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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA, Plaintiff, vs. FRANCIS SCHAEFFER COX, COLEMAN L. BARNEY, and LONNIE G. VERNON, Defendants.	)	Case No. 3:11-CR-00022-RJB **UNITED STATES' MOTION IN LIMINE TO EXCLUDE ADMISSION OF HEARSAY STATEMENTS OF DEFENDANTS AND OTHERS**

The United States, by and through undersigned counsel, hereby submits this Motion *in Limine* to exclude the introduction of out of court hearsay evidence

consisting of statements made by the defendants, or other persons, which the defendants may attempt to introduce into evidence at trial.

I. INTRODUCTION

On January 31, 2012, government counsel provided counsel for the defendants with a draft list of the audio and video clips which the government intended to introduce in its case-in-chief. Counsel were to identify, by April 6, whether any clips needed to be expanded or added to for "context" pursuant to Rule 106 of the Federal Rules of Evidence.[1]

Counsel for defendant Barney responded and identified several expanded clips which he requested to be played.[2] He also identified other recordings which are entirely independent of the ones identified by the government which he requested the government to play in its case-in-chief. The government has agreed to expand a number of the government's previously identified case-in-chief recordings, but declines to play other completely independent clips.

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[1] The rule of completeness, *see* Fed.R.Evid. 106 (requiring that the redacted version of a statement not distort the meaning of the statement), applies only to written and recorded statements. *See United States v. Collicott*, 92 F.3d 973, 983 (9th Cir. 1996) (finding that "Rule 106"'does not compel admission of otherwise inadmissible hearsay evidence' ") (quoting *Phoenix Associates III v. Stone*, 60 F.3d 95, 103 (2d Cir. 1995)).

[2] Defendant Cox joined in this request.

The government anticipates that the defendants may attempt to introduce such statements by:

(1) playing recordings of meetings or telephone conversations which they may attempt to offer into evidence through witnesses in the defense case or during the cross examination of government witnesses, and / or

(2) asking witnesses, either on direct examination of witnesses in the defense case, or, on cross examination of government witnesses, about out of court statements made by the defendants or others.

Either way, all such statements are inadmissible hearsay and must be excluded absent some applicable exception to the hearsay rule.

II. ARGUMENT

A. Out-of-Court Statements Made By the Defendants Are Inadmissible Hearsay if Offered by the Defendants

As noted, the government anticipates that the defendants may attempt to play recorded conversations or, call witnesses in the defense case (or cross examine government witnesses) for the purpose of impermissibly seeking to introduce evidence regarding prior, out-of-court statements made by the defendants - or perhaps other persons. The Federal Rules of Evidence explicitly provide that such conversations are inadmissible when offered *by the defendant. See,* Rule

801(d)(2), Fed. R. Evid. They are admissible, however, if offered *by the government,* because, under Fed.R.Evid. 801(d)(2)(A), a statement is not hearsay if it "is offered against a party and is ... the party's own statement." Therefore, such statements are not admissible unless they are offered by the other party - in this case, the United States. There is no evidentiary basis that would allow the defendants to admit these types of prior conversations for the truth of the matter asserted.

As to out-of-court statements of persons other than the defendants, these statements are also clearly hearsay for which there is no applicable exception that would allow their admission into the record. *See* Fed. R. Evid. 801-803. Nor can they be admitted as non-hearsay, co-conspirator statements pursuant to Fed. R. Evid. 801(d)(2)(E).[3]

[3] If the defendants seek to introduce out-of-court statements allegedly made by the two cooperating informants in the investigation - Gerald Olson and William Fulton - they would not be admissible as coconspirator statements as Olson and Fulton, who were acting at the direction of the government cannot be a part of the conspiracy. And, even if (1) Olson and Fulton were conspirators, and (2) their out-of-court statements did relate to the existence of, or the furtherance of the alleged conspiracy, they cannot be offered into evidence as non-hearsay because they *must be offered against a party opponent.* That is, the defendants cannot offer co-conspirator statements by a co-conspirator against themselves. *See* Fed. R. Evid. 801(d)(2)(E).

B. Specifically, Prior Exculpatory Statements of a Defendant are Inadmissible Hearsay if Offered by the Defendant

As noted, prior statements of a defendant *are* admissible as substantive evidence *in the government's case*. *See, United States v. Matlock*, 415 U.S. 164, 172, 94 S.Ct. 988, 994, 39 L.Ed.2d 242 (1974). [A defendant's "own out-of-court admissions ... surmount all objections based on the hearsay rule ... and [are] admissible for whatever inferences the trial judge [can] reasonably draw."].

However, a defendant's *prior exculpatory* statements are hearsay, and they are not admissible through other witnesses or through recordings. *See, United States v. Ortega*, 203 F.3d 675, 682 (9th Cir. 2000). In other words, *a defendant* cannot play a recording, or call some other witness (or inquire of a government witness on cross examination for that matter) to admit some out-of-court exculpatory statement made by the defendant. Fed. R. Evid. 801(d)(2).

Such statements are inadmissible even if they were made contemporaneously with other self-inculpatory statements. *See Williamson v. United States*, 512 U.S. 594, 599 (1994). This is because the self-inculpatory statements, when offered by the government, are admissions by a party-opponent under Fed.R.Evid. 801(d)(2), and are therefore not hearsay. However, the non-self-inculpatory statements - even if made contemporaneously with self-

inculpatory statements - are inadmissible hearsay. *See Williamson*, 512 U.S. at 599 (finding that "[t]he fact that a person is making a broadly self-inculpatory confession does not make more credible the confession's non-self-inculpatory parts [which are hearsay]").

Allowing the admission of exculpatory out of court statements of a defendant would allow the defendant to place his exculpatory statements "before the jury without subjecting [himself] to cross-examination, precisely what the hearsay rule forbids." *United States v. Fernandez*, 839 F.2d 639, 640 (9th Cir. 1988).

C. There is no Applicable Exception to the Hearsay Rule Which Would Permit the Admission of Statements Arguably Reflecting the Defendant's Beliefs or Opinions

The defendants may argue that even if such statements are hearsay, certain statements reflecting the defendant's beliefs or opinions should be admissible under an exception to the hearsay rule.[4] Specifically, the defendants may assert that certain audio and / or video recorded statements or other statements of the

[4] "The proponent of the evidence" bears the "burden to demonstrate" the applicability of an exception to the hearsay rule. *See United States v. Chang*, 207 F.3d 1169, 1177 (9th Cir. 2000); *see also Los Angeles News Svc. v. CBS Broadcasting Corp.*, 305 F.3d 924, 934 (9th Cir. 2000).

defendants are admissible under Federal Rule of Evidence 803(3), which relates to a declarant's statements that express his or her "existing mental, emotional, or physical condition." Fed. R. Evid. 803(3). That exception provides that the hearsay rule does not exclude:

> 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 ...

Id.

In reviewing Rule 803(3) admissibility decisions, the Ninth Circuit has identified three factors bearing on the "*foundational* inquiry on admissibility" under that hearsay exception: "contemporaneousness, chance for reflection, and relevance." *United States v. Emmert*, 829 F.2d 805, 810 (9th Cir. 1987) (emphasis added). Where a defendant's own statements constitute "self-serving assertions that he did not have the requisite intent for the crime now charged," Rule 803(3) does not support the admission of those statements. *United States v. Bishop*, 264 F.3d 535, 549 (5th Cir. 2001).

A seminal case on the scope and application of Rule 803(3) is the Fifth Circuit's decision in *United States v. Cohen*, 631 F.2d 1223 (5th Cir. 1980), *reh'g denied*, 636 F.2d 315 (1981). There, the defense sought to admit statements that

would corroborate the defendant's direct testimony of threats made by Galkin, a co-conspirator. In upholding the district court's exclusion of that evidence, the Fifth Circuit first noted that Rule 803(3) is "limited" in its scope:

> Appellant seeks to stretch the limited scope of admissibility under F.R.E. 803(3). That rule by its own terms excepts from the ban on hearsay such statements as might have been made by Cohen of his then existing state of mind or emotion, but expressly excludes from the operation of the rule a statement of belief to prove the fact believed...

Applying Rule 803(3) to the proffered statements, the court held that the statements were inadmissible hearsay:

> [T]he state-of-mind exception does not permit the witness to relate any of the declarant's statements as to why he held the particular state of mind, or what he might have believed that would have induced the state of mind. *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 Galkin threatened me."

631 F.2d at 1225 (emphasis added).[5]

What *Cohen* acknowledged is that Rule 803(3) provides a limited safe harbor for a declarant's description of his present mental condition. When the declarant's statements stray from that narrow category – for instance, when the

[5] For a more detailed explanation of this aspect of Rule 803(3), *see United States v. Ledford*, 443 F.3d 702, 709 (10th Cir. 2005).

defendant expresses a belief, an opinion, an explanation, or any other such expression – the statement falls outside the Rule's protection and constitutes inadmissible hearsay.

The distinction set forth in *Cohen* – a difference between an expression of state of mind ("I'm scared") and an expression of a belief admitted for the purpose of proving the truth of that belief ("I'm scared because of X") was explicitly adopted by the Ninth Circuit in *United States v. Emmert*, 829 F.2d 805, 810 (9th Cir. 1987). In *Emmert*, the Ninth Circuit concluded that the defendant was not permitted to elicit, from a third party witness, the defendant's prior statements that the defendant feared government investigators. As the *Emmert* panel held, because the "testimony would have fallen within the 'belief' category and would not have been limited to Emmert's current state of mind, it was properly excluded." *Id.*

Similarly, in *United States v. Sayakhom*, 186 F.3d 928, 936-37 (9th Cir. 1999), the defendant sought to admit an audio recording of a meeting between the defendant and government investigators. The defendant proffered that the "recording was relevant to her state of mind," in that the recording would "show her knowledge in order to refute the intent requirement of the crimes charged." *Id.* at 937. Concluding that the defendant "thus proffered the tape to prove the truth of her statements to the investigators," the Ninth Circuit affirmed the district court's

exclusion of the recorded statements. *Id.* In so holding, the Ninth Circuit ruled that "Sayakhom's attempt to introduce statements of her belief (that she was not violating the law) to prove the fact believed (that she was acting in good faith) is improper." *Id.*

Here, in the event that the defendants seek admission under Rule 803(3), the government submits that any proffered statements do not constitute a statement of present mental condition, and are thus inadmissible under Rule 803(3). Similarly, statements by the defendants regarding their belief or opinion on certain issues constitute statements of *belief* that are inadmissible under Rule 803(3).[6]

III. CONCLUSION

If the defendants attempt to introduce out of court hearsay evidence consisting of statements made by the defendants, or other persons, they have to have a valid theory as to why such statements are not inadmissible hearsay, or, if hearsay, then a valid theory as to why some hearsay exception would apply.

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[6] Rule 803(3) contains two additional factors: "contemporaneousness [and] chance for reflection." *See Emmert*, 829 F.2d at 810. These factors are deemed important because "Rule 803(3) is related to the exceptions created by Rules 803(1) and (2), which allow statements of present sense impression and excited utterances." *United States v. Faust*, 850 F.2d 575, 586 (9th Cir. 1988) [affirming exclusion of hearsay because "[t]he circumstances in this case allowed Faust to think long and hard" before crafting his statement]].

RESPECTFULLY SUBMITTED this 23rd day of April, 2012, at Anchorage, Alaska.

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CERTIFICATE OF SERVICE
I hereby certify that a copy of the foregoing was served on April 23, 2012 via the CM/ECF system, to the following counsel of record:

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