IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant

PEOPLE FIRST OF TENNESSEE,

Intervenor-Appellant

WEST TENNESSEE PARENT GUARDIAN ASSOCIATION,

Intervenor-Appellee

v.

STATE OF TENNESSEE; DON SUNDQUIST,
Governor of the State of Tennessee; MARJORIE NELLE CARDWELL,
Commissioner, Tennessee Department of Mental Health and Mental Retardation;
MAX JACKSON, Superintendent, Arlington Development Center,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE

PROOF BRIEF FOR THE UNITED STATES AS APPELLANT

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 03-6389, 03-6628

UNITED STATES OF AMERICA,

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STATE OF TENNESSEE; DON SUNDQUIST,
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STATEMENT REGARDING ORAL ARGUMENT

The United States believes that oral argument would assist the Court in its deliberations.

STATEMENT OF JURISDICTION

The district court had jurisdiction over this matter pursuant to 28 U.S.C. 1331. The district court entered an order denying approval of the Mediation Settlement Agreement on February 21, 2003. (R. 1698, Apx. p. __). The United States timely moved to alter or amend that judgment, or in the alternative for a new trial, on February 24, 2003. (R. 1700, Apx. p.__). The district court denied that motion by order entered on October 6, 2003. (R. 1780, Apx. p. __). The United States timely filed a notice of appeal on December 5, 2003 (R. 1815, Apx. p. __; R. 1819, Apx. p.__). This Court has jurisdiction over this appeal pursuant to 28 U.S.C. 1291.

STATEMENT OF THE ISSUE

Whether relying on testimony taken solely as a proffer to deny approval of a settlement agreement without providing an opportunity for cross-examination or rebuttal is prejudicial error.

STATEMENT OF THE CASE

This appeal arises from a longstanding case brought to correct unconstitutional and unlawful conditions at the Arlington Development Center ("Arlington"), a large, publicly operated residential and out-patient treatment center for individuals with developmental disabilities in Tennessee. The United States brought suit in 1992 pursuant to the Civil Rights of Institutionalized Persons Act, 42 U.S.C. 1997 *et seq*. *United States* v. *Tennessee*, No. 03-6628 ("*United States*"). The complaint alleged that the State of Tennessee and several

individual defendants named in their official capacities ("Tennessee" or "State") had failed to (a) protect residents from abuse and neglect, (b) provide residents with adequate medical care, and (c) provide training and supervision sufficient to prevent undue bodily restraint, chemical restraint, and risk to personal safety. (R. 1 Complaint ¶¶ 15-17, Apx. p.__). In 1994, after an extended trial, the district court found conditions at Arlington to be unconstitutional and entered a remedial order enjoining the admission of any additional residents to Arlington (except for emergency, court-ordered admissions), and ordering the transition, where appropriate, of existing residents to community placements. (R. 338 Order, Apx. p. __).

In 1995, the district court certified a class of plaintiffs in a similar suit brought by People First of Tennessee ("People First"). (*People First* v. *Tennessee*, No. 92-2213 (W.D. Tenn); R. 1698 Order at 2, Apx. p.__). The district court entered the liability findings from the *United States* case as findings in the *People First* case, and found that the remedial order in *United States* constituted appropriate relief for the *People First* class. (R. 1698 at 2, Apx. p. __). The district court also allowed People First and the West Tennessee Parent Guardian Association (PGA), an association of parents and guardians of Arlington residents, to intervene in the *United States* case. (*Ibid.*).

The appeals now before this Court began with two orders entered by the district court in 2000: one defining the "at risk" class in *People First*, and a second addressing workgroups established by the district court. On July 17, 2000,

the district court clarified the definition for the portion of the *People First* class "at risk of being placed in Arlington Development Center." (R. 1302 Order, Apx. p. __). Tennessee appealed and successfully moved this Court to stay that order. (R. 1324 Notice of Appeal, Apx. p. __; R. 1372 Order, Apx. p. __). In August 2000, the district court granted Tennessee's motion to suspend the workgroups the district court had established to recommend corrections for violations identified in an earlier contempt order. (R. 1342 Order, Apx. __). The United States and People First appealed that order. (R. 1395 Notice of Appeal by U.S., Apx. p.__; R. 1363 Notice of Appeal by People First, Apx. p. __).

On December 10, 2001, after several months of mediation in this Court, all of the parties agreed to a settlement resolving the claims related to these appeals and addressing certain problems related to implementing the existing remedial orders. (R. 1539 Joint Motion, Apx. p. __). On the joint motion of all the parties, including PGA, this Court remanded the appeals to the district court for consideration of the proposed Settlement Agreement. (R. 1546 Order, Apx. p. __).

On April 30, June 27, and June 28, 2002, the district court held public fairness hearings on the proposed Settlement. (R. 1628, Apx. p.__; R. 1648, Apx. p. __; R. 1650, Apx. p. __). PGA, which changed its position about the settlement, moved to offer testimony opposing the Settlement. (R. 1582 Motion to Introduce Certain Evidence, Apx. p. __). The district court sustained the other parties' objections to admitting that evidence, but allowed PGA to make an offer

of proof to provide the appellate court with a record of the excluded testimony if PGA appealed the exclusion. (Tr. at 416-417, Apx. p. __). Then, relying in large part on expert testimony from the proffered evidence, the district court denied approval of the Settlement Agreement. (R. 1698 Order, Apx. p. __); *United States* v. *Tennessee*, 256 F. Supp. 2d 768 (W.D. Tenn. 2003). This appeal followed the district court's denial of the United States' motion to alter or amend the judgment. (R. 1780 Order, Apx. p. __; R. 1791 Notice of Appeal, Apx. p. __; R. 1815 Notice of Appeal, Apx. p. __; R. 1819 Notice of Appeal, Apx. p. __).

STATEMENT OF FACTS

A. The Mediation Settlement Agreement

While the "at risk" and workgroup appeals were pending in this Court, the parties spent several months in mediation and reached an agreement that would settle all claims related to those appeals. (R. 1698 at 11-12, Apx. p. __). The Mediation Settlement Agreement ("Settlement") was conditioned on the dismissal of the pending appeals, the vacation of the district court orders establishing and suspending the workgroups, (R. 1539 Settlement ¶ XII, Apx. p. __), and the entry of an order redefining the "at risk" portion of the class. The Settlement Agreement also addressed issues that had arisen from implementing the district court's earlier remedial orders related to community placements.

1. Definition Of The People First *Class*

The district court certified the class in *People First* as

> all persons who on or after December 12, 1989, have resided, or are

> residing at the Arlington Developmental Center; all persons who have been transferred from Arlington Developmental Center to other settings such as intermediate care facilities or skilled nursing facilities but remain defendant's responsibility; and *all persons at risk of being placed in Arlington Developmental Center*.

(R. 1302 at 2 (emphasis added)), Apx. p. __). Tennessee contended that no one was at risk of being placed in Arlington because the 1994 remedial order enjoined the admission of additional residents to Arlington (except for emergency, court-ordered placements). (R. 1302 at 2-3, Apx. pp.__). To resolve the dispute, the district court entered an order on July 17, 2000 defining the term "at risk" to include "all individuals who reside in the geographic region served by the Arlington Developmental Center * * * and who have demonstrated medical needs sufficient to require institutional care in the absence of home or community based services" as set out in 42 U.S.C. 1396n(c)(1) and 42 C.F.R. 430.25(c)(2). (R. 1302 at 7, Apx. p. __).

The definition of the "at risk" class in the proposed Settlement Agreement was less expansive than the definition in the district court's July 17, 2000 Order, but broader than that advocated by Tennessee. The proposed Settlement Agreement narrowed the scope of the "at risk" class by limiting relief to persons who were *actually placed* in a private facility and who in fact *applied for* and were eligible for services under a Medicare waiver. (R. 1539 Settlement ¶ XIII, Apx. p. __). In contrast, the district court's July 17 Order included all persons who *qualified* for institutional care under a waiver. (R. 1302, Apx. p. __).

2. Implementation Of The Community Plan

The proposed Settlement Agreement addressed other issues related to implementing the district court's existing remedial orders. Most relevant for this appeal, the Agreement required Tennessee to develop a "Closure Plan" to address the needs of residents moving from Arlington into community placements. (R. 1539 Settlement ¶ II, Apx. p. __). Such moves were governed by the "Community Plan," a 1997 court order that addressed moving class members from Arlington into smaller community-based homes and developing the support services required to make those placements safe and effective. (R. 753 Order on Community Plan for West Tennesse, Apx. p. __).

In the 1997 Community Plan, the State committed to specific actions and procedures to transform its treatment of the class from an institutional model of services to community-based care. (R. 708 Introduction pp. 1-3, Ch. IV(A), Apx. p. __). As part of this shift, the State agreed to develop individual treatment plans for all class members and, consistent with those individual plans, to move an average of eight residents per month out of Arlington and into appropriate community placements. (R. 708 Ch. VII, p. 1, Apx. p. __).

Pursuant to that process, the State determined that *all* of the residents presently at Arlington are eligible for community placement. (R. 1539 Settlement ¶ II(A), Apx. p. __). Accordingly, compliance with the Community Plan Order and the 1994 remedial order, which bars new admissions to Arlington, ultimately would move all of the class members out of Arlington into appropriate community placements.

To facilitate this process and to ensure adequate monitoring, medical care and services in community placements, the proposed Settlement Agreement required the State to develop a Closure Plan for Arlington. (R. 1539 Settlement ¶ II(A), Apx. p. __). The Closure Plan would contain "specific measurable objectives" and be subject to review by the parties and approval by the district court. (R. 1539 Settlement ¶ II(C), Apx. p. __). In addition, the proposed Settlement Agreement required the State to close Arlington within three years of the approval of the Closure Plan, and required the parties to submit an agreed order establishing the rate of transition for residents to community placements. (R. 1539 Settlement ¶ II, Apx. p. __).

The proposed Settlement Agreement further required the State to provide community-based services necessary to satisfy the needs of the class in accordance with the Community Plan. This included promoting the development of a stable provider network with adequate medical and nursing services for the class. (R. 1539 Settlement ¶ IV, Apx. p. __). In particular, the Settlement called for a needs assessment for class members who are medically-at-risk and/or significantly behaviorally challenged, so that the State could ensure that the necessary resources were available for these individuals in community placements. (R. 1539 Settlement ¶ IV(A), Apx. p. __).

At the time of the fairness hearing, there were approximately 236 residents at Arlington, with three or four residents moving into community placements each month. (Tr. at 86, Apx. p. __). Approximately 204 class members already lived in

community settings. (Tr. at 101, Apx. p. __).

B. Remand Of Appeals

Pursuant to the proposed Settlement Agreement, the parties filed a joint motion requesting the district court to vacate its orders related to the workgroups and the class definition; enter a new order defining the class as provided in the Settlement; and approve the Settlement as an order. (R. 1539, Apx. p. __). The parties also jointly moved this Court to remand the at-risk and workgroup appeals. (R. 1539, Apx. p. __). On December 14, 2001, the district court entered an order stating that if the Court of Appeals remanded the cases, the district court was inclined to enter the proposed Settlement Agreement. (R. 1542 Order, Apx. p. __). This Court remanded the appeals on January 8, 2002. (R. 1546 Order, Apx. p. __). On February 13, 2002, the district court entered an order provisionally accepting the Settlement Agreement and scheduling a fairness hearing. (R. 1566 Order, Apx. p.__; R. 1565, Apx. p. __).

C. The Fairness Hearings

The district court held public fairness hearings on April 30, June 27, and June 28, 2002. (R. 1628, Apx. p. _; R. 1648, Apx. p.__; R. 1650, Apx. p.__). Most of the testimony focused on moving residents into community placements and the effects of implementing the proposed plan to close Arlington.

1. Witnesses In Support Of The Settlement

The United States, People First, and the State recommended approval of the proposed Settlement Agreement. In support, they presented testimony from five

witnesses. The first was Nancy Ray, the court monitor. (Tr. at 68, Apx. p. __). The parties also called Gaye Hansen and Dr. Karen Anderson, the executive director and medical director of the Community Services Network, an association of medical professionals formed to provide community based services to class members. (Tr. at 209, 212-215, 342-346, Apx. pp. _____). In addition, the parties presented Rick Campbell, the deputy director for the Tennessee Commission on Compliance, a commission the Governor formed to assure compliance with the remedial orders in this case, (Tr. at 140-141, Apx. pp. __), and James Conroy, a Ph.D. in medical sociology and the former director of Research and Program Evaluation at the Temple University Institute on Disabilities. (Tr. at 269-272, Apx. pp. __). Finally, the parties presented testimony from Ruby Moore, a consultant with experience as a court monitor and compliance review officer in several states operating institutions pursuant to court order. (Tr. at 343-345, Apx. pp. __). Moore, Campbell and Conroy testified as experts. (Tr. at 144, 272, 351, Apx. pp. __).

The witnesses all supported the proposed Settlement Agreement. (Tr. at 89-90, 169, 228-230, 291-292, 315-318, Apx. pp. __). Campbell testified that even excellent residential institutions are limited in the quality of life they can provide an individual. (Tr. at 169-170, Apx. pp. __). He stated that because Arlington is in a rural, isolated location, it is difficult for class members to enjoy and participate in the larger community. (Tr. at 169-170, Apx. pp. __). Ray, the court monitor, testified that Arlington continues to have problems in several areas,

including appropriate active treatment to class members, injuries of unknown origin, and staff interaction and intervention. (Tr. at 116-117, Apx. pp. __).

Campbell, Conroy and Moore testified that individualized attention can significantly improve a developmentally disabled person's quality of life, and is best given in smaller environments like community placements. (Tr. at 169-170, 205-206, 268-280, 291-292, 360-362, Apx. pp. __). Ray testified that community placements provide a better overall quality of life than institutions, with more privacy and more individualized care. (Tr. at 88-89, Apx. pp.__). Moore testified that there are higher expectations and more individualized active treatment for class members in transition to and in community placements than for those remaining at Arlington. (Tr. at 375-376, Apx. pp. __). In addition, Campbell testified that implementing the individual work plans and needs assessments required by the proposed Settlement Agreement "would change class members' [lives]." (Tr. at 149-152, 169-171, 174-175, Apx. p. __).

The witnesses testified that although the advanced services required by some of the most medically fragile and behaviorally challenged class members were not yet provided in the existing community residences, (Tr. at 81-83, Apx. pp. __), with the right staff and resources, it would be possible to provide any service now available at Arlington in a community-based setting. (Tr. at 74, 91-93, 179-181, 200, 203-204, 222-226, 229-230, 312, 315-318, Apx. pp. _____). Anderson testified that CSN was successfully treating some patients requiring 24-hour nursing services and intermittent respiratory therapy in

community placements, as well as some class members with quadraplegia and feeding tubes. (Tr. at 312-313, Apx. pp. __). Ray testified that the proposed Closure Plan should preserve Arlington's medical services and staff by moving those resources and clinicians to two locations accessible to former Arlington residents who will then be in community placements. (Tr. at 72, Apx. p. __). Campbell testified that the State would develop providers for, or itself provide, any services required to properly care for the class members when they moved out of Arlington, including those with the greatest medical needs. These services would include providing both residential homes for the most medically challenged residents and transitional facilities for class members moving from hospitals back to their homes. (Tr. at 158-160, 177, Apx. pp. __).

Ray testified that, as court monitor, she would continue to monitor all individuals transitioned from Arlington into community placements. She said all such moves would be conditioned on her approval following her individualized review to ensure that each placement was safe and included appropriate treatment. (Tr. at 76-78, 88-89, Apx. pp. __). She further testified that, compared to the existing remedial orders, the new protections in the proposed Settlement Agreement would better ensure that class members in community placements are safe and receive appropriate residential, medical, programmatic, and vocational services. (Tr. at 83-84, 88-89, Apx. p. __).

2. Testimony Of Parents, Guardians, And Relatives Of Class Members

The district court also heard testimony from parents, guardians, and

relatives of the class members, and received approximately 100 written comments. The majority of these witnesses and comments opposed the proposed Settlement, in large part because of the provision closing Arlington. (R. 1698 at 12, Apx. p. __).

Some of the guardians, particularly those who were elderly and whose relatives had lived at Arlington for many, many, years, testified that they were satisfied with their relatives' care at Arlington and that the uncertainty and disruption associated with a move would be harmful, or even dangerous, to both the class members and themselves. (R. 1698 at 15-16, Apx. pp. __). Other guardians testified that their relatives required medical and nursing services that, in their view, could not be provided in a community residence, making community placements unsafe for their relatives. (R. 1698 at 13-15, Apx. pp. __). Some witnesses testified that instead of closing Arlington, the State should provide each class member with a choice between Arlington and a community placement. In this group were some guardians whose relatives were living in community placements but receiving medical and other services at Arlington. (R. 1698 at 14, 16, Apx. pp. __).

3. PGA's Proffered Testimony

PGA changed its position after signing the agreement and attempted to present evidence opposing the Settlement. (R. 1582, Apx. p. __). The United States, People First and the State objected, arguing that PGA was bound by both its agreement to the proposed Settlement Agreement and its prior stipulation

seeking approval of the Agreement from the district court. (R. 1598 Response of People First in Opp., Apx. p. __; R. 1599 Response of Tenn. in Opp., Apx. p. __; R. 1602 Response of U.S. in Opp., Apx. p. _; Tr. 412-416, Apx. pp. __). The district court sustained these objections, ruling that, as a signatory to the Settlement, PGA was bound by its prior stipulation and could not now oppose the Settlement. (Tr. at 416, Apx. p. __).

After sustaining the parties objections, however, the district court permitted PGA to make a proffer of its evidence solely for the purpose of any appeal:

> This is a fairness hearing, and while they are bound by that stipulation, I am also mindful that there may very well be appeals that results from this whole proceeding. * * * I'm going to hold PGA to their stipulation, but I'm going to allow [counsel for PGA] to proffer that testimony so that the appellate court may have a record of what I did and the testimony *that would have been excluded*. So put your witness on, sir. *And this will be a proffer*.

(Tr. at 416-417, Apx. pp. __) (emphasis added).

Substance Of The Proffer

PGA presented five witnesses in its proffer: Theodore Kastner (a physician and president of a health care organization for persons with developmental disabilities in New Jersey), Carolyn Cowans (a PGA board member), and three members of the Abuse and Neglect Prevention Committee (Committee), a committee the district court established to review allegations of abuse and neglect of class members at Arlington and in community placements. (Tr. at 423, Apx. p. __). One Committee member was an Arlington employee and one was the parent

of an Arlington resident.[1]

The Committee witnesses testified that the Committee opposed closing Arlington and had concerns about the ability of community providers to effectively address the needs of all members of the class. (Tr. at 456-458, Apx. pp. __). They testified that there were more substantiated complaints in community placements than there were at Arlington; that the incidents in the community homes were more serious in nature and presented a greater risk of harm to the class members; and that the number of incidents in community homes had not decreased over time. (Tr. 423, 457, 463-465, 640-641, 652; Apx. pp. ___). Two members testified that inconsistencies in reports from the State suggested that several incidents in community homes were reported to the State but neither investigated nor referred to the Committee. (Tr. at 431, Apx. p. __).

Counsel for People First asked to cross-examine one Committee member on a single issue, while expressly reserving the right to object and cross-examine on other issues. (Tr. at 655, Apx. p. __). The court permitted that limited cross-examination, expressly stating there was no waiver of the other objections. (Tr. at 655, Apx. p. __).

Cowans, a former president of PGA and a parent of an Arlington resident,

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[1] Earlier in the hearing, the district court indicated that it would hear testimony from the Committee. (Tr. at 9-10, 13-16, Apx. p. __). In addition, Committee member Thayer and former PGA President Cowans were parents and guardians of Arlington residents and entitled to testify on that basis. (Tr. at 446, 567, Apx. pp.__). The district court, however, ruled that their testimony was a part of the proffer. (Tr. at 412-417, Apx. p. __).

testified that she was one of the three PGA representatives who regularly participated in the mediation. (Tr. at 566-567, 570, Apx. p. __). She testified that the Settlement Agreement was not in the best interests of the class, in part because most class members in community placements return to Arlington for medical treatment. (Tr. at 582, Apx. p. __). Cowans testified that placing certain residents in homes that did not have immediate access to nurses and doctors would risk their lives. (Tr. at 581, Apx. p. __). She also testified that PGA had petitioned to return class members facing a crisis to Arlington, and that if Arlington were closed, there would be no safety net. (Tr. at 586, Apx. p. __). She further testified that she did not believe the State had the capacity or the will to provide safe and appropriate care to class members in community placements. (Tr. at 586-587, Apx. p. __).

Kastner proffered expert testimony about problems that arose in other areas of the country during transitions from institutions to community placements. (Tr. at 498-504, Apx. pp.__). He acknowledged that none of his testimony was based on research or experience with the class members, or with other developmentally disabled persons and providers in Tennessee. (Tr. at 548-550 Apx. pp. __).

Kastner testified that there were no valid studies supporting the conclusion that community care is consistently better than institutional care. He alleged that there were defects in the studies the United States' experts cited for that point. (Tr. at 509-511, 515-518, 527-529, Apx. pp. ___). He also testified that many individuals who move into community placements are placed in nursing homes if

they require advanced medical or health services that are not available in group homes. (Tr. at 514, Apx. p. __). Kastner testified that a California study in which he participated found a significantly higher relative risk of mortality, an increase in actual deaths over expected deaths in a two-year period, and an increase in preventable deaths in community placements. (Tr. at 519, Apx. pp. __). He testified that he and his colleagues recommend selective de-institutionalization as opposed to mandatory community placements. (Tr. at 519-520, Apx. p. __).

4. Objections And Reservations Of The Right To Cross-Examination And Rebuttal

The United States, People First, and Tennessee, who were coordinating their presentations in support of the proposed Settlement Agreement, renewed their objections to the proffered testimony and sought to preserve their right to cross-examination if PGA's proffered testimony were ever to be admitted into evidence. (Tr. at 438-439, 495-496, 541, 557, 560, Apx. pp. ___). The district court repeatedly assured counsel that the testimony was only a proffer and that all objections and their rights to rebut or cross-examine the testimony had been reserved. For example, at the conclusion of the testimony of the first proffered witness, Committee member Leaper, the following colloquy took place between the court and counsel for People First:

> The Court: This is a proffer, are there any questions?
>
> Mr. Schwarz: No, Your Honor, precisely, since it is a proffer, People First reserves its right to cross examination, it reserves its right to object to the testimony of this witness on the grounds of relevance and on the grounds of opinion testimony that was offered which this

witness is not qualified to offer.

The Court: All objections are reserved.

(Tr. at 438-439, Apx. pp. __).

A similar exchange took place with counsel for Tennessee when PGA called Dr. Kastner to the stand:

> Mr. Bearman: Your Honor, we've been handed, about three minutes ago, what purports to be an expert report which, as Your Honor knows, is usually supposed to come out under Rule 26 initial reports, the record doesn't reflect it, but my estimate is four inches thick. I obviously haven't read it, and I know this is proffered testimony but I think there's a limit even to that.
>
> And in – in looking at the table of contents, and I – I confess, Your Honor, I've obviously not read this in the last two minutes. This constitutes, in my judgment, not even proper proffered.

(Tr. at 495, Apx. p. __). The district court then gave PGA permission to put the testimony on the record as a proffer, and noted "There's not, you know, a jury here that we have to deal with, and the court will certainly separate those matters which are in the record from those that are properly not in the record." (Tr. at 497, Apx. p. __). The exchange concluded with further assurances from the district court:

> Mr. Bearman: Obviously I don't need to – none of us need to keep standing up.
>
> The Court: Oh, no, you have a continuing objection as to all of this.

(Tr. 497, Apx. p. _; see also Tr. at 443, 504, 506, 565, 632, Apx. pp. ____).

At the conclusion of the expert testimony, counsel for Tennessee, the United States, and People First declined to question Kastner for purposes of the proffer but expressly reserved all objections and all rights to cross-examine the witness.

(Tr. at 556-557, Apx. pp. __). The expert testimony was not subjected to cross-examination or rebuttal at the hearing because the district court said that all objections were preserved and the proffered testimony would not be used on the merits of approving the proposed Settlement Agreement.[2]

D. Denial Of Approval

The district court denied approval of the proposed Settlement Agreement on February 21, 2003. (R. 1698, Apx. p. __). Despite the court's assurances that the testimony of PGA's witnesses was solely a proffer to provide an appellate record in the event of an appeal by PGA, the district court expressly relied on the proffered evidence in assessing the fairness of the proposed Settlement Agreement. (R. 1698 at 11-12 n.3, Apx. pp. __).

The court considered the seven factors relevant to a determination of whether a class action settlement is fair, adequate, reasonable, and in the public interest:

> (1) the plaintiff's likelihood of ultimate success on the merits balanced against the relief offered by the proposed settlement agreement;

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[2] In the midst of PGA board member Cowan's testimony, the district court called counsel to the bench. The court stated that while the testimony was a proffer, counsel should consider cross-examining her because the court was concerned with portions of her testimony suggesting that PGA had been coerced into signing the Agreement. (Tr. at 577-578, Apx. pp. __). Following this suggestion, counsel for People First and for Tennessee cross-examined Ms. Cowans on that point, dispelling the district court's concern. (Tr. at 619-620, 625, Apx. p. __; R. 1698 at 12 n.3). This was the only instance in which the court expressed concerns about the substance of the proffered testimony and suggested cross-examination or rebuttal.

(2) the complexity, expense, and likely duration of the litigation;
(3) the stage of the proceedings and the amount of discovery;
(4) the judgment of experienced trial counsel;
(5) the nature of the negotiations;
(6) the objections, concerns, and comments of the class members and other interested parties; and
(7) the public interest.

(R. 1698 at 6, Apx. p. __). The district court found that the most important factors to be considered were the objections and concerns of the class members and the public interest in protecting the constitutional rights of the class members, including the right to adequate medical care and reasonable safety. (R. 1698 at 23-24, Apx. p. __). The district court's findings on these two factors expressly relied on Kastner's proffered expert testimony regarding safety and health issues in community placements. (R. 1698 at 24, Apx. p. __).

The district court found that transitioning all of the class members into community homes would be an ideal solution if the community could adequately meet each member's needs. (R. 1698 at 20, Apx. p. __). But the district court was not convinced that it was possible at this time to close Arlington and assure a safe transition for the most medically fragile and behaviorally challenged class members. (R. 1698 at 20-21, Apx. pp. __). The district court noted Kastner's testimony contending that there is an increase in the risk of relative mortality in community placements and that many persons in community placements continue to require intensive health care services that could not be offered in a group home. (R. 1698 at 21-23, Apx. pp. __). The district court also expressed concern that if Arlington closed, class members needing such services would simply be placed in

nursing homes. (R. 1698 at 21, Apx. p. __). The district court concluded that it was not appropriate to propose to close Arlington without having in place a range of facilities and services for the care and treatment of persons with diverse mental disabilities, and denied approval of the settlement. (R. 1698 at 23-24, Apx. pp. __). The district court denied the United States' motion to alter or amend that judgment. (R. 1780, Apx. p. __).

SUMMARY OF THE ARGUMENT

While the background of this case is complex, the issue on appeal is quite simple. A district court may not inform parties that witnesses' testimony will be received only as an offer of proof, assure those parties that they retain the right to cross-examine or rebut the proffered testimony if it is admitted later, and then rely on the witnesses' testimony to make key factual findings. To do so is reversible error.

This breach of fairness cannot be defended as harmless error. The district court expressly credited PGA's proffered expert testimony on the safety of class members in community placements, an issue central to its decision. Had the United States and the other parties known that the district court intended to rely on the testimony as evidence rather than as a proffer, we would have effectively countered that testimony. The government, and the other parties, were legally entitled to that opportunity.

STANDARD OF REVIEW

"Refusal to permit cross-examination of a witness concerning matters testified to on direct examination constitutes prejudicial error." *Francis* v. *Clark Equip. Co.,* 993 F.2d 545, 550-551 (6th Cir. 1993); *United States* v. *Mills*, 366 F.2d 512, 516 (6th Cir. 1966).

ARGUMENT

I

DISREGARDING RULINGS THAT TESTIMONY TAKEN SOLELY AS A PROFFER WILL BE SUBJECT TO CROSS EXAMINATION AND REBUTTAL IF LATER ADMITTED TO THE RECORD IS CLEAR AND UNEQUIVOCAL LEGAL ERROR

Parties proffer testimony to make courts aware of the substance of evidence that may be or has been excluded. If the trial court, as here, does not admit the proffered evidence, the proffered evidence cannot be considered by the finder of fact. Rather, it is part of the record solely to assist with appellate review of the trial court's decision to exclude the evidence. See, *e.g.*, *United States* v. *1,291.83 Acres of Land*, 411 F.2d 1081, 1085 (6th Cir. 1969); *Heyne* v. *Caruso*, 69 F.3d 1475, 1481 (9th Cir. 1995); *Polys* v. *Trans-Colorado Airlines, Inc.*, 941 F.2d 1404, 1406-1407 (10th Cir. 1991).

Notwithstanding its own rulings, the district court's decision to reject the Settlement Agreement expressly relied on the proffered testimony of Kastner and

the Committee members. (R. 1698 at 11 n.3, 21, Apx. pp. __). This is an unequivocal error.

"Cross-examination of a witness is a matter of right." *Alford* v. *United States*, 282 U.S. 687, 691 (1931); *The Ottawa*, 70 U.S. 268, 271 (1865). While "the extent of cross-examination with respect to an appropriate subject of inquiry is within the sound discretion of the trial court," *Alford*, 282 U.S. at 694, "the court may not restrict a party's right of cross-examination until that right has been substantially and fairly exercised." *Francis* v. *Clark Equip. Co.*, 993 F.2d 545, 550-551 (6th Cir. 1993); see *Hanger* v. *United States*, 160 F.2d 8, 10 (D.C. Cir. 1947). "Refusal to permit cross-examination of a witness concerning matters testified to on direct examination constitutes prejudicial error." *Francis*, 993 F.2d at 550; *United States* v. *Mills*, 366 F.2d 512, 516 (6th Cir. 1966); *Spaeth* v. *United States*, 232 F.2d 776, 778 (6th Cir. 1956).

While the right to cross-examination in criminal trials is often described as grounded in the confrontation clause of the Sixth Amendment, see, *e.g.*, *Pointer* v. *Texas*, 380 U.S. 400, 404 (1965), the right also applies in civil proceedings. See *Ottawa*, 70 U.S. at 271; *Francis*, 993 F.2d at 550-551; see also *Wiseman* v. *Reposa*, 463 F.2d 226, 227 (1st Cir. 1972); *United States* v. *Robertson*, 354 F.2d 877, 879 (5th Cir. 1966); *Derewecki* v. *Pennsylvania R.R. Co.*, 353 F.2d 436, 442

(3d Cir. 1965); *Hagans* v. *Ellerman & Bucknall S.S. Co.*, 318 F.2d 563, 586 (3d Cir. 1963). "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg* v. *Kelly*, 397 U.S. 254, 269 (1970); *Greene* v. *McElroy*, 360 U.S. 474, 496-497 (1959); cf. *Pointer*, 380 U.S. at 408 (Harlan, J., concurring) (right of confrontation is "implicit in the concept of ordered liberty" and thus guaranteed by the Due Process Clause of the Fourteenth Amendment independently of the Sixth Amendment in state proceedings) (quoting *Palko* v. *Connecticut*, 302 U.S. 319, 325 (1937)). "[I]f cross examination of an available witness is not had the litigant, deprived of cross-examination, has been denied due process of law." *Derewecki*, 353 F.2d at 442.

This case is unusual in that the district court did not merely restrict the scope of cross-examination on a particular topic. Such restrictions on the scope or duration of cross-examination are reviewed for abuse of discretion. See, *e.g.*, *Mills*, 366 F.2d at 516. Here, the district court effected a complete denial of the right to cross-examination by disregarding its own rulings and considering the proffered evidence on the merits of the fairness of the Settlement Agreement. "[While] the control of cross-examination is within the discretion of the trial judge, * * * it is only after a party has had an opportunity substantially to exercise

the right of cross-examination that discretion becomes operative." *Hanger*, 160 F.2d at 10; *Francis*, 993 F.2d at 550-551. Accordingly the district court's decision here should be reviewed for legal error. See *id.* at 550; *Spaeth*, 232 F.2d at 778.

In *Francis*, a magistrate ordered a new trial after concluding he had prejudiced the defendant in a product's liability action by allowing the plaintiff to abandon a strict liability theory in mid-trial, but refusing to allow the defendant to cross-examine on that theory. The plaintiff appealed the grant of a new trial. This Court upheld the finding of prejudice, holding that "the practical effect of the magistrate's rulings was to deny defendant the opportunity to explore evidence * * * on cross examination after plaintiff had made unfair use of the evidence on direct examination." 993 F.2d at 550.

The district court's actions here similarly prevented the United States and the other parties from cross-examining the proffered witnesses. This was undeniably prejudicial error.

II

WHILE SUMMARY DENIAL OF CROSS-EXAMINATION IS PREJUDICIAL PER SE, PREJUDICE IS FURTHER DEMONSTRATED BECAUSE THE PROFFERED TESTIMONY WAS CENTRAL TO THE DENIAL AND COULD HAVE BEEN COUNTERED BY CROSS-EXAMINATION AND REBUTTAL

"[The] summary denial of cross-examination is distinguishable from the

erroneous admission of harmless testimony." *Alford* v. *United States*, 282 U.S. 687, 692 (1931). Prejudice is established by the summary denial itself, for "to say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial." *Ibid.* Accordingly, "refusal to permit cross-examination of a witness concerning matters testified to on direct examination constitutes prejudicial error." *Francis* v. *Clark Equip. Co.*, 993 F.2d 545, 550 (6th Cir. 1993).

Even if further demonstration of prejudice were necessary, this Court has refused to hold errors similar to this case harmless. In the most analogous case in this circuit, *Columbia Gas Transmission Corporation* v. *Gwin*, this Court found prejudice where a district court disregarded its own agreement to let a party cross-examine an expert witness. Nos. 98-3569, 93-3570, 1999 WL 1023728 (6th Cir. Nov. 5, 1999). The *Columbia Gas* court had accepted testimony from Columbia Gas' experts, but agreed with the parties that the defendant landowners would have an opportunity to cross-examine the experts at a later time and would also be able to supplement an affidavit filed by their own expert to rebut the Columbia Gas expert. Then, without notice to the landowners, the district court granted

Columbia Gas' motion for summary judgment without either hearing the cross examination or accepting the supplemental affidavit. *Id.* at *2. This Court reversed, finding that the district court's failure to even consider the impact of the cross-examination and supplemental affidavit on the pending matters was not harmless. *Id.* at *4.

The same reasoning applies to this case. Relying on Kastner's testimony without allowing the other parties to object, cross-examine, or enter rebuttal evidence amounted to prejudicial error. Kastner was the only expert who testified in opposition to the settlement. The district court relied heavily on his proffered testimony in making its findings on two of the three factors that it found weighed against approval – the objections and concerns of class members, and the public interest. (R. 1698 at 18-24, Apx. pp. __). In fact, the district court stated that the public interest in protecting the constitutional rights of the class members was the "most important[]" factor in the court's decision. (R. 1698 at 25, Apx. p. __). Specifically, the district court cited the proffered testimony of Kastner to support its finding that community placements do not have adequate services for those class members with the most severe behavioral and medical issues. (R. 1698 at 21, Apx. p. __). The district court described as "compelling" Dr. Kastner's testimony that studies indicated a substantial increase in mortality rates for persons

placed in the community as compared to those in institutions. (R. 1698 at 21, Apx. p. __).

The district court's concerns regarding the safe and appropriate care of the most vulnerable class members are, of course, appropriate and legitimate. But had we and the other parties known that the district court would rely on Kastner's testimony as part of the record, we would have taken the opportunity to object to the admission of his report and of significant parts of his testimony, and to expose material inconsistencies and weaknesses in his assessments. This, in all likelihood, would have changed both the substance of Kastner's testimony in the record and the weight that the district court might have assigned that testimony.

Kastner's opinions on the relative safety and effectiveness of community placement were based on national studies, rather than studies on the specific providers and resources available to class members in Tennessee. (Tr. at 548-549, Apx. pp. __). Had the parties received notice that his testimony would be included in the record, they would have vigorously cross-examined Kastner on these points and provided rebuttal evidence. (Tr. at 541, Apx. p. __). For instance, Kastner testified about a study of patients in California conducted by Dr. Strauss. (Tr. at 519-521, Apx. pp. __). Kastner opined that the Strauss study indicated a significant increase in actual deaths versus expected deaths in community

placements and a similar increase in the relative risk of mortality. (Tr. at 519, Apx. p. __). The district court found the testimony on comparative mortality rates "compelling" and expressly cited Kastner's opinions on this issue. (R. 1698 at 21, Apx. p. __).

At the fairness hearing, however, counsel for People First vigorously objected to Kastner's testimony, stating that "he is talking about studies some of which we can go on and on by putting witnesses who can refute the Strass [sic] study, we can put testimony on and on and on. About half of what he is saying can be refuted." (Tr. at 541, Apx. p. __). She further noted that "we can ask to have this witness impeached for what he is putting on. This doesn't have anything to do with the population in Tennessee." (Tr. at 541, Apx. p. __). But despite the court's assurances about their continuing objections and the proffer status of Kastner's testimony, People First and the other parties were not allowed to introduce the rebuttal and impeachment evidence before the court's denial of approval.

In addition, Kastner testified that nationally, developmentally disabled individuals typically did not qualify for funding for home and community care, which is an optional service under Medicaid. Because they had a right to nursing home services, many of these individuals chose a nursing home so that they could

receive some service. (Tr. at 513-514, Apx. pp. __). The district court cited this testimony in its order, voicing concern that class members could end up in nursing homes. (R. 1698 at 21, Apx. p. __). The 1994 Remedial Order, however, specifically provides that "no ADC resident will be placed in a nursing home or other non-community placement, such as other state or private institutions." (R. 338 Order § XIV.B.5, Apx. p. __). The Settlement would not alter that prohibition. Had they received notice of the district court's intention to consider Kastner's testimony concerning nursing homes, the other parties would have brought this contradiction to the Court's attention.

These were not the only objectionable portions of Kastner's testimony. Kastner relied largely on the report he prepared summarizing various studies regarding the placement of developmentally disabled persons in the community. (Tr. at 499, Apx. p. __). The United States would have moved to exclude the report on the grounds that it was not disclosed to the parties prior to the hearing as required under Federal Rule of Civil Procedure 26(a)(3), (Tr. at 495, Apx. p. __), or asked for time to study the report in depth and provide a response. Portions of the report were also subject to objection on the grounds of relevance. In addition, the report included unsubstantiated attacks on the credibility of People First's expert witness Conroy, which were subject to objection on grounds of relevance,

improper impeachment, and scope of expert testimony, as well as cross-examination. (Tr. at 495-496, 516-518, Apx. pp. ___). Accordingly, the district court's use of the proffered testimony absent full cross-examination and rebuttal was prejudicial error.

CONCLUSION

This Court should vacate the district court's order denying approval of the Mediation Settlement Agreement and remand to the district court for further proceedings to allow the United States and People First to cross-examine and rebut the proffered testimony.

Respectfully submitted,

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APPELLANT'S DESIGNATION OF APPENDIX CONTENTS

Appellant, pursuant to Sixth Circuit Rule 28(d), hereby designates the following filings in the district's record as items to be included in the joint appendix.

Description of Item for Docket No. 92-2062	**Date filed in District Court**	**Record Entry Number**
District Court Docket Sheet		
Complaint	1/21/92	1
Remedial Order	9/2/94	338
Community Plan for West Tennessee Introduction pp. 1-3, Ch IV(A), Ch. VII p. 1	3/20/97	708
Order on Community Plan for West Tennessee	8/21/97	753
Order Regarding Scope of "At Risk" Population	7/17/00	1302
Joint Motion of the Parties with attachment Mediation Settlement Agreement	12/11/01	1539
Order Denying the Approval of Mediation Settlement Agreement	2/21/03	1698
Motion of United States to Alter or Amend Judgment, or in the Alternative for New Trial	3/10/03	1700
Order Denying Motion to Alter or Amend Judgment, or in the Alternative for New Trial	10/6/03	1780
Notice of Appeal for People First	10/20/03	1791
Notice of Appeal for United States	12/5/03	1815,1819

Description of Proceeding or Testimony	Date filed in District Court	Transcript Page Numbers
Fairness Hearing held April 30, 2002	3/9/04	
Court		9-16
Nancy Ray		68-93, 101, 116-117
Rick Campbell		140-160, 169-181
Gaye Hansen		200-209, 212-215, 222-230
James Conroy		268-280, 291-292
Karen Anderson		312-318
Ruby Moore		342-351, 360-362, 375-376
Fairness Hearing held June 27, 2002	3/9/04	
Court		412-417, 442-443
Carlene Leaper		423, 431-439, 446
Victor Thayer		456-458, 463-465

Fairness Hearing held June 28, 2002	3/9/04	
Carolyn Cowans		565-570, 577-578, 581-587, 618-625
Victor Thayer		560
Theodore Kastner		495-557
Sharon Williams		632, 640-641, 652-655

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type volume limitation imposed by Fed. R. App. P. 32(a)(7)(B). The brief was prepared using WordPerfect 9.0 and contains 7,253 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

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Date: June 14, 2004

CERTIFICATE OF SERVICE

I hereby certify that on June 14, 2004, a copy of the Proof Brief For The United States As Appellant was served upon counsel of record via Federal Express next-day service at the addresses listed below.

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