

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 EYE'S REQUEST THAT THE COURT GIVE
THE ATTACHED INSTRUCTION OR SOME VARIATION THEREOF
IN PLACE OF THE PROPOSED INSTRUCTION 28**

Defendant submits that the proposed instruction is based on the holding in *United States v. Bledsoe*, 728 F.2d 1094 (8th Cir. 1984) and its progeny. Defendant submits that subsequent holdings by the United States Supreme Court in *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003) and *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) are authority for the proposition that the jury should be instructed on the issue of "mixed-motive" issues. Also see *Philipp v. ANR Freight System, Inc*, 61 F.3d 669 (8th Cir. 1995) and *Gagnon v. Sprint Corporation*, 284 F.3d 839 (8th Cir. 2002).

Respectfully submitted,

/s/
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was caused to be emailed to David Ketchmark, Assistant US Attorney, WDMo, Kansas City, Missouri and other counsel in the case via the electronic document filing system on May 5, 2008.

/s/
JOHN R. OSGOOD

INSTRUCTION NO ____

FIRST, with respect to the element of race, you may find that a defendant acted because of William McCay's race or color if you find beyond a reasonable doubt that Mr. McCay's race or color was the motivating factor behind the commission of the charged offense even if you find that the alleged conduct was motivated by other possible unlawful reasons.

SECOND, however, if you find that William McCay's race was merely an incidental or slight contributing factor of the alleged act and that the conduct was in fact motivated by other more significant factors, and that race was merely an incidental or slight contributing factor, then you must acquit the defendant of those counts that have race as an element of the offense.

THIRD, Comments attributable to a defendant that may reflect a discriminatory attitude in circumstances unrelated to the charged offenses are insufficient standing alone to support a finding beyond a reasonable doubt that defendant acted because of William McCay's race or color. For example, remarks in other settings by a defendant unrelated to the charged offenses containing race as an element will not suffice standing alone to establish the government's burden of proof of establishing race as an element of the offense beyond a reasonable doubt and you must therefore acquit the defendant of that charged offense absent other proof that convinces you beyond a reasonable doubt that race or color was the motivating factor behind the act as defined in the FIRST paragraph.