

the right physically to face those who testify against him, and the right to conduct cross-examination." *Pennsylvania v. Ritchie*, 480 U.S. 39, 61, 107 S.Ct. 989, 998, 94 L.Ed.2d 40 (1987). Although an out-of-court statement related by a witness at trial constitutes "testimony" against the accused, "the Confrontation Clause is not violated by admitting a declarant's out-of-court statements, as long as the declarant is testifying as a witness and subject to full and effective cross-examination." *California v. Green*, 399 U.S. 149, 158, 90 S.Ct. 1930, 1935, 26 L.Ed.2d 489 (1970). Here, the out-of-court declarant, A.T., was physically present on the witness stand for cross-examination. Tome contends, however, that his right to conduct cross-examination was violated because the witness did not respond sufficiently to his questions. We disagree.

It is clear that "simply putting a child on the stand, regardless of her mental maturity, is not sufficient to eliminate all Confrontation Clause concerns." *United States v. Spotted War Bonnet*, 603 F.2d 1471, 1474 (8th Cir. 1991), cert. denied, \_\_\_ U.S. \_\_\_, 112 S.Ct. 1187, 117 L.Ed.2d 429 (1992); see *United States v. Dorian*, 803 F.2d 1439, 1446 (8th Cir. 1986) (concluding that five-year-old witness was unable to testify meaningfully because of age and fright); see also *Commonwealth v. Kironac*, 405 Mass. 557, 542 N.E.2d 270, 272-74 (1989) (witness resisted answering nearly all questions asked during cross-examination). Ours is not, however, a situation where the child witness was unable to answer questions on the stand. Rather, as discussed above, the record includes fifty-eight transcript pages of A.T.'s cross-examination during which she was generally responsive. Tome nevertheless challenges the sufficiency of the cross-examination because, in response to a number of questions, A.T. either gave no audible response or testified that she could not remember many things.

[12] The Confrontation Clause "guarantees only an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Fensterer*, 474 U.S. 15, 20, 106 S.Ct. 292, 295, 88 L.Ed.2d 15 (1985). The concerns

animating the Confrontation Clause are satisfied as long as the defendant has the opportunity to expose weaknesses in the witness' testimony. See *Owens*, 484 U.S. at 559, 108 S.Ct. at 842; see also *Kentucky v. Stincer*, 482 U.S. 730, 744, 107 S.Ct. 2658, 2667, 95 L.Ed.2d 631 (1987). Forgetfulness, for example, does not render cross-examination constitutionally infirm because the defense can use the witness's poor memory and trial demeanor to attack the witness's credibility. *Owens*, 484 U.S. at 559-60, 108 S.Ct. at 842-43; *Fensterer*, 474 U.S. at 20, 106 S.Ct. at 295. In this case, the defendant likewise had the opportunity to mount a successful attack against the partially nonresponsive witness and, in fact, rarely missed an opportunity to comment on the difference between A.T.'s testimony on direct and on cross-examination. Therefore, notwithstanding A.T.'s failure to respond to some questions on cross-examination, we find that Tome's rights under the Confrontation Clause were not violated because A.T.'s testimony provided him a sufficient opportunity to discredit her out-of-court statements.

### III. Use of Leading Questions

[13, 14] The trial judge permitted the government to use leading questions during A.T.'s direct examination. We review that decision for an abuse of discretion. See *United States v. Rodriguez-Garcia*, 963 F.2d 1563, 1570 (10th Cir. 1991). "In this realm the widest possible latitude is given to the judge on the scene." *Rodriguez v. Bunco Cent. Corp.*, 900 F.2d 7, 12 (1st Cir. 1993).

Fed.R.Evid. 611(c) provides that "[l]eading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony." This circuit has long recognized the necessity of using leading questions to elicit testimony from child sex abuse victims. See *Antelope v. United States*, 185 F.2d 174, 175 (10th Cir. 1950). Indeed, the Advisory Committee Notes to Rule 611(c) expressly identify the examination of child witnesses as an exception to the general prohibition on the use of leading questions during direct examination. Fed.R.Evid. 611(c) advisory committee's note; see also *United States v. Cuatros-*

IN RE OC' MARINE MUT.  
Civ. No. 93-1639  
1992  
964 F.2d 942, 943-44 (9th Cir. 1992)  
(leading question used during direct examination of 8-year-old sex abuse victim).

In this case, A.T.'s direct examination did involve a significant number of leading questions. It is evident from the record, however, that A.T. was reluctant to testify about her abuse. In fact, questioning was halted several times in order for A.T. to regain her composure and willingness to discuss the events at issue. The defense twice objected to the leading questions; both times the district judge decided to permit them. Under these circumstances, we cannot say that the district court abused its discretion in determining that leading questions were necessary to develop A.T.'s testimony.

### IV. Cumulative Error and Fundamental Unfairness

Finally, Tome argues that "[t]his Court need not decide whether the individual errors discussed herein require reversal of Tome's conviction; it is clear that the cumulative effect of those errors rendered the trial in this case fundamentally unfair." We interpret this assertion to raise two distinct arguments.

First, Tome appears to make a preemptory strike at a potential harmless error analysis. In this regard, he contends that, even if the alleged trial errors were individually harmless, they were not harmless in the aggregate. This argument is unavailing, however, because we already have concluded that the trial court's individual rulings were not erroneous. "[A] cumulative-error analysis aggregates only actual errors to determine their cumulative effect." *United States v. Rivera*, 900 F.2d 1462, 1470 (10th Cir. 1990) (emphasis added); see also *United States v. Hunt*, 931 F.2d 1368, 1377 (10th Cir. 1991) (effect of non-errors not included in aggregation).

[15, 16] Second, we interpret Tome's argument to challenge the "fundamental fairness" of his trial under the Due Process Clause of the Fifth Amendment. A trial is fundamentally unfair under the Fifth Amendment's Due Process Clause if it is "shocking to the universal sense of justice." *United States v. Russell*, 411 U.S. 423, 432, 93 S.Ct. 1637, 1643, 36 L.Ed.2d 366 (1973) (internal

quotation omitted). In *Rivera*, we noted that courts may consider prejudicial circumstances that do not amount to error in the course of reviewing for fundamental unfairness, but only when actual error has also occurred. 900 F.2d at 1477. Thus, "the linchpin of the analysis seems to be that an error was committed which, when considered with other circumstances, led to a fundamentally unfair trial." *Id.*

Here, as in *Rivera*, Tome requests a fundamental unfairness analysis without any actual error on which to hang his proverbial hat. Tome contends that this is a case where the government's scripted evidence, introduced through leading questions, and the defense's inability to cross-examine the source of that evidence combined synergistically to deny the defendant a fair trial. However, we already have approved of the use of leading questions in this case and have determined that A.T. was available for cross-examination under both Rule 801 and the Confrontation Clause. Moreover, the record reveals that the defendant presented his own witnesses and evidence while mounting a continuing attack on the credibility of the government's witnesses, A.T. included. The fact that a number of important evidentiary issues were decided against him, and that the jury chose to believe the government's witnesses rather than his, simply does not shock any universal sense of justice. Tome's trial, though not perfect, was fair.

We AFFIRM.



In re OCEAN MARINE MUTUAL PROTECTION AND INDEMNITY ASSOCIATION, LTD., Robert Davis, d/b/a Davis - Marine Insurance Agency, and Marimar Marine Industries, Inc., Petitioners.

No. 93-1639.

United States Court of Appeals,  
Eleventh Circuit.

Sept. 15, 1993.

Insurers sought writ of habeas corpus, alternatively a writ of prohibition, to vacate

remand order issued by the United States District Court for the Southern District of Florida, No. 92-1014-Civ, Donald L. Graham, J. The Court of Appeals held that remand order based upon timely motion to remand for defects in removal procedure was not reviewable.

Dismissed.

#### 1. Removal of Cases ⇐107(9)

Order of remand based upon timely motion to remand for defects in removal procedure is unreviewable. 28 U.S.C.A. § 1447(c, d).

#### 2. Removal of Cases ⇐82

Procedural requirements of rules mandating that all defendants join in removal within 30 days of when case becomes removable are generally applicable to a removal under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. 9 U.S.C.A. § 201 et seq.; 28 U.S.C.A. § 1446(a, b).

#### 3. Removal of Cases ⇐103

Failure to comply with rules requiring that all defendants must join in removal within 30 days of case becoming removable constitutes a defect in removal procedure within meaning of rule concerning motions to remand on basis of defect in procedure. 28 U.S.C.A. §§ 1446(a, b), 1447(c).

#### 4. Removal of Cases ⇐107(9)

Federal district court's remand order was not reviewable where it was based upon timely motion to remand for defects in removal procedure. 28 U.S.C.A. § 1447(c, d).

David S. Batcheller, Miami, FL, for Ocean Marine and Davis.

Robert M. Mayer, Miami, FL, for Davis.  
Sharon L. Wolfe, Co-Counsel, Miami, FL, for Deras.

On Petition for Writ of Mandamus or on Petition for Writ of Prohibition to the United

States District Court for the Southern District of Florida.

Before EDMONDSON, COX and CARNES, Circuit Judges.

PER CURIAM:

#### FACTS AND PROCEDURAL HISTORY

Ricardo Deras filed an action in Florida state court in 1989 against Ocean Marine Mutual Protection and Indemnity Association, Ltd., a British insurer ("Ocean Marine"), Robert Davis, and Marimar Marine Industries, Inc. ("Marimar"). Deras' claims against Ocean Marine are based on an insurance agreement; the claims against Davis and Marimar allege negligence for failure to obtain adequate insurance coverage. In December 1991, Deras obtained a default judgment against Ocean Marine, which never answered his complaint. In May 1992, Marimar asserted that the case fell under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards<sup>1</sup> and removed it to federal court pursuant to 9 U.S.C. § 205 (1988).

Deras then filed a timely motion to remand the case to state court. Deras contended that the action did not fall under the New York Convention and that Marimar had failed to follow proper removal procedure because all of the defendants did not join in removal as required by 28 U.S.C. § 1446(a) (1988). Davis subsequently joined in the petition for removal, and Ocean Marine filed a special appearance consenting to removal.

In March 1993, the district court granted Deras' motion to remand "for Defendants' failure to comply with § 1446(a) and (b)." (Order of Remand at 1). To support its decision, the district court cited, among other cases, *Wilson v. Ocean Marine Mut. Protection & Indem. Ass'n*, No. 92-1506-CIV-NESBITT (S.D.Fla. Aug. 4, 1992), vacated, Oct. 16, 1992, reinstated, Jan. 7, 1993 (concluding that 9 U.S.C. § 205 retains the § 1446(b) thirty-day time limit for filing notice of removal) and *Woods v. Firestone Tire*

<sup>1</sup> 9 U.S.C.A. § 201 (West Supp.1993) [hereinafter New York Convention].

& Rubber Co., 560 F.Supp. 588 (S.D.Fla.1983) (holding that all defendants must join in the notice of removal).

#### DISCUSSION

The defendants (petitioners) seek a writ of mandamus, or alternatively a writ of prohibition, directing the district court to vacate its Order of Remand. Deras responds that, pursuant to 28 U.S.C. § 1447(d) (1988),<sup>2</sup> the district court's remand order is not reviewable on mandamus. Because we conclude that § 1447(d) precludes our review of the district court's remand order, we dismiss the petition for lack of jurisdiction.

By its terms, § 1447(d) appears to proscribe any review of remand orders. In *Thermtron Products, Inc. v. Heraeusdorfer*, 423 U.S. 336, 96 S.Ct. 584, 46 L.Ed.2d 542 (1976), however, the Supreme Court held that § 1447(d) only prohibited review of remand orders issued pursuant to 28 U.S.C. § 1447(c). When *Thermtron* was decided, § 1447(c) provided for remand of cases that had been removed "improvidently and without jurisdiction." 423 U.S. at 342, 96 S.Ct. at 589. Remands based on considerations outside § 1447(c), e.g., a crowded docket, were an exception to § 1447(d) and remained subject to review on mandamus. *Id.* at 344-45, 96 S.Ct. at 590.

In 1988, Congress amended § 1447(c) to read:

A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded....

#### 2. 28 U.S.C. § 1447(d) (1988) provides:

An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

This case was not removed pursuant to § 1443, which provides for the removal of civil rights cases.

28 U.S.C. § 1447(c) (1988). While it was generally accepted that cases remanded for lack of subject matter jurisdiction remained immune from review after the 1988 amendment, see, e.g., *Harris v. Blue Cross/Blue Shield of Ala.*, 951 F.2d 325, 326-27 (11th Cir.1992), the status of cases remanded for defects in removal procedure was less certain. See *McDermott Int'l v. Lloyds Underwriters of London*, 944 F.2d 1199, 1201 (5th Cir.1991). The reviewability of a remand order based on a timely § 1447(c) motion to remand for defects in removal procedure is an issue of first impression in this circuit.

[1] Two other circuits have addressed this issue, however, concluding that § 1447(d) precludes review of an order of remand based upon a timely § 1447(c) motion to remand for defects in removal procedure. *In re Medacope Marine Ltd.*, 972 F.2d 107 (5th Cir.1992); *Foster v. Mutual Fire, Marine & Inland Ins. Co.*, 986 F.2d 48, 50 (3d Cir.1993); see also *Creekmore v. Food Lion, Inc.*, 797 F.Supp. 505 (E.D.Va.1992). We find these circuits' reasoning persuasive and agree that a remand order based on a timely § 1447(c) motion to remand for defects in removal procedure is unreviewable pursuant to § 1447(d).<sup>3</sup>

[2,3] In this case the district court remanded the action after Deras filed a timely motion alleging inapplicability of the New York Convention and defects in the removal procedure employed by the defendants. The court premised its decision on the defendants' failure to comply with § 1446(a) and (b), citing cases which held that all defendants must join the notice of removal under § 1446(a) within thirty days of the time when the case becomes removable under § 1446(b). The procedural requirements of § 1446(a) and (b) are generally applicable to a removal

3. It may be that an order of remand based on an untimely motion to remand for defects in removal procedure is reviewable on mandamus. See *In re Shell Oil Co.*, 932 F.2d 1518 (5th Cir.1991), cert. denied, \_\_\_ U.S. \_\_\_, 112 S.Ct. 914, 116 L.Ed.2d 814 (1992); *Air-Shields, Inc. v. Follmer*, 891 F.2d 63 (3d Cir.1989). Because Deras' motion was timely, we need not address the reviewability of a remand order based on a timely motion to remand for defects in removal procedure.

<sup>1</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 110 U.N.T.S. 38, reprinted *infra*.

under the New York Convention, because 9 U.S.C. § 205 provides that "[t]he procedure for removal of causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal." See *In re Amoco Petroleum Additives Co.*, 964 F.2d 706, 712 (7th Cir.1992). Failure to comply with § 1446(a) and (b) constitutes a defect in removal procedure within the meaning of § 1447(c). See *Wilson v. General Motors Corp.*, 888 F.2d 779, 781 n. 1 (11th Cir.1989).

[4] The district court's remand order is based upon a timely § 1447(c) motion to remand for defects in removal procedure.<sup>4</sup> Therefore the remand order, "whether erroneous or not," is not subject to review in this court pursuant to § 1447(d). *Thermtron*, 423 U.S. at 343, 96 S.Ct. at 589. Because the district court's order is not subject to review, we do not reach the question of the applicability of the New York Convention to *Deras'* state court action or the question of defendants' joinder; we state no opinion as to the correctness of the district court's conclusion that 9 U.S.C. § 205 retains the thirty-day time limit of § 1446(b) for the same reason.

The defendants' application for a writ of mandamus, or alternatively a writ of prohibition, is dismissed for lack of jurisdiction.



William L. LORANGER, individually and as surviving son and sole heir of Carolyn M. Loranger, deceased, and as personal representative of the estate of Carolyn M. Loranger, Plaintiff-Appellant,

v.

Merrett STIERHEIM, etc.,  
et al., Defendants,

Stuart Simon, individually and in his former capacity as county attorney for Metropolitan Dade County, Stanley Price, individually and in his official capacity as assistant county attorney for Metropolitan Dade County, Stuart Sobel, individually and in his official capacity as assistant county attorney for Metropolitan Dade County, William POWELL, individually and in his official capacity as director of the Metropolitan Dade County Public Works Department and his successors in office, Gonzalo Gonzalez, individually and in his official capacity as an employee of the Public Works Department of Metropolitan Dade County, Jack Chazen, individually and in his official capacity as former employee of the Public Works Department of Metropolitan Dade County, John Doe, individually and in his (their) official capacity(ies) as employees of Metropolitan Dade County, and Metropolitan Dade County, a political subdivision of the State of Florida, Defendants-Appellees.

No. 88-5179.

United States Court of Appeals,  
Eleventh Circuit.

Sept. 28, 1993.

Plaintiff's attorney in civil rights case moved for award of fees and recusal of judge.

other statutes. Moreover, our statement has been construed as conflicting with the Supreme Court's decision in *United States v. Rice*, 327 U.S. 742, 66 S.Ct. 835, 90 L.Ed. 982 (1946). See *In re FBI Litig. Cases Consol. II*, 940 F.2d 832, 838-39 n. 4 (3d Cir.1991), cert. denied, \_\_\_ U.S. \_\_\_, 112 S.Ct. 1262, 117 L.Ed.2d 491 (1992); *Federal Sav. & Loan Ins. Corp. v. Framentis Dev. Corp.*, 857 F.2d 265 (9th Cir.1988).

4. We have previously stated that "selection 1447(c)'s application is . . . limited to causes removed from state court pursuant to section 1441(a)." *In re Federal Sav. & Loan Ins. Corp.*, 837 F.2d 432, 436 (11th Cir.1988). We made this statement in a case removed under 12 U.S.C. § 1730b(k)(1) (1988), which authorizes the FSILIC to remove to federal court when acting as the receiver of a federal savings and loan association. It is dubious as to cases removed under

The United States District Court for the Southern District of Florida, No. 81-412-CIV-JWK, James W. Kehoe, J., denied motions. Appeal was taken. The Court of Appeals, Johnson, Senior Circuit Judge, held that: (1) recusal was not required; (2) district court failed to explain how it arrived at hourly rate for attorney and why it reduced number of claimed hours; and (3) court failed to discuss whether case was one of exceptional success.

Affirmed in part, vacated in part, and remanded.

Cox, Circuit Judge, concurred in part, dissented in part, and filed opinion.

#### 1. Federal Courts ⇐813

Disposition of recusal motion is reviewed for abuse of discretion. 28 U.S.C.A. § 455(a).

#### 2. Judges ⇐49(1)

Disqualification on ground that impartiality might reasonably be questioned is required only when alleged bias is personal in nature. 28 U.S.C.A. § 455(a).

#### 3. Judges ⇐49(1)

As general rule, judge's rulings in same case are not valid grounds for recusal. 28 U.S.C.A. § 455(a).

#### 4. Judges ⇐49(1)

Pervasive bias requiring recusal was not shown by judge's two-year delay between motion for attorney fees and initial order, delay between remand of initial fee award and district court's supplemental order, paucity of initial award, and district court's failure to circulate attorney's petition for en banc review of initial award; complaints about trial judge were nothing more than complaints about timeliness and rulings. 28 U.S.C.A. § 455(a).

#### 5. Federal Civil Procedure ⇐2737.4

Starting point in fashioning award of attorney fees is to multiply number of hours reasonably expended by reasonable hourly rate, and this lodestar may then be adjusted for results obtained.

#### 6. Federal Courts ⇐830

Award of attorney fees is reviewed for abuse of discretion.

#### 7. Federal Civil Procedure ⇐2737.1

Failure to adhere to procedures for fashioning attorney fee awards constitutes abuse of discretion.

#### 8. Federal Civil Procedure ⇐2742.5

Party seeking attorney fees bears burden of producing satisfactory evidence that requested-rate is in line with prevailing market rates.

#### 9. Federal Civil Procedure ⇐2742.5

District court was free to disregard deficient affidavits on reasonable hourly rate for attorneys in area and make fee award based on its own experience.

#### 10. Federal Civil Procedure ⇐2742.5

Although district court was free to rely on its own experience in determining reasonable hourly rate, it was not relieved from obligation to explain its reasoning in arriving at reasonable hourly rate.

#### 11. Federal Civil Procedure ⇐2742.5

Party seeking attorney fees begins by submitting evidence of hours worked; district court should then exclude (1) excessive or otherwise unnecessary hours, (2) redundant hours, and (3) hours spent on discrete and unsuccessful claims.

#### 12. Federal Civil Procedure ⇐2737.4

Where court believes that attorney seeking fees is inefficient or unskilled, court should adjust hourly rate, not reduce time billed.

#### 13. Federal Civil Procedure ⇐2742.5

Stating that review of attorney's time sheets reflected total of approximately 800 allowable hours out of 2,807 claimed failed to comply with requirement to explain which hours are disallowed and to show why award of those hours would be improper.

#### 14. Federal Civil Procedure ⇐2742.5

When request for attorney fees is to permit easy division between compensable and noncompensable hours, district court