

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

UNITED STATES OF AMERICA)
)
 Plaintiff,)
)
 v.) No. 05-CR-00344-01-W-ODS
GARY EYE,)
)
 Defendant.)

MOTION TO DISMISS THE INDICTMENT BECAUSE OF VIOLATION OF THE ATTORNEY CLIENT RELATIONSHIP BETWEEN DEFENDANT EYE AND HIS ATTORNEYS OR ALTERNATIVELY TO SUPPRESS ALL DIRECT AND DERIVATIVE EVIDENCE OBTAINED BY THE PROSECUTION, THE FBI OR ANY OTHER GOVERNMENT AGENCIES OR GOVERNMENT CONTRACT AGENTS WHICH WAS GATHERED OR OBTAINED AFTER THE INTITAL APPOINTMENT OF UNDERSIGNED COUNSEL OSGOOD TO REPRESENT DEFENDANT EYE IN THIS MATTER AND ADDITIONAL SANCTIONS AS SET FORTH IN DEFENDANT’S PRAYER FOR RELIEF WITH SUGGESTIONS IN SUPPORT

1. FACTS:

Defendant Gary Eye has been confined at the CCA confinement facility in Leavenworth, Kansas since his initial indictment in this case on September 29, 2005 (doc# 1). On October 11, 2005, prior to certification of the case as capital, the Court appointed undersigned counsel Osgood to represent the defendant (doc#

17) . Counsel first appeared before the magistrate on October 13, 2005 on behalf of Mr. Eye and has continued to represent him throughout the course of the pending prosecution (See doc# 25). During the course of representation counsel has had numerous telephone conversations with Mr. Eye. All of these calls were between the CCA facility and counsel's office phone which is (816) 525 8200.

On May 17, 2006 the grand jury returned a superseding indictment against defendant Eye and his co-defendant Steven Sandstrom (doc# 124). Defendant made his initial appearance on the superseding indictment on May 22, 2006 (doc# 131).

After the case was certified capital Mr. Lance Sandage was appointed by the court on June 26, 2006 as second counsel on the case (doc # 140). Numerous calls have also been made by Mr. Eye to Mr. Sandage at his office since that appointment. Formal notice of intent to seek the death penalty was filed on July 17, 2006 (doc# 153).

On August 30, 2006, some three months after the return of the superseding indictment, the prosecutor served a grand jury subpoena on Janice Shields, CCA, Leavenworth, KS directing the production of all visitation logs and all telephone calls made to and from Gary Eye with the exception of calls to (816) 525 8200

(Osgood Law Office number) and “any other telephone number deemed to be an attorney-client telephone calls (sic).” Co-counsel Sandage’s number was not listed as a number to exclude even though he had been on the case at that point for over a month. This subpoena was issued with a “dash 01” extension at the end of the U.S. Attorney office “KC” file number suggesting it was perhaps the first subpoena issued in a new investigation. This investigation would appear to be in response to information provided by one Eric Eymard to the FBI during an interview conducted on July 24, 2006 during which Eymard claimed that he and Eye were plotting to do harm to witnesses in each other’s cases.

Notwithstanding the instructions to exclude attorney client telephone calls from production, CCA, a contract facility operating under the authority of the United States Marshals Service, United Department of Justice, copied numerous telephone conversations between undersigned counsel and defendant Eye and co-counsel Sandage and defendant Eye and provided those conversations along with other conversations between Eye and his wife to the Federal Bureau of Investigation.

On or about September 12, 2007, undersigned counsel picked up remaining discovery from the prosecutor which was described as evidence in this case as

well as evidence of a potential “threat investigation.” It consisted of hundreds of pages of documents and a number of compact disks that purported to contain relevant conversations by Eye with his wife. Upon initial review of those disks, the very first call on the very first disk inserted in the disk player was a conversation between undersigned counsel and defendant Eye. The file names on the CDs actually contain the phone number called as part of the file identifier of each conversation .e.g., 5258200 or some other phone number. Upon further review, counsel discovered numerous other calls between counsel and defendant Eye on these CDs as well as calls between defendant Eye and co-counsel Sandage.

Counsel informed Assistant US Attorney Ketchmark and he expressed surprise and indicated he would investigate the matter. On September 24, 2007 Mr. Ketchmark provided counsel with a letter detailing the procedures employed in reviewing the tapes which he contends included instructions handed down in November 2006 to the FBI and government staff to “minimize” calls that appeared to be attorney client in nature. This of course was apparently not done as evidenced by the fact that such calls are copied onto CDs that were

subsequently distributed to undersigned counsel and third parties approximately nine months later.

The calls in question contain highly sensitive information dealing with defense strategy; identities of experts and discussion of their potential testimony; and, a good deal of strategy discussion involving mitigation evidence, witnesses and strategy. The problem was then further compounded when in mid-September 2007 these very disks with the attorney client calls on them were again copied and turned over to Mr. Alex McCulley, an attorney presently representing Stephanie Eye, defendant's spouse. This was almost a full year after FBI agents were instructed to carefully avoid this.

In a final bizarre twist to all of this, after much of this motion had been drafted, on October 22, 2007, counsel received a letter from Michael Crow, local outside counsel for CCA whose office is in Leavenworth, Kansas, which detailed further disclosures. Mr. Crow advised in his letter that “[a]t the end of July 2007, a deputy from the U.S. Marshal Service contacted Janine Shields at CCA detention center in Leavenworth and requested a copy of all monitored calls on file for inmate Gary Eye.” Mr. Crow states in the letter that no subpoena was served on CCA. In a subsequent telephone call he indicated that “all calls” was

interpreted to mean just that and included attorney client calls. The United States Marshal, Mr. Sheer, was contacted and he stated he was unaware of this but would investigate further.

2. ARGUMENT AND LAW

As a starting point, it is important to distinguish between pre-indictment and post-indictment constitutional implications. The *Eye* case is of course pending trial and this implicates the 6th Amendment right to counsel as well as 5th Amendment due process rights. Because the attorney client violations occurred prior to any new “threat” indictment or superseding indictment in the instant case incorporating threat charges, only 5th Amendment rights would be at issue with respect to sanctions directed to any such future indictment and prosecution. See *United States v. Kennedy*, 225 F.3d 1187 (10th Cir. 2000). Assuming the prosecution intends to offer this post-August 06 evidence through live testimony, tape recordings, and letters obtained from CCA and other derivative sources in the present case under Rule 404(b) and other relevant rules of evidence, defendant has a clear 6th Amendment claim of breach of the attorney client relationship as well as a 5th Amendment due process claim.

The Supreme Court has spoken to this issue in two separate cases *Black v. United States*, 385 U.S. 26 (1966), and *O'Brien v. United States*, 386 U.S. 345 (1967). In *Black* the government acknowledged the intercept but argued the matter should be remanded for a hearing to determine prejudice. The Court declined to remand and instead reversed and ordered a new trial noting it would “give the parties an opportunity to present the relevant evidence and permit the trial judge to decide the questions involved.” The following year the Court again declined to remand in a similar setting and instead reversed and ordered a new trial. The dissent by Justices Harlan and Stewart in *O'Brien* is illuminating inasmuch as it explains the facts which the dissenters felt did not rise to the level of a constitutional violation calling for reversal and a new trial:

A conversation in which O'Brien participated, occurring after the indictment and concerning his forthcoming trial, was overheard. The Solicitor General characterizes the episode as follows: "That conversation, although overheard by the monitoring agents and summarized in their logs, was not mentioned in any F. B. I. report nor were its contents communicated to attorneys for the Department of Justice, including those who prosecuted this case."

The Solicitor General further revealed a later conversation

which he characterizes as follows: "It also appears from the logs of this surveillance . . . that petitioner O'Brien was on the premises and was overheard in January 1964, when he placed a telephone call and requested one of his attorneys to file an application relating to the territorial conditions of his release on bail. This conversation, like the one in May 1963, was noted in the logs of the monitoring agents but was not communicated in any manner outside the F. B. I." (Footnote omitted.)

On the basis of these representations the Solicitor General indicated that he would "not oppose" a remand of the case for an adversary hearing as to the effect of this activity on the validity of petitioners' convictions. The Court, however, without a word of explanation, vacates the convictions and remands the entire case for a new trial.

O'Brien, id. at 346.

While these cases have since been construed together as not requiring a *per se* reversal anytime there is a violation of the attorney client privilege,¹ they do illustrate the level of sensitivity the Supreme Court has exhibited when being confronted with intrusion into the discussions between a client and his attorneys. And of course, neither *Black* nor *O'Brien* was a capital case. Also see *United*

¹ See *Weatherford v. Bursey*, 429 U.S. 545 (1977).

States v. Morrison, 449 U.S. 361 (1981) (Court ruled again that dismissal of the indictment was not appropriate where agents “interfered” in a defendant’s right to counsel by having direct contact with the defendant during which the lawyer was disparaged but the client did not incriminate herself and there was therefore no prejudice).

In *United States v. Solomon*, 679 F.2d 1246 (8th Cir. 1982) the defendant hired an attorney but then fired him after being pressured by federal agents and the prosecutor to continue cooperating. Solomon argued this was a 6th Amendment violation calling for dismissal of the indictment. The 8th Circuit, recognized that dismissal is in fact appropriate in certain situations and held:

In this case, the evidence used to convict Solomon was obtained prior to the constitutional violation.[footnote omitted] Information gathered after the Sixth Amendment intrusion, including Solomon's inculpatory statements, was not used to support the conviction. Thus the issue is clearly framed. The defendant must show that the representation he received or the proceedings leading to the conviction were adversely affected by virtue of the Sixth Amendment violation in order to obtain a dismissal of the indictment.

In *United States v. Lin Lyn Trading, Ltd.*, 149 F.3d 1112, 1117 (10th Cir. 1998), a criminal case investigated and initiated by U.S. Customs, the agents seized a notepad that contained confidential attorney-client communications. Despite demands for return of the notepad by defense counsel, the government kept it and failed to return copies of it when returning copies of other evidentiary discovery items seized from defendant. Defense counsel demanded return of the notepad. The Assistant U.S. Attorney sealed his copy but allowed customs to keep their copy without any conditions placed on that agency. The opinion notes that “. . . the existence of the notepad was common knowledge in the Salt Lake City Customs office.” Following indictment, the district court suppressed the evidence and also ordered the indictment dismissed, citing 5th and 6th amendment implications (right to counsel and due process violations).

On appeal the 10th Circuit reserved the dismissal but sustained the suppression of the evidence. The Tenth Circuit held that the district court had improperly relied on the 6th Amendment since it was a pre-indictment problem, the defendant had not been required to show prejudice, and the court failed to consider a less drastic remedy. As pointed out above and in *Lin Lyn*, Mr. Eye has both a 5th and 6th Amendment claim insofar as the present prosecution is

concerned inasmuch as the taint occurred a number of months after the last superseding indictment and the evidence will likely be offered in this trial.

Lin Lyn is also significant with respect to both its results and its analysis of the “fruit of the poisonous tree” doctrine:

Under the "fruit of the poisonous tree" doctrine, the exclusionary rule bars the admission of physical evidence and live witness testimony obtained directly or indirectly through the exploitation of police illegality." *Id.* (quoting *Hamilton v. Nix*, 809 F.2d 463, 465 (8th Cir. 1987)). The court may nevertheless admit evidence seized illegally, if the government shows that (1) the evidence was obtained from a source that was wholly independent of the illegal conduct, see *Segura v. United States*, 468 U.S. 796, 805, 104 S.Ct. 3380, 82 L.Ed.2d 599 (1984); (2) that the evidence inevitably would have been discovered despite the illegal activity, see *Nix v. Williams*, 467 U.S. 431, 444, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984); or (3) that the link between the illegality and the evidence has "become so attenuated as to dissipate the taint," *Nardone v. United States*, 308 U.S. 338, 341, 60 S.Ct. 266, 84 L.Ed. 307 (1939). The government must make its showing by a preponderance of the evidence. See *Nix*, 467 U.S. at 444 & n. 5, 104 S.Ct. 2501.

U.S. v. Lin Lyn Trading, LTD., 149 F.3d 1112, 1116 (10th Cir. 1998). Also see *United States v. Hatfield*, 333 F.3d 1189 (10th Cir. 2003) (Under the fruit of the poisonous tree doctrine, the exclusionary rule bars the admission of physical evidence and live testimony obtained directly or indirectly through the exploitation of unconstitutional police conduct. *Wong Sun v. United States*, 371 U.S. 471, 485 - 88 (1963)).

In *United States v. Kennedy*, 225 F.3d 1187 (10th Cir. 2000) the court noted that while a claim of a Sixth Amendment violation based on intrusion of attorney-client privilege is limited to government action which interferes with legal representation after the initiation of criminal proceedings, the court was equally ready to acknowledge a defendant may claim his rights under the due process clause have been violated by prosecutorial misconduct occurring prior to indictment. Obviously, if the due process clause is implicated pre-indictment it is simply an additional leg on which to stand in this case in a post-indictment claim. As noted in *Kennedy* at 1194:

Misconduct by law enforcement officials in collecting incriminating evidence may rise to the level of a due process violation when the misconduct is outrageous enough to shock the conscience of the court. *Rochin v.*

California, 342 U.S. 165, 172-4, 72 S.Ct. 205, 96 L.Ed.

183.

CCA is private pretrial facility operating under contract with the United States Government to house federal prisoners. It is consequently an agent of the United States Government and must operate in such a manner as not to offend an incarcerated person's 5th and 6th Amendment rights. See *United States v. Peoples*, 250 F.3d 630 (8th Cir. 2001); and *Beaudry v. Corr. Corp. of America*, 331 F.3d 1164 (10th Cir. 2003). The prosecutor in a federal case is charged with having knowledge of what goes on in his case, how evidence is gathered, what that evidence consists of, and whether it is admissible and legally obtained, and whether it must be made available to the defense. See *Strickler v. Green*, 527 U.S. 263 (1999) and *Kyles v. Whitley*, 514 U.S. 419 (1995).

As noted, Mr. Eye asserts both a 5th amendment due process violation as well as a violation of his attorney client 6th Amendment rights. He believes he is entitled to relief on both prongs. Indeed, although the 6th Amendment claim is easier to establish, Mr. Eye contends that he would prevail even on a free standing 5th Amendment claim as discussed in *United States v. Voigt*, 89 F.3d 1050 (3rd Cir.) cert denied, 519 U.S. 1047 (1996). *Voigt* holds:

in order to raise a colorable claim of outrageousness pertaining

to alleged governmental intrusion into the attorney-client relationship, the defendant's submissions must demonstrate an issue of fact as to each of the three following elements: (1) the government's objective awareness of an ongoing, personal attorney-client relationship between its informant and the defendant; (2) deliberate intrusion into that relationship; and (3) actual and substantial prejudice.

As to *Voigt* point one, in this case there is no question or dispute as to the existence of the attorney client relationship. As to point two, was there a deliberate intrusion into that relationship? Initially when the subpoena was issued it purported to excluded undersigned counsel's number, 525 8200 so giving the government the benefit of the doubt, the answer would be no. This however is not the end of the matter.

Unfortunately, CCA, an agent for the government, was at the very minimum grossly negligent in copying counsel Osgood's calls since they were clearly instructed to exclude such calls.² These calls were then turned over to Agents Gothard and Jenke who maintained possession of them at the FBI and copied them

² And of course there has been no explanation as to why co-counsel Sandage's phone number was not on the subpoena as an "excluded" number since he had been appointed in the case for over a month when the subpoena was served.

or caused them to be copied an unknown numbers of times. This makes it extremely difficult for the FBI to assert at this point that it was therefore unaware for many months that it had in its possession attorney client conversations. For as noted, indeed, the very first call on one of the CDs is a call between Eye and counsel Osgood. And while Mr. Sandage's number was not included on the exclude list, it should have been inasmuch as all parties to the litigation were fully aware of his role as co-counsel by the 1st of July 2006.

Copies of these calls were eventually provided to the United States Attorney in multiple sets who then distributed them to defense counsel for both defendants. And there remains confusion as to why AUSA Ketchmark would instruct the agents in November 2006 to minimize attorney client calls when none should have existed if the subpoena had been complied with.³ Finally, after undersigned counsel notified AUSA Ketchmark of the issue and demanded an explanation, some three weeks later counsel was informed that tapes of his conversation had recently been placed in the hands of a third party attorney for Stephanie Eye by

³ Sandage's number was not listed as an excluded number on the subpoena. Does this mean the agents thought they had excluded Osgood's number but had conversations of Sandage whose number had not been excluded and they were examining them for some perceived "crime fraud" exception that would require review and minimization? Or, more likely is it simply an unexplained inconsistency and evidence of lack of guidance and direct knowledge on the part of the prosecutor as to how the agents were proceeding.?

that attorney. Neither the FBI nor the prosecutor has apparently made any attempt to recall or retrieve these privileged conversations from Sandstrom's counsel, Stephanie Eye's counsel, or anyone else who has custody of them including the FBI. In other words, it does not appear that there has been any attempt by the government to "unring the bell" if it could be done. Meanwhile as in *Lin Lyn*, 149 F.3d 1112, *supra*, it is no doubt common knowledge at the FBI and the prosecutor's office and who knows where else that conversations between Mr. Eye and his attorney are on the loose. Thus, as to prong two of the due process leg, it appears there has been certainly as a minimum ongoing "deliberate indifference" to the situation which imputes intent to the prosecutor and the FBI and CCA, particularly once the issue was flushed out. See *Terrell v. Larson*, 371 F.3d 418 (8th Cir. 2004). Also see *United States v. Willis*, 277 F.3d 1026 (8th Cir. 2002) (deliberate indifference is evidence to support the inference that the party was aware of a high probability of the existence of the fact in question and purposely contrived to avoid learning all of the facts in order to have a defense against subsequent claims of knowledge and willfulness).⁴

⁴ As of the date of this motion we have of course now learned that apparently all attorney client phone conversations were also turned over to some unidentified US Marshal in late July 2007. This was revealed not by the prosecutor in this case but instead by local counsel for CCA, notwithstanding the fact that undersigned counsel raised questions about tapes several weeks ago

As to prejudice, defendant feels compelled to remind the court of the obvious: this is a capital case in which the United States is vigorously pursuing the death penalty for Mr. Eye. Capital litigation has been recognized by the Supreme Court as “serious” and “unique” and “complex” litigation because of the possible penalty of death. *McFarland v. Scott*, 512 U.S. 849, 856 (1994). Defendant has revealed some of his basic defense strategy in his motion for severance. Because this strategy has been revealed for some time and has not changed significantly, counsel has continued to discuss it with defendant, refine it, and, significantly, to discuss how to counter witnesses who have obviously lied before the federal grand jury e.g., Reginnia Rios, the government’s star witness, who has confessed to lying and presented numerous versions to police and the FBI about what happened and a person who has been sentenced to imprisonment because of said lies. Conversely, Defendant must convince the jury of his own truthfulness. At the same time he must also successfully attack the credibility of several witnesses who have motive to distort the truth.

Discussions of these defense tactics are critical to the defense and to alert the government to defense methodology and analysis before hand of the defense

and was led to believe that the problem was confined to those tapes produced in response to the August 2006 grand jury subpoena.

approach and strategy is highly prejudicial to the defendant's case. There are the additional issues of expert testimony, and the development of mitigation evidence. Indeed placing defense mitigation strategy in the hands of the FBI and the prosecution prior to trial is absolutely devastating for it gives the government the luxury and unfair advantage of attempting to counter each point well in advance of trial, something they simply are not entitled to do. And now at this late date the defense has been informed there was yet a second and more pervasive production of tape recorded conversations provided to the US Marshals as recently as late July 2007, assuming Mr. Crow's information in his letter is accurate.

In *United States v. Lee*, 274 F.3d 485 (8th Cir. 2001) the court observed that while the Federal Death Penalty Act (FDPA) requires the government to serve a defendant notice "setting forth the aggravating factor or factors that the government . . . proposes to prove as justifying a sentence of death." 18 U.S.C. § 3593(a), and Lee therefore had a right to advance notice of the aggravating factors the government sought to prove at sentencing, he had no right to advance notice of the specific evidence the government would use to prove those factors. The *Lee* case therefore allows the government to use information they have obtained by listening to attorney client calls about mitigation in violation of the Sixth

Amendment and thereafter affirmatively seek out and develop evidence to counter defense strategy and nullify that evidence without revealing in advance what that prosecution evidence is.

In short, the extent of damage to the defendant at this point is beyond meaningful repair. The government can hide behind the *Lee* case and “sandbag” defendant in a mitigation proceeding in the event of conviction and the defendant has no remedy short of this court protecting him before this can occur. That this court has a duty to protect the right to counsel can hardly be open to dispute.

In a long line of cases that includes *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932), *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938), and *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), the Supreme Court has recognized that the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial. The Constitution guarantees a fair trial through the due process clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause.

As pointed out in *Strickland v. Washington*, 466 U.S. 668 (1984) at 685:

That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.

In order to play this role of adversarial advocate for the defendant as described in *Strickland* it is necessary for the playing field to be level and for the defense attorney to represent his client vigorously and aggressively within the bounds of the law. As for the prosecution, the Supreme Court has made it clear, however, that while the adversary system permits the prosecutor to "prosecute with earnestness and vigor." And while he may strike hard blows, he is not at liberty to strike foul ones." *Berger v. United States*, 295 U.S. 78 (1935); *United States v. Young*, 470 U.S. 1 (1985). Clearly, if the prosecution and their agents are allowed to listen to confidential attorney client conversations about strategy, any concept of an adversary system is destroyed and meaningless.

3. SANCTIONS THAT SHOULD BE APPLIED

This prosecution was originally filed as a murder case in state court. The Kansas City Police Department Investigation supported a probable cause finding that the victim was shot on March 9, 2005, during the course of an altercation in the middle of 9th Street. For whatever reason, be it community pressure, or direct pressure from a since resigned and discredited Attorney General of the United States, the federal government apparently convinced the county prosecutor to relinquish jurisdiction to the United States Government who then, with the assistance of two aggressive and zealous FBI Agents, set out to find evidence to support claims of racial motivation which mainly boiled down to demonstrating that one or both defendants referred to blacks as “niggers.” Interestingly, while the actual physical evidence (letters and tape recorded conversations) are replete with use of the word “nigga”, a “hip hop” phrase used in rap music, there is a complete absence of the use of the word “nigger” in any of that evidence. Moreover and more importantly, there is a total absence of discussions of a substantive nature that would imply that either defendant is racially prejudiced.⁵

⁵ Establishing the racial component of the alleged crime in this manner before the grand jury is apparently not grounds for the Court to dismiss under its supervisory power inasmuch as *Costello v. United States*, 350 U.S. 359 holds that such is permissible because the grand jury inquiries should be unfettered by technical rules. But also see *United States v. Garrett*, 797 F.2d 656 (8th Cir. 1986) (*Costello* construed narrowly). This does not make it any less disturbing or unfair however.

Undaunted, the FBI, set out to fill in the blanks. Witnesses have been “spoon fed” questions and answers suggested to them that were designed to bolster the racial motivation. During FBI interviews and grand jury testimony these witnesses were repeatedly asked the inadmissible and ultimate prejudicial question “is Eye or Sandstrom a racist.” It was then suggested to these same witnesses through leading and suggestive questions and interrogations that Eye and Sandstrom had used the term “nigger” in their presence notwithstanding the fact that all letters and tape recordings point to use of street hip hop language and use of the term “nigga” as a cultural term of friendship applied to each other. In striking contrast to this tactic, witnesses, with perhaps the exception of Rios, were never asked, “state in your own words now why and through what conduct you contend that so and so is a racist and more importantly what evidence you have to support a claim that this homicide was racially motivated?”

In January 2006, during a previous hearing before the magistrate, the co-case Agents Gothard and Janke were present in court. During sworn testimony agent Janke indicated he had 311 taped calls from the Jackson County Missouri detention center and that he had listened to 50% of those calls (Hr.Tr. 47). He then was asked how many of the calls he listened to contain a preamble warning (Hr. Tr.

49). His answer was “. . . every call that I have listened to contains the preamble” (id.). He repeated this answer later again when asked once again (Hr.Tr. 52-53). This hearing was continued until March 16, 2006 because of additional issues that were raised in the initial hearing. After Sandstrom’s defense attorney raised questions about the existence of the preamble, a point central to the legal argument in the proceedings, during the second hearing Agent Janke testified that his prior testimony was not accurate and admitted that a considerable number of the CDs with multiple conversations in fact did not contain the preamble he had previously testified he personally heard (See March 16, 2006 transcript at 70-75).

While Janke offered a rambling explanation for this, a review of the voluminous discovery and investigative techniques employed strongly points to over zealousness and a desire to win at any cost. This is going to make it somewhat difficult to believe more sworn testimony from this same agent if he in the future contends that he has not reviewed privileged conversations between Mr. Eye and his attorneys.

While the *Lin Lyn* court did not believe there was justification to dismiss the indictment in that case, it only involved a notepad. The intrusion here is far greater and far more significant and far more disturbing. This case should be dismissed

and sent back to Jackson County where it started and where it should properly be charged as murder in the second degree based on probable cause evidence in police investigative reports.

Alternatively, if this court believes that less drastic measures are called for per *Lin Lyn*, 149 F.3d 1112, analysis, then the court should exercise its supervisory power and order that the case be decertified as a capital prosecution and order the suppression of all evidence that the government cannot show an independent and untainted source for and which was obtained and developed prior to appointment of undersigned counsel Osgood.⁶

Defendant believes he is entitled to a hearing on this motion and requests that the court conduct one at the earliest possible opportunity. Counsel anticipates that the defense will subpoena Assistant U.S. Attorneys Ketchmark and Green and possibly one or more Department of Justice personnel as witnesses. Witnesses will also include a number of persons from CCA including but not limited to the

⁶ Once a case is certified capital it seems that the district court has no discretion in terms of proceeding with the second hearing under 18 U.S.C. 3593 and must go forward if the statute has been complied with. Nevertheless, if the Court has supervisory authority to dismiss the indictment because of a Sixth Amendment violation per *United States v. Solomon*, 679 F.2d 1246 (8th Cir. 1982), then a less drastic measure if the court declines to dismiss, per *Lin Lyn* analysis, would be simply to exercise supervisory power as a sanction for misconduct and refuse to conduct the 3593 hearing which would in effect amount to de-certification. See discussion of death penalty certification and DOJ protocol generally in *United States v. Lee*, 274 F.3d 485 (8th Cir. 2001).

warden and various subordinate personnel who were involved in the retrieval of tape recordings and subsequent copying.⁷

Defendant submits that prosecutors Ketchmark and Green as well as DOJ prosecutors who have heretofore participated in the prosecution of this case should be disqualified from conducting any such hearing into potential Fifth and Sixth Amendment violations because of their direct and substantial involvement in events and the need to question them under oath about the events. This court has authority to disqualify these attorneys and should because of said direct and substantial conflict. See Missouri Supreme Court Rule 4-3.7; *Young v. U.S. Ex Rel Vuitton Et Fils S. A.*, 481 U.S. 787 (1987); *State Ex Rel Wallace v. Munton*, 989 S.W. 2d 641 (Mo. App. S.D. 1999).

WHEREFORE, defendant Eye prays for the following relief:

1) Dismissal of the indictment with prejudice because of the intrusion into his attorney client relationship by government agents which violated his 5th Amendment right to due process and his 6th Amendment right to counsel; 2) alternatively, suppression of all direct and derivative evidence obtained by the

⁷ Counsel has alerted local counsel for CCA of the likelihood of such a hearing and has made a specific request in writing asking for the identities of these persons under the assumption that this court does not want to piecemeal any hearing which will be the result if counsel has to first question the Warden to obtain the identify of the actual parties involved. To date, counsel has not received a list of the names.

government after defense counsel was first appointed in this federal prosecution and de-certification of this case as a capital case under the court's supervisory power; 3) a hearing before this court at which the government is assigned the burden of establishing and proving that any evidence offered at trial in the Eye prosecution is not the fruit of the unlawful intercepts and disclosures with particular emphasis on the issue of potential mitigation evidence; 4) an order disqualifying prosecutors Ketchmark, Green and all DOJ prosecutors listed as counsel in the case from participating in the aforesaid requested hearing; and, 5) such other relief as the court determines to be just and necessary to address past harm and ensure the prevention of future harm including but not limited to a return of all seized tape recordings between Eye and his attorneys including transcripts of such recording whenever and to whomever produced.

Respectfully submitted,

/s/

John R. Osgood
Attorney at Law, #23896
Commercial Fed Bnk- Suite 305
740 NW Blue Parkway
Lee's Summit, MO 64086
Office Phone: (816) 525-8200
Fax: 525-7580

/s/

Lance D. Sandage, Mo Bar #46022
The Sandage Law Firm, P.C.
4700 Belleview, Ste 404
Kansas City, MO 64112

ATTORNEYS FOR GARY EYE

CERTIFICATE OF SERVICE

I certify that a copy of this pleading has been caused to be served on the Assistant United States Attorney for Western District of Missouri through use of the Electronic Court Document Filing System on Wednesday, October 24, 2007.

/s/

JOHN R. OSGOOD