

**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 RESPONSE TO GOVERNMENT’S
MOTION *IN LIMINE* REGARDING EVIDENCE OF RACIAL ANIMUS**

Defendant JON BURGE, by his attorneys, respectfully responds to the Government’s Motion *in Limine* Regarding Evidence of Racial Animus:

Background

The indictment alleges that the defendant committed obstruction of justice on November 12, 2003 in his alleged answers to the following two interrogatory questions propounded by plaintiff’s counsel in *Hobley v. Burge*, 03 C 7638 (N.D. Ill.):

QUESTION # 13: State whether you have ever used methods, procedures or techniques involving any form of verbal or physical coercion of suspects while in detention or during interrogation, such as deprivation of sleep, quiet, food, drink, bathroom facilities, or contact with legal counsel and/or family members; the use of verbal and/or physical threats or intimidation; physical beatings, or hangings; the use of racial slurs or profanity; the use of physical restraints, such as handcuffs; the use of photographs or polygraph testing; and the use of physical objects to inflict pain, suffering or fear, such as firearms, telephone books, typewriter covers, radiators, or machines that delivery electric shock. For each such use of verbal or physical coercion identify the detainee(s) and/or suspect(s), any other officers or individuals involved, the date of the incident, the specific conduct in which you or any other officer engaged, and whether you or any other officer was the subject of any complaint or discipline as a result of said conduct.

QUESTION # 14: State whether you were aware of any Chicago Police Officer, including but not limited to officers under your command, ever using methods, procedures or techniques involving any form of verbal or physical coercion of suspects while in detention or during interrogation, such as deprivation of sleep, quiet, food, drink, bathroom

facilities, or contact with legal counsel and/or family members; the use of verbal and/or physical threats or intimidation; physical beatings, or hangings; the use of racial slurs or profanity; the use of physical restraints, such as handcuffs; the use of photographs or polygraph testing; and the use of physical objects to inflict pain, suffering or fear, such as firearms, telephone books, typewriter covers, radiators, or machines that delivery electric shock. For each such use of verbal or physical coercion identify the detainee(s) and/or suspect(s), any other officers or individuals involved, the date of the incident, the specific conduct in which you or any other officer engaged, and whether you or any other officer was the subject of any complaint or discipline as a result of said conduct.

Indictment, Count One.¹

**Response to Categories of Evidence
In Government's Motion**

1. Victims' accounts

A. Statements Alleged to Have Been Made By the Defendant

Rule 403 vests a court with discretion to exclude relevant evidence that appeals to emotional considerations. See Fed.R.Evid. 403, Advisory Committee Comment. Here, racial slurs are a hot-button topic. Cf. *United States v. Doe*, 903 F.2d 16, 21-22 (D.C. Cir. 1990). If admitted, the evidence would appeal to the jurors' emotions and risk conviction on the basis of propensity considerations. A conviction could ensue, not because the government proved its case beyond a reasonable doubt, but because the government successfully painted the defendant as a "bad" person. See, e.g., *Michelson v. United States*, 335 U.S. 469, 476 (1948); *United States v. Wright*, 901 F.2d 68, 70 (7th Cir. 1990).

On balance, the probative value of the racial slur evidence is reduced given that the interrogatory question at issue lists so many "methods, procedures and techniques."

¹ The questions at issue in Counts Two and Three do not make express reference to alleged use of racial slurs.

Cf. *United States v. Willis*, 43 F.Supp.2d 873, 881 (N.D. Ill. 1999) (evidence of government agents' alleged racial bias excludable on Rule 403 grounds); see also *Bell v. City of Milwaukee*, 746 F.2d 1205, 1259 (7th Cir. 1984), *overruled on other grounds Russ v. Watts*, 414 F.3d 583 (7th Cir. 2005) (“derogatory references to racial or ethnic background by themselves obviously do not rise to the level of a deprivation of constitutional rights”). Indeed, the proffered evidence fits within the classic definition of unfair prejudice: “The term ‘unfair prejudice,’ as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged.” *Old Chief v. United States*, 519 U.S. 172, 180 (1997).

B. Statements Alleged To Have Been Made By Another Officer

In the “Victims’ accounts” section, the government seeks to admit testimony from an unnamed witness that an unnamed officer uttered a racial slur before placing a bag over a defendant’s head. The government’s proffer does not connect this evidence to the defendant. Alleged use of a racial slur by a person other than the defendant is inadmissible. Fed.R.Evid. 401-402; see also *United States v. Paladino*, 401 F.3d 471, 475 (7th Cir. 2005). Even if the evidence were somehow connected to the defendant’s mental state, it should be precluded on Rule 403 grounds for the reasons argued above.

2. People outside of CPD

The government wants to present evidence from witnesses who allegedly had conversations with the defendant on social occasions. The government contends that the defendant used racial slurs, told racial jokes, gave the impression that the Wilson brothers

had been beaten, and laughed at the “black box” accusations against him during these conversations.

The government’s request is less than clear. It does not identify the names of the witnesses, or provide the complete context in which the conversations supposedly arose. Accordingly, the government’s motion should be denied, or, at least deferred until trial. Cf. *United States v. Caputo*, 313 F. Supp.2d 764, 767-68 (N.D. Ill. 2004); see also *Kelly v. Boeing Petroleum Services, Inc.*, 61 F.3d 350, 357 (5th Cir. 1995) (“We agree with other circuits that have cautioned that an appellate court should carefully examine blanket pre-trial evidentiary rulings.”) (citing, *inter alia*, *Riordan v. Kempiners*, 831 F.2d 690, 697 (7th Cir. 1987)).

We nevertheless glean the following from recently-tendered 3500 material:

Over 25 years ago, the defendant dated a woman who worked as a bartender. This woman purportedly dated other men, including one of the government’s putative witnesses, who we will identify here as “the man.” The potential for animus between two men competing for the same woman is obvious, and, so too here, as the man admits that he did not get along with the defendant, and has made utterly unsubstantiated claims about him. In any event, the man claims that, in or around 1983, the defendant used racial slurs in conversations, instructed the woman to keep quiet when she urged him to describe use of a black box, and said that the high position of handcuffing rings made it uncomfortable for arrestees (described by the man as “torture”).

The government also proposes to call the woman’s sister (“the sister”), a recovering alcoholic who has long been estranged from her sister. The sister claims that she met the defendant approximately 30 years ago. During one summer (apparently in

the early 1980s), the sister allegedly socialized with the defendant and others on the defendant's boat. According to the sister, the defendant bragged about abusing suspects and getting them to confess. In addition, the sister believed the defendant to be a racist, and states that he would "always speak negatively" about African-Americans and openly use racist slurs. The sister also claims to remember a derogatory story the defendant told about an individual who died while moving furniture in the Cabrini Green housing project.

The defendant's former girlfriend testified before the grand jury, but did not corroborate the allegations made by her sister and other boyfriend.

In addition, the 3500 material includes the grand jury testimony of a woman ("the woman") who claims she had a bar-room conversation with the defendant on some unknown date in the 1980s. The woman maintains that she "got the impression" that the defendant distinguished between African-American criminals and those of other races, by referring to the former as "dogs." The woman also "got the impression" that the Wilson brothers were beaten in order to secure confessions.

The government suggests that "other acts evidence" is admissible without reference to Rule 404(b) of the Federal Rules of Evidence "if the evidence arose out of the same transaction or series of transactions as the charged offense, if it is inextricably intertwined with the evidence regarding the charged offense, or if it is necessary to complete the story of the crime on trial." Motion, p. 2. Here, the government maintains that the defendant's alleged comments are admissible without reference to Rule 404(b) because they are "circumstantial evidence supporting the charged offense." Motion, p. 4.

The latest case cited by the government is *circa* 1997. The government fails to mention that the so-called “inextricably intertwined” doctrine has fallen out of favor in the Seventh Circuit because it is “unhelpfully vague.” *United States v. Taylor*, 522 F.3d 731, 734 (7th Cir. 2008); see also *United States v. Conner*, 583 F.3d 1011, 1019 (7th Cir. 2009). Rather than resorting to a murky legal formula, the Court should determine whether the “prior crimes evidence is relevant (other than to show propensity, which may be relevant to guilt, but is impermissible as evidence),” and, if so, whether it passes muster under Rule 403. See *United States v. Edwards*, 581 F.3d 604, 608 (7th Cir. 2009).

Even if the “inextricably intertwined” or “intricately related” test[s] retain validity, the evidence offered by the man, the sister and the woman simply are not part of the charged offenses, as argued by the government. The charged offenses here are obstruction of justice and perjury, alleged to have occurred in November 2003. The events about which persons outside the CPD would testify occurred in the 1980s. Moreover, the man, the sister and the woman were not persons who were alleged victims, *i.e.*, arrestees at the Area Two police station. It strains reason to conclude that the supposed social conversations in the 1980s are “inextricably intertwined” with the false statement-based offenses alleged to have occurred in November 2003. See *United States v. Owens*, 424 F.3d 649, 656 (7th Cir. 2005) (reversing because “government got greedy and “tainted the record” with a prior offense that was not intricately related to the offense on trial). The evidence simply is not necessary to fill a conceptual void. *Id.*; *United States v. Simpson*, 479 F.3d 492, 500-01 (7th Cir. 2007) (evidence of prior drug deliveries was not admissible to fill a conceptual void where the defendant was charged with a single drug delivery to a single person); *United States v. Swan*, 250 F.3d 495, 501 (7th

Cir. 2001) (evidence of defendant's gambling not necessary to fill out story in public corruption case).

The claimed recollections of the putative witnesses are also inadmissible under Rule 404(b). Statements of the sort proffered by the government here bring to mind the Lord Chief Justice statements excluding other acts evidence in *Harrison's Trial*: "Hold, what are you doing now? Are you going to arraign his whole life? Away, away, that ought not to be; that is nothing to the matter." 12 How.St.Tr. 834 (Old Bailey 1692)." *McKinney v. Rees*, 993 F.2d 1378, 1380 (9th Cir. 1993).

In any event, the government concedes that the following four-point test applies to determine the admissibility of "other acts" evidence:

- the evidence must be directed toward establishing a matter in issue other than the defendant's propensity to commit the crime charged;
- the evidence must show that the other act is similar enough and close enough in time to be relevant to the matter in issue;
- the evidence must be sufficient to support a jury finding that the defendant committed the similar act; and
- the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice.

Motion, p. 2; see also *Owens*, 424 F.3d at 653.

The defendant is not charged with "torture." Nor is the defendant charged with a civil rights offense. He is charged with false statement-based offenses, said to have occurred in November 2003. What the defendant may or may not have said in a tavern, or while drinking on a boat one summer in the 1980s, does not establish whether the defendant had the intent to commit the charged offenses many years later.

Under the circumstances, the evidence would risk conviction on forbidden propensity grounds. A jury could be more apt to find for the government because the government has raised an alleged character flaw of the defendant. See *Michelson*, 335 U.S. at 476; see also *Owens*, 424 F.3d at 655; *United States v. Thomas*, 321 F.3d 627, 631-32 (7th Cir. 2003); *Wright*, 901 F.2d at 70; *United States v. Hudson*, 843 F.2d 1062, 1066-67 (7th Cir. 1988); *United States v. Beasley*, 809 F.2d 1273, 1279 (7th Cir. 1987).

In addition, the man, the sister and the woman do not relate stories that are similar to the charged crime. Again, the charged crimes sound in false statements made under oath. What the defendant may or may not have said in social settings many years ago plainly is not similar to the offenses charged in the indictment. See *Wright*, 901 F.2d at 70; *United States v. Gometz*, 879 F.3d 256, 260 (7th Cir. 1989); *Beasley*, 809 F.2d at 1279.

The evidence of the “people outside the CPD” also is not close in time to the charged offenses. Although the dates the defendant allegedly made bar-room or leisure-boat statements are unclear, it is apparent that they occurred as much as 20 years before the charged offenses. A difference of more than 10 years between charged offenses and “other conduct” “is at the outer edges of the requirement for Rule 404(b) that the prior crime be close enough in time to be relevant.” *United States v. Polichemi*, 219 F.3d 698, 709 (7th Cir. 2000). The temporal separation between the proffered “other acts” and the charged offenses plainly renders the “other acts” evidence” inadmissible. See, e.g., *Gometz*, 879 F.3d at 260 (three years not close in time).

The probative value of the “other acts” evidence is outweighed by its potential for unwarranted prejudice. As argued above with respect to “victims’ accounts,” the

prejudice associated with alleged bigotry cannot be gainsaid. Presentation of the proffered evidence would divert the jury's attentions from the real issues in this case, and unduly appeal to their emotions. Rule 403's balancing test provides yet another reason to deny the government's motion *in limine* to admit the testimony of "people outside the CPD." See, e.g., *Owens*, 424 F.3d at 655; *Thomas*, 321 F.3d at 632-33; *United States v. Heath*, 188 F.3d 916, 923 (7th Cir. 1999).²

The cases cited by the government are inapposite: neither addressed the admissibility of "other acts" evidence pursuant to the "inextricably intertwined" doctrine or Rule 404(b). *O'Neal v. Delo*, 44 F.3d 655 (8th Cir. 1995), was a habeas corpus case invoking the stringent review standards of the Anti-Terrorism and Effective Death Penalty Act, e.g., whether the State court unreasonably applied established Supreme Court precedent. The case did not involve application of the Federal Rules of Evidence. Rather, the defendant argued that evidence of his membership in white supremacist organizations violated his First Amendment rights. Further, although the State courts found that the evidence was relevant to motive, it was also relevant because the defendant put the matter at issue by calling fellow supremacist organization members in his defense.

In *United States v. Craft*, 484 F.3d 922 (7th Cir. 2007), the defendant challenged the sufficiency of the evidence underlying his convictions for conspiracy to injure another because of race. As opposed to contesting evidentiary issues surrounding the admission of "other acts" evidence, the defendant argued that the government failed to prove the

² The woman's "impressions" about what the defendant was saying during the supposed bar-room conversations are incompetent, irrelevant and unduly prejudicial, Fed.R.Evid. 401-403, 602, and are excludable for these reasons as well.

arson was racially-motivated. Unlike the obstruction and perjury counts here, racial animus was an essential element of the charged offenses in *Craft*.

3. Former Area 2 Employees

The government states that it intends to call former Area Two employees who have “previously testified about racial tensions at Area 2.” Motion, p. 6. Without naming the witnesses, or citing the proceeding at which they gave testimony, the government lists their “assertions,” including work-place grievances (*e.g.*, the racial composition of the “A-Team” of Area Two detectives, and the assignment of African-American detectives to inferior cases); perceptions about whether the defendant “liked” African-Americans in general or African-American detectives; alleged complaints to supervisors about the defendant; and one unnamed detective’s subjective reasons for not reporting alleged abuse. *Id.* The government goes on to say that it “does not intend to elicit this information during direct examination,” unless the defendant intends to cross-examine the witnesses “regarding their bias against the defendant or the CPD.” *Id.*

The topics identified by the government are not admissible. How perceived racial tensions *etc.* at Area Two many years ago is probative to whether the defendant committed the offenses of obstruction of perjury and obstruction of justice in 2003 is unarticulated in the government’s motion. *Cf. Dawson v. Delaware*, 503 U.S. 159 (1992) (finding defendant’s membership in white supremacist prison gang irrelevant to issues in capital sentencing). Nor does the government’s motion posit that the evidence is somehow intricately-related to the charged offenses (if that doctrine has any continued viability). A trial on perjury and obstruction of justice charges alleged to have occurred in 2003 is neither a personality contest nor some kind of discrimination suit concerning

workplace conditions in the 1970s and 1980s. Furthermore, the government, as the possible proponent of the evidence, has failed to establish how the evidence of other officers' grievances, perceptions of the defendant and explanations for their own failure to act meets the four-part test for admission of evidence under Rule 404(b). In all events, the evidence is inadmissible under Rule 403. It certainly would sidetrack the jury from the real issues in the case, and risk a mini-trial on collateral matters. See, e.g., *United States v. Pitt-Des Moines, Inc.*, 168 F.3d 976, 992 (7th Cir. 1999); *White v. United States*, 148 F.3d 787, 791 (7th Cir.1998); *United States v. Thomas*, 11 F.3d 1392, 1399 (7th Cir. 1993).

Even if the Court were inclined to consider admitting the evidence, the government's motion does not provide enough information to enable an informed pre-trial ruling. It is often difficult to issue a *limine* ruling outside the pulse of a trial, and that is the case here. The direction of any cross-examination depends on the content of the direct examination. And, as the Supreme Court has noted: "Counsel often cannot know in advance what pertinent facts may be elicited on cross-examination. For that reason it is necessarily exploratory; and the rule that the examiner must indicate the purpose of his inquiry does not, in general, apply." *Alford v. United States*, 282 U.S. 687, 692 (1931). Absent disclosure of the identity of the government witnesses and the particulars of his/her direct-examination, the defense cannot realistically articulate how it intends to conduct a particular cross-examination. Accordingly, ruling on the motion should be deferred until trial, or until the government provides more detailed information.

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

I, MARC W. MARTIN, an attorney for Defendant Jon Burge, hereby certify that on this, the 7th day of April, 2010, I filed the above-attached document on the CM/ECF system of the United States District Court for the Northern District of Illinois, which constitutes service of the same.

/s/ Marc W. Martin

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