

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

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

**GOVERNMENT’S MOTION TO CROSS-EXAMINE DEFENDANT JON BURGE  
ABOUT A SPECIFIC INSTANCE OF CONDUCT IN ORDER TO  
REBUT PERTINENT TRAIT EVIDENCE**

On June 17, 2010, at the end of the trial day, counsel for defendant Jon Burge objected to the government’s effort to impeach defendant Jon Burge’s denial that a “code of silence” existed within the Chicago Police Department.<sup>1</sup> The Court ruled that , while probably impeaching, the information would be excluded because it was highly prejudicial for the defense and “could easily open up some collateral issues.” Tr.260-61. The Court, however, agreed to consider alternative theories of admissibility. Tr.261.

The government respectfully submits that inquiry of Burge about the incident discussed at sidebar is permissible pursuant to Rule 404(a)(1) of the Federal Rules of Evidence in order to rebut Burge’s direct testimony as to his character and traits of character for integrity and trustworthiness

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<sup>1</sup> On June 17, 2010, towards the end of day, the government challenged Burge’s testimony about his interview with Shaheed Mu’min in light of testimony by former Chicago Police Department Detective Michael McDermott. Tr.244-247. The government asked Burge whether there was anything he did with Mu’min that “a reasonable person, could have misconstrued as you [Burge] putting plastic over his face?” Tr.246. Burge responded, “I don’t believe so.” *Id.* Burge then volunteered, “[McDermott] appeared to me to be terribly distraught and under great pressure at the time he testified.” Tr.246-47. The government responded by asking Burge if “that’s because there is a big code of silence within the Chicago Police Department.” Tr.247. Burge stated, “[n]ot to my knowledge, sir.” Counsel for Burge objected when the government attempted to question Burge about a whether a particular detective had ever created a problem at Area 2. Tr.248.

as a police officer. The government believes that questions on cross-examination may be posed in such a way so as to prevent any detour into collateral issues.

## **I. BACKGROUND**

Burge is charged with obstruction of justice and perjury based on his answers to interrogatories concerning the abuse of prisoners by himself or by those under his command. On June 17, 2010, Burge took the witness stand and testified multiple times about his integrity and character as a law-abiding and trusted police officer. Burge, for example, told the jury that he had received a “department commendation” for his participation in the arrest of Anthony Holmes and the investigation of the Royal Family organization. Tr.17. Burge also testified that, in addition to this distinction, he had received “nine or ten department commendation, probably 50 or 60 honorable mentions, and numerous letters of appreciation from citizens.” *Id.* Burge explained that department commendations “come[] out over the superintendent’s signature.” *Id.* Burge denied abusing prisoners or knowing of abuse of prisoners by those under his command. *See, e.g.*, Tr.36-39 (Anthony Holmes); 47-49 (Melvin Jones); 99, 104 (Andrew Wilson); 115 (Gregory Banks); 130-132 (Shaheed Mu’min). Burge testified that, under his watch, “[a]ttorneys were always allowed access to their clients [in Area 2].” Tr. 38-39.

Burge presented himself to the jury as a police officer who followed rules, procedures, and orders. Burge, for example, described how he properly handled his service weapon. *See, e.g.*, 50-51 (Burge denied removing his service revolver and cocking it back twice in the presence of Anthony Jones or holding the gun to Jones’s head); 126 (Burge testified that, as Shaheed Mu’min was brought to his office, he “took my revolver out of the holster and locked it in the desk drawer, which was my normal practice....Ever since I’d been a detective, I would never go into an interview room or talked

with a suspect any place with an exposed firearm. If I had a firearm that was small enough, I'd put it in my pocket so he wouldn't be able to see it. In this case, in my office, I locked the weapon I was carrying in my desk.”). Burge also testified that, in keeping with what he said was “normal” procedure, he did not proceed to take a court reported statement from Andrew Wilson immediately after Wilson allegedly confessed because “[t]hat wouldn't be normal procedure, and there was no court reporter present in the building.” Tr.86.

## **II. ARGUMENT**

Rule 404(a)(1) provides in pertinent part that “[e]vidence of a person's character or trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except...“[i]n a criminal case, evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same....” Fed.R.Evid.401(a)(1). Rule 405(a), in turn, provides that, “[i]n all cases in which evidence of character or a trait of character of a person is admissible, ...inquiry [on cross-examination] is allowable into relevant specific instances of conduct.” Fed.R.Evid. 405(a).

The government seeks to inquire of Burge on cross-examination about an incident in which Burge, while a member of the Chicago Police Department, pulled out his weapon and pointed it at another officer as that officer left a room. The officer did not see the gesture but the gesture, and the word spoken by Burge at the time, was witnessed by other Chicago Police Department personnel who were in the room. The evidence of this specific instance of conduct directly rebuts Burge's testimony on direct examination about his integrity as a police officer and about his consistent conformity with rules and regulations, including those involving the appropriate use and normal procedures regarding the handling of his service weapon. *See United States v. Hill*, 40 F.3d 164, 169

(7<sup>th</sup> Cir. 1994) (specific instances of law-abidingness admissible only if law-abidingness was an essential element of the charge or defense); *United States v. Jordan*, 722 F.2d 353, 358 (7<sup>th</sup> Cir. 1983) (district court properly allowed prosecutor to question a defense witness about witness's knowledge of defendant's prior arrests because defendant had opened the door to line of questioning by putting in issue his reputation for the traits of peaceful and law-abiding citizenship).

Burge, through his testimony, presented himself as a person, who, as a police officer, followed the rules and properly supervised those under his command. Burge's actions as to the officer discussed at sidebar, however, were contrary to the manner in which Burge should have used his service revolver in that an officer is only authorized to unholster his weapon and point the weapon in situations in which he is authorized to use deadly force.<sup>2</sup> The probative value of this incident, in light of Burge's decision to present his character and traits of character to the jury in the manner that he did, outweighs the prejudicial affect on the jury about the incident due to the minimal way in which the government proposes the jury will hear about it.

In the event the Court allows the government to inquire of Burge about the incident in the minimal manner proposed, and Burge denies the incident, the government also seeks to present limited evidence about the incident, in keeping with the proposed manner in which questions would be posed to Burge on cross-examination, during its rebuttal case. *See* Fed.R.Evid. 405(b) ("In cases in which character or a trait of character of a person is an essential element of a ... *defense*, proof may also be made of specific instances of that person's conduct.") (Emphasis added). Here, Burge has chosen to defend the charges of obstruction of justice and perjury by presenting his character

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<sup>2</sup> Indeed, Burge, during direct examination, acknowledged that pointing a gun at someone who was not a threat to him was a form of abuse. Tr.168.

and traits of character for law-abidingness to the jury. The government, in turn, under Rule 405(b), is allowed to present contrary evidence.

Respectfully submitted,

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