

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

<b>UNITED STATES OF AMERICA</b>	)
	)
vs.	) <b>No. 08 CR 846</b>
	) <b>Honorable Joan H. Lefkow</b>
<b>JON BURGE</b>	)

**DEFENDANT’S BENCH BRIEF CONCERNING  
CROSS-EXAMINATION OF ANTHONY HOLMES**

The government has objected to Defendant Jon Burge’s cross-examination of Anthony Holmes about his prior gang activity. In addition, the government objects to cross-examination of Holmes about the content of his court-reported confessions. These lines of cross-examination are permissible under the circumstances of this case.

I.

A party may explore issues under Rule 401 of the Federal Rules of Evidence when the opposing party “opens the door” to the introduction of evidence. This doctrine is an exception to the prohibition regarding the details of a prior conviction offered under Rule 609(b). As summarized in *United States v. Douglas*, 408 F.3d 922, 929 (7<sup>th</sup> Cir. 2005):

When a defendant “opens the door,” however, by offering testimony that explains away an earlier conviction or offers testimony inconsistent with the facts underlying an earlier conviction, the government may inquire into the details of the conviction. *Id.* We have cautioned that an open door is not a “license to dwell on the details of the prior conviction and shift the focus of the current trial to the defendant’s prior bad acts.” *Id.*

Here, the government offered Holmes’ prior murder conviction during his direct examination. Holmes tried to explain it away by saying that he was abused into making his confession to the murder. In addition, Holmes gave testimony to the effect that he

would have signed anything because of the abuse. Holmes did not admit making statements to an assistant state's attorney in the presence of a court-reporter. See Exhibits 1 and 2, which will be tendered to the Court.

That Holmes gave court-reported statements in question and answer format rebuts his portrayal of the events on the morning of his arrest. Holmes' contention that he just signed documents that were put to him is contradicted by his coherent answers in response to questions posed by an assistant state's attorney. Holmes denies giving the confessions. (He gave two confessions that morning.) As with any other impeachment situation, the defense should be permitted to ask if Holmes gave certain answers in response to questions. This evidence is not offered as "bad character" evidence, but rather rebuts Holmes' claim that he did not make statements and merely signed documents. (Defendant does not object to a limiting instruction, limiting the evidence to impeachment.)

This evidence is also relevant under Rule 401. A party is entitled to provide the jury with a complete picture of critical occurrences. Here, the government has offered testimony about its theory. Defendant should be allowed to complete the story with evidence supporting his defense. Holmes testified that he had been abused to the point where he did not know where he was, passed out and thought he had died. That Holmes answered a prosecutor's questions in the presence of a court-reporter absent complaining about abuse are facts rebutting Holmes' version of the events on the morning of his arrest. If Holmes was so out of it, then why is he giving detailed court-reported statements within hours of being brought to Area 2? Holmes' court-reported statements are intrinsic to the events on the morning in question. Precluding the defense from

exploring this area on cross-examination impedes its presentation of a defense and exercise of the right to confrontation.

II.

On another topic, evidence of Holmes' gang activity is admissible. In *United States v. McAnderson*, 914 F.2d 934 (7<sup>th</sup> Cir. 1990), the defendants complained about the admission of other crimes evidence in the form of prior gang-related drug activity. The Seventh Circuit held that the defendants had opened the door to this argument:

The evidence was not offered to demonstrate the defendants' tendency to commit acts of terrorism or to stash illegal firearms. Instead, the prosecution submitted this evidence to rebut the statements made by the defense in opening argument, and pursued throughout trial, that the El Rukns were a social and religious organization similar to many Catholic, Jewish, Protestant and Muslim groups. Counsel for Jeff Fort compared the El Rukns to the Knights of Columbus. The door was effectively opened for a great deal of rebuttal evidence after this line of defense was established.

*Id.* at 946.

During Holmes' direct examination, the government elicited that Holmes' nickname ("Satan") was coined when he was two years old by his brother. Holmes' also testified that he was "wild" as a youth. What does that mean? The government also brought out that Holmes was a gang member.

Under the Sixth Amendment, the defendant must be given latitude to probe these assertions on cross-examination. Cf. *Alford v. United States*, 282 U.S. 687 (1931) ("Cross-examination of a witness is a matter of right ... Its permissible purposes, among others, are that the witness may be identified with his community so that independent testimony may be sought and offered of his reputation for veracity in his own neighborhood."). Further, the jury should not be left to speculate that Holmes was simply

a misguided youth or a truant. In short, Holmes' direct testimony painted an inaccurate impression of him. As in *McAnderson*, the defense should be permitted to establish the true nature of Satan's "wild" youth.

Respectfully submitted,

/s/ Marc W. Martin

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**CERTIFICATE OF SERVICE**

Defendant Jon Burge, by counsel, states that he filed the foregoing document of the CM/ECF system of the Northern District of Illinois on this 27<sup>th</sup> day of May 2010, constituting service of the same.

Respectfully submitted,

/s/ Marc W. Martin\_\_\_\_\_

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