

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

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

**DEFENDANT’S MOTION *IN LIMINE*
TO PRECLUDE INADMISSIBLE REBUTTAL EVIDENCE**

Defendant JON BURGE, by his attorneys, pursuant to Rule 403-405 of the Federal Rules of Evidence, respectfully moves this Honorable Court to enter an order precluding the government from introducing inadmissible rebuttal evidence. In support thereof, the following is offered:

1. At the conclusion of Jon Burge’s testimony on Friday, June 18, 2010, the Court precluded cross-examination about whether Burge had ever pointed a weapon at Chicago Police Department Detective Frank Laverty (because Laverty had come forward with evidence about street file practices).

2. Minutes before the commencement of testimony on Monday, June 21, 2010 the government filed a motion to reconsider. The government argued that the evidence was admissible under Rule 404(a)(1).¹ The Court found that the government had cast the evidence in a different light, and that Burge could be cross-examined about whether he had followed unsafe gun practices by pointing a gun at Laverty.

¹ The timing of the government’s filing, of course, precluded the defense from researching the government’s motion.

3. On cross-examination, Burge denied the incident. The government now proposes to call Doris Byrd to rebut Burge's denial. For the reasons stated below, Byrd's putative rebuttal testimony is inadmissible.

4. The evidentiary provision under which the government successfully secured admission of questions concerning the alleged gun pointing incident is Rule 404(a)(1), which provides:

(a) Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of accused - In a criminal case, evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404 (a)(2), evidence of the same trait of character of the accused offered by the prosecution.

5. Rule 404(a)(1) does not answer the question of *how* pertinent character evidence may be proved, *e.g.*, cross-examination only, or with extrinsic evidence?² Rule 405 addresses that issue:

(a) Reputation or opinion.

In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(b) Specific instances of conduct.

In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.

² Burge does not abandon his argument that the gun-pointing evidence is not "character" evidence in the first place.

6. The advisory committee notes to Rule 405 explain:

The rule deals only with allowable methods of proving character, not with the admissibility of character evidence, which is covered in Rule 404.

Of the three methods of proving character provided by the rule, evidence of specific instances of conduct is the most convincing. At the same time it possesses the greatest capacity to arouse prejudice, to confuse, to surprise, and to consume time. *Consequently the rule confines the use of evidence of this kind to cases in which character is, in the strict sense, in issue and hence deserving of a searching inquiry.* When character is used circumstantially and hence occupies a lesser status in the case, proof may be only by reputation and opinion. These latter methods are also available when character is in issue. This treatment is, with respect to specific instances of conduct and reputation, conventional contemporary common law doctrine. McCormick § 153.

* * *

The express allowance of inquiry into specific instances of conduct on cross-examination in subdivision (a) and the express allowance of it as part of a case in chief when character is actually in issue in subdivision (b) contemplate that testimony of specific instances is not generally permissible on the direct examination of an ordinary opinion witness to character. Similarly as to witnesses to the character of witnesses under Rule 608(b). Opinion testimony on direct in these situations ought in general to correspond to reputation testimony as now given, i.e., be confined to the nature and extent of observation and acquaintance upon which the opinion is based. See Rule 701.

Fed.R.Evid. 405, Notes of Advisory Committee (emphasis added).

7. Rule 405 regulates extrinsic evidence of specific acts to instances in which the character trait “is an essential element of a charge, claim, or defense.” Fed.R.Evid. 405(b). What does this mean? In *United States v. Smith*, 230 F.3d 300, 307-08 (7th Cir. 2000), the court ruled that evidence of a victim’s violent character (in the form of misdemeanor battery convictions) was not an essential element of a self-defense defense. The court ruled that the district court had properly excluded the convictions. In a civil rights police shooting case, the Seventh Circuit held that the victim’s prior articulations

of a death wish was not an element of a defense, so as to permit extrinsic evidence regarding the victim's desire to commit "suicide by police." *Palmquist v. Selvik*, 111 F.3d 1332, 1341 (7th Cir. 1997).³

8. Pointing a gun at a detective is not an essential element of the charge. The offenses here raise issues of whether the defendant corruptly intended to obstruct justice in the *Hobley* lawsuit by giving materially false answers to interrogatory questions under oath. Nothing in the essential elements of 18 U.S.C. §§ 1512(c)(1) or 1621(1) relate to "gun practices." The same can be said of the "gun practices" evidence *vis-à-vis* the defense. The defendant denied that he committed the charged offenses. In so doing, the defendant denied that he abused detainees at Area 2, or witnessed the same. Whether the defendant allegedly once pointed a gun at a detective is not an element of either the charge or the defense.

9. We understand the Court's reconsideration ruling allowing the government to inquire into the alleged Lavery incident on cross-examination. But under the rules of evidence the inquiry must stop there. Clearly, the government is precluded from attempting to prove this alleged specific act with rebuttal evidence in the form of Doris Byrd's testimony.⁴

³ In this case, the government successfully moved pretrial to preclude the defense from admitting extrinsic evidence that other Area 2 officers had not generally witnessed torture (as support for the defense that Burge's interrogatory answers were truthful). If that type of evidence is not relevant to the charge or the defense, then it is difficult to see how Byrd's putative rebuttal testimony would fall in a different category.

⁴ The rule that the examiner must accept the witness' answer about a specific act (and not attempt to prove the act with extrinsic evidence) also applies in the context of questions relating to credibility under Rule 608(b) of the Federal Rules of Evidence. See, e.g., *United States v. Robinson*, 8 F.3d 398, 412 n. 20 (7th Cir. 1993).

Respectfully submitted,

/s Marc W. Martin

RICHARD BEUKE
53 W. Jackson Blvd., Suite 1410
Chicago, IL 60604
(312) 427-3050

WILLIAM GAMBONEY, JR.
216 S. Marion St.
Oak Park, IL 60302
(708) 445-1994

MARC W. MARTIN
MARC MARTIN, LTD.
53 W. Jackson Blvd., Suite 1420
Chicago, IL 60604
(312) 408-1111
Attorneys for Defendant Jon Burge

CERTIFICATE OF SERVICE

MARC W. MARTIN, an attorney for the Defendant Jon Burge, hereby certifies that I caused filing of the foregoing motion this 6th day of June 2010, on the CM/ECF system for the Northern District of Illinois, constituting service of the same.

Respectfully submitted,

/s Marc W. Martin

RICHARD BEUKE
53 W. Jackson Blvd., Suite 1410
Chicago, IL 60604
(312) 427-3050

WILLIAM GAMBONEY, JR.
216 S. Marion St.
Oak Park, IL 60302
(708) 445-1994

MARC W. MARTIN
MARC MARTIN, LTD.
53 W. Jackson Blvd., Suite 1420
Chicago, IL 60604
(312) 408-1111
Attorneys for Defendant Jon Burge