

NOT FOR PUBLICATION

**IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX**

UNITED STATES OF AMERICA,)	
)	
Plaintiff)	
)	
v.)	
)	CRIM. NO. 2004-05F/R
CRAIG M. HENDRICKS,)	
RUSSELL ROBINSON, aka “Don,”)	
ELROY DOWE,)	
DANIEL FLEMING,)	
RANNEY LARONDE, aka “Ronnie,”)	
ANDY ANTOINE,)	
RUDOLPH CLARKE,)	
RAFAEL CINTRON,)	
JACQUELYN CARR,)	
)	
Defendants)	
_____)	

ORDER

THIS MATTER is before the Court on United States’ Motion for Reconsideration of the Court’s Order as to Suppression of Wiretap Interceptions and Consensually Monitored Recordings, docket item # 465. On April 27, 2004, this Court entered a Memorandum Opinion and Order in which the Court denied in part and granted in part United States Motion in Limine for Pretrial Ruling Regarding Admissibility of Evidence (docket item # 327). The Government asks the Court to reconsider its ruling as to the admissibility of wiretap interceptions and also consensually monitored recordings made by Hector Rivera. Defendant Cintron opposes this motion. The Government has declined to file a reply brief.

I. Background

In its April 27, 2004 Memorandum Opinion and Order, this Court held that statements by government agent Hector Rivera would be inadmissible at trial because Hector Rivera is unavailable to testify at trial and Defendants have not had a prior opportunity to cross-examine him. (Memorandum Opinion and Order entered by Chief Judge Finch on April 27, 2004 at 3.) This Court quoted the U.S. Supreme Court's recent declaration 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." Memorandum Opinion and Order entered by Chief Judge Finch on April 27, 2004 at 3 (citing Crawford v. Washington, 124 S.Ct. 1354, 1369, WL 413301 (2004)).

Similarly, pursuant to Crawford, this Court concluded that the Government should be limited to introducing wiretap statements that were made by declarants who testify as witnesses at trial. (Memorandum Opinion and Order entered by Chief Judge Finch on April 27, 2004 at 4 - 5.) No showing had been made that any statement recorded on the wiretap was made by a person who is no longer available and whom Defendants have had an opportunity to cross-examine. (Memorandum Opinion and Order entered by Chief Judge Finch on April 27, 2004 at 4 - 5.)

II. Analysis

A. Title III Recordings

The Government contends that Title III recordings are not subject to Crawford because Title III recordings are not testimonial. (Government's Motion at 3 - 4.) The Government is

correct to assert that Crawford only applies to testimonial evidence. Furthermore, the Government cites cases from the 1st, 5th, and 11th Circuits indicating that those courts have found tape recordings to fall within the definition of real evidence. (Government's Case Supplement at 1.) However, the Third Circuit has not yet had an opportunity to take a position on the issue and this Court concludes that Title III recordings are testimonial.

Although a recording may provide a sufficient indicia of reliability in terms of the actual words spoken by a witness or defendant, they do not necessarily provide a reliable context. The Court does not agree with the Government's belief that Title III recordings are more akin to a photograph, gun, or other real evidence. (Government's Motion at 3.) If recorded statements are entered into evidence against a defendant and that defendant does not have an opportunity to cross-examine the declarant as to what those statements meant, what context those statements were made in, who those statements were directed to, and what was going on at the time the statements were made, then the defendant's right to confront has been extinguished.

B. Consensually Monitored Recordings

The Government seeks to introduce consensually monitored recordings between government informant Hector Rivera and Defendant(s). (Government's Motion at 5.) The Government argues that Crawford is inapplicable to consensual recordings between a government informant and a defendant. (Government's Motion at 5.) In discussing the "core" class of statements that are considered testimonial, the U.S. Supreme Court specifically included "...pretrial statements that declarants would reasonably expect to be used prosecutorially," Crawford v. Washington, 124 S.Ct. 1354, 1364, WL 413301 (2004) (citing Brief for Petitioner 23). This would certainly apply to any statements that Hector Rivera, as a government agent,

would have made during a consensual recording. Furthermore, the same grave concerns regarding context that the Court noted with regard to Title III recordings apply to consensual recordings.

III. Conclusion

The U.S. Supreme Court in Crawford postponed the task of defining what types of evidence should be included as testimonial. Crawford v. Washington, 124 S.Ct. 1354, 1374, WL 413301 (2004). “Whatever else the term [testimonial] 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. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.” Crawford, 124 S.Ct. at 1374 (*emphasis added*). The U.S. Supreme Court purposefully left the definition of “testimonial” broadly open and this Court fails to find any precedent suggesting that recorded statements are not considered testimonial in the Third Circuit. Accordingly, it is hereby

ORDERED that United States’ Motion for Reconsideration of the Court’s Order as to Suppression of Wiretap Interceptions and Consensually Monitored Recordings is **DENIED**.

ENTER:

Dated: May 11, 2004

RAYMOND L. FINCH
CHIEF U.S. DISTRICT JUDGE

Attest:

Wilfredo F. Morales
Clerk of the Court

By:

Deputy Clerk

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