UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOHN GRAHAM aka JOHN BOY PATTON, and VINE RICHARD MARSHALL aka RICHARD VINE MARSHALL aka DICK MARSHALL,

Defendants.

CR08-50079

UNITED STATES' TRIAL MEMORANDUM RE: CRAWFORD

COMES NOW the United States by and through United States Attorney Marty J. Jackley and Assistant US Attorney Robert A. Mandel and files its Trial Memorandum Re: Crawford and the admissibility of certain statements.

It is anticipated that testimony will be introduced regarding certain statements of co-Defendant Fritz Arlo Looking Cloud and alleged principal Theda Clarke, including, but not necessarily limited to, the following:[1]

1. Conversation between Defendant Looking Cloud, cooperating witness Maverick, and Troy Lynn Yellow Wood (see Looking Cloud jury TT 150-51, GRAHAM 01810-02067).

[1]During trial, other similar type conversations may become relevant and admissible under the same legal analysis set forth herein. In a similar filing in United States v. Graham, CR 03-50020, the United States had included certain statements by Richard Marshall. Based upon the Superseding Indictment's party joinder, Richard Marshall's statements are admissible as admissions pursuant to Fed. R. Evid. 801(d)(2).

2. Telephonic conversation between Defendant Looking Cloud and Denise Maloney (see Looking Cloud TT 295-98).

3. Conversation between cooperating witness Maverick and alleged principal Theda Clarke on July 25, 2000, where in the context of discussing Anna Mae as an informant, Theda made statements against interest including: "Yeah, that's why we did it and it wasn't ever going to happen again." (see Summary of Clark Meeting 01-22, p. 21, GRAHAM04430).

Pursuant to Crawford v. Washington, 541 U.S. 36 (2004), testimonial statements are not admissible unless the witness testifies and is subject to cross-examination. Id. at 51-52. Statements that are not offered for the truth of the matter asserted are non-testimonial and therefore not excluded by Crawford. See United States v. Rodriguez, 484 F.3d 1006, 1013-14 (8th Cir. 2007) (quoting Crawford, 541 U.S. at 59 n.9 ("The [Confrontation] clause . . . does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted."). Certain matters contained within the above referenced various statements constitute "non-hearsay" in that they qualify as: verbal acts/words with independent legal significance and relevance; verbal objects distinguishing two different items; and circumstantial evidence of the state of mind. See Fed. R. Evid. 801(c).

To the extent a statement constitutes hearsay, Crawford further distinguishes between a formal statement to law enforcement and a casual statement made to an acquaintance or confidant. Crawford, 541 U.S. at 51. See also United States v. Hyles, 521 F.3d 946 (8th Cir. 2008). The focus is whether the declarant reasonably believes "that the statement would be available for use

at a later trial." See Crawford, 541 U.S. at 51-52; United States v. Lee, 374 F.3d 637, 644-45 (8th Cir. 2004) (holding confession to be non-testimonial).[2] It is the United States' position that the above-referenced statements are non-testimonial in that in each instance the declarant did not reasonably believe the statements would be used at a trial.

It is well settled that statements made to informants and cooperating witnesses are non-testimonial for Confrontation Clause purposes. See United States v. Udeozor, 515 F.3d 260, 270 (4th Cir. 2008); United States v. Watson, 525 F.3d 583, 589 (7th Cir. 2008) ("A statement unwittingly made to a confidential informant and recorded by the government is not 'testimonial' for the Confrontation Clause purposes."); United States v. Toliver, 454 F.3d 660, 664 (7th Cir. 2006); United States v. Underwood, 446 F.3d 1340, 1347-48 (11th Cir. 2006); United States v. Hendricks, 395 F.3d 173, 182-84 (3d Cir. 2005); United States v. Saget, 377 F.3d 223, 229-30 (2d Cir. 2004). Statements made to

---

[2]See United States v. Summers, 414 F.3d 1285, 1302 (10th Cir. 2005) ("common nucleus' present in the formulations which the court considered centers on the reasonable expectations of the declarant"); United States v. Udeozor, 515 F.3d 260, 268 (4th Cir. 2008) (whether a reasonable person in the declarant's position would have expected his statements to be used at trial – that is, whether the declarant would have expected or intended to "bear witness" against another in a later proceeding"); United States v. Maher, 454 F.3d 13, 21 (1st Cir. 2006) ("an objectively reasonable person in [the declarant's] shoes would understand that the statement would be used in prosecuting" the defendant); United States v. Watson, 525 F.3d 583, 589 (7th Cir. 2008) (citing Summers "proper focus is on whether *declarant* would believe statement would later be used as evidence"); United States v. Hinton, 423 F.3d 355, 360 (3rd Cir. 2005); United States v. Saget, 377 F.3d 223, 228 (2d Cir. 2004); United States v. Cromer, 389 F.3d 662, 675 (6th Cir. 2004).

informants and cooperating witnesses are considered non-testimonial based upon the rationale that the declarant does not know or "believe that the statement would be used later at trial." See Crawford, 541 U.S. at 51-52. To the extent the statements at issue constitute hearsay, they are non-testimonial statements that fall within the hearsay exception of statements against interest under Fed. R. Evid. 804(b)(3).[3]

The Eighth Circuit has developed a three-prong test for admission of an inculpatory statement under Rule 804(b)(3): (1) the declarant is unavailable as a witness; (2) the statement must so far tend to subject the declarant to criminal liability that a reasonable person in the declarant's position would not have made the statement unless he or she believed it to be true; and (3) corroborating circumstances clearly indicate the trustworthiness of the statement.[4] United

---

[3]Fed. R. Evid. 804(b)(3) provides:

> A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

[4]Fed. R. Evid. 804(b)(3) only requires the first two prongs for inculpatory statements. The Eighth Circuit subsequently applied the third prong to both exculpatory and inculpatory statements through a Confrontation Clause analysis. See United States v. Riley, 647 F.2d 1377, 1383 n.7 (8th Cir. 1981). Because the Confrontation Clause does not apply to non-testimonial statements, arguably the third prong should not be applied to inculpatory statements. See Davis v.

(continued...)

States v. Hazelett, 32 F.3d 1313, 1316 (8th Cir. 1994); United States v. Keltner, 147 F.3d 662, 670 (8th Cir. 1998). With respect to the statements at issue, all three elements are satisfied. See United States v. Manfre, 368 F.3d 832, 841-42 (8th Cir. 2004) (admitting a statement against interest by another person implicated in the same crime).

The Seventh Circuit in allowing an accomplice's statement to be admitted under the statement against interest exception recognized:

> So long as the incriminating and inculpatory portions of a statement are closely related, if the circumstances surrounding the portion of a declarant's statement inculpating another are such that the court determines that the inculpatory portion of the statement is just as trustworthy as the portion of the statement directly incriminating the declarant, there is no need to excise or sever the inculpatory portion of the statement.

United States v. Hamilton, 19 F.3d 350, 356 (7th Cir. 1994). See also United States v. Saget, 377 F.3d 223, 230 (2d Cir. 2004) (A "'statement incriminating both the declarant and the defendant may possess adequate reliability if . . . the statement was made to a person whom the declarant believes is an ally,' and the circumstances indicate that those portions of the statement that inculpates the defendant are no less reliable than the self-inculpatory parts of the statement.") (quoting United States v. Sasso, 59 F.3d 341 (2d Cir. 1995)); United States v. Watson, 525 F.3d 583, 588 (7th Cir. 2008)("Blaming one's self and someone else

---

[4](...continued)
Washington, 547 U.S. 813 (2006) (Confrontation Clause does not apply to non-testimonial statements).

does not necessarily reduce a statement's trustworthiness."); United States v. Westry, 524 F.3d 1198,1215 (11th Cir. 2008).

Accordingly, the statements at issue are non-testimonial in that they are being admitted for non-hearsay purposes or otherwise constitute non-testimonial statements or conversation by declarants that did not reasonably believe the statement would later be used at trial. The statements are admissible under the statements against interest exception pursuant to Rule 804(b)(3).

Date: November 4, 2008

MARTY J. JACKLEY
United States Attorney
ROBERT A. MANDEL
Assistant United States Attorney
PO Box 2638
Sioux Falls, SD 57101-2638
605.357.2310
FAX: 605.330.4405
Marty.J.Jackley@usdoj.gov

CERTIFICATE OF SERVICE

The undersigned hereby certifies on November 4, 2008, a true and correct copy of the foregoing was served upon the following person(s), by placing the same in the service indicated, addressed as follows:

John R. Murphy
Dana Hanna

- ☐ U.S. Mail, postage prepaid
- ☐ Hand Delivery
- ☐ Facsimile at
- ☐ Federal Express
- ☒ Electronic Case Filing

Marty J. Jackley

This document has been filed electronically.