

**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 FOR
RECONSIDERATION OF RULING DENYING
MOTION *IN LIMINE* TO ADMIT PRIOR TESTIMONY**

Defendant Jon Burge, by his attorneys, respectfully moves this Honorable Court to reconsider its Opinion and Order denying his motion to admit the prior testimony of two deceased Chicago Police Department Detectives, John Yucaitis and Patrick O’Hara. In support thereof, the following is offered:

This Court has ruled that the government may admit the testimony of a deceased witness, Andrew Wilson. In prior testimony, Wilson claimed that Yucaitis physically abused him after he had been arrested for the murders of Chicago Police Department Officers William Fahey and Richard O’Brien.

Since the Court’s ruling, the government has tendered a “summary” of Wilson’s proposed testimony.¹ According to the summary, the government seeks to admit

Wilson’s prior testimony about Yucaitis, summarized as follows:

- Yucaitis and Burge were present in a room at Area Two where Wilson was beaten on the morning of his arrest.
- Yucaitis later took Wilson to a second room and left him alone.
- Yucaitis returned to this room, removed Wilson to another room and requested Wilson to call his brother, Jackie Wilson. After

¹ Burge will not stipulate to Wilson’s prior testimony in summary form, and has so advised the government.

Wilson refused to do so, Yucaitis took him to the room and handcuffed him to a ring on the wall.

- Yucaitis later came into this room with another officer whom Wilson could not identify. Yucaitis then removed a black wooden box from a bag he had been carrying. The box had a crank, and protruding wires with alligator clips. Yucaitis placed the alligator clips on Wilson's ears and cranked the box, causing Wilson to feel pain in his head and grind his teeth. Wilson kicked Yucaitis between the legs. Yucaitis responded by striking Wilson in the mouth. Yucaitis continued to crank the box.
- Someone came to the door. Thereafter, Yucaitis removed the alligator clips and left the room. Yucaitis later returned to the room and gathered up the black box.

The government's proposed summary states the following about O'Hara:

- After Yucaitis left the interview room with the black box, O'Hara entered the room, uncuffed Wilson and took him to a large office occupied by several police officers.
- Later in the afternoon, O'Hara, along with Chicago Police Department Detective Thomas McKenna transported Wilson from Area Two to Area One wherein Burge supposedly placed a gun in Wilson's mouth.
- O'Hara and McKenna drove Wilson back to Area Two (following a lineup procedure at Area One).
- At Area Two, O'Hara took Wilson to a small room where Assistant State's Attorney Lawrence Hyman was waiting with a statement for Wilson to sign.

In denying Burge's motion to admit the prior testimony of Yucaitis and O'Hara (at the very same proceedings for which the government seeks to offer Wilson's prior testimony), the Court stated it was not persuaded by Burge's contention that the evidence was more probative on the point for which it was offered than other available evidence. The Court suggested that Burge could call other individuals who were present at Area Two "during the interrogation of Wilson." Opinion, p. 8. Citing the Chicago Police

Board's decision, the Court named the following individuals: "Paul Nealis, Larry Hyman, Kathleen Warnick, Tim McKeough, Thomas McKenna, Michael Hartnett, [George] Karl and David Diguandi." *Id.* at 8-9. The Opinion did not state what roles these individuals played, nor did it describe how their actions and observations were more probative than those of Yucaitis or O'Hara.²

The problem with this is that the Wilson summary does not mention or refer to Nealis, Warnick, McKeough, Karl or Diguandi. Wilson did not allege that these individuals were present during the interrogations. Their testimony simply would not be more probative than the prior testimony of Yucaitis and/or O'Hara, who did in fact have direct contact with Wilson on the day of his arrest.

More particularly, Wilson maintained that *Yucaitis* was the person who initially administered electric shocks from a black box with wired alligator clips. Wilson did not claim that any of the persons named in the Court's opinion (as being available and more probative than the proffered prior testimony) were present when Yucaitis produced the black box. In fact, the only person whom Wilson claimed was also present was unidentified, thereby making it impossible for Burge to rebut.

O'Hara's prior testimony is important for the reasons delineated in our motion. Further, Wilson testified that O'Hara and McKenna transported him between Area One and Two. Thus, O'Hara was obviously in a position to have seen whether Wilson was

² McKenna was the only other Area Two Detective named in the Wilson summary. Nealis, Warnick, Hyman and Hartnett were not police officers. Nealis, Warnick and Hyman were Assistant Cook County State's Attorneys. Wilson did not mention Nealis or Warnick. McKeough was an evidence technician who took the fingerprints of the Wilson brothers. Hartnett was the stenographer. Wilson did not testify that Hartnett or McKeough administered any physical abuse.

injured prior to his confession. The time Wilson incurred injuries is critical both to the government's case, and Burge's defense.

The Court's opinion mentions the possibility of Burge calling McKenna or Hyman. Counsel for McKenna and Hyman have advised us that they would seek to invoke the Fifth Amendment privilege to remain silent if called as a witness at trial.³ In addition, Karl died in December 2005.

In its Opinion, this Court also stated that "[t]here is no evidence in the record as to the witnesses' respective character for truthfulness or the availability of evidence to establish such character, so this factor is disregarded here." Opinion, p. 4. In his motion, however, Burge asserted that the character of Yucaitis and O'Hara was, in fact, a "consideration," and proffered that "Yucaitis and O'Hara each called character witnesses on their behalf" at the police board hearing. District Court Doc. 80, p. 12. Consequently, the Court's conclusion that there was "no evidence" of the character of Yucaitis and O'Hara is incorrect.⁴

Another conceptual difficulty with the Court's opinion is that the Court essentially weighed for itself the credibility of Wilson, Yucaitis and O'Hara, and sided with the government. The ultimate question of the trustworthiness of each of the deceased witnesses should be for the jury. In other words, the points cited by the Court

³ As part of the defense case, we intend to seek a hearing on the good faith basis for assertions of the Fifth Amendment and/or will seek to admit portions of testimony for which the witnesses have no valid Fifth Amendment claim. Note the Court found that Wilson's repeated invocation of the Fifth Amendment did not provide grounds to strike his testimony.

⁴ We also pointed out that Yucaitis and O'Hara were long-time Chicago police officers who had never been convicted of a crime (unlike Andrew Wilson), and that the civil jury returned verdicts in their favor. We acknowledge that this Court mentioned these factors in its opinion.

as favoring the government's quest to keep the jury in the dark about the prior testimony of Yucaitis and O'Hara goes to the *weight* of the testimony, as opposed to admissibility.

Moreover, what the Court thinks of the prior testimony of Yucaitis and O'Hara should not have been the guiding factor in the trustworthiness analysis. Because the proffered testimony was transcribed by court reporters, there is no question as to the content of the testimony. The verbatim capture of the prior testimony renders many of the trustworthiness factors irrelevant under *United States v. Singleton*, 125 F.3d 1097, 1106 (7th Cir. 1997), and *United States v. York*, 852 F.2d 221, 225 (7th Cir. 1988) – cases cited by Burge, District Court Doc. 80, p. 8, but not addressed in the Court's opinion.

We realize that a district court is a gatekeeper of the rules of evidence. But the Court is also the gatekeeper of the defendant's right to a fair trial. Indeed, Rule 102 of the Federal Rules of Evidence provides, "These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." Stated simply, it is fundamentally unfair, and in contradiction of Rule 102, for the government to be able to admit the testimony of a deceased serial felon/murderer while denying the defendant a like opportunity to rebut the testimony with the sworn, cross-examined testimonies of decorated police officers. Lady justice is supposed to be blind and her scales balanced. Not allowing Burge to admit the prior testimony of the only persons available to rebut specific claims made by Wilson is, in a word, wrong.

Finally, Burge has been prejudiced by the passage of time. Due to the passage of time, the jury will be unable to evaluate Wilson's demeanor first-hand, and Burge is not

being allowed to rebut Wilson's allegations with the testimony of two police officers explicitly named by Wilson. If Yucaitis and O'Hara had not died, they would be available to testify (as they did at the civil trials and the police board hearing). Rule 403 of the Federal Rules of Evidence provides a ground for curing the prejudice by not allowing Wilson's prior testimony in the first instance. That would obviate prejudice resulting from the passage of time and circumstances beyond Burge's control, *i.e.*, the deaths of Yucaitis and O'Hara.

Respectfully submitted,

/s/ Richard M. Beuke

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CERTIFICATE OF SERVICE

I, MARC W. MARTIN, an attorney for Defendant Jon Burge, hereby certify that on this, the 19th day of March, 2010, I filed the above-described 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

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