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.	)	

MOTION FOR FOUNDATION FOR SUMMARY WITNESS TESTIMONY OF PHILLIP HARROD, FOR RULING AS TO THE ADMISSIBILITY OF SAME AND FOR JURY INSTRUCTION

The Government has indicated its intention to introduce the testimony of a summary witness, Phillip Harrod. Initially, the Government represented that Mr. Harrod would be a rebuttal witness only. However, as of July 1, 2011, Defendants learned that Mr. Harrod would serve as a summary witness in the Government's case in chief. At that point, ninety new exhibits were identified for use with Mr. Harrod. (Objections filed as to these new exhibits are still pending.[Doc. 1431])

As the Court knows, the use of a summary witness should be strictly limited because use of a summary witness potentially: (a) invades the province of the jury by permitting a government witness to comment on the evidence presented and (b) provides the Government an opportunity essentially to have two bites at closing argument.

Courts have concluded that a summary witness should only be allowed in "exceptional cases" because the credibility of a summary witness may be substituted for the credibility of the evidence summarized. See U.S. v. Baker, 10 F.3d 1374, 1412 (9th Cir. 1993); see also Weinstein's Federal Evidence Sec. 1006.04 (warning that a summary witness should only be

allowed in "exceptional cases" because of their tendency to usurp the function of the jury and substitute their own credibility for the credibility of the evidence summarized); United States v. Johnson, 54 F.3d 1150 (4th Cir.), cert. denied, 516 U.S. 903, 133 L.Ed. 2d 187, 116 S.Ct. 265 (1995) (summary witness testimony is inappropriate in a normal case given inherent dangers, including confusion); see also U.S. v. Castillo, 77 F.3d 1480, 1499 (5th Cir. 1996) (Rule 1006 does not contemplate summarization of live testimony presented in court and criticizing Government for permitting one prosecution witness to recap the testimony of another); U.S. v. Fullwood, 342 F.3d 409, 413-414 (5th Cir. 2003) (special agent without justification as rebuttal witness allowed to recap substantial portions of government's case in chief); U.S. v. Flores de Jesus, 569 F. 3d 8, 18-19 (1st Cir. 2009) (describing the reluctance of courts to allow the government an additional opportunity to present its case in a tidy package at the end).

Some courts have even held that a threshold question for admissibility of summary testimony should be the same as that for summary charts: (1) whether the evidence to be summarized is so voluminous in nature and (2) whether review by the jury would be inconvenient. See U.S. v. Bishop, 264 F.3d 535 (5th Cir. 2001) (summary evidence and testimony governed by whether evidence is voluminous and review by jury is inconvenient as with summary evidence).

In addition, even if summary evidence is permitted, it must have an adequate foundation in evidence already admitted, and should be accompanied by a cautionary instruction. U.S. v. Bishop, 264 F.3d 535 (5th Cir. 2001).

Given the problematic nature of the summary witness as a trial tactic and given the length of the trial and the Government's tendency to revisit the same evidence repeatedly through the multiple witnesses, Defendant McGregor asks that the Court: (1) require the Government to

identify the areas it intends to address through Phillip Harrod; (2) permit objections to the same; and (3) rule on those objections, all outside the presence of the jury.

Furthermore, McGregor takes the position that none of the evidence at issue in this case, with the possible exception of the toll records which are the subject of the testimony of a different witness, constitutes evidence which is voluminous enough to justify any sort of summary witness or testimony. The mere fact that this case involves a long indictment and that the Government has chosen to try all Defendants together should not justify a summary witness. The bottom line is that there is no particular area of the evidence (outside possibly the toll record evidence)[1] which itself involves voluminous records. No aspect of the case involves complicated, technical facts. Thus, the jury will *not* be aided by the summarization. Instead, it will merely give the Government an early shot at presenting part of its closing argument and invade the province of the jury.

Even if some of the summary testimony is permitted over objection, Defendant McGregor asks that a jury instruction be given prior to the testimony to insure that the jury understands that the summary witness is not an expert, is not giving opinion testimony, that his testimony itself is not evidence and is not binding on the jury in any way. The instruction should make it clear to the jury that they must rely ultimately on their own understanding and review of the evidence.

WHEREFORE, Defendant McGregor moves the Court to require the Government to lay the foundation for each area about which the Government wishes the summary witness to testify outside the presence of the jury, to permit objections thereto, and further asks that the Court issue

[1] The toll record exhibits are also the subject of a motion by McGregor to exclude based on their late disclosure by the Government. [Doc. 1431]

a ruling limiting the areas of testimony upon ruling on those objections. McGregor further asks the Court to issue an appropriate limiting instruction.

s/Shannon L. Holliday
Robert D. Segall (ASB-7354-E68R)
Shannon L. Holliday (ASB-5440-Y77S)
J. David Martin (ASB-7387-A54J)
Ashley N. Penhale (ASB-1771-A50P)
Clayton R.Tartt
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
Email: Penhale@copelandfranco.com
Email: Tartt@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

Ruth H. Whitney
Attorney at Law
One Financial Centre, Suite 305
650 South. Shackleford Road
Little Rock, AR 72212
Telephone: *(501)* 954-7878
Email: rwhitney@inveritainfo.com

CERTIFICATE OF SERVICE

I hereby certify that on this the 20th day of July, I have filed the foregoing document with the Clerk of the Court using the CM/ECF System which will notify the following counsel of record electronically:

Andrew Darrell Arrington aarrington@ago.state.al.us, andrewa_atty@yahoo.com, mhays@ago.state.al.us

Barak Cohen barak.cohen@usdoj.gov, barakcohenaccount@gmail.com

Brenda K Morris Brenda.Morris@usdoj.gov

Brett Michael Bloomston brettbloomston@hotmail.com

David Jerome Harrison davidjharrison@centurytel.net

Denise Arden Simmons Dsimlaw@aol.com

Edward T. Kang edward.kang3@usdoj.gov

Emily Rae Woods rae.woods@usdoj.gov

Eric Olshan eric.olshan@usdoj.gov

Glory R. McLaughlin grm@rmclaw.com,

G. Douglas Jones gdj@hsy.com, tmf@hsy.com

H. Lewis Gillis hlgillis@tmgslaw.com, lksteele@tmgslaw.com, tvenice@tmgslaw.com

Jackson R Sharman , III jsharman@lightfootlaw.com, adalton@lightfootlaw.com,

James P. Judkins jjudkins@readyfortrial.com, fsnavely@readyfortrial.com

James W. Parkman , III parkman@parkmanlawfirm.com

Jeffery C. Duffey jcduffey@aol.com, jcduffey@bellsouth.net

Jeffrey P. Doss jdoss@lightfootlaw.com, mistyg@lightfootlaw.com

Joel E. Dillard jdillard@bddmc.com

John M. Englehart jmenglehart@gmail.com

Joseph James Basgier , III joebasgier@gmail.com

Joshua Logan McKeown jmckeown@parkmanlawfirm.com, parkman@parkmanlawfirm.com

Justin V. Shur justin.shur@usdoj.gov, debbie.shaw@usdoj.gov

Larry Dean Simpson lsimpson@readyfortrial.com, fsnavely@readyfortrial.com

Louis V. Franklin , Sr louis.franklin@usdoj.gov, debbie.shaw@usdoj.gov

Martha Geron Gadd mgerongaddsgja@gmail.com,

Michael R. Pennington mpennington@babc.com, lstewart@babc.com

Richard M. Adams adams@parkmanlawfirm.com, parkman@parkmanlawfirm.com

Ronald W. Wise ronwwise@aol.com, melisslinn@aol.com

Ruth H. Whitney rwhitney@inveritasinfo.com, kmclelland@inveritasinfo.com

Samuel H. Heldman sam@heldman.net

Samuel H. Franklin sfranklin@lightfootlaw.com, kayb@lightfootlaw.com

Sandra Payne Hagood sandra@hagoodappellate.com

Stephen P. Feaga steve.feaga@usdoj.gov, brittney.boshell@usdoj.gov, debbie.shaw@usdoj.gov

Stephen W. Shaw sws@rmclaw.com, melissa@rmclaw.com

Stewart D. McKnight , III dmcknight@baxleydillard.com

Susan G. James sgjamesandassoc@aol.com, Dsimlaw@aol.com, mgaddSJLAW@aol.com

Thomas Julian Butler tb@hsy.com

Thomas M. Goggans tgoggans@tgoggans.com

Tyrone C. Means tcmeans@tmgslaw.com, sdprice@tmgslaw.com, twevans@tmgslaw.com

William Joseph Baxley BBaxley@bddmc.com

William Hayes Mills whm@rmclaw.com, leighann@rmclaw.com

William N. Clark wnc@rmclaw.com, Lisa@rmclaw.com

William C. White , II wwhite@parkmanlawfirm.com, parkman@parkmanlawfirm.com

s/Shannon L. Holliday
Of Counsel