UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. VINE RICHARD MARSHALL, a.k.a. RICHARD VINE MARSHALL, a.k.a. DICK MARSHALL, Defendant.	Case No. CR 08-50079 **DEFENDANT'S MEMORANDUM OF LAW**

The defense has argued that government witness Looking Cloud first told federal investigators that Richard Marshall had provided a gun to Theda Clarke in a proffer session on August 19, 2008 and introduced evidence that on four prior occasions–at his first proffer session at the US Attorney's office in Denver on November 17, 1994, in a follow up interview in January 1995, in a car trip with investigators from Colorado to the murder scene near Wanblee, South Dakota in July 1995, and in his post-arrest interview on March 27, 2003–Looking Cloud made no mention of Richard Marshall or stopping in Allen at the home of Richard Marshall, nor did he make any claim that Marshall had given Theda Clarke a gun. [1]

Over objection, Looking Cloud testified that the reason he had not told federal investigators about Richard Marshall or stopping in Allen was that he was afraid of Richard Marshall when he had made his previous statements; but that he had overcome that fear in

[1] Also, Looking Cloud's statements on those prior occasions about the route taken by the kidnapper-murderers were inconsistent with his trial testimony.

August 2008 when he finally decided to tell investigators what he claimed to be "the truth"– that Marshall gave Theda Clarke a gun in Allen. The prosecutor was allowed to ask Looking Cloud why he had not told investigators about Richard Marshall in 1994, 1995 or 2003. He answered that at those times he had been afraid of Richard Marshall. The prosecutor was allowed to ask why he was afraid of Richard Marshall. Looking Cloud testified that he had heard or that he believed that Marshall was "Russell Means' enforcer" and that Marshall had confessed to murder. On re-direct, the prosecutor again was allowed to ask Looking Cloud, over objection, why he had been afraid of Marshall when he had earlier been interviewed by investigators (in 1994, 1995, and 2003) and he answered that it was common knowledge in the Indian community that Marshall was Russell Means' "gunman."[2] He then went on to testify that he knew that Marshall had been in prison for murder, that he had been released, and that because he knew Marshall was out of prison he believed Marshall represented a threat to the safety him and of "his family."

The court instructed the jury that the testimony was admissible for the limited purpose of proving Looking Cloud's state of mind when he previously had spoken to investigators without mentioning Marshall, but not for the truth of what he believed about Marshall.

The government now seeks to offer the testimony of Barry Bachrach, the lawyer for Looking Cloud, who would testify as to what Looking Cloud told him in 2008: that he told Bachrach in 2008 that he was afraid of Marshall in 1994, 1995, and 2003, and that was why he had been afraid to tell investigators "the truth" about stopping in Allen and seeing Marshall give

[2] The court struck the testimony about "common knowledge in the Indian community" but allowed the statements about Marshall being Means' "gunman" to stay in the record.

a gun to Theda Clarke.

The government argues this testimony from Bachrach is admissible under Federal Rule of Evidence 803(3) to prove Arlo Looking Cloud's "then existing state of mind".

Defendant Marshall objects to the admission of such testimony. He contends that (1) the foundational requirements for a "then existing state of mind" exception to the hearsay rule cannot be met here, because the statements Looking Cloud made to his lawyer in 2008 about what his state of mind was in 1994, 1995 and 2003 were not about his then existing state of mind; rather, they refer to a past state of mind.

The statements are also inadmissible as "prior consistent statements" under Rule 801(d)(1)(B), because the declarant Looking Cloud clearly had a motive to fabricate when he made his statements to his lawyer in 2008. Third, Looking Cloud's out of court declarations as to why he was afraid are clearly outside the parameters of Rule 803(3). Fourth, if the court applies the necessary balancing test of Rule 403, the substantial likelihood of the testimony causing jury confusion and undue prejudice substantially outweighs any theoretical relevant probative value the testimony of Looking Cloud's lawyer might have.

I

LOOKING CLOUD'S SELF-SERVING OUT OF COURT DECLARATIONS TO HIS LAWYER THAT HE HAD BEEN AFRAID OF THE DEFENDANT IN THE PAST ARE NOT ADMISSIBLE AS DECLARATIONS OF A THEN EXISTING STATE OF MIND UNDER FRE 803(3).

The issue to be decided is whether Attorney Bachrach's testimony that Looking Cloud told him in 2008 that he had been afraid of Dick Marshall in 1994, 1995, and 2003 is admissible under the "then existing state of mind" exception to the hearsay rule.

They are not admissible because the statements were not about his *then* existing state of mind, but about a past state of mind.

FRE 803(3) provides that out of court statements as to the declarant's "Then Existing Mental, Emotional, or Physical Condition" are not excluded by the hearsay rule, regardless of whether the declarant is available as a witness, if such statement is:

> A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive,, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed ***.

Here, the lawyer's testimony of Looking Cloud's statements to him in 2008 are inadmissable under Rule 803(3)'s then existing state of mind exception because Looking Cloud's out of court declarations were statements of a *memory* of a *past* state of mind, not a statement about a *then existing* state of mind.

Looking Cloud's out of court declarations to his lawyer–that in 1994, 1995, and 2003, he was afraid of Marshall– are being offered to prove the truth of the facts asserted in the out of court statements: that Looking Cloud was afraid of Marshall in 1994, 1995 and 2003. Therefore, they are hearsay under 801 and inadmissible under 802 unless they come under an exception.

Rule 803 provide for exceptions to the hearsay rule, whereby out of court statements that are hearsay are nonetheless admissible if the proponent can establish the necessary foundational "circumstantial guarantees of trustworthiness". Federal Rules of Evidence Advisory Committee Notes, Rule 803.

"A key circumstantial guarantee of trustworthiness in respect to Rule 803(3) is that it requires that statement be contemporaneous with the declarant's 'then existing' state of

mind, emotion, sensation, or physical condition." United States v. Naiden, 424 F.3d 718, 722 (8th Cir. 2005). That case cites United States v. Partyka, 561 F.2d 118, 125 (8th Cir. 1977), which contrasts "self-serving declarations about a past attitude or state of mind" with declarations of [the declarant's] present state of mind, his immediate reaction to an event." Naiden, at 722.

A declarant's self serving statements about emotions in the past–e.g. fear–lack the requisite indicia of reliability because "declarations about 'a past attitude or state of mind' (*citing Partyka*) are less likely to be reliable because trustworthiness is diminished if a declarant has had the time to reflect on the potential implications of his conduct." Naiden, at 722.

Here, as in Naiden, the facts of this case show how the passage of time may prompt someone to make a deliberate misrepresentation about a past state of mind.

Here, Looking Cloud's out of court statements to his lawyer about his fear of the defendant 14, 13, and 5 years before he made those statements are precisely the sort of self serving declarations about a past state of mind that are inadmissible under Rule 803(3), as interpreted in Naiden and Partyka.

II

THE LAWYER'S TESTIMONY ABOUT HIS CLIENT'S OUT OF COURT DECLARATIONS AS TO *WHY* HE WAS AFRAID WOULD NOT BE ADMISSIBLE UNDER RULE 803(3).

Moreover, as he did with Looking Cloud, the government attorney would surely seek to ask Bachrach for other self serving declarations from his client as to why he was afraid, thereby inviting more prejudicial testimony that Richard Marshall was an AIM gunman and enforcer, as well as the fact he was convicted of murder. Even if Looking Cloud's declarations about a past fear were admissible, Looking Cloud's explanations as to why he was afraid would clearly not be

admissible under 803(3).

The exception of then existing state of mind declarations applies only to a statement describing a state of mind expressed by the declarant. Such statements cannot be used to prove the cause of the state of mind. United States. v. Emmert, , 829 F.2d 805, 810 (9th Cir. 1987)("If the reservation in the text of the rule is to have any effect, it must be understood to narrowly limit those admissible statements to declarations of condition,–"I'm scared'–and not belief–"I'm scared because [someone] threatened me,'" quoting United States v. Cohen, 631 F.2d 1223, 1225 (5thCir. 1980). Thus, a declarant's explanation as to *why* she was afraid of her husband is not encompassed within the 803(3) exception. United States v. Joe, 8 F.3d 1488 (10th Cir. 1993). A declarant's out of court explanations as to why he feared for his life are inadmissible. United States v. Liu, 960 F.2d 449 (5th Cir. 1992).

III

THE SERIOUS RISK THAT THE TESTIMONY OF LOOKING CLOUD'S LAWYER WOULD BE CONSIDERED BY JURORS AS EVIDENCE THAT CONFIRMS AND CORROBORATES THE FACTS ASSERTED BY LOOKING CLOUD AS THE BASIS FOR HIS PURPORTED FEAR OF THE DEFENDANT OUTWEIGHS ANY PROBATIVE VALUE OF SUCH EVIDENCE.

The testimony is clearly not admissible as a prior consistent statement, since it was not made at a time Looking Cloud had no motive to fabricate a lie as to his prior state of mind. Tome v. United States, 513 US 150, 115 S.Ct. 696 (1995).

However, that is how the evidence would likely be interpreted by the jury, regardless of judicial instructions to the contrary. The substantial likelihood for confusion and undue prejudice on the part of the jury outweighs any probative value this evidence could have, if it were

admissible under 803(3), which it is not. In spite of any judicial instruction, the jurors would be likely to consider the offered evidence as having some tendency to prove that Richard Marshall had in fact acted as an AIM "enforcer" and "gunman", which, if it were true, would provide a possible motive for the actions he is accused of by Looking Cloud. Therefore, the evidence should also be excluded under Rule 403.

DATED: April 19, 2010

VINE RICHARD MARSHALL, Defendant

BY: */s/Dana Hanna*

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CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing Motion was hand delivered upon the other parties in the case address liste below:

AUSA Robert Mandel
Assistant United States Attorney
United States Courthouse
515 Ninth Street, #201
Rapid City, SD 57701

Dated this 19th day of April, 2010.

/s/Dana Hanna
Dana L. Hanna