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

UNITED STATES OF AMERICA Plaintiff, vs. JOHN GRAHAM a/k/a JOHN BOY PATTON, and VINE RICHARD MARSHALL a/k/a RICHARD VINE MARSHALL a/k/a DICK MARSHALL, Defendants.	)))))))))))	CRIM. NO. 08-50079-01 DEFENDANT'S GRAHAM'S RESPONSE TO GOVERNMENT'S TRIAL MEMORANDUM REGARDING CRAWFORD

In its Trial Memorandum Regarding Crawford, File Document 64, the government seeks to admit four specific statements against Graham. Govt. Trial Memo 1-2. The government also argues for admission of other "similar type conversations" without referencing any specific statement or declarant. Govt. Trial Memo n. 1.

The four specific statements the government seeks to admit are: (1) statements made by Fritz Arlo Looking Cloud to Darlene "Kamook" Nichols and Troy Lynn Yellow Wood; (2) statements made by Looking Cloud to Denise Maloney; (3) statements by Theda Clarke to Nichols; and, (4) statements by Vine Richard Marshall to Serle Chapman.

In support of admission, the government asserts that the statements are not hearsay under Fed.R.Evid. 801(c), not hearsay under Fed.R.Evid.801(d), or are admissible hearsay statements under Fed.R.Evid. 804(b)(3).

Each of these statements and the reasons why they are not admissible are discussed separately below.

A. LOOKING CLOUD'S STATEMENTS TO NICHOLS AND YELLOW WOOD:

1. LOOKING CLOUD'S INTERVIEW

On December 16, 2000, Looking Cloud was secretly recorded having a conversation with Nichols and Yellow Wood. Graham Doc. 01593.[1] Nichols was a "reimbursed" informant working for the government. It is unclear as to whether Yellow Wood was also working for the government at this time.

The recorded conversation that the government wants to admit as a "statement" filled nine (9) audio tapes. The unofficial, single spaced transcript of the conversation is 257 pages long. The government's Trial Memorandum fails to specify any particular part of that statement it seeks to admit.

The conversation begins while Nichols and Yellow Wood are waiting for

[1]The government has incorrectly cited the document as Graham 01810. That is a Bates number, and is not consistent with the Graham document numbering system provided to defense counsel by the government for referencing the discovery materials. The Bates numbers are not used consistently throughout the discovery.

Looking Cloud to be released from jail. Graham Doc. 01595. The government has not disclosed what charges Looking Cloud was in custody for. The nature of the charges may have an impact on the court's reliability analysis, especially if the charges related to drug or alcohol use. Further, no information has been provided as to whether Looking Cloud was intoxicated or under the influence of drugs when he was apprehended.

Within the first few minutes of conversation, Looking Cloud states, "they had me on Tranzine 'til, 'til this morning. They took the Tranzine off of me. . . Aah, its like a depressant like. It knocks you out. Yeah, it just knocks you out. . . Tranzine shots they gave me." Graham Doc. 01597-98. Looking Cloud goes on to say that he slept for three days as a result of the shots. Graham Doc. 01599. Looking Cloud also states that he was given other drugs in addition to Tranzine and that he was hung over as a result. Graham Doc. 01624. He states that he took some pill that morning, and that it was still "foggin" his mind during the conversation. Graham Doc. 01636-37. He states that they gave him the pills every three hours while in jail. Graham Doc. 01637. Nichols, the government's informant, even jokes about the effect of the pills on Looking Cloud's mind. Graham Doc. 10643.

The references to intravenously admitted depressants or tranquilizers, and the repeated dosages of pills that impair his ability to think, bears on the reliability of Looking Cloud's statements. First, it raises the issue as to why he needed to be sedated Second, the issue is raised as to what effects the drugs had on Looking Cloud's ability to accurately perceive and recall events.

During the conversations, references are made to Looking Cloud's substance abuse issues. Yellow Wood and Nichols discuss his alcohol abuse. Graham Doc. 01608. Looking Cloud separates from Yellow Wood and Nichols during an early portion of the conversation to go to a store to buy cigarettes. Upon his return, he states that he has a bottle of "Red Dog." Graham Doc. 01611. Though Yellow Wood and Nichols perceive this as a joke, Looking Cloud reiterates the assertion. Graham Doc. 01611. Looking Cloud then states that he has difficulty remembering past events. Graham Doc. 01598 ("[L]ately people's been tryin' to tell me, do you remember this? And I'm like . . . sometimes I do, and sometimes I don't.").

During this extended conversation, Looking Cloud's recollections are not his own and are not offered in a narrative fashion. Nichols and Yellow Wood assert approximately ten (10) pages of facts to Looking Cloud prior to getting affirmative responses from Looking Cloud, and even then his responses are often

vague and ambiguous. Graham Doc. 01664-73. Nichols and Yellow Wood consistently spoon feed Looking Cloud with the "facts" of the case and speak for pages without any input from him. Graham Doc. 01664-74. For instance, Looking Cloud states he doesn't know where Bill Means lives. Graham Doc. 01688. Nichols then tells Looking cloud that he was told to drive to Means' house, to which Looking Cloud merely responds, "Oh, yeah." Graham Doc. 01688. Similarly, Looking Cloud never mentions or suggests that he was asked to guard Aquash's room until being told he did this. Graham Doc. 01676. This dynamic continues itself throughout the conversation.

In addition to providing Looking Cloud with the story, Nichols and Yellow Wood assist Looking Cloud in deflecting blame from himself by implicating Graham. Looking Cloud tells Nichols whether she can tell others that they have spoken, Graham Doc. 01749, 01761, and states that by the next time they speak he'll be able to get his story straight. Graham Doc. 01761 ("We didn't get things across, but next time we will. 'Cause right now, I'm [unintelligible]."). Yellow Wood then advises Looking Cloud to have someone present with him when he speaks to law enforcement "so that you don't somehow implicate yourself into something ugly." Graham Doc. 01768. When Looking Cloud asks who he should implicate, Nichols expressly tells him only to implicate Graham. Graham Doc.

01761-62 (Looking Cloud: "How many people should I implicate? Huh?" Nichols: "Only John Boy.").

Yellow Wood goes on to suggest that Looking Cloud should implicate Graham to get back at him. Graham Doc. 01762. This dialog appears to be a response to Nichols telling Looking Cloud that Graham had stated Looking Cloud had committed the murder. Graham Doc. 01710, 01748. Nichols had lied to Looking Cloud and told him Graham had "totally blamed" Looking Cloud for the murder. Graham Doc. 01710. Graham had not made any such statements. This gave Looking Cloud a motive to fabricate an allegation in response. When Looking Cloud asked Nichols who to implicate, Nichols told him that the only person he should implicate was Graham because in the end it would boil down to "you're (sic) word against his." Graham Doc. 01761-62.

Even when Looking Cloud is told what the facts are and what he supposedly did, Looking Cloud's responses are vague and ambiguous. Nichols tells Looking Cloud, "I know that you guys drove and this, this is what I hear. Okay, they drove [Aquash] to South Dakota. They drove her." Graham Doc. 01674. Looking Cloud is then asked whether they drove straight to Rapid City, to which he responds "Yeah, I think we drove it straight." Graham Doc. 01674. But, when he is asked for further detail, he states, "I don't even remember now." Graham Doc.

01674. When describing the events that allegedly led to Aquash's death, Looking Cloud is vague and Nichols is the primary source of the facts. Looking Cloud never discusses or mentions Aquash being brought to a cliff or being shot. That information is all provided by Nichols, to which Looking Cloud responds in an ambiguous fashion to Nichols' compound questions. Graham Doc. 01701 (repeated use of "I think" in response to assertions of fact); 01703 (no response to assertions of fact other than an inaudible but alleged sigh).

The government has evidence in its possession that establishes the unreliability of Looking Cloud's statements. Looking Cloud was polygraphed twice by the FBI. Graham Doc. 01883, 01885. During the second polygraph, Looking Cloud stated he did not shoot Aquash. The polygrapher determined that his negative response was deceptive. Graham Doc. 01885.[2] Thus, the government has reason to believe that Looking Cloud, not Graham, shot Aquash, and that Looking Cloud's statement to Nichols and Yellow Wood is unreliable.

2. THE INTERVIEW IS HEARSAY

The government generically asserts that Looking Cloud's statements to Nichols and Yellow Wood are not hearsay under Fed.R.Evid. 801(c) because they

[2]The first polygraph is discussed in Section B, as it relates to a later version of facts given by Looking Cloud. At that time, Looking Cloud had claimed not to have been present when Aquash was shot. The polygraph results were inconclusive.

are verbal acts with independent legal significance and relevance, verbal objects distinguishing two different items, and circumstantial evidence of state of mind. Though the interview lasted hours and is over 250 pages long, the government has failed to identify a single statement contained therein that could conceivably fit the definition of a verbal act, a verbal object, or be admissible as state of mind evidence.

The verbal act doctrine is not applicable to this case. That doctrine applies when the making of the statement itself (as opposed to the truth of the statement) affects the legal rights of the parties or is a circumstance bearing on the rights of the parties. Mueller v. Abdnor, 972 F.2d 931, 937 (8th Cir. 1992). Instances of verbal acts include statements creating rights or obligations under contract, or statements relating to the execution of a will. There were no statements made by Looking Cloud during this conversation that constitute verbal acts.

The government also asserts that Looking Cloud's statements are admissible as non-hearsay verbal objects distinguishing two different items. Govt. Trial Memo p. 2. This is not a valid or recognized basis for admitting an out of court statement. Graham has been unable to find any case recognizing such an exception to the rule against hearsay.

The government asserts that Looking Cloud's statements are admissible as

non hearsay because they are circumstantial evidence "of the state of mind." Govt. Trial Memo p. 2. Out of court statements may be admissible under Fed.R.Evid. 801(c) if they are merely illustrative of the declarant's present state of mind or show the effect a statement has had on someone who heard it. United States v. Thiel, 619 F.2d 778, 781 (8th Cir. 1980); McClure v. State, 575 S.W.2d 564 (Tex.Crim.App. 1979). Examples include statements offered to show poor relations between parties, statements bearing on whether a party acted in good faith, or statements that show a party had notice or knowledge of an issue where such notice or knowledge is relevant. See United States v. Cline, 570 F.2d 731, 734 (8th Cir. 1978); Bush v. Dictaphone Corp., 161 F.3d 363-366-67 (6th Cir. 1998); Smedra v. Stanek, 187 F.2d 892 (10th Cir. 1951).

This exemption to the rule defining hearsay does not relate to Looking Cloud's statements to Yellow Wood or Nichols. Out of court statements by Looking Cloud as to his state of mind are not relevant or admissible in the prosecution against Graham. How Looking Cloud reacted when he was told something by Nichols or Yellow Wood, or what Looking Cloud claimed his state of mind was during any point in time, is not admissible against Graham.

3. THE STATEMENTS ARE NOT ADMISSIBLE UNDER 804(b)(3):

The government argues in the alternative that Looking Cloud's statements

to Nichols and Yellow Wood are admissible as statements against interest. The government has not established a bases for admissibility under this exception to the rule against hearsay.

The government has not met its burden of proving that Looking Cloud is unavailable as a witness. United States v. Hazelette, 32 F.3d 1313, 1316 (8th Cir. 1994); United States v. Fuentes-Galindo, 929 F.2d 1507, 1510 (10th Cir. 1991). Looking Cloud has not been shown to be unavailable. He has lost at trial and on appeal, and therefore he has lost his right to remain silent. United States v. Duchi, 944 F.2d 391 (8th Cir. 1991). If he retains his right to remain silent based on fear of future prosecution, the government can grant him immunity and compel his testimony. United States v. Velasquez, 141 F.3d 1280, 1282 (8th Cir. 1998).

The government has not met its burden of proving Looking Cloud's reliability. The statements against interest exception is not a firmly rooted exception to the rule against hearsay. Lilly v. Virginia, 527 U.S. 116, 134 (1999). Therefore, for Looking Cloud's statements to be admissible under the statements against interest exception, the government must show particularized guarantees of trustworthiness so compelling that adversarial testing would add little to the statement's reliability. Id. This is an extremely high standard of reliability as the

admission of this kind of hearsay directly infringes upon Graham's Sixth Amendment right to confrontation.

Looking Cloud's statements does not meet this standard. First, the statements are not truly against Looking Cloud's interests. It is clear from his statements that he is trying to implicate others in the crime while exculpating himself. Looking Cloud's whole version of events is based on the premise that he was an unwitting bystander who had no knowledge of the plan and was surprised when the killing occurred. And, Yellow Wood and Nichols facilitate him in constructing a story that implicates Graham and exculpates himself.

Second, Looking Cloud's motive to fabricate is clear. He is told that Graham has implicated him, and he is trying to turn this situation around against Graham. This raises substantial doubts about the reliability of the statements. Looking Cloud is fashioning a defense not describing facts.

Third, there are circumstantial issues showing the lack of reliability in the statement. Looking Cloud is under the influence of heavy medications for unknown mental conditions. He repeatedly acknowledges that those drugs are affecting his mind at the time the statements are being made. He repeatedly asserts that his recollections of events are poor and he demonstrates an inability to recall events with clarity or specificity.

Fourth, most of Looking Cloud's statements are not the product of his own independent recollection. Instead, Nichols and Yellow Wood provide him with most of the facts. Looking Cloud merely passively restates or affirms their assertions of fact. In many instances, Looking Cloud's responses to Nichols' and Yellow Wood's assertions of fact are so vague or ambiguous as to render them meaningless. Further, since Yellow Wood and Nichols often present compound questions or compound statements of fact to Looking Cloud, there is a substantial question as to what he is responding to when he appears to affirm a point.

Fifth, the polygraph results should be taken into account when making an admissibility determination in this case. The government wants to admit Looking Cloud's statement to Nichols and Yellow Wood that Graham shot Aquash. Looking Cloud failed a government conducted polygraph on this specific issue. The government can't discount the value of the polygraph in bearing on Looking Cloud's reliability: The government picked the polygrapher from among its own ranks and made passage of the polygraph a condition of Looking Cloud's immunity agreement. This directly attacks the government's position that Looking Cloud's statement is reliable.

In a case of such significance, and with Graham's right to confrontation being placed in peril, the Court should err on the side of excluding out of court

statements such as this. The risk or prejudicial harm to Graham is so significant that the Court should not allow the government to try this case through attenuated, tainted evidence. Therefore, Graham asks that the government be precluded from introducing these out of court statements.

B. LOOKING CLOUD'S STATEMENTS TO MALONEY:

1. LOOKING CLOUD'S PHONE CALL

Denise Pictou Maloney, Aquash's daughter, testified at Looking Cloud's trial that Looking Cloud called her in April of 2002. The call was instigated by a reporter, Paul DeMain, through Richard Two Elk, who knew Looking Cloud. The conversation between Looking Cloud and Maloney was not recorded.

According to Maloney, Looking Cloud said that he was with Aquash, Graham, and Clarke when the traveled from Denver to Rapid City to Rosebud. JT 296-97. Looking Cloud told her that when they arrived at some unknown location, Clarke told him to stay in the car while she, Graham, and Aquash walked over a hill. JT 297. He heard a gun shot, and Graham and Clarke returned without Aquash. JT 297. Looking Cloud stated he wasn't present when Aquash was shot. JT 297. He claimed he did not know that Aquash was going to be shot, but instead thought they were going to scare her. JT 297.

This version of events directly contradicts the version of events given by Looking Cloud in his statement to Nichols and Yellow Wood. In that statement, he alleged Clarke stayed at the car while he, Aquash and Graham walked to a cliff where Graham shot her. Graham Doc. 1694, 1701-04.

Looking Cloud had previously been polygraphed twice about his role in Aquash's death. Graham Doc. 01883, 01885. During the first polygraph, Looking Cloud denied seeing Aquash get shot. The results of the polygraph were inconclusive. Graham Doc. 01883.

2. LOOKING CLOUD'S PHONE CALL IS NOT NON-HEARSAY

None of the purported bases for admission under Fed.R.Evid.801(c) apply to Looking Cloud's statements to Maloney. Looking Cloud's statements exculpating himself and blaming the crime on Graham and Clarke are not verbal acts or objects. They do not have a legal significance apart from their content. See Section A(2), supra. Further, they are not admissible as state of mind evidence. See Section A(2), supra. Looking Cloud's state of mind is irrelevant to a determination of guilt in Graham's case.

3. LOOKING CLOUD'S PHONE CALL IS NOT ADMISSIBLE UNDER 804(b)(3)

For many of the same reasons outlined in Section A, supra, Looking

Cloud's statements to Maloney are not admissible as statements against interest in regard to Graham.

First, the government has not made a showing that Looking Cloud is unavailable. United States v. Fuentes-Galindo, 929 F.2d 1507, 1510 (10th Cir. 1991).

Second, this statement directly contradicts Looking Cloud's other statements. This demonstrates the substantial confrontation clause issue presented when out of court statements are admitted, and the lack of reliability of Looking Cloud's statements. This is a prime example of why declarants should be subjected to cross-examination as opposed to having their out of court statements admitted.

Looking Cloud's two conflicting statements cannot both be true. The Court is not in a position to determine which of the statements, if either, is more reliable. The government shouldn't be allowed to pick from among the conflicting out of court statements to find one that best fits its theory of the case.

Out of court statements should not be admitted unless they are so reliable that adversarial testing would be of little value. Lilly v. Virginia, 527 U.S. 116, 134 (1999). When one witness has given multiple, mutually exclusive versions of events on a key issue, adversarial testing is a necessity. Looking Cloud should be

subjected to cross-examination so that the contradictions in his statements are presented in full fashion to the jury. Therefore, his statements to Maloney or to Nichols and Yellow Wood should not be admitted.

Third, Looking Cloud's statements are not statements against his interest to such an extent that they are inherently reliable. The primary factual statement made by Looking Cloud to Maloney was that he was not present when Aquash was killed and that he did not know she was going to be killed. This is a purely exculpatory statement designed to shift attention from him and to place it upon Graham and Clarke. It is the kind of self-serving exculpatory evidence that would not be admissible without corroboration if offered by a defendant due to its inherent unreliability. Fed.R.Evid. 804(b)(3). It would be fundamentally unfair and be an affront to the confrontation clause to allow the government to introduce this kind of out of court statement against Graham when Graham could not admit the same kind of testimony if it assisted in his own defense.

Because Looking Cloud's statements are not non-hearsay, and they are not admissible as hearsay statements against interest, they should not be admitted against Graham at trial.

C. MARSHALL'S STATEMENTS TO CHAPMAN:

The third set of out of court statements the government seeks to admit are

Vine Richard Marshall's alleged statements to Serle Chapman. The inadmissibility of these statements against Graham was also addressed in Graham's Memorandum in Support of Motion for Separate Trials, File Doc. 76.

1. ALLEGED STATEMENTS

Serle Chapman was a "reimbursed" witness posing as a journalist who acted on the government's behalf to accumulate information against members of AIM. He conducted dozens of recorded interviews with Graham, Marshall and others. Oddly, all of the incriminating statements he allegedly obtained from Graham and Marshall occurred when his recorder was off.

According to Chapman, Marshall told him in an unrecorded conversation that Graham, Theda Clarke, Fritz Arlo Looking Cloud, and Anna Mae Aquash came to his home in December of 1975. One of them gave Marshall a note about keeping "the baggage," presumably referring to Aquash. When Marshall refused to keep Aquash at his house, someone in the group asked him for directions to Rosebud. Then, when Chapman put forth a compound set of facts about rumors in the Indian community that Marshall had provided the gun used to kill Aquash, or whether the baggage note referenced a gun, Marshall allegedly responded "[b]ack in the day when you was asked to do something, somebody asked you for something, you didn't ask too many questions." Graham Doc. 04870.

2. MARSHALL'S STATEMENTS ARE NOT NON-HEARSAY

None of Marshall's alleged statements constitute non-hearsay statements under Fed.R.Evid. 801(c). There is no verbal act, verbal object or state of mind component to any of Marshall's alleged declarations.

The government also suggests that Marshall's statements may be admissible under Fed.R.Evid. 801(d). The only potential basis for admission would be under Fed.R.Evid. 801(d)(2), admissions by party-opponent. That rule only allows the statement to be admitted against the declarant. It cannot be admitted against a non-declarant if the declarant does not testify without violating the Sixth Amendment's confrontation guarantee. See infra.

3. MARSHALL'S STATEMENTS ARE NOT ADMISSIBLE AGAINST GRAHAM

Graham's right to confrontation will be violated if Marshall's jointly inculpatory statements are admitted against him. Marshall, through his counsel, has asserted that Marshall is not likely to testify if the defendants are jointly tried. File Doc. 81. Therefore, Graham will not have the ability to confront the declarant, Marshall. This will violate Graham's right to confrontation. Bruton v. United States, 391 U.S. 123, 126 (1968).

A curative or limiting instruction will not overcome the confrontation clause violation due to the powerfully incriminating nature of the alleged statements. Id. at 135-36. Redaction is not a feasible method of addressing the confrontation issue presented in this case because an inevitable association between Graham and Marshall will still be suggested. See Richardson v. Marsh, 481 U.S. 200, 211 (1987); U.S. v. Van Hemelryck, 945 F.2d 1493, 1503 (11th Cir. 1991); U.S. v. Petit, 841 F.2d 1546, 155 (11th Cir. 1988).

D. CONCLUSION

The government is trying to obtain convictions through out of court statements. Rather than specify in a meaningful manner how these statements are admissible, the government has set forth a laundry list of possible grounds for admission (verbal acts, verbal objects, state of mind, statements against interest).

A close review of the statements and the rules for admission of out of court statements reveals that none of these purported bases for admission are valid. Admission of these statements would not only violate the rule against hearsay, but Graham's right to confrontation. It would also violate his right to trial, as the evidence that the government seeks to introduce is so unreliable that admitting it would call into question the fundamental fairness of the process. For these reasons, Graham asks that the court issue its ruling excluding the statements

identified by the government, and the unidentified statements that the government claims are of a similar nature.

Dated December 5, 2008.

/s/ John R. Murphy

John R. Murphy
328 East New York Street, Suite 1
Rapid City, SD 57701
(605) 342-2909

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true and correct copy of the foregoing document upon the person(s) herein next designated, on the date shown below by placing the same in the service indicated, addressed as follows:

MARTY J. JACKLEY	☐	U.S. Mail, postage prepaid
	☐	Hand Delivery
	☐	Federal Express
	☐	Facsimile at
	☒	Electronic Case Filing
ROBERT A. MANDEL	☐	U.S. Mail, postage prepaid
	☐	Hand Delivery
	☐	Federal Express
	☐	Facsimile at
	☒	Electronic Case Filing
DANA HANNA	☐	U.S. Mail, postage prepaid
	☐	Hand Delivery
	☐	Federal Express
	☐	Facsimile at
	☒	Electronic Case Filing

Dated December 5, 2008.

/s/ John R. Murphy
John R. Murphy