IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

UNITED STATES OF AMERICA,

v.

MILTON E. MCGREGOR
THOMAS E. COKER
ROBERT B. GEDDIE JR.
LARRY P. MEANS
JAMES E. PREUITT
QUINTON T. ROSS JR.
HARRI ANNE H. SMITH
JARRELL W. WALKER JR.
JOSEPH R. CROSBY

Criminal No. 2:10CR186-MHT

UNITED STATES' MEMORANDUM OF LAW REGARDING LAY OPINION TESTIMONY, PURSUANT TO FEDERAL RULE OF EVIDENCE 701, OF UNDERSTANDING OF DEFENDANTS' ACTIONS, WORDS AND CONDUCT

The United States offers this memorandum of law in support of its position that its witnesses, pursuant to Federal Rule of Evidence ("Rule") 701, may offer lay opinion testimony which may include the word "bribe," "payoff," "shakedown," or other similar terms, as to their understanding of the defendants' actions, words and conduct when the witnesses were a participant in actions for which explanation is sought and observed the defendants' conduct first-hand.

Rule 701 permits lay witnesses to offer testify as to their opinions if the opinions are "rationally based on the witnesses' own perceptions and if they either help clarify the witnesses' other testimony or determine a fact in issue." United States v. Bowe, 221 F.3d 1183, 1192-93 (11th Cir. 2000) (citing Fed. R. Evid. 701); see also United States v. Myers, 972 F.2d 1566, 1577-78 (11th Cir. 1992) (officer's opinion testimony as to whether use of force was

"reasonable" was permissible with proper foundation); United States v. LeCroy, 441 F.3d 914, 927 (11th Cir. 2006) (officer's testimony that "a blood stain on the back of [the victim's] shirt appeared to have been made by someone wiping a bloody knife off on the shirt" was permissible opinion testimony by a lay witness admissible under Rule 701); United States v. Milne, 487 F.2d 1232, 1235 (5th Cir. 1973) (lay opinion of a witness who is sufficiently acquainted with defendant and has observed his conduct is admissible as to the sanity of such defendant). Lay witnesses may not, however, testify based on "scientific, technical, or other specialized knowledge …." United States v. Dulcio, 441 F.3d 1269, 1275 (11th Cir. 2006) (citing Fed. R. Evid. 701(c)) (officer's lay opinion testimony tying all co-defendants' roles to those typical in narcotics importing businesses was based on specialized knowledge and violated Rule 701).

So long as fact witnesses base their opinion testimony as to the intent and conduct of the defendants on their "own first-hand impression of the situation," their testimony "fits squarely within that permitted by Rules 701 and 704." See United States v. McFarland, 255 Fed. Appx. 462, 466 (11th Cir. 2007) (allowing lay witness's opinion testimony when she drew from "first-hand observations and experiences of the events and transactions at issue"); see also Fed. R. Evid. 704 ("[T]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.").

To determine if a lay witness's opinion testimony should be excluded for using legal terms of art that require specialized knowledge, the Sixth Circuit has developed a straightforward test: the court should ask whether the language "involve[s] terms with a separate, distinct and specialized meaning in the law different from that present in the vernacular." United States v. Sheffey, 57 F.3d 1419, 1426 (6th Cir. 1995). In Sheffey, the Sixth Circuit allowed the lay opinions of multiple eye-witnesses who each testified the defendant had driven "recklessly" and

with "depraved indifference to human life" because the testimony did not "require the jury to attempt to define for itself legal terms of art or to rely upon anything but their own life experience." Id. at 1426. "Rather, the testimony set out observation-based opinions by lay people – expressed in terms easy for non-lawyers to understand – on the ultimate issue of fact." Id. at 1428.

Similarly, the terms "'bribes,' 'kickbacks,' and 'payoffs' are routinely reported in the media; they are not terms of art, they are words of common currency which form part of the vocabulary of almost any American in his teens or older." United States v. Long, 534 F.2d 1097, 1100 (3rd Cir. 1976). Indeed, this is evidenced by the media coverage of this case as well as the defense attorneys' denials, during their opening statements to the jury, that the defendants' behavior merited the labels in question. In this case, because the fact witnesses will be basing their lay opinions as to the defendants' actions on their own first-hand impressions of the situation and transactions in question, and because terms like "bribes" and "shakedown" are not terms of art but are instead "words of common currency," there is no basis for precluding the testimony under Rule 701. Id.

Nor should the witnesses be precluded from using the word "bribe" under Rule 403, which allows for the exclusion of relevant evidence if "its probative value is substantially outweighed by the danger of unfair prejudice." Fed. R. Evid. 403. "Rule 403 is an extraordinary remedy that should be used sparingly…," United States v. Ross, 33 F.3d 1507, 1524 (11th Cir. 1994), and the "balance [under Rule 403] should be struck in favor of admission." United States v. Norton, 867 F.2d 1354, 1361 (11th Cir. 1989). Further, "[i]n criminal trials relevant evidence is inherently prejudicial. The rule permits exclusion only when unfair prejudice substantially outweighs probative value." United States v. Betancourt, 734 F.2d 750, 757 (11th Cir. 1984).

Here, the prejudice of allowing the witnesses to testify as to their understanding of the defendants' actions in accordance with their own first-hand observations does not substantially outweigh the probative value of the testimony in question. Rather, the testimony in question is expected to "set out observation-based opinions by [a lay person] – expressed in terms easy for non-lawyers to understand – on the ultimate issue of fact." See Sheffey, 57 F.3d at 1428.

If the Court is concerned about the jury's ability to properly weigh the witnesses' opinion testimony, the issue could be easily remedied by issuing an appropriate instruction. For example, the Court might advise the jury that the witnesses are testifying as to their own, personal opinions, that they are not qualified to draw legal conclusions for the jurors.

Accordingly, it is proper, pursuant to Rule 701, for the government in this case to elicit lay opinion testimony which may include the word "bribe," "payoff," "shakedown," or other similar terms, from its witnesses as to their understanding of the defendants' actions, words and conduct of which they have first-hand knowledge.

DATED: June 12, 2011

Respectfully submitted,

JACK SMITH
Chief

By: /s/ Justin V. Shur_____
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CERTIFICATE OF SERVICE

I HERBY CERTIFY that on this date, I caused the foregoing motion to be electronically filed with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the attorneys of record for the defendants.

DATED: June 12, 2011

/s/ Justin V. Shur_____
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