

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 08-3164 WM

UNITED STATES OF AMERICA

vs.

GARY EYE

APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

BRIEF FOR APPELLANT

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SUMMARY OF CASE AND REQUEST
FOR ORAL ARGUMENT

The appellant, Gary Eye was charged on May 17, 2006 by superseding indictment with co-defendant Steven Sandstrom in eight counts arising from the alleged murder of William McCay with a firearm because of his race (18 USC, Section 245 and 924), after which defendants allegedly burned the vehicle to obstruct the investigation (18 USC, Section 844 and 1519). Defendant Sandstrom was charged in a separate 9th count with threatening a witness (18 USC 1513).

Eye and Sandstrom entered pleas of not guilty to all counts in the indictment and were tried jointly by jury and Mr. Eye was found guilty on September 11, 2008 of all counts. Mr. Eye was sentenced to Life without parole on the murder and additional consecutive terms of years on related counts.

This case presents important issues of sufficiency of the evidence, *Bruton* violations, prejudicial joinder, multiplicity and other trial errors. Appellant requests 30 minutes oral argument.

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JURISDICTIONAL STATEMENT

The jurisdiction of the United States District Court below was based upon violations of the laws of the United States. This is a direct appeal of Mr. Eye's jury trial conviction in the United States District Court for the Western District of Missouri, Case No. 05-00344-01/02-CR-W-ODS, tried before The Honorable Ortrie D. Smith. This appeal is authorized pursuant to Rule 4(b) of the Federal Rules of Appellate Procedure; Title 18 United States Code and Title 28, United States Code, §1291.

Mr. Eye filed a timely Notice of Appeal on September 12, 2008. Undersigned counsel represented appellant in United States District Court as counsel appointed pursuant to the Criminal Justice Act and is presently representing appellant before this court as CJA counsel.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. THE EVIDENCE TO SUPPORT EYE'S CONVICTION ON COUNTS ONE, AND TWO WAS INSUFFICIENT AS A MATTER OF LAW BECAUSE THE VICTIM MCCAY WAS NOT THE PERSON ALLEDGED TO HAVE BEEN AT 9TH AND SPRUCE AND, EVEN IF SUCH AN INDIVIDUAL DID EXIST AND WAS SHOT AT, SUCH CONDUCT DOES NOT SUPPORT A CONVICTION UNDER COUNTS ONE AND TWO OF THE INDICMENT

United States v. Helder, 452 F.3d 751 (8th Cir. 2006)

United States v. Blazek, 431 F.3d 1104, 1107 (8th Cir. 2005)

United States v. Sobrilski, 127 F.3d 669 (8th Cir. 1997)

II. THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING EYE'S MOTION TO SEVER DEFENDANTS BECAUSE EYE AND SANDSTROM PRESENTED MUTUALLY ANTAGONISTIC, IRRECONCILABLE, DEFENSES THAT RESULTED IN NEITHER RECEIVING A FAIR TRIAL

Zafiro v. United States, 506 U.S. 534 (1993)

Richardson v. Marsh, 481 U.S. at 200 (1987)

United States v. Joiner, 418 F.3d 868 (8th Cir. 2005)

III. THE DISTRICT COURT ERRED WHEN IT FAILED TO

GRANT EYE'S REQUESTS FOR MISTRIAL AND SEVERANCE BECAUSE OF VIOLATIONS OF HIS RIGHT TO CONFRONTATION IN VIOLATION OF THE RULE IN *BRUTON V. UNITED STATES*

United states v. Williams, 429 F.3d 767 (8th Cir. 2005)

United States v. Al-Musqsit, 191 F.3d 928 (8th Cir. 1999)

United States v. Jones, 101 F.3d 1263 (8th Cir. 1996)

IV. THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING EYE AND SANDSTROM'S OBJECTIONS AND MOTIONS FOR MISTRIALS WHEN THE PROSECUTING ATTORNEY COMMENTED ON THEIR FAILURE TO TESTIFY AND SHIFTED THE BURDEN OF PROOF TO BOTH DEFENDANTS

Griffin v. California, 380 U.S. 609, 615 (1965)

United States v. Burns, 432 F. 3d 856 (8th Cir. 2005)

Graham v. Dormire, 212 F.3d 437, 439 (8th Cir. 2000)

V. THE COURT ERRED WHEN IT FAILED TO DISMISS MULTIPLICITOUS COUNTS IN THE INDICTMENT

United States v. Chipps, 410 F.3d 438 (8th Cir. 2005)

United States v. Page, 84 F.3d 38 (1st Cir. 1996)

VI. THE DISTRICT COURT ERRED IN DEYING MOTIONS
TO DISMISS COUNTS ONE, THREE, AND FIVE ON
GROUNDS THAT 18 U.S.C., SECTION 245 IS
UNCONSTITUTIONAL

United States v. Lopez, 514 U.S. 549 (1995)

United States v. Morrison, 529 U.S. 598 (2000)

United States v. Bledsoe, 728 F.2d 1094 (1984)

STATEMENT OF THE CASE

Eye was charged with aiding and abetting the following offenses: two Counts of interference with federally protected activities (Counts One and Three), one count of using or discharging a firearm during a crime of violence (Count Two), two counts of using or discharging a firearm during a crime of violence causing murder (Counts Four and Six), one count of tampering with a witness (Count Five), one count of obstruction of justice (Count Seven), and one count of using fire to commit a felony (Count Eight). His co-defendant Sandstrom was charged in the same eight counts and additionally with one count of threatening to retaliate against a federal witness (Count Nine) (Doc. 124).

Eye twice moved to sever his trial from that of his codefendant through motions by arguing that he and Sandstrom would present mutually antagonistic

defenses (Docs. 80 and 396) and made numerous renewed motions during the trial for severance. Sandstrom made similar motions which were denied. The Honorable Robert E. Larsen, Magistrate Judge, denied Eye's initial motion (Doc. 104) which was timely objected to (Doc. 122). The renewed motion to reconsider by the district court was denied by Judge Smith (Doc. 403). The court recognized Eye and Sandstrom's objections to a joint trial as a continuing objection (Tr. at 89).

Sandstrom moved to dismiss the Indictment on the grounds that it was multiplicitous, because the defendants were subject to multiple punishments for the same offense (Doc. 60). Eye filed a motion to dismiss Counts Two, Four, and Six on the ground that the defendants would be subject to multiple punishments based on a single predicate offense arising out of one transaction (Doc. 68). Sandstrom joined in this motion (Doc. 70). Judge Larsen denied both motions (Doc. 120, 168). Eye filed timely objections to Judge Larsen's report and recommendation (Doc. 187). The court overruled all objections and adopted the reports and recommendations denying the motions to dismiss (Doc. 176, 189).

Eye and Sandstrom filed a join motion to dismiss Counts One, Three, and Five on the grounds that Congress did not have the authority to enact 18 U.S.C. § 245 under the Commerce Clause or the Thirteenth Amendment (Doc. 66). Judge Larsen recommended that the motion be denied (Doc. 121). The court adopted

Judge Larsen's report and recommendation over objections by both defendants (Doc. 177).

The case proceeded to trial on April 22, 2008 (Tr. at 3). The case was charged and tried as a capital case. During trial defendant Eye made a number of renewed objections dealing with severance and *Bruton* violations which were denied. During closing argument, the prosecuting attorney stated that the defense had not supplied a motive other than race to explain why the shootings occurred (Tr. at 1979). Both defendants objected and requested a mistrial on the grounds that the argument shifted the burden of proof to the defense and was a comment on their failure to testify (Tr. at 1979-1980). The court overruled the objections and mistrial requests (Tr. at 1980).

The jury convicted Eye on all counts in which he was charged. The same jury acquitted Sandstrom of Counts One and Two (alleged initial shooting at McKay at 9th and Spruce) but found him guilty of the remaining counts (Tr. at 2145-2149). The jury failed to return a death sentence in Eye's case and the Court thereafter sentenced him to life without parole and additional terms of years on related counts that called for additional consecutive time. See J&C Addendum. On September 12, 2008, Eye timely filed a Notice of Appeal (Doc. 511).

STATEMENT OF FACTS

Regennia Rios was the only witness in the case who provided direct testimony as to what happened at the two separate locations where shots were alleged to have been fired by defendant Eye (Tr. 928-1190). Treating her testimony in a light most favorable to the government, as defendant must, it amounts to the following.

Rios had known Sandstorm for 10 years and had a dating relationship with him (Tr. 929). Sandstrom, Eye, and Regennia Rios spent the evening of March 8, 2005, and the morning of March 9, 2005, stealing cars and using methamphetamine (Tr. at 931-932, 939-941). After stealing a vehicle, Eye and Rios separated from Sandstrom for a period of time (Tr. 933). The group reconvened a short time later (Tr. at 935). According to Rios, Sandstrom claimed that he "shot at a nigger" at a 7-Eleven store (Tr. 935).

The group picked up Vince Deleon at Jonnie Renee's house and went to Independence to steal another vehicle (Tr. 938). On the way, Eye, referring to Sandstrom's statement that he shot at an African-American person, said, "If you get to do one, I get to do one" (Tr. 939). According to Deleon, both Sandstrom and Eye said that they would "kill a nigger quick" (Tr. at 255, 261, 264). Deleon stole

a vehicle and separated from the others, who remained in a red Intrepid that they drove throughout the night (Tr. at 940-941).

Sandstrom had a gun that he carried inside an Ace bandage that he wore like a back brace (Tr. 940). Rios saw Sandstrom tuck it in his shirt earlier before they left the Sandstorm home (Tr. Id.). Sandstrom, Eye, and Rios drove to a gas station to pick up a friend, Johnnie Renee Chrisp, who needed a ride home (Tr. at 941-943). Chrisp testified that Sandstrom held up a revolver and said, "You're about to witness a homicide" (Tr. At 1613, 1615-1616). Chrisp said she just wanted to go home and Eye told her it was a good idea because she would probably see something she did not want to see (Tr. 944).

A short time later the three were headed west on 8th street and at the Kensington intersection Rios saw "McCay" walking on the left side of 9th Street [east bound] (Tr. 949).¹ Eye told Sandstrom to "hit the alley" and Sandstrom turned south off 8th street into the alley between Kensington and Spruce (Tr. 949).

Eye, was seated in the front passenger seat and told Sandstrom to give him "the strap" (Tr. 949). Sandstrom drove to the end of the alley where it intersects 9th Street and Eye put his arm out the window and shot twice (Tr. 952). The person referred to as McCay was 3 to 4 feet away (Tr. Id.). Eye told Sandstrom to "hit the

¹ Rios did not know McCay and simply referred to him name at trial having since learned

block” and they drove east to Spruce and circled the block coming back to 9th Street by way of Kensington (Tr. 953). The individual Eye said he shot twice in the face was not there and Rios told Sandstrom to find him (Id.).

Sandstrom proceeded directly east on 9th Street to Van Brunt and turned left on Van Brunt and drove a block north to 8th Street, turned right on 8th Street and drove directly to Brighton and turned back south on Brighton where they saw the victim, William McCay (Tr. 954-955). Rios testified it is about ½ mile from Spruce to Brighton, they made no stops and she saw McCay who she assumed was the same man they had shot at walking down 9th Street (Tr. 1037-1038). Others confirmed the distance from Brighton to Spruce is ½ mile based on aerial photos and having knowledge of the streets (See testimony of Public Works employee Tapscott; Tr. 900). FBI Special Agent Arch Gothard testified that based on his car odometer, it was four-tenths of a mile from the alley between Kensington and Brighton (Tr. 1678). Agent Gothard testified there are 1760 yards in a mile and four-tenths would be 704 yards or the length of 7 football fields goal post to goal post (Tr. 1682). It amounts to a distance that is just the shy side of two times around the track at a typical high school stadium (Id.).

his name (Tr. 950).

Sandstrom stopped the car and Eye got out of the car and approached McCay who came into the intersection toward Eye (Tr. 957). They met in the middle of the Street and Eye got McCay in a headlock (Id.) . Rios did not see the gun as Eye got out of the car; she assumed it was concealed in the pocket of his sweatshirt (Tr. 525 at 958, 1117). According to Rios, Eye fired one or two shots, and McCay stumbled away (Tr. at 958-959). The three then sped off (Tr. 959).

They drove to Sandstrom's house where they had left the vehicle they had stolen earlier in the evening (Tr. 960). They drove both vehicles under the Manchester Street Bridge, where Sandstrom set the Intrepid on fire (Tr. 962-963).

Driving a stolen Jeep, they picked up Deleon at his girlfriend's house (Tr. 964-967). According to Deleon, they turned on the television and listened to the news, which was reporting on McCay's homicide (Doc. 522 at 281 282). Eye and Deleon went outside where Eye told Deleon, "I smoked that nigger" (Tr. at 283-284). Deleon, Eye, Sandstrom, and Rios left together and drove to where the shooting had occurred (Tr. 522 at 288-289; Tr. 525 at 965-966). According to Deleon, Sandstrom said, "That's where Gary shot that nigger" and Eye laughed, saying, "Here nigger, nigger, nigger" (Tr. 522 at 290, 291).

A few days later, Eye, Sandstrom, and Rios were at Kristina and Jonathan

Chirino's house with some other friends (Tr. 532; 972,973). Eye bragged that he had killed the "nigger" because he was in "my hood on my time" (Tr. 536 537).

On March 17, 2005, Sandstrom was arrested at Kristina's house (Tr. 544). Before Sandstrom was arrested, he hid his gun in a closet (Tr. 546, 547). A short time later, Sandstrom's sister, Stephanie, arrived and took Sandstrom's gun to dispose of it (Tr. 549-550; 665-666). She later threw the gun into the Little Blue River (Tr. 666). Divers recovered a revolver from the river, but ballistics testing could not confirm that the revolver was used to kill McCay (Tr. 771-772, 829).

An autopsy and medical testimony revealed that McCay died from a single gunshot wound to the left side of the chest area (Doc. 1286, 1287). The absence of stippling around the wound and the absence of gunshot residue on his clothing was evidence that the gun was held some distance from the body when it was fired (Tr. 1288). Ballistics testing confirmed that the gun was held at least 38 inches from the body (Tr. 836). Testing of McCay's fingernail scrapings revealed Eye's DNA profile confirming he had been in a struggle with McCay when he was shot (Tr. 1718-1719).

Before trial, Sandstrom was held in the Jackson County jail. He wrote his cousin, Justin Buchanan, several letters in which he made racial slurs about African-Americans (Tr. 1389, 1391, 1408-1409, 1428). Sandstrom made

comments about Rios which Buchanan interpreted as Sandstrom asking him to kill Rios (Tr. at 1393-1394, 1396, 1402, 1410-1411, 1414-1415, 1417, 1425, 1427). In a letter to Rios' best friend, Sandstrom threatened to harm Rios (Tr. at 1330, 1341-1345). Sandstrom wrote, "I'm a killer, my whole family is" (Tr. 1343).

On this evidence, Eye was convicted of all counts in the indictment and sentenced to life without parole for the killing and consecutive periods for the related counts.

SUMMARY OF THE ARGUMENTS

In Argument I Eye contends that the evidence was insufficient to convict him on Counts One and Two because: it was impossible for the victim to have gone from the first location to the second in less time that it took defendants to drive there; McCay was calmly walking along; the time was two minutes or less based on Rios's description of events from scene one to scene two; there were no reports of shots at the first location; there were no bullet holes in buildings; and it defies logic that McCay would approach Eye in the street under such circumstances.

In Argument II Eye argues that he should have been severed because of inconsistent defenses. Eye's defense was the first shooting did not occur and was a Rios fabrication; coming upon McCay at 9th and Brighton was a chance encounter;

Eye got in a fight with him in the middle of the street; and, Rios or Sandstrom then shot McCay without warning to or complicity by Eye. Sandstrom argued that Eye did indeed fire at McCay at 9th and Spruce and Sandstrom did not know it was going to occur and it was Eye who shot McCay and 9th and Brighton to keep him from testifying.

In Argument III Eye points to two key statements attributable to Sandstrom and a piece of key testimony by Sandstrom's girlfriend that clearly point to Eye as the shooter and identify him clearly notwithstanding a hollow attempt at redaction all of which was admitted in violation of *Bruton*.

In Argument IV Eye argues that the prosecution shifted the burden in closing argument through improper comments to he and Sandstrom and challenged them as to why they did not produce evidence to refute motive and explain their respective actions and defenses. The argument highlight the irreconcilable defenses of Eye and Sandstrom and further pitted them against each other.

In argument V Eye argues that the indictment contains multiple counts to cover a single course of conduct multiplying their exposure and making them look worse in the eyes of the jurors.

In argument VI Eye argues that the statute under which he was charged, 18 U.S.C. 245 is unconstitutional.

Eye contends that I through V were trial errors that prejudiced him that entitle him to a new trial and that VI requires dismissal of all charges.

ARGUMENT

I. THE EVIDENCE TO SUPPORT EYE'S CONVICTION ON COUNTS ONE AND TWO WAS INSUFFICIENT AS A MATTER OF LAW BECAUSE THE VICTIM MCCAY WAS NOT THE PERSON ALLEDGED TO HAVE BEEN AT 9TH AND SPRUCE AND, EVEN IF SUCH AN INDIVIDUAL DID EXIST AND WAS SHOT AT, SUCH CONDUCT DOES NOT SUPPORT A CONVICTION UNDER COUNTS ONE AND TWO OF THE INDICMENT

STANDARD OF REVIEW:

In considering the sufficiency of the evidence, the Court must view the evidence in the light most favorable to the government, resolving evidentiary conflicts in favor of the government, and accepting all reasonable inferences drawn from the evidence that support the jury's verdict." *United States v. Blazek*, 431 F.3d 1104, 1107 (8th Cir. 2005).

ARGUMENT:

The first alleged shooting at 9th and Spruce quite simply did not occur or if the court concludes it did, it had to be a different individual. This is of course the shooting of which Sandstrom was acquitted and which his counsel argued

vigorously was all Eye's doing which surprised Sandstrom when it happened. Sandstrom's counsel were in effect surrogate prosecutors. The only testifying witness as to what actually happened once the trio started down 8th Street in the early morning hours of March 9th was Rios.

Rios admitted at trial that she had entered a guilty plea to lying to the FBI in connection with the investigation which was directly related to her perjury before the grand jury and the different versions of events she provided to the FBI (See Rios's testimony; Tr. at 928-1190). As will be developed below, Rios's uncorroborated version of what allegedly happened at 9th and Spruce was a physical impossibility when squared with other evidence in the case.

Eye made no secret of his defense when filing pretrial motions (See Doc. 80, Eye's Motion to Sever). It was Eye's position from the outset that the shooting at 9th and Spruce was a complete fabrication by Rios; that the encounter with McCay at 9th and Brighton was a chance one; that McCay had not been at 9th and Spruce minutes earlier; that Eye got out of the automobile at 9th and Brighton and approached the center of the intersection; that McCay saw him, turned and walked directly toward Eye; the two got in a scuffle; Eye's DNA ended up under McCay's fingernails as a result of the fight; and, during the scuffle, either Rios or Sandstrom then shot McCay with Sandstrom's revolver he carried in his Ace bandage which

his sister later disposed of in the Little Blue River. Eye's defense was corroborated by scientific evidence establishing that the gun was fired at a minimum of 38 inches distance contrary to Rios's testimony that he placed the gun directly against McCay's chest and fired it while holding him in a headlock. His defense was also supported by the absence of any bullet holes in the buildings directly across from and in line with the alley from which the shots were allegedly fired at the first location. Finally, there was the timeline issue.²

On May 19th and May 26th Rios was interviewed by FBI agents under terms of a proffer agreement and withheld information even though nothing she said could be used against her (Tr. 987-988). Subsequently she appeared before the grand jury, refused to testify and was then granted immunity and then testified on July 19th for the grand jury and again failed to provide facts she later testified to at trial (Tr. 988-989). She did not testify to the term "on site"; she said she lied about knowing what was going to happen; she said she lied about how the car was stopped in the alley so the gun could be passed; and she did not tell the grand jury

² Eye has not raised a sufficiency of the Evidence argument with respect to the fatal shooting at 9th and Brighton simply because, while he continues to vigorously maintain his innocence, when considering the evidence in a light most favorable to the government, as he must on appeal, he cannot meet the legal test and does not wish to deter this court from focusing on the very real issue of the bizarre and impossible events that are alleged to have occurred two minutes or so earlier at 9th and Spruce. Having said this, it is unquestionable that Eye was prejudiced beyond any hope when he had to defend the alleged first shooting in a joint trial and but for this, he might well have had a good

about encouraging Eye and Sandstrom to find the person they had allegedly just shot at to avoid “catching a case.” (Tr. 990-992). By the time Rios appeared at trial her version of events conformed to the government’s theory of events based on the many interviews of Sandstrom’s relatives, friends, girlfriends, and acquaintances as well as statements attributable to Sandstrom himself.

Rios testified first about the shooting in the alley; then about how they immediately drove around the block and did not find the person; how they then proceeded directly down 9th street, went up a block at Van Brunt and back to 8th street; then they drove directly east to Brighton and turned south on Brighton; and, then drove a block to the corner where they saw McCay calmly walking down the south side of 9th Street near the intersection.

Q So then you go on down to the end of the alley. Is that where you stopped?

A At the end of the alley.

Q And what happened there?

A That's where Mr. McCay was standing as we approached the end of the alley, he was at the sidewalk.

* * *

Q What happened?

A Gary stuck his arm out the window and shot him.

Q Okay. Was there some conversation about whether Mr. McCay

chance for acquittal on his defense to the fatal shooting.

was hit?

A Afterward.

Q Where did that conversation take place?

A After we went around the block, he wasn't there.

Q Which way did you go around the block?

A We went around through Kensington. We came back out on Spruce. So we went -

Q So you came around this way and went straight around the block?

A And back down.

Q Back down again. Then you went straight down 9th Street?

A That's correct.

Q All right. Now, you didn't stop on the way or do anything, did you?

A No.

Q You were in a hurry trying to find Mr. McCay, weren't you?

A Yes.

Q And you drove straight down 9th Street at 6:00 in the morning, right?

A That's correct.

Q You get to Van Brunt, according to your testimony?

A Yes.

Q You take a left on Van Brunt?

A Yes.

Q You go back up to 8th Street again, is that correct?

A Yes.

Q You then go down to?

A Brighton.

* * *

Q All right. Then so when you get down to 9th and Brighton, you go around the corner and go down to the building on the corner of 9th and Brighton, is that right?

A That's right.

(Tr. 1034-1036).

Q So you're at 9th and Brighton now and you see Mr. McCay?

A That's correct.

Q Is he walking or running?

A He wasn't running, no. He was walking.

Q So he would be walking down the street?

A That's correct.

Q Now, do you know how far it is from 8th and Spruce?

A It's a distance.

Q It's a half mile, isn't it?

A About.

Q So --and you didn't make any intervening stops between?

A No, we didn't.

Q You go straight down there as fast as you could?

A We went around the block. They had their little discussion about Gary taking it too far and Gary freaking over him not being there.

Q That wasn't my question. Did you make any stops?

A No.

Q And then you say some man is at the corner, walking down the street, 9th and Brighton?

A I assume it's the same man.

(Tr. 1036-1037).

Q Now, where do you see, precisely, Mr. McCay at this point?

A He was on the right-hand side of 9th Street.

Q Over here?

A He was like about right there. That's right.

Q Mr. Eye is out of the car?

A He gets out.

Q Does he urinate?

A No.

Q Did you previously tell anybody ever, any point in time, that he had to urinate? He got out of the car to urinate?

A No.

Q He sees Mr. McCay and Mr. McCay sees him?

A Yes.

Q And they meet where? In the intersection?

A In the intersection.

Q In the middle?

A That's correct.

Q And that's when you say that Mr. Eye got him in a headlock?

A He threw his arm around him.

Q And put the gun up next to him and pulled the trigger?

A I didn't see the gun but I heard the shots.

Q Did he shoot at him prior to that time?

A As far as I knew, it was the same man.

Q No. No. When he's walking across the street, did he shoot at him?

A No. Not until they met in the middle of the street.

(Tr. 1038-1039).

The FBI put the distance from the alley near Spruce to the Brighton intersection at 4 tenths of a mile which is 704 yards (1760 x .4) or seven football fields placed end to end (See Gothard testimony; Tr. at 1682). To believe that McCay had just been shot at about one-half mile back up the street (880 yards is ½ mile) and was at the corner of Brighton calmly waking down the street, all before the trio arrived there in their same automobile driving on empty streets at around 6:00 a.m. frantically looking for him, defies all logic, common sense and physical reality. To sustain this conviction on these charges the Court must further ignore why McCay, having supposedly just been shot at at point blank range by Eye, would have approached him and the same automobile in the middle of the intersection to provide them a second chance to shoot him!

According to the United States Track and Field web site, the current open record for the 800 meter race is held by Wilson Kipkert of Cologne and stands at 1:41.11 minutes set in 1997. The same records in the Masters category indicate that the 800 meter record for age 50-55 category is held by Nolan Shaheed of the United States at 1:58.65 and for age 55-60 by Stan Immelman at 2:03.7. These are

world records. Based on Rio's testimony as to the direct route the trio took without any intervening stops, it was physically impossible for McCay to have gotten from Spruce to Brighton, to have fully recovered from his world class sprint while in street clothes carrying his backpack, and to have stopped from his run prior to entering the intersection where he was observed by Rios calmly walking down the street.

Defendant employed an expert, Mr. John Cayton, to test fire a similar weapon in the alley between Kensington and Spruce while accompanied by FBI agent Bauer while another FBI agent, Tucker, remained with Mr. Mark Reeder, the defense investigator, in a restaurant where a government witness said he may have heard some shots on the Morning of March 19th. The exact time of the planned weapon discharge was not disclosed to Reeder and the FBI agent before sitting down in the restaurant near the window. Subsequently, at 5:50 a.m. the expert and the other agent arrived at the restaurant after completion of the test. Reeder testified his hearing is normal, he is a former police officer, and he heard no shots and the government did not call the FBI agent Tucker to contest this point. (See Tr. 1779-783). Moreover, there was no report of "shots fired" at the 9th and Spruce location to police dispatch on the morning of March 19th according to Detective Williams, one of the first responders to the scene of the fatal shooting (Tr. 484).

There was a two story build directly across from the alley in the line of fire from where Eye is alleged to have shot twice directly at the individual at 9th and Spruce. Agent Gothard testified that he and Special Agent Janke did a canvas of the neighborhood and checked for bullet holes in buildings and found none but they did not spend a lot of time doing it (Tr. 1687).

Mr. Cayton testified in response to questions about the 9th and Spruce crime scene:

Q Now, something we didn't ask, if you're just a really lousy shot and you hold the gun out the window and you shoot the concrete here instead by mistake, would there be evidence of ricochet on the concrete block?

A Could be, yes.

Q And would that be something you would look for if you were investigating the crime scene?

A Yeah. If we were looking for bullet impact, bullet holes, so forth, I think we would do that.

Q If there is a car in the alley and the person shoots out the window and the person is stepping off the curb, would you also look primarily and spend a lot of time looking for bullet holes in this building over here?

A Yes.

Q. You also look primarily and spend a lot of time looking for bullet holes in this building over here?

A Yes.

Q And is that building so large that it would make it counter productive and a waste of time to search for bullet holes in it?

A Not in a homicide.

Q Pretty important, isn't it?

A Yes.

Q And a .22 lead bullet into wood buries itself what, maybe quarter inch or less?

A It depends on what .22 it is.

Q .22 longs?

A Long rifle. These are long rifles I think but depends on the wood. Pine is one of the softer woods. Other woods are harder. Depends on the finish, how it's treated, so forth. But, typically, you know, an inch is not unreasonable to expect a bullet to impact. We actually train our crime scene people how to cut bullets out of things like wood.

(Tr. 1878-1879).

Eye still contends that the first shooting incident was a fabrication. There is simply no logical explanation how McCay could have been four-tenths to a half mile away calmly walking along minding his own business under these facts. Even if the Court concludes shots “might” have been fired at the first location, the best that can be said is it was another unknown and never identified black male. This does not support guilt on Counts One and Two of the Indictment. It was a legal impossibility. In *United States v. Helder*, 452 F.3d 751 (8th Cir. 2006) the Court explained the difference between factual and legal impossibility:

[F]actual impossibility is not a defense to the crime if the defendant could have committed the crime had the attendant circumstances been as the actor believed them to be, while legal impossibility is where the defendant's actions, even if carried out, do not constitute a crime.

In *United States v. Sobrilski*, 127 F.3d 669 (8th Cir. 1997) the

Court described the difference between the two principles as:

Legal impossibility occurs when the actions which the defendant performs or sets in motion, even if fully carried out as he desires, would not constitute a crime. Factual impossibility occurs when the objective of the defendant is proscribed by the criminal law but a circumstance unknown to the actor prevents him from bringing about that objective.

Counts One and two should be dismissed and the conviction on the remaining counts vacated and a new trial ordered because of the attendant prejudice discussed above.

II. THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING EYE'S MOTION TO SEVER DEFENDANTS BECAUSE EYE AND SANDSTROM PRESENTED MUTUALLY ANTAGONISTIC, IRRECONCILABLE, DEFENSES THAT RESULTED IN NEITHER RECEIVING A FAIR TRIAL.

STANDARD OF REVIEW

An appellate court reviews a district court's ruling on a motion to sever for an abuse of discretion resulting in clear prejudice. *United States v. Bustos-Flores*, 362 F.3d 1030, 1039 (8th Cir. 2004).

ARGUMENT

Eye filed a pretrial motion requesting severance on grounds of antagonistic defenses and anticipated *Bruton* violations (Doc. 80). The government opposed

the motion and the Magistrate recommended denial (Doc. 104). Eye timely objected. Prior to trial both Eye and Sandstrom renewed their severance motions (See Eye motion, Doc. 96). These were denied by the district court relying on the reasons contained in the Magistrate's original R&R (Order, Doc. 403). Magistrate Judge Larsen recognized that "[w]here defendants are properly joined under Rule 8(b), severance should be granted only if there is a "serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." He erroneously then recommended denial of Eye's motion (Id.).

Sandstrom argues in his brief that he "was prosecuted not only by the government but by his codefendant's counsel" and that "counsel for Eye used every possible opportunity to accuse Sandstrom of being the shooter" (Brief for Appellant Sandstrom at 14). Ironically, it was Eye who had a legitimate and more viable defense to the shooting of McCay that was seriously and substantially undermined by Counsel for Sandstrom at every opportunity with the help of course of the testimony from Rios and Sandstrom's family and friends.

Sandstrom's attorneys took the position that Rios's version of the first shooting was truthful and that McCay was in fact shot at in the alley. As early as the end of opening statements Eye knew his defense was going to suffer severe

prejudice on two fronts: problems with an antagonistic defense and *Bruton* “redacted” evidence that would point directly to Eye notwithstanding a hollow attempt to cure it with so-called “neutral pronouns” (See Argument III dealing with *Bruton* errors, *infra*).³

While the some trial testimony tended to support Rios’s version of some of the events, the versions of the first shooting and second shootings were substantially and significantly directly contradicted by the scientific evidence in the case such as the DEA confirming the altercation between Eye and the victim; the absence of striplings on the victim’s body supporting the expert’s testimony that the fatal shot in the chest was fired from a distance of greater than 38 inches; the absence of bullet holes in any of the buildings directly across from the alley where the first incident is alleged to have occurred; and, the fact that it was impossible based on Rios’s own testimony as to the timing of the events for McCay to get to 9th and Brighton ahead of the defendants and Rios.

In short, the defenses were horribly in conflict throughout the trial and relative culpability still in question even at the close of the guilt phase. This is clearly illustrated by the fact the government sided with Sandstrom’s and Rios’s versions of events during trial and argued to the jury that Eye was the shooter and

³ See Tr. At 307 where counsel informed the court that the governments and Sandstrom’s

most culpable. Incredibly, after Eye received life as opposed to death, the government “shifted gears” and went forward in the penalty phase against Sandstorm seeking the death penalty for the only person the jury had just determined to be innocent of the first shooting and the person the government viewed as less culpable at the start of the trial.

As recognized by the Magistrate in his R&R, a defendant can establish prejudice by showing that his defense is irreconcilable with his codefendant's defense. *United States v. Abfalter*, 340 F.3d 646, 652 (8th Cir.2003). "Defenses are deemed irreconcilable when they 'so conflict that the jury, in order to believe the core of one defense, must necessarily disbelieve the core of the other.'" *Id.*, quoting, *United States v. Jones*, 880 F.2d 55, 63 (8th Cir. 1989). This is exactly what happened in this case. The core of Eye's defense was the first shooting was a fabrication and Eye or Rios shot the victim at the second location. The jury totally rejected Eye's defense and instead believed that the first shooting in fact occurred and that it was Eye's doings and Sandstrom was unaware it was going to happen, undoubtedly in part because of ineffective sanitation of Sandstrom's post arrest statements to Detectives Williams and Blehm (See Argument III, *infra*).

In *Zafiro v. United States*, the Supreme Court held that mutually antagonistic opening statements were already causing serious conflict for him.

defenses are not prejudicial *per se*. 506 U.S. 534, 538 (1993). The Court recognized, however, that severance should be granted where "there is a serious risk that a joint trial would compromise a specific right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *Id.* at 539. It is precisely these circumstances which resulted from the district court's refusal to sever Eye from Sandstrom. Sandstrom's own brief on appeal reinforces this position and is well stated and worth repeating here:

Sandstrom's theory of defense was that Eye was the shooter, and Sandstrom did not know that Eye was going to shoot and kill McCay. (Doc. 522 at 76, 85). Sandstrom asserted he had no intent to kill McCay or assist Eye in doing so and did not act with a racial motive (Doc . 522 at 85-86). Eye's theory of defense was that Sandstrom, not Eye, was the shooter (Doc. 522 at 71; Doc. 529 at 2020, 2034, 2035,2039-2040). According to Eye, there was no shooting at 9th Street and Spruce Avenue (Doc. 522 at 63). Eye accused Sandstrom of shooting McCay as Eye and McCay were fist-fighting at 9th Street and Brighton Avenue (Doc. 522 at 71).

Sandstrom's and Eye's defenses were not merely inconsistent; they were irreconcilable. If the jury believed the core of Eye 's defense, it would be impossible for the jury to acquit Sandstrom on Counts Three through Six. To accept Eye 's defense, the jury had to reject Sandstrom's defense. Severance is mandated under such circumstances.

(Brief for Appellant Sandstrom at 16). Also see cases cited at pages 16 and 17 by

Sandstrom where courts have discussed the irreconcilable defense claims (Id.).

The Court ordered these cases consolidated for appeal. While Eye has suggested throughout this brief that there are significant differences in how the court rulings affected each appellant and that those rulings may have impacted a particular defendant differently from a prejudice standpoint, there are also threads common to both appeals that do not require additional argument by Eye at this point.

Sandstrom's persuasive and well written argument, both as to fact and law, with respect to prejudice from the failure to grant severance is equally applicable to Eye and Eye incorporates that argument herein by reference in all respects (See Section C, on Prejudice, Brief for Sandstrom, pages 18-28). Eye would only add as a footnote that he also is the one who, in addition to that discussed above, also had to contend with "redacted" statements of others entered into evidence against him where the redactions were ineffective and instead pointed directly to him numerous times which would of course have been avoided by a separate trial (See Argument III, *infra* and cases cited therein).

Eye submits that he too was entitled to severance for all these reasons, the district court erred when it failed to grant separate trials, and his conviction should be vacated and a new trial granted.

III. THE DISTRICT COURT ERRED WHEN IT FAILED TO GRANT EYE'S REQUESTS FOR MISTRIAL AND SEVERANCE BECAUSE OF VIOLATIONS OF HIS RIGHT TO CONFRONTATION IN VIOLATION OF THE RULE IN *BRUTON V. UNITED STATES*

STANDARD OF REVIEW

Appellate review of a trial court's application of alleged *Bruton* violations is *de novo*. *United States v. Vega Molina*, 407 F.3d 511 (1st Cir. 2005); *United States v. Sarracino*, 340 F.3d 1148, 1158-59 (10th Cir. 2003); see also *Blake v. Pellegrino*, 329 F.3d 43, 46 (1st Cir. 2003) (explaining that questions of law associated with evidentiary rulings are reviewed *de novo*).

ARGUMENT

In *Bruton v. United States*, 391 U.S. 123 (1968), the Supreme Court reviewed the conviction of a defendant whose non-testifying codefendant's out-of-court confession, admitted at trial, explicitly inculpated both of them. The Court reversed the conviction as a violation of the Confrontation Clause, notwithstanding an instruction to the jury that it could consider the confession only against the co-defendant. In *Richardson v. Marsh*, 481 U.S. 200 (1987) the Court held that the Confrontation Clause is not violated by the admission of a non-testifying co-defendant's confession where the court issues a proper limiting instruction and "the confession is redacted to eliminate not only the defendant's name, but any

reference to his or her existence." Id. at 211.[fn3]. In *Gray v. Maryland*, 523 U.S. 185 (1998) the Court held that substituted blanks and the word "delete" for the defendant's name was a clear violation of *Bruton*.

The Supreme Court has yet to rule precisely on what amounts to a "seamless redaction" with acceptable pronouns. The Court has in the meantime revisited the Confrontation Clause again in *Crawford v. Washington*, 541 U.S. 36 (2004) and held in that case *albeit* not a *Bruton* case, that "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is confrontation."

Three cases from this Circuit seem to clearly call for reversal in this case when an analysis is done of the so-called redacted statements of Sandstrom offered through Detectives Williams and Blehm that appear *infra*. See *United states v. Williams*, 429 F.3d 767 (8th Cir. 2005); *United States v. Al-Musqsit*, 191 F.3d 928 (8th Cir. 1999) and *United States v. Jones*, 101 F.3d 1263 (8th Cir. 1996).

In appellant's trial the government introduced through these detectives statements obtained from co-defendant Sandstrom that were highly incriminating as to Eye.⁴ Appellant objected to statements that the prosecutor proposed to read

⁴ The government recognized the sensitivity of this issue and proposed to have the detectives simply read prepared statement into evidence with portions redacted. Eye was not consulted on this ahead of time in terms of what words to substitute but did agree when shown the prepared two documents that this was the lesser of evils and agreed to

to the jury that implicated Eye as a violation of *Bruton v. United States* even though redacted (Tr. 304-305). These involved post-conspiracy interviews of Sandstrom on two occasions by Detectives Williams and Blehm. Judge Smith made the following observation when the first *Bruton* objection surfaced in the trial after a brief review of the statements:

With respect to the statement itself, I think Mr. Osgood makes a good point and that is that it's pretty clear who the other person is. Nevertheless, under the law of the Circuit as I understand it, this is an acceptable way to proceed, followed by an instruction or admonition to the jury that the statement can only be used against Mr. Sandstrom and not against Mr. Eye. So I will allow the statement to be read to the jury.

(Tr. 310). In so ruling the Court did not go a step further and do an in depth analysis as to whether the sheer number of redactions as well as such things as linking the word “person” to the word “person charged with murder” made redaction meaningless and destroyed Eye’s defense. Also, the Court failed to distinguish cases where the defendant against whom the statement is offered is claiming no connection the crime (e.g., alibi) as opposed to one who was clearly present but offers a different explanation as to what happened as in Eye’s case. See *United states v. Williams*, 429 F.3d 767 (8th Cir. 2005); *United States v. Al-Musqsit*, 191 F.3d 928 (8th Cir. 1999) *United States v. Jones*, 101 F.3d 1263 (8th Cir. 1996).

the procedure but objected to the manner in which they were redacted as not being seamless and truly neutral (Tr. 304-305).

Eye objected again before the first statement was read to the jury by Detective Williams (Tr. 472). Prior to reading the statement, the Court gave a limiting instruction to the jury and told them “[l]adies and gentlemen of the jury, you are about to hear a summary of statements given by Defendant Steven Sandstrom. You may consider those statements only in the case against him and not in the case against Defendant Gary Eye” (Tr. 477). The statement was then read into evidence:

* * *

I asked Sandstrom what he knew about the homicide that occurred on 9th Street and Brighton and he stated that he had heard some guy got shot. I asked him if he had heard anything else and he stated no. I asked Sandstrom if he had ever stolen a car and he stated yes. I advised him that I knew he had been involved with a homicide that occurred on 9th and Brighton and he stated that he was not there. I told him that he did not have to be there when the shooting happened to be involved. Sandstrom finally stated that he had been at Kristina's, Vince's cousin's house the morning of the homicide. He stated that the phone rang and Kristina answered the phone. He stated Kristina told him to go meet somebody at Steven's parents' house at 12th and Ewing. He stated that he went over there and met that person. He stated that the person he met was driving a red Dodge Intrepid. He stated this person asked him to follow him because he had to get rid of the car because it was hot. He stated he followed the guy down to the area of 23rd and Manchester where the other

person tried setting the car on fire. He stated that when the other person got out of the Intrepid, he observed that he was holding a dark-colored handgun. He stated that the other person tried several times to light the car on fire. He stated that he, himself, Mr. Sandstrom eventually went over to the car with a torch-like lighter and set the seats of the Intrepid on fire. He stated they got back in his vehicle and left. He stated while in the Jeep, the other person placed the dark-colored gun next to the passenger seat. He stated that he got mad at that person for not telling him that he had the pistol. He stated that the person then went over to Vince's girlfriend's house, Christina Stanley, over off 16th Terrace. He stated as they pulled up that Vince was pulling up behind them in a truck.

* * *

I asked Sandstrom if he had ever asked the other person why he was burning the red Dodge Intrepid and he stated no. I asked him if he thought it was a little odd, out of all the stolen cars they have stolen, to be setting this one on fire. He stated that it did not surprise him at all. I asked him if he was surprised to see the other person with a gun and he stated, no, not really. I told Sandstrom that someone had told me that he and the other person had shown up to Stanley's house with a couple girls. He stated that they had picked them up near the Service Oil on Hardesty. I asked him who they were. He stated he did not know but one of them might have been named Jessica. He stated that he was having a hard time remembering. He stated that several

days can go by and he will not even know it. I asked him several times if he had shown up with girls to the house or not and he stated he could not remember. I asked Sandstrom if the other person had told anyone else what he had done and he stated that he was bragging to everyone. He stated that he had told some girls over in KCK and people inside of Stanley's house. I asked who was inside the house at the time that he was bragging. And he stated that Vince, Vince's sister Nessa, Shelly Stanley and Christina Stanley were there. I told Sandstrom that I found it hard to believe that he was not with the other person when the homicide took place. And he really could not give me an answer to me. I told him that I could sense he was withholding information from me and asked him to tell me what it was. He stated that he could not. He stated that he owes the other person from way back and he would not rat him out. He stated that he had surprised himself with telling us as much as he did. I asked him if he knew where the gun that was used to kill the victim was now and he stated that it was probably in the river. I asked him how he knew this and he would not tell me. Sandstrom stated that he had needed something done when he went to jail and that other person had taken care of it for him. I asked him what it was that the other person, I'm sorry, I asked him what it was he had the other person do. He would not tell me. Sandstrom stated he would take a case for that other person if he had to. After questioning, Sandstrom asked to be dropped off by his parents' house.

(Tr. 477-483). There were 16 separate references to the other person in the above statement. In this first statement Sandstrom was clearly attempting to extricate himself from any criminal responsibility and was attempting to shift blame to Eye.

Detective Blehm was allowed to follow the same procedure and read his prepared statement into evidence (Tr. 1551). This statement was objected to by the defense also and a specific objection was made with respect to the use of pronouns that were in fact not neutral under the most liberal interpretation:

MR. OSGOOD: Again, Your Honor, I don't think the pronouns in this are neutral. For example, at the bottom of the page says, other person and Rios got out of the Intrepid. To be neutral, it should say everyone got out of the Intrepid. On the second page it says the person followed the Jeep while he drove the Intrepid and the other person lit the Intrepid on fire. I think it should say someone else lit the Intrepid on fire. These neutral pronounces are not neutral. They point directly to Mr. Eye.

The objection was overruled and the statement was read to the jury. That statement consisted of the following:

On 4-11-2005, at approximately 1640 hours, Special Agent Arch Gothard, FBI, and I contacted Steven Sandstrom.

* * *

I asked Sandstrom to direct his attention back to the morning of March 9, 2005. And then asked him to describe his whereabouts. Sandstrom stated in the early morning hours

around sunrise, he was at his girlfriend's, Kristina Chirino, who lives in the area of Van Brunt between Smart and Anderson. He advised someone called the residence and requested that Sandstrom meet him in the area of 11th and Ewing to help him get rid of a car. Sandstrom stated he then got into a stolen black or purple Jeep and drove over to the area of 11th and Ewing where he met the caller. He advised upon his arrival he followed the person to the area of 23rd and Manchester at which time he helped the other person start a fire in a red Dodge Intrepid. He advised after they burned the car then they then drove to Christina Stanley's house located on 16th Terrace. He advised after dropping the person off, he drove back to Chirino's house where he stayed the rest of the afternoon. I then asked Sandstrom if he had spoken with the other person since that person had been charged with murder at which time he advised he spoke to him once on the phone. He stated the person told him he was not sure what was going on. He could not understand why he got charged with murder. He stated the other person asked him if he had told the police anything. Sandstrom advised he did not have a chance to answer because the phone cut off. Sandstrom was then confronted with several inconsistencies with his recollection of the events that occurred on the morning of March 9th. At that time Sandstrom admitted to being in the car, the red Dodge Intrepid, with the other person at the time of the murder. Sandstrom stated that he, Regennia Rios, and the other person.

were all driving around in the red Intrepid in the early morning hours of March 9th. He stated some time in the morning he was driving in the area of 9th and Brighton. He stated the other person was the front passenger of the vehicle and Regennia Rios was in the back seat. He stated periodically during the morning the other person had been playing, quote, Wild West, unquote, with Sandstrom's chrome plated revolver. He stated the gun the person was playing with belonged to him, Sandstrom. He had had the gun for approximately four months. He stated the gun was a .22 caliber revolver. Sandstrom stated that in the area of 9th and Brighton, I'm sorry, Sandstrom stated that in the area of 9th and Brighton. He stated at that point the other person got out of the vehicle and moments after that Sandstrom heard several shots. He stated he did not see where the shots were coming from or who was shot. He advised moments after that, the person who got out of the car returned to the vehicle and stated, get out of here. We need to get rid of the car. Sandstrom stated the person later said he had shot someone. Sandstrom advised they then drove to the area of 11th and Ewing to retrieve a stolen, dark color Jeep Cherokee which Sandstrom had parked at that location earlier the day before. Sandstrom stated upon arriving at 11th and Ewing the other person and Rios got out of the red Intrepid and into the Jeep. He advised the person followed him in the Jeep while he drove the Intrepid to the area of 23rd and Manchester where both he and the other person lit the

Intrepid on fire. He advised they then all got into the Jeep and drove to Christina Stanley's house on 16th Terrace. Sandstrom was asked if he recalled anyone in the vehicle playing a game called, quote, nigger, nigger, nigger, unquote, prior to the shooting at which time he stated no. Sandstrom was asked why the person shot the victim and he stated he was not sure.

Sandstrom was asked if the other person had issues with black people and he advised no. Sandstrom was asked what happened to the weapon that was used in the homicide and he advised the last time he saw it was when he had left the gun on the air duct in the basement of Kristina Chirino's residence. He advised when he returned after speaking with the detective, Chirino or someone advised him it had been taken care of and not to worry about it. When confronted about this, Sandstrom advised that he called his sister, Stephanie Sandstrom, after his first interview and told her to go to Chirino's house and get rid of what he left there and get rid of it. She later told him she had taken care of it. I asked Sandstrom what that meant. And he advised that his sister had disposed of the weapon, most likely she threw it in the river. Sandstrom was asked where she would have logically thrown it in the river. He stated she would throw it off the east side of the Chouteau Bridge from the northbound lane. Sandstrom stated that was the only logical place she could have disposed of it. I asked Sandstrom if he knew for sure that's where it was and he stated no. It should be

noted that Sandstrom is currently intimately involved with Chirino.

* * *

There are at least 28 separate references to Eye in this statement. The total combined references to Eye in the two statements number at least 44. In the latter statement focus on Eye is narrowed even more when the “redacted” statement refers to Rios and the other person acting in concert, often in the same sentence, instead of simply referring to “they” or “the two” or something less focused. It is absolutely and unequivocally clear that the person is defendant Eye, that he was in the front seat, that Rios was in the back and that Eye was the shooter. The sheer number of these references to Eye through the so-called neutral pronouns was consequently meaningless under these circumstance. And the detective clearly identified Eye as the co-defendant who had been charged with “murder” when he said “I then asked Sandstrom if he had spoken with the other person since that person had been charged with murder.” The statements also refer to Christina Chirino and her relationship with Sandstorm and the fact that the “other persons” admitted the crime in front of Chirino.

The identity of the “other person” was reinforced in a blatant direct reference to a Sandstrom statement that Eye was the shooter and guilty party when Sandstrom’s girlfriend, Kristina Chirino, testified:

Q After Gary left, did you discuss the murder with Stevie?

A Yes.

Q Did you ask Stevie any questions about it?

A All he told me is that Gary shot somebody.

There were no pronoun substitutions – just a straight forward hearsay statement attributable to Sandstorm from his girlfriend that put the crime directly on Eye making abundantly clear who the many references to “somebody else” was in the statements read by the detectives. In response to a defense *Bruton* objection, the prosecutor first argued it was not a *Bruton* violation because it was not in response to police interrogation. Appellant also objected on grounds that it was not a statement against interest by Sandstrom or co-conspirator hearsay and was inadmissible under any theory of evidence and that it was but another self-serving exculpatory statement by Sandstrom trying to put it off on someone else. The court ruled it was not testimonial in nature and overruled the objection as to *Bruton* and as to hearsay (Tr. 542-543). There were obviously no limiting instructions or curative instructions tied to this statement which so clearly elucidated the “redacted” detective statements. The court itself had earlier conceded that the substitutions for Eye’s name in the detective statements left little doubt as to who was being referred to. If there was any lingering doubt, Ms. Chirino wiped it away in one sentence.

In *United States v. Williams*, *supra* a 2005 case, there were 40 instances of the use of the word someone. A panel of this Circuit affirmed the conviction applying a “harmless beyond a reasonable doubt standard” but noted the procedure employed was wanting:

Applying the analysis of *Logan*, it would appear that in kind and degree, the redaction of Caldwell's statement made it obvious that a name had been redacted. The replacements were not seamlessly woven into the narrative as in *Logan*, and the neutral pronoun "someone" may have lost its anonymity by sheer repetition. It may well have been clear to the jury that the statement had obviously been redacted and that the "someone" of the statement was defendant Williams. *Gray*, 523 U.S. at 196, 118 S.Ct. 1151. As the Supreme Court held in *Gray*, this case may fall within the *Bruton* class of cases where a district's court's repeated cautionary instructions cautionary instructions cannot protect the defendant. *Id.* at 192, 118 S.Ct. 1151.

In *U.S. v. Al-Musqsit*, 191 F.3d 928 (8th Cir. 1999) the court focused on the type of defense offered at trial and what impact that had on attempted redaction:

The facts in this case are quite unlike the facts in *Gray* and many of our own cases dealing with *Bruton* violations where the defendant simply claimed that he was not present when the crime was committed and/or objected to the use of a very general reference t48o other persons such as "we" or "they." Instead, testifying in his own defense, Logan's claim was that he was unaware of Roan's plan to rob Lloyd's Gun Shop, but rather thought that Roan intended to purchase a gun as he had done many times in the past.[fn6] Thus, Roan's redacted statement that he had planned the robbery with "another individual" cannot be considered a generalized reference, but rather a much more specific and direct reference serving as a damaging piece of evidence going directly to the heart of

Logan's defense.[fn7] The nature of this statement highlights the importance of *Richardson's* requirement that all references to the existence of the defendant be eliminated.

[fn7] The analysis found in *Gray* and in our cases such as *Garcia* and *Long*, approving and disapproving the use of the neutral pronoun "someone" is not helpful in this situation because it focuses on whether the redaction invites speculation on the part of the jury as to whether the name has been omitted and asks them to fill in the blank. Here, the issue was not filling in the blank, but the substance of the statement that the robbery had been planned with the individual.

The courts have obviously struggled with the concept of how to neutralize statements such as used in this case. Because English has no gender-neutral pronoun in the singular (“its” can only be used of objects, not of people) writers are faced with a knotty problem when they want to speak of one person, but either do not want to identify that person by sex, or do not know what it is. This has led to the use of “he/she” instead of the traditional gender-neutral pronoun “his” in many government and business documents to ensure political correctness. In informal settings there has been an increased use (improperly) of a plural pronoun such as “their” instead. In *U.S. v. Vega Molina*, 407 F.3d 511 (1st Cir. 2005) the court observed:

The application of *Bruton*, *Richardson*, and *Gray* to redacted statements that employ phraseology such as "other individuals" or "another person" requires careful attention to both text and context, that is, to the text of the statement itself and to the

context in which it is proffered. The mere fact that the other defendants were on trial for the same crimes to which the declarant confessed is insufficient, in and of itself, to render the use of neutral pronouns an impermissible means of redaction. A particular case may involve numerous events and actors, such that no direct inference plausibly can be made that a neutral phrase like "another person" refers to a specific codefendant. See, e.g., *United States v. Sutton*, 337 F.3d 792, 799-800 (7th Cir. 2003). A different case may involve so few defendants that the statement leaves little doubt in the listener's mind about the identity of "another person." See, e.g., *United States v. Vejar-Urias*, 165 F.3d 337, 340 (5th Cir. 1999). Page 521 In short, each case must be subjected to individualized scrutiny.

In appellant's case only one of three persons identified throughout the trial could have fired the gun that killed Mr. McCay. It was either Sandstrom, Eye or Rios. Only two defendants were on trial. The jury knew without a doubt who was being referred to in the Williams and Blehm "redacted" statements. See *U.S. v. Vega Molina, supra*. Eye did not offer a defense of non-involvement – just the opposite – his theory of the case was the first shooting was a fabrication and McCay was shot by Rios or Sandstrom with Sandstrom's .22 caliber revolver at the 9th and Brighton location while Eye was fighting with McCay. As in *U.S. v. Al-Musqsit, supra*, the redaction under these facts was meaningless. The jury clearly knew Eye was the mysterious "other person" based on the

total context of the statements, the sheer number of references to “another person” in the statements and held him accountable by their verdict. And of course, the “icing on the cake” was applied by Sandstrom’s girlfriend when she testified that Sandstrom said Eye was the shooter and referred to him by name.

On these facts, applying the law, Eye’s conviction should be vacated and a new trial ordered.

IV. THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING EYE AND SANDSTROM'S OBJECTIONS AND MOTIONS FOR MISTRIALS WHEN THE PROSECUTING ATTORNEY COMMENTED ON THEIR FAILURE TO TESTIFY AND SHIFTED THE BURDEN OF PROOF TO BOTH DEFENDANTS

STANDARD OF REVIEW

An appellate court reviews de novo whether a prosecutor has unconstitutionally commented on a defendant's Fifth Amendment right to remain silent. *United States v. Gardner*, 396 F.3d 987, 988 (8th Cir. 2005). A trial court's decision whether to grant a mistrial is reviewed for abuse of discretion. *Id.* at 989.

ARGUMENT

During closing argument, the Assistant U.S. Attorney directed the jury to

Eye and Sandstrom's failure to testify and shifted the burden of proof by arguing that there had been no explanation refuting the government's assertion that the defendants shot at and killed McCay because of his race:

Nowhere in that instruction does it require the government to demonstrate or satisfy to anyone that these two individuals are racists. But, ladies and gentleman, if not race, why?

* * *

Circumstantial evidence of intent, corroboration is reflected in the words and the deeds and the vocabulary. And, ladies and gentlemen, I, again, submit to you, if not race, why? Not a single alternative motive has been supplied.

(Tr. 1978-1979).

This was a clear Fifth Amendment violation. See *United States v. Burns*, 432 F. 3d 856 (8th Cir. 2005); *Graham v. Dormire*, 212 F.3d 437, 439 (8th Cir. 2000); and, *Griffin v. California*, 380 U.S. 609, 615 (1965). This was an emotionally charged trial from the very beginning with two defendants on trial with antagonistic defenses.

In *Burns* the district court chastised the government for making similar comments and told the prosecutor to "be careful." This court said: "We conclude that even if the government's comments were improper, Mr. Burns has not shown

that they deprived him of a fair trial.” The prosecutor’s comments in this case in effect go a step further and suggest to the jury that both defendants should have testified and clarified the clearly inconsistent versions of what happened, who was and who was not racist, whose idea it all was, and who was perhaps an innocent person present at the scene of an unanticipated offense. In other words why didn’t they simply help the jury by explaining their positions?

By implication, the jurors probably asked themselves if Sandstrom was indeed innocent of everything (not just count I) and not a racist, why didn’t he take the stand and say that Eye was and it was his idea. And the of course the converse is true. Why didn’t Eye take the stand and explain that Rios and Sandstrom were lying about what happened at the first location and the shooting actually occurred and was done by Rios or Sandstorm after Eye got into an altercation with the victim in the middle of 9th and Brighton?

The very nature of the prosecution with the antagonistic defenses with finger pointing by all compounded the problem and helped to further put the jury in a quandary as to what really happened and suggested to them they could draw not only logical inferences from the evidence but also from the lack of evidence know uniquely to the two defendants, neither of whom wanted to take the stand and explain it all.

The racial motivation component was hotly contested. Both defendants offered evidence that the use of the word “nigga” was common place usage among them in their own circles and that in many instances this was the word used as opposed to the more offensive term “nigger.” “Nigga” is mentioned in testimony 138 times in the transcript and the word “nigger” 279 times. The government built its entire case with respect to the racial component around use of the word “nigger” by defendants and argued that it was the only motive for the crime while defendants argued they were simply using street “hip hop” terms. Rios also testified about this element of the alleged crimes:

Q Oh. You knew that was the focus of the investigation, didn't you?

A That it was racial?

Q Yes.

A At that time, yes.

Q And so over the course of time you kept adding what you say were comments made by the defendants that were clearly racially inflammatory, didn't you?

A They were true, yes.

Q Pardon?

A That's what was said, yes.

Q That's what you say was said, as time goes on. You add a new one each time you meet with them?

A Correct.

Q You never told the police department back, way back when,

any racial comments by any of them, did you?

A No.

Q Now, isn't it a fact that in your neighborhood and among the people that you run with that you commonly use the term nigga all the time?

A Yes.

Q And now, again, you're sober today and you're very well spoken here on the witness stand but we heard an excerpt of you on the tape there, didn't we?

A Yeah.

Q And it sounded like hip-hop street talk, didn't it?

A Yeah.

Q And you talked that way routinely when you were on the street, didn't you?

A Yeah.

Q How you doing, nigga? What's up, cuz? Hi, bro?

A Yeah.

Q You're a ho bitch, that kind of stuff?

A Yes.

Q That's common language?

A Yes.

Q That's common language by, unfortunately, my client, too, isn't it?

A Yes.

Q That's common language on the street, isn't it?

A Yes.

(Tr. 1070-1071)

The prosecutor's comments were intentionally intended focus the jury on motive and were intended to plant in their minds the need to recall the above and similar testimony and in the process ask themselves, if not racial motive what then and who best can explain but has failed to do so? In the total context of things, this was but one more error that deprived Eye of a fair trial. The case should be reversed and remanded for new trial.

V. THE COURT ERRED WHEN IT FAILED TO DISMISS MULTIPLICITOUS COUNTS IN THE INDICTMENT

STARNDARD OF REVIEW

Appellate review on a challenge that an indictment contains multiplicitous counts is *de novo*. *United States v. Christner*, 66 F.3d 922 (8th Cir. 1995).

Both defendants Eye and Sandstrom filed motions attacking various counts in the indictment as multiplicitous. On March 14, 2006, Sandstrom was first to file a motion to dismiss Counts one through six on these grounds. Later the same day Eye joined in the motion and expanded the argument with respect to counts Two, Four, and Six (Doc. 68). The Magistrate recommended denial of all motions and Eye and Sandstrom filed timely objections to the Magistrate's report and recommendation (R&R) (Doc. 168). On September 15, 2006 the district court

adopted the R&R, rejecting defendants' appeals (Doc. 189).

This Court ordered the cases consolidated for purposes of appeal. The brief for appellant Sandstrom contains a thorough and detailed argument on issues of multiplicity (See brief for Sandstrom, Argument II, pages 29-48). Appellant Eye hereby incorporates these argument by reference and makes the same argument with respect to Eye. *United States v. Chipps*, 410 F.3d 438 (8th Cir. 2005); *United States v. Page*, 84 F.3d 38 (1st Cir. 1996).

[VI. THE DISTRICT COURT ERRED IN DEYING MOTIONS TO DISMISS COUNTS ONE, THREE, AND FIVE ON GROUNDS THAT 18 U.S.C., SECTION 245 IS UNCONSTITUTIONAL](#)

STANDARD OF REVIEW

Appellate review on a challenge to the constitutionality of a federal statute is *de novo*. *United States v. Howell*, 552 F.3d 709 (8th Cir. 2009).

ARGUMENT

Defendant Eye moved to dismiss Counts One, Three, and Five on grounds that the statute was unconstitutional and even if it was, it did not apply to city streets (Doc. 66). The Magistrate's R&R was to deny the motion (Doc. 121). Eye filed timely objections (Doc. 158) and the R&R was adopted by the district court

by Order dated August 21, 2006 (Doc. 177).

As noted, this Court ordered the cases consolidated for purposes of appeal. The brief for appellant Sandstrom contains a thorough and detailed argument on these issues (See brief for Sandstrom, Argument III, pages 48-62). Appellant Eye hereby incorporates these arguments by reference and makes the same arguments with respect to Eye. See *United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Bledsoe*, 728 F.2d 1094 (1984).

CONCLUSIONS

For the reasons argued above, both separately and collectively, appellant is entitled to a new trial because of the grossly unfair nature of the trial proceedings.

Respectfully submitted,

JOHN R. OSGOOD, #23896
Bank of the West, Suite 305
740 NW Blue Parkway
Lee Summit, MO 64086

Certificate of Service and Brief

Compliance

I hereby certify that two copies of the foregoing were mailed, postage pre-paid on March 24, 2009 to:

Angela Miller
Department of Justice, Civil Rights Division
Appellate Section - RFK 3720
Ben Franklin Station, P.O. Box 14403
Washington, D.C. 20044-4403

Attorney for Plaintiff

I hereby further certify that this brief contains 12,872 words, in 14 point font, that the brief was prepared using Microsoft Word 2003, and that a copy of the brief was provided to opposing counsel on compact disk that was virus free.

John R. Osgood

ADDENDUM

Judgment of conviction attached as exhibit A

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION**

UNITED STATES OF AMERICA

**-vs-
GARY EYE**

Case No.: 05-00344-01-CR-W-ODS

USM Number: 18593-045

John Osgood & Lance Sandage, CJA

JUDGMENT IN A CRIMINAL CASE

The defendant was found guilty on Counts 1 through 8 on 05/13/2008 of the Superseding Indictment. Accordingly, the court has adjudicated that the defendant is guilty of the following offense(s):

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Date Offense Concluded</u>	<u>Count Number(s)</u>
18 U.S.C. 245(b)(2)(B) and 2	Aiding and Abetting in the Interference with Federally Protected Activities	March 9, 2005	1
18 U.S.C. 924(c)(1)(a)(iii) and 2	Aiding and Abetting in the Use or Discharge of a Firearm During Crime of Violence	March 9, 2005	2
18 U.S.C. 245(b)(2)(B) and 2	Aiding and Abetting in the Interference with Federally Protected Activities	March 9, 2005	3
18 U.S.C. 924(c)(1)(A)(iii),(j)(1) and 2	Aiding and Abetting in the Use or Discharge of a Firearm During Crime of Violence Causing Murder	March 9, 2005	4
18 U.S.C. 1512(a)(1)(C), (a)(3)(A) and 2	Aiding and Abetting in the Tampering with a Witness	March 9, 2005	5
18 U.S.C. 924(c)(1)(A)(iii),(j)(1) and 2	Aiding and Abetting in the Use or Discharge of a Firearm During Crime of Violence Causing Murder	March 9, 2005	6
18 U.S.C. 1519 and 2	Aiding and Abetting in the Obstruction of Justice	March 9, 2005	7
18 U.S.C. 844(h)(1) and 2	Aiding and Abetting in the Use of Fire to Commit a Felony	March 9, 2005	8

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

IT IS ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all special assessments imposed by this judgment are fully paid.

Date of Imposition of Sentence: September 9, 2008

/s/ Ortrie D. Smith
ORTRIE D. SMITH
UNITED STATES DISTRICT JUDGE

September 11, 2008

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of life on counts 3 and 5, 240 months on count 7, and 120 months on count 1. These counts are to be served concurrently to one another for a total term of life imprisonment. 120 months imprisonment on counts 2 and 8, each of these counts to run consecutively to each other and to every other count. Life imprisonment on counts 4 and 6, each of these counts to run concurrently to each other and consecutively to every other count, for a total term of life imprisonment.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By: _____
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **3** years on each of counts 1 through 8, the terms to run concurrently.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

If this judgment imposes a fine or restitution, it is a condition of supervision that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer **at least ten (10) days prior** to any change in residence or employment;
7. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
11. The defendant shall notify the probation officer within **seventy-two (72) hours** of being arrested or questioned by a law enforcement officer;

12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

ADDITIONAL CONDITIONS OF SUPERVISED RELEASE

The defendant shall also comply with the following additional conditions of supervised release: none imposed.

ACKNOWLEDGMENT OF CONDITIONS

I have read or have had read to me the conditions of supervision set forth in this judgment and I fully understand them. I have been provided a copy of them.

I understand that upon finding of a violation of probation or supervised release, the Court may (1) revoke supervision, (2) extend the term of supervision, and/or (3) modify the conditions of supervision.

Defendant

Date

United States Probation Officer

Date

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments set forth in the Schedule of Payments.

Total Assessment

\$800.00

Total Fine

\$

Total Restitution

\$

The defendant shall pay interest on any fine or restitution of more than \$2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on the Schedule of Payments may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

Note: Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994 but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.