IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CRIMINAL DIVISION

IN RE APPOINTMENT OF SPECIAL PROSECUTOR	)	**No. 2001 Misc. # 4**

PETITION FOR APPOINTMENT OF A SPECIAL PROSECUTOR

The Petitioners, Lawrence E. Kennon, Mary D. Powers, and Mary L. Johnson, all three of whom are citizens of Illinois and residents of Cook County, together with Citizens Alert, the Coalition to End Police Torture and Brutality, First Defense Legal Aid, the Justice Coalition of Greater Chicago, the Cook County Bar Association, the Chicago Council of Lawyers, the Chicago Lawyers Committee for Civil Rights Under Law, Inc., the Campaign to End the Death Penalty, the Illinois Coalition Against the Death Penalty, the Illinois Death Penalty Moratorium Project, the National Lawyers Guild, Amnesty International, and Rainbow/PUSH Coalition, by their attorneys, Randolph N. Stone, of the Mandel Legal Aid Clinic of the University of Chicago Law School, and Locke E. Bowman, of the MacArthur Justice Center, respectfully request that this Court appoint a special prosecutor to investigate allegations of torture, perjury, obstruction of justice, conspiracy to obstruct justice, and other offenses by police officers under the command of Jon Burge at Area 2 and later Area 3 headquarters in the City of Chicago during the period from 1973 to the present.

In support, petitioners state:

1. During the period from 1973 to 1991, at least sixty-six individuals claimed that they

were tortured while in the custody of Jon Burge, or police officers under his command at Area 2 Police Headquarters and later Area 3 Police Headquarters in the City of Chicago. The Police Department's Office of Professional Standards (OPS) surveyed the pattern of abuse and concluded in a 1990 report that the abuse of suspects by Burge and those in his command was systematic and methodical. A copy of this report, hereinafter referred to as the Goldston Report, is attached as Exhibit A. Later investigating specific allegations by Andrew Wilson that Burge and others tortured him on February 14, 1982, OPS concluded that such abuse did occur. Sanders Report, Exhibit B. As a result, the Police Board, after lengthy hearings, fired Commander Burge and suspended two officers in his command on February 10, 1993, a sanction which was affirmed by the Appellate Court of Illinois, First Judicial District in an unpublished order dated December 15, 1995. *O'Hara v. Police Board*, Nos. 1-94-0999, 1-94-2462, 1-94-2475 cons. (1995).

2. In a protracted federal civil rights lawsuit by Wilson against the City of Chicago, Burge and three other officers, attorneys for the City – after defending the conduct of Burge and the others for over five years – admitted that the officers had engaged in torture. In a March 28, 1994 memorandum in response to Wilson's motion for summary judgment, attached hereto as Exhibit C, the city admitted that Burge and the other officers had acted in an "outrageous manner and utilized methods far beyond those sanctioned, permitted, and expected by the Police Department." Id. at 16. City attorneys went on to concede that Burge and the others committed acts of "torture" by shocking Wilson with a modified curling iron and other devices and burning him on a radiator. Id. at 19. Furthermore, the City admitted that the officers' actions "constitute[d] the offense of battery under Illinois law." Id. at 18. Finally, the City argued that

Burge and the other officers were acting for their own purposes of revenge and that Burge himself was motivated by the prospect of personal advancement and derived "sadistic pleasure" from watching Wilson suffer. Id. at 21-22. City attorneys also conceded during the course of Wilson's federal lawsuit that Burge and others had tortured another suspect, Melvin Jones, nine days before their torture of Wilson. Exhibit D, Local Rule N Statement of City, No. 26, at 7. Over the years, the City of Chicago has paid out over 1.25 million dollars in damages and attorneys fees as a result of lawsuits by victims of this torture.

3. Various courts – including the Illinois Supreme Court, the United States District Court for the Northern District of Illinois, and Seventh Circuit Court of Appeals – have recognized a pattern of torture by Jon Burge and those in his command consistent with that described in the Goldston report. *See People v. Patterson*, 192 Ill.2d 93, 735 N.E.2d 616 (Ill. 2000); *Wilson v. City of Chicago*, 6 F.3d 1233 (7th Cir. 1993); *Wilson v. City of Chicago*, 120 F.3d 681 (7th Cir. 1997); see also *People v. Cannon*, 293 Ill. App.3d 634, 688 N.E.2d 693 (1st Dist. 1997). As Judge Milton Shadur has stated:

> It is now common knowledge that in the early to mid 1980's Jon Burge and many officers working under him regularly engaged in the physical abuse and torture of prisoners to extract confessions. Both internal police accounts and numerous lawsuits and appeals brought by suspects alleging such abuse substantiate that those beatings and other means of torture occurred as an established practice, not just on an isolated basis.

U. S. ex rel. Maxwell v. Gilmore, Memorandum and Order at 35 (N.D. Ill. March 9, 1999).

4. Since there appears to be no doubt that there was systematic and methodical abuse of suspects by Burge and those in his command dating back to 1973, it should be just as clear that there have been hundreds of serious crimes committed by police officers at these stations over the years. For example, each act of torture – whether by electroshock, burning, Russian roulette,

suffocation, or merely striking with a phone book, constitutes a violation of the armed violence statute (intimidation or official misconduct while armed with a dangerous weapon), a Class X felony. Ill. Rev. Stat. 1981, ch. 38, §§12-6, 33-3, 33A-2, 33A-3. The typical incident described by victims involved multiple acts of torture by three or four officers, each playing a different role. As to each act of torture, every officer who abused the suspect or was accountable for the abuse of the suspect has committed this very serious offense. In some cases, as many as twenty separate convictions for the offense of armed violence would be justified, such as where four officers subjected a suspect to five different acts of torture.

Armed violence, of course, is not the only offense allegedly committed by the officers involved. In addition to lesser offenses such as intimidation, official misconduct, compelling a confession by force, and aggravated battery [Ill. Rev. Stat. 1981, ch. 38, §§12-4, 12-6, 12-7, 33-3, 33A-2], virtually every officer involved would appear to have committed various secondary offenses, such as perjury and obstruction of justice, every time they were called on to testify about the interrogation and statement; in some cases, officers testified as many as five times (for example, before a grand jury, at the suppression hearing, at trial, on retrial, and in civil proceedings). Ill. Rev. Stat. 1981, ch. 38, §§ 31-4, 32-2. The typical case would appear to involve a minimum of twenty such secondary offenses.

Finally, since there was torture by Burge and those under his command, every officer involved in the coverup of such torture has committed the offense of conspiracy, or more precisely, conspiracy to obstruct justice. Ill. Rev. Stat. 1981, ch. 38, §§ 8-2, 31-4. While it is theoretically possible that each of the officers independently decided to lie about the torture incidents and each made up his own scenario as to how the suspects “confessed”, there is no

innocent explanation for the consistency of such lies in each and every case. The inescapable conclusion is that the officers in each of these cases conspired together to obstruct justice by agreeing that all should tell the same lie. *People v. Link*, 365 Ill. 266, 282, 6 N.E.2d 201(1936) (existence of conspiracy may be inferred from conduct, statements and other circumstances that disclose common criminal purpose).

5. It very well may be that the statutes of limitations have run with respect to many of these offenses during the twenty-eight years since reports of torture at Area 2 first started surfacing. At least some of these offenses, however, may still be prosecuted. The three-year statute of limitations for the offense of conspiracy, since it is a continuing offense under Illinois law, begins to run anew with each overt act done by a co-conspirator in furtherance of the conspiracy. 720 ILCS 5/3-8 (2000); *People v. Perry*, 23 Ill.2d 147, 155, 177 N.E.2d 323, 327-28 (1961); *People v. Pascarella*, 92 Ill.App.3d 413, 415 N.E.2d 1285, 1289 (3d Dist. 1981). Former Sergeant John Byrne, who admits that he was Jon Burge's right-hand man at Area 2 before becoming a lawyer (and being disbarred three years later), performed an act in furtherance of the conspiracy to obstruct justice when, in an interview on network television about sixteen months ago, he denied that Aaron Patterson or any other suspect was tortured at Area 2 or Area 3 police headquarters. In the same interview, he went on to state with certainty that Aaron Patterson was guilty. See Exhibit E, Partial Transcript of Sixty Minutes II, originally aired on December 6, 1999.

Similarly, when Officer Peter Dignan sought out a *Chicago Sun-Times* reporter, claiming he wanted to tell his side as to the torture allegations, and he was subsequently permitted to tell his story (denying all torture) in a front-page article in that newspaper on February 12, 2001, he

too committed an act in furtherance of their conspiracy. Main, *After 17 Years, Cop Has His Say*, Chicago Sun-Times, February 12, 2001, at 1, Col. 1 (Exhibit F). With respect to these denials by Byrne and Dignan, it is important to note that they are contradicted (as to abuse of Gregory Banks and Darryl Cannon) by the findings of the one and only independent investigation – minimal though it was – in each case: OPS investigators concluded that both Banks and Cannon had been tortured and that Byrne and Dignan were involved in such torture. See Exhibit G, OPS findings in Cannon and Banks. Furthermore, there are other such recent acts in furtherance of the conspiracy by officers formerly under the command of Jon Burge at Area 2 or Area 3, including the 1999 testimony of former police officer Anthony Maslanka in the case of *People v. Cortez Brown*, and depositions by Byrne in the case of *People v. Aaron Patterson* and other officers in the case of *People v. Madison Hobley*. Although the acts enumerated above in furtherance of the conspiracy are the only ones known to Petitioners at this time, it is likely that a full investigation of the wrongdoing by Burge and those under him will uncover other recent acts in furtherance of the conspiracy. It is also possible that a full investigation will disclose evidence of another continuing conspiracy, such as the original conspiracy to commit armed violence.

6. Despite the seemingly universal acceptance of the fact that Burge and those under him routinely tortured suspects in order to obtain statements and thus committed a large number of very serious crimes, no criminal investigation has ever been conducted to determine which statements were unlawfully obtained, what crimes were committed by Burge and other officers, which officers were involved, and whether there is ongoing criminal conduct by those involved. By contrast, allegations of abuse by police officers in New York City in the heavily publicized case of Abner Louima resulted in the successful prosecution of several police officers. Similarly,

when charges much like those at issue here were leveled against Houston police officers, the officers were tried for and convicted of a number of very serious offenses. See Exhibit H.

7. The continuing failure to investigate this widespread and disturbing criminality by those paid by the City of Chicago to enforce the law must be attributed, at least in part, to the conflicts of interests under which the Cook County State's Attorney's Office (CCSAO) and State's Attorney Richard A. Devine labor.

8. The CCSAO, as an institution, faces a conflict of interest in considering the allegations of torture at Area 2 and Area 3 because many felony review assistants – some of whom are still with the CCSAO – were closely involved in the taking of statements from the alleged torture victims, and other assistant state's attorneys prosecuted those victims. While the Petitioners do not allege that any employees of the CCSAO were responsible for the torture of suspects, the allegations of the alleged torture victims suggest that at least some assistant state's attorneys were aware or should have been aware of what was happening and should have stopped it or reported it. In any event, whether these many past and current felony review assistants are viewed as potential targets of an investigation, or – as is more likely – essential witnesses to be thoroughly interviewed in the course of a full investigation, the CCSAO, as an institution, is not in a position to conduct a proper investigation. The office is further conflicted in that, by pursuing a full investigation, it likely will put a significant number of convictions it has won in jeopardy.

9. Apart from the institutional conflict faced by the office, State's Attorney Richard A. Devine himself faces a conflict of interest in any investigation of torture by Jon Burge and those under him. State's Attorney Devine has an interest in the outcome of the investigation, and any

resulting prosecution, because of his role in the CCSAO at the time of the torture. In 1980, Devine became First Assistant in the CCSAO, a position second only to the State's Attorney himself, and he served in that position until 1983, when he left the office for private practice. In his capacity as First Assistant, Devine was responsible for the day-to-day operations of the office. If an investigation were to establish – as the torture victims allege and the Goldston report concludes – that a substantial portion of the abuse of suspects by Burge and his underlings (27 0f 66 cases) occurred during the period in which Devine was in charge, this would be a very significant political embarrassment for Devine, who must stand for reelection every four years. For this reason, while the People of the State of Illinois would be well served by a thorough investigation which uncovers all wrongdoing by Burge and those around him, State's Attorney Devine likely would not be. This constitutes a *per se* conflict of interest under Illinois law. *People v. Spreitzer*, 123 Ill.2d 1, 525 N.E.2d 30, 34-35 (1988).

10. State's Attorney Devine also labors under a *per se* conflict of interest in investigating and prosecuting any criminality at Area 2 and Area 3 because of his professional relationship with Jon Burge. Upon leaving the CCSAO in 1983, Devine joined and became a partner in the Chicago law firm of Phelan, Pope & John, Ltd., where he remained until 1995, shortly before he ran for State's Attorney. Devine's successor as First Assistant, who had been third in command in the office during Devine's tenure as First Assistant, was William Kunkle. Kunkle followed Devine to Phelan, Pope & John in 1985, where he served as special prosecutor in Andrew Wilson's retrial. The firm was paid approximately $40,000 by Cook County for this representation. Kunkle and the firm were retained again in 1988, this time at City expense, to defend Jon Burge and three other officers in Wilson's federal suit against both the city and the

officers. After a mistrial in early 1989 and a retrial later that year, Wilson won a new trial on appeal and ultimately he and his attorneys were awarded one million dollars, covering damages and attorneys fees. Phelan, Pope & John represented Burge throughout both trials in 1989, on appeal to the Seventh Circuit Court of Appeals in 1993, and in later proceedings. For their representation of Burge and the other officers over this period, the firm was paid $839,250.64 by the City of Chicago. The firm also represented Burge in the proceedings before the Police Board, as well as in Burge's unsuccessful appeal of the Board's ruling. *O'Hara v. Police Board*, Nos. 1-94-0999, 1-94-2462, 1-94-2475 cons. (December 15, 1995). The Fraternal Order of Police, which has actively disputed all claims of torture on the part of Burge and others, paid Phelan, Pope & John untold thousands more dollars to represent Burge in these separation proceedings.

11. As a partner in the firm of Phelan, Pope & John during the seven years it represented Jon Burge, Devine was – in the eyes of the law – himself counsel for Burge. *Ross v. Heyne*, 638 F.2d 979, 982-83 (7th Cir.1980); *People v. Dace*, 153 Ill.App.3d 891, 896, 506 N.E.2d 332 (3d Dist. 1987). Rule 1.10 of the Rules of Professional Conduct provides that no lawyer associated with a firm shall represent a client when another lawyer associated with that firm would be prohibited from doing so. 134 Ill.2d R. 1.10. Thus, in this respect as well, he has a *per se* conflict of interest in considering or conducting an investigation or prosecution stemming from the criminality at Area 2 and Area 3. A thorough investigation, leading to the prosecution of the perpetrators of torture, is clearly in the interests of the People of the State of Illinois, but it is likely not in the best interests of Devine's former clients, Commander Jon Burge and the other three officers represented by Devine's firm.

12. The conflict of interest resulting from Phelan, Pope & John's representation of Burge and the others becomes all the more blatant when one considers that Devine himself appeared in the federal district court in Chicago on at least one occasion as counsel for Burge. See Plys, *Seeking a Shock to the System*, Chicago Sun-Times, April 7, 2000 (Exhibit I). While Devine has claimed that his involvement in the case was insignificant, the firm's billing in the case indicates otherwise. The firm billed the City of Chicago a total of $4,287.50 for 24.5 hours of Devine's time on the case in 1989. Exhibit J. Thus, Devine was in fact – and not just in theory – counsel for the officers. The conflict of interest facing Devine under these circumstances is patent: he cannot prosecute those he has defended – for the same conduct. He cannot, either ethically or practically, argue that the very same conduct he claimed was innocent from 1988 through 1995 is now to be considered a crime. Furthermore, Devine and his firm may have gained knowledge during their representation of Burge and the others which would prevent Devine from investigating crimes at Area 2 and Area 3 without necessarily breaching his ethical obligations to Burge and the others.

13. Illinois law provides a remedy for the situation in which a state's attorney faces a conflict of interest in investigating or prosecuting particular crimes: appointment of a special prosecutor. Section 55 ILCS 5/3-9008 (2000), states as follows:

> Appointment of attorney to perform duties. Whenever the State's attorney is sick or absent, or unable to attend, or is interested in any cause or proceeding, civil or criminal, which it is or may be his duty to prosecute or defend, the court in which said cause or proceeding is pending may appoint some competent attorney to prosecute or defend such cause or proceeding, and the attorney so appointed shall have the same power and authority in relation to such cause or proceeding as the State's attorney would have had if present and attending to the same . . . . Any attorney appointed for any reason under this Section shall possess all the powers and discharge all the duties of a regularly elected State's attorney under the laws of the State to the extent necessary to fulfill the purpose of such appointment, and

shall be paid by the county he serves not to exceed in any one period of 12 months . . . .

Even in situations where the statute does not specifically provide for appointment of a special prosecutor, courts have the inherent power to protect the due process rights of the people by appointing one. *In re Appointment of Special State's Attorneys*, 42 Ill.App.3d 176, 356 N.E.2d 195, 199 (3d Dist. 1976). A special prosecutor may be appointed at any stage in a case, even before formal charges are filed. *Baxter v. Peterlin*, 156 Ill.App.3d 564, 509 N.E.2d 156 (3d Dist. 1987). Thus, special prosecutors have frequently been appointed to investigate allegations of criminal wrongdoing. See, e.g., *People v. Pawlaczyk*, 189 Ill.2d 177, 724 N.E.2d 901 (2000) ; *People v. Arrington*, 297 Ill.App.3d 1, 696 N.E.2d 1229 (2d Dist. 1998); *In re Appointment of Special Prosecutor*, 164 Ill.App.3d 183, 517 N.E.2d 682 (5th Dist. 1987); *Baxter v. Peterlin*; *People v. Sears*; 49 Ill.2d 14, 273 N.E.2d 380 (1971).

The special prosecutor statute may be invoked by the court, by the state's attorney, or by a private citizen. *Baxter v. Peterlin*, 509 N.E.2d at 157. A citizen petitioning for a special prosecutor must allege specific facts, since mere conclusions are insufficient to warrant an appointment. *People ex rel. Baughman v. Eaton*, 24 Ill.App.3d 833, 321 N.E.2d 531 (4th Dist. 1974). The circuit court hearing such petition has discretion in determining whether an appointment is necessary, and denial of the petition is an appealable order. 321 N.E.2d at 532. Since, as explained above, State's Attorney Devine "is interested in" the investigation or prosecution of wrongdoing by police at Area 2 and Area 3, the petitioners have demonstrated that appointment of a special prosecutor is appropriate and necessary in this case.

14. The obvious interest to be served by appointment of a special prosecutor to investigate the wrongdoing by Burge and his underlings is society's general interest in enforcing

our criminal laws and punishing those who have committed crimes. Appointment of a special prosecutor under the very unusual circumstances of this case would also serve at least two other salutary purposes. First, by thoroughly investigating the long and troubling history of this police wrongdoing, the special prosecutor can help this city begin to address, if not answer, certain very fundamental questions this scandal raises, i.e.:

- How can our entire criminal justice system – despite a number of very obvious signs dating back to at least 1983 – fail to recognize the undeniable pattern of torture under Jon Burge at Area 2 and Area 3?

- Does the Chicago Police Department's Office of Professional Standards serve any meaningful role in investigating and punishing police misconduct when it failed to conduct any investigation into the alleged torture of Melvin Jones and forty others; it covered up its own investigators' findings of torture in six cases (Darrell Cannon, Stanley Howard, Gregory Banks, Phillip Atkins, Thomas Craft, and Lee Holmes) (see Exhibit K, August 2, 1999 letter to the Superintendent, the OPS Director, and the Police Board President); it later permitted the Superintendent of Police to overrule OPS findings of torture in these six cases (id.); it then refused requests that investigations be re-opened in these cases and in 32 others (id.); and it failed to refer any of the sixty-six alleged torture incidents to the CCSAO for prosecution?

15. Appointment of a special prosecutor here would also help to determine just what injustices citizens of this state have been subjected to at the hands of the lawless law enforcement officers under Commander Burge:

- As many as thirteen men were placed on Illinois' Death Row as a result of statements extracted from them by Jon Burge and officers under his command. One of these men has died, but twelve remain on Death Row, their very existence depending on the willingness of this State to enforce common standards of decency which are universally accepted by all lawful governments on our planet;

- A number of others still sit in prisons in this state – some never to be released – as a result of statements obtained through such torture;

- $ A number of other persons, though they have now completed their sentences and been released, were convicted and sent to prison based on statements obtained through torture; and

- $ Other persons, though never prosecuted or never convicted of a crime, were nevertheless subjected to unspeakable acts of torture by men paid by the citizens of this city to enforce laws, not violate them.

- $ Many of the officers repeatedly accused of torture are still employed by the Chicago Police Department or have retired with full pension benefits, all at taxpayer expense.

After unleashing Jon Burge and other lawless officers on the public and then ignoring decades of criminal activity on the part of these officers, the State of Illinois owes it to those citizens who fell prey to these officers to determine the full nature and extent of the lawlessness by police, as well as the nature and extent of the injustices (injuries) they caused. In fact, the public has demanded such an inquiry in recent years. (See Exhibit L, editorial from the *Chicago Tribune*; Exhibit M editorial from the *Chicago Sun-Times;* Exhibit K, August 2, 1999 letter).

16. It is also likely that a special prosecutor will be able to penetrate the code of silence which has prevented other officers, not guilty of any misconduct, from coming forward and providing information about crimes committed by the offending officers. During the course of representing Andrew Wilson and other torture victims, Attorney G. Flint Taylor received a number of anonymous letters and other anonymous communications from officers who feared reprisals if they spoke publically. (See Exhibit N). A special prosecutor, by the use of his subpoena and contempt powers, would be able to force other officers to testify under oath and reveal what they knew.

17. The need for an investigation is particularly great at this time because of its potential impact on the cases of the twelve men now on Death Row as a result of confessions they insist

were obtained by Jon Burge and officers in his command through torture. Although State's Attorney Devine has pledged that his office will not oppose hearings in these cases on procedural grounds, the office has succeeded in avoiding a hearing in the cases of Madison Hobley and Reginald Mahaffey, and currently opposes a hearing in the case of Cortez Brown. Similarly, although State's Attorney Devine has insisted that his office will review torture allegations in any case in which new evidence relating to innocence is presented, the office has opposed hearings for Madison Hobley and Aaron Patterson, even though significant new evidence relating to innocence has been presented in their cases in post-conviction proceedings. The CCSAO has also been guilty of violating the mandate of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963), that the prosecution turn over evidence favorable to the accused. In the cases of Darrell Cannon and Stanley Howard, reports of OPS investigators concluding that these men had been tortured were never turned over to these defendants, who became aware of them only after a federal judge ordered their release several years after they were prepared.

Even when a defendant is able to defeat the procedural arguments raised by the CCSAO and wins an evidentiary hearing, he faces a media campaign by Area 2 officers who seek to convince the public that there was no torture by Jon Burge or any of the other officers and that those claiming such torture are in fact guilty. See Exhibits E and F.

18. These conflicts of interest have been repeatedly called to the attention of State's Attorney Richard Devine. On March 29, 2001, two of the petitioners wrote a letter to State's Attorney Devine advising him of their intent to file this petition. Exhibit O. They requested, however, that prior to filing this petition, they be permitted to meet with him, both to discuss

their concerns and to urge him to invoke the special prosecutor statute himself. Petitioners wrote a follow-up letter to State's Attorney Devine on April 2, 2001 reiterating this request. Exhibit P. On April 4, 2001, the Chief Deputy Cook County State's Attorney's responded in writing to petitioners, declining their request to discuss the need for a special prosecutor. Exhibit Q.

WHEREFORE, Petitioners request that, in light of the conflicts under which Cook County State's Attorney Richard A. Devine and the CCSAO currently labor, this Court exercise the authority granted it under Illinois law and appoint a special prosecutor to investigate any and all wrongdoing arising out of abuse of suspects by police officers under the command of Jon Burge at Area 2 and later Area 3 Police Headquarters in the City of Chicago from 1973 until the present.

Respectfully submitted,

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