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 TO DISMISS COUNT NINE OF THE INDICTMENT ON GROUNDS OF IMPROPER JOINDER WITH SUGGESTIONS IN SUPPORT

Comes Now defendant Eye and moves the Court to dismiss Count Nine of the indictment. As grounds therefore, defendant states:

Defendant is charged jointly with Steven Sandstrom. The indictment generally alleges that the two deprived a third party victim of his civil rights by shooting and killing him because of his race.

Defendant Eye has moved to dismiss Counts One through Eight based on various legal arguments and has raised the issue of misjoinder of parties in other motions. This motion is directed to the possibility that all other motions might be denied and defendant is forced to trial with his co-defendant Sandstrom.

Count Nine of the indictment alleges that on July 31, 2005, some four months after the alleged acts charged in Counts One through Eight, that Sandstrom threaten someone in connection with some other federal offense. It does not state that it was one of the offenses charged in Counts One through Eight nor does it plead any facts that would allow for joinder of parties or offenses in this case insofar as defendant Eye is concerned. See

Rule 8, Federal Rules of Criminal Procedure. Joinder of offenses is proper if the conduct is based on common transaction acts. Joinder of parties is proper, again, if based on participation in a common scheme. Assuming for the sake of argument that defendants are properly joined as defendants, there is nothing pled in count nine to indicate that it was part of any common scheme or transaction even insofar as Sandstrom is concerned, much less Eye. The Count is a misjoinder of an offense as to Sandstrom and a misjoinder of an offense and a party as to Eye.

From the bare bones nature of the charge it might well be that the grand jury has included this count because Mr. Sandstrom saw fit to threaten some witness in connection with any one of his many other numerous nefarious activities (car thefts, drug dealings, etc.) documented in his various confessions, which did not involve Mr. Eye in an way whatsoever.

Joinder law is not quite as simple clear cut to comprehend as one might think as is apparent from the admonition to the majority from the dissenters in the en banc decision in United States v. Grey Bear, 863 F.2d 572 (8th Cir. 1988:

> Thus, the opposing statement reasons that proper joinder under Fed.R.Crim.P. 8(b) exists as long as a defendant participates in one act of a logically related series of transactions, without the necessity of a common scheme connecting the series. Such reasoning renders Fed.R.Crim.P. 8(b) meaningless and causes individual, unrelated defendants to face a joint trial of isolated conduct as long as the overall substantive counts are similar or logically related. This theory of joinder of

> 8(b) has long been rejected. The requirement of a common scheme and commonality of proof connecting all of the defendants has long been the sine qua non of proper joinder of different defendants under 8(b). It is unfortunate that a gross miscarriage of justice has resulted in a mass trial, because five members of this court misapply established principles of joinder under 8(b) in order to avoid a new trial. The convenience of the government and the court may be served but the denial of a fair trial to the defendants is the exchange.

Little more needs to be said on this argument because here we are not even told what the common scheme might be and how it is connected to Count Nine. Indeed, the grand jury has not seen fit to tell Mr. Eye how he is connected to Count Nine, if he is indeed connected at all. This Court may not speculate on this issue and must review this indictment for its sufficiency looking to the four corners of the indictment. Quoting from a district court case dismissing an indictment, the Eighth Circuit in United States v. ITT Blackburn Co., Div. of ITT, 824 F.2d 628 (8th Cir. 1987) made this abundantly clear when it held the failure to plead critical information must result in dismissal:

> such information is not readily apparent from the record before this court nor is it to be found within the four corners of the indictment. Accordingly, the indictment must be dismissed.

Count Nine is improperly joined in this case and must be dismissed.

WHEREFORE, defendant moves the Court to dismiss Count Nine

of the indictment or alternatively, sever him as a co-defendant on this ground standing alone.

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 and counsel for co-defendant Sandstrom through use of the Electronic Court Document Filing System on March 17, 2006.

/s/
JOHN R. OSGOOD