IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	CR. NO. 2:10cr186-MHT
	)	
MILTON E. MCGREGOR	)	
THOMAS E. COKER	)	
ROBERT B. GEDDIE JR.	)	
LARRY P. MEANS	)	
JAMES E. PREUITT	)	
QUINTON T. ROSS JR.	)	
HARRI ANNE H. SMITH	)	
JARRELL W. WALKER JR.	)	
JOSEPH R. CROSBY	)	

UNITED STATES' RESPONSE TO DEFENDANT SMITH'S MOTION IN LIMINE REGARDING ADMISSIBILITY OF DEFENDANT PREUITT'S STATEMENTS TO JOSHUA BLADES

The Government, through undersigned counsel, hereby opposes defendant Harri Anne Smith's motion in limine to exclude testimony of Joshua Blades concerning statements made to him by defendant James Preuitt. Blades will testify that, on or about March 4, 2010, Preuitt told him about an incident involving Smith. After Preuitt and Blades discussed Ronnie Gilley's efforts to raise hundreds of thousands of dollars for Smith, Preuitt explained to Blades that, on a prior occasion, Smith handed Preuitt her phone in order to talk with Gilley about the bingo legislation, and while Preuitt was on the phone with Gilley, Smith passed a piece of paper to Preuitt with a number written on it. Preuitt told Blades that the number was similar to the amount of money Gilley had raised for Smith. For the reasons that follow, the Government submits that Blades' testimony raises no Confrontation Clause problems and is admissible against all defendants.

I. Because Preuitt's Statements To Blades Are Nontestimonial, They Do Not Run Afoul of the Confrontation Clause.

In Crawford v. Washington, 541 U.S. 36, 53 (2004), the Supreme Court dramatically shifted its Confrontation Clause jurisprudence by abandoning the traditional reliability test for determining the admissibility of hearsay evidence, and holding that the "primary object" of the Sixth Amendment is "testimonial hearsay." Although Crawford declined to provide a precise definition of "testimonial statements," the Court did approve of various formulations offered in previous opinions and in the parties' written briefs, including "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions," id. at 51-52 (quoting White v. Illinois, 504 U.S. 346, 365 (1992)), as well as "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." Id. at 52 (quoting Brief for National Association of Criminal Defense Lawyers). Moreover, in holding that the Confrontation Clause applies only to "those who bear testimony," the Court noted that "an accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." Id. at 51 (emphasis added).

Preuitt's statements to Blades clearly fall outside the "common nucleus" of testimonial evidence exhibited by the various formulations in Crawford. Id. at 52. Preuitt did not make the incriminating statements in the context of a police interrogation, an affidavit to the court, or in a deposition. Rather, Preuitt relayed Smith's conduct to Blades during a conversation in Preuitt's office. Preuitt, and certainly no objective witness, reasonably could have believed that the statement would be "available for use at a later trial" when he was speaking with Blades. Rather, Preuitt's statements were much more akin to "a casual remark to an acquaintance" than "a formal statement to government officers." Id. at 51.

In support of her argument that Blades's testimony should be excluded as unreliable, Smith cites a 2005 case, United States v. Baker, 432 F.3d 1189, 1204 (11th Cir. 2005), which stated that that "[a]dmission of non-testimonial hearsay against criminal defendants is not governed by Crawford," but rather by the "particularized guarantee of trustworthiness" test from Ohio v. Roberts, 448 U.S. 56 (1980). This rule from Baker, however, contradicts more recent Supreme Court cases that reiterate that the trustworthiness standard is no longer good law. Indeed, two years after Crawford, the Court held in Davis v. Washington, 547 U.S. 813, 840 (2006), that an emergency 911 telephone call fell outside the scope of the Confrontation Clause and was thus admissible evidence because it was nontestimonial. Id. And in the 2007 case Whorton v. Bockting, 549 U.S. 406, 420 (2007), the Supreme Court left no doubt that Crawford had eviscerated both Roberts and the "indicia of reliability" test. Contrasting Crawford with Roberts, the Court noted: "Under Roberts, an out-of-court nontestimonial statement not subject to prior cross-examination could not be admitted without a judicial determination regarding reliability. Under Crawford, on the other hand, the Confrontation Clause has no application to such statements and therefore permits their admission even if they lack indicia of reliability." Id. (emphasis added).

Moreover, a number of circuit court cases after Crawford have explicitly held that nontestimonial evidence categorically falls outside the scope of Bruton, another Confrontation Clause case. See United States v. Figueroa-Cartagena, 612 F.3d 69, 85 (1st Cir. 2010) (holding that there was no Bruton violation where statement was nontestimonial); United States v. Johnson, 581 F.3d 320, 326 (6th Cir. 2009) ("Because it is premised on the Confrontation Clause, the Bruton rule, like the Confrontation Clause itself, does not apply to nontestimonial statements."); United States v. Vargas, 570 F.3d 1004, 1009 (8th Cir. 2009) (holding that there

was no Bruton violation where statement was not testimonial); United States v. Pike, 292 F. App'x 108, 112 (2d Cir. 2008) ("[B]ecause the statement was not testimonial, its admission does not violate either Crawford or Bruton."). As such, Smith's reliability argument[1] under Baker is inapposite, as the Confrontation Clause simply is not implicated by Preuitt's nontestimonial statements to Blades.

II. Preuitt's Statements Are Admissible Against All Defendants Under Federal Rules of Evidence 801(d)(2)(e) and 801(d)(5).

Blades's likely testimony will involve so-called "double hearsay," because it involves statements which are twice removed from his testimony. Admission of "hearsay within hearsay" is permitted under Federal Rule of Evidence 805, however, so long as "each part of the combined statements conforms with an exception to the hearsay rule" provided in the Rules.

Smith's statement to Preuitt and his statements to Blades are both admissible under Federal Rule of Evidence 801(d)(2)(E), which provides that a statement is not hearsay if the statement "is offered against a party" and is "a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." Both defendants are charged in Count One of the Indictment with conspiracy to commit federal programs bribery in violation of 18 U.S.C. §§ 371 and 666. Smith's out-of-court statement to Preuitt as relayed to Blades (*i.e.*, Smith told Preuitt Gilley wanted to talk with him about the legislation and then while Preuitt spoke with Gilley Smith passed Preuitt the note) occurred sometime between December 2009 and March 2010 which falls within the time period of the conspiracy (*i.e.*, from February 2009 through August 2010). Moreover, the clear implication of defendant Smith's note was that he would receive an

[1] Smith conflates her Crawford-based reliability argument with a more general challenge to the reliability of Blades's memory. Focusing on statements that he made to law enforcement and to the grand jury, she claims that his version of events cannot be trusted. This argument, too, is misplaced. Any flaws in Blades's recollection concerning Preuitt's statements goes to the weight afforded his testimony by the jury, and not whether it is admissible in the first place. Smith, and her co-defendants, are well-equipped to challenge Blades's memory of his conversation with Preuitt during cross-examination.

amount of money, similar to the amount Gilley had previously raised for Smith, in exchange for his vote on the gambling legislation. As such, Smith's statement is exempted under Rule 801(d)(2)(E).

Similarly, Preuitt's statements to Blades, recounting defendant Smith's actions, were made in furtherance of the conspiracy. As an initial matter, evidence previously admitted belies Smith's claim that Preuitt was not a member of the conspiracy on March 4, 2010, when he spoke with Blades. On March 2, 2010, see Ex. J-019, Jarrod Massey told Gilley that "the deal with Preuitt is still a problem," and Gilley responded that he had just spoken with Preuitt and that Gilley believed Preuitt's "gonna come around." During the same conversation, Massey told Gilley that he had spoken with Smith twenty minutes earlier to discuss working with Preuitt. Id. This evidence provides more than sufficient support for both the existence of a conspiracy in early March 2010---as well as Preuitt's involvement in it.

Blades' conversation with Preuitt two days after the Massey-Gilley call corroborates the Massey-Gilley call and proves the conspiratorial relationship between Massey, Gilley, Preuitt, and Smith. Further, Preuitt's statements to Blades during the March 4 conversation were in furtherance of the conspiracy. As Blades will testify, at the time of the conversation he was the Chief of Staff to then-Governor Bob Riley, who opposed SB380. As such, Preuitt's purpose in telling Blades about his conversation with Smith was to ensure that Blades would relay Gilley's offer to Riley, in the hopes of getting a higher counter-offer from the Governor to oppose the legislation. This is corroborated by the fact that, during the March 4 Preuitt-Blades conversation regarding SB380, Preuitt asks Blades if the Governor would provide certain funds to his district. In that regard, Preuitt's conversation with Blades furthered Preuitt's participation in the conspiracy---to solicit or demand things of value in exchange for his vote on SB380. Because

Preuitt's statements to Blades fall within the co-consipirator hearsay exception under Rule 801(d)(2)(E), they are therefore admissible against all members of the conspiracy---all defendants.[2]

For the foregoing reasons, the Government respectfully submits that Blades' testimony raises no Confrontation Clause problems and is admissible against all defendants and therefore defendant Smith's motion should be denied in its entirety.

DATED: July 21, 2011

Respectfully submitted,

JACK SMITH
Chief

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[2] However, in the event that the Court holds that Preuitt's statements to Blades are not admissible against the other defendants, they nevertheless still would be admissible against him as admissions of a party-opponent under Rule 801(d)(2)(A) (admission by a party-opponent) and 804(b)(3)(A) (statement against interest).

CERTIFICATE OF SERVICE

I HERBY CERTIFY that on this date, I caused the foregoing motion to be electronically filed with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the attorneys of record for the defendants.

DATED: July 21, 2011

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