

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,)
)
 v.) No. 1:22-cr-392 (DLF)
)
 ABU AGILA MOHAMMAD)
 MAS'UD KHEIR AL-MARIMI,)
 Defendant.)

**MR. AL-MARIMI'S RESPONSE TO THE GOVERNMENT'S SUPPLEMENT
TO ITS RESPONSE TO MR. AL-MARIMI'S MOTION IN LIMINE
REGARDING PORTIONS OF MR. AL-MARIMI'S ALLEGED CONFESSION
PURSUANT TO FEDERAL RULES OF EVIDENCE
402, 403, 404, 602, AND 802**

In its original opposition, *see* ECF No. 246, to Mr. Al-Marimi's motion challenging portions of his alleged confession under the Federal Rules of Evidence, *see* ECF No. 231, the government asserted that every circuit that had addressed the issue had held that the personal knowledge requirement in Federal Rule of Evidence 602 did not apply to party-opponent statements under Federal Rule of Evidence 801(d)(2). In reply, the defense had pointed to a Tenth Circuit case finding that Rule 602 applied to party admissions. In a short supplement the government filed yesterday, the government stated that the "defense misstated the holding of *Gross v. Burgraff Const. Co.*, 53 F.3d 1531, 1541 (10th Cir. 1995)," ECF No. 454 at 1, when the defense argued that party admissions were not exempt from Rule 602's personal knowledge requirement, *see* ECF No. 256 at 24.

In *Gross*, Ms. Gross had sued the company that had employed her and her supervisor—Mr. Anderson, alleging gender discrimination and wrongful discharge.

53 F.3d at 1534. The former employer and supervisor moved for summary judgment of her claims, which the court granted finding no genuine issue of material fact regarding either claim. *Id.* at 1536. The former employer filed a motion to strike materials Ms. Gross had submitted in her opposition to the motion for summary judgment; the court denied the motion to strike. *Id.*

On appeal, one issue was whether what Ms. Gross reported hearing from another employee that Mr. Anderson said about Ms. Gross was admissible and thus eligible for consideration in evaluating the grant of summary judgment. *Id.* at 1539, 1541. Meaning, could Ms. Gross (a party) use her own report of what a non-party indicated that Mr. Anderson (the opposing party) stated about Ms. Gross. The *Gross* court first recognized the statement as double hearsay. *Id.* at 1541. When Ms. Gross pointed to Federal Rule 801(d)(2)(A), which provides that a party's own admission is not hearsay, the Tenth Circuit observed in response that Rule 801(d)(2)(A) "does not eliminate the requirement of Rule 602 of the Federal Rules of Evidence that '[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter'". *Gross*, 53 F.3d at 1541-42. Ms. Gross did not have personal knowledge¹ of Mr. Anderson's statement,

¹ This same sentence of *Gross* indicates that the other employee also did not have personal knowledge of Mr. Anderson's statement, *see Gross*, 53 F.3d at 1542. But if Ms. Gross's response to the interrogatory in question was assumed to be truthful—as court's do when evaluating summary judgment claims, the other employee (Mr. Durfee) did have personal knowledge of the statement, *id.* at 1539. But, this potential error in the *Gross* court's discussion does not undermine the Tenth Circuit's holding as to Ms. Gross not having personal knowledge of Anderson's statement.

and the Tenth Circuit held that “[a]n admission by a party to an action is admissible in evidence only if a witness, who heard the party make the statement, is presented for cross-examination.” *Id.* at 1542. Meaning, Ms. Gross could not testify about an opposing party admission unless she had personal knowledge of that admission.

The Seventh Circuit case that the government pointed to in its original response was *Jordan v. Binns*, 712 F.3d 1123 (7th Cir. 2013). In *Jordan*, Ms. Jordan had been injured in a motorcycle collision with a semi-truck that Mr. Binns had been driving. *Id.* at 1125. Mr. Binns told a claims manager, a state trooper, and a claims adjuster that he had heard Ms. Jordan claim responsibility for the accident at the scene of the accident. *Id.* Ms. Jordan’s husband—also a party—had also told several people that his wife had claimed responsibility. *Id.* at 1125-26. The trial court admitted a series of statements from these other witnesses about Ms. Jordan’s claim of responsibility at trial. *Id.* at 1127. It was in the context of analyzing the admissibility of these statements from other witnesses about Ms. Jordan’s claim of responsibility that the Seventh Circuit observed: “Because trustworthiness is not the touchstone for admissibility of party admissions, they are not subject to the personal-knowledge requirement of FRE 602”. *Id.* at 1128.

Thus, rather than *Gross* and *Jordan* offering observations about a different aspect of the interplay—or lack thereof—between Rules 602 and 801(d)(2)(A), both *Gross* and *Jordan* addressed the circumstances under which another person may testify about a party’s admission. In *Gross*, the admission at issue was Mr. Anderson’s

alleged admission and who could testify about it. In *Jordan*, the admission at issue was Ms. Jordan's alleged admission and who could testify about it. And while the Seventh Circuit observed that Rule 602 does not apply to party admissions, the Tenth Circuit held that it does. Consequently, the defense did not misstate the holding of *Gross* on this point.

Respectfully submitted
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