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

UNITED STATES OF AMERICA,	**CR. NO. 2:10cr186-MHT**
v.	
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.** **JOSEPH R. CROSBY**	
Defendants.	

UNITED STATES' MEMORANDUM OF LAW IN SUPPORT OF THE ADMISSIBILITY OF GAIL TRAYLOR'S TESTIMONY

The United States of America, by and through its undersigned counsel, hereby submits the following points and authorities in support of the admissibility of the testimony of Gail Traylor:

On June 21, 2011, in the course of the direct examination of Ms. Traylor, counsel for the government asked the witness: "Based on your position would you be able to tell us whether the state of Alabama received more than ten thousand dollars in federal funds for certain years?" June 21, 2011 Tr. (Morning Session). The question drew an objection from defense counsel who, when asked by the court the basis of the objection, responded, "It would be the best evidence rule, Your Honor. I think the witness would only know that from documents." Id.

Under controlling Eleventh Circuit law, however, the best evidence rule is inapplicable and thus cannot bar the testimony the government seeks to elicit from Ms. Traylor. Moreover, the Eleventh Circuit has elsewhere deemed admissible testimony strikingly similar, if not identical, to what the government seeks to admit here – that is, testimony from a public employee about whether a state or local government entity had received more than $10,000 in federal funds to satisfy the jurisdictional requirement of 18 U.S.C. § 666. Accordingly, the Court should overrule the defense objection and admit Ms. Traylor's testimony. Even if, however, the court deems Ms. Traylor's testimony inadmissible, the audit reports produced by Ms. Traylor's office should be admitted as either a record of regularly conducted activity under Federal Rule of Evidence 803(6) or as a public record or report under Federal Rule of Evidence 803(8)(B).

The Eleventh Circuit has clearly held that Federal Rule of Evidence 1002, commonly known as the "best evidence rule," "requires production of an original document only when the proponent of the evidence seeks to prove the content of the writing." Allstate Ins. Co. v. Swann, 27 F.3d 1539, 1543 (11th Cir. 1994) (emphasis added). Moreover, as the Court of Appeals went on to note in Swann, Rule 1002 "does not … 'require production of a document simply because the document contains facts that are also testified to by a witness.'" Id. (quoting United States v. Finklestain, 718 F. Supp. 1187, 1192 (S.D.N.Y. 1989)). As counsel for the government made clear in court on June 21, the government was not attempting to prove the content of any writing through the testimony of Ms. Traylor. June 21, 2011 Tr. (Morning Session) ("At this point in the testimony I don't believe the government is trying to prove the content of a writing. The fact that information is contained in a writing is something separate and apart from whether this witness has knowledge of that information."). Rather than seeking to prove the content of any writing, the government is seeking to establish that, based upon her knowledge as Director of the

State Audit Division within the Alabama Department of Examiners of Public Accounts, the State of Alabama received significantly more than $10,000 in federal funds for the years charged in the indictment. Under the Eleventh Circuit's interpretation of the rule, then, the best evidence rule is inapplicable here, and the testimony the government seeks to elicit from Ms. Traylor is clearly admissible.

Even if Swann were the only Eleventh Circuit case on point, Ms. Traylor's testimony would be admissible. But the Eleventh Circuit has actually applied Swann to facts strikingly similar to those at issue here and concluded that testimony from a public employee like Ms. Traylor is admissible for the purposes of establishing the $10,000 jurisdictional requirement under 18 U.S.C. § 666. In United States v. Castro, 89 F.3d 1443 (11th Cir. 1996), a defendant challenged his conviction for federal programs bribery by arguing, among other things, that the district court should have excluded the testimony of a county employee who testified that the county received federal grants in excess of $10,000 because the witness lacked the requisite personal knowledge under Federal Rule of Evidence 602. Id. at 1454. The defendant in Castro also argued, as defendants do here, that the best evidence rule barred the testimony of the county employee "because the government should have entered [a] composite exhibit … that detailed federal funds Metropolitan Dade County received." Id. at 1455. The Eleventh Circuit rejected both arguments.

With respect to the defendant's argument that the best evidence rule barred the county employee's testimony, the Eleventh Circuit, citing Swann, concluded that "[w]e do not believe that Rule 1002 of the Federal Rules of Evidence was implicated in this case because the questions posed to [the county employee] did not seek to elicit the 'contents' of [the] composite exhibit …" Id. "Rather," the court continued, "the questions were aimed at showing that Dade

County received substantially more than $10,000 in federal grants, and not necessarily the exact amount or details surrounding the county's receipt of millions of dollars in federal grants." Id. The Eleventh Circuit's holding in Castro is applicable here: as with the testimony of the county employee in Castro, the government is not "seek[ing] to elicit the 'contents'" of the annual federal programs audits she performed. Instead, the government's questions are "aimed at showing that [the state of Alabama] received substantially more than $10,000 in federal grants." Id. The best evidence rule, therefore, does not bar Ms. Traylor's testimony.[1]

The defense has not raised an objection to Ms. Traylor's testimony under Federal Rule of Evidence 602, but any such objection should be rejected by this court, as it was by the Eleventh Circuit in Castro. The Castro court held that the witness had the requisite personal knowledge of the federal grants received by virtue of his position in the county finance department. Similarly, Ms. Traylor, through her position in the Department of Examiners of Public Accounts, has gained personal knowledge of the amounts of federal grant funds received by the State of

[1] Assuming, as suggested by the defense, the best evidence rule applied, the government should be permitted to admit into evidence the audit reports Ms. Traylor prepared. The audit reports fall within two clearly established exceptions to the hearsay rule, Rule 803(6) and Rule 803(8). The reports are admissible under Rule 803(6) because, as the rule requires, they constitute a "report, record, or data compilation … kept in the course of a regularly conducted business activity." See, e.g., United States v. Frazier, 53 F.3d 1105 (10th Cir. 1995) (Department of Labor audit admissible under Rule 803(6)). The reports are also admissible under Rule 803(8) because they constitute "records, reports, statements, or data compilations of public offices or agencies," as required under the Rule. See, e.g., United States v. De La Cruz, 469 F.3d 1064 (7th Cir. 2006) (noting admissibility of municipal audit report under Rule 803(8)); United States v. Logan, 641 F.2d 860 (10th Cir. 1981) (noting admissibility of Bureau of Indian Affairs audit under both Rule 803(6) and 803(8)). Because the audit reports are clearly admissible under either or both of Rules 803(6) and 803(8), the government hereby moves for their admission into evidence in the event the court should conclude that Ms. Traylor's testimony is inadmissible. While only one of the audit reports was previously identified as an exhibit, the defendants can not claim unfair surprise if the court were to allow the government to admit the additional reports. The defendants had more than sufficient notice of this evidence. The $10,000 jurisdictional requirement under 18 U.S.C. § 666 (*i.e.*, that the State of Alabama received more than $10,000 in federal funds for the relevant years) is alleged in the indictment and the government pre-marked as an exhibit one of the federal program audit reports which demonstrates this point. Moreover, the audit reports for the relevant years and others are publicly available and therefore accessible to the defendants.

Alabama. Indeed, as Ms. Traylor's testimony indicated, she is required by law to know – and to account for – the amount of money the state receives and disburses from the federal government. June 21, 2011 Tr. (Morning Session) ("One of the requirements of the Circular A133 is that we prepare for the report a schedule of expenditures of federal awards and even though that's what's in the title we also have to report the federal receipts, what is received from the federal government.") While it is true that the county employee whose testimony was admitted in Castro worked in the department that was responsible for receiving federal grant monies on behalf of the county, Castro, 89 F.3d at 1454, the Eleventh Circuit's opinion makes clear that the witness was not required to have knowledge of every grant received – let alone to have been the individual who actually received the funds – in order for his testimony to be both admissible under Rule 602 and sufficient to satisfy the jurisdictional amount required by 18 U.S.C. § 666. Id. at 1454 n.8 (noting that while the witness could not recall the specific number of grants the country received, he testified that the grants exceeded $90 million). Thus, in some sense, Ms. Traylor, by virtue of the fact that she is required by law to account for every federal grant dollar received by the state, is better positioned than the witness in Castro to testify about the state's receipt of federal funds. The mere fact that Ms. Traylor gains her knowledge of the federal monies received by conducting her statutorily mandated audit does not make that knowledge any less "personal" for the purposes of Rule 602.[2]

[2] It bears emphasis that at least two other circuits have held that, for the purposes of Rule 602, a witness' personal knowledge can be derived from documents and records the witness gathered or reviewed in the course of his employment. In United States v. Weaver, 281 F.3d 228, 231 (D.C. Cir. 2002), the D.C. Circuit held that a postal inspector who was also a certified internal auditor could testify about his "personal knowledge" gleaned from a review of ledgers, cash register logs, and other documentary evidence. Similarly, in United States v. Neal, 36 F.3d 1190, 1206 (1st Cir. 1994), the First Circuit held that Rule 602 did not bar a bank employee's testimony about (1) records that indicated the bank was federally insured and (2) records that indicated the bank had customers and a correspondent bank account out of state.

Because neither Rule 1002 nor Rule 602 bar the testimony the government seeks to elicit from Ms. Traylor, the Court should allow her testimony to proceed – subject of course to cross-examination by the defense.

DATED: June 22, 2011

Respectfully submitted,

By: /s/ Justin V. Shur_____
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CERTIFICATE OF SERVICE

I HERBY CERTIFY that on this date, I caused the foregoing motion to be electronically filed with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the attorneys of record for the defendants.

DATED: June 22, 2011

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