IN THE

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Docket No. 93-5517

UNITED STATES OF AMERICA,

Appellee,

vs.

PETER HELLER,

Appellant.

Criminal Action (NJDC Crim. No. 93-00065)

On Appeal from Judgment of Conviction in the United States District Court for the District of New Jersey.

Sat Below: Honorable Nicholas H. Politan, U.S.D.J., and a Jury

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BRIEF ON BEHALF OF APPELLANT

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On the Brief

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

JURISDICTIONAL STATEMENT

Jurisdiction is founded upon 28 U.S.C. §1291 as counsel certifies that this is an appeal from a final judgment of conviction entered by the United States District Court for the District of New Jersey.

RELATED CASES AND PROCEEDINGS

This Court denied appelant's application for bail pending appeal, on September 30, 1993. [21a.]

ISSUES PRESENTED

1. Did the court below err in permitting the government to prove a case which departed so substantially from the indictment that it amounted to an unconstitutional constructive amendment of the indictment?

Raised: 147a; 117a

Ruled upon: 147a-148a; 115a; 117a; 192a.

Standard of review: Plenary

a. Did the court below err in permitting the government to prove a case which, if not a constructive amendment, was a prejudicial variance from the crime charged in the indictment?

Raised: 147a

Ruled upon: 147a-148a.

Standard of review: Plenary

2. Did the court below err in permitting the government to introduce Diane Kochanski's expert's report despite the goverrnment's failure to designate same as an expert report pursuant to Fed. R. Crim. P. 16(a)(1)(D)?

Raised: 111a

Ruled upon: 111a.

Standard of review: Abuse of discetion

3. Did the court below err in permitting Diane Kochanski to testify beyond the scope of her expertise in Social Security Administration rules, policies and procedures?

Raised: 102a; 109a; 116a-117a.

Ruled upon: 113a-114a; 117a.

Standard of review: Abuse of discretion

4. Was it reversible prosecutorial misconduct for the government improperly to refer, on cross-examination, and despite repeated sustained objections, to the defense's failure to call a third-party witness who was uniquely under the government's control?

Raised: 149a; 154a-155a.

Ruled upon: 154a-155a.

Standard of Review: Plenary

STATEMENT OF THE CASE

A. Nature of the Case

This is an appeal from a final Judgment of Conviction in United States District Court for the District of New Jersey.

B. Procedural History

On or about February 10, 1993, appellant was indicted by the federal grand jury for the District of New Jersey for alleged theft of federal monies in violation of 18 U.S.C. §641 (count one); failure to disclose material information to the Social Security Administration ("SSA") in violation of 42 U.S.C. §408 (counts two and three); and filing a false statement with SSA in violation of 42 U.S.C. §408 (count four). [3a-9a[3].]

On May 28, 1993, after a four-day jury trial before the Honorable Nicholas H. Politan, U.S.D.J., appellant was found guilty of all four counts of the indictment. [17a.]

On August 17, 1993, appellant was sentenced to 18 months in a federal correctional institution. Judgment

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[3]References to pages of the Appendix are designated by "__a" herein.]

was entered on August 20, 1993. [10a.] At sentencing, the district court also denied appellant's motion for bail pending appeal; the order denying such motion was filed September 13, 1993. [19a]

On August 25, 1993, notice of appeal was filed. [1a.]

On September 17, 1993, appellant surrendered to the Federal Correctional Institution in Springfield, Missouri, to begin serving his sentence.

On September 30, 1993, this Court denied appellant's application for bail pending appeal. [21a.]

STATEMENT OF FACTS

Appellant is a 46-year-old [22a] police officer who served on the Police Department of the Port Authority of New York and New Jersey for approximately 14 years. [23a.]

In August 1984, appellant was involved in an off-duty motor vehicle accident which caused severe trauma to his kidneys. [24a.] On or about April 30, 1985, appellant received a kidney transplant at the University of Minnesota Hospital in Rochester, Minnesota. [25a.]

At the recommendation of personnel at the University of Minnesota Hospital [26a], appellant applied on April 5, 1985 for disability benefits from the Social Security Administration ("SSA") at the SSA district office in Jersey City, New Jersey [27a.]. Appellant was interviewed by SSA employee Lorraine Butts, who filled out several SSA forms during the interview [28a.]. Appellant testified at trial that he disclosed to Butts his employment as a Port Authority police officer as well as his part-time job as a security consultant with the Union City, New Jersey Board of Education. [29a-31a.] The SSA form completed by Butts [32a] listed only appellant's law enforcement job as his relevant employment, but nevertheless listed an amount of year-to-date income which was significantly greater than his police job alone and approximated his total income from both his police job and his part-time job. [33a.]

On June 18, 1985, at Butts's suggestion, appellant applied for SSA benefits for his two children. [36a-39a.] On or about August 6, 1985, the SSA awarded disability benefits to appellant for himself and on his children's behalf retroactive to January 1985. [40a-41a.]

Appellant testified at trial that he returned to full-time employment with Union City in September 1985 and that he notified SSA of that fact by telephone and by mail on a form sent to him for that purpose.[4] [43a-52a.] SSA denied receiving this form. [53a-54a.] Appellant testified that he understood he was entitled to continue to collect disability benefits under SSA work rules despite his return to work. [55a.]

Thereafter, in 1986 and 1987, appellant took a number of part-time jobs loading trucks, coaching football at Bayonne High School, supervising an urban youth summer work program and working as an environmental coordinator for a local hospital. Appellant testified that while he did not understand that he had an obligation to report these part-time jobs, he did report to SSA his return to work full-time as a security consultant in September 1985 and as a police officer in April 1987. [56a-61a.]

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[4]As a result of an employment dispute with the Port Authority, appellant did not return to his full-time job as a police officer until approximately April 1987. [42a.]

Similarly, in August 1987, appellant reported to SSA an anticipated change in his full-time employment status. Appellant had planned to take a new full-time job with CDS Trucking Co., and reported that position to SSA on an SSA form dated September 1, 1987. The job offer fell through, however, and appellant never worked for CDS Trucking. [62a-65a.] It was this disclosure of an anticipated job to SSA which formed the basis for the false-statement charge in count four of the indictment. [8a-9a.]

Shortly after appellant reported his anticipated new employment with CDS Trucking, he received notice from SSA that he was coming up for his first formal review, including a medical examination. [66a.] In response, he completed an SSA form disclosing his full medical and work history since he began receiving disability benefits, and hand-delivered it to the SSA office in Jersey City. Appellant testified he was told at the time that he would continue receiving benefits for a nine-month trial work period ending in late 1988. [67a-77a; 193-199a.] SSA denied receiving this form. [78a.]

When appellant continued receiving checks in 1988 after the nine-month period, he stopped cashing them for a time and contacted SSA. [79a-81a.] When the checks continued to come in 1989, appellant went to the SSA office in Jersey City and asked that the checks be stopped. [82a.] SSA then sought to recover the "overpayment" of benefits to appellant, ultimately leading

to the instant criminal charges because of appellant's neglect in timely pursuing administrative remedies. At no time did SSA seek to recover from appellant in a civil action. [83a-97a.] It was undisputed at trial that it was appellant's actions in 1989 which caused the SSA to stop issuing benefit checks. [98a-99a.]

At trial, the government's case consisted primarily of the testimony of Diane Kochanski, the operations supervisor of the SSA office in Jersey City, New Jersey. [100a.] Kochanski admitted on the stand that she had no personal knowledge of appellant or his dealings with SSA. [101a.] Over appellant's objection, she was qualified as an expert in SSA rules, regulations and procedures, and through her, the government introduced appellant's SSA file as a public record. [102a-115a; 191a.] Kochanski testified, over defense objection [116a-117a], based solely on her review of appellant's SSA file, and on a computer runoff prepared by her based on that file [117a-127a]. Despite a defense request for all expert reports under Fed. R. Crim. P. 16(a)(1)(D) and a court order requiring the same, the computer runoff and "payment summaries" [128a-133a] prepared by Kochanski, and also introduced at trial over objections, were not turned over to the defense and designated as expert reports. In fact the government represented to the district court that Kochanski did not prepare any report. [111a.]

Based on her reading of appellant's SSA file, Kochanski testified: that appellant did not report his second job with the Union City Board of Education in his initial SSA interview in April 1985 [134a]; that appellant never reported his return to full-time employment in 1985 [135a]; and that he never reported his employment history in 1987 [136a-137a]. Kochanski as well offered her opinion that since appellant's SSA file did not contain copies of the SSA forms appellant produced as evidence that he did report his employment, they must have been fabricated for use at trial and were "phony." [138a.]

Through Kochanski's testimony, the government presented a critically different theory of appellant's criminal liability from that articulated in the indictment. The charging paragraphs of the indictment alleged as follows:

> 11. For the period March 1986 through April 1989, the defendant Peter Heller received disability insurance benefits personally and on behalf of his dependents of approximately $39,013.50 which neither he nor his dependents were entitled to receive because of defendant's return to employment in 1985.
>
> 12. Between March 1986 and April 1989 at Hudson County in the District of New Jersey, and elsewhere, the defendant
>
> PETER HELLER
>
> knowingly and willfully did embezzle, steal, purloin and convert to his own use approximately $39,013.50 in monies of the United States.

[4a-5a (emphasis added).] Similarly, counts two and three alleged that Heller fraudulently secured payment of SSA benefits totalling $39,013.50 for himself and his children between March 1986 and April 1989. [6a-7a.]

At trial, however, the government elicited through Kochanski's testimony that appellant's receipt of benefits beginning in August 1985, retroactive to January 1985, was unlawful and that appellant had therefore unlawfully obtained a total of approximately $55,000 in benefits on behalf of himself and his children. [139a-140a.]

Kochanski went on to explain that she did not participate in drafting and presenting the indictment to the grand jury, and that, in her opinion, the indictment's theory of appellant's criminal liability was incorrect. In her opinion, the indictment incorrectly gave appellant the benefit of a nine-month trial work period to which he was not entitled. In Kochanski's opinion, appellant was never entitled to benefits because he was collecting wages from a part-time job at the time of his original SSA application in April 1985. [141a-146a.] Therefore, according to Kochanski, the indictment should have charged appellant with unlawfully receiving benefits from August 1985 (retroactive to January 1985) forward. It also should have charged him with unlawful receipt of $54,965.40 in benefits, not $39,013.50.

The court below rejected appellant's argument that the government's proofs of different amounts, dates and underlying theory of criminality at trial amounted to a fatal constructive amendment of or variance from the indictment. The district court ruled that the language in the charging paragraphs of the indictment was not dispositive because other paragraphs recited appellant's employment with the Union City Board of Education as early as January 1985 and at the time of his application for benefits in April 1985. The court ruled that appellant was on sufficient "notice" of the government's proofs and was not prejudiced by the differences between the indictment and the trial evidence. [147a-148a.]

Despite the new prosecution theory which would permit the jury to convict appellant for his alleged false statements in his initial 1985 SSA interview, the government did not produce SSA employee Lorraine Butts, who had conducted the initial interview and who had prepared much of the original documentation permitted into evidence through Kochanski. Prior to trial, Butts had refused to be interviewed by defense counsel and, in response to a defense trial subpoena, had said she would be out of state on "vacation" and unavailable as a defense witness. [149a-153a.]

Appellant testified in his own behalf at trial. On cross-examination, the government asked him a series of improper questions suggesting that appellant's counsel had

spoken to Butts prior to trial and had subpoenaed her, but had not called her as a defense witness because her testimony about his initial SSA interview would contradict his own. The district court sustained appellant's objection to each of the improper questions. [154a-155a.] The defense rested its case that day. [156a.]

That evening, the government "located" Butts in Ohio. She was flown to New Jersey the next morning and was produced as a rebuttal witness over appellant's objection. [149a-153a; 157a.] Contrary to the damaging suggestions in the government's improper cross-examination of appellant the previous day, Butts testified that she had no recollection of defendant or her several dealings with him. [165a-167a.] She testified generally as to her routine practice in conducting SSA disability interviews. She testified that she never would have disregarded or overlooked employment information disclosed to her by an applicant or neglected to note such information on the SSA interview form. [158a-167a.]

On cross-examination, Butts admitted she had refused a pretrial defense interview, had said she would be unavailable for trial and had flown in that morning to testify on the government's behalf on rebuttal. [168a-171a.]

ARGUMENT

POINT I

THE COURT BELOW ERRED IN PERMITTING THE GOVERNMENT TO PROVE A CASE WHICH DEPARTED SO SUBSTANTIALLY FROM THE INDICTMENT THAT IT AMOUNTED TO AN IMPERMISSIBLE AMENDMENT OF THE INDICTMENT OR A PREJUDICIAL VARIANCE FROM IT.

A critical disparity between an indictment and the government's theory and proofs at trial amounts to an unconstitutional constructive amendment of the indictment. It has been recognized since Ex Parte Bain, 121 U.S. 1 (1887) that "the party can only be tried upon the indictment as found by such grand jury, and especially upon all its language found in the charging part." See also, United States v. DeCavalcante, 440 F.2d 1264, 1270-71 (3d Cir. 1971). The prohibition against constructive amendment -- amendment of an indictment other than by the grand jury itself -- was reaffirmed in Stirone v. United States, 361 U.S. 212, (1960) and in Russell v. United States, 369 U.S. 749, (1962). As DeCavalcante made clear, the indictment under which the accused is prosecuted must remain the same one brought by the grand jury, rather than becoming "through interpolation the indictment of the prosecutor, or of the court." 440 F.2d at 1271, quoting 8 Moore, Federal Practice §7.04 (Cipes ed. 1970). Constructive amendment is fatal error mandating reversal. Stirone, supra at 219.

An indictment is deemed constructively amended when its charging terms are altered, either literally or in effect. In contrast, a variance occurs when the charging terms in the indictment are left unaltered, but the evidence offered at trial proves facts materially different from those alleged in the indictment. DeCavalcante, 440 F.2d at 1271; Gaither v. United States, 413 F.2d 1061, 1071 (D.C. Cir. 1969); United States v. Weiss, 752 F.2d 777, 787 (2d Cir. 1985). Constructive amendments to indictments are prejudicial per se, as opposed to variances which are subject to the harmless-error rule and which require a showing of prejudice to the defendant. United States v. Crocker, 568 F.2d 1049, 1060 (3d Cir. 1977); United States v. Garquilo, 554 F.2d 59 (2d Cir. 1977). A constructive amendment such as the one in the instant case is per se violative of the Fifth Amendment because it impermissibly "broadens the possible bases for conviction from those contained in the indictment by proving an offense not fully contained in the indictment." U.S. v. Rosin, 892 F.2d 649, 651 (7th Cir. 1990).

A. The government's case so substantially varied from the indictment as to work an amendment of the indictment, which is prejudicial per se and mandates a reversal.

In the present case, the government constructively amended the indictment at trial in several key respects:

- While the indictment was premised on the theory that appellant was entitled to SSA

> charged, together with the faulty instruction on count two, destroyed Leichtnam's fifth amendment right to be tried only on the charges contained in his indictment.
>
> Obviously, the government could easily have drawn up Leichtnam's indictment to charge him simply with having used or carried "a firearm." But it did not do so, and the description it gave of the gun in the indictment, "to wit a Mossberg rifle, Model 250CA with no serial number," was not merely surplusage. That is true as a matter of law. By the way the government chose to frame Leichtnam's indictment, it made the Mossberg [gun] an essential part of the charge and limited the bases for possible conviction to the Mossberg.

Id. (footnote omitted; emphasis added). The conviction was reversed as clear error.

In United States v. Beeler, 587 F.2d 340 (6th Cir. 1978), a county official was indicted under the Hobbs Act for accepting bribes of $2,500 per month month from January, 1973 through November, 1975. The district court permitted testimony that he had also received payments on two occasions in July 1972. Unlike the trial courts in the above-cited cases, however, the district court in Beeler actually attempted to cure the constructive amendment with a jury instruction that the jury should adhere to the indictment. The Sixth Circuit nonetheless reversed the conviction, finding that the constitutional infirmities of the constructive amendment were not cured by the instruction. Id. at 343.

Here, as in Stirone, Leichtnam and Beeler, the government was permitted to add a new, independent basis for appellant's conviction which appeared nowhere in the indictment. The indictment charged that appellant's receipt of benefits after March 1986 was illegal because he had failed to report his return to work. The government proved, however, that appellant was never entitled to benefits and that the relevant conduct was not appellant's failure to report his return to work, but his failure to report his employment status on his initial SSA application five months earlier.

The court below, like the trial courts in Leichtnam and Stirone, attempted to cure the defect by instructing the jury generally as to what the indictment charged and the statutory definitions of the legal terms, leaving it unclear whether the jury was limited to the specific acts charged in the indictment or could convict on the uncharged conduct. This is precisely what the Constitution forbids. See Stirone, 361 U.S. at 219 (under court's general charge jury may have convicted defendant on unindicted conduct); Leichtnam, 948 F.2d at 380-1 (no way of knowing whether jury based verdict on charged or broadened bases); United States v. Adams, 778 F.2d 1117 (5th Cir. 1985) (indictment for use of false name did not include use of false address; conviction reversed because jury may have convicted for either).

The trial court repeatedly overruled appellant's objections to the uncharged theory and conduct and repeatedly rejected appellant's attempts to limit the government's theory of proof to the indictment. Indeed, appellants' counsel raised this objection immediately after the government's opening. [182a-188a.] This colloquy followed:

> [Assistant U.S. Attorney] MS. BUMB: What will come out at trial, however, is that the defendant's failure to conceal initially from the beginning resulted in an amount of about $55,000.
>
> THE COURT: Why didn't you charge it that way? Why did you charge it this way? Why didn't you just say he was working when he mailed the application he shouldn't have made the application and he stole $55,000.
>
> MS. BUMB: Judge, the answer to that is I don't know. . . .

[185a.]

> [Defense Counsel] MR. KROVATIN: If I may? Paragraph 12 is what we call the charging paragraph in the indictment. That repeats paragraph 11. Between March '86 and April '89.
>
> THE COURT: Do you want to limit her proofs to that period of time in terms of money?
>
> MR. KROVATIN: No, your Honor. I want to dismiss the indictment. She opened on the fact that my client['s] lies on the application in April of 1985 was the fraud, was the beginning of the fraud, that he wasn't entitled in April of '85. She didn't limit herself in her opening [to] March of '86.

> THE COURT: Read Paragraph 10. Read Paragraph 10.
>
> MR. KROVATIN: That is not the charging paragraph.
>
> THE COURT: Not an artfully drawn indictment. I won't dismiss it. Not artfully drawn. I won't dismiss it. There is enough in there to know you are charged with wrongful conduct from April '85 through whatever the date in '89. . . .

[187a.]

Contrary to the trial court's interpretation, the charging paragraphs of the indictment cannot be fairly read to charge wrongful conduct from April 1985 forward. Indictments are not subject to the same "notice pleading" rules of liberal interpretation that civil complaints are. The mere fact that the April 1985 date was innocuously refered to in another paragraph of the indictment does not permit the government to constructively amend the charging paragraphs of the indictment at trial.

Nevertheless, the trial court consistently overruled appellant's objections based on its misguided view that "notice" was sufficient. As the trial court candidly stated at sentencing, "There is no question -- I think the record is clear there was a variance between the Indictment and the proofs. . . . But there was nothing . . . presented in the proofs which did not put you on notice as to . . . what the testimony was going to be." [189a.]

However, as the District of Columbia Court of Appeals wrote in Gaither, the issue is "not that the variance deprived the defendant of notice . . .," but that it usurped the grand jury's function. 413 F.2d at 1072 (emphasis added). "For all we know," wrote the Fifth Circuit in Adams, responding to similar trial court reasoning:

> [T]he grand jury may have considered and rejected a charge on false residence. Our role, however, does not call for speculation as to what the grand jury might have done. What the grand jury did was to indict Ernest Adams solely for the use of the name Ernest Cole and nothing else. When the government and trial court went beyond the grand jury's charge, they constructively and impermissibly amended the indictment, thereby denying Adams a substantial right under the fifth amendment.

Id. at 1125 (footnote omitted.) See also, DeCavalcante, supra, 440 F.2d at 1272. Appellant's conviction must be reversed because of this critical error by the court below.

B. The government's case materially varied from the indictment, resulting in impermissible prejudice and requiring reversal.

As DeCavalcante and the cases cited supra make clear, a constructive amendment of an indictment is per se reversible without the need for a showing of prejudice to the defendant. Nevertheless, even if the government's proofs are found to have varied from the indictment, the prejudice to appellant which resulted also amounted to reversible error. The defendant was forced to defend against a

constantly shifting theory of liability at trial. Not until the government's opening did the defense know the government's new theory: that defendant was never entitled to benefits at any time. The indictment and all of the discovery suggested that the government had conceded the defendant's entitlement to benefits from January 1985 to March 1986.

1. Appellant was prejudiced by the variance because appellant could not adequately prepare for the government's "new" case.

The variance between indictment and trial proofs prejudiced appellant in two significant respects. First, it put a premium on Kochanski's "expert" testimony (given over appellant's objection) that appellant was never entitled to benefits. Appellant had no pretrial notice of the government's intent to offer Kochanski as an expert witness, nor was her report designated as an expert's report. [111a; 128a-133a.] Appellant was unable to produce an "expert" of his own at trial to counter Kochanski's opinion. If the government had merely sought to prove the case charged in the indictment, no expert opinion or interpretation of SSA work rules would have been required. Either appellant reported his return to work in September 1985 or, as alleged in the indictment, he did not. A whole area of testimony prejudicial to appellant was, to the defense's surprise, permitted to be put before the jury.

2. **Appellant was prejudiced by the variance because the testimony of Lorraine Butts should have been part of the government's "new" case.**

Secondly, the government's new theory put great emphasis for the first time on the initial SSA interview of appellant by Lorraine Butts. Had appellant known of this, the defense might not have been so accommodating of her "vacation" plans in response to his trial subpoena, and likely would have risked calling her as a hostile witness.

But rather than call Butts -- the best witness as to the operative facts -- on its case-in-chief, the government chose instead to rely on Kochanski's opinion testimony, divined from appellant's SSA file, that appellant did not disclose his second job to Butts in the initial SSA interview. In a cruel irony, the government later cross-examined appellant on his failure to call Butts, and implied incaccurately and prejudicially that if called, she would contradict his testimony. In fact, the government called Butts ostensibly on rebuttal but actually to give testimony that did not contradict appellant at all and which belonged in the government's case-in-chief. Putting her on the stand "in rebuttal" prejudiced appellant.

3. **Appellant was prejudiced by the variance because under the government's "new" case, appellant's SSA file should not have come in on Diane Kochanski's testimony.**

The impropriety surrounding Butt's testimony had a ripple effect on the whole case. Appellant's SSA file [116a-118a], and certainly the summary prepared by Kochanski [128a-133a], were not properly admissible as public records under Fed. R. Evid. 803(8). [191a.] Under Rule 803(8)(c), public records are not admissible in criminal cases where they constitute factual findings resulting from an investigation made pursuant to law unless the author herself testifies. United States v. King, 613 F.2d 670, 673 (7th Cir. 1980) (in embezzlement prosecution, SSA forms admissible only where claims representatives testified at trial).

Here, Butts was not called by the party offering her statements into evidence. By the time she was called as a rebuttal witness, the damage in admitting the hearsay-laden file had been done. The government should have called Butts on its case in chief, when she could have testified and been cross-exmained about the initial SSA interview. Only because of the government's moving-target theory of prosecution was the file able to come in, improperly, through Kochanski.[5]

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[5]Appellant submits that the government's improper cross-examination of appellant regarding the defense's failure to call Lorraine Butts was also a source of prejudice arising from the variance. That issue is discussed more fully in Point III, infra.

The net effect was that the government changed the theory of the case and made it appear, in the way it tried the case, that it had proved more than it did. At the same time, the government unfairly, and without a good-faith basis, attacked appellant's credibility for failing to call Butts, a witness uniquely under the government's control.

The prejudice to the appellant of this trial conduct rises to the level of reversible error when viewed in the context of the amendment of the indictment -- for without the broadening of the government's case, it is unlikely that Butts would have been called by either side. Even if the disparity between indictment and proofs is considered a variance as opposed to an amendment, the appellant was unfairly prejudiced by the variance in view of the prejudicial manner in which the government tried its "new" case.

POINT II

APPELLANT'S CONVICTION SHOULD BE REVERSED BECAUSE THE EXPERT'S REPORT OF DIANE KOCHANSKI WAS NOT DESIGNATED AS SUCH TO THE DEFENSE, DESPITE A DISCOVERY ORDER UNDER RULE 16, AND BECAUSE KOCHANSKI WAS, OVER OBJECTION, IMPROPERLY PERMITTED TO TESTIFY BEYOND THE SCOPE OF HER EXPERTISE.

The government's key witness, was permitted to testify over defendant's objection as an expert on Social Security Administration rules, practices and procedures. The government's intention to offer Kochanski as an expert was unknown to the defense, which made a request for discovery pursuant to Fed. R. Crim. P. 16 before trial requesting all expert materials.

More importantly, Kochanski was permitted to testify, again over objection, to matters far beyond the scope of her testimony far exceeded her supposed expertise. Kochanski ultimately offered her opinion on the credibility of appellant, the authenticity of evidence proferred by him, the interpretation of Social Security regulations, and ultimately the entire theory of the government's case.

A. The failure of the government to supply the defense with pretrial notice of their intention to call an expert witness and to designate as expert's reports Diane Kochanski's findings, results, reports or examination prepared for the prosecution substantially prejudiced the defense.

The government substantially prejudiced the preparation of appellant's defense by not providing pretrial notice that it planned to call Diane Kochanski as an

expert witness on SSA policy, procedures, rules and regulations and by not providing the defense with the results or reports of an examination of appellant's SSA file undertaken by Kochanski, which the government knew would be used in its case in chief. Pursuant to Fed. R. Crim. P. 16, any such results, report or analysis was required to be turned over to the defense prior to trial.[6]

The government's expert witness, Kochanski, testified that she examined appellant's SSA computer file, and went on to base her testimony on a summary she generated.[7] The fact that this report would be proffered at trial as an expert's report was not only material to the preparation of appellant's defense, but the government intended to and did use such analysis as evidence in its

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[6]Rule 16(a)(1)(D) provides as follows:

REPORTS OF EXAMINATION AND TESTS. Upon request of a defendant, the government shall permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and which are material to the preparation of the defense or are intended for use by the government as evidence in chief at the trial.

[7]Although the government represented to the court below that no expert report was rendered [111a], Kochanski testified on direct examination that she prepared a "summary of [her] findings" based on her review of appellant's SSA file. [117a-133a.]

case in chief at trial. Clearly, the government's duty to disclose the results or reports of analysis was triggered pursuant to Rule 16(a)(1)(D).

The defense was substantially prejudiced by the government's failure to designate the results or reports of the government's only expert witness. Kochanski was the cornerstone of the government's case, testifying to the documents in appellant's SSA file, their interpretation, and SSA procedures, as well as application of SSA statutes, rules, and regulations to appellant's case. Where an expert's testimony would have the effect, because of surprise, of critically underwriting the value of cross-examination virtually meaningless, a conviction gained largely by that expert testimony should be reversed. See, Smith v. Estelle, 602 F.2d 694, 700 (5th Cir.), aff'd 451 U.S. 454 (1981) (surprise testimony of psychiatrist in sentencing phase made preparation of effective cross-examination impossible).

Without proper pre-trial disclosure that Kochanski's summary would be tendered as an expert's report, the defense could not prepare adequately its cross-examination of her, nor obtain and prepare an adequate expert for the defense to rebut Kochanski's testimony. Because the government failed to disclose Kochanski's computer summary of appellant's SSA file prior to trial, the defense was substantially prejudiced.

B. Kochanski's testimony went far beyond her purported expertise, and severely prejudiced appellant.

Kochanski was admitted as an expert on SSA rules, practices and procedures. Her testimony went far beyond that, however -- indeed, far beyond the indictment -- including her conclusion that appellant's and his family's benefits "should never have been awarded." [141a-146a; 200a-203a.] Kochanski ultimately and improperly gave her legal opinion that she didn't even agree with the indictment [143a; 201a.], and, later, that potentially exonerating defense documents were "backdated," "phoney," and a "cover-up." [138a.] An expert may not, as Kochanski did here, examine materials produced in discovery and draw inferences from the record which result in legal, not expert opinion. Mid-State Fertilizer v. Exchange National Bank, 877 F.2d 1333, 1340 (7th Cir. 1989). Kochanski's testimony is reminiscent of the testimony which led to a reversal in United States v. Scop, 846 F.2d 135 (2d Cir. 1988). In Scop, an expert on securities trading testified that the defendants had engaged in "manipulation," a "scheme to defraud," and "fraud." Id. at 140. Like Kochanski, the expert in Scop "made no attempt to couch the opinion testimony at issue in even conclusory factual statements," id. at 140, but merely concluded that appellant was guilty of fraud and embezzlement. In the present case, as in Scop, Kochanski's testimony was highly prejudicial and should be grounds for reversal.

More critically, Kochanski's testimony as to the authenticity of evidence proferred by appellant -- specifically, that the defense's documents were "backdated," "phony," and "a cover-up" -- was improper since Kochanski was not qualified as an expert in authenticating documents. Under Fed. R. Evid. 702, an expert's opinion is admissible only if it draws on his expertise. As Judge Easterbrook wrote in a leading Seventh Circuit case, Mid-State Fertilizer v. Exchange National Bank, 877 F.2d 1333, 1340 (7th Cir. 1989), the expert may not "cast aside his [expert's] mantle and bec[o]me a shill" for the prosecution. Rather, "determinations of credibility are for the jury." United States v. Richter, 826 F.2d 206, 208 (2nd Cir. 1987), and "experts may not offer opinions on relevant events based on their personal assessment of credibility of another witness's testimony," Scop, 846 F.2d at 142. Kochanski's opinion as to the authenticity of appellant's evidence, much less than he was engaged in a "cover-up," was improperly admitted and substantially prejudiced appellant.

POINT III

THE PROSECUTION'S IMPROPER REFERENCES AND COMMENTS ON THE FAILURE OF THE DEFENDANT TO CALL A WITNESS WAS PREJUDICIAL TO THE DEFENDANT AND WAS PROSECUTORIAL MISCONDUCT, MANDATING REVERSAL.

During cross-examination of appellant at trial, the government asked appellant if he knew the whereabouts of Butts, a former SSA claims representative. Counsel for the defendant vigorously objected to the question and the objection was sustained. [154a-155a.]

However, the prosecutor did not change her line of questioning after the objection was sustained. On the contrary, she proceeded to ask a series of questions about whether the defendant had released Butts from a subpoena, or knew Butts was on vacation in Ohio, or if the defense had failed to call Butts as a witness because her testimony would not corroborate appellant's, or would be negative. Defense objections to each question were sustained. [Id.] However, the prosecutor's repeated "questions", which actually amounted to improper unsworn testimony, suggested that appellant somehow knew Butts would give negative testimony and implied that the defendant knew Butts was unavailable as a witness to refute his testimony. These highly prejudicial statements were made intentionally with no good faith basis to believe they were true. As such, they require the reversal of appellant's conviction.

A prosecutor's remarks regarding the credibility of a witness, if based on evidence not addressed at trial, requires reversal per se. United States v. DiLoreto, 888 F.2d 996, 999 (3rd Cir. 1989). It is also reversible error to put prejudicial material before the jury on cross-examination, where the witness denies the statement and no one is called to verify it. Philadelphia & Reading Railway Co. v. Bartsch, 9 F.2d 858 (3rd Cir. 1925); United States v. Brown, 519 F.2d 1368, 1370 (6th Cir. 1975); St. Clair v. Eastern Air Lines, Inc., 279 F.2d 119, 122 (2d Cir. 1960). A fortiori this is true when the questions are objected to, and the objections sustained. Indeed, by continuing a line of questioning barred repeatedly by the court below, the prosecutor engaged in another species of misconduct warranting reversal. See, e.g., Locken v. United States, 383 F.2d 340, 341 (9th Cir. 1967) (prosecutor's persistence in eliciting testimony ruled inadmissible is grounds for reversal).

Furthermore, no party may imply to the jury that a witness was not called because that witness's testimony would be unfavorable, unless the witness in question was peculiarly available to the party to produce. United States v. Williams, 739 F.2d 297 (7th Cir. 1984); United States v. Martin, 696 F.2d 49 (6th Cir. 1983); United States v. Wilkins, 422 F. Supp. 1371 (E.D. Pa.), aff'd 601 F.2d 578 (3rd Cir. 1979). Here Butts was a government employee who had refused a pretrial interview with defense

counsel (a fact which was known to the prosecutor) and responded to a defense subpoena by saying she would be on vacation. [149a-153a.] If anything, Butts was uniquely under the government's control.

Moreover, under United States v. Beeler, 587 F.2d 340, 343 (6th Cir. 1978), cert. denied, 454 U.S. 860 (1981), the government must obtain an advance ruling from the court before requesting the jury to draw an inference that a potential witness was not called by he defense because the witness' testimony would be unfavorable.[8]

The case at bar is substantially similar to United States v. Beeler, supra. In Beeler, the prosecutor argued that potential witnesses were not called by the defense because the witnesses would not have corroborated the defendant's testimony, which the Sixth Circuit Court of Appeals held was reversible error. Id., 587 F.2d 343. In the case at bar, while not arguing to the jury, the prejudice caused by the government's repeated objection is the same, and the impropriety is the same as that of the government in Beeler. Further, in Martin, supra, the

---

[8]Indeed, the court below refused to grant the government an instruction to the jury regarding the defendant's failure to call a witness as grounds for inferring that the witness' testimony would be unfavorable. [192a.] In essence, the prosecution, through its unrelenting, heavy-handed questioning alleging facts not in evidence regarding Butts's testimony, was allowed to leave an impression with the jury which it was later precluded from doing directly.

Court also noted "a strong implication, rather than a direct request, could under some circumstances invite the jury to draw an adverse inference". Martin, 696 F.2d at 52. Here the invitation was wide open.[9]

Under these circumstances, the impermissible statements by the government about the failure to call Butts, when it was clear the government had access and control over her, cannot be considered harmless error, and are likely to have affected the jury's verdict.

---

[9]The government may argue that the prosecutor's improper comments were in effect "cured" by Butts being called to testify in rebuttal by the government. To the contrary, the government's dramatic overnight air operation only served to underscore the false impression that she was readily available to all parties. Butts's brief testimony did not change the impression that the defendant did not call her because her testimony would be unfavorable. In fact, the impression left by the prosecutor's bombastic questioning of appellant regarding Butts likely colored the jurors' perception of Butts's actual testimony as negative to Peter Heller, when in reality it was essentially neutral. The government's comments regarding Butts were not minimal, nor of minimal impact.

CONCLUSION

For the foregoing reasons, appellant respectfully requests that the Court reverse his conviction and grant him a new trial.

Respectfully submitted,

LOWENSTEIN, SANDLER, KOHL,
FISHER & BOYLAN
A Professional Corporation

By: Gerald Krovatin

DATED: November 1, 1993

CERTIFICATION

I hereby certify that I am a member of the Bar of this Court.

Gerald Krovatin

DATED: November 1, 1993

CERTIFICATE OF SERVICE

I hereby certify that I have caused to be served upon Edna B. Axelrod, AUSA, counsel for the government, one copy of the brief and one copy of the appendix by certified mail, return receipt requested, on Novemer 1, 1993.

Gerald Krovatin

Dated: November 1, 1993
Roseland, New Jersey

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA,	:	Hon. Nicholas H. Politan, U.S.D.J.
Plaintiff,	:	Criminal No. 93-65 (NHP)
vs.	:	
PETER HELLER,	:	NOTICE OF APPEAL
Defendant.	:	

TO: WILLIAM T. WALSH, CLERK
United States District Court
Martin Luther King Jr., Federal
Building and U.S. Court House
50 Walnut Street
P.O. Box 999
Newark, New Jersey 07101

RENEE BUMB, ASSISTANT U.S. ATTORNEY
United States Attorney's Office
970 Broad Street
Newark, New Jersey 07102

DEAR SIR AND MADAM:

NOTICE IS HEREBY given that Peter Heller, defendant above-named, hereby appeals to the United States Court of Appeals for the Third Circuit from the final judgment of conviction and sentence entered in this action on the 20th day of August, 1993.

LOWENSTEIN, SANDLER, KOHL,
FISHER & BOYLAN
A Professional Corporation
Attorneys for Defendant

By: Gerald Krovatin

DATED: August 23, 1993

LOWENSTEIN, SANDLER,
KOHL, FISHER
& BOYLAN
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AO 245 S (Rev. 4/90) Sheet 1 - Judgment in a Criminal Case

ORIGINAL FILED
AUG 20 1993
WILLIAM T. WALSH, CLERK

United States District Court

District of NEW JERSEY

UNITED STATES OF AMERICA
V.
PETER HELLER 16862050
(Name of Defendant)

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: 93-65(NHP)

Gerald Krovatin, Esq.
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____.
☒ was found guilty on count(s) one, two, three and four after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 USC 641	Converting Monies of the U.S.		1
42 USC 408 (a) (4)	Social Security Fraud		2 and 3
42 USC 408 (a)(3)	False Statements to Social Security Admini		4

Certified as a true copy on
This Date: 8/17/93
By _____
( ) Clerk
(X) Deputy

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____, and is discharged as to such count(s).
☐ Count(s) _____ (is)(are) dismissed on the motion of the United States.
☑ It is ordered that the defendant shall pay a special assessment of $ 200.00, for count(s) one, two, three and four, which shall be due ☒ immediately ☐ as follows:
($50.00 on each count)

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 138-38-8745

Defendant's Date of Birth: 9-22-46

Defendant's Mailing Address:
69 Monona Avenue
Rutherford, New Jersey 07070

Defendant's Residence Address:

August 17, 1993
Date of Imposition of Sentence

Signature of Judicial Officer

HON. NICHOLAS H. POLITAN
Name & Title of Judicial Officer

8/20/93
Date

Defendant: Peter Heller
Case Number: 93-65

Judgment—Page 2 of 5

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 18 months on counts 1, 2 and 3 all counts to run concurrently with each other;.
On count 4- 18 months to run concurrently with sentence imposed on counts 1, 2 and 3.

16862050

☐ The court makes the following recommendations to the Bureau of Prisons:

☐ The defendant is remanded to the custody of the United States marshal.
☐ The defendant shall surrender to the United States marshal for this district.
  ☐ at _____ a.m. / p.m. on _____.
  ☐ as notified by the United States marshal.
☑ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons,
  ☐ before 2 p.m. on 09/17/93.
  ☐ as notified by the United States marshal.
  ☐ as notified by the probation office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy Marshal

Defendant: Peter Heller
Case Number: 93-65

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years. This ocnsists of three years on each of counts 1, 2 and 3, all such terms to run concurrently with each other.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

☑ The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

☐ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

☐ The defendant shall not possess a firearm or destructive device.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Defendant: Peter Heller
Case Number: 93-65

RESTITUTION AND FORFEITURE

RESTITUTION

☑ The defendant shall make restitution to the following persons in the following amounts:

Name of Payee	Amount of Restitution
Social Security Administration	$55,415.40

Payments of restitution are to be made to:

☐ the United States Attorney for transfer to the payee(s).
☑ the payee(s).

Restitution shall be paid:

☐ in full immediately.
☐ in full not later than _____.
☐ in equal monthly installments over a period of _____ months. The first payment is due on the date of this judgment. Subsequent payments are due monthly thereafter.
☐ in installments according to the following schedule of payments:

Any payment shall be divided proportionately among the payees named unless otherwise specified here.

FORFEITURE

☐ The defendant is ordered to forfeit the following property to the United States:

Defendant: Peter Heller
Case Number: 93-65

STATEMENT OF REASONS

☑ The court adopts the factual findings and guideline application in the presentence report.

OR

☐ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: 15

Criminal History Category: 1

Imprisonment Range: 18 to 24 months

Supervised Release Range: 2 to 3 years

Fine Range: $ 4,000. to $ 40,000.

☑ Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitution: $ 55,415.40

☐ Full restitution is not ordered for the following reason(s):

☑ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

☐ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

The sentence departs from the guideline range

☐ upon motion of the government, as a result of defendant's substantial assistance.

☐ for the following reason(s):