

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

|                                 |                                   |
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| <b>UNITED STATES OF AMERICA</b> | )                                 |
|                                 | )                                 |
| <b>vs.</b>                      | ) <b>No. 08 CR 846</b>            |
|                                 | ) <b>Honorable Joan H. Lefkow</b> |
| <b>JON BURGE</b>                | )                                 |

**DEFENDANT’S MOTION TO EXCLUDE EVIDENCE,  
OR, IN THE ALTERNATIVE, RESET TRIAL DATE**

Defendant Jon Burge, by his attorneys, pursuant to Rules 102 and 403 of the Federal Rules of Evidence, and the Fifth and Sixth Amendments to the United States Constitution, respectfully moves this Honorable Court to enter an order excluding evidence, or, in the alternative, resetting the trial date. In support thereof, the following is offered:

**Introduction**

For the past 11 months and beyond, the defense has relied on the government’s representations about the interrogations that would be at issue at trial. Now, with a venire panel scheduled to complete a jury questionnaire on May 6, 2010, the government has indicated that it seeks to add new interrogations (occurring decades ago) to its proof. The newly disclosed cases cannot be deemed collateral, and significantly “transform[]” the government’s case. See *United States v. Williams*, 576 F.3d 385, 389 (7<sup>th</sup> Cir. 2009). Moreover, the government’s belated disclosure threatens to enlarge the trial significantly. It is patently unfair to expect the defense to investigate and prepare a defense to the new interrogations under the present schedule. *Id.* Under the circumstances, the newly disclosed interrogations should be excluded from the government’s case-in-chief. Alternatively, the trial date should be reset.

**Government's Prior Commitment to  
Case-in-Chief Proof About Seven Cases**

This case is unusual given the breadth and antiquity of the allegations at issue. The universe of the persons interrogated while the defendant was a police officer is countless. Equally complicating is the fact that the brunt of the alleged interrogations occurred in the 1970s and early/mid 1980s.

Early on in this case, the government recognized the importance of providing notice of the particular interrogations that would be the subject of its case-in-chief. Thus, 14 months ago (on January 15, 2009), the government gave defense counsel a list of nine cases, plus one incident for which the case name was unknown, about which it intended to adduce proof. Thereafter, the government narrowed the list to eight (on April 28, 2009), and then seven (on May 5, 2009). See District Court Document ("DCD") 89. For the past 11 months or so, defense counsel have been operating under the government's repeated, affirmative representations that its case-in-chief would consist of these cases.

The government's representations have permeated the record. For example, the government opposed the defendant's motion to dismiss the indictment on vagueness grounds (for failure to identify cases) on grounds it had provided the defense with a list of the relevant cases. DCD 53. The government resisted the defendant's motion for a bill of particulars, *inter alia*, because it had identified the relevant cases, and promised to provide particulars about the unnamed incident. DCD 89. In opposing the defendant's motion for a witness list and early production of witness statements, the government said that it had "significantly reduc[ed] the universe of potential witnesses" by narrowing the relevant cases to seven. DCD 89, p. 9. The government further wrote, "there are seven, discrete incidents that may be presented at trial." DCD 89, p. 10.

Furthermore, the government has consistently taken the position that any interrogations outside the seven cases would be “irrelevant.” See, *e.g.*, DCD 90 (government’s response to *Brady/Giglio* motion). And when the defense made a motion to continue to the trial date given the volume of the discovery, the government argued against the motion on grounds that its case would consist only of the seven identified cases, thereby making, according to a heading in its response, “Most of the Documents ... Not Relevant to the Trial of this Case. See DCD 69, pp. 4-5. The government pronounced it unnecessary, in terms of trial preparation, for defense counsel to sift through the voluminous database for materials relating to interrogations outside the government’s “narrow” seven-case list.

Based upon the government’s representations about its case-in-chief, the defense undertook extensive trial preparation, *focusing on the seven cases*. We have detailed in previous motions the time consuming nature of investigating interrogations by police officers and prosecutors in criminal cases/investigations that occurred more than 25 years ago.<sup>1</sup> Not only did the criminal cases that occurred long ago have to be investigated, in some instances, the interrogated individuals filed lawsuits that resulted in extensive civil litigation. Also in the mix is a four-year-plus investigation by the Office of the Special Prosecutor. In at least one of the newly disclosed cases, the work product of another special prosecutor is at issue.

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<sup>1</sup> Any interrogation entails a determination of the police officers, police personnel, prosecutors, court reporters, defense counsel and/or civilians involved, as well as the related criminal and/or civil litigation history. Invariably, the police officers are retired, and the prosecutors are no longer employed as prosecutors. In some instances (in respect to the cases on the government’s original list), the officers are no longer living in the State of Illinois, or have passed away. Indeed, at least one of the cases on the government’s new list involves an alleged interrogation (and possibly prior testimony) by a deceased police officer.

This Court has recognized the laborious nature of the investigation. In finding the government had not unduly delayed seeking an indictment, the Court stated, “The length of this investigation is not suspect given the complex history of the allegations of torture and physical abuse at issue – a history which has spanned several decades, involved numerous civil rights cases and investigations, and generated copious amounts of materials.” DCD 138, pp. 15-16.

In addition, this Court has relied on the government’s representations about having “narrowed down” the universe of potentially relevant case-in-chief cases. In denying the defendant’s motion to dismiss on vagueness grounds, the Court observed that the government’s identification of the seven cases had “further assisted” the preparation of a defense. DCD 138, p. 10 n. 6. In denying the defendant’s motion for a bill of particulars, the Court cited that the government had “narrowed the evidence it intends to introduce in its case-in-chief to seven incidents.” DCD 138, p. 17. In addressing the defendant’s motion for early production of witness statements, the Court again noted that the government “has already narrowed down the incidents of allegedly improper coercion, physical abuse and torture it will present in its case in chief to seven.” DCD 138, pp. 15-16. In ruling on the defendant’s *Brady/Giglio* requests, the Court commented that false accusations by “individuals who are not part of this case” were “irrelevant.” DCD 157, p. 2.

The defendant also filed pretrial motions *tailored to the particular cases the government had identified*, including a motion to dismiss for pretrial delay, a motion based on *Garrity v. New Jersey*, requests for production of exculpatory and impeaching information, and a motion seeking to introduce prior testimony of unavailable witnesses.

These were not routine motions; rather, they were specific to interrogations identified by the government.

In accordance with this Court's order, the defense has also provided the government with notice of expert testimony, including a medical and a gang expert. Of course, we have not sought out possible expert testimony in respect to the new interrogations.

**The Seven Relevant Interrogations Significantly Enlarge  
Shortly Before Pretrial Conference Filings Are Due**

The foregoing disclosures, and pace to enable appropriate trial preparation, went for naught the late afternoon of March 24, 2010. After spending approximately two hours with government counsel in an effort to reach agreements on the format of Andrew Wilson's prior testimony and the jury questionnaire, the government handed each defense counsel an envelope containing a letter, stating "we anticipate presenting evidence during our direct case concerning allegations of torture and abuse made by some of the following individuals, in addition to the individuals whose names were previously disclosed on January 15, 2009: [names of six persons]."

It is not clear from the government's letter whether the three cases previously removed from the government's January 15, 2009 letter are back in play. (The government attorneys also orally stated that the new list may be subject to revision.) Our preliminary inquiry about the cases has revealed that two involved co-defendants; thus, four State court cases are involved in the six new interrogations.

**The Belated Nature of the Disclosure of the  
Previously-Undisclosed Interrogations Necessitates  
Exclusion From the Government's Case-In-Chief**

We realize that a special jury pool is being impaneled, and the Court has set aside time to try this case in May and June 2010. Accordingly, our initial request is to exclude the evidence of the interrogations identified in the government's March 24, 2010 letter from the government's case-in-chief.

Rule 403 of the Federal Rules of Evidence provides a basis for exclusion. As stated in *United States v. Messino*, 181 F.3d 826, 829-30 (7<sup>th</sup> Cir. 1999):

Under the Federal Rules of Evidence, district judges are clearly vested with some discretion to exclude evidence. Rule 402 states that “[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority.” Fed.R.Evid. 402. Rule 403 adds that “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Fed.R.Evid. 403. Thus, while creating a presumption of admissibility for relevant evidence, the Rules delineate a zone of discretion within which judges may exclude evidence. Furthermore, it bears noting that Rule 403 authorizes the exclusion of evidence not only to avoid prejudice, but also for a host of other prudential reasons.

Under the circumstances of this case, the new interrogations fall within the “zone of discretion” for the exclusion of evidence. Addition of interrogations as proof in the government's case-in-chief is cumulative, would result in undue delay and waste time. Indeed, the government proceeded in this case for over a year without articulating that the new cases were relevant or necessary, to say nothing of the fact that their introduction will significantly increase the trial's length.

Moreover, the defense is unfairly surprised and prejudiced by the additional cases. See, e.g., *United States v. Gasparik*, 141 F.Supp.2d 361 (S.D. N.Y. 2001) (excluding testimony from government's case-in-chief where the witness was disclosed five days into trial and the defense was unfairly surprised and prejudiced by the late disclosure). In view of the government's representations on the record to date, we simply have not prepared for trial with any of the new interrogations in mind. Defense cannot adequately investigate these interrogations in time for trial.<sup>2</sup> See *infra*, pp. 8-9.

The Court has set a schedule requiring the production of a witness list, required disclosures and the filing of proposed jury instructions and exclusion motions by April 1, 2010. That is impossible for defense counsel to do by April 1, 2010, regarding the new interrogations. See *Williams*, 576 F.3d at 389 ("Given the impact of Walker's testimony, the supposition that the defense could prepare a response in just four days is unrealistic."). The defendant also has a right to present fact specific motions regarding the new interrogations, just as he did with respect to cases identified in the government's January 15, 2009 letter.

As the Court knows from the memorandum opinions issued in this case, the legal issues are involved and time consuming. It is unfair to expect the defense to hone in on trial preparation, respond to government filings, *and* investigate, research and prepare pretrial motions for a new list of cases – something that itself cannot be done competently until after a factual investigation. Defendant should not be put in a position where he potentially forgoes filing fully informed pretrial motions, or compromises attorney trial

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<sup>2</sup> As of the date of this filing, the government has not produced 3500 material. The time available in the month before trial should be spent on digesting and preparing for trial based on the 3500 material – not investigating allegations relating to previously undisclosed interrogations.

preparation because the government waited so long to propose augmenting its case-in-chief in a substantial fashion.

That two of the prosecutors were assigned to this case in January 2010 is not reason to allow the addition of six interrogations as part of the government's case-in-chief for a variety of reasons. First, one of the prosecutors – the one who signed the pleading resisting defendant's disclosure requests because the case had been "narrowed down" to seven incidents – has remained constant from the outset. Second, the two previous prosecutors obviously knew they were leaving the United States Attorneys' Office in advance of finding other employment. That additional prosecutors were not assigned to the case until January should not work to the defendant's detriment. Third, this is a high profile case that clearly is being overseen by supervisors in the United States Attorneys Office, and there has not been a change in that line of command since the inception of this case (as far as we know). Fourth, the government is the government. The addition of new prosecutors is not good cause to deviate from the government's previous representations that the government's case-in-chief would consist of seven interrogations. Just as the defendant is bound by his prior attorney's cross-examination of Andrew Wilson, see DCD 31, the government should be bound by its attorneys' representations.

**Alternatively, the Trial Date Should Be Reset**

Alternatively, if proof relating to any of the newly disclosed cases is to be introduced in the government's case-in-chief, the trial date and other scheduling matters should be reset. Whether to grant a continuance is a matter of district court discretion dependant on the circumstances. See, e.g., *United States v. Issacs*, 593 F.3d 517, 524-25

(7<sup>th</sup> Cir. 2010); *United States v. Williams*, 576 F.3d 385, 389-91 (7<sup>th</sup> Cir. 2009); *United States v. Santos*, 201 F.3d 953, 958 (7<sup>th</sup> Cir. 2000).

In *Issacs*, the court stated:

In deciding whether a district court abused its discretion in denying a continuance, “we bear in mind that ‘a trial date once set must be adhered to unless there are compelling reasons for granting a continuance.’” *Id.* (quoting *United States v. Reynolds*, 189 F.3d 521, 527 (7<sup>th</sup> Cir.1999)). However, at the same time, a court cannot have a “‘myopic insistence upon expeditiousness in the face of a justifiable request for delay.’” *United States v. Robbins*, 197 F.3d 829, 846 (7<sup>th</sup> Cir.1999) (quoting *Ungar v. Sarafite*, 376 U.S. 575, 589, 84 S.Ct. 841, 11 L.Ed.2d 921 (1964)).

In evaluating a request for a continuance, a district court weighs seven nonexhaustive factors:

- 1) the amount of time available for preparation;
- 2) the likelihood of prejudice from denial;
- 3) the defendant's role in shortening the effective preparation time;
- 4) the degree of complexity of the case;
- 5) the availability of discovery from the prosecution;
- 6) the likelihood a continuance would satisfy the movant's needs; and
- 7) the inconvenience and burden to the court and its pending case load.

*Farr*, 297 F.3d at 655 (citations omitted). The weight of these factors will vary in any given situation and the district court is in “the best position to evaluate and assess the circumstances presented by [a party's] request for a continuance.” *Id.* (quoting *Schwensow*, 151 F.3d at 656).

593 F.3d at 525.<sup>3</sup>

The circumstances of this case present compelling reasons to grant a continuance if the government is allowed to present evidence of the previously unidentified interrogations. Stated simply, the defendant’s rights to a fair trial and effective assistance of counsel outweigh countervailing interests.

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<sup>3</sup> The *Issacs* facts do not resemble those in this case. *Issacs* did not involve a situation where the government repeatedly informed the Court and defense that it would seek to adduce certain proof, only to add to the body of proof significantly eight days before the due date of pretrial conference-related filings.

Application of the *Issacs* factors also weighs in the defendant's favor:

- The date of the required trial filings has been set at April 1, 2010. It would be impossible for defense counsel to investigate the new interrogations fully, find and subpoena witnesses and prepare appropriate motions. See *Williams*, 576 F.3d at 389 (“The defense needed to investigate Walker, evaluate the new evidence, and adapt its strategy.”).<sup>4</sup> The same also cannot be done in time for trial scheduled to commence with prospective jurors completing questionnaires on May 6, 2010. Notably, counsels’ time between May 6/7 and May 10<sup>th</sup> must be devoted to jury selection.
- If the evidence of the new interrogations is allowed, the defendant will be prejudiced by a failure to allot more time to prepare for trial in view of the new interrogations for the reasons stated herein. The new cases must be thoroughly investigated in a variety of manners, including locating and reviewing all proceedings at which witnesses for the new interrogations testified, and investigating impeachment witnesses and evidence. See *Walker*, 576 F.3d at 391. Jail intake and/or medical records must be obtained and reviewed for lack of outcry and/or corroboration. The defendant’s connection to the cases, and work history, must be examined to determine his participation and/or knowledge, if any, of the underlying cases or investigations. Connection of the interrogated individuals to the conspiracy to frame police officers must be analyzed through review of criminal histories, jail records, legal representation history, and locating and/or questioning of potential defense witnesses, some of whom are incarcerated. Impeachment of the new persons’ claims must be secured by obtaining prior testimony, as well as identifying, locating and questioning possible rebuttal witnesses. The investigation also must be assembled and collated into a coherent theory of the defense. All of this is a complicated endeavor given the age of the underlying allegations and copious materials involved in serious murder cases that, in some instances, resulted in later civil litigation. In view of the unique circumstances, defense counsel cannot adequately perform what is required of them under the present schedule. See *Williams*, 576 F.3d 389-91.

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<sup>4</sup> In *Williams*, the Seventh Circuit reversed the district court’s failure to grant a continuance in a case involving belated disclosure of one witness and other pieces of information. Here, the government has made belated disclosure of six additional interrogations, which puts into play the testimony not only of the six individuals, but also any allegedly corroborative testimony and/or evidence.

- With respect to the defendant's role, while he is not in custody, he is suffering from cancer and undergoing radiation treatments. Unsurprisingly, the treatments leave him with no energy or stamina. Intensive treatment and diagnosis (being conducted out-of-State) is set to end in April 2010. We, however, are not relying upon the defendant's illness as a basis for the continuance. We mention it here because the defendant's role is one of the factors.
- The complexity of this case, especially in light of the newly introduced allegations, is not a matter of controversy. As this Court has found, this case involves a "complex history" that spans "several decades." DCD 138, pp. 15-16.
- Until March 24, 2010, the defense was informed that discovery materials relating to cases other than the seven identified in the January 15, 2009 letter were "irrelevant." Having no knowledge that additional interrogations would be the subject of the government's proof, the defense has not prepared for a trial in their light.
- A continuance would satisfy the movant's needs by providing defense counsel time to prepare for trial and take appropriate legal positions.
- We have no doubt that a continuance would inconvenience the Court, but it is notable that the jurors have yet to assemble and this motion is being made at the earliest practical moment. See *Carlson v. Jess*, 526 F.3d at 1018, 1026 (7<sup>th</sup> Cir. 2008). In any event, we have first moved the Court to exclude the evidence to prevent inconvenience. Given that the *government's* late disclosure has prompted this motion, it is unfair to put the defense in the position of alternatively having to request a continuance. The government should not be allowed to turn the Court's understandable insistence on adhering to a trial date into a tactical advantage. Preventing trial by ambush and ensuring effective assistance of counsel are the greater values in this instance.

WHEREFORE, based on the foregoing, Defendant Jon Burge respectfully moves this Honorable Court to exclude evidence as aforesaid, or, in the alternative, reset the trial date and dates for filing pretrial and pretrial conference motions and/or grant any other equitable and appropriate relief.

Respectfully submitted,

/s/ Richard Beuke

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*

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**UNITED STATES OF AMERICA**            )  
  )  
  ) **vs.**                                    )  
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**JON BURGE**                                    ) **Honorable Joan H. Lefkow**  
  )

**CERTIFICATE OF SERVICE**

Please take notice that I, Richard Beuke, an attorney for JON BURGE, caused an electronic copy of the foregoing DEFENDANT’S MOTION TO EXCLUDE EVIDENCE, OR, IN THE ALTERNATIVE, RESET TRIAL DATE to be filed on the CM/ECF system of the United States District Court for the Northern District of Illinois on this 26<sup>th</sup> day of March 2010, said filing constituting service of the same.

Respectfully submitted,

/s/ Richard Beuke\_\_\_\_\_

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*