

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 06-30049-WDS
	)	
GARY E. PEEL,	)	
	)	
Defendant.	)	

**MOTION FOR NEW TRIAL AND MEMORANDUM IN SUPPORT**

COMES NOW Defendant Gary E. Peel through counsel, Federal Public Defender Phillip J. Kavanaugh and Assistant Federal Public Defenders Stephen C. Williams and Daniel G. Cronin, and moves this court for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure and in Support thereof states as follows:

Mr. Peel submits that cumulative errors in this case denied him a Fair Trial. These errors included giving improper jury instructions, excluding evidence that prevented Mr. Peel from presenting a complete defense , and allowing the government to present incompetent testimony and evidence that should have been excluded. On these grounds, the interests of justice require that a new trial be granted. Additionally, the evidence was insufficient as matter of law, to support a guilty verdict on Counts III and IV due to the lack of evidence pertaining to Mr. Peel’s knowledge and a nexus between the images in evidence and interstate commerce.

## I. Improper Jury Instructions

### A. Refusal to Give Defendant's Requested Instruction Regarding the Irrelevance of his Subjective Intentions to the Issue of Lasciviousness.

Giving erroneous jury instructions is a proper ground upon which a motion for a new trial can be granted. Mr. Peel asserts that this Court erred in refusing to give his proposed instruction #8, which would have instructed the jury that Mr. Peel's subjective intentions in taking the photographs at issue in this case were irrelevant to the jury's determination of whether any image met the definition of child pornography. The instruction should have been given because the determination of whether a particular image is lascivious should, properly, be an objective one. *See United States v. Villard*, 885 F.3d 117, 125 (3d Cir. 1989); *United States v. Kemmerling*, 285 F.3d 644, 646 (8<sup>th</sup> Cir. 2002); *United States v. Wiegand*, 812 F.2d 1239, 1243 - 45 (9<sup>th</sup> Cir. 1987); *People v. Lamborn*, 185 Ill.2d 585, 594 (1999); *see also United States v. Amirault*, 173 F.3d 28, 34 (1<sup>st</sup> Cir. 1999); *but see United States v. Fabrizio*, 459 F.3d 80, 90 (1<sup>st</sup> Cir. 2006). In this case, by allowing the jury to consider Mr. Peel's subjective intentions, the Court impermissibly expanded the scope of the statute beyond its plain language and in violation of Mr. Peel's Fifth Amendment rights to due process. *See Osborne v. Ohio*, 495 U.S. 103, 116 - 17 (1990); *Marks v. United States*, 430 U.S. 188, 195 - 96 (1977); *Rabe v. Washington*, 405 U.S. 313, 315 (1972).

Failure to give this instruction allowed the jury to consider testimony of Donna Rodgers relating to the circumstances of the production of the images. It also allowed the government to argue that this evidence was relevant to whether the photographs were child pornography. At trial, Ms. Rodgers claimed that Mr. Peel had instructed her how to pose in the photographs. In addition, it was undisputed at trial that Mr. Peel and Ms. Rodgers had engaged in sexual intercourse at the time the photos were taken at his law office. Consequently, the failure to give the proposed

instruction allowed the government to invite the jury to consider the contemporaneous sexual activity between Mr. Peel and Ms. Rodgers, as well as Ms. Rodgers testimony regarding Mr. Peel's alleged instructions to her, as further evidence that the pictures in question were child pornography. Ultimately, consideration of this evidence allowed the jury to weigh Mr. Peel's subjective intentions at the time the photos were taken in determining whether the photographs, on their face, met the criteria for child pornography beyond a reasonable doubt. This was error.

Although this issue has yet to be considered by the Seventh Circuit, at least two circuit courts have clearly held that the inquiry is an objective one. *Villard*, 885 F.2d at 125 (3d Cir. 1989); *Kemmerling*, 285 F.3d at 646 (8<sup>th</sup> Cir. 2002). In *Villard*, the Third Circuit panel was faced with descriptions of images as opposed to the pictures themselves. Nevertheless, the court adopted the use of the *Dost* factors in evaluating whether the described images were lascivious. See *United States v. Dost*, 636 F. Supp. 828 (S.D. Cal. 1986). In applying the sixth *Dost* factor relating to the intended design of the image, the court stated:

We must, therefore, look at the *photograph*, rather than the viewer. If we were to conclude that the photographs were lascivious merely because Villard found them sexually arousing, we would be engaging in conclusory bootstrapping rather than the task at hand - a legal analysis of the sufficiency of the evidence of lasciviousness.

885 F.2d at 125 (emphasis added). Although the *Villard* court did not specifically address the intent of the photographer, it made clear that the inquiry must focus on the picture itself, as opposed to any subjective intentions. Significantly, in support of this position, the *Villard* court cited the Ninth Circuit opinion which affirmed *Dost*, stating “[p]rivate fantasies are not within the statutes’s ambit.” *Id.* (quoting *Wiegand*, 812 F.2d at 1245). Thus, the Third Circuit concluded that subjective thoughts should not properly be considered in evaluating the content of alleged child pornography. Doing so would shift the focus from the character of the so-called prohibited object - in this case a photograph - to the personal cravings, or private fantasies, of the viewer or photographer. Because, “[p]rivate

fantasies are not within the statute's ambit,"[*Wiegand*, 812 F.2d at 1245] evaluating the nature of an image with reference to subjective thoughts or intentions would go beyond the scope of the statute.

The Eighth Circuit has similarly adopted an objective approach in evaluating the question of lasciviousness. *Kemmerling*, 285 F.3d at 646. *Kemmerling* involved the appeal of a district court's factual findings at a bench trial. The district court had determined that certain images and a video were "lascivious" within the meaning of the child pornography statute. *Id.* at 645 - 646. In upholding the verdict, the appellate court began its analysis by stating that "[w]e emphasize that the relevant factual inquiry in this case is not whether the pictures in issue appealed, or were intended to appeal, to Mr. Kemmerling's sexual interests but whether, *on their face*, they appear to be of a sexual character." *Id.* at 646 (emphasis added). The court added that "it is the duty of the trier of fact in this kind of a case to examine the pictures" to determine their intended design. *Id.* The court thereby limited the proper scope of the inquiry to the four corners of the photographs. In doing so, the *Kemmerling* court avoided the prospect of expanding the scope of the statute into areas of subjective intent that are beyond its ambit.

Only one circuit court has directly suggested that the subjective intentions of a photographer might be relevant to the determination of whether images are lascivious. *Fabrizio*, 459 F.3d at 89 - 90. Reflecting on the relevance of circumstances surrounding the production of an image, the *Fabrizio* court observed that it was *arguable* that such facts could be considered by a jury. *Id.* Significantly, the *Fabrizio* court refrained from actually deciding this issue. *Id.* Additionally, the court's observations appear to have backtracked from an earlier holding adopting an objective approach to evaluating the nature of images for the purposes of sentencing. *See Amirault*, 173 F.3d at 34 - 35. In fact, the concurring opinion in *Fabrizio* suggests that, while the First Circuit may not

have specifically adopted an objective approach limited to the four corners of a photograph, the jury “could not consider the circumstances of the production of the image in determining lasciviousness.” 459 F.3d at 95 (TORRUELLA, Concurring). The concurring judge explained that “the plain language of the statute is generally consistent with the four corners rule.” *Id.*

The root of the disagreement among the First Circuit judges is evident when reading the *Amirault* opinion. *Amirault* seemed to have adopted an entirely objective approach. 173 F.3d at 34. And although the court was reviewing the content of photographs in the context of a sentencing, the reasoning is no less applicable. The court reasoned that if a defendant’s “subjective reaction were relevant, a sexual deviant’s quirks could turn a Sears catalog into pornography.” *Id.* Important to the case at bar, the court further stated that it had “serious doubts that focusing upon the intent of the deviant photographer is any more objective than the focusing upon a pedophile-viewer’s reaction; in either case, a deviant’s subjective response could turn innocuous images into pornography.” *Id.* Citing the Third Circuit’s *Villard* opinion, the *Amirault* panel concluded that “in determining whether there is an intent to elicit a sexual response, the focus should be on the *objective criteria* of the photograph’s design.” *Id.* at 34 - 35.

The objective approach advanced by Mr. Peel also appears to be consistent with the Ninth Circuit approach, where *Dost* originated. See *United States v. Hill*, 459 F.3d 966, 972 (9<sup>th</sup> Cir. 2006); *Wiegand*, 812 F.2d at 1244 - 45; *Dost*, 636 F. Supp. at 832. In *Wiegand*, the opinion initially upholding *Dost*, the court did employ some language suggesting that the subjective intentions of a photographer might be relevant to the question of whether an image is lascivious. The court stated that the exhibition was lascivious “because the photographer arrayed it to suit his peculiar lust. Each of the pictures featured the child photographed as a sexual object.” 812 F.3d at 1244. At first blush,

this language might be interpreted to open the door to evidence concerning the producer's intentions and the circumstances of productions. The *Wiegand* court explained further, however, that the relevant facts to consider are the characteristics of the "exhibition" set up by the photographer. *Id.* More importantly, the court further eschewed the consideration of the photographer's motives in explaining that "[t]he crime punished . . . does not consist of the cravings of the person posing the child or in the cravings of the audience. Private fantasies are not within the statute's ambit." *Id.* at 1245. Thus, close scrutiny of the opinion reveals that the *Wiegand* court rejected any interpretation of the statute that would sweep within its consideration the subjective intentions of the photographer.

This position is also consistent with the *Dost* opinion itself. There the court explained, after enunciating the six-factor test, that the determination of whether a visual depiction constitutes a lascivious exhibition must be based on the "content of the visual depiction," while at the same time taking into account the age of the minor depicted. 636 F. Supp. at 832. And, in fact, the *Dost* court's analysis was limited to the actual content of the images as opposed to extraneous facts relating to the images' production. *Id.* at 833. Recently, the Ninth Circuit reaffirmed this principle stating the "determination of lasciviousness 'ha[s] to be made based on the overall content of the visual depiction.'" *Hill*, 459 F.3d at 972 (quoting *Dost* at 832). It thereby appears, that if confronted directly with this question, the Ninth Circuit would follow the lead of the Third and Eighth Circuits in adopting an objective approach to the determination of the lasciviousness of an image.

Mr. Peel's proposed instruction was, accordingly, consistent with prevailing law in the circuits as well as the plain language of the statute. Failure to give the instruction allowed the government to, in effect, expand the scope of the statute and argue that facts irrelevant to the determination of the lasciviousness should be considered by the jury on that issue.

It is anticipated that the government might argue that Mr. Peel's own participation in the production of the images in question make his subjective intentions relevant to this issue. Mr. Peel was not, however, charged with producing child pornography, only with possessing it. Moreover, the reasoning of the courts that have addressed this issue is equally applicable to situations where some facts concerning the production of images may be known by a defendant. This is true because the criminality of the statute hinges on the content of the images themselves. *See Wiegand*, 812 F.2d at 1245. The Illinois Supreme Court's treatment of the issue in the context of state child pornography laws is illustrative. *See Lamborn*, 185 Ill.2d at 587 - 88, 594 - 95 & 597.

In *Lamborn*, the Illinois Supreme Court was tasked with evaluating the content of photographs that the defendant charged with both possessing and producing contained "lewd exhibitions." *Id.* In doing so, the court employed the six-factor test established in *Dost*. *Lamborn*, 185 Ill.2d at 592. Significant to the analysis here is the fact that, in *Lamborn*, the defendant had actually participated in the production of the images. *Id.* at 587 & 594. Additionally, as in this case, there was evidence presented that the defendant made suggestions to the individuals pictured in the photos. In *Lamborn*, the defendant apparently suggested that the minors get undressed for the photographs. *Id.* at 594. Here, the government presented testimony from Donna Rodgers claiming that Mr. Peel had suggested the poses in the pictures.

In *Lamborn* the state argued that this trial evidence should be considered by the court in evaluating the sixth *Dost* fact - whether the image is intended or designed to elicit a sexual response. *Id.* The court, however, squarely rejected this suggestion. "Courts should apply an objective standard in determining whether material is child pornography. Accordingly, application of the sixth factor, *ie.*, whether the visual depiction is intended or designed to elicit a sexual response in the

viewer, refers to an *objective* viewer.” *Id.* Citing *Villard*, the court reasoned that whether the defendant was aroused by the photographs was irrelevant to whether or not they were lewd. *Id.* The court concluded by holding that “[a]pplication of this objective standard requires us to focus on the photograph itself, and not on the circumstances surrounding the taking of the photograph.” *Id.* at 597. Like the court in *Lamborn*, this Court should similarly reject the suggestion the scope of the statute should be expanded by virtue of the fact that Mr. Peel was involved in the production of the photographs at issue in this case.

Here, the Court’s refusal to give Mr. Peel’s proffered instruction #8 was prejudicial in that it allowed the jury to consider irrelevant and unfavorable evidence when considering whether the charged photographs were lascivious. The error committed was twofold. First, the refusal of the instruction allowed Mr. Peel to be convicted based on factors that went beyond the plain language of the statute. Second, this error had the effect of expanding the scope of the statute to the extent that it violated Mr. Peel’s rights to due process under the Fifth Amendment. *See Osborne*, 495 U.S. at 116 -117; *Marks*, 430 U.S. at 195 - 96; *Rabe*, 405 U.S. at 314 - 16. In this case Mr. Peel was not on fair notice that he could be convicted of this offense based, in part, on his participation in non-criminal conduct which occurred 30 years ago. Rather, by its plain terms, the statute only put him on notice that he could be charged on the basis of the content of the pictures possessed.

By expanding the scope of the possession statute to allow a conviction to rest on circumstances surrounding the production of images. Such an interpretation offends due process as applied to Mr. Peel. This issue is similar to that analyzed by the Supreme Court in the *Marks* and *Rabe* decisions. In *Marks*, the Court reversed a defendant’s conviction for transporting obscene materials. The issue presented in that case was whether the jury could be instructed based on the

Court's newly formulated test for obscenity that was enunciated in *Miller v. California*, 413 U.S. 15 (1977). The defendant had been charged with conduct that occurred before the issuance of the *Miller* decision. *Marks*, 430 U.S. at 189 - 90. Consequently, the defendants urged the trial court to instruct the jury under the more exacting standards for obscenity that were prevailing at the time of the charged conduct. *Id.* at 190 -91. The trial court overruled the defendants' objections and instructed the jury on the newly announced standards in *Miller*. *Id.* at 191. The Court found that in failing to instruct the jury based on the standards in effect at the time of the charged conduct, the defendants were denied fair notice of criminal liability. *Id.* at 196. This was a denial of their rights to due process. *Id.*

Similarly, in *Rabe* the Court reversed the conviction of a defendant charged with the knowing display of an obscene motion picture. 405 U.S. at 314 - 16. In that case, the Supreme Court of Washington had upheld the conviction, reasoning that while the film was not obscene if the viewing audience only consisted of consenting adults, in its context - being shown at a drive-in theater - the film could be considered obscene. *Id.* at 314 - 15. In reversing, the Supreme Court observed that the statute in question "made no mention that the 'context' or location of the exhibition was an element of the offense somehow modifying the word 'obscene.'" *Id.* at 315. The Court further reasoned that "[t]he statute, so construed, is impermissibly vague as applied to petitioner because of its failure to give him fair notice that criminal liability is dependent on the place where the film is shown." *Id.* at 315 - 16. The Court thus reversed the conviction on the basis that the defendant had not been given notice that the "location of the exhibition was a vital element of the offense." *Id.* at 316.

In both *Rabe* and *Marks* the Court reversed convictions due to application of judicial interpretations of statutes under which the defendants were convicted. The *Rabe* opinion is

particularly instructive here because the interpretation at issue involved the expansion of the statute beyond its plain language. Like Washington Supreme Court in *Rabe*, the Court here expanded the language of the statute to all the jury to consider the ‘context’ in which the photos were taken as opposed to the context of the photos alone. Mr. Peel had no fair notice that the statute would be so interpreted. Accordingly, his proposed instruction limiting the jury’s consideration of evidence on the issue of lasciviousness should have been given. The court’s failure to give the instruction was an error of statutory construction that violated Mr. Peel’s right to due process. This instructional error denied Mr. Peel a fair trial on counts III and IV. On this basis alone, a new trial should be granted on those counts.

**B. Improper Instruction on Silence in the Face of an Accusation.**

At trial, Mr. Peel also objected to the court giving the government’s proposed instruction #9 - silence in the face of an accusation. The instruction given by the Court was modified to some degree by eliminating the word ‘crime’ and replacing it with the word ‘blackmail.’ This solution, however, did not remedy the problem with endorsing the use of the word blackmail in instructions on the law by the Court. As Mr. Peel argued at the instruction conference, the pattern instruction which uses the word ‘crime’ was unduly prejudicial, because it unfairly suggested that Mr. Peel’s silence would constitute a confession. Given the myriad of possible uses of the word ‘blackmail’ - referring to both criminal and non-criminal conduct - such an inference would be patently unfair. This is no less true when simply inserting the word ‘blackmail’ into the instruction. It still suggested to the jury that Mr. Peel’s failure to deny the accusation constituted a confession as a matter of law. This was so despite

the fact that the jury heard no evidence concerning the meaning of the term as it was understood by Mr. Peel or Deborah Peel in the context of the conversation.

As the Committee Comment states, the instruction should only be given where it is clear the defendant heard and understood the statement. 7<sup>th</sup> Cir. IPI 3.03 (committee comment). Yet, in this case, it is still impossible to discern precisely what was meant by the comment. Giving the instruction was analogous to allowing evidence in the form of testimony on legal conclusions. *See United States v. Espino*, 32 F.3d 253, 257 (7<sup>th</sup> Cir. 1994) (finding error in trial court allowing prosecutor to question defendant about whether he was “admitting the conspiracy”). Without such a clear understanding, the instruction should not be given. Here, the instruction allowed the jury to make a prejudicial legal conclusion about the legal import of Mr. Peel’s silence despite this uncertainty. Giving the instruction thereby denied Mr. Peel a fair trial on counts I and II.

## **II. Exclusion of Evidence of Deborah J. Peel’s Improper Dispersal of Funds and Requests for Funds for Unnecessary Plastic Surgery.**

Mr. Peel was also prejudiced by this Court’s exclusion of evidence important to his defense. Prior to trial, this Court granted a number of motions in limine by the government, including the government’s motions seeking the exclusion of evidence pertaining to non-reconstructive plastic surgery, such as a facelift, which Deborah J. Peel sought to have paid out of marital funds. In doing so, the Court explained, “...whether or not these other procedures were medically necessary is simply not a defense, nor do they appear in any manner to be related to the charges in this Indictment.” Doc. 113 at Section A, ¶ 5. This Court added, “The defendant asserts that this evidence is relevant to her credibility, veracity, and lack of good faith. The Court is not so persuaded.” *Id.* at FN 2.

Similarly, this Court rejected the defense's contention that evidence of Deborah J. Peel's misappropriation of money in violation of the terms of the Financial Settlement with Gary Peel "...is best left for the state or bankruptcy courts. It is not relevant to these charges and, without more, allegations of misuse or money-grubbing will not be admitted in this criminal trial." Doc. 113 at Section A, ¶ 12.

It is respectfully submitted that these rulings were in error and impeded Gary Peel's defense to a degree which necessitates the granting of a new trial. As a threshold matter, evidence pertaining to a witness's credibility, state of mind, bias, and untruthfulness need not bear directly on a defense or on the elements of a charged offense. As the cases discussed *infra* explain, it is sufficient that the defense has proper evidence on these matters, particularly when the witness involved is a key prosecution witness. Moreover, as distasteful as divorce litigation may be, that context should not have served to inoculate Deborah J. Peel from proper challenges to her credibility, state of mind, bias, and untruthfulness. Finally, the evidence was relevant to Mr. Peel's state of mind as it relates to elements of the offense specifically charged in the Indictment.

**A. Credibility of Deborah J. Peel**

A witness's credibility suffers when he or she improperly spends funds, no matter how proper that witness's access to those funds were:

In fact, petitioner was permitted to introduce some specific instances of the victim's conduct to prove that she was an untruthful person through Vinh Phung's testimony that she borrowed money from him to pay the rent and then used it to buy clothes...Petitioner was therefore afforded an adequate opportunity to impeach the victim's credibility.

*Erlich v. Trombley*, 2002 WL 31545999, \*6 (E.D.Mich. 2002).

Moreover, it is not merely the dispersal of funds, but the witness's explanation about that dispersal which can cast doubt on that witness's credibility:

The evidence, largely documentary, introduced on behalf of Hellen S. Kelly to discredit the assertion of Mrs. Wallis that the insured had, after their divorce, at times been in arrears or in default in the payments of support money under the divorce decree, cast doubt upon the credibility of June Kelly Wallis and the weight of her evidence.

*Kelly v. Layton*, 309 F.2d 611, 613 (8<sup>th</sup> Cir. 1962), *reh'g denied*. See also *Thomas v. IRS*, 223 F.2d 83, 88 (6<sup>th</sup> Cir. 1955) ("The credibility of George's testimony was weakened by his admission that he had consciously failed to report any of his share of the profits for 1948, in order to conceal assets from his wife who was in the process of obtaining a divorce.").

More recently, courts have similarly recognized the importance of such impeachment - even when the factual context was a divorce. See, e.g., *Islander East Rental Program v. Ferguson*, 917 F.Supp. 504, 513 (S.D.Texas 1996) ("For example, if it is established at trial that Riley did receive money in connection with his management of the IERP, his general credibility could be impeached by pointing out that he did not disclose that income during his divorce.").

#### **B. State of Mind of Deborah J. Peel**

Although the government successfully opposed the admission of evidence bearing on Deborah J. Peel's state of mind, the government has elsewhere been allowed to introduce evidence on a victim's state of mind in order to show the accused's motive to commit a crime in response. *United States v. Tokars*, 95 F.3d 1520, 1535 (11<sup>th</sup> Cir. 1996), *cert. denied*, 520 U.S. 1132, 117 S.Ct.

1282 (1997). In affirming the admission of this evidence, the Eleventh Circuit was undeterred by the facts that the evidence spanned approximately three years, and involved a planned divorce.

Of course, the entirety of the contentions between Deborah J. Peel and Gary Peel need not be admitted in order to allow at least limited state of mind evidence. As one district court reiterated, “This Court has stated its intention not to allow the acrimony of the divorce to infect the litigation of the business arrangements of the parties.” *Lo Bosco v. Kure Engineering Ltd.*, 891 F.Supp. 1035 (D.N.J. 1995) (citation omitted). Nevertheless, that district court ruled that one spouse’s letters to another about reconciling could be admitted for purposes such as bias or state of mind. *Id.* at 1039-40.

### **C. Bias of Deborah J. Peel**

Of course, this Court’s limitations on exploration of Deborah J. Peel’s bias against Gary Peel implicates the Confrontation Clause. It was precisely on this basis that the Eighth Circuit reversed a conviction:

It was an error of law and therefore an abuse of discretion for the district court to conclude that the bias and motives of the government’s key witness did not mean anything...It is admittedly rare that we reverse the district court for a Confrontation Clause violation. But when a criminal defendant is “prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias” to impeach the credibility of a critical government witness, constitutional error results. The defendant’s opportunity to establish other forms of bias does not divest him of his constitutional right to expose relevant and non-cumulative witness bias.

*United States v. Drapeau*, 414 F.3d 869, 880-81 (8<sup>th</sup> Cir. 2005), *reh’g denied; cert. denied*, \_\_\_ U.S. \_\_\_, 126 S.Ct. 1090 (2006) (citations omitted).

It is respectfully submitted that the violation of Gary Peel’s rights under the Confrontation

Clause is all the more apparent because Deborah J. Peel's accusations against Gary Peel served to neutralize and discredit her own most vocal accuser: Gary Peel. Indeed, in reversing a conviction and remanding for new trial due to a Brady violation, the Ninth Circuit noted the impeachment value of a witness owing money to a defendant: "The withheld evidence also showed that Schultz owed defendant some money, giving him a motive to lie to get Steinberg locked up." *United States v. Steinberg*, 99 F.3d 1486, 1491 (9<sup>th</sup> Cir. 1996), *disapproved on other grounds by United States v. Foster*, 165 F.3d 689 (9<sup>th</sup> Cir. 1999).

Put plainly, Deborah J. Peel's misappropriation of funds gave her a powerful bias against Gary Peel - a bias about which Gary Peel's jury was completely unaware. The Seventh Circuit has reversed a conviction when the district court completely prohibited cross-examination about bias:

In this case, the district court entirely prevented the defendant from asking Colburn and Campbell about their fear of Pszeniczka and its relationship, if any, to their testimony against Manske. This complete ban cut off an important avenue for the defendant to expose those individual's alleged bias and motive to testify as they did, leaving the jury short of potentially essential information.

*United States v. Manske*, 186 F.3d 770, 778 (7<sup>th</sup> Cir. 1999).

#### **D. Untruthfulness of Deborah J. Peel**

The Seventh Circuit has repeatedly pronounced that "...acts of fraud or deceit [are] probative of a witness's truthfulness or untruthfulness under Rule 608(b)." *United States v. West*, 202 F.3d 275 (table), 2000 WL 14421, \*2 (7<sup>th</sup> Cir. 2000), citing *United States v. Smith*, 80 F.3d 1188, 1193 (7<sup>th</sup> Cir. 1996), *Varhol v. National R.R. Passenger Corp.*, 909 F.2d 1557, 1567 (7<sup>th</sup> Cir. 1990) (en banc).

Moreover, the witness need not have been convicted of fraud in order to be properly impeached:

The prosecutor's cross-examination of Mr. Harlan likely would have diminished greatly the value of his testimony. Mr. Harlan was under indictment in a related fraud case, and the conduct underlying that indictment almost certainly would have been suitable material for impeachment pursuant to Federal Rule of Evidence 608(b), as fraudulent conduct implicates a witness's character for truthfulness, e.g., *United States v. Smith*, 80 F.3d 1188, 1193 (7<sup>th</sup> Cir. 1996).

*United States v. Staples*, 410 F.3d 484, 489 (8<sup>th</sup> Cir. 2005).

Finally, the fact that the government alluded to Deborah J. Peel having a different view of her noncompliance with the Settlement Agreement is neither surprising. Impeachment need not be limited to uncontroverted matters, as the Fifth Circuit explained:

Although Sanders argues that the incident is irrelevant because it was a mere contract dispute, the government alleges that Sanders committed fraud and cheated the real estate agent into giving him a refund. Fraud has been held to be probative of a witness's character for truthfulness or untruthfulness...Therefore the district court did not abuse its discretion in allowing the government to cross-examine Sanders regarding the transaction.

*United States v. Sanders*, 343 F.3d 511, 519 (5<sup>th</sup> Cir. 2003) (citation omitted).

As with evidence of Deborah J. Peel's bias, state of mind, and credibility, evidence of and cross-examination about her untruthfulness was proper. Cross examination of Mrs. Peel on all issues effecting her credibility and bias was essential due to the fact that her testimony was the only evidence offered at trial concerning key unrecorded conversations. Therefore, depriving Gary Peel of the opportunity to Confront her on these issues deprived him of a fair trial.

**E. Relevance to Charge Offense.**

Deborah J. Peel's misuse of marital funds was also directly relevant to the charges of bankruptcy fraud and obstruction of justice. Count I of the Indictment alleged, in part, that Mr. Peel did knowingly and fraudulently "receive . . . and attempt to obtain money and property, remuneration, compensation, reward, advantage and promise" in the pending bankruptcy proceeding. Count II alleged that he knowingly and corruptly attempted to obstruct an official proceeding. Nevertheless, by excluding the evidence of Mr. Peel's claims against his wife regarding the improper use of marital funds, this Court prevented Mr. Peel from explaining to the jury the full extent of the consideration he was giving up in the negotiations with his ex-wife. Without hearing this evidence, the jury was not allowed to properly weigh whether the government had proven beyond a reasonable doubt whether Mr. Peel had fraudulently used the pictures to gain an advantage in the bankruptcy.

Denying Mr. Peel the right to present this evidence denied him his right to present a complete defense. Mr. Peel testified at trial that his conduct with respect to the pictures was a reaction to activities on the part of his ex-wife in making private matters in the bankruptcy public. They were not done for the purpose of obtaining an advantage in the bankruptcy. Had Mr. Peel been allowed to explain his claims against his ex-wife, as well as the fact that he was willing to give them up as part of his settlement offer, he would have been able to show the extent to which he was offering very real, and very fair, consideration for the settlement. Denying him the right to present this aspect of his defense further denied Mr. Peel a fair trial on counts I & II.

#### IV. Exclusion of Testimony of Thomas Hoops.

Although this Court overruled the government's *Daubert* objections regarding proffered testimony of Thomas L. Hoops, the Court limited any testimony by Thomas Hoops to rebutting any challenges by the government that the initial bankruptcy filing by Gary Peel was unwarranted. *See* Doc. 101 at 2. This Court made clear a blanket prohibition: "The Court will not allow Hoops to testify as to any intent of the defendant." *Id.*

Unfortunately, this blanket prohibition far exceeded the limitations regarding expert testimony on ultimate issues contained in Rule 704(b) of the Federal Rules of Evidence:

Under Rule 704(b), an expert witness may not testify, state an opinion, or infer that a defendant "did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto." Fed.R.Evid. 704(b). In evaluating the fine line between permissible and impermissible testimony under Rule 704(b), the Third Circuit has reasoned that "[e]xpert testimony is admissible if it merely 'support[s] an inference or conclusion that the defendant did or did not have the requisite mens rea, so long as the expert does not draw the ultimate inference or conclusion for the jury and the ultimate inference or conclusion does not necessarily follow from the testimony.'"

*United States v. Davis*, 233 F.Supp.2d 695, 701 (E.D. Penn. 2002) (citations omitted), *aff'd*, 397 F.2d 173 (2005); *reh'g denied*. In *Davis*, the district court admitted the expert testimony pertaining to the defendant's mental state, as did a district court in the Northern District of Illinois:

There is no question that the government experts' opinions are relevant to determination of whether defendant has the requisite intent to defraud; the issue is whether those opinions are sufficiently reliable to be admissible...But the Court sees no need to hold a pretrial evidentiary hearing on the subject, as we are confident that a basis sufficient under *Daubert* will be supplied on the witnesses' direct examination.

*United States v. Vasquez-Ruiz*, 2002 WL 171969, \*4 (N.D.Ill. 2002).

Of course, the courts for the Eastern District of Pennsylvania and the Northern District of Illinois are hardly the only courts to allow expert testimony pertaining to a defendant's intent, as long as such expert testimony does not resolve the ultimate issue for the jury. Indeed, the Fourth Circuit upheld the admission of expert testimony, in part because that expert testimony bore on the defendant's intent:

The district court found that Dr. Stinger's opinion regarding the amount of force was trustworthy because it was based upon the doctor's experience as a surgeon. Furthermore, the testimony was relevant to the issue of Hall's intent, and fell outside the jury's common knowledge.

*United States v. Hall*, 7 Fed.Appx. 301, 303 (4<sup>th</sup> Cir. 2001) (citations omitted).

In seeking a new trial at which Thomas Hoops may testify on matters pertaining to Gary Peel's intent and credibility, Gary Peel is asking for no more than what has been allowed in the criminal cases cited *supra*, as well as in a civil case decided earlier this year:

Within their appropriate spheres of expertise, and assuming that such opinions are grounded in reliable methodology, Lancaster and Jeffay are free to opine as to whether defendant's communications to plaintiff were, or were not, entirely credible. Defendant's motion to exclude the expert reports of Lancaster and Jeffay based on opinions relating to the credibility of defendant is DENIED.

*Bouygues Telecom, S.A. v. Tekelec*, 472 F.Supp.2d 722, 727 (E.D. North Carolina, 2007)

(capitalization in original).

Here, the testimony of Mr. Hoops was highly relevant to Mr. Peel's intent at the time of the actions alleged in the Indictment. As demonstrated by Mr. Peel's pretrial submission on this issue, Mr. Hoops proposed testimony focused on the relative financial positions of Mr. Peel and his ex-wife during the negotiations. This evidence was important to Mr. Peel's defense for two

reasons. First, it would have educated the jury concerning the extent of consideration being offered by Mr. Peel at a time when he was supposedly attempting to defraud his ex-wife out of money in the bankruptcy proceeding. Second, it would have strengthened Mr. Peel's testimony at trial that his actions were not intended as a means of gaining an unfair advantage in the bankruptcy, but instead were a reaction to the disclosures by his ex-wife of private details relating to the bankruptcy. Foreclosing this evidence denied Mr. Peel a fair trial and demands a new one.

**V. The Court Erred in the Admission of the Testimony of Ms. Marianne Dilman.**

Marianne Dilman was called by the prosecution to address the element of the interstate nexus of the original photograph of Donna Rodgers. Prior to her testimony counsel for Defendant inquired as to the type and nature of Ms. Dilman's testimony. Specifically, whether or not she was a fact witness or an expert witness.

The prosecutor assured the Court and counsel for Defendant that she was being called as a fact witness. Then, preliminary foundation questions were asked of the witness that paralleled those qualifying an expert. Counsel objected and a sidebar ensued. Counsel for Defendant Peel specifically cited the provisions of Rule 602 FRE, requiring personal knowledge on the part of the fact witness. Counsel also called the Court's attention to the provisions of Rule 703 FRE and the distinction between the two.

The Court allowed the testimony of this witness on the theory that although she had no personal knowledge of the facts about which she testified, her employment qualified her to give

historical knowledge. The Court likened the testimony of a person who could state, based upon historical knowledge, that a certain building was located at a certain address at a certain past point in time.

While this might be correct, the Court's ruling went too far. Because the effect of the Court's ruling was to not only allow the witness to testify to historical facts but also testimony as to technical facts. Using the Court's example, it may be appropriate for a witness to testify to a historical fact i.e., the location of a building. However, it is totally improper for a fact witness with no knowledge to testify as to the manufacturing processes, techniques and circumstances that went on inside that building unless that witness is qualified as an expert pursuant to Rule 703 and 704 FRE.

In *Kaczmarek v. Allied Chemical*, 836 F.2d 1055, 1061 (7<sup>th</sup> Cir. 1987), it was determined that it was reversible error to allow a transport company's safety director to testify as to certain safety rules at the time of an accident which was five years before the witness began his employment at the trucking company. Likewise, a lay witness could not offer the contents of a hearsay statement as his personal knowledge. Such a witness, even attesting to historical facts, cannot rely on the same evidence as a qualified expert witness. *Clark v. Takata Corp.*, 192 F.3d 750, 758 (7<sup>th</sup> Cir. 1999).

The circuits have repeatedly been consistent on this issue. Personal knowledge of a fact which can be perceived by the senses requires that the witness have an opportunity to observe those facts and had actually observed personally the facts in issue. Personal knowledge of a witness cannot be based on the statements of another or observations or conclusory statements. *United States v. Owens*, 789 F.2d 750, 20 FRE serv. 807 (9<sup>th</sup> Cir. 1986); *Stagman v. Ryan*, 176 F.3d 986, 995 (7<sup>th</sup> Cir. 1999); *Kemp v. Balboa*, 23 F.3d 211, 213 (8<sup>th</sup> Cir. 1994).

Thus, it is respectfully submitted that the Court erred in admitting this testimony. The

testimony of Marianne Dilman was the only testimony that spoke to the interstate nexus element of the foundation for the photograph in question. It is respectfully argued that this element was not proved beyond a reasonable doubt.

**VI. The Government Failed to Prove Beyond a Reasonable Doubt that the Photocopies of the Original Image were Manufactured with Materials that Traveled in or Affected Interstate or Foreign Commerce.**

The statutory language and the language of the jury instruction speaks to “materials” that traveled in interstate or foreign commerce. Webster’s Third New International Dictionary at page 1392 defines “material” as the basic matter, as metal, wood, plastic, fiber) from which the whole or the greater part of something physical is made. In the instant matter the prosecution did prove that the copier/photocopier in question traveled in foreign commerce. However, there was no evidence that the component materials i.e., paper and ink was manufactured outside the State of Illinois. There is a legal distinction, according to the precise language of the statute between the “materials” of production and the machinery which takes the components and creates the whole.

In the instant matter we are dealing with an original image that was created 33 years prior to trial. The photocopies were created two to three days prior to dissemination. Absent proof that the component materials were manufactured outside the State of Illinois, there is no basis to determine that the interstate commerce requirement has been met. It is respectfully submitted that in terms of both the original image and the photocopies, Defendant Peel’s possession of same was purely intrastate.

**VII. The Government Failed to Prove the Scierter Requirement of 18 U.S.C. § 2252A Beyond a Reasonable Doubt.**

In *United States v. X-citement Video*, 513 U.S. 64, 115 S.Ct. 464, (1994), the Supreme Court determined that the elements of the minority of the subject and the sexually implicit conduct, within the statutory definition must be proven by the prosecution beyond a reasonable doubt.

The uncontroverted trial testimony disclosed that the single image in question was taken during the summer of 1974 in close proximity to Donna Rodgers' 17<sup>th</sup> birthday. The individual portrayed in this image is a sexually mature young woman, in no apparent distress, reclining on the floor of a law office, smiling at the camera. The pubic region is visible, but no genitalia are visible. No sex acts are expressed or implied in this pose. At the time of the creation of this image the sexual liaison between Donna Rodgers and Gary Peel was legal. In addition, the taking of the photograph and possession of same was legal. The version of 18 U.S.C. § 2255A under which Peel was prosecuted did not take effect until October of 1998. At the time the photo was made and possessed, and for decades thereafter, the possession by Defendant Peel was entirely legal. At the time of the creation of the image Defendant Peel may have had knowledge of Donna Rodgers' true age. However, no evidence was presented at trial that imputed this knowledge to Peel in January of 2006.

During a covertly recorded telephone conversation between Gary Peel's ex-wife and himself, while D.J. Peel was under the "guidance" of the Justice Department, the following exchange took place:

Deborah Peel ". . . And how old was she, Gary? For God's sakes. I thought I saw braces on her teeth."

Gary Peel “I don’t think so. I mean, she was over 18 if that’s what you’re asking me.”

This is the only direct evidence of Gary Peel’s knowledge of the age of Donna Rodgers in January of 2006. In addition, Peel met with the FBI on two occasions; once on January 31, 2006 and again on February 14, 2006. On both occasions the agents had an opportunity to interrogate Peel as to his knowledge of Donna Rodgers’ age. They did not. Further, the agents had a number of in-person and telephonic interviews with Gary Peel’s wife, Deborah Pontious-Peel and no mention of her knowledge or Gary’s knowledge was taken up in these discussions.

At trial, subject to the penalties of perjury and cross-examine, Gary Peel adamantly maintained that in January, 2006 he assumed that Donna Rodgers was 18 years or older. This testimony was uncontradicted. Accordingly, Mr. Peel submits that the government did not prove its case beyond a reasonable doubt. On this further basis a new trial should be granted.

### **CONCLUSION**

The cumulative error at trial, to include the exclusion of defense evidence, the improper inclusion of government evidence, and instructional errors, all warrant a new trial on all counts. Furthermore, the government’s proof was insufficient as to counts III & IV. Mr. Peel therefore respectfully requests that this Court grant him a new trial on all counts.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned attorney hereby certifies that on April 30<sup>th</sup>, 2007, he provided a copy of this document to:

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