

**UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT**

No. 93-2141

**UNITED STATES,
Appellee,**

v.

**THOMAS A. SHAY,
Defendant, Appellant.**

BEFORE

**TORRUELLA, Chief Judge,
BOUDIN, Circuit Judge, and
BARBADORO, *District Judge.**

ORDER OF THE COURT

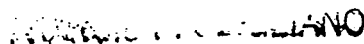
Entered: December 27, 1995

Thomas Shay Jr., was convicted of conspiracy and aiding and abetting an attempt to blow up his father's car. During the trial, Shay attempted to call Dr. Robert Phillips, a psychiatrist, who was prepared to testify that Shay's incriminating statements were the product of a mental disorder that caused him to make false and grandiose statements. The district court excluded this testimony pursuant to Fed. R. Evid. 702 because it concluded that (1) it would not assist the jury and (2) Dr. Phillips might stray into the impermissible subject of Shay's capacity to commit the charged crimes if he were allowed to testify. The court did not determine whether his testimony satisfied rule 702's other requirements.

We concluded on appeal that Dr. Phillips' testimony should not have been excluded for the reasons cited by the district court and that the court's error was not harmless. *United States v. Shay*, 57 F.3d 126, 133 (1st Cir. 1995). Accordingly, we remanded the case to the district court in order to permit the court to determine whether the proposed testimony should have been excluded for any other reason. *Id.* at 137.

The district court issued a procedural order on remand, concluding that "the Court of Appeals remanded the case for a determination of admissibility of Dr. Phillips' testimony only under Rule 403, that is, for a ruling whether the potential prejudice of the testimony outweighs its probative value, and under Rule 702, for a ruling whether the testimony 'fits the facts of the case.' " The government argues in its motion for clarification that the district court construed its authority on remand too narrowly. We agree. We did not determine whether the proposed testimony satisfied Rule 702's other requirements. Nor did we limit the district court's power to consider this question on remand. Thus, the government's motion is granted.

By the Court:



Clerk

(cc: Messrs. Kelly, Libby & Ms. Weinman)

Certified Copy to Robert Smith, Clerk U.S. District Court of Massachusetts

*Of the District of New Hampshire, sitting by designation.