

RAS C-247

DOCKETED  
USNRC

December 23, 2007 (8:30am)

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OHIO  
WESTERN DIVISION

OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

UNITED STATES OF AMERICA, )  
)  
Plaintiff, )  
)  
)  
v. )  
)  
DAVID GEISEN, )  
)  
Defendant )

No. 3:06CR712 (Katz)

ORAL ARGUMENT  
RESPECTFULLY REQUESTED

**REPLY OF DAVID C. GEISEN TO THE GOVERNMENT'S OPPOSITION  
TO MOTION FOR JUDGMENT OF ACQUITTAL  
OR, IN THE ALTERNATIVE, FOR A NEW TRIAL**

In its Opposition to David C. Geisen's Motion for Judgment of Acquittal or, in the Alternative, for a New Trial ("Opposition"), the Government suggests inferences from the circumstantial evidence it adduced were sufficient to support the jury's verdicts. But the "inferences" proposed by the government are largely speculations based either on mischaracterizations of the evidence or made without any evidentiary support. While the Court must, for the purpose of the Rule 29 motion, draw inferences in favor of the government, it cannot engage in such speculation. Nor could the jury, legitimately.

The insufficiency of the evidence comes through clearly once the impermissible speculation is removed from the Opposition, as does the potential mischief of the deliberate ignorance instruction, which the government sought in the absence of evidentiary foundation. The Opposition underscores the fundamental unfairness of the verdicts on what Mr. Geisen should have known rather than what he did know. It also reveals, notwithstanding the abundance

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of speculation offered by the government, the lack of evidence of Mr. Geisen's intent to deceive the NRC. This Court should grant the relief requested in the Motion.

### ARGUMENT

The government suggests Mr. Geisen "would require direct evidence of intent" to support a conviction. Opposition at 6. Mr. Geisen has never made such an argument. He has argued the jury could not convict him of violating 18 U.S.C. § 1001 unless the government proved knowledge and intent beyond a reasonable doubt.<sup>1</sup> Whether that proof is based upon direct or circumstantial evidence, it must be sufficient as a matter of law to establish those elements. The fact, as the government apparently concedes in the Opposition, that no direct evidence of Mr. Geisen's knowledge or intent was produced, informs the sufficiency analysis, but obviously does

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<sup>1</sup> Obviously, the government was also required to prove the falsity of the statements. While Mr. Geisen conceded some statements he made proved to be inaccurate, the government cites to other statements in its Opposition that are arguably not "false" as a matter of law.

For example, the government cites to FENOC's claim in 2741 "following 12RFO, the RPV head was cleaned with demineralized water to the extent possible to provide a clean head for evaluating future inspection results" and argues Mr. Geisen already knew the head had not been successfully cleaned during 12RFO. Opposition at 18-19. But the quoted statement from 2741 did not communicate a complete cleaning of the head. While the language may be insufficiently precise, it is not "false" as the words "to the extent possible" modify the word "cleaned." Of course, as noted in the Motion, *Mr. Geisen had no role in drafting 2741*. Motion at 24.

Similarly, the government cites Mr. Geisen's use of the word "verified" in an October 11 presentation to the NRC Technical Assistants when Mr. Siemaszko was still in the process of completing his nozzle-by-nozzle table. Opposition at 16. As the government established on cross-examination, Mr. Geisen believed, on October 11, that plant engineering reviewed the 1998 and 2000 videotapes in writing Serial Letter 2731. Tr. 10/19, 89. Mr. Siemaszko also told him, in essence, he had verified all penetrations were free from popcorn. Tr. 10/19, 91. In the light of those undisputed facts, use of the word "verified" was not "false" and certainly does not, as the government suggests, support an inference that Mr. Geisen was "presenting baseless information in an effort to deceive the NRC about the quality of past inspections" Opposition at 16. And Mr. Geisen's editing of the language in the very same slide where the word "verified" appeared undercuts any inference of intent to deceive the NRC on his part. Motion at 18. While the jury is entitled to draw inferences from circumstantial evidence, they must be "reasonable" and can not be speculative. See, *United States v. Conrad*, 507 F.3d 424 (6th Cir. 2007).

not end it. Mr. Geisen concedes if the government produced sufficient circumstantial evidence to support verdicts of guilt, those verdicts would survive a Rule 29 review. The government simply did not do so.

The government's sufficiency argument rests heavily, if not entirely, on the allegation that Mr. Geisen reviewed videotapes of past inspections closely enough to know those videotapes did not support FENOC's statements about past inspections. Opposition at 12. It cites the testimony of Jack Martin and of Mr. Geisen himself to support that allegation. But it misstates the evidence in setting forth the circumstantial evidence from which it then draws "inferences." In fact, the circumstantial evidence does not show Mr. Geisen "reviewed" the past videotapes. Argument otherwise, opposition at 12, is unsupported and impermissible speculation.

The government argues the jury "could appropriately infer that [Mr.] Geisen reviewed both as-found and as-left inspection" tapes in August 2001 based upon the testimony of Jack Martin. That suggested inference, however, rests upon a mischaracterization of Mr. Martin's testimony. Mr. Martin did not, as the government intimates, specifically interview Mr. Geisen about his review of the videotapes. And Mr. Martin's account of Mr. Geisen's statement regarding the videotapes was not sufficiently detailed or precise to support the argument the government attempts to draw from it.

Jack Martin spoke with Mr. Geisen in March 2002 in the course his review of plant management and organizational performance. Tr. 10/3, 31. His review was not intended to be a formal investigation, for which he conceded that he did not possess sufficient qualifications. Tr. 10/3, 36. His conversation with Mr. Geisen was not intended to be a verbatim interview. Id. He was not focused on issues relating to the bulletin responses or the review of videotapes in

connection with the responses. Tr. 10/3, 37. Instead, he spoke with Mr. Geisen about the cleaning of the head in 2000. Tr. 10/3, 32. In discussing that issue, Mr. Martin claims Mr. Geisen said he learned the 2000 cleaning of the head had not been entirely successful when reviewing the videos while preparing for the NRC interactions in August 2001.<sup>2</sup>

There are significant reasons to question the accuracy of Mr. Martin's account.<sup>3</sup>

However, assuming *arguendo* the Court, in applying Rule 29, credits that Mr. Geisen learned the head had not been successfully cleaned in 2000 through the review of videotapes, that testimony does not support an inference that Mr. Geisen "reviewed both as-found and as-left inspections," Opposition at 13. Indeed, all that could be legitimately inferred is that Mr. Geisen viewed the tape that would have shown the head left with boron coming out of the 2000 inspection -- the as-left tape. Any other conclusion would be speculation without testimonial or evidentiary support.

The government repeatedly argues that Mr. Geisen "admitted reviewing video records" with Mr. Siemaszko in October 2001. Opposition at 13 ("[Geisen] admitted reviewing video records with Andrew Siemaszko for over an hour prior to Serial Letters 2741 and 2744 being sent"), 17 ("Geisen admitted having sat next to Defendant Siemaszko for an hour, as Siemaszko was reviewing video"), 18 ("[Geisen] admitted having reviewed video, together with Defendant Siemaszko"; "jury could reasonably conclude, from Geisen's own testimony, that he'd spent

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<sup>2</sup> This is the account memorialized in a document typed by a secretary from Mr. Martin's handwritten notes after the conversation. Mr. Martin admitted the document was not intended to be verbatim, was not reviewed by Mr. Geisen for accuracy, and that he told the Grand Jury it was a challenge for him to read his own handwriting. Tr. 10b/3, 41.

<sup>3</sup> The record suggests a reasonable juror would necessarily have doubts about Mr. Martin's ability to accurately recall details of his interview. For example, Mr. Martin said he reviewed his notes to refresh his recollection before he testified, Tr. 10/3, 34, but testified Mr. Geisen said he viewed the videos "in preparation to answer the NRC bulletin." *Id.* Of course, there is no mention of the Bulletin in Mr. Martin's notes and the evidence showed Mr. Geisen was not involved in interactions with the NRC before October 3, 2001.

over an hour reviewing video with Defendant Siemaszko”), 30 (“[Geisen] admitted viewing an hour of video with Defendant Siemaszko”). Each time, the government cites to the trial transcript. As the transcript attests, Mr. Geisen’s testimony is completely misstated.<sup>4</sup> Mr. Geisen testified he sat with Mr. Siemaszko and viewed digitized video clips drawn from the videotapes while Mr. Siemaszko explained how he was making calls on individual nozzles. He did not testify that he reviewed a running inspection tape. He did not testify he viewed “an hour of video.” Indeed, he did not know *which* video Mr. Siemaszko was analyzing. From Mr. Geisen’s testimony, no reasonable juror could conclude Mr. Geisen “reviewed video records” with Mr. Siemaszko in October 2001 such that he would have known the content of the all of the past inspection videos. Such a conclusion would not be an “inference” as the government argues, but rather complete and impermissible speculation.<sup>5</sup> It would also be incorrect.

The government repeatedly cites to Mr. Geisen’s “knowledge” of the content of the inspection videos throughout its sufficiency argument. But the evidence did not establish such “knowledge” on Mr. Geisen’s part.

The difference between legitimate inference and impermissible speculation is highlighted by the government’s argument regarding the sufficiency of the evidence relating to Serial Letter 2744. Opposition at 19. Mr. Geisen acknowledged he wrote the captions to photos in 2744 based on information he received from Mr. Siemaszko. Motion at 26-28. The government

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<sup>4</sup> The cited pages, 9-12 from October 19, are attached to this Reply as Attachment A.

<sup>5</sup> Mr. Geisen concedes a reasonable juror could reject his account of his meeting with Mr. Siemaszko, although his account was not challenged by the government. But if a juror did so, he or she would be left with no testimony about that meeting, and would not be permitted to substitute the government’s speculation (that he reviewed tapes with Mr. Siemaszko for an hour) in the place of Mr. Geisen’s testimony. The government’s account of the meeting is simply devoid of any evidentiary basis.

argues “the circumstances ...suggest that something strange was going on,”<sup>6</sup> because Mr. Geisen did work that Mr. Siemaszko “should have...done.” Opposition at 19. The government did not advance this argument at trial, likely due to the fact that no evidence supports it.<sup>7</sup> But it then argues that “strange” circumstances combined with Mr. Geisen’s “established knowledge of the video record,” would allow a juror to “reasonably infer either that [Mr. Geisen] wanted to write captions that were different than what he thought Siemaszko would write, that he was in collusion with Mr. Siemaszko about what should be said, or that he did not want to know what Siemaszko would say about the photographs.” *Id.*

Huh?

There was absolutely no evidence of “collusion” between Mr. Geisen and Mr. Siemaszko and any inference of such “collusion” would be rank speculation. There *was* evidence as to what Mr. Siemaszko would have said or written about the photographs, as Mr. Geisen collected the information in the captions directly from Mr. Siemaszko. Even if a juror chose not to credit Mr. Geisen’s testimony, nothing in the record supported an inference that Mr. Siemaszko would have written something different than what appeared in 2744 or that Mr. Geisen wrote the captions to avoid Mr. Siemaszko’s input. Having indicted Mr. Siemaszko and repeatedly characterized him as unreliable and dishonest, this argument from the government is peculiar. More importantly, though, it is totally unsupported by the record.

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<sup>6</sup> The Sixth Circuit recently noted in an unpublished opinion “we have consistently held that “the government’s case will not succeed merely because there is something ‘fishy’ about the defendant’s conduct.” *United States v. Morrison*, 220 Fed. Appx. 389 (6th Cir. 2007).

<sup>7</sup> Indeed, the evidence suggested ample reason for Mr. Geisen to write the captions. Multiple witnesses testified to Mr. Siemaszko’s troubles with the English language. The evidence established Mr. Geisen assumed a greater role in some of the Bulletin responses after October 3, 2001.

The government criticizes Mr. Geisen's reliance on Mr. Siemaszko in the Opposition, as it did during the trial. Opposition at 13-14. But the issue for this jury, and the one before the Court in evaluating Mr. Geisen's present motion, is not whether he should have questioned Mr. Siemaszko's reliability, but whether he did. The government's argument that a reasonable juror could conclude Mr. Geisen knew, by October 17, 2001 that Mr. Siemaszko was unreliable, is unsupported by the evidence and epitomizes the type of hindsight reasoning at the core of the government's case.

Obviously, there was no direct evidence of Mr. Geisen's doubt in Mr. Siemaszko's reliability. There was also no circumstantial evidence of such a doubt that would allow for a legitimate, non-speculative inference to be drawn. It is not difficult to imagine forms such circumstantial evidence could have taken: evidence that Mr. Geisen began to use others for tasks previously assigned to Mr. Siemaszko, evidence that Mr. Geisen suggested to superiors that Mr. Siemaszko's job performance was sub par, evidence that Mr. Geisen stopped seeking Mr. Siemaszko's input with regard to Bulletin responses. But the government introduced no such evidence. In fact, the evidence directly contradicts such an inference. It showed that Mr. Geisen continued to rely upon Mr. Siemaszko, notably in his construction of 2744. It also showed that Mr. Geisen recommended that FENOC send Mr. Siemaszko to meet with the NRC on November 14, 2001. No reasonable juror could infer Mr. Geisen "knew" Mr. Siemaszko was unreliable, though a reasonable juror could arguably conclude that Mr. Geisen should have.

This argument by the government also demonstrates why the deliberate ignorance instruction was so dangerous in this case. The government cites to the portion of the instruction counseling the jury not to convict based on carelessness, negligence, or foolishness, but that same caution appeared in the trial court's instruction in *Ramos* and the Sixth Circuit still held the

instruction “should be used with caution, because of the possibility that ‘juries will convict on a basis akin to a standard of negligence.’” *United States v. Ramos*, 1994 U.S.App.LEXIS 28711, \*9 (6th Cir. 1994)(unpublished opinion.) It was included in the trial court’s instruction in *Mari* and the Sixth Circuit still held the instruction should not be given “indiscriminately.” *United States v. Mari*, 47 F.3d 782, 786 (6th Cir. 1995). And it was included in the trial court’s instruction in *Barnhard* and the Eighth Circuit still held “despite the instruction’s cautionary disclaimer, there is a ‘possibility that the jury will be led to employ a negligence standard and convict a defendant on the impermissible ground that he should have know [an illegal act] was taking place.’” *United States v. Barnhard*, 979 F.2d 647, 651 (8th Cir. 1992). Thus, as Mr. Geisen argued in the Motion, the proper inquiry for this Court is whether the instruction was supported by any evidence. Mr. Geisen respectfully submits the answer is no.

As set forth at length in the Motion, deliberate ignorance requires an affirmative, intentional effort by the defendant to avoid gaining knowledge for the purpose of establishing a defense. Motion at 9-10. No such evidence exists in the record. The government tried this case on a theory of actual knowledge. All of the evidence regarding the “warnings” to Mr. Geisen from pre-Bulletin e-mails and trip reports was introduced to suggest Mr. Geisen actually knew of the falsity of later statements to the NRC. Even though all of the government’s evidence was circumstantial, rather than direct, the evidence was offered to prove he actually knew an operative fact. As the Tenth Circuit noted in *de Francisco-Lopez*, “[i]f evidence proves the defendant actually *knew* and operant fact, the same evidence could not *also* prove he was *ignorant* of that fact. Logic simply defies that result.” *United States v. de Francisco-Lopez*, 939 F.2d 1405, 1410 (10th Cir. 1992.) The government concludes the Tenth Circuit “fell into [a] trap” in that case. Opposition at 9. Review of that opinion demonstrates the government’s

statement, while bold, is wrong. The Tenth Circuit carefully and correctly analyzed the deliberate ignorance charge, and the example cited by the government in the Opposition proves the soundness of the Tenth Circuit's logic. The government cites an instance in which a strong smell of marijuana wafting from a stopped car, along with the driver's failure to obtain a key to the trunk, could support a finding of actual knowledge and deliberate ignorance. But the two pieces of evidence would support different theories of knowledge. The smell wafting from the car would support the argument the defendant had actual knowledge of marijuana in the trunk. The refusal to get a key would support the argument that the defendant actively avoided gaining knowledge of the contents. But the smell would not support both an actual knowledge and a deliberate ignorance instruction. Nor would the refusal to get a key. In this case, the government sought both instructions from evidence of actual knowledge only.<sup>8</sup>

The government seeks refuge in the Sixth Circuit's holding in *Mari*<sup>9</sup> that while the deliberate ignorance instruction should not have been given, the jury in that case must have convicted the defendant based on his actual knowledge. Opposition at 33. But the *Mari* Court specifically noted there was "certainly sufficient evidence [of actual knowledge] to support a conviction." *Mari*, 47 F.3d at 785. For the reasons set forth above and throughout Mr. Geisen's Motion, that certainly cannot be said in this case. There was insufficient evidence of actual

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<sup>8</sup> It is not difficult to envision what evidence of deliberate ignorance would look like in this case. It could be direct, such as Mr. Geisen saying to Prason Goyal or Andrew Siemaszko "don't tell me, I don't want to know." See, *Lara-Velasquez*, 919 F.2d at 951. Or it could be circumstantial, such as evidence that Mr. Geisen avoided reading his emails, refused to attend prep sessions before meetings with the NRC, or actively avoided contact with engineers who were involved in the drafting process. There was neither type in this case.

<sup>9</sup> Many of the cases dealing with deliberate ignorance involve simple factual scenarios such as drug possession charges. The facts in this case were significantly more technical and the evidence was obviously more complicated than in the average drug possession trial. Given that distinction, the logical  
(footnote continued on next page)

knowledge to support a rational conclusion that Mr. Geisen knew his statements were false and intended to deceive the NRC. In contrast, there was significant evidence upon which a jury could conclude Mr. Geisen was negligent in his job performance. The verdicts compel the conclusion that the convictions rested squarely on that conclusion. Negligence, however, simply cannot support a criminal conviction.

Mr. Geisen moved this Court to vacate his convictions pursuant to Rule 29. For the reasons set forth above and in his initial motion, the government's evidence of knowledge and intent was insufficient to support the jury's verdict, and the Court should grant judgments of acquittal on counts one, three, and four.

If, however, the Court denies that motion because it must draw all reasonable inferences in favor of the government, the Court should grant a new trial under Rule 33. As argued in the Motion, Rule 33 does not require the Court to draw inferences in favor of the government. It allows the Court to weigh the evidence and consider the credibility of the witnesses to insure there is no miscarriage of justice. Applying this standard, when the Court considers the government's heavy reliance on the testimony of Jack Martin to support its contention that Mr. Geisen reviewed videos in August, 2001, it should conclude it is a claim thoroughly undercut by the other evidence in the case and by the inherent unreliability of Mr. Martin's testimony. It should weigh the fact that the government's argument about Mr. Geisen's knowledge of past inspection results rests on a complete mischaracterization of Mr. Geisen's session with Mr. Siemaszko in advance of 2735. It should consider the fact that Mr. Geisen's colleagues, Steven Moffitt and Mark McLaughlin vouched for his integrity and honesty. If the jury's verdicts

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conclusion of the Sixth Circuit in *Mari* provides this Court little guidance in evaluating the effect of an improper deliberate ignorance charge in this case.

survive the Court's Rule 29 analysis (which Mr. Geisen strongly believes they cannot), they do so by the slimmest of margins and only with the benefit of every conceivable inference. They cannot survive a Rule 33 analysis, when viewed against the evidence in the case, the inconsistency with the acquittals on counts two and five, and the inconsistencies with the acquittals of Mr. Cook.

Mr. Geisen stands by the arguments made in his Motion.

Mr. Geisen made mistakes. He acknowledges those mistakes. He did not commit crimes. The Court should acknowledge that by granting his Motion.

Respectfully Submitted,

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