

**United States District Court, Northern District of Illinois**

<b>Name of Assigned Judge or Magistrate Judge</b>	Joan H. Lefkow	<b>Sitting Judge if Other than Assigned Judge</b>	
<b>CASE NUMBER</b>	08 CR 846	<b>DATE</b>	5/12/2010
<b>CASE TITLE</b>	USA vs. Burge		

**DOCKET ENTRY TEXT**

Defendant's renewed motion to dismiss for pre-indictment delay and to admit the prior testimony of Charles Grunhard [191] is denied.

■ [ For further details see text below.]

Docketing to mail notices.

**STATEMENT**

Burge originally filed a motion to dismiss for pre-indictment delay on May 26, 2009. *See* Dkt. No. 77. This court denied the motion. *See* Oct. 27, 2009 Op. & Order (Dkt. No. 138). On April 23, 2010, Burge filed a supplement to his motion to dismiss citing two additional cases, *People v. James Andrews*<sup>1</sup> and *People v. Gregory Banks and David Bates*,<sup>2</sup> both of which arose from events occurring in 1983. The court construes this supplement as a renewed motion to dismiss and presumes that the government intends to introduce evidence in its case-in-chief that Andrews and Banks were physically abused or tortured with Burge's participation or knowledge. As an alternative to dismissal, Burge offers notice of his intent to offer the testimony of Charles Grunhard, one of the detectives whom Banks alleged physically abused him during his interrogation who is now deceased, under Federal Rule of Evidence 807.

As this court explained in its October 27, 2009 ruling:

While "the applicable statute of limitations is the primary guarantee against bringing overly stale criminal charges[,] . . . the due process clause of the Fifth Amendment would require dismissal of the indictment if it were shown at trial that the pre-indictment delay in this case caused substantial prejudice to [the defendant's] right to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused." *United States v. Marion*, 404 U.S. 307, 322-24, 92 S. Ct. 455, 30 L. Ed. 2d 468 (1971) (citations omitted) (internal quotation marks omitted); *accord United States v. Sowa*, 34 F.3d 447, 450 (7th Cir. 1994) ("To establish that a pre-indictment delay violated due process, [the defendant] must prove that the delay caused actual and substantial prejudice to his fair trial rights, and there must be a showing that the government delayed indictment to gain tactical advantage." (citations omitted)). "[A]llegations of actual and substantial prejudice [must] be specific, concrete, and supported by evidence." *Sowa*, 34 F.3d at 450 (citations omitted) (internal quotation marks

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omitted). It is insufficient for the defendant to “allege that a particular witness is no longer available and that the witness’s testimony would have helped the defense.” *United States v. Doerr*, 886 F.2d 944, 964 (7th Cir. 1989) (citations omitted) (internal quotation marks omitted). The defendant must instead convince the court that the witness would have testified, that the testimony would have withstood cross-examination, and that the jury would have found the witness credible. *Id.* Likewise, where the defendant complains that certain records have become unavailable due to pre-indictment delay, he must show “whose records would have been subpoenaed, what those records are likely to have shown, and how the records would have been helpful to the defense.” *United States v. Canoy*, 38 F.3d 893, 902-03 (7th Cir. 1994).

*Id.* at 14. Burge complains that the Chicago Police Department’s time and attendance records, Cook County jail records and paramedic records for these cases are either unavailable or illegible; that the investigations of the Office of Professional Standards’ (“OPS”) in these cases are incomplete and unclear; that Grunhard is deceased and thus unable to refute Banks’ testimony; that Banks’ memory is deficient; and that Banks and Bates have convictions which are too old to be the subject of impeachment at trial. Dkt 191 at 3-5. Burge has failed to establish that the absence of any documentary evidence has prejudiced him, however, because he has not shown what it would have established and how it would have helped his case. With regard to Grunhard, Burge has failed to show that he would have testified and that his testimony would have withstood cross-examination and been found credible. Additionally, Burge is not necessarily foreclosed from impeaching government witnesses through convictions more than ten years old because, under Rule 609(b), the court has discretion to admit such convictions if it determines that the probative effect outweighs the danger of unfair prejudice. Accordingly, Burge has failed to demonstrate prejudice.

In addition to failing to show that he has been prejudiced, Burge has not and cannot show that the government delayed in seeking an indictment against him to gain a tactical advantage in this case. As the court determined in its previous opinion, “[t]he length of [the government’s] investigation is not suspect given the complex history of the allegations of torture and physical abuse at issue – a history which has spanned several decades, involved numerous civil rights cases and investigations, and generated copious amounts of materials.” *Id.* at 15. Any negative effects arising from the unavailability or unreliability of the evidence due to the passage of time between the interrogations at issue and the return of the indictment – such as Banks’ allegedly deficient memory, the incomplete OPS investigations, and the illegible or unavailable records – adhere equally to both parties. Moreover, much of the evidence at issue was unavailable prior to the time Burge is alleged to have committed the conduct with which he is charged: perjury and obstruction of justice in 2003. For instance, as the government notes, the police department’s time and attendance records were destroyed in 1990 and Grunhard died prior to 1995. Accordingly, Burge has failed to show that the government purposefully delayed bringing the indictment in order gain a tactical advantage in the prosecution. His renewed motion to dismiss must therefore be denied.

Burge cursorily makes the alternative argument that the court should permit him to introduce Grunhard’s testimony at the hearing on Banks’s motion to suppress and at the police board hearing under Rule 807 because, unlike detectives John Yucaitis and Patrick O’Hara whose testimony the court has excluded, *see* Dkt. Nos. 156 & 187, detective Grunhard did not testify at a civil proceeding in which he was a defendant, nor was his job on the line at the police board hearing. In other words, Burge appears to argue that Grunhard had less of a motivation to lie than Yucaitis and O’Hara. At the outset, the court need not consider this argument because the Seventh Circuit “has repeatedly made clear that perfunctory and undeveloped arguments that are unsupported by pertinent authority, are waived (even where those arguments raise constitutional issues).” *United States v. Berkowitz*, 927 F.2d 1376, 1384 (7th Cir. 1991). But even if

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the court were to consider the argument on its merits, it would be unpersuasive.

This court previously explained in addressing Burge's motion to admit the testimony of detectives Yucaitis and O'Hara that trustworthiness is the primary criterion in dispute. Dkt. No. 156 at 3.

In determining whether a statement is sufficiently reliable for purposes of [the residual exception], a court should examine, among other factors: (1) the probable motivation of the declarant in making the statement; (2) the circumstances under which it was made; and (3) the knowledge and qualifications of the declarant. [Other relevant factors may include] (1) the character of the declarant for truthfulness and honesty and the availability of evidence on the issue; (2) whether the testimony was given voluntarily, under oath, subject to cross examination and a penalty for perjury; (3) the extent to which the witness' testimony reflects his personal knowledge; (4) whether the witness ever recanted his testimony; and (5) whether the declarant's statement was insufficiently corroborated.

*United States v. Hall*, 165 F.3d 1095, 1110-11 (7th Cir. 1999) (citations omitted) (internal quotation marks omitted). As were Yucaitis and O'Hara, Grunhard was also strongly motivated to deny that he had tortured or abused Banks because admitting that he had done so at the hearing on Bank's motion to suppress would have undermined the prosecution of Banks, who was charged with the murders of two individuals. Such an admission in either Banks's criminal trial or in the police board proceedings would have also increased Grunhard's and his colleagues' risk of being disciplined or becoming the object of civil or criminal proceedings. Accordingly, Burge's attempt to distinguish Grunhard's motivation from that of O'Hara and Yucaitis is unpersuasive. In addition, having reviewed the cases and documents submitted in support of Burge's motion, the court is aware (1) that the appellate court reversed Banks's conviction on the basis that his motion to suppress should have been granted, *see supra* at n. 2; (2) that OPS sustained charges against Grunhard for kicking Banks while he lay handcuffed, failing to report the use of excessive force and giving a false report to OPS in 1984, *see* Dkt. 191, Ex. 1 at 16; and (3) that the office of the special prosecutor concluded that although sufficient evidence existed that police officers beat and tortured Banks and Bates, when the substantial impeachment evidence and other deficiencies were considered along with this evidence, a reasonable trier of fact could not find that the criminal charges were proven beyond a reasonable doubt. *Id.* at 29. Thus, the conclusions of the Illinois Appellate Court, OPS or the special prosecutor's office do not support a finding that Grunhard's prior testimony is trustworthy. Lastly, as the government points out, Burge has failed to show that Grunhard's testimony satisfies any of the other factors relevant to the trustworthiness analysis. Accordingly, Burge's motion to admit Grunhard's testimony under Rule 807 is denied.

1. James Andrews and David Fauntleroy were co-defendants. Both were charged with the murder of Keith Lewis on March 30, 1983 and the unrelated murder of Floyd Jenkins. *See People v. Fauntleroy*, 586 N.E.2d 292, 299, 224 Ill. App. 3d 140 (Ill. App. Ct. 1991). Andrews was convicted of the murders of Lewis and Jenkins. *Id.* Andrews confessed to the murder of Lewis but later filed an unsuccessful motion to suppress on the basis that it was coerced. *United States ex rel. Andrews v. Gilmore*, No. 97 C 3235, 1998 U.S. Dist. LEXIS 7104, at \*6-7 (N.D. Ill. Apr. 21, 1998). Burge asserts that Andrews testified that detectives Madigan and McSweeney interrogated him and that Burge's involvement is unknown. Dkt. 191 at 2.

2. Gregory Banks and David Bates were co-defendants charged with the murder and armed robbery of Leon Barkan and Jeltro Givens on October 28, 1983. *People v. Banks*, 549 N.E.2d

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766, 192 Ill. App. 3d 986 (Ill. App. Ct. 1989). Banks was convicted of the charges related to Barkan but acquitted as to Givens. *Id.* at 987. Prior to trial, Banks filed a motion to suppress on the basis that he had been abused and tortured by several Chicago police officers, including detective Charles Grunhard. The trial court denied Banks's motion. The appellate court reversed on appeal and remanded the case for a new trial, ruling that because "the State failed to show by clear and convincing evidence that the confession was not the product of coercion, defendant's confession should have been suppressed as having been involuntarily given." *Id.* at 770.