No. 11-16531

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STEPHANIE RODRIGUEZ, et al.,
Plaintiffs – Appellants,

v.

GENERAL DYNAMICS ARMAMENT AND TECHNICAL PRODUCTS, INC., et al.
Defendant – Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII
SUSAN OKI MOLLWAY, DISTRICT JUDGE · CASE NO. 08-189

APPELLANTS' OPENING BRIEF

WITHERS, BRANT, IGOE & MULLENNIX, P.C. WARD K. BROWN Two South Main Liberty, MO 64068 816-781-4788 · FAX: (816) 792-2807	**O'CONNOR PLAYDON & GUBEN LLP** DENNIS E.W. O'CONNOR JR. Pacific Guardian Center, Makai Tower 733 Bishop Street, Suite 2400 Honolulu, Hawaii 96813 (808)-524-8350; FAX: (808)-531-8628

ATTORNEYS FOR PLAINTIFFS – APPELLANTS
STEPHANIE RODRIGUEZ, JULIUS RIGGINS, SAMUEL OYOLA-PEREZ, NILDA MEYER, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF WILFREDO DAYANDANTE

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

OTHER

JURISDICTIONAL STATEMENT

Plaintiffs Stephanie Rodriguez, Samuel Oyola-Perez, Julius Riggins and Nilda Meyer (for themselves and others) filed this action in Hawaii state court in 2008. (6 ER 1024.) The action was removed to the United States District Court for the District of Hawaii, which acquired subject matter jurisdiction under 28 U.S.C. § 1332(a). (6 ER 1017.) Plaintiffs named General Dynamics Armament and Technical Products, Inc. ("General Dynamics") as a defendant as successor to another entity (6 ER 1011-16), and General Dynamics ultimately was the sole defendant at trial. (2 ER 206, 215.)

On November 30, 2010, the district court entered judgment on the jury's verdict in General Dynamics' favor. (2 ER 215.) Appellants' timely filed their motion for judgment as a matter of law and for new trial on December 27, 2010. (2 ER 154-204.) The district court denied the motion on May 25, 2011. (1 ER 37.)

Appellants gave timely notice of appeal (2 ER 38) on June 17, 2011. *See* 28 U.S.C. §§ 1294(1), 2107(a); Fed. R. App. P. 4(a)(1)(A). The jurisdiction of this Court is invoked under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE PRESENTED

During a live fire training exercise in Hawaii, an 81mm M374A3 HE (High Explosive) mortar cartridge exploded prematurely in the barrel of a mortar. Shrapnel from the blast killed one soldier and severely wounded three others. The soldiers and their families filed a product liability action alleging the mortar cartridge was defective.

At trial, the district court allowed an Army investigator (a non-designated witness named Philip Leong) to testify as to the cause of the explosion, as well as other scientific, technical and specialized matters. The district court's allowed the testimony as purported lay opinion testimony under Rule 701. This appeal presents the following issue:

Did the district court err in allowing Philip Leong to testify as a lay opinion witness under Rule 701 regarding the cause of the premature explosion and other scientific, technical, and specialized matters?

PERTINENT RULES

Rules 701 and 702 of the Federal Rules of Evidence are pertinent to this appeal and are set forth verbatim below.

An addendum at the end of this brief sets out verbatim the advisory committee notes to the 2000 amendment of Rule 701.

Rule 701. Opinion Testimony by Lay Witnesses

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Rule 702. Testimony by Experts

> 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.

STATEMENT OF THE CASE

This product liability action arises out of the premature explosion of a mortar cartridge while still inside a mortar tube during an Army training mission in Hawaii. The blast killed Oscar Rodriguez and injured Samuel Oyola-Perez, Julius Riggins, and Wilfredo Dayandante. The soldiers and their families sued General Dynamics, the manufacturer of the mortar cartridge (as successor to Martin Marietta Aluminum Sales, Inc.), alleging that a defect in the cartridge caused it to prematurely detonate.

At trial, the soldiers' expert witness testified the most likely cause of the premature explosion was a defect in the mortar cartridge (either a crack in the metal body or a void in the high explosive filling).

During discovery, General Dynamics identified two Rule 26 expert witnesses on causation and other scientific, technical and specialized matters. Both provided materials required by the rule and were deposed. After the close of discovery, General Dynamics sought appointment of an undesignated Army investigator (Philip Leong) as the district court's expert under Rule 614 and Rule 706. The district

court denied the motion and said the witness would be limited to any appropriate lay opinion testimony under Rule 701. The district court also ruled in advance of trial that none of the conclusions from the various Army investigations would be admitted at trial.

At trial, Leong was only witness called by General Dynamics. Before and during trial, the soldiers repeatedly objected on the grounds that Leong was not a percipient witness, the site had been dramatically changed by the time he arrived several days after the explosion, his testimony called for "scientific, technical, or other specialized knowledge" under Rule 702, the basis of his testimony was on reasoning which can be mastered only by specialists in the field (not on a process of reasoning familiar in everyday life), lack of foundation, and on other grounds.

Ultimately, the district court allowed Leong to testify regarding the cause of the explosion and other matters as a purported lay opinion witness under Rule 701. Leong testified that the cause was human error due to double loading of shells, and not a defect. All of the eyewitnesses to the explosion, however, testified that no double loading occurred.

Ultimately, the jury returned a defense verdict in favor or General Dynamics. The soldiers' motion for judgment as a matter of law and for new trial was denied by the district court. This appeal followed.

STATEMENT OF FACTS

A. One soldier dies and three are severely injured when a mortar shell cartridge prematurely explodes in the mortar tube during training.

On March 10, 2006, several soldiers were involved in a live fire mortar training exercise in Hawaii. (Transcript ("Tr.") 3—33:13-35:25.) During the morning mission, multiple 81mm M374A3 HE mortar rounds were successfully fired down range without incident by two mortar crews. (Tr. 3—42:21-44:1, 2—73:1-18; 2—76-9-77:1-8).

After a break of more than an hour, the crews re-positioned for a second mission. (Tr.79:4-80:1.) When all was ready, the command to fire was given and the first round of the afternoon mission was dropped into the tube. Instead of firing off down range, the shell exploded in the mortar tube and mortar shrapnel seriously injured Army soldiers Julius Riggins, Samuel Oyola-Perez, and Wilfredo Dayandante. (Tr.2—87:18-90:6.) Another piece of shrapnel struck Oscar Rodriguez and he died after being evacuated by helicopter. (*Id.*; Tr.2—94:20-95:7.)

B. The soldiers file a product liability action against General Dynamics.

Oscar Rodriguez' widow, Stephanie Rodriguez, sued General Dynamics Armament and Technical Products, Inc. ("General Dynamics") on behalf of herself and the Rodriguez' son, Jacob. (6 ER 972.) The injured soldiers joined in the lawsuit and sought damages for personal injuries caused by the mortar malfunction. (*Id.*) When Dayandante died in May of 2009, his mother, Nilda Meyer, was substituted as plaintiff for his estate. (6 ER 974.)

At trial, the soldiers relied on the doctrine of *res ipsa loquitur* in submitting their claims under a product liability theory per Hawaii law. (1 ER 2.) The parties stipulated that General Dynamics manufactured the mortar cartridge via its predecessor-in-interest. (6 ER 1014.) Ultimately, the jury returned a special verdict indicating that the shell was not defective, and the district court entered judgment in favor of General Dynamics. (1 ER 206, 215.)

C. The soldier's designate John Nixon as its expert witness on liability issues.

The soldiers designated John Nixon as a retained expert under Rule 26(a)(2)(A). (5 ER 932.) Nixon provided his Rule 26 materials and sat for his deposition. (5 ER 932, 6 ER 1041.) According to Nixon, the shell was defective when it was manufactured due to either a

crack in the metal body of the cartridge, or because of a void in the high explosive filler. (Tr.8—126:4-148:14.)

D. General Dynamics designates three expert witnesses on liability issues.

Per Rule 26(a)(2)(A), General Dynamics designated Col. John Harms, Vincent Di Ricco, and Peter Czachorowski as its retained expert witnesses. (5 ER 920-21.) In addition to providing the information required by Rule 26(a)(2)(B) (*i.e.*, reports, exhibits, publications, other testimony, etc.), each witness was deposed. (6 ER 1034-36.) Both Di Ricco and Czachorowski are from the Army's Armament Research Development and Engineering Center ("ARDEC"). (5 ER 923-24, 6 ER 1010.)

General Dynamics withdrew Harms as an expert well before trial. (5 ER 776.) Although not withdrawn, General Dynamics did not call Di Ricco at trial. (Tr. 13-72 to 15-166.) Plaintiffs read portions of Czachorowski's deposition testimony in their case. (Tr.6—191:22-192:8.) For example, Czachorowski testified that a cracked shell can detonate at various positions in the gun tube depending upon the orientation, size and location of the crack on the projectile. (6 ER 1037-39, Depo.61:1-63:2.) General Dynamics also introduced excerpts

from the deposition during plaintiffs' case. For instance, Czachorowski testified that in his opinion, collapse of HE was not a cause of the premature explosion. (6 ER 1040, Depo.73:15-18.)

In addition to its retained experts, General Dynamics also listed the Medical Examiner and the soldiers' treating physicians as non-retained experts in its Rule 26 disclosures. (5 ER 921, 930.)

E. The Army authorizes an Army investigator (Philip Leong) to testify about facts—but he cannot provide any expert or opinion testimony.

Under the district court's scheduling order, General Dynamics' deadline for disclosing expert witnesses and their reports was December 16, 2009. (6 ER 1005.) Discovery closed on March 19, 2010, and trial was scheduled for May 18, 2010. (6 ER 1004-05.) Although the May trial date was later continued to October of 2010, the relevant deadlines in the scheduling order did not change. (5 ER 780.)

On July 16, 2010, General Dynamics sought leave to amend the scheduling order to add a new Rule 26(a)(2)(A) expert witness to replace Harms. (5 ER 778.) The request was denied based in part on the prejudice that would result by amending a number of other deadlines, the lack of time for *Daubert* motions, the possible need for

the soldiers to seek and retain a rebuttal expert, and the likelihood that trial would be postponed again. (5 ER 788-89.)

At trial, the only witness called by General Dynamics was Philip Leong, an Army investigator from ARDEC (the same unit as General Dynamics' Rule 26 experts Di Ricco and Czachorowski). (Tr.13—72:9-15—166:11.) General Dynamics also consulted with several other ARDEC employees on this case as well. (Tr. 15—75:24-7719.) ARDEC was one of four Army agencies to investigate the explosion. (5 ER 908-10.) Leong was not listed as a retained or non-retained expert in any Rule 26 disclosures or discovery responses by the defense. (5 ER 916-22, 925-30.)

Leong authored a "Closeout" report regarding his investigation and the Army agreed to produce him for his deposition. (6 ER 1042.) In response to plaintiffs' inquiry well before the deposition, General Dynamics confirmed it "would be a fact deposition only. We do not have authorization from the Dept. of the Army for him to be an expert witness." (2 ER 190, Tr. 14—56:3-11.) The Army's authorization stated Leong "will not provide any expert or opinion testimony." (2 ER 185 (bottom of page).)

At the outset of Leong's deposition, Army counsel reiterated that Mr. Leong was providing fact testimony only. (5 ER 801, Depo. 7:19-8:1.) Leong also confirmed that he was appearing to provide fact testimony only. (5 ER 833, Depo. 137:18-23.) During the deposition, plaintiffs' counsel objected and noted the parties' agreement as follows:

> MR. BROWN: The form of the question is it is asking for an expert opinion and he is here not testifying as an expert. And that was an agreement of the parties and he said that at the very beginning. So that was the basis for that.
>
> MR. FOWLER: I just wanted to make sure. Thank you. I appreciate that.

(5 ER 827, Depo 112: 14-20.)

F. The district court denies General Dynamics' request to appoint Philip Leong as an expert under F.R.E. 614 and 706.

Well after the March 19, 2010 close of discovery (6 ER 1004-05), General Dynamics filed its "Motion for the Court to Order Philip Leong to Testify to his Opinions and Conclusions Under Federal Rules of Evidence 614 or 706." (5 ER 862.) General Dynamics sought to elicit "Mr. Leong's expert testimony" as follows:

> Additionally, Mr. Leong's expert testimony would avoid forcing the jury to speculate about how the accident was investigated, why certain steps were taken and others were not, and would provide a clear picture of the materials he relied upon outside of his first-hand investigations. For example, Mr. Leong would be able to testify to the possible causes of an in-bore detonation and the cumulative knowledge and data that opinion relies upon; the facts determined in an investigation that support and contradict the possible causes, *i.e.* existence of Composition B residue, the "signature" of the explosion; the characteristics of the Army ammunition manufacturing processes, to include how defects can occur, as well as the experience gleaned from other investigations, some performed by Mr. Leong himself and many not, that give rise to a body of knowledge regarding how "user error" can be committed; and the methodology used to eliminate possible causes and arrive at a "most likely" cause. Mr. Leong also would be able to explain why Army policy dictates that in the subsequent investigation, mortar cartridges are x-rayed and visually inspected, rather than another form of inspection such as ultrasound or magnetic particle.

(5 ER 869.) The district court denied the motion (6 ER 1085, Doc. No. 675.)

G. At trial, the district court allows non-designated witness Leong to testify as to the cause of the explosion and other scientific, technical and specialized matters.

Both before trial and during Leong's direct examination, the district court indicated it would not allow Leong to testify regarding various expert matters. (Tr.13—71:13-23.) Ultimately, however, Leong was permitted to testify that the cause of the explosion was the result of double loading. (Tr. 14—208:2-209:11.) Not only did this

testimony come in over a lack of foundation objection (*e.g.*, Tr.14—205:25-208:23), the soldiers' counsel had already preserved continuing objections based on Rule 701, calling for expert testimony, the testing that formed the basis was not substantially similar or comparable to our mortar system, etc. (Tr.14—49:14-69:25, 14—78:19-81:10.) Leong was also allowed to testify regarding numerous other matters calling for scientific, technical and specialized matters beyond what is allowed under Rule 701. A table summarizing many of the soldiers' objections and the district court's rulings is set out at the end of the Argument section of this brief. (*See also* 2 ER 216-223.)

Before his deposition, Leong was served with a subpoena duces tecum requesting all physical evidence obtained from the scene and anything else he relied on during his investigation, among other things. (2 ER 202-03.) Leong said he had produced everything he had that was responsive to the subpoena. (5 ER 802, Depo. 10:23-12:14.)

At trial, however, Leong brought several additional items and acknowledged he had not produced them at his deposition even though they were called for by the subpoena. (Tr.14—14:9-28:21.) For example, Leong failed to produce photographs he took of evidence and

the scene, a blood-stained notebook he said he found, the ruptured mortar tube (although an objection to this exhibit was withdrawn at trial), and a variety of other items. (*Id.*; Tr. 14—33:13-34:22, 184:6-185:11, 15—156:10-158:13.) He also testified about the results from and conclusions from other malfunction investigations and tests, such as one in which he said he drilled holes. (Tr.14—85:10-88:6.)

During his deposition, Leong indicated there was not enough evidence to point one way or the other regarding the cause of the explosion, and that the probable cause of the failure was inconclusive. (5 ER 833-34, Depo. 137:24-138:7, Tr.14—115:15-118:22.) At trial, however, Leong was allowed to testify that the blast was most likely caused by double loading. (Tr.14—208:2-209:11.) Likewise, although Leong did not rule out a metal defect in the cartridge body before trial (he stated metal defects were "unlikely")(Tr.14—137:16-138:3), he was allowed to testify at trial that such a defect was excluded as a possible cause this malfunction. (Tr.14—214:17-19.)

In addition, Leong's report provides "the evidence and test data did not identify the cause of the malfunction." (5 ER 1043.) His report then lists the "possible" causes of the explosion, once again not ruling

out material defects but, instead, listing them as "unlikely." (5 ER 1044-46.)

H. Eyewitnesses at the scene perceive no misfire or double loading.

The eyewitnesses who observed the mission testified that the soldiers were properly operating the mortar cannons (or "guns), and that nothing out of the ordinary occurred before the explosion. (Tr. 3—42:21-44:1, 2—73:1-18, 2—76:9-77:8). The eyewitnesses denied that the last round of the morning mission had misfired, or any type of double loading event. (Tr.2—140:1-6, 3—138:8-10, 4—85:22-24.) Instead, the witnesses reported that all rounds had fired without incident until the blast occurred, and that the detonation occurred when the first shell was inserted after the break. (Tr. 2—73:1-18; 2—76:9-25, 2—77:1-8, 4—32:17-33:3, 4-130:19-132:2.)

The eyewitnesses also testified that the guns were about 25-35 meters apart (approximately 100 feet). (Tr.3—37:12-23, 3—121:23-122:5, 4—29:13-19, 4—129:15-130:7.) Although the guns were no longer in position by the time Leong arrived, Leong was allowed to testify that they were approximately 20-30 *feet* apart at the time of the blast. (13—97:24-98:22.)

I. Four different Army units investigate the malfunction.

Following the explosion, the Army conducted four separate investigations into the March 10, 2006 incident. (5 ER 908-10.) The first Army team to arrive at the scene was the 2nd Brigade Combat Team. (5 ER 908.) They were on the scene by March 11, 2006, the day after the explosion. (Tr.14—240:25-241:9.)

The second investigative team to arrive at the site was the Army Criminal Investigative Division (CID). (5 ER 910.) They were there by March 11, 2006, one day after the explosion. (Tr.13—75:19-22.)

The third investigation was conducted by the Army Combat Readiness Center at Fort Rucker, Alabama ("Ft. Rucker"). (5 ER 910.) Many of the findings and conclusions of the Ft. Rucker team were redacted from documents provided by the Army. (*Id.*) Because Oscar Rodriguez died as a result of the explosion, however, regulations required the Army to inform his family as to the likely cause of his death. *See* Dept. of Defense Instruction 1300.18, §4.9 (requiring next of kin to be "informed of the releasable investigative results" and, upon request, "provide a fully qualified representative to answer any

questions about the investigation reports….")

In May of 2007, five or six Army officers came to Mrs. Rodriguez' home and provided a PowerPoint presentation reflecting that suspected cause was a crack in the cartridge body that allowed propellant gasses to detonate the composition B explosive in the gun barrel. (Tr.16—17:15-23:23, 6 ER 1025, 1033.) One of the officers listed on the first page of the PowerPoint is Maj. Charles Jack, the person Leong said took over the Ft. Rucker investigation. (6 ER 1025, Tr.15—65:2-15.) During trial, an Army attorney, Lt. Col. Morris, was present and accompanied Leong to the courthouse. (Tr.14—121:11-123:11.) Plaintiffs confirmed through Morris that the basis of the PowerPoint was the Ft. Rucker report. (Tr.13—133:20-134:22.)

The fourth investigation was by Leong (ARDEC). (5 ER 910.) Leong did not arrive at the site until after dark on March 14, 2010, four days after the explosion. (Tr.14—37:6-21, 226:1-4.) He was not able to see anything at the site until he arrived the next morning on the 15th. (Tr.14—37:17-21.) He was only at the site on the 15th for an hour or so until rain suspended the investigation. (Tr.14—42:9-13.)

J. The site is cleared to evacuate the wounded, other investigators collect evidence, and Leong arrives later.

In order to evacuate the wounded, much of the site was cleared immediately after the blast to allow a helicopter to land, and because of concern that debris could get caught in the rotors of the helicopter. (Tr.2—90:7-91:18.) By the time Leong arrived at the site five days later, he noted he had never found so little evidence on an accident site. (Tr.13—137:23-138:1.)

Leong had no personal knowledge of what occurred on the day of the explosion because he was not present. (Tr.14—235:6-18.) He agreed that the soldiers who were present at the scene on March 10, 2006, had personal knowledge of what happened that day. (*Id.*) Likewise, he had no knowledge as to evidence collected by investigators who were on the scene before him other than a photo shown to him during trial. (Tr.14—236:14-238:9) Although he provided questions for other investigators to use in interviewing and taking statements from eyewitnesses, he never obtained or reviewed the statements. (Tr.14—223-224:9.)

Leong testified that the mortar guns were numbered from left to right at the firing point. (Tr.15—39:22-40:2.) Although he found the baseplate imprint of the gun he believed was gun 3, he said he could

never find the baseplate of the gun he thought was at issue (gun 2). (Tr.13—96:17-97:7.) According to the eyewitnesses, however, the mortar guns were numbered one through four from the *right to the left* from the perspective of those firing them. (Tr.4—12:16-13:16.)

Leong further testified that the guns were approximately 20-30 feet apart at the time of the incident. (Tr.13—97:24-99:4.) According to the eyewitnesses, however, the guns were 25-35 *meters* apart (approximately 100 feet). (Tr.3—37:12-23; 3—121:23-122:5;4—29:13-19; 4—129:15-130:7.)

K. The soldiers repeatedly object to Leong's testimony.

A non-exhaustive table at the end of the Argument section of this brief summarizes objections Plaintiffs made during Leong's testimony. It is also reproduced in the Excerpts of Record (2 ER 216-23) along with Leong's testimony. (3 ER 224-407, 4 ER 408-664, 5 ER 665-774.)

SUMMARY OF THE ARGUMENT

The district court erred in allowing Philip Leong to testify as a "lay witness" under Rule 701 regarding opinions and conclusions involving scientific, technical, or other specialized knowledge. Determining the cause of an explosion necessarily involves scientific, technical and other specialized expertise. Leong's testimony was based on reasoning which can be mastered only by specialists in the field, not on a process of reasoning familiar in everyday life. Rule 701(c).

Further, he was not present at the site when the explosion occurred—his testimony went far beyond what little he saw by the time he arrived five days after the explosion. In order to evacuate the wounded, the scene was cleared immediately after the explosion to allow a Medevac helicopter to land. In addition, several other investigators had already combed the site and collected evidence by the time Leong arrived. Rule 701(a).

Leong's testimony falls squarely within Rule 702, not Rule 701.

ARGUMENT

I. THE DISTRICT COURT ERRED IN ALLOWING PHILIP LEONG TO TESTIFY AS A LAY OPINION WITNESS UNDER FEDERAL RULE OF EVIDENCE 701 REGARDING THE CAUSE OF THE PREMATURE EXPLOSION AND OTHER SCIENTIFIC, TECHNICAL, AND SPECIALIZED MATTERS.

A. Standard of review.

The district court's "construction or interpretation of…the Federal Rules of Evidence, including whether particular evidence falls within the scope of a given rule, is subject to *de novo* review." *U.S. v. Durham*, 464 F.3d 976, 981 (9th Cir. 2006)(addressing Rule 701). Once it is determined that the challenged evidence falls within a given rule, however, the district court's decision to admit it is reviewed for abuse of discretion. *Id.*

An abuse of discretion exists where the district court makes an error of law or a clear error of fact. The district court abuses its discretion when it does not apply the correct law or rests its decision on a clearly erroneous finding of a material fact. *See Casey v. Albertson's Inc.*, 362 F.3d 1254, 1257 (9th Cir. 2004). Reversal is not warranted unless there is prejudice. *See Harper v. City of Los*

Angeles, 533 F.3d 1010, 1030 (9th Cir. 2008). If the trial court erred, there is a presumption of prejudice that "can be rebutted by a showing that it is more probable than not that the jury would have reached the same verdict" without the error. *See Obrey v. Johnson*, 400 F.3d 691, 701 (9th Cir. 2005). Prejudice means that it is more probable than not that the error tainted the verdict. *See Harper*, 533 F.3d at 1030.

A district court's denial of a motion for new trial under Rule 59(a) is reviewed under an abuse of discretion standard. *Molski v. M.J. Cable, Inc.*, 481 F.3d 724, 728 (9th Cir. 2007).

B. The district court erred in interpreting and applying Rules 701 and 702.

The district court erred in its interpretation and application of Federal Rule of Evidence 701. The rule permits a lay witness to provide opinion testimony only if it (a) is "rationally based on the perception of the witness," (b) "helpful to a clear understanding of the witness' testimony or the determination of a fact in issue," and (c) "not based on scientific, technical, or other specialized knowledge within the scope of Rule 702."

Here, Leong's testimony ran afoul of Rule 701(c) in that it involved scientific, technical and specialized knowledge that should have been channeled through Rule 702. The testimony also violated subsection (a) because Leong was permitted to provide opinions that were not based on his personal perception, but instead were based on speculation regarding the scene, hearsay, historic testing, and on other matters. The district court's interpretation of the rule as allowing such testimony *if the witness said it was based on his background and experience* was erroneous. (*e.g.*, Tr.13—120:16-121:22; 13—128:20-130:15.)

1. The 2000 Amendment to F.R.E. 701.

In 2000, Rule 701 was amended to add subsection (c) to "eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing." *See* Fed.R.Evid. 701 Adv. Comm. Notes (2000 Am.) (attached as Addendum).

Under the rule, the *content* of the testimony is the key:

> The amendment does not distinguish between expert and lay *witnesses*, but rather between expert and lay *testimony*. Certainly it is possible for the same witness to provide both lay and expert testimony in a single case. *See, e.g, United States v. Figueroa-*

> *Lopez*, 125 F.3d 1241, 1246 (9th Cir. 1997) (law enforcement agents could testify that the defendant was acting suspiciously, without being qualified as experts; however, **the rules on experts were applicable where the agents testified on the basis of extensive experience that the defendant was using code words to refer to drug quantities and prices**). The amendment makes clear that any part of a witness' testimony that is based upon scientific, technical, or other specialized knowledge within the scope of Rule 702 is governed by the standards of Rule 702 and the corresponding disclosure requirements of the Civil and Criminal Rules.

Id. (bold emphasis added).

In *James River Insurance Company v. Rapid Funding, LLC*, 648 F.3d 1134 (10th Cir. 2011), the Tenth Circuit rejected an attempt to fit opinion testimony into Rule 701 when such testimony was based on the witness' background and professional experience. *Id*. at 1144. After a fire destroyed a building, the witness *James River* attempted to calculate the pre-fire value of a building *Id*. at 1137, 1141.

> Instead of supporting the admissibility of Mr. Miller's testimony as lay opinion, Rapid Funding's argument places Mr. Miller's testimony into the category of expert opinion. "[K]nowledge derived from previous professional experience falls squarely within the scope of Rule 702 and thus by definition outside of Rule 701." *United States v. Smith,* 640 F.3d 358, 365 (D.C.Cir.2011) (quotation omitted).

Id. at 1142.

Thus, the attempt to justify the admission of Leong's testimony by citing his background and work experience constitutes both a misinterpretation and

misapplication of the rule. The 2000 amendment to Rule 701 makes it clear that such testimony is controlled by Rule 702.

2. Rule 701(c)—Leong's testimony was based on scientific, technical and other specialized knowledge within the scope of Rule 702.

Under Rule 701, "…the distinction between lay and expert witness testimony is that lay testimony results from a process of reasoning familiar in everyday life, while expert testimony results from a process of reasoning which can be mastered only by specialists in the field."). Fed.R.Evid. 701 Adv. Comm. Notes (2000 Am.). *See also United States v. Corona*, 359 Fed.Appx. 848, 851, 2009 WL 5103163 at 1 (9th Cir. 2009)(challenged statements in tax prosecution did not involve expert testimony under Rule 702 because they did not result from specialized knowledge or expertise); *United States v. Nelson*, 285 Fed.Appx. 491, 494, 2008 WL 2812447 (9th Cir. 2008)(officers' observations allowed as lay opinion testimony because it "did not require scientific, technical or other specialized knowledge"). According to the Fifth Circuit, "any part of a witness's opinion that rests on scientific, technical, or specialized knowledge must be determined by reference to Rule 702, not Rule 701. FED. R.

EVID. 701 advisory committee's note." *U.S. v. Cooks*, 589 F.3d 173, 180 (5th Cir. 2009).

While a witness with specialized knowledge can testify under Rule 701 based on observations about "common enough" matters, the witness may only employ "a limited amount of expertise." *See United States v. Figueroa-Lopez*, 125 F.3d 1241, 1245-46 (9th Cir. 1997)(officers' testimony that actions were consistent with experienced drug traffickers was improperly admitted as lay opinion testimony). Although *Figueroa-Lopez* was decided before the 2000 amendment to Rule 701, it is cited in the Advisory Committee's Notes to the rule. *See* Addendum.

Our research has not revealed any reported case in which opinion testimony regarding the *cause of an explosion* was admitted under Rule 701. This makes sense given the scientific, technical nature of such testimony. Determining the cause of a premature, in-bore detonation is far beyond common experience and requires specialized, scientific knowledge. In fact, the Ninth Circuit has held that determining the cause of an explosion necessarily involves expert testimony:

> Determining the cause of the explosion here required exploration and evaluation of complex facts and theory "beyond common experience." It presented questions of physics, metallurgy, and engineering related to the construction, composition, design and operation of a handheld torch attached to a gas cylinder. The district court properly recognized that the plaintiffs therefore were required to present expert testimony on these issues to establish a prima facie case.

Shalaby v. Newell Rubbermaid, Inc., 379 Fed.Appx. 620, 622, 2010 WL 1972137 (9th Cir. 2010), *Id.* at 622.

Applying these principles here, the district court erred in allowing Leong to testify under Rule 701 with respect to opinions involving scientific, technical, or other specialized knowledge. Leong's testimony was based on reasoning which can be mastered only by specialists in the field, not on a process of reasoning familiar in everyday life. As such, it falls squarely within Rule 702. Such testimony is properly channeled through Rule 702 so that it is subject to challenge under *Daubert* in line with the court's gatekeeping functions. *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 593, 113 S.Ct. 2786 (1993). The purpose is to "ensure that any and all scientific testimony evidence admitted is not only relevant, but reliable." *Id.*, 509 U.S. at 589; 113 S.Ct. 2786.

During trial, the soldiers' counsel was forced to repeatedly object to Leong's testimony. *See* Appendix. Efforts to rein in Leong's testimony began before Leong took the stand and continued as soon as General Dynamics addressed his background and training. (Tr.13—71:11-24; 13—73:23-74:6.) At one point, the district court even noted the frequency of counsel's objections: "THE COURT: Don't worry. He's going to object all the time anyway, so, you know." (Tr.14—217:14-15.)

Early on, Defendant's plan was to sell Leong as the worldwide expert in the field of premature explosions. (Tr.13—83:11-13)("…is there anybody you know of that's more qualified to do that than you?"). This was hammered home repeatedly during closing argument. (*See e.g.*, Tr.16—125:13-25, 16—129:19-130:23.) Leong went from a purported percipient lay witness to the Army's "go-to guy" on premature detonations. (Tr.13—82:21-24, 16—130:14.)

3. Rule 701(a)—Leong's testimony was not rationally based on his perception.

Under Rule 701(a), the witness' testimony is limited to opinions "rationally based on the perception of the witness." A rational perception is one involving "first-hand knowledge or observation."

United States v. Yannotti, 541 F.3d 112, 125 (2d Cir. 2008)(citation omitted). *See also United States v. Durham*, 464 F.3d 976 (9th Cir. 2006)(must be based on "concrete facts within their own observation and … senses, as distinguished from their opinions or conclusions drawn from such facts"); *Plush Lounge Las Vegas, LLC v. Hotspur Resorts Nevada, Inc.*, 371 Fed.Appx. 719, 720-21, 2010 WL 893495 (9th Cir. 2010)(applicable market definition testimony was not based on the witness' sensory perceptions and thus, inadmissible under Rule 701).

Leong was not present at the time of the explosion and the scene had been significantly disturbed by the time he arrived. His opinions were largely *drawn from* what unidentified others reportedly told him. Further, his opinions were also derived from all kinds of non-percipient information secured after-the-fact, such as lab reports, testing, data records, etc. While this type of information might constitute "sufficient facts and data" under Rule 702 in appropriate circumstances, it is does not under Rule 701. *See James River Insurance Company*, 648 F.3d at 1142 (reliance on data and technical analysis of others falls under Rules 702 and 703, not Rule 701).

By the time Leong arrived, the scene was much different than it had been at the time of the explosion. In order to evacuate the wounded by helicopter, the firing point was cleared by others at the site. Several other investigative teams combed the site and collected evidence before Leong arrived. At best, Leong's testimony was akin to an accident reconstruction expert who visits the scene after the cars had been removed. In short, the testimony here was not based on what Leong saw when he ultimately arrived on the scene (he found very little), but on the application of scientific principles and technical information afterwards.

C. Even if an abuse of discretion standard is applied, the soldiers' were prejudiced by the admission of Leong's testimony.

Leong was the only witness called by General Dynamics at trial. The Court specifically rejected defendant's attempt to have him appointed as an expert witness, because "the defense did not follow the requirements for presenting Mr. Leong as a 702 witness." (Tr. 14—6:1-7:10.) Nevertheless, Leong was allowed to opine on the ultimate cause of the malfunction even though the Court indicated in pretrial rulings that this would not be allowed. Once his testimony

came in, General Dynamics abandoned its retained experts and rested. Leong was the only witness who supported General Dynamics' double loading theory. Without Leong, the only testimony as to the cause of the blast would have been the soldiers' expert who said the shell was defective.

Given the trial court's error, a presumption of prejudice arises unless rebutted. *See Obrey v. Johnson*, 400 F.3d 691, 701 (9th Cir. 2005). Prejudice means that it is more probable than not that the error tainted the verdict. *See Harper*, 533 F.3d at 1030.

1. Leong's testimony provided a false impression regarding the Army's official position on the cause of the malfunction.

One instance of prejudice resulted from the false impression that the Army's official position was in line with General Dynamics' double loading theory. The Army was required to inform the surviving spouse as to the official results of its investigation regarding the cause of the malfunction. Dept. of Defense Instruction 1300.18, § 4.9. The Ft. Rucker board met with Mrs. Rodriguez to explain its findings regarding the incident. During this meeting at her home, the officers indicated that a defect in the metal cartridge

body was the suspected cause of the explosion. They presented her a PowerPoint slide presentation at that time. (Tr.16—17:15-23:23, 6 ER 1025, 1033.)

When the parties sought a copy of the full Ft. Rucker report, it was produced in heavily redacted form. (5 ER 910, 5 ER 833, Depo. 135:1-22.) Leong was allowed to review the report but was instructed to keep it secret. (5 ER 833, Depo. 134:2-135:22.)

During trial, Leong testified as if his position represented the official position of the Army. (Tr. 14—83:10-15, 14—188:190:20.) This provided an incorrect impression to the jury. Although the court attempted to address this by allowing the PowerPoint presentation into evidence, the defense pointed out that it was not an official Army report and hammered on the fact than no witness appeared from the Army to testify about it. (Tr.16—127:14-128:7.) What we are left with is the appearance that the Army sides with General Dynamics' theory of the case while keeping the favorable Ft. Rucker conclusions from the jury.

The Army's regulations recognize the danger in this type of situation. Army Regulation 27-40 forbids former and current Army

personnel from providing expert testimony in private litigation except in most extraordinary circumstances. More specifically, this regulation prohibits both "opinion" testimony and "expert" testimony:

> **7–10. Expert witnesses**
> *a. General rule.* Present DA personnel will not provide, with or without compensation, **opinion** or expert testimony either in private litigation or in litigation in which the United States has an interest for a party other than the United States.

Army Regulation 27-40, Section 7-10. The sample expert witness denial letter that is part of the regulation provides: "When a witness with an official connection with the Army testifies, a natural tendency exists to assume that the testimony represents the official view of the Army, despite express disclaimers to the contrary." *Id.*

General Dynamics was not reticent in asserting that Leong's trial testimony represented the Army's official position. The following statement, among others, was may during closing argument: "The man who was in charge of the technical investigations of mortar malfunctions for the Army in the entire world sat before you and testified in this case." (Tr.16—125:15-17.)

The district court recognized the unfairness and attempted to address it by allowing Plaintiffs to introduce the PowerPoint slides.

(Tr. 14—158:5-24; 16—20:17-24:7. However, this simply did not cure the prejudice, particularly given the arguments Defendant made during closing. ("Did they call a witness in this case to explain that PowerPoint to you?"; "Why isn't anybody here to back it up? Simple. Simple. Nobody will come in the court from the Army and say it.") (Tr. 16—126:20-128:7.)

2. Leong was allowed to testify beyond the information provided before trial.

Although the Army produced Leong's report and he was deposed, we were told his deposition would be a fact deposition only. (Tr.14-56:3-11.) Leong was served with a subpoena duces tecum and testified he had brought all responsive materials to the deposition. (Tr. 14—23:18-25:2.) Nevertheless, he appeared at trial with additional items that the soldiers' counsel saw for the first time when he took the stand. Leong was allowed to base his opinion on purported physical evidence that he failed to produce or mention at his deposition. Plaintiffs were unfairly forced to repeatedly object to the witness' testimony in front of the jury. *See* Appendix.

Further, the witness was allowed to base his testimony on testing results that he never produced, not even at trial. (Tr.14—

150:13-153:14.) Likewise, Leong produced no data or other backup information from the testing. (Tr.14—150:13-153:14.) Moreover, no foundation was ever provided to demonstrate that these tests were reliable or substantially similar to the instant situation. In fact, Leong himself conceded that one of the two tests on which he relied was not comparable to the mortar system here (the 4.2-inch, rifle-loaded mortar system). (Tr.14—78:19-81:10; 15—91:20-96:8.) Counsel was forced to explore the two tests with the witness in front of the jury without knowing what the responses would be, and without any meaningful opportunity to respond. (Tr.14—78:17-80:19; 15—91:20-96:8.)

Thus, not only was General Dynamics allowed to convert Leong into an expert witness during trial, it did so without plaintiffs ever receiving key information needed in order to effectively cross-examine him, conduct a *Daubert* analysis, or determine what type of discovery follow-up was required. Plaintiffs were forced to take the witness' word for it during trial and had no opportunity to fully test reliability either via motion or on cross-examination. It was not possible for plaintiffs to verify what was done during the testing because Leong

failed to produce the backup information from the tests. He was permitted to display photographs of an in-bore detonation from another cannon without providing the underlying documentation. There was no way to verify or test the accuracy of his testimony. This is but one example of why Leong's testimony should have been channeled through Rule 702, as required by subsection (c) of Rule 701

In addition, Leong was allowed to testify about drilling holes into the bottom of other explosives to support his opinion that a metal defect would result in an explosion in the bottom portion of the tube. (Tr.14—85:10-88:6.) Plaintiffs had no opportunity to scrutinize these purported tests, the methodology, or the data because they were not produced. As explained above, his reliance on other tests, technical reports and data brings this under Rule 702.

3. Lack of foundation for two past tests on which Leong relied for his double loading testimony.

As part of his investigation, Leong attempted to re-create an in-bore detonation with the very lot of shells at issue in this case at the Yuma testing grounds. Each time the shells were double loaded into the barrel, however, they successfully fired off down range without incident. (Tr.15—98:4-102:3.) Instead of relying on these tests, Leong

based his opinion on the two tests that reportedly had been done years ago. (Tr.15—91:20-96:8.) Not only was Leong allowed to testify regarding the other tests without producing test data and materials, General Dynamics was never even required to lay an appropriate foundation showing the tests were applicable here. (Tr. 14—196:15-208:23.) *See, e.g., Am. Broadcasting Co., Inc. v. Kenai Air of Hawaii, Inc.*, 67 Haw. 219, 225-26, 686 P.2d 1, 5 (Haw. 1984) (proponent of the evidence has burden of showing substantially similar). Even though no foundation was provided, the Court allowed Leong to testify to a purported "signature" of double loading based on two tests. (Tr. 14—48:2-49:7;14—68:5-70:7.) In essence, the Court shifted the burden to plaintiffs to demonstrate the tests were not substantially similar, despite the fact Leong did not produce the tests and backup information.

According to Leong's testimony, his opinion that a double loading results in an upper barrel explosion is a conclusion drawn from the two tests for which no proper foundation was proper. (Tr. 14—78:19-81:10; 15—91:20-96:8.) The witness also vaguely referred to other historical test data without providing any specifics, let alone

providing a foundation showing that that it was appropriate to draw conclusions from such information. (Tr.14—47:17:48:1; 14—68:5-70:7.) The district court allowed Leong to testify to a double loading "signature" based on two tests involving *different mortar shells and systems*. (*Id.*) Not only does such testimony fall under Rule 702, it lacked foundation and was unreliable.

When Leong performed double loading tests here with the *same lot of shells and same model of mortar tube*, each and every mortar round successfully fired down range. (Tr.15—98:4-102:3.) Each unspent round was found approximately 200 meters down range. (Tr.15—75:15-23.)

One of the two tests Leong was allowed to testify to involved a 4.2-inch rifle-barreled system. (Tr.15—91:20-25.) This system was not comparable to the mortar system used by the soldiers in the instant case. Rather than dropping a round into the smooth-loading barrel like ours, a rifle-barreled mortar spins down the tube in grooves until it comes into contact with the firing mechanism. (Tr.15—91:24-92:16; 8—91:24-96:6.) There were numerous other differences that the

soldiers' counsel learned during an "on-the-fly" examination at trial. (Tr. 14—78:19-79:4, 15—91:20-94:25.)

Likewise, he testified the 81mm test he relied on from 1990 was "was a British *cast iron* mortar shell instead of an American forged steel round like ours. (Tr.15—94:25-96:8; 14—79:5-80:16.) He also described several other differences during cross examination such as different fuze and propelling charges. (*Id.*) Again, plaintiffs were never afforded the opportunity to conduct discovery on these tests because Leong did not include them in his report or produce them. Upon timely notice that Leong would be allowed to testify as an expert, plaintiffs would have been entitled to discover all of his opinions and all bases therefore. Based on the limited information gleaned during cross-examination at trial, plaintiffs would have challenged Leong under *Daubert*, given his reliance on suspect data and questionable methodology. At a minimum, the soldiers were deprived of this opportunity and were unable to fully and effectively cross examine Leong as they lacked the very information that Leong says he relied upon.

The prejudice is further evident because Leong was the only defense witness. General Dynamics abandoned its retained experts because, unlike Leong, the plaintiffs had been afforded the opportunity to engage in the discovery contemplated by Rule 26. Plaintiffs were ready to attack the stated bases for the retained experts' conclusions.

Further, the trial court allowed Leong to testify that *the cause* of the malfunction was double loading (Tr.14—208:2-209:11), even though he stated in his report that the "evidence and test data did not identify the cause" (6 ER 1043), and in his deposition that it was inconclusive. (5 ER 834, Depo. 138:4-7.) For example, Leong failed to mention in his report or deposition the bloody notebook he says he found at the site (14—33:13-34:22),photographs of the fuze cap and fin (Tr.15—156:10-158:13), and high speed photos purportedly from a previous test (*Id.*). This was significant not only for trial preparation and cross-examination purposes, but also because of General Dynamics' comments during closing about the lack of cross examination on fuse cap and photos (*Id.* at 143:15-23).

Regarding additional evidence that *supported* the soldiers' claims, such as the video of the Yuma double-loading test firing, Leong did not bring it to trial. He claimed that he had lost it. (Tr.15—105:6-106:10.) Regardless, if the witness was going to rely on tests and materials to support his opinions (which the district court allowed over objection)(*See e.g.*, Trial Tr. 11/16/10 at 42:12-44:9), at the very least he had an obligation to produce them at his deposition.

Plaintiffs were prejudiced because they had no way of verifying or scrutinizing information that was withheld during discovery, they were unable to properly prepare to cross-examine Leong, they did not have the information to provide to their expert for comment and analysis, and because they could not challenge the witness under *Daubert*.

The bottom line is that Leong allowed to extrapolate and draw inferences based on his purported "scientific, technical, or other specialized knowledge." This was not Rule 701 testimony, it fell under Rule 702. The two tests he said support his double loading "signature" testimony constitute the very type of information utilized by experts, not percipient lay opinion witnesses. The trial court's

directive to opposing counsel to begin questions of Leong with the phrase "based on your work experience" in no way cures the prejudice or satisfies Rule 701.

Thus, the district court erred in its interpretation and application of Rule 701 and Rule 702. Alternatively, the district court's evidentiary rulings were erroneous and the soldiers were thereby prejudiced. Accordingly, the judgment should be reversed and remanded for a new trial.

4. Table setting out trial objections.

The following is a table setting out some of the objections made to Leong's testimony at trial. Although the table is not exhaustive, it was presented to the district court as part of the briefing on the post-trial motions.

Objection/Testimony	**Volume—Page:Lines**
November 12, 2010	
Misfire requirements and what happens at scene when there is physical injury (calls for expert testimony, hearsay, leading)	13—85-87:23
What had been done at the scene vs. what did he see (district court cut off objection making distinction between what was seen vs. speculation on what had been done)	13—89:2-19

Leong's purpose at scene to collect evidence, not to resolve the problem at the scene—"not to reach any conclusions" (did not reach conclusion as percipient witness, but as an expert)	13—95:19-96:4
What Leong would expect to find at the scene had it not been disturbed (calls for expert testimony)	13—97:14-17
Distance between guns and location of gun 2 (speculation and no foundation)	13—98:5-24
Disturbance of site by helicopter (speculation, expert)	13—102:13-23
At "some point" after leaving the site Leong would reach a conclusion as to cause (did not reach conclusion as percipient witness, but as an expert)	13—115:21-116:3
Expectation of residue would be found (expert testimony)	13—116:4-10
Objection to question "based on your experience" (expert, beyond 701)	13—121:2-21
Explanation of "low order detonation" (expert)(district court instructs in front of jury on how to ask questions, thus pitting Plaintiffs' counsel against the district court when objecting)	13—128:20-130:2
Never found less evidence at a site than this one (expert)	13—137:23-138:1
Testimony regarding other lots of ammunition (no notice)	13—150:5-151:3
Yuma inspection results for cartridges as to whether they were out of spec (hearsay)	13—165:19-166:6

Record made of multiple questions calling for expert testimony forcing Plaintiffs to object in front of jury (district court says remedy is to take it up on appeal)	13—175:7-176:7
November 16, 2010	
Plaintiffs renewed objection regarding "signature" of double loading, comparison to other malfunctions, extrapolation of conclusions based on the firing pin, condition of the site and other testing (expert testimony, requires technical, scientific testimony; no Rule 26 materials; Army and Defendant said would not testify about opinions; don't want to be forced to repeatedly stand up to object)(district court: opinions/inferences must be rationally based on Leong's perceptions (14—6:15-7:10))	14—3:20-8:24
Photographs not produced—specifically called for by subpoena, Leong swore in deposition he had produced everything he had	14—14:9-28:21
Defendant explains failure to produce photos – they were on Leong's computer and counsel looked at them; when he found they were different, then he had Leong print them—they were taken at the lab; clearly responsive to the deposition subpoena (14—22:5-25:2); Leong strongly denied allowing counsel to touch his computer because it is government classified	14—22:5-25:2 15—81:1-9
Gun 2 position based on what others allegedly told Leong (moved to strike based on hearsay and nonresponsive)	14—32:7-19
Bloody notebook Leong purportedly found (not in report, not in deposition, not ever produced)	14—33:13-34:22

Open-ended questions regarding his investigation of other mortar accidents (701/702 objection, expert testimony)(district court ruled no 701 problem "to say what he's done in his job")	14—39:15-40-25
Open-ended questions regarding what Leong has historically done to determine what different things can cause an inbore explosion (district court ruled Leong "still being asked what he's done")	14—41:14-42:8
District court says witness can testify to "what he does in certain circumstances"	14—44:10-13
Multiple objections to Leong's extrapolating an opinion based on the location in the tube where the explosion occurs	14—44:14-46-11
Testimony regarding historical data an expert would rely on	14—48:2-11
Witness made nonresponsive answer that "this is a signature for double loading" (Plaintiffs moved to strike based on the conclusion, expert conclusion, no Rule 26 process; extrapolation from data and opinion is expert testimony; not substantially similar tests/systems; calls for scientific, technical testimony contrary to 701)(district court overruled objections by stating that witness was talking "historically" and "Any witness can talk about his job")	14—48:2-49:23
District court held "rare bench conference"; calls for expert testimony and scientific, technical testimony; issue of "signature" requires extrapolation from past data; even if treating physician analogy would apply, we were told no	14—49:14-69:25

expert testimony or opinions; cannot make something "substantially similar" just because it involves job experience; (district court overruled Plaintiffs' objections **but granted a *continuing objection* based on 701/702 and no substantially similar foundation** 14—69:22-25)	
Testimony regarding purported "signature" of double loading (**701/702, expert testimony and no substantially similar foundation)(district court granted continuing objection**)	14—69:19-25
Possibilities that might cause malfunctions (calls for a conclusion, if based on historical data, no foundation for substantially similar, not produced)	14—75:15-76:4
Voir dire examination of the two tests relied on by Leong for his conclusion of double loading "signature"; one was 4.2 system Leong agreed **was not like ours and that it would not be comparable to ours** (14—78:19-79:4); explained differences in the 81mm system allegedly tested in 1990 (14—79:5-80:17)(district court said it would require a better foundation but none was ever provided—see below)	14—78:19-81:10
Objection sustained to lack of foundation for substantially similar	14—83:2-8
One test by drilling holes not substantially similar, Leong admitted it was different, insufficient foundation (Court said "I'm going to allow him to explain why he thought it would be helpful." 14—87:7-8)	14—85:10-87:8
Voir dire regarding other mortar system double	14—110:16-113:1

load test—fired at different charge, charging system different with more charges, fuse is different, shell made in UK, cast iron shell (ours is steel), etc.	
District court notes in Leong's report, he stated he could not say what caused the explosion, could not rule anything out, did not rule out each possible cause in his report	14—115:15-118:22
Lt. Col. Morris explains that it was not until April, 2010 (immediately before the first trial setting and months after discovery closed) that the Army authorized Leong to testify as to his opinions	14—121:10-123:19
Lengthy off the record discussion involving Lt. Col. Morris, Army reports, Leong's testimony and other issues (district court says it will limit Leong to his deposition testimony)	14—124:9-171:23
District court summarizes the three double load tests Leong mentioned: the 4.2 rifle-bored system, the 81mm cast iron UK system, and the double load tests of this lot of shells	14—147:14-22
District court orders Leong's testimony stricken regarding a "double primer indent" because not in his deposition	14—184:6-185:11
Reiterated continuing objection—not substantially similar, lack of foundation—regarding signature Leong would expect if defect or crack in the cartridge	14—196:15-197:5
Although the district court previously sustained objections based on lack of foundation and not substantially similar (*e.g.* 14—207:2-6), the	14—208:2-209:11

district court allowed Leong to give opinion of double load even though no foundation provided	
Testimony of soldier error being the most common cause of malfunctions (continuing objection)	14—218:19-25
Other investigators arrived days before, he did not know what they did at the site before he arrived; site disturbed	14—225:23 - 229:2; 14—241:6-9
No personal knowledge of conditions on 3/10/06, not there that day; soldiers have personal knowledge	14—235:6-18
November 17, 2010	
Leong saw nothing at the site until five days after the explosion	15—37:17-21
Additional testimony about purported double load "signature" (continuing objection)	15—155:1-156-9
Leong allowed to testify and describe photos not in deposition or report; allowed to describe double imprint even though not in report or deposition; contrary to Court's earlier ruling (14—184:6-185:11); emphasized during closing (16—84:5-13; 131:15-132:1; 143:15-145:23)(counsel commented in closing about lack of cross examination on fuse cap and photos (*Id.* at 143:15-23)—but because not produced or mentioned before, Plaintiffs had no idea what witness might say)	15—156:10-158:13
4.2 mortar system is rifle bored, meaning it spins down the tube and then spins out	15—163:16-164:8
Leong mentioned two double load tests to support opinion the double load "signature"; 4.2 much bigger shell, rifle loaded, no fins, agrees it is	15—91:20-94:24

"significantly different" than our shell (15—92:19-20), different propellant—a "cheese" propellant, like American cheese, different obturator ("scrub obturator" with a brass bristle brush)	
Second test involved an 81mm British cast iron mortar (not forged steel like ours), fired at an enhanced charge four (ours charge three), different fuse	15—94:25-96:8
Partial list of non-percipient testimony:1 Leong based the gun 2 position and orientation of guns on what unidentified soldiers allegedly told him and by estimating (15—38:1-40:22) Relied on lot acceptance records reflecting data others had compiled (13—149:15-153:6) Relied on records others made on "sister lots" of ammunition ("All the data I got is no problem with either side, the sister lot") (13—151:5-152:3) Relied on "stockpile reliability" test data others performed (13—152:10-17) Relied on the Benet Lab report on strength of the tube and metallurgical findings-no personal knowledge (14—195:21-196:14) Reviewed records others kept regarding the servicing of tube (13—142:14-174:17) Criticized soldiers for not cleaning cannon within last week even though not present and did	

1All testimony was subject to Plaintiffs' continuing objections.

not see tube until several days after explosion (13—140:7-21) Soldiers fired 26 HE and 11 WP rounds in morning mission (was not there) (14—250:22-254:8) Tube rusty when he saw it 5 days later but agreed it was not rusty in photos taken 3/10/06 and had no impact on cause; can't describe how things appeared 3/10/06 because was not there (14—248:25-250:21)	

CONCLUSION

The Court should reverse and remand for a new trial.

ADDENDUM

United States Code Annotated Currentness
Rules of Evidence for United States Courts and Magistrates (Refs & Annos)
Article VII. Opinions and Expert Testimony
Rule 701. Opinion Testimony by Lay Witnesses

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

CREDIT(S)

(Pub.L. 93-595, § 1, Jan. 2, 1975, 88 Stat.1937; Mar. 2, 1987, eff. Oct. 1, 1987; Apr. 17, 2000, eff. Dec. 1, 2000.)

2000 Amendments

Rule 701 has been amended to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing. Under the amendment, a witness' testimony must be scrutinized under the rules regulating expert opinion to the extent that the witness is providing testimony based on scientific, technical, or other specialized knowledge within the scope of Rule 702. *See generally Asplundh Mfg. Div. v. Benton Harbor Eng'g*, 57 F.3d 1190 (3d Cir. 1995). By channeling testimony that is actually expert testimony to Rule 702, the amendment also ensures that a party will not evade the expert witness disclosure requirements set forth in Fed.R.Civ.P. 26 and Fed.R.Crim.P. 16 by simply calling an expert witness in the guise of a layperson. *See* Joseph, *Emerging Expert Issues Under the 1993 Disclosure Amendments to the Federal Rules of Civil Procedure*, 164 F.R.D. 97, 108 (1996) (noting that "there is no good reason to allow what is essentially surprise expert testimony." and that "the Court should be vigilant to preclude manipulative conduct designed to thwart the expert disclosure and discovery process") *See also United States v. Figueroa-Lopez*, 125 F.3d 1241, 1246 (9th Cir. 1997) (law enforcement agents testifying that the defendant's conduct was consistent with that of a drug trafficker could not testify as lay witnesses; to permit such testimony under Rule 701 "subverts the requirements

of Federal Rule of Criminal Procedure 16(a)(1)(E)").

The amendment does not distinguish between expert and lay *witnesses*, but rather between expert and lay *testimony*. Certainly it is possible for the same witness to provide both lay and expert testimony in a single case. *See, e.g, United States v. Figueroa-Lopez*, 125 F.3d 1241, 1246 (9th Cir. 1997) (law enforcement agents could testify that the defendant was acting suspiciously, without being qualified as experts; however, the rules on experts were applicable where the agents testified on the basis of extensive experience that the defendant was using code words to refer to drug quantities and prices). The amendment makes clear that any part of a witness' testimony that is based upon scientific, technical, or other specialized knowledge within the scope of Rule 702 is governed by the standards of Rule 702 and the corresponding disclosure requirements of the Civil and Criminal Rules.

The amendment is not intended to affect the "prototypical example[s] of the type of evidence contemplated by the adoption of Rule 701 relat[ing] to the appearance of persons or things, identity, the manner of conduct, competency of a person, degrees of light or darkness, sound, size, weight, distance, and an endless number of items that cannot be described factually in words apart from inferences." *Asplundh Mfg. Div. v. Benton Harbor Eng' g*, 57 F.3d 1190, 1196 (3d Cir. 1995).

For example, most courts have permitted the owner or officer of a business to testify to the value or projected profits of the business, without the necessity of qualifying the witness as an accountant, appraiser, or similar expert. *See, e.g., Lightning Lube, Inc. v. Witco Corp*. 4 F.3d 1153 (3d Cir. 1993) (no abuse of discretion in permitting the plaintiff's owner to give lay opinion testimony as to damages, as it was based on his knowledge and participation in the day-to-day affairs of the business). Such opinion testimony is admitted not because of experience, training or specialized knowledge within the realm of an expert, but because of the particularized knowledge that the witness has by virtue of his or her position in the business. The amendment does not purport to change this analysis. Similarly, courts have permitted lay witnesses to testify that a substance appeared to be a narcotic, so long as a foundation of familiarity with the substance is established. *See, e.g., United States v. Westbrook*, 896 F.2d 330 (8th Cir. 1990) (two lay witnesses who were heavy amphetamine users were properly permitted to testify that a substance was amphetamine; but it was error to permit another witness to make such an identification where she had no experience with amphetamines). Such testimony is not based on specialized

knowledge within the scope of Rule 702, but rather is based upon a layperson's personal knowledge. If, however, that witness were to describe how a narcotic was manufactured, or to describe the intricate workings of a narcotic distribution network, then the witness would have to qualify as an expert under Rule 702. *United States v . Figueroa-Lopez, supra*.

The amendment incorporates the distinctions set forth in *State v. Brown*, 836 S.W.2d 530, 549 (1992), a case involving former Tennessee Rule of Evidence 701, a rule that precluded lay witness testimony based on "special knowledge." In *Brown*, the court declared that the distinction between lay and expert witness testimony is that lay testimony "results from a process of reasoning familiar in everyday life," while expert testimony "results from a process of reasoning which can be mastered only by specialists in the field." The court in *Brown* noted that a lay witness with experience could testify that a substance appeared to be blood, but that a witness would have to qualify as an expert before he could testify that bruising around the eyes is indicative of skull trauma. That is the kind of distinction made by the amendment to this Rule.

GAP Report--Proposed Amendment to Rule 701

The Committee made the following changes to the published draft of the proposed amendment to Evidence Rule 701:

1. The words "within the scope of Rule 702" were added at the end of the proposed amendment, to emphasize that the Rule does not require witnesses to qualify as experts unless their testimony is of the type traditionally considered within the purview of Rule 702. The Committee Note was amended to accord with this textual change.

2. The Committee Note was revised to provide further examples of the kind of testimony that could and could not be proffered under the limitation imposed by the proposed amendment.

October 12, 2011

WITHERS, BRANT, IGOE & MULLENNIX, P.C.
Ward K. Brown
David E. Larson

O'CONNOR PLAYDON & GUBEN LLP
Dennis E.W. O'Connor, Jr.

By:____*/s/ Ward K. Brown*_____
Ward K. Brown

Attorneys for Plaintiffs-Appellees
STEPHANIE RODRIGUEZ, JULIUS RIGGINS, SAMUEL OYOLA-PEREZ AND NILDA MEYER, INDIVIDUALLY AND AS PERSONAL REP FOR THE ESTATE OF WILFREDO DAYANDANTE

STATEMENT OF RELATED CASES

We are not aware of any pending appeals related to this appeal. *See* 9th Cir. R. 28-2.6. A previous interlocutory appeal was filed by General Dynamics and denied on November 30, 2010. *Rodriguez v. Lockheed Martin Corporation*, 627 F.3d 1259 (9th Cir. 2010). A motion to vacate the opinion was denied.

CERTIFICATION OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS [FED R. APP. P. 32(a)(7)(C)]

X 1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

X this brief contains 9,584 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), or

□ this brief uses monospaced typeface and contains [state the number of] lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

X 2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

X this brief has been prepared in a proportionally spaced typeface using MS-Word in 14-point Century Schoolbook font type, or

□ this brief has been prepared in a monospaced typeface using [state name and version of word processing program] with [state number of characters per inch and name of type style].

October 12, 2011 /s/Ward K. Brown

Date *ATTORNEY NAME*

CERTIFICATE OF SERVICE

I hereby certify that on October, 12, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Four copies of Appellants' Excerpts of Record were sent, via Federal Express, to the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit, James R. Browning Courthouse, U.S. Court of Appeals, 95 Seventh Street, San Francisco, CA, 94103-1526, this 12th day of October, 2011.

A copy of Appellants' Excerpts of Record was mailed via U.S. Mail, postage prepaid, this 12th day of October, 2011, to: Peder K. Batalden, Horvitz & Levy, LLP, 15760 Ventura Boulevard, 18th Floor, Encino, California, 91436-3000.

Signature: /s/ Ward K. Brown