IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

UNITED STATES OF AMERICA

VS. **CRIMINAL NO. 3:08CR014**

ROBERT L. MOULTRIE, et al.

REBUTTAL MEMORANDUM OF LAW IN SUPPORT OF MOTION OF CAROTHERS CONSTRUCTION CO., INC. TO QUASH SUBPOENA DUCES TECUM

The Standard To Be Applied

While the "devil is in the details," Carothers and Moultrie apparently agree that the correct statement of the test to be applied by the court is that quoted by Carothers in its original Memo and likewise quoted in full by Moultrie in his Memo. As stated by the Court in United States v. Ball:[1]

> [I]n order for the court to authorize Rule 17(c) subpoena, the moving party must be able to describe specific documents, or, at least specific kinds of documents. *[cit.]* Moreover, the moving party must specify why the materials are wanted, what information is contained in the documents, and why those documents would be relevant and admissible at trial. (citations omitted). ***Without detailed information on the requested documents, a court is only left 'to speculate as to the specific nature of their contents and relevance.'*** (citing United States v. Arditti, 955 F2d 331, 346 (5th Cir. 1992) (emphasis added)

[1]Quoted by Moultrie on page 25 of his memo. See ECF Doc. No. 138.

According to Moultrie, "Moultrie's subpoena request satisfies this standard."[2] Carothers contends that Moultrie has not met the Ball-Arditti standard because the Court is left "to speculate as to the specific nature of their [the subpoenaed documents] contents and relevance" and admissibility. This is the dispute for the court to resolve on this motion to quash.

While Moultrie's response is diffuse, he alleges Sean Carothers will testify as both a fact and an expert witness.[3] Moultrie's, who has the burden of proof on this motion, has however neither described the documents he wants with the requisite specificity, nor has he demonstrated their relevance and/or admissibility with the requisite specificity.

A Comparison of Moultrie To Authority Which He Cites

Juxtaposing Moultrie's demands against those in one of the cases which Moultrie cited as supporting his position clearly illustrates this point. Moultrie cites United States v. Caruso[4] as supporting the proposition that "Each of the subpoena's requests indisputably includes within its scope some evidence which could be admissible at trial under *Nixon* under some potential rule...."[5]

In Caruso the criminal defendant in a mail fraud case was the former managing partner of an accounting firm from which he was trying to obtain documents. The documents requested included:

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[2] *Id.*

[3] ECF Doc. 138, at page 2.

[4] 948 F. Supp.382 (D.N.J. 1996). See ECF Doc No. 138 at page 17.

[5] ECF Doc. 138 at page 17.

1. All documents concerning the accounting firm's policies and practices regarding partner location, subsidies paid in lieu of relocation, and reimbursement to partners or others in connection with partner relocation;
2. All documents concerning reimbursement and subsidy payments made as a result of the relocation of [the names of several individual are omitted.]; and,
3. All documents concerning the accounting firm's policies and practices with respect to the authority of managing partners within their geographic responsibility, including but not limited to documents concerning managing partners' authority to make decisions regarding charitable contributions and accounting therefor, office expenses, the discounting of bills, and other subjects as to which managing partners had decision making authority.[6]

A close examination of Caruso, in which the court ordered the documents produced, reveals the following:

1. Caruso's request for the documents was based on his personal knowledge as the accounting firm's former managing partner. According to him, based on his ***personal first-hand knowledge***, "the documents will demonstrate a variance between policy and actual practice" at the accounting firm with regard to the ***specific issue*** of "partner relocation."[7]
2. According to Caruso, the relevance of the documents was that they would

[6]Caruso, *supra.,* note 12 at 396.

[7]Caruso, *supra.,* note 12 at 397.

show his actions "were in accord with his authority as managing partner" and were relevant to "establish a state-of-mind defense to the crimes charged" that he did not act with criminal intent."[8]

Now compare Caruso with Mr. Moultrie who tells us the following:

1. "He is *possibly* a fact witness concerning TFG's performance of the contract, a subject of the billings...."[9]
2. Sean Carothers is a fact witness "because he was the original contractor on the beef plant project;"[10]
2. "These requests are directed at both Sean Carothers as a fact witness and his experience with CCC."[11]
3. "Moultrie's subpoena is specifically directed to the basis of the expert testimony of Sean Carothers to be offered in the Government's case-in-chief."[12]
4. "The Government will be required to establish Sean Carothers' experience in order to qualify him to testify as an expert."[13]
5. "The requested information is relevant and material to Moultrie's defense;"[14]

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[8]Caruso, *supra.,* note 12 at 396.

[9]ECF Doc. 138, at page 2 (emphasis added).

[10]ECF Doc. 138, at page 1.

[11]*Id.*

[12]ECF Doc. 138, at page 3.

[13]*Id.*

[14]*Id.*

6. As a fact witness Sean Carothers can testify about: the method by which he billed the work under his contract; how subcontractors were paid; Richard Hall's involvement; the Governor did not run the project; the likelihood of the success or failure of the project; that the failure of the project was not impacted by TFG joining the project; and, the billing procedures used by TFG compared to those used by Carothers Construction Company; the TFG contract; the TFG accounting records; TFG's calculation, allocation and billing of costs; and, accounting generally in the construction industry.[15]

7. Sean Carothers testimony will be based on his experience and these records are relevant to his experience. They are "those prior instances where Mr. Carothers dealt with similar documents and records in similar situations."[16]

8. ***" If*** evidence shows that Mr. Carothers experience shows that he would have managed the project in the same way as the defendants, then his expert opinion is not 'as careful as he would be in his regular professional work.' This is a specific *Daubert* factor and so it is relevant to Mr. Carothers' expert testimony."[17]

9. "The documents sought in category 3 are relevant in that its contents bare (sic.) On Mr. Carothers experience, much like category 1. CCC admitted that 'at best' the material requested, including category 3, 'would tend to show

[15]ECF Doc. 138, at page 11-12.

[16]ECF Doc. 138, at page 12.

[17]ECF Doc. 138, at page 13.

what Carothers ***believed*** its contract allowed it to charge the project.' ***Precisely.*** The documents...bear on Mr. Carothers ***belief*** as to how contracts of the type – involved – design build – should be administered."[18]

10. Payments made by Sean Carothers to Richard Hall will prove "that Mr. Carothers' experience is NOT in accordance with industry practices."[19]

11. "After the hiring of TFG, the documents would relate to the question whether TFG's management was reasonable and its billings fraudulent or not."[20]

14. The (category 4) requests for "all communications between all of the parties involved in the project – before and during the time the Facility Group joined the project – will reflect the true nature of the situation. That being that everyone involved with the project had misgivings similar to the Facility Group"[21]

Now bear in mind that the two count indictment charges:

1, That the defendants conspired to make a political contribution to a public official to influence him in connection with the beef plant project; and,

2. The defendants engaged in a scheme to defraud the backers of the beef plant project by disguising inter-company profits which were not allowed under its project management contract.

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[18]ECF Doc. 138, at page 14. (emphasis added)

[19]*Id.*

[20]*Id.*

[21]ECF Doc. 138, at pages 14-15.

The documents sought from Carothers Construction Company all relate to:

1. Carothers' construction of the building under the Carothers contract;

2. Carothers unsuccessful bid on the project management contract;

3. Sean Carothers payments to Richard Hall; and,

4. All communications between everybody related to any aspect of the project.

Now the Caruso analysis. In Caruso the defendant (1) based on his first hand knowledge as to their ***specific*** contents growing out of his former role as the firm's managing partner; (2) requested documents on the ***specific*** accounting firm policy of partner relocation; (3) because, he said, these documents were necessary to support his ***specific*** defense of lack of criminal intent.

According to Moultrie's reply to the motion:

1. Sean Carothers is "possibly" a fact witness; and, "if" the evidence shows Sean Carothers would have administered his contract the same way as TFG administered its contract, then Carothers may not qualify as an expert under Daubert. [The problem here is that 17(c) requires that Moultrie *know* what the documents contain – not a hope as to what they might contain. Also, questioning Carothers about his contract is cross examination.]

2. The documents requested relate to Sean Carothers experience and his experience is relevant. [Relevant to what – some defense he intends to raise? He doesn't say. Nor does he tell us which *specific* documents he is talking about.]

3. Sean Carothers can testify how Carothers Construction Company carried out

its contract to build the building. ["To be 'relevant' means to relate to the issue. To be 'material' means to have probative weight, i.e., reasonably likely to influence the tribunal in making a determination required to be made."[22] There has been no showing that how Carothers carried out its contract is relevant. It would not be relevant and admissible unless and until it is shown that the Carothers and TFG contracts were so similar that administration of one can be considered probative of the administration of the other. The two contracts may be similar or they may not. We don't know because Moultrie hasn't told us. TFG was brought in because of cost overruns. Does this not suggest that the TFG contract would be different from the Carothers contract in order to address this problem? With no showing of similarity of the two contracts, the court is left to *speculate* as to the relevance of performance under the Carothers contract.]

4. Sean Carothers can testify about unlawful payments to Richard Hall. [What is this relevant to other than cross-examination? There is likewise no specificity as to the documents, the contents or what defense they might relate to.]

5. The documents will tell us what Sean Carothers "believed" about the administration of his contract. [No specific documents, no specific issue and no relevance without the predicate of similarity of contracts.]

6. All communications between everyone associated with the project will reflect

[22]United States v. Rigas, 490 F3d 208, 234 (2nd Cir. 2007).

the "true nature of the situation." [No specific documents, no specific issue.]

Suffice it to say simply that Moultrie's reply fails to demonstrate the level of specificity necessary for the Court to make a determination as to relevance and admissibility except on the basis of *speculation* which fails to pass muster.

The Right To Notice

Moultrie in his reply argues that Carothers Construction Company was not entitled to notice of Moultrie's motion for issuance of the subpoena so the proceeding was therefore not *ex parte.*

The Court's attention is invited to the Skilling cited in Carothers original brief. In Skilling the court said:

> "Specificity serves to prevent a subpoena from being converted into a license for what the Supreme Court...[has]...decried as a 'fishing expedition....The specificity requirement is intended to provide the subpoenaed party with enough knowledge about the documents being requested to lodge objections based on relevancy and admissibility."[23]

Note that the Skilling court said notice sufficient to "object," not sufficient notice upon which to base a motion to quash. The right to "object" is a right to "object" prior to the issuance of the subpoena. The court's attention is likewise invited to United States v. Urlacher[24] also cited by Carothers in its original brief. In Urlacher the defendant was using a 17(c) subpoena to obtain information about the government's star witness, a Mr. Ruffin. In granting the Government's motion to quash, the Urlacher court said:

"The defendant cites Fed.R.Crim.P. 17(c) in support of his

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[23]United States v. Skilling, 2006 WL 1006622, at 2 (S.D. Tex. 2006).

[24]136 F.R.D. 550 (W.D.N.Y. 1991).

> request for *ex parte* subpoenas. Rule 17(c), however, simply does not support an *ex parte* application for such a subpoena, and the defendant has provided no reason why the court should grant his request without benefit of notice to others involved. Moreover, defendant seeks extensive and personal information about an individual who is not a party to this action. Accordingly, *both Mr. Ruffin and the United States Attorney are entitled to notice of such a motion.*[25]

Finally, the Court is reminded of the case law cited in Carothers original memo holding that the Government has no standing to object to the issuance of a Rule 17(c) subpoena to a third party. Carothers contend that based on this case law the matter was *ex parte* and should that be the wrong term, that Carothers was nevertheless entitled to prior notice of the motion and an opportunity to object.

Admission of Hearsay Under Rule 803(6)

Moultrie argues the records are admissible under 803(6) as business records citing a number of cases for the proposition that "[t]here is no requirement...that the witness laying the foundation be the one who [created the document] or be able to attest personally to its accuracy." Nevertheless, *someone* must vouch for the document's trustworthiness to make it admissible under 803(6). Even though the burden of proof is on him on this motion, Moultrie is unwilling to vouch for the trustworthiness of the documents he seeks (and no one else has). Therefore, the 803(6) exception to the hearsay rule has not been met and Moultrie has failed to prove admissibility on this ground.

Admission of Hearsay Under Rule 807

In the alternative Moultrie argues the documents would be admissible under the residual exception to the hearsay rule. This rule is of no help to Moultrie either. Rule 807

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[25] *Id.* at 551-52. (emphasis added)

requires "circumstantial guarantees of trustworthiness, equivalent to those established under the other hearsay exceptions." Cook v. Miss. Dept of Human Serv, 108 Fed Appx. 852, 856 (5th Cir. 2004).

Proof of Bias Is Not Collateral

Rule 608(b) does not prevent the impeachment of a witness on a collateral matter. It simply prevents the impeachment of the witness on a collateral matter *with extrinsic evidence.*

Moultrie is correct in saying bias is not collateral and thus not subject to Rule 608(b). See for example: United States v. Diecidue, 603 F2d 535, 550 (5th Cir. 1979). To be admissible as evidence of bias, it would have to either be evidence of bias in favor of the government or against TFG. Query: How do documents about how Carothers Construction carried out its contract and how Sean Carothers is qualified to testify as an expert show bias for the government or against TFG? It doesn't.

Also, in making the determination whether proffered evidence is admissible on the issue of bias, the court must determine: (1) whether it is probative of bias; and, if so, (2) whether its probative value outweighs the risks of prejudice attending its admission. Diecidue, supra., 603 F2d at 550. At this point the court has no basis to answer these questions other than *speculation*. Therefore, the records sought are not admissible and the Rule 17(c) subpoena fails.

The Issue of Specificity

Moultrie suggests that the category 1 documents have the necessary specificity

because they "contain evidence of Mr. Carothers experience."[26] He also suggests that the category 1 documents are described with the required specificity because they contain "Carothers' prior billing and accounting experience – which are the basis of his qualifications as an expert to opine on these issues in this case." Query: Is the representation "they contain evidence of Mr. Carothers experience" or they contain "Carothers prior billing and accounting experience" sufficiently specific for the court to determine which specific documents are being requested, and whether each is relevant and admissible? Or is the Court left to speculate? Clearly it is.

He suggests that the Category 4 documents contain the necessary specificity because "they contain evidence of the beliefs and understandings of persons involved with the project as to whether the beef plant would fail."[27] He alleges the requisite specificity is present because they are "documents pertaining to the payments that were made to Mr. Hall" and they are documents "pertaining to CCC's proposal to manage the beef plant project" and they "contain information bearing on Carothers personal experience in administering a design-build contract."[28] Same query and same answer. The lack of specificity leaves the court in the position of *speculating* whether these documents are relevant and admissible.

Miscellaneous Housekeeping Matters

Much of Moultrie's reply is couched in hyperbole which court's recognize is not legal

[26]ECF Doc. 138, at page 25.

[27]ECF Doc. 138, at page 25-6.

[28]*Id.* at 26.

argument,[29] obscures the real issues,[30] and "is a sure sign of a weak argument."[31] Carothers argument is variously described by Moultrie as "baseless efforts,[32] "disingenuous in the extreme,"[33] "defies logic,"[34] and should be "rejected out of hand."[35] Such *ad hominems* are uniformly dismissed with the conclusion that the fact-finder "has the common sense to discount hyperbole of an advocate, discounting the force of the argument."[36] To be fair however Carothers' counsel likewise, in his haste to finish the original memo, also used hyperbole to describe the 29 line definition of "document" used by Moultrie in his subpoena. This hyperbole should likewise be discounted.

Moultrie appears confused about with whom attorneys Purdy and Germany had an attorney-client relationship. He says "Moultrie reasonably believed that Messrs. Purdy and Germany represented Sean Carothers, not his company."[37] Purdy and Germany at

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[29]Beamon v. Marshall & Isley Trust Co., 411 F3d 854 (7th Cir. 2005) ("This is hyperbole, not legal argument.")

[30]Doug Grant, Inc.v. Greate Bay Casino Corp., 232 F3d 173, 185 (3rd Cir. 2000) ("arguments in dramatic hyperbole obfuscat[es] the real issues.")

[31]United States v. Shayesteh, 166 F3d 349, at 5 (Table), 1998 WL 839083 (10th Cir. 1998) ("[R]eliance on hyperbole instead of evidence is a sure sign of a weak argument.").

[32]Moultrie Reply Brief at 16. ECF Doc. 138.

[33]*Id.* at 18.

[34]*Id.* at 19.

[35]*Id.*

[36]United States v. Varraro, 115 F3d 1211, 1216 (5th Cir. 1997); United States v. Baptiste, 264 F3d 578, 592 (5th Cir. 2001); and, United States v. Gonzalez-Perales, 2008 WL 1743905 (5th Cir. 2008).

[37]ECF Doc. 138, at page 9.

different times and on different matters had an attorney client relationship with Sean Carothers or Carothers Construction Company. This is explained on pages 23-24 of Carothers' original brief.

Moultrie makes much of what he considers to be Carothers mistaken interpretation and application of United States v. Ail.[38] Carothers represents that Ails provides the proponent of a subpoena under Rule 17(c) must be able to demonstrate that the subpoenaed documents are material. Moultrie suggests that Ails applies only to Rule 16 discovery of documents "material to preparing a defense. As noted above evidence is material when it is "reasonably likely to influence the tribunal in making a determination required to be made."[39] That is to say, it has some probative value.

Surely, Moultrie is not suggesting that materiality is not an issue under 17(c). Clearly, immaterial evidence is not admissible and therefore the evidence has not met the Rule 17(c) requirements which includes a showing of admissibility.

Summary

As the D.C. Circuit observed several weeks ago in commenting on the government's lack of proof in the case before it:

> "Lewis Carroll notwithstanding, the fact that the government has 'said it thrice' does not make an allegation true. *See* LEWIS CARROLL, THE HUNTING OF THE SNARK 3 (1876) ('I have said it thrice: What I tell you three times is true.'). In fact, we have no basis for concluding that there are independent sources for the documents' thrice-made

[38]2007 WL 1229415.

[39]United States v. Rigas, *supra.,* 490 F3d at 234.

assertions."[40]

Saying that something is a fact does not *ipse dixit* make it a fact – even if you say it a lot. In this case Mr. Moultrie has in many different ways and many different times said to the court that the multitude of documents which he has subpoenaed are both relevant and admissible.

To meet the requirements of Rule 17(c) the information about the documents must be sufficiently specific to allow a court to make a determination whether the information sought it both relevant and admissible, without resorting to speculation. In this case each one of Moultrie's documents designations requires the court to speculate. This is not enough to pass muster and the motion to quash should therefore be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Preston Rideout, hereby certify that on July 29, 2008, I electronically filed the

[40]Parhat v. Gates, ___F3d___, 2008 WL 2576977 (D.C. Cir. 6/20/08).

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