UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
EASTERN DIVISION

No. 4:12-CR-88-1H(2)

UNITED STATES OF AMERICA v. STEPHEN A. LAROQUE	DEFENDANT'S MOTION TO EXCLUDE TESTIMONY OF DIANNE CHIPPS BAILEY

Mr. LaRoque respectfully submits the following motion in limine for the Court's consideration. It is anticipated that the government will attempt to introduce evidence through an expert in state nonprofit regulation regarding best practices for the administration and management of nonprofits, purported breaches of fiduciary duties of loyalty and obedience, and violation of state nonprofit regulations and organizational policies. These topics, as explained further below, are irrelevant—or any relevance is significantly outweighed by the risk of unfair prejudice and or the potential for delay and the waste of the Court's time—and these topics, if introduced, threaten to provide an unconstitutional basis for conviction of Mr. LaRoque. Mr. LaRoque therefore respectfully requests that such evidence be excluded.

SUMMARY OF ARGUMENT

The Supreme Court has rejected as unconstitutional theories of criminality based on mere breaches of fiduciary duties or state regulations. The Fourth Circuit has also overturned a conviction based on mere violations of organization policies and other similar theories of criminality. Such theories are unconstitutional largely because they fail to protect against arbitrary, discriminatory, and abusive enforcement against public persons. Nonetheless, the

government's pleadings and notices indicate that it will attempt to base its prosecution on these unconstitutional theories of criminal liability, and it intends to call a witness for the sole purpose of obtaining that witness' testimony about such unconstitutional theories. This witness' anticipated testimony, as outlined by the government, is irrelevant, and even if the government can outline a theory under which the testimony is relevant, the risk of confusion or inappropriate application by the jury, and/or waste of the Court's time, significantly outweigh (or entirely eclipse) any benefit to the jury. Therefore, Mr. LaRoque asks the Court to exclude the testimony of this expert witness.

BACKGROUND

The government first began investigating Mr. LaRoque directly after the publication by an internet blog of a political article that criticized Mr. LaRoque, then an outspoken conservative Republican legislator. After 19 months and three different indictments, the government finally outlined its theory of criminal liability in its pleadings, stating, in essence, that Mr. LaRoque was guilty of *theft* because he controlled the boards of the nonprofits and obtained money that was owed to him under contracts that the boards of those nonprofits approved.

After Mr. LaRoque filed motions to dismiss on the basis that this theory of prosecution fails to state a crime, the government proposed a new theory that included fraud on the boards of the organization—the same boards it still maintains he controlled. However, the government's pleadings and notices indicate that its last-minute change of course was merely an attempt to meet the pleading requirements, and it appears that the government still intends to prove criminality on the basis of mere breach of fiduciary duties or violations of organizational policies or nonprofit regulations.

For example, on May 12, 2013, the government provided Mr. LaRoque with a letter outlining the anticipated areas of testimony of Dianne Chipps Bailey, a lawyer from Charlotte with the firm Robinson Bradshaw & Hinton, P.A., whose "practice is dedicated to the representation of nonprofit organizations, their senior management and volunteer leaders." According to the government's notice, "if called, . . . Ms. Bailey would testify regarding widely-accepted best practices for the administration and management of [nonprofits] and her opinion that the board of directors of ECDC and PDC consistently failed to observe such [best] practices[.]" The notice also informed Mr. LaRoque that Ms. Bailey would testify about North Carolina regulations governing nonprofits as well as the contents of ECDC and PDC's organizational policies. Finally, Ms. Bailey would testify "that the Defendant breached fiduciary duties of loyalty and obedience in connection with his action and inactions in controversy in this case."

For the reasons that follow, this witness' testimony is inappropriate and irrelevant, unduly prejudicial and confusing, and a waste of government resources and the Court's time.

LEGAL STANDARD

Federal Rules of Evidence 401 and 402, read together, provide that evidence not "having tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence" is not admissible because it is not "relevant." Additionally, pursuant to Federal Rule of Evidence 403, "evidence may be excluded if the probative value is substantially outweighed by the danger of unfair prejudice." Relevant evidence may also be excluded if admission would cause "undue delay, waste of time, or needless presentation of cumulative evidence."

Further, it is fundamental that expert testimony on the meaning and applicability of law is inadmissible, because the judge is the legal expert at trial. *See, .e.g., United States v. Wilson,* 133 F.3d 251 (4th Cir. 1997) ("the jury must be instructed on the law by the court and not by the witness") ("Permitting such testimony as to legal conclusions gives cogent meaning to the 'apprehensions that jurors will turn to the expert, rather than to the judge, for guidance on the applicable law." (internal quotation marks omitted)) ("we believe that to maintain properly the court's role as the sole arbiter of the applicable law, the court should have taken steps to limit those witness' testimony generally to the facts of history, practices and procedures followed by them in their work, opinions based on demonstrated expertise, and similar matters, but it should not have allowed them to give opinions on what the law means or how it is interpreted"); *Adalman v. Baker, Watts, & Co.,* 807 F2d 359, 366-68 (4th Cir. 1986) ("expert" testimony of lawyer about meaning and applicability of securities laws inadmissible as "usurp[ing] the province of the judge"), *abrogated on other grounds by Pinter v. Dahl*, 486 U.S. 622, 650 (1988); *Nieves-Villanueva v. Soto-Rivera*, 133 F.3d 92, 99-100 (1st Cir. 1997) (collecting cases); *In re Initial Public Offering Securities Litigation*, 174 F. Supp. 2d 61, 64 (S.D.N.Y. 2001) ("[E]very circuit has explicitly held that experts may not invade the court's province by testifying on issue of law.") (collecting cases). Moreover, the Fourth Circuit and other circuits have often affirmed a trial court's decision to exclude the testimony of purported "experts" espousing legal conclusions or conclusions about how the law should apply to the particular facts. *See, e.g., United States v. Barile*, 286 F.3d 749, 761 (4th Cir. 2002) (testimony by former director of Food and Drug Administration's Office of Device Evaluation that defendant's submissions to FDA did not contain "materially misleading statements" properly excluded); *Wilson*, 133 F.3d at 265 (testimony of two former state Assistant Attorneys General about scope

of Clean Water Act properly excluded); *Adalman*, 807 F.2d at 368 (". . . Appellant's proffered [witness] as an expert witness to testify in substantial part to meaning and applicability of the securities law to the transactions here, giving his expert opinion on governing law . . . flies squarely in the face of the precedent—and the logic of that precedent—set out in [*Marx & Co., Inc. v. Diner's Club, Inc.*, 550 F.2d 505 (2d Cir. 1977)]."); *Estate of Sowell v. United States*, 198 F.3d 169, 171-72 (5th Cir. 1999) (testimony by law school dean about what actions would be reasonable for a hypothetical estate executor to take, when faced with same facts as in case at bar, properly excluded); *United States v. Scholl*, 166 F.3d 964, 973 (9th Cir. 1999) (testimony by tax experts on tax and accounting laws that such laws were confusing and that defendant was reasonable in his belief that he could net out gambling wins and losses properly excluded); *Snap-Drape, Inc. v. Commissioner of Internal Revenue*, 98 F.3d 194, 198 (5th Cir. 1996) (testimony by two certified public accountants about whether certain dividends are deductible under the Internal Revenue Code in calculating "adjusted current earnings" for purposes of the corporate alternative minimum tax properly excluded); *Farmland Indus. v. Frazier-Parrot Commodities, Inc.*, 871 F.2d 1402, 1409 (8th Cir. 1989) (testimony by defense expert on whether requirements of commodities regulations had been met properly excluded).

Finally, Federal Rule of Evidence 704(a) makes plain that, while opinion testimony may embrace ultimate issue of fact, opinion testimony merely stating a legal conclusion is not admissible. *See, e.g., Nieves-Villanueva*, 133 F.3d at 100 ("Because the jury does not decide such pure questions of law, such testimony is not helpful to the jury[.]" ("Expert testimony that consists of legal conclusions cannot properly assist the trier of fact[.] . . . Fed. R. Evid. 704(a) . . . does not vitiate the[is] rule[.]" (citations omitted)); *In re Initial Public Offering Securities*

Litigation, 174 F. Supp. 2d 61, 64 (S.D.N.Y. 2001) ("[E]very circuit has explicitly held that experts may not invade the court's province by testifying on issues of law.") (citing cases)

DISCUSSION

The prosecution of this case involves, at its heart, four questions: (1) Did Mr. LaRoque intentionally steal money from ECDC or PDC when he took loans of funds owed to him under his 2009 contracts with those organizations? (2) Did Mr. LaRoque conceal, through trick, scheme, or device, material information from the USDA when ECDC's independent auditor disclosed that information on ECDC's audit and the USDA regulators reviewed virtually nothing that Mr. LaRoque submitted? (3) Did Mr. LaRoque intentionally lie to the USDA when he signed, within the context of a loan closing, the last page of a five-page document entitled "Security Agreement," which contained a phrase relating to the truth of statements made in another document submitted more than seven months prior? And (4) Did Mr. LaRoque intentionally violate the tax laws of the United States when he signed 2009 and 2010 income tax returns that his accountant prepared after being provided with all relevant information?

Because this is a criminal—not a civil—case, the question is not whether Mr. LaRoque violated fiduciary duties, state regulations, or nonprofit policies. These are not questions raised by the indictment, and these would be unconstitutional bases for criminal convictions. Yet these unrelated, irrelevant, and unconstitutional questions are exactly the questions that the government wants the jury to focus on. That is likely because the government knows that it cannot meet head-on the burden it set up for itself by charging Mr. LaRoque criminally. In any event, the Court should not allow the government to side step its burden. Rather, the Court must hold the government to prove the *crimes* it charged, and it must not allow the government to attempt to convict Mr. LaRoque on the basis of acts that are, at worst, foundations for allegations

of civil liability. In addition to being irrelevant and highly misleading, this expert's testimony is improper because her testimony, as forecast by the government, invades the province of Court by opining on the meaning and applicability of laws and the duty of the jury to apply this law to the evidence.

I. THE TESTIMONY IS IRRELEVANT AND OVERLY PREJUDICIAL BECAUSE THE SUPREME COURT HAS REJECTED THE THEORIES OF GUILT OUTLINED THAT THIS WITNESS' TESTIMONY IS PROVIDED TO SUPPORT.

In *Skilling v. United States*, the Supreme Court rejected as unconstitutional the concept that mere breaches of fiduciary duties or conflict of interest provisions could form the basis for criminal fraud convictions. *See* 130 S. Ct. 2896, 2926-35 (2010). In fact, Justice Scalia noted just prior to the *Skilling* decision that, because the law establishes no "principle . . . that separates the criminal breaches, conflicts and misstatements from the obnoxious but lawful ones," criminalization of such conduct "invites abuse by [] prosecutors in pursuit of local officials, state legislators, and corporate CEOs who engage in any manner of unappealing or ethically questionable conduct." *Sorich v. United States*, 555 U.S. 1204, 1310 (2009) (Scalia, J., dissenting from denial of certiorari). Further, Justice Scalia asked, "Is it the role of the Federal Government to define the fiduciary duties that a town alderman or school board trustee owes to his constituents?" *Id*. He might have also included a nonprofit officer or director's duties in that list, and in *Skilling* the Supreme Court answered these questions in the negative. *See* 130 S. Ct. at 2926-35. "It is one thing," Justice Scalia continued, "to enact and enforce clear rules against certain types of corrupt behavior, *e.g.* 18 U.S.C. § 666(a) (bribes and gratuities to public officials), but quite another to mandate a freestanding, open-ended duty to provide 'honest services'—with the details to be worked out case-by-case." *Sorich*, 555 U.S. at 1310 (Scalia, J., dissenting from denial of certiorari).

Turning to the unconstitutionality of such theories, Justice Scalia noted that the Supreme Court "has long recognized the 'basic principle that a criminal statute must give fair warning of the conduct that it makes a crime.' There is serious argument that [the crime of honest-services wire fraud] is nothing more than an invitation for federal courts to develop a common-law crime of unethical conduct." *Id.* However, he said, "It is simply not fair to prosecute someone for a crime that has not been defined until the judicial decision that sends him to jail. 'How can the public be expected to know what the statute means when the judges and prosecutors themselves do not know, or must make it up as they go along?'" *Id.* (internal citations omitted).

It was these very concerns that led the Supreme Court a year later to reject the concept that honest-services wire fraud criminalizes the "amorphous category" of cases involving mere breaches of fiduciary duties, conflict of interest transactions, or violations of state regulations. *Skilling*, 130 S. Ct. at 2932. Rather, the Court limited the statute to conduct that was long known to be a federal crime: acceptance of bribes and kickbacks. *Id.* at 2928. Only with this limited construction was the honest-services wire fraud crime not unconstitutional for lack of fair notice or failure to protect against arbitrary and discriminatory prosecutions. *Id*. at 2929-35. Thus, the Supreme Court has rejected as unconstitutional the government's theory of prosecution in this case.

Despite this recent and clear constitutional proscription of these theories, the government intends to spend taxpayer dollars to call an expert witness whose only purpose is to testify in support of such unconstitutional theories. The "facts" that the government intends to prove to the jury through the nonprofit regulations expert are (1) that the board of directors of ECDC and PDC failed to observe "best practices" of nonprofit management, (2) the contents of state nonprofit regulations and ECDC and PDC's policies, and (3) that Mr. LaRoque breached

"fiduciary duties of loyalty and obedience." These are not facts of consequence to any constitutional theory of Mr. LaRoque's guilt. Instead, they are facts designed to convince the jury to convict Mr. LaRoque on the basis of unconstitutional theories. Thus, these facts are irrelevant and highly prejudicial.

Even if the government can come up with a way in which these facts are arguably relevant to some legitimate theory of guilt, such relevance would be significantly outweighed—if not entirely eclipsed—by the danger of unfair prejudice and constitutional error. Such prejudice is inherent in the potential for the jury to convict Mr. LaRoque—not based on defined, understood, and constitutional theories of criminal liability—but based on the amorphous and unconstitutional theories of breach of fiduciary duty or violation of other state nonprofit regulations, which the nonprofit regulations expert's testimony is intended to further. Moreover, because this expert's testimony is irrelevant to any legitimate theory of criminal liability, not only would calling her to testify be a waste of taxpayer dollars, but would also be a waste of the Court's time. Therefore, Mr. LaRoque respectfully requests that the Court exclude the testimony of this legal expert witness.

II. IN ADDITION TO BEING IRRELEVANT, THE LEGAL EXPERT WITNESS' TESTIMONY WILL INVADE THE PROVINCE OF THE COURT TO SET FORTH THE LAW AND THE DUTY OF THE JURY TO APPLY THAT LAW TO THE EVIDENCE.

If the Court finds that this testimony is relevant to facts at issue and that such relevancy is not substantially outweighed by the danger of prejudice, confusion or waste of time, the testimony is nonetheless improper because it usurps the province of the Court to set out the applicable law and the duty of the jury to apply that law to the evidence. The following specifically discusses each of the nine proposed areas of testimony by this legal expert.

The first segment of the nonprofit regulations expert's proposed testimony is that she "would testify that ECDC and PDC are nonprofit corporations under North Carolina law and are also exempt from taxes under [IRS] Code . . . Section 501(c)(3) and further classified as a public charity under Section 509(a)(2) of the Code." Certainly, it is a waste of time to call an expert for this purpose alone, since this information is available through documents and testimony by witnesses who would provide some additional factual value.

The second section of proposed testimony is that the nonprofit regulations expert "would testify regarding the widely-accepted best practices for the administration and management of Section 501(c)(3) charities and her opinion that the board of directors of ECDC and PDC consistently failed to observe such practices[.]" This testimony is utterly improper for suggesting a negligence standard only appropriate in a civil case. Further, it has nothing to do with whether Mr. LaRoque stole money, concealed information from or lied to the USDA, or intentionally violated the tax laws of the United States in filing his 2009 and 2010 income tax returns—which are the only issues in this criminal case. Thus, the government attempts to set out ideal codes of conduct and then use an expert to show how the boards of the organizations did not live up to those ideal standards—all purportedly to prove that he stole money? This proposed testimony makes plain the government's true aim: It wants to convict Mr. LaRoque for what it alleges is generally unethical behavior for which there exists no federal crime. Would it otherwise spend precious government resources on such testimony which is obviously improper in a criminal case? Such an invitation for constitutional error should be denied. Quite simply, this area of testimony does not relate to the issues of this case. It is irrelevant, prejudicial, and a waste of the Court's time.

The fourth proposed area of testimony of this nonprofit regulations expert is that she "would also testify that in North Carolina, a nonprofit may not make loans to or for the benefit of its directors or officers unless the applicable director or officer is a full-time employee of the nonprofit." This proposed testimony is not about facts, but is a legal instruction, and therefore improperly invades the province of the judge. *See, e.g., Adalman*, 807 f.2d at 366 (experts may not testify to "the meaning and applicability of the appropriate law"). It is also irrelevant as to whether Mr. LaRoque *stole* money; it is only relevant to whether he violated a technical nonprofit regulation that he allegedly violated merely because he was a contractor, as opposed to an employee. The nonprofit regulations expert also intends to testify that "[t]he Defendant was not a full-time employee of ECDC[.]" Taken together, the government's proposal is to have a purported legal expert testify that Mr. LaRoque violated North Carolina nonprofit law. Not only is this legal conclusion irrelevant to whether he committed the criminal acts he is charged with, it is also an improper legal conclusion by a witness, which invades the province of the Court and usurps the duty of the jury to apply the law to the evidence. *See, e.g., Marx & Co., Inc.*, 550 F.2d at 510 ("It is for the jury to evaluate the facts in the light of the applicable rules of law, and it is therefore erroneous for a witness to state his opinion on the law[.]")[1]

The fifth proposed area of testimony of the nonprofit regulations expert is that she would read ECDC and PDC's organizational policies to the jury. These policies are written in plain language and therefore such testimony does not aid the jury and is both improper and a waste of the Court's time (not to mention additional precious government resources). Moreover, violations of such policies are irrelevant, since the board authorized the transactions at issue, and, as discussed in *United States v. Graham*, board authorization supersedes organizational policies.

[1] In *Adalman*, 807 F.2d at 367, the Fourth Circuit stated that *Marx* "cogently delineates permissible and impermissible areas for [expert] testimony[.]"

269 Fed. Appx. 281 (4th Cir. 2008) (per curiam) (unpublished). Therefore, this testimony is irrelevant as well.

As a sixth proposed area of testimony, the government informed Mr. LaRoque that the nonprofit regulations expert "may also testify regarding whether the ECDC and PDC complied with their Bylaw meeting notice requirements and quorum requirements" at certain meetings. This is, again, irrelevant to the issues in this case. With this proposed testimony, the government is simply attempting to undermine a valid contract through technical violations of organizational policies. Such technical violations do not change a valid, authorized transaction into theft. *Graham* so holds and under *Skilling* to so charge the jury would violate Mr. LaRoque's due process rights to fair warning of what constitutes criminal conduct. Thus, as with virtually all of this proposed testimony, this proposed area is an attempt to support unconstitutional bases for conviction of Mr. LaRoque, thereby confusing the jury as to the factual questions at issue in this case and inviting constitutional error.

Seventh, the proposed legal expert intends to testify to "the impact on a board decision if it is based on fraudulent representations made to the boards." This proposed testimony is a legal conclusion, which invades the province of the Court and is therefore improper.

Eighth, the government's notice states, "Ms. Bailey may also testify that in North Carolina, an uncompensated nonprofit director generally is immune from monetary damages in connection with breaches of his or her fiduciary duties. . . . ECDC's articles of incorporation do not include [an] optional limitation of liability provision but could be so amended in the future." While Mr. LaRoque appreciates this lesson in North Carolina nonprofit regulation, as well as this notice of a fact that undermines the government's case, this legal information is irrelevant and invades the province of the Court. With this proposed testimony, the government also intends to

suggest to the jury a hypothetical event that "could [occur] in the future." How this fact changes anything about the case is entirely lost on Mr. LaRoque and his counsel. However, Mr. LaRoque submits that there are many hypothetical events that could happen in the future that would help his case. For example, the IRS agent in this case could admit that Mr. LaRoque was targeted because he was a conservative Republican. That admission "could [occur] in the future" and may aid Mr. LaRoque's case. He does not, however, propose to call an expert witness to suggest this possibility to the jury, because such hypotheticals are utterly useless to the jury's determination of the facts at issue in this case. So too are the proposed hypothetical possible future events that the nonprofit regulations expert is expected to discuss if called.

Lastly, "it is also anticipated [by the government] that Ms. Bailey would testify that the Defendant breached fiduciary duties of loyalty and obedience in connection with his action and inactions in controversy in this case." Under the government's proposed theory of prosecution, this is simply an expert opinion that "supplies the jury with no information other than the witness's view of how the verdict should read." *Barile*, 286 F.3d at 760 (internal quotation marks omitted). *See also Askanase v. Fatjo*, 130 F.3d 657, 673 (5th Cir. 1997) (trial court properly excluded testimony that individuals breached their fiduciary duties, because "[s]uch testimony is a legal opinion and inadmissible."). It is, of course, also an unconstitutional basis for conviction, and is therefore irrelevant and overly prejudicial. *See Skilling*, 130 S. Ct. at 2926-35. It would also require an exposition by this witness on the law of fiduciary duties, which would invade the province of the Court, and it would constitute the inappropriate application of law to facts, thereby usurping the duty of the jury. Therefore, this last area of testimony is improper as well.

In sum, all of the proposed testimony of the nonprofit regulations expert is irrelevant and/or improper and her testimony should be excluded in its entirety.

CONCLUSION

For the foregoing reasons, the Defendant respectfully requests that the Court exclude the testimony of the nonprofit regulations expert, Ms. Bailey, as well as other evidence related to breaches of fiduciary duties, conflict of interest transactions, and other violations of state regulations.

Respectfully submitted, this the 15th day of May, 2013.

CHESHIRE PARKER SCHNEIDER & BRYAN, PLLC

/s/ Joseph B. Cheshire, V
Joseph B. Cheshire, V
N.C. State Bar # 5543
P. O. Box 1029
Raleigh, NC 27602
Phone: (919) 833-3114
Fax: (919) 832-0739
Joe.Cheshire@cheshirepark.com

/s/ Elliot S. Abrams
Elliot S. Abrams
N.C. State Bar# 42639
Elliot.Abrams@cheshirepark.com

Attorneys for the Defendant

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true and correct copy of the foregoing MOTION TO EXCLUDE TESTIMONY through the electronic service function of the Court's electronic filing system, as follows:

[redacted]
Assistant United States Attorney
310 New Bern Avenue
Federal Building, Suite 800
Raleigh, NC 27601-1461

This 15th day of May, 2013.

/s/ Joseph B. Cheshire, V

Joseph B. Cheshire, V
CHESHIRE PARKER SCHNEIDER & BRYAN, PLLC
P. O. Box 1029
Raleigh, North Carolina 27602
Tel: (919) 833-3114
Joe.Cheshire@cheshirepark.com