

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CRIMINAL MINUTES - GENERAL

Case No. CR 07-689-GW Date July 21, 2008

Present: The Honorable GEORGE H. WU, UNITED STATES DISTRICT JUDGE

Interpreter None

Javier Gonzalez

Wil Wilcox

David P. Kowal; Rasha Gerges

Deputy Clerk

Court Reporter/Recorder, Tape No.

Assistant U.S. Attorney

U.S.A. v. Defendant(s): Present Cust. Bond Attorneys for Defendants: Present App. Ret.

1. Charles C. Lynch ✓ ✓ 1. Reuven L. Cohen; John L. Littrell ✓ ✓

PROCEEDINGS: PRETRIAL CONFERENCE

GOVERNMENT'S MOTION IN LIMINE NO. 2 TO PRECLUDE EVIDENCE, ARGUMENT OR CROSS-EXAMINATION REGARDING (1) IMPEACHMENT OF NON-TESTIFYING CONFIDENTIAL INFORMANT AND (2) NON-FELONY CONVICTIONS, OR FELONY CONVICTIONS MORE THAN TEN YEARS OLD OF TESTIFYING CONFIDENTIAL INFORMANT;

GOVERNMENT'S MOTION IN LIMINE NO. 3 TO INTRODUCE BUSINESS RECORDS PURSUANT TO SELF-AUTHENTICATION PROVISIONS OF FED. R. EVID. 902(11) (filed 07/14/08)

GOVERNMENT'S MOTION IN LIMINE TO EXCLUDE OR LIMIT TESTIMONY OF DEFENDANT'S FINANCIAL EXPERT (filed 07/16/08)

GOVERNMENT'S REQUEST FOR WRITTEN ORDER PRIOR TO TRIAL RE COURT'S RULING GRANTING GOVERNMENT'S MOTION IN LIMINE EXCLUDING MEDICAL MARIJUANA ISSUES (filed 07/14/08)

DEFENDANT CHARLES C. LYNCH'S MOTION IN LIMINE TO EXCLUDE EVIDENCE RELATED TO SIDE-DEALING BY ABRAM BAXTER AND OUT-OF-COURT STATEMENTS RELATED TO SIDE-DEAL (filed 07/14/08)

DEFENDANT CHARLES C. LYNCH'S MOTION TO IMPOSE PRECLUSIVE SANCTIONS FOR DESTRUCTION OF EVIDENCE (filed 07/17/08)

Pretrial Conference is held. Court and counsel confer.

The Court tentative ruling as to the above-entitled motions is circulated (attached).

For reasons stated on the record, the Court rules as follows:

Government's Motion in Limine No. 2 to Preclude Evidence, Argument or Cross-examination Regarding (1) Impeachment of Non-Testifying Confidential Informant and (2) Non-felony Convictions, or Felony Convictions More than Ten Years Old of Testifying Confidential Informant is **moot** as to confidential informant number two. The Court will allow the statements of confidential informant number one;

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Government's Motion in Limine No. 3 to Introduce Business Records Pursuant to Self-Authentication Provisions of Fed. R. Evid. 902(11) is **granted**;

Government's Motion in Limine to Exclude or Limit Testimony of Defendant's Financial Expert is **granted in part**;

Government's Request for Written Order Prior to Trial re Court's Ruling Granting Government's Motion in Limine Excluding Medical Marijuana Issues is **taken under submission**;

Defendant Charles C. Lynch's Motion in Limine to Exclude Evidence Related to Side-Dealing by Abram Baxter and Out-Of-Court Statements Related to Side-Deal is **denied**;

Defendant Charles C. Lynch's Motion to Impose Preclusive Sanctions for Destruction of Evidence is **granted**. The Court will allow the testimony of the government's witness. An instruction shall be given as to the destruction of evidence.

The Court orders the parties to file the joint set of jury instructions by no later than July 22, 2008.

The Pretrial Conference is **continued** to **July 22, 2008 at 2:30 p.m.** The Jury Trial is **continued** to **July 23, 2008 at 9:00 a.m.**

IT IS SO ORDERED.

3 : 25

Initials of Deputy Clerk JG

Tentative Rulings on Six New Motions in Limine

I. Background

Charles C. Lynch (“Defendant”) owned and operated a marijuana dispensary. The indictment in this case charges Defendant with six counts: 1) violation of 21 U.S.C. §§ 846, 841(a)(1), 841(b)(1)(B), 856 and 859; 2-3) violation of 21 U.S.C. §§ 841(a)(1), 859(a), and 18 U.S.C. § 2; 4) violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(B), 5) violation of 21 U.S.C. § 856(a)(1), and 6) violation of 21 U.S.C. § 853.

II. Six New Motions in Limine

Motion 1: Issue written ruling on earlier motion to exclude medical marijuana issues and evidence.

Motion 2: Exclude any impeachment evidence relating to CS-1. Exclude non-felony conviction and felony convictions over 10 years old relating to CS-2

Motion 3: Permit authentication of dispensary’s bank records pursuant to Fed. R. Evid. 902(11).

Motion 4: Exclude testimony and opinion of Carl Knudson.

Motion 5: Exclude evidence of marijuana sale made by Abram/Abraham Baxter, Baxter’s recorded statements, and statements of buyer (a non-testifying confidential informant).

Motion 6: Exclude any and all testimony describing marijuana plants or number of plants, as well as any and all photographs, video footage, or any other evidence depicting or describing the marijuana plants. Alternatively, instruct jury as to destruction of evidence and that jury can consider the destruction in determining whether Government has met burden of proof.

III. Analysis

A. Motion 1

The Government seeks to have this Court’s ruling on the earlier medical marijuana motion in limine reduced to writing so that Defendant does not mistakenly (or otherwise) reference such issues in opening or closing statements or in examination of witnesses. The Court’s July 7, 2008 Criminal Minutes already reflect the following:

The Government’s Motion in Limine to Exclude Evidence and Argument Re: Medical Marijuana Issues is granted in part. The defendant filed a partial opposition. Court made ruling on the partial opposition on the record. The Court will allow defendant to make an offer of proof after the Government’s case-in-chief as to items which it seeks to offer.

Nevertheless, the Government's request makes some sense and its proposed order does note that the Court may revisit the issue of admissibility depending on what happens in the Government's case-in-chief. While the Government has invited Defendant to identify in what way the proposed order does not reflect the meaning of the Court's earlier oral ruling, Defendant has not done so. Instead, he merely argues that he "maintains his objection to the government's proposed order because the proposed order does not accurately describe the relief that this Court granted." Defendant's Opposition at 2:8-9.

The Court will order a copy of the transcript of its rulings at the July 7th hearing and will fashion a more detailed order as to that motion in limine.

B. Motion 2

The Government seeks to preclude the introduction of any impeachment evidence as to CS-1, who will not be called as a witness at the trial, or of any evidence, cross-examination, or argument relating to CS-2's non-felony convictions and felony convictions that are more than 10 years old. Defendant's Opposition in connection with this motion appears to assume that the Government is attempting to preclude Defendant from offering any evidence of impeachment whatsoever as to either of the confidential informants. *See* Defendant's Opposition at 4:13-5:5.

1) CS-1

The Government does not intend to call CS-1 as a witness, nor does it intend to offer CS-1's statements for "the truth of the matter asserted." Therefore, Federal Rules of Evidence 607 and 609 do not provide Defendant with a basis to impeach CS-1. Instead, CS-1's statements will be offered "to show their effect on the listener, Baxter, and to provide foundation and context for co-conspirator Baxter's statements." Motion 2 at 5:4-5; *see also* Fed. R. Evid. 801(c) (defining hearsay as a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted"). Although the difference between context and truth is at least somewhat unclear and the Government has not provided the Court with a transcript of the recording, it has plentiful authority for such a foundation/context proposition. *See United States v. Becerra*, 992 F.2d 960, 965 (9th Cir. 1993)¹ (admitting out-of-court statement of government informant where statement not offered for truth, "but as foundation

¹ Defendant mysteriously asserts that *Becerra* stands for the proposition that the district court in that case erred by denying the defendant's motion for discovery "and held that he was 'entitled to attack the credibility of [the informant's] statement.'" Defendant's Opposition at 7:19-8:1. Defendant's reading of *Becerra* is either misguided or an attempt to intentionally mislead the Court. Ironically, for someone who claims that "the language that government quotes appears nowhere in the text of the opinion," Defendant's Opposition at 7:20-21, Defendant's quote from that opinion – "entitled to attack the credibility of [the informant's] statement", *see* Defendant's Opposition at 8:1 – appears nowhere therein (nor in any other reported Ninth Circuit decision). In any event, the Government's quoted passage does appear in *Becerra*. *See id.* at 965.

for...discussions about cocaine” between undercover officer and defendant); *United States v. Whitman*, 771 F.2d 1348, 1351-52 (9th Cir. 1985) (concluding, in *dicta*, that an informant’s statements were admissible as non-hearsay to place a conspirator’s statements in context); *see also United States v. McClain*, 934 F.2d 822, 832-33 (7th Cir. 1991) (noting that court gave limiting instruction that recorded statements were not to be considered for their truth but “only for the context they provided” and that they were only relevant “as to what the listener says, does, or believes in response to them”); *United States v. Byrom*, 910 F.2d 725, 737 (11th Cir. 1990) (noting that a confidential informant’s statements in a taped conversation with defendant are admissible to provide context, so long as the informant’s statements are not admitted for the truth asserted).

Before finally ruling on this motion, the Court will need to review the transcript of the conversation and will have to also resolve Motion 5, below. If the Court were to admit CS-1’s statements, it would require giving the jury a proper limiting instruction. *See McClain*, 934 F.2d at 832-33.

2) CS-2

Federal Rule of Evidence 609 provides, in pertinent part, as follows:

(a) General rule.--For the purpose of attacking the character for truthfulness of a witness,

(1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

(2) evidence that any witness has been convicted of a crime shall be admitted regardless of the punishment, if it readily can be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness.

(b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

Fed. R. Evid. 609; *see also Brewer v. City of Napa*, 210 F.3d 1093, 1095-96 (9th Cir. 2000). Therefore, if more than 10 years has elapsed from the date of any of CS-2's convictions or his release for confinement from those convictions, whichever dates are later, those convictions are inadmissible "unless the court determines, in the interest of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect." Fed. R. Evid. 609(b); *see also United States v. Bensimon*, 172 F.3d 1121, 1125 (9th Cir. 1999).

Defendant seeks to impeach CS-2, in part, with his convictions that are more than 10 years old (including one for forgery) as well as with certain more recent misdemeanors. However, Defendant fails to articulate what exact "interests of justice" would require this Court to allow those items to be utilized at the trial. Neither side has fully delineated what precisely CS-2 will say.² Defendant cites to *United States v. Bay*, 762 F.2d 1314, 1317 (9th Cir. 1984), for the proposition that "Evidence of a conviction of forgery which is a crime involving dishonesty and false statement is mandatorily admissible for impeachment purposes." However, in *Bay*, the forgery conviction was only 7 years previous and the Circuit's discussion was in the context of reversing the district court's exclusion of testimony in regards to that conviction. Moreover, the court in *Bay* went on to say that "Evidence of a conviction more than 10 years old is presumptively inadmissible as too remote."³ Defendant also cites to *United States v. Holmes*, 822 F.2d 802, 804 (8th Cir. 1987) for the proposition that "Because of his lengthy and steady record of criminal activity...Holmes is in a poor position to claim entitlement to the presumption that the probative value of prior convictions decreases over time." However, Defendant cites the *Holmes* case as being a Ninth Circuit decision which it clearly is not. Also, the witness is *Holmes*, who was impeached with convictions older than 10 years, was the defendant.

Although the Government also argues that CS-2's non-felony convictions and convictions older than 10 years are irrelevant, that any relevance is inadmissible under Rule 403 and that exclusion under Rule 611 is necessary to protect CS-2 from harassment or undue embarrassment, the Court is not particularly persuaded by those arguments. *See* footnote 2, *supra*. They may be relevant to the extent they reflect CS-2's capacity for truth-telling, and their probative value may

² The Government merely states that it "does intend to call CS-2 as a witness to discuss CS-2's purchases of marijuana on July 14, 2006 and December 21, 2006." Given the fact that the sale of marijuana at Defendant's dispensary is not really disputed, the importance of CS-2's testimony cannot be measured by this Court at this time. Such a determination will have to be made before this Court can rule on this motion.

³ It appears that Defendant's attorneys are under the mistaken belief that this Court will not bother to actually read the cases cited to it by counsel. Otherwise, they would not have cited to *Bay* which totally *dis*-establishes the point they are apparently trying to make.

not “substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay [or] waste of time.” Although CS-2 certainly will be embarrassed to some extent, it is hard to see why it should be considered “undue,” especially in light of Defendant’s right to attack the credibility of the Government’s witnesses. But, at this point, the Court cannot make a final determination and there is case law to support whatever decision is reached. *See, e.g., United States v. Hedgcoth*, 873 F.2d 1307, 1314 (9th Cir.) (holding that trial court did not abuse discretion by precluding mention of witness’s misdemeanor forgery conviction over ten years old), *cert. denied*, 493 U.S. 857 (1989).

C. Motion 3

The Government moves to permit authentication of the dispensary’s bank account records with Bank of America pursuant to Fed. R. Evid. 902(11) so that the Government need not present the live testimony of the bank’s custodian of records.⁴ Rule 902(11) indicates, in pertinent part, that:

[e]xtrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to...[t]he original or a duplicate of a domestic record of regularly conducted activity that would be admissible under Rule 803(6)[⁵] if accompanied by a written declaration of its custodian or other qualified person...certifying that the record—

(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;

(B) was kept in the course of the regularly conducted activity; and

(C) was made by the regularly conducted activity as a regular practice.

A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

⁴ As of 4:15 p.m. on July 17, 2008, Defendant had not filed an Opposition to this timely-filed motion.

⁵ Fed. R. Evid. 803(6) excludes from the hearsay rule (even though the declarant is available as a witness):

[a] memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term “business” as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Fed. R. Evid. 902(11). The Government provided Defendant with the records and the custodian's declaration on February 1, 2008, clearly "sufficiently in advance" so as to provide Defendant "with a fair opportunity to provide them." See Kowal Decl. ¶ 2 & Exhs. A-B. Defendant apparently refused to stipulate to the admissibility of the records in question, but indicated to the Government's counsel that "the government could instead introduce them pursuant to Fed. R. Evid. 902(11)." See Kowal Decl., Exh. C.

Notwithstanding Defendant's failure to stipulate, Bank of America's custodian's declaration/certification appears to meet all the requirements of Rules 902(11) and 803(6). Whether or not the custodian's certification is to be considered testimonial (and therefore subject to the Confrontation Clause analysis set forth in *Crawford v. Washington*, 541 U.S. 36 (2004)) is somewhat unclear in some Circuits, but likely not in this Circuit. See *United States v. Weiland*, 420 F.3d 1062, 1077 (9th Cir. 2005) (noting that authenticity certification as public records did not raise *Crawford* problem, but noting that the court "need express no opinion on whether the Confrontation Clause requires the government to make the custodian of business records available for cross-examination") (emphasis added), *cert. denied*, 547 U.S. 1114 (2006); *United States v. Cervantes-Flores*, 421 F.3d 825, 830-34 (9th Cir. 2005), *cert. denied*, 547 U.S. 1114 (2006); *United States v. Ellis*, 460 F.3d 920, 927 (7th Cir. 2006); see also *United States v. Hemphill*, 514 F.3d 1350, 1358 n.2 (D.C. Cir. 2008); *United States v. Jimenez*, 513 F.3d 62, 77-79 (3d Cir.), *cert. denied*, 128 S.Ct. 2460 (2008). The bank records themselves clearly are not testimonial. See *Hemphill*, 514 F.3d at 1358 n.2 ("Needless to say, bank records and credit card statements are not testimonial evidence, and that is what the Confrontation Clause regulates.") (citing *Crawford*, 541 U.S. at 68).

In any event, it is unclear why the jury would ever need to see the certification, which can be used by the Court merely for purposes of resolving the preliminary admissibility determination under Fed. R. Evid. 104(a) and 104(c). See *United States v. Saneaux*, 365 F.Supp.2d 493, 498 n.5 (S.D.N.Y. 2005) (noting that court may properly consider evidence pursuant to Fed. R. Evid. 104(a) even if *Crawford* means that such evidence could not be admitted by the government); see also *United States v. Warshak*, 2007 WL 4591208, *6 (S.D. Ohio Dec. 28, 2007) (noting, but not resolving, argument that Rule 902(11) certification could be examined at Rule 104(a) hearing because "the certifications never reach the jury"); cf. *United States v. Morgan*, 505 F.3d 332, 339 (5th Cir. 2007) ("*Crawford* does not apply to the foundational evidence authenticating business records in preliminary determinations of the admissibility of evidence."). However, the Confrontation Clause on its face gives a criminal defendant the right to confront witnesses "[i]n all criminal prosecutions," and therefore does not appear to be limited to matters which are presented

before a jury. U.S. Const. amend. VI. Nevertheless, in *Bourjaily v. United States*, 483 U.S. 171, 175-76, 181-82 (1987), the Supreme Court held that a judge can make preliminary fact determinations without offending Confrontation Clause rights. *See also United States v. Collins*, 966 F.2d 1214, 1223 (7th Cir. 1992).

Because the custodian's certification satisfies Rules 902(11) and 803(6) and does not appear to raise a Confrontation Clause problem under *Crawford*, the Court will grant the motion.

D. Motion 4

1) Procedural Issue

Motion 4 is untimely, filed two days after the Court ordered the parties to file all other motions in limine. This gave Defendant a single day to prepare an opposition under the schedule the Court set.⁶ The Government claims to have filed an *ex parte* application simultaneously with the filing of the motion, but the Court has not seen any copy of that application. Technically, of course, this motion is not properly filed until the Court rules on the *ex parte* application and should have, instead, been lodged along with the *ex parte* application. To the extent the Court considers this written motion, the following Analysis section applies.

2) Analysis

Without seeing Defendant's Opposition on this motion, it is unclear just what theory Defendant has for why Carl Knudson's testimony as to the dispensary's/Lynch's profits or payments to vendors and employees or other expenses are relevant to this action. Clearly the amount in marijuana sales is relevant because that is charged as one of the overt acts in the indictment's conspiracy charge. Defendant should be able to offer testimony to demonstrate that the \$2.1 million figure is incorrect (assuming that Defendant can indeed qualify Knudson as an expert on that topic if that is the intention),⁷ but there is no need for Defendant to attempt to offer evidence to the jury as to whether or not the dispensary's operation made him a wealthy man. If Defendant is concerned about prejudice as to this point, he can propose a reasonable limiting instruction.

The Government also complains that Defendant's disclosure related to Knudson violated Fed. R. Crim P. 16(b). That Rule obligates a criminal defendant to "give to the government a

⁶ As of 4:15 p.m. on July 17, 2008, Defendant has not filed an Opposition to this motion (or to the Government's related *ex parte* motion).

⁷ In addition, assuming as appears from Defendant's counsel's July 7 and July 15, 2008 letters (*see* Kowal Decl., Exhs. A, D) that Defendant intends to offer Knudson as an expert, under Fed. R. Evid. 703, Knudson cannot simply act as a funnel to feed the jury inadmissible material. *See* Fed. R. Evid. 703 ("Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.").

written summary of any testimony that the defendant intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidences as evidence at trial” including “opinions, the bases and reasons for those opinions, and the witness’s qualifications” only if the defendant requests a similar disclosure and the Government complies or the defendant gives notice of an intent to present expert testimony on the defendant’s mental condition. The Government has not demonstrated that either of these situations are present here. Even if they were, however, the Court likely could not entirely exclude Knudson’s testimony. *See generally United States v. Finley*, 301 F.3d 1000, 1016-19 (9th Cir. 2002) (ruling that court improperly excluded entire testimony of criminal defendant’s expert and noting that defendant had given the government “sufficient notice of the general nature” of the testimony); *United States v. Aceves-Rosales*, 832 F.2d 1155, 1156-57 (9th Cir. 1987) (finding no abuse of discretion in excluding medical report where defense counsel knew of report’s existence but waited until after first full day of trial and close of prosecution’s case-in-chief before revealing existence), *cert. denied*, 484 U.S. 1077 (1988); Fed. R. Crim P. 16(d)(2) (listing types of sanctions for failure to comply with Fed. R. Crim P. 16).

Until the Court can learn more about Defendant’s theory of relevance, the Court would limit Knudson to testifying about whether the \$2.1 million figure is accurate, and would also need to ensure that Knudson is properly testifying as an expert and is not simply attempting to act as a funnel for the introduction of inadmissible evidence.

E. Motion 5

Defendant seeks to exclude evidence of a marijuana sale made by the dispensary’s employee, Abram (or Abraham) Baxter, to CS-1, and recorded statements made by both in connection with that transaction. Obviously, as to the recorded statements, this motion overlaps to some degree with Motion 2.

Defendant first argues that he had no knowledge of Baxter’s sale and that, therefore, it is irrelevant under Rules 401 and 402. Obviously, the Government will have to lay some foundation as to the existence of the conspiracy and to tie Baxter and the sale to it in order to make evidence of the sale admissible. In that respect, this aspect of the motion is somewhat premature.

Defendant correctly notes that the content of Baxter’s statements in question alone are insufficient to prove the existence of the conspiracy or to tie him or Defendant to the conspiracy, though those statements may form part of the Court’s consideration. *See United States v. Bridgforth*, 441 F.3d 864, 869 (9th Cir. 2006).⁸ The statements may also be admitted conditionally, subject to further proof of the conspiracy sometime during trial, *see* Fed. R. Evid.

⁸ In its Opposition, the Government indicates that it will not be calling Baxter as a witness at trial. *See* Government’s Opposition at 2:24-25.

104(b), though if the Government later fails to sufficiently establish a foundation the Court presumably would need to issue a limiting instruction or, potentially, declare a mistrial. *See, e.g., United States v. Costa*, 947 F.2d 919, 923 (11th Cir. 1991) (indicating that district court should admit potential conspiracy evidence “with a Rule 104(b) limiting instruction to the effect that the jury may consider the evidence only if it finds that the evidence relates to the indicted conspiracy”), *cert. denied*, 506 U.S. 929 (1992); *United States v. Shoffner*, 826 F.2d 619, 629-30 (7th Cir.), *cert. denied*, 484 U.S. 958 (1987).

Defendant also argues that Baxter’s sale to CS-1 is inadmissible under Fed. R. Evid. 403. It is hard to see how the sale would be inadmissible under Rule 403 if the sale is in fact one of the overt acts of the conspiracy. It is directly probative in that respect and is not substantially outweighed by “the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Fed. R. Evid. 403. To the extent that Defendant argues that Baxter’s and CS-1’s statements are hearsay, if the Government can establish the existence of the conspiracy, can tie Baxter to the conspiracy, and can demonstrate that Baxter made the statements “during the course and in furtherance of the conspiracy,” his statements are admissible pursuant to Fed. R. Evid. 801(d)(2)(E). *See United States v. Bowman*, 215 F.3d 951, 960-61 (9th Cir. 2000). Before admitting Baxter’s statements, the Court would have to make findings in this respect on the record, under a preponderance of the evidence standard. *See Fed. R. Evid. 104(a); Bourjaily*, 483 U.S. at 175; *Bowman*, 215 F.3d at 960-61.

The Government also argues (at least in connection with Motion 2) that Baxter’s statements constitute an admission by virtue of Baxter being Lynch’s employee, pursuant to Rule 801(d)(2)(D). The application of this Rule is somewhat tenuous, as Defendant states that Baxter was merely his security guard, *see* Motion 5 at 3:10-12,⁹ and it might be difficult for the Government to prove that sales of marijuana outside the dispensary were within the scope of a security guard’s employment (unless of course Defendant instructed Baxter to make the sale, in which case the co-conspirator exception would seemingly apply in any event).¹⁰ *See Sea-Land Serv., Inc. v. Lozen Int’l, LLC*, 285 F.3d 808, 821 (9th Cir. 2002).

⁹ The Government refers to Baxter as the dispensary’s “chief security officer.” Government’s Opposition at 1:10.

¹⁰ The existence of an agency relationship is a preliminary fact determination for the Court under Fed. R. Evid. 104(a) on which the Government would bear a preponderance of the evidence burden. *See Bourjaily v. United States*, 483 U.S. 171, 176 (1987); *United States v. Chang*, 207 F.3d 1169, 1176 (9th Cir.), *cert. denied*, 531 U.S. 860 (2000). As with the conspiracy question, Baxter’s statements alone are insufficient to prove this preliminary fact. *See Fed. R. Evid. 801(d)(2)*.

As noted above in connection with Motion 2, CS-1's statements are admissible as non-hearsay because they are not offered for the truth. *See* Fed. R. Evid. 801(c) (defining hearsay as a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted"); *Becerra*, 992 F.2d at 965 (9th Cir. 1993) (admitting out-of-court statement of government informant where statement not offered for truth, "but as foundation for...discussions about cocaine" between undercover officer and defendant); *United States v. Whitman*, 771 F.2d 1348, 1351-52 (9th Cir. 1985) (concluding, in *dicta*, that an informant's statements were admissible as non-hearsay to place a conspirator's statements in context); *see also McClain*, 934 F.2d at 832-33 (noting that court gave limiting instruction that recorded statements were not to be considered for their truth but "only for the context they provided" and that they were only relevant "as to what the listener says, does, or believes in response to them"); *United States v. Byrom*, 910 F.2d 725, 737 (11th Cir. 1990) (noting that a confidential informant's statements in a taped conversation with defendant are admissible to provide context, so long as the informant's statements are not admitted for the truth asserted).

Defendant also argues, however, that the introduction of CS-1's statements would violate the Constitution's Confrontation Clause. *See Crawford*, 541 U.S. at 52. Here, Defendant might have a viable argument (if CS-1's statements were offered for their truth). In *Crawford*, the Supreme Court made clear that the Confrontation Clause applied not just to in-court testimony, but to out-of-court testimonial statements. *See id.* at 51. The Court referenced various formulations of the type of out-of-court "testimonial" statements covered by the Clause, such as "pretrial statements that declarants would reasonably expect to be used prosecutorially" and "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 51-52. Ultimately, the Court left "for another day any effort to spell out a comprehensive definition of 'testimonial.'" *Id.* at 68. However, the Court had clearly signaled its thinking in the area.

Here, CS-1 was a paid informant wearing a wire to record his conversation and transaction with Baxter. His statements, therefore, appear to clearly fall within the types of out-of-court "testimonial" statements *Crawford* identified as being subject to the Confrontation Clause. *See, e.g., United States v. Cromer*, 389 F.3d 662, 670-71 (6th Cir. 2004) ("[S]tatements of a confidential informant are testimonial in nature and therefore may not be offered by the government to establish the guilt of an accused absent an opportunity for the accused to cross-examine the informant."). The Supreme Court made clear that "[t]estimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." 541 U.S. at 59. A judicial

determination of reliability is insufficient to take such a testimonial statement outside the scope of the Clause: “Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.” *Id.* at 62.

If, however, the Court accepts the Government’s argument that CS-1’s statements are not to be offered for their truth (as discussed further above and in connection with Motion 2), *Crawford* would not apply. *See id.* at 59 n.9 (“The Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.”); *see also United States v. Gibbs*, 506 F.3d 479, 486 (6th Cir. 2007); *United States v. Paulino*, 445 F.3d 211, 216-17 (2d Cir.), *cert. denied*, 127 S.Ct. 446 (2006); *United States v. Barone*, 913 F.2d 46, 49 (2d Cir. 1990) (“So long as the informant’s recorded statements are not presented for the truth of the matter asserted, but only to establish a context for the recorded statements of the accused, the defendant’s Sixth Amendment rights are not transgressed.”).

F. Motion 6

1) Procedural Issue

Motion 6 is untimely, filed three days after the Court ordered the parties to file all other motions in limine. This gave the Government zero days to prepare an opposition under the schedule the Court set.¹¹ It does not appear that Defendant even filed an ex parte motion in connection with this motion. In mitigation, however, this motion is clearly a natural offshoot of the earlier motion to dismiss the indictment for destruction of exculpatory evidence. To the extent the Court considers this written motion, the following Analysis applies.

Analysis

The Court refers to its earlier ruling in connection with Defendant’s motion to dismiss the indictment for destruction of exculpatory evidence. Some form of evidentiary sanction may be appropriate here. The Court will allow argument on this point at the hearing.

¹¹ As of 4:15 p.m. on July 17, 2008, the Government had not filed an opposition to this motion.