

**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 BURGE'S
PROPOSED JURY INSTRUCTIONS**

Defendant JON BUGE, by his attorneys, pursuant to Rule 30 of the Federal Rules of Criminal Procedure, respectfully submits the following proposed jury instructions.¹

Respectfully submitted,

/s/ Marc W. Martin

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¹ The United States Court of Appeals for the Seventh Circuit has convened a Committee to update the criminal jury instructions. (One of Burge's lawyers is a member of this Committee.) The Committee has not yet published its final work. Modifications of many of standard instructions included herein draw upon or duplicate instructions prepared by a subcommittee headed by the Honorable Matthew F. Kennelly.

Members of the jury, I will now instruct you on the law that you must follow in deciding this case. I will give each of you a copy of the instructions to use in the jury room. You must follow all of my instructions about the law, even if you disagree with them. This includes the instructions I gave you before the trial, any instructions I gave you during the trial, and the instructions I am giving you now.

As jurors, you have two duties. Your first duty is to decide the facts from the evidence that you saw and heard here in court. This is your job, not my job or anyone else's job.

Your second duty is to take the law as I give it to you, apply it to the facts, and decide if the government has proved the defendant[s] guilty beyond a reasonable doubt. You must perform these duties fairly and impartially. Do not let sympathy, prejudice, fear, or public opinion influence you. In addition, do not let any person's race, color, religion, national ancestry, or gender influence you.

You must not take anything I may say or do during the trial as indicating what I think of the evidence or what I think your verdict should be.

Defendant's Instruction 1

Seventh Circuit § 1.01 (modified)

The charges against the defendant are in a document called an indictment. You will have a copy of the indictment during your deliberations.

Counts One and Three of the indictment in this case charges that the defendant corruptly obstructing, influencing, and impeding an official proceeding. Count Two charges the defendant committed perjury. The defendant has pleaded not guilty to the charges.

The indictment is simply the formal way of telling the defendant what crimes he is accused of committing. It is not evidence that the defendant is guilty. It does not even raise a suspicion of guilt.

Defendant's Instruction 2

Seventh Circuit § 2.01 (modified)

United States v. Garcia, 562 F.2d 411, 417 (7th Cir. 1977)

United States v. Smith, 419 F.3d 521, 530-31 (6th Cir. 2005)

The defendant is presumed innocent of each and every one of the charges. This presumption continues throughout the case. It is not overcome unless, from all the evidence in the case, you are convinced beyond a reasonable doubt that the defendant is guilty as charged.

The government has the burden of proving the defendant's guilt beyond a reasonable doubt. This burden of proof stays with the government throughout the case.

The defendant is never required to prove his innocence. He is not required to produce any evidence at all.

Defendant's Instruction 3

Seventh Circuit § 1.03 (modified)

You must make your decision based only on the evidence that you saw and heard here in court. Do not consider anything you may have seen or heard outside of court, including anything from the newspaper, television, radio, the Internet, or any other source.

The evidence includes only what the witnesses said when they were testifying under oath, and the exhibits that I allowed into evidence, and the stipulations that the lawyers agreed to. A stipulation is an agreement that a witness would have given certain testimony.

Nothing else is evidence. The lawyers' statements and arguments are not evidence. If what a lawyer said is different from the evidence as you remember it, the evidence is what counts. The lawyers' questions and objections likewise are not evidence.

A lawyer has a duty to object if he thinks a question is improper. If I sustained objections to questions the lawyers asked, you must not speculate on what the answers might have been.

If, during the trial, I struck testimony or exhibits from the record, or told you to disregard something, that is not evidence, and you must not consider it.

Defendant's Instruction 4

Seventh Circuit § 1.02 & 1.06 (modified)

United States v. Xiong, 262 F.3d 672, 676 (7th Cir. 2001)

Give the evidence whatever weight you believe it deserves. Use your common sense in weighing the evidence, and consider the evidence in light of your own everyday experience.

People sometimes look at one fact and conclude from it that another fact exists. This is called an inference. You are allowed to make reasonable inferences, so long as they are based on the evidence.

Defendant's Instruction 5

Seventh Circuit § 1.04 (modified)

You may have heard the terms “direct evidence” and “circumstantial evidence.” Direct evidence is evidence that, if you believe it, directly proves a fact. Circumstantial evidence is evidence that, if you believe it, indirectly proves a fact.

You are to consider both direct and circumstantial evidence. The law does not say that one is better than the other. It is up to you to decide how much weight to give to any evidence, whether direct or circumstantial.

Defendant’s Instruction 6

Seventh Circuit § 1.05 (modified)

Do not make any decisions by simply counting the number of witnesses who testified about a certain point.

What is important is how believable the witnesses were and how much weight you think their testimony deserves.

Defendant's Instruction 7

Seventh Circuit § 1.09 (modified)

See also Sixth Circuit § 1.08

Part of your job as jurors is to decide how believable each witness was, and how much weight to give each witness's testimony [, including that of the defendant]. Some factors you may consider are:

- the age of the witness;
- the intelligence of the witness;
- the witness's ability and opportunity to see, hear, or know the things the witness testified about;
- the witness's memory;
- the witness's demeanor;
- whether the witness had any bias, prejudice, or other reason to lie or slant his or her testimony;
- the believability of the witness's testimony in light of the other evidence presented; and
- inconsistent statements or conduct by the witness.

You may also consider any other factors that shed light on the believability of each witness's testimony.

Defendant's Instruction 8

Seventh Circuit § 1.03 (modified)

It is proper for an attorney to interview any witness in preparation for trial.

Defendant's Instruction 9

Seventh Circuit § 1.07 (modified)

You have heard evidence that before the trial, witnesses made statements that may be inconsistent with his testimony here in court. You have also heard evidence that before his testimony, Andrew Wilson made statements that may have been inconsistent with his testimony. You may consider an inconsistent statement made before the trial or the prior testimony only to help you decide how believable the witnesses' testimony was. If an earlier statement was made under oath, then you can also consider the earlier statement as evidence of the truth of whatever the witness said in the earlier statement.

Defendant's Instruction 10

Seventh Circuit § 3.09 (modified)

You have heard testimony from _____ who [has] [have] admitted lying under oath.

You may give [this witness'] [these witnesses'] testimony whatever weight you believe is appropriate, keeping in mind that you must consider that testimony with caution and great care.

Defendant's Instruction 11

Seventh Circuit § 3.13 (modified)

You have heard evidence that _____ has been convicted of a crime. You may consider this evidence only in deciding whether _____ testimony is truthful in whole, in part, or not at all. You may not consider this evidence for any other purpose.

Defendant's Instruction 12

Seventh Circuit § 3.11

You have heard testimony about _____ character for untruthfulness.

You may consider this evidence only in deciding the believability of _____ testimony and how much weight to give to it.

Defendant's Instruction 13

Seventh Circuit § 3.12 (modified)

You have heard testimony about the defendant's good character and character truthfulness and being a law-abiding citizen. This evidence, standing alone, may provide a reasonable doubt.

Defendant's Instruction 14

Edgington v. United States, 164 U.S. 361 (1896)

Michelson v. United States, 335 U.S. 469 (1948)

United States v. Donnelly, 179 F.2d 227, 233 (7th Cir. 1950)

But see United States v. Burke, 781 F.2d 1234, 1238-42 (7th Cir. 1985)

See also *United States v. Ross*, 77 F.3d 1525, 1538 (7th Cir. 1996) ("This Court has repeatedly held that such an instruction, while sometimes allowable, is never necessary")

United States v. Winter, 663 F.2d 1120, 1147-49 (1st Cir. 1981)

United States v. Pujana-Mena, 949 F.2d 24, 27-32 (2d Cir. 1991)

United States v. Spangler, 838 F.2d 85, 87-88 (3d Cir. 1988)

United States v. Foley, 598 F.2d 1323, 1336-37 (4th Cir. 1979)

You have heard testimony of an identification of a person. Identification testimony is an expression of the witness's belief or impression. In evaluating this testimony, you should consider the opportunity the witness had to observe the person at the time of the offense and to make a reliable identification later. You should also consider the circumstances under which the witness later made the identification. The government must prove beyond a reasonable doubt that the defendant is the person who committed the crime that is charged.

Defendant's Instruction 15

Seventh Circuit § 3.08

You have heard witnesses give opinions about matters requiring special knowledge or skill. You should judge this testimony in the same way that you judge the testimony of any other witness. The fact that such a person has given an opinion does not mean that you are required to accept it. Give the testimony whatever weight you think it deserves, considering the reasons given for the opinion, the witness' qualifications, and all of the other evidence in the case.

Defendant's Instruction 16

Seventh Circuit § 3.07

If you have taken notes during the trial, you may use them during deliberations to help you remember what happened during the trial. You should use your notes only as aids to your memory. The notes are not evidence. All of you should rely on your independent recollection of the evidence, and you should not be unduly influenced by the notes of other jurors. Notes are not entitled to any more weight than the memory or impressions of each juror.

Defendant's Instruction 17

Seventh Circuit Civil § 1.07

To sustain the charge of obstruction of justice as charged in Count One and Three of the indictment, the government must prove the following propositions:

First, the defendant obstructed, influenced or impeded an official proceeding, or attempted to do so;

Second, the defendant acted corruptly.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, as to a particular count, then you should find the that defendant guilty as to that count.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt a particular count, then you should find the defendant not guilty as to that count.

Defendant's Instruction 18

18 U.S.C. § 1512(c)

A person attempts to commit an offense if he knowingly takes a substantial step toward committing the offense, intending to commit the offense. A substantial step is an act beyond mere planning or preparation to commit the crime, but less than the last act necessary to commit the crime.

Defendant's Instruction 19

Seventh Circuit § 4.07 (modified)

The term “official proceeding” as used in Counts One and Three means a proceeding before a judge or court of the United States.

Defendant’s Instruction 20

18 U.S.C. § 1515(a)

A person acts “corruptly” if he or she acts with the purpose of wrongfully impeding the due administration of justice.

Defendant’s Instruction 21

United States v. Matthews, 505 F.3d 698 (7th Cir. 2007)

The swearing of a statement before a notary public, or the submission of the statement to opposing counsel in a federal civil rights lawsuit, do not constitute the making of a statement in an “official proceeding.” This is because a notary public or attorneys in a civil case are not judges or courts of the United States. The swearing of a statement before a notary public, or the submission of written answers to interrogatories to opposing counsel in a civil case, lack the degree of formality to be a statement in an “official proceeding.”

Defendant’s Instruction 22

Dunn v. United States, 442 U.S. 100 (1979)

See also *United States v. Aguilar*, 515 U.S. 593, 599 (1995) (obstruction statute did not reach proceedings that were ancillary to a court or grand jury proceeding)

Arthur Andersen LLP v. United States, 544 U.S. 696 (2005) (citing *Aguilar*).

Count One charges the defendant with making more than one false statement. The government is not required to prove that the defendant made every one of the false statements alleged in Count One. However, the government is required to prove that the defendant made at least one of the particular false statements alleged in Count One. To find that the government has proven this point, you must agree unanimously on which particular alleged false statement the defendant made, as well as all of the other elements of the crime charged.

Defendant's Instruction 23

See Seventh Circuit § 4.03 (modified)

United States v. Fawley, 137 F.3d 458, 470 (7th Cir. 1998)

To sustain the charge of perjury as charged in Count Two of the indictment, the government must prove the following propositions:

First, the defendant took an oath to testify truthfully before an officer, or person, in a case in which a law of the United States authorizes an oath to be administered;

Second, the defendant stated or subscribed to the sworn answer described in Count Two;

Third, the defendant did not believe the answer to be true;

Fourth, the answer related to a material matter; and

Fifth, the defendant acted willfully and contrary to the oath;

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, as to a particular count, then you should find the that defendant guilty as to that count.

If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt a particular count, then you should find the defendant not guilty as to that count.

Defendant's Instruction 24

18 U.S.C. § 1612

A statement is false only if it is literally untrue. A statement is not false merely because it is misleading or evasive.

You should consider the statement in the context of the sequence of questions asked and answers given, and the words used should be given their common and ordinary meaning unless the context clearly shows that a different meaning was mutually understood by the questioner and the witness.

If you should find that a particular question was ambiguous and that the defendant truthfully answered one reasonable interpretation of the question under the circumstances presented, then such answer would not be false. Similarly, if you should find that the question was clear, but the answer was ambiguous, and one reasonable interpretation of such answer is that the answer was truthful, then the answer would not be false.

Defendant's Instruction 25

United States v. Kosth, 257 F.3d 712, 719-20 (7th Cir. 2001)

Bronston v. United States, 409 U.S. 352, 353-58 (1973)

United States v. Vesaas, 568 F.2d 101, 104 (8th Cir. 1978)

Pattern Jury Instructions of the District Judges Association of the Fifth Circuit, Criminal Cases, Instruction 2.69 (2001)

Pattern Jury Instructions of the District Judges Association of the Eleventh Circuit, Offense Instruction No. 50 (1997)

A statement is “material” if it has a natural tendency to influence, or is capable of influencing, the decision of the decision-making body to which it was addressed.

To determine whether a statement is material requires examination of:

- what statement was made; and
- what decision was being made by the decision-making body,

Materiality and relevance do not mean the same thing. A matter is relevant if it relates to an issue. Materiality requires that the statement under consideration be reasonably likely to influence the decision-making body in making the required determination.

Defendant’s Instruction 26

Neder v. United States, 527 U.S. 1, 16 (1999)

United States v. Wells, 519 U.S. 482, 490 (1997)

Kungys v. United States, 485 U.S. 759, 767-75 (1988)

United States v. Gaudin, 515 U.S. 506, 512 (1995)

United States v. Rigas, 490 F.3d 208, 231 (2nd Cir. 2007)

United States v. Puerta, 982 F.2d 1297 (9th Cir. 1992)

If the defendant acted in good faith, then he lacked the corrupt or willful mental state required to prove the offenses charged in the indictment. The defendant acted in good faith if, at the time, he honestly believed the truthfulness of his answers to the interrogatory questions set forth in the indictment.

The defendant does not have to prove his good faith. Rather, the government must prove beyond a reasonable doubt that the defendant acted corruptly as charged in Counts One and Three, or willfully as charged in Count Two.

Defendant's Instruction 27

Seventh Circuit § 6.10 (modified)

To succeed on cause of action in a civil lawsuit, a Plaintiff must prove each of the essential elements of a claim. In this case, the indictment alleges that Madison Hobley filed a lawsuit against Jon Burge and others. To succeed on claims against Jon Burge, Plaintiff Hobley was required prove each of the following things by a preponderance of the evidence:

1. A conspiracy to use unreasonable force against Plaintiff existed;
2. Jon Burge knowingly became of a member of this conspiracy with intention to further the conspiracy; and
3. An overt act was committed by at least one member of the conspiracy in furtherance of the conspiracy.

OR

1. Chicago Police Officers used unreasonable force against Plaintiff;
2. Jon Burge knew that the officers were to use excessive force against Plaintiff;
3. Jon Burge had a realistic opportunity to do something to prevent the harm from occurring;
4. Jon Burge failed to take reasonable steps to prevent the harm from occurring;
5. Jon Burge's failure to act caused Plaintiff to suffer harm; and
6. Jon Burge acted under color of law.

If Plaintiff proved each of these things by a preponderance of the evidence, then Plaintiff would entitled to a finding of liability against Jon Burge. If Plaintiff failed to prove any one of the essential elements by a preponderance of the evidence, then Jon Burge would be entitled to a finding in his favor.

The term "preponderance of the evidence" means more probably true than not true.

Defendant's Instruction 28

Seventh Circuit Civil §§ 1.27, 7.08, 7.16 (modified)

Seventh Circuit § 5.08 (modified)

When questioning an arrested person, police are not required to supply the person with information to help him determine his self-interest in deciding whether to speak, remain silent or request an attorney.

By nature, the questioning of a suspect in a police station may involve compelling pressures that undermine the a suspect's will to resist and to compel him to speak where he would not otherwise do so. Nevertheless, in questioning a suspect in police custody, police are entitled to use reasonable investigative methods, procedures and techniques. Under the law, police have no obligation to inform a suspect that an attorney has requested to consult with the suspect. Nor are police obligated to permit family members to visit a suspect after he has been arrested. In addition, police may use handcuffs on a person for whom there is probable cause for an arrest. Use of photographs and polygraph testing are also proper interrogation methods, procedures and techniques.

In questioning a suspect, police are also allowed to deception, misinformation or trickery. Police may actively mislead the arrested person in order to obtain a confession, so long as it remains possible for the arrested person to make a rational decision about whether or not to confess or make a statement.

Defendant's Instruction 29

Moran v. Burbine, 475 U.S. 412 (1986)

Frazier v. Cupp, 394 U.S. 731 (1969)

Miranda v. Arizona, 384 U.S. 436 (1966)

Conner v. McBride, 375 F.3d 643, 653 (7th Cir. 2004)

United States v. Ceballos, 302 F.3d 679, 695 (7th Cir. 2002)

In performing his job, an officer may use force that is reasonably necessary under the circumstances.

Whether a police officer's use of force was unreasonable must be measured from the perspective of a reasonable officer facing the same circumstances. Whether use of force was unreasonable is based on what the officer knew at the time of the arrest, not based on what is later learned. Whether Defendant's intentions were good or bad is not a consideration in determining whether use of force was unreasonable.

Defendant's Instruction 30

Seventh Circuit § 7.09 (modified)

Graham v. Connor, 490 U.S. 386, 396 (1989)

Tennessee v. Garner, 471 U.S. 1, 8-9 (1985)

Deering v. Reich, 183 F.3d 645 (7th Cir. 1999)

Police may arrest a person if there is probable cause. There is probable cause for an arrest if at the moment the arrest was made, a prudent person would have believed that the person arrested had committed or was committing a crime based on what the officers knew and what reasonably trustworthy they had received.

It is not necessary that police officers have probable cause to arrest for the offense[s] for which he is prosecuted, so long as the officers had probable cause to arrest for some criminal offense.

Probable cause requires more than just a suspicion. But it does not need to be based on evidence that would be sufficient to support a conviction, or even a showing that the officer's belief was probably right. The fact that an arrested was later acquitted, had charges dismissed or was pardoned of does not by itself mean that there was no probable cause at the time of his arrest.

Defendant's Instruction 31

Seventh Circuit Civil § 7.06 (modified)

“Torture” means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.

“Severe mental pain or suffering” means:

- the prolonged mental harm caused by or resulting from the intentional infliction or threatened infliction of severe physical pain or suffering;
- the threat of imminent death; the threat that another person will imminently be subjected to death, severe physical pain or suffering, or
- the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.

Defendant’s Instruction 32

18 U.S.C. § 2340

[In deciding your verdict, you should not consider the possible punishment for the defendant who is on trial. If you decide that the government has proved the defendant guilty beyond a reasonable doubt, then it will be my job to decide on the appropriate punishment.]

Defendant's Instruction 33

Defendant does not believe this instruction is necessary, but proposes the above language as an alternative to Government Instruction No. 30.

Each count of the indictment charges the defendant with having committed a separate offense.

Each count and the evidence relating to it should be considered separately, and a separate verdict should be returned as to each count. Your verdict of guilty or not guilty of an offense charged in one count should not control your decision as to any other count.

Defendant's Instruction 34

Seventh Circuit § 7.03

Once you are all in the jury room, the first thing you should do is choose a foreperson. The foreperson should see to it that your discussions are carried on in an organized way and that everyone has a fair chance to be heard.

Once you start deliberating, do not communicate about the case or your deliberations with anyone except other members of your jury. You may discuss the case only when all jurors are present.

If you need to communicate with me while you are deliberating, send a note through the court security officer. The note should be signed by the foreperson or by one or more members of the jury. To have a complete record of this trial, it is important that you not communicate with me except by a written note. I may have to talk to the lawyers about your message, so it may take me some time to get back to you. You should continue your deliberations while you wait for my answer.

If you send me a message, do not include the breakdown of your votes. In other words, do not tell me that you are split 6-6, or 8-4, or whatever your vote happens to be.

Defendant's Instruction 35

Seventh Circuit § 7.05 (modified)

Forms of verdict have been prepared for you.

[Forms of verdict read.]

Take these forms to the jury room, and when you have reached unanimous agreement on the verdict, your foreperson will fill in and date the appropriate form, and each of you will sign it.

Defendant's Instruction 36

Seventh Circuit § 7.01

The verdict must represent the considered judgment of each juror. Your verdict, whether it is guilty or not guilty, must be unanimous.

You should make every reasonable effort to reach a verdict. In doing so, you should consult with each other, express your own views, and listen to your fellow jurors' opinions. Discuss your differences with an open mind. Do not hesitate to re-examine your own view and change your opinion if you come to believe it is wrong. But you should not surrender your honest beliefs about the weight or effect of evidence just because of the opinions of your fellow jurors or just so that there can be a unanimous verdict.

The twelve of you should give fair and equal consideration to all the evidence. You should deliberate with the goal of reaching an agreement that is consistent with the individual judgment of each juror.

You are impartial judges of the facts. Your sole interest is to determine whether the government has proved its case beyond a reasonable doubt.

Defendant's Instruction 37

Seventh Circuit § 7.06 (modified)

United States v. Silvern, 484 F.2d 879 (7th Cir. 1973)

Defendant reserves the right to supplement these instructions, submit a theory of defense instruction and/or submit an alternative verdict form based on the evidence adduced at trial.