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 FOR AN ORDER DIRECTING THE UNITED STATES TO DISCLOSE TO DEFENDANT EYE THE TRANSCRIPTS OF SELECT WTINESSES WHO DEFENDANT BELIEVES TESTIFIED BEFORE THE GRAND JURY IN THIS CASE WITH SUGGESTIONS IN SUPPORT

COMES NOW defendant and hereby moves the Court for an order directing the government to disclose to defendant Eye grand jury transcripts of below listed government witnesses in further aid and support of his motion to sever that was previously placed on file and to allow him to effectively make a non-certification argument to the Justice Department. As grounds, defendant states:

1. First, and significantly, defendant does not seek the minutes of the grand jury, any voting records, admonitions, statements legal instructions, minutes or other items that are particularly subject to the strongest rules of secrecy. Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979)(any request should be tailored and narrow in scope).

2. Defendant does request disclosure by Court Order of the testimony of the following witnesses:

a. Regina Rios a.k.a Gina Rios
b. Vincent Deleon
c. Vanessa Deleon a.k.a Nessa Deleon
d. Christina Deleon
e. Stephanie Sandstrom
f. Larry Stanley
g. Christina Stanley

3. Defendant knows for certain that Gina Rios testified and that it is probable that several of the other listed persons did also.

4. Defendant seeks these transcripts for two distinct reasons. **First**, defendant believes the transcripts will assist in a fair evaluation of his pending motion to obtain a severance of parties. **Second**, defendant believes a review of the transcripts is essential to assist counsel in making a Sixth Amendment constitutionally effective presentation to the U.S. Justice Department during the scheduled April 24, 2006 presentation to determine capital certification issues.

SEVERANCE ISSUES:

5. Defendant's motion for severance is based on a claim of antagonistic defenses and insurmountable Bruton[1] problems. Defendant has alleged in his motion to sever certain facts to support his contention of antagonistic defenses. The testimony of Ms. Rios bears directly and critically on that issue and will directly support defendant's assertions. The testimony of the other named parties will further corroborate this assertion.

6. Defendant recognizes that the establish rule in this Circuit is that grand jury transcripts are generally not available before a witness has testified at trial. United States v. Bruton, 647 F.2d 818 (8th Cir. 1981); United States v. Pelton, 578 F.2d 701 (8th Cir. 1972). Also, the rule generally covers witnesses called by the defense at a suppression hearing. Bruton, id.

7. Before grand jury materials may be disclosed, defendant must make "a strong showing of particularized need." Untied States v. Sells Engineering, 463 U.S. 418 (1982). A party seeking disclosure of transcripts under Rule 6(e) must show that the material sought is needed to avoid a

[1] Bruton v. United States, 391 U.S. 123 (1968) (confrontation issues).

possible injustice in another judicial proceeding and that the need for disclosure is greater than the need for continued secrecy and that the request is structured to cover only material needed. Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979). The decision to disclose is left to the sound discretion of the district court. United States v. Wilkinson, 124 F.3d 971 (8th Cir. 1997); In Re Grand Jury Subpoenas Duces, 904 F.2d 466 (8th Cir. 1990).

8. Defendant submits that the need for continued secrecy is limited at this point. Both defendants are in custody and are the only alleged suspects. No warrants are outstanding for other parties and no other individuals have been named in the indictment. The matter is set for trial. The identifies of the key witness in the case and their statements, names, addresses and general identifying information is known to defendant. Security concerns are therefore not a realistic factor nor is the need to keep the matter secret while others are sought out to charge a factor.

9. Conversely, defendant needs the transcripts, particularly

that of Rios, to focus on important and specific details of the alleged offense that go directly to the issue of antagonistic defenses e.g., who she now says shot the victim, how many shots were fired, in what direction they were fired, in what sequence, what was said and by whom, where the parties were at before the shooting, where they went after the shooting and so on. It should be noted that Ms. Rios gave a disturbingly different account in video taped statements and written reports of interview in that she said all these details were learned through admissions of the defendants after the crime when in fact she now contends (learned through private investigation and some supposition) that she was an on-the-scene participate in the murder who was likely immunized.

CAPITAL CERTIFICATION ISSUE:

10. Defendants are scheduled to make a presentation to the U.S. Department of Justice on April 24, 2006 by video conference on the issue of capital case certification.

11. It is the duty of the defense attorney to present the best possible mitigation case for his client at a death penalty hearing and simply going through the motions after a

particularly difficult case on the merits and allowing a defendant to receive a sentence of death is ineffective assistance of counsel. Wiggins v. Smith, 539 U.S. 510 (2003). To worry about these issues at the end of the case and half heartedly address questions of aggravation and mitigation is, to quote the old euphemism, "a day late and a dollar short." See Wiggins, id.

12. As argued in the first portion of this motion, who did what and when and under what circumstances it a critical factor for sentencing in the event of a conviction. In Atkins v. Virgina, 536 U.S. 304 (2002) the Supreme Court reminded lower courts again quoting from a prior case that:

> For purposes of imposing the death penalty, . . . criminal culpability must be limited to [a party's] . . . participation in the robbery, and [a defendant's] . . . punishment must be tailored to his personal responsibility and moral guilt. Putting [a defendant] . . . to death to avenge two killings that he did not commit and had no intention of committing or causing does not measurably contribute to the retributive end of ensuring that the criminal gets his just deserts. This is the judgment of most of the legislatures that have recently addressed the matter, and we have no reason to disagree with that judgment for purposes of construing and applying the Eighth Amendment.

13. Defendant Eye is presumed not guilty and will vigorously defend this case as is apparent from the facts set out in his motion to sever. Nevertheless, Counsel has a Sixth Amendment obligation to Mr. Eye to exhaust every possible defense and defense position, including the ugly possibility that the client's defense might be rejected by the jury and the client might then have to confront sentencing issues. The possibility of death is the ultimate sentence by law that can be imposed. To bury one's head in the sand as a defense attorney under the strong assumption that a good defense will result in acquittal is naive at the least and more probably ineffective. It is counsel's duty to explore all options and possible outcomes.

14. It goes without saying that the best way to avoid the death penalty is to convince the certifying authority not to certify in the first instance. To do this, counsel must be afforded the opportunity to present reasonable and relevant mitigation evidence to the Justice Department Officials. The duty does not end here, however. An

equally important duty is to address possible aggravator factors that the Justice Department might believe tip the scales against defendant. The testimony of Rios before the grand jury, in particular, goes to the heart of this matter. To effectively carry out his Sixth Amendment duties and to make a meaningful presentation to the Justice Department, it is essential that counsel be afforded the opportunity to review these transcripts and in particular the Rios transcript.

WHEREFORE, Defendant pray for the following relief by way of court order: 1) An Order disclosing the grand jury transcripts of the above named witnesses based on the aforesaid argument; 2) alternatively, a grand jury transcript of Rios based on the aforesaid arguments; or 3) alternatively for the Court to review these transcripts in camera for a further determination as to the merits of this motion and the relevance to the severance request.

Respectfully submitted,

/s/
John R. Osgood
Attorney at Law, #23896
Commercial Fed Bnk- Suite 305
740 NW Blue Parkway

Lee's Summit, MO 64086

Office Phone: (816) 525-8200
Fax: 525-7580

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 17, 2006.

/s/
JOHN R. OSGOOD