

**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 TWO, FOUR, AND 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), to respectfully file the following objections to the Report and Recommendation to Deny Defendant’s Motion to Dismiss Counts Two, Four, and Six (Document 68), in support of which is offered the following:

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 defendant’s motion. Because he did not conduct a hearing related to defendants’ motion, the magistrate did not have sufficient information available to him to make proper findings and recommendation.

There is a significant factual dispute in the case as to how many shots were fired, when they were fired, and where. The deceased died as the result of a single bullet wound. There is factual dispute as to time interval between shots, with at least two witnesses suggesting that if more than one shot was fired such shots were fired in rapid succession all at one location and the deceased then expired at some distance from the

altercation. Defendant Eye's theory of defense is that the shot or shots all occurred at the same time at the same location and were done by a third party while Mr. Eye was engaged in a physical altercation with the deceased and he was unaware such was going to happen and was not a party to such alleged criminal act. In short, it is defendant Eye's position that the evidence will show but one single transaction and not separate events as mistaken alleged in the indictment.

In addition to recommending denial of the basic motion to dismiss on grounds of multiplicity without taking evidence, the Magistrate's R&R also recommends that the Court not order election of counts prior to submission of the matter to the jury. While this is arguably a premature request at this point, Mr. Eye submits that foreclosing his right to request such relief prior to jury submission is clearly contrary to accepted law cited in his motion and law long recognized by this Circuit. If there is a failure of proof at trial of separate transactions, taking the evidence in a light most favorable to the government, then this Court should require the government to choose between multiplicitious counts.

WHEREFORE, defendant Gary Eye respectfully prays that this Honorable Court not accept the Report and Recommendation and enter an order granting defendant's motion in all respects.

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 Friday, August 25, 2006

/s/
JOHN R. OSGOOD