

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

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

**GOVERNMENT’S RESPONSE TO DEFENDANT’S MOTION TO PRECLUDE  
HIS PRIOR TESTIMONY, OR IN THE ALTERNATIVE,  
INVOCATION OF THE DOCTRINE OF COMPLETENESS**

The UNITED STATES of AMERICA, through its attorney, PATRICK J. FITZGERALD, respectfully responds as follows to defendant’s motion to preclude use of his prior testimony, or in the alternative, to rely on the Doctrine of Completeness:

***Background***

The government has proffered eight proposed stipulations outlining portions of defendant’s prior statements under oath for admission as substantive evidence at trial. *See* F.R.E. 801(d)(2)(A). Defendant’s filing is the first response that the government has received from defense counsel as to the government’s proposed stipulations. While the parties have successfully navigated other issues involved in this litigation, and have been able to agree (or at the least, limit areas of disagreement) on many trial-related issues, defense counsel has not presented any specific objections and/or Rule 106 submissions to government counsel prior to this filing.

*Argument*

***Defendant's Motion Should Be Denied as Untimely***

As noted *supra*, because the government has not even had a chance to respond to defendant's concerns, which is the preferred course in the context of Rule 106 objections, defendant's motion should be denied without prejudice as untimely. This would allow the parties to resolve or narrow the areas of disagreement and allow for more efficient use of the Court's time.

***Defendant's Motion to Preclude Use of His Prior Testimony Should Be Denied As Legally Unfounded***

While in his motion defendant requests to preclude use of his prior testimony under oath, defendant cites to no legal authority that would support such a resolution. The government is entitled to use defendant's own statements as evidence against him in this criminal trial presuming that the proposed statements satisfy relevancy concerns. *See generally* F.R.E. 403. Defendant has not even attempted to demonstrate that the proposed statements are not relevant. His suggestion that the statements should be precluded because, in essence, he has Rule 106 concerns, puts the cart before the horse. If the issues of completeness are addressed, defendant has not proffered any reason why the government's proposed statements of the defendant are not admissible.

***Defendant's Position Misapprehends the Rule of Completeness***

The government agrees that the Rule of Completeness applies to the statements that the government has offered as evidence. However, the Rule of Completeness, as codified

by F.R.E. 106, is not without its limits.

In *United States v. Glover*, 101 F.3d 1183 (7th Cir. 1996),<sup>1</sup> the Seventh Circuit was faced with a similar situation presented in the instant case – *i.e.* defendant sought to admit large portions of his prior trial testimony in response to government’s submission of eleven pages of defendant’s prior trial testimony. The Court in rejecting defendant’s claim of error, noted:

[T]he test of admissibility under Rule 106 is conjunctive. Thus, once the proponent of the evidence establishes its relevance, the district court must address the second part of the test, and should do so by asking (1) whether the additional evidence explains the evidence already admitted; (2) whether it places the admitted evidence in its proper context; (3) whether its admission will serve to avoid misleading the trier of fact; and (4) whether its admission will ‘insure a fair and impartial understanding of all of the evidence.’

*Glover*, 101 F.3d at 1190, quoting, *United States v. Velasco*, 953 F.2d 1467, 1475 (7th Cir. 1992). In further explaining the contours of the explanatory value of defendant’s proffered Rule 106 additions, the Seventh Circuit stated, that the defendant failed “to demonstrate . . . that only the entire transcript, rather than selected portions of it, would have sufficed to qualify or explain the excerpts that were introduced by the government.” *Id.*, at 1191. *See also Velasco*, 953 F.2d at 1475 (“a trial judge need admit only that evidence which qualifies or explains the evidence offered by the opponent”).

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<sup>1</sup> The defendant also cites *Glover* for the proposition that a defendant must specify those portions of the transcript that he wishes to be offered into evidence under the Doctrine of Completeness. *See* Defendant’s Motion, p. 8. The government does not argue that defendant has failed to sufficiently identify which portions of the transcript he wishes to be admitted into evidence.

In the instant case, many of defendant's proffered additions to his own statements do not comport with the second prong of analysis required under F.R.E. 106. The government agrees that, generally, defendant's proffered portions of his prior testimony are relevant to the issues presented in this trial – for example, in many of defendant's proffered statements, he denies altogether committing abuse while at Area 2 of the Chicago Police Department.

However, that is only one of the two hurdles that defendant must clear. Defendant must also clear the four-part test enunciated in *Velasco*. Defendant has failed to do this. For example, defendant seeks to admit pages of defendant's testimony where he discusses the disposition of criminal charges against government witness Melvin Jones. Not only is defendant's proffered evidence rampant with hearsay, it is completely far afield from the government's limited excerpt that demonstrates the defendant spoke with Melvin Jones while Jones was in custody at Area 2 and being questioned about a murder. Defendant's proffered statements in no way “place[] the admitted evidence in its proper context.” *Glover*, 101 F.3d at 1190.

*Conclusion*

For the reasons set forth above, the government requests that this Court deny without prejudice defendant's motion as not timely; allow the parties to attempt to resolve this issue by agreement; and if necessary, decide the remaining issues based on oral argument presented to the Court.

Respectfully submitted,

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