UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, et al.,	:	
Plaintiffs,	:	
v.	:	Case No. 03-2006 (EGS/JMF)
FELD ENTERTAINMENT, INC.,	:	
Defendant.	:	

DEFENDANT'S MEMORANDUM REGARDING EVIDENTIARY MATTERS RAISED IN COURT ON MARCH 11, 2009

EXHIBIT 1

POINTS AND AUTHORITIES

LEXSEE 684 F.2D 370

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. PAUL K. COSTNER, Defendant-Appellant

No. 81-5525

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

684 F.2d 370; *1982 U.S. App. LEXIS 16952*

May 28, 1982, Cause Argued
July 30, 1982, Decided

PRIOR HISTORY: [**1] APPEAL from the United States District Court for the Eastern District of Tennessee.

DISPOSITION: REVERSE and REMAND.

COUNSEL: Herbert S. Moncier, Knoxville, Tennessee, Edward E. Wilson, for Appellant.

John H. Cary, United States Attorney, Knoxville, Tennessee, Robert E. Simpson, for Appellee.

JUDGES: Martin and Contie, Circuit Judges, and Walinski, District Judge. *

* The Honorable Nicholas J. Walinski, United States District Judge for the Northern District of Ohio, sitting by designation.

OPINION BY: CONTIE

OPINION

[*371] CONTIE, Circuit Judge.

Appellant appeals his conviction by jury on two counts of violating *18 U.S.C. § 1014*, by making a false statement to a federally insured bank for the purpose of influencing the bank to lend him money. Appellant presented to the Bank of Knoxville certificates of title for two 1979 Chevrolet Blazers as collateral for a loan of approximately $15,000.00. Before the loan became due, appellant notified his insurance company and the bank that the vehicles had been stolen.

The government contends that the appellant never owned or possessed the Blazers, that they were properly titled to someone else, and that appellant [**2] purposely defrauded the Bank of Knoxville by presenting the worthless titles.

Appellant contends that he purchased the two vehicles at auction, and that he left them in the care and possession of a friend and associate in North Carolina while he returned to Tennessee. Appellant's theory of the case is that he unwittingly purchased two stolen vehicles that had been laundered by means of fraudulent certificates of title and a change in vehicle identification numbers (VINs).

At trial documents were introduced tracing ownership of the two Blazers with the VINs on the certificates of title presented to the bank from the manufacturer through [*372] several intermediaries to the ultimate consumers.

One of the intermediaries was Danny Lynch, an automobile broker and auto body shop operator. Lynch testified that, before transferring the Blazers,

he had lost the certificates of title. He ordered from the state of South Carolina duplicates, which he subsequently forwarded to his buyer. Lynch testified that he later found the lost original titles and transferred them to McCaskell, a friend who requested them as a favor. Lynch testified further that two men came to pick up the titles and [**3] that one of them was the defendant, Costner. Lynch's testimony was central to the government's case, for it was what connected Costner to a certificate of title unaccompanied by a vehicle.

During cross-examination, defense counsel quizzed Lynch about possible inconsistencies between his testimony and statements he had given various investigators.

At the beginning of defendant's case, defense counsel called Player, an investigator for the National Automobile Theft Bureau, for the purpose of impeaching the testimony of Lynch. Player, refreshing his memory by consulting reports he had written, testified that he had spoken to Lynch on two separate occasions. On the first occasion, Lynch denied ever having transferred duplicate titles or meeting the defendant; on the second, Lynch said that the defendant had picked up the titles for McCaskell.

At the close of Player's testimony, the defense moved to have the portions of Player's reports that he had used in testifying admitted into evidence. The prosecution moved to have the entire documents admitted. Over the defense's repeated and strenuous objection, the trial judge permitted the entire documents, labeled Exhibit 18, to be shown to [**4] the jury. The defense moved for a mistrial; the judge denied the motion.

Exhibit 18 consists of three reports written by Player to the home office of the National Automobile Theft Bureau. The first and second are dated August 1, 1980, and report that Player interviewed Lynch, who told him that he did not know Costner and had never sold him a vehicle as indicated by the title history. The third report is dated October 10, 1980; the second and third paragraphs recount a second interview with Lynch, in which Lynch told Player that (1) after receiving duplicate titles from the state, he had found the originals; (2) McCaskell had asked him for two South Carolina titles; (3) Costner and another man had picked up the titles from him; and (4) he had not indicated on the back that he had sold the vehicles to Costner.

The fourth paragraph of Player's report of October 10 records a separate incident. It reads:

> Mr. Lynch contacted the writer by phone on 10-10-80 stating that he had talked with Mr. Don Alexander in Charlotte, North Carolina. Mr. Alexander advised Mr. Lynch that he knew Paul Costner and that he was a Con. Mr. Alexander stated that Mr. Costner was employed at Toyota City, [**5] Charlotte, N.C. at one time, however he tried to change a VIN plate from a 1971 Toyota to a 1979 Toyota and borrow money at some bank in Charlotte. Mr. Joe Barkeley owns this Toyota Place and will be glad to discuss Mr. Costner with anyone. · *

Showing this paragraph to the jury was reversible error.

> * * Alexander, an automobile broker, was a prosecution witness, who had testified that he had purchased the two Blazers in North Carolina for Lynch in

> South Carolina. He also testified that he had never met Costner, although he recognized him by sight.

The purpose of Player's testimony was to impeach Lynch's testimony that he had given the certificates of title to Costner by introducing a prior inconsistent statement. Accordingly, the scope of Player's testimony was necessarily limited by the scope of Lynch's testimony. Consistent with this, the record indicates that the trial court was careful to limit Player's testimony to matters Lynch had already testified to regarding what had happened to the certificates [**6] of title for the Blazers.

[*373] Player's testimony and the portions of the reports he used to refresh his memory were introduced not to prove the truth of the matter asserted but to attack Lynch's credibility; consequently they were not hearsay. *Fed. R. Evid.* 801(c). However, Player's statement of what Lynch told him Alexander told him (which perhaps Barkeley told him) had no bearing on the issue of Lynch's veracity. If offered to impeach Lynch, it was inadmissible on grounds of relevancy. If offered to prove the truth of the matter asserted, it was inadmissible as hearsay. Further, it may have been inadmissible as evidence of a similar bad act.

The trial judge stated that because the defense introduced a part of the document, the prosecution could compel the admission of the whole document.

Rule 612, Federal Rules of Evidence, provides that when a witness uses a writing to refresh his memory,

> an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters [**7] not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not so related and order delivery of the remainder to the party entitled thereto.

In the instant case, the defense itself introduced into evidence the relevant portions of the writing. The prosecution did not have the right to see, much less to introduce into evidence, portions of the reports unrelated to Player's testimony. The trial court had an obligation to examine the writing and excise any irrelevant matter.

A rule of completeness did exist at common law. This court has summarized that rule as follows:

> The general rule is that if one party to litigation puts in evidence part of a document, or a correspondence or a conversation, which is detrimental to the opposing party, the latter may introduce the balance of the document, correspondence or conversation in order to explain or rebut the adverse inferences which might arise from the incomplete character of the evidence introduced by his adversary. * * * But this rule is subject to the qualification that only the other parts of the document which are relevant and throw light upon the parts already [**8] admitted become competent upon its introduction. There is no rule that either the

> whole document, or no part of it, is competent. [Citations omitted.]

United States v. Littwin, 338 F.2d 141 (6th Cir.), *cert. denied, 380 U.S. 911, 13 L. Ed. 2d 797, 85 S. Ct. 896 (1964)*. As we have already noted, what Alexander may have told Lynch he heard about Costner is not relevant to the issue of Lynch's credibility. Moreover, it does not throw light upon his contradictory statements. Neither is it necessary to complete the rest of Player's report, for it records a separate conversation with Lynch on a separate subject.

The rule of completeness has been codified in *Rule 106*, which reads:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

Fairness did not require the contemporaneous consideration of what Alexander told Lynch about Costner. *Rule 106* is intended to eliminate the misleading impression created by taking a statement [**9] out of context. The rule covers an order of proof problem; it is not designed to make something admissible that should be excluded. 1 Weinstein's Evidence para. 106[01] (1981). *See United States v. Burreson, 643 F.2d 1344* (9th Cir.), *cert. denied, 454 U.S. 830, 102 S. Ct. 125, 165, 70 L. Ed. 2d 106 (1981)* (holding no abuse of discretion in excluding part of prior statement as irrelevant and inadmissible as hearsay).

At one point during the repeated discussion about the admission of Exhibit 18, the judge gave the jury the following limiting instruction:

> Don't consider those letters for the purpose of proving facts, because they are [*374] not substantive evidence of facts. They are only received for the sole purpose of what relevancy they may have on the credibility of the witnesses who have testified in this case.

One of those witnesses was the defendant; therefore the Court specifically instructed the jury that they could use the documents in assessing the defendant's credibility. The error of admitting Exhibit 18 was not cured by the limiting instruction.

Neither was the error harmless; for the other evidence of guilt [**10] was not overwhelming. Prior to the introduction of the hearsay statement in Exhibit 18 that Costner had committed a similar bad act, the only evidence contradicting the defendant's theory of the case was Lynch's impeached testimony that Costner had picked up the certificates of title from him.

Because we find that the admission of Exhibit 18 was reversible error, we need not consider the merit of other errors assigned by appellant.

Accordingly, we REVERSE and REMAND for a new trial.

255 U.S. App. D.C. 307; 801 F.2d 1346, *;
1986 U.S. App. LEXIS 28946, **; 21 Fed. R. Evid. Serv. (Callaghan) 305

LEXSEE 801 F.2D 1346

UNITED STATES OF AMERICA v. ROBERT B. SUTTON, Mark A. Sucher, Appellant

No. 85-5277

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

255 U.S. App. D.C. 307; *801 F.2d 1346; 1986 U.S. App. LEXIS 28946; 21 Fed. R. Evid. Serv. (Callaghan) 305*

January 10, 1986, Argued
August 29, 1986

PRIOR HISTORY: [**1] Appeals from the United States District Court for the District of Columbia (Criminal No. 84-84-00322).

COUNSEL: Mitchell B. Lansden, appointed by this Court, for Appellant in No. 85-5277.

W. Gary Kohlman for Appellant in No. 85-5600.

Michael W. Farrell, Assistant United States Attorney, with whom Joseph E. diGenova, United States Attorney, and E. Lawrence Barcella, Jr., Assistant United States Attorney, were on the brief, for Appellee in No. 85-5277 and 85-5600.

JUDGES: Starr, Circuit Judge, Wright and MacKinnon, Senior Circuit Judges. Opinion for the Court filed by Senior Circuit Judge MacKinnon.

OPINION BY: MacKINNON

OPINION

[*1348] MACKINNON, Senior Circuit Judge:

Appellants Robert Sutton, who resold crude oil, and Mark Sucher, an employee of the Department of Energy ("DOE"), were convicted of various criminal offenses [1] for their roles in a complicated conspiracy to bribe federal officials in order to obstruct a DOE investigation of Sutton's companies for noncompliance with price regulations, and to gain confidential information relating [*1349] to DOE settlement negotiations. On appeal Sutton and Sucher assign several grounds as reversible error. Finding none, [**2] we affirm the convictions.

1 The indictment contained five counts:

Count I -- Conspiracy to commit bribery, *18 U.S.C. § 371*;

Count II -- Bribery of public officials, *18 U.S.C. §§ 2, 201(b)*;

Count III -- Interstate transportation in aid of racketeering, *18 U.S.C. §§ 2, 1952(a)(3)*;

Count IV -- Acceptance of a bribe, *18 U.S.C. § 201(c)*;

Count V -- Causing others to travel in interstate commerce to promote bribery, *18 U.S.C. §§ 2, 1952(a)(3)*.

The conspiracy allegedly began

"from in or about April 1, 1980 and continu[ed] through in or about June, 1980." Count I. Sutton was charged in all counts of the indictment except Count IV. Sucher was charged in Counts II, III, and IV. Counts II, III, and V charged defendants as principals under *18 U.S.C. § 2*. Both defendants were convicted as charged. Sutton was sentenced to a four year prison term to run concurrently with the sentence he presently is serving for obstruction of justice, five years probation, and a fine of $105,000. Sucher received a two year prison term, three years probation, and a fine of $15,000.

[**3] I. BACKGROUND

A. ***Facts***

Robert Sutton was engaged in the business of reselling crude oil through the corporate entity BPM Ltd., operating out of Oklahoma (BPM Oklahoma), California (BPM California), and the Bahamas (BPM International). Sutton and his affiliated companies were allegedly among the largest violators of DOE price regulations pertaining to the certification and resale of crude oil. [2] In response to civil and criminal investigations by the Department of Energy and the Department of Justice, Sutton became involved in a labyrinthian conspiratorial effort to bribe officials of the federal government, hoping to gain confidential information and to improperly influence government settlement negotiations.

2 The DOE investigation led to a civil suit alleging violations of approximately 1.2 to 1.3 billion dollars (Tr. 1487). The DOE price regulations allowed higher prices to be charged for old oil than for new oil (whether oil was characterized as "old" or "new" depended on the date that it was taken from the ground). There was thus money to be made, albeit illegally, from having new oil certified as old oil and selling it at the higher price that could permissibly be charged for the latter (Tr. 1475).

[**4] The conspiracy included Sutton, at least four intermediaries, and Mark Sucher, a trial attorney in the Office of Special Counsel at the Department of Energy. The four intermediaries in the conspiracy were: Andrew Gazzara, Sutton's employee in charge of the California operation and the conspirator who apparently had Sutton's ear for much of the duration of the conspiracy; Myron Maxwell, a Florida businessman who brought the conspirators together in the first instance and seemed to coordinate matters along the way; Thomas Peacock, a Washington lobbyist, who was a former employee at DOE and an old friend of Maxwell; and Shelley Kolbert, a high-ranking administrative official in the Office of Special Counsel at DOE. Each of these four conspirators testified at trial for the prosecution pursuant to plea negotiations. [3] According to the government, Sucher received bribe money originating with Sutton in exchange for admittedly passing information and confidential DOE documents to Shelley Kolbert intended for Sutton.

3 Gazzara, Maxwell, and Kolbert were indicted for their roles in the conspiracy, and they pled guilty prior to trial. Maxwell and Gazzara pled guilty to one count of conspiracy to bribe a government official. Both men were awaiting sentencing at the time of trial. Kolbert pled guilty to one felony count of accepting a bribe and one misdemeanor count of tax evasion. He received concurrent terms of

three years and one year imprisonment, and a fine of $30,000. Kolbert's prison term was reduced after the trial of Sutton and Sucher to one year. Peacock was not indicted in the present conspiracy, but pled guilty to an obstruction of justice charge arising from his role in an unrelated insider trading scheme. He received a sentence of two years probation, 200 hours of community service, and a fine of $5,000.

[**5] Sutton and Gazzara began doing business together in the late 1970's reselling crude oil. In 1978 the DOE began investigating alleged violations of DOE price regulations by Sutton's companies. By late 1979 DOE had prepared criminal referrals--DOE documents that contained evidence of potential criminal liability--on the Sutton operations to be forwarded to the Department of Justice for possible federal criminal prosecution.

Through one of Sutton's business associates, Gordon Margulis, Maxwell learned in late 1979 of Sutton's difficulties with the Department of Energy (Tr. 490). Maxwell claimed to have a contact in the District of Columbia, a lobbyist who had prior experience with the DOE (Tr. 491). After speaking with Margulis, Maxwell called his Washington contact, Tom Peacock, stated the nature of Sutton's troubles with DOE, and asked whether Peacock could help. Peacock replied that he could help Sutton. Maxwell passed the information to Margulis, who set up a meeting for Sutton and several of his associates with Maxwell and Peacock in Washington, D.C. Peacock arranged [*1350] for Sutton to meet with former Senator Walter Flowers in February 1980, although Sutton ultimately [**6] decided against using the services of Flowers' lobbying firm.

After it had become apparent that Sutton was not interested in using Flowers' lobbying firm, Peacock, following several conversations with Maxwell (Tr. 751), contacted Shelley Kolbert sometime in the spring of 1980. Peacock told Kolbert "that these people wanted help and [that] there was money to be made." (Tr. 753). Kolbert's testimony regarding the same conversation was more descriptive:

> [Peacock said,] "Hey I've got something that I think we can make a really big score on." . . . He said that he had a client that was interested in getting some information out of the Department of Energy. More specifically, a client that was interested in getting information out about an investigation of a firm within the Department of Energy.
>
> . . . The client's name was Mr. Robert Sutton.
>
> . . .
>
> And [Peacock] said that if there was anything that I [Kolbert] could do to assist him, that it would be worth my while and that any moneys which he received for these services would be split on a 50-50 basis.

(Tr. 1079-80).

Kolbert, who was not a lawyer, was then employed in an administrative capacity in [**7] the Office of Special Counsel at DOE, but did not have personal access to information relating to the Sutton investigations (Tr. 1084). Kolbert thus immediately contacted Mark Sucher, who was then employed as a trial attorney in the division of the Office of Special Counsel charged with investigating

possible willful or criminal violations by the thirty-five largest oil refiners. [4] Kolbert testified:

> I told Mr. Sucher that I had a friend, whom I didn't name, who had a client that was interested in getting some information out of the Department of Energy dealing with certain of the investigations dealing with an oil company. . . . Well, *I told him that this friend was willing to pay for the information.*
>
> . . . I told him that the principal interest that was stressed by Mr. Peacock was a company or companies dealing with a Mr. Robert Sutton.

(Tr. 1084) (emphasis added). *Sucher* then explained to Kolbert who Sutton was and why the Sutton investigation was regarded as important to DOE (Tr. 1085). Kolbert's understanding of the meeting was clear:

> At that first meeting [with Sucher], it was my idea that we would provide Mr. Peacock . . . information [**8] on a company which wasn't Mr. Sutton's company, but just something to show that, in fact, timely information could be gotten by us and given to him, in other words, on another company, a company which was totally unrelated, basically as a show document to aid Mr. Peacock in his negotiations with his clients.
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> . . .
>
> . . . I told Mark [Sucher] that *we* would be receiving money for this and that was pretty much the sum total of the meeting.

[*1351] (Tr. 1085-87) (emphasis added). Shortly after this meeting, according to Kolbert, Sucher called to verify his ability to retrieve documents relating to the Sutton companies (Tr. 1088).

4 Sutton's companies were not among the thirty-five largest oil refiners, and hence not directly within the jurisdiction of the Office of Special Counsel, where Sucher worked. Sutton's companies, and all oil companies other than the largest thirty-five, were monitored by the Office of Special Investigations. However, according to the testimony of the persons in charge of these respective offices, in many investigations there were areas of considerable overlap. Attorneys from the Office of Special Counsel and the Office of Special Investigations therefore met regularly to apprise one another of matters of mutual concern. Mark Sucher was one of the attorneys from the Office of Special Counsel assigned to be involved in these "joint investigations" (Tr. 1409, 1488-89). According to the detailed testimony of Jeffrey Whieldon, Deputy Solicitor of the Office of Special Counsel and Sucher's supervisor, Sucher had access to the specific documents involved in the conspiracy alleged in this case, as well as access generally to the kinds of documents involved in joint investigations (Tr. 1365-1416). Jerome Wiener, Director of the Office of Special Investigations, testified in accord (Tr. 1472-74, 1488-91, 1512).

[**9] Acting on the assumption

that money would be forthcoming, Peacock began to receive from Kolbert information pertaining to audit reports, grand jury activities, and the possibility of settlement (Tr. 754-55). Peacock relayed the information to Maxwell and transmitted Maxwell's questions to Kolbert (Tr. 756). Kolbert testified that his source of information was Mark Sucher (Tr. 1090-91).

A short time later Kolbert went to Peacock's office to find out whether Sutton's money would be forthcoming. Kolbert testified that Peacock telephoned Maxwell, while Kolbert was in the room, and said, "'Concerning the oil deal, I think we can do some good for your people, but it's going to cost you some money.'" (Tr. 1089). Peacock then covered the receiver and asked Kolbert how much it would cost. When Kolbert did not give a figure, Peacock suggested $25,000, saying to Maxwell, "'It is going to cost $25,000, because people need to be paid for their services.'" (Tr. 1089-90). Peacock's account of his conversation with Maxwell differed somewhat. Peacock testified that Kolbert stated a need for $10,000 "to take care of people in government that were giving him [Kolbert] information" (Tr. 757). [**10] While Peacock had Maxwell on the telephone, Kolbert added $5,000 for himself and Peacock did likewise. Peacock thus asked Maxwell for $20,000 (Tr. 757). Maxwell told Peacock that he intended to keep $5,000 for himself, pushing the figure up to $25,000 (Tr. 498-99). Peacock told Maxwell that the money was necessary "if you [Maxwell] want to keep the information going" (Tr. 754). At this meeting Kolbert also provided Peacock with a summary of the type of documents that he could take from the Department of Energy. Kolbert had earlier been briefed on this subject by Mark Sucher (Tr. 1091).

Maxwell thereafter contacted Gordon Margulis, who recommended that Maxwell contact Andrew Gazzara in order to get money from Sutton. Through Gazzara, Maxwell requested $40,000 from Sutton "to start getting the ball rolling in Washington" (Tr. 76). Maxwell testified that, contrary to his conversation with Peacock, he intended to keep $20,000 (Tr. 498-99). *Sutton* directed Gazzara to wire Maxwell money drawn from Gazzara's account with BPM California, and promised to reimburse Gazzara. Gazzara wired $40,000 to Maxwell in Florida on May 6, 1980; Maxwell caused $20,000 to be wired to Peacock [**11] in the District of Columbia on May 7, 1980 (Tr. 760). The latter wire transfer was the basis of Count III of the indictment. Peacock endorsed a check on May 7, 1980 for $20,000 cash, from which he gave Kolbert $15,000. Contrary to Kolbert's understanding with Peacock, however, Kolbert kept $10,000 (Tr. 1109). Kolbert testified that he gave defendant Sucher $5,000 cash in a white envelope in Kolbert's Washington office at DOE (Tr. 1111). Counts II and IV of the indictment were based on these payments to Kolbert and Sucher.

Kolbert testified that, in his initial conversation with Mark Sucher, he had come up with the idea of providing a confidential DOE document to Peacock "to show that, in fact, timely information could be gotten by us and given to him, in other words, on another company, a company which was totally unrelated, basically as a show document to aid Mr. Peacock in his negotiations with his client" (Tr. 1085-86). Kolbert therefore asked Sucher to retrieve a current, confidential DOE document (Tr. 1095). Sucher returned with a criminal referral and supporting audit on Vantage Petroleum, dated April 17, 1980. Sucher asked Kolbert about money; Kolbert said that a total [**12] of $25,000 would be paid for documents, though he claimed to be unsure how that amount would be

divided (Tr. 1096).

Kolbert studied the Vantage document and took it to Peacock's office, where Peacock photocopied it. Kolbert testified that Peacock said the Vantage document would [*1352] be "helpful in getting them [Sutton] to come across with their end of the proposition" (Tr. 1100). In other words, Peacock considered that the Vantage document would be useful in Peacock's negotiations for more money from Sutton. Peacock later called Kolbert to confirm that the Vantage document had been helpful (Tr. 1101).

Peacock passed the Vantage document to Maxwell, who in turn passed it to Gazzara. Gazzara testified that, prior to his receipt of the Vantage document, he had been pressured by defendant Sutton to show some tangible results of Sutton's outlay of $40,000. Gazzara accordingly had been calling Maxwell (Tr. 84). On cross-examination, Gazzara testified that he had specifically requested documents relating to Vantage Petroleum in order to appease Sutton and to test the ability of Maxwell's contacts in Washington to gain confidential information from the Department of Energy [**13] (Tr. 203). [5] Gazzara testified that he "showed [the Vantage document] to Mr. Sutton and Mr. Sutton . . . kept it quiet because he saw something that came out of the government. That was that." (Tr. 287). Peacock testified that Maxwell had specifically mentioned documents relating to Vantage Petroleum as being of interest to Sutton (Tr. 770). Maxwell and Kolbert had no recollection of making a specific request for Vantage documents (Tr. 636, 1191-92).

5 Gazzara testified:

> . . . I asked Mr. Maxwell if he had any pull in Washington, could he get me some information on Vantage Petroleum because I heard that Vantage Petroleum had a problem in New York. . . . We were looking at . . . the possibility of buying the company, and if he [Maxwell] had any, any pull that he was supposed to have in Washington, this would satisfy Mr. Sutton.

(Tr. 172-73). Gazzara explicitly identified *Sutton* as providing the impetus for the request for a show document:

> [Sutton would say] hey, what is going on, you are paid money . . . I want to know this and that. . . . I would call Maxwell and say Max, what are you doing, you got paid $40,000, what are you doing for the $40,000. . . . So I told Maxwell . . . you are putting this all on me, I am getting heat from him [Sutton], if you are going to do something, do something, if you are not, let's forget it because I don't want to hear it no more. He says well, I am going to show you something. . . . I said if you are going to show something, I want a Vantage, if they are involved in a federal appeal.

(Tr. 286-87).

Kolbert's testimony implied

that the Vantage "show documents" were to be given to Sutton as an inducement for Sutton's payment (Tr. 1090). It is unclear whether Kolbert considered the Vantage document to be an inducement for the initial payment in May 1980 or the subsequent payment in December 1980, though the mention of the "show documents" was contemporaneous with the request for $25,000 "because people need to be paid for their services." Sucher had previously "briefed" Kolbert "on the type of documents which could be gotten from the Department of Energy" (Tr. 1090).

[**14] Maxwell was also told by Peacock to direct Sutton to contact Alex Peters, a Washington attorney. Maxwell did not recall being given any reason why Peters should be hired, and had little contact with Peters (Tr. 537-38). Peacock testified that Sucher drew attention to Alex Peters in the spring of 1980, indicating that Peters was an attorney with experience in energy matters who Sutton could hire to negotiate with the Department of Energy (Tr. 764). Peters testified that *Sucher* telephoned him the morning of May 7, 1980 -- the same day that Maxwell wired $20,000 to Peacock (Tr. 760) -- to ask whether Peters was interested in taking a case involving the DOE regulations concerning the resale of crude oil. In response to Peters' questions, Sucher stated that neither he nor his office was involved (Tr. 999). [6] Peters then indicated his interest in the case, and Sucher said that a "Ray Sutton" would call (Tr. 999). Defendant Robert Sutton telephoned Peters that afternoon, and agreed to hire Peters on retainer (Tr. 1000). Thereafter Peters contacted the Department of Justice attorney working on the Sutton investigation, and spoke with Sutton on the telephone approximately ten to [**15] twenty times (Tr. 1002). On June 16, 1981 Peters had a [*1353] conversation with Gazzara that he considered "cause for concern":

> [Gazzara] again suggested that Mr. Sutton then wanted me to approach DOE, as opposed to DOJ, and he wanted me to try to convince the Justice Department to try to kick the case back to DOE. He indicated to me something like the matter was all set up and under control. I remember that specifically because I asked my secretary to type that telephone conversation.
>
> . . .
>
> I indicated to [Gazzara] if he thought he was setting something up over the Department of Justice, I wasn't interested in being a part of it.

(Tr. 1005-06). Gazzara denied any impropriety at the time. Peters asked Mark Sucher on several occasions how, or from whom, Peters had received the referral in the Sutton case. Peters testified that Sucher refused to divulge the information, referring to the person only as the "guardian angel" (Tr. 1011).

> 6 In fact, Sucher and his office were very much involved in the Sutton investigation, according to the testimony of Jeffrey Whieldon, Deputy Solicitor of the Office of Special Counsel (Tr. 1365-1416).

[**16] Kolbert testified that Sucher had indicated from the start that Sutton's attorneys did not have the right approach to dealing with the government (Tr. 1131). The importance of counsel became apparent to Kolbert in the fall of 1980 when Peacock told

Kolbert that Sutton was willing to pay "a tremendous amount of money . . . $100,000 for the attempt and a quarter of a million dollars if successful" in return for influencing the settlement process (Tr. 1128). Kolbert told Peacock of Sucher's recommendation of Alex Peters, and Peacock said that he would exaggerate the situation to tell Maxwell that Sutton must employ Peters in order to effect a settlement with the government (Tr.1132). Sucher informed Kolbert that the government thought that it had a good case against Sutton, and also discussed the magnitude of the alleged violations by Sutton's companies. Kolbert and Peacock apparently thought that they could make considerable money from Sutton by providing at least the appearance of involvement in the settlement process.

Kolbert and Peacock therefore spoke with Maxwell on numerous occasions about the Sutton case, Peacock passing along information from Kolbert that Kolbert had [**17] received from Sucher. On one occasion Kolbert passed himself off as a DOE attorney in a telephone conversation with Maxwell from Peacock's office (Tr. 1136). Kolbert spoke generally about the settlement process, using information that he received from Sucher (Tr. 1125-30). Gazzara testified that Sutton was particularly interested in obtaining the removal of a Department of Justice attorney, Sauber, and an FBI agent, Zeringue, from the investigation (Tr. 92-93). However, Kolbert denied at trial that any steps were taken to improperly influence the investigative process.

In approximately December 1980 Kolbert put Peacock in touch directly with Mark Sucher, so that relevant information could be communicated without the mediation of Kolbert (Tr. 1149). Kolbert testified that he specifically instructed Sucher not to reveal to Peacock Sucher's role in providing the documents: "I felt this was a great breach of security and would jeopardize all of us. . . . I also didn't want Mark [Sucher] and Tom [Peacock] to compare notes as to what money had passed between them because I [Kolbert] had taken the lion's share." (Tr. 1150).

The steady flow of internal DOE documents played [**18] an important role in the conspiracy between May and December of 1980. Even prior to passing the Vantage document, Kolbert instructed Sucher to begin collecting confidential DOE documents relating to Sutton, specifically criminal referrals and backup audit reports. Kolbert testified that he tried to alleviate Sucher's concern about the security of the documents. Sucher told Kolbert that he had assembled the Sutton documents by taking them from the files, photocopying them, and returning them to the files (Tr. 1103-04). According to Kolbert, the common thread throughout these documents was that Sutton's companies were somehow involved (Tr. 1105). Kolbert testified that the bulk of the confidential documents [*1354] were passed to Peacock sometime in May 1980, although documents supporting the criminal referrals were passed up the chain as they became available throughout 1980 (Tr. 1112).

In December 1980 Maxwell traveled to Washington to receive the Sutton documents from Peacock, which Peacock represented contained "the whole game plan [of DOE] against Mr. Sutton and BPM" (Tr. 508). In his office, Peacock drew a diagonal line across each page of the documents and instructed [**19] Maxwell to show the documents to Sutton, and not to lose sight or possession of the documents (Tr. 509).

Maxwell then flew to California to December 10, 1980 to meet Gazzara. Gazzara placed in his safe the documents carried by Maxwell, after he photocopied them without telling

Maxwell (Tr. 94-95). On December 12, 1980 Maxwell and Gazzara flew to New Orleans. Maxwell and Gazzara met with Sutton in Gazzara's hotel room, where Maxwell explained to Sutton that the documents contained "the Department of Energy's game plan against him as far as what any trial would be" (Tr. 510). Gazzara testified that Sutton looked over the documents and stated that "'my lawyers can get this in discovery,'" to which Maxwell replied, "'You haven't even gone before the grand jury and this is not discovery . . . these came out of there and no lawyer.'" (Tr. 95-96). Gazzara testified that Maxwell asked Sutton for $350,000 [7] during the same meeting, and Sutton said that he would think about it (Tr. 96-97). According to Gazzara, "At that time [Maxwell] told [Sutton] this money [$350,000] was going to be used to influence people in Washington in the government, in the Department of Justice. He [Maxwell] [**20] brought these things [documents] to show how much strength. . . ." (Tr. 291).

7 Gazzara testified that the $350,000 figure was suggested by Maxwell (Tr. 236-38). Maxwell testified that he called Gazzara to say that there was "a deal working ", but that it would cost Sutton $150,000. According to Maxwell, Gazzara suggested, and Maxwell agreed, that they ask for $350,000 and split the extra $200,000 (Tr. 497).

Two days later Maxwell called Gazzara to reiterate his request for $350,000 "if anything is going to be done in Washington" (Tr. 98). Gazzara called Sutton, who this time authorized, through his comptroller, the transfer of the money. On December 15, 1980 $350,000 was wired by Sutton to the account of BPM California (Tr. 119). Gazzara transferred the money to his personal bank account.

On December 19, 1980 Gazzara met Maxwell in Las Vegas, where he gave $50,000 to Maxwell, laundering the money through the use of gambling chips (Tr. 99). Gazzara later wired Maxwell another $30,000 (Tr. 102).

[**21] On December 23, 1980 Maxwell, Peacock, and Kolbert met in the Key Bridge Marriott Hotel in Rosslyn, Virginia. Peacock arranged the meeting to distribute the money received from Maxwell, and to assure Maxwell that someone from the Department of Energy was working on the Sutton case. Kolbert and Maxwell sat separately in adjoining rooms, while Peacock stood in the common doorway. Kolbert and Maxwell were careful not to reveal their identities to one another. Maxwell brought $75,000 to be divided three ways, but Peacock suggest dividing only $ 50,000 three ways, with the remaining $25,000 to be divided between Maxwell and Peacock. The money was divided as Peacock suggested. Kolbert told Maxwell of his willingness to help other clients of Maxwell who might have trouble with the DOE (Tr. 520-25). The journey of Kolbert and Peacock from the District of Columbia at the bidding of Maxwell -- acting on Sutton's behalf -- formed the basis of Count IV of the indictment charging the acceptance of the bribe.

A few days later Maxwell received additional DOE documents from Peacock, which he placed in the trunk of his car. The car was subsequently repossessed by the leasing company with [**22] the confidential DOE documents still in the trunk. The documents were returned to Maxwell, but not before the repossessor photocopied [*1355] them and gave them to the local police. The police forwarded the documents to the FBI (Tr. 534-35).

Some time thereafter, Gazzara fell from Sutton's favor and Kolbert was

removed from the chain. Maxwell therefore began communicating directly with Sutton. In October 1981 Sutton was indicated for alleged federal criminal offenses relating to the sale of crude oil. The resulting trial was held in federal district court in Oklahoma. When Maxwell called Peacock with a question at about this time, Peacock instructed Maxwell to contact Sucher directly (Tr. 544). During the time of Sutton's indictment and trial in Oklahoma, Maxwell spoke on several occasions with Sucher generally concerning the strengths and weaknesses of the government's case and the level of experience of the government attorneys (Tr. 546). At one point Sutton's attorney gave Maxwell a specific question to ask Sucher (Tr. 546). Maxwell passed Sucher's answers along to Sutton. There was no allegation that Sucher received additional money for these acts.

Maxwell taped [**23] a telephone conversation with Sutton in early 1981 during the time of the federal grand jury investigation in Oklahoma. Maxwell stated that "everything at this end looks good," but expressed concern for the money:

> What they're concerned about, and rightly so, as you know I guess, I put up what needed to be done. Uh, they want some kind of guarantee about the other, and I told them that I would talk to you, that if you said it I would go along with that and take your word for it.

Sutton replied, "That's no problem." (J.A. 25). Maxwell spoke to Sutton as if a deal had already been set up at the Department of Energy:

> The way this is going to be, it's going to be first of all through the . . . it's already handled there. . . . When we get the okay, you send your lawyer in, or whoever you choose, it doesn't even have to be a lawyer. . . . Go see somebody that you know is important and he'll give you the word. . . . But here's the thing, you're not going to pay anything. . . . You are going to get a clean bill of health to date.

(J.A. 28-29). Sutton indicated his understanding and consent throughout. When Maxwell again stated his concern for [**24] the money, Sutton confirmed his commitment to pay for influencing the settlement process and indicated that "we'll settle up over at . . . the island [meaning Sutton's place in the Bahamas]. . . . You know how it is over there . . . their laws." (J.A. 30). Maxwell repeated his concern for the money, saying, "I have put up what needed to be put up in front. . . . I don't want to hear later that, you know, it could have been done without us." Sutton replied, "No, no, no, no." (J.A. 31).

Sutton was tried in 1982 in the Northern District of Oklahoma on criminal charges relating, *inter alia*, to alleged violations of DOE crude oil regulations. He was acquitted of all counts except for one count of obstruction of justice and one count of conspiracy to obstruct justice (J.A. 1-4). The conviction for obstruction of justice was based on his actions "counseling, advising and suggesting" to an employee to destroy records demanded by a subpoena issued by the DOE (J.A. 1). The conviction for conspiracy to obstruct justice resulted from his role in a conspiracy to prevent, through physical restraint and intimidation, two persons from speaking with investigators from the

FBI and the Department [**25] of Justice (J.A. 2-4).

In 1983 an investigation by the Securities and Exchange Commission implicated Peacock in an insider trading scheme. Peacock thereafter agreed to cooperate with the government concerning the Sutton conspiracy. As a result, he subsequently taped, with the assistance of FBI agents, at least eleven conversations with Mark Sucher. In a conversation of October 25, 1983 Sucher told Peacock that he had retained counsel (J.A. 108). On October 26, 1983 Sucher expressed his concern over the investigation of Shelley Kolbert. Sucher initially told Peacock that "you don't wanna know," but then said, "They're, they're, I guess [*1356] you know because they're diggin' around with Shelly [sic]. I don't know where they're goin'. . . . And who said what to whom." (J.A. 118). Sucher told Peacock that he would prefer to ask questions through his retained counsel, because "tha[t] way we're both covered by talkin' through our attorneys" (J.A. 120).

On October 28, 1983 Peacock and Sucher had two conversations concerning the government's investigation of the conspiracy and the immunity given Peacock in return for his cooperation with the government (J.A. 156, 162). [**26] The most relevant part of the colloquy related to Sucher's virtual admission that he had passed documents to Kolbert:

> Peacock: My main concern was anything relating to documents. . . . It was you that I was worried about not me, they already got me pal. (Laughs).
>
> Sucher: Ahm. How good's your memory, awful about now right? Good. Ah, *well they're gonna get me too.*
>
> Peacock: *On documents*?
>
> Sucher: Um-hum.
>
> Peacock: Hmm, hmm, hmm, hmm. What'd you do, did you provide them for Shelley?
>
> Sucher: (Unintelligible). . . . I can't ask you to corroborate that.
>
> Peacock: Okay, all right, never mind, I'm sorry I even asked.
>
> Sucher: That's the wrong ques, I mean curiosity is one thing, but . . .
>
> Peacock: Yeah okay.
>
> Sucher: . . . reckless disregard of the life of a human being (unintelligible) . . .
>
> Peacock: (Talking same time) Your [sic] right.
>
> Sucher: I mean because if, (PAUSE), if you know that they don't need me.

(J.A. 164-65) (emphasis added).

This last remark seems to have clarified an oblique remark made by Sucher earlier in the same conversation. Sucher had previously said, "And, when you're tryin' to bake a pie, sometimes you try to bake [**27] it from radiation from on top and sometimes you try to bake it with radiation from, from below. It's an amazingly effective way to bake it, if it is baked from above and below." (J.A. 154). Peacock asked whether Sucher was the one who was being baked. Sucher replied that Peacock was missing the "whole point" because Sucher said, "I don't think I'd be the bakee" and he added, "They're baked 'em [sic] from above I don't wanna be stuck, being in a cold part of the

oven." (J.A. 154). These remarks significantly indicate Sucher's awareness that any potential value that he might have as a government witness -- and hence the potential leverage he might have in receiving immunity in exchange for cooperation with the government -- depended on the timing of his request and the exclusivity of his knowledge of the events of the conspiracy. It is important to remember that Kolbert had been careful not to let Peacock know that Sucher had been the source of the confidential documents coming from DOE, because Kolbert had given Sucher $5,000 less than Kolbert had told Peacock he would give his unnamed source. As Kolbert stated at trial, "I also didn't want Mark [Sucher] and Tom [Peacock] [**28] to compare notes as to what money had passed between them because I had taken the lion's share." (Tr. 1150).

On November 18, 1983 Shelley Kolbert, in cooperation with government agents, taped a telephone conversation with Sucher. Sucher stated on several occasions that the government investigation was focusing on Kolbert and Peacock, although Sucher was, in his own words, "trying to be a little circumspect about it" (J.A. 173). Although Kolbert and Sucher were involved in other possibly illegal schemes, Sucher was particularly concerned with the Sutton matter (J.A. 174, 176). Sucher agreed with Kolbert's statement, regarding the Sutton case, that "it comes down to one person's word against another ['s]" and stated that he considered the investigation "real close" (J.A. 176).

During the same conversation Kolbert stated, "I'm concerned about ahh, you know, the -- the fact that you passed documents to me. That's what I'm concerned [*1357] about." (J.A. 178). Sucher replied, "They already know about that Shelley. . . . Well, from whatever source, they know that I gave you the documents. And as I recall (unintelligible) . . . and I gave them to you and you gave them back [**29] to me." (J.A. 178-79). Kolbert remarked, "Unfortunately though I do remember . . . precisely . . . the one major thing [*i.e.*, passing documents [8]] dealing with Sutton. . . ." Sucher replied, "That's the hook. . . . My guess then . . . is that, before they come down on you they will try and go all the way, up the chain ta' Sutton. . . . And if they succeed in that then they'll come down on you and then come down on Sutton." (J.A.179-80).

8 Kolbert testified that he intended the phrase "one major thing" to mean "the passing of documents and the receiving of money" (Tr. 1158).

Sucher's role in passing documents was made clear in the same conversation:

> Sucher: Now I haven't talked to them but I think that they'll be able to place the documents in your hands.
>
> Kolbert: You think they will be able to place the documents in my hands? Will they be able -- will they be able to place the link between you and the documents in my hands?
>
> Sucher: I don't know. Ahhm . . .
>
> Kolbert: I mean we weren't [**30] monitored when you passed them to me were we?
>
> Sucher: No.

(J.A. 181-82). Later in the conversation Kolbert asked, "Do you think there's any possibility that

ahh, there's been a ahh, any sort of tracing dealing with money?" Sucher responded, "No I mean, they can, try and look, for money in me all day, they won't find it. . . . I have a terrific talent." (J.A. 184). Near the end of the conversation the following exchange took place:

> Kolbert: Do you feel jeopardy for yourself?
>
> Sucher: There may be some. But mainly having to do with the, ahh, Sutton matter and that's about it.
>
> Kolbert: That's major jeopardy.
>
> Sucher: Yeah, I understand but . . .
>
> Kolbert: I mean . . . isn't that felonious? . . . If there's a way it can be proved. . . .
>
> Sucher: You have to prove intent.

(J.A. 185-86).

B. ***Proceedings***

Sucher was arraigned October 15, 1984. He demanded a speedy trial under *18 U.S.C. § 3161 et seq.*, which guarantees trial within 70 days of arraignment. The court set a trial date of November 30, 1984, but on November 29, 1984, because of the receipt of additional evidence, the government dismissed the indictment [**31] and returned a superseding indictment that included Sutton as co-defendant. Trial commenced January 4, 1985, concluding February 14, 1985. The jury found both defendants guilty as charged. Sutton received a four year prison term to run concurrently with the sentence he presently is serving for obstruction of justice, five years probation, and a fine of $105,000. Sucher received a two year prison term, three years probation, and a fine of $15,000.

II. Robert Sutton

Sutton challenges the sufficiency of the evidence to support his conviction as a principal on Counts II and III of the indictment, namely, bribery of public officials in violation of *18 U.S.C. § 201(b)* and interstate transportation in aid of racketeering in violation of *18 U.S.C. § 1952(a)(3)*. In addition, Sutton challenges the trial court's evidentiary ruling that permitted the government to introduce evidence of Sutton's prior convictions for obstruction of justice and conspiracy to obstruct justice. Finally, Sutton claims that his *Sixth Amendment* right to confront witnesses was abridged by the trial court's restriction of Sutton's cross-examination of Kolbert. [**32] Each claim is analyzed below.

A. ***Sufficiency of the Evidence***

Sutton challenges the sufficiency of the evidence from which the jury could [*1358] have convicted him of bribery of public officials, *18 U.S.C. § 201(b)*, and interstate transportation in aid of racketeering, *18 U.S.C. § 1952(a)(3)*. He unsuccessfully moved for judgment of acquittal. Our task in reviewing denials of motions for acquittal is to view the evidence in the light most favorable to the government, allowing the government the benefit of all reasonable inferences that may be drawn from the evidence, and permitting the jury to determine the weight and the credibility of the evidence. *See Jackson v. Virginia, 443 U.S. 307, 318-19, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); United States v. Singleton, 226 U.S. App. D.C. 422, 702 F.2d 1159, 1163 (D.C. Cir. 1983); United States v. Fench, 152 U.S. App. D.C. 325, 470 F.2d 1234, 1242 (D.C. Cir. 1972)*. "If the evidence reasonably permits a verdict of acquittal or a verdict of guilt, the

decision is for the jury to make." *Curley v. United States, 81 U.S. App. D.C. 389, 160 F.2d 229, 237* [**33] (D.C. Cir.), *cert. denied, 331 U.S. 837, 67 S. Ct. 1512, 91 L. Ed. 1850 (1947)*. Moreover, no legal distinction exists between circumstantial and direct evidence. *See Holland v. United States, 348 U.S. 121, 139-40, 99 L. Ed. 150, 75 S. Ct. 127 (1954)*. It is readily apparent that there is ample record evidence from which the jury could reasonably have found Sutton guilty as charged, and that the trial judge correctly denied Sutton's motion for judgment of acquittal.

Counts II and III of the indictment resulted from the wire transfer of $20,000 on May 7, 1980 from Maxwell in Florida to Peacock, Kolbert, and Sucher in Washington, D.C. Specifically, Count II charged that Sutton "corruptly did give, offer and promise a thing of value, that is an aggregate of $15,000 to Shelley Kolbert and Mark A. Sucher . . . with intent to influence official acts and to induce them to do acts in violation of their lawful duties." Count III charged that Sutton, Gazzara, and Sucher

> did use and caused to be used a facility in interstate commerce, that is they did cause $20,000 to be wire transferred from Daytona Beach, State of Florida to Washington, District [**34] of Columbia, with intent to promote, manage, establish, carry on, and facilitate the promotion, management, establishment and carrying on of an unlawful activity, that is bribery in violation of Title *18, U.S.C. § 201(b)* and thereafter did perform and attempt to perform acts . . . in carrying on said unlawful activity.

Sutton was charged and convicted as a principal under *18 U.S.C. § 2*, [9] a very broad statute.

9 *18 U.S.C. § 2* provides:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Sutton significantly does not challenge the very fact of the wire transfer or the resulting bribe to Kolbert and Sucher. Rather, Sutton challenges the sufficiency [**35] of evidence from which the jury could have determined that he intentionally authorized the transfer of money to be used for bribery. Sutton contends that the money was authorized only to be used for legitimate lobbying purposes, and points to Gazzara and Maxwell, who testified explicitly that, at the time of the initial payment to Peacock, they both considered the money to have been authorized for legitimate activities. Sutton Brief at 9-10.

There was thus no direct evidence of Sutton's intent at the time of the transfer, although there was considerable circumstantial evidence from which a jury could infer Sutton's knowledge that the money would be used

to bribe government employees. To reiterate briefly: Sutton and several associates met in Washington in the latter part of 1979 with Maxwell, Peacock, and the lobbying firm of former Senator Flowers. The jury was not told in detail about these meetings, but it is undisputed that Sutton decided against using the services of the Flowers' lobbying firm. Neither Maxwell nor Peacock had significant [*1359] contact with Sutton on this trip. Gazzara became involved in the conspiracy when Maxwell forwarded Peacock's request for [**36] $40,000 to "get the ball rolling in Washington." As mentioned above, both Gazzara and Maxwell testified that they had no knowledge of illegality at the time of payment.

Yet the jury knew, for example, that the date of the wire transfer of $20,000 was May 7, 1980. Not coincidentally, this was the same day that Mark Sucher, whose intervention could not be described as fortuitous, called Alex Peters in the morning to say that a "Ray Sutton" would contact him with regard to possible representation. Robert Sutton contacted Peters that very afternoon.

The role of the Vantage Petroleum document is also very significant. Gazzara testified that he specifically asked for a show document on Vantage Petroleum in order to learn something about a competing oil company as well as to test the reach of Peacock's contacts in the Department of Energy. Gazzara testified that Sutton prompted him to show some tangible evidence of his expenditure of $40,000. Gazzara therefore testified that the passing of the Vantage document occurred after the payment to Peacock. However, Kolbert's testimony was less clear on the timing of the passing of the Vantage document; he testified that the Vantage document [**37] preceded the request by Peacock of $40,000. Indeed, evidence was presented that Gazzara had conversations of a hostile nature with officers of Vantage Petroleum in late April of 1980, prior to the wire transfer of money. These conversations provide a motive for obtaining the Vantage document, from which the jury could reasonably have inferred that the Vantage document was requested specifically by Sutton's agent Gazzara.

Whether the Vantage document was passed before or after Sutton authorized payment of $40,000 presented a jury question of the credibility of the witnesses. However, either resolution allows a reasonable inference of Sutton's criminal intent: If Sutton paid in advance, he simply received illegally what he expected in the form of the Vantage document; conversely, if the Vantage document preceded payment, then the subsequent $40,000 was clearly paid by Sutton with the intent illegally to procure confidential documents. The testimony of Gazzara tends to imply the former explanation, Kolbert's testimony the latter. The jury was free to choose among the two versions, or to accept both as representing the understandably imperfect recall of witnesses nearly five years [**38] after the relevant events. The central theme of the testimony in any event is that the Vantage document directly corresponded to the receipt of money from Sutton.

Sutton attempts to explain away the Vantage document as being the product of a separate conspiracy organized by Gazzara. Again, circumstantial evidence suggests otherwise. Gazzara testified unequivocally that Sutton reviewed the Vantage document and "kept it quiet because [Sutton] saw something that came out of the government" (Tr. 287). The only reasonable inference from this episode is that Sutton was receiving exactly the kind of confidential information that he expected to receive through his dealings with Maxwell and Peacock. Sutton certainly took no steps to

persuade the other conspirators to stop their activities because he intended only legal lobby activities to occur.

The jury, moreover, heard testimony from Paul McBride, Sutton's former attorney and confidant. McBride testified that he and Sutton were in regular contact during 1979 and 1980 on matters beyond the attorney-client relationship. McBride stated that Sutton had said in the fall of 1979 that lawyers were "dumb" for recommending a settlement [**39] with the Department of Energy, because "there were other ways to take care of this thing that were less expensive and that he [Sutton] had a direct approach to handle it. . . . He [Sutton] could send the green directly to Washington and take care of this problem." (Tr. 468-69). Suton emphasized that "for 30 -- 40 -- or $50,000 he could have this whole [*1360] matter taken care of and the investigation would be dropped" (Tr. 469). [10]

10 It was for the jury to determine whether this statement implied payment for retaining competent counsel or for improperly influencing government officials.

Sutton admittedly authorized $350,000 to be paid in December 1980 following the December 12 meeting with Maxwell in New Orleans at which Sutton was shown the bulk of the DOE documents concerning his companies. Moreover, in the telephone conversation between Maxwell and Sutton, Maxwell claims to have "put up what needed to be done" and "put up what needed to be put up in front" (J.A. 25, 31). Sutton's responses [**40] throughout could reasonably be construed to indicate that all these payments were being handled as he had intended.

Finally, the jury received evidence of Sutton's convictions in the Oklahoma trial for obstruction of justice and conspiracy to obstruct justice. Since in the present counts Sutton was charged with an attempt to obstruct the investigations of the Department of Energy and the Department of Justice into Sutton's companies, *see infra*, the jury could reasonably have concluded that his prior convictions were probative of Sutton's intent to use illegal means to subvert the government's investigation.

In both cases, there seems to have been a consistent pattern of attempts by Sutton to illegally subvert the enforcement of federal law, beginning with his efforts to obstruct the criminal investigations that led to this trial in Oklahoma, continuing with his payment of $40,000 to the other conspirators and the subsequent receipt of government documents and information, and extending through his payment of $350,000 in exchange for what he knew to be unlawful influence to settle his cases with the Department of Energy and the Department of Justice. There was simply no evidence [**41] of discontinuity in these events, only the single-minded attempt to escape, by whatever means, the accountability required by federal law. The jury thus could reasonably have concluded beyond a reasonable doubt that Sutton deliberately intended to bribe government officials with the payment of $40,000.

B. ***Prior Convictions***

As mentioned previously, Sutton was convicted in the 1982 Oklahoma trial of obstruction of justice, *18 U.S.C. § 1505*, and conspiracy to obstruct justice, *18 U.S.C. § 371*. Over the objections of Sutton's trial counsel, the government introduced evidence of these convictions through a redacted copy of the indictment, a copy of the judgement and conviction, and the

brief testimony of an FBI agent who had worked on the prior case (Tr. 1492-1511, 1616).

It is imperative that a criminal jury consider only those things that directly relate to the guilt or innocence of the accused as charged in the indictment. As stated recently by Judge Tamm, "A fundamental tenet in our criminal jurisprudence is that a jury should not premise its verdict upon a general evaluation of the defendant's character but rather [**42] upon an assessment of the evidence relevant to the particular crime with which the defendant is presently charged." *United States v. Lavelle, 243 U.S. App. D.C. 47, 751 F.2d 1266, 1275 (D.C. Cir. 1985); see United States v. Foskey, 204 U.S. App. D.C. 245, 636 F.2d 517, 523 (D.C. Cir. 1980).* *Federal Rule of Evidence 404(b)* provides:

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

Fed. R. Evid. 404(b). Of course, even if evidence of other crimes is admissible under *Rule 404(b)*, it may still be excluded by *Rule 403*'s ban on otherwise relevant evidence whose "probative value is substantially outweighed by the danger of unfair [*1361] prejudice, confusion of the issues, or misleading the jury."

Sutton's challenge to the government's use of the prior convictions is forthright. He contends that his conviction for conspiracy [**43] to obstruct justice "has absolutely nothing to do with any of the participants or events in the instant case," and that the obstruction of justice conviction "had nothing to do with bribery or influence of any Governmental officials and certainly nothing to do with any of the participants in this indictment [the present case]." Sutton Brief at 12. Introduction of this evidence, Sutton contends, "essentially allowed the Government to infer and argue that since Sutton was a bad character who could commit criminal acts and therefore that he must have acted criminally in this case. That if he would commit other crimes to benefit himself then he must have committed bribery." *Id.* at 12-13.

Sutton's argument is misplaced. He argues that the convictions from the 1982 Oklahoma trial had "nothing to do" with the events of the present trial, yet the Oklahoma trail determined, *inter alia*, that Sutton would be held criminally liable for his alleged violations of DOE price regulations and other business practices allegedly in violation of federal law. These charges were the direct result of the DOE investigation that Sutton later allegedly attempted to influence illegally, as charged [**44] in the present case. We must keep in mind that there was only one DOE investigation, with separate criminal trials resulting therefrom, one in Oklahoma and this one later in the District of Columbia. That the prior convictions did not involve bribery of government officials or any of the co-conspirators in the present case does not render the prior convictions *irrelevant* to the question whether Sutton again would knowingly or intentionally adopt illegal means to block the same DOE investigation.

Indeed, the prior convictions were highly relevant to proving just those

things that *Rule 404(b)* explicitly mentions -- "motive, opportunity, intent, preparation, plan, knowledge, identity, and absence of mistake or accident." This is particularly the case in light of Sutton's defense at trial. There, his counsel argued that Sutton had been the unwitting victim of a conspiracy perpetrated by Maxwell and Gazzara to take extraordinary amounts of money under the pretense of providing legitimate lobbying efforts and participating in legitimate settlement efforts (Tr. 27-50). Thus, it was crucial for Sutton to argue that he had no knowledge that the two transfers of money ($40,000 and [**45] $350,000) were to be used for payments to government officials.

We consider that the trial court quite correctly determined that Sutton's prior convictions could be considered to represent just two of several schemes -- including among them the conspiracy involved in the present case -- to thwart the investigation of the Department of Energy. [11] Since such evidence can provide proof of Sutton's knowledge and intent at the time he authorized the payment of money, such evidence was relevant and admissible under *Rule 404(b)*.

11 The trial judge said to Sutton's attorney:

> The fact remains, however, that [the prior] conviction[s] related to the acts of this defendant in connection with the very investigation of oil regulations which are at issue here. This was just another, arguably, device that was utilized by these defendants in order to suppress, derail or otherwise confound that particular investigation.

(Tr. 1506-07).

As with all otherwise admissible evidence, prior convictions must [**46] satisfy the balancing test of probative value versus prejudicial effect embodied in *Rule 403*. In assessing the probative value of other acts evidence, this court has considered, *inter alia*, the similarity and temporal distance of the acts, and the government's need for the evidence. *See United States v. Lavelle, 243 U.S. App. D.C. 47, 751 F.2d 1266, 1277 (D.C. Cir. 1985)* (citing cases). Sutton's prior efforts to obstruct the DOE investigation involved different persons and did not involve bribery, yet they were similar to elements of the conspiracy alleged in the present case insofar [*1362] as the earlier efforts illegally attempted to block a single DOE investigation. Moreover, the prior convictions concerned events that had occurred at most only eighteen months prior to the events alleged in the present case, and some of those events occurred contemporaneously with events alleged in the present conspiracy. Finally, in lieu of direct evidence of Sutton's intent at the time of the first payment of money in May of 1980, it is clear that the government had an actual need to introduce Sutton's prior convictions as evidence of his intent and knowledge.

[**47] Furthermore, the government and the trial court scrupulously tried to avoid the unfair prejudice that could have attended the introduction of Sutton's prior convictions. The jury was given copies of the two counts of the indictment and heard them identified by an FBI agent who had worked on the investigation, and the court twice instructed the jury of the limited

purpose of such evidence (Tr. 1617-18, 1977-78). [12] There was no significant discussion or inflammatory testimony about the actions underlying Sutton's prior convictions.

12 In the limiting instruction to the jury immediately after the evidence was introduced the court instructed:

> This evidence was admitted only for your consideration of whether it shows that the defendant had the intent to commit the offense for which he is now on trial, and whether or not the defendant had knowledge with respect to the illegal activity that was involved in efforts to avoid prosecution for oil regulation violations involved in this particular case. It is not to be considered by you as evincing bad character or a criminal propensity on his part, but only for the two purposes for which I have indicated that it was admitted into evidence; namely, his knowledge of whether or not there was illegal activity occurring in connection with the case which is in trial before you and whether or not he intended that the activities that took place as to which you have heard evidence were for an illegal purpose.

(Tr. 1617-18).

[**48] Sutton finally contends that the court failed to make the requisite on-the-record balancing of probative value versus prejudicial effect. *See United States v. Moore, 235 U.S. App. D.C. 381, 732 F.2d 983, 987 (D.C. Cir. 1984)*. However, reversal or remand for failure to make such a balancing on the record is inappropriate, first, if defense counsel failed to request such balancing, or, second, if the considerations germane to balancing probative value versus prejudicial effect are readily apparent from the record. *See United States v. Lavelle, 243 U.S. App. D.C. 47, 751 F.2d 1266, 1279 (D.C. Cir. 1985)*.

The trial transcript does not reveal a specific request for such an on-the-record balancing by Sutton's attorney, which is unsurprising considering the length at which this evidentiary point was debated: Sutton's attorney and the government argued the admissibility of Sutton's prior convictions for the entire morning session of February 8, 1985 (Tr. 1560-1612). The record fully reveals the considerations required by *Rule 403*'s balancing test, and it is quite clear that the court correctly conducted the requisite balancing.

C. ***Right*** [**49] ***of Confrontation***

Sutton claims that he was denied the ability to effectively cross-examine Kolbert, thus breaching his *Sixth Amendment* rights. *See Douglas v. Alabama, 380 U.S. 415, 418, 13 L. Ed. 2d 934, 85 S. Ct. 1074 (1965)*. The trial court observed that Kolbert "was involved in a lot of activities which could be characterized as illicit or possibly illicit" (Tr. 1305). Mark Sucher joined Kolbert in several of these collateral schemes. However, Sutton's attorney was prevented from cross-examining Kolbert on such matters, even though they might have reflected on Kolbert's credibility as

a witness. More important, the court ruled against Sutton's attorney inquiring into a drug importation *scheme* (not a conviction) between Kolbert and Mark Sucher, which Sutton contends would have shown a motive, other than bribery, for Kolbert's payment of $5,000 to Sucher. Sutton contended that Kolbert paid Sucher $5,000 to settle a previous debt from the alleged drug importation [*1363] scheme, not as payment for documents.

The court carefully evaluated the arguments from attorneys for the government and Sutton (both of whom favored such cross-examination) [**50] and Mark Sucher's attorney (who opposed such cross-examination), and ruled against allowing cross-examination of Kolbert's putatively illegal activities other than those directly involved in the present conspiracy, because of the danger that testimony by Kolbert about illegal schemes involving Mark Sucher would unfairly prejudice Sucher before the jury. Moreover, the drug importation scheme, for which Kolbert allegedly owed Sucher money, is irrelevant to the issue of Sutton's guilt or innocence in the present case. As far as Sutton is concerned, it matters not why Kolbert paid Sucher, but only that Sutton intended to pay money to government officials -- *i.e.*, Kolbert *or* Sucher -- in exchange for confidential documents and information. In light of the limited utility to Sutton of such questioning, the court properly acted within its sound discretion.

On the basis of the foregoing, we hold that Sutton's *Sixth Amendment* right to confrontation was adequately protected by the considered ruling of the court.

III. MARK SUCHER

Mark Sucher raises four arguments on appeal. First, Sucher argues that his right to a fair trial was irreparably prejudiced by the court's refusal [**51] to grant Sucher's motion for severance under *Rule 14 of the Federal Rules of Criminal Procedure*. Second, he contends that the date of the trial violated the 70 day time limit of the Speedy Trial Act, *18 U.S.C. § 3161 et seq.* Third, Sucher argues that the government's role in taping his conversations with Peacock and Kolbert, knowing after October 25, 1983 that Sucher was represented by counsel, violated his *Sixth Amendment* right to counsel. Finally, Sucher argues that the trial court abused its discretion in refusing to permit the introduction of exculpatory statements made contemporaneously to portions of his taped conversations with Kolbert and Peacock that were introduced into evidence by the government.

A. ***Motion for Severance***

Sucher made an unsuccessful pretrial motion for severance, [13] on the grounds that the weight and venality of the evidence against Sutton would prejudice the jury against Sucher. *See United States v. Sampol, 204 U.S. App. D.C. 349, 636 F.2d 621, 643-46 (D.C. Cir. 1980)* (per curiam). Sucher points to the allegations that Sutton was involved in a violation of DOE price regulations to the [**52] tune of 1.2 to 1.3 billion dollars, and that much of the government's evidence concerned Sutton's illicit dealings with conspirators other than Sucher. Sucher further points to trial testimony that suggested, *inter alia*, that Sutton had become wealthy through violations of federal regulations, through bribes paid to foreign officials (Tr. 353-54), through extortionary business practices (Tr. 205-21), and evidence showing Sutton's payment of almost $400,000 in order to bribe government officials in this case. Sucher asserts, "The tidal wave of evidence surely drowned Sutton, but it created an undertow that caught

appellant Sucher as well." Sucher Brief at 52. Compelling though the metaphor may be, Sucher's legal argument is unpersuasive. Sucher was drowned by other evidence which proved his *direct* involvement in the conspiracy and substantive offenses.

13 *Rule 14 of the Federal Rules of Criminal Procedure* provides:

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever relief justice requires.

[**53]

Trial court rulings on motions for severance will be disturbed only for an abuse of discretion. *See Opper v. United States, 348 U.S. 84, 95, 99 L. Ed. 101, 75 S. Ct. 158 (1954); United States v. Daniels, 248 U.S. App. D.C. 198, 770 F.2d 1111, 1115 (D.C. Cir. 1985).* Motions for severance are particularly sensitive in [*1364] conspiracy cases because of the danger that the guilt of one defendant may be unjustly transferred to another. *See Kotteakos v. United States, 328 U.S. 750, 774, 90 L. Ed. 1557, 66 S. Ct. 1239 (1946); United States v. Mardian, 178 U.S. App. D.C. 207, 546 F.2d 973, 977 (D.C. Cir. 1976)* (en banc).

Sucher relies on two prior decisions of this court, *United States v. Mardian, 178 U.S. App. D.C. 207, 546 F.2d 973 (D.C. Cir. 1976)* (en banc), and *United States v. Sampol, 204 U.S. App. D.C. 349, 636 F.2d 621 (D.C. Cir. 1980)* (per curiam), but neither case supports a decision contrary to the trial court's ruling in this case. In *Mardian* we reversed the conviction of alleged Watergate conspirator Robert Mardian and ordered a new trial. Mardian argued [**54] that the trial court should have granted his original motion for severance because he, unlike all other indictees, had been named only in the conspiracy count. Moreover, Mardian was charged with participation only until June 21, 1972, in a conspiracy alleged to have continued until March 1, 1974. *546 F.2d at 977-78.* At trial it became apparent that the prosecution would focus primarily on events that occurred after Mardian had left the conspiracy. Nevertheless, we held that Mardian had not shown an abuse of the trial court's discretion in denying the severance motion before the start of the trial. *Id. at 979.* However, we did reverse Mardian's conviction because, in addition to the foregoing, during the second week of the trial, Mardian's trial counsel unexpectedly had to be hospitalized and Mardian was required to continue without his lead attorney during the remainder of the trial that lasted approximately three months. Moreover, the government did not oppose Mardian's motion for severance after his first attorney was hospitalized. *Id. at 979-81.* Under the circumstances a new trial was granted.

In *Sampol* we reversed the conviction of Ignacio Novo Sampol [**55] for making false statements to the grand jury and misprision of a felony. *636 F.2d at 642.* Ignacio Novo Sampol was tried along with two co-defendants who were charged with various crimes arising from the assassination of the former Chilean ambassador to the United States, Orlando Letelier, and his American

associate, Ronni Moffitt. We reversed the conviction of Ignacio Novo Sampol in that case because of the likelihood that the jury would confuse his guilt with that of his co-defendants. One of the reasons for our holding was that Ignacio Novo Sampol was not even named in the conspiracy count, in which his co-defendants "were accused of participating in an intentional and extremely violent assassination scheme, the gory details of which were described with extreme accuracy to the jury." *Id. at 646*. Moreover, we noted that "the vast *bulk* of the testimony concerned the crimes of conspiracy to assassinate and murder for which [the co-defendants] were being tried." *Id.* (emphasis in original).

The facts in the present case clearly distinguish it from *Mardian* and *Sampol*. Sucher was not tried with a co-defendant against whom the government's evidence [**56] was overwhelmingly damning. Rather, Sucher was named as a co-conspirator in three counts of a five-count indictment, and his actions were part and parcel of an ongoing attempt to obstruct the investigation of the Department of Energy. Sucher's participation was not limited to a brief portion of the conspiracy, but extended throughout the entire duration of the conspiracy. In fact, Sucher willingly communicated with Maxwell about Sutton's criminal trial in Oklahoma long after Kolbert and Peacock had dropped from the conspiratorial chain. In a sense, Sucher was the linchpin of the conspiracy since he was the source of the confidential documents and information that were used to impress Sutton with the influence that the co-conspirators had inside the DOE. The Vantage document particularly served this purpose as a "show document" to stimulate the flow of money from Sutton on down through those in the conspiracy. Sucher also was the illegal source of DOE documents relevant to the investigation of Sutton and his BPM companies.

[*1365] Moreover, we cannot ignore the general policy favoring joint trials of defendants indicted together, *see United States v. Hines, 147 U.S. App. D.C. 249, 455 F.2d 1317, 1334 (D.C. Cir. 1971)*, [**57] especially when, as here, the respective charges require presentation of much of the same evidence, testimony of the same witnesses, and involve two defendants who are charged, *inter alia*, with participating in the same illegal acts. The trial court committed no error in denying Sucher's motion for severance.

B. ***Speedy Trial Act***

Sucher was arraigned with Maxwell and Gazzara on October 15, 1984. A trial was scheduled for November 30, 1984, but on November 29, 1984 (as a result of Maxwell's cooperation and guilty plea on November 13, 1984) the government obtained additional evidence and on November 29, 1984 returned a superseding indictment that included Sutton as co-defendant. Trial commenced on January 24, 1985. Sucher argues that he was denied the right to a trial within seventy days, as required by the Speedy Trial Act, *18 U.S.C. § 3161 et seq.*

However, Sucher misreads the Act, which requires trial to commence within 70 days of arraignment, but excuses

> [a] reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has [**58] been granted.

Id. § *3161(h)(7)*. The Senate Report on the Speedy Trial Act states that

the quoted provision

> provides for the exclusion of time from the time limits where the defendant is joined for trial with a codefendant who was arrested *or indicted* after the defendant. The purpose of the provision is to make sure that *[§ 3161(h)(7)]* does not alter the present rules on severance of codefendants by forcing the Government to prosecute the first defendant separately or be subject to a speedy trial dismissal motion. . . .

S. Rep. No. 83-1021, 93d Cong., 2d Sess. 38 (1974) (emphasis added). The trial date was 101 days after Sucher's initial arraignment, but only 55 days after the second arraignment, which was a "reasonable period of delay" in order to allow the newly indicted Sutton adequate time to prepare for trial. The trial of Sucher was conducted fully within the text and intent of the relevant statute.

C. ***Right to Counsel***

Sucher objects to the taping of his conversations with Kolbert and Peacock after the government became aware on October 25, 1983 that Sucher was represented by counsel. Sucher bases his argument [**59] on the *Sixth Amendment* right to counsel and the Canons of Legal Ethics, contending that the government should have notified his attorney. The trial court denied Sucher's motion to suppress the resulting tapes that were subsequently admitted into evidence at trial.

The *Sixth Amendment* [14] is not applicable here. It provides that an "*accused* " is entitled "to have the Assistance of Counsel for his *defence*" (emphasis added). Sucher was not an "accused" when the taping occurred. The right to counsel attaches only after the initiation of "adversary judicial criminal proceedings," *e.g.*, formal charge, preliminary hearing, indictment, information, or arraignment. *See United States v. Gouveia, 467 U.S. 180, 189, 81 L. Ed. 2d 146, 104 S. Ct. 2292 (1984); United States v. Lemonakis, 158 U.S. App. D.C. 162, 485 F.2d 941, 953-54 (1973), cert. denied, 415 U.S. 989,* [*1366] *39 L. Ed. 2d 885, 94 S. Ct. 1586 (1974).* The taping here occurred at the investigatory stage *before* the initiation of any judicial proceedings which would call for Sucher's defense.

14 The *Sixth Amendment* provides:

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

[**60] Likewise, Sucher's objection based on Disciplinary Rule 7-104 of the Code of Professional Responsibility was explicitly rejected in *Lemonakis, 485 F.2d at 956.* Rule 7-104 was never meant to apply to

situations such as this one, but was meant to ensure that lawyers not prey on persons known to be represented by counsel. *Id.* In short, neither the *Sixth Amendment* nor the Canons of Legal Ethics provide a basis for excluding the taped conversations.

D. ***Federal Rule of Evidence 106***

Sucher's final issue involves his unsuccessful attempt, prior to his cross-examination of Peacock, to introduce *portions* of transcript from the taped conversations between Sucher and Peacock. Specifically, Sucher sought to introduce approximately four pages of transcript from the conversation of October 28, 1983 at 2:00 p.m. (J.A. 132-35). Those four pages are set out in full in the margin. [15]

15 Sucher sought to introduce the following four transcript pages of the conversation taped by Peacock on October 28, 1983 at 2:00 p.m. The portions specifically excluded by the trial court are underscored:

> Sucher: *I don't know, to be honest with you, what Shelley had going with (inaudible) Maxwell that uh, I just kind of guessed because I don't know if Shelley made representations to Maxwell about uh, I guess* I shouldn't talk about this because if they ask you what you're [sic] supposition on it you don't want to know anything or . . . have any ideas.
>
> Peacock: (Laughing).
>
> Sucher: . . . true? True.
>
> Peacock: True.
>
> Sucher: Leave it. *But I don't know what ideas Shelley might have put in his head.*
>
> Peacock: *Meaning whose head?*
>
> Sucher: *Maxwell's.*
>
> Peacock: Maxwell's?
>
> Sucher: Yeah. Because regardless of the reality of the situation what Maxwell thought happened that uh, you know, that isn't it.
>
> Peacock: They can think anything they want, it's proving it.
>
> Sucher: Yeah . . .
>
> Peacock: That will get, that will get you in trouble.
>
> Sucher: . . . if they can get Maxwell to testify to the best of his recollection that XY was promised to him and whether or not that's true, it's his word versus my word!
>
> Peacock: Yeah, not an altogether inviting proposition.
>
> Sucher: It's not a bad proposition, *but I've always had a history of cooperating with people* . . .
>
> Peacock: Yeah.
>
> Sucher: . . . who, uh, ask questions about other people, so that's not bad.
>
> Peacock: Oh.
>
> Sucher: *I certainly*

never took any money from Shelley. (Pause) Anyway, so that's uh . . .

Peacock: Have you gone to church (laughing). I have . . .

Sucher: No, but I need to. Uhm . . .

Peacock: I wonder if they still give sanctuary.

Sucher: Who knows, who knows, so to make a long story longer, uhm, actually I was wondering if they talked to Maxwell. If they talked to Maxwell (inaudible).

Peacock: Okay, I am operating under the assumption that they have . . .

Sucher: Okay.

Peacock: Alright? Now, I know what I did . . .

Sucher: I don't want to know.

Peacock: . . . with Shelley, okay?

Sucher: Yeah.

Peacock: Uhm . . .

Sucher: I don't want to know, period.

Peacock: Okay, but I, I do know what I did and I'll be real blunt with you -- I could be in trouble and I think I am, alright.

Sucher: *Okay. (Pause) Well, I don't know if I'm in trouble or not, it depends on what thoughts Shelley put into Maxwell's head.* I know what I thought when I was doing it that it wouldn't get me in trouble, but . . .

Peacock: Did you do anything with Shelley in the Sutton case beside [sic] talk to Maxwell?

Sucher: Uhm . . . do I have to answer that question . . .

Peacock: (Laughing) Yes, raise your right hand.

Sucher: I really don't want to answer that question only because (inaudible).

Peacock: Okay, let, let me, let me put it this way . . . they are talking to me about it.

Sucher: Yeah.

Peacock: Okay.

(J.A. 132-35).

[**61] The government had introduced, as part of its direct examination of Peacock, portions of the conversations of October 25, 1983, October 26, 1983, and the conversation that began at 3:20 p.m. on October 28, [*1367] 1983 (there were three taped conversations between Sucher and Peacock on October 28, 1983, one in the morning, one at 2:00 p.m., and one at 3:20 p.m.). The portions of the conversations introduced by the government gave the impression that Sucher was afraid of Maxwell and Kolbert because Sucher thought they would reveal his role in the conspiracy. In short, the government's

evidence tended to show Sucher's consciousness of guilt.

The government objected to Sucher's attempt to introduce portions of the 2:00 p.m. conversation on October 28, 1983, arguing that these pages constituted excludable out-of-court exculpatory statements concerning Sucher's state of mind at the time of the alleged crime. *See Federal Rules of Evidence 801, 802.* The court sustained the government's objection, finding the statements excludable as "exculpatory extra-judicial statements as to a past fact" (Tr. 906, 912-14). Sucher based his request for admission in part on the rule of completeness [**62] contained in *Federal Rule of Evidence 106, infra,* which generally permits the contemporaneous admission of portions of writings or recorded statements when the already introduced portions might be misleading unless properly placed in context.

Sucher contends that he requested the admission of the entirety of at least three separate recorded conversations with Peacock. This argument, however, was not properly preserved for appellate review. It is true that the initial request was for admission of all conversations recorded by Peacock, but Sucher's attorney sought to assuage the court's fears by saying, "I am going to focus Mr. Peacock on a couple of discrete areas." (Tr. 849). The court denied this broad request, telling Sucher's attorney, "I would like very much to see discrete portions of the manuscripts rather than entire telephone conversations which you think are particularly significant for purposes of an explanatory context for the phone conversations that the government did introduce . . ." (Tr. 899). Sucher's attorney replied, "The Court is correct. I understand what the Court's reservation is and its seems like the ball is in my court." (Tr. 900). A moment later, [**63] the court instructed Sucher's attorney to "hone in on particular portions of the transcript," and Sucher's attorney again indicated his consent (Tr. 902). Sucher's attorney affirmed for a third time the limited nature of his specific request for admission of portions of the tapings (Tr. 909). Against this backdrop it is clear that Sucher waived whatever objections he may have had to the court's prohibition on introducing the entirety of the other taped conversations.

Sucher attempts, in addition, to challenge the correctness of the court's ruling that the statements from the 2:00 p.m. October 28 conversation were excludable hearsay as assertions of past fact offered to prove the truth of the matter asserted therein. Here, too, it is clear that Sucher waived his right to raise the issue on appeal. In response to the court's statement that a particular statement was an assertion of past fact, Sucher's attorney said, "I agree with that. Therefore, although the Court wants for me to maybe suggest an 803 argument, I really don't think that is what this is all about." (Tr. 909). At any rate, as shown by the underscored portions of the conversation, the court was quite correct in characterizing [**64] the statements as excludable assertions of past fact and exculpatory hearsay statements.

This is not, however, the end of our inquiry. In the government's direct examination of Peacock, other recorded conversations had been used in part to support the government's case. One of the key issues at trial was whether Sucher had the requisite *mens rea* when he passed the documents to Kolbert. Sucher's defense was significantly based on an alternative construction of his role in passing the documents: namely, that Sucher innocently passed the documents to Kolbert because Kolbert was superior to Sucher in the hierarchy at DOE.

Sucher's argument conceded that he may have violated certain ethical obligations in talking with Maxwell and Peacock about the Sutton case, but, [*1368] without taking the stand, he denied taking money in exchange for giving the documents to Kolbert, and denied knowing that Kolbert was acting illegally. Sucher's attorney therefore had quite a different interpretation of some portions of his conversations with Sucher and Peacock. Sucher contended that these conversations did not show the necessary criminal intent, but rather demonstrated a fear of the falsehoods [**65] that Maxwell and Kolbert might tell the government. Sucher argued that his fear of Kolbert was rational considering the character of Kolbert and the variety of shady activities Kolbert had been engaged in. Since Sucher admitted providing Kolbert with documents, but denied receiving money or having any illegal intent, such an interpretation is not entirely implausible, and such an inference would have contradicted the government's inference that the conversations supported its case.

Such circumstances raise the question whether *Rule 106* permits the introduction of evidence that is otherwise *inadmissible* under the Federal Rules of Evidence. *Rule 106* provides:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

The Advisory Committee note to *Rule 106* states that "the rule is based on two considerations. The first is to correct a misleading impression created by taking matters out of context. The second is the inadequacy of repair work when delayed [**66] to a point later in the trial."

Rule 106 explicitly changes the normal order of proof in requiring that such evidence must be "considered contemporaneously" with the evidence already admitted. Whether *Rule 106* concerns the substance of evidence, however, is a more difficult matter. The structure of the Federal Rules of Evidence indicates that *Rule 106* is concerned with more than merely the order of proof. *Rule 106* is found not in Rule 611, which governs the "Mode and Order of Interrogation and Presentation," but in Article I, which contains rules that generally restrict the manner of applying the exclusionary rules. *See* C. Wright & K. Graham, Federal Practice and Procedure: Evidence § 5078, at 376 (1977 & 1986 Supp.). Moreover, every major rule of exclusion in the Federal Rules of Evidence contains the proviso, "except as otherwise provided by these rules," [16] which indicates "that the draftsmen knew of the need to provide for relationships between rules and were familiar with a technique for doing this." *Id.* There is no such proviso in *Rule 106*, which indicates that *Rule 106* should not be so restrictively construed. *See id.* [17]

16 *See, e.g., Federal Rules of Evidence 402* (irrelevant evidence), 501 (privileges), 602 (lack of personal knowledge), 613(b) (examining witness concerning prior statement), 704 (opinion on ultimate issue), 802 (hearsay), 806 (credibility of declarant), 901 (b)(10) (methods of authentication), 1002 (original writing). *See* C. Wright & K. Graham, *supra*, at 376.

[**67]

17 Professors Wright and Graham suggest additional reasons why *Rule 106* should not be limited solely to otherwise admissible evidence. First, they note that the only limitation on the common-law doctrine of completeness embodied in *Rule 106* was on grounds of prejudice. C. Wright & K. Graham, *supra*, at 373-74. Second, the Advisory Committee modeled *Rule 106* on the California codification of the completeness doctrine and the federal civil rule governing partial use of depositions, both of which were not restricted by other rules of evidence. *Id. at 374-75.* Third, the Justice Department specifically requested the Senate Judiciary Committee to add a proviso stating that *Rule 106* is limited to evidence that was "otherwise admissible." No proviso was added. *Id. at 375.*

Rule 106 can adequately fulfill its function only by permitting the admission of some otherwise inadmissible evidence when the court finds in fairness that the proffered evidence should be considered contemporaneously. A contrary construction raises the specter of distorted and misleading trials, and creates difficulties [**68] for both litigants and the trial court.

[*1369] The most sensible course is to allow the prosecution to introduce the inculpatory statements. [18] The defense can then argue to the court that the statements are misleading because of a lack of context, after which the court can, in its discretion, permit such limited portions to be contemporaneously introduced as will remove the distortion that otherwise would accompany the prosecution's evidence. Such a result is more efficient and comprehensible, and is consonant with the requirement that the "rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." *Federal Rule of Evidence 102.* [19]

18 Professors Wright and Graham assert:

> No self-respecting judge would permit a party to manipulate the rules of evidence to put on a case that looked like an advertisement for a bad movie -- bits and pieces taken out of critical context to create a misleading impression of what was really said. If this cannot be done in a forthright manner under *Rule 106*, the judge must find some other way to see that justice is done. . . . In short, there will be few cases in which the judge cannot reach the result that sound policy compels; to say that he cannot do this under *Rule 106* is to prefer the costly, roundabout, fictional method over the direct and honest approach.

C. Wright & K. Graham, *supra*, at 377.

[**69]

19 The example of a criminal case is illustrative. Similar benefits will accrue from a similar interpretation of *Rule 106* in civil cases.

Moreover, under this approach the

trial court can focus solely on issues of distortion and timing as mandated by *Rule 106*. The trial court has a wide range of discretion to expeditiously structure the inquiry, as the judge did in this case by requiring Sucher's attorney to point to specific passages of the transcript that ought to have been admitted to avert the distorting effect of the portions already introduced by the government. In addition, the provision of *Rule 106* grounding admission on "fairness" reasonably should be interpreted to incorporate the common-law requirements that the evidence be relevant, and be necessary to qualify or explain the already introduced evidence allegedly taken out of context. *See United States v. McCorkle, 511 F.2d 482, 486-87* (7th Cir.) (en banc), *cert. denied, 423 U.S. 826, 96 S. Ct. 43, 46 L. Ed. 2d 43 (1975)* (applying the doctrine of "verbal completeness" prior to the passage [**70] of the Federal Rules of Evidence); VII J. Wigmore, Evidence § 2113 (3d ed. 1940). The response of Sucher's attorney typically indicates the limited scope of the *Rule 106* admission because he pointed to only four pages of transcript, from which Judge Jackson excluded four parts. In almost all cases we think *Rule 106* will be invoked rarely and for a limited purpose.

We turn, therefore, to the specific portions of the transcript that Sucher requested under *Rule 106*. They are numbered below:

(1) (J.A. 133).

> Sucher: I don't know, to be honest with you, what Shelley had going with (inaudible) Maxwell that uh, I just kind of guessed because I don't know if Shelley made representations to Maxwell about Uh, I guess. . . .
>
> . . .
>
> Sucher: . . . But I don't know what ideas Shelley might have put in his head.
>
> Peacock: Meaning whose head?
>
> Sucher: Maxwell's

(2) (J.A. 134).

> Sucher: . . . but I've always had a history of cooperating with people. . . .

(3) (J.A. 134).

> Sucher: I certainly never took any money from Shelley. . . .

(4) (J.A. 135).

> Sucher: Okay. (PAUSE) Well, I don't know if I'm in trouble or not, it depends on what thoughts Shelley put into Maxwell's head. [**71] I know what I thought when I was doing it wouldn't get me in trouble, but. . . .

[*1370] The portions of Sucher's conversation introduced by the government seem to say that he "never took any money *from Shelley*" but that he was afraid of what Maxwell might say, that he feared conviction, and that he did not wish to reveal *to Peacock* whether he had been the source of documents passed to Kolbert.

However, as mentioned earlier, Sucher's defense was that he innocently gave Kolbert the documents without any knowledge of illegality. Three of the four excluded statements would support an inference consistent with that defense. The second statement (2) could have supported Sucher's assertion that he provided documents to Kolbert out of a desire to cooperate with his fellow employee

at DOE. The first (1) and fourth (4) statements would have supported an inference contrary to the government's contention that Sucher exhibited consciousness of his guilt. The possible contrary inference of (1) and (4) is that Sucher gave documents innocently, and was afraid that Kolbert may have falsely told Maxwell that Sucher, as the source of the documents, was a knowing and willing [**72] participant in the illegal conspiracy.

The excluded statements would have partially rebutted the government's use of the recordings, and were relevant to Sucher's defense. Since this was a criminal case Sucher had a constitutional right not to testify, and it was thus necessary for Sucher to rebut the government's inference with the excluded portions of these recordings. *See United States v. Walker, 652 F.2d 708, 713 (7th Cir. 1981)*. Under our analysis of *Federal Rule of Evidence 106*, Sucher should have been permitted to introduce these four portions of the recorded conversation with Peacock if considerations of "fairness" justified contemporaneous admission and consideration.

Even when the trial court errs, however, reversal is not required unless "substantial rights" are affected. *Fed. R. Crim. P. Rule 52(a)*. Accordingly, we must uphold the jury verdict unless we determine that the error substantially prejudiced the right of the defendant to a fair trial. As stated definitively by Justice Rutledge:

> If one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was [**73] not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

Kotteakos v. United States, 328 U.S. 750, 756, 90 L. Ed. 1557, 66 S. Ct. 1239 (1946).

As is readily apparent from the evidence presented at trial and recited above, there can be no doubt as to the soundness of the jury verdict. To summarize briefly: The jury heard extensive, uncontradicted and unequivocal testimony from Kolbert as to Sucher's complicity in passing DOE documents and information in exchange for $5,000. The two of them together came up with the idea of a "show document" to bait the trap, and the record is devoid of any evidence to support a *valid* reason for passing the documents to Kolbert. The jury heard Sucher's supervisor at DOE testify that Sucher would have had access to specific documents that were passed on to Maxwell and Sutton and which were presented [**74] as documentary evidence at trial. Sucher's telephone call to Peters to tell him to expect a call from Sutton was highly incriminating, and the jury could infer therefrom that Sucher was at the center of the conspiracy -- where Kolbert's testimony placed him. Thomas Peacock testified as to Sucher's continuing role in passing information out of DOE *and* referring Sutton to Alex Peters. Peacock was unaware of Sucher's role as the source of the documents initially, because

Kolbert wanted to conceal his taking the "lion's share" of the bribe money from Sutton. The jury heard Maxwell's testimony that [*1371] he spoke *directly* with Sucher during the time of Sutton's criminal trial in Oklahoma.

Finally, the jury heard recordings of Sucher's taped conversations with Peacock and Kolbert. While Sucher's conversations with Peacock may have been somewhat detrimental to his defense, they were nevertheless rather limited. The same cannot be said of Sucher's conversation in November 1983 with Shelley Kolbert. The jury heard Sucher tell Kolbert that "they [the government] know that I gave you the documents. . . . I gave them to you and you gave them back to me. . . ." (J.A. [**75] 178-79). Sucher confirmed in so many words that he had *taken money from Kolbert* for the documents, but that the government could "*try and look[] for money in me all day, [but] they won't find it. . . . I have a terrific talent.*" (J.A. 181-82) (emphasis added).

Notwithstanding the contention that ambiguous inferences could conceivably be drawn from those four parts of Sucher's conversation with Peacock, which were not admitted, the recorded conversations with Kolbert evince beyond a reasonable doubt that Sucher's statements in effect constituted a complete admission of his guilt in the Sutton conspiracy. His "*money*" and "*talent*" statement clearly imply that he took money for his part (furnishing the documents) in the charged offenses but that his "talent" for concealment would prevent the government from finding it. This personal statement to Kolbert, a fellow employee who was Sucher's confederate in the illegal passing of the documents for which Sucher admits taking money and having a "talent" for concealing it -- because Sucher could not deny as much to Kolbert, the person who had paid him the money -- completely overrides the possibility of any favorable [**76] probative value being given to Sucher's denial to Peacock (who was not an employee of the agency) that he did not take "money." No reasonable jury would have believed that Sucher did not take money when he in effect admitted to Kolbert that he did. We thus conclude that the refusal to admit the four segments of the 2:00 p.m. taped conversation, which in the court's discretion could have been admitted, did not substantially influence Sucher's defense or the verdict, and, at the most, is harmless error.

We have no hesitation in affirming the jury's verdict.

IV. CONCLUSION

Robert Sutton and Mark Sucher were both willing participants in a conspiracy to bribe government officials in order to avoid the legal consequences of Sutton's illegal business practices. In a lengthy and difficult trial, a jury found both men guilty as charged. Considered in light of the overwhelming evidence of the defendants' guilt we find no basis for disturbing the jury verdict. The convictions are therefore affirmed.

Judgment accordingly.

1 of 1 DOCUMENT

Weinstein's Federal Evidence

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Rule 106 Remainder of or Related Writings or Recorded Statements.
CHAPTER 106 Remainder of or Related Writings or Recorded Statements *

1-106 Weinstein's Federal Evidence § 106.04

§ 106.04 Admission of Separate Writings or Correspondence Related to Offered Writing

[1] Introduction of Accompanying Documents to Whole Writing

A misleading impression can be created not only by taking a part of a written statement out of context, but also by introducing a whole writing without accompanying documents or related correspondence. Situations will arise when fairness and *Rule 106* require the proponent to offer into evidence the entire correspondence or all accompanying documents that ought to be considered contemporaneously with the writing being introduced into evidence.n1 If the court is ambivalent as to whether the surrounding documents might assist the jury in understanding the full significance of the document offered by the proponent, admission has been allowed.n2 This might require the introduction of documents that were used in preparation of another document that has been introduced into evidence.n3

Federal courts have often required the proponent of correspondence to introduce the entire correspondence and all relevant documents, including replies.n4 Similarly, written replies to letters have generally been admitted freely and properly in explanation of a document offered by the proponent.n5

A related rule has developed in insurance cases. When the beneficiary puts in the proof of loss, all documents accompanying the proof, such as physician's or coroner's certificates, must usually be offered at the same time.n6

Documents marked as exhibits to a deposition may have to be admitted if the deposition or a portion of a deposition is offered in evidence.n7 For further discussion of the introduction of depositions into evidence, see § *106.08*.

[2] Documents Surrounding Creation of Contract

The requirement of *Rule 106* concerning introduction of related writings has been most clearly recognized in contract cases. If a contract has been made in a series of letters, the whole correspondence may be considered along with the surrounding facts and circumstances of the transaction.n8 Of course, the parol evidence rule and the merger doctrine may have a bearing on this determination.

[3] Admission of Related Writings Subject to General Requirements of Relevancy

Admissibility of an entire correspondence or accompanying documents is always subject to the general requirements of relevancy.n9 For complete discussion of issues of relevancy, see Chapters 401, *Definition of ''Relevant Evidence ,''* and 403, *Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time.*

Legal Topics:

For related research and practice materials, see the following legal topics:
EvidenceDocumentary EvidenceCompletenessEvidenceRelevanceRelevant Evidence

FOOTNOTES:

(n1)Footnote 1. *Fed. R. Evid. 106.*

(n2)Footnote 2. **Evidence admitted for potential clarification.** *See Lonergan v. United States, 95 F.2d 642, 646 (9th Cir. 1938)* (letters addressed to defendant, and letters replying to those letters, admissible to show connections between entities).

(n3)Footnote 3. **Admission of documents used to prepare documents already admitted.** *Phoenix Assocs. III v. Stone, 60 F.3d 95, 102 (2d Cir. 1995)* (circuit court allowed introduction of party's financial statements for 1989; court of appeals held that *Rule 106* required court to admit as well work paper relied on in preparation of those documents).

(n4)Footnote 4. **Writings relevant to admitted correspondence.** *United States v. Morello, 250 F.2d 631, 634 (2d Cir. 1957)* (government agent's letter was admissible to bring out meaning of defendant's reply); *Security Trust Co. v. Robb, 142 Fed. 78, 83 (3d Cir. 1906)* (original letter that is ''immediately connected'' must be admitted before defendant's reply letter is admissible).

(n5)Footnote 5. **Replies to admitted letters admissible.** *See Crawford v. United States, 212 U.S. 183, 198-200, 29 S. Ct. 260, 53 L. Ed. 465 (1909)* (failure to admit defendant's reply to letter of accusation required exclusion of accusatory letter); *Perrin v. United States, 169 Fed. 17, 25-26 (9th Cir. 1909)* (in case involving conspiracy to defraud, contracts between alleged conspirators after transaction in question were admissible when forwarded with letter of defendant and contract giving rise to prosecution, both of which were admitted already).

(n6)Footnote 6. **Documents accompanying proof of insured loss must be offered along with proof of loss.** *Richelieu & Ontario Nav. Co. v. Boston Marine Ins. Co., 136 U.S. 408, 435-436, 10 S. Ct. 934, 34 L. Ed. 398 (1890)* (protest of captain admissible against insured since part of proof of loss).

10th Circuit See Wertheimer v. Traveler's Protective Ass'n, 64 F.2d 435, 435 (10th Cir. 1933) (physician's certificate considered part of proof of loss).

D.C. Circuit New York Life Ins. Co. v. Taylor, 147 F.2d 297, 299 (D.C. Cir. 1945) (doctor's statement usually admissible to show manner

of loss).

(n7)Footnote 7. *See Fed. R. Civ. P. 32(a)(6).*

(n8)Footnote 8. **All correspondence constituting contract admissible.** *Flint v. Youngstown Sheet & Tube Co., 143 F.2d 923, 924 (2d Cir. 1944)* (correspondence between plaintiff's predecessor in interest and defendant admissible to explain renewal contract).

2d Circuit *Flint v. Youngstown Sheet & Tube Co., 143 F.2d 923, 924 (2d Cir. 1944)* (correspondence between plaintiff's predecessor in interest and defendant admissible to explain renewal contract).

3d Circuit *Brady v. Kern, 222 Fed. 873, 875-876 (3d Cir. 1915)* (contract partly written and partly oral); *Dunn v. Mayo Mills, 134 Fed. 804, 807 (3d Cir. 1905)* (dictum); *Elizabeth City Cotton Mills v. Loeb, 119 Fed. 154, 156 (3d Cir. 1902)* (correspondence).

6th Circuit *Zehr v. Wardall, 134 F.2d 805, 807-808 (6th Cir. 1943)* (correspondence).

(n9)Footnote 9. **Relevancy requirement applies.**

2d Circuit See *United States v. Johnson, 507 F.3d 793, 796-797 (2d Cir. 2007)* (district court did not exceed its discretion in admitting redacted version of defendant's confession because omitted portion neither explained the admitted portion nor placed it in context); *United States v. Jackson, 180 F.3d 55, 73 (2d Cir. 1999)* (excluding as ''neither explanatory or relevant'' 42 minutes of tape consisting largely of defendant's own self-serving statements, which defendant tried to introduce under rule of completeness after government introduced 90-second portion to show defendant's awareness of unlawfulness of his extortion scheme); *United States v. Rivera, 61 F.3d 131, 135-136 (2d Cir. 1995)* (stipulation of offense conduct incorporated by reference into co-defendant's plea agreement was inadmissible because it ''added nothing to the jury's understanding of the plea agreement for its relevant purpose,'' which was impeachment).

4th Circuit Cf. *Prudential Ins. Co. v. Bialkowski, 85 F.2d 880, 883 (4th Cir. 1936)* (coroner's conclusion that was based on hearsay was admissible with proof of loss but not entitled to weight).

8th Circuit See *United States v. 7 Jugs, Etc. of Dr. Salsbury's Rakos, 53 F. Supp. 746, 760 (D. Minn. 1944)* (in case involving condemnations of drugs for false and misleading representations, accompanying books were excluded, since most were wholly irrelevant).

* Chapter revised in 1986 by Jeffery B. Miller, J.D., and in 1997 by Russell H. Miller, member of the California Bar.

LEXSEE 211 F. 824

POSTAL TELEGRAPH-CABLE CO. OF WASH. v. NORTHERN PAC. RY. CO.

No. 2268

Circuit Court of Appeals, Ninth Circuit

211 F. 824; *1914 U.S. App. LEXIS 1781*

March 9, 1914

PRIOR HISTORY: [**1] In Error to the District Court of the United States for the Northern Division of the Western District of Washington; Clinton W. Howard, Judge.

OPINION BY: GILBERT

OPINION

[*826] Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. Error is assigned to the ruling of the trial court in excluding certain testimony offered in rebuttal by the plaintiff in error. The testimony was excluded on the ground that it was part of the petitioner's case in chief, and not proper rebuttal testimony. It is not disputed that the law of Washington places upon the petitioner in a condemnation suit, such as this, the burden of showing the reasonable value of the easement sought to be appropriated, and the damage or absence of damage to the remainder so as to present the evidence of the compensation that should be paid to the defendant. The law of that state does not require the defendant in such a suit to file an answer, and he may show the value of the land taken and the damages he will sustain without having presented in any pleading the facts on which he relies. *State ex rel. Ami Co. v. Superior Court, 42 Wash. 675, 85 Pac. 669; Tacoma v. Wetherby, 57 Wash. 295, 106 Pac. 903.* [**2] In pursuance of that law, the defendant herein filed no answer to the petition. Assuming the burden thus imposed upon it by the statute, the plaintiff in error called witnesses to answer the question:

"What damage or diminution in the value of the use of this right of way by this railway company, or its successors in interest, in the use and operation of the right of way for any railway purpose, would be occasioned or is occasioned by the appropriation of the right to construct and maintain a telegraph line as proposed in this petition?"

The witnesses answered that the damages would be merely nominal. The two principal witnesses were cross-examined by the defendant in error, and were interrogated as to the additional expense which the telegraph poles and line would add to the expense of clearing the right of way of the railroad company of brush. One of them testified that he could not answer as he had not taken into consideration the question of such added expense. The other testified on cross-examination that the presence of telegraph poles would not add any appreciable amount to the expense of keeping the right of way clear of brush. By the cross-examination of these witnesses [**3] the plaintiff in error was distinctly advised of the

nature of the defendant's claim for damage; as much so as if there had been an answer setting up such elements of damage to the right of way. The plaintiff in error had the opportunity then to offer testimony in chief to show, if it could, that the presence of the telegraph poles on the right of way and the wires attached thereto would not add to the expense of keeping the right of way clear of brush, and such testimony was a part of its case in chief and was as [*827] available to it then as it was after the defendant in error rested. The plaintiff in error was not taken by surprise, therefore, when the defendant in error offered testimony tending to prove that the presence of poles and wires on the right of way appreciably enhanced the cost of clearing and keeping clear the right of way. When, after the defendant in error had closed its testimony and rested, the plaintiff in error again approached the subject of the expense of clearing the right of way of brush, it was offering evidence which should have been offered in chief, and there was no abuse of discretion in the ruling of the court that the evidence so offered was [**4] part of the case of the plaintiff in error in the first instance, and was not proper rebuttal. The rule is thus expressed in 38 Cyc. 1356:

"After he has rested, neither party can, as a matter of right, introduce any further testimony which may properly be considered testimony in chief. The strict rule is that he must try his case out when he commences, and cannot divide his evidence and give part in chief and part in rebuttal. Any relaxation of this rule is but an appeal to the sound discretion of the court."

See, also, *Marande v. Texas & P. Ry., 124 Fed. 42, 46,* 59 C.C.A. 562; *Mitchell v. City of Boston, 215 Mass. 150, 102 N.E. 127; Stewart v. Smith, 111 Ind. 526, 13 N.E. 48.*

Was there error in giving or refusing instructions? The whole case before the court and jury resolved itself into the inquiry: How much injury would the railroad company sustain, if any, by reason of the presence upon its right of way of the proposed telegraph poles and wires? It is said that the court erred in refusing to instruct the jury that the statutes of the state of Washington do not impose any express duty upon a railroad company to cut or burn the brush growing upon its right of way, or to keep [**5] the same free from grass, weeds, brush, or trees. It was not error to refuse that instruction and this for two reasons, either of which is sufficient. In the first place, it was entirely immaterial whether or not there was such a statutory requirement. It was not disputed that irrespective of any such statute the railroad company was required to keep its right of way clear of brush. It was shown by the undisputed testimony that on the right of way of the defendant in error brush will grow from six to ten feet in a single season, and that upon portions thereof it was necessary to clear the brush every year. The testimony presented to show such necessity was pertinent to the issues and was received without objection. The necessity was one not created by statute, but by the very nature of the situation. In the second place, it was not error to refuse such instruction for the reason that the plaintiff in error took no exception to the charge in which the court instructed the jury as follows:

"You are instructed that the law requires a railway company to use reasonable diligence in keeping its right of way cleared from inflammable material, and that, where it fails to do so and [**6] damage results therefrom, the railway company is liable; and if you should find from the evidence that it is necessary or

desirable for the railway company, in order to prevent the setting out and spreading of fires, in the operation of its trains, or for any other necessary or appropriate railway use or purpose, the expense thereof should be chargeable to the petitioner here in this proceeding; provided, however, that the necessary expense thereof would in any material or substantial degree [*828] be increased by reason of the construction and maintenance of the proposed telegraph line upon said right of way, such additional expense, if any, may be considered by you in arriving at your verdict."

This instruction was accepted as correctly stating the law applicable to the issues. It expressed the law of Washington as it is found in the opinion of the court in *Fireman's Fund Ins. Co. v. Northern Pacific Ry., 46 Wash. 635, 91 Pac. 13.*

Nor was there error in the refusal of the court to instruct the jury, as requested by the plaintiff in error, that the railway company would owe no duty to the telegraph company to cut or remove such brush or undergrowth immediately surrounding [**7] the poles of the latter company unless the jury believed from the evidence that the cutting of such brush or undergrowth would be necessary for the safe and proper operation of the railway trains and business or to prevent the spread of fires. There was nothing in the evidence to which this requested instruction was applicable. No question was, or could have been, at any time presented of any duty of the railway company to the telegraph company to cut or remove brush, and to have given the requested instruction would have been to divert the attention of the jury from the real question in issue. It may be conceded, as argued, that the obligation imposed upon a railroad company to keep its right of way free of brush or other material likely to cause damage by fire is not to be taxed against one who in no way adds to that burden, but that proposition was wholly aside from the issues and the evidence in the case. But a single question was presented for decision, and that was whether the presence of the telegraph poles and wires would add to the burden of the duty imposed upon the railroad company. If it did add to that burden, clearly it was proper that the expense of bearing the [**8] added burden should be assessed against the telegraph company, which for its own benefit caused it. It was to the question of this added burden that all the testimony was directed, and it was because the jury found there was such an added burden that they returned their verdict against the petitioner. The instructions of the court to the jury clearly and properly presented the single issue which was involved, and the attention of the jury was confined to the consideration of the additional expense, if any, which the railroad company would incur in clearing its right of way of brush by reason of the presence of the telegraph poles and lines upon its right of way; and the jury were, in substance, instructed to consider the obligation to clear that right of way as one resting upon the railroad company for its own benefit, and not for the benefit of any other person or corporation.

We find no error.

The judgment is affirmed.

DISSENT BY: ROSS

DISSENT

ROSS, Circuit Judge (dissenting). The defendant in error being the owner of a right of way between the city of Seattle and Sumas in the state of Washington, a distance of about 120 miles, over which it operates its line of railway, the plaintiff [**9] in error commenced this proceeding in the

court below to condemn a right on and over the railway [*829] right of way upon which to maintain and operate a telegraph line, which it was authorized to do by virtue of the laws of that state.

In its petition for such condemnation the telegraph company alleged, among other things:

That its line "will at all times hereafter be constructed and reconstructed of the best material and by the most approved methods of construction, and will consist of a single line of poles not less than 20 nor more than 30 feet in length, including length underground except at highways or where obstructions exist, where the poles will be of such a height as may be required by statute, or necessary because of physical conditions existing, or to protect other wires or structures rightfully upon the said right of way. That the poles will be about 10 inches in diameter at the base, planted from 4 to 8 feet in the ground, according to the length of the poles, and in such positions upon said right of way as safe and proper construction permit; the poles to be placed upon that portion of said right of way between a line 5 feet from the outer edge thereof and a [**10] line 25 feet from the center of the main track, except where the right of way may be less than 60 feet in width, or where the location of the main track upon the right of way, or the location of buildings, tracks, or other improvements or obstructions upon the right of way may make it impossible to place the poles upon that portion of the right of way above described, in which event the poles will be placed upon the most practicable remaining portion of the right of way consistent with the safe and proper construction of said telegraph line, such portion of said right of way to be designated by said railway company or its lessees, so as not to interfere with the ordinary travel or use of said railroad. That the poles will be set about 165 feet apart, making a total of 32 to 35 poles to the mile, excepting at sharp angles, where they may be not less than 75 feet apart, and around curves, where they may be from 117 to 131 feet apart; the poles to be equipped with cross-arms about 10 feet long, at or near the top of the poles, fastened at about the middle of the cross-arms to the poles, and along and upon said cross-arms or poles, or upon said cross-arms and poles, will be strung a sufficient [**11] number of wires to transact such business as will be given to the telegraph company by the United States government and the public. That said line of poles and wires will be so constructed, maintained, and operated as not to interfere with the ordinary travel or use of said railroad.

"This petitioner further avers that the only lands that will be actually taken or occupied by it by virtue of this proceeding will be about one square foot for each pole; that the space between the poles and under the wires can be used by said railway company or its lessees for all purposes for which it has heretofore been used; that wherever it becomes necessary for said telegraph line to cross said right of way the said crossing will be made by having its poles at such crossing so erected and its wires so insulated and strung so high above said railroad track as to prevent any injury to or interference with the employes or property of the said railway company. And this petitioner further stipulates that its said telegraph line will not interfere with any other telegraph or telephone line now rightfully upon said right of way; that if at any time the said railway company, its successors or lessees, [**12] shall require for railroad purposes the immediate use of any of the land occupied by said telegraph line, then and in that

event, upon reasonable notice in writing, this petitioner will, at its own expense, remove its line to some other place, to be designated by said railway company, adjacent thereto, on said right of way, so as not to interfere with the use of said right of way for railroad purposes; that said telegraph line will not be erected on any embankment or slope or any cut of said right of way, without the consent of said railway company, and, if at any time said railway company or its lessees shall require its entire right of way for railroad purposes at any point, the telegraph company will at such point or points remove its line entirely off said right of way."

The question as to what the telegraph company should be required to pay the railway company for the right thus sought came on for trial in the court below before a jury, resulting in a verdict in favor [*830] of the railway company for $15,000, upon which verdict a judgment was entered giving the telegraph company the right sought upon the payment to the railway company of that sum, with costs. The case [**13] is brought here by the petitioning company by writ of error.

It shows that when the proceeding was instituted the railway company had an exclusive right to use the strip of land constituting its right of way for railroad purposes. To the extent that that exclusive right of enjoyment for railroad purposes was diminished in value by subjecting its right of way to that sought by the telegraph company, and the extent to which the establishment and maintenance of the telegraph line on the railway right of way might be properly said to add to the railway company's burdens, were the only questions to be determined by the jury.

In the state of Washington, where this case arose, it is the established rule that he who seeks condemnation of another's property must affirmatively show the reasonable value of the thing sought to be taken. *Bellingham Bay, etc., R. Co. v. Strand, 4 Wash. 311, 30 Pac. 144.* In assuming that burden the petitioner below introduced witnesses who testified to the effect that the value of the railway company's right of way for railroad purposes would not be diminished by the additional servitude to be created by the construction and maintenance of the proposed telegraph [**14] line, under the stipulations of the petition. The defendant to the proceeding introduced testimony to the effect that the construction and maintenance of such telegraph line on the railway company's right of way would impose upon the latter company an additional annual expense in cutting, piling, and burning the undergrowth thereon; its engineer of maintenance, Perkins, testifying among other things, as follows:

"The added expense has not been made an exact matter of record by bookkeeping, but I would estimate from my general knowledge of the line in question, and of the nature of it, that the specific and general items that add to the cost of the maintenance on that line by reason of the presence of a pole line would make an annual amount of about $15 per mile. Q. Explain to the court and jury how you arrive at that figure. A. I am taking into consideration the added cost of clearing the right of way from brush; the added cost by reason of the particular items of clearing and pulling the brush and inflammable material away from poles, to protect them from destruction by fire; the added cost by reason of the presence of poles between and adjacent to tracks, in the way of acting [**15] as obstructions to the handling of ties and tie renewal; the added cost by reason of the protection and care that is needed in the burning of old

ties, and needed in order to protect the poles from fire and to protect the wire lines from damage; the added cost by reason of delays that occur in connection with construction, in waiting for poles to be moved; and the actual loss of the use of a certain amount of team track capacity by reason of poles being located beside team tracks and thereby preventing the use of a certain part of the team track, which is worth a certain amount of money to us, and to some extent the added risk by reason of poles being in close proximity to tracks and endangering the employes and others in connection with the operation of trains."

And its witnesses F. M. Smith and W. H. Gale testifying, among other things, as follows:

F. M. Smith:

"Well, it would increase the cost of maintenance in several ways. Places where our right of way is narrow, it would doubtless increase the cost of [*831] burning the old ties; that is, moving them to a place where sufficient clearance could be obtained from the wires so that we could burn them without injuring the [**16] wires and also in unloading our ties or piling them up; and in places where the brush is rather heavy in the cutting of the brush, we would have to pile the brush back from the poles and from under the wires so that when the slashing was burned it would not destroy the poles and the wires, and we have at various times when we do this burning to station men along to watch the burning so that the poles would not catch and burn up. And this labor represents dollars and cents and probably would increase the cost of maintenance considerably. In some certain sections in this burning and slashing probably it would increase the cost from $12 to $15 per mile, and in the handling of our ties for burning narrow strips of right of way such as we have from Fremont to Bothel it would run into considerable money in a year, depending on the number of ties we put in. It would increase the cost probably one or two cents a tie for the handling. I have figures showing about one cent for the extra handling on account of finding a proper place to burn them."

W. H. Gale:

"We have right of way on a part of our track that we have no poles on, and if we go once a year and cut that brush we can cut it [**17] irrespective of where it falls. We can let it fall anywhere except next to the fences. When the men are cutting brush they let it fall away from the fence. We do not make any pretense of piling the brush to burn it because it dries out better, and after we come to burn it we can get a better burn, because it burns every weed on that right of way. It is our desire always, when we burn it -- it not only helps to burn the brush, but it sets it back by burning the roots, and where you have a line of poles you have to protect those poles by cutting around the poles and throwing the stuff back a sufficient distance to save the poles. We have always done it. That has been the practice, and it is quite an item when you come to clear a right of way to clear away and keep it away and save the poles while you are burning it. Q. About how much a mile, Mr. Gale? * * * A. I would say at least $10 or $12 per mile, easily, for the difference in pulling away the brush. There have been a great many of the telegraph company's poles on fire at one time or another. The matter of extinguishing the fires requires labor. I never knew the telegraph company to furnish men to watch the poles or pull [**18] back the brush when they are burning, or to clear any of the right of way except to chop down a few of the tops which might be reaching up to the lower

wires. We have to cut it off again just the same and it takes more work to do it."

The plaintiff in error sought to rebut this testimony of the railway company by several witnesses, but the trial court rejected the offer upon the ground that the testimony should have been given in chief, to which ruling the plaintiff in error reserved an exception.

No such cause of damage appears to have been pleaded by the railway company; indeed, it has been held that the clearing of such a right of way and the burning or other disposition of the brush and other obstructions thereon is not to be considered in assessing such damages for the reason that such expense is incurred, not as a result of the construction of the line of telegraph, but because necessary to the railway company in the safe conduct of its own business. *Atlantic Coast Line R. Co. v. Postal Telegraph-Cable Co., 120 Ga. 268, 48 S.E. 19, 1 Ann. Cas. 734.* However that may be, I am of the opinion that the plaintiff in error was entitled to rebut the evidence given by the railway [**19] company upon the subject.

The state of Washington has this statute:

"Every one clearing right of way for railroad, wagonroad or other road, shall pile and burn on such right of way all refuse timber, slashings, choppings [*832] and brush cut thereon, as rapidly as the clearing or cutting progresses, and the weather conditions permit, or at such other times as the forester, or any of his assistants, or any warden, may direct, and before doing so, shall obtain a permit." Sessions Laws 1911, p. 634.

As will be observed, this statute does not expressly require a railroad company to keep its right of way free of brush and other like obstructions, and the plaintiff in error requested the trial court in this case to instruct the jury as follows:

"You are further instructed that the statutes of the state of Washington do not impose any express duty upon the defendant railway company to cut or burn the brush growing on its right of way, nor to keep the same free from grass, weeds, brush, or trees; neither does it impose any such express duty upon the telegraph company. If, however, the defendant railway company does clear its right of way of timber, slashings, choppings, and brush, [**20] then it is made its duty under the laws of this state, as rapidly as the clearing or cutting progresses and the weather conditions permit or at such times as the forester or any of his assistants, or any fire warden, may direct, to obtain a permit and to pile and burn the same on such right of way."

The court refused to give this instruction, to which exception was taken by the plaintiff in error, and gave to the jury, among others, the following:

"The law requires a railway company to use reasonable diligence in keeping its right of way clear from inflammable material, and that where it fails to do so and damage results therefrom, the railway company is liable" -- to which latter instruction the plaintiff in error also excepted.

The direct effect of the refusal of the request of the petitioner for the above instruction respecting the clearing of the right of way, and the giving of the last one above quoted, was to tell the jury that the cost to the railway company of keeping its right of way free of such material was properly chargeable as damages against the petitioner for the right of way sought by it, regardless of whether such clearing would or would not be made necessary or [**21] proper by the construction and maintenance of

the telegraph line, and to what extent, if at all. And this was emphasized by the refusal of the court (to which refusal the petitioner also excepted) to give this requested instruction:

"You are further instructed that, if you believe from the evidence that the clearing of brush and other undergrowth immediately surrounding the poles of the telegraph company would require additional time and expense, then the defendant railway company will owe no duty to the telegraph company to cut or remove such brush and undergrowth, and it need not incur such additional expense unless you believe from the evidence that the cutting of such brush or undergrowth immediately around said telegraph poles would be necessary for the safe and proper operation of defendant's railway trains and business or to prevent the spread of fires from the said railway across its right of way to adjoining land."

Certainly the duty imposed by law upon a railroad company to keep its right of way free of brush or other material likely to cause damage is not to be taxed against any other party who in no way adds to the burden, but is imposed upon the company owning the right [**22] of way, as a duty owing to the public and for the protection of those injured by its neglect. *Chicago, Burlington, etc., R. Co. v. Chicago, 166 U.S. 226, 254, 17 Sup. Ct.* 581, *41 L. Ed. 979,* and authorities there cited.

[*833] I am of the opinion that the plaintiff in error was clearly entitled to show, if it could, that the construction and maintenance of its telegraph line on the right of way of the railway company would not add to any burden imposed by law upon the latter company to keep its right of way free of brush and other like obstructions, or, if at all, to what extent. *Chicago, etc., R. Co. v. Phelps, 125 Ill. 482, 17 N.E. 771; Hartshorn v. Illinois, etc., Ry. Co., 216 Ill. 392, 75 N.E. 122.*

From what has been said, I think the judgment should be reversed, and the cause remanded to the court below for a new trial, and therefore dissent from that given here.

LEXSEE 421 F. SUPP. 2D 140

THOMAS P. ATHRIDGE, Individually and as Father and Next Friend of THOMAS P. ATHRIDGE, Minor, Plaintiffs, v. FRANCISCO RIVAS, CHURRERIA MADRID RESTAURANT, CHURRERIA MADRID RESTAURANT, INC., Defendants. THOMAS P. ATHRIDGE, SR., THOMAS P. ATHRIDGE, JR., MARY T. ATHRIDGE, Plaintiffs, v. HILDA RIVAS, Defendant.

Civil Action No. 92-1868 (JMF), Civil Action No. 89-1222 (JMF)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

421 F. Supp. 2d 140; *2006 U.S. Dist. LEXIS 11937*

March 23, 2006, Decided

SUBSEQUENT HISTORY: Motion denied by *Athridge v. Rivas, 236 F.R.D. 6, 2006 U.S. Dist. LEXIS 16798 (D.D.C., Apr. 7, 2006)*

PRIOR HISTORY: *Athridge v. Iglesias, 382 F. Supp. 2d 42, 2005 U.S. Dist. LEXIS 16662 (D.D.C., 2005)*

COUNSEL: [**1] For THOMAS F. ATHRIDGE, JR., Individually and as Father and Next Friend of THOMAS P. ATHRIDGE, Minor, (89-1222), Plaintiff: Charles Belsome Long, COLLIER SHANNON SCOTT, PLLC, Washington, DC; Martin Stanley Protas, Rockville, MD; Michael H. Selter, MANELLI, DENISON & SELTER, Washington, DC; William Joseph Rodgers, CONNOLLY RODGERS SCHARMAN, Washington, DC; Lisa Rene Riggs, RIGGS, ABNEY, NEAL, TURPEN, ORBISON & LEWIS, Tulsa, OK.

For JORGE IGLESIAS, (89-1222), Defendant: Irving Starr, Richard Edward Starr, Alexandria, VA.

For FRANCISCO RIVAS, CHURRERIA MADRID RESTAURANT, INC., (89-1222), Defendants: David F. Grimaldi, MARTELL, DONNELLY, GRIMALDI & GALLAGHER, P.A., Washington, DC.

For THOMAS P. ATHRIDGE, SR., THOMAS P. ATHRIDGE, JR., MARY T. ATHRIDGE, (92-1868), Plaintiffs: Martin Stanley Protas, Rockville, MD; William Joseph Rodgers, CONNOLLY RODGERS SCHARMAN, Washington, DC; Michael H. Selter, MANELLI, DENISON & SELTER, Washington, DC.

For HILDA RIVAS, trading as CHURRERIA MADRID RESTAURANT, (92-1868), Defendant: David F. Grimaldi, MARTELL, DONNELLY, GRIMALDI & GALLAGHER, P.A., [**2] Washington, DC.

JUDGES: JOHN M. FACCIOLA, UNITED STATES MAGISTRATE JUDGE.

OPINION BY: JOHN M. FACCIOLA

OPINION

[*142] **MEMORANDUM OPINION**

These consolidated cases were referred to me, upon consent of the parties, for all purposes including trial. Currently pending [*143] for resolution is Defendants' Motion for New Trial and/or Judgment

Notwithstanding the Verdict. For the reasons stated herein, defendants' motion will be denied.

I. BACKGROUND

This case has a long, complicated history. In July 1987, Jorge Iglesias ("Iglesias") drove a car belonging to his aunt and uncle ("the Rivases"), while they were in South America, and he collided with a young man named Thomas Athridge. Thomas Athridge and his parents ("plaintiffs" or "the Athridges") filed several lawsuits, naming as defendants Iglesias, the Rivases, the restaurant owned by the Rivases, and two insurance companies.

In July 1995, Judge Thomas Penfield Jackson granted summary judgment in favor of all defendants except Iglesias. The remaining claim, Thomas Athridge's negligence action against Iglesias, was then transferred to Judge Harold Greene. After a bench trial in 1996, Judge Greene issued an opinion finding that Iglesias was negligent, that his negligence proximately caused the injuries Thomas Athridge suffered, and [**3] that Iglesias had the last clear chance to avoid the accident but failed to take it. Judge Greene awarded $ 5,510,010.78 to the Athridges, and the judgment was summarily affirmed on appeal. *Athridge v. Iglesias, 950 F. Supp. 1187 (D.D.C. 1996)*, aff'd without opinion, *1997 U.S. App. LEXIS 19022, 1997 WL 404854 (D.C. Cir. June 30, 1997)*. After entry of the judgment against him, Iglesias declared bankruptcy. Aetna Insurance Company ("Aetna"), Iglesias' insurer, denied coverage, pending further proceedings in plaintiffs' lawsuit against Aetna. Accordingly, plaintiffs' judgment against Iglesias has remained completely unsatisfied.

In the meantime, Thomas Athridge appealed Judge Jackson's July 19, 1995 grant of summary judgment against all defendants except Iglesias. The court of appeals affirmed the award of summary judgment as to all defendants, except the Rivases and their restaurant. Upon remand, the parties conducted additional discovery and filed cross-motions for summary judgment.

In December 1999, the cases brought by the Athridges against the Rivases were referred to me for all purposes including trial. In October 2001, I concluded that there was no genuine issue of material [**4] fact as to Iglesias having the Rivases' consent to drive their car and granted summary judgment in the Rivases' favor. The court of appeals, however, reversed that determination and remanded the case for a jury trial. *Athridge v. Rivas, 354 U.S. App. D.C. 105, 312 F. 3d 474 (D.C. Cir. 2002)*. A trial was held in January 2005, and the following two issues were presented to the jury: (1) whether the defendants established by a preponderance of the evidence that they did not consent to Iglesias' use of their car; and (2) whether the plaintiffs established by a preponderance of the evidence that the defendants were negligent in permitting Iglesias access to the keys to their car and, if so, whether their negligence proximately caused the accident. On January 12, 2005, the jury returned a verdict in favor of plaintiffs and against the Rivases on both counts.

The parties had previously stipulated that, if the Rivases were found by the jury to have consented to Iglesias' use of their car, then they would be bound by the $ 5.5 million judgment against Iglesias. A dispute arose, however, over whether plaintiffs were entitled to interest dating back to Judge Greene's 1996 judgment. [**5] After briefing from the parties, on August 12, 2005, I issued an order denying plaintiffs' request for interest dating back to 1996. [*144] Final Judgment was entered on August 15, 2005.

On August 24, 2005, the Rivases filed the present motion for a new trial under *Rule 59* and for judgment notwithstanding the verdict under *Rule 50* [1] on five grounds: (1) I wrongfully denied defendants' motion for a directed verdict [2] ;(2) the jury's verdict was contrary to the evidence; (3) the jury instruction on "consent" was erroneous and incomplete; (4) the admission of Exhibit 11 was erroneous and unfairly prejudicial; and (5) the admission of Exhibit 14 was erroneous and unfairly prejudicial. Memorandum of Points & Authorities ("Defs. Br.") at 19. Although the Rivases do not specify on which grounds they seek judgment as a matter of law and on which grounds they seek a new trial, I will assume that defendants' renewed motion for judgment as a matter of law is based on my denial of their motion for judgment as a matter of law and that their motion for a new trial is based on the remaining four grounds.

1 Motions for judgment notwithstanding the verdict are now called renewed motions for judgment as a matter of law. For the remainder of this opinion, I will refer to defendants' motion as a renewed motion for judgment as a matter of law.

[**6]

2 Motions for a directed verdict are now called motions for judgment as a matter of law. For the remainder of this opinion, I will refer to defendants' prior motion for a directed verdict as a motion for judgment as a matter of law.

II. DISCUSSION

A. Defendants' Motion Was Timely

As a threshold matter, plaintiffs argue that defendants' motion should be dismissed as untimely. Memorandum of Points and Authorities in Support of Plaintiffs' Opposition to Defendants' Motion for New Trial and/or Judgment Notwithstanding the Verdict ("Pls. Br.") at 4-6. Under *Rules 50* and *59* of the Federal Rules of Civil Procedure, a party has ten days from the entry of judgment to file a renewed motion for judgment as a matter of law or a motion for a new trial. *Fed. R. Civ. P. 50(b), 59(b)*. In this case, final judgment was entered on August 15, 2005 and, as a result, defendants had until August 25, 2005 to file their motion. Plaintiffs argue that the actual date from [**7] which the time for filing began to run was June 13, 2005, not August 15, 2005, and, therefore, defendants' motion, which was filed on August 24, 2005, was untimely. Pls. Br. at 4-6.

Plaintiffs base their untimeliness argument on *Rule 58*. Under *Rule 58*, judgment must be entered on a separate document. *Fed. R. Civ. P. 58(a)*. In 2002, *Rule 58* was amended to address situations where courts fail to comply with the separate document requirement - that had resulted in confusion as to when the time for making post-judgment motions had to begin to run. *Fed. R. Civ. P. 58(b)(2)* advisory committee's notes. Under the amended rule, judgment is deemed to be entered either at the time judgment is in fact entered on a separate document *or* 150 days after entry of judgment on the docket. *Fed. R. Civ. P. 58(b)(2)*. Plaintiffs argue that judgment was entered on January 13, 2005, when the jury's verdict was entered on the docket, and, because the Court did not enter judgment on a separate document until August 15, 2005, the time for filing *Rule 50* and *59* motions began to run on June 13, 2005 - [**8] 150 days after the jury's verdict was entered. Defs. Br. at 4-6.

Plaintiffs' argument ignores the fact that, at the time jury returned its verdict, the amount of the judgment had not yet been determined due to a dispute between the parties as to whether plaintiffs [*145] were

entitled to pre-judgment interest on Judge Greene's $ 5,510,010.78 damage award. Moreover, I expressly told the parties that judgment would not be entered until *after* the pre-judgment interest issue had been resolved. Transcript of Jury Deliberations Before the Honorable John M. Facciola United States Magistrate Judge, at 7-8 (Jan. 12, 2005). Shortly after the jury read its verdict, defendants had raised the issue of post-trial motions and, in response, I explained: "We don't want to get ahead of ourselves. First we have to get a judgment and then it is final." Id. at 7. And when defendants' counsel sought clarification, I stated: "The clerk will not enter judgment ...until we know the amount in which the judgment is going to be entered and we don't know that until that question is resolved." Id. at 7-8. On August 12, 2005, I issued an order denying pre-judgment interest and, on August 15, 2005, final [**9] judgment was entered. Because defendants' motion was filed on August 24, 2005, less then ten days thereafter, it was timely.

B. Standard for Renewed Motion for Judgment as a Matter of Law

Entry of judgment as a matter of law pursuant to a motion made under *Rule 50(b)* is warranted only if "no reasonable juror could reach the verdict rendered in the case." *United States ex rel. Yesudian v. Howard Univ., 332 U.S. App. D.C. 56, 153 F. 3d 731, 735 (D.C. Cir. 1998)* (quoting *Anderson v. Group Hospitalization, Inc., 261 U.S. App. D.C. 57, 820 F. 2d 465, 473 (D.C. Cir. 1987))*. Like the standard for summary judgment, "judgment as a matter of law is proper only if, 'considering the evidence in the light most favorable to [the non-moving party] and making all reasonable inferences in [its] favor,' there is no legally sufficient evidentiary basis for a reasonable jury to have found in [the moving party's] favor under controlling law." *Pitt v. District of Columbia, 404 F. Supp. 2d 351, 353 (D.D.C. 2005)* (quoting *Hendry v. Pelland, 315 U.S. App. D.C. 297, 73 F. 3d 397, 400 (D.C. Cir. 1996))*. "In making that determination, [**10] a court may not assess the credibility of witnesses or weigh the evidence." *Hayman v. Nat'l Acad. of Sciences, 306 U.S. App. D.C. 227, 23 F. 3d 535, 537 (D.C. Cir. 1994)*. Entering judgment as a matter of law after the verdict is highly disfavored because it intrudes upon the rightful province of the jury. *Boodoo v. Cary, 305 U.S. App. D.C. 409, 21 F. 3d 1157, 1161 (D.C. Cir. 1994)*. Accordingly, "even if the Court finds the evidence that led to the jury verdict unpersuasive, or that it would have reached a different result if it were sitting as fact-finder, that is not a basis for overturning the jury's verdict and granting judgment as a matter of law." *Pitt, 404 F. Supp. 2d at 354* (citing 9 *Moore's Federal Practice § 50.60[1]* at 50-87 (3d. ed. 2002)).

C. Denial of Defendants' Motion for Judgment as a Matter of Law Was Not Erroneous

Defendants argue that I erroneously denied their motion for judgment as a matter of law. Specifically, they assert that the evidence presented at trial was less persuasive than the record evidence that had been before the court of appeals when it reversed summary [**11] judgment and, therefore, a reasonable jury could not have found that defendants consented to Iglesias' use of their vehicle. Defs. Br. at 22-25. In response, plaintiffs stress the high standard for granting renewed motions for judgment as a matter of law and argue that the court of appeals' decision reversing summary judgment requires that defendants' present motion be denied. Pls. Br. at 6-7.

In reversing my grant of summary

judgment, the court of appeals found that defendants' evidence regarding the absence of consent was contradicted and, as a result, the case had to go to the jury. *Athridge,* [*146] *312 F. 3d at 477-78*. Under the District of Columbia Motor Vehicle Safety Responsibility Act, *D.C. Code* § *50-1301.08*, [3] proof of ownership of a vehicle creates "a rebuttable presumption" that the owner consented to the driver's use of the vehicle. Id. This presumption is "powerful" and "can only be overcome by 'uncontradicted and conclusive evidence' of non-consent." Id. The court of appeals explained that, "an automobile owner is entitled to judgment as a matter of law if he or she asserts *without contradiction* that the vehicle [**12] was taken and used without consent." Id. (emphasis in original). However, "if the plaintiff proffers facts to discredit the defendant's evidence of non-consent, then the issue must be submitted to a jury." Id. (internal citations omitted). Although the Rivases and Iglesias both testified that there was no consent, the court of appeals found that the plaintiffs had presented contrary evidence of non-consent and, therefore, the case had to go to the jury. *Id. at 477-78*.

3 All references to the D.C. Code are to the electronic version available on Westlaw and Lexis.

In renewing their motion for judgment as a matter of law, defendants argue that the evidence of implied consent that was ultimately presented at trial was not as persuasive as the evidence that had been before the court of appeals. Defs. Br. at 25. The court of appeals' opinion listed the following evidence of implied consent: (1) Iglesias' facility with a stick-shift vehicle; (2) testimony that Iglesias told his friend Bruce Thornberg [**13] that he had driven the vehicle in the past; (3) testimony that Iglesias had been seen driving a vehicle belonging to the Rivases' son in the past; (4) that the Rivases and Iglesias are relatives; (5) that the Rivases did not press charges against Iglesias for unauthorized use of their vehicle; (6) that the Rivases allowed Iglesias access to their home while they were in South America, while leaving the car keys available therein; and (7) Francisco Rivas' inability to read English when he signed his affidavit asserting non-consent. *Athridge, 312 F. 3d at 478*. In their renewed motion for judgment as a matter of law, defendants attack each of these pieces of evidence in turn.

Defendants argue that the evidence that Iglesias had previously driven the Rivases' vehicle was weakened at trial. First, the evidence that Iglesias was able to drive a stick-shift car was based solely on the testimony of Bruce Thornberg, who had ridden in the car with Iglesias on the day of the accident. Defs. Br. at 22. Although Thornberg testified that Iglesias had no difficulty driving the car, defendants stress that Thornberg did not observe Iglesias driving with a stick-shift until *after* [**14] Iglesias had driven from the Rivases' home to the Mazza Gallery and then from the Mazza Gallery to the point where the accident occurred. Id. at 22-23. Defendants contend that Iglesias could have learned to drive with a stick-shift that very day before he saw Thornberg. Id. at 23. In addition, Iglesias denied at trial that he had ever driven the Rivases' car in the past and Thornberg did not testify that he had previously seen Iglesias drive the Rivases' son's car. Id.

Defendants also challenge the probative value of the familial relationship and the fact that the Rivases did not press charges. Id. at 23-24. Specifically, defendants argue that a familial relationship is merely

one of many factors that might raise doubts about veracity. Id. at 23. Defendants argue that the probative value of the Rivases' decision to not press charges was weakened by the testimony of [*147] Officer Sharr. Id. at 24. Officer Sharr testified that he had abandoned further inquiry into whether the Rivases intended to press charges because he knew that Iglesias was the Rivases' relative. Id. at 24. In addition, defendants argue that the Rivases did not press charges because they did [**15] not think of Iglesais' use of their car as "stealing," that is, use without regard to bringing it back. Id. at 23-24.

Defendants argue that the fact that the Rivases left the car keys in the house and available while they were in South America "is of no consequence." Id. at 24. But defendants do not explain why that was of no consequence.

Finally, defendants argue that the fact that Francisco Rivas consistently testified that he did not consent to Iglesias' use of the car contradicts the court of appeals' conclusion that his lack of proficiency reading English weakened the probative value of an affidavit in which he stated that he did not consent to Iglesias' use of his car. Id. at 24.

The standard applied by the court of appeals in reversing summary judgment is the same standard that I must now apply in considering defendants' renewed motion for judgment as a matter of law: whether, considering the evidence in the light most favorable to plaintiffs, there was a legally sufficient evidentiary basis for a reasonable jury to have found in plaintiffs' favor. Despite defendants' challenges to the strength of plaintiffs' evidence on implied consent, there remained a factual [**16] dispute over whether there was implied consent and, therefore, the case had to be submitted to the jury. Any difference between the record evidence that was before the court of appeals and what was ultimately presented at trial is not so significant that it changed the landscape of the consent issue. The evidence now highlighted by defendants (some of which is argument, not evidence) was just part of the overall evidence to be considered and weighed by the jury. "The court may not assess the credibility of witnesses or weigh the evidence." *Hayman, 23 F. 3d at 537*. "Even if the Court finds the evidence that led to the jury verdict unpersuasive, or that it would have reached a different result if it were sitting as fact-finder, that is not a basis for overturning the jury's verdict and granting judgment as a matter of law." *Pitt, 404 F. Supp. 2d at 354*. As dictated by the court of appeals' reasoning, I cannot find that no reasonable jury could have found implied consent and, therefore, defendants' renewed motion for judgment as a matter of law must be denied.

D. Standard for Motion for New Trial

A motion for a new trial under *Rule 50 of the Federal Rules of Civil Procedure* [**17] should be granted "only where the court is convinced the jury verdict was a 'seriously erroneous result' and where denial of the motion will result in a 'clear miscarriage of justice.'" *Nyman v. Fed. Deposit Ins. Corp. 967 F. Supp. 1562, 1569 (D.D.C. 1997)* (quoting *Sedgwick v. Giant Food, Inc., 110 F.R.D. 175, 176 (D.D.C. 1986)*). "The standard for granting a new trial is not whether minor evidentiary errors were made but rather whether there was a 'clear miscarriage of justice.'" *Nyman, 967 F. Supp. at 1569* (citations omitted). When deciding whether to grant a motion for a new trial, "the court should be mindful of the jury's special function in our legal system

and hesitate to disturb its finding." Id.

E. The Jury Verdict Was Not Against the Weight of the Evidence

In considering a motion for a new trial based on the argument that the [*148] verdict was against the weight of the evidence, "the trial judge's disagreement with the jury on the credibility of witnesses does not justify the granting of a new trial." *Langevine v. District of Columbia, 323 U.S. App. D.C. 210, 106 F. 3d 1018, 1023 (D.C. Cir. 1997)* [**18] (citing *Hutchinson v. Stuckey, 293 U.S. App. D.C. 224, 952 F. 2d 1418, 1421 (D.C. Cir. 1992))*. As previously discussed in the context of defendants' renewed motion for judgment as a matter of law, there was evidence contradicting the Rivases' and Iglesias' assertion of non-consent and, therefore, it was for the jury to weigh the evidence and to consider the credibility of the witnesses. Accordingly, I will not grant defendants a new trial on the ground that the verdict was against the weight of the evidence.

F. The Jury Instruction on Consent Was Not Erroneous

Defendants argue that my instruction to the jury regarding "consent" was "incomplete, erroneous, and prejudicial to the defense." Defs. Br. at 28. Defendants assert that the jury should have been instructed to determine whether there was consent at the "time of the accident" or on the "day of the accident." Defs. Br. at 30. In response, plaintiffs argue that defendants were not prejudiced by the instruction because the element that defendants claim was missing from the instructions was actually encompassed by the language used and because all of the evidence and argument presented at trial focused the [**19] jury on the issue of whether Iglesias had defendants' consent on the day of the accident. Pls. Br. at 15-18.

"It is well-established that '[a] defendant is entitled to an instruction on a defense theory if it has a basis in the law and in the record.'" *Rogers v. Ingersoll-Rand Co., 971 F. Supp. 4, 11 (D.D.C. 1997)* (quoting *Hasbrouck v. Texaco, Inc., 842 F. 2d 1034, 1044 (9th Cir. 1989))*. However, "as long as a district judge's instructions are legally correct ...he is not required to give [jury instructions] in any particular language." *Miller v. Poretsky, 193 U.S. App. D.C. 395, 595 F. 2d 780, 788 (D.C. Cir. 1978)*. See also *Joy v. Bell Helicopter Textron, Inc., 303 U.S. App. D.C. 1, 999 F. 2d 549, 556 (D.C. Cir. 1993)* ("jury instructions are not considered erroneous if, when viewed as a whole, 'they fairly present the applicable legal principles and standards'"); *Columbia Plaza v. Sec. Nat'l Bank, 219 U.S. App. D.C. 182, 676 F. 2d 780, 787 n. 4 (D.C. Cir. 1982)* ("as long as the instructions provided by the trial judge state the applicable law correctly, the form of the language used can be left [**20] to the trial court's discretion"). Indeed, "no party to litigation is entitled to have instruction presented to the jury in a manner most likely to result in a verdict in that party's favor." *Camenisch v. Martens, 1995 U.S. Dist. LEXIS 21851, No. 93-0322, 1995 WL 461928, at *1 (D.D.C. July 7, 1995)*. "Rather, the trial judge's responsibility is to present fair and balanced instructions which explain the relevant legal principals to the jury." Id.

I issued the following jury instruction on consent:

> In this case, plaintiffs contend that the defendants consented to Jorge Iglesias' use of their car. Plaintiffs make no claim that the defendants gave their express consent to Jorge to drive their car.

> Instead, plaintiffs claim that the defendants gave their implied consent for Jorge to drive their Jetta. Implied consent may be inferred from one's conduct rather than one's direct expression. The conduct may occur before or after the accident. In determining whether there was implied consent, *you should consider all the facts of the case bearing on the use of the car and the relationship of the owner and the driver.*
>
> You many find that the owners gave implied consent [**21] to the driver if *under the circumstances* a reasonable person [*149] would conclude that they gave their consent. Such implied consent may be inferred from acts or words indicating to a reasonable person that that person had consent to use the vehicle.

Transcript of Jury Trial - Day 2 Before the Honorable John M. Facciola United States Magistrate Judge, at 146 (Jan. 11, 2005) (emphasis added). At trial, defendants objected to this consent instruction, asserting that the instruction should have directed the jury to determine whether Iglesias had consent to use the vehicle on the actual day of the accident, when the Rivases were in South America. Defendants' counsel argued:

> In prior discussion of this case, and I believe in a prior order, the Court indicated that the consent issue dealt with whether the defendants had given consent to Jorge to drive the car that struck the minor plaintiff *on this particular day*, and under these circumstances. And I don't think the instruction addresses it in that manner. It simply asks -- it simply addresses consent in a general term.

Id. at 82 (emphasis added). But, under the District of Columbia Motor Vehicle [**22] Safety Responsibility Act, consent can be either express or implied, see *D.C. Code § 50-1301.08*, and there are any number of facts from which implied consent can be inferred. Accordingly, the instruction that the jurors "consider all the facts of the case bearing on the use of the car and the relationship of the owner and the driver" in determining whether there was implied consent was an accurate reflection of the law. Although the driver must have had consent to use the car *at the time* of the accident, such consent does not necessarily have to have been given *on the day* of the accident. Defendants are not entitled to a consent instruction that, in essence, instructs the jury to find that, because the Rivases were in South America *on the day* of the accident, they could not have given their consent for Iglesias to use the car *at the time* of the accident. It is the court's responsibility to accurately and fairly state the law. Accordingly, I find that defendants have not shown that the jury instructions on consent were erroneous, incomplete, or resulted in such a clear miscarriage of justice so as to warrant a new trial.

G. Admission [**23] **of Exhibit 11**

Exhibit 11 consisted of the findings of fact from Judge Greene's 1996 opinion with the redaction of the following phrase: "not only did the defendant (Iglesias) take the car without the permission of the owner, but he did not have, and had never had, either a driver's license or a

learner's permit." Pls. Br. at 18. Defendants argue that the admission of Judge Greene's findings of fact caused the case to be framed as a past injustice and created irrelevant sympathies for the plaintiffs. Defs. Br. at 32. Specifically, they argue that the injuries and damages aspect of the case, that are reflected in Judge Greene's findings, have no bearing upon the issues before the jury and that allowing Judge Greene's findings into evidence permitted plaintiffs to argue that an injustice had occurred and that the $ 5.5 million verdict was still unsatisfied. Defs. Br. at 32. Defendants argue that the prejudice was compounded by the fact that the only relevant part of the exhibit was the redacted sentence in which Judge Greene stated that Iglesias did not have the Rivases' permission to take the car. Defs. Br. at 32.

A little history of the dispute surrounding Exhibit 11 is necessary. [**24] Initially, plaintiffs moved me to take judicial notice of certain excerpts of Judge Greene's findings. Plaintiffs' request for judicial notice was denied, but I decided to allow the findings into evidence under the residual [*150] exception to the hearsay rule, *Rule 807*. *Rule 807* allows the court to admit hearsay for which there are circumstantial guarantees of trustworthiness where the hearsay is evidence of a material fact, it is more probative than other available evidence, and the interests of justice are best served by its admission. See *Fed. R. Evid. 807*. I determined that allowing Judge Greene's findings into evidence, but not giving them preclusive effect, was the fairest way to balance both plaintiffs' and defendants' interests. Athridge v. Rivas, No. 89-1222, Memorandum Opinion at 11-12 (Dec. 21, 2004). Specifically, I found that Judge Greene's findings were particularly trustworthy and that their probative value outweighed any tendency to prejudice the Rivases. Id. at 12. And, finding that the interests of justice were best served by admitting Judge Greene's findings, I explained:

> The Rivases conceded that they were bound [**25] by Judge Greene's decision ...and they have proffered no reason to relieve them of that concession. In a lawsuit that bears a 1989 docket number and is based on an accident that occurred in 1987, preventing the Athridges from introducing evidence of a court decision that summarizes the very evidence the Rivases would have faced had they not been improvidently dismissed - when the Rivases have conceded that they should be bound by that prior judgment if they are found to have consented - is surely an abuse of my discretion. Simply put, I am hard pressed to understand why a party that made such a concession would be unfairly prejudiced by the admission of Plaintiffs' Exhibit 11 into evidence, especially because, at this point, it will not be given any preclusive effect.

Id. at 13. Unlike Judge Greene's other findings, however, I decided to redact the finding regarding the Rivases' permission because it was less probative and more prejudicial than his other findings. Specifically, because that finding went to the ultimate issue in the present case, it may have been unfairly prejudicial to defendants. Moreover, because consent was not an issue before Judge Greene, [**26] that finding constitutes

dicta.

In defendants' present motion for a new trial, they raise no new arguments as to why Exhibit 11 should not have been admitted. Accordingly, for the reasons stated in my previous opinion just discussed, I find that defendants have failed to show how my decision to allow Exhibit 11 into evidence resulted in a clear miscarriage of justice so as to warrant such an extreme remedy as a new trial.

H. Admission of Exhibit 14 Was Not Erroneous

Exhibit 14 consisted of the complaint filed by Aetna in the earlier Superior Court case against Iglesias and Iglesias' answer to that complaint. In relevant part, in his answer, Iglesias denied Aetna's allegation that he was operating the Rivases' vehicle without a reasonable belief that he was entitled to do so. Defs. Br. at 34. At trial, defendants objected to the admission of Exhibit 14 on the ground that the denial was "not [Iglesias'] answer." Transcript of Jury Trial -Day 1 Before the Honorable John M. Facciola United States Magistrate Judge, at 163-64 (Jan. 10, 2005). I overruled defendants' objection explaining: "No, it is. It's counsel for the defendant. [Iglesias] was the defendant. It's [**27] an adopted admission. It was submitted by his attorney as the answer to a complaint." Id. at 164.

In their present motion for a new trial, defendants argue that the admission of Exhibit 14 was erroneous for the following reasons: (1) Iglesias' denial was a statement [*151] of his attorney, Irving Starr, not a statement of Iglesias; (2) the denial was not probative because it has been shown to be inaccurate by (a) Iglesias' testimony that he never told Attorney Starr that he believed that he had permission to operate the Rivases' vehicle and (b) Attorney Starr's deposition testimony that Iglesias had always told him that he took the car on impulse and never had any reason to believe that he had permission to do so; (3) defendants were unfairly prejudiced because, without Exhibit 14, the only contradiction to Iglesias' assertion of nonconsent was Thornberg's testimony regarding statements made by Iglesias on the day of the accident; and (4) the denial was hearsay and none of the exceptions provided in *Rules 801*, *803*, or *804* of the Federal Rules of Evidence rendered it admissible. Defs. Br. at 33-36. In response, plaintiffs argue that Iglesias' statement [**28] was admissible (1) as a statement made by his attorney concerning a matter within his employment and (2) as a prior inconsistent statement. Pls. Br. at 21-22.

First, although Attorney Starr may have drafted and signed Iglesias' answer, the statements contained therein are considered statements of Iglesias himself. See, e.g., *Dugan v. EMS Helicopters, Inc., 915 F. 2d 1428, 1431-32 (10th Cir. 1990)* ("inconsistent allegations contained in prior pleadings are admissible in subsequent litigation" and prior pleadings may be introduced on cross-examination for use as an impeachment tool under *Rule 613 of the Federal Rules of Evidence*); *Williams v. Union Carbide Corp., 790 F. 2d 552, 555-56 (6th Cir. 1986)* (statements made by an attorney concerning a matter within the scope of his employment may be admissible against the client and pleadings in a prior case may be used as evidentiary admissions).

Second, the determination of Exhibit 14's probative value was for the jury. Defendants had the opportunity to question Iglesias about his answer and about whether he ever told his attorney that he had a reasonable [**29] belief that he had the Rivases' consent to use their vehicle. Moreover, defendants could

have had Attorney Starr testify at trial regarding whether Iglesias had always told him that he took the car on impulse and never had any reason to believe that he had permission to do so.

Finally, because defendants did not raise at trial the argument that Iglesias' answer did not fall within any of the hearsay exceptions in *Rules 801, 803,* or *804*, that argument has been waived and it cannot be raised in a post-trial motion. At trial, defendants merely objected to Exhibit 14 on the ground that it was not Iglesias' statement - they did not raise a hearsay objection. Moreover, in their current motion, defendants provide absolutely no explanation as to why *Rules 801, 803,* and *804* would not render the denial admissible. I cannot be expected to guess the basis of defendants' argument. In order to succeed on a motion for a new trial, defendants must show that the admission of Exhibit 14 resulted in a clear miscarriage of justice. Defendants have not meet this burden and, therefore, I will not grant this motion for a new trial on this ground.

III. CONCLUSION

For the foregoing reasons, [**30] defendants' renewed motion for judgment as a matter of law and motion for a new trial will be denied.

JOHN M. FACCIOLA

UNITED STATES MAGISTRATE JUDGE

ORDER

In accordance with the accompanying Memorandum Opinion, it is, hereby, **ORDERED** that Defendants' Motion for New Trial and/or Judgment Notwithstanding the Verdict [# 233] is **DENIED**.

SO ORDERED.

JOHN M. FACCIOLA

UNITED STATES MAGISTRATE JUDGE