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 REQUEST FOR A HEARING AND MOTION TO DISMISS FOR PRE-INDICTMENT DELAY

I.

In dismissing an indictment for pre-indictment delay in *United States v. Sabath*, 990 F.Supp. 1007, 1020 (N.D. Ill. 1998), Judge Castillo wrote:

> The requirement of prompt and fair justice has been part of the common law tradition since the Magna Carta. This right was recognized in early state constitutions even before it was embodied in the Sixth Amendment … The reason this fundamental constitutional right was recognized so early in our nations history is the well-established fact that a trial conducted years after the alleged commission of an offense inevitably suffers from impaired fact finding.

Statute of limitations provide "the primary safeguard against, against bringing overly stale charges." *United States v. Marion*, 404 U.S. 307, 324 (1971) (citation omitted). But statutes of limitations do not fully define a defendant's rights with respect to pre-indictment delay, as the Due Process Clause plays a limited role "in protecting against oppressive delay." *United States v. Lovasco*, 431 U.S. 783, 789 (1977).

A defendant who seeks dismissal of charges based on pre-indictment delay bears an initial burden of raising a specific, concrete and supported showing of actual and substantial prejudice. *E.g., United States v. McMutuary*, 217 F.3d 477, 481-82 (7th Cir. 2000); *United States v. Spears*, 159 F.3d 1081, 1084 (7th Cir. 1999); *United States v.*

Fuesting, 845 F.2d 664, 669 (7th Cir. 1988); *United States v. Antonio*, 830 F.2d 798, 804-06 (7th Cir. 1987).[1]

Lovasco "could not determine in the abstract the circumstances in which preindictment delay would require dismissing prosecutions." 431 U.S. at 796. *Lovasco* thus left it to the lower courts to apply due process principles in particular cases. The appropriate standard for the "government fault" component of the pre-indictment delay test has been the subject of debate. *Sabath*, 990 F.Supp. at 1013; see also *United States v. Gross*, 165 F.Supp.2d 372, 379-80 (E.D. N.Y. 2001).

In *Sabath*, Judge Castillo undertook an exhaustive review of the Seventh Circuit law at the time. Based on *United States v. Sowa*, 34 F.3d 447, 450-52 (7th Cir. 1994), as well as *United States v. Williams*, 738 F.2d 172 (7th Cir. 1984), the court found that a "high, bad faith intent standard is simply not required." 900 F.Supp. at 1016; see also *Gross*, 165 F.Supp.2d at 379-80, 385. Indeed, the government in *Lovasco* conceded that a showing of recklessness would violate the Due Process Clause. 431 U.S. at 795 n. 17. *Sabath* found that the second prong was subject to a shifting burden/balancing test. As stated in *Sowa*:

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[1] Although pre-indictment delay may serve as grounds for a pre-trial motion, "events at trial may demonstrate actual prejudice." *Marion*, 404 U.S. at 326. Indeed, the district court in *United States v. Glist*, 594 F.2d 1374 (10th Cir. 1979), took motions to dismiss for pre-trial delay under advisement. In the midst of trial, the court terminated the trial because it concluded that a fair trial was not occurring. Although several reasons undergirded this ruling, the overriding consideration stemmed from the long delay (three years) in the bringing of the indictment. The judge said, "I have now come to understand when pre-indictment delay is so prejudicial that no trial can be conducted. I suppose, like the famous phrase with respect to obscenity, you have great difficulty in attempting to define it, but you know it when you see it. I have seen it in this trial." *Id*. at 1377. The Tenth Circuit affirmed.

> [O]nce the defendant has proven actual and substantial prejudice, the government must come forward and provide reasons for the delay. The reasons are then balanced against the defendant's prejudice to determine whether the defendant has been denied due process …. [A]s indicated by *Lovasco*, if the cause of the delay is legitimately investigative in nature, a court will not find a due process violation.

34 F.3d at 450; see also *United States v. Canoy*, 38 F.3d 893, 902 (7th Cir. 1994).

Since *Sabath*, *Aleman v. the Honorable Judges of the Circuit Court*, 138 F.3d 302, 309 (7th Cir. 1998), reaffirmed that a balancing test applies to pre-indictment delay claims. In addition, *Spears* cited *Sowa* in discussing pre-indictment delay standards. 159 F.3d at 1084-85. *McMutuary* analyzed a pre-indictment claim by determining whether the defendant's prejudice showing "outweighed" the government's explanation for the delay. 217 F.3d at 482. *United States v. Henderson*, 337 F.3d 914, 920 (7th Cir. 2003), summarized the applicable standards by again citing the balancing test:

> The defendant may establish a due process violation if the prosecutorial delay caused actual and substantial prejudice to the defendant's right to a fair trial … A defendant must first show more than mere speculative harm but instead must establish prejudice with facts that are specific, concrete, and supported by evidence. *Id*. at 482. If a defendant makes the proper showing, the burden shifts to the government to demonstrate that the " 'purpose of the delay was not to gain a tactical advantage over the defendant or for some other impermissible reason.' " *Id*. The government's reasons are then balanced against the prejudice to a defendant to determine whether a due process violation occurred.[2]

[2] In *United States v. Wallace*, 326 F.3d 881, 886 (7th Cir. 2003), the court commented that, to dismiss an indictment on due process grounds, the defendant would have to establish that the delay caused substantial prejudice and "was an intentional device to gain tactical advantage over the accused." *Wallace*, however, does not obviate the balancing test discussed above. *Wallace's* discussion of pre-indictment delay was *dicta* in that the defendant did not make a due process claim in his appeal. Furthermore, *Wallace* did not discuss the line of cases establishing the shifting burden and the balancing test, let alone purport to overrule them. In addition, the court in *Henderson* applied the balancing test after *Wallace*.

II.

With the foregoing principles, in mind, we turn to the unique circumstances of this case. This showing made below is substantial and sufficient to require an evidentiary hearing and shift the burden to the government.[3]

We first provide some background as to why this case is unique. The indictment charges that Burge was a Chicago Police Department officer between 1971 and 1993. Count One, ¶ 1(a). (He was actually suspended in 1991). At various times and in various capacities, Burge was assigned to Area Two. Count One, ¶ 1(d). The indictment makes relevant incidents of "torture" occurring in unnamed cases between 1970 and 1986:

> During the time that defendant JON BURGE was assigned to Area Two, JON BURGE was present for, and at times participated in, the torture and physical abuse of a person being questioned on one or more occasions. In addition, during the time he worked as the lieutenant supervising Area Two Violent Crimes detectives, JON BURGE was aware that detectives he was supervising engaged in torture and physical abuse of a person being questioned on one or more occasions.

In January 2009, the government, by way of a letter, identified nine cases about which it anticipated introducing evidence during its case in chief. The government also indicated that it would seek to admit evidence concerning events supposedly observed by William Parker in 1973. (The government has since stricken three cases from the list.) Although the government's letter did not provide the dates of the alleged incidents, the alleged incidents now at issue and dates thereof are as follows:

[3] We make this proffer based on information known to us at this time in that we are still in the process of sifting through the 1/2 million-page database and preparing Burge's defense.

DATE	NAME
September 1972	Unknown - William Parker allegation
May 30, 1973	Anthony "Satan" Holmes
February 5-6, 1982	Melvin Jones
February 14, 1982	Andrew Wilson
June 9, 1982	Michael Johnson
November 25, 1983	Leonard Hinton
October 30, 1985	Shadeed Mumin

Thus, the earliest alleged incident occurred more than 36.5 years ago. The next alleged incident occurred approximately 36 years ago. Four alleged incidents occurred in 1982 and 1983 – around a quarter of a century ago. The last alleged incident occurred over 23 years ago.

The indictment charges perjury and obstruction of justice in relation to answers Burge allegedly made in response to interrogatory questions in a civil case filed by Madison Hobley in 2003, *Hobley v. Burge*, 03 C 3678 (N.D. Ill.). Burge is alleged to have made the answers on November 12, 2003 and November 23, 2003. The general five-year statute of limitations governs the charges, 18 U.S.C. § 3282. The indictment is stamped October 16, 2008. The indictment was returned approximately one-month before the expiration of the statute of limitations. Put another way, the government obtained the indictment during the 59th month of the 60-month statute of limitations.

Given the antiquity of the underlying allegations in the "truth" paragraphs, witnesses have died, memories are faded and documents cannot be located. In its report, the Special States Attorney ("SSA") – which elected not to seek any criminal charges against Burge because of the statute of limitations – observed:

> Needless to say we had to determine the location of the claimants as well as their lawyers. Some of that information was readily available through the lawyers who are presently of record in pending matters*; but much of it was not. We subsequently learned that several of the claimants were deceased* and several were incarcerated, some on new charges and some in other jurisdictions. Last, we wanted to learn the identity of, and to talk to, any person who could corroborate or contradict the claimants or the officers.
>
> We also had to locate police officers against whom allegations of wrongdoing were made as well as other officers who were listed as witnesses. *Several of the officers were deceased and most of them were retired.* Several officers were residing out-of-state.
>
> It was necessary to collect as much relevant written material as we could. This would include, but not be limited to medical reports, police reports, State's Attorney files, Public Defender files, the records of the Office of Professional Standards (OPS), and records, including transcripts, in the State and Federal courts, in civil as well as criminal cases and, in one case, the report of proceedings before the Chicago Police Board. We also sought the records of the Chicago Police Pension Board and some records from the Federal Bureau of Investigation, the United States Attorney and the United States Attorney General. *Acquiring those reports and court records, which had been in several courts, was a very difficult and time-consuming effort. To this date, we have been unable to locate some of the records. Many important exhibits are still missing. Many police records, OPS records and medical records are no longer available.*

SSA Report 6-7 (emphasis added).

The SSA was not alone in electing not to bring charges against Burge because of the statute of limitations. The Department of Justice repeatedly conducted multiple investigations of Burge yet declined prosecution. See, *e.g.*, SSA Report 29-31. SSA Supp. Report; Ex. 1. In addition, Burge has testified in multiple proceedings between the early 1970s and 1992, including in his capacity as an investigating officer at State criminal court proceedings, in the *Wilson* civil proceedings and before the police board. Burge has consistently denied physically abusing suspects. At no point after Burge's

testimony in these proceedings did the federal government seek an indictment. Rather, the government steadfastly refused to bring any charges.

The statute of limitations is supposed to be the primary safeguard in protecting against stale charges. *E.g.*, *Marion*, 404 U.S. 307 at 324. That the government refused to bring prosecutions, including prosecutions in the cases at issue here, is significant in determining whether Burge has been prejudiced by the pre-indictment delay.

III.

We now chronologically turn to some specifics in the cases about which the government anticipates introducing evidence at trial:

Unknown Consider the first allegation, made by Detective Parker. The exact date of the incident is unknown. The name of the supposed victim is unknown. The names of the two officers who supposedly participated in the incident with Burge are unknown.

Under these circumstances, it simply is not possible for Burge to defend himself. He is unable to test the credibility of Parker's claim by ascertaining his whereabouts on the day in question, or interviewing the alleged victim or other officers, if they are even alive. Nor can Burge obtain any records that would refute the claim. The passage of 36.5 years, coupled with the vague underlying allegations, makes it impossible to conduct a meaningful investigation, or prepare a defense. Burge has been prejudiced by the delay.

Anthony "Satan" Holmes This incident is alleged to have occurred 36 years ago (in 1973) when Holmes was arrested for murder. Holmes, however, did not make allegations of police abuse until 15 years after the fact. The SSA ultimately closed Holmes' complaint for lack of credible corroboration. SSA Supp. Report; Ex. 2.

Holmes gave a handwritten statement to Burge and Detective John Yucaitis, who is now deceased. SSA Report 63. Yucaitis would have been available to provide exculpatory testimony. He was a defendant in Andrew Wilson's civil case, and was joined in Burge's disciplinary proceedings. He testified in both proceedings and denied torture allegations.

Janice Conley Holmes, Holmes' ex-wife, was present when Holmes was arrested, and could testify to his physical condition and Burge's statements, if any. *Id.* Holmes, however, is now deceased and unavailable to corroborate Holmes' physical appearance before he was arrested. *Id.*

An Odessa Cole may have visited Holmes while he was in police custody, but she is also deceased. *Id.*

While Holmes claims he went to Cermak Health Services following the interrogation, Cermak was unable to produce any records relating to Holmes. *Id.*

The public defenders' file is also unavailable. *Id.* This is important because Holmes belatedly claimed that he made a suppression motion, yet it does not appear that he testified to any allegations of police brutality in the circuit court, and his attorney informed the circuit court that no suppression motion had been filed. *Id.*

The Clerk of the Circuit Court cannot locate an impoundment order for the file, which would contain original exhibits including photos of Holmes in police custody. *Id.*

The unavailability of the foregoing matters – which would show that Holmes was not injured while in police custody – is prejudicial.

Melvin Jones A brief history is necessary. On February 5, 1982, Jones was arrested for unlawful possession of a weapon by a felon ("UUW"). He was a suspect in

the murder of an informant, Geoffrey Mayfield. Jones did not make any incriminating statements while in police custody. Attorney Cassandra Watson visited Jones at Area Two, and represented him on the UUW charge. Watson originally filed a typewritten motion to suppress, but later handwrote charges of abuse. Judge Kiley granted Jones' suppression motion on *Miranda* grounds. Jones was acquitted of the UUW charge.

Later in 1982, Area Two detectives questioned Jones. He admitted that he had murdered Mayfield, but insisted he could not be charged because of double jeopardy based on the UUW case. Jones was charged with the Mayfield murder. (Jones does not allege that he was abused during this arrest.) He was convicted, but the case was reversed on appeal. At the retrial, a jury acquitted Jones.

Jones testified in Burge's police board proceeding.

The SSA closed Jones' file because "Jones' version of the police misconduct perpetrated upon him is subject to substantial impeachment which … would significantly and detrimentally affect his credibility." SSA Supp. Report; Ex. 3.

Attorney Watson, who refused to cooperate with the SSA, gave a deposition during the police board proceedings against Burge, but the SSA could not locate it. *Id.* Watson testified at Jones' State murder trial, but "simply did not have a good recollection of the prior events." *Id.* When Watson testified at the police board, she did not have a good recollection of the specifics of the conversation in which Jones' claimed to have been tortured. *Id.* What and when Jones said things to Watson is important to Burge's defense. For example, Watson's failure to include allegations of abuse in the typed suppression motion demonstrates that Jones did not make timely outcry. *Id.*

Given that more than 27 years have transpired since Jones' arrests, the identities of individuals present at Area Two on the day Jones was allegedly abused are unknown. *Id*. These persons are important to show that Jones, in fact, was not abused.

Cermak or jail intake health records are unavailable in relation to Jones' February 1982 incarceration. *Id*. These would show that Jones did not make any complaints of police torture while in the jail.

In addition, Jones has an "extensive criminal history." *Id.* The passage of time has allowed more than ten years to elapse since the convictions denoted in the SSA's Supplemental Report. Consequently, Burge is impeded in his ability to impeach Jones under Rule 609 of the Federal Rules of Evidence.

Andrew Wilson Andrew Wilson's case is a catalyst for this motion, as this Court has ruled that Andrew Wilson's prior testimony at a civil case in 1989 and at a police board hearing in 1992 may be admitted.

Burge would be prejudiced by Wilson's unavailability. Wilson has been convicted of murdering two police officers, and had a long criminal history. He refused to answer numerous questions at both prior proceedings on Fifth Amendment grounds given the pendency of his direct criminal appeal. See Deft's Response to Govt's Motion *in Limine* to Admit Testimony of a Deceased Witness Under Rule 804(b)(1). The government apparently made no effort to preserve his testimony at a time when Wilson no longer had a Fifth Amendment privilege. That Wilson blithely allowed an innocent man (Alton Logan) to rot in prison for 23 years for a murder Wilson committed did not become known until *after* Wilson's death in 1987. *Id.*

Of course, if the charges had been brought sooner, Burge would have had an opportunity to subject Wilson to full cross-examination at which Wilson could not have legitimately invoked the Fifth Amendment. As a matter of due process, there simply is no substitute for a jury evaluating Wilson's demeanor first-hand.[4] Replicating the demeanor of this sociopath is impossible.

Detective John Yucaitis was the officer in charge of guarding Wilson on February 14, 1982. Deft's Motion *in Limine* to Admit Prior Testimony. He has previously given testimony exculpatory to Burge. *Id*. Yucaitis, however, is deceased. SSA Report 63.

Detective Patrick O'Hara was with Wilson more than any other person on February 14, 1982. Deft's Motion *in Limine* to Admit Prior Testimony. He was present when Wilson confessed both in the morning on the 14th and between 6:00 and 8:30 p.m. O'Hara was in a position to have known whether Wilson had been abused. O'Hara has previously given testimony exculpatory to Burge. O'Hara, however, is also deceased. SSA Report 63.

Around 9:00 p.m. on February 14, 1982, two Chicago Police Department police officers, Mulvaney and Mario Ferro ("the wagonmen") took control of Wilson. The photograph of Wilson taken by the court reporter around 8:30 p.m. on February 14, 1982 does not depict any large open wounds on Wilson's face or anywhere else. See Deft's Motion *in Limine* to Admit Prior Testimony, Group Ex. 11. A few days later, however, Wilson was photographed with such wounds. Consequently, one could argue that the wagonmen injured Wilson. In fact, Wilson named Mulvaney and Ferro as defendants in

[4] We have been informed that court reporter records in this district are only retained for ten years. Thus, even if Judge Duff's court reporter, who is no longer employed in this district, had tape-recorded Wilson's testimony, Burge is prejudiced in his ability to secure the best evidence of Wilson's prior testimony (in light of this Court's ruling allowing its admission).

his civil suit, and testified that Mulvaney slammed him into a wall and hit him on the head with a gun. Deft's Response to Govt's Motion *in Limine* to Admit Testimony of a Deceased Witness Under Rule 804(b)(1), Exs 5 and 6. At the police board, Burge's attorney contended that Mulvany and Ferro placed Wilson over a radiator at 11th and State. SSA Report 52.

Burge is prejudiced by the fact that both Mulvaney and Ferro are deceased and cannot be cross-examined about infliction of injuries. Mulvaney committed suicide in the 1983, and was never officially questioned about his handling of Wilson. The only time Ferro was officially questioned about Wilson was when he provided a telephone deposition to a PLO lawyer in 1989. During the deposition, Ferro repeatedly could not recall details. Ex. 7. He only saw a mark on Wilson's face and believed that Wilson may have fallen while in the custody of Mulvaney and himself. Burge's counsel did not examine Ferro in the deposition or any other proceeding.

Following its investigation into the Wilson case, the SSA concluded that there were many "unanswered questions." SSA Report 148. The SSA hopes that Judge William Kunkle, who along with ASA Michael Angarola knew the most about the case, could clear up unanswered questions were "dashed" in that Kunkle could provide few positive recollections. *Id*.

Angarola was in charge of the Fahey/O'Brien murder investigation and was present at Area Two on February 14, 1982. SSA Report 60. Angarola could explain the timing of investigative decisions that have been questioned (such as the decision to take court-reported statement from Jackie Wilson, question other witnesses and conduct lineups before taking a court-reported statement from Andrew Wilson). Angarola is also

deceased. SSA Report 55. Angarola was not officially questioned about what he observed at Area Two on February 14th before his death.

Richard Devine, the First Assistant State's Attorney at the time, has little recollection of the specifics of his dealings with prosecutors at Area Two on February 14th. SSA Report 125.

Additional officers who worked on the Fahey/O'Brien investigation are deceased, including: Charles Grunhard, Dale Riordan, Frank Laverty, Thomas Ferry, Chester Batey and LeMon Works. Some of these officers were present at Area Two on February 14, 1982 and could have testified that Burge did not physically abuse Andrew Wilson and was not even present at Area Two during the afternoon of February 14, 1982.

Michael Johnson In 1998, Attorney Thomas Needham, then counsel to the Superintendent of the Chicago Police Department, reviewed reopened OPS investigations that had been submitted to Gayle Shines, the OPS Executive Director, four and a half years earlier. Michael Johnson's case was one of the reviewed cases. SSA Report 112. Needham concluded that the passage of time impaired the officers' defense and made it "virtually impossible" to conduct any "meaningful inquiry" into the cases. *Id*. at 118.

The SSA attempted to obtain medical records for June 9, 1982. SSA Supp. Report; Ex. 4. While Grant Hospital located a computer entry for Michael Johnson on that date, the actual medical records could not be located. SSA Report 113.

Photographs of Johnson taken by the OPS in 1982 are not available. SSA Report 113. (The FBI, too closed an investigation into Johnson's complaint in 1982. *Id*. at 114.)

Attorney Watson apparently was involved in this case and her statement is missing. SSA Supp. Report; Ex. 4.

Johnson has convictions outside the ten-year time frame for provables. *Id*.

Leonard Hinton Hinton gave a court-reported statement to ASA Lori Levin. SSA Supp. Report; Ex. 5. At a motion to suppress, Hinton said he made up the statement due to abuse. At trial, however, Hinton testified the statement was true.

The transcript of Levin's' suppression hearing testimony is incomplete. *Id*. The SSA questioned Levin, but she lacked a specific recollection of her testimony. *Id*.

The court reporter who took Hinton's statement has no recollection of Hinton's statement. *Id*.

Obviously, the testimony of Levin and the court reporter are important to Burge's defense. They would show that these individuals did not observe any evidence of Hinton being abused while at Area Two.

Hinton also has convictions outside the ten-year time frame. *Id*.

Shadeed Mumin The federal government conducted investigations into the Mumin case in the early 1990s, but declined prosecution because of the statute of limitations. SSA Report 30-31.

The SSA also attempted to question Mumin. SSA Supp. Report; Ex. 6. He "emphatically stated that the incident in question occurred many years ago, and he no longer wants to go forward with his complaint." *Id*.

IV.

The foregoing proffer is sufficient to require this case to be set down for an evidentiary hearing on the issue of pre-indictment delay, see *e.g., Lovasco*, 431 U.S. at 798; *United States v. King*, 593 F.2d 269 (7th Cir. 1979); *Gross*, 165 F.Supp.2d at 375; *Sabath*, 990 F.Supp. 1007, and to shift the burden to the government to explain the

reasons for delay in seeking charges against Burge. Following the hearing, Burge will ask the Court for an opportunity to brief or argue the applicable Seventh Circuit balancing test.

Respectfully submitted,

*/s/ Marc W. Martin*_____

WILLIAM GAMBONEY, JR.
216 S. Marion St.
Oak Park, IL 60302
(708) 445-1994

RICHARD BEUKE
53 W. Jackson Blvd., Suite 1410
Chicago, IL 60604
(312) 427-3050

MARC W. MARTIN
MARC MARTIN, LTD.
53 W. Jackson Blvd., Suite 1420
Chicago, IL 60604
(312) 408-1111
Attorneys for Defendant Jon Burge

CERTIFICATE OF SERVICE

I, MARC W. MARTIN, an attorney for Defendant Jon Burge, hereby certify that on this, the 26th day of May, 2009, 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

MARC W. MARTIN
MARC MARTIN, LTD.
53 W. Jackson Blvd., Suite 1420
Chicago, IL 60604
(312) 408-1111

REPORT OF THE SPECIAL STATE'S ATTORNEY

APPOINTED AND ORDERED BY THE PRESIDING JUDGE OF THE CRIMINAL DIVISION OF THE CIRCUIT COURT OF COOK COUNTY IN NO. 2001 MISC. 4

Edward J. Egan
Special State's Attorney

Robert D. Boyle
Chief Deputy Special State's Attorney

Because credibility was the primary test, it was our decision that we must, if possible, personally interview all principal witnesses, beginning with the claimants. But before we interviewed those witnesses we wanted to know whether they had said at another time something different from what they were telling us. If they had, this would be the most fundamental form of impeachment. Because many years have passed since the alleged acts complained of occurred, it was also of utmost importance to determine what the witnesses remembered. Under no circumstances would we seek an indictment unless we first had personally interviewed the person making the allegation of police mistreatment and we had been assured that the person was willing to testify.

Needless to say we had to determine the location of the claimants as well as their lawyers. Some of that information was readily available through the lawyers who are presently of record in pending matters; but much of it was not. We subsequently learned that several of the claimants were deceased and several were incarcerated, some on new charges and some in other jurisdictions. Last, we wanted to learn the identity of, and to talk to, any person who could corroborate or contradict the claimants or the officers.

We also had to locate police officers against whom allegations of wrongdoing were made as well as other officers who were listed as witnesses. Several of the officers were deceased and most of them were retired. Several officers were residing out-of-state.

It was necessary to collect as much relevant written material as we could. This would include, but not be limited to medical reports, police reports, State's Attorney files, Public Defender files, the records of the Office of Professional Standards (OPS), and records, including transcripts, in the State and Federal courts, in civil as well as criminal cases and, in one case, the report of proceedings before the Chicago Police Board. We

also sought the records of the Chicago Police Pension Board and some records from the Federal Bureau of Investigation, the United States Attorney and the United States Attorney General. Acquiring those reports and court records, which had been in several courts, was a very difficult and time-consuming effort. To this date, we have been unable to locate some of the records. Many important exhibits are still missing. Many police records, OPS records and medical records are no longer available.

We have been assisted by the Clerks of the Circuit Court, the First District Appellate Court, the Illinois Supreme Court, the Federal District Court and the Seventh Circuit Court of Appeals. We have had to seek the assistance of this Court in acquiring some of the Circuit Court records. We have also received records and other information from some of the attorneys representing the claimants.

It has been and is our position that we should use the Grand Jury after we had completed our investigation and had made a judgment in good faith that there was sufficient evidence to present to the Grand Jury and seek an indictment or when we needed Grand Jury process to require the appearance of a witness who refused to co-operate or to require the production of evidence.

It was also our general position that witnesses should be interviewed under oath and their statements be recorded by a court reporter. We knew that some witnesses whose cooperation we were seeking would balk at giving written statements at all, let alone under oath; but we saw no reason why persons who were alleging they were brutalized would take that position. We took many statements following that procedure with several witnesses, including some claimants and former assistant state's attorneys who are presently Illinois appellate court judges. No one made an issue of that procedure

when the overt act is committed. It will begin to run anew with each succeeding overt act performed within three years before the date of the indictment. Consequently, even if we agree that Burge and his fellow officers agreed on November 9, 1982 that they would commit perjury at the trial of Andrew Wilson and at any other proceedings including a post-conviction hearing or a habeas corpus proceeding, that conspiracy would have to end on November 10, 1985 unless Burge or one of his fellow conspiring officers committed an overt act between November 9, 1982 and November 10, 1985. There is no evidence of any such overt act. Burge testified in depositions in the civil suit brought by Andrew Wilson in 1988 and 1989 and subsequently at two trials in the Wilson civil case; and Burge testified at his own hearing before the Chicago Police Board in 1992. In all of that testimony he denied any wrongdoing, contrary to the testimony of Andrew Wilson. All of this testimony occurred after November 10, 1985.

The same impediment to prosecuting Burge exists in all the cases we have investigated; and we have investigated every claim of wrongdoing against every police officer named. Under proffers and under grants of immunity we have sought to discover any evidence that would support a finding that two or more officers agreed to continue to give false testimony at any future proceedings involving any of the claimants. We have not been successful. Therefore, we must concede that the statute of limitations began to run at the time the officer last testified or made the statement. More than three years has expired in each of those cases

We repeat that we are not bound by the findings of any agency, but it is noteworthy that Maloney, Masters, Shields and Fadeyi were Federal prosecutions. And

the issue of the statute of limitations in the cases we have investigated has arisen with the United States Justice Department on a number of occasions.

Shortly after we were appointed, we were informed that persons, including Congressman Bobby Rush, seeking prosecution of police officers, met with Attorney General Janet Reno. We have received a report that the investigation of Jon Burge by the Civil Rights Section of the Justice Department was "closed as of December 2001," because of the statute of limitations. On another occasion a lawyer for one of the claimants met with Andrea Zopp, then an Assistant United States Attorney. She told us that she did not remember everything that was said, but she did know that her office declined prosecution because of the statute of limitations.

On October 3, 1990, Jennifer Modell, a representative of the Task Force to Confront Police Violence, wrote to Fred Foreman, the United State's Attorney, pointing out that her organization had previously submitted information regarding incidents of torture committed by the detectives at Detective Area 2 under the direction of Lieutenant Jon Burge; and that the response from the United States Attorney's Office was that the incidents had occurred more than five years before. She referred him to the Shadeed Mumin complaint, which she alleged occurred within the five year statute of limitations. Prosecution was declined.

On March 15, 1991, Assistant Public Defender Joseph M. Gump wrote to Attorney General Richard Thornburgh, also referring to the case of Shadeed Mumin and the case of Andrew Wilson. Mr. Gump identified over 25 cases involving persons who claimed to have been abused by Lieutenant Burge and some of his subordinates. Mr. Gump was subsequently interviewed by the FBI; and it was determined that prosecution

would be declined because of the statute of limitations. The matter was reopened by the Department of Justice, and on May 18, 1993, prosecution was again declined because of the statute of limitations.

The last argument to be addressed is the claim that prosecution of a conspiracy that is barred by the passage of time may be resuscitated by a subsequent overt act. This is an argument that has caused us much concern. It was because of this argument that virtually all police officers refused to talk to us despite being subpoenaed before the grand jury. The lawyers representing them informed us that the officers were concerned that their testimony or statements would be used by us to revive charges of conspiracy that had been barred by the statute of limitations. At one point lawyers for defendant police officers in the civil rights litigation in the Federal district court brought by claimants who had been pardoned by Governor Ryan filed a motion before this court to compel us to make our position known on the applicability of the statute of limitations so that the officers could make a reasoned judgment on whether to testify in those proceedings. As this court knows, we resisted that motion. Our first task was to analyze the evidence; our second task was to analyze the law. Our first task had not been completed at the time of the hearing on the motion and we had not yet begun our second task to analyze the law.

As noted, we invited the assistance of the lawyer who was the principal drafter of the petition for our appointment. After learning of his legal position on the "resuscitation" of the statute of limitations, we asked him to provide us with any authority for his position. At our next meeting, he conceded he could find no authority for his position.

Korn had identified as burn marks, were not burn marks. He based his opinion on his examination of a picture of Andrew Wilson's body. Another burn expert, Dr. Warren Spitz, was called at the Police Board hearing. In contradiction to the testimony of Dr. Warpeha, Dr. Spitz testified that the mark on Wilson's thigh was a burn mark. He also based his opinion on his examination of a picture. (Dr. Raba and Dr. Korn examined Wilson personally.)

It was also argued at the Police Board hearing by Mr. Kunkle that the burn marks could have been caused by Mulvaney and Ferro by their placing Wilson over a radiator outside the lock-up at 11th & State. (It was disclosed that that radiator was in an open area that was subject to heavy pedestrian traffic.) Last, Burge's attorney introduced the testimony of William Coleman, a British national, who was in the County Jail for possession of cocaine. He had previously done time in England for extortion. (We have been unable to locate Coleman.) He testified in 1989 that Wilson told him in August, 1987 that although the police beat him on the way to Area 2 Wilson had actually draped himself on the radiator to inflict the burns on himself as a means of getting out of the confession. The first time Coleman ever told anyone about his conversation with Wilson was in April or May of 1989 when Coleman told his lawyer, who was a former assistant state's attorney. (Coleman's testimony was also introduced at the second civil trial.)

Thus, according to Coleman, Wilson, after the Supreme Court had already reversed his conviction and held that the confession should not have been introduced told a stranger that he had, in effect, "put one over" on the Illinois Supreme Court and that he was going to claim the police burned him at his upcoming trial where no confession could be introduced. As the Seventh Circuit Court of Appeals noted, this was indeed "an

for a court reporter. The court reporter, Michael Hartnett, arrived around 11:00 a.m. Hyman saw Hartnett about 11:30. Despite the fact that he had been told that Andrew Wilson was the shooter, he did not go in to see, let alone interview, Andrew Wilson. At the first civil trial he testified that he called Michael Angarola, his superior who later prosecuted Andrew Wilson. (Angarola later was the First Assistant State's Attorney and was tragically killed in an automobile accident.)

Hyman learned that Jackie Wilson was in custody, and he waited for Jackie Wilson to be brought to Area 2. He saw Jackie Wilson about 10:30 or 10:45. He took an oral statement which took about a half-hour. Then lunch was brought in about 11:30 or 11:45, and he, Jackie Wilson and some police officers had lunch. The lunch took about a half-hour. After lunch he took a court-reported statement from Jackie Wilson which took about 15 or 20 minutes. According to the statement, it concluded at 12:43 p.m.

Michael Hartnett then transcribed his notes which took about an hour and a half. Hyman received the statement about 2:00 or 2:15 p.m. He had Jackie Wilson review it and sign it. Hyman said he saw Andrew Wilson leaving Area 2 to go to Area 1 for a line-up after Jackie Wilson's statement had been taken.

Then Hyman took an oral and a written statement from Derrick Martin, who said he had been with the Wilsons in a car on the afternoon of February 14 and had been let out shortly before the killing of the police officers. (The appellate court opinion discusses Derrick Martin at length. (See People v. Wilson, 626 N.E.2d 1282.))

After he took the statement from Martin, Hyman left to go to Area 1 for the line-up. He assigned Assistant State's Attorney Catherine Warnick to supervise the signing of Martin's statement. There is confusion in the record over whether Hyman was present at

We observe parenthetically that the confessions of Andrew and Jackie Wilson ignore the admonition of the manual that leading questions should not be used except to set time, place and people or to prevent the offender from going off on a tangent.

We note at this point that Nealis and Warnick were at Area 2 and were available "to help." In fact, Nealis testified that he had conferences with Angarola several times. He agreed to be there with the police. He was there to give any advice that was needed. He rode to the scene of the arrest of Andrew Wilson with Burge. He went back to Area 2 and Angarola arrived there. Angarola was more or less in charge of the investigation. Nealis said "there were other prosecutors that had arrived that day." He saw Lawrence Hyman. We had information that Hyman and Nealis had had an argument at Area 2. When we asked Nealis about that information, he said he did not recall having had an argument with Hyman. He was present when Andrew Wilson left for the line-up. He saw a mark on Wilson's face or something to that effect.

O'Hara testified that he offered Wilson medical attention for his eye, but Wilson refused it. The Commanding Officer of Area 2, Milton Deas, testified that Burge had told him that Wilson had sustained an injury to his eye when he struck his head on a piece of furniture or the floor at the time of the arrest. The Police Board referred to that testimony of O'Hara and Deas as illustrative of the significance of the eye injury to Wilson. The Board then implicitly expressed doubt of Hyman's explanation of his failure to ask Wilson about his eye injury. We share that doubt also.

Hyman said he had been asked to review everything that went on in the case. He basically took over the Felony Review process for the case. He said that there were different stages of confessions: an oral confession to a policeman; a written confession to

typewriter cover over his head until he passed out on two occasions. Mu'Min has informed our office that he will not cooperate with us in any further investigation of the officers of Detective Area 2. We have concluded that the testimony of Melvin Jones would not amount to proof beyond a reasonable doubt, but we believe it would be admissible in any trial of Burge based on the testimony of Andrew Wilson.

In deciding whether to prosecute the prosecutor performs a quasi-judicial function. (Imbler v. Pachtman, 96 S.C. 984, 988. White, J., concurring in the judgment.) In our analysis of the evidence available to us we make judgments with full awareness of the fact that we are quasi-judicial officers who are called upon to express conclusions on credibility which might not be the conclusions on credibility that others, judges or jurors, would share. But it is not the function of prosecutors to refuse to prosecute simply because a case may not be as strong as they would prefer. We believe Andrew Wilson's statements that he had been tortured. Justice Byron White expressed our view more eloquently than we could:

> "A prosecutor faced with a decision whether or not to call a witness whom he believes, but whose credibility he knows will be in doubt and whose testimony may be disbelieved by the jury, should be given every incentive to submit that witness' testimony to the crucible of the judicial process so that the factfinder may consider it, after cross-examination, together with the other evidence in the case to determine where the truth lies." (Imbler, 96 S.C. at 999.)

In our judgment, we could in good faith ask a grand jury to indict and a trial jury to convict Jon Burge of aggravated battery, perjury and obstruction of justice. Both Yucaitis and O'Hara are now deceased. Wilson has made it clear that neither O'Hara or McKenna ever mistreated him nor were they present when he was mistreated. There is

ALLEGATIONS OF "COVER-UP"

The accusation has been made for our review that certain individuals have engaged in a "cover-up" of police brutality. The persons named specifically are Thomas Needham and Superintendent Terry Hillard. The charge has also been made generally against several other Superintendents and State's Attorneys. Before we address these charges, it is necessary to identify from a prosecutor's perspective what a "cover-up" means. It means to a prosecutor that an allegation that a public official covered up a crime is an allegation that an individual has committed the crime of obstruction of justice or official misconduct. Our investigation discloses that the evidence is insufficient to support any criminal charges.

Thomas Needham

Thomas Needham has been a lawyer for twenty-one years; he was an assistant state's attorney for several years; in early 1998 he was appointed General Counsel to Superintendent Terry Hillard. He is now in private practice. The complaint against Thomas Needham centers on a memorandum that he sent to Leonard Benefico on August 11, 1998. Benefico, who was then the Director of Investigations for OPS, came to Needham with nine files that were completed investigations by OPS investigators that had been submitted to Gayle Shines, the then Executive Director of OPS, four and a half years before. Gayle Shines left office without having reviewed six of those files. In the other three she had found the evidence insufficient to support charges against the officers. She testified in her deposition that she never got around to reviewing the six files; she had other things to do. (A copy of the memorandum submitted by Needham to Benefico is attached hereto as Needham Exhibit No. 1.)

The individuals whose files were submitted are as follows:

Michael Johnson, allegedly abused on June 9, 1982;

Lee Holmes, allegedly abused on September 10, 1982;

Stanley Howard, allegedly abused on November 3, 1984;

Phillip Adkins, allegedly abused on November 4, 1984;

Donald White, allegedly abused on February 13, 1982;

Gregory Banks, allegedly abused on October 29, 1983;

Lavert Jones, allegedly abused on January 29, 1984;

Darrell Cannon, allegedly abused on November 2, 1983; and

Stanley Wrice (Ware), allegedly abused on September 9, 1982.

Johnson and White were never charged. Insofar as we have been able to determine, motions to suppress evidence were made in all the other cases and evidence was heard.

Michael Johnson filed a complaint on June 9, 1982, which was ultimately closed without any action being taken. Johnson had alleged that he was struck and electro-shocked by Burge and went to Grant Hospital. Grant Hospital found a computer entry which indicated that Michael Johnson had been seen in the Emergency Room, but the hospital was unable to find the medical record of the visit.

Photographs taken of Michael Johnson by the evidence technician of OPS were not available. The investigation was re-opened at the direction of Gayle Shines some time in 1993. In June, 1994, the OPS investigator concluded that the allegations of brutality on the part of Burge were not sustained. Johnson also made a complaint to the

Angarola when Wilson or one of the Wilsons was picked up. Kunkle did communicate directly with State's Attorney Daley. They did not have a rigid structure then, and they do not have one now. It would be normal that Felony Review would be charged with taking the statement. His general recollection is that a good deal of information came from Mike Angarola; he has specific recollection of Angarola just walking into the office and giving him information about what was going on. His clear impression was that Angarola was at Area 2 on a periodic basis.

He had no specific recollection of the length of time Hyman took before taking a statement coming up either then or later. He has a recollection of Greg Ginex being at Area 2. (Ginex emphatically denies ever being at Area 2.) Hyman worked under Ginex.

It would be a plus to have Kunkle, the most experienced prosecutor on the criminal side in the office, to want to undertake the job of trying the case. Based on his understanding from conversations he had, Kunkle had the letter from Dr. Raba at some point. It was discussed by a number of people in the office, including Kunkle. He remembers that some people might have said, "Why has this letter been sent to us? This is very unusual. What's this all about?" Some of the conversation included a certain level of suspicion as to why the letter was sent. The discussions included the fact that the letter was contrary to the normal procedures in place. That would include the Office of Professional Standards doing an initial investigation to determine if there was any credence or substance to the claim. "There was some thinking it was a cover-your-flanks kind of letter on the part of the police superintendent." At that time there was a certain level of tension between the City administration and the State's Attorneys Office.

Exhibits 2-7
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