

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

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.) CR. NO. 2:10cr186-MHT
)
 MILTON E. McGREGOR,)
)
 Defendant.)

**REPLY IN OPPOSITION TO UNITED STATES MOTION TO ADMIT
PEDAGOGICAL SUMMARIES INTO EVIDENCE**

In its Motion to Admit Exhibits 1199-1206 into evidence, the Government relies on two circuit court cases, *United States v. Poschwatta*, 829 F.2d 1477 (9th Cir. 1987), *overruled on other grounds by Cheek v. United States*, 498 U.S. 192 (1991) and *United States v. Bray*, 139 F.3d 1104, 111-12 (6th Cir. 1998). [Doc. 1397].

Although finding that the District Court did not abuse its discretion in admitting into evidence pedagogical summary charts, the Ninth Circuit in *Poschwatta* expressly stated that “the **better practice** may have been for the court to allow the charts to be used as testimonial aids only,....”. (emphasis added). The dicta from *Bray* relied upon by the Government recognizes a third type of summary chart which is a hybrid of a Rule 1006 summary and a summary that is merely a pedagogical device. 139 F.3d at 1111-1112. This hybrid summary or “secondary evidence chart”, which the Sixth Circuit held can be admitted into evidence, has not been recognized in the Eleventh Circuit as far as undersigned counsel can determine. However, even to qualify as a “secondary evidence chart” under the dicta in *Bray*, such a summary must “accurately and reliably summarize **complex or difficult** evidence....” *Id.* at 1112 (emphasis

added). As demonstrated during the June 28th argument on whether these summary financial charts satisfy the requirements of Rule 1006, the information summarized on these summary financial charts is neither complex nor difficult and, therefore, even if “secondary evidence charts” were recognized in the Eleventh Circuit, these charts would not qualify. *See, e.g.* Exhibit 1202 (summarizing seven checks); Exhibit 1203 (summarizing five checks) and Exhibit 1204 (summarizing four checks).

Exhibits 1199-1206, which are mere pedagogical aids, should not be admitted into evidence and should not go to the jury room. *See, e.g., 6 Weinstein's Federal Evidence* § 1006.04 (“Pedagogical-device summaries are used to summarize evidence and are not themselves admitted into evidence.”); *United States v. Janati*, 374 F.3d 263, 273 (4th Cir. 2004) (pedagogical charts or summaries “are not admitted as evidence”); *United States v. Taylor*, 210 F.3d 311, 315 (5th Cir. 2000) (recognizing that pedagogical charts “are not admitted into evidence and should not go to the jury room....”).

s/ J. David Martin

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