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

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 05-00344-01/02-CR-W-ODS
	)	
GARY EYE and	)	
STEVEN SANDSTROM,	)	
	)	
Defendants.	)	

ORDER

On March 17, 2008, the Court issued an Order that, *inter alia*, addressed Defendants' arguments regarding United States v. Bruton and stated "to aid the parties and the Court in any future consideration of this issue, the Government is directed to provide Defendants with copies of any statements it intends to use at trial that have been redacted in an attempt to satisfy Bruton. This should be done on or before April 4, 2008." On April 4, the Government filed a Notice indicating it had complied with this directive, but only with respect to those statements the Government determined were "testimonial" within the meaning of Crawford v. Washington, 541 U.S. 36 (2004). In Crawford, the Supreme Court adopted a new analysis for Confrontation Clause issues and held the protections of that clause apply to testimonial statements. The Government interprets Bruton as applying only when the Confrontation Clause is implicated, and thus concludes Bruton only applies to testimonial statements as defined in Crawford.

Crawford rejected the prior rule from Ohio v. Roberts because of that rule's "demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude." 541 U.S. at 63. With respect to nontestimonial statements, the Court held "it is wholly consistent with the Framers' design to afford the States flexibility in the development of their hearsay law . . . ." Id. at 69. Later, in Davis v. Washington, the Court explicitly held that the Confrontation Clause does not apply to nontestimonial statements. 547 U.S. 813, 823-26 (2006). Whether this means Bruton

is changed is less clear. Bruton itself involved testimonial statements, so its outcome would not appear to have changed even if Crawford governs. However, Bruton is more than simply a case about the Confrontation Clause, which may be why the Eighth Circuit has held that Crawford did not overrule Bruton. United States v. Rashid, 383 F.3d 769, 775-76 (8th Cir. 2004), cert. denied, 543 U.S. 1080 (2005).[1] Generally speaking, there has been much overlap between Confrontation Clause analysis and the hearsay rule. Bruton itself entangled the two concepts when it described itself as rejecting the Supreme Court's prior holding "that this encroachment on the right to confrontation could be avoided by the instruction to the jury to disregard the inadmissible hearsay evidence." 391 U.S. at 128; see also 391 U.S. at 128 n.3; Dutton v. Evans, 400 U.S. 74, 86 (1970); California v. Green, 399 U.S. 149, 179 n.14 (1970) (Harlan, J., concurring); More recently, the Court described Bruton strictly in terms of its implications under hearsay principles. Lilly v. Virginia, 527 U.S. 116, 134 n.5 (1999); Tennessee v. Street, 471 U.S. 409, 413 (1985).

Regardless of whether the hearsay statement of a codefendant is analyzed under hearsay principles or the Confrontation Clause[2] the outcome is essentially the same, and the Court rests its decision on ordinary evidentiary principles. The Government seeks to introduce evidence that generally takes the form of a statement by one defendant that incriminates both the speaker and the speaker's co-defendant. The statement is admissible against the speaker as either a statement by a party under Rule 801(d)(2)(A) or a statement against interest under Rule 804(b)(3). The Government suggests that if the statement is admissible against one defendant it is

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[1]There is an indication this case was vacated by the Supreme Court. However, that order related to a different defendant than the one discussed in this portion of the Eighth Circuit's opinion. It also was vacated for reasons unrelated to the Confrontation Clause issues discussed herein.

[2]The apparent inapplicability of the Confrontation Clause seems contrary to the principles of that provision. In this situation, a co-defendant's statements – expressed through the mouth of another – become the functional equivalent of testimony against the defendant, and the defendant has no opportunity to confront, cross-examine, or otherwise test the veracity of the actual witness against him.

admissible as to all defendants – but this is not a correct statement of law. Rule 801(d)(2) specifically states that a party's statement is admissible when offered against that party. A statement by a defendant implicating his co-defendant is not against the declarant's penal interest, so it would not be admissible under Rule 804(b)(3). The Government counters these concerns by emphasizing the statements do not only implicate a co-defendant, but implicate both the declarant and a co-defendant. This does not make the entire statement admissible.[3] In other words, if a declarant says "I killed John, and Joe helped," the inculpatory portion is admissible but the portion naming Joe does not incriminate the speaker and is not admissible against Joe. "[T]he most faithful reading of Rule 804(b)(3) is that it does not allow admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory. The district court may not just assume for purposes of Rule 804(b)(3) that a statement is self-inculpatory because it is part of a fuller confession, and this is particularly true when the statement implicates someone else." Williamson v. United States, 512 U.S. 594, 600-01 (1994); see also United States v. Mendoza, 85 F.3d 1347, 1351-52 (8th Cir. 1996).[4]

Given that a statement may contain both self-inculpatory (and hence admissible) statements and accusatory (and hence inadmissible) statements, the next issue is: what is to be done in such a circumstance? The lesson of Bruton is applicable here: an instruction asking the jury to disregard the inadmissible accusatory statement is not likely to be effective, so such accusations must be redacted. In short, the Court intends to apply Bruton's procedure to all statements by a nontestifying defendant that implicate

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[3]The cases upon which the Government principally relies are distinguishable because the statements in question were admitted under the co-conspirator exception, Rule 801(d)(2)(E), and "Bruton . . . does not preclude the admission of otherwise admissible statements by a co-conspirator under Rule 801(d)(2)(E)." E.g., United States v. Singh, 494 F.3d 653, 658 (8th Cir. 2007). This does not mean that Bruton is inapplicable to other exceptions to the hearsay rule. Cf. United States v. Inadi, 475 U.S. 387, 395-96 (1986) (discussing unique attributes of co-conspirator exception).

[4]Mendoza also requires "corroborating circumstances [that] clearly indicate the trustworthiness of the statement." 85 F.3d at 1351.

a co-defendant and that are not admissible under Rule 801(d)(2)(E). Having reached this conclusion, the Court cannot determine whether and to what extent the Government's anticipated evidence must be redacted. Arguably, the excerpt from Sandstrom's letter explicated on page 16 of the Government's April 4 filing does not even implicate Eye. In any event, the Government must review all defendants' statements it plans to submit in light of the Court's holding that a defendant's statement rendered admissible under Rule 804(b)(3) cannot be used to implicate a co-defendant. Any such statement may be admitted to the extent it implicates the declarant, so long as the forbidden references are removed in accordance with the procedure established in Bruton and its progeny.

The Government is directed to provide Defendants with copies of any of defendants' statements it intends to use at trial, along with any redactions made to comply with this Order. This shall be done on or before April 11, 2008.

IT IS SO ORDERED.

/s/ Ortrie D. Smith
ORTRIE D. SMITH, JUDGE
UNITED STATES DISTRICT COURT

DATE: April 8, 2008