

**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  
OFFERING EVIDENCE DURING OPENING  
STATEMENT OR THE CASE IN CHIEF THAT  
DEFENDANT EYE THREATENED WITNESSES POST-  
INDICTMENT OR ENGAGED IN A PLOT TO HARM  
WITNESSES OR OBSTRUCT THE PROSECUTION  
IN THIS CASE WITH SUGGESTIONS IN SUPPORT**

In *United States v. Weir*, 575 F.2d 668 (8<sup>th</sup> Cir. 1978), a bank robbery prosecution, “[a]t trial the government introduced evidence of an attempt by appellants to kill a suspected informant, one Gilman, which allegedly occurred approximately two weeks after the robbery, and of threats by Weir to kill Jackson and an FBI agent. This evidence was introduced through the testimony of Jackson” over repeated defense objection.

The 8<sup>th</sup> Circuit, after a lengthy discussion of probative value, prejudice, and Rules 403 and 404, Federal Rules of Evidence, concluded that this type of testimony from a participant in the crimes was so prejudicial that reversal was required. As in *Weir*, the government will use witnesses in Mr. Eye’s case with problems similar to those attributed to Jackson that mandated reversal in that case. In Mr. Eye’s case one of the

“other crimes” key witnesses will be an individual who attempted to sell information about Mr. Eye to other inmates. The second key witness also has a similar checkered past.

In reversing in *Weir*, the Court carefully picked apart the government’s argument for the justification for use of such evidence and offered cogent reasons as to why the evidence only marginally qualified under 404(b) and why it was so overwhelmingly prejudicial under Rule 403. *Weir*, while a bank robbery, is otherwise almost squarely on point with Mr. Eye’s situation. Obviously, *Weir* does not stand in a vacuum and in the more recent case of *United States v. DeAngelo*, 13 F.3d 1228 (8<sup>th</sup> Cir. 1994) the court takes the position that post indictment murder threats are generally admissible under Rule 404(b). In so ruling, the court did not however reach the *Weir* 403 argument and instead held that the defense attorney had opened the door to the evidence and in any event any error would have been harmless because of the overwhelming evidence of guilt. In *United States v. White*, 794 F. 2d 367 (8<sup>th</sup> Cir. 1986) the court admitted a threat by the defendant to show guilty knowledge. In comparing *Weir*, the court said it did “. . . not believe that the prejudicial impact of the testimony about the threat outweighed its probative value as evidence of guilty knowledge because *the threat was not particularly inflammatory and Montgomery's testimony concerning the threat was brief.*” (emphasis added).

Given the highly charged emotional nature of this type of evidence, as a bare minimum this court should prohibit any reference to it until the government has firmly established justification for its admission, if it can, and until the defense has had an opportunity to fully argue the 403 impact out of the presence of the jury. The importance of the balancing that must be done is well illustrated by a quote from *United States v. Dennis*, 625 F.2<sup>nd</sup> 782 (8<sup>th</sup> Cir. 1980) and is certainly applicable to this case:

Rule 403 is to be interpreted and applied in conjunction with the overall purposes of the Federal Rules of Evidence in Rule 102. Rule 403 "contemplates a flexible scheme of discretionary judgments by trial courts designed to minimize the evidentiary costs of protecting parties from undue prejudice." *United States v. Jackson*, 405 F. Supp. 938, 945 (E.D.N.Y. 1975). In determining whether evidence should have been excluded under Rule 403, a reviewing court must give great deference to the trial judge who saw and heard the evidence. *United States v. Weir*, 575 F.2d 668, 670 (8th Cir. 1978). "'Unfair prejudice' [under Rule 403] means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." Advisory Committee's Note, Rule 403, Fed.R.Evid. quoted in *Depew v. Hanover Insurance Co.*, 438 F. Supp. 358, 360 (E.D.Tenn. 1977). Confusion of the issues warrants exclusion of relevant evidence if admission of the evidence would lead to litigation of collateral issues.

The government's motive in offering this evidence is quite simply to show that Mr. Eye is a violent, mean spirited individual who killed for fun and racial animus and when caught will then not hesitate to kill again to thwart the prosecution. This is of course the emotional response discussed in *Dennis* and the very reason why it should not be allowed based on a *Dennis* and *Weir* analysis. Indeed, Mr. Eye has put forth a very plausible defense in his motion for severance. It is his defense, corroborated in no small part by the physical and forensic evidence, that while engaged in a fight in the middle of the street the victim was shot by someone else without his prior knowledge it was going to happen. To be wrongly accused of a crime of this magnitude and to face the death penalty might well explain injudicious conduct that could be interpreted as threats made out of frustration and anger. Thus, instead of proving consciousness of guilt it could be argued it is strong evidence of consciousness of innocence. Ergo, it is confusing to the jury and highly charged emotional evidence that is of limited probative value that should be excluded under both 403 and 404 analysis.

**WHEREFORE**, defendant Eye moves the Court for an order directing the government not to mention any threat evidence during opening statement and during the case in chief until such time as the court has ruled on the issue out of the presence of the jury.

Respectfully submitted,

/s/

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/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 November 27, 2007.

/s/

JOHN R. OSGOOD