

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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

GOVERNMENT’S MOTION FOR A MODIFIED VOIR DIRE PROCEDURE

The United States of America, by its attorney, PATRICK J. FITZGERALD, United States Attorney for the Northern District of Illinois, respectfully submits the following motion requesting a modified voir dire procedure. Specifically, the government requests that, after a peremptory challenge has been exercised against a juror, the Court ask that juror to return to the Jury Room until jury selection is complete.

I. RELEVANT BACKGROUND OF THE CASE

Defendant Jon Burge was indicted on October 16, 2008, for perjury and obstruction of justice in connection with his answers to interrogatories in a civil matter in November 2003. In his answers to the interrogatories, Burge denied participating in, or having knowledge of, torture or abuse by Chicago police officers. Specifically, Count One of the indictment charges that Burge lied when he answered in the negative whether he had ever used, or was aware of any other Chicago police officer using, certain methods, procedures, or techniques, including racial slurs or profanity, during the interrogation of subjects. Indictment, Count 1 ¶ 7.

The government previously filed a Motion *in Limine* Regarding Evidence of Racial Animus. R. 1t 169. As noted in that motion, the government anticipates that there will be evidence of racial motivation for some of the abuse claimed by victims in this case, all of whom

are African-American. While evidence of racial animus will not be the focus of the government's case, it will be a relevant and material part of the testimony.

II. RELEVANT LAW

Both the government and the defendant are prohibited from exercising racially motivated peremptory challenges. *Batson v. Kentucky*, 476 U.S. 79 (1976); *Georgia v. McCollum*, 505 U.S. 42, 59 (1992). If either party believes that the other has violated this prohibition, the objecting party must make a prima facie case that the challenge was based on race. If the party that exercised the challenge provides a race-neutral reason for the use of the peremptory, then the challenge is permitted, unless the objecting party can establish that the reason given is pretextual. *See United States v. Brown*, 289 F.3d 989, 993 (7th Cir. 2002). The trial judge's ruling on the matter is a finding of fact that enjoys great deference and will only be overturned if it is determined to be clearly erroneous. *United States v. Roberts*, 163 F. 3d 998, 999 (7th Cir. 1998) (citing *Hernandez v. New York*, 500 U.S. 352, 359-60 (1991)).

The trial judge is also given wide discretion in the procedure used to select juries. FED. R. CRIM. P. 24; *United States v. Graves*, 418 F.3d 739 (7th Cir. 2005). In *Graves*, the defendant based his appeal, in part, on an "exceptionally confused jury selection process" that affected his ability to intelligently use his peremptory challenges against two jurors. In rejecting *Graves'* argument, the appellate court found that the process had been clearly explained and the jury that heard the case was impartial. *Id.* at 743-44 (citing *United States v. Williams*, 447 F. 2d 894 (5th Cir. 1974) for proposition that as long as the jury is unbiased, there is no authority to limit the trial judge's discretion in carrying out the jury selection process).

III. PROPOSED PROCEDURE

In the instant case, the government does not propose any change to how challenges will be exercised by either side. However, as the selection process is carried out, either side may develop a good faith basis to raise a *Batson* or reverse-*Batson* challenge, based on a perceived emerging pattern of discriminatory peremptory challenges, or based on an earlier challenge in light of a later one. Context is important to fully evaluate the process. *See, e.g., Roberts*, 163 F.3d 998. In *Roberts*, the defendant used all ten peremptory challenges to strike white jurors. The government used two peremptories to strike black jurors, instigating a *Batson* challenge by the defense. The judge concluded that the reasons given by the government were race-neutral and not pretextual; the reason for one of the challenges was that the juror was an elementary school teacher and teachers think there “are no bad kids.” *Id.*

On review, the appellate court found the government’s race-neutral reasons to be suspect, in part because one of the white women who remained on the jury was an elementary school teacher. The defendant did not call the trial judge’s attention to that discrepancy and so the appellate court did not rely on it. But the reviewing court also noted that two African-Americans sat on the jury and that the government had three unused challenges at the conclusion of the process. *Id.* at 999. In the end, the appellate court affirmed the conviction citing the deference given to trial judges to assess the candor of the attorneys who are before them. *Id.* at 1000.

Roberts serves to illustrate that the developing, or final, makeup of the jury during the selection process may enlighten all involved in either challenging the use of a peremptory or ruling on such a challenge. Because there is a racial component to the instant case, the government believes that it is in the best interest of both parties to keep venire members who

have been the subject of a peremptory challenge available should an objection arise at a later point in the selection process. If the venire members are permitted to leave the courthouse and it is later determined that a party struck them improperly, recalling the individual(s) may not be an option.¹

IV. CONCLUSION

It is in the best interest of both parties to this case to take steps to ensure that the jury selection process goes smoothly and an impartial jury is selected as efficiently as possible. By keeping excused potential jurors available, the court will ensure there is a remedy available in the unlikely event that a *Batson*-related objection is sustained.

WHEREFORE, the government respectfully requests that this Court exercise the discretion afforded by FED. R. CRIM. P. 24 and ask struck venire members to remain available until the trial jury has been selected.²

Respectfully submitted,
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¹ A Civil Rights Division attorney recently encountered this very issue in the Western District of Tennessee. In *United States v. Bridges McRae*, 2:08:20378-1-A, after potential jurors had been excused and sent home, a pattern of discriminatory challenges became apparent. The Court sustained the government's reverse-*Batson* objections, but because the jurors were not readily available and bringing them back could have given rise to unwanted speculation by jurors, a mistrial was declared.

² If jury selection lasts more than one day, the government suggests that jurors who have been the subject of a peremptory challenge be excused at the end of each day.

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NOTICE OF FILING

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PLEASE TAKE NOTICE that on April 6, 2010, the undersigned filed with the Clerk, U.S. District Court, 219 S. Dearborn, Chicago, the “*Government’s Motion for a Modified Voir Dire Procedure.*” A copy is served upon you herewith.

Respectfully submitted,

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Certificate of Service

The undersigned Department of Justice Attorney hereby certifies that the aforesaid document was served on April 6, 2010, in accordance with FED. R. CRIM. P. 49, FED. R. CIV. P. 5, LR 5.5, and the General Order on Electronic Case Filing (ECF) pursuant to the district court’s system as to ECF filers.

/s Betsy Biffl