IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-1612

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

JIMMIE F. SMITH, II, and GLEN P. WILCOXSON,

Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Texas
CR6 91 35 (2)

August 11, 1993

Before SMITH, DUHÉ, and WIENER, Circuit Judges.

JERRY E. SMITH, Circuit Judge:[*]

Jimmie Smith and Glen Wilcoxson appeal their convictions arising from a complex set of financial transactions designed to evade the paying of income taxes. We reverse their convictions for money laundering but affirm in all other respects.

I.

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[*]Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

Wilcoxson and Smith were convicted by a jury on one count of conspiring to defraud the United States by impeding the lawful functions of the Internal Revenue Service ("IRS"), to commit mail and wire fraud and money laundering, and to evade currency transaction reporting requirements, in violation, respectively, of 18 U.S.C. §§ 371, 1341, 1343 and 1956 and 31 U.S.C. § 5324; two counts of tax evasion in violation of 26 U.S.C. § 7201 and 18 U.S.C. § 2; twenty counts of mail fraud, 18 U.S.C. § 1341, and sixty-six counts of wire fraud, 18 U.S.C. § 1343; 138 counts of money laundering, 18 U.S.C. § 1956; and one count of structuring currency transactions in order to evade reporting requirements in violation of 31 U.S.C. § 5324. Smith, who was a revenue officer for the Collection Division of the IRS at the time of the alleged acts, also also convicted on two counts of filing false income tax returns.

These charges stemmed from a complex scheme involving three unincorporated business organizations (one domestic trust and two located in the Turks and Caicos Islands), which Smith, trained as an accountant, administered in order to shield income derived from Wilcoxson's practice as an anesthesiologist. Professional Manager's Company ("PMC"), the domestic trust, employed Wilcoxson and paid him a monthly salary and distributed the remainder to Asset Management Company ("AMC"), a foreign trust of which Smith was the secretary and sole signatory for its account. The funds from this trust, in turn, were distributed to a second foreign trust, Asset International Company ("AIC").

Wilcoxson, who claimed to be an employee of PMC working for an annual salary of $40,000, deposited $1,156,000 in receipts from his medical practice into the PMC account from October 1986 through March 1989. During that same period, PMC transferred $889,500 in cashier's checks and wire transfers to AMC, $856,000 of which Smith then transferred to AIC. Wilcoxson wrote seventy-nine checks for a total of $565,000 in cash on the AIC account between January 1987 and March 1989; each transaction usually was for less than $10,000, the minimum amount triggering currency transaction reporting requirements. According to the government, Smith benefited to the extent of $11,000 he received from PMC and AMC that he failed to report as income and from $89,000 in reported net operating losses from oil and gas exploration that, in reality, properly belonged to Wilcoxson.

II.

A.

Wilcoxson and Smith first argue that the evidence was insufficient to support their convictions for tax evasion under 26 U.S.C. § 7201. In evaluating the sufficiency of the evidence, we consider the evidence in the light most favorable to the verdict and determine whether a rational jury could have found the essential elements of the offense beyond a reasonable doubt. Glasser v. United States, 315 U.S. 60, 80 (1942); United States v. Chavez, 947 F.2d 742, 744 (5th Cir. 1991). Our evaluation must give the government the benefit of all reasonable inferences and

credibility choices. United States v. Hernandez-Palacios, 838 F.2d 1346, 1348 (5th Cir. 1988).

In order to prove tax evasion, the government must demonstrate the existence of (1) an actual tax deficiency; (2) an affirmative act of evasion or attempted evasion; and (3) willfulness. United States v. Masat, 948 F.2d 923, 931 (5th Cir. 1991), cert. denied, 113 S. Ct. 108 (1992). While seemingly conceding the tax deficiency, Wilcoxson disputes both the question of concealment and of his criminal intent. He claims that for each bank account, either he or Jimmie Smith filled out the required forms, gave addresses associated with Wilcoxson, and provided tax identification numbers. Moreover, Wilcoxson argues, he openly wrote checks and transferred funds in and out of the accounts, donated large sums to Christian charitable organizations, bought one car for his wife and another for Smith's mother, and purchased a boat for his brother. Citing United States v. Sanders, 929 F.2d 1466, 1472-73 (10th Cir.), cert. denied, 112 S. Ct. 143 (1991), Wilcoxson suggests that his open and conspicuous use of his money undermines any inference of concealment.

The record, however, bears out the government's protestations that Wilcoxson misrepresents the evidence. Wilcoxson's name was not associated with either the PMC or AMC accounts; and even though he was a signatory on the AIC account, the account was in a company name. Although he managed to cash seventy-nine checks for a total of $565,000 between January 1987 and March 1989, he did not report that sum as income on his 1987 tax return and failed to file a 1988

return. Moreover, despite an average transfer of $7,152 per transaction, usually at small, rural banks spread over three states, Wilcoxson avoided almost entirely the filing of currency transaction reports ("CTR's"), required for any transaction in excess of $10,000 or whenever a bank suspects an illicit attempt to avoid the requirement by the structuring of transactions. In light of the fact that an affirmative act of evasion may consist of "any conduct, the likely effect of which would be to mislead or to conceal," Spies v. United States, 317 U.S. 492, 498-99 (1943), and includes the failure to report substantial income or "the spending of large amounts of cash that cannot be reconciled with the amount of reported income," United States v. Kim, 884 F.2d 189, 192 (5th Cir. 1989), we conclude that the prosecution presented sufficient evidence from which a jury could determine that Wilcoxson concealed or attempted to conceal income.

B.

Both Wilcoxson and Smith assert that there was insufficient evidence of their criminal intent. They claim that the three-trust arrangement was a good-faith attempt to avoid, not evade, income)) ostensibly for the purpose of donating the proceeds to charities; that Smith researched the trust scheme's validity, and that Wilcoxson relied upon the results of that research in holding his good-faith belief that the trusts would not be subject to taxes.

Smith adds that his good faith is demonstrated by his research into the three-trust arrangement)) travel to the Bahamas to verify

the legitimacy of Nassau Life, the firm that helped Smith create the trust, and consultation with the accounting firm of Ernst & Whinney)) and by his ignorance of Wilcoxson's withdrawal of funds from the AIC account. As a "C" student and recent graduate in accounting from the University of Alabama, Smith asserts, he was overwhelmed by the complexity of the trust scheme.

Viewing the evidence in the light most favorable to the verdict, however, we believe there was sufficient evidence from which the jury could infer Wilcoxson and Smith's willfulness. Shortly before establishing the trusts, Wilcoxson had been notified by the IRS, in late 1985 and early 1986, that he owed approximately $600,000 in back taxes. Moreover, the opinion letters submitted by Wilcoxson to the accountant who prepared the PMC and AMC returns were not addressed to Wilcoxson, nor did he demonstrate any reliance upon them. Neither Wilcoxson nor Smith ever submitted the trust agreements to any accountant engaged to prepare their individual returns, nor was it ever revealed that Wilcoxson was withdrawing considerable funds from the AIC account for personal use.

Like the defendant in Masat, 948 F.2d at 930, Wilcoxson cannot show that he made complete disclosure of all the relevant facts and that he relied in good faith upon a professional's advice. In the absence of a valid reliance defense, the extensive and far-flung trust operations, together with Wilcoxson's prior tax difficulties, his failure to report his income, and the large amount of funds withdrawn provide sufficient evidence of willfulness)) the

"`voluntary, intentional violation of a known legal duty,'" Cheek v. United States, 498 U.S. 192, 200 (1991) (quoting United States v. Bishop, 412 U.S. 346, 360 (1973)).

As for Smith, his claim to good-faith reliance upon the advice of certain professionals obtained during his research into the three-trust arrangement is belied by the evidence adduced at trial. Smith learned of the trusts through Timothy Yarbrough, a paralegal at Nassau Life who arranged the trusts for Wilcoxson. Yarbrough was indicted, however, for tax fraud violations in 1986 in Alabama, Smith's home state. At the time Smith met with him in Nassau in 1986, Yarbrough was a fugitive from those charges. Similarly, Robert Chappell, who headed Nassau Life, was indicted in 1986 for failing to surrender himself for sentencing on a prior mail fraud conviction; Nassau Life collapsed shortly after Chappell's return to this country. Although Smith admitted that he knew of Chappell's indictment and conviction and of the failure of Nassau Life, he claimed that these events did not shake his faith in the three-trust system.[1]

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[1] Wilcoxson and Smith's reliance upon United States v. Dahlstrom, 713 F.2d 1423, 1426-28 (9th Cir. 1983), cert. denied, 466 U.S. 980 (1984), for the proposition that because of the unsettled questions regarding the trusts' legality, they acted with a good-faith belief in the propriety of their conduct, is entirely misplaced. Although the Ninth Circuit did find insufficient evidence of willfulness to convict a defendant for constructing offshore three-trust schemes similar to that at issue here, it did so in large part because, at that time, "the legality of the tax shelter program advocated by the appellants in this case was completely unsettled by any clearly relevant precedent on the dates alleged in the indictment." Id. at 1428. The Dahlstrom court refused to accept the Commissioner's 1979 position paper and the case of Zmuda v. Commissioner, 79 T.C. 714 (1982) (civil enforcement), aff'd, 731 F.2d 1417 (9th Cir. 1984), both of which addressed the legality of the foreign trusts but had been issued subsequent to the acts alleged in the indictment, as adequate notice such that the defendant could conform his conduct to the requirements of the law. Id. at 1427. Yet Dahlstrom itself, and both Zmuda and the 1979 paper, occurred well before any act alleged in the instant indictment. Thus, unlike Dahlstrom, Wilcoxson and Smith cannot claim

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Additionally, Smith had been cautioned about the trusts by two accountants; one told him it would not work, and the second warned that whoever extracted funds from the last trust would owe taxes on it. Smith's later actions in administering the trusts reinforce the impression that he knew of their illicit purpose: Although he already was involved with the trusts prior to his employment with the IRS, he failed to list them on his pre-employment background information forms and affirmatively denied having custody or control over any other person's funds.

Indeed, when Smith opened an account for AMC at the First National Bank of Rowena, Texas)) a small town of some 500 people located approximately 200 miles southeast of Lubbock, where Smith was working at the time)) he gave as his occupation "investment manager," a position forbidden to IRS employees without prior approval, which the record reveals Smith sought for two projects unrelated to the trusts, but not for the trusts themselves. Nor did Smith give his address or telephone number on any of the AMC accounts. The considerable evidence of Smith's concealment of his activities and involvement in the scheme entitled the jury to disbelieve Smith's protestations that he believed in good faith that the trusts were a legal means of tax avoidance.

In a related argument, Wilcoxson and Smith contend that the district court's instructions inadequately addressed the subjective nature of the willfulness standard. Although the Court in Cheek,

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that the illegality of the three-trust arrangement was not well settled at the time they entered into it.

111 S. Ct. at 608, 611, determined that it was error to instruct the jury that only an objectively reasonable misunderstanding of the law negates the statutory willfulness requirement of 26 U.S.C. § 7201, the court here laid out the proper standard.[2]

When reviewing whether the district court erred in giving a particular instruction, "[w]e afford the district court substantial latitude in formulating its instructions and we review a district court's refusal to include a defendant's proposed jury instruction for abuse of discretion." United States v. Chaney, 964 F.2d 437, 444 (5th Cir. 1992). Because the court retains such broad discretion, "we will not reverse unless the instructions taken as a whole do not correctly reflect the issues and law." United States v. Arditti, 955 F.2d 331, 339 (5th Cir.), cert. denied, 113 S. Ct. 597 (1992).

While the court's formulation of the willfulness standard did

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[2] The charge read, in part, as follows:

> If the Defendant acted in good faith, that is to say he actually believed the actions he took were allowable by law, for whatever reason, then he is not guilty of the offense of failing to file income tax returns. It does not matter whether the Defendant was right or wrong in his belief, nor does it matter if his belief makes sense, or sounds reasonable to you the jury or to me as the judge. The only thing that matters is whether or not the Defendant actually believed he was correct in his actions. Also, it is not the Defendant's burden to prove that he did believe his actions were correct, but rather it's the Government's burden to prove that he did not.
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> It is for you, the jury, to decide whether the Government has proved that the Defendant willfully failed to file any tax returns by proving beyond a reasonable doubt that he did not actually believe his actions were correct . . . or whether the Defendant, for any reason, believed his actions were proper. If you find that the Government has failed to meet its burden, then you must find the Defendant not guilty. If there is any doubt in your mind as to this issue, or even if you conclude that the Defendant could have only believed his actions were proper by abysmal ignorance and the rankest kind of stupidity, yet you find that he believed he was correct, you must find the Defendant not guilty.

(Emphasis added.)

not in so many words state that it was a subjective one, yet)) as the italicized portions in footnote 2, supra, show)) it conveyed in plain and repetitive terms the essence of the matter. Our caselaw requires no more. See United States v. Barnett, 945 F.2d 1296, 1298-99 (5th Cir. 1991) (rejecting identical challenge to similar formulation), cert. denied, 112 S. Ct. 1487 (1992). We cannot say that the court's instruction abused its discretion, nor can we accept Wilcoxson's broader argument that the court erred by charging the jury with none of his requested instructions.[3]

III.

Wilcoxson also contends that the lack of evidence demonstrating his criminal intent supports a claim of selective prosecution, inasmuch as the defendant in Johnson v. Commissioner, T.C. Memo 1989-591, was being prosecuted civilly pursuant to 26 U.S.C. § 6653(b) for employing the identical three-trust scheme through Nassau Life at the same time the investigation into Wilcoxson's finances was underway. Not only did Wilcoxson fail to raise this issue before the district court, but he has also failed even to allege any discriminatory effect or purpose on the part of the prosecution, a necessary prologue to any selective prosecution claim. See Wayte v. United States, 470 U.S. 598, 608 & n.9, 610

[3] Wilcoxson cites United States v. Schmidt, 935 F.2d 1440, 1449 (4th Cir. 1991), for the proposition that "a district court may not refuse a theory of defense instruction if such instruction has an evidentiary foundation and is an accurate statement of the law." Yet he points to no theory of defense in which the district court declined to instruct the jury; a defendant is not entitled to the precise wording he requests in an instruction. Arditti, 955 F.2d at 339.

(1985). Absent such a showing, this case falls within the broad discretion our criminal justice system accords the prosecutor: "[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978).

IV.

Smith next argues that his conviction for structuring currency transactions violates the Ex Post Facto Clause because the district court incorporated into its jury instructions the definition of structuring provided by 31 C.F.R. § 103.11(p),[4] which was adopted in 1990, after all but six of the charged transactions, totalling $53,000, had taken place. Smith asserts the crucial significance of the distinction, because the lower amount is insufficient to trigger the specific offense characteristics under U.S.S.G. §§ 2S1.3(b)(2) and 2S1.1(b)(2). Smith correctly cites to

[4] Section 103.11(p) provides, in pertinent part as follows:

> [A] person structures a transaction if that person, acting alone, or in conjunction with, or on behalf of, other persons, conducts or attempts to conduct one or more transactions in currency, in any amount, at one or more financial institutions, on one or more days, in any manner, for the purpose of evading the reporting requirements under section 103.22 of this part. "In any manner" includes, but is not limited to, the breaking down of a single sum of currency exceeding $10,000 into smaller sums, including sums at or below $10,000, or the conduct of a transaction, or series of currency transactions, including transactions at or below $10,000. The transaction or transactions need not exceed the $10,000 reporting threshold at any single financial institution on any single day in order to constitute structuring within the meaning of this definition.

31 C.F.R. § 103.11(p) (1992).

United States v. Murphy, 809 F.2d 1427, 1430 (9th Cir. 1987) (citing California Bankers Ass'n v. Shultz, 416 U.S. 21, 26 (1974)), for the proposition that "[t]he reporting act is not self-executing; it can impose no reporting duties until implementing regulations have been promulgated." Absent some implementing regulation plainly imposing a duty upon the defendants, therefore, it is violative of due process to impose criminal sanctions for the failure to disclose that which no regulation requires to be disclosed. Id. at 1430-31.

Nonetheless, Smith's argument fails for the simple reason that, as the government points out, it is 31 C.F.R. § 103.22(a) that sets forth the currency transaction reporting requirements implementing 31 U.S.C. § 5313(a). See, e.g., United States v. Caming, 968 F.2d 232, 238 (2d Cir.), cert. denied, 113 S. Ct. 416 (1992); United States v. Scanio, 900 F.2d 485, 492 (2d Cir. 1990). Unfortunately for Smith, section 103.22(a) was adopted on April 8, 1987)) sufficiently early in the genesis of the foreign trust scheme to make no difference for the purposes of sentencing. See 52 Fed. Reg. 11,442-43 (1987).

V.

Next, Wilcoxson and Smith assert, and the government concedes, that it was error to charge them with 138 counts of money laundering and that their convictions on these counts must be overturned. The money laundering statute, 18 U.S.C. § 1956(a)(1), prohibits the conducting, with knowledge, of a financial

transaction "which in fact involves the proceeds of specified unlawful activity."[5] The government was required to prove that the defendants knowingly conducted financial transactions involving the proceeds of mail and wire fraud and did so knowing that the transactions were designed to disguise the nature, source, or ownership of the proceeds. United States v. Gonzalez-Rodriguez, 966 F.2d 918, 923 (5th Cir. 1992) (quoting United States v. Martin, 933 F.2d 609, 610 (8th Cir. 1991)).

At trial, the government sought to prove that Wilcoxson and Smith engaged in a scheme to defraud the government of tax revenue, concealing Wilcoxson's anesthesiology income by means of the three trusts and the incidents of mail and wire fraud by which these were

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[5] The full text of 18 U.S.C. § 1956(a)(1) (Supp. 1993) provides as follows:

> Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity))
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> (A)(i) with the intent to promote the carrying on of specified unlawful activity; or
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> (ii) with intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986; or
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> (B) knowing that the transaction is designed in whole or in part))
>
> (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or
>
> (ii) to avoid a transaction reporting requirement under State of Federal law,
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> shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.

set up and administered. Yet the initial proceeds deposited into the PMC account derived from Wilcoxson's legitimate medical practice; nor is tax evasion among the specified unlawful activities listed in section 1956(c)(7). Given these circumstances, we must agree with the government's concession of error and reverse Wilcoxson and Smith's money laundering convictions.

VI.

Our resolution of the money laundering counts raises the related issue of whether the mail and wire fraud convictions may stand despite the taint introduced by the prosecution's proceeding with 138 unfounded counts of money laundering in a 233-count indictment. Although Wilcoxson first raised this issue on appeal in his reply brief, we believe it is sufficiently related to the argument presented in his original brief that we address it here.

We preface our remarks by expressing our concern with the government's conduct. Looking at the bare allegations of the indictment, without more, the sheer volume of the money laundering counts)) given the baselessness of the charges)) is dismaying. Yet to reverse on this basis, without some showing of either prosecutorial misconduct or prejudicial spillover from evidence presented on the dismissed counts, would be to erect an inflexible and arbitrary per se rule: Would reversal automatically be required where fifty percent of the charges fall out? Or perhaps more than one hundred charges in any large indictment? The

difficulties in formulating such a rule are apparent.

We prefer a more fact-bound inquiry into the actual prejudice or spillover of evidence presented at trial. Although cognizant of the considerable potential for prejudice whenever the phrase "money laundering" may be thrown around the courtroom, the government in this case hardly can be accused of waving the bloody towel.

While its theory on the money laundering counts, in retrospect, perhaps should have struck the government as rather rickety at the time,[6] the fact remains that all the evidence adduced in support of these counts was equally admissible to prove the mail and wire fraud, tax evasion, and structuring charges. The profound extent of the transfers, as well as the use of small, occasionally private banks in out-of-the-way small towns, was highly probative of the defendants' knowledge and intent respecting the validity of the trust arrangement. Any small spillover there may have been)) and we are aware of none)) was mitigated by the court's charging the jury to give separate consideration to each

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[6] The government's theory on the money laundering counts is explained in its opening statement, the understated character of which (at least respecting the money laundering counts) also is demonstrated. The entirety of the government's comments regarding the money laundering counts in its opening statement is as follows:

> And then counts 26 through 91 are wire fraud. What that means is each time the money is wired, well, if it is wired from Rowena to the Fayetteville Bank, each time that a wire transfer is executed and interstate wires are used to transfer that money, that is a separate offense. And then counts 92 through 229 have to do with money laundering. And what is alleged there is that the proceeds of this mail fraud and this wire fraud were moved by the defendants in interstate transfers of the funds, and each time the proceeds of such activity is moved in interstate commerce, whether it be by cashier's check being sent from Killen, Alabama to Rowena, or the wire transfer from Rowena back to Fayetteville, that is a specific count of money laundering, and you will be asked to decide each of those individually.

count and each defendant. There was no prejudicial spillover of evidence in this case.

As for misconduct, the paucity of the prosecution's references to the money laundering counts is somewhat surprising. The prosecution blandly covered the money laundering counts in its opening statement and, with almost equal blandness, reiterated its comments in the closing argument.[7]

In fact, the only prejudicial employment of the money laundering counts came exclusively from defense counsel. Wilcoxson's attorney, apparently hoping to gain from the contrast between the criminal charges and the innocuous appearance of Jimmie Smith's mother, facetiously stated, "Well, here are these

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[7] Again, the entirety of the prosecution's remarks in closing is as follows:

> Now counts 92 through 229 are money laundering counts. What does that deal with? It deals with the same money we have been talking about. It is the movement of the money across the state lines. It is the movement of the mailings and the wires in such a way as to conceal and hide the true ownership of this money)) Glen Wilcoxson. And counts 92 through 163 specifically deal with the money that is moving from Alabama to Texas, First Alabama from Biddie Smith to Jimmie Smith, Rowena.
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> And 164 through 229, that is the money going from Rowena to Tennessee from Jimmie Smith to Glen Wilcoxson. And the indictment sets forth the dates and the amounts of all of these transactions. And you saw what was admitted into evidence as CHT 9. This lists counts 6 through 229, and it lists what exhibits go with each of those [sic] these counts. You can take a look at that and look in the exhibits, and you can look in the bank records, and you can watch and trace this money as it moves.

Later, in his rebuttal, the Assistant United States Attorney made perhaps his most prejudicial money laundering-related comment of the trial:

> Then Mr. Piper [Smith's attorney] tells you, well, said, you know, "Jimmie Smith is a great employee," and I submit to you, ladies and gentlemen, could you expect anything else? I mean if you are involved, as Mr. Smith was, in an operation to move almost $900,000, to <u>wash</u> that money so your friend and patron Glen Wilcoxson will have access to it in cash after it is <u>washed</u> through, would you expect an individual like that who has become an employee of the Internal Revenue Service to draw attention to himself, to be a troublemaker, to be a bad employee?

(Emphasis added.)

deceivers, Biddie Smith included, here she is conspiring to deceive the government. There she is. There is your conspirator and money launderer." Apparently, he was merely warming to the task, for later he argues as follows:

> And just to tantalize you a little bit more, what do we have? We have a charge of money laundering. And you know you think to yourself, "whoa, money laundering." You think of Manuel Noriega, you think of nefarious criminals, right? That evokes that certain kind of imagery to you, doesn't it, money laundering. There is a money launderer, that's the kind of person I associate with Manuel Noriega. That's the kind of person I associate with money laundering, especially by check in open and notorious accounts.
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> And money laundering, well, you know what money laundering is? What do you think of? What do you think of when you think of money laundering? You think "Oh, boy, a bunch of criminals, they got a bunch of cash, and they have got to wash it into legitimate businesses to get rid of the cash." Right? That's what you think. Well, that's what I think. But I mean that's generally what you think about money laundering, okay?[8]

In short, an exhaustive review of the record compiled in this case reveals no prejudicial spillover of evidence and precious little attempt by the government to take advantage of the improperly padded indictment. Again, to reverse for a new trial merely because a certain number or percentage of counts were improper would be to create an inflexible per se rule that only incidentally addresses the due process concerns implicated in such a circumstance. This we decline to do.[9]

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[8] Wilcoxson's attorney made additional, shorter comments as well, predominantly in the same caustic vein.

[9] Defendant Wilcoxson's reply brief also asserted as error the convictions on the mail and wire fraud counts (counts 6 through 91), apparently arguing that because the money laundering counts were not crimes,

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VII.

Lastly, Smith contends the district court erred in overruling his objections to the testimony of IRS Agent Duncan McLean, the government's summary witness. McLean's testimony was offered to summarize the evidence presented at trial, including the oil and gas losses that Smith had claimed on his 1987 and 1988 tax returns. Smith alleged that he had borrowed money from Wilcoxson to invest in oil wells through a production company called Tre-J. The wells did not pan out, and Tre-J eventually went bankrupt, leaving Smith with losses he claimed as his own on his tax returns.

At trial, McLean testified regarding the amount of taxes owed by Wilcoxson and Smith, based upon the evidence presented at trial. He allocated the oil and gas losses claimed by Smith to Wilcoxson, citing the testimony of the Tre-J witnesses and documentary evidence indicating that the money came from Wilcoxson; on cross-examination, he conceded that if the jury determined that Wilcoxson legitimately had loaned the money to Smith, Smith would have been entitled to claim the loss on his returns. McLean also testified that a $10,000 check received by Smith when Finasco, another trust company, closed its account should have been classified as income; again, he acknowledged on cross-examination that were the money in fact a loan, it need not be reported.

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the instances of mail and wire fraud upon which they were premised likewise was no crime. Because we can see no valid reason why this argument, standing alone as it does, could not have been raised in appellant's original brief, we must deem it waived. It is well settled that this Court will not consider a new claim raised for the first time in an appellate reply brief. United States v. Prince, 868 F.2d 1379, 1386 (5th Cir.), cert. denied, 493 U.S. 932 (1989).

Wilcoxson and Smith argue that McLean's testimony arbitrarily allocated the oil and gas losses to Wilcoxson and the Finasco check to Smith, thus improperly bolstering the credibility of witnesses who had so testified. As a summary witness, they insist, McLean was limited to matters within his expertise and could not draw inferences from disputed testimony. They cite United States v. Price, 722 F.2d 88 (5th Cir. 1983), cert. denied, 473 U.S. 904 (1985), for the proposition that a summary witness may not bolster the credibility of witnesses upon whose testimony his conclusions are based.

We review the district court's evidentiary rulings under an abuse of discretion standard. Herrington v. Hiller, 883 F.2d 411, 414 (5th Cir. 1989). We find no abuse of discretion here. We have consistently, if cautiously, upheld the admission of the type of summary testimony presented here. In United States v. Diez, 515 F.2d 892, 905 (5th Cir. 1975), cert. denied, 423 U.S. 1052 (1976), we upheld the admission of summary charts, noting that "[a]ny such chart of computations, however, must rest on certain assumptions. Contrary to defendants' argument, the essential requirement is not that the charts be free from reliance on any assumptions, but rather that these assumptions be supported by evidence in the record."[10]

The instant case fills Jennings' prescription: The supporting

[10] See also United States v. Jennings, 724 F.2d 436, 442 (5th Cir.), cert. denied, 467 U.S. 1227 (1984) ("This Court has recently noted that such assumptions are allowed so long as supporting evidence has been presented previously to the jury . . . and where the court has made it clear that the ultimate decision should be made by the jury as to what weight should be given to the evidence.").

evidence was introduced in the form of prior witness's testimony, and the judge gave the appropriate limiting instruction. See United States v. Schuster, 777 F.2d 264, 269 (5th Cir.) (approving identical limiting instruction), vacated as moot, 778 F.2d 1132 (5th Cir. 1985).[11] The court also reiterated the instruction in his charge. Moreover, defense counsel's effective cross-examination, which forced McLean to concede the disputed assumptions upon which his computations were based, lessened any danger that the jury may have mistaken McLean's assumptions for fact. As we stated in Jennings,

> Even if it were determined that the trial court abused its discretion in allowing the use of the government's summary charts, we cannot see that [defendant] was prejudiced thereby. The full cross-examination and the trial court's admonitions to the jury served to minimize the risks of prejudice.

724 F.2d at 442; see also Schuster, 777 F.2d at 268.

Price, relied upon by the defendants, is distinguishable. There, we reversed a conviction for defrauding the United States, making false statements before the grand jury, and income tax evasion because of the testimony of an IRS agent testifying as a summary witness as to the income tax charge. His computations, he

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[11] The court instructed the jury as follows:

> The testimony of a summary witness and the charts or summaries prepared by him and admitted in evidence are received for the purpose of explaining facts disclosed by books, records, and other documents which are in evidence in the case. Such charts or summaries and the witness' explanation of such are not in and of themselves evidence or proof of any facts. If such charts or summaries or witness's explanation of such do not correctly reflect or state facts or figures shown by the evidence in the case, you should disregard them. In other words, such charts or summaries are used only as a matter of convenience. So if and to the extent that you find they are not in truth summaries of facts or figures shown by the evidence in the case, you are to disregard them entirely.

admitted on cross-examination, were based upon the testimony of two of the government's key witnesses as to the other counts; on redirect examination by the government, he explained that he had thus based his computations upon assumptions arising from the two witnesses' testimony because he "believed them." 722 F.2d at 90. The trial court refused to instruct the jury to disregard this testimony, admonishing them only that they were the sole judges of credibility.

A full reading of Price, however, leaves little doubt that the basis for that decision was the summary witness's explicit voucher for the credibility of the two key witnesses, as well as the judge's failure to instruct the jury. See United States v. Moore, 1993 U.S. App. LEXIS 18514, at *10-*11 (5th Cir. July 21, 1993). As we stated in Price,

> Generally, it is best to require the maker of a summary chart to disclose the basis for his computations before admitting the chart into evidence. Such testimony was adequately brought out by the defense on cross examination, when [IRS Agent] Whitfield admitted that the entire exhibit was based on his "assumption" that the toy sellers were telling the truth. In going beyond that admission and prodding Whitfield to state, on redirect examination, that he believed the toy sellers, the government crossed the line between laying a proper foundation for the chart and eliciting bolstering testimony that usurped the jury's rightful place.

722 F.2d at 91 (citation omitted).

Here, however, the government crossed no such line; McLean's testimony properly laid the evidentiary foundation for his computations, cross-examination elicited the contested assumptions upon which those were based)) as well as McLean's concession that the jury might disagree with the assumptions he made and therefore,

disregard his computations)) and the court's instructions clarified the jury's responsibilities in its consideration of the testimony. The district court did not abuse its discretion.[12]

Because Wilcoxson and Smith wrongly were indicted and convicted on 138 counts of money laundering, we REVERSE those counts of conviction and REMAND for resentencing. In all other particulars, we AFFIRM.

[12] Wilcoxson and Smith's reliance upon United States v. Benson, 941 F.2d 598, 604-05 (7th Cir. 1991), modified on reh'g, 957 F.2d 301 (7th Cir. 1992), likewise is misplaced. There, the Seventh Circuit reversed a conviction in which an IRS agent opined, among other things, as to why he thought the defendant should have known he was not entitled to receive Social Security disability benefits, because "[m]uch of [Agent] Cantzler's testimony consist[ed] of nothing more than drawing inferences from the evidence that he was no more qualified than the jury to draw." Id. at 604. Benson, however, involved expert testimony under FED. R. EVID. 702, not, as here, summary testimony introduced pursuant to FED. R. EVID. 1006. See Benson, 957 F.2d at 604 ("We agree that much of Cantzler's testimony was not properly admissible as expert testimony." (emphasis added)). McLean, in contrast, left the credibility determinations to the jury; his inferences from the evidence were drawn for the purpose of computing tax liability, and the disputed assumptions unmistakably were left for the jury to resolve.