No. _____

IN THE SUPREME COURT OF THE UNITED STATES

KIMBERLY SPONAUGLE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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Dated: February 12, 2025

QUESTION PRESENTED FOR REVIEW

Whether the trial court erred as a matter of law in ruling that F.R.E. 701 permitted the prosecution to present in its case-in-chief lay opinion testimony of three expert witnesses, a certified public accountant, an accountant, and an FBI forensic accountant, without providing F.R.Cr.P. 16(a)(1)(G) summaries of the opinions of the prosecution's experts?

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

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PETITION FOR WRIT OF CERTIORARI TO
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Petitioner Kimberly Sponaugle prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on September 11, 2024 and the denial of Petitioner's Rehearing Petition on November 15, 2024 in United States of America v. Kimberly Sponaugle, No. 22-2851 (3rd Cir. 2024).

OPINION BELOW

The Judgment Order of the United States Court of Appeals for the Third Circuit was dated September 11, 2024 and a Petition for Rehearing was denied by Third Circuit Court on November 15, 2024. The Third Circuit Court docket number for the subject matter was Number 22-2851. Copies of the Third Circuit Court Memorandum Opinion and Judgment Order and Order denying the Rehearing Petition are attached hereto at pages A1 through A10 of the Appendix.

Copies of the relevant written opinions of the United States District Court for the District of Delaware appear at pages A10 through A86 of the Appendix.

JURISDICTION OF THE COURT

The United States Court of Appeals for the Third Circuit issued its Judgment Order on September 11, 2024 affirming Petitioner's convictions and issued an Order denying Petitioner's Petition for Rehearing on November 15, 2024. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(2).

The United States District Court for the District of Delaware had subject matter jurisdiction of this case pursuant to 18 U.S.C. §§ 1343 and 3231. The United States Court of Appeals for the Third Circuit had appellate jurisdiction pursuant to 28 U.S.C. § 1291 in that this case was appealed from an Order of Judgment in a Criminal Case of the district court entered on September 6, 2022.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment VI:

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 defense.

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

This appeal is from a final Judgment of the United States District Court for the District of Delaware in a criminal case.[1] Petitioner Kimberly Sponaugle was indicted on August 15, 2019 on one count of Wire Fraud in violation of 18 U.S.C. § 1343.[2] The Indictment alleged that between January 23, 2012 and March 12, 2018, Sponaugle "…engaged in over 2,100 personal, unauthorized transactions on her corporate credit card… [that] totaled approximately $322,652.00" in a scheme to defraud her employer, All About Women, ("AAW"), an OB/GYN medical practice.[3] On August 22, 2019, Sponaugle pleaded "Not Guilty".[4]

On November 11, 2021, the government filed motions in limine seeking to admit lay opinion testimony of an FBI forensic accountant, a certified public accountant, ("C.P.A."), and an accountant.[5]

On November 17, 2021, a pretrial hearing was held that addressed the motions in limine.[6] Over defense objection, the district court granted the government's applications to admit lay opinion testimony of the FBI forensic accountant, C.P.A., and accountant. The district court also denied the defense request that the government be required to produce summaries of the "lay opinion" testimony of their accounting experts pursuant to the mandate of F.R.Cr.P. 16(a)(1)(G).[7]

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1 A3-8.
2 A85,103-107.
3 A104.
4 A86.
5 A9-83,91,203-233; MHT1-75; GPTM1-31.
6 A9-83,91; MHT1-75.
7 A26-28,38-40,50-51,55-57,91; MHT34-36,46-48,58-59,63-65.

Trial commenced on December 3, 2021 and concluded on December 15, 2021 with the jury finding Sponaugle guilty of Wire Fraud.[8]

Following trial, the district court ordered the parties to file memoranda on Sentencing issues and loss calculation and held evidentiary hearings on March 10 and 11, 2022 and April 4 and 28, 2022.[9] On August 15, 2022, the district court issued a 100 page opinion deciding these issues.[10]

On August 31, 2022, Sponaugle was sentenced to serve 24 months of probation, including 6 months of home detention, and to pay $138,356.98 in restitution.[11]

On October 1, 2022, a Notice of Appeal was filed.[12] On September 11, 2024, Petitioner's conviction was affirmed and on November 15, 2024, Petitioner's Rehearing Petition was denied.

B. STATEMENT OF FACTS

1. Background of Wire Fraud Charge.

The Indictment alleged that Sponaugle intentionally defrauded All About Women, ("AAW"), an OB/GYN medical practice, by using her corporate credit card without authorization to make personal purchases and thereafter intentionally used funds without authorization from AAW's bank account to pay the credit card bills associated with these purchases. Furthermore, it was alleged that Sponaugle intentionally disguised the amounts of her purported unauthorized purchases in AAW's QuickBooks accounting system by

8 A92,2138-2139; TT1774-1775.
9 A94-96,2186,2262,2328,2432.
10 A97,2653-2755; PTO1-100.
11 A3-8,98.
12 A1-2,100.

recording inaccurate, lower expenditures from her corporate credit card and falsely inflating records of other AAW expenditures.[13]

The Indictment alleged that between January 23, 2012 and March 12, 2018, Sponaugle made over 2,100 unauthorized purchases on her corporate credit card totaling $322,652.00.[14] The Indictment failed to specify the dates of these purchases; the names of the merchants from whom the purchases were made; or, the amounts involved in the 2,100 purchases. The Indictment simply provided one date for each calendar year from January 23, 2012 to March 12, 2018 on which Sponaugle electronically transferred funds from AAW's bank account to repay charges from her credit card purchases. For example, the Indictment stated that electronic funds transfers included:

> A November 13, 2013, electronic funds transfer request from COMPANY A's… [b]ank account… to repay charges on SPONAUGLE'S corporate credit card….[15]

A similar averment was made in the Indictment for each year from 2012 through 2018.[16]

The government made an initial discovery production of over 8,000 pages including corporate credit card and bank statements and financial documents that referenced 5,185 transactions on Sponaugle's AAW credit card from January 23, 2012 through March 20, 2018 of which over 2,100 unspecified transactions were claimed to have been unauthorized.[17] Sponaugle moved for a Bill of Particulars to obtain notice of the dates, merchants, and amounts of each of the 2,100 credit card purchases.[18] Specific information

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13 A104, ¶¶ 4-6.
14 A104, ¶ 7.
15 A104-106, ¶ 8.
16 A105-106.
17 A104.
18 A86,108-121.

regarding Sponaugle's alleged unauthorized credit card purchases was essential to the preparation of her defense since she claimed her purchases had been authorized by AAW principals.

After the filing of Sponaugle's Motion for Bill of Particulars, the government produced Excel spreadsheets that listed all transactions on Sponaugle's AAW credit card for the January 23, 2012 through March 12, 2018 time frame alleged in the Indictment totaling 5,336 transactions.[19] The spreadsheets included the dates and amounts of each credit card transaction and the names of the merchants and vendors paid by Sponaugle's AAW credit card. The spreadsheets also listed those credit card transactions that were allegedly unauthorized. It was ultimately determined that the classification of which credit card purchases were authorized and which were unauthorized was done by AAW partner Diane McCracken, M.D., when she performed a quick, "first pass, …off the top of my head" review in a hotel room where she was watching her daughter's swim meet.[20]

2. <u>Sponaugle's Efforts to Obtain Essential Defense Evidence</u>.

Sponaugle reviewed all alleged unauthorized credit card transactions and determined that a substantial number had been authorized by AAW partners in various manners including e-mails, inter-office e-mails, electronic medical records messages, ("EMR's"), and cell phone text messages sent to Sponaugle.

The documentation supporting much of the authorization for Sponaugle's AAW credit card spending was in AAW's control, but was not produced to the government. Thus, Sponaugle was forced to issue <u>sub poenas</u> pursuant to F.R.Cr.P. 17(c) to AAW to attempt to obtain access to her AAW computer, AAW e-mails, AAW EMR's, and AAW cell phone

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[19] A2772-2872. [This version includes Sponaugle's notations to the original spreadsheets produced.]

[20] A946,2194-2195; TT546; PTH3/10/22 at 33,36.

text messages.[21] AAW objected to Sponaugle's Rule 17(c) sub poena.[22] Sponaugle filed a motion to compel[23] that resulted in AAW agreeing to produce some of the requested documents pursuant to a protective order.[24] However, AAW's responses were not complete, which required Sponaugle to issue additional Rule 17(c) sub poenas directly to AAW's e-mail, EMR, and cellular service vendors to obtain critical evidence.[25] This resulted in the production of tens of thousands of e-mails, EMR's, and text messages.[26] Many of these documented that AAW partners had granted Sponaugle authorization to make purchases on her AAW credit card that Dr. McCracken had claimed were unauthorized following her review of Sponaugle's credit card usage. None of the electronic communications refuting AAW's claims that Sponaugle's credit card usage was unauthorized had been obtained or reviewed by FBI agents investigating this case before the prosecution presented it to the grand jury for indictment.[27]

3. All About Women and Its Business Practices.

AAW was a large medical practice; but, the operation of its business left much to be desired. Dr. McCracken, a founding partner, readily admitted that she had no business training or experience.[28]

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21 A129-135,139-144,181-187,188-192.

22 A2873-2877.

23 A88,145-172.

24 A89,136-138.

25 A139-144,181-187

26 Sponaugle was indicted 16 months after she ceased working for AAW. FBI agents never sought or obtained all text messaging between Sponaugle and AAW partners from AAW's cellular phone service provider. Although Sponaugle sought production from AAW's cellular phone service provider of these text messages regarding her credit card purchases, the service provider's retention policy was only one year from the date of the text message transmission preventing Sponaugle from obtaining relevant text messages for her defense. A2335-2336; PTH4/4/22 29-30.

27 A744-746,772,2518; TT380-382,408; PTH4/28/22 2518.

28 A771, TT407.

At its inception in 2001, the business side of AAW was run by a woman who served as office manager.[29] Additionally, one of the original partners, Dr. Molly McBride, had her father, a retired businessman, help with management of the practice by paying bills and writing checks.[30] According to Dr. McCracken and another partner, Dr. Helen McCullough, accountants Ralph Cetrulo, C.P.A. and Julie Morgan assisted with the business of the practice by "…**overseeing all of the finances and doing routine audits on the practice**."[31] This included "…doing a balancing of what the income is, what the bills look like and what was paid out and the bank statements…" as well as making sure things were properly categorized.[32] McCracken testified that the routine audits involved:

> **Looking at all the expenditures and looking at the revenue and making sure everything was in the right place and proper category, and making sure there was nothing that was, you know, that was unauthorized.**[33]

Eventually, AAW's first office manager was replaced by Tom Mazzello, who worked as practice administrator for two years.[34] Mazzello was terminated for employee theft for "…making large cash withdrawals on a credit card."[35] Despite the fact that accountants Cetrulo and Morgan regularly met with Mazzello to oversee his work, they failed to detect his credit card theft.[36] It was Dr. McBride's father, the retired businessman, who discovered Mazzello's credit card theft.[37]

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29 A1048-1049,1286; TT684-685,922
30 A865-866,1049; TT501-502,685.
31 A869; TT505. [Emphasis added.] See also, A772; TT408.
32 A1052; TT688.
33 A869; TT505. [Emphasis added.] See also, A1052; TT688.
34 A685,1602-1603; TT1049,1238-1239.
35 A1049-1050; TT685-686.
36 A1051; TT687.
37 A1049-1052; TT685-688.

Following Mazzello's firing, AAW hired Sponaugle, then a 27 year old medical technician and lab manager pursuing an MBA in healthcare management[38], to be its practice manager.[39] Sponaugle had no prior bookkeeping or accounting experience.[40] Before Sponaugle was hired, Dr. McCullough confirmed AAW did nothing to define what Sponaugle's role would be regarding bookkeeping and accounting and did nothing to determine if Sponaugle had any accounting background.[41] McCullough testified, "[Sponaugle] was getting her master's in **healthcare finance**, so **our assumption** was that she was well qualified to do the job she was being asked to do….,"[42] and that she was knowledgeable about accounting and bookkeeping.[43]

McCullough also testified that she had no knowledge whether accountants Cetrulo and Morgan assessed Sponaugle's knowledge of accounting, bookkeeping, and QuickBooks or whether they provided Sponaugle any training in these areas and in dealing with bank and credit card statements and proper categorization of expenditures.[44] Cetrulo verified that neither he nor his firm assessed Sponaugle's accounting knowledge when she was hired as AAW's practice manager and did not recall if she had any prior accounting experience.[45]

Sponaugle testified that during her hiring process, she was not told she would be responsible for the practice's accounting and bookkeeping and had not been asked if she had any experience in these areas.[46] In fact, she had **no** prior training or experience with the

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38 A1588; TT1224.
39 A1055-1057,1591-1592,1595; TT691-693,1227-1228,1231.
40 A1057; TT693.
41 A1056-1057; TT692-693.
42 A1057; TT693. [Emphasis added.]
43 Id. Sponaugle actually was pursuing her M.B.A. in healthcare management. A1588; TT1224.
44 A1047-1048,1058-1059; TT683-685,694-695.
45 A1288; TT924.
46 A1597,1599-1600; TT1233,1235-1236.

QuickBooks accounting system.[47] Her "training" at AAW consisted of a five minute summary of QuickBooks provided to her by accountant Julie Morgan on "cutting checks".[48] When Sponaugle began using QuickBooks at the time Dr. McBride's father was assisting with bookkeeping, the QuickBooks system already had been set-up and was in operation.[49] She never learned how to set-up a new QuickBooks category, although she later learned how to create subcategories.[50]

From August of 2015 through February of 2018, Sponaugle was first practice manager and then director of AAW. When she was hired, AAW was $800,000.00 in debt.[51] Under her stewardship, AAW retired its $800,000.00 debt; grew to a medical practice with eighteen medical service providers; and, had purchased the real estate where its offices were located instead of continuing to rent office space.[52]

4. Sponaugle's Compensation.

Sponaugle's starting salary was $60,000.00.[53] Eventually, she was named Director[54] in 2010 due to her exceptional job performance and in 2011 was given a compensation package with an annual base salary of $100,000.00 plus summer[55], Christmas, and quarterly bonuses of 5% of her annual salary.[56] In 2011, her total annual compensation exceeded $130,000.00.[57] Additionally, she was provided perks only available to AAW partners including a $600.00 monthly car allowance, health insurance coverage for herself and family,

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47 A1607-1608, 1611; TT1243-1244,1247.
48 A1611; TT1247.
49 Id.
50 A1611-1612; TT1247-1248.
51 A878,1197-1198; TT514,833-834.
52 A1068-1069,1620; TT704-705,1256.
53 A1620; TT1256.
54 A1621; TT1257.
55 A1455,1977-1978; TT1091,1613-1614.
56 A1631-1632,1977-1978; TT1267-1268,1613-1614.
57 A1636; TT1272.

and a partnership interest with the AAW partners in ISIS Med, an entity that operated a medical equipment business and acquired real estate for AAW's offices.[58] Sponaugle was given an AAW corporate credit card to pay for her gasoline and car maintenance expenses. She also used her AAW credit card to pay for AAW's regular business expenses.[59]

5. Sponaugle's Divorce and Bonus Deferral.

In 2014, Sponaugle's marriage began to fail and she assessed her options in case of a divorce. Sponaugle's divorce attorney advised her to request that AAW stop including bonuses in her paycheck since child support calculations would be part of any divorce proceedings.[60] AAW agreed to this arrangement.[61] C.P.A. Cetrulo also was aware of AAW deferring Sponaugle's bonuses from her paycheck.[62]

From 2011 through 2014, Sponaugle averaged over $126,000.00 in annual salary and bonuses.[63] From 2015 through 2017, she averaged only $106,000 in annual earnings.[64] No longer receiving bonuses in her paycheck, Sponaugle experienced a reduction in her compensation of at least $60,000.00 during the three year period from 2014 through 2017, a significant reduction for a soon to be divorced single mother of two children.[65] While after the fact, Dr. McCracken claimed the bonuses withheld from Sponaugle's paycheck were paid at a later time in the form of a family trip to Mexico and a weekend spa trip to Massachusetts that AAW had authorized Sponaugle to charge on her AAW credit card, the combined cost of

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58 A1319,1624-1629; TT955,1260-1265.
59 A923; TT559.
60 A809,1083,1646-1648; TT445,719,1282-1284.
61 A1648; TT1284.
62 A1329-1330; TT965-966.
63 A1636-1637; TT1272-1273.
64 Id.
65 A1648-1649; TT1284-1285. This $60,000.00 difference was based on what Sponaugle was paid from 2011 through 2014, but does not include the additional $45,000.00 in bonuses Sponaugle indicated she was owed. A1879; TT1515.

these trips at under $10,000.00 came nowhere near making up for the bonuses that no longer appeared in Sponaugle's paycheck.[66]

6. Cetrulo, the conflicted accountant, recruits Sponaugle to work for another client's medical practice.

In early 2018, Ralph Cetrulo, AAW's C.P.A., told Sponaugle that another larger medical practice for whom he did accounting work, Christiana Spine Center, ("CSC"), was seeking a chief executive officer to administer its practice.[67] Taking Cetrulo's lead, Sponaugle applied for the position and was hired by CSC at Cetrulo's recommendation.[68] In late February of 2018, Sponaugle announced to AAW partners she was leaving to become practice manager for CSC, whose offices were in the same building as AAW's offices, but on a different floor. This news shocked AAW partners and caused significant concern as to how their practice would be managed without Sponaugle. Although Sponaugle accepted CSC's offer, she agreed to assist AAW in transitioning to a new practice manager by providing three months of free consulting services including coming to AAW each day after her workday at CSC.[69]

7. AAW's Calculation of Alleged Unauthorized Credit Card Purchases.

After Sponaugle tendered her resignation from AAW, Dr. McCracken reviewed Sponaugle's credit card usage. McCracken claimed Sponaugle had used her AAW credit card for unauthorized purchases. Although the government contended this review was very detailed, McCracken testified that when she was provided with the Excel spreadsheet by the accountants, she "…in general, checked – I would say that the majority of my check was like

66 A1756,1766; TT1392,1402.
67 A1320-1323; TT956-959.
68 A959; TT1323.
69 A1875; TT1511.

text messages…."[70] In trying to determine what she believed was an authorized versus an unauthorized purchase, McCracken stated:

> …[I]t was a **first pass**, okay, like just a, hey, **I'm going to give you everything off the top of my head** or in looking at some things and remembering. And then knowing that we were handing that over to somebody also to look at in more depth."[71]

McCracken explained that she "looked at text threads and sometimes a few e-mails."[72] However, she admitted that she did not recall looking into Sponaugle's e-mails other than to determine if there were other concerns.[73] Upon completing her "off the top of my head" review, McCracken gave the Excel spreadsheet to her accountants and law enforcement agents and stated, "I did not make any changes. I did the best I could and handed it over. I didn't do anything after that."[74]

Based only on McCracken's review of the spreadsheet listing Sponaugle's AAW credit card purchases, the government originally alleged unauthorized purchases of $322,652.00.[75] This figure decreased over time. Additional e-mails from Sponaugle's AAW Google e-mail account and EMR's that were obtained through defense Rule 17(c) sub poenas revealed that many of the transactions originally classified as unauthorized had been authorized by AAW partners.

8. Sponaugle's Defense.[76]

Sponaugle presented a defense calling Dr. Anthony Cucuzzella, Dr. Ann Kim, and Dr. Scott Roberts, her then current employers, as well as Carla Sayer, and Diane McWilliams,

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70 A911; TT547.
71 A946-947; TT582-583. [Emphasis added.]
72 A947; TT583.
73 A947; TT583.
74 A953; TT589.
75 A104, ¶ 7.
76 This summary is from the district court's August 15, 2021 post trial opinion. A2668-2672; PTO13-17.

her long-time friends, as character witnesses. They testified to her excellent reputation for being honest, trustworthy, and law-abiding at work and in her community.[77] Sponaugle also called Michele Allen, an employment attorney who represented her after her termination from AAW. Allen described how she had communicated with AAW's counsel to try to work through issues that led to Sponaugle's termination until she learned AAW was not interested in negotiating.[78]

The core of the defense case was Sponaugle's testimony that lasted for more than a full day.[79] Sponaugle explained her understanding of what she was authorized to purchase and why she used her AAW credit card for personal items instead of receiving bonuses from October of 2014 to her termination in March of 2018.

In the defense summation, it was argued that Sponaugle "…believed in good faith, based upon her discussion with the physicians and her tenure at All About Women, that she was permitted and authorized to use her [business] credit card for personal expenditures."[80] Sponaugle argued that those expenditures were intended to make up for her bonuses, which averaged about $21,000 a year, which she did not take while going through her divorce.[81] Sponaugle contended that because she acted in good faith, she did not have an intent to defraud and was not guilty of Wire Fraud.[82]

9. <u>The Prosecution's Summation</u>.

In closing, the government reiterated its claim that Sponaugle "made, ultimately, over 3,000 personal purchases, totaling well over a quarter of a million dollars," on her AAW credit

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77 A1557-1586,1687-1732,1833-1840; TT1193-1222,1323-1368,1469-1476.
78 A1980-1987; TT1616-1623.
79 A1586-1686,1734-1818,1841-1978; TT1222-1322,1370-1454,1477-1614.
80 A2067; TT1703.
81 A2085-2089; TT1721-1725.
82 A2067,2114-2117; TT1703,1750-1753.

card.[83] It also emphasized that the jury was not required to "decide exactly how much money the defendant ultimately stole," but only had to "agree on one time that she acted" to implement her alleged scheme to defraud.[84]

In rebuttal, the government stressed that the jury had to agree on the three elements of Wire Fraud for only "one example" of Sponaugle purchasing something personal on her AAW credit card and "hiding it in QuickBooks."[85]

C. REASONS FOR GRANTING THE WRIT.

The lower courts erred as a matter of law in ruling that F.R.E. 701 permitted the government to present in its case-in-chief lay opinion testimony of a certified public accountant, an accountant, and an FBI forensic accountant without first producing to the defense the required F.R.Cr.P. 16(a)(1)(G) summaries of the opinion testimony of their expert witnesses.

Standard and Scope of Review.

The standard and scope of review utilized by an appellate court in reviewing a district court's decision to admit or exclude evidence is whether the lower court committed an abuse of discretion.[86] However, appellate review of a trial court's interpretation of the Federal Rules of Evidence is plenary[87], which is the standard that must be applied here to the district court's interpretation of F.R.E. 701 allowing the government to present purported lay opinion testimony of its expert witnesses.

Sponaugle preserved this issue by opposing the government's motion.[88]

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83 A2046; TT1682.

84 A2049; TT1685.

85 A2130; TT1766.

86 United States v. Georgiou, 777 F.3d 125, 143 (3rd Cir. 2015); and, Hirst v. Inverness Hotel Corp., 544 F.3d 221, 225 (3rd Cir. 2008).

87 United States v. Georgiou, supra at 143, citing Hurst v. Inverness Hotel Corp., supra, United States v. Serafini, 233 F.3d 758, 768, n. 14 (3rd Cir. 2000), and United States v. Pelullo, 964 F.2d 193, 199 (3rd Cir. 1992). See also, Marra v. Philadelphia Housing Authority, 491 F.3d 286, 287 (3rd Cir. 2007).

88 A40-44; MHT32-36.

Argument.

1. The government's motion in limine.

The government filed a motion in limine that sought to present lay opinion testimony under F.R.E. 701 of its three expert witnesses, a certified public accountant, ("C.P.A."), an accountant/bookkeeper, and an FBI forensic accountant.

In its motion, the government first advised that it intended to call Ralph Cetrulo, C.P.A., "…to testify based on his experience preparing taxes and about what disclosures related to income are required for tax filings."[89] At the pretrial hearing, the government explained Cetrulo's anticipated testimony:

> Ralph Cetrulo… will testify that he prepared Ms. Sponaugle's personal taxes. He will describe what information she provided him regarding her income or gifts for tax purposes, and **he will explain what information he usually seeks from clients in those regards when preparing taxes**. He knows what information is relevant to those determinations through his own personal knowledge as an accountant.[90]

In its motion in limine, the government related that it also intended to present testimony of "AAW's accountants or bookkeepers" in order to "…provide background information about QuickBooks, [and] how it is properly used as a bookkeeping tool…."[91] At the pretrial hearing, the government offered further details regarding the proposed "lay opinion" testimony of the accountant/bookkeeper:

> In addition, Kathy Storm is one of Ralph Cetrulo's associates who was one of All About Women's outside accountants during the time of the time period in the indictment. **She will explain the level of accounting oversight that she was providing for Ms. Sponaugle's work** throughout the relevant time. She will testify that she conducted **monthly**

89 A225; GPTM23, n. 16.
90 A37; MHT29. [Emphasis added.]
91 A225; GPTM23.

> **audits**[92] – I'm sorry – monthly reconciliations of All About Women's books and **she will explain what a reconciliation is and how it differs from more thorough accounting practices like audits**. She knows what a reconciliation and an audit are through her personal knowledge as an accountant.[93]

Lastly, the government's motion indicated that it would call FBI Forensic Accountant Michelle Hoffman to explain her role in the investigation including her review of AAW's bank and credit card records and QuickBooks ledgers. Hoffman additionally would "…provide her own perspective, having completed her own investigative review of financial records…" of whether AAW's QuickBooks ledgers accurately reflected the monetary amounts in their bank and credit card statements.[94] The government described Hoffman's expected testimony as follows:

> [Hoffman] will explain QuickBooks ledgers contain a lots [sic] of data. She will explain how she searched that information to find – searched that data to find information relevant to this case by running auto-generated reports that the parties have stipulated are admissible.
>
> **She will also explain whether the data that she found in All About Women's ledgers was consistent with her own personal knowledge of how QuickBooks is supposed to be used**. She knows how QuickBooks works

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92 Even the government's attorney displayed how easy it is for a layperson to confuse technical accounting terms such as an "audit" and a "reconciliation". The ease with which a layperson could confuse these terms and the confusion that existed at AAW regarding the level of review involved in an audit was seen at trial when Dr. McCracken testified that Cetrulo's accounting firm "…was overseeing all of the finances and doing **routine audits** on the practice." (A772; TT408). [Emphasis added.] Dr. McCullough also testified that Cetrulo's firm was conducting "routine audits". (A1052; TT688). Sponaugle too believed that AAW's accountants had been overseeing her work by conducting monthly "audits" of her bookkeeping. (A1607,2017; TT1243,1653). In its post-trial opinion, the trial judge observed, "The government presented no evidence that Ms. Sponaugle, or the average lay person, understood this distinction [between and audit and reconciliation], much less that Ms. Sponaugle fiendishly exploited these differences to further her fraudulent aims." A2750; PTO95, n. 72.

93 A37-38; MHT29-30.

94 A226; GPTM24.

> because of her own personal knowledge of the forensic accountant and investigator in this case.[95]

The government contended that its experts witnesses would "testify largely as fact witnesses".[96] It further claimed that the opinions of its experts on accounting principles and whether Sponaugle's QuickBooks entries were accurate and "…were in keeping with how QuickBooks is properly used…" constituted proper lay opinion testimony under F.R.E. 701.[97] The government argued that the proposed opinion testimony of its experts was in the "heartland" [98] of what purportedly has been held to be permissible lay opinion testimony. Their position seemingly was that Cetrulo's "personal knowledge" of accounting principles; Storm's "personal knowledge" of technical accounting terms and how QuickBooks operates; and, Hoffman's "personal knowledge" of QuickBooks ledgers and how QuickBooks is used rendered their testimony admissible as lay opinion based on their "personal knowledge" of these technical areas. However, the government's theory of admissibility failed to recognize that each expert's specialized knowledge did not originate from simple everyday life experiences and percipient observations, but rather from specialized formal education and training. [99]

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95 A38; MHT30. [Emphasis added.]

96 A226; GPTM24.

97 A226; GPTM24.

98 A38; MHT30.

99 The government's position ignores one of the chief reasons for the 2000 Amendment to F.R.E. 701, namely, that lay witness testimony based on special knowledge is precluded if the lay opinion testimony "results from a process of reasoning which can only be mastered by specialists in the field", such as is seen here with experts formally trained in accounting principles, as opposed to lay opinion testimony that "results from a process of reasoning familiar in everyday life." See F.R.E. 701, Committee Notes on Rules - 2000 Amendment, citing State v. Brown, 836 S.W.2d 530, 549 (1992).

2. The defense response.

The defense categorically objected to the government's proposed lay opinion testimony by its experts.[100] Sponaugle contended that if the government's experts opined regarding accounting, bookkeeping, and QuickBooks principles, they would be giving opinion testimony concerning topics about which they had technical and specialized knowledge within the scope of F.R.E. 702 outside the ken of a non-expert.[101] Additionally, Sponaugle objected to the "lay opinion" testimony of these expert witnesses since the government failed to provide any written summary of the basis for their opinion testimony, which is a predicate to the admission of expert testimony under F.R.Cr.P. 16(a)(1)(G)[102].[103] Sponaugle claimed the government's motion to allow its experts to provide "lay opinion" testimony was an "end-run" around the expert witness disclosure requirements of F.R.Cr.P. 16(a)(1)(G).[104]

3. The ruling on the "lay opinion" testimony issue.

The trial judge granted the government's motion to permit "lay opinion" testimony by its expert witnesses under F.R.E. 701 concluding that the opinion testimony the government's experts intended to give was based on "personal knowledge" and consistent with the Savage[105] decision, stating:

> While those witnesses do also have specialized and technical knowledge, as the Third Circuit said there, **as long as the technical components of the testimony are based on the lay witness's personal knowledge**, such testimony is usually permissible as lay opinion testimony. And I believe that is the

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100 A267-269; RGPTM3-5.

101 A41-43; MHT33-35.

102 See text of F.R.Cr.P. 16(a)(1)(G) attached as Exhibit "B".

103 A267-269; RGPTM3-5.

104 A40-41; MHT32-33.

105 United States v. Savage, 970 F.3d 217, 286 (3rd Cir. 2020). A46-47; MHT38-39. Savage notes that the 2000 Amendment to F.R.E. 701 was made to prohibit parties from using the Rule to avoid fulfilling the disclosure requirements of F.R.Cr.P. 16. That is exactly what happened here. The government never made expert disclosures mandated by Savage and F.R.Cr.P. 16(a)(1)(G). Id. at 286.

> situation here for the reasons outlined by the government both in writing and in their presentation today.[106]
>
> So, as well, and as the defense concedes, because these witnesses are not being offered as experts[107], they're not being recognized as experts, they are not giving expert opinion, they are under no obligation to provide a written summary of their opinion so there is no violation of the Rules of Evidence or the Rules of Criminal Procedure in that regard.
>
> Clearly, I do not view this as the end-run around the rules or expert disclosures that the defendant alleges.[108]

4. <u>The law</u>.

Witnesses are permitted to testify regarding facts about which they have knowledge. However, a witness may testify based on their opinion, as opposed to testifying based on facts

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[106] A47; MHT39. The lower court accepted the government's flawed argument that if an opinion is based on a witness' "personal knowledge", it automatically should be admitted as lay opinion testimony. In doing so, the trial court failed to grasp the distinction that "personal knowledge" could be gained from <u>both</u> percipient observations made during everyday life experiences as well as from specialized formal education and training. Only the former is admissible as lay opinion testimony under F.R.E. 701. See F.R.E. 701, Committee Notes on Rules – 2000.

[107] The district court's ruling suggested Sponaugle "concede[d]" that the witnesses the government intended to call were <u>not</u> being presented as expert witnesses. This is incorrect! Sponaugle characterized the government's attempt to present expert testimony as lay opinion testimony as an "end-run" around the expert disclosure requirements of F.R.Cr.P. 16(a)(1)(G). A269,40; RGPTM5; MHT32. Sponaugle argued that "…the government is going to be relying on their expertise to… provide testimony about specialized areas of accounting…" that could not be considered to be within their general knowledge. Sponaugle contended their testimony was specialized "…to the point that they should be identified as expert witnesses…" and that the government should have been "…required to treat them as expert witnesses and make the necessary disclosures." A43; MHT35. Sponaugle never conceded that these witnesses were <u>not</u> being called as experts. Sponaugle only agreed with the trial judge's hypothetical that <u>if</u> the district court <u>were</u> to deem the proposed expert testimony "lay opinion testimony", there would be no disclosure requirement under F.R.Cr.P. 16(a)(1)(G). A43; MHT35. Sponaugle never abandoned her claim that the proposed testimony was anything but expert opinion testimony and that F.R.Cr.P. 16(a)(1)(G) disclosures were required.

[108] A47; MHT39. [Emphasis added.]

about which they have personal knowledge, in two instances, as a lay person pursuant to F.R.E. 701 or as an expert pursuant to F.R.E. 702.[109]

Lay opinion testimony requires the proponent to bear the burden of establishing an adequate foundation for such testimony.[110] If such testimony fails to meet any of the three foundational requirements of F.R.E. 701[111], it is inadmissible.[112]

In layman's terms, F.R.E. 701 means that a witness is only permitted to give their opinion or interpretation of an event when they have personal knowledge of it.[113] Such testimony must be rationally based on a "witness's perception".[114] The objective is to put "the trier of fact in possession of an accurate reproduction of the event."[115] Lay opinion testimony is permitted under F.R.E. 701 since it has the effect of describing something that jurors could not otherwise experience for themselves by drawing from a witness' sensory and experiential observations that were made as a first-hand witness to a relevant event.[116] This type of opinion testimony includes "…the appearance of persons or things, identity, the manner of conduct, competency of a person, degrees of light or darkness, sound, size, weight, distance, and an endless number of items that cannot be described factually in words apart from inferences."[117] Other examples include whether a person is intoxicated or the speed of a

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109 United States v. Freeman, 730 F.3d 590 (6th Cir. 2013), citing United States v. Jayyousi, 657 F.3d 1085, 1120 (11 Cir. 2011), Barkett, J., dissenting in part and concurring in part.

110 Id.

111 See text of F.R.E. 701 attached as Exhibit "C".

112 Id.

113 United States v. Fulton, 837 F.3d 281, 291 (3rd Cir. 2016).

114 Savage, supra at 284.

115 Id., citing Freeman, supra at 595.

116 Freeman, supra at 595, citing Jayyousi, supra at 1120.

117 Jayyousi, supra at 1120, quoting F.R.E. 701 Committee Note on Rules – 2000 Amendment, quoting Asplundh Mfg. Div. v. Benton Harbor Eng'g., 57 F.3d 1190, 1196 (3rd Cir. 1995).

vehicle or boat.[118] F.R.E. 701 recognizes the reality that "eyewitnesses sometimes find it difficult to describe the appearance or relationship of persons, the atmosphere of a place, or the value of an object by reference only to objective facts."[119] Accordingly, the Rule permits witnesses "to testify to their personal perceptions in the form of inferences or conclusory opinions.[120]

5. The "lay" opinion testimony of the government's expert witnesses was not based on their "perception" of an event they witnessed in everyday life as required by F.R.E. 701(a), but was based on their technical and specialized knowledge that was within the scope of F.R.E. 702.

Measured against F.R.E. 701, the testimony of C.P.A. Cetrulo, accountant Storm, and FBI forensic accountant Hoffman did not meet the foundational requirements to be admitted as lay opinion testimony. The government indicated: (1) Cetrulo would testify regarding "what disclosures related to income are required for tax filings"[121] and "what information he usually seeks from clients …when preparing taxes"[122]; (2) Storm would testify regarding how QuickBooks is used as a bookkeeping tool, levels of accounting, and how a reconciliation and an audit differ in accounting practices; and, (3) Hoffman would testify regarding her "perspective" of AAW's QuickBooks ledgers and how QuickBooks is supposed to be used.[123]

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118 Jayyousi, supra at 1120, citing, United States v. Marshall, 173 F.3d 13112, 1315 (11th Cir. 1999); and, United States v. Tinoco, 304 F.3d 1088, 1119 (11th Cir. 2002).

119 Fulton, supra at 291, citing United States v. Garcia, 413 F.3d 201, 211 (2nd Cir. 2005).

120 Fulton, supra at 291.

121 A225; GPTM23, n. 16.

122 A37; MHT29.

123 A226,37; GPTM24; MHT30. In its Opening, the government expanded the scope and subject matter of forensic accountant Hoffman's anticipated opinion testimony, telling the jury, "And then finally you will hear from Michelle Hoffman. …She is the forensic accountant at the FBI, and **she will explain to you how she figured out what the defendant's scheme was**…." A682; TT318. [Emphasis added.] The forensic accountant's explanation of what constitutes a "scheme" to defraud, an essential element of Wire Fraud, results from reasoning that only can be mastered by specialists in forensic accounting as opposed to reasoning familiar in everyday life. See F.R.E. 701, Committee Note on Rules – 2000 Amendment, citing State v. Brown, supra at 549.

None of these proposed testimony topics are things that were based on the witnesses' perceptions of something such as the speed of a vehicle, sound, size, weight, distance, and things that cannot be described factually in words.[124] Rather, they are topics of testimony based on technical and specialized knowledge gained through formal education in accounting and as such are excluded from the realm of lay opinion testimony by F.R.E. 701(c). A person does not learn what income disclosures are required for tax filings; what a C.P.A. or accountant would seek from a client when preparing a tax return; how an audit and reconciliation differ and are defined in technical accounting terms; how QuickBooks operates; and, what constitutes a proper QuickBooks bookkeeping entry through perceiving an event. Specialized knowledge of these technical topics is learned through the study of accounting in college and in educational training courses. The experts' testimony about accounting and QuickBooks bookkeeping principles was based on their education, training, and experience in accounting, which falls under the definition of expert testimony in F.R.E. 702.[125] Thus, it should not have been admitted as lay opinion testimony. The district court's interpretation of F.R.E. 701 as allowing the government's experts to provide lay opinion testimony constituted an error of law.

Case law supports Sponaugle's contention that the district court committed legal error by interpreting F.R.E. 701 to allow the government's experts to offer lay opinion testimony. In the Sixth Circuit case of United States v. White[126], Defendant White and other co-defendants were indicted on charges that included Medicare Fraud and Wire Fraud. Before trial, the defendants requested a list of expert witnesses the government planned to call and

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124 F.R.E. 701 Committee Note on Rules – 2000 Amendment, quoting Asplundh Mfg. Div. v. Benton Harbor Eng'g., supra at 1196.

125 See text of F.R.E. 702 attached as Exhibit "D".

126 United States v. White, 492 F.3d 380 (6th Cir. 2007).

a description of their opinions and the bases for their opinions.[127] The government provided a list of witnesses, but no information about the opinions to be given. The defendants moved in limine to exclude the expert testimony arguing that the government had failed to comply with the notice requirements of F.R.Cr.P. 16. The district court denied the defendants' motion in limine and permitted the government's witnesses to testify ruling that the witnesses in question "'weren't experts per se, [but] they were people who worked in the [Medicare] industry,' as well as fact witnesses."[128]

At trial, the government presented witnesses who discussed their understanding of concepts in Medicare statutes and regulations as they related to the case. One witness, an audit reimbursement supervisor employed by one of Medicare's fiscal intermediaries, testified to her understanding of technical terms used in the Medicare Provider Reimbursement Manual, including "cost-related organization," "related," and "control."[129] The government also called other Medicare auditors to testify about their understanding of Medicare concepts. During the defense case, White and his co-defendants called their own expert witness, a certified fraud examiner, to counter the testimony of the government's fiscal intermediary witnesses.[130] White was found guilty of all charges.[131]

On appeal, White challenged the district court's decision to allow the government to call witnesses with specialized knowledge to offer lay opinion testimony at trial and the government's failure to provide sufficient notice pursuant to F.R.Cr.P. 16(a)(1)(G) of the bases of the opinions of the government's experts.[132]

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127 Id. at 389.
128 Id.
129 Id.
130 Id. at 389, 407.
131 Id. at 389.
132 Id. at 398.

Prior to trial, the defendants had requested a summary of any expert testimony that the government intended to offer under F.R.E. 702, 703, or 705 including a description of the witnesses' opinions, the bases for their opinions, and the witnesses' qualifications.[133] The government responded with only generalized information about these witnesses' anticipated testimony and a one sentence summary of their qualifications. The district court ruled, as previously noted, that witnesses working as Medicare auditors were not experts per se, but were just people who worked in the industry. At trial, the government questioned these witnesses about their work experience and background. The trial court permitted them to testify as lay witnesses and present purported lay opinion testimony under F.R.E. 701.[134]

In White, the Sixth Circuit found that the district court erred in allowing the Medicare auditors to testify as lay witnesses since their testimony was based on technical or specialized knowledge within the scope of F.R.E. 701(c).[135] This decision relied on the Advisory Committee's Notes to the 2000 Amendment to F.R.E. 701.[136]

The Court in White additionally concluded that the Medicare program operated within a complex regulatory scheme and that the average lay person, including Medicare

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133 Id. at 399.

134 Id.

135 Id. at 400.

136 Id. at 401, citing F.R.E. 701, Committee Notes on Rules – 2000. The Sixth Circuit also cited United States v. Ganier, 469 F.3d 920, 922 (6th Cir. 2006), holding it was proper to exclude testimony of an IRS Special Agent computer specialist's expert testimony at trial for government's failure to provide adequate notice pursuant to F.R.Cr.P. 16(a)(1)(G). White, supra at 401. In Ganier, the government argued the computer specialist would give lay opinion testimony obtained by running commercially available software programs and reciting the results. Id. at 925-926. The appellate court rejected this claim ruling "'such an interpretation would require [the witness] to apply specialized knowledge and familiarity with computers and the particular forensic software well beyond that of the average layperson.'" White, supra at 401, citing Ganier, supra at 925-926.

beneficiaries, did not possess a working knowledge of Medicare reimbursement procedures.[137] The fiscal intermediary witnesses relied on specialized knowledge acquired over years of experience as Medicare auditors in testifying to procedures inherent in the Medicare program as well as their understanding of various terms.[138] The Sixth Circuit determined that a lay person would not have been able to make sense of the exhibits that the fiscal intermediary witnesses clarified and linked together based on the reasoning process they employed daily in their highly specialized jobs.[139] The government made no attempt to demonstrate that the witnesses' lay opinions were the result of a reasoning processes familiar to the average person in everyday life rather than by technical and specialized knowledge, training, and education. Thus, the appellate Court held that the district court erred[140] in allowing the fiscal intermediary witnesses to testify as experts without first being qualified.[141]

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137 Id. at 403, citing United States v. Strange, 23 Fed.Appx. 715, 717 (9th Cir. 2001), observing testimony regarding Medicare regulations and reimbursement procedures was "entirely appropriate for an expert".

138 Id. at 403-404.

139 Id. at 404.

140 Id.

141 See also, Id. at 401-402, 403, n. 10, citing: United States v. Cruz, 363 F.3d 187, 189 (2nd Cir. 2004), holding district court "failed to fulfill its gatekeeping functions" by allowing DEA Agent called as fact witness to testify as though an expert regarding meaning of phrase used in a drug transaction since government had not provided notice of this expert testimony under F.R.Cr.P. 16; United States v. Garcia, supra at 215 (2nd Cir. 2005), ruling DEA Agent's testimony that defendant was a partner receiving cocaine from a supplier was inadmissible under F.R.E. 701 since agent's testimony was not that of an average person in everyday life, but rather that of a law enforcement officer with considerable specialized training and experience in drug trafficking; and, noting that final foundational requirement of F.R.E. 701(c) was to prevent a party from conflating expert and lay opinion testimony giving an aura of expertise to a witness without satisfying reliability standard of F.R.E. 702 and pretrial disclosure requirements of F.R.Cr.P. 16; and, JGR, Inc. v. Thomasville Furniture Industries, Inc., 370 F.3d 519, 526 (6th Cir. 2004), vacating damage award and remanding for new trial on damages where district court erroneously admitted under F.R.E. 701 testimony of a certified public accountant and lawyer on lost profits and business value incurred by plaintiff following defendant's alleged breach of contract; and, holding that although challenged witness rendered accounting services to plaintiff company, he had no ownership stake in company, nor did he serve as an officer or director and because witness relied solely on information provided by plaintiff company to calculate projected loss, he lacked basis

The testimony of the government's experts in this case is virtually identical to the testimony of the Medicare auditors and fiscal intermediary witnesses in White. Cetrulo and Storm testified about the accounting definitions of an "audit" and a "reconciliation" and the differences between the two[142] just as the Medicare auditors in White testified regarding the definitions of the Medicare terms "cost-related organization," "related," and "control.".[143] Hoffman, the FBI forensic accountant, interpreted and explained the accounting reports that she generated from AAW's QuickBooks program and relied on her specialized training, education, and years of experience in forensic accounting to do so[144] just as the Medicare fiscal intermediary witnesses in White "…relied to a significant degree on specialized knowledge acquired over years of experience as Medicare auditors in testifying to the structure and procedures inherent in the Medicare program…."[145] Additionally, in Ganier[146], the testimony of a computer expert, who gave purported lay opinion testimony based on running commercially available software programs then obtaining and reciting the results was held to be expert opinion testimony. This computer expert's testimony parallels the testimony given by Hoffman, the government's forensic accounting expert, regarding AAW's QuickBooks accounting and bookkeeping program since Hoffman's testimony was based on her running the QuickBooks program, obtaining the results, and reciting and interpreting them for the jury.[147] Given the similarity between the testimony of the accounting experts

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necessary or personal perception to offer lay testimony; and, furthermore, accountant in question contracted to provide services to plaintiff company because of his expertise, which he acquired not through personal involvement in company, but through formal education and training.

142 A886-887,975- 978; TT1250-1251,1339-1342.

143 White, supra at 389.

144 A1395-1399; TT1031-1035.

145 White, supra at 403-404.

146 Ganier, supra at 925-926.

147 A1396-1405; TT1032-1041.

here and that of the experts in the Sixth Circuit cases of White and Ganier, the district court erred in deeming the testimony of Cetrulo, Storm, and Hoffman admissible as lay opinion testimony since it was based on technical and specialized knowledge, training, and education.

6. The trial court's ruling permitting the government's experts to offer lay opinion testimony allowed the government to avoid the mandatory expert witness disclosures required by F.R.Cr.P. 16(a)(1)(G).

The Committee Notes on Rules – 2000 Amendment to F.R.E. 701 expressly indicate that F.R.E. 701 was amended to eliminate the risk of proffering an expert witness in lay witness clothing.[148] The 2000 Amendment sought to ensure that a party would not evade the expert witness disclosure requirements set forth in F.R.Cr.P. 16(a)(1)(G) "…by calling an expert in the guise of a layperson."[149] This is exactly what Sponaugle claimed the government was doing when arguing that the government's motion to allow its experts to provide "lay opinion" testimony was simply an "end-run" around the disclosure requirements of F.R.Cr.P. 16(a)(1)(G).[150]

Sponaugle objected to the government's failure to provide F.R.Cr.P. 16(a)(1)(G) disclosures regarding the proposed lay opinion testimony of its experts in her response to the government's motion in limine and during the pretrial motions hearing.[151] Sponaugle also made a formal written discovery request pursuant to F.R.Cr.P. 16 requesting that the government disclose any evidence that it may present at trial "under Federal Rules of

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148 See F.R.E. 701, Committee Notes on Rules – 2000. See also, United States v. Savage, supra at 284, citing United States v. Shaw, 891 F.3d 441, 453 (3rd Cir. 2018), and quoting Hirst v. Inverness Hotel Corp., supra at 227.

149 See F.R.E. 701, Committee Notes on Rules – 2000, citing Joseph, Emerging Expert Issues Under the 1993 Disclosure Amendments to the Federal Rule of Civil Procedure, 164 F.R.D. 97, 108 (1996), noting "that there is no good reason to allow what is essentially surprise expert testimony," and that "the Court should be vigilant to preclude manipulative conduct designed to thwart the expert disclosure and discovery process."

150 A269,40-41; RGPTM5; MHT32-33.

151 A269,40-41; RGPTM 5; MHT32-33.

Evidence 702, 703, or 705" in a written response that included the identity/name of the witness, the witness' qualifications, any report or summary prepared by the witness, the specific substance of any opinions and conclusions to be made by the witness, and the basis and reasons for the witness' opinions.[152] Other than the incredibly abbreviated and general summaries of the experts' anticipated testimony in the government's motion in limine and at the pretrial hearing, which amounted to a mere several sentences, the government failed to provide Sponaugle with the type of robust and substantive expert disclosure contemplated and mandated by F.R.Cr.P. 16(a)(1)(G).[153]

In White, the government similarly provided extremely brief and general disclosures regarding the expected testimony of their Medicare auditor and fiscal intermediary witnesses. They disclosed the witnesses' names, titles, and employers. For two of the witnesses, the government indicated their experience with Medicare cost report auditing. However, no resumes were produced for these witnesses. The government's disclosure of their anticipated testimony was limited to just five sentences.[154] The Sixth Circuit astutely

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[152] A2878-2881. [Sponaugle's F.R.Cr.P. 16 discovery request at pages 1-2, ¶ 3.]

[153] A225-226,40-41; GPTM23-24; MHT29-30.

[154] In White, government's F.R.Cr.P. 16(a)(1)(G) notice regarding its fiscal intermediary witnesses stated:

> They are familiar with Medicare rules, regulations, and procedures with respect to cost reporting and costs allowable as reimbursement to providers of medical services to Medicare patients. Costs reimbursed under the Medicare program include the reasonable costs actually incurred but excludes any costs unnecessary to the efficient delivery of needed health services. "Related Party" costs are only allowed for the actual cost to the party related to the provider if otherwise reasonable and necessary. A related party may include a person or entity which has significant influence over the provider. Medicare is keenly interested in knowing whether there were any costs attributable to a "related party" in order to determine what costs would be properly allowed to the provider.

observed that the government's F.R.Cr.P. 16(a)(1)(G) disclosure "…did not describe in great detail 'the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications.'"[155] The Court further noted that the drafters of the 1993 amendment to F.R.Cr.P. 16 required mandatory expert disclosure "'to minimize surprise that often results from unexpected testimony… and to provide the opponent with a fair opportunity to test the merit of the expert's testimony through focused cross-examination.'"[156] To enable these goals, the expert disclosure and summary should inform the opposing party whether the expert will provide only background information on an issue or whether the witness will offer an opinion.[157] A summary of the bases of an expert's opinion must be provided even where an expert did not prepare a formal report and should include "any information that might be recognized as a legitimate basis for an opinion under Federal Rule of Evidence 703."[158]

Based on its analysis of the government's F.R.Cr.P. 16(a)(1)(G) expert disclosure in White, the appellate Court concluded that "the government failed to comply with Rule 16's minimal notice requirements."[159] The Court found that the government's F.R.Cr.P. 16 disclosure only included "a vague avowal of experience concerning cost report issues and Medicare audits, along with the witnesses' titles, employers, and contact information," and that the disclosure "made no attempt to quantify the witnesses' experience, nor to attach so much as a resume."[160] White observed that the government's expert summary, "[i]n short, [] left Defendants no better prepared to challenge the witnesses' qualifications at trial."[161]

White, supra at 405-406.

155 Id. at 406.

156 Id., citing F.R.Cr.P. 16 Advisory Committee's Note (1993).

157 Id.

158 Id.

159 Id.

160 Id.

161 Id. at 407.

Additionally, the Court held that that the summary of the witnesses' expected testimony was lacking. Although the summary informed the defense that the government's expert witnesses would provide background testimony relevant to Medicare rules, regulations, and procedures, it merely listed the general subject matter to be covered, but failed to identify what opinion the expert would offer on those subjects.[162]

The expert disclosures of the prosecution in this case were the functional equivalent of those in White, a list of the experts' names and a few short sentences describing the general topics about which the experts would testify. In light of the strikingly similar and entirely non-substantive F.R.Cr.P. 16(a)(1)(G) disclosures by the government in White and in the case at bar, the Sixth Circuit's analysis should be followed and the conclusion should be made that the government failed to provide sufficient expert disclosures to Sponaugle.[163]

7. The government's failure to provide sufficient expert witness disclosures that complied with F.R.Cr.P. 16(a)(1)(G) unfairly prejudiced Sponaugle and negatively affected her substantial rights.

Although the White decision found that the government failed to provide a sufficient F.R.Cr.P. 16(a)(1)(G) expert disclosure to the defense, this error did not warrant a reversal. When evidence is erroneously admitted, reversible error only occurs if it affects a defendant's substantial rights.[164] An error affects substantial rights if it is likely to have had "any

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162 Id.

163 In his post-trial opinion, the trial judge was highly critical of Hoffman's forensic analysis describing it as "unpersuasive", "inconsistent", "not conservative", too heavily reliant on the views of the AAW physicians by giving "extra weight to their initial conclusions", and largely based on assumptions. A2706-2715; PTO51-60. Had a proper F.R.Cr.P. 16(a)(1)(G) disclosure been made, Sponaugle undoubtedly would have been in a significantly better position to counter these shortcomings instead of being forced to address them "on the fly" having learned of the bases of Hoffman's opinions for first time on direct examination. A44; MHT36.

164 Hirst v. Inverness Hotel Corp., supra at 228, citing Becker v. ARCO Chemical Co., 207 F.3d 176, 205 (3rd Cir. 2000). See also, White, supra at 404, citing F.R.E. 103(a). [In Hirst, this Court ruled that lay witness could not offer opinion testimony that required technical or specialized knowledge of what security measures could have been taken to prevent a crime.]

substantial effect" on a defendant's conviction.[165] An error is harmless "only if it is highly probable that the error[] did not affect the outcome of the case."[166] In evaluating whether an error affected the verdict, a court must consider the relation of the wrongfully admitted evidence to the critical question for the jury, the importance of the evidence, and the closeness of the case.[167] In close cases, it is difficult to conclude that "it is 'highly probable' that erroneously admitted evidence did not affect the jury's verdict."[168] Courts "are especially loath to regard any error as harmless in a close case since in such a case **even the smallest error may have been enough to tilt the balance**."[169]

In White, the Court found the erroneously admitted lay opinion testimony and lack of sufficient expert disclosure to be harmless since the defendants did not demonstrate how the insufficient notice impeded their ability to present a defense, did not suffer unfair surprise, and did not show how the verdict would have been different if they had a more detailed summary of the fiscal intermediaries' testimony.[170] The Court also pointed out that the defendants even presented their own expert witness, a certified fraud examiner, to counter the testimony of the government's fiscal intermediary witnesses.[171] While these factors existed in White rendering the trial court's erroneous decisions regarding lay opinion testimony and F.R.Cr.P. 16(a)(1)(G) mandatory expert witness disclosures harmless, these same errors were not harmless in Sponaugle's case.

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165 White, supra at 404, citing United States v. Whittington, 455 F.3d 736, 740 (6th Cir. 2006).

166 Hirst v. Inverness Hotel Corp., supra at 228, citing McQueeney v. Wilmington Trust Co., 770 F.2d 916, 917 (3rd Cir. 1985).

167 White, supra at 404, citing Field v. Trigg County Hosp., Inc., 386 F.3d 729, 736 (6th Cir. 2004).

168 Id., citing Hester v. BIC Corp., 225 F.3d 178, 185 (2nd Cir. 2000).

169 Id. at 228-229.

170 Id.

171 Id. at 406-407.

Here, the erroneous admission of improper "lay" opinion testimony together with the government's failure to provide a complete F.R.Cr.P. 16(a)(1)(G) disclosure negatively affected Sponaugle's ability to present a full defense and deprived Sponaugle of her Fifth Amendment right to due process and her Sixth Amendment right to a fair trial. The government did identify the names and employment information of its trinity of expert witnesses. It also listed in incredibly abbreviated fashion the topics about which its experts would testify, namely: the type of information accountants seek in preparing tax returns[172], how QuickBooks is properly used in bookkeeping[173], the accounting definition of the terms "audit" and "reconciliation"[174], and the forensic accountant's "own perspective" of what AAW's QuickBooks records reflected.[175] However, other than naming its experts and providing vague blurbs about their topics of testimony, the government disclosed no details and nothing of substance that Sponaugle could have provided before trial to a defense accounting expert to evaluate any specific theory the government's experts might have had concerning her actions in making bookkeeping entries at AAW. Without a more definitive disclosure by the prosecution, Sponaugle was left to guess just exactly what theories the government's experts would propound based on the literally thousands of credit card transactions at issue and the tens of thousands of pages of documents produced in discovery.[176]

At the pretrial hearing, Sponaugle expressed concerns regarding the insufficient expert disclosures indicating, "…typically in litigation, you find out what the side with the burden of proof has and then you retain your expert and you get your opinion as to where it

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172 A225,37; GPTM23, n. 16; MHT29.
173 A225; GPTM23.
174 A37-38; MHT29-30.
175 A226; GPTM24.
176 A41; MHT33.

stands."[177] Sponaugle further explained that a defense forensic accountant had not been retained because the defense had no idea what the specific testimony of the government's experts would be given the paucity of detail the government disclosed about their experts' testimony.[178] Had a proper expert disclosure been made, Sponaugle could have had a defense expert evaluate it and counter it at trial.[179] She was deprived of this ability by the lack of a F.R.Cr.P. 16(a)(1)(G) disclosure.[180] This unfairly impeded her ability to present a defense.[181]

Sponaugle further submits that the insufficient expert disclosure caused unfair surprise. At the pretrial hearing, she argued that without advance expert disclosures, she would be faced with interpreting the testimony of the government's expert witnesses "on the fly" and for "the first time when they're on the stand" emphasizing that this would be highly prejudicial.[182]

Additionally, although in its motion and at the pretrial hearing, the government indicated that FBI forensic accountant Hoffman would testify regarding "how QuickBooks is

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177 A44; MHT36.

178 A41-42,44; MHT33-34,36.

179 It would have been impractical, unduly burdensome, and prohibitively expensive for Sponaugle to have given a defense forensic accounting expert the tens of thousands of pages of financial records produced with a request to "figure out" what the government's experts might determine the prosecution's theory of the case to be and then assess the soundness of that possible theory and evaluate if it could be countered successfully. A49-51; MHT41-43.

180 In its post-trial opinion, the trial judge noted "the government did not identify any particular number of fraudulent transactions, or an amount or fraudulent loss it intended to prove," and "**the Indictment does not identify even a single credit card purchase transaction as being allegedly fraudulent.**" A2668, 2675; PTO13,20. [Emphasis in original.] This lack of specificity regarding the alleged offense conduct and Hoffman's analysis of AAW's QuickBooks data is what made it difficult, if not nearly impossible, to prepare to defend against Hoffman's undisclosed opinions.

181 White held that defendants' ability to present a defense was not hindered by improper lay opinion testimony and lack of sufficient notice of expert testimony since defendants presented a witness, a certified fraud examiner, to counter testimony of the fiscal intermediary witnesses. Id. 407.

182 A44; MHT36.

supposed to be used" and her "perspective"[183] of AAW's QuickBooks ledgers, the government later significantly expanded the scope of Hoffman's testimony from what it initially described. In its Opening, the government touted to the jury that Hoffman was "a forensic accountant at the FBI" and that "…[Hoffman] will explain to you what the defendant's scheme was and how she figured out how much and what the defendant stole."[184]

Before Openings, no formal notice pursuant to F.R.Cr.P. 16(a)(1)(G) had been produced by the government indicating that, in Hoffman's opinion, Sponaugle's bookkeeping entries constituted a "scheme" to defraud, which is an element of Wire Fraud. This belated notice of the substance of Hoffman's testimony also included Hoffman's conclusion regarding Sponaugle's state of mind, that Sponaugle had an intent to defraud, since Hoffman would testify as to how much Sponaugle allegedly "stole."[185] Pursuant to F.R.E. 704(b)[186], expert witnesses are prohibited from opining as to a defendant's state of mind. In its Opening, the government told the jury that Hoffman would do just that. This ran afoul of what would constitute proper expert witness testimony in a criminal trial.

The government's experts were critical to their case. Their testimony regarding Sponaugle's tax returns, her alleged understanding of the difference between an audit and a reconciliation, and her entries into AAW's QuickBooks program was advanced to suggest to the jury that Sponaugle made intentional misrepresentations: (1) when not declaring as

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183 A226,38; GPTM24; MHT30.

184 A682; TT318. See also, United States v. Freeman, supra at 598, citing United States v. Grinage, 390 F.3d 746, 751 (2nd Cir. 2004), and cautioning that agent presenting lay opinion testimony to a jury possessed an aura of expertise and authority that increased risk jury would be swayed improperly by agent's testimony and imprimatur rather than by relying on its own interpretation of the evidence. In Freeman, an FBI Agent provided lay opinion testimony with no expert disclosure interpreting a small number of 23,000 recorded phone conversations he had reviewed. Freeman, supra at 594-595.

185 A318; TT682.

186 See text of F.R.E. 704 attached as Exhibit "E".

taxable income her personal spending on her AAW credit card; (2) when advising AAW partners that her bookkeeping work was being "audited" each month by Cetrulo and Storm; and, (3) when making QuickBooks entries for personal purchases on her AAW credit card to recoup her substantial yearly bonuses that AAW agreed to defer when Sponaugle was litigating post-divorce child support issues with her ex-husband. Sponaugle's defense was that she acted in good faith in making personal purchases on her AAW credit card since AAW partners had approved the deferral of her annual bonuses from her paycheck to assist in her child support litigation and since many of the purchases on Sponaugle's AAW credit card that initially were deemed fraudulent actually were shown to have been approved by some or all of the AAW partners/physicians.[187]

In the absence of sufficient expert disclosures, Sponaugle was left to guess the exact theory of the government's wire fraud case and the specific acts arising from the thousands of credit card transactions the government claimed were proof of Sponaugle's alleged intent to defraud. Producing thousands of pages of documents, but not disclosing what acts constituted the alleged offense conduct is tantamount to trial by ambush and defies all notions of due process and what constitutes a fair trial. This strategy, which embodies the essence of unfair surprise, precluded Sponaugle from having a defense forensic accountant assess the government's theory of the case before trial and testify at trial to refute the government's claim that Sponaugle engaged in a scheme to defraud.[188]

The opinion testimony of the government's experts was not only closely related, but essential to the critical questions of whether Sponaugle engaged in a scheme to defraud or

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187 A2715-2726; PTO60-71.

188 The fact that defendants in White were able to present the testimony of an expert witness, a certified fraud examiner, in their defense was a factor in finding that legal errors were harmless. White, supra at 406-407.

whether she acted in good faith. The final inquiry in the harmless error analysis assesses the closeness of the case. Here, the case was a close one.

In the Indictment, the government alleged that Sponaugle engaged in over 2,100 unauthorized personal credit card transactions totaling $322,652.00.[189] However, in its Opening, the government told the jury that Sponaugle had "swiped" her AAW credit card over 3,000 times and had made "over a quarter million dollars" of unauthorized expenditures.[190] Before post-trial evidentiary hearings, the government alleged that Sponaugle's fraudulent credit card usage totaled $230,160.54 and Hoffman agreed that the alleged loss amount she had calculated had dropped by nearly $100,000.00.[191] The government conceded that it failed to prove what Hoffman told the jury, that the loss was "well over a quarter of a million dollars."[192] The alleged loss amount was uncertain and constantly decreasing.

Sponaugle's good faith defense was based on the authorization that she had been given by AAW partners/physicians to cease being paid bonuses in her paycheck and to recoup her bonuses through use of her AAW credit card. The district court found in its post-trial opinion that Sponaugle's testimony that her bonuses "were taken as the credit card use" since the AAW physicians "told me to take it as I need it" was "clear and credible".[193] The lower court also commented on the way the prosecution tried this case noting, "…the government claimed thousands of fraudulent transactions, but told the jury, consistent with the jury instructions, it need only find a single transaction of fraud…" in order to sustain a conviction.[194] In the

189 A104, ¶ 7.
190 A673,674-675,680,682-683; TT309,310-311,316,318-319.
191 A2290 2292,2706-2707; TT110,121; PTO51-52.
192 A2707,1446,1535; PTO52; TT1082,1171.
193 A2729; PTO74.
194 A2698; PTO43.

conclusion of its post-trial opinion, while recognizing that the jury had found Sponaugle guilty of the Wire Fraud, the trial judge stated "...the government did not come close to proving that Ms. Sponaugle defrauded AAW of hundreds of thousands of dollars" and that Sponaugle "did not intend any enormous amount of fraud."[195] All of these factors observed by the trial judge are undeniably indicative that although the jury convicted Sponaugle of wire fraud, that this was a close case and it cannot be said that it is highly probable that the erroneously admitted lay opinion testimony of the government's experts did **not** affect the jury's verdict.

CONCLUSION

Accordingly, Sponaugle's Petition for Writ of Certiorari must be granted.

Respectfully submitted,

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195 A2574; PTO99.