote

[4] **Criminal Law**
Requisites and Sufficiency
Criminal Law
Conduct and Deliberations of Jury

District court's response to jury question during deliberations seeming to indicate that coconspirators' cooperation in testifying against defendant would not affect their sentences upon defendant's conviction for conspiring to falsify petroleum test results was reversible error; though answer was technically correct, it was certainly misleading in light of fact that Guidelines afforded government unilateral discretion to request downward departures based upon coconspirators' cooperation, and government's case against defendant turned on the credibility of fellow petroleum testing company employees who testified for government.

1 Cases that cite this headnote

*115 Appeal from the United States District Court for the District of New Jersey (Crim No. 02-cr-00302-1), District Court: The Honorable William H. Walls.

Attorneys and Law Firms

Diana K. Lloyd, Esq., (Argued), Richard M. Harper II, Esq., E. Page Wilkins, Esq., Choate Hall & Stewart LLP, Boston, MA, for Appellant.

John L. Smeltzer, Esq., (Argued), Sue Ellen Wooldridge, Assistant Attorney General, Attorneys, Department of Justice, Environment & Natural Resources Division, Washington D.C., Ellen J. Durkee, Stacey A. Mitchell, George S. Leone, Office of the United States Attorney, Newark, NJ, for Appellee.

Before: SCIRICA, McKEE, and STAPLETON, Circuit Judges.

Opinion

OPINION

McKEE, Circuit Judge.

Thomas Hayes appeals his conviction and sentence arguing that the trial court erred in excluding evidence under Fed.R.Evid. 404(b), and in answering a question the jury asked during deliberations. We agree that the district court erred in refusing to admit certain evidence under Rule 404(b), and that the error was compounded by the court's response to the jury's question. Accordingly, we will vacate the judgment of conviction and remand for a new trial. [1]

I.

[1] Inasmuch as we write primarily for the parties, it is not necessary to recite the facts of this case in detail. The Indictment alleged, in part, that Hayes conspired with other Saybolt employees to falsify test results for various petroleum products between September 1992 and November 1996.

The jury convicted Hayes of the conspiracy charged in Count One of the Indictment, but acquitted him of obstruction of justice as charged in Count Two. During the trial, Hayes introduced "Exhibit 35" over the government's objection. [2] That exhibit was a Saybolt memorandum, authored by Hayes on July 26, 1996, distributed to all inspection and laboratory personnel. In the memorandum, Hayes describes a recent instance of data falsification at Saybolt, states that it violated company policy, and warns that such conduct would result in immediate termination. In overruling the government's objection to Exhibit 35, the court explained that the exhibit was relevant because it tended to rebut the government's evidence of Hayes' involvement in a conspiracy to fabricate test results.

However, the court also ruled that other testimony Hayes wanted to introduce to rebut evidence of an intent to fabricate results of petroleum tests was inadmissible under Fed.R.Evid. 404(b). That evidence included testimony from non-conspirator regional managers that Hayes never asked them to falsify tests; and testimony from non-conspirator senior managers that *116 Hayes never suggested that data falsification was acceptable. The court also sustained the government's objections to questions about particular

statements or "directives" Hayes allegedly made in meetings with subordinates that tended to negate his involvement in a conspiracy to fabricate test results. The court ruled that testimony of non-conspirators and evidence of particular statements or directives was "truly character evidence" that was "forbidden" by Rule 404(b).[3]

Hayes contends that he offered this evidence for a proper purpose, and that it was directly relevant to whether he was part of the charged conspiracy. Just as the government was permitted to offer evidence of specific actions Hayes purportedly took in furtherance of a conspiracy, Hayes argues that he should have been able to introduce evidence of circumstances that tended to negate his involvement in any such conspiracy, and this includes specific examples of his conduct, including his directives and statements to Saybolt personnel.

The government defends the court's 404(b) rulings arguing that Hayes failed to connect the disputed directives to persons involved in the conspiracy or acts taken in furtherance of it. The government also claims that testimony by Saybolt managers and employees was properly excluded because they were not co-conspirators, did not work in the same offices as the members of the conspiracy, and did not profess to have any knowledge of the events charged in the Indictment.

Federal Rule of Evidence 404(b) precludes evidence of specific acts to establish character or propensities. The Rule provides in part that "[e]vidence of other ... acts is not admissible to prove the character of a person in order to show action in conformity therewith." However, the rule also states that "other crimes, wrongs, or acts ... may ... be admissible for other purposes, such as proof of motive, ... intent, ... knowledge, ... or absence of mistake or accident...." The rule is usually applied in the context of prosecution attempts to introduce "bad act" evidence against a defendant. However, a "seldomly used subspecies of Rule 404(b) known as 'reverse 404(b)' " evidence is sometimes relied upon by a defendant to rebut allegations of criminality or criminal intent. *United States v. Stevens,* 935 F.2d 1380, 1383 (3d Cir.1991). When used in this manner, Rule 404(b) limits a defendant's attempt to rely upon prior "good acts" as exculpatory evidence. *See United States v. Shavin,* 287 F.2d 647, 654 (7th Cir.1961); and *Ansell v. Green Acres Contracting Co.,* 347 F.3d 515, 520 (3d Cir.2003) (evidence of other good acts admissible to disprove discriminatory intent in a civil case). The rule prohibits evidence of good acts if that evidence is used to establish the defendant's good character. As is true with bad act evidence, evidence of good acts is also admissible for a proper purpose such as motive, intent, absence of mistake, etc.

In the more common context of bad acts, we have stated that Rule 404(b) is a rule of inclusion rather than exclusion. *United States v. Cruz,* 326 F.3d 392, 395 (3d Cir.2003) (citation omitted). Thus, the law favors "admission of evidence of other ... acts if such evidence is relevant for any purpose other than to show a mere propensity or disposition on the part of the ***117** defendant to commit the crime." *Id.* (internal quotation marks omitted).

Once a proper evidentiary purpose such as intent is proffered, admissibility under Rule 404(b) requires: (1) that the evidence be relevant; (2) that its probative value outweigh any prejudicial impact under Rule 403; and (3) that a limiting instruction be given to explain how the evidence may be used. *United States v. Mastrangelo,* 172 F.3d 288, 294 (3d Cir.1999); *see also Ansell,* 347 F.3d at 520.

Relevant evidence is "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. Here, the relevance inquiry is readily satisfied. The evidence was not offered to prove Hayes' character as the district court concluded. Rather, it was offered to show that his actions were inconsistent with conspiring to fabricate test results. The evidence, if accepted by the jury, could well have raised a reasonable doubt about whether Hayes was part of the charged conspiracy.

The government alleged a conspiracy to falsify test results that was company-wide and originated with "top" officials such as Hayes. The Indictment charged that Hayes "disregarded the formal policies" of Saybolt and "designed practices to avoid reporting 'off-spec' results by altering and falsifying test results." The Indictment also alleged that the "overt acts" constituting the conspiracy took place at specific locations and "elsewhere," and specifically included Saybolt's Kenilworth, New Jersey and Woburn, Massachusetts laboratories without further specificity or explanation. Evidence that Hayes attempted to enforce Saybolt's policies and did not encourage reporting "off-spec" test results to be reported as "on-spec" was therefore highly relevant to his participation in the charged conspiracy. Indeed, given the breadth of this Indictment, it is difficult to imagine how Hayes could rebut the government's charges absent evidence of directives he issued, and statements he made

to ensure the integrity of test results and enforcement of company policy.

Evidence that certain Saybolt personnel were not pressured by Hayes to get good test results was therefore relevant to determining if the charged conspiracy had been proven, and if so, whether Hayes was a co-conspirator. Thus, the jury should have had the benefit of relevant directives and statements by Hayes that may have been inconsistent with the atmosphere of coerced fabrication the government's conspiracy rested upon.

The government introduced specific instances of Hayes pressuring employees to ignore company policy and fabricate test results. The evidence Hayes wanted to introduce is no less relevant merely because it is exculpatory and undermines Hayes' participation in the alleged conspiracy. The government defined this conspiracy by drafting the Indictment to charge a "top-down" conspiracy existing at certain locations in Massachusetts, New Jersey, "and elsewhere." The statements that Hayes tried to introduce can therefore not be challenged on the grounds that they were made to non-conspirators. They are nevertheless relevant to Hayes' conduct *vis à vis* Saybolt's policies and testing and are therefore not precluded by Rule 404(b).

The trial court's focus on character evidence was misplaced. The issue here is not Hayes' good character. Rather, it is his conduct. Evidence that he conducted himself in a manner that was consistent with Saybolt's announced policy, and inconsistent with a conspiracy to fabricate test results, was clearly relevant to the charges he had to defend against.

***118** Hayes presented a proper evidentiary purpose as detailed in his March 26, 2003 Letter Brief and by oral proffer on March 28, 2003. He sought to introduce evidence that at the time the government alleged that he intentionally falsified test results as part of a company-wide policy, he (1) did not direct the falsification of test results; and (2) consistently directed employees to follow proper procedures. His proffer specifically stated that the evidence was not offered to prove his character, but instead to show his intent during the conspiracy period.

In viewing this evidence through the lens of character testimony, the district court misinterpreted its relevance and was therefore unable to see or appreciate its probative value. Various government witnesses testified that Hayes promoted a company-wide policy of altering test results and thereby caused petroleum to be reported as "on-spec" when it was actually "off spec." Prosecution witnesses testified that Hayes conveyed that policy to subordinates. For example, one government witness testified that he falsified testing results because he "was directed to do so by the highest senior management within the company as a worldwide philosophy." Two witnesses testified that Hayes was at least partially responsible for a paperwork reduction policy that resulted in the destruction of printouts from petroleum testing equipment that made it easier to fabricate those results.

In addition, the court sustained a series of prosecution objections during the direct examination of defense witness, Michael Huckaby. Huckaby and Hayes were both members of Saybolt's senior management team. They worked closely together and their responsibilities overlapped. Hayes wanted Huckaby to testify about: (1) how Hayes responded to Saybolt pressures "to achieve on spec results"; (2) what Hayes did to ensure that his subordinates throughout the North American operations followed Saybolt policies; (3) and whether Hayes did anything to ensure that RFG regulations were followed at Saybolt. Hayes also tried to have Huckaby testify about whether he observed anything about Hayes' conduct that caused him to believe that Hayes was following company policy and accurately reporting test results, and whether Hayes issued any directive in response to customer pressures to report "on-spec" results. Although the court permitted Huckaby to testify that Hayes took steps to "insure that his subordinates through the North American operations followed Saybolt's policies" generally, the court disallowed testimony about specific directives and actions. Given the specificity of much of the government's testimony, the defense evidence that was excluded may well have been more effective than the generalized evidence of Saybolt policies that the court allowed into evidence.

Although we are sympathetic to the court's legitimate reluctance to give "carte blanche" regarding evidence of good conduct, once Hayes proffered a proper purpose for the evidence, the court could not automatically exclude it under Rule 404(b) without further analysis.

II.

Our conclusion that the evidence that was excluded under Rule 404(b) was relevant to a proper purpose does not end our inquiry. As we noted earlier, once a court determines that evidence is relevant, the court must then decide if its probative value outweighs any prejudicial impact it may have.

Fed.R.Evid. 403. However, "prejudice does not simply mean damage to the opponent's case." *Goodman v. Pa. Turnpike Comm'n,* 293 F.3d 655, 670 (3d Cir.2002) (citation omitted). Indeed, evidence that does not damage an opponent's ***119** case is rarely relevant. *Ansell,* 347 F.3d at 525. Rather, Rule 403 addresses only "[u]nfair prejudice ... [that] could arise if a jury uses 404(b) evidence to infer propensity rather than intent." *Id.* at 525-26.

[2] Here, the district court never engaged in the balancing required under Rule 403 because the court failed to recognize the relevance and probative force of the excluded evidence. When the district court fails to explicitly engage in that balancing process on the record, we can either determine that the court "implicitly performed the required balance; or, if we decide the trial court did not, we [can] ... perform the balance ourselves." *Id.* at 524. We can undertake the balance here with little difficulty.

We can readily dispel any suggestion that this evidence was "unduly" prejudicial. First, as we have already explained, it directly rebutted evidence of a far reaching conspiracy that was alleged to have existed in New Jersey, Massachusetts, and "elsewhere" and was therefore of unlimited reach.

Second, given the nature of the conspiracy the government alleged and the witnesses it produced, there was little if any danger that the jury would use Hayes' directives and statements to conclude that he was a good person and therefore less likely to be involved in manipulating test results to please Saybolt's customers. Moreover, to the extent the government was concerned that the jury might use this evidence to assess Hayes' character, the appropriate remedy should have been a limiting instruction, not exclusion. *See United States v. Givan,* 320 F.3d 452, 461-62 (3d Cir.2003).

In excluding the evidence, the court relied in part on *United States v. Camejo,* 929 F.2d 610 (11th Cir.1991), and *United States v. Boggi,* No. CRIM. A.94-145, 1995 WL 8015 (E.D.Pa. Jan.5, 1995). *Boggi,* requires little discussion because it is an unpublished trial court opinion that is not binding on us. Moreover, the charge there did not involve conspiracy, and the disputed evidence was not relevant to the defendant's intent. Similarly, *Camejo,* does not offer much support for the district court's evidentiary ruling.

The defendants in *Camejo* were charged with conspiracy to smuggle cocaine from Colombia to Miami onboard commercial flights. *Camejo,* 929 F.2d at 612. During the trial, one defendant called a witness to testify that the defendant refused an offer to become involved with a drug distribution ring the witness had organized during the same time frame as the charged cocaine conspiracy. *Id.* The court found the evidence inadmissible, stating "[e]vidence of good conduct is not admissible to negate criminal intent." *Id.* at 613. The court also reasoned that the evidence was irrelevant to the charges against the defendant under Rule 404(b). The court correctly explained that the "proffered testimony was merely an attempt to portray [the defendant] as [having] good character through the use of prior 'good acts.' " *Id.* at 613. That is not true here.

The disputed evidence in *Camejo* was wholly unrelated to the charged conspiracy and therefore irrelevant to the defendant's criminal intent *vis á vis* the charges at issue. Here, the principal issue is whether Hayes was part of a company-wide, top-down conspiracy to falsify test results. His directives and statements to subordinates in various regions regarding the company's policy on testing was relevant to his intent and involvement in that conspiracy.

III.

[3] The government contends that any error the court may have committed in ***120** excluding the disputed evidence under Rule 404(b) was harmless and that Hayes is therefore not entitled to relief based upon those rulings. We can not agree.

Error is harmless if the reviewing court is left with the "sure conviction" that the error did not prejudice the defendant. This is true when it is highly probable that the error did not contribute to the jury's judgment of conviction. *United States v. Casoni,* 950 F.2d 893, 902 (3d Cir.1991). We have no such confidence in this verdict. In fact, we need only consider the trial court's evaluation of the potential impact of the evidence that was excluded under Rule 404(b) to conclude that the verdict may well have been different had the jury been allowed to hear this evidence. The following exchange occurred during argument on the defense motion for release on bail pending appeal: [4]

> THE COURT: If ... the circuit judges say that I should have let him introduce evidence of his going around saying you've got to do right people when he was doing wrong in

effect [*sic*] obviously the jury, if they accept it for what he said would find him not guilty.

[PROSECUTION]: Possibly.

THE COURT: *No, not possibly. If they accept what he said, they will find him not guilty.*

* * *

THE COURT: ... if it was determined that I incorrectly decided it would result in his getting a new trial which could easily result in being found not guilty if the jury believes his spin.

Appendix ("App.") at 1198-99 (emphasis added). The exchange continued:

> THE COURT: [S]uppose the circuit says ... what he was doing in his job and what he was saying about making sure the data is verified and stay within the standards, is evidence from which a jury, if it had it could evaluate the likelihood of whether he was at the same time participating in the conspiracy ... I can see where you can argue that because generally circumstantially a person is judged by what he says and what he does not say and how he acts and does not act during the period under observation.

App. at 1202.

The trial court was in the best position to assess the strength of the government's case, the credibility of the government's witnesses, and the possible impact the 404(b) evidence could have had on the verdict. Moreover, we agree with the court's assessment of the potential force of the excluded 404(b) evidence. In fact, given the court's assessment of the import of the excluded evidence, it is difficult to understand the court's conclusion that it was "wholly character" evidence that was inadmissible under 404(b). [5] That error alone would seriously undermine the jury's verdict; however, there is more. [6]

***121 IV.**

[4] Shortly after the jury began its deliberations, it sent the judge the following question: "Do the co-conspirators' (who already have plead [*sic*] guilty) sentences depend on the verdict(s) we come up with?" App 99. The court simply answered, "No," without explanation or elaboration, and deliberations continued. In his brief, Hayes claims that the question "came on the heels of the defense closing, which focused heavily on the benefit the government's cooperating witnesses stood to gain by testifying against Hayes."

U.S.S.G. § 5K1.1 gives the government unilateral discretion to request downward departures based upon cooperation. The exercise of that discretion is not subject to judicial review. We have explained that a sentencing court can consider the usefulness of a defendant's cooperation in determining the extent of any departure it awards pursuant to a 5K1.1 motion. *See United States v. Spiropoulos,* 976 F.2d 155, 157 (3d Cir.1992). In *Spiropoulos,* we asked: "whether the fruitlessness of a defendant's good-faith cooperation constitutes a legally permissible consideration in determining the amount of downward departure under section 5K1.1." *Id.* We concluded that "it does." *Id.* Of course, a cooperating witness's sentence does not necessarily turn upon the success of the government's prosecution, but it clearly can.

Thus, although the district court's answer to the jury's question was not technically incorrect, it was certainly misleading. We review jury instructions for abuse of discretion to determine whether they are misleading. *See Woodson v. Scott Paper Co.,* 109 F.3d 913, 929 (3d Cir.1997). The government's case against Hayes turned on the credibility of the Saybolt employees who testified for the government. The court's answer to the jury's question allowed the jurors to conclude that the witnesses had nothing to gain by Hayes' conviction. It thereby fortified their testimony and simultaneously undermined the efficacy of the general charge the court gave regarding scrutinizing the testimony of co-conspirators.

While arguing that the court's answer was appropriate, the government maintains that the general instruction regarding credibility of co-conspirators negates any potential impact of the court's response to the jury's question. We can not agree, and the potential impact of that response further undermines our confidence in this verdict.

V.

For the foregoing reasons, we will vacate the judgments of conviction and sentence and remand for a new trial.

Parallel Citations

2007 WL 708984 (C.A.3 (N.J.)), 72 Fed. R. Evid. Serv. 733

Footnotes

1 Since we are remanding for a new trial, we need not reach the sentencing issues raised in this appeal.

2 The document marked as Defense Exhibit 35 was marked twice at trial and therefore appears in the record as both Exhibit 35 and Exhibit 57.

3 To the extent that we must review the district court's interpretation of Rule 404(b), our review is plenary. However, if the court correctly applied the rule but determined admissibility as an exercise of discretion, our review is for abuse of discretion. *United States v. Givan*, 320 F.3d 452, 460 (3d Cir.2003) (discussing the analogous situation of "bad act" character evidence under Rule 404(b)).

4 *See* 18 U.S.C. § 3143(b) (requiring, as prerequisite pending appeal, district court to find that appeal raises substantial question of law or fact likely to result in reversal or an order for new trial).

5 Hayes also claims that statements he made to Saybolt employees reinforcing the company's stated policies were admissible under the state of mind exception to the hearsay rule. *See* Fed.R.Evid. 803(3). Since we conclude that the evidence is admissible under Rule 404(b), we need not address that argument. The government is not suggesting that directives and statements of policy constitute hearsay, and the district court did not exclude the evidence on that basis.

6 We realize, of course, that Hayes could have been "going around saying you've got to do right people ..." to cover his subversion of Saybolt's announced policy while he simultaneously worked to undermine it by ensuring that key personnel would do what was necessary to get "on-spec" test results. However, that is an argument for the jury to evaluate after hearing the evidence. It is not grounds to exclude the evidence under Rule 404(b)'s prohibition against evidence of good character.

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