

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 IN LIMINE TO EXCLUDE TESTIMONY OF WITNESSES
EYMARD AND BUCHANAN BECAUSE OF 1) ATTEMPTS
TO VIOLATE THE ATTORNEY CLIENT PRIVILEGE
2) BECAUSE OF POTENTIAL BRUTON VIOLATIONS
AND 3) BECAUSE THE STATEMENTS ARE REplete WITH
ALLEGED CRIMINAL ACTS THAT ARE HIGHLY PREJUDICIAL
AND UNRELATED TO THIS CASE WITH
SUGGESTIONS IN SUPPORT

It is anticipated that the Government will call witnesses Eric Eymard and Justin Buchanan to testify to alleged admissions that may have been made by defendants Eye and Sandstrom while each was incarcerated at one time or another with each other in the same facility.

Discovery provided to date indicates the following interviews:

17 November 2005: Buchanan was interviewed at Cross Roads Correctional Center (CRCC) by FBI agents Janke and Gothard about letters he had allegedly received from

co-defendant Sandstrom referencing alleged threats against potential witnesses;

18 November 2005: Buchanan made alleged voluntary statements to FBI agents Gothard and Stinnett about co-defendant Sandstrom while being transported from CRCC to the US Marshals, Kansas City, Missouri

10 February 2006: Buchanan was interviewed by agents Janke and Gothard at the CCA facility about statements allegedly made by defendant Gary Eye to him while both were housed at CCA. The communications allegedly occurred both orally and in writing while both were housed in proximity to each other.

10 July 2006: Eymard was interviewed at CCA, Leavenworth, KS by FBI Agents Janke and Mullen and provided information about alleged admissions of defendant Gary Eye;

24 July 2006: Eymard was interviewed at CCA again by Janke and Mullen concerning admissions by Eye;

17 October 2006: Buchanan was interviewed by agents Janke and Gothard at the CCA facility under terms of a proffer letter in the presence of AUSA Ketchmark and his attorney Robert Martin. This interview focused on, among other things, allegations that Buchanan had been attempting to sell information about Eye from Eye's discovery to other inmates.

14 February 007: Buchanan was interviewed by agents Janke and Gothard at an undisclosed location about statements allegedly made by Eye as well as Buchanan's association and inter action with Eric Eymard.

ATTORNEY CLIENT VIOLATIONS:

Subsequent to Eymard meeting with the United States Attorney and federal agents he was intentionally placed back in the CCA facility in close proximity to Eye, over objections by defendant Eye's counsel, and continued to attempt to have contact with Eye in an attempt elicit information from Eye in violation of *Massiah v. United States*, 377 U.S. 201 (1964) and *United States v. Henry*, 447 U.S. 264 (1980). Also see *United States v. Johnson*, 338 F.3d 918 (8th Cir. 2003). It is also likely, although less clear to counsel in the absence of further discovery and a hearing, that Buchanan was housed near one or both of the defendants and Eymard to further efforts to communicate with each other and to elicit information from one or both of the defendants in violation of the 6th Amendment. Unfortunately, dismissal of the indictment is not a Supreme Court sanctioned remedy and the prosecution may use any untainted evidence, assuming it can meet its burden of showing absence of prejudice. *United States v. Morrison* 449 U.S. 361 (1981). The difficulty here is that no conversations or interviews were recorded and therefore it is impossible to determine whether the testimony will be limited to statements allegedly made prior to the *Massiah* violation as opposed to statements that might have been unlawfully elicited subsequent to cooperation agreements

having been made. Consequently, the only remedy that will protect the defendant and act as a prophylactic to further such violations is to simply exclude testimony from Eymard and Buchanan in its entirety.

BRUTON ISSUES:

A cursory review of these FBI reports of interview will reveal that they are replete with post-indictment non-coconspirator hearsay statements attributable to defendant Eye that are highly prejudicial to his case. This evidence consists of both oral statements as well as a summary of information contained in letters from co-defendant Sandstrom written to Buchanan, his cousin, post indictment. These should be ruled inadmissible under *Bruton v. United States*, 391 U.S. 123 (1968). See *United States v. Veltmann*, 6 F.3d 1483 (11th Cir. 1993) (reversible error to allow the non-testifying co-defendant's cell mate's testimony which directly inculpated the defendant); *United States v. Sherlock* 865 F.2d 1069 (9th Cir. 1989) (redaction not an adequate cure).

RULE 404(b) EVIDENCE:

Assuming one or both of these witnesses are allowed to present testimony, the court should limit that testimony to evidence directly related to the charged offenses and exclude any evidence dealing with alleged threat plots. While more

recently the 8th Circuit has referred to 404(b) as a rule of inclusion instead of exclusion, it is equally clear that the admission of emotionally charged evidence of unrelated criminal acts can amount to prejudicial error requiring reversal. See cases reversed: *United States v. Temple*, 862 F.2d 821 (10th Cir. 1988); *Huddleston v. United States*, 802 F.2d 874 (6th Cir. 1986); *United States v. Neary*, 733 F.2d 210 (2nd Cir. 1984); *United States v. Dothard*, 666 F.2d 498 (11th Cir. 1982); *United States v. Guerrero*, 650 F.2d 728 (5th Cir. 1981).

SUMMARY:

Of all the many witnesses that will be likely endorsed by the government as part of its case in chief, this pair is the most despicable. Both are practiced and accomplished liars with lengthy criminal histories who have used deception and subterfuge to subvert the criminal justice system to further their own agendas. Buchanan has attempted to sell to other inmates information about defendant Eye which he obtained second hand. He and Eymard have undoubtedly collaborated. Eymard, while housed next door to Eye, convinced Eye to show him discovery from the case which Eymard actually copied out by hand. Eymard told Eye he would review the discovery and give him his impression of the strengths and weaknesses of the case. Later, Eymard sought out the authorities and, to cover all

bases, then claimed to the authorities that Eye admitted the many different versions of the crime recounted in the discovery which had actually been provided to police investigators by other unsavory witnesses such as Ms. Rios, the convicted perjurer. Incredibly, Eymard then admitted to the FBI that he had copies of Eye's discovery and had hand copied it. Notwithstanding this track record, the government apparently still intends to sponsor these two witnesses in court as truthful government witnesses in a capital case. And after all of the forgoing, the government again placed Eymard in CCA in close proximity to Eye where Eymard once again attempted to have direct contact with defendant Eye.

These witnesses should be excluded from testifying for the reasons set forth above or at the very minimum their testimony should be severely restricted after a thorough review of the reports of interview.

WHEREFORE, defendant moves the Court for an order in limine excluding the testimony of Eymard and Buchanan or such other relief as the Court deems Appropriate.

Respectfully submitted,

/s/
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ATTORNEYS FOR GARY EYE

CERTIFICATE OF SERVICE

I certify that a copy of this pleading has been caused to be served on Assistant United States Attorney for Western District of Missouri, David Ketchmark, and other counsel of record in the case through use of the Electronic Court Document Filing System on January 22, 2008.

/s/
JOHN R. OSGOOD