SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION - FELONY BRANCH

UNITED STATES OF AMERICA	:	**Case No. 08 CF1 27068**
	:	**08 CF1 26996**
v.	:	**08 CF1 26997**
	:	
DYLAN M. WARD,	:	**Judge Lynn Leibovitz**
JOSEPH R. PRICE, and	:	
VICTOR J. ZABORSKY	:	**Status Hearing: April 23, 2010**

GOVERNMENT'S NOTICE OF INTENT TO USE STATEMENTS

The United States of America, by and through its attorney, the United States Attorney for the District of Columbia, respectfully provides the following notice regarding use of the defendants' statements.

I. Procedural Background

On February 26, 2010, the defendants filed a joint motion for severance of their cases, asserting that admission of each defendant's statements to the police at a joint trial would cause undue prejudice to the co-defendants. In an opposition filed on March 24, 2010, the government argued that severance was not warranted in this case where the statements are not hearsay, and do not violate the Confrontation Clause.[1] At a status hearing on April 5, 2010, the Court ordered the government to provide additional detail regarding its intent to use the defendants' statements at trial. Specifically, the Court sought clarification of which particular statements of the defendants the government intended to use at trial, for what particular purpose, and pursuant to what specific theory of admissibility.

[1]In the interest of efficiency, this pleading adopts and incorporates by reference the government's March 24, 2010 opposition to the defendants' motion to sever.

II. Summary of the Government's Position

The statements the government seeks to introduce at trial fall into essentially two categories: (1) statements not offered to prove the truth of the matter asserted; and (2) statements offered for their truth, but which refer only to the declarant. Significantly, none of the statements facially incriminate the co-defendants, much less "powerfully" so, such that the Confrontation Clause is implicated. Because neither category of statements runs afoul of the Confrontation Clause, or the hearsay rules, the Court should admit the statements at trial. Our analysis follows.

II. Legal Framework and Analysis

As a general matter, statements are admissible at trial if relevant, and are not otherwise limited by the Confrontation Clause or the rule barring hearsay evidence.

A. Admission of the statements does not violate the Confrontation Clause.

The Confrontation Clause bars the admission of statements that "powerfully incriminate" a co-defendant. Bruton v. United States, 391 U.S. 123 (1968). In addition, the Confrontation Clause bars admission of a "testimonial" statement, being offered to prove the truth of the matter asserted, if the declarant is unavailable to testify and the defendant has not had a prior opportunity to cross examine the declarant. Crawford v. Washington, 541 U.S. 36 (2004). However, as the Supreme Court made clear in Davis v. Washington, 547 U.S. 813, 821 (2006), if the statement is not testimonial, then the Confrontation Clause is not implicated. *See also* Thomas v. United States, 978 A.2d 1211, 1224-25 (D.C. 2009). Similarly, if the statement is not offered for its truth, the Confrontation Clause is not implicated.

1. **None of the statements is incriminating, much less "powerfully" so.**

As an initial matter, Bruton and its progeny address statements that "powerfully incriminat[e]" a co-defendant. Bruton, 391 U.S. at 135; *see also* Thomas, 978 A.2d 1224-25 ("if a defendant's extrajudicial statement *inculpating* a co-defendant is testimonial, Bruton requires that it be redacted for use in a joint trial . . . . Whether or not it is testimonial, a defendant's extrajudicial statement *directly implicating* a co-defendant is equally susceptible to improper use by the jury against that co-defendant") (emphasis added). Indeed, as the Court of Appeals made clear in Geter v. United States, if the extrajudicial statement is not "*significantly incriminating*," it may be "appropriate for the trial court . . . to admit the statement without limiting instructions." 929 A.2d 428, 431-32 n. 7, *quoting* Carpenter v. United States, 430 A.2d 496, 505 (D.C. 1981) (*en banc*) (internal quotation omitted).

In Bruton, the Supreme Court made clear that a "facially incriminating" confession by a defendant that inculpates his co-defendant has a risk of violating the Confrontation Clause rights of the co-defendant. 391 U.S. at 126. Several cases that follow Bruton highlight the nearly universally-accepted proposition that, when a defendant's confession (hereinafter referred to for ease of reference as "defendant A") directly incriminates the non-declarent co-defendant (hereinafter "defendant B"), limiting instructions may be inadequate to overcome the prejudice to defendant B. Bruton itself involved a situation where defendant A confessed that he and defendant B committed an armed postal robbery together. The confession was admitted at trial against only defendant A, with instructions to the jury that it could not be considered against defendant B. The Supreme Court held that the admission, at a joint trial, of a "facially incriminating" confession by defendant A violated defendant B's rights under the Confrontation

Clause notwithstanding the limiting instructions given by the trial court.

By contrast, in cases where statements admitted into evidence are not directly incriminating on their face but are only inferentially incriminating when viewed in light of other evidence, the Supreme Court has held that a limiting instruction likely will suffice to protect the rights of the non-declarant co-defendant. Richardson v. Marsh, 481 U.S. 200 (1987). In Richardson, defendant A's confession, which had been sanitized to omit any reference to defendant B, was admitted into evidence with a limiting instruction that the jury could use the statement only against defendant A. Respondent Marsh (defendant B in this scenario) argued that her conviction should be reversed because of the fact that defendant A's confession inferentially incriminated her in violation of the Confrontation Clause and Bruton's prohibitions. The Supreme Court disagreed:

> Where the necessity of such linkage [*i.e.*, inferential incrimination] is involved, it is a less valid generalization that the jury will not likely obey the instruction to disregard the evidence. Specific testimony that "the defendant helped me commit the crime" is more vivid than inferential incrimination, and hence, more difficult to thrust out of mind. Moreover, with regard to such an explicit statement the only issue is, plain and simply, whether the jury can possibly be expected to forget it in assessing the defendant's guilt; whereas with regard to inferential incrimination, the judge's instruction may well be successful in dissuading the jury from entering onto the path of inference in the first place, so that there is no incriminating information to to forget. In short, while it may not always be simple for members of a jury to obey the instruction that they disregard an incriminating inference, there does not exist the overwhelming probability of their inability to do so that is the foundation of Bruton's exception to the general rule.

Id. at 208 (brackets added).

The Court went on to instruct that, "[e]ven more significantly, evidence requiring linkage differs from evidence incriminating on its face in the practical effects which application of the Bruton exception would produce," citing the difficulty a court would have in assessing whether there was sufficient linkage to other evidence to make that statement incriminating. Id. at 208-09. The court went on emphasize that "facially incriminating confessions" are the danger against which Bruton was designed to guard. Id. at 209.

Finally, in rejecting the notion that separate trials are in order every time "an incriminating statement" of one defendant is introduced at a joint trial, the court instructed, "[t]hat is not as facile or as just a remedy as might seem. . . . Joint trials generally serve the interests of justice by avoiding inconsistent verdicts and enabling more accurate assessment of relative culpability – advantages which sometimes operate to the defendant's benefit. Even apart from these tactical considerations, joint trials generally serve the interests of justice by avoiding the scandal and inequality of inconsistent verdicts. Id. at 209-210.

The Supreme Court later reiterated the implications of it's decision in Richardson: "We concede that Richardson placed outside the scope of Bruton's rule those statements that incriminate inferentially." Gray v. Maryland, 523 U.S. 185, 195 (1998). Locally, the District of Columbia Court of Appeals also recognized this principle: "the use of a statement by a non-testifying co-defendant that *expressly implicates* the defendant violates the Sixth Amendment right to confront the witness testifying against him." Plater v. United States, 745 A.2d 953 (D.C. 2000) (emphasis added); *see also* Carpenter, 430 A.2d at 503 (Bruton violated where "confessions and admissions that are '*powerfully incriminating*' present an especially great risk that limiting instructions will not be followed at potentially great prejudice to the non-confessing

co-defendant") (emphasis added) (internal citation omitted).

In a case factually similar to the case at bar, the Supreme Court of South Dakota recently examined whether the trial court committed a Bruton violation by conducting a joint-trial in which the unredacted videotaped statements of each of the two defendants – neither of which incriminated the other – were played. South Dakota v. Zakaria, 730 N.W.2d 140 (S.D. 2007). The Court found that co-defendant Reath's videotaped statement, which referenced Zakaria, but did not implicate him in the armed robbery of a casino:

> falls within the rule of Richardson rather than Bruton. Bruton involved a confession by a co-defendant that directly implicated Bruton with "powerfully incriminating" evidence. Richardson, 481 U.S. at 208. In contrast, neither Reath nor Zakaria confessed or implicated the other. Because Reath's statements were not inculpatory, and certainly were not powerfully incriminating, the trial court did not violate Bruton by refusing to sever and utilizing a limiting instruction.

Id. at 144.[2]

As in Zakaria, none of the statements the government seeks to introduce at trial facially incriminates the co-defendants, much less "powerfully" so. Indeed, various aspects of the statements of each defendant, if believed, powerfully exculpate the others. Thus, the Confrontation Clause does not bar the admission of any of the defendants' statements.

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[2] The court's limiting instructions may well be a good model in this case as well. In preliminary instructions, the court told the jury that "a particular item of evidence is sometimes received for a limited purpose. [The judge will] tell you when that occurs, and instruct you on the purposes for which the item can and can not be used." Then, prior to the admission of each defendant's videotaped statement, the court instructed: "Questions and statements by the police are not evidence. Statements made by the defendant are evidence but only may be considered in your deliberation regarding the charges against that person. In this trial with two defendants, you must make a distinction and only consider this evidence with regard to the defendant who made the statements." South Dakota v. Zakaria, 730 N.W.2d 140, 144 n. 3 (S.D. 2007).

2. **The majority of the statements are not being offered for the truth of the matter asserted.**

Further, even assuming *arguendo* that some portions of some of the statements "incriminated" the other defendants, those statements are not being offered for the truth of the matter asserted. The post-Bruton case Tennessee v. Street makes clear that the Confrontation Clause is not implicated when an out-of-court statement, even one incriminating the defendant, is not offered for its truth. 471 U.S. 409 (1985) (defendant's Confrontation Clause rights not violated by introduction of accomplice's confession to murder to rebut defendant's claim that his own confession to murder was coercively derived from the accomplice's).

3. **The statements are not otherwise testimonial, and thus the Confrontation Clause is not implicated.**

Crawford's requirement that the declarant be available for cross-examination does not apply to statements that are not testimonial. Davis v. Washington, *supra*, 547 U.S. at 821 (if the statement is not testimonial, then the Confrontation Clause is not implicated); *see also* Thomas v. United States, *supra*, 978 A.2d at 1224-25 ("if a defendant's extrajudicial statement inculpating a co-defendant is *not* testimonial, Bruton does not apply, because admission of the uncensored statement in evidence at a joint trial would not infringe the co-defendant's Sixth Amendment rights, whether or not the statement fits within a hearsay exception."). A statement is "testimonial" if it is a "'solemn declaration or affirmation made for the purpose of establishing or proving some fact,' 'a formal statement to government officers,' or the like." Lewis v. United States, 938 A.2d 771, 777 (D.C. 2007), *quoting* Crawford, 541 U.S. at 51. As set forth in the articulation of specific statements, there are a few statements that the government may seek to admit for the truth of at least some of the matters therein. However, those statements are not

testimonial either because they are made to civilian witnesses (*see* Thomas, 978 A.2d at 1227 (statements to acquaintances not testimonial)), in a 9-1-1 call (*see* Tyler v. United States, 975 A.2d 848, 855 (statements made to 9-1-1 operator given to meet an ongoing emergency not testimonial)), or to first responding medical technicians or officers (*see* Lewis, 938 A.2d at 780 (statements made to first responding officer recounting the basic facts of the incident not testimonial because the primary purpose of the questioning was to enable the officer to respond most effectively to an ongoing emergency)).

B. Admission of the statements does not violate the hearsay rules.

The statements the government seeks to admit also comply with the hearsay rules in that: (1) statements not offered for their truth are non-hearsay, Fed.R.Evid. 801(c); and (2) statements by a defendant, implicating only that defendant, are statements of a party opponent, and are similarly non-hearsay. Fed.R.Evid. 801(d)(2)(A).

IV. The Statements Sought to be Admitted

As noted, the statements of the defendants that the government seeks to admit fall into essentially two categories: (1) those not offered to prove the truth of the matter asserted, and (2) those offered against the declarant alone, with a limiting instruction if applicable.

A. Statements not for the Truth

1. Defendant Joseph Price

a) Videotaped interview with Detective Norris/Sgt. Wagner

The government may seek to admit this interview in its entirety at trial. A summary of the statement follows, the transcript of which was attached to the Government's Opposition to the Defendant's Motion to Suppress Statements, filed March 24, 2010 (hereinafter "Price TR1").

Mr. Price stated that the three male residents of Swann Street had been home that night, had dinner, and then went to their respective rooms. His longtime friend, Robert Wone, was going to come over later in the evening to spend the night because he had just started a new job, which required him to work late that night, and he didn't want to travel all the way home to Oakton, VA via mass transit at that late hour. Mr. Price said that he was in the bedroom he shared with Mr. Zaborsky on the third floor of the house, when he heard the door chime, indicating that Mr. Wone had arrived. Before he could get down to answer the door, Mr. Ward, whose bedroom is on the second floor, had gone down to let him in. The three men remained downstairs for a short time, drinking water and chatting, while Mr. Zaborsky remained upstairs in the third floor bedroom, watching TV. Eventually they retired to their respective bedrooms, with Mr. Price showing Mr. Wone to the guestroom on the second floor.

Mr. Price then went back to his room, watched television, and went to sleep. Sometime later, he awoke to the sounds of the door chimes, followed a few minutes later by a low grunting noise, and ran down to the second floor, followed by Mr. Zaborsky, to investigate the disturbance. He saw that the door to the guestroom was open, so he went inside. There he saw Mr. Wone lying on the bed with a knife on his chest. He yelled to Mr. Zaborsky to call 9-1-1, which Mr. Zaborsky did. The 9-1-1 operator told them to apply pressure to Mr. Wone's wounds, which they did. During this call, Mr. Ward emerged from his bedroom at the end of the hall and asked what was going on.

When the officers arrived at the home, Mr. Price went downstairs and spoke with them. He said that someone, he thought likely Mr. Ward, mentioned that the back door was open, and he could see that the deadbolt was in the unlocked position and the door was not flush with the

frame. He also noticed in the kitchen that one of the knives was missing from the knife block.

During the course of the interview, Mr. Price acknowledged that the story didn't make a lot of sense: "I know you guys can't just say 'oh, Joseph is not innocent [sic]. So we're done. I realize this sounds crazy." (Id. at 25). And again a short time later, Mr. Price said: "I know you guys have to come at me like 10 times and see if the story sticks, but I'm not making this up, they're not making this up." (Id. at 36). Later still, Mr. Price again renewed his claim of collective innocence: "I mean, you guys are trying to do your job. You're trying to like, you know, get one of us to, to reveal the, you know, facts or to screw up or whatever, but we didn't do it." (Id. at 48-49).

As he was leaving the interview room, Mr. Price stated that he wanted an attorney, and one for "Dylan" as well. He did not request an attorney for Mr. Zaborsky.

b) Videotaped interview with Detective Waid

In the course of a subsequent interview with Detective Waid later that morning, the entirety of which the government may seek to admit at trial, Mr. Price provided essentially the same information that he had to the other detectives about the events of that night.[3] Additional statements include: "you know, I'm getting my ass kicked for talking to you now because my lawyer said don't do it, you know. I told him [indiscernible] look, if I had anything to hide, I wouldn't be talking because I know better, but I don't." (Price TR 2 at 15). Thereafter, he offered that the detectives could "have whatever you want, go through whatever you want, you know. Other than some pornography, there's nothing there that I would care if you guys find it

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[3] A transcript of this statement was attached to the March 24, 2010 Opposition to Defendants' Motion to Suppress Statements (hereinafter "Price TR 2").

and keep [indiscernible]." (Id. at 21).

After Detective Waid left, Mr. Price knocked on the door, and Detective Bryan Kasul came in. Mr. Price said he wanted to leave and to see "Dylan."

2. Statements of Defendant Dylan Ward

a) Interview with Sergeant Wagner and Detective Norris

After a short conversation with Detective Brown, set forth *infra*, Sergeant Wagner and Detective Norris came in to speak with Mr. Ward, in a videotaped interview, the entirety of which the government may seek to introduce at trial.[4] At the outset, Mr. Ward powerfully exculpated Mr. Price and Mr. Zaborsky, when told that "one or more of you three stabbed this guy," stating: "I don't believe that, I really can't believe that. If it's one of the other guys, I would be completely shocked." (Ward TR at 2). Again later, he stated: "But I don't have any reason to believe that they did it, and I don't – I'm not hiding anything. So I don't – I mean, everyone keeps saying this and sort of threatening it, but I feel like I don't know what to say. I mean, I'm telling you everything that I remember." (Id. at 22-23).

Mr. Ward also described the living situation at 1509 Swann Street. He said that he had lived at Swann Street with Joe and Victor since April of 2005. Mr. Ward works in direct marketing consulting, Mr. Zaborsky works in marketing, and Mr. Price is a lawyer. (Id. at 6-7).

Mr. Ward described the night's events in great detail, consistent with the version of events offered by Mr. Price. He said that Robert had come over that evening a little after 10:30, and he, Joe, and Robert had chatted briefly in the kitchen. Joe saw a spider on the light outside,

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[4] A transcript of this statement was attached to the March 26, 2010 Opposition to the Defendant's Motion to Suppress Statements (hereinafter "Ward TR").

so he went outside for a second, and then the three went upstairs. They showed Robert where his bedroom was, and Robert said he wanted to take a shower, so they showed him the shower, and then Mr. Ward went to his room. He read for five minutes and then took a sleeping pill and went to bed. (Id. at 4-7).

He came out of his bedroom later that evening when he heard his housemates screaming. Victor was on the phone with 9-1-1, and Joe was sitting on the bed next to Robert. He did not come out of his room initially because he had just fallen asleep and thought maybe it was just "the guys fighting or maybe it's something in the alley." The sound he heard was "like a short high-pitched like scream or laugh." (Id. at 13). He heard people running down the stairs from the third floor, and Victor and Joe yelling, and that's what finally roused him, and he came out of his room within a few minutes. They did not go downstairs because Mr. Ward and Victor were worried that someone might be down there. Mr. Ward did not go into the bedroom and did not see the body well. He never saw the knife, though Joe told him that he touched the knife and moved it. He thought the bed had two spots of blood on it, and it didn't seem like a lot of blood. (Id. at 9-13).

After the emergency medical personnel came, he went downstairs with his housemates and sat on the couch in the living room. He looked around and the first thing he noticed was that the back door to the kitchen was unlocked. He didn't notice it unlocked before they went up to bed that night, "[b]ut Joe was the last person out there tonight, and sometimes he's careless, so maybe he didn't lock it. I mean, it's completely possible that it was left unlocked." (Id. at 17-18).

He also discussed their relationship with Mr. Wone. He said that he "hardly know[s] the guy," and that Joe was an old college friend of Mr. Wone, and they were trying to work together on some business issues. (Id. at 19-20)

Throughout the remainder of the interview, Mr. Ward went over the events of the evening with the detectives. He added detail in some areas, for example, that if someone were running fast down the hardwood stairs, he thinks he would have heard that. (Id. at 28). When confronted with what the detectives thought to be the illogic of his story, Mr. Ward stated "It doesn't make sense." (Id. at 32).

b) Interview with Detective Kasul

Detective Kasul next came in to talk to Mr. Ward, as he was awaiting word regarding whether a polygrapher was available at the FBI. They ran through some of the details that Mr. Ward had discussed that night with the other detectives, all of which was captured on videotape, and incorporated into Ward TR. The government may seek to admit this statement in its entirety at trial.

c) Interview with Detective Waid

As Detective Kasul was wrapping up his interview, Detective Waid came in and introduced himself and asked Mr. Ward to talk through the evening's events with him. Mr. Ward again recounted the details of the evening, all of which is captured on tape and incorporated into Ward TR. The only new details were the fact that Mr. Ward heard Robert take a shower (id. at 55); his speculation that perhaps the intruder "could have jumped on the hood of the car and jumped over" the security fence in the back, adding "that's what we thought, eventually;" (id. at 56); and that when he first came out of his room after the commotion he "peered over Victor"

and saw Joe pressing a square on Robert's chest, "like [to] staunch it or something." (Id. at 60).

3. Statements of Defendant Victor Zaborsky

a) Interview with Detective Dan Lewis

At approximately 4 a.m., Detective Lewis entered Mr. Zaborsky's interview room and began to question him. This interview, the entirety of which the government may seek to introduce at trial, was recorded, and the transcript was appended to the government's March 24, 2010 Opposition to Defendants' Motion to Suppress Statements (hereinafter "Zaborsky TR 1").[5] Mr. Zaborsky went over the facts of the evening in essentially the same detail as had Messrs. Price and Ward, with Mr. Zaborsky fleshing out some more information regarding his personal activities of the evening – he had been in Denver earlier in the day, and had gotten home at approximately 6:30 p.m. He went to the gym, and Joe was already there. Dylan was exercising at home. Mr. Zaborsky got home from the gym around 7:15 or 7:20 p.m., after Joe, and went upstairs to take a shower. Joe was trying to fix the leaky shower upstairs, so Mr. Zaborsky went down to help Dylan make dinner, a process which was already underway. They were "in and out the back door" while they were cooking dinner. (Id. at 3).

The three Swann Street housemates had dinner, which finished up around 9:30 p.m. or perhaps a bit earlier, after which he and Dylan cleaned the dishes while Joe went back up to the third floor to clean up the leaky shower. Mr. Zaborsky then began to water the plants throughout the house. When he went to the second floor, he saw Dylan making up the bed in the office. He wasn't aware that they were having any guests that evening, so he asked Dylan what he was

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[5] In addition, counsel for Mr. Zaborsky has indicated that, should the government not play each of his client's videotaped statements in their entirety, he would seek to do so under the rule of completeness.

doing. Dylan told him that Robert was coming over to spend the night because he was working late and wanted to sleep at their house instead of driving all the way home. Joe confirmed that Robert was coming over that night and that they were going to have breakfast together in the morning. (Id. at 4-5).

Mr. Zaborsky went upstairs to the third floor bedroom he shared with Joe at approximately 10 p.m., to watch Project Runway, but the cable was out. Joe went downstairs for 10-15 minutes, and when he returned the Project Runway station was working. Robert called and said he was on his way over, so Joe told him to just ring the doorbell when he got there. Robert arrived a short time later and Joe went down to see him. About 15 - 20 minutes later, Joe came back upstairs and they watched the rest of the show. When the show ended at 11 p.m., he took a Sudafed and a sleep aid and got into bed. The lights were off, but Joe continued to watch television for a few more minutes before turning off the light. (Id. at 5-6).

He woke up to screams, and he and Joe jumped out of bed and ran to the door. They turned on the light and heard another "kind of low scream" and then he and Joe went running down the stairs. Mr. Zaborsky looked into the room and saw Robert lying on the bed catty-corner and then he started screaming. Sometime during this period, he thinks he heard the door chime. Joe told him to go upstairs and call 9-1-1, and went over to Robert. He spoke on the phone with the 9-1-1 operator, telling her to send help quickly. From the landing where he stood, he could see Joe, who was saying that Robert was hurt and they needed an ambulance right away. Joe said he was stabbed, and the operator told him to apply pressure to the wound. Mr. Zaborsky went downstairs and gave another towel to Joe, who was already apply pressure to the wound. Dylan had come out of his room at that point. Joe asked what time it was and what was taking so

long. The ambulance came a short time later. (Id. at 6-9).

Mr. Zaborsky also discussed the context of his relationship with Mr. Price and Mr. Ward, saying that he and Joe had been together for over six years, and Dylan had joined the relationship approximately four years ago. He also discussed their friendship with Robert and his wife Kathy. (Id. at 10-11).

He also provided "powerfully exculpatory" statements about Mr. Price and Mr. Ward, saying: "I know Dylan. He's not a violent person. He's one of the nicest, sweetest people I've ever met." (Id. at 13). When asked whether Mr. Price had killed Robert he said: "absolutely not. He was with me." (Id. at 14). When asked about the hypothetical situation where one of the others in the house committed the murder, he replied: "I honestly cannot believe that any of us killed him. It's just – it's so absurd. I mean, there's just – there's no reason in the world. There's no – and I know both of them. We're family." (Id. at 18).

b) Interview with Detective Bryan Kasul

Mr. Zaborsky was interviewed again a short time later by Detective Kasul. The government may seek to introduce this statement in its entirety at trial. A copy of the transcript is appended hereto as Attachment A (hereinafter "Zaborsky TR 2"). They did not go over all of the aspects of the evening, but rather focused on discreet points. Again, Mr. Zaborsky provided exculpatory information about his co-defendants. He stated that he knew for a fact none of them was involved in the murder. When asked how he knew, he replied: "I know because Joe and I were together when we heard the screams, and the other reason, I know Dylan. I know what kind of person he is. . . . He's a good person. . . . He's a quiet person, he's a gentle person, he's a kind person." (Zaborsky TR 2 at 9-10).

c) Interview with Detective Bryan Waid

Mr. Zaborsky was interviewed by Detective Waid later that morning. This statement, too, was videotaped, and the government may seek to introduce it in its entirety at trial (hereinafter Zaborsky TR 3). He provided essentially the same information that he had in the previous interviews, with a bit further detail regarding his observations of Mr. Wone's body. Specifically, he said that he thought he saw the black handle of the knife when he looked quickly, but he was hysterical. He thought he saw Mr. Wone's hand, which was "standing up and sort of twisted," on his stomach. (Zaborsky TR 3 at 12). He also added that when the police were coming into the house, Dylan asked him whether the back door was open. He didn't know whether it was, so he went over to the dining room and could see that the door was unlocked, but couldn't tell if it was ajar. (Id. at 12-13).

B. Statements Implicating the Declarant Only[6]

1. Statements of Joseph Price

a) To EMS works on the scene

"I heard a scream."

b) To Officer Hampton, first on the scene

As Officer Hampton entered 1509 Swann Street, he encountered Mr. Price standing in the front hallway and asked him "what happened?" Mr. Price replied that he woke up, having heard a door chime, so he went downstairs in the house to check out what was going on. He said that

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[6] To be clear, the government will not argue that each of the facts contained in these statements is true; rather, there are portions of the statements which we may seek to offer for their truth, *e.g.*, admissions that each of the defendants was at the house at the time of the murder. For context and completeness, we include the full statements here.

he noticed that the back door was ajar, so he went outside to look around. Seeing nothing, he came back into the residence, shut the back door, and went upstairs where he saw Robert in the guest bedroom with a knife on his chest. He told his housemate to call 9-1-1.[7]

c) To officers on the scene arriving within the first few minutes

"I heard the door chime" – and then noted that "there is a black guy who lives back there." Finally, he said that the intruder left the knife upstairs.

d) To detectives on the scene, within first 30 minutes of investigation.

Mr. Price provided a brief overview of the events of the evening – We had dinner earlier, and then I went upstairs to work on the leaky shower on the third floor. Robert was a long-time friend of mine, who had come to stay the night because he needed to stay late at work. He arrived at the house at approximately 10:30 p.m., and Dylan and I spent a few minutes with him downstairs, having a glass of water, before showing him to his room in the second-floor guest room at approximately 10:50 p.m. Dylan and I then returned to our bedrooms, and I went to sleep shortly thereafter. I woke up sometime later at the sound of the door chime, and assumed it was the tenant who lived in the basement returning from an evening out. Before I had a chance to fall back asleep, I heard the sound of low grunts, so Victor and I jumped out of bed and ran down to the second floor to see what was going on. There we saw Robert lying on the bed, with a knife on his chest.

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[7] The government notes that in his written statement taken the day after the murder, Officer Hampton reversed the sequence of events, stating that Mr. Price said that he first discovered the body of Mr. Wone, then went downstairs and looked outside in the back of the house, and then came back upstairs and told Mr. Zaborsky to call 9-1-1.

e) To Civilian Witnesses

Mr. Price made a number of statements to civilian witnesses regarding the events of the evening, which are similar in all material respects to his statements to law enforcement.

2. Statements of Dylan Ward

a) Initial interview with Detective Gail Brown

Mr. Ward spoke briefly with Detective Gail Brown. He provided basic information about the evening, specifically that he took Lunesta, a prescribed sleep aid, at approximately 11 p.m. He awoke sometime later when he heard a scream, followed by commotion. Two to three minutes later, he went out to investigate. He mentioned that he had heard Mr. Wone close his door earlier. He also related information regarding the living arrangements at 1509 Swann Street, noting that a woman named Sarah lives in the basement, and that he, Mr. Price, and Mr. Zaborsky shared a "polyamorous relationship." Finally, he explained that he takes a variety of medications, prescribed by a doctor, including an anti-depressant and anti-anxiety medication. This interview terminated shortly thereafter, and he remained alone in the interview room.

b) Grand Jury testimony regarding burglary

Mr. Ward testified before the grand jury investigating the October 2006 burglary of 1509 Swann Street. In general, he testified about his personal background (p. 5-6); his residence at 1509 Swann Street and his general relationship with Mr. Price and Mr. Zaborsky (p. 6-7); his relationship with Michael Price (p. 8-10); a description of the house (p. 12-14); who had access to the house (p. 14-17); Joseph Price's relationship with his brother Michael (p. 18-19); Michael's access to the home (p. 19-20); his discovery of the burglary (p. 20-32); his response to

that discovery (p. 32-36)[8]; his immediate assumption that Michael Price was the burglar (p. 37-39); and the specifics of his report (p. 43-44).

3. Statements of Victor Zaborsky

a) 9-1-1 Call

At 11:49 p.m. on August 2, 2006, Mr. Zaborsky called 9-1-1 to report the stabbing. A copy of a rough transcription of that call is appended hereto at Attachment C.[9] It that call, Mr. Zaborsky informed the operator that someone had been stabbed in the home, and urged her to send an ambulance quickly. He noted that his partner is "applying pressure" to Mr. Wone's wounds, and that the "intruder" has one of their knives. At one point, he asked the operator what time it was, and shortly thereafter went downstairs to greet the arriving paramedics.[10]

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[8] The government will seek to use only those portions of Mr. Ward's transcript that refer to Mr. Ward himself, and will sanitize references to the actions of his co-defendants. We will not seek to introduce his statements regarding the actions of his co-defendants, in particular that they go together and decided not to report the burglary for a period of time. In addition, we do not seek to admit those portions of the statement that are clearly hearsay, *e.g.*, how he learned that Michael Price had been arrested in Maryland. However, we attach the complete transcript, appended hereto at Attachment B, for the Court to have the full scope of the statement, in the event of rule of completeness or other challenges.

[9] The government will have the call formally transcribed in advance of trial, and will make that transcript available to the Court and counsel as soon as it is complete.

[10] In the government's March 24, 2010 Opposition to the Defendants' Motion to Suppress Statements, the government mistakenly stated that Mr. Zaborsky did not answer the EMS worker's question "what's going on?" As is clear from careful attention to the 9-1-1 call, he tells the EMS worker "Help us, he was stabbed, he is on the second floor."

b) Initial interview with Detective Gail Brown

When he arrived at the Violent Crimes Branch, Mr. Zaborsky was first briefly interviewed by Detective Brown. This statement was not recorded on videotape. He said: I arrived home from Dulles Airport that evening at approximately 6:30 p.m. I changed my clothes and went to the gym where Joe had already begun his workout. Dylan was exercising at home. Later that evening Dylan made dinner which we finished at approximately 9:30 p.m. After dinner, Joe went upstairs to fix the leaky shower and Dylan and I went to the guest room to make up the bed for Robert who was expected later that evening. Dylan then went to his bedroom to read and I went to my room to watch Project Runway.

At approximately 10:40 p.m., Robert called Joe, who told Robert to ring the bell when he arrived. Robert did so, and Joe and Dylan met him downstairs and had a drink with him, while I remained in my room. At approximately 10:50 p.m., Joe came back upstairs and finished watching the show. Then we went to sleep.

Some time later, I woke up when he heard a series of screams. Joe said that he had heard the door chime. Joe lead the way as we went downstairs. We saw Robert lying kiddie-corner on the bed in the guest room with a knife with a black handle laying across his body and his hands on his abdomen. I started screaming and thought I heard the door chime again. I then went upstairs to call 9-1-1, and was told to apply pressure. When I came downstairs, Joe was already applying pressure to Robert, and Dylan was standing in the doorway.

Robert had recently changed jobs, and this was the first time he had ever stayed over night at the home. I do not think that Robert had marital problems.

c) Grand jury testimony regarding burglary

Mr. Zaborsky testified before the grand jury investigating a burglary to 1509 Swann Street in October 2006. A copy of that transcript is appended hereto at Attachment D. In general, he testified about his personal background (p. 4-5); the residents of Swann Street, who had keys, who knew the alarm code (p. 5-7); how he learned of the burglary (p. 7-8); his concerns about Michael Price that weekend (p. 8-12); Mr. Ward's reporting of the burglary (p.12-14); his reaction to the news of the burglary (p. 14); his decision about whether and when to report the burglary (p. 15)[11]; his concerns about Michael Price, still hadn't found him, past experiences with Michael Price drunk (p.16-17); his assumption that the burglar was Michael Price (p. 17-18, 19-20); his desire to report the burglary on the date it was discovered (p. 18); the report of the burglary a few days later, so attorney could be with him/them (p. 22); email from Michael Price apologizing for the burglary (p. 25-26).

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[11] As with the grand jury transcript of Mr. Ward, the government will seek to use only those portions of Mr. Zaborsky's transcript that refer to Mr. Zaborsky himself, and will sanitize references to the actions of his co-defendants. We will not seek to introduce his statements regarding the actions of his co-defendants, in particular that they got together and decided not to report the burglary for a period of time. In addition, we do not seek to admit those portions of the statement that are clearly hearsay, *e.g.*, how he learned that Michael Price had been arrested in Maryland. However, we attach the complete transcript, appended hereto at Attachment D, for the Court to have the full scope of the statement, in the event of rule of completeness or other challenges.

V. Conclusion

WHEREFORE, the United States respectfully submits the foregoing Notice of Intent to Use Statements.

Respectfully Submitted,
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CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing to be served by electronic mail and first-class mail, on April 16, 2010, upon Bernard Grimm, Esq., Cozen O'Connor, The Army and Navy Building, 1627 I Street, NW, Suite 1100, Washington, DC 20006, counsel for defendant Price, Thomas G. Connolly, Esq., Wiltshire & Grannis, LLP, 1200 Eighteenth Street, N.W., 12th Floor, Washington, DC 20036-2506, counsel for defendant Zaborsky, and David Schertler, Esq., Schertler & Onorato, LLP, 601 Pennsylvania Avenue NW, North Building, 9th Floor, Washington, DC 20004-2601, counsel for defendant Ward.

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ASSISTANT UNITED STATES ATTORNEY