

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

Criminal Case No. 06-cr-00192-LTB

UNITED STATES OF AMERICA,

Plaintiff,

v.

1. WILLIAM C. ORR,

Defendant.

**GOVERNMENT'S RESPONSE TO DEFENDANT'S
RULE 29 MOTION FOR JUDGMENT OF ACQUITTAL, AND
RULE 33 MOTION FOR A NEW TRIAL**

The United States of America, by and through Assistant United States Attorneys Patricia W. Davies and Thomas M. O'Rourke, submits the following response to the Rule 29 Motion for Judgment of Acquittal and Rule 33 Motion for a New Trial (document 498).

I. SUMMARY OF ARGUMENT

On May 28, 2008, following a trial in this court, a jury returned verdicts finding the defendant William C. Orr guilty on twenty-two counts of the indictment in this case. The counts of conviction were: (1) Counts 1 through 8, which charged a scheme to defraud, and to obtain money from, a group of people who invested in Octane International Ltd. ("Octane"), (2) Counts 9 through 14, which charged a scheme to defraud and to get money from, the United States government, (3) Counts 15 and 17, which alleged the submission of false documents to the Environmental Protection Agency, and (4) Counts

23 through 28, which charged that Orr willfully failed to file tax returns. Doc. 463. See also doc. 1 at 2-14, 20-23. The jury failed to reach verdicts on Counts 19 through 22, which charged tax evasion. Doc. 463. Prior to trial, the government moved to dismiss, and this Court entered an order dismissing, Counts 16 and 18. (Doc. 253, doc. 271).

On July 15, 2008, Orr filed the present motion, claiming, *inter alia*, that:

(a) insufficient evidence supported Orr's convictions on Counts 1 through 15, and Count 17 as to whether "Orr misrepresented the NIPER test results" (Doc. 498, pg. 2);

(b) the conviction on Count 16 "depends on impermissible inferences and is directly contradicted by the evidence at trial" (*Id.*); and

(c) A miscellany of trial errors occurred, including: the Court's *voir dire*, and the government's purported improper use of non-experts William Marshall, Thomas Reed, Justin Buckmaster, and Shivayam Ellis, purported misstatement of evidence in closing argument, use of hypothetical questions to victims/investors, and references to instances of Orr using money for gambling and providing whiskey in connection with obtaining the NAFF grant.

Orr concludes that "all counts of conviction must be vacated and a new trial ordered. A judgment of acquittal must enter on Count 17, and on the tax evasion counts, Counts 18-22. A judgment of acquittal should be entered on the all fo the wilful failure to file counts, Counts 23-28. . . ." (Doc. 498, pg. 31).

As demonstrated below, Orr's motion fails in all respects to make the showing for relief required by Rule 29 and/or Rule 33. Pursuant to Rule 29, the trial evidence in this case was clearly sufficient, when taken in the light most favorable to the government, so that a reasonable jury could find defendant guilty. Pursuant to Rule 33, the trial errors

alleged by Orr taken singly or together in no way undermine the legitimacy of the jury's verdicts. Accordingly, Orr's motion should be denied.

II. MOTION FOR JUDGMENT OF ACQUITTAL

_____The Court obviously cannot enter a judgment of acquittal on Counts 16 and 18 since those counts were previously dismissed, and it can grant the request as to Counts 17 and 19 through 28 only if it finds that "the evidence [was] insufficient to sustain a conviction." Fed. R. Crim. Pro. 29(a).

The standard for deciding the motion is as follows:

The evidence -- both direct and circumstantial, together with the reasonable inferences to be drawn therefrom -- is sufficient if, when taken in the light most favorable to the government, a reasonable jury could find the defendant guilty beyond a reasonable doubt.

United States v. Hooks, 780 F.2d 1526, 1531 (10th Cir.), *cert. denied*, 475 U.S. 1128 (1986). This standard

gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution. The criterion thus impinges upon "jury" discretion only to the extent necessary to guarantee the fundamental protection of due process of law.

Jackson v. Virginia, 443 U.S. 307, 318-19 (1979) (emphasis in original).

The evidence must support the conviction beyond raising "a mere suspicion of guilt," but "it need not conclusively exclude every other reasonable hypothesis[,] and it need not negate all possibilities except guilt." *United States v. Vallejos*, 421 F.3d 1119,

1122 (10th Cir. 2005). A trial court, in other words, cannot reverse a conviction “on the ground that the evidence was consistent with a reasonable hypothesis of innocence.” *United States v. Hooks*, 780 F.2d at 1530. A trial court “does not weigh conflicting evidence nor consider the credibility of the witnesses.” *United States v. Downen*, 496 F.2d 314, 318 (10th Cir.), *cert. denied*, 419 U.S. 897 (1974). And it should not “ ‘ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt.’ ” *Jackson v. Virginia*, 443 U.S. at 318-19, *quoting Woodby v. Immigration & Naturalization Serv.*, 385 U.S. 276, 282 (1966). “The Court must defer to the jury’s finding ‘unless no reasonable juror could have reached the disputed verdict.’ ” *United States v. Bruner*, 2007 WL 2420073, at *1 (W.D.OK 2007), *citing United States v. Carter*, 130 F.3d 1432, 1439 (10th Cir. 1997).

The evidence in this case was substantial. Although Orr’s motion in some portions challenges sufficiency specifically as to Counts 17 through 28, because Orr’s motion also appears to challenge sufficiency on other counts, the government recounts the trial evidence as to all counts. (See e.g., Doc. 498 at 2, 6, 9-10, 12, 13).

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

The trial evidence established the following:

Orr caused Octane International (“Octane”) to be formed in 1991 and subsequently, used Octane’s name in connection with soliciting monies from investors, purportedly to commercialize his “vapor phase combustion” fuel additive (“VPC”). (Testimony of Scott Shires; Orr; Ex. 62 [Octane incorporation records]).

Thereafter, Orr personally, and through Scott Shires, Alden Kautz and/or Charles

Thomas, solicited investors in Octane. (Testimony of Shires; Orr & Kautz; and Andrews; Carey; Huber; Klein; Lade; Martinez; Pothoff; Routh; Thomas; Wing [collectively, "Investors' testimony"]; Exs. 1-2 [investor lists]; Exs. 51-55, 57, 59, 60 [Sample investors' checks]; Exs. 99-103 [Summary charts of investor checks deposited into Octane account 1998-2002, respectively]; Exs. 159, 160A, 160B, 160B [Records for Octane and Orr bank accounts]).

For the period of January 1998 through 2002, Orr obtained investments in Octane through various representations, including: (i) VPC was ready to be produced and marketed; (ii) scientific testing demonstrated that VPC had substantial benefits over conventional gasoline regarding both decreased nitrogen oxide ("NOx") emissions and increased fuel efficiency; (iii) Exxon wanted to purchase VPC and its patent for \$30 million or above; (iv) Prudential was interested in furnishing substantial funds for Octane; (v) investor monies would be used to finish developing and marketing VPC; and (vi) investors would receive Octane shares and would reap substantial profits due to an imminent initial public offering ("IPO") and/or other substantial increase in Octane's share price. (Testimony of Shires, Orr, Kautz, Investors' Testimony; Ex. 4).

To solicit new investors, solicit additional funds from prior investors and/or to appease prior investors, Orr prepared and caused to be mailed to investors shareholder newsletters called "Confidential Updates," in which he made similar representations about imminent investments by or corporate support from companies like Exxon, Enron,

Prudential Bache, and other companies. Orr's shareholder newsletters included, among other information, references to results of tests on VPC by the National Institute of Petroleum and Energy Research ("NIPER"), which Orr falsely claimed demonstrated that VPC was superior to conventional gasoline because it had significantly greater fuel efficiency and lower NOx emissions. Later, Orr also falsely claimed that testing done at the National Alternative Fuel Foundation ("NAFF") laboratory confirmed the benefits shown in the NIPER tests of VPC. (Testimony of Shires; Orr; Investors; Exs. 10-13, 15, 18-21, 27-31, 36, 38-39, 41, 48, 49 [Confidential updates with representations]). Orr also prepared business plans that were sent to investors, representing that Octane or related business entities Advanced Fuels International and/or Advanced Energy Partners would market VPC in the near term, and listed Herb Bruch, George Unzelman and others as management members or consultants. (Testimony of Shires; Orr; Investors; Exs. 3, 25, 34, 35 [Business plans]).

The trial evidence demonstrated that these representations by Orr to solicit funds and in the business plans included false representations. (Testimony of Johnston & Nacheman [representations re: Exxon]; Potempa, Holmes & Cline [representations re: Enron]; Wade [representations re: Prudential]; Kelly [representations re: Peremba Kentz's chairman of the Board]; Marshall [re NIPER results relayed to Orr]; Reed, Buckmaster, Ellis [re NAFF results relayed to Orr]; Jim Caldwell [re whether VPC could be legally marketed]; George Unzelman [re Orr's unauthorized listing of Unzelman in Orr's business plans]). The trial evidence also demonstrated that Orr/Octane never took any substantial steps toward or conducted an IPO; never

received any substantial investment from any company; never submitted a fuel registration statement for VPC; never marketed a product; never provided a return on investment to any investor; never transferred title to the VPC patent from Orr to Octane; and/or never spent any substantial money on testing VPC. (Testimony of Shires, Orr; Wade, Caldwell; Parr; Investors' Testimony; Ex. 50 [Patent & lack of assignment in USPTO records]; Exs. 159, 160A, 160B, 160B [Records for Octane and Orr bank accounts]). The trial evidence included specific mailings to investors as charged in the indictment. Exs. 42-49.

This evidence – taken in the light most favorable to the government and its reasonable inferences – was clearly sufficient for a reasonable jury's finding of Orr's guilt on Counts 1 through 8. The jury was properly instructed as to the government's burden of proof and the presumption of innocence (Instruct. #3), the evidence on which they could base their verdicts (Instruct. # 4), responsibility to make credibility determinations (Instruct. #6), the elements and relevant definitions for mail fraud (Instruct. 11, 15 & 16), and other applicable matters, and Orr makes no claim otherwise.

As to these counts, Orr primarily asserts that there was a trial error with respect to allowing the testimony of William Marshall on the NIPER tests, discussed *infra*. However, the trial evidence included proof of multiple misrepresentations by Orr as noted above (*i.e.*, Orr's telling investors verbally and in newsletters of an imminent Octane IPO; Orr's claims to investors that both Exxon and Enron were interested after being told otherwise by Exxon and Enron; Orr's continued claims that Prudential would invest in Octane when Prudential was awaiting a business plan Orr never supplied, etc.) Orr attempts to dispute the evidence as to these other misrepresentations that

separately support the jury's verdicts. (Doc. 498, pp. 6-14).¹ By these arguments, Orr asks this Court to conduct the re-weighing of conflicting evidence and consider the credibility of witnesses, which the Tenth Circuit forbids under Rule 29. *United States v. Downen, supra*.

B. MAIL & WIRE FRAUD AGAINST AND FALSE STATEMENTS TO EPA (COUNTS 9-15 & 17)

The trial evidence demonstrated that prior to and during 2000, Orr lobbied representatives of the United States government, and thereby obtained a \$3.6 million earmark for further testing on VPC. (Testimony of Orr & Shires; Vanek & Kimball [former political staffers]; Ex. 38 (Confidential Update, with Congressional Record reflecting earmark]). In January 2001, Orr caused NAFF to be formed as a non-profit organization in order to receive and utilize the \$3.6 million research grant created by the earmark, which grant was to be administered by the EPA. (Testimony of Orr & Shires; Ex. 66 [Incorporation records for NAFF]).

The trial evidence showed that the \$3.6 million could only be disbursed to NAFF upon NAFF submitting to the EPA a grant proposal, and the various other information

¹For example, Orr argues that John Johnston of Exxon should be disbelieved because of his alleged infringement of Orr's patent and that this Court improperly disallowed full exploration of the alleged infringement. (Doc. 498, pg. 7). In fact, Orr explored Johnston's alleged bias at some length on cross-examination, and it was only when Orr appeared headed for a "mini-trial" on patent infringement that this Court properly exercised its discretion under Fed.R.Evid. 403 and 608(b) in precluding further inquiry. Similarly, Orr claims that evidence in an email from Chuck Thomas to other investors was improper. (Doc. 498, pp. 7-8). However, Chuck Thomas testified that the information in the email (Exhibit 4) came from his meeting with Orr and Shires; that technical information like that in the email was always supplied to him by Orr - not Shires; and that he prepared the email shortly after meeting with Orr and attempted to be as accurate as he could be. Orr's evidentiary disputes are not well-founded.

requested by the EPA. (Testimony of Dolin, Brophy, Moore, Oge [EPA personnel]). To obtain funds from the \$3.6 million grant, Orr caused a grant proposal and other documents to be submitted to the EPA, which ORR knew contained material falsities, including specifically, the false NIPER test results for VPC; and falsities regarding the ownership of VPC. (Testimony of Orr & Shires; Testimony of Dolin, Brophy, Moore, Oge, Kuhlman [re grant procedures, documents submitted by NAFF, Orr's representations about Octane and NIPER]; Marshall [re NIPER results discussed with Orr]); Exs. 68, 70, 71 [Documents submitted by NAFF to EPA containing falsities]; Ex. 69 [Express mail receipt by Orr to submit letter to Brophy with false NIPER tests]).

The trial evidence showed that, based on the false documents NAFF submitted, the grant proceeded, and between late December 2001 and late December 2004, the EPA disbursed funds at NAFF's request for a total amount fraudulently obtained by Orr of approximately \$2,073,420. (Testimony of Orr & Shires; Testimony of Dolin, Brophy & Moore, Pumphries; Ex. 72 [payment requests]; Exs. 97-97 [NAFF General Ledgers, 2002-2004]; Ex. 161 [NAFF bank records]). The trial evidence included specific mailings and wire transmissions as charged in the indictment as the mail and wire fraud counts, and as false statements to the EPA. Exs. 68, 70, 71, 72.

Viewed under the proper standard, this evidence was clearly sufficient for a reasonable jury's finding of Orr's guilt on Counts 9 through 15, and 17. The jury was properly instructed as to these counts, and Orr makes no claim otherwise. Instead, Orr references supposed testimony by Margo Oge that "EPA did not rely on Orr's representations of the science" in order to challenge materiality. (Doc. 498, pg. 13). Orr's argument ignores testimony from several other EPA witnesses that established

materiality (e.g., John Brophy [importance of NIPER tests from Orr and that he would not have recommended grant progressing if Orr failed to provide specifics about the science]; Katherine Moore [EPA grant office’s ability and willingness to structure grant payments]; Rich Kuhlman [EPA grant office ability to stop grant funds for perceived improprieties]), and again seeks to have this Court improperly supplant the jury’s verdicts. *United States v. Hooks*, 780 F.2d at 1530; *Jackson v. Virginia*, 443 U.S. at 318-19, *supra*.

C. WILFUL FAILURE TO FILE TAX RETURNS (COUNTS 23-28)

The evidence at trial established that during each of the charged calendar years Orr had gross income, in the approximate amounts set forth below, that required that he file an income tax return:

1999	2000	2001	2002	2003	2004
\$168,441.00	\$200,121.00	\$101,301.00	\$253,930.00	\$137,499.00	\$211,666.00

(Ex. 163 [Summary chart of Orr’s Gross Income for charged years]; Testimony of S.A. Nelson, Peter Shepka [IRS revenue agent]; Shires; Exs. 1-2 [Investor lists]; Exs.99-103 [Summary charts of investor checks deposited into Octane account 1998-2002, respectively]; Exs.104-108 [Summary of transfers from Octane account to Orr account, 1998-2002, respectively]; Exs.109-111 [Summary of transfers from NAFF to Orr, 2002-2004]); Exs. 122-123 [ACLF tax returns showing compensation paid to Orr in 1999, 2000]; Exs. 125-126 [NAFF tax returns showing compensation paid to Orr in 2002, 2003]; Exs. 159, 160A, 160B, 160B [Records for Octane and Orr bank accounts]).

The trial evidence established that Orr knew of his obligation to file tax returns in the charged years but failed to do so. (Testimony of Shires [re Orr directing Shires to prepare tax returns but then Orr failing to file them]; Exs.73-78 [IRS certifications re lack of filed tax returns for Orr for tax years 1999-2004]; Ex. 79 [IRS certification of lack of filing by Orr from 1988 - 1998]; Exs. 80-82 [IRS records re Orr's prior requests for extensions of time to file]; Exs.180-185 [IRS transcripts for Orr from prior years showing requests for extensions, etc.]).

The trial evidence also demonstrated that Orr controlled and used the investors' money for personal and business expenses. Testimony of Shires & Orr; Exs. 85 -91A [Bill Orr Income statements for 1998-2004, respectively]; Exs. 92-95 [Bill Orr General Ledger for 1998-2004, respectively]).

Again, this evidence – taken in the light most favorable to the government and when coupled with reasonable inferences – was clearly sufficient for a reasonable jury's finding of Orr's guilt on Counts 23-28. They jury was properly instructed as to the government's burden of proof (Instruct. #3), the evidence on which they could base their verdicts (Instruct. # 4), credibility determinations (Instruct. #6), the elements and relevant definitions for wilful failure to file tax returns (Instruct. # 22, 23, 24, 26), and Orr makes no showing otherwise.

As to these counts, Orr primarily asserts that, in closing arguments, the government inaccurately recounted the testimony of Scott Shires regarding an IRS letter to Orr relieving him of an obligation to file tax returns, discussed *infra*. Orr also recites the testimony of his tax expert, Mr. Gelt, and argues that Gelt's testimony single-handedly proved Orr innocent of the tax charges. (Doc. 498, pp. 16 -20). However, the jury also

heard from Special Agent Patricia Nelson, and Revenue Agent Pete Shepka on the tax charges. And, the jury was properly instructed regarding its duty to make credibility determinations amongst witnesses (Instruct. # 6), and its responsibility to evaluate expert testimony, including disregarding it if the jury deemed appropriate (Instruct. # 7). Again, Orr apparently asks this Court to supplant its credibility determinations regarding Mr. Gelt – assuming that the Court shares Orr’s view on this witness – for those of the jury, in violation of the standards under Rule 29.

In sum, Orr has failed to allege sufficiently any deficiencies in the trial evidence or to provide any legal support for his argument that the evidence was insufficient. The motion for judgments of acquittal should be denied.

III. MOTION FOR NEW TRIAL

_____The Court can grant Orr’s request for a new trial on the counts of conviction “for error occurring at the trial,” *United States v. Smith*, 331 U.S. 469, 475 (1947), “if the interests of justice so require,” Fed. R. Crim. P. 33.² The Tenth Circuit has warned, however, that

[a]lthough a trial court is afforded discretion in ruling on such a motion, and is free to weigh the evidence and assess witness credibility, [citation omitted] a motion for new trial is regarded with disfavor and should only be granted with great caution. [Citation omitted.]

United States v. Quintanilla, 193 F.3d 1139, 1146 (10th Cir. 1999), *cert. denied*, 529 U.S. 1029 (2000). “The Court is proscribed from granting a new trial except ‘in exceptional circumstances in which the evidence preponderates heavily against the verdict.’” *United*

²The only specific basis mentioned in the rule is “newly discovered evidence,” Fed. R. Crim. P. 33, but Orr did not base his motion on such a claim.

States v. Robertson, 2007 WL 2407089, at *2-3 (W.D.OK 2007), citing *United States v. Evans*, 42 F.3d 586, 593-94 (10th Cir. 1994).

Orr claimed in his motion that mistakes occurred during jury selection and that the jury was “misled and manipulated” during trial. However, none of Orr’s alleged trial errors warrant a new trial as to any count of conviction.

A. Jury Selection

The defendant made two complaints about the process by which the court selected the jury in this case. Orr said that the court erred in not allowing his attorney to question the jury panel about his assertion that innocent people have been convicted. Doc. 498 at 4. He also complained that the court failed during *voir dire* to adequately address the issue of “wrongful convictions,” claiming that the jury panel “did not participate in a discussion of how juries can be misled and manipulated.” *Id.* at 5-6.

The court had “wide latitude” in deciding how *voir dire* would be conducted in this case. *United States v. Visinaiz*, 428 F.3d 1300, 1313 (10th Cir. 2005), *cert. denied*, 546 U.S. 1123 (2006). The court could have conducted *voir dire* itself or allowed the attorneys to directly question members of the jury panel. Fed. R. Crim. 24(a). The court chose the former option, and the defendant has provided no basis for concluding that the court abused its discretion in doing so, or that the resulting jury was other than fair and impartial.

The defendant’s second argument seems to be that members of the jury panel should have been asked about the notion that they could be “misled and manipulated.” Orr apparently is complaining that the court decided not to use *voir dire* questions that he had proposed. His proposed questions included the following: “Do you think juries can

be manipulated by persuasive attorneys?”, “Do you think it is possible for juries to make mistakes and convict innocent people?” and “Do you think it is possible that juries sometimes make decisions not based on the evidence but on the persuasiveness of the attorneys.” Doc. 265 at 2. Orr provides no authority that supports the notion that his tendered questions were appropriate in this case. Again, the Court had discretion to conduct *voir dire* as it deemed appropriate, and absent any showing that the jury was fair and impartial, Orr’s claims fail.

B. The Alleged Trial Errors Do Not Warrant a New Trial.

Orr contends that various alleged trial errors or misconduct by the prosecution warrant a new trial. (Doc. 498, pg. 6.) However, given the cautious approach with which requests for new trials should be viewed, the alleged errors taken singly or together do not warrant a new trial in this case. *United States v. Quintanilla*, 193 F.3d at 1146, *supra*.

1. Testimony of William Marshall, Thomas Reed, Justin Buckmaster and Shivayam Ellis

Orr’s motion argues that allowing testimony from William Marshall, Thomas Reed, Justin Buckmaster and Shivayam Ellis in the government’s case was trial error. In particular, Orr claims that because the government did not designate Marshall and these other witnesses as experts under Rule 702, the testimony was improper. However, this issue was thoroughly litigated in the course of trial, and this Court set clear boundaries about which Marshall (and others similarly situated) could testify: that is, that Marshall on behalf of NIPER, and Reed, Buckmaster, and Ellis on behalf of NAFF were hired by Orr to conduct particular tests on Orr’s VPC fuel additive, and what Marshall relayed to Orr

about the results of the NIIPER tests, and Reed, Buckmaster, and Ellis relayed to Orr about the NAFF tests.

The government adhered to the Court's ruling as to the proper scope of these percipient witnesses' testimony. These witnesses were not asked by the government and did not testify to any "opinions" regarding the scientific validity of Orr's VPC additive. Rather, because Orr specifically represented to investors and the EPA that the NIPER tests showed increased fuel efficiency and decreased pollutants, and specifically represented to investors that the NAFF tests confirmed the NIPER tests, the testimony of these witnesses – who did the tests and communicated the results to Orr – was relevant and properly admitted under Rules 401 through 403.

Moreover, in response to Orr's objections, the Court repeatedly instructed the jury that these witnesses were not testifying as experts. Indeed, the jury heard Orr testify that he did not meet with William Marshall in the fall of 1997 and discuss the NIPER test results at all. Thus, the jury fulfilled its responsibility to make credibility determinations and resolve conflicting evidence, which determinations provide no basis for a new trial.³ See *Richardson v. Marsh*, 481 U.S. 200, 211 (1987) (juries are presumed to follow their instructions).

³Orr claims that the fact that the government did not designate Marshall, Reed, Buckmaster and Ellis as expert witnesses somehow hindered his ability to cross-examine them. The trial showed otherwise; Orr thoroughly cross-examined these witnesses. Moreover, because Orr denied outright that he met with Marshall to discuss the NIPER results in late 1997, Marshall's "expert" or "non-expert" designation seems moot. Finally, in the unlikely event that Orr actually held back in cross-examining Marshall, Reed, Buckmaster and Ellis, Orr has provided no authority that his election in this regard warrants a new trial under Rule 33.

2. Purported Misstatement of Scott Shires' Testimony About IRS Letter.

Orr also claims that he is entitled to a new trial because the government allegedly misstated Shires' testimony in its rebuttal argument. In sum, according to Orr, the government wrongly claimed that Shires acknowledged he had never seen a purported letter from the IRS, which excused Orr from filing tax returns until Orr had exhausted his Net Operating Loss. Orr had testified about the letter, claiming that he had received it, he understood it to excuse him from filing tax returns but that he could not locate it. The government understood Shires to testify that he had seen the IRS letters admitted at trial (Ex. A-92), but that all of his information about those IRS letters and the other purported IRS letter came to him from Orr, and that he had not seen the missing letter. Moreover, Revenue Agent Shepka testified that in his many years with the Internal Revenue Service, he had never seen a letter akin to the letter Orr claimed, and did not believe that the IRS issued such open-ended letters.

This Court instructed the jury as to what was evidence (*e.g.*, the testimony of witnesses, documents received in evidence, etc.) and that statements and arguments of counsel are not evidence (Instruct. # 4). Thus, even if the government misunderstood Shires' testimony on this point and so stated in rebuttal, this single statement in the context of this lengthy trial and the totality of the evidence to a properly instructed jury in no way warrants the relief sought. *See Darden v. Wainwright*, 477 U.S. 168, 182 (1986) (jury instructions that "their decision was to be made on *the basis* of the evidence alone, and that the arguments of counsel were not evidence" helped remedy prosecutor's improper closing argument).

3. Alleged Improper Hypotheticals To Victims/Investors

Orr also complains that the government improperly asked “hypothetical, speculative, loaded with negative implications questions . . . of many investors witnesses with regard to other statements made in newsletters and updates and business plans.” (Doc. 498, pg. 15, n.4). The government understands this complaint to focus on questions which queried, in substance, whether if the investor witness had believed that certain of Orr’s representations were false (such as the imminent IPO, imminent investment or partnership between Octane and Exxon or Enron, etc.) that belief would be important to the investor’s decision to contribute money to Octane.

These questions were proper in light of the charges and government’s burden of proof in this case, and Orr provides no rationale otherwise. This Court properly instructed the jury that the government bears the burden of proving each and every element of the charged mail fraud counts; that the government had to prove that Orr “knowingly devised a scheme to either defraud or to obtain money by means of false or fraudulent pretenses, representations or promises;” and that the “scheme employed false or fraudulent pretenses, representations or promises that were material;” (Instruct. # 11). The jury was also instructed that “a false statement is ‘material’ if it would be important to a reasonable person in deciding whether to engage or not engage in a particular transaction.” (Instruct. # 15). Thus, the hypotheticals about which Orr complains were simply the government eliciting evidence relevant to whether Orr’s representations were material. They were proper questions and provide no basis for a new trial.⁴

⁴Orr also asserts that the hypothetical questions were an improper ‘expression of the prosecutor’s opinion of guilt.’ (Doc. 498, pg. 24). Orr is wrong: the questions in no

4. References to Orr's Use of Investor Contributions for Personal Purposes, Including Gambling

Orr also complains that the government made "unsupported allegations that Orr spent investor money on gambling," which wrongly influenced the jury. (Doc. 498, pg. 3). In fact, the trial evidence demonstrated Orr's personal use of investor money for gambling and other purposes. (Testimony of Shires [re gambling]; Ex. 93, pp. 14-15 [Orr's ATM withdrawals in Blackhawk]). This evidence was relevant because it showed Orr's exclusive control over the investor money, as it pertained to both the alleged fraud against investors and that the investor money was "income" to Orr for the tax-related counts. Orr also complains that the government made unsupported allegations that Orr "obtained a congressional earmark in exchange for a bottle of whiskey." (Doc. 498, pg. 3). However, Shires testified that in discussing how Orr obtained the earmark, Orr remarked to Shires, in substance, that it was amazing what a good bottle of whiskey could get. This evidence was relevant to Counts 9-14 and 18, Orr's fraud as to the United States government; was insignificant in the context of this seven-plus week trial; and provides no basis for a new trial under Rule 33.

5. Orr's Claim That the Court Precluded Him From Attacking the Investigation

Orr also complains that the Court precluded him from questioning "the manner in which the investigation was conducted", which "effectively precluded [Orr] from defending himself against the charges. . ." (Doc. 498, pg. 20-21). The government's recollection is

way suggested personal opinions or information outside the evidence. The questions focused on the materiality of the representations, consistent with the government's burden of proof. Moreover, the jury was properly instructed that counsel's questions, statements, and objections are not evidence. (Instruct. # 4).

otherwise. Rather, the Court left open the extent to which Orr could offer certain evidence. In fact, Orr cross-examined multiple EPA witnesses about an alleged EPA bias against Orr. Orr subpoenaed Special Agent Cory Rumble, and questioned him extensively about alleged improprieties in the investigation. Orr called defense witnesses Lonnie Haynes, Alden Kautz and others to testify about alleged improper aspects of the investigation. Orr chose not to cross-examine Special Agent Patricia Nelson, or to call Postal Inspector George Allen. Thus, this claim by Orr also fails to demonstrate any trial error or basis for a new trial.

IV. CONCLUSION

For all of the foregoing reasons, the government respectfully submits that defendant motion for judgments of acquittal and motion for new trial should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of August 2008, I electronically filed the foregoing **GOVERNMENT'S RESPONSE TO DEFENDANT'S RULE 29 MOTION FOR JUDGMENT OF ACQUITTAL, AND RULE 33 MOTION FOR A NEW TRIAL** with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following e-mail address:

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