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 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 DEFENDANT EYE A FAIR TRIAL IF SUCH STATEMENTS ARE INDEED ADMITTED AT TRIAL IN THAT NO AMOUNT OF BRUTONIZING WILL ADEQUATELY PROTECT DEFENDANT EYE BECAUSE THE USE OF A NEUTRAL PRONOUN WILL STILL CLEARLY IDENTIFY THE DEFENDANT GIVEN THE NATURE OF THE EVIDENCE AND THEORY OF PROSECUTION IN THIS CASE

COMES NOW defendant Eye through counsel and moves the Court to grant him a separate trial from that of his co-defendant on grounds that a joint trial will prevent him for receiving a fair trial free from error in violation of his rights guaranteed him by the 5th, 6th, and 8th Amendments of the Constitution, applicable provisions of Title 18, United States Code, the applicable Federal Rules of Criminal Procedure, and interpretive case law as announced by the United States Supreme Court and various lower federal courts. Defendant also moves the Court to grant him a hearing on the issue of severance so that he may more

fully develop the detailed facts set forth below through the live testimony of the various third party witness mentioned herein.

FACTUAL BACKGROUND:

Defendant Eye has been provided some but not all discovery. Defendant is reasonably confident that he has been provided most all police reports prepared by the Kansas City, Missouri Police Department during the course of the state homicide investigation.

Defendant does not believe he has all relevant FBI 302 reports of interviews and knows for absolute certainty that at least one very key witness, Ms. Rios, has testified before the grand jury and that transcript has not been provided.

Although the defendant does not have Ms. Rios's latest version of what happened, some details have emerged through private investigation that shed light on the government's theory of prosecution in this case. In a nutshell, the early investigation pointed to the following facts if all statements in the police reports are to be believed:[1]

1. The two defendants were together prior to the shooting.

2. They were in a stolen dodge automobile.

3. Mr. Sanderson possessed a .22 caliber hand gun.

4. Mr. McKay was on his way to work and was arbitrarily executed by Mr. Eye because of his race.

[1] This is one big "if" inasmuch as the star witness, Ms. Rios, has likely gone before the grand jury and dramatically changed her testimony and is now claiming to have been an on the scene witness when in discovery and taped statements she purported to be only a witness to admissions of the two defendants.

5. Mr. Eye used Mr. Sanderson's gun and then gave it back to him.

6. Mr. Eye fired several shots into the victim.

7. The two defendants went to a location near the old steel mill and burned the dodge vehicle.

8. The two defendants then went to a residence and made damaging admissions in front of Ms. Rios and others.

9. Mr. Sanderson then gave his .22 revolver to Ms. Rios or possibly Mr. Sanderson’s sister to dispose of and this person threw it in the Little Blue River.

10. 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.

11. Ms. Rios, having been immunized, will now likely testify that Mr. Eye was the shooter consistent with the government's theory of the case.

Mr. Eye's defense in a nutshell will be:

1. He was with Mr. Sandstrom on the date in question.

2. Ms. Rios was also present in the automobile.

3. Mr. Eye stopped to urinate in the street.

4. Mr. Eye and Mr. McKay got into a physical confrontation presumably over Mr. Eye's act of public urination.

5. Mr. Eye's DNA has been found under the fingernails of the deceased corroborating the fact they were involved in a physical fight.

6. During the confrontation, Mr. Sanderson, perhaps 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 fired one or more shots, one of which fatally struck the victim resulting in his death.

7. Mr. Eye was totally unaware this was going to occur, did not plan this offense with Mr. Sanderson, and was not a willing participant and harbored on racial animus toward the victim or any other person of color.

8. Ms. Rios and Mr. Sanderson then burned the Dodge automobile and Ms. Rios or Mr. Sanderson's sister at Mr. Sanderson's direction later disposed of the gun in the river.

9. One or both of these two females have since assisted the authorities in the recovery of a .22 caliber hand gun purported to be the murder weapon.

10. Mr. Sanderson always carried the .22 caliber hand gun inside an ace bandage wrapped about his waist.

While counsel does not purport to speak for the co-defendant or co-counsel as to defense tactics, it would appear that Mr. Sanderson's only tenable approach is to rely on general denial and not take the stand and try to suggest though cross-examination that Mr. Eye is the guilty party. Mr. Eye will on the other hand probably testify in his own defense.[2]

Mr. Eye intends to vigorously attack the character of Mr. Sanderson, Ms. Rios, Vincent Deleon and other members of the Deleon family at trial and demonstrate a close personal relationship between Mr. Sanderson and these individuals that points to a strong motive for Ms. Rios and others to lie about Mr. Eye's role or lack thereof to protect Mr. Sanderson as much as possible. Mr. Eye will likely testify that it was indeed Mr. Sanderson who shot the victim without his (Eye's) knowledge,

[2] Counsel for both defendants early on recognized and agreed that it would be impossible to enter into any type of joint defense agreement and recognized almost immediately that the defenses were extremely antagonistic.

consent, agreement or any concert of purpose being involved.

By way of further explanation, key witnesses Vincent Deleon, Nessa Deleon, and Christina Deleon are all siblings. Christina Deleon is Mr. Sanderson's girlfriend and has written and called him. Vincent Deleon and Ms. Rios have been in a physical relationship on and off again over the course of time. Ms. Rios and Mr. Deleon broke up at one point and Ms. Rios formed a relationship with Jason Stanley.[3] During the course of this relationship, Mr. Jason Stanley allegedly shot himself to death in Ms. Rios's presence. Speculation abounded as to whether this was a homicide and whether Rios and or Deleon were directly involved. Co-incidentally, Ms. Rios was allegedly present when Mr. Deleon, a person also of checkered past, allegedly shot an individual known as "Black Raymond", probably over drugs.

In sum, the Deleons, Ms. Rios, and Mr. Sanderson have engaged in intertwined activities of a questionable nature for some time. All have a strong motive to point a finger at Mr. Eye in this case for various diverse reasons. All are alleged to have been heavily involved in the possession and distribution of drugs and the theft of numerous automobiles.

Mr. Sanderson has written a number of letters and made

[3] Jason Stanley, now deceased, is the son of Larry Stanley. Larry Stanley is likely the person that called the tips hot line and provided information about the offense to collect the reward. He will likely testify that he overheard some conversations between Sanderson, Rios, and Eye.

numerous telephone calls during which he has made conflicting and self incriminating statements which tend to exculpate Mr. Eye. It is essential to Mr. Eye's case that he is afforded the opportunity to cross-examine Mr. Sanderson as to these statements and/or use them as substantive evidence. Indeed, at one point Mr. Sanderson went so far as to remind another individual in a letter that he was "a killer."

The Eighth Circuit in United State v. Abefalter,, 340 F.3d 646 (8th Cir. 2003, made the following observations about antagonistic defenses:

> We will reverse the district court's decision to deny a severance only if the court abused its discretion, causing real prejudice to the defendant. United States v. O'Meara, 895 F.2d 1216, 1219 (8th Cir. 1990), cert. denied, 498 U.S. 943 (1990). A defendant can show real prejudice either by showing that his or her defense is irreconcilable with the co-defendant's defense "or that the jury will be unable to compartmentalize the evidence as it relates to separate defendants." United States v. Gutberlet, 939 F.2d 643, 645 (8th Cir. 1991). Defenses are deemed irreconcilable when they "so conflict that the jury, in order to believe the core of one defense, must necessarily disbelieve the core of the other." United States v. Jones, 880 F.2d 55, 63 (8th Cir. 1989) (internal quotations omitted).

The Supreme Court refused to establish a bright line rule on antagonistic defenses in Zafiro v. United States, 506 U.S. 534 (1993) but did clearly recognize that it is sometimes prudent and necessary citing cases in which the Circuits have reversed because of such problems. See, e.g., United States v. Tootick, 952 F.2d 1078 (CA9 1991); United States v. Rucker, 915 F.2d 1511,

1512-1513 (CA11 1990); and, United States v. Romanello, 726 F.2d 173 (CA5 1984). Justice O'Connor provided examples in Zafiro of the risks associated with a joint trial where there are antagonistic defenses:

> Such a risk might occur when evidence that the jury should not consider against a defendant, and that would not be admissible if a defendant were tried alone, is admitted against a codefendant. For example, evidence of a codefendant's wrongdoing in some circumstances erroneously could lead a jury to conclude that a defendant was guilty. . . . Evidence that is probative of a defendant's guilt but technically admissible only against a codefendant also might present a risk of prejudice. See Bruton v. United States, 391 U.S. 123 (1968). Conversely, a defendant might suffer prejudice if essential exculpatory evidence that would be available to a defendant tried alone were unavailable in a joint trial. See, e.g., Tifford v. Wainwright, 588 F.2d 954 (CA5 1979) (per curiam). The risk of prejudice will vary with the facts in each case, and district courts may find prejudice in situations not discussed here.

Justice Stevens concurred but offered the following reservation which certainly hits home in the present fact setting confronting this court:

> I would save for another day evaluation of the prejudice that may arise when the evidence or testimony offered by one defendant is truly irreconcilable with the innocence of a codefendant. Because the facts here do not present the issue squarely, I hesitate in this case to develop a rule that would govern the very different situation faced in cases like People v. Braune, 363 Ill. 551, 557, 2 N.E.2d 839, 842 (1936), in which mutually exclusive defenses transform a trial into "more of a contest between the defendants than between the people and

> the defendants." Under such circumstances, joinder may well be highly prejudicial . . .

In those instances where a court declines to grant severance it is usually because a defendant asserting such a right has not provided sufficient facts to justify a finding of probable prejudice. In the case of an "antagonistic defense" argument, it is generally not enough to simply state the conclusion that the defenses are likely to conflict. See United States v. Mason, 982 F.2d 325 (8th Cir. 1993). In this case Mr. Sanderson's defense will "inescapably inculpate" Mr. Eye, a valid ground for severance. See United States v. DeLuna, 763 F.2d 897, 921 (8th Cir.). And of course the converse is true insofar as Mr. Sanderson is concerned.[4]

Defendant also believes that the Bruton issue by itself is justification for a severance. See Bruton v. United States, 391 U.S. 123 (1968). The government has a number of Sanderson statements, letters, and tape recordings that mention Mr. Eye. No amount of substitution of pronouns for the name "Eye" is going keep the jury from figuring out who "he" or "the other person" or the "individual" is simply because of the very nature of the case and how the crime is alleged to have occurred. The detailed factual statement supra makes it clear that the instant that a statement is admitted attributable to Sanderson where he mentions

[4] Mr. Sanderson has already moved for severance through his counsel and that motion raises issues of general prejudice that will flow from a joint trial.

Mr. Eye in connection with the offense that the jury is going inescapably conclude that the person being referred to is indeed Mr. Eye regardless of how crafty the government tries to be with the use of neutral substitute pronouns.

There were only two males at the scene. Mr. Eye is going to testify about his actions and lack of involvement in the crime and point the finger directly at Mr. Sanderson. Mr. Sanderson might but probably will not testify because of his many admissions of guilt, his ownership of the murder weapon, and his nefarious connections to Rios and the Deleons. Conversely, Mr. Sanderson's able and skilled counsel will do his job well and not overlook a single opportunity during cross-examination of the government witnesses, particularly those mentioned above, to shift the blame to Mr. Eye and reinforce and pound into the minds of the jurors that it was indeed Mr. Eye who was the trigger man and hope that lightening strikes.

Aside from the fact that Mr. Eye will not be afforded his right of confrontation against Mr. Sanderson, if these so-called neutral pronouns are substituted for Eye's name and the jury hears the hearsay and Sanderson does not testify as expected then Mr. Eye himself may well be precluded from presenting his own defense testimony for fear of it being rejected by the jury based on their conclusions (ones probably already reached anyway by that point) that the "he/him" pronouns were clearly references to Eye. This of course may inject a significant chilling affect on defendant's constitutional right and ability to present his

defense.

WHEREFORE, defendant moves the Court to grant him a severance from his co-defendant for the reasons stated and further to afford him the opportunity to supplement his pleading with an evidentiary hearing should the Court have any reservation about the wisdom of a severance.

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 March 16, 2006.

/s/
JOHN R. OSGOOD