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 *IN LIMINE*
REGARDING EVIDENCE OF RACIAL ANIMUS

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 *in limine* regarding evidence of racial motive and bias by the defendant.

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, or verbal threats or intimidation, during the interrogation of subjects. Indictment, Count 1 ¶ 7.

To prove the charges in the indictment, the government must present evidence of the underlying incidents of abuse, including verbal abuse. To that end, the government will present evidence from victims, whose descriptions of the abuse they suffered will include the use of

racial slurs used by officers. The government also anticipates presenting testimony about statements the defendant made to people who were not present during the interrogations at the Chicago Police Department (CPD). Some of these statements will include racial slurs and the defendant's view of African-Americans. This evidence is relevant and probative to the charges and should be admitted pursuant to Federal Rules of Evidence 403 and 404(b).

II. RELEVANT LAW

"Other acts" evidence is admissible without reference to Rule 404(b) 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. *United States v. Lahey*, 55 F.3d 1289, 1295-96 (7th Cir. 1995) (evidence admissible where evidence is "inextricably intertwined" with, or completes the story of, a charged offense); *United States v. King*, 126 F.3d 987, 995 (7th Cir. 1997). If the evidence is so related, "the only limitation on the admission of such evidence is the balancing test required by Rule 403." *United States v. Hilgeford*, 7 F.3d 1340, 1345 (7th Cir. 1993).

Evidence satisfying the following requirements is admissible under Federal Rules of Evidence 404(b):

(1) the evidence must be directed toward establishing a matter in issue other than the defendant's propensity to commit the crime charged;

(2) the evidence must show that the other act is similar enough and close enough in time to be relevant to the matter in issue;

(3) the evidence must be sufficient to support a jury finding that the defendant committed the similar act; and

(4) the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice.

United States v. Best, 250 F.3d 1084, 1091 (7th Cir. 2001); *see also*, *United States v. Pittman*,

319 F.3d 1010, 1012 (7th Cir. 2003); *United States v. Williams,* 238 F.3d 871, 874 (7th Cir. 2001); *United States v. Anifowoshe,* 307 F.3d 643, 646-47 (7th Cir. 2002); and *United States v. Betts,* 16 F.3d 748, 757 (7th Cir. 1994).

III. ANTICIPATED EVIDENCE

The government's case potentially includes evidence of racial animus from three categories of witnesses: victims, people outside of CPD, and former CPD employees who worked at Area 2 with the defendant.[1] The evidence of racial animus is a limited part of each witness's relevant testimony, and will be used only to prove the charge or the defendant's motive, or to corroborate the victims' accounts.

A. <u>Victims' accounts</u>

Victims who may testify at trial have previously testified or given statements about the abuse they suffered at Area 2. Their trial testimony will include, but not be limited to, claims that:

- CPD officers, including Burge, called them "nigger" while they were being interrogated and/or abused;
- an officer said, "We have something for niggers," before placing a plastic bag over one victim's head;
- the defendant told a victim, "We're going to fry your black ass now," after the victim had given a statement subsequent to being physically abused; and
- the defendant told a victim, that he would "blow his black head off."

All of this evidence is admissible without regard to Rule 404(b) because statements like these go to the heart of what the government must prove: that the defendant lied when he denied

[1] The purpose of this motion is to alert the Court and the defendant to these issues. We are not naming the potential witnesses here, but the 3500 material includes the testimony referenced.

that racial slurs or profanity, or verbal threats or intimidation, were used against suspects who were being detained or interrogated at CPD.

Moreover, this evidence is not unfairly prejudicial under Rule 403. All relevant evidence is prejudicial in some way. The question is whether the probative value of the statements will be substantially outweighed by the danger of unfair prejudice. *United States v. Kapp*, 2003 WL 1484908 at *1 (N.D. Ill. Mar. 20, 2003); *see also Crawford v. Edmonson*, 764 F.2d 479, 484 (7th Cir. 1985). Testimony by victims about racial slurs used by the defendant and other CPD officers will comprise a small but material part of the government's case. Without this evidence, the government would be unable to fully illustrate the abusive acts, or to prove that the defendant committed perjury and obstruction of justice by stating that no racial slurs or profanity were used. The probative value of this evidence far outweighs any attendant prejudice, and the statements should be admitted.

B. <u>People outside of CPD</u>

The government also intends to present evidence from witnesses who had conversations with the defendant on social occasions. These witnesses will testify that the defendant referred to African-American defendants using the terms "dogs" and other racial slurs, that the defendant told jokes about African-Americans who had suffered from injuries, and that the defendant laughed when being accused of using a "black box" to torture African-American defendants.

To the extent that these witnesses use racial terms or phrases that are similar to those recounted by the victims, this evidence is circumstantial evidence supporting the charged offenses, and is therefore admissible without regard to Rule 404(b). Additionally, this evidence is admissible under Rule 404(b) as proof of the defendant's motive. All of these comments

occurred during the time period that the defendant is alleged to have committed the acts charged in the indictment, and are therefore similar enough and close enough in time to be relevant. Additionally, the witnesses' testimony of their first-hand observations of the defendant are sufficient to support a jury finding that the defendant made the statements. Finally, the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice for the reasons described below.

All of the alleged victims in this case are African-American. These statements will be relevant, both to corroborate the victims' testimony of the use of racial slurs and to prove the defendant's motive in abusing the victims, or tolerating their abuse by others, and covering up the abuse. *See, O'Neal v. Delo*, 44 F. 3d 655 (8th Cir. 1995). In *O'Neal*, a white defendant was convicted of murdering a black man. The evidence suggested a racial motive, and the trial court allowed evidence of the defendant's membership in the Aryan Brotherhood. The appellate court affirmed the conviction, finding that the defendant's membership in a racist organization was probative on the issue of his motive. *Id.* at 661. Likewise, the evidence in the instant case suggests that the defendant was motivated by his views of African-Americans, and the jury should hear that evidence.

Burge's contempt for African-Americans may not have been his sole motive, but the government does not have to prove that it was to make this evidence admissible. *United States v. Craft,* 484 F. 3d 922 (7th Cir. 2007) (affirming conviction for three counts of arson and two counts of use of fire to commit a felony where racial animus, proven by evidence of the defendant's use of racial slurs about the victims and general testimony that he was a racist and made racist remarks during the relevant time frame, was shown to be at least partial motive for

his crimes).

C. Former Area 2 employees

The government intends to call several former Area 2 employees as witnesses. Some of these potential witnesses have previously testified about racial tensions at Area 2. This testimony has included assertions that:

- the defendant supervised a group of detectives at Area 2 known as the "A-Team." There were not any African-Americans on the A-Team;
- the defendant did not like African-Americans in general, and he did not like the African-American detectives, because of their race;
- the African-American detectives were given only the "non-newsworthy" cases or the "ghost-chasing" cases, and some had only African-American partners;
- some of the African-American detectives complained to their superiors about how they were treated by the defendant. No action was taken by the department, and when the defendant became aware of the complaints, he berated the detectives for going outside the chain of command; and
- one African-American detective said that he did not report abuse he had witnessed at Area 2 because as a black detective, he could not do that on his own.

While this information is relevant to corroborate other testimony of the defendant's racial views and to prove that the atmosphere at Area 2 was conducive to the abuse of African-American detainees, the government does not intend to elicit this information during direct examination, unless the defense intends to cross-examine these witnesses regarding their bias against the defendant or CPD. If the defense does intend to cross-examine these witnesses as to bias, then the government is entitled to elicit this testimony on direct examination so that it does not appear that the government is hiding it from the jury. If the defendant agrees that he will forgo any cross-examination as to bias, with the Court's acquiescence, the government can ask leading questions of these witnesses to avoid the statements above.

IV. CONCLUSION

The evidence of racial animus set out in this motion is relevant to prove that the defendant committed the crimes with which he is charged. No witness will be called solely to testify to racial animus of the defendant, and the statements above will comprise a small part of the government's case-in-chief. However, they have strong probative value which greatly outweighs the danger of unfair prejudice, and they should be admitted pursuant to Rules 403 and 404(b).

WHEREFORE, the government respectfully requests that this Court permit the government to introduce during its case-in-chief the evidence described in this Motion.

Respectfully submitted,
PATRICK J. FITZGERALD
United States Attorney

By: *s/ Betsy Biffl*____________
BETSY BIFFL
Trial Attorney, DOJ Civil Rights Division
601 D Street NW
Washington, D.C. 20004
(202) 305-8194

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NOTICE OF FILING

TO:			
	Richard M. Beuke 53 W. Jackson, Ste. 1410 Chicago, IL 60604	William G. Gamboney, Jr 216 South Marion Street Oak Park, IL 60302	Marc W. Martin 53 W. Jackson, Suite 1420 Chicago, IL 60604

PLEASE TAKE NOTICE that on April 1, 2010, the undersigned filed with the Clerk, U.S. District Court, 219 S. Dearborn, Chicago, the "*Government's Motions In Limine Regarding Evidence of Racial Animus*." A copy is served upon you herewith.

Respectfully submitted,

PATRICK J. FITZGERALD
United States Attorney

By: /s Betsy Biffl
BETSY BIFFL
Trial Attorney, Criminal Section,
Civil Rights Division

M. David Weisman
April M. Perry
Assistant United States Attorneys
219 South Dearborn Street, 5th Floor
Chicago, Illinois 60604
(312) 353-5300

Certificate of Service

The undersigned Assistant U.S. Attorney hereby certifies that the aforesaid document was served on April 1, 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