

**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 PROHIBIT THE GOVERNMENT
FROM COMMENTING ON, OFFERING, OR MAKING REFERENCE TO
ANY EVIDENCE DURING OPENING STATEMENT OR THE CASE
IN CHIEF THAT WOULD CONSTITUTE *BRUTON* EVIDENCE OR SO-CALLED
SANATIZED *BRUTON* EVIDENCE USING “NEUTRAL PRONOUNS”
WITH SUGGESTIONS IN SUPPORT**

The prosecution will no doubt offer hearsay testimony during the course of this prosecution under the theory that it is admissible under Rule 801, Federal Rules of Evidence as co-conspirator hearsay. This category of evidence is of course admissible generally if the government can establish 1) that there was a conspiracy; 2) that a statement was made during the course of that conspiracy; and 3) that it was in furtherance of the conspiracy. If the government chooses to allude to such during their opening statement, they do so at the risk of a mistrial if it later should be determined by the court that no such conspiracy existed. See *United States v. Bell*, 573 F2d 1040 (8th

Cir. 1978)¹ and *United States v. Reyes*, 362 F.3d 536 (8th Cir. 2004). This type of evidence also appears to still be admissible under *Crawford v. Washington*, 541 U.S. 36 (2004). See *U.S. v. Shingh*, 494 F.3d. 653 (8th cir. 2007). Notwithstanding the *Bell* line of cases the court has authority to limit such evidence during opening statement if it so chooses and that is certainly probably the better practice.

Post arrest statements of defendants are of course all together a different category of evidence. Where defendant “A” inculpatates defendant “B” in a statement offered in a joint trial such evidence is not co-conspirator hearsay and clearly run afoul of the *Bruton* rule (See *Bruton v. United States*, 391 U.S. 123 (1968). A lengthy and detailed discussion of this issue may be found in *United States v. Edwards*, 159 F.3d 1117 (8th Cir. 1998), the multi-defendant case where defendants were charged with causing the explosion that killed several firefighters. Each defendant made statements post-conspiracy that inculpatated a fellow co-defendant. The district court denied severance motions and instead allowed the government to substitute “neutral pronouns” in place of a co-defendant’s name to avoid the *Bruton* trap. In affirming *Edwards* the court acknowledge that the controlling law was *Richardson v. Marsh*, 481 U.S. 200 (1987) and *Gray v. Maryland*, 523 U.S. 185 (1998) and stated:

¹ *Bell* is the benchmark case in the 8th Circuit that set out the procedure to be followed in all further cases after *Bell* by the district courts in ruling on objections to co-conspirator hearsay evidence.

This court and other circuit courts have consistently upheld such evidence so long as the redacted confession or admission does not facially incriminate or lead the jury directly to a non-testifying declarant's co-defendant. See *United States v. Jones*, 101 F.3d 1263, 1270 & n. 5 (8th Cir. 1996) (use of "we" and "they"); *United States v. Williams*, 936 F.2d 698, 700-01 (2d Cir. 1991) ("another guy"); *United States v. Briscoe*, 896 F.2d 1476, 1502 (7th Cir. 1990) ("we"); *United States v. Garcia*, 836 F.2d 385, 390-91 (8th Cir. 1987) ("someone"). We conclude the district court's decision to admit non-testifying defendant admissions, redacted as to co-defendants by the use of pronouns and other neutral words, and accompanied by appropriate limiting instructions, was consistent with this court's decisions in *Jones* and *Garcia* and the Supreme Court's recent decision in *Gray*.

In *Edwards* there were multiple defendants. The use of the neutral pronouns could have pointed to any one of a number of other persons including one or more co-defendants or other third party associates who were prominent figures in the case. It was therefore not possible to tell precisely who was being referred to when a witness testified that defendant "x" told him that he defendant "x" and "someone else" set the fire that caused the explosion. Also see *United States v. Logan*, 210 F.3d 820 (8th Cir. 2000) (*en banc*) (no error because the redaction was favorable to defendant and actually did arguably point to "another person").

The facts in this case are dramatically different. The use of a neutral pronoun will accomplish nothing since it will be clear from virtually the first witness that only three persons were involved at the scene based on the government's own theory of prosecution: Mr. Eye; Mr. Sandstrom; and the key witness who was in the car, Ms. Rios. Consequently, any attempt to use substitute pronouns will be meaningless and will point directly to the parties. This is precisely what *Gray v. Maryland* and *Richardson v. Marsh* hold is error.

In this case there are a number of post indictment telephone calls that the government will attempt to place in evidence. First, there is the practical problem of how they will substitute neutral pronouns (as opposed to simply bleeping out a name which is clearly in violation of *Gray* and *Richardson*) in these tape recordings. There are also letters written by each of the defendants which pose the same exact problem. And finally, there are statements allegedly made by Eye or Sandstrom to third party witnesses that are in the same category. Finally, there are statements made by each defendant to police authorities that refer to the other defendant. No reasonable juror will be fooled or left wondering who the "neutral pronoun" person is once they have listened to the otherwise admissible evidence in this case.

And there is of course the sheer number of pronouns that will be inserted during the course of the trial if all this evidence is allowed (letters, phone calls, statements to

detectives, and so on). The repetition problem was addressed post *Logan, supra*, in *United States v. Williams*, 429 F.3d 767 (8th Cir. 2005):

Applying the analysis of *Logan*, it would appear that in kind and degree, the redaction of Caldwell's statement made it obvious that a name had been redacted. The replacements were not seamlessly woven into the narrative as in *Logan*, and the neutral pronoun "someone" may have lost its anonymity by sheer repetition. It may well have been clear to the jury that the statement had obviously been redacted and that the "someone" of the statement was defendant Williams. *Gray*, 523 U.S. at 196, 118 S.Ct. 1151. As the Supreme Court held in *Gray*, this case may fall within the *Bruton* class of cases where a district's court's repeated cautionary instructions cannot protect the defendant. *Id.* at 192, 118 S.Ct. 1151.

The defendant Eye has on more than one occasion raised this issue with the court in support of a motion to sever. The defendant has also indicated in prior pleadings that he is likely to testify. Obviously, if he were to testify in the case it would solve any problems that Mr. Sandstrom might have in terms of *Bruton* inasmuch as Mr. Eye would be subject to cross-examination. It of course does not solve Mr. Eye's major problem of how to counter and confront such hearsay if Mr. Sandstrom does not testify. Conversely, if Mr. Eye chooses not testify at the close of the government's case, Mr. Sandstorm has the same problem.

Given the uncertainty of who will or will not testify and fact that this court has on several occasions refused to grant severance of parties, the defendant believes the proper remedy to protect his right of confrontation is to prohibit the government from offering any post conspiracy hearsay whether sanitized with neutral pronouns or not. Obviously, if a particular defendant does then indeed testify, the government case offer such evidence in rebuttal.

WHEREFORE, defendant Eye moves the court for an order directing the government not to mention or allude to post conspiracy hearsay evidence where a witness testifies as to statements of a party defendant and at the same time inculcates the co-defendant, whether directly or through the use of so-called “neutral pronouns.”

Respectfully submitted,

/s/

John R. Osgood
Attorney at Law, #23896
Bank of the West Bank Building - Suite 305
740 NW Blue Parkway
Lee's Summit, MO 64086
Office Phone: (816) 525-8200

/s/

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

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 28, 2007.

/s/
JOHN R. OSGOOD