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 GRAHAM'S TRIAL MEMORANDUM REGARDING STATEMENTS AGAINST INTEREST AND REQUEST FOR HEARING ON ADMISSIBILITY

INTRODUCTION

In this case, and in Defendant Graham's previous file, CR 03-50020, the government has stated that it intends to admit at trial against Graham out of court statements made by co-defendant Vine Richard Marshall, co-defendant Fritz Arlo Looking Cloud, and un-indicted alleged accomplice, Theda Clarke. See File No. 08-50079, Docs. 64, 65, 95; File No. 03-50020, Docs. 303, 305, 307, 313, 314. The government has also stated that it intends to offer other, unspecified out of court statements against Graham. See File No. 08-50079, Doc. 64, note 1; File No. 03-50020, Doc. 303, note 1. The government states these statements, though not made by Graham, are admissible against him under the "statements against interest" exception to the rule against hearsay, Fed.R.Evid. 804(b)(3).

Mr. Graham has previously challenged the admissibility of some of these statements, particularly on confrontation clause grounds. File 08-50079, Doc. 76, 86. And, Mr. Graham has previously argued that separate trials should be granted if the government wants to admit Marshall's jointly inculpatory statements against Marshall at trial. File 08-50079, Doc. 76.

In this trial memorandum, Graham outlines general legal principles regarding the admissibility of statements under Fed.R.Evid. 804(b)(3). As set forth below, Graham asserts that because the statements the government seeks to admit contain collateral matters or are not exclusively self-inculpatory, they are inadmissible against him.

Graham has raised this matter prior to trial for several reasons. As set forth below, the admissibility analysis places several burdens on the Court. Prior to admitting statements against interest, the Court must excise the collateral and/or jointly inculpatory portions of a statement, and isolate the directly self-inculpatory portions. This is in addition to the other foundational findings the Court must make under the rule, such as determining that the declarant is unavailable and that the statement has particularized guarantees of trustworthiness. Further, the Court must consider the Bruton and Crawford issues previously raised by Mr. Graham in regard to admission of these statements.

REQUEST FOR HEARING

A pretrial hearing is warranted in regard to these matters. Fed.R.Evid. 104(c). The statements are confessions under Fed.R.Evid. 104(c) because the government asserts the statements are directly contrary to the declarants' penal interests. Therefore, these are not matters that can be resolved in the presence of the jury at trial. Fed.R.Evid. 104(c). A pretrial hearing would resolve many of the questions regarding admissibility.

LEGAL PRINCIPLES TO BE APPLIED

Prior to 1994, considerable debate existed as to what statements were admissible under Fed.R.Evid. 804(b)(3). Williamson v. United States, 512 U.S. 594, 611-12 (1994) At issue was whether the term "statement" included whole conversations or statements which included collateral matters, jointly inculpatory statements, or partially exculpatory assertions. Or, whether it should be construed narrowly to only include directly inculpatory portions of conversations and not collateral matters or matters that directed blame elsewhere or tended to exculpate the declarant. See generally Williamson v. United States, 512 U.S. 594 (1994) (plurality opinion, O'Connor, J., all justices concurring in the judgment, four separate opinions written).

Those issues were resolved in Williamson v. United States, 512 U.S. 594 (1994). Williamson held that Fed.R.Evid. 804(b)(3) should be construed narrowly so that collateral matters, non-self-inculpatory statements, and statements that are partially inculpatory but partially exculpatory, are inadmissible. Id. at 599-600 (O'Connor, J., writing for the Court), 606 (Scalia, J., concurring), 607 (Ginsburg, J., Blackmun, J., Stevens, J., and Souter, J., concurring). As Justice O'Connor wrote:

> Although the text of the Rule does not directly resolve the matter, the principle behind the Rule, so far as it is discernible from the text, points clearly to the narrower reading. Rule 804(b)(3) is founded on the commonsense notion that reasonable people, even reasonable people who are not especially honest, tend not to make self-inculpatory statements unless they believe them to be true. This notion simply does not extend to the broader definition of "statement." The fact that a person is making a broadly self-inculpatory confession does not make more credible the confession's non-self-inculpatory parts. One of the most effective ways to lie is to mix falsehood with truth, especially truth that seems particularly persuasive because of its self-inculpatory nature.
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> And when part of the confession is actually self-exculpatory, the generalization on which Rule 804(b)(3) is founded becomes even less applicable. Self-exculpatory statements are exactly the ones which people are most likely to make even when they are false; and mere proximity to other, self-inculpatory, statements does not increase the plausibility of the self-exculpatory statements.
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> * * *
>
> The fact that a statement is self-inculpatory does make it more reliable; but

> the fact that a statement is collateral to a self-inculpatory statement says nothing at all about the collateral statement's reliability. We see no reason why collateral statements, even ones that are neutral as to interest, should be treated any differently from other hearsay statements that are generally excluded.
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> * * *
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> In our view, the most faithful reading of Rule 804(b)(3) is that it does not allow admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory. The district court may not just assume for purposes of Rule 804(b)(3) that a statement is self-inculpatory because it is part of a fuller confession, and this is especially true when the statement implicates someone else.

Williamson, supra, 599-601.

And, as Justice Scalia wrote:

> I quite agree with the Court that a reading of the term "statement" to connote an extended declaration (and which would thereby allow both self-inculpatory and non-self-inculpatory parts of a declaration to be admitted so long as the declaration in the aggregate was sufficiently inculpatory) is unsupportable.

Williamson, supra, (Scalia, J., concurring), 606.

And, as Justice Ginsbach wrote:

> I agree with the Court that Federal Rule of Evidence 804(b)(3) excepts from the general rule that hearsay statements are inadmissible only 'those declarations or remarks within [a narrative] that are individually self-inculpatory.' As the Court explains, the exception for statements against penal interest 'does not allow admission of non-self-inculpatory statements,

> even if they are made within a broader narrative that is generally self-inculpatory.

Williamson, supra, 607 (Ginsbach, J., concurring, Blackmun, J., Stevens, J., and Souter, J., joining) (emphasis added). See United States v. Mendoza, 85 F.3d 1347, 1351-1352 (8th Cir. 1996) (citing Williamson and stating that portions of inculpatory statements "that pose no risk to the declarants are not particularly reliable; they are just garden variety hearsay.").

Based on these principles, courts must distinguish between individually self-inculpatory portions of a statement and those that contain either collateral matters, non-self-inculpatory matters, jointly inculpatory matters, or matters that shift blame to other persons. Williamson, supra; Mendoza, supra (citations omitted). The government has made no effort to do this in this case.

Instead, the government proposes to introduce statements by Looking Cloud where he claims to be an unwitting bystander when Aquash was killed, and an unwilling accomplice to her kidnaping and rape. The government proposes to introduce Marshall's statements that Graham, Clarke and Looking Cloud brought Aquash to his house, against her will, and that he refused to assist them other than to give directions. The government proposes to introduce vague, jointly inculpatory statements by Marshall about how AIM conducted itself "back in the

day" and unspecific, jointly inculpatory statements by Clarke about "we [persons unknown] weren't going to let it [event unknown] happen again." And, the government intends to admit other out of court statements that it alleges are similar but which it has yet to identify.

Prior to admitting any of these statements, the Court must take out the collateral, exculpatory and the jointly inculpatory portions, and isolate the directly self-inculpatory portions. This is in addition to the other foundational findings required under the rule, such as finding the unavailability of the declarant and particularized guarantees of trustworthiness. Further, the Court must consider the Bruton and Crawford issues previously raised by Mr. Graham in regard to admission of these statements.

Accordingly, Mr. Graham asks the Court to prohibit admission of any of these statements until such time as an admissibility hearing has been conducted.

Dated December 19, 2008.

/s/ John R. Murphy

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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:

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Dated December 19, 2008.

/s/ John R. Murphy
John R. Murphy