

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Case No. 06-CR-00192-LTB

UNITED STATES OF AMERICA,

Plaintiff,

v.

WILLIAM ORR

Defendant.

**RULE 29 MOTION FOR JUDGMENT OF ACQUITTAL
AND RULE 33 MOTION FOR A NEW TRIAL**

Pursuant to Fed.R.Crim.P. 29 and 33, Defendant William Orr, respectfully submits his **RULE 29 MOTION FOR JUDGMENT OF ACQUITTAL AND RULE 33 MOTION FOR A NEW TRIAL**, and in support, Mr. Orr states:

1. After an eight week trial, Mr. Orr was on May 28, 2008, convicted by a jury on multiple counts of the indictment in this case. Orr states there are numerous grounds on which judgments of acquittal should be entered on some of the counts, and that the convictions must be vacated because of numerous trial errors.
2. The case involves charges of wire and mail fraud, tax evasion, failure to file tax returns, and false statements to and fraud on the government, and the activities on which the charges are based go back more than 15 years.
3. The defendant has requested but has not yet received any of the transcripts of important trial testimony and of closing argument, to supply the court with

important detail which supports Mr. Orr's motions. Mr. Orr requests leave to supplement or amend these motions when those transcripts are available, which is now estimated to be October 3, 2008.

4. Mr. Orr raises numerous issues in these motions, including: insufficient evidence as a matter of law on the question of whether Orr misrepresented the NIPER test results, and on whether [Orr knew] there were proven benefits to using the Orr technology. Convictions on Counts 1 through 15, and on Count 17, rest on this question, and must be vacated or acquittals entered. Conviction on Count 16 depends upon impermissible inferences and is directly contradicted by the evidence produced at trial. The government deliberately misstated and misrepresented the evidence in closing argument and misled the jury regarding Counts 23-28, requiring those convictions be vacated. The unrefuted evidence presented at trial precludes conviction on counts 23, 24, and 25. Judgment of acquittal should enter on the tax evasion counts. The government presented unfounded and unsupported allegations against Mr. Orr which attacked his character, resulting in a jury biased against him, as evidenced by the jury ignoring much of the evidence and as indicated by the jury convicting Mr. Orr on charges where *no evidence of guilt* was produced. The government used "non-experts" William Marshall, Thomas Reed, Vincent Buckmaster, and Shavayam Ellis, to attack the science of Orr's technology through implied expert testimony, in a manner which made it impossible to either cross-examine or refute these non-experts. This was improper and should not have been allowed. The verdicts

show that the jury relied on the testimony of the government's non-experts to conclude that Orr misrepresented the NIPER test results and that Orr's technology was a hoax, which reveals the jury attached the value of "expert opinion" to the testimony of the "non-experts." The government shifted the burden of proof to Mr. Orr through its improper techniques and Mr. Orr never did overcome that burden. The government did not prove that Orr misrepresented the NIPER tests or the benefits of the technology - but it repeated the allegations often enough to convince the jury that Mr. Orr was guilty. The government's unsupported allegations that Orr spent investor money on gambling and that he obtained a congressional earmark in exchange for a bottle of whiskey, were cheap shots which likely had further effect destroying Orr's credibility with the jury. The government's incessant use of guilt-assuming hypothetical and speculative questions to witnesses ("had you known that Orr's statements were false, would that have affected your investment decision") biased the jury against Orr and deprived him of the presumption of innocence and of a fair trial.

5. The trial of William Orr is a frightening example of how easy it is for skillful prosecutors to persuade a jury to convict a defendant, even when they lack the evidence to prove guilt beyond a reasonable doubt. The trial is also a vivid example of how ineffective many jury instructions are in protecting the rights of a defendant. Several times the court reminded the jury that William Marshall was not testifying as an expert, yet the jury obviously bought his *implied expert opinion* that Orr misrepresented the NIPER results. How did the jury know the

NIPER tests results were misrepresented by Orr? Because Bill Marshall [supposedly] told Bill Orr that the data was unreliable, but Orr used it anyway.

6. Mr. Orr's jury was persuaded of his guilt through skillful and unscrupulous manipulation and deception by the prosecutors.

The Innocence Project has in recent years proved (primarily through the use of DNA evidence) that hundreds of persons have been wrongfully convicted in the past 15 - 20 years. But they have only looked at a very small number of cases, those which combine loud claims of innocence and preserved DNA evidence which might shed light on the verdict. Their results - if extrapolated to apply to all cases of conviction by juries during the same time frame - suggest that *tens of thousands of innocent persons have been wrongfully convicted* during that same time frame. There is, of course, no way of knowing how many innocents have been convicted. But what is clear is that juries wrongly convicted hundreds (and, thus, thousands) of innocent persons. This means juries are making large numbers of mistakes, and that there are obvious problems which need to be addressed. Problems with juries being too easily convinced to convict. You can't prove that an innocent person is guilty. That is logically impossible. But prosecutors obviously can, and, in far too many cases, they do, convince a juries to convict innocent persons. How does that happen? Jurors are allowing themselves to be persuaded and duped, rather than requiring compelling and unequivocal proof. They are not requiring the prosecutor to eliminate reasonable alternatives to the defendant being guilty.

These are points which defense counsel would like to have made with the jury during voir dire, but counsel was not allowed to participate in voir dire. These are issues that defense counsel hoped the court would discuss with the jury during voir dire, but the court did not.

Defense counsel proposed voir dire questions to the court, in which this issue of wrongful convictions would have been discussed, but the court declined to ask these or similar questions.

Counsel states that Court-conducted voir dire in this case denied his client the right to a fair trial, and to due process of law, because the jury was not adequately questioned in the area of wrongful convictions.

The importance of the issue is that juries are often wrongfully convicting defendants, and they do so because *they allow themselves to be **persuaded** that defendants are guilty*, rather than insisting that the government prove its case beyond a reasonable doubt. They accept accusations as proof, and negative implication, and innuendo, and arguments of counsel. Jury instructions are inadequate against these dangers, as revealed in this case.

Juries have too low a threshold, too little understanding, as to how much evidence it takes to prove something - anything - beyond a reasonable doubt. Jurors who reveal a high threshold are peremptorily stricken by prosecutors. Jurors often allow accusations to substitute for proof, they allow persuasion to substitute for evidence. And they aren't even aware of how gullible - *i.e.*, how persuadable they are. They allow themselves to be persuaded by the accusatory tone of prosecutors; they allow themselves to be persuaded by negative implications and innuendo, by accusations without adequate proof, as in this case.

If these issues are *discussed with jurors* before the trial begins, it is the experience of undersigned counsel in state courts that jurors are more likely to be on guard against accepting accusations and persuasion as substitutes for proof. Jurors are less likely to allow themselves to be manipulated or duped, if they are placed on their guard during voir dire, if they are cautioned as to the very high risks of wrongful convictions. These are issues that most people have not

considered before being called for jury duty - issues of how juries frequently wrongfully convict, and why - and these are issues that jurors need to consider in order to responsibly perform their duties.

Mr. Orr's jury did not participate in a discussion of how juries can be misled and manipulated. Mr. Orr's jury was misled and manipulated.

DISCUSSION OF COUNTS OF CONVICTION

A. MAIL FRAUD AGAINST INVESTORS (Counts 1-8)

The government presented no evidence that Mr. Orr misrepresented his technology or the NIPER test results. Defense expert witnesses Frank Cox and Donald Stedman testified that he accurately represented the results of the NIPER tests and that the NIPER test results were consistent with what was independently known about the Orr technology. The government presented no competent evidence that Mr. Orr misrepresented results of the NIPER tests, and no competent evidence that Mr. Orr misrepresented the NAFF tests, yet the government apparently convinced the jury on both issues. This shows how unreliable the trial process was in determining the truth. And how effectively skilled prosecutors can mislead and manipulate a jury when they are committed to obtaining convictions, rather than to serving justice.

The government twisted and manipulated evidence, arguing inferences which were unreasonable and unfair, presenting a biased picture to the jury which bore little resemblance to reality. The government smeared Mr. Orr with false implications and false suggestions, including such smears as suggesting that the investor money was squandered on gambling and foreign personal travel, when there was no evidence to support these suggestions. The government implied that Mr. Orr misrepresented communications from French aviation company

Dassault, when the evidence actually showed that an investment newsletter with positive statements about interest from Dassault was mailed by Octane to investors at about the same time that negative news may have been received by Octane from Dassault - a letter mailed from France saying that Dassault would not be interested in the Orr technology - when *there was absolutely no evidence* that the newsletter writer (Orr) had seen that letter before the Octane newsletter was mailed. And all later Octane newsletters omitted discussion about Dassault, indicating that when the negative news was actually received and processed, there was *no misrepresentation of Dassault's interest*. An ethical prosecutor would not have presented such ambiguous evidence and asked the jury to consider it as additional evidence of fraud without some proof that Orr had seen the Dassault letter before the newsletter went out.

The government called witnesses from Exxon corporation who should have been impeached with Exxon's obvious interest in Orr's technology - they tried to steal it - yet the government successfully fought to keep the impeachment evidence out when Exxon witnesses were testifying . Exxon had a confidentiality agreement with Orr and Octane, and Orr would have testified that Exxon's patent applications incorporating some of Orr's technology violated that confidentiality agreement and that would have shown the jury Exxon's bias and financial interest in denying that Exxon was interested in Orr's technology. The government accused Orr of misrepresenting Exxon's interest in Orr's technology. The Court prevented effective cross-examination of Mr. Johnson. The Court thus erred in excluding this impeachment cross-examination, depriving Mr. Orr of his Sixth Amendment right of confrontation.

In the indictment, the government claimed that Bill Orr said Exxon offered to buy his technology for \$30,000,000, when the actual evidence at trial showed that Chuck Thomas

[unknown to Bill Orr] sent an excited and *gossip-filled and inaccurate email* to a friend about what he had heard about the technology, and Chuck Thomas (who lived with Scott Shires at the time) said Exxon had offered \$30,000,000 (he also wrote that the White House wanted to buy it!), but Chuck Thomas did not say in his email that Orr had said that, and the gossip-filled email was 10 years old at the time of trial. Orr was forced to defend himself against 10-year old gossip in an email which Orr had neither seen or even heard about before trial. *The government held Orr accountable for this gossip* produced by Thomas, just as if Orr had seen and approved the accuracy of the email before it was sent, an absurd and unfair twisting of evidence if ever there was one. This was one of many cheap shots by the government.

The government presented the Dassault misinformation, the Chuck Thomas gossip, the allegations of gambling and using investor money for foreign travel and using a bottle of Scotch whiskey to obtain a \$3.6 million congressional earmark for research, and the *non-expert testimony* of Marshall, Tom Reed, and others, as evidence of misrepresentations of science. None of this evidence should have been considered as anything but cheap shots, and none of it should ever have been offered or admitted. *Given the underhanded nature of all of this evidence*, it is clear that the prosecutors knew their evidence was weak and they were desperately seeking convictions. Mr. Orr was tarnished and smeared by whatever means available, and the resulting convictions cannot be allowed to stand.

Evidence at trial showed that Orr believed he had serious interest in the technology from potential partners such as Exxon, Enron, Prudential Bache, Peremba Kentz, et al. The evidence at trial showed that Orr believed in the value of the technology – Orr invested some \$350,000 of his own money in the early 2000s, after he had stopped raising money from investors.

The evidence at trial (Thomas, Shires, and Orr) showed that Octane International and Bill Orr had *an agreement that the patents were owed to Octane and would be formally assigned to Octane* when the technology was ready for commercialization. *The law defines that agreement as creating equitable ownership* in Octane International. Thus, Octane owned rights to the Orr technology. No one at trial denied that this agreement existed, and government witness Shires testified that it had existed from the beginning of Octane's existence. There was no evidence offered that even suggested Orr did not intend to honor his agreement and testimony of Orr and Belton showed that Orr executed assignment documents to perform his obligations. No one contradicted Orr on this - except the prosecutors in their arguments unsupported by evidence and in their suggestive questions to investors.

The government argued without any evidence to support the argument, that Orr misrepresented the ownership of his technology. The government did prove that the patent had not been formally assigned prior to the investigation being initiated against Orr, but no one ever claimed that it had been. The government obtained a conviction against Orr for misrepresenting the ownership of the patent rights (Count 16): “[Orr] knowingly and wilfully caused a letter to be sent on behalf of NAFF to the U.S. Environmental Protection Agency, enclosing a “Testing and Demonstration Agreement” between NAFF and Octane, which falsely represented that Octane owned the patent rights to VPC.” The government had no evidence to support this charge because *the Testing and Demonstration Agreement did not even mention the patent rights to VPC*. Yet Orr was convicted on Count 16 by a confused and misled jury.

“The Scheme to Defraud.”

In the government's description of *the scheme to defraud* (Counts 1-8), the indictment

states, in part:

Prior to January 1998 and continuing thereafter, defendant WILLIAM C. ORR solicited monies from persons, and in connection therewith made various claims, including that: (I) Octane owned the patent(s) for VPC; (ii) VPC was ready to be produced and marketed; (iii) scientific testing demonstrated that VPC had substantial benefits over conventional gasoline regarding both decreased nitrogen oxide (“Nox”) emissions and increased fuel efficiency; (iv) Exxon wanted to purchase VPC and its patent for \$30 million or above; (v) Prudential was interested in furnishing substantial funds for Octane; (vi) investor monies would be used to finish developing and marketing VPC; and (vii) investors would receive Octane shares and would reap substantial profits due to an imminent initial public offering (“IPO”) and/or other substantial increase in Octane’s share price.

These allegations were proven to be false. The evidence presented at trial (the NAFF - Octane International Agreement) was that Octane owned the rights to the technology, not the patent. Evidence at trial did prove that VPC was ready to be produced and marketed at various relevant times - it had been used by Sunoco in the early 1990's; an EPA-issued fuel registration statement approved its use at a later time (testimony by Terrence Higgins, Shires, Orr). Evidence at trial showed that VPC technology had been approved (a § 211(f) waiver had been obtained by Ethyl Corporation in the 1990's) in unleaded gasoline, and instructions were offered by Orr (but erroneously denied by the Court) which showed that the law includes 10% ethanol blends (the second component of Orr’s fuel technology, along with MMT, the “first” component) in the definition of unleaded gasoline; and that 10% ethanol blends are certification fuels used in more than 50% of American gasoline today. Evidence at trial (Higgins, Herb Bruch, Donald Stedman, Frank Cox, Bill Orr, James Caldwell) showed that VPC technology decreases NOx emissions. An EPA document authenticated by Caldwell showed EPA’s own analysis showing NOx emission benefits in the Ethyl data. There was no dispute from any witness, expert or lay, that

Orr's VPC technology results in octane boosts - which is an indicator of fuel efficiency improvements. NIPER test data shows clear benefits in fuel efficiency - at low load and at high load. *No expert invalidated the NIPER test results.* Experts Stedman and Cox testified that the NIPER results were consistent with what was independently known about Orr's fuel technology.

Orr never said that Exxon wanted to buy the VPC technology - or that the White House wanted to buy it - not for \$30,000,000, or for any other price! Chuck Thomas made these silly representations in a private, gossipy email he sent to friends ten years before the trial, and he did not attribute those statements to Bill Orr in his e-mail. Clever manipulation through cross-examination suggested to Thomas that he must have heard these statements from Orr. That is nothing other than the skillful leading of a witness by the prosecutor to the point of putting words into his mouth. That demonstrates how dangerous a tool cross-examination can be when a skilled attorney will do anything to obtain a conviction.

Evidence at trial showed that Prudential was interested in furnishing substantial funds to Octane - when Octane was ready. But first, Prudential wanted to see Octane with a product in the market, and they wanted to see Octane raise some money. Shires and Orr testified, and Martin Wade (of Prudential) confirmed, that Octane and Prudential had positive discussions about Prudential's interest in and ability to provide the funding to build two \$250,000,000 chemical plants for Octane to produce VPC products (dimethyl carbonate). No final agreement was ever reached, but no one at trial ever denied that Prudential had positive interests in funding development of the technology.

Undisputed evidence presented at trial (Shires, Orr) showed that investor funds were used to further develop and market VPC technology. In fact, the undisputed evidence showed that 80

- 90% of the investor money went towards those purposes, that Orr lived frugally on what he needed of the borrowed money, and that Orr also contributed funds equal to about 20% of investor money out of his own money (salary from NAFF).

Evidence at trial showed that all investors were issued shares in Octane as part of the return on their investment, although this did not occur promptly, and apparently not quite all of the shares were ever delivered. Orr, in fact, has not yet received his shares.

The stock price never rose, a public offering never occurred. Orr and Shires both testified, and no one contradicted them, that they hoped for and worked toward achieving a public offering, with Prudential and with other potential partners, and with various securities lawyers, but a public offering was never achieved. Shires testified that Octane was getting its books and affairs in order in 2000-2001, so that the company would be ready to go public - because he expected that it would soon. That's why (he testified) that he was preparing tax returns for Orr and preparing all the company books and accounting records.

Similar analysis of any of the other claims in the indictment will show similar weaknesses in the rest of the government's case. But Mr. Orr understands that he has been convicted by a jury. And that the court cannot substitute its judgment for the factual findings of the jury.

Mr. Orr offered the analysis above to provide a quick picture of *the nature of the government's case* - it is long on accusation and lacking in evidence and misleading in its manipulation of evidence. But the jury verdicts indicate that the jury accepted the government accusations and suggestions and arguments as proof.

The evidence at trial showed - without dispute - the enormous economic value of Orr's

technology as an octane enhancer for gasoline. That evidence would have been more compelling had the Court not [erroneously] disallowed defense expert Schlosberg, who would have testified that the technology was worth tens or hundreds of millions of dollars to Octane.¹ The evidence at trial showed - without dispute - that Orr's technology (MMT in unleaded gasoline²) has already passed EPA tests for emissions requirements. What was not shown at trial is whether Orr's technology will receive EPA permission for introduction into commerce in the United States. Evidence at trial suggests that litigation may be needed to resolve that issue, that EPA continues to resist and actively block the use of MMT in unleaded gasoline - even though Ethyl Corporation has already obtained a waiver for that use.

Octane International, like Ethyl Corporation, will likely have to sue EPA to get approval for the Orr fuel additive.

B. MAIL AND WIRE FRAUD AGAINST AND FALSE STATEMENTS TO EPA

EPA officials (Margaret Oge) testified that the *EPA did not and would not have relied upon Orr's representations of the science* behind his technology, in awarding the funds for research, because EPA was honoring *congressional intent* to award the earmarked funds to

¹ The Court erroneously concluded that Schlosberg's analysis was unreliable because he did not employ all the tools he would have used preparing his analysis for Exxon, but the analysis was prepared for consideration of the value of the technology to Octane, its owner, not to consider its value to Exxon or to a potential licensor. When asked to reconsider the ruling, the Court then ruled the analysis was unreliable because it was based on subjective criteria - Schlosberg's assumptions. But Schlosberg testified that assumptions like those he made were essential to anyone making the analysis, that such assumptions were typical, and that his assumptions were quite conservative, and he explained why that was so.

² And defense expert Stedman testified there is no scientific reason to expect that 10% ethanol blends would have any different result than did straight unleaded gasoline when MMT was added.

NAFF.

EPA Project Officer John Brophy testified that he would not have been concerned to learn there was some argument about the validity of 1 data point in the NIPER data, where the author of the study had not even explained what was supposedly wrong with that data point and how he could know there was something wrong with it. William Marshall testified (as a non-expert) that he told Orr, five years after the test was performed, that one data point “could not be right.” Marshall did not explain how he decided 5 years later that 1 data point was wrong (a typographical error, he suggested), or what the data point should be. Marshall testified that he had not told Orr what that mysterious data point “should be.”³ Marshall never explained how 1 mis-typed data point for testing of Orr’s fuel additive under high engine load, could discredit the low load data, which showed (as Stedman and Orr testified) similar trends as the high load data.

If Orr misrepresented NIPER, how did the government prove that? Marshall’s testimony was not that of an expert, and should not have been considered by the jury. No other witness testified that Orr misrepresented the NIPER test results. But the government suggested that Orr misrepresented NIPER test results, in dozens of *hypothetical questions* to witnesses. Apparently, the jury accepted the implications of those hypothetical, accusatory questions as substitutes for proof.

Mr. Orr (through counsel) strenuously and repeatedly objected to the use of these hypothetical, negatively loaded, questions posed to witnesses. *“If you had known that the test*

³ The prosecutor improperly suggested to the jury that Marshall had told Orr what the data point should be, and she made Orr look bad when she asked Orr on cross-examination, “didn’t Marshall tell you the data point should be ___?” Marshall had expressly answered to defense counsel on cross-examination that he did not tell Orr what the data point should be, and *the prosecutor had no good faith basis for her question.*

results were false, that Mr. Orr had been told by the person who performed the tests, that the date was unreliable, would this have affected your investment decision?" Orr objected seemingly dozens of times that these questions were improper, they called for speculation, they assumed facts not in evidence, they were unfairly prejudicial and not probative at all, and they unfairly biased the jury against Mr. Orr.⁴ The objections were overruled. The questions implied that Marshall had expressed his expert opinion that the data was unreliable, that the prosecutor believed this was proved, and that Orr had ignored this expert.

The jury obviously attached importance to Marshall's implied expert opinion, which is why Marshall should never have been allowed to testify as to what he supposedly told Orr. Orr objected repeatedly to questions as to what Marshall may have told Orr, and was repeatedly overruled. What he may have told Orr⁵ had no significance or relevance, if Marshall was not qualified as an expert. If it was relevant, it was incompetent, because Marshall had not been qualified as an expert.

EPA (Katherine Moore) admitted in cross-examination that EPA's only interest in who owned the technology, was *whether NAFF had the right to test it*. There was no evidence that anyone told EPA that the patents were owned by or in the name of Octane. *And no one at trial or prior to trial ever disputed that NAFF had authority to conduct tests of the Orr technology, so*

⁴ Similar hypothetical, speculative, loaded-with-negative implications questions were asked of many investor witnesses with regard to other statements made in newsletters and updates and business plans. The same objections were made by defense counsel, and the objections were consistently overruled.

⁵ And what Tom Reed may have told Orr about NAFF tests, and what Shavayam Ellis or Vincent Buckmaster may have told Orr, was similarly irrelevant testimony from *non-experts*, and it was similarly unfairly prejudicial. The government's extensive use of non-experts to smuggle in implied expert opinions was devious and effective. And it deprived Mr. Orr of a fair trial.

EPA was not and could not have been “defrauded” by statements about who owned the technology. Orr and Octane (Kautz) and NAFF (Thomas) and Shires all agreed - and no one disputed - that NAFF had the right to test. How was Orr convicted of defrauding the EPA on who owned the technology where the EPA was not misled? NAFF had the right to test!

This is another example of how the jury was misled by government accusations, manipulation, persuasion, and deception.

Orr didn’t misrepresent the ownership of the technology or the scientific basis (the NIPER tests) for his claims. The government presented no competent evidence on these points. Thus, there was *no evidence of false statements to EPA presented at trial*. Thus, there was no fraud. Nevertheless, Orr stands convicted of false statements to and fraud against EPA.

C. WILFUL FAILURE TO FILE TAX RETURNS

Scott Shires testified that Bill Orr had a letter he received from the IRS in approximately 1992, telling him he would not have to file tax returns in the future as long as he carried forward a Net Operating Loss (greater than his income). Orr testified he received the letter and relied on it. Scott Shires testified that he, too, saw the letter and relied upon it.

The government misrepresented Shires’ testimony and lied to the jury in rebuttal closing argument (transcripts of Shires’ testimony and of all closing argument are ordered) when Mr. O’Rourke told the jury that Shires never saw the letter, that Shires did not testify that he had seen the letter, that he testified that he was only told about it by Orr. The prosecutor argued to the jury that the letter never existed.⁶ The jury must have believed and been persuaded by these false

⁶ Which is undoubtedly the same argument (the letters never existed) the government would have made about the 3 IRS letters which were produced as exhibits, letters which told Orr that he had no duty to file returns for 1989, 1990, and 1991, had Shires and Orr not been able to

statements from the prosecutor. Because if that letter did exist, then Orr had a good reason to believe he had no duty to file a return, and the jury would have seen that.

This misrepresentation from the prosecutor in rebuttal closing argument came following numerous defense objections to misconduct and objections that the government was in its closing arguments mis-characterizing and mis-stating the evidence. Each such objection was overruled, and the Court made it clear that the Court was leaving all such questions to the jurors' recollections, providing the impression that the government's closing argument was beyond criticism. Defense counsel was harshly criticized in the Court's response to defense objections and the Court made it clear that defense counsel should sit down and stop objecting. Further objections would have further provoked the court and this was seen by defense counsel as inimical to Mr. Orr's best interests. Thus, defense counsel stopped objecting to government misconduct during closing and rebuttal closing argument.

In this case, the government's misrepresentation as to Shires' testimony about the IRS letter was nothing short of a deliberate and flagrant misrepresentation by the government and it also amounted to an improper suggestion that sworn testimony had been misrepresented by the Defense. Defense counsel had argued in his closing argument that Orr had a good faith basis - this IRS letter, seen by Shires - for believing he had no duty to file personal income tax returns because Orr still carried forward a sizable net operating loss for all years in which he was charged with willful failure to file.

Shires' testimony at trial showed that Shires was preparing the books and personal returns and that he had told Orr to file his personal returns as part of Octane's efforts to get its books and

produce those letters.

records ready for a public offering, *not because Orr owed taxes or had a duty to file.*

Evidence at trial showed that Shires created bookkeeping entries and tax return entries in 2002, which retroactively created compensation from ACLF to Orr in 1999, 2000, 2001, despite the fact that the payments to Orr in those years had originally been booked as loans.⁷ This bookkeeper-created compensation would have created gross income for Orr in those years, triggering a duty to file personal income tax returns. Mr. Gelt provided uncontradicted testimony that a bookkeeper can't change the nature of a transaction after the fact, so Shires' entries in the ACLF returns did not create gross income for Orr. Thus, Orr had no gross income and no duty to file for 1999, 2000, and 2001. How and why did the jury ignore this evidence? Money that Orr borrowed from ACLF was loans when transferred, and money borrowed/transferred from Octane in years 1999-2004, was either loans or a return of capital, neither of which constitutes gross income.

D. Tax Evasion Counts

Government tax expert Peter Shepka testified that he ignored much of the evidence which was available to him because the government did not ask him to look at it. He did not evaluate Orr's draft tax returns from 1991-2001 or the evidence of net operating losses from 1991 through 2004, based on Shires' bookkeeping records. He simply ignored that evidence. But he did use Shires' accounting records to determine Orr's tax liabilities from 1999-2004. He also acknowledged that he knew that the bookkeeping records of Shires (Orr's income and expenses)

⁷ In closing argument, the prosecutor argued that only Orr called the money loans, that there was no evidence that anyone other than Orr made such decisions for ACLF. This, too was contradicted by the evidence: Lonnie Haynes testified that he had participated in an ACLF Board meeting approving a loan to Orr.

were never even completed for tax year 2004, and that he did not know what information was missing. Nevertheless, Shepka offered his opinion that Orr owed and evaded taxes even for that year, where the accounting records were incomplete.

Shepka testified he treated all the money that Orr borrowed from Octane during the years he analyzed, as income to Orr, despite the fact that Octane had treated the money as loans on its books, and despite the testimony that Shires and Orr always considered the money to be loans to Orr. But Shepka also testified that his analysis would be proven wrong, if Orr now repaid the money to Octane - that would make the original transfers loans. Which indicates that Shepka only considers the money not loans because it has not yet been repaid. But Orr has not had any ability to repay, so Shepka's analysis makes no sense. This expert refuted himself. The inability to repay the loans cannot change the nature of the transactions or create the crimes of tax evasion or the crimes of willful failure to file tax returns.

Defense tax expert Theodore Gelt testified that, on balance, there are factors which weigh most heavily in favor of treating the money transferred from Octane to Orr as loans to Orr. Gelt also testified that if the borrowed money was not treated as loans (by the IRS), then it should be considered a return of capital to Orr, since it was Orr's money (personally borrowed from investors, as shown on all investor notes introduced at trial) when it was contributed to Octane. If the money Orr subsequently received from Octane was loans to Orr, he had no taxable income and huge net operating losses for all the years he was charged with evading taxes. If the money he received from Octane was not treated as loans, but considered as return of capital, he still had no taxable income for any of the years charged in the indictment.

Shepka had no answer to or even any response to Gelt's "return of capital" theory. Based

on this state of the evidence, why the jury did not enter acquittals on all of the tax evasion charges is simply mystifying. *The jury had no basis for not acquitting on the tax evasion charges.* This shows how thoroughly they were misled and manipulated.

The government's only response to the testimony of Gelt, was *an irresponsible and unsupported attack on his credibility.* In rebuttal closing argument, the government argued to the jury that they should accept Shepka and reject Gelt because *Gelt was not credible.* This suggested to the jury that Mr. Gelt was dishonest, that he was lying under oath, or that he was so biased or incompetent that he should not be believed. The government had no valid or good faith basis for that attack on Gelt, and it was just more *desperate and irresponsible argument* to create bias against Mr. Orr. And it apparently worked, since some of the jurors did obviously ignore Mr. Gelt, as implied by the jury's failure to return not guilty verdicts on the tax evasion charges. The government's argument also suggested, however, since no evidence on Gelt's credibility was introduced, that the government had some unknown and undisclosed reason to doubt the credibility of Mr. Gelt. That argument amounts to serious misconduct.

The fact that the jury did not acquit on the tax evasion charges, is compelling evidence that this jury was misled and manipulated and completely biased against Mr. Orr by the conduct of the prosecutor. This jury simply would not accept any argument that resulted in acquittal, even when there was no evidence on which to convict.

E. Evidence of Improper Investigation

The Court ruled pre-trial, "provisionally", that the defense would not be able to question the manner in which the investigation was conducted. The Court never revised its ruling. During trial, the court ruled inconsistently on whether the defense could attack the manner of the

government's investigation. The defendant was effectively precluded from defending himself against the charges, as recognized by the Tenth Circuit and the United States Supreme Court.

The Tenth Circuit has observed "The . . . evidence also raises serious questions about the manner, quality, and thoroughness of the investigation that led to Bowen's arrest and trial. A common trial tactic of defense lawyers is to discredit the caliber of the investigation or the decision to charge the defendant, and we may consider such use in assessing a possible Brady violation." *Bowen v. Maynard*, 799 F.2d 593, 613 (10 Cir. 1986). The Supreme Court has approved the time-honored defense tactic of attacking the quality and manner of investigation: "When . . . the probative force of evidence depends on the circumstances in which it was obtained and those circumstances raise a possibility of fraud, indications of conscientious police work will enhance probative force and slovenly work will diminish it." *Kyles v. Whitley*, 514 U.S. 419, 446 (1995).

Mr. Orr was denied the right to present his complete defense: "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)). This right is abridged by evidence rules [or rulings] that "infring[e] upon a weighty interest of the accused" and are "'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" *United States v. Scheffer*, 523 U.S. 303, 325 (1998) (quoting *Rock v. Arkansas*, 483 U.S. 44, 58, (1987)).

Mr. Orr was not allowed to introduce evidence of the government's efforts to enlist witnesses in a class-action lawsuit against Mr. Orr, when he was disallowed from asking Chuck

Thomas about (and showing to the jury) solicitations he received from the Department of Justice to join a lawsuit against Mr. Orr. Mr. Orr was not allowed to question some witnesses (Alden Kautz) about the bizarre accusations and actions of government investigators which showed that they were out to influence witnesses against Mr. Orr and that they were apparently out to convict Mr. Orr without regard to fairness or truth.

ARGUMENT

The government's trial tactics deprived Mr. Orr of a fair trial, which is guaranteed by the Due Process Clause of the Fifth Amendment and by the Sixth Amendment.

Use of "Non-Experts"

In one of Mr. Orr's many responses (RESPONSE TO GOVERNMENT MOTION TO EXCLUDE PROPOSED TESTIMONY OF RICHARD SCHLOSBERG) to the government's pre-trial motions to exclude all defense experts, Mr. Orr [accurately] predicted the unfair prejudice which would result from the government's use of "non-experts:"

"The government will ask multiple non-expert witnesses to testify that they told Orr that tests of Orr's technology showed it provided no benefits, for the obvious purpose of convincing the jury that the technology was worthless and a hoax perpetrated on his investors and the EPA. The government's case will repeatedly imply that his supposed technology was part of his scheme to defraud investors and the EPA, and that the technology is worthless. *The jury may well be misled by these false implications - as the grand jurors clearly were - through the implied attacks on the value of Orr's technology.*"

The petit jurors clearly were misled, as to the value and as to the validity of Mr. Orr's technology.

Mr. Orr objected pre-trial to the government's proposed use of so-called "non-experts": "The government witnesses who will be offered to testify about these test results, have not been disclosed as experts and should not be allowed to express their opinions that scientific tests had negative results." Response to Government Motion to Exclude Terry Higgins. Mr. Orr also objected repeatedly, and often, to their use during the trial. Whenever the prosecutor asked a witness what they had told Mr. Orr about test results, Mr. Orr objected that the testimony was irrelevant unless the witness were qualified as an expert, and the witness was not qualified as an expert. The objection was made dozens of times during trial - to the testimony of William Marshall, Tom Reed, Shavayam Ellis, and Vincent Buckmaster. And the court always overruled the objection, sometimes reminding the jury that the witness was not testifying as an expert. If the witness was not testifying as an expert, the testimony was incompetent. Similar objections were made to any of these witnesses commenting on Mr. Orr's statements - oral or in print - regarding the test results, and these, too, were always overruled. The court's instruction not to consider the testimony as expert testimony, was obviously ineffective.

The essence of the Government's argument on NIPER (all or part of the proof for Counts 1, 2, 3, 4, 5, 6, 7, 8, 9, 11, 12, 13, 14, 15, and 17) was that William Marshall, the individual who had conducted testing for the Defendant at NIPER, had, without providing a corrected data set or any written report retracting the formal report for which NIPER was paid, subsequently claimed to have informed the defendant that one data point was wrong and that some of the defendant's claims as to conclusions from the NIPER data were, thus, wrong.

The problem with this is that there was no competent evidence that any of the Defendant's claims as to NIPER were wrong or otherwise not justified by, or inconsistent with,

the existing science. The interpretation of the NIPER data was not within the common experience of a lay witness - which is all that William Marshall was, in this trial.

Government Misconduct

“While [the prosecutor] may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.” *Berger v. United States*, 295 U.S. 78, 88 (1935). “It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none.” *Id.*

"It is unprofessional conduct for the prosecutor to express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant." ABA Standards for Criminal Justice 3-5.8(b) (2d ed. 1980), quoted in *United States v. Young*, 470 U.S. 1, 9 (1985). “A trial judge should deal promptly with any breach by either counsel.” *Id.* What the prosecutor did, through hypothetical questions implying guilt and implying facts which were not in evidence, was an expression of the prosecutor’s opinion of guilt. The negative implications of the questions - “had you known Mr. Orr’s statements were false” - repeated often enough, in this case dozens or perhaps hundreds of times, were apparently accepted as evidence by the jury. The result was a jury so biased against Mr. Orr that the jury convicted him on many charges (wire and mail fraud, and false statements re patent ownership and NIPER results) where there was no competent evidence, and refused to acquit him on other charges (tax evasion) where

there was no competent evidence.

When the prosecutor expresses her personal opinion (implied by the accusatory questions) concerning the guilt of the accused it poses two dangers: such comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and the prosecutor's [implied] opinion carries with it the imprimatur of the Government and *may induce the jury to trust the Government's judgment rather than its own view of the evidence.* *United States v. Young*, 470 U.S. at 18.

The prosecutors also injected their own opinion that Orr was guilty in the hypothetical and speculative questions they asked of so many witnesses, the questions of the form: “Had you known what Mr. Orr said about the test results (meetings with Exxon, meetings with Prudential, etc.) was not true, would that have affected your investment decision?”

Questions which assume that the defendant is guilty of the crimes for which he is charged, are unfairly prejudicial. Where the questions posed sought speculative responses resting upon an assumption of guilt, they were improper. *United States v. Polsinelli*, 649 F.2d 793, 796 (10th Cir. 1981), citing *United States v. Candelaria-Gonzalez*, 547 F.2d 291 (5th Cir. 1977). Such hypothetical questions strike at the very heart of the presumption of innocence which is fundamental to Anglo-Saxon concepts of fair trial. *Id.* Such questions have no place in a criminal trial. *Id.* A state court commented on a similar question, pointing out that such questions inject the opinion of the prosecutor: “The estimate of the solicitor as to the accused should not be injected into a case in this manner, for the fundamental law provides and guarantees to every person on trial charged with a criminal offense, a fair and impartial trial, and

however strong the solicitor may have been in his belief that the accused was a cotton thief, such belief on his part should not be permitted to go to the jury as was here allowed.” *Chiles v. State*, 26 Ala.App. 358, 159 So. 700 (1935), quoted in *Polsinelli*, 649 F.2d at 798.

Considering the government’s misconduct and improper questioning in context, and the Court’s error in allowing it, these errors seriously affected "substantial rights" of Mr. Orr, and likely had an unfairly prejudicial impact on the jury's deliberations. Thus, these errors undermined the fairness of the trial and contributed to a miscarriage of justice. *See United States v. Young*, 470 U.S. at 16 (applying plain error standard of review where no objection was made, but these errors should be subjected to harmless error review, since the improper questions were objected to and the objections to improper questions were overruled; defense was told to stop objecting to improper closing argument). Mr. Orr was denied a fair trial as guaranteed by the due process clause of the Fifth Amendment and by the fair trial guarantees of the Sixth Amendment.

The government’s abuse of its non-expert strategy to smuggle in improper implied expert opinions, should also be viewed as misconduct. The government knew the implications of having an engineer (Marshall) and a Ph.D. Chemist (Reed) testify that they told Orr the test results were unreliable (NIPER tests, Marshall) or negative (NAFF, Reed). The implications were that these were expert opinions. Rule 701 forbids the admission of expert testimony dressed in lay witness clothing. *United States v. Perkins*, 470 F3d 150, 156 (4th Cir. 2006). Federal Rule of Evidence 701 permits a lay witness to give opinion testimony that is "(a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) *not based on scientific, technical, or other specialized knowledge within the scope of Rule 702*. Fed.R.Evid. 701.

Marshall's analysis of the research results had to be based on scientific or technical knowledge to be valid, hence his opinions, whether express or implied, came within the scope of Rule 702. The same applied to the smuggled-in opinions of Reed, Buckmaster, and Ellis. There was no reason to offer the testimony of these witnesses, other than to convince the jury that what these witnesses said about test results mattered, and that Orr was morally bound to accept their opinions over his own. The prosecutor asked the jury to infer that Orr misrepresented NIPER and NAFF test results because he did not accept the views of "the persons who performed the tests", these so-called "non-experts." The government came right out and asked the jury to attach special significance to Marshall's testimony about what he told Orr, since Marshall, himself, conducted the NIPER tests. That amounts to improper bolstering [as if an expert], and is misconduct, since neither Marshall or the NAFF witnesses were qualified to offer expert testimony. The court erred in allowing trial through such deceitful practices. The government asked Marshall (over defense objections) to comment on whether Orr's statements to investors or the EPA about the NIPER tests, were consistent with what Marshall had told Orr. Marshall's analysis of those statements and his resulting answers required expert analysis and testimony, and should not have been allowed. The government's conduct in skirting the requirements for qualifying experts was deliberate and a calculated abuse of the rules of evidence.

The Court recognized the weakness of the government's approach, and described as a possibly fatal flaw the government's strategy of attempting to try the case without scientific experts, when the Court considered and rejected the government's last minute effort to offer "rebuttal" expert testimony from Dr. Reed, who would have offered expert testimony to rebut several of Orr's technical experts. The Court was correct, this was a fatal flaw, the government

never did prove that Orr misrepresented the benefits of the technology or the results of any tests.

The government knew (and defense counsel argued this before trial) that defense counsel could not effectively cross-examine the non-expert witnesses without turning them into expert witnesses, and the government knew it had avoided pre-trial expert disclosures and reports required of experts, and it had avoided *Daubert hearings* on whether what these “non-experts” had to say was admissible. The defense was hamstrung in dealing with these witnesses.

What was William Marshall’s “methodology” that he used to determine, 5 years after completing the NIPER tests for Orr, that a key data point was or must have been a typographical error? Intuition? Pure guess? He never repeated the tests for Orr and he never conducted such tests for anyone else, so how could he determine from looking at a graph that one data point was “bad”? Did it just not look right to him? Should Orr or the jury simply have accepted his intuition as proof? There was *no evidence presented or even suggested that there was any scientific basis for Marshall’s statement* that a data point was “bad,” even accepting as true his testimony that he had made such a statement to Orr. Would any scientist accept this statement if it is just based on a researcher’s intuition? As defense expert Dr. Donald Stedman testified, if a researcher repudiates some of his research data previously reported, without any explanation or justification, then that repudiation is meaningless and unprofessional and should be ignored until it is justified.

The analysis in the paragraph above is an example of some of what would have been used against Marshall in cross-examination, had he been qualified as an expert. But he would have had to disclose his opinion and other expert testimony, and the bases therefore, and his methodology in forming his opinions, before the trial. Had his opinions been based on intuition,

the Court would undoubtedly have found his expert opinion testimony unreliable and inadmissible. Thus, what he told Orr would have been irrelevant. Marshall would not have testified what he told Orr; the jury would not have “found” that Orr misrepresented the NIPER test results to investors or to EPA; and the government’s case would have been greatly weakened.

But the prosecutor avoided *Daubert* testing of Marshall (and of Reed and of others), and the jury obviously believed that Orr misrepresented the NIPER test results to his investors and to the EPA, and the only basis they had for reaching that conclusion, was the “non-expert” (*i.e.*, lay) testimony of William Marshall. They may also have been led to believe that Orr misrepresented the benefits of his technology, through the effectively misleading questioning by the prosecutors. There was no scientific or technical testimony to the effect that Orr misrepresented the benefits of his technology, but questions to investor witnesses and to Orr, himself, sure implied that he had misrepresented the benefits. These questions were not asked in good faith, as there was nothing to support them, but they seem to have effectively destroyed the credibility of Orr and of his expert witnesses. Where accusations were repeated hundreds of times in dozens of different ways, through questions improperly loaded with negative, but unproven assumptions by prosecutors who showed that they believed the accusations, eventually this seemed to persuade this jury that Orr was guilty, even where there was no evidence of guilt. The trial tactics of these prosecutors offer a primer in how to convict a defendant without evidence.

Since the jury should not have heard the implied expert testimony of Marshall, or of Reed, Ellis, or Buckmaster, and since these errors cannot be viewed as harmless, conviction on all of the wire fraud and mail fraud counts should be vacated (Counts 1-14), as should the conviction for making false statements re NIPER (Counts 15, 17).

'Evidence is sufficient to support a conviction if a reasonable jury could find the defendant guilty beyond a reasonable doubt, given the direct and circumstantial evidence, along with reasonable inferences therefrom, taken in a light most favorable to the government.'" *United States v. Nelson*, 383 F.3d 1227, 1229 (10th Cir. 2004) (quoting *United States v. Wilson*, 107 F.3d 774, 778 (10th Cir. 1997)). A reviewing court will not weigh conflicting evidence or second-guess the fact-finding decisions of the jury. *United States v. Summers*, 414 F.3d 1287, 1293 (10th Cir. 2005).

The jury could not reasonably draw the inference that Marshall was an authority on the NIPER test results since he was not qualified as an expert, but they did apparently rely on his testimony to infer that Orr misrepresented the NIPER tests. Since there was no competent evidence that Orr misrepresented the NIPER test results, judgment of acquittal must enter on counts where proof of that misrepresentation was an essential element. Thus, judgment of acquittal must enter on Count 15. Where a conclusion that Orr misrepresented the NIPER test results could have satisfied the misrepresentation element of an offense, conviction of that offense must be vacated. Thus, since all of the mail and wire fraud offenses were described as possibly resting on Orr's misrepresentation of the NIPER results, all convictions for mail and wire fraud - *i.e.*, convictions on Counts 1-14, must be vacated.

Mr. Orr argued at trial that the jury should have been instructed on the fraud counts, and on Count 17, that the allegations as to misrepresentations of NIPER test results must be stricken because there was no evidence to support those allegations. Since the jury was not so instructed, convictions on these counts may well have rested on the incompetent evidence from Marshall. Those convictions must be vacated.

Conviction on Count 16 (and on all other counts) must be vacated because the entire jury verdict is tainted by the improper conduct of the prosecutors and by evidence introduced through improper questions erroneously allowed by the court. The bias created against Mr. Orr through the clever but improper use of non-experts, through the repeated use of improper hypothetical, speculative questions loaded with negative assumptions and innuendo, the misrepresentations in closing argument, and other errors identified above, destroyed the credibility of Orr and all of his witnesses, including his experts, and resulted in an unfair trial. No one can have any confidence in the outcome of this trial.

Experienced trial lawyers, and judges, know well that it is often a fairly small thing which tips the scales at trial, which results in the jury deciding who to believe, who to disbelieve, when to convict, when to acquit. The improper questions and arguments and tactics of the prosecutors were designed to tip those scales in favor of the government, and it worked. The use of improper questions and arguments and tactics would have been unnecessary if the government had real evidence against Mr. Orr. These desperate tactics by the prosecutors deprived Mr. Orr of a fair trial, and require a new trial.

WHEREFORE, all counts of conviction must be vacated and a new trial ordered. A judgment of acquittal must enter on Count 17, and on the tax evasion counts, Counts 18-22. A judgment of acquittal should be entered on all of the willful failure to file counts, Counts 23-28, as an appropriate remedy for the deliberate and gross misconduct of the prosecutors in misrepresenting Shires' testimony to the jury. Mr. Orr further requests that he be allowed to amend and supplement this motion with specific references to the transcripts and record when transcripts are available, and that he be allowed to address other instances of prosecutorial

misconduct revealed in those transcripts. Counsel cannot recall from memory and notes all of the problems which occurred in an 8 week trial.

Dated this 15th Day of July, 2008.

Respectfully submitted,

s/ Paul Grant
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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing DEFENDANT'S MOTION was served via ecf, on this 15th Day of July, 2008 to the following:

Patricia Davies
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s/Paul Grant
Paul Grant