

**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 MEMORANDUM OF LAW
IN SUPPORT OF MOTION FOR JUDGMENT
OF ACQUITTAL AND ARREST OF JUDGMENT**

I. The Court Should Arrest Judgment or Enter Judgment of Acquittal on Counts 1 and 3

A. Background

Counts 1 and 3 charged Defendant Jon Burge with “obstruction of justice,” 18 U.S.C. § 1512(c). This statute makes it a federal offense for a person to “corruptly ... obstruct[] influence[], or impede[] any official proceeding, or attempt[] to do so.”

The operative language of Count 1 provides:

On or about November 12, 2003, at Chicago, in the Northern District of Illinois, Eastern Division, and elsewhere,

JON BURGE,

defendant herein, did corruptly obstruct, influence, and impede an official proceeding, and attempt to do so, in that the defendant signed answers containing false statements in response to interrogatories in the case of *Hobley v. Jon Burge, et. al.*, case no. 03 C 3678, and caused them to be served upon counsel for the plaintiff;

In violation of Title 18, United States Code, Section 1512(c)(2).

The operative language of Count 3 is as follows:

On or about November 25, 2003, at Chicago, in the Northern District of Illinois, Eastern Division, and elsewhere,

JON BURGE,

defendant herein, did corruptly obstruct, influence, and impede an official proceeding, and attempt to do so, in that the defendant signed answers containing false statements in response to interrogatories in the case of *Hobley v. Jon Burge, et. al.*, case no. 03 C 3678, and caused them to be served upon counsel for the plaintiff.

In violation of Title 18, United States Code, Section 1512(c)(2).

The term “official proceeding” is defined in 18 U.S.C. 1515(a)(1)(A) as “a proceeding before a judge or court of the United States.”

B. Argument

1. *Dunn v. United States*, 442 U.S. 100 (1979), dealt with the meaning of the word “proceeding” as used in the 18 U.S.C. § 1623 perjury statute, and held that a person’s submission of a false affidavit to an attorney did not constitute the making of a material false statement in a court “proceeding.”

Neither the government nor the Court has ever adequately explained why this definition does not apply to § 1512(c). The notion that statutory words are chameleon-like has been rejected. As stated by a four-Justice plurality:

Justice STEVENS’ position is original with him; neither the United States nor any *amicus* suggested it; it has no precedent in our cases. Justice STEVENS relies on the proposition that one undefined word, repeated in different statutory provisions, can have different meanings in each provision. See *post*, at 2032, and n. 2. But that is worlds apart from giving the same word, *in the same statutory provision*, different meanings *in different factual contexts*. Not only have we never engaged in such interpretive contortion; just over three years ago, in an opinion joined by Justice STEVENS, we forcefully rejected it. *Clark v. Martinez*, 543 U.S. 371, 125 S.Ct. 716, 160 L.Ed.2d 734 (2005), held that the meaning of words in a statute cannot change with the statute’s application. See *id.*, at

378, 125 S.Ct. 716. To hold otherwise “would render every statute a chameleon,” *id.*, at 382, 125 S.Ct. 716, and “would establish within our jurisprudence ... the dangerous principle that judges can give the same statutory text different meanings in different cases,” *id.*, at 386, 125 S.Ct. 716. Precisely to avoid that result, our cases often “give a statute's ambiguous language a limiting construction called for by one of the statute's applications, even though other of the statute's applications, standing alone, would not support the same limitation. *The lowest common denominator, as it were, must govern.*” *Id.*, at 380, 125 S.Ct. 716 (emphasis added).

United States v. Santos, 553 U.S. 507, 128 S.Ct. 2020, 2030 (2008) (emphasis original).

In *Dunn*, the defendant had implicated another in immunized testimony before a grand jury. The implicated person was indicted, and his attorney procured Dunn's oral statement recanting the grand jury testimony before a notary public. The government obtained an indictment charging Dunn with violating 18 U.S.C. § 1623 based on the recantation statement. Like §§ 1512(c)(2) and 1515(a)(1)(C), § 1623 uses the word “proceeding.”

The Supreme Court rejected the government's argument that the term “ancillary proceeding” should be given an expansive reading so as to include the false swearing of an affidavit since such conduct “poses the same threat to the fact-finding process as false testimony in open court.” 442 U.S. at 107. Instead, the Court found that the word “proceeding ... carries a somewhat more formal connotation.” *Id.* The Court determined that Congress had not intended to relax the “court proceedings” requirement. If that were Congress' intent, then it “would have drafted § 1623 to encompass all sworn declarations irrespective of whether they were made in proceedings before or ancillary to a court.” *Id.* at 108-09. The Court concluded that § 1623 excludes from its coverage “statements given in less formal contexts than depositions.” *Id.* at 111. The Court held that statements given before a notary public during the interview by counsel for the defendant

in a criminal case did not constitute statements given in an “ancillary proceeding.” *Id.* at 112-13.

The definition of “official proceeding” at issue here is even more circumscribed than the “proceeding” in § 1623. While § 1623 includes *ancillary* judicial proceedings, § 1515(a)(1)(A) does not. Rather, the covered “proceedings” germane here are “proceedings before a judge or court of the United States.” 18 U.S.C. § 1515(a)(1)(A).¹

Applying *Dunn* to this case, Burge’s convictions cannot stand. The submission of notarized answers to interrogatories to opposing counsel in a civil lawsuit – all that was shown here – plainly is not an action taken in an “official proceeding” within the meaning of § 1512(c). Sworn statements made before a notary public are not statements made before a “judge or court of the United States” within the meaning of § 1515(a)(1). The submission of a notarized document to opposing counsel in discovery lacks the requisite degree of formality to amount to a statement made in an “official proceeding.” See *Dunn*, 442 U.S. 100; see also *United States v. Benevolence International Foundation, Inc.*, 2002 WL 31050156 (N.D. Ill. 2002) (Gottschal, J.) (dismissing § 1623 indictment based on allegedly false declarations made “under penalty of perjury” and attached to a motion for a preliminary injunction filed in a civil case); *United States v. Savoy*, 38 F.Supp.2d 406, 410-12 (D. Md. 1998) (§ 1623 prosecution could not be predicated upon false statements in declaration made by defendant in connection with civil case in a context less formal than a deposition); *United States v. Lamplugh*, 17 F.Supp.2d 354 (M.D. Pa. 1998) (allegedly false declaration filed in support of motion for return of

¹ In construing another obstruction statute (18 U.S.C. § 1503’s catchall provision), the Court in *United States v. Aguilar*, 515 U.S. 593, 599 (1995), held that the statute did not reach proceedings that were ancillary to a court or grand jury proceeding. See also *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005).

property lacked formality required of court proceeding; defendant could not be prosecuted for perjury under Section 1623). If Congress desired to punish all false declarations in the course of civil discovery proceedings as “obstruction of justice,” it would have said so, especially in view of the fact that the obstruction statute at issue was passed after the Supreme Court’s decision in *Dunn*. Cf. *Skilling v. United States*, 130 S.Ct. 2896, 2927-28 (2010) (discussing Congress’ duty to speak clearly in drafting criminal statutes).

Based on the foregoing, the Court should arrest judgment and/or enter judgment of acquittal on Counts 1 and 3. Alternatively, a new trial is required, as the Court erred in refusing defense jury instructions leaving it for the jury to determine whether an “official proceeding” was corruptly obstructed. Rather, the Court directed the jury to find that the civil lawsuit *Hobley v. Burge* was an official proceeding. The Fifth and Sixth Amendments preclude the Court from finding facts forming essential elements, e.g., *Booker v. United States*, 543 U.S. 220 (2005), *Blakely v. Washington*, 542 U.S. 296 (2004), *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Jones v. United States*, 526 U.S. 227 (1999), as well as the directing of verdicts in the government’s favor, e.g., *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 348 (1979). See *United States v. Gaudin*, 515 U.S. 506 (1995). By refusing the defense instructions, and instructing the jury in the manner it did, these precepts were violated.

2. Counts 1 and 3 alleged both choate and inchoate obstruction offenses. Even accepting all the evidence and reasonable inferences therefrom in a light most favorable to the government, the government failed to prove that Burge *completed* an obstruction offense. The government introduced no evidence that Burge “did corruptly

obstruct, influence, and impede an official proceeding” through the interrogatory answers. The government did not introduce any evidence that the answers in question were ever used, or filed, by any party in any proceeding in the *Hobley* case. No witness so testified. Even Hobley’s lawyer, Jon Loevy, who testified as a government witness said nothing about the effect Burge’s answers had on him or the lawsuit. See *infra* § II.

On the evidence presented at trial, and putting aside the other fatal legal defects in the indictment and proof, the most that can be said is that the case should have gone to the jury on the attempt aspect of § 1512(c)(1) only. The Court, however, denied Burge’s request to instruct the jury only on the “attempt” portion of § 1512(c)(1). Because the jury was instructed on a defective legal theory, the jury’s verdicts on Counts 1 and 3 are subject to *vacatur*. See *Yates v. United States*, 354 U.S. 298 (1957); cf. *United States v. Lee*, 558 F.3d 638, 645 (7th Cir. 2009); *United States v. Hodge*, 558 F.3d 630, 634 (7th Cir. 2009).

II. The Court Should Arrest Judgment or Enter Judgment of Acquittal on Count 2

A. Background

Count 2 charged Burge with perjury. Count 2’s operative language provides:

On or about November 25, 2003, at Chicago, in the Northern District of Illinois, Eastern Division, and elsewhere,

JON BURGE,

defendant herein, having taken an oath to testify truthfully before a competent officer, or person, in a case in which a law of the United States authorizes an oath to be administered, subscribed to sworn answers to Plaintiff’s Second Set of Interrogatories in *Hobley v. Jon Burge, et. al.*, case no. 03 C 3678, and willfully and contrary to such oath stated and subscribed to the material matter set forth above in his answer to Question 3 which he did not believe to be true, when in truth and fact, as defendant JON BURGE then and there well knew, he had observed, participated in,

and had knowledge of one or more other examples of physical abuse and torture on the part of Chicago police officers at Area Two, including, but not limited to, abuse of a person by “bagging”;

In violation of Title 18, United States Code, Section 1621(1).

B. Argument

Administration of an oath is an essential element of a § 1621(1) charge. Even accepting all the evidence and reasonable inferences therefrom in a light most favorable to the government, the government failed to establish this essential element. The government called the notary public whose stamp/signature appears on the answer at issue in Count 2. That notary, Wendy Heide, testified that she lacked independent recollection of the transaction. Heide testified, however, that she did not actually administer oaths when she notarized documents. There is a legally significant difference between notarizing a signature – what Heide said she did – and administering an oath.² See Governor’s Reference Guide for Notaries, p. 12 (Fla.), available at www.flgov.com/notary_ref_manual. Absent proof that an oath was administered before Burge signed the answer at issue, Count 2 fails as a matter of law.

In addition, the government’s proof on the essential element of “materiality” has failed. As noted, the government presented no evidence that the answers were ever filed or actually used in a court filing. The most that can be said is that the answers were tendered to an attorney for Madison Hobley, Jon Loevy, who testified as a government witness. Loevy, however, did not state that the answers had any effect on him, or any

² Government witnesses testified that answers to interrogatories are supposed to “notarized.” Actually, Rule 33(b)(3) of the Federal Rules of Civil Procedure provides, “Each interrogatory must, to the extent it is not objected to, be answered separately and fully in writing *under oath*.” The Rule does not use the word “notarized.”

action or decision taken in the course of Hobley's suit. While Loevy acknowledged that he received the answer, he did not at all explain what he did with it.

Furthermore, the fact that Burge denied knowledge of other "examples" of abuse as claimed by Madison Hobley was unremarkable in that Burge, by that point (as shown by various stipulations presented by the government), had testified to denials on multiple occasions. Burge's failure to change course or give incriminating responses evidences that the answer was not "material." Speculation in the form of expert testimony about possible uses of answers (in general) was insufficient to satisfy the government's burden on the essential element of "materiality."

III. Judgment of Acquittal Should Enter Due to the Government's Failure to Prove Up the Hobley Case and Hobley's Fraud Upon the Court

The allegations regarding Hobley's complaint were not proved with competent evidence. The government failed to call Hobley as a witness or introduce his complaint into evidence. As argued in Burge's pretrial motion to dismiss, Burge's answers would not become material and relevant if Hobley's lawsuit allegations were themselves false or unproven.

The government's failure to prove the veracity of Madison Hobley's allegations is legally consequential in view of Darryl Sims' statements to government agents around the time of Burge's indictment (which were not produced by the government until mid-trial and after Jon Loevy had testified). See R. 253. No party has a right to pollute the court system with a false lawsuit. Cf. *Franks v. Delaware*, 438 U.S. 154 (1978) ("[I]t would be an unthinkable imposition upon [the authority of a magistrate judge] if a warrant affidavit, revealed after the fact to contain a deliberately or recklessly false statement, were to stand beyond impeachment."); see also *Nix v. Whiteside*, 475 U.S. 157

(1986); *Napue v. Illinois*, 360 U.S. 264 (1959); *Alcorta v. Texas*, 355 U.S. 28 (1957); *Pyle v. Kansas*, 317 U.S. 213 (1942); *Mooney v. Holohan*, 294 U.S. 103, 104 (1935).

This is true even when a named defendant in the suit is Jon Burge. *Appropo* are Judge Bauer's words in *United States v. Cortina*, 630 F.2d 1207, 1214 (1980):

The call for the court's supervisory power under these circumstances is at its strongest and most defensible. The judicial system itself has been defrauded. As held in *Franks*, the constitutional requirement of probable cause "would be reduced to a nullity if a police officer was able to use deliberately falsified allegations to demonstrate probable cause, and, having misled the magistrate, then was able to remain confident that the ploy was worthwhile." *Franks*, 438 U.S. at 168, 98 S.Ct. at 2683. The Court in *Franks* expressly sanctioned the use of the exclusionary rule to remedy this type of fraud on the court, stating that "the alternative sanctions of a perjury prosecution, administrative discipline, contempt, or a civil suit are not likely to fill the gap." *Id.* at 169, 98 S.Ct. at 2684.

Our holding is therefore simple we will not allow or condone reckless or deliberate misrepresentations made to magistrates. But we note that our holding is not based merely on abhorrence of Agent Brown's conduct, for that would not justify use of our power to suppress the evidence. *United States v. Payner*, 447 U.S. at --, 100 S.Ct. at 2444. We recognize that the federal supervisory power does not give "the federal judiciary a 'chancellor's foot' veto over law enforcement practices of which it (does) not approve." *United States v. Russell*, 411 U.S. 423, 435, 93 S.Ct. 1637, 1644, 36 L.Ed.2d 366 (1973). But we do not merely disagree with the method of law enforcement attempted here; rather, we are preventing the court from condoning a fraud perpetrated upon it. To allow this evidence to be used at trial would make the federal courts "accomplices in the willful disobedience of a Constitution they are sworn to uphold." *Elkins v. United States*, 364 U.S. at 223, 80 S.Ct. at 1447. And a judicial system which condones fraud will be of little value to the individuals whose rights it is sworn to protect.

Allowing a criminal prosecution based on discovery responses in an originally-dubious suit countenances Hobley's abuse of the justice system. In response to this point at trial, the government relied on the old saw that two wrongs do not make a right. The government put the cart before the horse. A threshold wrong cannot serve as the springboard for an acceptable criminal indictment. Furthermore, the government's

reasoning has been rejected as described above. Judgment of acquittal or arrest of judgment should enter on all counts. In the alternative, the Court should hold a hearing on this motion.

Respectfully submitted,

/s Marc W. Martin

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CERTIFICATE OF SERVICE

I, MARC W. MARTIN, an attorney for Defendant Jon Burge, hereby certify that on this, the 27th of August, 2010, I filed the Memorandum of Law in Support of the Motion for Arrest of Judgment and/or Acquittal 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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