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Defendant's Motion to Exclude Testimony of Robert Parks or Motion for a EVID. R. 104 Hearing to Determine Admissibility

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IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

FILED

2003 FEB 24 2:34

ALAN DAVIS, Special Administrator
of the Estate of Samuel H. Sheppard,

Plaintiff,

v.

STATE OF OHIO,

Defendant.

) CASE NO. 312322
)
) JUDGE SUSTER

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CUYAHOGA COUNTY

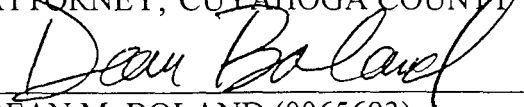
) **DEFENDANT'S MOTION TO**
) **EXCLUDE TESTIMONY OF**
) **ROBERT PARKS**
) **OR**
) **MOTION FOR A EVID. R. 104**
) **HEARING TO DETERMINE**
) **ADMISSIBILITY**

Now comes Defendant State of Ohio who, pursuant to Evidence Rule 804(B)(3), moves this Court to exclude the testimony of Robert Parks regarding the alleged confession of Richard Eberling.

Alternately, Defendant requests that this Court conduct a preliminary hearing, pursuant to Evid. R. 104 to determine the admissibility of the evidence.

Respectfully submitted,

WILLIAM D. MASON, PROSECUTING
ATTORNEY, CUYAHOGA COUNTY


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MEMORANDUM IN SUPPORT

In creating the statement against penal interest exception to the hearsay rule, Evidence Rule 804(B)(3) provides:

Statement against interest. A statement that was at the time of its making contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless the declarant believed it to be true. A statement tending to expose the declarant to criminal liability, whether offered to exculpate or inculpate the accused, is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

In analysing this rule, courts have laid out three distinct elements that must be met for evidence to be admitted pursuant to this rule.

"Evid. R. 804(B)(3) provides that a declaration against interest may be admitted into evidence as an exception to the hearsay rule if [(1)] the declarant is unavailable; [(2)] the statement so far tends to subject the declarant to criminal liability that a reasonable person in his position would not have made the statement unless he or she reasonably believed it to be true; and [(3)] corroborating circumstances indicate its trustworthiness." *State v. Riggins* (Cuyahoga 1986), 35 Ohio App.3d 1.

Plaintiff fails on both the second and third elements.

As to the second element, the requirement that the statement is against the declarant's penal interest is based on an assumption that the person will tell the truth if the person does in fact have a penal interest at risk. Richard Eberling did not have a penal interest at risk. The United States Court of Appeals has analyzed a similar scenario in *Valdez v. Winans* (1984), 738 F.2d 1087, 1088, reasoning that at the time defendant Garcia made a confession, "[w]hether Garcia's confession was truly against his penal interest is debatable. He apparently had little to lose by making a false confession because he had already been convicted of numerous other crimes."

Richard Eberling was, at the time of the alleged statements to Parks, in his late sixties serving a life sentence to run consecutively to a thirteen year sentence to run consecutively to a sentence of five to fifteen years. He had nothing to lose by making a false confession. Rather, as the evidence will demonstrate, he had other motivations at the time the statement was made. Thus there is no basis to believe that he told the truth. As a result, he had no true penal interest at risk.

As to the third element, assuming *arguendo* that this Honorable Court determines a penal interest exists, the statement should be excluded due to the fact that there is no corroborating evidence to provide sufficient indicia of reliability and trustworthiness. Rather, all of the evidence surrounding the statement indicates a lack of trustworthiness. The statement is being offered by Robert Parks, a convicted criminal, who has made conflicting statements with regards to what Richard Eberling actually confessed. On one occasion, Parks stated that Eberling stated he was hired by Dr. Samuel Sheppard to murder Marilyn. On another occasion, Parks stated that Eberling stated he was not hired by Dr. Samuel Sheppard and rather, murdered Marilyn on his own accord. The conflicting statements alone demonstrate a lack of reliability and thus make the

statements improper subject matter for admission under Evid. R. 804(B)(3).

In addition to the lack of credibility surrounding Robert Parks, there is insufficient indicia of trustworthiness stemming from the circumstances surrounding Richard Eberling. On multiple occasions Richard Eberling was given an opportunity to provide a confession or knowledge he may have had regarding the case. He never took advantage of such opportunities. Rather, Richard Eberling has made many other statements completely contrary to those offered by Robert Parks.

Furthermore, in applying 804(B)(3), the courts have held that the declarant often is advancing other interests. In *United States v. Riley* (1981), 657 F.2d 1377, 1384, the court held that,

“Ms. Robinson’s unedited statement suggests that, despite her relationship with appellant, she was physically afraid of appellant (who was in custody at the time she made the statement) and wanted to leave him and thus she may have been motivated to misrepresent the circumstances, the parties’ relationship, and in particular appellant’s role in the events in question.

In sum, we are not convinced that Ms. Robinson’s statement, although ostensibly against interest, was in fact against her interest under all the surrounding circumstances.”

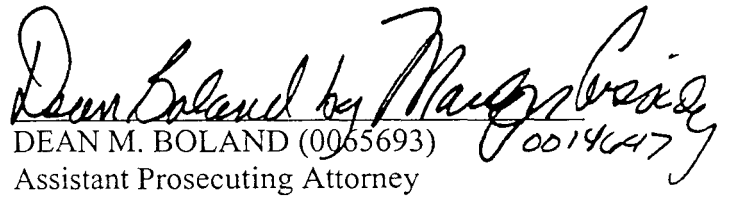
Once again, the evidence will demonstrate that Richard Eberling’s had other motivations than telling the truth when the statements were made. As a result, there is a lack of sufficient corroborating evidence of trustworthiness.

Courts have additionally held that the requirement of corroborating evidence when the statement tends to expose the declarant to criminal liability created by Evid. R. 804(B)(3) contains “**significant hurdles** which must be overcome by the proponent of the statement.” *State v. Sumlin* (1994), 69 Ohio St.3d 105, 108 (citations omitted) (emphasis added). The court went on to say, “The statement will *not* be admissible *unless* accompanied by ‘corroborating circumstances.’ The corroboration must ‘*clearly* indicate’ that the statement is ‘trustworthy.’”

Id.

Evid. R. 104(A) provides, “[p]reliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (B). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

As a result, should this decide Court to not automatically exclude the testimony of Robert Parks, an preliminary hearing pursuant to Evid. R. 104 is proper.


DEAN M. BOLAND (0065693) 0019647
Assistant Prosecuting Attorney

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Motion and Memorandum in Support has been hand delivered on this 24th day of February, 2000, to: Terry H. Gilbert, 1700 Standard Building, 1370 Ontario Street, Cleveland, Ohio 44113.


MARILYN BARKLEY CASSIDY
Assistant Prosecuting Attorney