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 DOC. 1312

Milton McGregor responds as follows to Doc. 1312, in which the Government argues the admissibility of testimony from witness Traylor about the State's receipt of federal funds.

In *United States v. Castro*, 89 F.3d 1443 (11th Cir. 1996), a witness was allowed to testify that the government entity received more than $10,000 in federal funds because the witness had personal knowledge of that fact. *Id.* at 1454-55. The witness was not just testifying about what he had learned from documents; he knew it. *Id.* Here, by contrast, Ms. Traylor did not have personal knowledge; what she claimed to know, she learned from looking at documents that told her those things. "THE COURT: Okay. So you essentially do rely on documents, is that correct? THE WITNESS: We do. That's what an audit is all about." (real time transcript). Certainly there is no reason in the record to believe that Ms. Traylor does have personal knowledge – i.e., knowledge gained in some

way other than reading documents prepared by others – of the facts that the Government is seeking to introduce.

It might be different if Ms. Traylor claimed to have seen a check or a wire transfer with her own eyes. Then we would be arguing about whether the amount of the check or wire transfer was the "contents of a writing" that must be proven by the check or wire transfer documents. But the Government has not even got the case to that point yet. The Government has not shown that Ms. Traylor has any knowledge derived from sources other than reading documents prepared by others.

The Government claims that the "defense has not raised an objection to Ms. Traylor's testimony under Federal Rule of Evidence 602." (Doc. 1312, p. 4). That is wrong. Lack of personal knowledge (which is what Rule 602 is about) was a cornerstone of Mr. McGregor's objection and argument. "MR. SEGALL: … I don't believe the witness has firsthand knowledge.:" "MR. SEGALL: The problem Your Honor is the witness has no firsthand knowledge of this. She only knows it from reviewing documents." Etc. (real time transcript).

The Government relies on two cases for its claim that knowledge gained from documents is "personal." In *United States v. Weaver*, 281 F.3d 228, 231 (D.C. Cir. 2002), there is no indication that the case involved an attempt to prove things without introducing the underlying documents into evidence; there is no mention of any "best evidence" contention in the case. *United States v. Neal*, 36 F.3d 1190, 1206 (1st Cir. 1994) (allowing bank employee to testify that she had seen records of bank's FDIC-

insured status and of its having some out-of-state customers), is probably wrong, but in any event it is unlike this case because here there is not even any evidence that Ms. Traylor has seen the primary documents herself; she is, for all the Court can tell at this point, relying *only* on secondary documents – audit reports – as the source of her "knowledge."

The Government alternatively seeks to introduce documents that it did not share as exhibits within the time set by the Court. These documents would not be rebuttal, or impeachment. They would be designed to meet the Government's burden of proof on one of the elements of 18 U.S.C. § 666. These documents are the very sort of thing that is at the core of the reason for exchanging exhibits before trial. There is no excuse for the Government's failure to have listed them. The Government did list and exchange one document, for one year. There is no reason, other than strategy, why the Government would have chosen to list and exchange only that one. The Court should therefore decline to excuse the Government's noncompliance with the exhibit-exchange deadline in this particular instance.

Respectfully submitted,

s/ Benjamin J. Espy
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