

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

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

**GOVERNMENT’S RESPONSE TO DEFENDANT’S SUPPLEMENT TO
MOTION TO DISMISS FOR PRE-INDICTMENT DELAY and
INTENT TO OFFER FORMER TESTIMONY OF CHARLES GRUNHARD**

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 supplement to his motion to dismiss for pre-indictment delay, and intent to offer former testimony of Charles Grunhard:

Background

As this Court is very familiar with the factual background of this case, the government will avoid a repetitive general recitation of the facts. However, as to the motion *sub judice*, a brief procedural history is helpful.

The defendant first moved to dismiss the indictment for pre-indictment delay almost one year ago. *See* R. 77. In his factual recitation, defendant detailed the age of the alleged conduct and identifies that some witnesses are now deceased, and thus unavailable to testify. After the government filed its response (*see* R. 111), this Court denied defendant’s motion. R. 138. In the opinion, this Court noted that the defendant failed to establish the requisite prejudice required under *United States v. Marion*, 404 U.S. 307, 322-24 (1971). Furthermore, the Court noted that even if the prejudice prong had been satisfied, the defendant similarly failed to show that any delay “was an intentional device to gain tactical advantage over the accused.” *Id.* This Court noted that the

defendant could not show any tactical advantage gained by the government even if delay was presumed, reasoning that many of the witnesses and documents that are now unavailable were similarly unavailable in 2003 (when Burge answered the interrogatories that are the basis for the pending charges), and that the government had been similarly negatively affected by the passage of time as the defendant.

Argument as to Pre-indictment Delay

In his instant motion, defendant has provided no factual or legal argument to challenge this Court's original reasoning. Rather, defendant simply supplements his list of aged cases with additional victims that the government has identified as possible witnesses at trial – James Andrews, arrested in 1983; and Gregory Banks and David Bates, jointly arrested in 1983. *See* R. 191. When defendant identifies specific areas of possible prejudice, the identified items would not have been available (or suffered from the same deficiencies that they currently suffer from) if the government acted more quickly (presuming *arguendo* that this was possible) in indicting Burge for his 2003 answers to interrogatories.

For example, defendant complains of the following:

1. **Time & Attendance Records:** The Chicago Police Department (CPD) has a seven year retention policy for these documents. R. 191, p. 4. The relevant records would have been destroyed in 1990, seven years after the 1983 incident.
2. **Incomplete OPS Investigations:** Defendant identifies two Office of Professional Standards (OPS) investigations as being incomplete, suggesting prejudicial impact to the defendant. Defendant does not attempt to explain how incomplete reports (that do not result in sustained charges against the defendant) prejudice the defendant.

Presumably, an incomplete report that exonerated the accused officer would work against the prosecutor and inure to the benefit of the defendant. In fact, defendant makes no attempt to explain how the government's purported delay in this circumstance would provide a tactical advantage to the government.

3. **Charles Grunhard:** Defendant identifies the death of Detective Charles Grunhard as a basis for prejudice resulting from the government's presumed delay. However, Grunhard died some time prior to 1995. *See* R. 191, Ex. #1, p. 15 (noting that Grunhard was dead when the 1995 OPS report regarding Banks was issued). As Grunhard died prior to Burge's answers in 2003, defendant cannot even attempt to argue that the government's delay created prejudice as a result of Detective Grunhard's death.
4. **Jail Intake and Paramedic Records:** Defendant notes that certain jail records are unavailable or illegible and *might suggest* that Gregory Banks did *not* complain of injuries when he was initially brought to Cook County Jail. To support this argument, defendant further argues that "[t]here was a suggestion at Banks' suppression hearing that injuries were not noted by jail paramedics." If there was convincing evidence that Banks did not make a complaint, one would presume that the state prosecutors would have presented that information during Banks' motion to suppress. Rather, as the OPS investigation noted, Dr. Walter Romine examined Banks at Cermak Hospital (which is part of Cook County Jail) six days after Banks' arrest and found injuries "consistent with a beating." *See* 191, R. #1, p. 8. Defendant's speculative argument that a suggestion that Banks did not make any

complaints at the time of his intake at Cook County does not rise to the concrete showing that he has suffered actual and substantial prejudice due to the presumed delay. *See Marion*, 404 U.S. at 325-26.

5. **Unavailability of Cook County Jail photographs:** Defendant presumes that these photographs would benefit his theory of the case. This is speculation at its best. Dr. Romine documented injuries “consistent with a beating,” soon after Banks was admitted to Cook County Jail. While not articulated, defendant’s theory may be that Banks self-inflicted these injuries upon arrival at Cook County Jail. Again, this is completely speculative (and of course, Banks will be subject to cross examination on the source of his injuries). Similarly speculative, is that the photographs would help defendant’s theory of the case, as opposed to documenting possible injuries. Finally, defendant has made no showing that these photographs would have been available if the government charged the instant case closer in time to 2003.
6. **Banks’s Memory is Deficient:** Defendant fails to explain how a government witness’s deficient memory hurts the defendant. Common sense dictates a different conclusion. *See United States v. Creamer*, 370 F.Supp.2d 715, 720-1 (N.D. Ill 2005) (concluding that factors including faded memories were insufficient to establish prejudice).
7. **F.R.E. 609(b):** Defendant cites to presumed prejudice as a result of disallowed impeachment under F.R.E. 609(b). As this Court is aware, F.R.E. 609(b) allows for the Court to permit impeachment through a prior conviction more than ten years old if the Court “determines, in the interest of justice, that the probative value of the

conviction . . . substantially outweighs its prejudicial effect.” Thus, defendant cannot claim prejudice because at this juncture such prejudice is wholly speculative. Moreover, if the convictions would have faced the same hurdle under Rule 609(b) in 2003, defendant cannot show any prejudice as a result of a presumed delay by the government.

Because the defendant has not proffered any reason – either factual or legal – for this Court to reverse itself, defendant’s motion should be denied.

Argument as to Detective Charles Grunhard’s Prior Testimony Under F.R.E. 807

Returning to the well again, defendant argues that as an alternative to dismissing the indictment altogether, this Court permit the testimony of Detective Grunhard (now deceased) from Banks’s motion to suppress to be admitted into evidence. R. 191, p. 5. This Court has considered and rejected defendant’s previous arguments for admission of others’ testimony where the defendant has relied on F.R.E. 807. *See* R. 156; R. 187.

As this Court has noted, in the current set of circumstances, “[t]he criterion primarily in dispute is trustworthiness, that is, ‘whether the proffered hearsay possesses indicia of reliability ‘equivalent’ to the indicia of reliability supporting the traditional exceptions. . . .’” R. 156, p. 3, *citing Doe v. United States*, 976 F.2d 1071, 1075 (7th Cir. 1992).

Defendant argues that “Grunhard’s former testimony cannot be dismissed as non-trustworthy” because unlike Detectives Yucaitis and O’Hara, “Grunhard did not give testimony at a civil proceeding in which he was a defendant.” R. 191, p. 3. While it is true that the proffered testimony of Grunhard comes from a hearing on Banks’s motion to suppress his statements, that fact

alone does not create a presumption of trustworthiness for purposes of admissibility under F.R.E. 807.

Indeed, in the instant case, OPS found that Grunhard engaged in abuse of Gregory Banks; failed to report the use of excessive force against Gregory Banks; and, gave false information to OPS during the course of its investigation regarding Banks's allegations. R. 191, Ex. #1, p. 16. Such findings are not the traditional hallmarks of trustworthiness.

Moreover, while the prosecution prevailed at the suppression hearing on Banks's confession, the appellate court reversed the circuit court's finding and suppressed Banks's confession. The appellate court noted that the state's reliance on "mere denials of coercion by police officers" was not "sufficient to establish by clear and convincing evidence that defendant's injuries were not inflicted as a means of producing the confession." *People v. Banks*, 192 Ill. App.3d 986, 992 (1989). While the appellate court's decisions cannot fairly be read as a condemnation of Grunhard's testimony, it certainly was not an endorsement of it either. Grunhard testified at the suppression hearing, and the appellate court reviewed his testimony in rendering its decision that the State had not carried its burden by presenting clear and convincing evidence.

More to the point, the Illinois appellate court (relying on case law jurisprudence) noted that the officers' testimony should not be "viewed in isolation as if they have no interest in the outcome in the case." *Id.*, at 991. While this Court is not bound by Illinois case law on this point, the state law jurisprudence acknowledges the reality of state law enforcement in state criminal proceedings – an officer's testimony "must be examined by the trial judge with the same scrupulous eye that one would expect the trial judge to use to assay the testimony of a party to a lawsuit." *Id.* Thus, contrary to defendant's position, Grunhard's testimony at the suppression hearing did not obtain a level of

higher neutrality simply because he was not testifying in a civil proceeding where he faced damages and/or possible employment consequences. *See United States v. Hall*, 165 F.3d 1095, 1110-11 (7th Cir. 1999) (identifying probable motivation for the declarant in making the statement).

And while once removed from Yucaitis and O'Hara's direct civil exposure, Grunhard faced civil liability if he testified that he either engaged in physical abuse of Banks, or watched as others did the same. Thus, Grunhard's testimony is not significantly more trustworthy under the circumstances.

As to other relevant considerations, defendant proffers no evidence as to Grunhard's character for truthfulness and honesty. *Hall*, 165 F.3d at 1110-11. Indeed, as the record now stands, the only evidence on this point is OPS's findings that Grunhard provided false statements to OPS during the course of its investigation. The government acknowledges that the proffered testimony was under oath, voluntary, subject to cross examination, and under the threat of perjury. The government also does not contest Grunhard's personal knowledge or suggest that he recanted.

However, apart from the testimony of his fellow officers, Grunhard's evidence was not corroborated. This lack of corroboration was at the crux of the appellate court's decision. Other than the officers who testified for the state, there was no evidence that corroborated their version of events. While this Court must make its own independent assessment on this front, and is not bound by the appellate court's assessment, the point is that the State failed to present evidence that sufficiently corroborated Detective Grunhard's testimony. Similarly, in the instant case, the defendant fails to outline any corroboration of Grunhard's testimony. Rather, defendant posits that Grunhard's testimony is less unreliable than Yucaitis and O'Hara's respective statements. While this may be true, F.R.E. 807 is not a rule of relative strengths. To the contrary, F.R.E. 807 requires

a showing that “the admission of the testimony of [this unavailable witness] has circumstantial guarantees of trustworthiness equivalent to the exceptions enumerated in Rules 803 and 804, meaning that it would . . . be useful in ascertaining the truth.” R. 156, p. 9. Because Det. Grunhard’s testimony lacks such guarantees, “it would not serve the interest of justice to admit the testimony.”
Id.

Conclusion.

For the foregoing reasons, the Government respectfully requests that this Court deny defendant’s motion to dismiss the indictment for pre-indictment delay. The government further requests that this Court deny defendant’s request to admit the testimony of Det. Grunhard under F.R.E. 807.

Respectfully submitted,

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