

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

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	05-00344-01-CR-W-ODS
	)	
GARY EYE,	)	
	)	
Defendant.	)	

**OBJECTIONS TO REPORT AND RECOMMENDATION TO DENY  
DEFENDANTS’ MOTION TO DISMISS COUNTS ONE THROUGH SIX  
BASED ON MULTIPLICITY**

COMES NOW Gary Eye (hereinafter “defendant”), by and through appointed counsel and pursuant to 28 U.S.C. §636(b)(1), respectfully files the following objections to the Report and Recommendation to Deny Defendants’ Motion to Dismiss Counts One Through Six Based on Multiplicity (Document 120), with suggestions in support.

**I. Procedural history**

On March 14, 2006, Co-defendant Sandstrom filed a motion to dismiss all six counts “due to multiplicity” (Document 60). The latter motion was only three pages in length. On the same day Defendant Eye expanded on the argument in a six page pleading in which he moved to dismiss counts two, four and six (Document 68) addressing in greater detail the multiplicity problem and further arguing that the punishment scheme resulting from the manner of charging violated the 5<sup>th</sup> and 8<sup>th</sup> Amendments to the US Constitution. The following day, March 15, 2006, Defendant Sandstrom filed a motion to join Eye’s expanded motion notwithstanding the fact that he had already moved

individually to dismiss all six counts because of multiplicity (See Doc 70). This latter attempt to join in and expand his motion was denied by the Court on the same day (Doc 72). Sandstrom did not thereafter file any additional multiplicity pleadings. On April 14, 2006 the government filed suggestions in opposition to Eye's separate motion (Doc 91).

On May 11, 2006, the magistrate filed a report and recommendation to deny Defendant Sandstrom's original motion to dismiss the six counts for multiplicity (Doc 120). The 14 page R&R discusses multiplicity issues raised by Sandstrom. On June 12, 2006, counsel for co-defendant Sandstrom filed a motion (Doc 137) requesting an enlargement of time within which to object to Magistrate R&Rs 120 (addresses Sandstrom's separate multiplicity motion) and Magistrate R&R 121 (addresses Eye and Sandstrom's joint motion attacking constitutionality of the indictment).

On June 20, 2006, the district court entered an order granting both defendants an enlargement until July 21, 2006 to file objections to R&Rs 120 (Sandstrom multiplicity motion) and 121 (Eye and Sandstrom's joint motion of constitutional attack on indictment).

It would appear from the foregoing review of the pleadings and docket entries that the Court has yet to rule on defendant Eye's separate expanded motion to dismiss for multiplicity which also included due process and cruel and unusual punishment arguments. While the Sandstrom R&R (doc 120) addresses part of Eye's argument it does not address other significant issues. Consequently, defendant Eye presumes these arguments are still under Magistrate advisement awaiting decision and the district court's order purporting to grant Eye the right to object to Sandstrom's multiplicity motion is an oversight. Nevertheless, out of an abundance of caution, Eye does object the the R&R

findings with respect to multiplicity insofar as they address issues raised in his separate motion.

**II. The magistrate erred in not conducting a hearing regarding defendants' separate motions to dismiss for multiplicity.**

By order dated October 14, 2005, the magistrate is "designated to hear and process all pretrial motions" requesting dismissal of the indictment. Contrary to the order, the magistrate did not conduct a hearing regarding either defendant's motion. In making his recommendations related to the Sandstrom motion, the magistrate was required to apply general principles of law to the facts of this case. Because he did not conduct a hearing related to defendants' separate motions, the magistrate did not have sufficient information available to him to make proper findings and recommendations.

**II. The magistrate erred in finding that Counts One through Six of the indictment are not defective on the ground of multiplicity.**

The indictment alleges the defendants, aiding and abetting each other, shot at and killed William McCay. In making his recommendation regarding defendant's motion, the magistrate assumed the existence of multiple occurrences, whereas the indictment may be read to describe a single transaction. No hearing was had regarding the motion, and the government presented no evidence of multiple or different behaviors. Because the indictment may be read to charge separate counts related to the same alleged behavior, the counts are multiplicitous and offensive to defendant's right not to face multiple punishments for a single offense and to due process of law.

WHEREFORE, defendant Gary Eye respectfully prays that this Honorable Court not accept the Report and Recommendation and enter an order granting appropriate relief.

Respectfully submitted,

/s/

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was caused to be emailed to David Ketchmark, Assistant US Attorney, WDMo, Kansas City, Missouri and other counsel in the case via the electronic document filing system on July 21, 2006

/s/

JOHN R. OSGOOD