



On May 6, 2010, the government proposed eight stipulations containing fragments of Burge's prior testimony. The proposed stipulations relate to police questioning/arrests of Andrew Wilson, Shadeed Mumin, Melvin Jones, Anthony Holmes and Gregory Banks, as well as Burge's practices when detectives conducted interrogations.

Pursuant to Rule 106 of the Federal Rules of Evidence, Defendant Burge moves to permit admission of other select portions of his testimony. We have specifically identified the testimony that should be admitted contemporaneously with the testimony in the government's proposed stipulations. (The designations follow the proposed stipulations in Exhibits 1-8.)

#### Legal Overview

Rule 106 provides:

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

In *United States v. Price*, 516 F.3d 597 (7<sup>th</sup> Cir. 2008), the court summarized the Seventh Circuit's treatment of Rule 106:

We have held that, under the doctrine of completeness, codified in Federal Rule of Evidence 106, a party against whom a "fragmentary statement" is introduced may ask the district court to admit other parts of the statement necessary to "clarify or explain the portion already received." *Glover*, 101 F.3d at 1183, 1189.

By allowing litigants to present a broader picture of the evidence, the completeness rule prevents the jury from being misled by a statement introduced out of its true context ...

As the party seeking to admit the additional evidence, Price must establish both that the evidence is relevant to the issues in the case and that it clarifies or explains the portion offered by the government. See *Glover*, 101 F.3d at 1190. To determine whether the evidence serves a clarifying purpose, the district court must ask whether the evidence: (1) explains the evidence already admitted; (2) places the admitted evidence in its proper context; (3) will serve to avoid misleading the trier of fact; and (4) will insure a fair and impartial understanding of all of the evidence. A judge need not admit every portion of a statement—just those needed to explain portions previously introduced. See *Li*, 55 F.3d at 329-30.

In *United States v. Walker*, 652 F.2d 708 (7<sup>th</sup> Cir. 1981), the court reversed in a case in which the district court had permitted the government to admit portions of the defendant's prior testimony, while precluding the defendant from admitting remaining portions. The *Walker* defendant was a member of the Chicago Fire Department, charged with committing extortion under color of official right. Arthur Nichols, an owner of apartment buildings, claimed that the defendant had represented himself as an inspector (falsely), and requested a couple hundred dollars to approve Nichols' building. Nichols contacted the FBI and agreed to tape-record the defendant. Defendant eventually appeared at Nichols' apartment (on July 7, 1979). Although Nichols produced \$150 cash, the circumstances of the meeting were disputed.

Defendant testified at trial, contending that he refused the money and threw it in an ashtray. The trial ended in a mistrial. Defendant did not testify at a second trial, but the government admitted a partial transcript of his testimony (14 pages of direct and an excerpt from cross-examination) from the first trial.

Defendant was convicted. On appeal, he argued that the district court erred in refusing to admit remaining portions of his 28-page trial testimony. With the exception of two pages of introductory testimony, the court of appeals agreed.

The court pronounced:

The excluded testimony satisfies the standard enunciated in *United States v. McCorkle*, [511 F.2d 482 (7<sup>th</sup> Cir. 1975)] because substantial portions were both relevant to specific elements of the Government's proof and explanatory of the excerpts already admitted. For instance, some of the excluded testimony probed Walker's intent and developed his allegation that his participation in the July 7<sup>th</sup> meeting was innocent.

652 F.2d at 711. After quoting excluded testimony in which the defendant denied extorting money, the court stated:

This testimony satisfies the first prong of the *McCorkle* test because it relates to the issue of whether Nichols produced the money in response to an extortionate demand by Walker or whether Nichols initiated the bribe which Walker allegedly rejected. The testimony also fulfills the second *McCorkle* requirement by explaining Walker's already admitted statements that he had visited Nichols for personal reasons and that Nichols himself had initiated the bribe by tendering money which Walker rejected.

*Id.* The court reached the same conclusion with respect to excluded testimony regarding whether the defendant had pocketed the \$150; the defendant's reasons for appearing at Nichols' apartment; and whether the defendant had previously visited tenants while in uniform.

In finding the district court abused its discretion in refusing admission of the remainder of the defendant's prior testimony under Rule 106, the court stated:

The Government would not have been confronted with a situation of operosity had it been compelled to read the balance of the transcript. Walker's entire testimony constituted only twenty-eight pages. The Government read approximately fourteen of these pages into evidence. Forcing the Government to include the remainder would not have seriously disrupted the prosecution's case. Most importantly, it is axiomatic that the Government has a duty to conduct a fair trial. As this court admonished in oral argument, the Government's efforts to execute this obligation should be at least as active as its zeal to secure convictions. The potential unfairness to the defendant, by contrast, was substantial ....

Any inconvenience to the court caused by the introduction of the remaining testimony would have been minimal. At trial, the Government attorneys read the selected portions to the jury with one attorney assuming the role of the defendant and the other taking the part of the examiner. The additional time necessary for them to have read the remaining pages would have been inconsequential. In view of the weighty factors favoring admissibility, which are not counterbalanced by any plausible reasons for exclusion, we find that the trial judge committed error in excluding the relevant and explanatory portions of Walker's prior testimony

652 F.2d at 713-14.

### *Analysis*

The portions of the testimony designated by Burge satisfy these standards. Each offered excerpt explains the testimony offered by the government, and places it in context. The offered testimony is necessary to avoid misleading the jury, and to ensure and fair and impartial understanding of the evidence.

This case is not one in which the defendant's designations concern irrelevant topics.<sup>1</sup> Critical issues in this case will relate to whether Burge knew about, or participated in, physical abuse of Andrew Wilson, Shadeed Mumin, Melvin Jones, Anthony Holmes or Gregory Banks. The government desires to introduce Burge's prior testimony to connect him to these interrogations. But, in the same proceedings, Burge denied abusing, or knowing about police abuse, of these persons, or explained his involvement/observations, or lack thereof, in relation to the particular interrogations. Fairness requires that the testimony identified by the defendant be admitted pursuant to Rule 106. Absent application of Rule 106, the jury would be left with misleading impressions, *i.e.*, that Burge admitted participating in the interrogations, but did not deny knowing about, or participating in, physical abuse. In addition, without admitting the designated testimony, the jury would be left to speculate about what Burge testified about in the proceedings offered by the government. If Burge's prior statements are to be admitted, there is no sound reason to deny the jury the complete picture of the incidents described in those statements. The

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<sup>1</sup> In *United States v. Lewis*, 954 F.2d 1386 (7<sup>th</sup> Cir. 1992), the defendant took the stand; the government cross-examined him about a post-arrest statement. On redirect examination, the defense sought to elicit whether the defendant told the FBI agents that, if he "did it," he would not talk to them unless he consulted an attorney. The district court sustained the government's hearsay objection. The Seventh Circuit found that no plain error occurred. With respect to the Rule 106 point, the court said that it might have admitted the excluded testimony if it were the trial court. The court, however, determined that the excluded statement had minimal significance. The court pointed out that the "objection that the statement was "hearsay" is in error; the appropriate objection was that it was irrelevant." *Id.* at 1392.

complete picture is relevant within the meaning of Rule 401, even if it is not helpful to the government's theory.

This is not a case where there is a significant time gap in the testimony offered by the government, and testimony designated by the defense. Cf. *Price*, 516 F.3d 597 (excluded portions were from a statement made two years after the statements offered by the government). There is no like time-gap in this case. The designated testimonies are from the same proceedings as offered by the government, e.g., a motion to suppress, deposition or trial.<sup>2</sup> The designated testimony typically followed and/or preceded the questions and answers in the proposed stipulations.

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<sup>2</sup> In *United States v. Giles*, 244 F.3d 966 (7<sup>th</sup> Cir. 2001), the government offered a number of tape-recorded conversations between an informant and a defendant. A recording dated February 11, 1995 was not among them. Citing Rules 803(3) and 106, the defendant unsuccessfully moved to introduce the tape because it was exculpatory. The district court excluded the tape on hearsay grounds, reasoning the defendant had too much time for reflection after the recording offered by the government. The court of appeals said this about the ruling:

We think the February 11 tape should have been admitted, especially in this case where Giles was going to (and did) testify. The government's argument that the tape was a product of Giles' reflection-an attempt to cover his tracks in case he got caught-should have been made to the jury, not the judge. On a close evidentiary call like this, we think it's best to err on the side of inclusion rather than exclusion if an error at all is to be made. But all that said, we can't say the decision to keep the tape out was so outside the zone of reasonableness so as to be an abuse of discretion by the trial judge. And even if it were, unfortunately for Giles, given the strong evidence of his guilt, the error would be viewed as harmless.

*Id.* at 974.

This also is not a case in which the defendant has failed to identify particular testimony. Cf. *United States v. Glover*, 101 F.3d 1183, 1189-92 (7<sup>th</sup> Cir. 1996) (in a retrial in which the defendant had testified at the first trial and the government admitted 11 pages of his 168-page testimony from the first trial, no Rule 106 error occurred where defense counsel wanted the entire testimony admitted and failed to identify particular portions of the prior testimony). Here, the testimony that should be provided to the jury along with that identified in the government's proposed stipulations is set forth in Exhibits 1-8. The defendant-offered snippets are not overly cumbersome (in some cases, a few lines), and explain the stipulations proposed by the government. Admission of this testimony would not unduly prolong the trial.

Also implicated is the defendant's constitutional right to remain silent. A defendant should not be compelled to waive his Fifth Amendment rights to rebut the impression created by an incomplete evidentiary description of his prior statements. See *Walker*, 652 F.3d at 713, 714; see also *Glover*, 101 F.3d at 1192 (citing *Walker* and *United States v. Sutton*, 801 F.3d 1346, 1369-70 (D.C. Cir. 1986) (because defendant had constitutional right not to testify, excluded portions of recorded conversation were necessary to rebut government's case, and should have been admitted)). That the defendant-offered testimony may be exculpatory is no reason for exclusion. As explained in *Walker*:

The admitted testimony in this case cannot properly be characterized as a confession. It contains no admission of guilt and, since most of the admitted testimony was excerpted from Walker's

direct examination, it naturally contains statements favorable to Walker. Nonetheless, the Government's incomplete presentation may have painted a distorted picture of Walker's prior testimony which he was powerless to remedy without taking the stand.

652 F.3d at 713.

## II.

The proposed stipulation set forth in Exhibit 3 does not relate to a specific case on the government's list of relevant cases. Rather, the proposed stipulation relates to Burge's practices during interrogations conducted by other detectives. Specifically, the government seeks to introduce that Burge supervised interrogations of suspects and would sometimes stand outside the door of an interrogation room and listen, or slightly open the door in cases in which he (Burge) was directly involved.

This Court has previously granted the government's motion to preclude the defense from introducing evidence regarding interrogations other than the ones designated by the government. The introduction of the testimony in Exhibit 3 would open the door to counter-evidence by Burge, *e.g.*, evidence of lack of physical abuse of suspects, or knowledge thereof. See, *e.g.*, *United States v. McAnderson*, 914 F.2d 934, 946 (7<sup>th</sup> Cir. 1990).

### Conclusion

WHEREFORE, based on the foregoing, Defendant Jon Burge, respectfully moves this Honorable Court to preclude the admission of testimonial segments set forth in the stipulations in Exhibits 1-8, or, to allow the contemporaneous

admission of the testimony set forth after the stipulations in Exhibits 1-8 and/or to grant any other equitable and appropriate relief.

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 10th day of May, 2010, I filed the above-described document 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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