Washington and Lee Law Review

Volume 44 | Issue 2 Article 12

Spring 3-1-1987

Vi. Evidence A.

presumption.[242] Rather than defer to an administrative agency's interpretation, the Fourth Circuit engaged in judicial interpretation of an agency regulation to reach a decision.[243] The *Stapleton* court rejected the agency's interpretation primarily because the majority found that the interpretation was plainly erroneous and rendered the regulation inconsistent with the Act.[244] The Fourth Circuit correctly rejected the Director's interpretation on the invocation issue.[245] While the Director's interpretation of the invocation provision sufficiently comported with the language in the regulation, the interpretation rendered section 727.203 inconsistent with the underlying intent of the Act.[246] The Fourth Circuit, however, adopted a position regarding the use of nonqualifying evidence that renders section 727.203(b) inconsistent with the Act.[247] The court held that an A.L.J. must consider all relevant medical evidence in rebuttal.[248] The Fourth Circuit's decision allows employers to rely solely on nonqualifying evidence to rebut a presumption.[249]

MARK MURPHY

VI. EVIDENCE

A. Scott v. Sears, Roebuck & Company: Does the Admission of Human Factors Expert Testimony Violate Federal Rule of Evidence 702?

Rule 702 of the Federal Rules of Evidence (Rule 702) allows for the admissibility of testimony of expert witnesses who possess some specialized

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242. *See supra* notes 45-49 and accompanying text (per curiam decision rejected argument that § 727.203(a) mandated use of preponderance standard); notes 55-57 and accompanying text (Hall, J., stating that claimants need not prove by preponderance of evidence existence of facts necessary for invoking presumption).

243. *See supra* notes 45-51 and accompanying text (Fourth Circuit's per curiam opinion in *Stapleton*).

244. *See supra* notes 175-78 and accompanying text (Judge Sprouse analyzing the Director's interpretation of § 727.203 under deference standards that Judge Phillips advocated).

245. *See supra* notes 175-99 and accompanying text (analyzing Director's interpretation of § 727.203 under plainly erroneous standard).

246. *See supra* notes 209-13 and accompanying text (analyzing legislative history in order to determine if Director's interpretation was inconsistent with legislative intent of Act).

247. *See supra* notes 228-31 and accompanying text (comparing legislative history of Act with Fourth Circuit's holding on allowable use of nonqualifying evidence in rebuttal).

248. *See supra* notes 214-36 and accompanying text (discussing per curiam holding that adjudicators may consider in rebuttal stage all relevant evidence, without restriction, whether qualifying or nonqualifying).

249. *See supra* notes 232-36 and accompanying text (referring to how allowing in rebuttal unrestricted consideration of all relevant evidence allows employers to defeat claims more easily).

knowledge if the testimony will aid the trier of fact to understand the evidence or to determine a fact in the case.[1] Congress, however, did not intend that the federal courts admit all testimony proffered under Rule 702.[2] The general test regarding the admissibility of expert testimony is whether the jury can receive appreciable help from the testimony.[3] The United States Supreme Court in *Salem v. United States Lines Company*[4] held that expert testimony is inadmissible if the subject matter of the case is within the common knowledge of the average juror.[5] The testimony, therefore, is excludable at the discretion of the trial judge when the primary facts are related accurately and concisely to a jury capable of grasping the issue to which the facts relate and capable of drawing reasonable conclusions similar to the conclusions that the expert witness would draw.[6] The trial judge has broad discretion in determining the admissibility of expert witness testimony, and the ruling of the trial judge should remain undisturbed unless the appellate court finds that the trial court's determination is manifestly erroneous.[7]

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1. FED. R. EVID. 702. Rule 702 of the Federal Rules of Evidence provides that a witness qualified as an expert because of knowledge, skill, experience, training, or education, may testify in the form of an opinion or otherwise if the expert possesses scientific, technical, or other specialized knowledge that will assist the trier of fact in understanding the presented evidence or in determining a fact in issue. *Id.*

2. *See* Rules of Evidence, Pub. L. No. 93-595, Preamble, 88 Stat. 1926 (1974) (rules apply except when infeasible, or when they would work injustice); *see also* United States v. Portsmouth Paving Corp., 694 F.2d 312, 323 (4th Cir. 1982) (holding that Rule 702 does not require admission of all proffered testimony).

3. *See* 7 J. WIGMORE, EVIDENCE § 1923, at 21 (3d ed. 1940) (appreciable help is relative to and dependent on particular subject and witness).

4. 370 U.S. 31 (1962).

5. *Id.* at 35. The United States Supreme Court in *Salem v. United States Lines Co.* held that expert testimony is not only unnecessary, but is properly excludable if, in the discretion of the trial judge, lay witnesses accurately and intelligibly can describe to the jury all the primary facts. *Id.* The Court further noted that the trial judge has broad discretion in the decision of including or excluding the expert testimony, and the trial judge's decision should stand unless manifestly erroneous. *Id.* The Court recognized that if the issue is only arguably beyond the jurors' common understanding, the trial court should excercise discretion in admitting the expert testimony. *Id.* at 37 n.6.

6. *Id.* at 35; *see also* 2 J. MOORE, MOORE'S FEDERAL PRACTICE Rule 702, at 251 n.702.3 (2d ed. 1987) (Advisory Committee note under Rule 702 discussing that expert witness testimony admitted on basis that witness would provide assistance to trier of fact). The most certain test for determining when the courts should admit expert testimony is the common sense inquiry into whether the untrained layman is qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from the experts on the subject involved in the dispute. MOORE'S FEDERAL PRACTICE Rule 702, at 251 n.702.3 (2d ed. 1987); *see* Ladd, *Expert Testimony*, 5 VAND. L. REV. 414, 418 (1952) [hereinafter Ladd, *Expert Testimony*] (expert testimony is necessary when issues are not determinable intelligently on basis of ordinary judgment and practical experience).

7. *See Salem*, 370 U.S. at 35 (trial judge has discretion to determine if jury can understand evidence/testimony accurately and intelligibly without using expert testimony); Bridger v. Union Ry. Co., 355 F.2d 382, 388 (6th Cir. 1966) (although trial courts and appellate courts may differ on admissibility of expert testimony, trial court's discretionary

In *Scott v. Sears, Roebuck & Company*,[8] the United States Court of Appeals for the Fourth Circuit addressed the admissibility under Rule 702 of the testimony of a human factors expert who offered testimony on the reasonable perceptions of a person in the same situation as the plaintiff.[9] The Fourth Circuit in admitting the human factors expert testimony establishes a precedent for the admittance of human factors testimony in cases where an injured party claims that through reasonable perception the plaintiff was unable to foresee any injury under the circumstances.[10]

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rejection of expert testimony is insufficient ground for reversal); Schillie v. Atchison, Topkea & Santa Fe R.R. Co., 222 F.2d 810, 814 (8th Cir. 1955) (specifically holding that Eighth Circuit would have reached different conclusion than district court, but affirming decision because district court did not abuse discretion).

8. 789 F.2d 1052 (4th Cir. 1986).

9. *Scott*, 789 F.2d at 1054. The court in *Scott v. Sears, Roebuck & Co.* noted that the study of human factors is otherwise known as ergonomics. *Id.* at 1053. Frank Fowler, a noted human factors expert, defines ergonomics as the study of how people interact with their environment. *See* Fowler, *Human Factors Analysis*, 10 TRIAL, Nov.-Dec. 1974, 53, 53 (ergonomics is study of how humans interact with their environment); Note, *Evidence-Expert Testimony: Admissibility of Human Factors Testimony Under the Federal Rules of Evidence*, 60 N.C.L. REV. 411, 411 (1982) [hereinafter Note, *Evidence-Expert Testimony*] (human factors is study of all factors that combine to influence individual's decision-making process, including past experiences, present feelings, and immediate motor response in terms of present situations or environments).

Several commentators have written about the practical use of human factors experts in relation to products liability cases and railroad crossing accidents, and in connection with the use of human factors experts in determining the imposition of contributory fault. *See, e.g.*, Messina, *The Human Factors Expert in Tort Litigation*, 20 TRIAL, Jan. 1984, at 38, 39-40 (discussion of human factors expert testimony concerning highway accidents due to faulty highway design); Messina, *The Human Factors Expert*, 15 TRIAL LAW. Q. 56, 61-63 (1983) (discussion of use of human factors experts to avoid contributory fault); Peters, *PassengerWorthiness: Designing with the Human Factor in Mind*, 18 TRIAL, Nov. 1982, at 63, 63 (use of human factors experts to demonstrate that manufacturers failed to consider foreseeable injuries in automotive design); Ryan, *Human Factors Engineering for Consumer Safety: A Perspective*, 18 TRIAL, Nov. 1982, at 86, 87-88 (discussion of surveys and statistics available to manufacturers on human reactions to certain products and conditions); Fowler, *Railroad Litigation and the Human Factors Expert: Why the Plaintiff Missed the Train*, 4 AM. J. TRIAL ADVOC. 621, 624-29 (1981) (discussion of use of human factors experts to demonstrate how reasonable people would not see on-coming train due to railroad crossing design); Perlman, *Use of Human Factors in Product Liability Cases*, 2 AM. J. TRIAL ADVOC. 47, 52-56 (1978) (discussion of use of human factors experts when courts subsequently have held that manufacturers failed to provide safety features that were necessary to protect against foreseeable injuries); Bliss & Robinson, *The Role of Human Factors Specialists as Expert Witnesses in Products Liability Cases*, 51 WIS. B. BULL. June 1977, at 35, 36 (discussion of legal interest in using human factors expert witnesses). The human factors expert can demonstrate that manufacturers should anticipate and avoid many product-related injuries long before the product enters the market. *See* Messina, *Human Factors in Tort Litigation*, *supra*, at 39 (expert analysis is based upon specific facts of accident and knowledge of normal human behavior); Perlman, *supra*, at 48 (expert can determine extent to which manufacturer ignored available knowledge about human behavior in design stage of product). The human factors expert can demonstrate the designer's failure to minimize the consequences of human error as the cause of an accident. Messina, *Human Factors in Tort Litigation*, *supra*, at 39.

10. *See supra* note 9 (outlining various situations in which human factors testimony may provide testimony useful in avoiding contributory negligence).

In *Scott*, plaintiff Margaret Scott brought a diversity action in the United States District Court for the Western District of Virginia against Sears, Roebuck & Company (Sears) after she suffered a broken leg when the heel of her shoe caught in a displaced portion of a curb on the Sears property.[11] Returning to her car from the parcel post entrance of Sears, Scott walked diagonally across the sidewalk, avoiding a series of metal grates, and intended to step off the sidewalk onto the pavement at the third metal grate.[12] The concrete near the third grate had deteriorated, and the surface of the curb was crumbling.[13] The curb where Scott snagged her heel had deteriorated approximately three inches below the surface of the sidewalk and the adjacent curbing.[14] When one of Scott's shoe heels caught in the displaced curb, she fell, breaking her leg.[15] Scott alleged that Sears was negligent in maintaining the sidewalk.[16] At trial, Sears relied on a contributory negligence defense to avoid liability.[17] To rebut the defense of contributory negligence, Scott offered the testimony of Dr. Harry Snydor, an expert in human factors.[18] An expert in the field of human factors offers

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11. *Scott*, 789 F.2d at 1053. In *Scott v. Sears, Roebuck & Co.*, the plaintiff went to Sears, Roebuck & Co. (Sears) to pick up a rug and upon leaving, she stepped on a defective sidewalk. *Id.* The *Scott* court noted that Ms. Scott was wearing one-inch heels. *Id.* Scott, a resident of Virginia, brought a diversity action in the United States District Court for the Western District of Virginia against Sears, which had its principal place of business in Illinois. *Id.*

12. *Id.* In *Scott v. Sears, Roebuck & Co.*, Scott testified that she noticed the gratings and intentionally walked farther out towards the curb to avoid the gratings. Brief for Appellant at 3, *Scott v. Sears, Roebuck & Co.*, 789 F.2d 1052 (4th Cir. 1986) (No. 84-2086) [hereinafter *Appellant's Brief*].

13. *Scott*, 789 F.2d at 1053. The United States District Court for the Western District of Virginia in *Scott v. Sears, Roebuck & Co.* noted that the location of the defective sidewalk was near the parcel pickup entrance of Sears and was in a section of the sidewalk where the concrete surface had deteriorated and the expansion joint had opened significantly. *Appellant's Brief* at 3.

14. *Appellant's Brief* at 3.

15. *Scott*, 789 F.2d at 1053. In *Scott v. Sears, Roebuck & Co.*, the plaintiff suffered a severe fracture of the upper-right femur resulting in surgery, traction, 122 days of hospitalization, and permanent disability. Brief for Appellee at 1, Scott v. Sears, Roebuck & Co., 789 F.2d 1052 (4th Cir. 1986) (No. 84-2086) [hereinafter *Appellee's Brief*]. The district court noted that Scott was an active and healthy 59-year-old woman before the accident. *Id.*

16. *Scott*, 789 F.2d at 1053-54.

17. *Id.* at 1054.

18. *Id.* The district court in *Scott v. Sears, Roebuck & Co.* noted the credentials of Dr. Snydor, which included serving as chairman of the Industrial Engineering Department at Virginia Polytechnic Institute and State University (Virginia Tech) for four years. *Appellee's Brief* at 4. Dr. Snydor received a bachelor's degree in psychology from Brown University and a master's degree and Ph.D. in experimental psychology from Johns Hopkins University. *Id.* Prior to teaching at Virginia Tech, Dr. Snydor spent eight years in industry doing work in human factors engineering, research, and development. *Id.* In 1970, Virginia Tech requested that Dr. Snydor establish a human factors engineering degree program, and the program has become a highly-recognized human factors program. *Id.*

The district court in *Scott* admitted the testimony of John H. Parrot, a construction and engineering consultant who testified that the curb height was not uniform and that the curb

testimony that discusses how an individual's past experiences, present attitudes, and immediate motor skills influence the person's decision-making process.[19] Dr. Snydor testified at trial that the defect in the curb, although open, was not obvious and, therefore, Scott was not contributorily negligent.[20] The United States District Court for the Western District of Virginia admitted Dr. Snydor's testimony and returned a jury verdict for Scott.[21] Sears appealed the district court's decision to the United States Court of Appeals for the Fourth Circuit on two grounds.[22] Sears argued first that Virginia law required the exclusion of Dr. Snydor's testimony in a diversity action because the testimony would prejudice the jury regarding Virginia's contributory negligence law, which places a strict standard of care on pedestrians who use sidewalks.[23] Sears contended that without Dr. Snydor's

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had an unexpected slope of four to five inches. *Appellee's Brief* at 3. The district court, however, refused to admit into evidence Mr. Parrot's additional testimony concerning the safety conditions of the curb on the ground that Mr. Parrot was not a safety engineer. *Id.*

19. *See* Note, *Evidence-Expert Testimony*, *supra* note 9, at 411 (human factors includes all factors that combine to influence individual's decision-making process).

20. *Scott*, 789 F.2d at 1054. Under Virginia law, a pedestrian is contributorily negligent, although he possesses no actual knowledge of a defective condition, if the defect is open and obvious and if the pedestrian, in the exercise of ordinary care, could have and should have seen the defect. *See* West v. Portsmouth, 217 Va. 734, 736-37, 232 S.E.2d 763, 765 (1977) (defining duty of care imposed on persons using sidewalks). Accidental displacement of brick or stone may constitute a defect in a sidewalk that is so open and obvious that the duty to notice and avoid the defect rests on the pedestrian. *Id.* at 739, 232 S.E.2d at 766. Under Virginia law, a person who is contributorily negligent for failing to exercise ordinary care when using a sidewalk is barred from recovery. *Id.* at 738-39, 232 S.E.2d at 765. If the accident occurs in broad daylight and involves an open and exposed defect, the burden rests upon the injured pedestrian to demonstrate that outside conditions prevented the pedestrian from seeing the defect or excused his failure to observe the defect. *Id.* at 737, S.E.2d at 764; *see also* Town of Virginia Beach v. Starr, 194 Va. 34, 37-38, 72 S.E.2d 239, 239-241 (1952) (plaintiff fell due to shallow crevice between expansion joints in sidewalk, but court held plaintiff was at fault for her injuries); Hill v. City of Richmond, 189 Va. 576, 584, 53 S.E.2d 810, 810-814 (1949) (plaintiff fell due to depression in sidewalk, but court held plaintiff was aware of defective sidewalk and defendant, therefore, was not liable for plaintiff's injuries).

21. *Scott*, 789 F.2d at 1052. In *Scott*, the jury awarded the plaintiff $125,000 in damages. *Id.* at 1054.

22. *Id.* at 1054.

23. *Scott*, 789 F.2d at 1054. The United States Court of Appeals for the Fourth Circuit in *Wratchford v. S. J. Groves & Sons* held that under the *Erie* doctrine, a federal court sitting in diversity must apply state law that defines and limits substantive law and obligations. Wratchford v. S. J. Groves & Sons, 405 F.2d 1061, 1065 (4th Cir. 1969); *see also* Reed v. General Motors Corp., 773 F.2d 660, 663 (5th Cir. 1985) (although *Erie* doctrine requires federal courts sitting in diversity to follow state substantive law, federal rules of evidence apply in diversity actions); McHann v. Firestone Tire & Rubber Co., 713 F.2d 161, 164 (5th Cir. 1983) (while substantive state law applies in diversity action, federal court applies federal law to determine if sufficient evidence exists for jury question); Krizak v. W. C. Brooks & Sons, Inc., 320 F.2d 37, 41 (4th Cir. 1963) (Federal Rules of Civil Procedure and not state law governs admissibility of testimony of expert "accidentologist"); *supra* note 20 and accompanying text (discussion of Virginia law of contributory negligence in cases involving accidents on sidewalks).

testimony, Sears was entitled to judgment as a matter of law.[24] The Fourth Circuit, however, held that federal law controls the admissibility of expert testimony in a federal court sitting in diversity and that the admissibililty of expert testimony under Virginia law was irrelevant.[25]

Sears also argued that the human factors expert testimony concerned matters within the common knowledge of the jurors.[26] Sears contended that the testimony of a human factors expert was inadmissible per se on the ground that the testimony dealt with probable human reaction to environmental conditions.[27] The Fourth Circuit refused to adopt the per se exclusion of the human factors expert testimony.[28] In rejecting Sears' argument that human factors testimony was per se inadmissible, the Fourth Circuit relied on the liberal construction of Federal Rule of Evidence 702, which grants broad discretion to a trial judge in admitting expert testimony.[29] The Fourth Circuit recognized that a federal appellate court normally defers to a district court's judgment regarding the admissibility of testimony.[30] The Fourth Circuit reasoned that a district court, pursuant to Rule 702, will exclude testimony that is within the jurors' common knowledge because the testimony is of no assistance to the jurors.[31] The Fourth Circuit, however, noted that even if a district court admits testimony that is not helpful to the jury, the admission of the testimony is usually harmless error, and an appellate court should not reverse the case.[32] The Fourth Circuit recognized that a problem arises with human factors witnesses when the expert testimony concerning human reactions supplants a jury's independent exercise of common sense and possibly prejudices the final judgment.[33] The Fourth

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24. *Scott*, 789 F.2d at 1054.

25. *Id.*; *see supra* note 23 and accompanying text (discussion of precedent establishing that federal courts in diversity apply federal rules of evidence).

26. *Scott*, 789 F.2d at 1054; *see supra* notes 1-6 and accompanying text (discussing admissibility requirements for expert testimony under Federal Rule of Evidence 702). The Commonwealth of Virginia currently is in the process of codifying the Federal Rules of Evidence. *See* 2 VIRGINIA LAW REPORTS Part Seven, at 568, 598 (1985) (proposed Virginia counterpart to Federal Rule of Evidence 702).

27. *Scott*, 789 F.2d at 1054.

28. *Id.* at 1054-55; *see infra* notes 29-34 and accompanying text (discussion of Fourth Circuit's holding in *Scott*).

29. *Scott*, 789 F.2d at 1055; *see supra* notes 5 & 7 and accompanying text (appellate court may reverse trial court's decision only if admission of testimony is manifestly erroneous).

30. *Scott*, 789 F.2d at 1055.

31. *Id.*

32. *Id.* The Fourth Circuit in *Scott v. Sears, Roebuck & Co.* found that the admission of nonprejudicial testimony almost invariably will be harmless. *Id.* (citing United States v. Brown, 501 F.2d 146, 148-50 (9th Cir. 1974) (holding that admitted expert testimony on personal photographic identification was harmless in light of all evidence allowed)); *see infra* note 84 and accompanying text (admitted testimony is harmless when nonprejudicial).

33. *Scott*, 789 F.2d at 1055. The Fourth Circuit in *Scott* reasoned that when an expert's evaluation of a situation supplants the jury's role in exercising common sense, the testimony may not pass judicial evaluation under Rule 702. *Id.* (citing Marx & Co. v. Diner's Club, Inc. 550 F.2d 505, 510 (2d Cir. 1977) (expert testimony excluded when testimony enters jury's

Circuit held that once the trial court admits evidence under Rule 702, the lower court should apply Federal Rule of Evidence 403 (Rule 403) to determine whether an expert's testimony might supplant the jury's exercise of common sense and prejudice the final judgment.[34]

In reviewing the district court's admission of the human factors expert testimony, the Fourth Circuit evaluated independently each piece of Dr. Snydor's testimony to determine whether the district court admitted the testimony in violation of Rule 702 and, if so, whether the admission of the testimony was harmless error or prejudicial under Rule 403.[35] The Fourth Circuit determined that the admission of Dr. Snydor's testimony concerning the higher and closer section of the curb hiding the displaced section was within the common knowledge of the trier of fact and, thus, was inadmissible under Rule 702.[36] The *Scott* court, however, held that the testimony resulted in harmless error and was not prejudicial to Sears.[37] Dr. Snydor also testified that the yellow color of the curb might cause a reasonable person's perception to fill in the discontinuities of the curb.[38] The *Scott* court noted that Dr. Snydor's testimony concerning the reasonable perception of the curb contained some scientific basis.[39] The Fourth Circuit recognized that the admission of testimony having a scientific basis was proper under Rule 702 and was not an abuse of the district court's discretion.[40] The Fourth Circuit, however, ruled that the admission of Dr. Snydor's testimony that the crumbling of the concrete was an effective distraction was in violation of Rule 702, because the jurors had an opportunity to view the curb in person and to view color photographs of the curb that the district court had

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province in exercising common sense), *cert. denied*, 434 U.S. 861 (1977)). The United States District Court for the Middle District of Pennsylvania in *United States v. Collins* noted that the expert testimony proffered at trial failed to include sufficient factors necessary for the jury to challenge the expert's credibility and that the testimony did not assist materially the jury in analyzing the evidence. United States v. Collins, 395 F.Supp. 629, 637 (M.D. Pa. 1975) *aff'd mem.*, 523 F.2d 1051 (3d Cir. 1975). The district court in *Collins*, therefore, held that a substantial risk existed that the expert's credentials and persuasive powers would have a greater influence on the jury than the evidence presented at trial. *Id.* Rule 403 of the Federal Rules of Evidence provides that although relevant, evidence is excludable when the danger of unfair prejudice, confusion of the issues, misleading of the jury, or considerations of undue delay, waste of time, or needless presentation of cumulative evidence substantially outweighs the probative value of the testimony. FED. R. EVID. 403.

34. *Scott*, 789 F.2d at 1055; *see* FED. R. EVID. 403 (relevant evidence is excludable if potential for unfair prejudice, confusion of issues, misleading of jury, undue delay, waste or cumulative evidence substantially outweighs probative value of evidence).

35. *Scott*, 789 F.2d at 1055-56; *see infra* notes 36-44 and accompanying text (discussion of Fourth Circuit's holding in *Scott* concerning Dr. Snydor's testimony).

36. *Scott*, 789 F.2d at 1055.

37. *Id.*; *see infra* note 84 and accompanying text (erroneous admission of nonprejudicial testimony constitutes harmless error).

38. *Scott*, 789 F.2d at 1055.

39. *Id.*, 789 F.2d at 1055. The Fourth Circuit in *Scott v. Sears, Roebuck & Co.* held that testimony concerning the human perception of a yellow curb was a statement of scientific understanding. *Id.*

40. *Id.*

admitted into evidence.[41] The Fourth Circuit held that the trial court admitted Dr. Snydor's testimony of the crumbling concrete erronously under Rule 702, but held that the testimony did not violate Rule 403 because the error was harmless.[42] The Fourth Circuit, however, found that Dr. Snydor's comment that the deteriorating concrete was an "accident waiting to happen" was prejudicial to Sears because the statement was inflamatory and, therefore, the admitted prejudicial testimony violated Rule 403.[43] The Fourth Circuit, in remanding the case to the district court for a new trial, ruled that the testimony of a human factors expert was admissible under Federal Rule of Evidence 702 at the discretion of the trial court unless the testimony was prejudicial and, thus, in violation of Federal Rule of Evidence 403.[44]

Prior to the *Scott* decision, only the United States Courts of Appeal for the Fifth and the Eleventh Circuits had considered whether to admit the testimony of a human factors expert under Federal Rule of Evidence 702.[45] In *Garwood v. International Paper Co.*[46], the United States Court of Appeals for the Fifth Circuit held that the testimony of a human factors expert was admissible under Rule 702 if the proffered testimony aided the jury in determining the facts.[47] In *Garwood*, the plaintiff offered the deposition of a human factors expert witness in an attempt to demonstrate that the plaintiff's dive into the defendant's pond was reasonable conduct under the particular conditions.[48] The Fifth Circuit upheld the district court's exclusion of the human factors expert testimony under Rule 702 because the human factors testimony did not aid the jury in determining the facts.[49] The

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41. *Id.* In *Scott*, the jurors had an opportunity to observe for themselves the accident site. *Id.* Plaintiff Scott also submitted color photograghs of the curb at the point of her fall as evidence of the sidewalk's deteriorated condition. *Id.*

42. *Id.* at 1055-56. The Fourth Circuit in *Scott v. Sears, Roebuck & Co.* found that the district court failed to submit a jury instruction stating that the jury could use the crumbling concrete as a basis for finding that Scott reasonably was distracted and, therefore, was innocent of contributory negligence. *Id.*

43. *Id.* at 1056.

44. *Id.* at 1055; *see supra* notes 29-34 and accompanying text (discussion of Fourth Circuit's two-step analysis for admitting human factors testimony).

45. *See* Collins v. Seaboard Coast Line R.R. Co., 675 F.2d 1185, 1194-95 (11th Cir. 1982) (holding that Federal Rule of Evidence 702 governs admission of expert human factors testimony); Garwood v. International Paper Co., 666 F.2d 217, 223 (5th Cir. 1982) (holding that human factors expert testimony is admissible if testimony aids trier of fact under Federal Rule of Evidence 702); *see infra* notes 46-57 and accompanying text (discussion of *Garwood* and *Collins* decisions).

46. 666 F.2d 217 (5th Cir. 1982).

47. *Garwood*, 666 F.2d at 223. In *Garwood v. International Paper Co.* the plaintiff, Garwood, sought to offer the testimony of a human factors expert to show that Garwood was not contributorily negligent in diving into the defendant's pond. *Id.* at 218-22. The district court refused to admit the testimony. *Id.* at 222. On appeal, Garwood argued that the testimony demonstrated that the environmental features surrounding the water into which he dove created a situation where a reasonable person would not perceive the shallow water and would have acted in the same manner as Garwood had acted. *Id.* at 222-23.

48. *Id.* at 223.

49. *Id.* at 223. The district court in *Garwood* also excluded the expert testimony because

Garwood court, therefore, held that the district court did not abuse its discretion in excluding the plaintiff's human factors testimony concerning the environmental conditions of the shallow water in a pond because the evidence did not aid the trier of fact.[50]

Following the Fifth Circuit's precedent, the United States Court of Appeals for the Eleventh Circuit in *Collins v. Seaboard Coast Line Railroad Company*[51] held that the testimony of a human factors expert was admissible under Rule 702 if the testimony aided the jury in determining the facts.[52] In *Collins*, the plaintiff's truck rolled onto the railroad tracks where the motor choked immediately before the train struck the right side of the cab.[53] The plaintiff offered the human factor's expert testimony to support the contention that the railroad crossing was dangerous.[54] The Eleventh Circuit recognized that the federal courts liberally construe Rule 702 in determining whether the facts are within the common understanding of the average juror.[55] The *Collins* court then stated that the average juror could not understand the complex factors involved in the construction and maintenance of a railroad crossing.[56] The Eleventh Circuit, therefore, affirmed the district court's admission under Rule 702 of the human factors expert testimony concerning the hazardous condition of the railroad crossing, and held that the testimony would assist the trier of fact in determining whether the railroad crossing was dangerous.[57]

In contrast to the decisions of the Fifth and the Eleventh Circuits, which have held that human factors expert testimony is admissible when the proffered testimony aids the trier of fact, Florida state courts have held

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the issue of contributory negligence was not outside the common understanding of the average juror. *Id.* The Fifth Circuit, however, did not reach a decision on the contributory negligence issue because the court held that the human factors testimony did not aid the jurors. *Id.*

50. *Id.*

51. 675 F.2d 1185 (11th Cir. 1982).

52. *Collins*, 675 F.2d at 1194-95. In *Collins v. Seaboard Coast Line Railroad Co.*, the plaintiff offered the expert testimony of Frank Fowler, a human factors safety expert. *Id.* Fowler's experience included the investigation of several hundred railroad grade crossing accidents. *Id.* The district court admitted the expert testimony. *Id.* On appeal, the defendant contended that Fowler's expert opinion concerning the reasonably safe speed limit and the degree of danger at a particular crossing were improper testimony for a human factors expert witness. *Id.*

53. *Id.* at 1187.

54. *Id.* at 1194; *see supra* note 52 (outlining experience of human factors expert utilized in *Collins*).

55. *Collins*, 675 F.2d at 1194-95.

56. *Id.* at 1195. The district court in *Collins v. Seaboard Coast Line Railroad Co.* agreed with the Sixth Circuit's decision in *Bridger v. Union Railway Co.* that to expect the average juror to comprehend the diverse and complex factors of constructing and maintaining a railroad crossing is absurd. *Id.*; *see* Bridger v. Union Ry. Co., 355 F.2d 382, 389 (6th Cir. 1966) (appellate court should not disturb trial court's decision that expert testimony was required to assist jury in deciding issues).

57. *Id.* The United States Court of Appeals for the Eleventh Circuit in *Collins v. Seaboard Coast Line Railroad Co.* held that the defendant's appeal based on the admitted expert testimony was frivolous. *Id.*

that human factors expert testimony is admissible when the testimony aids the trier of fact only if an unusual fact situation exists in the case.[58] In *Public Health Foundation for Cancer & Blood Pressure Research Inc. v. Cole*[59], the Florida District Court of Appeals for the Fourth District reconciled two conflicting Fourth District cases concerning the admissibility of human factors expert testimony.[60] In *Seaboard Coast Line Railroad Company v. Hill*[61], the Florida District Court of Appeal for the Fourth District noted that the subject matter of a human factors expert's testimony must relate to some science, profession, business, or occupation beyond the common understanding of the average layman.[62] In *Hill*, the plaintiff's decedent husband stopped his car during the early morning hours while it was still dark on the defendant's railroad tracks at a crossing without any warning signals.[63] The plaintiff in *Hill* offered the testimony of a human factors expert to demonstrate that the defendant's train struck the decedent's car because the crossing was unsafe.[64] The *Hill* court found that the expert's testimony concerning a reasonably prudent person's reaction to the railroad crossing was within the expertise of the witness and beyond the scope of the common knowledge of the jurors.[65]

In conflict with the *Hill* decision, the Florida District Court of Appeal for the Fourth District four years later in *Seaboard Coast Line Railroad v. Kubalski*[66] ruled that the lower court erred in admitting a safety consultant's testimony concerning the reasonable human reaction to a particular railroad crossing.[67] The plaintiff in *Kubalski* had stopped on the railroad crossing

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58. *See* Public Health Found. for Cancer & Blood Research Inc. v. Cole, 352 So. 2d 877, 879 (Fla. Dist. Ct. App. 1977) (human factors expert testimony is admissible when sufficient unusual facts exist); Seaboard Coast Line R.R. Co. v. Kubalski, 323 So. 2d 32, 34 (Fla. Dist. Ct. App. 1975) (expert testimony concerning reasonable human reaction improperly admitted because fact situation did not contain sufficient unusual circumstances to warrant expert testimony); Seaboard Coast Line R.R. Co. v. Hill, 250 So. 2d 311, 313-15 (Fla. Dist. Ct. App. 1971) (holding that sufficient unusual circumstances existed prior to decedent's accident with defendant's train); *see also* Note, *Evidence-Expert Testimony*, *supra* note 9, at 412-24 (discussion of Florida state court treatment of human factors experts). At the time of *Public Health Found. for Cancer & Blood Research Inc. v. Cole*, *Seaboard Coast Line R.R. Co. v. Kubalski* and *Seaboard Coast Line R.R. Co. v. Hill* the state of Florida had not adopted the Federal Rules of Evidence. *Id.* at 411 n.6 (noting that Florida did not adopt Federal Rules of Evidence until 1976).

59. 352 So. 2d 877 (Fla. Dist. Ct. App. 1977).

60. *Cole*, 352 F.2d at 879. The trial court in *Public Health Found. for Cancer & Blood Research Inc. v. Cole* admitted the expert testimony based on the *Seaboard Coast Line R.R. Co. v. Hill* decision. *Id.* The defendants contended, however, that the *Seaboard Coast Line R.R. Co. v. Kubalski* case governed the *Cole* decision. *Id.*

61. 250 So. 2d 311 (Fla. Dist. Ct. App. 1971), *writ discharged*, 270 So. 2d 359 (Fla. 1972).

62. *Hill*, 250 So. 2d at 314-15.

63. *Id.* at 312-13.

64. *Id.*

65. *Id.* at 315.

66. 323 So. 2d 32 (Fla. Dist. Ct. App. 1975).

67. *Kubalski*, 323 So. 2d at 33-34.

in broad daylight with numerous warning devices sounding when the defendant's train struck the plaintiff's car.[68] The plaintiff offered the human factors expert testimony to prove that the railroad crossing was dangerous.[69] The *Kubalski* court held that the jury should have assessed the facts and circumstances solely on the basis of the jurors' common knowledge.[70]

The Fourth District decision in *Cole* reconciled the rulings in *Hill* and *Kubalski* because *Hill* contained unusual circumstances sufficient to warrant an intrusion upon the jury's province in deciding what a reasonable man would perceive under the particular circumstances.[71] The court in *Cole* noted that no unusual circumstances existed in *Kubalski* to warrant an intrusion into the province of the jury to determine how a reasonable person would react.[72] The *Cole* court concluded that sufficient unusual circumstances existed to support the admission of expert testimony pertaining to the deceptive quality of various environmental factors present prior to the plaintiff's accident at the defendant's waterfront recreation area.[73] The Fourth District in *Cole* then reinstated the trial court's decision.[74]

The Fifth and the Eleventh Circuits have considered the admissibility of human factors expert testimony with respect to Rule 702, but have not addressed the issue of whether human factors expert testimony was prejudicial under Rule 403 and thus inadmissible.[75] The Florida state courts are in agreement that the admissibility of human factors testimony depends on whether the proffered testimony is beyond the common knowledge of the

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68. *Id.* at 34.

69. *Id.* at 33-34.

70. *Id.*

71. *See Cole*, 352 So. 2d at 879 (comparing different circumstances in *Kubalski* to circumstances in *Hill* in deciding sufficient unusual circumstances existed in *Cole* to allow expert testimony); *see also Hill*, 250 So. 2d at 313-15 (holding that fact decedent was stopped on railroad crossing in dark weather with no warning devices constituted sufficient unusual circumstances); *Kubalski*, 323 So. 2d at 34 (holding that fact that decedent was stopped on railroad crossing in good weather during day light did not constitute enough unusual circumstances to warrant intrusion into jury's province of deciding reasonable person's reactions).

72. *Cole*, 352 So. 2d at 879.

73. *Id.* The court in *Public Health Found. for Cancer & Blood Pressure Research Inc. v. Cole* held that the significance of an individual's reaction to the environmental conditions present when the defendant dove into the river reasonably might involve issues that were within the sphere of the witnesses' expertise and beyond the scope of the common knowledge of the jurors. *Id.*

74. *Id.*

75. *See Garwood*, 666 F.2d at 223 (Fifth Circuit in *Garwood* excluded human factors expert testimony because under Federal Rule of Evidence 702 testimony did not aid trier of fact, court, therefore, did not question whether human factors expert testimony was prejudicial under Federal Rule of Evidence 403); *Collins*, 675 F.2d at 1195 (Eleventh Circuit in *Collins* ruled that complex factors existed which necessitated admittance of human factors expert testimony under Federal Rule of Evicence 702, court, therefore, did not need to question whether expert testimony was admissible under Federal Rule of Evidence 403); *supra* notes 46-57 and accompanying text (discussion of Fifth and Eleven Circuits' admission of human factors testimony).

jury.[76] The Florida courts, however, impose an additional requirement that sufficient unusual circumstances exist in the particular case to warrant an intrusion into the jury's province of determining the reactions of a reasonably prudent person.[77] The Florida courts, therefore, did not address the issue of whether admitted human factors expert testimony was prejudicial or whether Federal Rule of Evidence 403 restricted the admission of the expert testimony.[78]

Neither the Fifth nor the Eleventh Circuit considered the relevancy of human factors expert testimony under Rule 403, and the Fourth Circuit in *Scott v. Sears, Roebuck & Company* was the first federal court to question whether the admission of human factors expert testimony under Rule 403 was prejudicial.[79] The Fourth Circuit in *Scott* correctly adhered to the requirements of Federal Rules of Evidence 702 and 403.[80] The Fourth Circuit noted that although Rule 702 is liberal in the admission of expert testimony, the testimony must provide some assistance to the trier of fact.[81] The *Scott* court held that Dr. Snydor's testimony about the physical condition of the defective sidewalk and the statistical evidence that persons wearing heels tend to avoid gratings involved material that was within the common knowledge of the jurors.[82] The Fourth Circuit, therefore, correctly found that the testimony failed to provide any assistance to the trier of fact.[83] The Fourth Circuit, however, found that the district court's decision to admit the testimony resulted in harmless error.[84] Consequently, the Fourth

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76. *See supra* notes 65 & 70 and accompanying text (discussion of trend in Florida cases to hold that human factors testimony must aid jurors).

77. *See supra* notes 71-73 and accompanying text (discussion of *Cole* decision reconciling *Hill* and *Kubalski* on basis of unusual facts existing in *Hill* that warranted admission of human factors expert testimony).

78. *See supra* note 58 (discussion of Fifth Circuit's reconciliation of *Kubalski* and *Hill* decisions); *supra* notes 59-68 (Florida courts had neither applied nor mentioned Federal Rules of Evidence).

79. *See Scott*, 789 F.2d at 1055 (Fourth Circuit held that Federal Rule of Evidence 403 excludes expert testimony that might supplant jury's independent exercise of common sense if admission of evidence also is prejudicial).

80. *Id.*; *see supra* notes 1-6 and accompanying text (outlining provisions of Federal Rules of Evidence 702); *supra* note 33 and accompanying text (outlining provisions of Federal Rule of Evidence 403).

81. *Scott*, 789 F.2d at 1055.

82. *Id.*

83. *See id.* (Fourth Circuit in *Scott* held that expert testimony repeated what was common knowledge and common sense).

84. *See id.* (Fourth Circuit in *Scott* deferred to district court's discretion in allowing expert testimony that was nonprejudicial under Federal Rule of Evidence 403).

In interpreting the concept of harmless error in affirming a lower court's decision, the United States Supreme Court in *McDonough Power Equipment Inc. v. Greenwood* held that courts should exercise judgment in preference to the automatic reversal for error and that the courts should ignore errors that do not affect the essential fairness of the trial. McDonough Power Equip. Inc. v. Greenwood, 464 U.S. 548, 553 (1984). The Supreme Court, in *McDonough* noted that the rule governing motions for a new trial in the district courts is contained in Federal Rule of Civil Procedure 61 (Rule 61). *Id.* Rule 61 states that no error or defect in

Circuit correctly held that the submitting of nonprejudicial evidence, resulting in harmless error, did not warrant a new trial.[85]

The Fourth Circuit, unlike the Fifth Circuit or the Eleventh Circuit, had the opportunity to question whether human factors expert testimony admitted erroneously under Rule 702 was prejudicial testimony under Rule 403.[86] The Fourth Circuit held that when a trial court admits expert testimony that fails to assist the trier of fact as required under Rule 702, the appellate court must decide whether the admitted testimony was prejudicial under Rule 403, and, therefore, warrants a new trial.[87] The Fourth Circuit found that the admission of Dr. Snydor's testimony that the crumbling concrete was an accident waiting to happen and that the trial judge's failure to instruct the jury to disregard Dr. Snydor's testimony about the crumbling sidewalk was prejudicial error.[88] The Fourth Circuit in *Scott*, therefore, correctly granted a new trial because the trial court admitted the prejudicial testimony in violation of Federal Rule of Evidence 403.[89]

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any ruling is grounds for granting a new trial unless the refusal to grant a new trial is inconsistent with substantial justice. FED. R. CIV. P. 61. Rule 61 mandates that the court at every stage of the proceeding must disregard any error of the parties that does not affect the substantive rights of the parties. *Id.* The Supreme Court in *McDonough* noted that Congress, in enacting 28 U.S.C. section 2111, has reinforced the application of Rule 61 to the appellate courts. *McDonough*, 464 U.S. at 554. Section 2111 of 28 U.S.C. requires that appellate courts in hearing an appeal or writ of certiorari shall examine the record without regard to errors or defects that do not affect the substantial rights of the parties. 28 U.S.C. § 2111 (1982). According to *McDonough*, therefore, appellate courts should reject a motion for a new trial when the motion is based on an error or defect that does not produce a substantial injustice. *See McDonough*, 464 U.S. at 556 (rejecting argument for reversal when admitted testimony results in harmless error).

85. *See Scott*, 789 F.2d at 1055 (Fourth Circuit in *Scott* held that testimony admitted that is within jurors' common knowledge, but nonprejudicial, is harmless error); *see supra* note 84 and accompaying text (discussion of United States Supreme Court decision in *McDonough* holding that reviewing courts should exercise judgment rather than reverse decisions for nonprejudicial error).

86. *See supra* notes 46-57 and accompanying text (discussion of Fifth and Eleventh Circuits' ruling on admissibility of human factors testimony under Federal Rule of Evidence 702). The Fifth Circuit in *Garwood v. International Paper Co.* did not have an opportunity to discuss if the human factors expert testimony was prejudicial, because the court excluded the evidence on the ground that the testimony did not aid the jury. *See supra* note 49 and accompanying text (Fifth Circuit's holding on admission of human factors expert testimony). The Eleventh Circuit in *Collins v. Seaboard Coast Line R.R. Co.* did not discuss whether human factors expert testimony is prejudicial, because the court admitted the testimony on the basis that the testimony aided the jury due to the complex nature of the crossing. *See supra*, notes 54-56 and accompanying text (discussion of Eleventh Circuit's admission of human factors expert testimony); *supra* note 75 and accompanying text (noting that neither Fifth Circuit nor Eleventh Circuit resolved expert testimony question on Federal Rule of Evidence 403).

87. *See Scott*, 789 F.2d at 1055-56 (admission of prejudicial testimony under Federal Rule of Evidence 403 warrants new trial).

88. *Id.*; *see supra* note 42 (Fourth Circuit in *Scott* held district court's failure to instruct jury on Virginia contributory negligence law was prejudicial).

89. *See supra* notes 33-34 and accompanying text (discussion of Fourth Circuit's holding that testimony admitted under Federal Rule of Evidence 702 also must survive consideration under Federal Rule of Evidence 403).

The decision in *Scott v. Sears, Roebuck & Company* represents the Fourth Circuit's willingness to admit human factors expert testimony that the trial court has approved under Rule 702.[90] The Fourth Circuit, nevertheless, will not admit automatically the human factors expert testimony.[91] The Fourth Circuit reserves the opportunity under Rule 403 to grant a new trial if the expert testimony is prejudicial.[92] The Fourth Circuit extended the approach of the Fifth and the Eleventh Circuits, which admitted human factors expert testimony that aided the jury in deciding the facts, to include an evaluation of whether the admitted expert testimony was prejudicial under Rule 403.[93] The Fourth Circuit's approach also differs from the Florida state courts' position by not requiring that unusual circumstances exist before the court will permit human factors expert testimony concerning the reactions of reasonably prudent persons.[94] The significance of the *Scott* decision is that the Fourth Circuit closely follows the requirements of the Federal Rules of Evidence.[95] The Fourth Circuit, therefore, establishes a strong precedent for the use of nonprejudicial human factors expert testimony that suggests a conclusion regarding a set of facts that is outside the common knowledge of the jurors.[96]

ROBERT MUTH

B. United States v. Smith*: Construing The Classified Information Procedures Act As Restricting The Admissibility Of Evidence*

Prior to 1980, the government occasionally faced situations in which a defendant threatened to reveal classified information at trial simply to induce

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90. *See Scott*, 789 F.2d at 1054-56 (holding that plaintiff's proffered human factors expert testimony was admissible).

91. *See id.* at 1054-55 (admission of human factors expert testimony must satisfy Federal Rules of Evidence 702 and 403).

92. *See id.* at 1055 (expert testimony that supplants jury's independent exercise of common sense is prejudicial under Federal Rule of Evidence 403).

93. *See supra* notes 46-57 and accompanying text (discussion of Fifth and Eleventh Circuits' holdings in addressing admission of human factors expert testimony).

94. *See supra* notes 58-70 and accompanying text (discussion of Florida state court's approach to admitting human factors expert testimony).

95. *See supra* notes 29-34 and accompanying text (discussion of Fourth Circuit's two-step approach to admitting human factors expert testimony under Federal Rules of Evidence 702 and 403).

96. *See Scott*, 789 F.2d at 1054-56 (Fourth Circuit's holding that nonprejudicial human factors expert testimony is admissible under Federal Rule of Evidence 702).

the government to drop the case against him.[1] Rather than proceeding with the prosecution and risking the disclosure of information that could jeopardize national security or foreign relations, the government frequently opted to abandon the prosecution.[2] To minimize the "disclose or dismiss" dilemma and thus reduce the risk of unnecessary disclosures,[3] Congress enacted the Classified Information Procedures Act (CIPA).[4]

CIPA provides judges with a comprehensive set of pretrial, trial, and appellate procedures for determining the relevance and admissibility of classified evidence.[5] In particular, CIPA requires a defendant who intends to disclose, or cause the government to disclose, classified information to notify the court and the government of his intent to reveal the classified information.[6] CIPA provides for an *in camera* hearing by a court to determine the "use, relevance, or admissibility" of the classified information.[7] Should a court decide to admit the information, the government can appeal the district court's decision to a court of appeals,[8] and, even if the court deems the classified information relevant and admissible, the government can opt to substitute a summary of the material if the substitute provides the defendant with substantially the same ability to make his defense.[9] The provisions of CIPA supplement the existing rules of evidence, and Congress explicitly stated that CIPA must not alter any of the rules of evidence.[10] Congress, however, recognized the existence of judicial contro-

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1. *See* Note, *Graymail: Constitutional Immunity from Justice?*, 18 HARV. J. ON LEGIS. 389, 389-92 (1981) [hereinafter Note, *Constitutional Immunity*] (discussing problem in which defendant threatens to reveal classified information).

2. *See generally* S. REP. No. 823, 96th Cong., 2d Sess. 2, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 4294 [hereinafter S. REP. No. 823]. "Graymail" occurs when a defendant threatens to disclose classified information at trial in an effort to force the government to dismiss the case. *Id.* To ensure protection of national security, prior to 1980, the government often had to abandon the case. *Id.* If the government proceeded with the prosecution, the government risked a court ruling requiring the government to disclose the classified information because the information was relevant to the accused's defense. *Id.*; *see* United States v. Collins, 720 F.2d 1195, 1196-97 (11th Cir. 1983) (discussing graymail problem); Note, *Graymail: Constitutional Immunity* (same); Note, *Graymail: The Disclose or Dismiss Dilemma in Criminal Prosecutions*, 31 CASE W. RES. 84, 85 (1980) [hereinafter Note, *Disclose or Dismiss Dilemma*] (same).

3. *See* Note, *Disclose or Dismiss Dilemma*, *supra* note 2, at 85 (referring to graymail as "disclose or dismiss" dilemma for government); *see also* S. REP. No. 823, *supra* note 2, at 1-4 (discussing Congress' intention that Classified Information Procedures Act (CIPA) eliminate graymail problem); *see also Collins*, 720 F.2d at 1197 (discussing reason for "disclose or dismiss" dilemma); *supra* note 2 and accompanying text (same).

4. 18 U.S.C. APP. §§ 1-16 (1983).

5. *Id.*; *see infra* notes 6-9 and accompanying text (discussing CIPA provisions).

6. 18 U.S.C. APP. § 5(a) (1983).

7. *Id.* § 6(a).

8. *Id.* § 7(a).

9. *Id.*

10. *See* S. REP. No. 823, *supra* note 2, at 8. When the Senate voted to enact CIPA, the Senate specifically declared its intention to retain the existing rules of evidence, regardless of

versy regarding the precise standard of admissibility of evidence under the Federal Rules of Evidence (the Federal Rules).[11] In *United States v. Smith*,[12] the United States Court of Appeals for the Fourth Circuit confronted the issue of the applicable standard of admissibility of evidence under CIPA.[13]

In *Smith*, the Army Intelligence Security Command (INSCOM) employed Richard Craig Smith between 1973 and 1980.[14] During 1982 and 1983, Smith allegedly revealed the classified details of five INSCOM double agent operations to Victor Okunev, a Soviet agent.[15] According to Smith, two men, White and Ishida, claiming to represent the Central Intelligence Agency (CIA), approached Smith in Japan.[16] The two alleged agents recruited Smith to help establish a double agent project directed toward the Russians in Japan.[17] Although Smith never demanded to see identification from White and Ishida, he believed their claims of allegiance to the CIA.[18] White and Ishida convinced Smith that Smith had the authority to disclose the classified information to Okunev to gain the Soviet agent's confidence.[19] In exchange for supplying Okunev with the INSCOM details, Smith received $11,000 from Okunev.[20] The federal government subsequently brought suit in the

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the sensitive nature of the information at issue. S. REP. No. 823, *supra* note 2, at 8. The House of Representatives agreed that CIPA should not change the existing standards for determining relevance and admissibility of evidence. H. REP. No. 831(I), 96th Cong., 2d Sess. 14 (1980); H.R. CONF. REP. No. 1436, 96th Cong., 2d Sess. 12, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 4307, 4310. Relying on legislative history, courts trying cases under CIPA also have observed that CIPA creates no new substantive law. *Collins*, 720 F.2d at 1199. Academic analyses further substantiate the claim that Congress did not intend for CIPA to alter the existing rules of evidence. *See* Note, *Constitutional Immunity*, *supra* note 2, at 419 (CIPA does not change Rules of Evidence); Note, *Disclose or Dismiss Dilemma*, *supra* note 2, at 128 (same).

11. *See Graymail: Hearing on S. 1482 Before the Subcommittee on Criminal Justice of the Senate Committee on the Judiciary*, 96th Cong., 2d Sess. 44 (1980) [hereinafter *Committee on the Judiciary*] (Morton H. Halperin, witness on behalf of the American Civil Liberties Union, suggested that confusion existed regarding existing standard of admissibility of evidence).

12. 592 F. Supp. 424 (E.D. Va. 1984), *aff'd*, 750 F.2d 1215 (4th Cir. 1984), *vacated*, 780 F.2d 1102 (4th Cir. 1985).

13. *Id.*

14. *Smith*, 780 F.2d at 1104.

15. *Id.*

16. *Id.*

17. *Id.*

18. *United States v. Smith*, 592 F. Supp. 424, 428 (E.D. Va. 1984). In *United States v. Smith*, the defendant claimed that White's and Ishida's familiarity with the details of secret Army Intelligence Security Command (INSCOM) operations convinced him that White and Ishida worked for the Central Intelligence Agency (CIA). *Id.*

19. *Smith*, 780 F.2d at 1104. In *Smith*, defendant Smith alleged that, in addition to assuaging Smith's apprehensions by persuading Smith that he had authority to reveal classified information, White and Ishida also told Smith that the information Smith was to reveal to the Russian agents would be worthless to the Russians because the CIA had discontinued the operations to which the information related. *Id.*

20. *Id.*

United States District Court for the Eastern District of Virginia, charging Smith with five counts of espionage.[21]

Pursuant to section 5(a) of CIPA, Smith notified the district court and the government of his intention to introduce classified evidence to support his defense.[22] Smith intended to use the classified information to prove that he believed that he was working for the CIA,[23] an organization which would not intentionally engage in espionage to the injury of the United States.[24] Such proof would negate criminal intent, an element necessary to the crime of espionage.[25] As required by section 6(a) of CIPA, the district court conducted an *in camera* hearing to determine the relevance and admissibility of the classified information.[26]

In considering the admissibility of the classified information, the district court observed that Congress did not intend for CIPA to alter the Federal Rules regarding the relevance and admissibility of evidence.[27] Despite Congress' clear intent that courts should apply the existing Federal Rules when determining the admissibility of evidence, the government argued that, because of the sensitivity of classified material, the district court should apply a special standard of admissibility to classified information.[28] The government argued that a court should balance the government's need to

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21. *Id.* at 1103-04. In *Smith*, the government charged the defendant with five violations of the Espionage Act. *Id.*; *see* 18 U.S.C. §§ 797-799 (1983) (Espionage Act).

22. *Smith*, 780 F.2d at 1104. *See* 18 U.S.C. APP. § 5(a) (1983) (describing notice requirement in CIPA).

23. *Smith*, 780 F.2d at 1104.

24. *Id.*

25. *Id.* To be convicted of espionage under section 793, a defendant must be convicted of obtaining national defense information with intent or reason to believe that the information would either injure the United States or benefit a foreign nation. 18 U.S.C. § 793(a) (1983). Section 794 prohibits an individual from intending or attempting to communicate, deliver or transmit national defense information or have reason to believe that he is communicating such information. *Id.* at § 794(a).

26. *Smith*, 592 F. Supp. at 428-45.

27. *Id.* at 435. In *Smith*, the United States District Court for the Eastern District of Virginia noted that Congress did not intend to compromise a defendant's right to present competent evidence when Congress enacted CIPA. *Id.*

28. *Id.* At trial in *Smith*, the government did not argue that the district court should deny Smith the right to present evidence in support of his defense; rather, the government argued that the court should exclude all classified evidence based on the sensitivity of the information and the improbability of Smith's account. *Id.*

The government initially argued that Smith could not present any classified evidence because Smith's factual allegations could not establish a legally cognizable defense. *Id.* at 428. The district court rejected the government's contention on the ground that Smith's efforts to negate the state of mind element of the espionage charges could establish a legally valid defense. *Id.* at 428-34. The government also argued that the district court should exclude the defendant's proffered evidence on the ground that Smith fabricated the allegations in an attempt to force the government to dismiss the case rather than risk the disclosure of classified evidence. *Id.* at 434. The government argued that, because Smith's attempt at graymail violated the purpose of CIPA in preventing a forced dismissal of the prosecution, the district court should exclude all of the classified information. *Id.* at 435.

keep the classified information confidential against the defendant's need to reveal the information to support his defense.[29] The district court, however, rejected the government's proposed standard of admissibility and instead followed Congress' mandate to apply the Federal Rules in determining the relevance and admissibility of classified information.[30] The district court also declined to apply a balancing test because the district court recognized that a court is "ill-equipped" to determine fairly the potential harm disclosure of classified material may cause to national security.[31] The district court concluded that a court must admit all relevant evidence to uphold Congress' intent that CIPA leave intact the Federal Rules,[32] and to assure the defendant of his constitutional right to a fair trial.[33] Pursuant to section 7 of CIPA, the government appealed to a panel of the United States Court of Appeals for the Fourth Circuit.[34]

On appeal to a three-judge panel of the Fourth Circuit, the government in *Smith* contended that the district court erred by not balancing the potential harm that disclosure of the classified information would cause to the nation's security against the defendant's need for some of the concededly relevant evidence in preparing his defense.[35] A three-judge panel of the Fourth Circuit disagreed with the government's interpretation of CIPA.[36] Like the district court, the three-judge panel recognized that, because only the government designates the material as classifed, and only the government adequately understands the necessity of keeping information confidential, requiring a court to assess and balance the harm that disclosure of classified

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29. *Id.* at 436. The government in *Smith* based its argument for a balancing test on Rule 403 of the Federal Rules. *Id.*; FED. R. EVID. 403. Rule 403 provides in pertinent part, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. . . ." FED. R. EVID. 403. The government interpreted "unfair prejudice" as encompassing harm that could potentially befall national security should a court require disclosure of classified information. *Smith*, 592 F. Supp. at 436. Because of this "prejudice," the prosecution argued that the court should weigh the probative value of the relevant, but classified evidence. *Id.*

30. *Smith*, 592 F. Supp. at 435-36.

31. *Id.* at 436.

32. *See id.* at 435-37, 444 (concluding that Congress intended that courts comply with Federal Rules when considering admissibility of classified information under CIPA).

33. *See id.* at 435-41, 444 (discussing defendant's constitutional rights to a fair trial). The district court in *Smith* noted that Congress did not intend to compromise a defendant's right to produce evidence at trial. *Id.* The district court realized that denying Smith the right to present his factual defense would deny him the right to take the stand in his own defense. *Id.* at 444. By excluding competent evidence, the court would deprive Smith of the use of evidence that might establish his innocence or raise a reasonable doubt as to his guilt. *Id.*; *see infra* note 73 (discussing defendant's constitutional right to present competent evidence).

34. *See Smith*, 750 F.2d 1215, 1216 (4th Cir. 1984) (discussing government's appeal of district court decision); 18 U.S.C. APP. § 7 (1983) (CIPA provisions allow government to take interlocutory review of trial court ruling if trial court requires disclosure of classified evidence).

35. *Smith*, 750 F.2d at 1216.

36. *Id.* at 1217.

information may have on national security is impractical.[37] Moreover, the three-judge panel reasoned that, if Congress had intended a court to balance national security concerns against relevancy at the hearing stage, Congress would have included a provision to that effect in CIPA.[38]

In addition to rejecting the government's contention that CIPA requires a court to apply a balancing test to determine the admissibility of evidence, the three-judge panel of the Fourth Circuit also disagreed with the prosecution's application of the common law privileges delineated in Rule 501 of the Federal Rules.[39] Rule 501 permits a party in a special relationship, such as a physician-patient or an informer-law enforcer relationship, to prevent disclosure of information obtained from that relationship.[40] The government argued that, to protect national security, the court should grant the government a privilege to withhold or prevent the disclosure of any information which might endanger the security of the nation.[41] The government argued for a privilege by analogizing to the informer's privilege.[42] In informer's privilege cases, courts permit the government to invoke a privilege to protect the anonymity of persons supplying the state with information regarding violations of law.[43] The availability of a privilege to withhold the identity of an informer from a defendant depends on whether the government's need to protect the sources of information outweighs the defendant's need to obtain information to prepare his defense.[44] In *Smith*, the govern-

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37. *Id.* at 1217-18. The three-judge panel of the United States Court of Appeals for the Fourth Circuit in *Smith* relied on CIPA's definition of "classified information" to demonstrate that CIPA covers information deemed confidential by the United States government pursuant to an executive order, statute, or regulation. *Id.* As defined in section 1(a) of CIPA, classified information under CIPA "means any information or material that has been determined by the United States Government pursuant to an Executive order, statute, or regulation, to require protection against unauthorized disclosure for reasons of national security. . . ." 18 U.S.C. APP. § 1(a) (1983). The three-judge panel for the Fourth Circuit in *Smith* recognized that neither a court nor a defendant may challenge an executive classification of confidentiality. *Smith*, 750 F.2d at 1217. Moreover, because the government did not supply the district court with reasons why disclosure would harm national security, the three-judge panel could not balance competently the harm to national security against the importance of the information to the defendant's defense. *Id.* at 1218.

38. *Smith*, 750 F.2d at 1218.

39. *Id.* at 1219.

40. FED. R. EVID. 501. Rule 501 of the Federal Rules provides in pertinent part:

> Except as otherwise provided by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of common law as they may be interpreted by the courts of the United States in the light of reason and experience.

Id.

41. *Smith*, 750 F.2d at 1219.

42. *Id.*; *see infra* notes 87-92 and accompanying text (discussing informer's privilege case on which government in *Smith* relied in arguing that Fourth Circuit should apply balancing test to determine admissibility of classified information).

43. Roviaro v. United States, 353 U.S. 53, 59 (1957).

44. *See Smith*, 750 F.2d at 1219 (recognizing limitation on informer's privilege that

ment argued that the Fourth Circuit should apply a similar balancing test to determine whether the government is entitled to a privilege for the protection of national security.[45]

The three-judge panel of the Fourth Circuit refused to apply a balancing test, distinguishing the informer's privilege situation from the *Smith* situation.[46] The three-judge panel recognized that, in the case of an informer, the government supplies the court with information about the reason for withholding the name of the informer and the potential harm that could be caused by disclosure.[47] A court, therefore, has more information available to evaluate the government's need for a privilege to withhold information than in an espionage case in which the government merely tells the court that the government cannot release the information because disclosure potentially may harm national security.[48] The three-judge panel of the Fourth Circuit noted that the government cannot invoke an informer's privilege if the information is relevant and helpful to the defendant's defense.[49] In *Smith*, the district court had determined that some of the evidence Smith sought to introduce was relevant to his defense.[50] The three-judge panel of the Fourth Circuit rejected the government's comparison of *Smith* to informer's privilege cases, therefore, the government appealed the decision to an *en banc* assembly of the Fourth Circuit.[51]

The United States Court of Appeals for the Fourth Circuit granted *en banc* review[52] of *Smith* to determine whether the district court correctly interpreted CIPA as prohibiting the application of a balancing test to determine the admissibility of classified information.[53] Although the Fourth Circuit agreed with the district court that the classified evidence was relevant, the Fourth Circuit declared that the district court must further analyze the evidence to determine admissibility.[54] The Fourth Circuit agreed with the

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information must not be relevant or helpful to defense of accused); *infra* note 89 and accompanying text (discussing policy reasons for granting informer's privilege).

45. *Smith*, 750 F.2d at 1219.

46. *Id.*; *see infra* notes 47-49 and accompanying text (discussing *Smith* court's reasons for rejecting government's argument for privilege).

47. *Smith*, 750 F.2d at 1219.

48. *Id.*; *see Smith*, 592 F. Supp. at 534 (district court in *Smith* determined that some, but not all, classified information Smith sought to introduce was relevant to his defense of lack of criminal intent).

49. *See Smith*, 750 F.2d at 1219 (discussing informer's privilege case of *Roviaro*); *supra* notes 89-92 and accompanying text (discussing *Roviaro*).

50. *Smith*, 592 F. Supp. at 429, 444-45.

51. *See infra* notes 53-67 and accompanying text (discussing Fourth Circuit's review of *Smith*).

52. *See* FED. R. APP. P. 35(a) (definitions and conditions for granting rehearing *en banc*). A court should grant a rehearing *en banc* when the case at issue involves an important issue or when the full court must consider the issue to maintain consistent court decisions. *Id.*

53. *Smith*, 780 F.2d at 1104. The United States Court of Appeals for the Fourth Circuit in *Smith* focused on the construction and meaning of section 6 of CIPA to determine whether the evidence the defendant sought to introduce was admissible. *Id.* at 1106.

54. *Id.* at 1106-07, 1110.

government's contention that the court should exclude the classified information at issue in *Smith* under a privilege analogous to the informer's privilege.[55] The informer's privilege is a statutorily granted privilege which enables the government, in the interest of public policy, to withhold the names of persons who supply the government with information of criminal activity.[56] The Fourth Circuit reasoned that the government's interest in protecting sensitive sources and methods of gathering information entitles the government to a privilege similar to an informer's privilege.[57] Because a court must balance the interests of the government and the right of the defendant to prepare a defense in determining whether the government must disclose an informer's identity, the Fourth Circuit insisted that a court should follow a similar balancing procedure in ruling on classified information introduced under CIPA.[58] The Fourth Circuit further reasoned that, had Congress intended that a court unconditionally admit all relevant evidence, Congress would have enacted such a provision in CIPA.[59] The Fourth Circuit vacated and remanded the case to the district court, stating that, in determining whether to admit classified information, the district court failed to recognize a governmental privilege and failed to balance the public's interest in protecting national security against the defendant's right to prepare his defense.[60]

The dissent in *Smith* objected to the majority position that CIPA requires a court to apply a balancing test to determine the admissibility of classified information.[61] Instead, the dissent supported the district court's interpretation of CIPA as authorizing a court automatically to admit classified evidence once a court determines that classified information is relevant to the defense of the accused.[62] Like the three-judge panel of the Fourth Circuit, the dissent noted that Congress considered and rejected a proposal to include a stricter standard of admissibility than the admissibility standard established by the Federal Rules.[63] Focusing on the legislative history of CIPA, the dissent recognized Congress' desire to retain the existing standards governing the relevance and admissibility of evidence.[64] The dissent also rejected the majority's argument that the government is entitled to a privilege similar to an informer's privilege.[65] The dissent noted that in informer's

55. *Id.* at 1107-09.

56. *See generally* FED. R. EVID. 501 (describing privileges available to persons in specially protected relationships).

57. *Smith*, 780 F.2d at 1108-09.

58. *See id.* at 1107 (Fourth Circuit ruled that district court erred in not employing balancing test to determine applicability of privilege for classified information).

59. *Id.* at 1110.

60. *Id.*

61. *Id.* at 1111-13 (Butzner, J., dissenting).

62. *Id.* at 1111.

63. *Id.* at 1111-12; *see infra* notes 112-115 (discussing proposal rejected by Congress to require stricter standard of admissibility).

64. *Smith*, 780 F.2d at 1113 (Butzner, J., dissenting).

65. *See id.* at 1111-13 (distinguishing *Smith* situation from informer's privilege cases).

privilege cases a defendant attempts to discover privileged information, while in *Smith*, the defendant already possessed the information and the government attempted to prevent the defendant from disclosing the information.[66] Finally, the dissent opposed the application of a balancing test in cases arising under CIPA because, in the dissent's view, CIPA adequately protects the interests of all parties to a litigation.[67]

Congress enacted CIPA because the Federal Rules do not address specifically the admissibility of classified information.[68] Although Rule 501 prohibits a court from forcing a witness to disclose information obtained from persons in a special, protected relationship, the rule specifies no privilege for parties engaged in a relationship involving classified information.[69] Rule 402 and Rule 403 indicate that not all evidence automatically is admissible.[70] Rule 402 allows a court to admit only relevant evidence and prohibits a court from admitting irrelevant evidence,[71] while Rule 403 requires that the probative value of the evidence must outweigh the possibility of unfair prejudice before a court may admit relevant evidence.[72] Although the application of Rule 403 may suppress relevant evidence, courts invoke the rule only in extraordinary situations.[73] The Rules do not provide

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66. *Id.* at 1112-13.

67. *Id.* at 1113.

68. *Compare* 42 U.S.C. APP. §§ 1-16 (1983) (provisions protecting classified information) *with* FED. R. EVID. (no provisions for protecting classified evidence).

69. FED. R. EVID. 501; *see supra* note 40 (partial text of Rule 501).

70. *See infra* notes 73-74 and accompanying text (discussing restrictions on admissibility of relevant information in Rule 402 and Rule 403).

71. FED. R. EVID. 402.

72. FED. R. EVID. 403; *see supra* note 29 (partial text of Rule 403).

73. *See* United States v. Thevis, 665 F.2d 616, 633 (5th Cir. 1982) (advocating sparing use of "extraordinary remedy" of Rule 403); FED. R. EVID. 403 (permits exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time). Due to the importance of relevant evidence in determining the guilt or innocence of an accused, a court should exclude relevant evidence only if the court can justify the exclusion on strong public policy grounds with a basis in the Constitution or on statutory grounds. Nardone v. United States, 308 U.S. 338, 340 (1939). Moreover, no judicial support exists for the proposition that a court can prevent a defendant from introducing relevant evidence known to the defendant. *See* United States v. Godkins, 527 F.2d 1321, 1326 (5th Cir. 1976) (court cannot restrict right of defendant to supoena witness already known to defendant). The rationale for including all relevant evidence in a trial has its foundation in the federal constitution, which guarantees a defendant the right to a fair trial. *See* U.S. CONST. art. VI (guaranteeing criminal defendant right to trial by impartial jury). Inherent in the right to a fair trial is the right of the accused to present competent evidence in his own defense. *See* Henderson v. Fisher, 631 F.2d 1115, 1119 (3d Cir. 1980) (per curiam) (denying defendant opportunity to present competent evidence is violation of fair trial and due process); *cf.* Centoamore v. United States, 105 Neb. 452, 181 N.W. 182, 183 (1920) (recognizing importance of allowing defendant to produce evidence relevant to his defense). A citizen possesses a powerful weapon in the right to insist that a government disclose the evidence on which it seeks to convict a defendant. United States v. Coplan, 185 F.2d 629, 638 (2d Cir. 1950). Denying an accused access to relevant and material evidence, therefore, violates due process and the defendant's right to a fair trial. *Henderson*, 631 F.2d at 1119; *see* United States v. Herndon, 536 F.2d 1027, 1029 (5th Cir. 1976) (denying defendant opportunity to present proof violates due process); *cf.* Brady v. Maryland, 373 U.S. 83, 87 (1963) (government must not suppress evidence favorable to defense of accused).

procedures for handling classified information and, therefore, a court should favor a liberal rule of admissibility of relevant evidence.[74] Courts should apply a liberal standard of admissibility even when evaluating the admissibility of classified information because Congress intended that CIPA leave intact the existing rules of evidence.[75]

The United States Supreme Court has not considered the issue of admissibility of classified information under CIPA.[76] Nevertheless, the numerous courts that have ruled on CIPA cases agree that Congress did not intend to alter the rules of evidence governing admissibility.[77] Prior to *Smith*, however, no court construing CIPA faced the double-edged sword of deciding whether to admit concededly relevant, but highly classified material. All of the courts that have addressed the admissibility of classified information under CIPA have ruled that the evidence in question was irrelevant under the ordinary rules of evidence, never reaching the question of admissibility.[78] Although confronting a CIPA issue of first impression, the *Smith* court misinterpreted several of the prior CIPA decisions, failed to consider others, and erroneously analogized the *Smith* situation to cases involving the informer's privilege.[79]

The Fourth Circuit in *Smith* overlooked the United States Court of Appeals for the Eleventh Circuit's reasoning in *United States v. Juan*.[80] Like the defendant in *Smith*, the defendant in *Juan* sought to introduce classified evidence of his prior relationship with government agencies to negate the criminal intent element of his drug charge.[81] Pursuant to section 6 of CIPA, the United States District Court for the Middle District of

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74. *See* United States v. 1,129.75 Acres of Land, More or Less in Cross & Poinsett Counties, 473 F.2d 996, 999 (8th Cir. 1973). The United States Court of Appeals for the Eighth Circuit in *United States v. 1,129.75 Acres of Land, More or Less in Cross & Poinsett Counties* declared that the Federal Rules of Evidence favor a broad rule of admissibility designed to permit a court to receive all relevant information into evidence. *Id.* A court should exclude relevant evidence for only a sound and practical reason. *Id.*

75. *See supra* note 10 and accompanying text (discussing Congress' intent to leave intact rules of admissibility of evidence).

76. *Cf. Smith*, 780 F.2d at 1105, 1106 (implying that issue of admissibility of evidence was issue of first impression).

77. *See* United States v. Wilson, 732 F.2d 404, 412 (5th Cir. 1984) (Congress intended that CIPA would not alter existing rules of evidence); United States v. Collins, 720 F.2d 1195, 1199 (11th Cir. 1983) (same); *Smith*, 592 F. Supp. at 435 (same), *aff'd*, 750 F.2d at 1215, *vacated and remanded on other grounds*, 780 F.2d 1102.

78. *See* United States v. Wilson, 750 F.2d 7, 9 (2d Cir. 1984) (determining that classified information was irrelevant and immaterial under ordinary rules of evidence); United States v. Wilson, 732 F.2d 404, 412 (5th Cir. 1984) (same).

79. *See infra* notes 80-85 and accompanying text (discussing Fourth Circuit's failure to consider a factually similar CIPA case); notes 93-97 and accompanying text (discussing Fourth Circuit's incorrect comparison of *Smith* with informer's privilege cases); notes 105-106 and accompanying text (discussing Fourth Circuit's misinterpretation of CIPA cases); notes 107-116 and accompanying text (discussing legislative consideration of admissibility of evidence under CIPA).

80. 776 F.2d 256 (11th Cir. 1985).

81. *Id.* at 258.

Florida in *Juan* ruled that the classified information at issue was immaterial and, therefore, not admissible at trial.[82] On appeal, the Eleventh Circuit in *Juan* concluded that the district court erred in determining that the evidence was immaterial.[83] The Eleventh Circuit admitted the evidence after the court ruled that the evidence was relevant to the defense of the accused.[84] Significantly, the Eleventh Circuit relied solely on CIPA and the Federal Rules governing relevance and admissibility to determine the admissibility of the evidence.[85] The *Smith* court, on the other hand, went beyond the provisions of CIPA and required the application of a balancing test to determine the admissibility of relevant information.[86]

As a basis for its application of a balancing test, the Fourth Circuit relied on the United States Supreme Court's decision in *Roviaro v. United States*.[87] In *Roviaro*, the defendant sought to discover the identity of an informer who actively participated in the defendant's alleged drug crime.[88] Recognizing the importance of the informer's privilege to effective law enforcement,[89] the Supreme Court developed a balancing test for determining the admissibility of relevant information.[90] Under the *Roviaro* test, a court must balance the public's interest in nondisclosure of confidential information against the individual's right to prepare his defense.[91] The Supreme Court allowed the government to withhold the information from the defendant in *Roviaro*, but the Court cautioned that if the information was "relevant and helpful" to the defense of the accused, the interests of the defendant would outweigh the public interest in protecting the identity of informers.[92]

The *Smith* court incorrectly adopted the *Roviaro* balancing test as a standard for determining admissibility of evidence in cases brought under CIPA.[93] The Fourth Circuit interpreted CIPA as requiring that, before a

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82. *Id.* at 257.

83. *Id.* at 258. In *United States v. Juan*, the United States Court of Appeals for the Eleventh Circuit ruled that the defendant could not introduce classified information tending to demonstrate lack of criminal intent. *Id.*

84. *Id.*

85. *Id.*

86. *See Smith*, 780 F.2d at 1104-10 (advocating use of balancing test to determine admissibility of classified information).

87. 353 U.S. 53 (1957), *aff'd sub nom.*, Rugendorf v. United States, 376 U.S. 528 (1964).

88. *Roviaro*, 353 U.S. at 55-58. In *Roviaro v. United States*, the defendant averred that an informer helped defendant acquire illegal drugs and that the informer could testify that the defendant did not "knowingly" transport the drugs. *Id.* at 55.

89. *Id.* at 59 (informer's privilege furthers and protects public interest in law enforcement).

90. *Id.* at 60-62; *see infra* notes 91-92 and accompanying text (discussing *Roviaro* balancing test for purpose of determining applicability of informer's privilege).

91. *Roviaro*, 353 U.S. at 60-61.

92. *Id.*

93. *See Smith*, 780 F.2d at 1111-13 (Butzner, J., dissenting) (discussing Fourth Circuit majority's inappropriate application of *Roviaro* balancing test to CIPA cases); *infra* notes 107-116 (discussing Congress' rejection of proposal to include *Roviaro* balancing test in CIPA).

court admits relevant classified evidence, the court must determine that the defendant's need for the information for his defense outweighs the harm disclosure of the classified information potentially could cause to national security.[94] The dissent in *Smith* correctly recognized that the *Roviaro* Court applied the balancing test to evaluate the merits of the defendant's discovery requests, not to determine the admissibility of evidence.[95] Because the defendant in *Smith* already possessed the classified information, the court did not require use of a balancing test to determine the defendant's right to discover the information.[96] The only issue for the *Smith* court was the issue of the admissibility of relevant evidence.[97] The Fourth Circuit erred by not recognizing that the *Roviaro* standard applies to discovery requests, not to questions of admissibility.[98]

By failing to note that the *Roviaro* balancing test applies to the disclosure of information in the discovery stage, the Fourth Circuit improperly interpreted the United States Court of Appeals for the First Circuit's decision in *United States v. Pringle*.[99] In *Pringle*, the United States District Court for the District of Massachusetts convicted the defendants of conspiracy to possess with intent to distribute marijuana and of possessing with intent to import marijuana.[100] The defendants sought to require the government to disclose classified evidence relating to a surveillance operation.[101] Following an *in camera ex parte* hearing, the district court determined that the evidence was neither relevant nor helpful to the defense, nor essential to a fair determination of the case.[102] The district court, therefore, refused to grant the defendant's discovery request.[103]

The *Pringle* court applied the *Roviaro* "relevant and helpful" language and determined that the information the defendant in *Pringle* sought to introduce was both irrelevant and inadmissible.[104] The Fourth Circuit, however, incorrectly interpreted *Pringle* as advocating the application of a *Roviaro*-type balancing test to determine the admissibility of classified

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94. *See supra* notes 54-55 and accompanying text (discussing Fourth Circuit's analysis of CIPA § 6 as requiring balancing test to determine admissibility of classified information).

95. *Smith*, 780 F.2d at 1112-13 (Butzner, J., dissenting).

96. *Compare Smith*, 780 F.2d at 1104 (defendant possessed classified information) *with* United States v. Pringle, 751 F.2d 419, 427 (1st Cir. 1984) (defendant sought disclosure of classified evidence not in his possession).

97. *Smith*, 780 F.2d at 1106.

98. *Smith*, 780 F.2d at 1111-13 (Butzner, J., dissenting).

99. 751 F.2d 419 (1st Cir. 1984).

100. *Id.* at 422.

101. *Id.* at 422-23, 425.

102. *Id.* at 426.

103. *Id.* at 425-27. The United States Court of Appeals for the First Circuit in *United States v. Pringle* ruled that information regarding the government's surveillance operations of the defendants' sailing vessel was irrelevant and, therefore, inadmissible under the Federal Rules of Criminal Procedure. *Id.* at 426; *see* FED. R. CRIM. P. 16 (regarding discovery and inspection). The *Pringle* court also rejected defendants' contention that the government did not proceed properly under the provisions of CIPA. *Pringle*, 751 F.2d at 426-27.

104. *Pringle*, 751 F.2d at 427-28.

information.[105] In fact, the First Circuit applied the *Roviaro* balancing test only to determine the relevancy of the classified information.[106]

The Fourth Circuit's application of a *Roviaro*-type balancing test to cases involving the admissibility of classified information also directly contravenes the express intent of Congress in enacting CIPA.[107] The Senate opposed any balancing test whatsoever, and specifically stated that a court should not balance the government's national security interests against the defendant's right to obtain classified information.[108] A court could interpret Congress' declaration as a warning that courts should not engage in a balancing process at the discovery stage, but that a court could apply a balancing test to determine the admissibility of the evidence.[109] In the context of the legislative history of CIPA, however, a court more reasonably could interpret Congress' caution as prohibiting courts from applying a balancing test at any stage of litigation.[110] Moreover, Congress also declared that a court should not consider the sensitivity of the information when ruling upon the relevance and admissibility of the evidence.[111] The legislative history of CIPA strongly indicates that Congress intended for courts to refrain from applying a stricter standard of admissibility of evidence than required by the existing rules, thereby preventing courts from impermissibly changing the Federal Rules.

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105. *Smith*, 780 F.2d at 1109-10; *see id.* at 1113 (Butzner, J., dissenting) (distinguishing *Smith* from *Pringle*).

106. *Pringle*, 751 F.2d at 425-27.

107. *Smith*, 780 F.2d at 1111-12 (Butzner, J., dissenting); *see supra* note 10 and accompanying text (discussing Congress' intent in enacting CIPA); *infra* notes 112-116 (discussing Congress' rejection of proposal to include *Roviaro* balancing test in CIPA).

108. S. REP. No. 823, *supra* note 2, at 9.

109. *See* 18 U.S.C. APP. § 4 (1983) (containing no requirement that court must use balancing test at discovery stage of litigation).

110. *See Smith*, 592 F. Supp. at 436 n.16. The district court in *Smith* noted that the Senate acknowledged that section 6(e)(2) of CIPA prohibits a court from balancing the government's national security interests against the defendant's right to present a defense. *Id.*; *see* 18 U.S.C. APP. § 6(e)(2) (1983) (permitting court to dismiss indictment when Attorney General requires disclosure of classified information). The district court, however, concluded that, if a court may apply a balancing test at the section 6(e)(2) stage, a court by implication may not apply a balancing test at any time when it determines the admissibility of evidence. *Smith*, 592 F. Supp. at 436 n.16; *see Smith*, 750 F.2d at 1218 (court may not apply balancing test when determining admissibility of evidence).

111. S. REP. No. 823, *supra* note 2, at 8. In formulating the CIPA provisions, the Senate stated that a court should disregard the classified nature of the information at issue when determining the relevance and admissibility of evidence because CIPA procedures should not preclude the defendant from using relevant evidence in support of his defense. *Id.*; *see* United States v. Juan, 776 F.2d 256, 258 (11th Cir. 1985) (court should not consider sensitivity of information when ruling on admissibility of information). *Contra* United States v. Collins, 603 F. Supp. 301, 302 (S.D. Fla. 1985) (suggesting that courts should consider classified nature of information at CIPA § 6(c) substitution stage). No provision of CIPA, not even section 6(c), requires a court to apply a balancing test at any stage of the proceedings. *See generally* 18 U.S.C. APP. §§ 1-16 (1983) (no requirement that court balance sensitivity of information against defendant's need for classified information).

Congress not only insisted that CIPA leave unaltered the rules of evidence, but Congress also specifically refused to adopt a proposal to include a *Roviaro* standard of admissibility.[112] Congress rejected a suggestion to require that the information requested be "relevant and helpful" to the defense of the accused, not just relevant, before a court could require the government to disclose the information.[113] Congress recognized that the judiciary requested Congress to include a *Roviaro* relevant and helpful standard in CIPA to create a stricter standard of admissibility of evidence for cases involving classified information.[114] Congress, however, continued to insist that CIPA not change the existing rules of admissibility.[115] By utilizing a *Roviaro*-type standard in its construction of CIPA, the Fourth Circuit violated Congress' intent to omit a "relevant and helpful" standard and to leave unchanged the rules of evidence.[116]

By applying a stricter standard of admissibility to cases involving classified information, the Fourth Circuit in *Smith* wrought a subtle, but significant, change on both CIPA and the rules of evidence.[117] The Fourth Circuit added another step in the evaluation of classified information. By requiring the evidence to pass a balancing test, the defendant now must show a strong need for the evidence even after demonstrating relevancy.[118] Under the existing Federal Rules, the information Smith sought to introduce would have been admissible because the information was relevant to his

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112. *See infra* notes 113-116 and accompanying text (discussing Congress' consideration and rejection of proposal to Congress to include *Roviaro* relevant and helpful standard in CIPA to determine admissibility of evidence); *see also Smith*, 780 F.2d at 1111-12 (Butzner, J., dissenting) (discussing judiciary's proposal to include *Roviaro* standard of admissibility of evidence in CIPA).

113. *See Committee on the Judiciary*, *supra* note 11, at 3, 18 (proposing adoption of relevant and material standard in CIPA).

114. *Id.* at 44. At a hearing on CIPA before the Senate Committee on the Judiciary, a witness testifying on behalf of the American Civil Liberties Union noted that Congress intended to retain the existing standards for the admissibility of evidence under the Federal Rules. *Id.* Although the witness conceded that confusion exists among the courts regarding the exact standard of admissibility required by the Federal Rules of Evidence, the witness objected to the judiciary's proposal to include a "relevant and helpful" or "relevant and material" standard in CIPA to a stricter standard for admissibility of classified evidence. *Id.* The witness would have agreed to the judiciary's proposal if the judiciary could have convinced him that the relevant and helpful standard was the generally accepted standard used to determine the admissibility of evidence. *Id.*

115. *See supra* note 10 and accompanying text (emphasizing Congress' intent to leave unchanged the rules of evidence).

116. *See Smith*, 780 F.2d at 1106-10 (applying *Roviaro* balancing test to *Smith*).

117. *See Smith*, 780 F.2d at 1112 (Butzner, J., dissenting) The dissent in *Smith* contended that, by applying a *Roviaro* standard to exclude evidence known to the defendant, rather than restricting the *Roviaro* standard to evaluations of discovery requests, the Fourth Circuit significantly altered the existing standard for determining the admissibility of evidence. *Id.*

118. *See Smith*, 780 F.2d at 1110 (interpreting CIPA as requiring court to determine admissibility of evidence after determining relevance in light of suggested governmental privilege allowing for special protection of national security).

defense.[119] When the Fourth Circuit applied the *Roviaro*-type standard, however, the court denied Smith the opportunity to introduce the same relevant evidence.[120] Congress enacted CIPA to serve as a procedural tool to eliminate needless disclosures of classified evidence.[121] Congress did not intend to deprive a defendant of rights simply because he seeks to introduce classified evidence.[122]

The *Smith* court's decision to apply a balancing test to CIPA cases not only disregards the intent of Congress, but the decision also imposes a difficult burden on a court.[123] The judiciary takes no part in the initial classification of information,[124] therefore courts reasonably cannot foresee the consequences of disclosing classified information.[125] Without the means to predict the potential harm disclosure of classified information may cause to national security, a court cannot balance fairly the government's interest in nondisclosure against an individual's need for the information.

Policy considerations other than the practical difficulty of employing a balancing test militate against the standard of admissibility adopted by the Fourth Circuit.[126] The Fourth Circuit's interpretation of CIPA benefits the government to the disadvantage of the defendant because, theoretically, the government always could argue that the security of the entire nation outweighs the interests of a single individual.[127] Congress, however, recognized the government's potentially unfair advantage when Congress enacted CIPA.[128] The legislative history of CIPA indicates that Congress continually emphasized the importance of an individual's right to a fair trial.[129] Just as

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119. *See Smith*, 592 F. Supp. 424 (determining that, under existing rules of evidence, defendant's classified information was relevant and admissible); *Smith*, 750 F.2d at 1215 (same).

120. *See Smith*, 780 F.2d 1102 (determining that, under balancing test, some relevant classified evidence defendant sought to introduce was inadmissible).

121. *See supra* note 2 and accompanying text (discussing purpose of CIPA).

122. *See Smith*, 592 F. Supp. at 435 (recognizing Congress' determination not to compromise defendant's right to present evidence).

123. *See infra* notes 124-125 and accompanying text (discussing practical difficulties of applying balancing test to classified information).

124. *See supra* note 37 and accompanying text (recognizing that government has sole discretion in classifying information).

125. *See* United States v. Juan, 776 F.2d 256, 258-59 (11th Cir. 1985) (disclosure of seemingly harmless information may be dangerous to national security); *supra* note 37 and accompanying text (court cannot judge harm disclosure classified information may cause to national security if court does not know why government classified information).

126. *See infra* notes 127-132 (discussing policy reasons for not applying balancing test to determinations of admissibility of classified evidence).

127. *Cf.* Note, *Disclose or Dismiss Dilemma*, *supra* note 2, at 31 (observing that CIPA, even without balancing test, favors government's interest in providing fair trials over defendants' right to fair trials).

128. *See infra* note 129 and accompanying text (discussing Congress' recognition of individual's right to fair trial under CIPA). *But see* United States v. Jolliff, 548 F. Supp. 229 (D.Md. 1981) (upholding constitutionality of CIPA §§ 4 and 6).

129. *See* S. REP. No. 823, *supra* note 2, at 8 (court should not deny defendant use of evidence that defendant could introduce if information was not classified); *id.* at 9 (court

courts ruling on an informer's privilege conceded that the privilege must yield to requirements of fundamental fairness,[130] Congress also realized the necessity of permitting a defendant to produce material evidence affecting a determination of his guilt or innocence.[131] Although a court must employ a different set of procedures in ruling on the admissibility of classified information, the court still must uphold the defendant's constitutional right to a fair trial.[132]

Disregarding and misinterpreting case precedent[133] and legislative history,[134] the Fourth Circuit in *United States v. Smith* erroneously interpreted CIPA as requiring a court to determine whether evidence is admissible under a balancing test, as well as whether the evidence is relevant.[135] Congress did not intend to change the substantive rules of evidence when it enacted CIPA,[136] therefore, the *Smith* court improperly and needlessly developed its own procedures for evaluating the admissibility of relevant, but classified information.[137] To avoid violating a defendant's constitutional rights when a defendant seeks to disclose classified information at trial, a court should adhere to the provisions outlined in CIPA.[138]

MONICA L. MILLER

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should not balance national security interests against right of defendant to obtain information); *see also Smith*, 592 F. Supp. at 435 (noting that Congress did not intend to compromise defendant's rights by implementing CIPA).

130. *See* Roviaro v. United States, 353 U.S. 53, 60 (1957) (informer's privilege must yield to fundamental fairness).

131. *See* S. REP. No. 823, *supra* note 2, at 8-9. The Senate, in considering whether to enact CIPA, recognized that a court must not prejudice a defendant by ruling that the government need not disclose relevant classified evidence. *Id.* at 9. Specifically, the Senate noted that a court considering the admissibility or evidence under CIPA should not deny a defendant the use of information that the defendant could use under the Federal Rules. *Id.* at 8; *see supra* note 73 and accompanying text (discussing defendant's constitutional right to present evidence in his defense).

132. *See supra* notes 6-9 and accompanying text (discussing procedures for introducing classified information under CIPA); *supra* note 73 (discussing defendant's constitutional right to fair trial).

133. *See supra* notes 105-106 and accompanying text (suggesting that Fourth Circuit's analysis of *Pringle* was erroneous).

134. *See supra* notes 112-115 and accompanying text (discussing Fourth Circuit's refusal to recognize Congress' intention to omit *Roviaro* standard from CIPA).

135. *See supra* notes 54-59 and accompanying text (discussing Fourth Circuit's decision to apply balancing test in construing admissibility of evidence under CIPA).

136. *See supra* note 2 and accompanying text (discussing Congress' intent to leave unaltered the existing rules of evidence).

137. *See Smith*, 780 F.2d at 1113 (Butzner, J., dissenting) (stating that the Fourth Circuit majority needlessly departed from CIPA procedures and rules of admissibility of evidence).

138. *Id.*; *see supra* notes 6-9 and accompanying text (describing CIPA provisions); notes 80-86 and accompanying text (noting that First Circuit in *United States v. Juan* applied existing rules of evidence in determining admissibility of evidence).