

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

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

**DEFENDANT’S MOTION FOR MISTRIAL, OR, IN THE
ALTERNATIVE WITNESS RECALL OR A CONTINUANCE**

Defendant JON BURGE, by his attorneys, pursuant to the Fifth and Sixth Amendments to the United States Constitution, respectfully moves this Honorable Court to grant a mistrial, or, in the alternative, allow recall of a witness, or a continuance. In support thereof, the following is offered:

In April 2009, Defendant Jon Burge filed a motion requesting production of exculpatory and impeaching material. Burge commenced the motion with the following cautionary statement:

CAUTION – RED FLAG Due to the unique circumstances of this case, this is not a boilerplate *Brady/Giglio* motion that can be met with the usual governmental refrains that the government is unaware of any exculpatory information, or that the government is aware of their *Brady/Giglio* obligations and will comply with them. Based upon our preliminary investigation, it is evident that a wealth of *Brady/Giglio* information lurks.

District Court Document (“R.”) 51.

In his motion, Burge made specific requests for production of impeaching and exculpatory information in time to make use of it at trial. The motion laid out Burge’s theory of the defense – that gang members have fabricated allegations of police abuse against Burge and Area Two police officers. Burge specifically requested production of information regarding inmate awareness of the fabrication conspiracy:

We have reason to believe that other individuals, including individuals incarcerated with complainants, have personal knowledge of the plan to fabricate allegations against police officers. For example, one Ricky Shaw has been interviewed ...

But what about others? Burge moves for production of the identities of any and all individuals who are aware of the fabrication plan described above, and any and all notes, memorandum of interviews, papers, recordings or transcripts in which individuals have mentioned, in any fashion, any fabrication plan ...

Id. (emphasis added).

Burge is charged with having committed perjury and obstruction of justice thorough answers to interrogatories in a civil lawsuit brought by Madison Hobley. For example, the question at issue in the perjury count (Count Two) asked about awareness of any other “examples” of the physical abuse as alleged by Madison Hobley in the civil complaint. According, Burge specifically requested information about Hobley in his *Brady/Giglio* motion:

Exculpatory and Impeachment Material Relating to Madison Hobley The indictment alleges that the false interrogatory answers related to a civil case brought by Madison Hobley – an individual who had been accused of murdering seven people by aggravated arson. Following Hobley’s pardon by former Illinois Governor George H. Ryan, the U.S. Attorneys office in this district opened an investigation regarding the arson/murders. See Deft’s Motion to Change Venue, GE 236. The government’s list of the cases about which it expects to present evidence, however, does not include Hobley. Why? In fact, the United States Attorney has stated that the government is not “necessarily claiming that Hobley was tortured.” *Id.*, GE 254. What exculpatory or impeaching information has been learned about Hobley? Burge moves for production of any and all exculpatory and impeaching information in whatever form relative to Hobley.

The prosecution was further informed about the defense in this case as this litigation progressed. As part of his production obligations, Burge tendered reports of interviews of Ricky Shaw and Lee Harris, two inmates who confirmed the existence of a plan by some government witnesses to fabricate allegations of

abuse. In addition, Burge provided notice of proposed expert testimony regarding a street gang edict to manufacture allegations of abuse against Area Two police officers.

On June 3rd, in the midst of trial, the government produced to the defense a report of an interview of Darryl Simms by an AUSA and ATF Special Agents on October 16, 2008. The defense had never before seen this report, or had no prior knowledge of its contents.

According to the report, Simms was incarcerated with Hobley at Pontiac Correctional Center. Hobley treated Simms as a confidant, and confessed to committing the arson that resulted in deaths of his wife and son. Simms reported that Hobley wanted to “smoke out” his wife because she had been unfaithful. The report further states Hobley “specifically told [Simms] that he did confess to the police, but, only because of his son [A]t no time did HOBELY ever mention being beaten by the police.”

The report goes on to relate that Hobley plotted to find legal loophole, or mitigation material. Hobley joined a group of condemned inmates known as the “Death Row 10,” who worked on trying to secure release from prison. Simms believed that the Death Row 10 was the source of Hobley’s false allegations regarding police abuse. Simms disassociated himself from the group because of its gang proclivities, and because it “became more about making up ways to get released from prison.” Simms knew that the police did not abuse some group members.

The strictures of *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972), apply irrespective of the good faith of the prosecutors involved in the case. See *United States v. Banks*, 546 F.3d 507, 510 (7th Cir. 2008).

Brady and *Giglio* impose a continuing duty on the prosecution to inquire into the existence of the impeaching and exculpatory information. *Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (prosecutors have the duty “to learn of any favorable evidence known to others acting on the government’s behalf in the case”).

As evident, Simms’ information is material to Burge’s defense. Because of the late disclosure, the defense has been deprived of an opportunity to investigate Simms’ statements fully, *e.g.*, interview Simms, check out his statements, possibly call him as a witness and investigate the Death Row 10 group and its affiliates. Furthermore, the defense has already given an opening statement and conducted cross-examinations, including cross-examination of Hobley’s civil lawyer in the absence of knowledge of Simms’ information.

Given the role of Hobley in relation to Burge’s indictment, the nature of Burge’s defense and the specific requests made by Burge in his motion for production, there are no grounds upon which to excuse the belated disclosure of Simms’ interview. Indeed, a prosecutor in the United States Attorneys Office conducted the interview for the Northern District of Illinois on the very same day Burge’s indictment was filed.¹

We are aware the government responded to Burge’s *Brady/Giglio* motion by saying it would disclose impeachment material, but resisting the requests about Hobley because he would not be called as a witness. This Court accepted the government’s position. R. 157. But this does not solve the dilemma. Irrespective of whether the government calls Hobley, Simms’ information undermines the government’s case and may lead to the disclosure of relevant

¹ Defendant’s *Brady/Giglio* motion sought review of federal investigative agency files, including those of the ATF.

impeaching/exculpatory evidence. For example, did the Death Row 10's practices filter out to government witnesses, or individuals who have credible information about government witnesses?

Moreover, no party in litigation is permitted to perpetrate a fraud upon the Court, or proceed on the basis of false evidence. Cf. *Franks v. Delaware*, 458 U.S. 154 (1978). Thus, this motion cannot be dismissed on the basis of an argument that Hobley is not on the government's list of relevant cases. Rather, the very foundation of the indictment against Burge is tainted (assuming the truth of Simms' statements). How can Burge be criminally faulted for his alleged answers to interrogatories when the content of the question forming the basis for perjury and obstruction of justice charges was itself false? That is, the "examples" of physical abuse alleged by Hobley were not "examples" of physical abuse at all because they were fabricated. Obviously, the late tender of Simms' interview precludes the defense from pursuing a timely due process based motion to dismiss.

At this stage, the damage cannot be undone. A mistrial should be granted. In the alternative, Defendant moves for a continuance to allow adequate investigation of Simms, and moves to require the recalling of Hobley's attorney. Defendant again renews his *Brady/Giglio* motion, and requests the government to produce any information that casts doubt on the government's case, supports the defense, or refutes Hobley's claims of police abuse or innocence, including any and all information corroborating Simms' statements.

Respectfully submitted,

/s Richard M. Beuke

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CERTIFICATE OF SERVICE

MARC W. MARTIN, an attorney for the Defendant Jon Burge, hereby certifies that I caused filing of the foregoing motion this 6th day of June 2010, on the CM/ ECF system for the Northern District of Illinois, constituting service of the same.

Respectfully submitted,

/s Marc W. Martin

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