

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.)

DEFENDANT’S OBJECTIONS TO THE DENIAL OF HIS MOTION TO SEVER HIS CASE FROM THAT OF THE CODEFENDANT ON GROUNDS THAT 1) THE TWO DEFENSES ARE GOING TO BE SO ANTAGONISTIC AS TO DENY EACH DEFENDANT A FAIR TRIAL AND 2) ON GROUNDS THAT THE GOVERNMENT’S PROPOSED USE OF BRUTONIZED STATEMENTS WILL DENY DEFNDANT EYE A FAIR TRIAL.

Defendant Eye timely moved to sever his case from that of his co-defendant Sandstrom on grounds of antagonistic defenses and probable insurmountable *Bruton* problems. (Doc. 80). On April24, 2006, the Magistrate entered an order denying defendant’s motion (Doc. 105). On May 1, 2006 defendant Eye filed a motion requesting an enlargement of time within which to file objections to the Magistrate’s Order (Doc. 114). The latter motion was not specifically ruled on by the Magistrate or the district court with respect to Eye individually and is technically still pending; however, on May 9, 2006, the district entered an order denying co-defendant Sandstrom’s motion to stay further motion practice including the filing of any objections but then granted both defendants until May 16, 2006 to object to “Reports and Recommendations filed on May 2, 2006.” (See Doc. 119).

Defendant Eye now seeks de novo review of the denial of his motion to sever and reasserts the same grounds and incorporates same herein as raised before the Magistrate in his

original motion and further respectfully submits that the Magistrate's finding of fact and conclusions of law are clearly erroneous in light of the factual assertions set forth by defendant as to what his defense will be at trial.

In his severance motion Defendant noted that the following facts were revealed in discovery obtained from the Kansas City, Missouri Police department reports:

- The two defendants were together prior to the shooting.
- They were in a stolen dodge automobile.
- Mr. Sandstrom possessed a .22 caliber hand gun.
- Mr. McKay was on his way to work and was arbitrarily executed by Mr. Eye because of his race.
- Mr. Eye used Mr. Sandstrom's gun and then gave it back to him.
- Mr. Eye fired several shots into the victim.
- The two defendants went to a location near the old steel mill and burned the dodge vehicle.
- The two defendants then went to a residence and made damaging admissions in front of Ms. Rios and others.
- Mr. Sandstrom then gave his .22 revolver to Ms. Rios to dispose of and she threw it in the Little Blue River.
- Ms. Rios later recanted her prior statements and now contends she was in the vehicle at the scene of the crime and witnessed the crime.
- Ms. Rios, having been immunized, will now likely testify that Mr. Eye was the shooter consistent with the government's theory of the case.

Defendant Eye then stated that his defense will amount to the following:

- He was with Mr. Sandstrom on the date in question.
- Ms. Rios was also present.
- Mr. Eye stopped to urinate in the street.
- Mr. Eye and Mr. McKay got into a physical confrontation presumably over Mr. Eye's act of public urination.
- Mr. Eye's DNA will be found under the fingernails of the deceased corroborating the fact they were involved in a physical fight.
- During the confrontation, Mr. Sandstrom, having been egged on by Ms. Rios, a person of checkered past who has been on the scene of other shootings, got out of the vehicle and approached Mr. McKay and shot him one time resulting in his death.

- Mr. Eye was totally unaware this was going to occur, did not plan this offense with Mr. Sandstrom, and was not a willing participant.
- Ms. Rios and Mr. Sandstrom then burned the Dodge automobile and Ms. Rios [or perhaps Mr. Sandstrom's sister] at Mr. Sandstrom's direction later disposed of the gun in the river.

Antagonistic Defense Argument: In denying defendant's motion, the Magistrate first determined that joinder was proper under Rule 8, FRCP. Defendant does not disagree. The Magistrate then concluded that there was no Rule 14 unfair prejudice present and denied the motion on that basis also. The Magistrate's order correctly states the standard (Order, pages 6-7) but then fails to properly apply the rule in this particular case. In this case, contrary to the Magistrate's findings, if Mr. Eye's defense is to be believed by the jury, the jury must soundly reject the very core of Mr. Sandstrom's defense i.e. that Mr. Eye was the shooter and that he (Mr. Sandstrom) was not. Mr. Sandstrom, having made numerous incriminating statements as to his own culpability will be forced to focus his defense on avoiding a death sentence.¹ (See Magistrate's Order at p. 7 and cases cited therein).

The Magistrate also speculates that the defenses are not antagonistic because it is possible that someone else other than Eye or Sandstrom walked up during the confrontation between Eye and the deceased and shot him (Order at p. 10). This is of course pure speculation on the part of the Magistrate and is totally contrary to all the anticipated evidence revealed to date in discovery. Every fact revealed thus far strongly suggests that these two defenses are so at odds as to create a grossly unfair situation for both if the cases are tried jointly.

¹ The case has yet to be formally certified as a death case but the latest information from the prosecution is that the Justice Department is going to do so.

Ability to Cross Examine Sandstrom: The Magistrate presumes unfairly that Sandstrom will be unavailable as a witness. Defendant concedes that the law clearly provides that a defendant may not “orchestrate” the trial of cases to benefit his defense. However, given the strong case against Sandstrom which includes his numerous admissions against interest in letters and recorded telephone conversations, it is likely almost to a certainty that the government would try him first. And, assuming the admissions are placed in evidence, these admissions, together with the testimony of eye witness Rios, would be sufficient for a jury finding of guilty.

Under this probable scenario, Mr. Sandstrom could then be called by the Defendant Eye as a witness inasmuch as he would no longer have a 5th Amendment privilege. Even if Mr. Sandstrom still refused to testify, Mr. Eye would then be able to put in front of the jury Mr. Sandstrom’s prior inculpatory statements. On the other hand, in a joint trial if Mr. Sandstrom does not testify the government will no doubt selectively use the admissions and object to attempts by Mr. Eye to benefit meaningfully from such evidence.

The Magistrate erred when he failed to grant severance on this ground under Rule 14.

Bruton Grounds: Defendant respectfully disagrees with the Magistrate that there are neutral pronouns that will sufficiently protect the Defendant Eye from unfair prejudice. Heretofore, neither the government nor the Magistrate has taken serious issue with the factual summary provided by Mr. Eye in his severance motion and restated herein.

Ms. Rios is going to testify that she was at the scene of the crime, that Mr. Sandstrom and Mr. Eye were with her and one of the two shot the victim. Exactly what spin she will place on the facts at trial remains somewhat of a mystery simply because she has over time changed her

story. Nevertheless, the common thread throughout her various versions is that Eye and Sandstrom were there together on the scene.

Once Ms. Rios testifies, there is absolutely no way that neutral pronouns are going to shield Mr. Eye from the incriminating hearsay. The jury will know precisely who the “other person” referred to is and that it was Mr. Eye. This is a classic example of when redacting is simply useless. The prejudice will be overwhelming. The Court should grant severance on this ground also.

WHEREFORE, Defendant Eye moves the Court to reconsider de novo his motion filed before the Magistrate and grant his motion for severance of parties.

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 May 16, 2006.

/s/
JOHN R. OSGOOD