IN THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

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| UNITED STATES OF AMERICA,<br>v.<br>DYLAN M. WARD,<br>JOSEPH R. PRICE,<br>and<br>VICTOR J. ZABORSKY,<br>Defendants. | Criminal Nos. 2008-CF1-26996<br>2008-CF1-27068<br>2008-CF1-26997<br>Judge Lynn Leibovitz<br>Status Hearing – April 23, 2010 |

**DEFENDANTS' JOINT RESPONSE TO THE GOVERNMENT'S NOTICE OF INTENT TO USE STATEMENTS**

In a joint trial of all three Defendants, the government intends to introduce – in their "entirety" – the videotaped statements each Defendant gave to the police in the hours following the stabbing of Robert Wone. The government also plans to place before the jury a number of other statements made by each Defendant to law enforcement, emergency medical personnel, and civilian witnesses. Because these statements necessarily refer to and, under the government's theory of the case, incriminate the declarant's co-defendants, each Defendant moved to sever his case.

In its Consolidated Response to the motions to sever, the government argues that the statements are not hearsay and that their introduction would not offend the Confrontation Clause of the Sixth Amendment ("Consolidated Response"). As the Defendants pointed out in their Joint Reply to the Government's Consolidated Response to the Defendants' Motions to Sever ("Joint Reply"), the government's position ignores recent Supreme Court teachings about the

Confrontation Clause, ignores well-established case law on the admissibility of coconspirator statements, and ignores the obvious prejudice of admitting these statements in a joint trial.

At the April 5, 2010 status hearing, the Court agreed that the issues surrounding the admissibility of these statements were complex and ordered the government to identify, with particularity, the statements of the Defendants it intended to introduce at trial, the purpose for which they would be offered, and the theory of admissibility.[1] Pursuant to the Court's request, the government filed a Notice of Intent to Use Statements ("Notice"). As discussed in more detail below, while the Notice identifies two broad categories of statements the government intends to introduce at trial, the Notice does little to clarify which particular statements made by which particular Defendant would be offered for what particular purpose against which particular Defendant. Without this important clarification it will be difficult – if not impossible – for the Court to ensure that each Defendant's Sixth Amendment right to confront the witnesses against him is protected and that each Defendant is not unfairly prejudiced by the admission of his codefendants' statements. Severance is therefore required.

## I. LEGAL ANALYSIS

The Defendants' Joint Reply discusses, in detail, the legal framework for analyzing the admissibility of a non-testifying defendant's statement in a joint trial. In short, the Court undertakes a two step process. First, the Court must determine whether admitting the statement would violate the Confrontation Clause. "[I]f a defendant's extrajudicial statement inculpating a co-defendant *is* testimonial, *Bruton*[2] requires that it be redacted for use in a joint trial to protect

[1] The Defendants ordered a copy of the transcript of the April5, 2010 status hearing on an expedited basis. As of the date of this Response, the transcript has not yet been produced or delivered. Nevertheless, the Defendants generally agree with the government's characterization that 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." Notice, p.1.

[2] *Bruton v. United States*, 391 U.S. 123 (1968).

the co-defendant's Sixth Amendment rights even if the unredacted statement would be admissible against the co-defendant under a hearsay exception." *Thomas v. United States*, 978 A.2d 1211, 1224-25 (D.C. 2009). Second, whether or not the statement 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 . . . [and] therefore remains a candidate for redaction (or other remedial measures) under Criminal Rule 14 unless it fits within a hearsay exception rendering it admissible against the non-declarant co-defendant." *Id.* at 1225.

Against this framework the Court must consider the variety of statements the government intends to offer into evidence during the course of the trial.

## II. THE GOVERNMENT'S NOTICE OF INTENT TO USE STATEMENTS

There is little doubt that the statements made by the Defendants to various government agents will play a critical role in the trial of this matter. Each Defendant was interrogated at length by the police in the hours following the death of Robert Wone. The statements disclosed by the government include many hours of recorded videotaped statements, unrecorded statements by a dozen police officers, and statements made to emergency medical personnel. Having charged the Defendants with conspiring to obstruct and obstructing justice, the government's theory is that the Defendants "fabricated a story concerning the circumstances surrounding the homicide and told that story to the police and others during the course of the conspiracy." Consolidated Response, p. 4. These statements, as far as the government is concerned, are part and parcel of the efforts to obstruct justice.

Because of the importance of the statements and because of the complex legal issues surrounding their admissibility, the Court ordered the government to identify with particularity which of the Defendants' statements the government would seek to introduce at trial, the purpose

for which they would be admitted (*e.g.*, the truth of the matter asserted), and the theory of admissibility. By identifying and narrowing the intended scope and use of the statements, the goal was to narrow the scope of the legal issues be resolved.

Given the Court's Order, the Defendants expected to receive from the government a detailed, statement-by-statement description of particular statements that it intended to introduce at trial and whether such statements would be offered for their truth. Instead, the government identified two large categories of statements without further delineating which particular statements made by which particular Defendant would be offered for what particular purpose against which particular Defendant. As such, the government's Notice does little to clarify its position and raises more questions than it answers.

Specifically, the Government identifies two groups of statements: (1) those not to be admitted for their truth, and (2) those "implicating the declarant only." Neither category accurately describes the statements contained therein, nor adequately addresses the many legal obstacles confronting their admission.

We consider each category in turn.

**A. NOT TO BE ADMITTED FOR THEIR TRUTH**

According to its Notice, the government intends to introduce the following videotaped statements in their "entirety":

- Defendant Price's videotaped interrogations by (a) Detective Norris and Sgt. Wagner and (b) Detective Waid
- Defendant Ward's videotaped interrogations by (a) Sgt. Wagner and Detective Norris, (b) Detective Kasul, and (c) Detective Waid
- Defendant Zaborsky's videotaped interrogations by (a) Detective Lewis, (b) Detective Kasul, and (c) Detective Waid

The Notice suggests that because the government is not offering these lengthy statements for their truth, they are not "testimonial" within the meaning of *Crawford*[3], do not implicate the Confrontation Clause, and are not hearsay. Because the statements are not incriminating, the government further argues, they do not raise *Bruton* concerns. Conspicuously absent from the Notice is the purpose for which the statements would, in fact, be offered by the government (if not for the truth) and against whom each of these statements would be offered along with the basis of their admission.

In fact, notwithstanding the claims in its Notice, it is impossible to believe that the government will not rely on any sentence, statement or assertion contained in the Defendants' videotaped statements for its truth. To the contrary, it is obvious that the government will rely on a number of the statements precisely for the truth of the matter asserted as a substantial part of its proof against the Defendants. These videotaped statements are most certainly testimonial, most certainly incriminating under the government's theory of the case, and would most certainly constitute inadmissible hearsay as to the non-declarant co-defendants.

### 1. THE STATEMENTS ARE TESTIMONIAL

The Defendants' Joint Reply contains a detailed discussion of what constitutes a testimonial statement pursuant to the Supreme Court's decisions in *Crawford* and *Davis*[4], and that discussion is incorporated here by reference. It is enough to remind the Court that "[w]hatever else that term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; *and to police interrogations.*" *Crawford, supra*, 541 U.S. at 68 (emphasis added). Even under a "narrow standard," the Court held, "[s]tatements

[3] *Crawford v. Washington*, 541 U.S. 36 (2004).
[4] *Davis v. Washington*, 547 U.S. 813 (2006).

taken by police officers in the course of interrogation are . . . testimonial." *Id.* at 53. Clearly, this covers all of the videotaped statements of the Defendants

The government attempts to escape this conclusion by claiming that none of the statements will be offered for their truth. First, the Defendants doubt that is the case. As discussed below, the government will indeed be arguing (1) the truth that the statements were made to the police and (2) the truth of many of the assertions contained in those videotaped interrogations. Second, the government relies on the pre-*Crawford* case of *Tennessee v. Street*, 471 U.S. 409 (1985) for its conclusion that an out-of-court statement not offered for its truth does not offend the Confrontation Clause. At least one court – in a post-*Crawford* case cited by the government in its Consolidated Response – has held otherwise. In *United States v. Logan*, 419 F.3d 172 (2d Cir. 2005), the Second Circuit found that the false alibi statements of two (uncharged) coconspirators were indeed testimonial for purposes of the Confrontation Clause. The court held that the false alibi statements were made in the course of a police interrogation, and thus the coconspirators should reasonably have expected that their statements might be used in future judicial proceedings. "Given *Crawford*'s explicit instruction that "[s]tatements taken by police officers in the course of interrogations are ... testimonial under even a narrow standard," the government's contention that these statements were non-testimonial is unconvincing." *Logan*, supra, 419 F.3d at 179 (internal citation omitted).

### 2. THE DEFENDANTS' STATEMENTS ARE 'POWERFULLY INCRIMINATING'

The government's argument that the Defendants' videotaped statements are not "incriminating, much less powerfully so" is more than a little disingenuous. The Defendants are charged with conspiring to obstruct and obstructing justice by "lying to law enforcement authorities and others about the true circumstances surrounding the homicide of Robert Wone."

Indictment, Count 1. The government wants – indeed needs – to place these statements before the jury because, in the government's view, the statements incriminate the Defendants in a concerted effort to lie to the police. Put differently, the government wants to argue to the jury that the content and similarities in the Defendants' statements is evidence of a conspiracy and cover-up. Thus, introducing Price's statements, for example, would directly incriminate Ward and Zaborsky in the alleged cover-up and conspiracy.

The government has made much of the similarities in the Defendants' statements in arguing that they are part of effort to obstruct justice. As the videotapes reflect, each Defendant makes multiple assertions referring to his own actions and those of his co-defendants. Among the assertions made in the videotaped statement of *each* Defendant are:

- All three Defendants were present at 1509 Swann Street when Wone arrived.
- Wone arrived at the Swann Street house at about 10:30 p.m.
- Ward opened the door for Wone, Price then joined Ward and Wone for a drink of water.
- Ward and Price showed Wone to the guestroom.
- After Wone was shown to the room, Price and Zaborsky were in their third floor bedroom, and Ward was in his second floor bedroom.
- After hearing a sound, Price and Zaborsky came downstairs and saw that Wone had been stabbed.
- Ward came out of his bedroom once Price and Zaborsky were already downstairs.
- None of the Defendants saw or heard anyone else in the house.
- Other than the stabbing, nothing was disturbed or taken from the house.
- Price was with Wone and the knife in the guestroom as he applied pressure to Wone's wounds.
- Price touched the knife.

- The knife found in the guestroom came from inside of the house.
- Zaborsky called 9-1-1.

Using these statements, the government will argue that the fact that the Defendants each tell the same core story is evidence that they conspired to obstruct justice.

In addition, each Defendant's videotaped statements contain a number of directly incriminating assertions relating to the remaining codefendants which the government will most certainly offer for their truth. A few examples make this plain:

**A. Statements placing the codefendants at the scene[5]**

Price (15:6-10) "I mean, sometimes I do, sometimes I don't. I mean, I don't remember doing that tonight. And, in fact, while Dillon, and Robert, and I were talking around the sink standing in the kitchen, I was looking out - - the back door is all glass."

Price (4:15-18) "So, Victor and I both jump out of bed, we run downstairs, there's you know, this - - the stairs end at the door. You know, I see the door's open. I see Robert is laying there."

Zaborsky (13:1-3) "And was Joe in the bedroom the whole time? With you before you heard the screams?" "Yes. As far as I know. Yes."

Zaborsky (8:11-19) "And then we woke up - - I woke up to screams. And Joe and I both jumped up out of bed and ran to the door. And when we got to the door, Joe went out and flipped the light on and we heard another kind of low scream, while we were at the - - at our doorway. And we went running downstairs. Joe was right in front of me. And I looked in the room and Robert was laying on the bed, kind of cater-corner, and I started screaming. I mean, I was just hysterical."

Ward (74:3-6) "Both Joe and I were there. And then we show him - - he said he wanted to shower, so we just showed him where the bathroom was, and then I went to bed. And that is the last I saw of Joe or Robert."

Ward (15:12-20) "So when you got out of your bed. You saw Victor and Joe in the bedroom with Robert?" "I saw - - Joe was in the room with Robert. Sitting there, telling

[5] Each Defendant made numerous statements placing his co-defendants on the scene. In its Notice, the government concedes that intends to use other statements made by the Defendant to establish that each of them was present in the house when Wone was stabbed. See Notice, p. 17 n.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."). The prejudicial effect of the government's approach is discussed, *infra*, in Section III.

Victor to get the ambulance. And Victor was on the phone. So I don't know if Victor was in the room or just, like, kind of like, blocked in the doorway. I don't remember that clearly."

**B. Statements that Wone arrived at about 10:30 p.m.**

Ward (63-64:18-22; 1-3; 11-18) "So that is what happened. He came by sometime after 10:30. I had already gone to my room to read for the night. I wasn't expecting to answer the door. He's Joe's friend. I thought Joe would get the door. The doorbell rings. No one answers it for a couple of minutes. So I throw on my clothes and I go down and then let Robert in. And our door has a chime on it, so - - . . . Then we talked to Robert. You know, I got him a glass of water. And Joe came down. We talked about his wife, his job, a friend of ours - - you know, just chit-chat. And then we went upstairs, Joe, Robert and I, to show Robert his room with the (inaudible) bed. He said he wanted to shower. So we took him - - you know, showed him the shower."

**C. Statements relating to actions of co-Defendants**

Ward (14: 13-17) "I don't know because Joe was in the room with Robert. And Victor was just kind of yelling on the phone. And the people were asking, you know, have you gone - - and he was going, no, I'm not going downstairs, I don't know if somebody's down there."

Price (94:11-15) "You didn't see Dillon. So, how do you know Dillon didn't go downstairs and open the door?" "I don't know that he didn't do that."

Zaborsky (22:2-11) "No, as far as I know he was asleep. When I came up the last time, when I went up to go to my bed after I had watered the plants, his door was closed and his light was on. That was the last I saw of him. I know now that he got the door when Robert came and that they had a drink. And then he went - - I was told that he went to bed. So I don't know whether he was reading or whether he was asleep. I do know that Dylan uses a sleep aid so I don't know whether he took it tonight or not."

Ward (15:12-20) "So when you got out of your bed. You saw Victor and Joe in the bedroom with Robert?" "I saw - - Joe was in the room with Robert. Sitting there, telling Victor to get the ambulance. And Victor was on the phone. So I don't know if Victor was in the room or just, like, kind of like, blocked in the doorway. I don't remember that clearly."

**D. Statements relating to the knife**

Price (71:3-6) "I don't know. I don't know how the whole DNA thing works. But it's a kitchen knife in our house, you know, I use it, Victor uses it, Dillon uses it."

Ward: (12:1-4) "No, I never saw the knife. I know that they said there was a knife. I know that Joe said that he touched the knife. He moved it. But I never saw it."

Ward (23:20-21) "Did Joe ever tell you about - - anything about the knife?" "He said that he moved it."

Thus, whether alone or in combination, the government's claim that the 'strikingly similar statements' offered by the Defendants are not incriminating runs counter to its own theory of the case and the language of the indictment. As the government fashions its case, the statements will be argued as powerfully incriminating on the charges of conspiracy and obstruction.

### 3. THE GOVERNMENT WILL ARGUE THE TRUTH OF ASSERTIONS IN THE STATEMENTS

It is undoubtedly true that the government will argue the truth of statements made by the Defendants. First, as discussed in the Defendants' Joint Reply, the government is absolutely seeking to introduce these statements for the truth that each Defendant made strikingly similar statements to the police as did his codefendants. See Joint Reply, p. 7. Second, the government will necessarily argue that many of the assertions contained within the videotaped statements are true. Again, a few examples suffice to make the point:

- The Defendants were all present when Wone arrived.
- Ward's bedroom is on the second floor of the Swann Street residence.
- Price and Zaborsky's bedroom is on the third floor of the Swann Street residence.
- No identified person, other than the Defendants and Wone, was observed or heard inside of the house from when Wone arrived until he was found stabbed.
- A limited number of persons had keys and access to the Swann Street residence.
- Wone arrived at approximately 10:30 p.m.
- The knife found in the guestroom was from inside of the house.
- Price touched the knife found inside of the guestroom.

- Zaborsky made the 911 call.
- Nothing was observed by the Defendants as being disturbed following the discovery that Wone had been stabbed.

The Defendants suspect that there are many more such examples and expected that the government would have identified them as such in its Notice. Instead, the Defendants and the Court are left to guess which statements and assertions will ultimately be argued for their truth. What is clear, however, is that the government will certainly do so.

Because these statements will be offered and argued for the truth and because they are testimonial, they directly implicate the Confrontation Clause and must be excluded or redacted (if possible) in a joint trial. The only other option is severance.

### 4. THE GOVERNMENT FAILED TO ADDRESS THE RULE 14 / *CARPENTER* ANALYSIS

Even assuming the government successfully resolves the Confrontation Clause dilemma, exclusion, severance or redaction would still be warranted under Rule 14 because of the overwhelming prejudice that would result from the introduction of these statements against the non-testifying co-defendants. The government's Notice completely fails to take this into account or address the required analysis under Sup. Ct. Crim. R. 14 and the Court of Appeals decision in *Carpenter v. United States*, 430 A.2d 496 (D.C. 1981).

As discussed further below in Section II.B.4., it appears that the government has abandoned its theory that the videotaped statements are admissible as statements of coconspirators. Given the Supreme Court's decisions in *Krulewitch*[6] and *Grunewald*[7] and the holding of the District of Columbia Court of Appeals in *McCoy*[8], this represents a commendable concession by the government. But to the extent that the statements are being offered for their

[6] *Krulewitch v. United States*, 336 U.S. 440 (1949).
[7] *Grunewald v. United States*, 353 U.S. 391 (1957).
[8] *McCoy v. United States*, 760 A.2d 164 (D.C. 2000).

truth, they are inadmissible against a non-declarant co-defendant unless there is an applicable hearsay exception. For all of the reasons set forth in the Defendants' Joint Reply, no such exception exists.

In sum, the videotaped statements are testimonial, powerfully incriminating, and being offered in whole or in part for their truth. The Confrontation Clause precludes their admission in a joint trial unless redacted.[9]

### B. STATEMENTS OFFERED FOR THEIR TRUTH

The second category of statements identified by the government in its Notice is "Statements Implicating the Declarant Only." That label is entirely misleading. Many of the statements in this category are testimonial and implicate the declarant's co-defendants, thus violating the Confrontation Clause. Moreover, assuming the government seeks to introduce these statements as against all three Defendants, there is no applicable hearsay exception that would render this possible.

The government identifies ten separate statements it claims implicate the declarant, only. We consider them in turn and demonstrate that, for many of the statements, the government is wrong.[10] For the Court's convenience the statements are grouped together by similar legal issues

#### 1. GROUP 1

- Defendant Price's statements to EMS workers on the scene

[9] This analysis assumes, of course, that the Court does not suppress the statements of any or all of the Defendants on Fourth or Fifth Amendment grounds. Motions seeking suppression of the videotaped statements of Defendants Ward and Price are pending before the Court.

[10] With this category of statements, as with the first, the government has not delineated which statements or portions of statements would be introduced for the truth. In fact, notwithstanding the Court's Order, the government affirmatively failed to do so: "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 the their truth, *e.g.*, admissions that each of the defendants was at the house at the time of the murder." Notice, p 17 n.6. Instead, the Defendants and the Court are left to guess which assertions will be offered for the truth and against whom.

- Defendant Price's statements to Officer Hampton, first on the scene
- Defendant Price's statements to officers on the scene arriving within the first few minutes

Whether or not these statements were testimonial, because they only implicate Defendant Price, their admission does not offend the Confrontation Clause. They would be presumably admissible only against Defendant Price and not the remaining codefendants.[11]

2. **GROUP 2**

- Defendant Price's statements to detectives on the scene, within first 30 minutes of investigation
- Defendant Ward's initial interview with Detective Gail Brown
- Defendant Zaborsky's initial interview with Detective Gail Brown

These statements are most certainly testimonial; they were the product of police interrogation, the classic testimonial statements identified by *Crawford*. The government seems to suggest that these statements would not be testimonial because they were made to "first responding" law enforcement officers. Notice, p. 7-8. Once again, the government misunderstands the nature of testimonial statements as applied to the facts in this case.

The Court of Appeals observed in the recent case of *Lewis v. United States*, 938 A.2d 771, 778 (D.C. 2007), that the "line between testimonial and nontestimonial statements will not always be clear and each []statement thus must be assessed on its own terms and in its own context to determine on which side of the line it falls." (citations omitted). In *Lewis*, a case involving domestic violence, the government introduced as excited utterances statements made by the victim to the police (1) within minutes of receiving and responding to a 911 call, (2) where the victim has fresh injuries to her head and face, (3) where the victim was described as excited, crying, agitated, very emotional and upset, and (4) where the defendant was observed

[11] For a more thorough discussion of the hearsay issue, see Section II.B.4. below.

walking away from the victim. The court held that under these circumstances, the statements made by the victim to the police – even in response to questioning - were not testimonial. However, a more detailed accounting the facts of what happened made minutes later after the police had stopped the suspect and calmed the victim were, in fact, testimonial under *Crawford*. *Id.* at 780-82.

In so holding, the Court of Appeals relied on the Supreme Court case of *Davis v. Washington*, 547 U.S. 813 (2006), a consolidated appeal of two cases distinguishing between testimonial and nontestimonial statements made to the police. In the first case, the statements in question were made by a victim who called 911 reporting that she was being physically attacked by her former boyfriend. The 911 operator asked a series of questions to determine what was happening, the physical condition of the victim, and the identity and location of her attacker. *Id.* at 817-18.

In the second case, the police responded to a call for a domestic disturbance. Once on the scene, the purported victim told the police that nothing happened, and that "nothing was the matter." Nevertheless, the police obtained a written statement from the victim alleging that her husband had assaulted her. *Id.* at 819-20.

The Supreme Court held that the statements made in the first case were not testimonial, but the statements in the second case were, in fact, testimonial. The distinction, the Court held, was the purpose of the questioning by the police.

> Statements are nontestimonial when made in the course of police interrogations under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

*Id.* at 822.

In applying the *Davis* holding to the facts before it in *Lewis*, the Court of Appeals concluded, "the initial statements, recounting the basic facts of the assault, were nontestimonial because the primary purpose of [the police] questioning was to enable him to respond most effectively to an "ongoing emergency." However, we conclude that the more detailed account that [the victim] provided a short time later, after she had alighted from the car and sat down on the curb, was testimonial because at that time the emergency had dissipated." *Lewis, supra*, 939 A.2d at 780.

There is little doubt here that the statements made by Price on the scene up to 30 minutes after the police arrived, and statements made by Zaborsky and Ward to Detective Gail Brown at the Violent Crimes Branch after being transported there by the police were testimonial. They were made *after* the police had secured the scene, *after* the police determined that no one else was in the house, *after* the police transported Mr. Wone to the hospital, and as to Ward and Zaborsky, *after* taking them to the police station. The purpose of each interrogation was not – as in the initial police encounter with the victim in *Lewis* – to determine what *was happening*. Instead it was to determine *what had happened*. *See Davis, supra*, 547 U.S. at 830 (holding that the statement was testimonial where the officer "was not seeking to determine . . . 'what is happening,' but rather 'what happened.'"). As such the statements are testimonial.

The government is equally incorrect in its claim that each statement "implicates" only the declarant. A few brief examples will suffice:

- Price places Ward on the scene with Wone: "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."

- Price places Zaborsky on the scene with Wone: "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."

- Ward describes the "polyamorous relationship" that he shares with Price and Zaborsky.
- Zaborsky places Ward and Price on the scene with Wone:
  - "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."
  - "When I came downstairs, Joe was already applying pressure to Robert, and Dylan was standing in the doorway."

These testimonial statements (and these are but a few examples), which will undoubtedly be offered for their truth, offend the Confrontation Clause and should be excluded or redacted. Failing that, the Defendants are entitled to severance.[12]

3. GROUP 3

- Defendant Zaborsky's 9-1-1 Call

By contrast, the holdings of *Davis* and *Lewis* suggest that Zaborsky's call to 9-1-1 was not testimonial since it describes what was happening at the time and the questions asked by the operator were for the purpose of determining what was happening to make for a more effective police and medical response. The statements in the 9-1-1 call would be admissible against Zaborsky.

4. GROUP 4

- Defendant Price's statements to civilian witnesses

Even though the Supreme Court has not fully defined what constitutes a testimonial statement, and even though the government has not disclosed the content of Price's statements to civilian witnesses, it is likely that they are not testimonial. Thus, there is no need to engage in *Crawford*'s Confrontation Clause analysis. To the extent that any statement of Price to a civilian

[12] If such statements were nonetheless admitted, they could only be admitted against the declarant. As discussed in Section II.B.4., these statements would be utter hearsay as to the co-defendants with no applicable exception.

is introduced, it is admissible only against Price and not Ward and Zaborsky. As to those codefendants, these statements are inadmissible hearsay.

The government concedes as much in its Notice, arguing that the statements implicate only its declarant and that the relevant hearsay exception would be Fed. R. Evid. 801(d)(2)(A), statements of a party opponent. Notice, p.8. In making this argument, it appears as if the government has abandoned its original position, set forth in the Consolidated Response, that they are "coconspirator statements which are expressly "non hearsay" by virtue of Federal Rule of Evidence 801(d)(2)(E)" Consolidated Response, p.4.

As we note in the Joint Reply, the government would have an insurmountable obstacle in seeking to introduce these statements as statements of a coconspirator in light of *Grunewald*, *Krulewitch* and *McCoy*. Those arguments are adopted here. Moreover, before any coconspirator statements could be introduced, the government would shoulder the additional burden of demonstrating by a preponderance of the evidence, through independent, nonhearsay evidence, that (1) a conspiracy existed, (2) the defendant had a connection with the conspiracy, and (3) the coconspirator made the statements during the course of and in furtherance of the conspiracy. *Butler v. United States*, 481 A.2d 431, 439 (D.C. 1984). This the Defendants seriously doubt the government is able to do.

As the Defendants read the Notice, the government does not intend to introduce any statement made by the Defendant as a statement of a coconspirator. Thus, any Defendant's statement may only be admitted as against its declarant.

**5. GROUP 5**

- Defendant Ward's Grand Jury testimony regarding the burglary
- Defendant Zaborsky's Grand Jury testimony regarding the burglary

The government concedes, as it must, that Ward and Zaborsky's statements to the grand jury are testimonial.[13] It seeks to solve the Confrontation Clause problem by redaction:

> 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 as they go[t] 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 has been arrested in Maryland.[14]
>
> 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 as 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 has been arrested in Maryland.[15]

Assuming the Court finds this evidence relevant and not unfairly prejudicial, its admission will depend upon the nature of the redactions, which have not yet been provided by the government. As we note in the Joint Reply, "a defendant's extrajudicial statement normally may be admitted in evidence in a joint trial (with an appropriate limiting instruction, we emphasize) so long as the statement, as redacted if necessary, does not incriminate a non-declarant co-defendant *on its face*, either explicitly or by direct and obvious implication." *Thomas*, *supra*, 978 A.2d at 1235.

## III. SUBSTANTIAL RISK OF PREJUDICE

Given the diverse statements the government intends to introduce, their varied purposes, and their limited admissibility as to the co-defendants, there is a substantial risk that the jury will be confused about their proper use when considering the evidence. This is precisely the risk that Sup. Cr. Crim. R. 14, Relief from Prejudicial Joinder, was meant to address.

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[13] The Defendants have moved *in limine* to exclude this evidence as irrelevant and prejudicial. *See* Defendants' Motion *in Limine* to Exclude Evidence and Argument Regarding the Burglary of 1509 Swann Street.
[14] Notice, p. 20, n.8.
[15] Notice, p. 22, n.11.

This Court knows well that "if it appears that a defendant . . . is prejudiced by a joinder of . . . defendants in an indictment or information or by such joinder for trial together, the Court may order an election or separate trial of counts, grant a severance of defendants or provide whatever other relief justice requires." Sup. Ct. Crim. R. 14. Once a severance issue is presented, "the court has a continuing duty to take adequate measures to guard against unfair prejudice from joinder." *Carpenter, supra*, 430 A.2d at 501.

Here, there are at least three significant concerns with a joint trial in light of the government's plan to introduce the panoply of statements outlined in its Notice.

First, notwithstanding the government's assertion that the videotaped statements are not being introduced for their truth, it is inevitable that the government will argue that some of the assertions contained in those statements are, in fact, true. Indeed, the government is proposing to use other statements made by the Defendants to prove some of those very facts. For example, the government acknowledges in its Notice that in introducing statements which "implicate the declarant only," it will introduce *for their truth* statements that "each of the defendants was at the house at the time of the murder." Notice, p. 17, n.6. Those assertions, however, are also scattered throughout the videotaped statements where each Defendant implicates his co-defendants by placing them on the scene as well.

The government's proposed use of the statements creates a dynamic whereby the jury will be asked to consider an assertion by the Defendant for its truth (in the non-videotaped statement) and presumably instructed not to consider the exact same videotaped statement for its truth. This is the type of mental gymnastics that *Thomas* and *Carpenter* warned against in admitting non-testifying declarant's statements in a joint trial. It is difficult to imagine that any

jury – no matter how carefully instructed – will be able to keep focused on the proper use of the many statements.

Second, the length of the videotaped statements is considerable, running collectively many hours. Even if the Court finds that such statements are in large part nontestimonial, the sheer length of the statements along with each Defendant's inability to cross-examine the maker of the statement increases the risk of their improper use. In a case where government's chief theory is that the Defendants lied to the police, and where the charges require the government to prove specific intent to obstruct justice, there is tangible risk of juror confusion and prejudice to the Defendants. It is difficult to imagine that the jury will be able to properly attribute the statements to the individual declarants.

Finally, there are portions of the videotaped statements which are not only irrelevant on their face but inadmissible as a matter of law – even under the government's non-hearsay theory – such as references to polygraph examinations. The government's Notice admits no room for redacting such references, which clearly the law requires.

## IV. CONCLUSION

In sum, introduction of the statements as outlined in the government's Notice will substantially prejudice the Defendants in a joint trial. Absent redaction – which appears to be an unlikely and unworkable solution - severance is required.

Dated: April 23, 2010

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing Joint Response to Government's Notice of Intent to Use Statements was served via electronic and hand, this 23rd day of April, 2010 upon:

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