

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

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

**DEFENDANT EYE’S MOTION IN LIMINE FOR AN ORDER PROBITING THE GOVERNMENT FROM: 1) ASKING ANY QUESTION DESIGNED TO ELICIT AN AFFIRMATIVE OR NEGATIVE OPINION ANSWER FROM A WITNESS THAT DEFENDANT EYE OR SANDSTROM IS A “RACIST” OR THAT ANY OTHER WITNESS IN THE CASE IS OR IS NOT A “RACIST”; 2) OFFERREING EVIDENCE THAT IN THE PAST DEFENDANT EYE OR SANDSTROM HAS USED THE WORD “NIGGER” OR ANY OTHER RACIAL EPITATH IN REFERENCE TO BLACK PERSONS WITHOUT PRIOR APPROVAL OF THE COURT AFTER A SHOWING THAT SUCH EVIDENCE IS RELEVANT TO THE CURRENT CASE; 3) OFFERING ANY OPINION EVIDENCE BY A WITNESS AS TO THE RACIAL OR ETHNIC MAKEUP AND GENERAL DEMOGRAPICS OF THE NEIGHBORHOOD NEAR 9<sup>TH</sup> AND BRIGHTON IN KANSAS CITY, MISSOURI; AND 4) OFFERING ANY OPINION EVIDENCE BY A WITNESS AS TO THE PRESENCE OR ABSENCE OF RACIAL TENSIONS IN THE NEIGHBORHOOD**

Defendant Eye anticipates that the government will call a number of witnesses who have previously testified before the grand jury. During the grand jury inquiry, witnesses were routinely asked to speculate and offer opinion testimony as to the ultimate issue of whether Eye or Sandstrom was a “racist.” These witnesses were also often asked whether they had ever heard either defendant refer to a black person as a

“nigger” in the past without limitation on the question or any attempt to tie it to the present case. The investigation also focused on the demographics of the neighborhood, gang affiliations and whether there was or was not racial tension in certain parts of the neighborhood. No expert was produced to shore up any of this testimony which was of course all unsubstantiated opinion.

The defendant objects to any such testimony in this case without proper foundation having been laid through a *Daubert* hearing out of the presence of the jury. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). And the matter does not simply end with a *Daubert* inquiry. Defendant also submits that to the extent such testimony or evidence attempts to answer the ultimate question of whether either defendant is a racist who set out to “kill a nigger”, it clearly invades the province of the jury on an ultimate question of fact that is an element of the offense that is offered as proof of *mens rea* and is therefore improper.

Rule 704(b), FREv, prohibits an expert from testifying as to whether a defendant had "the mental state or condition constituting an element of the crime charged." *U.S. v. Vesey*, 338 F.3d 913 (8th Cir. 2003). The Eighth Circuit has held that the federal prosecutor should not ask questions using the specific language of the statute. See *United States v. Gipson*, 862 F.2d 714, 716 (8th Cir. 1988); *U.S. v. Two Eagle*, 318 F.3d 785 (8th Cir. 2003) (“serious bodily injury” improper in an assault case where that

is the charge); *U.S. v. Waldman*, 310 F.3d 1074 (8<sup>th</sup> Cir. 2002) (error for the expert to volunteer that the defendant “had an intent to kill a policeman.”). By the same token, it would be improper for any witness to express their opinion that Eye or Sandstrom shot a black person because of his race. Also see *United States v. Whitted*, 11 F.3d 782, 785 (8th Cir. 1993) (holding that expert may not testify that child was sexually abused because opinion is not helpful to the jury); and *United States v. Pemberton*, 121 F.3d 1157 (8th Cir. 1997) (quoting *Whitted* with approval).

WHEREFORE, defendant moves the Court to instruct the government not to offer such evidence during opening statement or the case in chief without prior ruling from the court.

Respectfully submitted,

/s/  
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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 Friday, November 23, 2007.

/s/  
JOHN R. OSGOOD