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.	)	

RESPONSE TO UNITED STATES'
MOTION REGARDING FED. R. EVID. 608(A)

Agent McEachern can be asked for his opinion on the character of other Government witnesses for truthfulness. Fed. R. Evid. 608(a). Beyond that, Agent McEachern can also be asked questions relevant to proving that the facts are different from the way other witnesses portrayed them, and can be asked questions relevant to proving that the other witnesses' accounts are implausible as a matter of fact.

This type of questioning about facts, undermining the account of other witnesses on those facts, is not a question governed by Rule 608. Rule 608 is about evidence of a witness's *character* (including character for truthfulness). When questions are asked for reasons of impeachment other than "character," it is not a Rule 608 problem. This is explained in the Committee notes on the 2003 amendments to Rule 608:

> The Rule has been amended to clarify that the absolute prohibition on extrinsic evidence applies only when the sole reason for proffering that evidence is to attack or support the witness' character for truthfulness. See United States v. Abel, 469 U.S. 45 [83 L. Ed. 2d 450] (1984); United States v. Fusco, 748 F.2d 996 (5th Cir. 1984) (Rule 608(b) limits the use of

> evidence "designed to show that the witness has done things, unrelated to the suit being tried, that make him more or less believable per se"); Ohio R.Evid. 608(b). On occasion the Rule's use of the overbroad term "credibility" has been read "to bar extrinsic evidence for bias, competency and contradiction impeachment since they too deal with credibility." American Bar Association Section of Litigation, Emerging Problems Under the Federal Rules of Evidence at 161 (3d ed. 1998). The amendment conforms the language of the Rule to its original intent, which was to impose an absolute bar on extrinsic evidence only if the sole purpose for offering the evidence was to prove the witness' character for veracity.
>
> By limiting the application of the Rule to proof of a witness' character for truthfulness, the amendment leaves the admissibility of extrinsic evidence offered for other grounds of impeachment (such as contradiction, prior inconsistent statement, bias and mental capacity) to Rules 402 and 403.

(emphasis supplied).

Furthermore the cases that the Government cites do not preclude a party from asking questions that undermine another witness's testimony, about historical events that occurred outside the courtroom. They stand only for the proposition that a witness should not be asked whether another witness lied in his testimony (or conversely should not be asked to attest that another witness should be believed).

This was holding of *United States v. Schmitz*, 634 F.3d 1247 (11th Cir. 2011), which the Government cites. The improper questions were whether the testifying defendant would accuse prosecution witnesses of being liars. The Eleventh Circuit addressed this under the heading "Prosecutorial Misconduct: The 'Were-They-Lying' Questions and Comments." *Id.* at 1267. The objectionable questions were squarely of that sort: are you saying that the other witness was lying on the witness stand?[1] The Eleventh Circuit held: "We hold that it is improper to ask a testifying defendant whether

[1] *Schmitz*, 634 F.3d at 1267 (recounting the questions).

another witness is lying." *Id.* at 1268. The Court explained, in part,

> Moreover, the were-they-lying questions have little or no probative value because they seek an answer beyond the personal knowledge of the witness. See Harris, 471 F.3d at 511 (stating that such questions "force a witness to testify as to something he cannot know, i.e., whether another is intentionally seeking to mislead the tribunal"); Fed. R. Evid. 602 ("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."). The were-they-lying questions are also not relevant because one witness's opinion that another person has or has not lied does not make it more or less likely that the person actually lied. Fed. R. Evid. 401. And, the were-they-lying questions distract the jury from the central task of determining what version of events is accurate in order to determine a defendant's guilt or innocence.

Schmitz, 634 F.3d at 1268-69.

That last sentence is crucial, and shows the boundaries of the holding. Questions are proper when they help the jury determine what version of events is accurate. "Do you think that other guy was lying" doesn't help the jury figure out what the historical facts were. But other sorts of questions – even including "in your experience, is it plausible to suggest that that the facts were such-and-such" – *can* help the jury in its "central task" (*Schmitz*, *supra*) of determining the facts. Likewise, questions like "when you were interviewing the witness over multiple occasions, did her account change from one time to the next" *can* help the jury in that task. There are many other sorts of examples, which the Government would call improperly "impeaching the credibility of the government's other witnesses" (Doc. 1350 at 1) but which are entirely proper.

The Eleventh Circuit made clear that it was not precluding every sort of questioning of a witness that was designed to highlight implausibilities or errors in the testimony: "We agree that 'it is often necessary on cross-examination to focus a witness

on the differences and similarities between his testimony and that of another witness. This is permissible provided he is not asked to testify as to the veracity of the other witness.'" *Schmitz*, 634 F.3d at 1269. The opinion only bars the "were they lying" questions, not "was their testimony accurate" questions. The opinion recognizes that there are various reasons why testimony could be inaccurate, other than lying. *Id.* at 1269 The opinion bars "were they lying" questions, not questions designed to demonstrate inaccuracy of another witness's testimony in other ways.

Questioning like "are you saying that the other witnesses were lying?" was also at issue in *United States v. Thomas*, 453 F.3d 838, 845-46 (7th Cir. 2006), on which the Government relies.[2] *Thomas* in turn relied on another case that is squarely about that same question, *United States v. McKee*, 389 F.3d 697 (7th Cir. 2004).

The other cases that the Government cites are the flip side of the coin: just as a witness may not be forced to state whether another witness has lied on the witness stand, a witness should not testify that another witness's testimony should be believed.[3] This

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[2] *Thomas*, 453 F.3d at 845-46: "At the close of Thomas's cross-examination, the prosecutor questioned him on the disparities between his testimony and that of Officer Fahrney and Enjoli McAlister. Thomas denied the truth of their statements. The prosecutor pressed on, asking if it was Thomas's testimony that Fahrney and McAlister were liars. …. Later, during closing arguments, the prosecutor returned to this exchange and attempted to discredit Thomas by telling the jury he had called Fahrney and McAlister liars."

[3] This was the situation in *Snowden v. Singletary*, 135 F.3d 732 (11th Cir. 1998), disapproving testimony from an "expert" witness who was called to testify that a child witness was credible because children are credible. *Id.* at 737: "The evidence at issue in this petition is testimony by an expert witness (Dr. Miranda) that 99.5% of children tell the truth and that the expert, in his own experience with children, had not personally encountered an instance where a child had invented a lie about abuse."

The remaining case cited by the Government is *United States v. Henderson*, 409 F.3d 1293, 1299

"you should believe the other witness" testimony is also very different from the questions that have been asked and may be asked of Agent McEachern in this case. He is not merely being asked to tell the jury whether Mr. Gilley or anyone else is lying on the witness stand. The questions in this case call upon Agent McEachern's knowledge, to shed light on underlying facts. If Agent McEachern will testify to facts that are "impeaching" of other witnesses, in the sense that his testimony will undermine what they have said about historical facts, that is not improper "credibility" testimony. It is not even testimony that is governed by Rule 608. It is, simply, relevant testimony.

Bringing out inconsistencies in the stories of informants and other cooperating government witnesses through Agent McEachern is also particularly relevant and permissible to determine what, if anything, the Government did to investigate the inconsistencies. Because such discrepancies do not involve collateral issues, for example, did Gilley or Lewis approach the other about a perceived bribe at the Garrett's dinner, it is a proper ground for cross examination to inquire of Agent McEachern what, if anything, he did to try and reconcile two divergent accounts.

(11th Cir. 2005), was about whether one passage of testimony from a government witness was an improper vouching for the credibility of another witness. The Court held that it was not. Again, the Court certainly did not preclude any questions beyond those that are merely asking one witness whether another witness was credible and telling the truth on the witness stand. The Court did not preclude any questions designed to get at historical facts.

s/ J. David Martin
Robert D. Segall (ASB-7354-E68R)
Shannon Holliday (ASB-5440-Y77S)
J. David Martin (ASB-7387-A54J)
COPELAND, FRANCO, SCREWS & GILL, P.A.
444 S. Perry Street (36104)
Post Office Box 347
Montgomery, Alabama 36101-0347
T: 334/834-1180 F: 334/834-3172
Email: martin@copelandfranco.com
Email: segall@copelandfranco.com
Email: holliday@copelandfranco.com
Co-Counsel for Defendant Milton E. McGregor

Joe Espy, III (ASB-6591-S82J)
Benjamin J. Espy (ASB-0699-A64E)
William M. Espy (ASB-0707-A41E)
MELTON, ESPY & WILLIAMS, P.C.
Post Office Drawer 5130
Montgomery, Alabama 36103
T: 334/263-6621 F: 334/263-7252
Email: jespy@mewlegal.com
Email: bespy@mewlegal.com
Email: wespy@mewlega.com

Fred D. Gray (ASB-1727-R63F)
Walter E. McGowan (ASB-8611-N27W)
GRAY, LANGFORD, SAPP, MCGOWAN,
GRAY, GRAY & NATHANSON, P.C.
Post Office Box 830239
Tuskegee, Alabama 36083-0239
T: 334/727-4830 F: 334/727-5877
Email: fgray@glsmgn.com
Email: wem@glsmgn.com

Sam Heldman (ASB-3794-N60S)
THE GARDNER FIRM, P.C.
2805 31st Street NW
Washington, D.C. 20008
T: 202/965-8884 F: 202/318-2445
Email: sam@heldman.net

CERTIFICATE OF SERVICE

I hereby certify that on June 30, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/EFC system which will send notification of such filing to the following:

Barak Cohen
Brenda K. Morris
Emily Rae Woods
Eric Olshan
John Luman Smith
Edward T. Kang
U.S. Department of Justice
1400 New York Avenue, NW
Washington, DC 20005

Lewis V. Franklin, Sr.
Steve Feaga
U.S. Attorney's Office
P.O Box 197
Montgomery, AL 36101-0197

David McKnight
Joel E. Dillard
William Joseph Baxley
Baxley, Dillard, Dauphin, McKnight & Barclift
2008 Third Avenue South
Birmingham, AL 35233

Jack Sharman
Samuel Holley Franklin
Lightfoot, Franklin & White
400 20th Street North
Birmingham, AL 35203

John Mark Englehart
Englehart Law Offices
9457 Alysbury Place
Montgomery, AL 36117-6005

Ruth H. Whitney
One Financial Center, Ste. 305
650 S. Shackleford Road
Little Rock, AR 72212

Ron W. Wise
Attorney at Law
200 Interstate Park Drive, Suite 105
Montgomery, AL 36109

H. Lewis Gillis
Tyrone C. Means
Thomas Means Gillis & Seay
P.O. Drawer 5058
Montgomery, AL 36103

J. W. Parkman, III
Richard Martin Adams
William Calvin White, II
Parkman, Adams & White
505 20th Street North, Suite 825
Birmingham, AL 35203

Susan G. James
Jeffery C. Duffey
Denise Arden Simmons
Susan G. James & Associates
600 South McDonough Street
Montgomery, AL 36104

Thomas M. Goggans
Attorney at Law
2030 East Second Street
Montgomery, AL 36106

William N. Clark
Stephen W. Shaw
William H. Mills
Redden Mills & Clark
505 North 20th Street, Suite 940
Birmingham, AL 35203

James P. Judkins
JUDKINS, SIMPSON, HIGH & SCHULTE
1102 North Gadsden Street
Tallahassee, Florida 32303

s/ J. David Martin
Of Counsel