IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	
	)	CR. NO. 2:10cr186-MHT
MILTON E. MCGREGOR,	)	
THOMAS E. COKER,	)	
ROBERT B. GEDDIE, JR.,	)	
LARRY P. MEANS,	)	
JAMES E. PREUITT,	)	
QUINTON T. ROSS, JR.,	)	
HARRI ANNE H. SMITH,	)	
JARRELL W. WALKER, JR.,	)	
and	)	
JOSEPH R. CROSBY,	)	
	)	
Defendants.	)	
	)	

UNITED STATES' MOTION TO PRECLUDE CROSS EXAMINATION ON BENJAMIN LEWIS' JUDICIAL APPOINTMENT AND ON FBI SOURCE VALIDATION REPORT

The United States, by and through undersigned counsel, moves to preclude cross examination of Benjamin Lewis on matters related to his appointment by then-Governor Bob Riley to a vacant state district judgeship in Dothan, as well as to preclude cross examination of any of the government witnesses on matters relating to a report prepared by an FBI analyst in Washington, D.C. regarding Mr. Lewis' purported motivations for cooperating with the FBI. Mr. Lewis' judicial appointment and the FBI analyst's report both post-date Mr. Lewis' cooperation with the FBI by many months and have no temporal connection with his willingness to make consensual recordings. Those events are thus irrelevant to the jury's assessment of Mr. Lewis' credibility and motivations at the time of his cooperation. Permitting cross examination on these matters would serve no purpose other than to confuse jurors on the proper issues that are before them, see Fed. R. Evid. 403, and to provide a

springboard for the equally inadmissible argument that the current case is but a political prosecution that was orchestrated by then-Governor Riley. As Magistrate Judge Moorer's recent decision to block defendant McGregor's efforts to subpoena trial testimony of Governor Riley demonstrated, that latter argument is not relevant, and should be precluded.

I. BACKGROUND

A. Benjamin Lewis' cooperation with the FBI and the state court judgeship

The evidence at trial will demonstrate that Benjamin Lewis served as a Representative in the Alabama State Legislature from November 2006 until June 2010. Lewis' district included Houston County, where Ronnie Gilley's Country Crossing facility was to be built, and overlapped with the district that Senator Harri Anne Smith served. The evidence will establish that on March 4, 2009, Lewis attended a dinner event at a restaurant in Montgomery called Garrett's. In attendance at that event were Ronnie Gilley, Harri Anne Smith, Jarrod Massey, Scott Beason, a lobbyist named Claire Austin, a businessman named James Stroud, and several country music personalities. Gilley gave the legislators in attendance (e.g., Senators Smith and Beason, and Representative Lewis) a presentation of his Country Crossing development, and "pitched" the merits of pro-gambling legislation that was to be introduced during the 2009 legislative session.

The evidence will establish that in connection with that meeting, Lewis felt that Ronnie Gilley had attempted to bribe him, and more specifically, offered in excess of $200,000 in campaign contributions in exchange for Lewis' vote on the pro-gambling bill. As a result, Lewis decided to contact the FBI to report what had happened at the Garrett's dinner event; his first contact with the FBI occurred on or about March 12, 2009. He agreed to record conversations at the FBI's direction and did in fact make recordings of both Senator Smith and Ronnie Gilley, among others. Lewis

recorded conversations during the 2009 legislative session, which ended in May 2009, and recorded several conversations during the 2010 legislative session. The last recording that he made was April 21, 2010.

At the time that Lewis was cooperating with the FBI and made recordings, he was employed as a State Representative and also worked as a prosecutor in the State's Attorney's Office in Florida. It was not until June 2010 – two months ***after*** the last recording he made at the direction of the FBI – that he was appointed by Governor Riley to a vacancy on the state court bench. Indeed, that judicial position was not even vacant until April 23, 2010, when the judge who had held that position unexpectedly retired. The evidence will show that Lewis went through an application process, which included a submission of his resume and an interview with Governor Riley's staff members. After that application process, Lewis was selected over two other candidates to fill the vacant judgeship position. Lewis was well-qualified for that position, and did not have extensive prior contacts with Governor Riley, other than a handful of business meetings in the presence of other legislators.

B. FBI analyst's source validation report of Benjamin Lewis

Shortly after Benjamin Lewis agreed to record conversations at the FBI's direction, he was classified as a "confidential human source" ("CHS") for the FBI. As a CHS in a significant public corruption investigation, Lewis' file was reviewed by an FBI analyst in Washington D.C. to determine whether he was still a suitable source to be used by the FBI. The analyst's report was completed on March 22, 2011 – months after the instant indictment had been returned by a federal grand jury and 14 months after Benjamin Lewis made the last consensual recording. That 7-page report, which was not prepared by any agent or any law enforcement officer involved in the instant investigation, concluded that "the Source was suitable for operation."

In reaching that conclusion, however, the analyst noted that:

> [A]n additional motivation may have been political gain. The Source reported on subjects who received favors in return for votes supporting specific legislation. The Source, along with the governor, opposed the aforementioned legislation. The Source received a judicial appointment from the governor. The reviewer was unable to determine with certainty if any relationship existed between the Source's appointment and his/her opposition to the legislation.

The FBI analyst's assessment that Benjamin Lewis may have been motivated by political gain was not based on conversations with anyone directly involved in this investigation. The FBI analyst had no contact with Benjamin Lewis, Governor Riley, the prosecutors, or any of the law enforcement officers involved in this investigation in reaching that conclusion of a possible political motive. The assessment was drawn from news accounts relating to Lewis' judicial appointment and the analyst's own conclusions that he took from that news. At bottom, the analyst's conclusion was made without consultation or discussion with anyone that had first-hand knowledge of the relevant facts.

II. DISCUSSION

As the chronology of relevant events described above makes clear, Benjamin Lewis' appointment to the state district court judgeship post-dates his cooperation with the FBI by months. Indeed, the judgeship to which he was ultimately appointed did not even become vacant until three months after he made his final recording at the direction of the FBI. To suggest that the judgeship somehow provided motivation for Lewis to cooperate is a distortion of the facts and the timing of events. Cross examination on this subject would therefore be irrelevant and would serve simply to confuse the jurors. The Court should therefore preclude cross examination on this matter under Fed. R. Evid. 401, 402, and 403.

Impeaching Benjamin Lewis on his motivation to cooperate with the FBI based upon a

judicial appointment that was not even available until months after his last recording was made would also be improper under Fed. R. Evid. 608(b). That rule states:

> Specific instances of conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of a crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

In this case, because the timing of events fails to support the inference that Benjamin Lewis' cooperation was tied to or otherwise connected to his judicial appointment, the appointment is not, as a logical matter, "probative of truthfulness or untruthfulness." Cross examination on this subject should thus be precluded on Fed. R. Evid. 608(b) grounds as well as Fed. R. Evid. 401, 402, and 403.

Similarly, cross examination of ***any*** of the government witnesses using the FBI analyst's report should be precluded.[1] As a threshold matter, that report is hearsay; it was not prepared by anyone involved in the investigation. The report itself, or any reference to it for the purpose of impeachment, should therefore be precluded on hearsay grounds. Fed. R. Evid. 801, 802.

Cross examination with respect to the findings in that report should also be precluded as irrelevant and tending to confuse the issues before the jury. Fed. R. Evid. 401, 402, 403. It is the province of the jury to evaluate the credibility of the witnesses at trial, not the FBI. For the same reasons that the government cannot introduce evidence that FBI personnel found a government witness particularly credible, the defense should not be permitted to cross examine using a report generated by an analyst with no first-hand knowledge of the investigation, as grounds to impeach.

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[1] This would include, for example, precluding cross examination of any of the testifying FBI agents with the analyst's report.

The Supreme Court has long recognized that it would be "grossly unfair to allow the defense to use statements to impeach a witness which could not fairly be said to be the witness' own rather than the product of the investigator's selections, interpretations, and interpolations." Palermo v. United States, 360 U.S. 343, 350 (1959). Simply put, neither Lewis nor anyone involved in this investigation authored the report at issue. Any attempt therefore to cross examine witnesses with this report would therefore be improper.

The true purpose of cross examination on these matters would be to further defense counsel's characterization of the current case as a political prosecution orchestrated by Governor Riley. That argument is clearly improper and irrelevant. It has no "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. It invites the jury to acquit based on beliefs and opinions outside of the evidence presented at trial and the Court's legal instructions. Such invitations to nullify are clearly improper and should be precluded. See, e.g., United States v. Trujillo, 714 F.2d 102, 105 (11th Cir. 1983) ("Appellant's nullification argument would have encouraged the jurors to ignore the court's instruction and apply the law at their caprice. While we recognize that a jury may render a verdict at odds with the evidence or the law, neither the court nor counsel should encourage jurors to violate their oath."); see also United States v. Perez, 86 F.3d 735, 736 (7th Cir. 1996) ("An unreasonable jury verdict, although unreviewable if it is an acquittal, is lawless, and the defendant has no right to invite the jury to act lawlessly. Jury nullification is a fact, because the government cannot appeal an acquittal; it is not a right, either of the jury or of the defendant."); see also United States v. Bruce, 109 F.3d 323, 327 (7th Cir. 1997) ("Jury nullification 'is not to be positively sanctioned by instructions,' but is to be viewed as an 'aberration under our

system.'") (quoting United States v. Anderson, 716 F.2d 446, 450 (7th Cir. 1983)); Scarpa v. Dubois, 38 F.3d 1, 11 (1st Cir. 1994) (noting that "defense counsel may not press arguments for jury nullification in criminal cases"); United States v. Sepulveda, 15 F.3d 1161, 1190 (1st Cir. 1993) ("[N]either the court nor counsel should encourage jurors to exercise [nullification] power. . . . A trial judge, therefore, may block defense attorneys' attempts to serenade a jury with the siren song of nullification.").

III. CONCLUSION

For the foregoing reasons, the Court should grant the government's motion to preclude cross examination on the subjects described herein.

Respectfully submitted,

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Acting Under Authority of 28 U.S.C. § 515

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CERTIFICATE OF SERVICE

I hereby certify that on June 20, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all attorneys of record.

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