

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA :
 :
 v. : CRIMINAL NO. 03-555
 :
 :
 JOHN VITILLO, ET AL. :

Surrick, J.

November 2, 2004

MEMORANDUM & ORDER

Presently before the Court is the United States' Motion in Limine to Exclude Defense Expert Testimony. (Doc. No. 42.) For the following reasons, the Government's Motion will be granted.

I. BACKGROUND

On August 28, 2003, John Vitillo, Vitillo Corporation, and Vitillo Engineering, Inc., were indicted on three counts in violation of 18 U.S.C. § 666(a)(1)(A) for theft from a program receiving federal funds. (Doc. No. 1.) The Government filed a superseding indictment on May 18, 2004, which added a count against the Defendants for conspiracy in violation of 18 U.S.C. § 371. (Doc. No. 26.) On July 13, 2004, the Government filed a second superseding indictment which contained the same conspiracy and theft counts as the prior superseding indictment plus facts relating to the case of *Blakely v. Washington*, 124 S. Ct. 2531 (2004). (Doc. No. 36.)

John Vitillo was the president of Vitillo Engineering, Inc. (formerly Vitillo Group, Inc.), a subsidiary of Vitillo Corporation. (Second Superseding Indictment ¶¶ 9, 10.) In October, 1997, Vitillo Engineering was appointed by the Reading Regional Airport Authority ("RRAA") to be the primary engineer and principal engineer consultant for the RRAA and the Reading Regional

Airport (“Airport”). (*Id.* ¶ 11.) In December, 1998, Vitillo signed a contract with the RRAA that made Vitillo Engineering the construction manager of the Airport’s expansion project. (*Id.* ¶ 12.) In the Second Superseding Indictment, the Government alleges that Defendants engaged in a conspiracy to falsify the invoices and billing records submitted to the RRAA (*id.* ¶ 14), to inflate the number of hours worked on the Airport expansion project (*id.* ¶ 15), and to alter the employee time cards on which the invoices and billing records were based. (*Id.* ¶¶ 16, 18.) The Government alleges that Defendants engaged in this illegal conduct to obtain fraudulently more than \$5,000 in 1998, 1999, and 2000.¹

In preparation for trial, Defendants informed the Government that they would seek to introduce the expert testimony of two accountants and one civil engineer. Defendants’ counsel assert that the testimony of Robert M. Caster, CPA, and Denise J. Hozza, CPA, will show that:

[W]hen time records were submitted and input by accounting staff, they made hundreds and hundreds of mistakes in setting forth the rate that was to be paid for a particular individual’s work. And that as a result of that, it was known that the pre-bills that were being prepared and coming out of the accounting system were low, that there were in some cases write-ups made . . . to make up for those differences.

(Tr. 9/2/04 at 54.) According to the accountants’ expert report:

Vitillo Engineering, Inc. under billed the Reading Regional Airport Authority by \$75,257.90. The under billing is attributable to the original invoices which were sent to and paid by the Reading Regional Airport Authority that included certain errors in the application of individual billable rates and certain items which were billable to the Reading Regional Airport Authority which were not billed at all.

(Caster Expert Rep. at 2.)

If admitted, the trial testimony of the civil engineering expert, Stephen Fournier, P.E., would be that: (1) Vitillo’s original estimate for the project was reasonable; (2) changes and

¹The Government contends that the total loss was in excess of \$200,000.

extra work on large projects are inevitable; (3) extra work spent on these changes is reasonable; and (4) the rates billed by the Defendants in connection with this project were also reasonable.

(Fournier Expert Rep. at 8.)

On August 4, 2004, the Government filed the instant Motion seeking “to exclude irrelevant and prejudicial defense expert testimony, pursuant to Fed. R. Evidence 402, 702, and 403.” (Gov’t Mot. in Limine to Exclude Def. Expert Testimony (“Motion in Limine”) (Doc. No. 42) at 1.) The Government filed the instant Motion because Defendants intend to offer this expert testimony to show that Defendants “were legally entitled to all of the monies that they received from the [Airport], and that the [Airport] suffered no pecuniary loss as a result of the inflated bills.” (*Id.*) The Government contends that such a “claim of right” defense cannot be used in a prosecution for a violation of 18 U.S.C. § 666, and seeks to have the proffered expert testimony excluded for that reason. In response, Defendants state that:

The government apparently misapprehends the defense in this matter. Contrary to the government’s assertion that Defendants intend to assert a ‘claim of right’ defense, the Defendants assert that no fraudulent invoice was ever submitted to the [RRAA], and the testimony of Defendant Vitillo and the expert witnesses is intended rather to demonstrate the *mens rea* of Defendant John Vitillo.

(Resp. of All Defs. to Gov’t Mot. in Limine (“Response I”) (Doc. No. 46) at 1.) On September 2, 2004, we heard argument on this Motion.²

Defendants have submitted three memoranda in response to the Government’s Motion: Response I, filed on August 27, 2004 (Doc. No. 46); Defendants’ Supplemental Memorandum of Law in Opposition to Government’s Motion in Limine (“Response II”), filed on September 9,

²At the hearing on September 2, 2004, both the Government and the Defendants chose not to present evidence or testimony.

2004 (Doc. No. 52); and Defendants' Supplemental Memorandum of Law in Opposition to the Government's Motion in Limine ("Response III"), filed on September 21, 2004 (Doc. No. 56).

Throughout these submissions, and at the hearing on September 2, 2004, Defendants have presented the defenses that they intend to use at trial in changing and contradictory ways.

Defendants representations include:

1. [T]he defense will demonstrate that the so called fraudulent time records are not the result of any fraudulent intent on the part of the Defendants but rather resulted from incompetent staff engaged in accounting work for the Defendants, who misapprehended the instruction they were given. (Response I at 1);
2. [I]t is the position of the Defendants that they believed the invoices that were submitted were fully justified at the time they were submitted. (*Id.* at 2);
3. [T]he crux of Defendants' defense is that Defendant John Vitillo never intentionally submitted fraudulent invoices for work performed at the RRAA as alleged. (*Id.* at 4);
4. I also need to point out that the defense here is not a defense of mistake or accident. Our contention is that bills submitted to the Reading Airport fairly reflected the work that had been done, and for which the Defendants were entitled to be paid. (Tr. 9/2/04 at 54);
5. It's our position, and . . . we would intend to show to the jury based on the testimony of the defendant and other defense witnesses and the experts, that the defendant was entitled to what he billed for, and he never submitted any knowingly false bill, or in any way stole money from the airport authority. That's the defense. (*Id.* at 62);
6. While the Defendants continue to assert that their defense in this matter is not an "entitlement" defense as that term is defined by the government, given the language of the statute, and the lack of authority, statutory, decisional, or otherwise to the contrary, the Defendants are entitled to an instruction at trial to the effect that they cannot be convicted of the alleged violation of 18 U.S.C. § 666(a)(1)(A) if the jury determines that the amounts received by the Defendants from the Reading Regional Airport Authority were justified by the contracts that were in place, and the

amount and quality of the work that was done. (Response II at 3);

7. Contrary to the government's arguments, Defendants do *not* seek to retrospectively justify over-billing. Rather, Defendants seek to demonstrate through the evidence that the bills submitted to the RRAA by Vitillo Corporation were accurate, except in some instances where the bills were less than they should have been (Response III at 1-2); and
8. This important factual information [from the expert witnesses] is crucial to understanding and appreciating Defendants' defense that John Vitillo lacked the requisite *mens rea* with respect to each of the charged crimes. (Response III at 4.)

We are not in a position to predict which defense will be presented at trial. Nor do we seek to force Defendants to choose litigation strategies prior to trial. However, pursuant to the Government's Motion, we must now decide to what extent Defendants' expert testimony can be used. Based on the representations made by counsel, we believe Defendants will attempt to offer one or more of the following defenses: (1) based on the accounting records as a whole, Defendants were entitled to the amounts they received from the RRAA, despite the fact that a number of the submitted claims may have been incorrect; (2) John Vitillo lacked the *mens rea* necessary to be found guilty of the alleged crimes; and (3) the claims submitted to the RRAA in accordance with the work done were not fraudulent.

Assuming that the expert testimony will be used to support one or more of these defenses, our analysis focuses first on whether the identified defenses may be used at trial; and second, whether the expert opinions Defendants seek to use are sufficiently relevant and reliable.

II. STANDARD OF LAW

The Government contends that the expert testimony that Defendants seek to introduce is inadmissible pursuant to Federal Rule of Evidence 702 and *Daubert v. Merrell Dow*

Pharmaceuticals, Inc., 509 U.S. 579 (1993). Rule 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed. R. Evid. 703. In *Daubert*, the United States Supreme Court held that the Federal Rules of Evidence “assign to the trial judge the task of ensuring that an expert’s testimony both rests on a reliable foundation and is relevant to the task at hand.” 509 U.S. at 597. Subsequently, in *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999), the Supreme Court held that “*Daubert*’s general holding - setting forth the trial judge’s general ‘gatekeeping’ obligation - applies not only to testimony based on ‘scientific’ knowledge, but also to testimony based on ‘technical’ and ‘other specialized’ knowledge.” 526 U.S. at 141.

In addition to analyzing Defendants’ proffered expert testimony for reliability, we must also assess the relevance of the expert testimony under Federal Rules of Evidence 401, 402, and 403. *Daubert*, 509 U.S. at 587-88, 595. Rule 402 provides that all relevant evidence generally is admissible. The Federal Rules of Evidence define relevance as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Fed. R. Evid. 401. Even though certain evidence may be relevant, a trial court can exclude it under Federal Rule of Evidence 403 “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.” Fed. R. Evid. 403.

III. ANALYSIS

A. Elements of an 18 U.S.C. § 666(a)(1)(A) Offense

To prove a violation of § 666(a)(1)(A), the Government must show that: (1) Defendants were agents “of an organization, or of a State, local, or Indian tribal government, or any agency thereof”; (2) Defendants embezzled, stole, obtained by fraud, knowingly converted, or intentionally misapplied property that is “valued at \$5,000 or more” from “such organization, government, or agency”; and (3) “such organization, government, or agency receives, in any one year period, [federal assistance] in excess of \$10,000.” *United States v. Cornier-Ortiz*, 361 F.3d 29, 33 (1st Cir. 2004) (quoting 18 U.S.C. § 666)).³ The Government also must prove that Defendants had the requisite specific intent to violate § 666(a)(1)(A). *See United States v. Richards*, 9 F. Supp. 2d 455, 458 n.2 (D.N.J. 1998) (stating that “§ 666 is analogous to embezzlement which courts have historically construed as a specific intent offense”).

B. Claim of Right Defense

The Government believes that Defendants will use the testimony of its experts to argue that they are not criminally liable because they were entitled to the funds that were allegedly illegally obtained. It contends that this claim of right defense (also known as an entitlement

³Section 666(a) provides in relevant part:

Whoever . . . (1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof – (A) embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies, property that – (i) is valued at \$5,000 or more, and (ii) is owned by, or is under the care, custody, or control of such organization, government, or agency . . . shall be fined under this title, imprisoned not more than 10 years, or both.

18 U.S.C. § 666(a) (2000).

defense, a “no harm no foul defense,” or a good faith defense) is not a valid defense to the crime at issue because it does not negate any of the elements of the crime. (Motion in Limine at 9.) The Government cites a number of fraud cases where the defendant was prevented from using the claim of right defense, and testimony supporting it was excluded as misleading and prejudicial. See *United States v. Gole*, 158 F.3d 166, 167-69 (2d Cir. 1998) (holding that in fraud prosecution, defendant was precluded from presenting testimony that he was entitled to money obtained by submitting false reports to pension board); *United States v. Hausmann*, 345 F.3d 952, 957 (7th Cir. 2003), *cert. denied*, 124 S. Ct. 2412 (2004) (holding that criminal liability for mail fraud was not negated by the fact that the individuals defrauded received the same net benefit they would have received absent any scheme); *United States v. Richman*, 944 F.2d 323, 330 (7th Cir. 1991) (stating that “[t]he establishment of a mail fraud does not include a requirement that the defendant receive or intend to receive money or property in excess of an amount he was entitled to receive”) (internal quotations omitted).

Gole is particularly relevant here. In *Gole*, the defendant firefighter retired after he sustained a service-related injury and began collecting disability income from the fire department pension fund. Under the terms of the plan, the defendant was entitled to his full pension as long as his annual income remained below a certain amount determined by the pension bureau. *Gole*, 158 F.3d at 167. If this income increased above that predetermined amount, his pension would decline accordingly. The defendant received the “full” pension for several years, despite receiving income over the predetermined amount, because the pension bureau did not send him the requisite income forms. *Id.* Subsequently, the defendant received the necessary forms and “underreported” his income for the years in which he had already wrongly received his full

pension. *Id.* At trial, the defendant sought to introduce evidence that the pension bureau made an improper benefits calculation to show that he should have been entitled to his entire pension despite underreporting his income. *Id.* The trial court excluded this evidence and instructed the jury as follows regarding defendant's good faith defense:

[T]he defense of good faith is not available to a defendant who deliberately makes a representation that he knew to be false, even if the defendant reasonably believed that he was legally entitled to the money he was seeking to obtain by such a false representation. Accordingly, it is not relevant to your consideration of the guilt or innocence of the defendant whether the formula used to determine the [Safeguard Amount] was correctly calculated, or whether the defendant believed that it was wrongly calculated.

Id. On appeal, the Second Circuit addressed the elements of mail fraud and the specific intent necessary to sustain a conviction. The court concluded that the defendant could not negate specific intent through a good faith defense because the defendant admitted to knowing that lying on his income report would affect the calculation of his pension. *Id.* at 168-69.

Equally important to the Second Circuit's decision was the notion that allowing the defendant to present a claim of right defense would create poor incentives to similarly-situated individuals. The Court stated:

If Gole's theory of self-help were the law, anyone who believed that he was legally entitled to benefits from a pension plan, or an insurance policy, or a government program, but who was concerned that he or she might nevertheless be denied such benefits, would be given carte blanche simply to lie to obtain those benefits. Such a course of action would often be much easier than pursuing legal remedies through civil actions in court, and would guarantee success as long as the misrepresentation remained undiscovered. We will not encourage people to lie to obtain benefits rather than pursue their rights in civil actions. Such controversies may be resolved by civil suit or settlement, but cannot be won by using lies and deception.

Id. at 168.

The Government asserts that Defendants in this case are in a position similar to that of the defendant in *Gole*. Counsel for Defendants has stated that:

[W]hen time records were submitted and input by accounting staff, they made hundreds and hundreds of mistakes in setting forth the rate that was to be paid for a particular individual's work. And that as a result of that, it was known that the pre-bills that were being prepared and coming out of the accounting system were low, that there were in some cases write-ups made . . . to make up for those differences.

(Tr. 9/2/04 at 54.) The Government contends that, just as Gole underreported his income to make up for what he believed was a deficiency in the calculation of what he should have received from his pension, the Defendants in this case overreported their hours to make up for deficiencies in their bills.

Defendants offer several arguments for why they should be permitted to use a claim of right defense.⁴ First, Defendants argue that the cases cited by the Government were not brought pursuant to 18 U.S.C. § 666, and thus are not applicable to this situation. None of the cases cited by the Government involve a prosecution for violation of § 666, but rather involve prosecutions for mail fraud. However, the statutes share important similarities. Both statutes seek to protect the integrity of federal government systems. Congress enacted the mail fraud statute “to protect the integrity of the United States mails by not allowing them to be used as ‘instruments of crime.’” *McNally v. United States*, 483 U.S. 350, 365-66 (1987) (quoting *United States v. Brewer*, 528 F.2d 492, 498 (4th Cir. 1975)). Similarly, the stated purpose in enacting 18 U.S.C. § 666 “was generally to ‘protect the integrity of the vast sums of money distributed through Federal programs from theft, fraud, and undue influence by bribery.’” *Sabri v. United States*,

⁴Defendants initially argued that they were not pursuing a claim of right defense. However, subsequent pleadings have presented arguments that they are in fact entitled to use such a defense.

124 S. Ct. 1941, 1946 (2004) (quoting S. Rep. No. 98-225, at 370 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3511). In addition, both statutes target fraudulent conduct.⁵ Like § 666, mail fraud under § 1341 is a specific intent offense. *United States v. Coyle*, 63 F.3d 1239, 1243 (3d Cir. 1995). To prevail under either statute, the government must show that a defendant intended to commit fraud at the time of the alleged fraudulent behavior. *See United States v. Dunn*, 961 F.2d 648, 651 (7th Cir. 1992) (Section 1341 requires evidence of knowledge that statement was false when made); *United States v. Sotomayor-Vazquez*, 249 F.3d 1, 9-10 (1st Cir. 2001) (Section 666 requires evidence that defendant was aware of embezzlement when such illicit conduct occurred). Thus, a claim of right defense would not negate an element of either crime because it merely serves as a post hoc justification for the alleged misconduct. Clearly, the reasons for disallowing the use of a claim of right defense in a mail fraud prosecution apply equally to actions brought pursuant to § 666.

Second, Defendants argue that the text of § 666(a)(1)(A) supports the use of a defense that they are the “rightful owners” of the funds at issue. Section 666(a)(1)(A) punishes an agent who “embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the *rightful owner* or intentionally misapplies, property.” 18 U.S.C. § 666(a)(1)(A) (emphasis added). Defendants, through their accounting experts, intend to show that they were entitled to all funds received and more. Defendants believe that such evidence is admissible based on this statutory language. (Response II at 2.)

Defendants’ interpretation of the statute is erroneous. Section 666 “was ‘designed to

⁵The elements of mail fraud are: (1) a scheme to defraud; (2) use of the mails to further that scheme; and (3) intent to defraud. *United States v. Pharis*, 298 F.3d 228, 233-34 (3d Cir. 2002); *see also* 18 U.S.C.A. § 1341 (2002).

create new offenses to augment the ability of the United States to vindicate significant acts of theft, fraud, and bribery involving Federal monies which are disbursed to private organizations or State and local governments pursuant to a Federal program.” *United States v. Cicco*, 938 F.2d 441, 444 (3d Cir. 1991) (quoting S. Rep. No. 98-225 at 369, *reprinted in* 1984 U.S.C.C.A.N. 3182, 3510). Thus, the statute’s language specifies that § 666(a)(1) protects “an organization, or [] a State, local, or Indian tribal government, or any agency thereof” that receives federal funds. 18 U.S.C. § 666(a)(1). The language of the statute does not protect an agent of an organization that receives federal funds. Rather, it was crafted specifically to prevent an agent from obtaining federal funds without proper authority. *Id.* § 666(a)(1)(A).

In this case, the United States disbursed funds to the RRAA for its expansion project. Thus, the RRAA is the rightful owner of the funds at issue.⁶ RRAA selected Defendants to serve as its agents regarding the completion of the expansion project. RRAA, as the rightful owner of the federal funds to complete the project, paid Defendants for the services they rendered as agents of the RRAA. Defendants, as agents, did not receive any money directly from the federal government and are not protected by the statute.⁷

Adopting Defendants’ reading of the statute would eviscerate the intent of the statute. As stated above, the purpose behind § 666 was “to protect the integrity of the vast sums of money

⁶Defendants recognize that “[t]he question before the Court, and the jury, is whether or not the Defendants stole, from the rightful owner, monies to which they were not entitled by contract.” (Response II at 2.)

⁷The Government’s Superseding Indictment charges Defendants, as agents, with embezzlement, theft, and obtaining funds through fraud as a result of misrepresenting the number of hours actually worked. In addressing the merits of the Government’s Motion in Limine, Defendants have not asserted that they were not agents of the RRAA.

distributed through Federal programs from theft, fraud, and undue influence by bribery.” *Sabri*, 124 S. Ct. at 1946 (internal quotation omitted). If we were to interpret the statute as Defendants suggest, it would allow an individual to steal funds as long as that individual could later prove that he was entitled to the funds he stole.

Defendants also contend that § 666(c) permits Defendants to make a claim of right argument that § 666 “does not apply to *bona fide* salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business.” 18 U.S.C. § 666(c) (emphasis added). Again, Defendants intend to use the accountants’ expert testimony to show that they were entitled to the funds received from the RRAA. Defendants believe that since they can show that they were entitled to the money received, the money was, in fact, a “bona fide” payment and the Defendants’ actions are excepted under the statute.

In support of this interpretation, Defendants cite *United States v. Harloff* 815 F. Supp. 618 (W.D.N.Y. 1993). In *Harloff*, a number of police officers were indicted pursuant to § 666 for allegedly “falsifying payroll records by claiming to have worked 40-hour weeks when in fact they had worked ‘substantially fewer hours.’” *Id.* at 618. In interpreting and applying § 666(c), the court held “[w]hile the exception stated at subsection (c) would not preclude a prosecution involving wages which are clearly not ‘bona fide,’ its plain language would prevent making a federal crime out of an employee’s working fewer hours than he or she is supposed to work.” *Id.* at 619. Defendants contend that like the defendants in *Harloff*, they should not be held criminally liable for overstating payments, when these payments were in fact owed to them.

We reject Defendants assertion that *Harloff* applies here. Section 666(c) “refers to the alleged wrongdoing, to ensure that the statute is not applied to acceptable commercial and

business practices.” *United States v. Marmolejo*, 89 F.3d 1185, 1190 n.5 (5th Cir. 1996). In other cases that have interpreted § 666(c), acts of fraud consistently have been found not to be bona fide payments made in the usual course of business. See *United States v. Urlacher*, 979 F.2d 935, 938 (2d Cir. 1992) (holding that § 666(c) did not exempt from coverage the intentional misapplication of funds, even for legitimate purposes); *United States v. Abney*, No. Crim. 3-97-260, 1998 WL 246636, at *2 (N.D. Tex. Jan. 5, 1998) (holding that § 666(c) did not apply where defendants altered time sheets to receive payment for overtime hours that were never worked); *United States v. Stout*, Nos. Civ. A. 93-2289, Cr. 89-317, 1994 WL 90025, at *5 (E.D. Pa. Mar. 21, 1994) (holding that § 666(c) exception did not apply to defendant who had “created” ghost employees and sought reimbursement for their employment).

Here, the Government alleges that Defendants engaged in a course of fraudulent conduct by overreporting the number of hours actually worked on the Airport expansion project. It claims that Defendants intentionally submitted inaccurate false invoices and billing records. This is not an acceptable business practice. If the Government demonstrates that this fraudulent practice occurred, then the § 666(c) exception cannot apply. The fact that Defendants’ expert analysis shows that the funds received were ultimately justified, even though the actual claims submitted were not accurate, does not exempt Defendants from liability under this statute.⁸ A fraudulent act cannot become a legitimate, or bona fide, act simply because the Defendants can later demonstrate they were entitled to the funds. If the claims submitted were fraudulent at the

⁸Based on § 666(c), Defendants contend they are entitled to a jury instruction that Defendants “cannot be convicted of the alleged violation of 18 U.S.C. § 666(a)(1)(A) if the jury determines that the amounts received by the Defendants from the Reading Regional Airport Authority were justified by the contracts that were in place, and the amount and quality of the work that was done.” (Response II at 3.) We reject this contention.

time they were submitted, the § 666(c) exception does not apply.

We conclude that Defendants cannot present the defense that they had a valid claim to the funds received from the RRAA. The claim of right defense and any evidence submitted in an effort to justify it is not relevant to the charges and would certainly be misleading and confusing to a jury. Defendants cannot introduce expert testimony to establish that Defendants were entitled to the money they received from the RRAA.⁹

C. Use of Expert Testimony for Other Purposes

Defendants argue that the preclusion of Defendants' expert testimony will deny Defendants their Sixth Amendment right to present a defense to the jury. (Response III at 3.) The expert testimony is precluded to the extent that it supports a claim of right defense. Defendants have the right to present evidence that serves to negate any of the elements of the crimes alleged. *In re Winship*, 397 U.S. 358, 364 (1970) (holding "that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged"); *see also United States v. Pelullo*, 14 F.3d 881, 896 (3d Cir. 1994) (holding that it is unconstitutional to interfere with the jury's power to determine every element of the crime). The expert testimony may certainly be used in support of the assertion that John Vitillo lacked the requisite specific intent or that the

⁹The Government also asserts that Defendants conspired to violate § 666(a)(1)(A), in violation of 18 U.S.C. § 371. To prevail on this theory, it must prove the following elements: (1) the existence of an agreement; (2) the Defendants had the objective of violating § 666(a)(1)(A); and (3) an overt act in furtherance of the agreement. *See Cornier-Ortiz*, 361 F.3d at 37. Defendants concede that the testimony of Robert Caster, Denise Hozza, and Stephen Fournier is not relevant to the conspiracy charge. (Response I at 7-8.)

bills submitted were not fraudulent.¹⁰

We have no reason to doubt the reliability of the methods used in formulating either expert opinion. Caster and Hozza's opinions are based on a review of the contracts between Defendants and the RRAA, and invoices of the work completed. Fournier's opinions are based on his experience as an engineer and his review of documents relating to the construction Defendants completed for the RRAA.

Caster and Hozza's report concludes that, because of mistakes made, the bills submitted to the RRAA were not an accurate presentation of the work actually done by Defendants. At times, Defendants have stated that "the defense will demonstrate that the so called fraudulent time records are not the result of any fraudulent intent on the part of the Defendants but rather resulted from incompetent staff engaged in accounting work for the Defendants, who misapprehended the instruction they were given." (Response I at 1.) The accountants' testimony is relevant to establish the fact that there were numerous mistakes made in the formulation of the bills submitted, and that Defendants lacked the specific intent to commit the violation of § 666.

After considering Fournier's report, however, we do not believe that his testimony is relevant to any issue at trial. The crux of the Government's case is that Defendants conspired to and did violate § 666(a)(1)(A) by submitting invoices and billing records to the RRAA which reflected an inflated number of hours worked on the Airport expansion project. Fournier's report concludes that: (1) Vitillo's original estimate for the project was reasonable; (2) changes and

¹⁰While Defendants may use expert testimony to show that the claims submitted were accurate, we caution Defendants that we have read the expert reports and note that nowhere in either report is such a conclusion reached. Therefore, testimony from any of the experts that speaks to the overall validity of the funds received by Defendants, and not to the validity of the claims *actually* submitted, will be stricken.

extra work on large projects are inevitable; (3) extra work spent on these changes is reasonable; and (4) the rates billed by the Defendants in connection with this project also were reasonable. (Fournier Expert Rep. at 8.) These opinions are not relevant to any fact at issue here. Even if his testimony could somehow be considered relevant, it would surely confuse and mislead the jury by conflating the critical issue of whether Defendants inflated the number of hours it billed the RRAA with other, ancillary information about the project.

IV. CONCLUSION

For these reasons, we are compelled to conclude that Defendants may not use expert testimony in support of a claim of right defense. Defendants may use expert testimony to negate the Government's proof of any of the elements of the crimes alleged. However, before offering such testimony, Defendants shall advise the Court of the exact nature of the testimony that they intend to offer and the relevance of such testimony.

An appropriate Order follows.

