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NICOLAS WAYNE MOORE

IN THE SUPERIOR COURT OF GUAM

THE PEOPLE OF GUAM **Plaintiff,** **vs.** **NICHOLAS WAYNEMOORE,** **Defendant.**	**S.C. Criminal Case No.: CF0313-21** **DEFENDANT'S MOTION IN LIMINE FOR DETERMINATION THAT THE GOVERNMENT HAS MADE JUDICIAL ADMISSIONS AND THAT THESE ADMISSIONS BE READ TO THE JURY WITH APPROPRIATE INSTRUCTIONS**

Comes Now Moore, by and through counsel, and states as follows:

Introduction.

The government has made critical judicial admissions. Those admissions appear in its Motion To Bar Further Cross-Examination Of Eric Salone Pursuant To Guam Rule Of Evidence 403 filed September 20, 2022. For example, the government has now admitted that the defense has elicited testimony from Mr. Salone that establishes that the bullet from the gun that Mr. Salone claims to have fired at the ground could have ricocheted off the ground and struck Mr. Mendiola.

Moore has argued, contrary to the government's theory of the case, that Mr. Salone fired the pistol that resulted in a .38 caliber bullet being lodged in Mendiola's leg. Together with police reports that state that Mr. Salone admitted to Mr. Mercado that Mr. Salone shot the .38 pistol, Mr. Moore's theory of the case is significantly advanced by the government's admission.

The government has also admitted that "other witnesses yet to testify have claimed that only one gun was fired and Mr. Salone was the shooter." This admission also goes to the heart of Moore's defense. Having made this admission, the government and defense should apprise the Court that one of the witnesses referred to by the government is Javier Mercado.

Below, Moore discusses the law of admissions. He also sets forth the many admissions the government has made. Moore requests those admissions be deemed judicial admissions and the jury be read those admissions together with a brief explanation of their effect.

Memorandum of Law.

Admissions made by a party are considered either "judicial admissions" or "evidentiary admissions." A judicial admission is a formal concession made in court or prior to trial by a party or its attorney, conceding for purposes of trial, the truth of the admitted fact. *Martinez v. Bally's Louisiana, Inc.*, 244 F.3d 474, 476 (5th Cir. 2001). Judicial admissions are not evidence at all but rather have the effect of withdrawing a

fact from contention and completely dispensing with need for proof of the fact. *Id; United States v. Davis*, 332 F.3d 1163, 1168 (9th Cir 2003). Ordinary evidentiary admissions, in contrast, may be controverted or explained by the party. *Id; McNamara v. Mill*er, 269 F.2d 511, 515 (D.C.Cir.1959); John William Strong, McCormick on Evidence § 254, at 142 (1992). Evidentiary admissions are explicitly recognized by Rule of Evidence § 801(d)(2).

Judicial admissions arise in various ways. Pleadings and requests for admissions are just two of many ways judicial admissions arise in civil proceedings. § 8:51 Authorized admissions under Rule 801(d)(2)(C)—Prior pleadings, discovery, argument by counsel, 4 Federal Evidence § 8:51 (4th ed.). The relationship between the judicial admission and the evidentiary admission is highlighted by the fact that an averment in a pleading acts as a judicial admission until it is amended or otherwise permitted to be withdrawn. If and when the pleading is amended/withdrawn and the averment is no longer contained in the amendment, the averment is no longer considered a judicial admission. However, the withdrawn averment does not become a nullity, it takes on new life as an evidentiary admission. *Id.*

Both judicial admissions and evidentiary admissions are recognized in criminal cases. *Sweat v. State*, 612 S.W.3d 390, 394 (Tex. App. 2020)(stipulations between parties); *Oscanyan v. Arms Co.,* 103 U.S. 261, 263 (1880)(Court hypothesizing judicial admission made in an opening statement that defendant had been pardoned); See, *United States v. Blood*, 806 F.2d 1218, 1220 (4th Cir. 1986)(judicial admission); *see*

also, United States v. Bentson, 947 F.2d 1353, 1356 (9th Cir. 1991) (statement in closing argument was a "straightforward judicial admission"); *United States v. Rivers,* 406 F. Supp. 709, 711 n.2 (E.D. Pa 1975)(Court considered statements of counsel at trial to be binding judicial admission for purposes of judgment of acquittal motion); *United States v. Novak,* 99 F.3d 1147 (9th Cir. 1996)(government's mistaken assertion of fact held against it as a judicial admission at bail hearing); *United States v. Kattar,* 840 F.2d 118, 130-31 (1st Cir. 1988)(evidentiary admission made by prosecutor); *United States v. Bakshinian*, 65 F.Supp.2d 1104, 1106-09 (C.D. Cal. 1999)(evidentiary admission).

Both judicial and evidentiary admissions are factual statements. They can encompass the same issue. For instance, a statement discussing the design of a gasoline tank that caught fire in a products liability case can constitute a judicial or an evidentiary admission, and the bar is higher for judicial admissions. Because a judicial admission removes the fact from further consideration it must, unlike an evidentiary admission, be deliberate, clear, and unequivocal. *See, McCaskill v. SCI Mgmt. Corp.*, 298 F.3d 677, 680 (7th Cir. 2002) ("judicial admissions are 'any deliberate, clear and unequivocal statement, either written or oral, made in the course of judicial proceedings'") (quoting *In re Lefkas Gen. Partners*, 153 B.R. 804, 807 (N.D. Ill. 1993)). Accordingly, courts uniformly consider factual statements offered in a pleading to be binding judicial admissions because pleadings are "the most formal and considered means possible" for a party to make factual averments, and judicial efficiency would be

harmed if parties were later permitted to controvert those statements. *Nat'l Sur. Corp. v. Ranger Ins. Co.*, 260 F.3d 881, 886 (8th Cir. 2001) (*citing Soo Line R.R. v. St. Louis S.W. Ry.*, 125 F.3d 481, 483 (7th Cir. 1997)); *see also, e.g., Official Comm. v. Coopers & Lybrand, L.L.P.*, 322 F.3d 147, 167 (2d Cir. 2003); *Am. Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226 (9th Cir. 1988). Factual statements in a brief are considered judicial admissions if unequivocal and there is sufficient indicial to show that the statements were made in a considered manner. *See, e.g., Holman v. Kemna*, 212 F.3d 413, 418 (8th Cir. 2000). *See, In re Doctors Hosp. of Hyde Park, Inc.*, 508 B.R. 697 (Bankr. N.D. Ill. 2014) (Binding judicial admissions are any deliberate, clear and unequivocal statement, either written or oral, made in course of judicial proceedings); *In re Cerrato,* 504 B.R. 23 (Bankr. E.D. N.Y. 2014) (Court can treat statements in briefs as binding judicial admissions of fact).

The government's admits "defense counsel have established" facts.

In its motion to prematurely terminate Moore's cross-examination of Mr. Salone, the bulk of the government's argument is that Moore has already accomplished what he set out to establish through its cross-examination of Salone. As part of the government's effort to focus the Court's attention on what Moore has already established, in its motion the government made many unequivocal, clear, and deliberate admissions. The government writes:

> Through its cross-examination of Mr. Salone, ***defense counsel have established*** that: (1) the bullet from the gun that Mr. Salone claims to have fired at the ground could have ricocheted off the ground and struck Mr. Mendiola; (2) Mr. Salone's DNA was on the .38 caliber revolver; (3) Mr. Salone is aware that the bullet retrieved from Mr. Mendiola was a .38 caliber bullet; and (4) other witnesses yet to testify have claimed that only one gun was fired and Mr. Salone was the shooter.

Government's Motion p. 3 lns 10 – 17 (emphasis added). Nothing could be more unequivocal than "defense counsel have established" the four statements of facts in the above quoted sentence.

Conveniently, the government numbers its admissions (1) – (4). Each of these should be read to the jury. *State v. Kibb*ee, 815 N.W.2d 872, 895 (2012)(" The trial court did not err in allowing the State to read the judicial admissions to the jury."). More specifically, the jury should be informed that the admissions constitute judicial admissions by the government meaning that the jury should consider each of the four as facts which are binding and which cannot be contested or controverted by the government. *See, Griffitts & Coder Custom Chopping, LLC v. CNH Indus. Am. LLC*, 438 F. Supp. 3d 1206, 1240–41 (D. Kan. 2020); *Hork v. Minneapolis St. Ry. Co.*, 258 N.W. 576, 577 (Minn. 1935). *C.f. Earthgrains Baking Companies Inc. v. Sycamore Fam. Bakery, Inc.*, 573 F. App'x 676, 681 (10th Cir. 2014).

Other admissions are contained in the Government's motion to prematurely terminate the cross-examination of Mr. Salone. In its motion, the government also stated:

> In addition, defense counsel have extensively impeached Mr. Salone's credibility and motives by: (1) pointing out multiple lies in his testimony that includes lying to Agent Craig Perry about the Defendant handing him the .45 caliber gun; (2) his history of drug use and marijuana that he has sold; and (3) benefits that he may receive by virtue of his cooperation in this case.

Government's Motion p. 5 ln 26 – p. 6 ln 3. Here, the government admits 1) that Mr. Salone has lied multiple times in his testimony. The government admits 2) Mr. Salone lied to Agent Perry about Defendant Moore handing Salone the .45 caliber gun. The government admits 3) Mr. Salone has a history of drug use. The government admits 4) Mr. Salone has sold marijuana. The government admits 5) Mr. Salone may receive benefits by virtue of his cooperation in this case. All five factual assertions constitute judicial admissions.

If for some reason the Court believes any of the nine admissions outlined *supra* do not rise to the level of a judicial admission, the Court should instruct the jury that they constitute evidentiary admissions. For these evidentiary admissions, the Court should instruct the jury that the government, through Mr. Grant Olan, made these assertions in a filing with the Court on September 20, 2022. The jury should be further instructed that these admissions by Mr. Olan should be given the "persuasive weight that you as jurors decide to give each admission." *See, Griffitts & Coder Custom Chopping, LLC v. CNH Indus. Am. LLC,* 438 F. Supp. 3d 1206, 1240–41 (D. Kan. 2020).

WHEREFORE Defendant prays that this Honorable Court instruct the jury that the government has judicially admitted the following:

The prosecution in a recent filing with the Court has made the following judicial admissions:

(1) the bullet from the gun that Mr. Salone claims to have fired at the ground could have ricocheted off the ground and struck Mr. Mendiola;

(2) Mr. Salone's DNA was on the .38 caliber revolver;

(3) Mr. Salone is aware that the bullet retrieved from Mr. Mendiola was a .38 caliber bullet;

(4) other witnesses yet to testify (including Javier Mercado) have claimed that only one gun was fired and Mr. Salone was the shooter.

(5) Mr. Salone has lied multiple times in his testimony.

(6) Mr. Salone lied to Agent Perry about Defendant Moore handing Salone the .45 caliber gun.

(7)) Mr. Salone has a history of drug use.

(8) Mr. Salone has sold marijuana.

(9) Mr. Salone may receive benefits by virtue of his cooperation in this case.

Each of these admission constitute judicial admissions by the government and that you the jury should consider the facts asserted in the admissions as binding and can no longer be contested or controverted by the government.

In the alternative, the Court should instruct the jury that the four statements constitute evidentiary admissions by the government. The Court should instruct the jury

that the government, through Mr. Grant Olan, made these assertions in a filing with the Court on September 20, 2022. The jury should be further instructed that these admissions by Mr. Olan should be given the "persuasive weight that you as jurors decide to give each admission."

Any other relief this Court deems appropriate.

Respectfully Submitted,

LAW OFFICES OF WILLIAM L. GAVRAS

Date: September 30, 2022. By: William Gavras
WILLIAM L. GAVRAS, ESQ.
Attorney for Defendant