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 UNITED STATES OF AMERICA

9 UNITED STATES DISTRICT COURT
 10 FOR THE CENTRAL DISTRICT OF CALIFORNIA

12 UNITED STATES OF AMERICA,)	No. ED CR 07-127(A) -SGL
)	
13 Plaintiff,)	<u>OPPOSITION TO DEFENDANT'S</u>
)	<u>MOTION IN LIMINE RE WEEMER'S</u>
14 v.)	<u>POLYGRAPH INTERVIEW</u>
)	
15 JOSE LUIS NAZARIO, JR.,)	
)	
16 Defendant.)	
_____)	

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 18 Plaintiff, United States of America, through its counsel of
 19 record, Assistant United States Attorneys Jerry A. Behnke and
 20 Charles J. Kovats, hereby opposes defendant's motion in limine
 21 regarding Ryan Weemer's pre-polygraph interview.

22 This opposition is based on the attached points and
 23 authorities, the government's trial memorandum, the testimony of
 24 Special Agent DeZeeuw, the files and records in this matter, and

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1 any additional evidence or argument as may be presented at the
2 hearing on the matter.

3 DATED: August 20, 2008

Respectfully submitted,

4 THOMAS P. O'BRIEN
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7 /s/

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1 statements be used against defendant. In fact, at no time during
2 the interview was defendant even mentioned by name by either
3 Weemer or SA DeZeeuw.

4 Defendant cites several factors to argue that the interview
5 amounted to an "interrogation."¹

6 Defendant argues that because SA DeZeeuw explained the
7 importance of being truthful, the statements are "analogous to
8 being made under oath."² However, the statements were not made
9 under oath and, in any event, this factor does not establish that
10 either Weemer or SA DeZeeuw were engaging in the interview with
11 the purpose of "bearing testimony" against defendant or building
12 an investigation "with an eye towards trial." See Crawford, 541
13 U.S. at 56. While this factor goes to establishing the
14 truthfulness and reliability of the statements, it does not

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16 ¹ Defendant, and indeed the Court as well, seem to conclude
17 that if there is an interrogation, Crawford applies. While the
18 Supreme Court did refer to police interrogations in Crawford, the
19 Court also explained that various definitions of "interrogation"
20 exist and that the Court did not need to further explain which
21 applied in that case because the statements at issue qualified as
22 testimonial "under any conceivable definition." Crawford, 541
23 U.S. at 53 n.4. There, a witness gave a tape-recorded statement
24 to police during an investigation of a stabbing committed by the
25 witness' husband. Id. at 38. This question-and-answer of the
26 witness by police was conducted for the purpose of building the
27 criminal case against the accused. Here, as SA DeZeeuw
28 testified, the question-and-answer was solely for the purpose of
assessing Weemer's suitability for employment and establishing
his psychological "base line" for the polygraph examination.

24 ² Defendant argued during oral argument that this is
25 analogous to other "under oath" statements like depositions.
26 That is incorrect for purposes of Crawford. A deposition is
27 conducted with an eye towards trial. In fact, depositions are
only conducted as a part of ongoing litigation. That is what
makes them testimonial, not the fact that an oath is
administered.

1 establish that the statements were testimonial under Crawford.

2 Second, defendant cites the fact that the interview was
3 conducted in one of the rooms used for criminals as evidence that
4 the statement was made in an atmosphere of a custodial
5 interrogation. Defendant further cites the fact that SA DeZeeuw
6 advised Weemer of his rights. However, at the same time, SA
7 DeZeeuw explained to Weemer that it was not a criminal interview.
8 SA DeZeeuw told Weemer, "Now obviously this is not a criminal
9 interrogation it's an applicant screening exam . . ."

10 (Transcript p. 3). Additionally, DA DeZeeuw's comment that the
11 interview room is normally used for criminals is actually
12 evidence that this was NOT a criminal custodial interrogation.
13 Certainly, an agent conducting a criminal interrogation would not
14 tell the suspect the interview room is used for criminals. The
15 statement by SA DeZeeuw conveyed to Weemer that he was different
16 - he was not a criminal. Also, SA DeZeeuw explained to Weemer
17 that during criminal interviews the outside speakers are on, but
18 that he would unplug them for Weemer's interview, stating that he
19 unplugs it for applicant exams because "the rest of the office
20 doesn't need to know" what Weemer says. (Transcript p. 5).

21 Defendant and the Court also placed great emphasis on the
22 allegation that Weemer was not free to use the restroom in
23 arguing this was analogous to a custodial interrogation.³ The
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26 ³ For instance, the jurors in this case were also not free
27 to just get up and leave the courtroom during voir dire. The
fact that they would have had to ask permission did not mean they
were in custody.

1 transcript shows that, when Weemer asked, SA DeZeeuw was willing
2 to allow him to go, but that Weemer decided to remain and finish
3 the interview. The fact that Weemer had the manners to politely
4 ask to use the restroom does not demonstrate that he was in
5 custody or its functional equivalent. In any event, even if he
6 was not free to leave, that would not convert his statements to
7 testimonial statements since, again, they were not made with an
8 eye toward trial.

9 Defendant also cites the fact that SA DeZeeuw said that he
10 would and then did ask follow up questions during the interview.⁴
11 As SA DeZeeuw testified, the purpose for these follow up
12 questions was strictly related to the applicant process and were
13 not geared towards building a criminal case. Follow up questions
14 were important to determine if certain acts of Weemer were
15 justified or not (which goes directly to his suitability for
16 employment) and to determine how Weemer felt about and perceived
17 the acts (which would have a direct impact on the polygraph
18 examination to follow). In fact, as SA DeZeeuw testified, if he
19 were building a criminal case he would have asked many more
20 detailed questions. At the very least he would have asked for
21 the names of the other persons involved and precisely where the
22 shooting occurred, but he did not, because his sole purpose was
23 to establish Weemer's suitability for employment and to establish
24 Weemer's psychological profile before the actual polygraph exam.

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27 ⁴ The Court too placed great weight on the "structured"
questioning that occurred.

1 That is why SA DeZeeuw asked questions related to possible
2 justifications for the shooting and why he engaged in the
3 "structured" follow up questions when Weemer raised issues of
4 concern.

5 As SA DeZeeuw clearly explained to Weemer at the outset of
6 the interview, the purpose of the interview was "the next step in
7 the overall process of becoming an employee with the Secret
8 Service." (Transcript, p. 2). The interview was not designed to
9 build a criminal case against anyone and neither Weemer nor SA
10 DeZeeuw, at the time of the interview, had "an eye towards
11 trial."

12 Weemer's statements to SA DeZeeuw should be admitted.

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