

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	No. 08 CR 846
v.	)	
	)	Judge Joan H. Lefkow
JON BURGE	)	

**GOVERNMENT’S RESPONSE TO  
DEFENDANT’S MOTION FOR NEW TRIAL**

The United States of America, by its attorney, PATRICK J. FITZGERALD, United States Attorney for the Northern District of Illinois, responds as follows to defendant’s Motion for New Trial (Doc. 303):

**Standard of Review**

Rule 33 of the Federal Rules of Criminal Procedure provides in pertinent part that “[t]he court on motion of a defendant may grant a new trial to that defendant if required in interest of justice.” “The trial court’s power to grant or deny a motion for a new trial is discretionary and will be overturned on appeal only if there has been ‘an error as a matter of law or a clear and manifest abuse of discretion.’” *United States v. Boyd*, 792 F. Supp. 1083, 1098 (N.D. Ill. 1992) (quoting *United States v. Reed*, 875 F.2d 107, 113 (7th Cir. 1989)). However, the discretion of a trial court in reviewing a Rule 33 motion for new trial is limited. The court may not reweigh the evidence and set aside the verdict simply because it feels some other result would be more reasonable. See *United States v. Reed*, 875 F.2d at 113; *United States v. Boyd*, 792 F. Supp at 1098. Jury verdicts in criminal cases “may not be overturned lightly.” *United States v. Boyd*, 792 F. Supp. at 1098.

**A. Waiver**

Because in many instances, the defendant offers no details, no analysis, and no specific legal precedent in support of his claims, these claims should be deemed waived. *United States v. Andreas*, 150 F.3d 766, 769-70 (7th Cir. 1998) (“Perfunctory and undeveloped arguments (even constitutional ones) are waived.”); *United States v. Berkowitz*, 927 F.2d 1376, 1384 (7th Cir. 1991) (“We repeatedly have made clear that perfunctory and underdeveloped arguments, and arguments that are unsupported by pertinent authority, are waived (even where those arguments raise constitutional issues.”).

As noted *infra*, the government has identified several arguments that the government considers waived based on inadequate development of factual and/or legal claims. To the extent the government substantively responds to these claims, the government does not intend to abandon any waiver argument.

**B. Incorporation of Previously Proffered Arguments**

By reference, the government re-incorporates all of its previous relevant filings and oral arguments presented during the pre-trial litigation phase and at trial as they pertain to the issues raised by defendant in his motion for a new trial.

**Publicity Did Not Result in an Unfair Trial**

The defendant first raises the issue of publicity before and during the trial. The defendant maintains his position that venue was improper, due to pretrial publicity. This issue, including arguments about a press conference held 19 months before trial, was fully briefed and ruled upon prior to trial. *See* Doc. 54, 55, 85, 99, 121. A juror questionnaire was

used, which asked about exposure to pretrial publicity, and voir dire was then conducted individually. Full inquiry was made into publicity and what effect, if any, it had on each potential juror. The two jurors who had discussed comments from a press conference were excused for cause, as well as a number of other potential jurors who said they may not be able to set aside what they had heard or read. The jury selection process was more than sufficient to ensure that the defendant had a fair jury. *See United States v. Reynolds*, 821 F.2d 427 (7th Cir. 1987) (holding that thorough *voir dire* during jury selection was sufficient to protect Sixth Amendment right in high publicity trial); *United States v. Martin*, 63 F.3d 1422, 1430 (7th Cir. 1995) (finding that pretrial publicity concerns addressed through thorough *voir dire*).

Next, the defendant complains of publicity during the trial. The Court instructed the jurors at the start of trial to refrain from reading, watching or listening to any media accounts of the trial. The Court also made periodic inquiries of jurors as to whether anyone had been exposed to publicity. On at least two occasions, a juror said he had seen press coverage; each time the juror was questioned outside of the presence of the other jurors as to the effect of the media exposure. He stated he could be fair and no motion was made to excuse him and seat one of the alternates.<sup>1</sup> Finally, at the close of trial, the jurors were instructed that they were not to consider anything heard or seen outside of the courtroom, including from any

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<sup>1</sup> The government does not have the transcript as to these two exchanges with the Court, but based on collective memories, the government does not believe that either party moved to dismiss this juror.

media source. *See e.g. United States v. Malsom*, 779 F.2d 1228, 1240 (7th Cir. 1985) (holding that inquiry of jurors who have been exposed to mid-trial publicity and cautionary instructions to jurors is appropriate means of addressing exposure to trial publicity).

“The constitutional standard of fairness requires that a defendant have a panel of impartial ‘indifferent jurors.’ To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror’s impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.” *Whitehead v. Cowan*, 263 F.3d 708, 720 (7th Cir. 2001) (citations and internal quotations omitted). The defendant has failed to demonstrate that any of the jurors were partial towards conviction, and therefore his argument fails. *Id.*

#### **Testimony of Andrew Wilson was Properly Admitted**

The defendant next objects to the admission of Andrew Wilson’s testimony. The first three arguments on this point - admission was improper, the defendant’s current lawyers have different motives than the lawyers in the past proceedings, and Wilson’s invocation of the Fifth Amendment made it inadmissible - were all fully briefed and ruled on well in advance of trial. *See* Doc. 21, 25, 27, 31. As to complaints about the reader of the testimony, the defendant made no objection at the time of the testimony. The government gave notice as to who the reader would be, and defense counsel declined to choose their own reader for cross-examination. They also cross-examined the reader on the fact that he had never met Wilson nor had he seen or heard Wilson testify.

The defendant's fourth argument about the admission of Wilson's testimony is that the jury was unaware that Wilson had committed a murder for which another man, Alton Logan, was convicted, and Wilson did nothing to stop him from going to prison. Wilson's attorney disclosed this information after Wilson's death, and Logan was subsequently released from prison. To have disclosed the information prior to Wilson's death would have been a clear violation of the attorney-client privilege. Therefore, had Wilson still been alive to testify at this trial, his attorneys would not have broken the privilege and made those facts public. If defense counsel had somehow suspected Wilson of the other murder and questioned him on it, defense counsel would have been prohibited from questioning Wilson regarding this uncharged conduct. *See* Fed. R. Evid. 609; 608(b). Murder is not a crime of untruthfulness, and Wilson had not been convicted of the murder. Wilson would have had the right to invoke his Fifth Amendment privilege.<sup>2</sup> For these reasons, the information about Alton Logan was properly excluded.<sup>3</sup>

### **General Due Process Issues**

Without as much as a case citation, the defendant identifies a number of alleged

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<sup>2</sup> Contrary to the defendant's claims, Rule 608(b) does not apply; assertion of the Fifth Amendment can not result in a finding that a person is untruthful, subjecting them to cross-examination about the matter for which he has asserted his privilege. *See United States v. McClurge*, 311 F.3d 866, 874 (7th Cir. 2002) (citing to Fed. R. Evid. 608(b) committee notes, and collecting cases).

<sup>3</sup> The defendant suggests that the government acted improperly by saying, fifteen months before trial, that it would consider stipulating to the admission of the Alton Logan information. The fact that the government determined that it would not stipulate does not change the admissibility of the information.

defects that created the “absence of a fair trial.” Doc. 303, p. 4. Because the defendant fails to identify a relevant legal standard, defendant’s arguments on these points are waived. *See supra*. Without waiving the claim of waiver, the government responds as follows to particular issues raised by the defendant.

***Testimony of Detectives O’Hara and Yucaitis Was Properly Excluded***

Defendant argues that the testimony of detectives O’Hara and Yucaitis (both now deceased) should have been presented to the jury. Doc. 303, p. 4. Noting that Andrew Wilson’s testimony was presented to the jury, the defendant, without legal citation, argues that “fundamental fairness dictated the admission” of O’Hara’s and Yucaitis’s testimony. *Id.* Yet, the Federal Rules of Evidence are not designed to create equal equations of admissibility. *Cf.* Fed. R. Evid. 412(b)(1)(B) (limiting defendant’s ability to offer evidence of prior sexual conduct by the alleged victim only to establish consent, but allowing the government to offer such evidence for any purpose).

More to the point in the instant case, the defendant has not raised any argument that undermines this Court’s reasoned opinions denying admissibility in the first instance. *See* Doc. 156, 186. Defendant argues that those factors identified by this Court that undermined the reliability of O’Hara and Yucaitis’s testimony – *i.e.* potential money damages in civil lawsuits and job loss through the police board hearing – “went to the weight of the evidence, not its admissibility.” Doc. 303, p. 4. Yet, in *United States v. Hall*, 165 F.3d 1095, 1110 - 1111 (7th Cir. 1999), the Seventh Circuit described as “critical” in determining the admissibility of statements under Federal Rule of Evidence 807, that “the district court

[find] that the statement is trustworthy.” Thus, this Court properly identified factors that undermined the “trustworthiness” of O’Hara and Yucaitis’s prior testimony.

Defendant’s citation to *In re United States of America*, 2010 WL 2977455, \*3 (7th Cir., July 27, 2010)<sup>4</sup> is irrelevant. While the case does discuss the concept of “weight versus admissibility,” Federal Rule of Evidence 807 is not even mentioned in the opinion. Similarly, the defendant argues that this Court did not properly consider the good character evidence of O’Hara and Yucaitis, noting that both officers were “decorated police veterans,” and were “exonerated at the first *Wilson* trial. . . [and therefore] lacked personal financial motives when they testified at the second civil trial.” Doc. 303, p. 5. The weight to place on O’Hara’s and Yucaitis’s status as “decorated police veterans” is unfortunately somewhat dubious under the circumstances, as the defendant himself was also a decorated police veteran. The Court was justified in discounting this factor.

Moreover, the defendant’s assertion that O’Hara and Yucaitis lacked “personal financial motive” because they were exonerated in the first *Wilson* trial is completely misdirected. The judgment in the officers’ favor was reversed by the Seventh Circuit. *See Wilson v. City of Chicago*, 6 F.3d 1233 (7th Cir. 1993). Upon remand in the district court, O’Hara and Yucaitis were still named and identified by the district court as having pending claims under 42 U.S.C. §1983 against them. *See Wilson v. City of Chicago*, 900 F.Supp. 1015 (N.D. Ill. 1995) (Gettleman, J.). Thus, O’Hara and Yucaitis still had reason to

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<sup>4</sup> This case is now found at *In re: United States*, 614 F.3d 661 (7th Cir. 2010).

manipulate their testimony even after the first Wilson civil trial.

***Testimony of Detective Hill Was Properly Excluded***

As to Detective Hill, who suffers from dementia, defendant also claims error. Defendant sought to admit Hill's prior testimony as well. Detective Hill's testimony was relevant, according to the defendant, because Hill was *not* present when Wilson claimed he was abused by Burge and Hill. Yet, the defendant presented the testimony of Hill's wife, who was able to establish the same fact – that Detective Hill was not present when Wilson claimed him to be present because Hill was with his family in Wisconsin. Thus, assuming *arguendo* that Hill's testimony should have been admitted, defendant cannot show any harm as to the Court's decision.

Moreover, defendant's legal argument is erroneous. Defendant argues that "[t]he Court made factual findings regarding trustworthiness" . . . [that] . . . "were for the jury." Doc. 303, p. 5. Admissibility under Federal Rule of Evidence 807 (or any other rule of evidence for that matter) is not for the jury to decide. The Seventh Circuit has been clear that as a threshold matter, under Federal Rule of Evidence 807 the district court should determine the trustworthiness of the proffered evidence. *See Hall*, 165 F.3d at 1110 - 1111.

***Assertions of Fifth Amendment Protection***

Defendant argues that he was further denied a fair trial because certain witnesses were allowed to assert their Fifth Amendment privilege, thus denying the defendant access to these witnesses' presumably favorable testimony.<sup>5</sup> The defendant fails to explain how the various witnesses' anticipated testimony could have assisted his defense. As the defendant notes, the Court conducted *in camera* hearings to determine the propriety of various witnesses asserting their Fifth Amendment claims. The government was not privy to these hearings nor to the substance of the Court's rulings. Therefore, the government is not in a position to substantively respond to defendant's undeveloped argument.

***Details of Witnesses' Confessions and Criminal Conduct Were Properly Excluded***

Throughout the trial, the defense repeatedly attempted to introduce evidence relating to the contents of various witnesses'<sup>6</sup> alleged statements to the defendant, and other detectives, as well as elicit details of the underlying offenses. The Court generally precluded such inquiry on grounds of relevance. *See generally* Fed. R. Evid. 403. The defendant has cited absolutely no legal precedent for his claim of error, and thus has waived this argument.

Without waiving the claim of waiver, the government notes that defendant's apparent legal principle for his claim of error has turned the rules of relevance on its figurative head.

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<sup>5</sup> The defendant's argument is not quite that cogent. In fact, the defendant does not actually identify any prejudice other than "more evidence the jury did not get to hear." Doc. 303, p. 5.

<sup>6</sup> In this section, the government uses the term "witness" or "witnesses" as shorthand for those witnesses who testified that they were tortured by Burge and/or other detectives at Area 2 of the Chicago Police Department.

The defendant argues that the Court improperly precluded testimony regarding the details and contents of the witnesses' confessions, arguing that "Burge was the person on trial – not the witnesses." Doc. 303, p. 6. Defendant's argument is erroneous on two fronts.

First, while a witness can be impeached through a felony conviction under the appropriate circumstance (*see generally* Fed. R. Evid. 609(a)), the details of the underlying conviction are generally not admissible. In *Campbell v. Greer*, 831 F.2d 700, 707 (7th Cir. 1987)<sup>7</sup>, the Seventh Circuit held that for impeachment purposes under Federal Rule of Evidence 609, the impeaching party should be permitted to offer the name of the crime charged, the date, and the disposition of a prior conviction. The *Campbell* court went on to caution that "the opposing party may [not] harp on the witness's crime, parade it lovingly before the jury in all its gruesome details, and thereby shift the focus of attention from the events at issue in the present case to the witness's conviction in a previous case." *Id.*, at 707. *See also Hernandez v. Cepeda*, 860 F.2d 260, 264 (7th Cir. 1988) (same); *United States v. White*, 222 F.3d 363, 370 (7th Cir. 2000) (applying *Campbell* in criminal context); and, *Wilson v. City of Chicago*, 6 F.3d 1233 (7th Cir. 1233) (discussed *infra*). In essence, the defendant complains because he was denied the opportunity to "harp on the witness's crime, [and] parade it lovingly before the jury in all its gruesome details." The law does not allow

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<sup>7</sup> The *Campbell* decision was based on a version of Federal Rule of Evidence 609 that did *not* include the now-required Federal Rule of Evidence 403 balancing. However, the limitations pertaining to the details of the underlying felony conviction have survived the amended version of Federal Rule of Evidence 609. *See United States v. Estrada*, 430 F.3d 606, 616 (2<sup>nd</sup> Cir. 2005).

such conduct, and this Court properly denied defendant the opportunity to do so.

In addition to the problems presented under Federal Rule of Evidence 609, the defendant faces an equally upstream battle under Federal Rule of Evidence 401 and 403. Defendant argues, again without so much as a citation to a rule of evidence, that the contents of the confession give “rise to an inference that the witnesses had confessed not because they were ‘tortured’ by police, but for other reasons, including because they were guilty of the offenses.” Doc. 303, p. 6. The contents of the confessions demonstrate that there was a confession obtained, but the details of the crimes contained in the confessions have marginal (if any) relevance to whether the witnesses were tortured. Put another way, if the defendant was permitted to elicit details of the confession, these details would have no relevance in establishing whether the witnesses were tortured in the process of obtaining their confessions. Relevance is defined by the charges before the jury, which in the instant case had nothing to do with the *contents* of the confession, but rather the means by which the confessions were obtained. *Cf. United States v. Sawyer*, 558 F.3d 705, 714 (7th Cir. 2005) (equating relevancy of evidence by reference to the charged conduct).

This Court’s ruling in generally excluding the contents of the confession was well supported by related case precedent. In *Wilson v. City of Chicago*, this defendant’s civil-defense counsel employed a similar tactic in a §1983 action – presenting to the jury details of Andrew Wilson’s brutal murder of two Chicago police officers. The Seventh Circuit reversed a jury finding in favor of the officers, holding *inter alia*:

A mass of inflammatory evidence having little or no relevance to the issues in [the

civil rights trial] was admitted, and the defendants' counsel was permitted to harp on it to the jury and thus turn the trial of the defendants into a trial of the plaintiff [Andrew Wilson]. Of course, when the plaintiff in a case happens to be a murderer this turning of the tables has undoubted forensic appeal. But even a murderer has a right to be free from torture and the correlative right to present his claim of torture to a jury that has not been whipped into a frenzy of hatred.

*Wilson*, 6 F.3d at 1236. Despite this clear roadmap from the Seventh Circuit, defendant continues to maintain that his desired “forensic appeal” should take precedent over the requirement that evidence be relevant. This Court properly limited cross examination of the witnesses regarding the contents of their respective confessions.

***Hearsay and Relevancy Objections Were Properly Sustained***

Without much specificity or developed argument, defendant argues that he was precluded from presenting a full defense, and prevented from fully cross-examining government witnesses. At base, defendant’s argument appears to be that the rules of evidence were not fairly applied. However, defendant’s incredulity belies the problem – there was, and remains, scant legal support for many of the evidentiary positions taken by the defendant at trial and in defendant’s post-trial motion. *See e.g.* Doc. 303, n. 10 (complaining that extrinsic evidence used to attack Shadeed Mu’min’s character for truthfulness should have been allowed into evidence, *but see* Fed. R. Evid. 609(b)); Doc. 303, n. 12 (complaining that Holmes’s decades old street gang involvement should have been admitted, *but see United States v. Alviar*, 573 F.3d 526, 536 (7th Cir. 2009) (acknowledging highly prejudicial nature of gang evidence, and noting that gang evidence should be admitted only in limited circumstances); Doc. 303, n. 7 (complaining about objections in opening

statement that were argumentative and could only be supported by expert opinion), *but see Soltys v. Costello*, 520 F.3d 737, 744 (7th Cir. 2005) (affirming *in dicta* that opening statement should be limited to admissible evidence). In short, defendant has not identified any general evidentiary ruling that would support a new trial, nor has defendant offered a cognizable argument to support any claim of error.

***Validity of Hobley Lawsuit Was Not At Issue***

Defendant argues that *Hobley v. Burge* “was a bogus lawsuit” and that the defense should have been able to call Darryl Simms as a witness at trial to prove that the lawsuit was based on false pretenses. The defense further contends that the government’s failure to turn over a report of interview with Simms until mid-trial constituted a *Brady/Giglio* violation, and that a mistrial should have been granted. Doc. 303, p. 8-9. Defendant’s claims are without merit.

Darryl Simms’ only potential relevance as a witness was based upon his relationship with Madison Hobley while the two were in prison together. Simms did not have dealings with any of the government’s witnesses, or have any involvement with the victims whose torture was at issue at trial. According to the defense’s theory, Simms should have been allowed to testify that Hobley made up his police torture, and did not have a true basis for his lawsuit against the defendant. However, Hobley did not testify at trial, and no evidence was presented or arguments made regarding whether or not Hobley’s lawsuit was legitimate.

The defense does not cite a single case, or present any coherent argument, as to why Simms’ potential testimony was either exculpatory for the defendant or impeaching of any

government witness. *See United States v. Kimoto*, 588 F.3d 464, 474 (7th Cir. 2009) (holding that to state a *Brady* claim, the defendant first must prove that the evidence that was withheld was favorable, meaning that it was exculpatory or impeaching). That is because there is no case that holds that it is acceptable to commit perjury and obstruction if facing a meritless, or even frivolous, lawsuit. If defendant's reasoning was correct, a defendant in a criminal investigation could intimidate witnesses and destroy evidence with impunity, so long as he was not guilty of the underlying offense. This Court appropriately determined that Hobley's motivation for bringing suit, and the merits of that suit, were irrelevant to the defendant's choice to violate the law by committing perjury and obstruction. For the reasons stated in court, as well as in the *Government's Response to Defendant's Motion for Judgment of Acquittal and Arrest of Judgment*, the Court should deny defendant's motion.

***Testimony of Ricky Shaw Was Properly Limited***

Defendant complains that his witness, Ricky Shaw, was not permitted to present evidence on the "D.C. effect."<sup>8</sup> As the record demonstrates, Ricky Shaw was not able to link the so-called "D.C. effect" to any of the government's witnesses. Thus, Shaw's testimony on this point was not relevant, and therefore, properly excluded.

***Testimony of Dr. Raba was Properly Admitted***

The defendant complains that the government improperly elicited testimony about a letter that Dr. Raba wrote to then-Superintendent Brzeczek about Andrew Wilson's injuries,

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<sup>8</sup> "D.C." refers to Darryl Cannon, an individual who claims that he was tortured by Area 2 detectives. The government did not call Darryl Cannon as a witness.

and about a phone call Raba received after sending the letter. Testimony on both topics was relevant and not offered for the truth of the matter. Dr. Raba first described the injuries he observed on Wilson, and was then asked whether he relayed his observations in a letter. The letter was not read to the jury. Prior to Raba's testimony, defense counsel had repeatedly asked witnesses if they had reported suspected abuse after seeing injuries on the victims, or were told about the victims being abused. This line of questioning was presumably designed to impugn the witnesses' credibility by suggesting that their lack of action meant either that they did not see or hear the things they said they did, or they did not believe the victims who reported the abuse. The fact that Dr. Raba did take action was relevant to further explain his concerns about Wilson's injuries and that these were not injuries commonly seen in the jail, or caused by objects in the jail.

After sending his letter, Dr. Raba testified that he received a phone call from George Dunn, President of the Cook County Board, who said words to the effect of, "Doc, what are you doing? Why are you getting involved in this?" These questions were not offered for the truth of the matter and defense counsel were not prevented from cross-examining Raba on whether this conversation occurred. Furthermore, that this conversation occurred is relevant to why Raba did not pursue the issue further. The defendant claims that Raba had never previously disclosed this conversation, but that is not true. In his March 7, 2008, interview with the FBI, Raba discussed this conversation. The summary of that interview was disclosed to the defense in February, 2010, a full three months before trial.

***Testimony of Darlene Lopez was Properly Admitted***

Here the defendant again attempts to relitigate an issue that was argued pretrial and decided by this Court in a written Order, with which the government complied. Specifically, the government filed a *Motion in Limine to Introduce Evidence of Racial Animus*; the defendant responded and discussed Darlene Lopez and her anticipated testimony (presumably gleaned from her grand jury transcript and the record of her FBI interview, both of which were disclosed nearly two months before trial began). Doc. 180, p. 4-5. After hearing argument on the issue, the Court ruled that the government could

introduce testimony concerning statements Burge made to people outside the CPD regarding specific incidents which took place at Area Two to show Burge's motive and knowledge. To the extent the government seeks to use this testimony as corroborating evidence of the incidents used to prove its case-in-chief, such testimony will be admissible so long as the government can lay a sufficient foundation showing that the incident about which the witness testifies is the same as one of those used to prove its case-in-chief.

Doc. 186, p. 4. Several days before trial began, the government sent defense counsel a letter spelling out its anticipated order of proof; included in the list was "admissions made to Darlene Lopez."

At the time that Lopez testified, defense counsel argued that the government was in violation of the Court's order. In the instant motion, they continue to try to erase the distinction made in the Court's ruling: statements by Burge to people outside CPD regarding specific incidents were admissible, and a subset of that admissible testimony included statements that could be linked to the five incidents being used to prove the case-in-chief.

Lopez testified to the former, and her testimony was relevant to the defendant's motive and knowledge of abuse at Area Two. Lopez was subjected to vigorous cross-examination. The weight to be given her testimony was properly left to the jury.

***Cross-examination of Dr. Baden was Proper***

Dr. Michael Baden was called by the defense and testified that he expected to be paid approximately \$27,000 for his work on the defendant's case. During cross-examination, the following exchange occurred:

Q: How much did you make . . . last year from testifying and consulting on cases like this?"

A: I don't know how much I made. I would imagine it might be ... a third of my income ...

Q: Can you estimate what that is?

Testimony of Dr. Baden, p. 41-42. At that point the defendant objected to questions about Baden's income, and Baden attempted to further avoid answering by saying he had not yet prepared his tax returns. As an expert, surely the witness anticipated that he would be asked about his income from testifying. His answer was meaningless without knowing "1/3 of what?" In the end, Baden "guessed" he was paid about \$150,000 for his work as an expert in court cases last year, a fact that was certainly relevant to the jury's consideration of his bias. *See e.g. Collins v. Wayne Corp.*, 621 F.2d 777, 784 (5th Cir. 1980) (cross examination of experts on fees earned as an expert witness appropriate); *Hawkins v. South Plains Intern. Trucks, Inc.*, 139 F.R.D. 679, 682 (D. Colo. 1991) (same).

Dr. Baden was also cross-examined about his review of medical records that were entered into evidence, and his review of testimony of doctors who had examined Wilson.

Baden's opinion conformed with the opinion of others as to the burn to Wilson's thigh. *Id.* at 70. His opinion differed from others as to the injuries to Wilson's chest and face. *See, e.g. id.* at 63. His opinion also conflicted with prior testimony by the defendant. *Id.* at 64-65. Inquiry into the facts behind others' findings - facts that also informed Baden's opinion - was entirely proper. *See Wipf v. Kowalski*, 519 F.3d 380, 386 (7th Cir. 2008) (concluding it was proper impeachment to question expert on article updating views expressed in an earlier article relied upon by expert). However, on redirect, defense counsel sought to bolster his opinion by eliciting the opinion of a non-testifying expert who had never examined Wilson, without eliciting facts or data supporting that other opinion. *Id.*, at 84, lines 2-4. This was improper, and the answer was properly excluded. *See Matter of James Wilson Associates*, 965 F.2d 160, 172 (7th Cir. 1992) (finding it was improper to use expert witness to present otherwise inadmissible hearsay evidence, noting the proper course is to call the original declarant).

***Cross Examination of Michael McDermott Did Not Constitute Error***

Defendant claims that "at strategic points during the trial, the government made improper comments and pursued inappropriate lines of inquiry." Def. Mot. 10. Defendant cites only one example. Specifically, after witness Michael McDermott (who the Court had allowed the government to treat as a hostile witness) *sua sponte* started accusing the government of misconduct and undue delay in the prosecution of the defendant, the government asked if part of the reason for the delay was McDermott's prior refusal to acknowledge the defendant's wrongdoing. The exchange was as follows:

Q: So certainly no one told you that the government was interested in hearing about Shadeed Mu'Min, did they?

A: I know it was listed. I know I went down to OPS. I know it was brought up at the police board. This was all public record decades ago, and your office did nothing. So I – I don't know why you waited 20 years. This stuff was all brought up before, and nobody did nothing about it. . .

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Q: Sir, isn't it true that the reason these cases were not brought earlier is because people like yourself did not come forward earlier?

6/14/10 Tr. 142-43. Following this question, there was an immediate objection, and the objection was sustained. The witness did not answer the question.

The defendant does not cite any case or rule of evidence that would indicate what basis he relies on for his allegation that the government's question constituted misconduct. At most, he can argue that the question was irrelevant or argumentative, but that alone is far from a showing that the question "so infected the trial with unfairness as to make the resulting conviction a denial of due process." See *United States v. Serfling*, 504 F.3d 672, 677 (7th Cir. 2007) (setting forth the standard for a finding of prosecutorial misconduct). There was certainly a good faith basis for the question: McDermott admitted on direct examination that the first time he ever provided information about the defendant's 1985 torture of a suspect in custody was when McDermott testified before a federal grand jury in 2008, despite that McDermott was asked about the specific event by the Office of Professional Standards more than 10 years before. 6/14/10 Tr. 40. McDermott's statements that "this stuff was all brought up before" and that "this was all public record decades ago" were blatantly false, considering that prior to 2008 he had never truthfully provided the information he had to investigators.

In any event, the objection to the question was quickly sustained, and no answer was given. Jurors on several occasions were instructed that the lawyers' statements were not evidence, and that the lawyers' questions should be disregarded when objections were sustained. Jurors are presumed to follow the instructions they are given. *See United States v. Della Rose*, 403 F.3d 891, 905 (7th Cir. 2005) (stating that "as in every case, the jury was instructed not to give any evidentiary weight to the questions and statements of attorneys, and we presume the jury followed that instruction," and holding that an improper cross-examination question by the government was not a basis for a mistrial). For these reasons, the Court properly denied defendant's motion for a mistrial.

***Cross Examination of Burge Was Proper***

Defendant complains that the government was permitted to cross-exam Burge on his safe handling of handguns. After satisfying itself that the government's cross-examination would be limited to Burge's safety practices in handling a firearm, the Court allowed the cross-examination. The defendant denied ever pointing a gun at Frank Laverty. The government offered no extrinsic evidence on the point, and did not argue the point in its closing. As this Court noted, the line of questioning was impeaching of Burge's testimony that he always safely handled firearms. There was no error in allowing this examination, and absolutely no identifiable prejudice based on the defendant's denials.

The defendant also complains that the government should not have been permitted to cross-examine the defendant regarding his boat's name – *The Vigilante*. The line of questioning relating to *The Vigilante* was proper impeachment. It came on the heels of

defendant's denial that he would have told Darlene Lopez, a social acquaintance, about his knowledge of police misconduct; and, that he would not have told Diane Panos that he did not believe in certain Constitutional rights afforded criminal defendants. The government then began to question the defendant as to whether he was actually proud of his reputation for taking the law into his own hands, which led to questioning about the defendant naming his boat *The Vigilante*. This line of questioning was proper. The defendant had denied discussing with Lopez and Panos – both social acquaintances – that he had made statements implicitly endorsing police misconduct. The fact that the defendant chose a name for his boat that evinced a contrary sentiment – that he believed in taking the law into his own hands – was appropriate impeachment on the issue.

The defendant cites to *United States v. Williams*, 739 F.2d 297 (7th Cir. 1984) in support of his argument. In *Williams*, the government elicited testimony from a police detective that he knew the defendant as “Fast Eddie,” a piece of evidence that the Court found to have only one meaning – that the defendant was an “unsavory character or even a criminal.” *Id.*, at 300. In the instant case, the government did not elicit the boat's name in a vacuum. Rather, the defendant suggested that he would not share information that suggested he disregarded the law with mere social acquaintances. His selection of the name *Vigilante* was circumstantial evidence that he shared with the public-at-large that he had a penchant for taking the law into his own hands. Moreover, *Williams* involved a nickname that law enforcement had created for the defendant – not a name the defendant had selected and publicly proclaimed for himself. In the instant case, the relevance of the boat's name

came from defendant's selection of the name for his boat, *not* a name foisted upon him by law enforcement.

### **Jury Selection**

Defendant also complains that the jury selection process was improper because this Court sustained a *Batson* challenge made against the defense. Defendant's argument on this point does not raise any cogent legal challenge. To the contrary, the defendant misstates the law as it applies to jury selection.

Defendant begins with the premise that jury selection is "one area in which a defendant ostensibly should be free from court intervention," yet "even here, Burge was stymied." Doc. 303, p. 12. Defendant's view of this Court's role in the jury selection process is completely unfounded. When a *Batson* challenge is raised, the trial court should play a "pivotal role" in evaluating *Batson* claims. *United States v. McMath*, 559 F.3d 657, 664 (7th Cir. 2009), citing *Snyder v. Louisiana*, 128 S.Ct. 1203, 1207 (2008).

Defendant continues down this misguided legal path when he argues that *Batson* was misapplied because "it is Burge's right to a fair trial that was at stake – not other persons." Doc. 303, p. 12. This is a particularly misguided argument as *Batson* and its progeny stand for the proposition that the venire members have a right to serve on the jury – not that the defendant has a right to pick a jury of his own liking. *See Powers v. Ohio*, 111 S.Ct. 1364 (1991) (recognizing that the Equal Protection Clause protects a citizen's right to serve on a jury irrespective of the race of the defendant). *See also United States v. Stephens*, 421 F.3d 503, 523 (7th Cir. 2005) (Kanne, dissenting) ("individuals . . . have the right to serve on

juries”).

Finally, defendant summarily concludes that as to Juror 19, the defense provided race neutral reasons. Doc. 303, p. 12. However, providing race neutral reasons is only the mid-point of a proper *Batson* analysis. The third-step of the *Batson* analysis is the trial court’s assessment of the proffered reasons. *United States v. Stephens*, 514 F.3d 703, 710 (7th Cir. 2008). In his post-trial filing, the defendant relies on the same reasons he presented at the trial for striking Juror 19 – her experience as a notary and relationships with police officers. The defendant does not offer any further argument as to why this Court’s assessment of these reasons was in error. This Court’s conclusion was not erroneous, and the *Batson* issue should not serve as a basis for a new trial.

### **Handling of Jury Questions**

The defendant also objects to this Court’s handling of jury questions, including a request for a magnifying glass; a request for alligator clips that were used as demonstrative evidence at trial; and answers to two substantive jury questions. The government responds to these issues in turn.

As to the magnifying glass, in general, providing the jury with a magnifying glass to assist the jury in its analysis of the evidence is not improper. *See United States v. Young*, 814 F.2d 392, 396 (7th Cir. 1987). Assuming a technical violation of Fed. R. Crim. P. 43 occurred, any error would be reviewed for harmless error. *United States v. Evans*, 352 F.3d 65, 69 (1<sup>st</sup> Cir. 2003), citing *Rogers v. United States*, 95 S.Ct. 2091 (1975). In the instant case, the defendant was aware that the magnifying glass had been given to the jury, and only

expressed concern that they were not present when the decision was made, not that the magnifying glass was provided to the jury. Tr. 6/28/10, p. 10. *See also, Young*, 814 F.2d at 396 (reviewing for harmless error where defendant failed to object to court providing jury with magnifying glass).

As to defendant's objection that alligator clips – demonstrative items used to impeach Dr. Baden's testimony – were not provided to the jury, this Court exercised its sound discretion in not providing them to the jury. As an initial matter, the alligator clips were not admitted into evidence. *Cf. United States v. Bates*, 407 F.2d 590, 593 (7th Cir. 1969) (reversible error to give jury stipulation because, in part, stipulation was not entered into evidence in the first instance). Moreover, the government did not rely on the alligator clips themselves as evidence, the alligator clips were used to show that Dr. Baden's opinion was not well founded. This Court properly exercised its discretion in not providing the jury with non-evidence to consider during its deliberation.

The final jury question issue raised by the defendant is this Court's responses to two jury questions. The defendant complains that in answering the questions, the Court filled "voids in the government's proof." Doc. 303, p. 13. In fact, both questions asked for interpretations of the law – one asking whether a civil-defendant could exercise his Fifth Amendment right when answering interrogatories; and, one asking whether an interrogatory that is objected to and still answered, is considered a proper answer. Both of these questions required legal guidance. The trial court has wide discretion in providing supplemental instructions. *United States v. Carani*, 492 F.3d 867, 874 (7th Cir. 2007). The Court's

instructions were proper statements of the law, and were concise, concrete responses to the jury's inquiry. *See United States v. Hewlett*, 453 F.3d 876, 880 (7th Cir. 2006) (commending simple answers to jury questions). There was no error in the handling of the jury questions.

### **Jury Instructions**

The defendant asserts that error was committed with the jury instructions on materiality and unanimity, and by the failure to give an instruction on permissible interrogation techniques. The government reasserts arguments made during the charge conference.<sup>9</sup> As to the materiality instruction, the instruction that was given did not impermissibly amend the indictment. The indictment alleged that the defendant's knowledge of torture or physical abuse at CPD was material to the outcome of the *Hobley* lawsuit. Indictment, ¶ 6. Count Two then alleged perjury on the "material matter set forth above." The materiality instruction stated that an interrogatory answer is "material if a truthful answer might reasonably be calculated to lead to the discovery of evidence admissible at trial of the underlying lawsuit *or otherwise affect its outcome*" (emphasis added). This instruction was an accurate statement of the law. *See United States v. Kross*, 14 F.3d 751, 754 (2d Cir. 1994) *cert. denied*, 513 U.S. 828 (1994).

In this case, the defendant attempts to split hairs by arguing that he was charged with affecting the outcome of the *Hobley* lawsuit, but not the discovery process that leads to admissible evidence that dictates the outcome of the lawsuit. The defendant provided false

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<sup>9</sup> The government failed to request all the necessary jury instruction transcripts, and therefore, we are reliant on collective memories as to these issues.

answers in the interrogatory because truthful answers would have resulted in a detrimental outcome of the lawsuit. The materiality instruction provided to this jury was proper.

Next, the defendant challenges the unanimity instruction. The defendant's proposed unanimity instruction would have required the jurors to find unanimously that a specific act of abuse occurred. But the defendant was charged with signing false interrogatory answers, not committing specific acts of abuse. The jury was properly instructed that they had to unanimously agree which question was answered falsely. The answers were the proper focus of the unanimity instruction.

Finally, the defendant submitted two proposed instructions on interrogation techniques, Defendant's Instruction 29 and Defendant's Supplemental Instruction 2. Both instructions focused on investigative techniques not charged in the indictment. The indictment alleged only that the defendant had lied about physical abuse or torture. To instruct on other investigative techniques that were not at issue would have been confusing to the jury. The government argued only about actions that were clearly improper, such as shocking, bagging, and threatening suspects with firearms. The proposed defense instruction was unnecessary and was properly denied.

#### **Pre-Indictment Delay**

Finally, defendant claims that "the passage of time prejudiced Burge's ability to defend." Def. Mot. 15. This issue was fully briefed and ruled upon prior to trial. *See* Doc. 77, 78, 111, 125, 137, 138. Defendant presents no new arguments in support of his motion, nor does he cite a single case that favors his position. For the reasons previously stated by

the government, and in this Court's order of October 27, 2009, defendant's argument is without merit and should be denied.

### CONCLUSION

For the reasons noted above, and previously submitted by the government, the government respectfully moves this Court to deny defendant's motion for new trial.

Respectfully submitted,

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