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Three Chicago Torture Victims Exonerated, Another Granted a New Trial

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From 1972 to 1991, at least 110 African American men were tortured by a ring of Chicago police detectives headed up by police commander Jon Burge. After decades of cover-up and refusals to prosecute by former Cook County State's Attorney – and present City of Chicago Mayor – Richard M. Daley, and numerous other high-ranking City police and County prosecutorial officials, U.S. Attorney Patrick Fitzgerald indicted Burge for perjury and obstruction of justice in October of 2008. See, *PMCRLR*, Vol. 9 No. 7. Burge, who lives in Florida on a police pension, awaits trial, though his trial date, now scheduled for May of 2010, is in question due to his treatment for prostate cancer. An active federal investigation into a number of other alleged torturers also continues. At the time of Burge's indictment, more than twenty-five men remained in prison on the basis of confessions that they claimed were tortured from them by Burge and his officers. While four death row torture victims had been pardoned on the basis of innocence by Governor George Ryan in January of 2003, see, *PMCRLR*, Vol. 7 No. 7, the prosecutors who succeeded Daley in defending the remaining convictions – State's Attorney Richard Devine and Attorney General Lisa Madigan – have refused to concede that these convictions are tainted by torture and

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have resisted agreeing to new hearings or new trials. During the past nine months, however, there have been a number of significant individual victories in these cases: several convicted torture victims have been granted new hearings, one victim, Victor Safford, has been granted a new trial, and three others, Michael Tillman, Ronald Kitchen, and his co-defendant Marvin Reeves, have been exonerated and set free. Another torture victim, Mark Clements, was also set free after twenty-eight years in prison after his murder conviction and life sentence were vacated, he pleaded guilty to a lesser offense, and he was sentenced to time considered served. Several other victims are presently awaiting evidentiary hearings in their post conviction cases. In this article we will discuss the *Safford*, *Kitchen/Reeves* and *Tillman* cases.

The Victor Safford Case

Victor Safford (a.k.a. Cortez Brown) was arrested for two murders in April of 1990 and taken to Area 3 Detective Headquarters on the west side of Chicago. At this time, Jon Burge was the Commander of Area 3, having been promoted from his position as Commanding Lieutenant of the Area 2 Violent Crimes Unit several years before. When Burge became Commander of Area 3, he brought several of his trusted torture ring detectives from Area 2 to work with him at Area 3. Safford was interrogated by several of these detectives, beaten, and,

within hours, confessed to both murders. His motion to suppress the confessions was denied, the confessions were admitted into evidence at separate trials, he was convicted of both murders, and received the death penalty for one of the murders. In January of 2003, his death sentence was commuted to life in prison without the possibility of parole by Governor Ryan. In 2005, his post conviction petition on the life sentence case was denied without a hearing, but the Appellate Court reversed, holding that he was entitled to an evidentiary hearing on the question of whether his confession in this case was physically coerced from him. *People v. Brown*, No. 1-05-0928 (Ill. App. Ct. 2007) (unpublished order of November 30, 2007). In May 2009, this hearing was held before Cook County Criminal Court Judge Clayton Crane. Prior to the hearing, Safford's attorneys had obtained an order from Judge Crane finding Burge to be a material witness, and requesting that a Florida judge issue a subpoena compelling his attendance at the hearing. Burge appeared, without counsel, before the Florida judge, and, while claiming no involvement in Safford's interrogation, also asserted that he would invoke his Fifth Amendment rights if compelled to testify. The Florida judge refused to compel Burge to attend the hearing, despite Safford's attorneys' arguments that the judge should honor the Illinois judge's finding of materiality, on the basis that Burge intended to take the Fifth Amendment, rather than give substantive testimony. The argument that Burge had waived his Fifth Amendment rights by denying involvement was also rejected.

The hearing thus proceeded without Burge. Safford detailed his coercive interrogation, and also called two other victims of the same detectives to the stand. The testimony of one of the victims, Marcus Wiggins, was particularly moving. Now thirty-one years old, Wiggins haltingly described how, as a tiny thirteen-year-old, he was tortured with electric shock by the same detectives who brutalized Safford and gave a statement inculcating himself in a crime he did not commit. The testimony of numerous other torture victims was submitted on paper, and Safford's attorneys also called several of the detectives who brutalized Safford and their supervising sergeant, John Byrne, who was known as Burge's "right hand man" when it came to brutal interrogations. Unlike Burge, these officers were either within the jurisdiction or otherwise did not resist appearing. Each of them asserted the Fifth Amendment to all questions concerning their alleged abuse and torture of Safford, and the numerous other African America men who accused them of torture. Burge's assertions of the Fifth Amendment were introduced by stipulation. The State's case consisted primarily of two Assistant State's Attorneys who took the statements from Safford, and, in accordance with the State's Attorneys' Office's longstanding practice of denying any knowledge

of torture, testified that Safford showed no signs of abuse, did not complain, and in fact said, in response to their questions, that he was treated well by the detectives.

After a four-day hearing, the Judge ruled from the bench, finding that, while he had some reservations about Safford's credibility, he was swayed by the "staggering" and "damning" evidence that the detectives under Byrne's supervision and Burge's command similarly tortured other interrogation suspects. He vacated Safford's conviction and ordered a new trial, without the coerced confession. The Attorney General Office, which had been previously appointed to represent the State in the torture post conviction cases,² then announced that they would re-try Safford without the confession, and the re-trial is presently pending.

Relying on Judge Crane's ruling, Safford then filed a post-conviction petition in his other murder case, arguing that the Court's finding of coercion was "newly discovered" evidence that permitted him to file what

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would otherwise have been a tardy petition. Additionally, he argued that since the same coercive interrogation compelled both confessions, principles of *res judicata* and collateral estoppel required a finding that the second confession was also coerced, entitling him to a new trial in his second case. In response, the Attorney General waived all statute of limitations arguments and instead asked for a *de novo* hearing, in order to put on a detective who had elected, subsequently to the hearing, to come off the Fifth Amendment and testify that no abuse or coercion took place. The Court is expected to rule on these issues in March of this year.

The Ronald Kitchen and Marvin Reeves Case

On July 26, 1988, two women and three young children were murdered in a bungalow on the southwest side of Chicago, and the house was set on fire. This mass murder was highlighted in the Chicago media and the police were under enormous pressure to swiftly solve the crime. Jon Burge, who was then the Commander of Area 3 Violent Crimes, reported to the scene of the crime and personally took charge of the investigation. No physical evidence at the crime scene revealed the identity of the murderer. Circumstantial evidence pointed to the possibility that the victims had been murdered by a family member. The husband, brother-in-law, and lover of one of the victims, all failed police polygraph examinations administered by Chicago Police investigators; the husband and brother-in-law both provided false alibis to the investigators, and an eyewitness placed the husband at the scene of the crime on the night of the murders.

At the time of the murders, a jailhouse informant named Willie Williams, who was an acquaintance of Ronald Kitchen, was serving a three year sentence for burglary. Williams, who had a long criminal history, had an anticipated release date in December of 1989. Williams became aware of the five homicides and many important details of the crime by reading the Chicago newspapers. He also learned there was an offer to pay a \$2,000 reward for information regarding the case. He then allegedly placed a telephone call from prison to Area 3 detective John Smith, who was working under Burge's command. Smith was one of the officers who had arrested Williams in 1985 after Williams' girlfriend reported that he had hit her in the head with a hammer. Smith later claimed that during this call Williams told Smith that Kitchen admitted over the phone several days earlier to Williams that he and another man, Marvin Reeves, had committed the murders. Williams also claimed that Reeves had made admissions in a separate call.

Rather than rejecting Williams' provably false story, Burge, Smith, and an Assistant State's Attorney working on the investigation shifted their focus to Kitchen and Reeves. They obtained a court order remanding Williams from the custody of the Illinois Department of Corrections to the custody of the States Attorneys' Office, where Williams was housed in the Witness Quarters at the Cook County Jail. Relying on Williams' false statements, they also obtained a Court order for Williams to conduct "consensual overhears" of Kitchen and Reeves. Pursuant to this order, between August 12 and August 22, 1988, Williams made 36 phone calls to Kitchen and Reeves, all of which were overheard by the investigators. During this ten-day period, Williams failed to elicit any incriminating information regarding the murders from either Kitchen or Reeves. During this time period, the detectives and Assistant State's Attorneys repeatedly met with Williams, further shaping and manufacturing his knowingly false story concerning Kitchen and Reeves' purported telephonic admissions.

On the evening of August 25, 1988, with the sensational quintuple murders still unsolved, the detectives arrested Kitchen, purportedly for auto theft, and, in order to dissuade his family and friends from coming to the station, told them at the scene of the arrest that he would probably be released in a few hours on a recognizance bond. Reeves was also taken into custody, and they were both taken to Area 3. Shortly after his arrival at Area 3, Kitchen was handcuffed to a metal loop on the wall of an interrogation room and Burge and detective Michael Kill, another officer with a long history of alleged brutality, beat Kitchen extensively, striking him in the face, back, chest and groin with fists and kicking him in the back, ribs and groin after Kitchen refused to answer their questions about to whom he had talked regarding the murders. Another detective responded to Kitchen's request to call his lawyer by grabbing an unattached receiver from a phone in the room, hitting him on the side of the head with the receiver, and then handing it to Kitchen and leaving the room. Later, Burge and Kill subjected Kitchen to a second session of physical abuse, including kicking him out of the chair in which he was seated, and punching and kicking him in the ribs and groin as he lay on the floor after he again refused to admit that he had "talked to anybody" about the murders or been involved in any way. As the interrogation continued, detective Smith asked Kitchen if he had "ever been introduced to the telephone book and the blackjack," forced him up against a wall, and used a blackjack to violently assault him on the genitals and a telephone book to strike him on his head, causing him to cry out in pain. Later, Kill told Kitchen that the detectives would "keep going until we get tired."

On two separate occasions, the Assistant State's Attorney entered the interrogation room and asked Kitchen if he was willing to speak with him. On each occasion, Kitchen requested to speak with a lawyer; the ASA then left the room, and detective Kill promptly re-entered the room and resumed beating and verbally abusing Kitchen. Throughout the interrogation process, the interrogators subjected Kitchen to racial epithets and abuse. After enduring over sixteen hours of abuse, Kitchen told Kill that he would make a statement. After Kitchen's "agreement" had been secured, the Assistant State's Attorney wrote out a statement as Kill asked leading questions. Kill provided the story of Kitchen and Reeves' purported involvement in the murders, piece by piece, and Kitchen responded that Kill's assertions were true. Kitchen then signed the statement, in which he placed himself at the scene of the crime, implicated Marvin Reeves, but did not admit any participation in the crime itself. Reeves was also subjected to coercion and physical abuse, but did not give a statement.

Kitchen was then transported from Area 3 Police Headquarters to several other Chicago Police stations before he was ultimately brought to Cook County Jail. While being processed at the Jail, Kitchen was denied medical treatment. Instead he was placed in the "hole" of the jail. At their bond hearing, counsel for Kitchen and Reeves advised the Judge that both complained they were beaten and that Kitchen had suffered injuries to his groin, head, and back. The Judge noted that Kitchen was physically injured and ordered that he be transported to Cook County Hospital for medical attention. At the hospital, Kitchen informed the doctors that he had been physically abused by his interrogators. He was diagnosed as suffering from testicular trauma, treated with pain killers, and given a scrotal support. He continued to receive medical treatment for this condition over the next four months.

Both Kitchen and Reeves were indicted for the quintuple murders and for arson. Kitchen moved to suppress his confession, but the motion was denied. The lawyer who saw him injured at the station, heard him screaming, and was a party to his contemporaneous complaints, did not testify at the hearing, but rather continued to represent him. Kitchen and Reeves were then tried separately. At Kitchen's trial, Willie Williams, having greatly embellished his story at the behest of the prosecutors, told his tale about Kitchen's alleged phone call admissions, and painted a picture of drug sales and drug debts through which he further linked Kitchen and Reeves to the victims. He denied receiving any favors for his testimony. The only other evidence was Kitchen's tortured confession that placed him outside of the house at the time the crime was

committed. Kitchen was convicted, and the prosecutors, with the express approval of the Cook County State's Attorney, sought and obtained the death penalty. Williams also testified at Reeves' trial, and told of the phone conversation during which Reeves purportedly made admissions about the crime. An empty gasoline container that was found in the trunk of Reeves' car was also admitted into evidence. Additionally, in apparent violation of *Bruton v. United States*, 391 U.S. 123 (1968), Williams testified about the admissions that Kitchen purportedly made to him. Reeves was also convicted and received a natural life sentence.

Both Reeves and Kitchen appealed. A majority of the Illinois Supreme Court affirmed Kitchen's conviction, finding, inter alia, that the evidence of guilt was "overwhelming," and that the State had not violated *Batson v. Kentucky*, 476 U.S. 79 (1976) during jury selection. *People v. Kitchen*, 159 Ill. 2d 1 (Ill. S. Ct. 1994). The majority, relying on the testimony of the detectives and Assistant State's Attorneys, also held that Kitchen's counsel's failure to testify at the suppression hearing was neither a conflict of interest nor ineffective assistance of counsel, because the nature of counsel's testimony was not properly established in the record and would not have established a "reasonable probability" of a different outcome. 159 Ill. 2d at 32. Two judges dissented, arguing that *Batson* had been violated and that Kitchen was therefore entitled to a new trial. The Illinois Appellate Court reversed Reeves' conviction and remanded for a new trial, finding that Williams' testimony about Kitchen's conversation with him, as compounded by the prosecutors' opening and closing arguments on the subject, was a *Bruton* violation. *People v. Reeves*, 271 Ill. App. 3d 213 (1995).

In 1995, Kitchen filed a post-conviction petition in which he directly raised the issue of his coerced confession; for the first time in Court proceedings, he identified Burge as one of his torturers, and presented a wealth of newly discovered evidence in support of his contention that his tortured confession was part of a systematic pattern and practice of torture and abuse under Burge. At a routine discovery hearing, the Court dismissed the petition without notice or argument, and Kitchen appealed. Kitchen not only raised the sua sponte dismissal, but also moved, after the appeal was pending, for a limited remand for a new suppression hearing. The Illinois Supreme Court held that the denial of the petition was a clear violation of Kitchen's "critical" post conviction right to due process, warning the judge and prosecutor that it "trusted" such a violation would "not soon be repeated." *People v. Kitchen*, 189 Ill. 2d 424, 435 (Ill. S. Ct. 1999). The Court vacated the dismissal, denied Kitchen's motion for a limited remand,

and returned the petition to the trial court for further proceedings on the pleadings. Meanwhile, Reeves was retried, re-convicted, and given a natural life sentence with no possibility of parole. This conviction was affirmed by the Illinois Appellate Court. *People v. Reeves*, 314 Ill. App. 3d 482 (2000).

After remand from the Illinois Supreme Court, Kitchen pursued discovery on his post-conviction petition and also sought clemency from Illinois Governor George Ryan. In January of 2003, Kitchen, together with all of the men and women on death row, were granted clemency by the Governor, who reduced their sentences to life without parole. See, PMCLR, Vol. 7, No. 7. However, Kitchen and his lawyers were greatly disappointed when the Governor did not include him with the four death row torture victims whom the Governor contemporaneously freed with innocence pardons. In April 2003, Chief Criminal Court Judge Paul Biebel disqualified Cook County State's Attorney Richard Devine and his Office from further involvement in the torture post-conviction cases – including Kitchen's – due to Devine's conflict of interest that arose from his prior representation of Burge while in private practice, and appointed the Illinois Attorney General's Office to represent the State in these cases.

After the appointment of the Illinois Attorney General, counsel for Kitchen filed several motions seeking additional discovery in the case, to allow them to prepare a complete and comprehensive amended post-conviction petition. In these motions, they sought all information regarding the State's Attorneys' Office's relationship with Willie Williams and leave to depose the prosecutors and police officers involved in the case. The Illinois Attorney General then embarked on a complete re-investigation of Kitchen's case in order to determine what position it would take with respect to Kitchen's post-conviction petition. While the case was formally stayed during the pendency of the four-year Special Prosecutors' criminal investigation of Burge and his men,³ discovery and investigation by both sides continued, leading to the unearthing of a wealth of previously suppressed *Brady* material that was highly favorable to Kitchen and Reeves' defenses.

This material included the State's Attorneys' witness quarters and relocation files on Willie Williams. These files revealed, contrary to Williams' testimony and the trial arguments of the prosecutors, that those prosecutors had facilitated Williams' release from prison nearly a year before his scheduled outdate, and had given his girlfriend rent money. The files also documented a large number of, until then unknown, contacts between the prosecutors and Willie Williams from August 12 to October 12, 1988. Additionally, Williams' master prison file was declared

missing. In lieu of depositions, the trial prosecutors submitted to informal interviews with defense counsel, during which they further implicated the lead trial counsel, who in turn attempted to explain the prosecution's wholesale *Brady* violations with demonstrable falsehoods.

In 2006 the stay was lifted, and, in 2008, Kitchen's counsel filed a 156-page Amended Post Conviction Petition that documented all of the prosecutors' *Brady* violations as well as additional newly discovered torture evidence. Finally, in July of 2009, the Attorney General's Office formally recognized that the prosecution's *Brady* violations mandated granting of Kitchen's petition and the dismissal of Kitchen and Reeves' cases. On July 7, 2009, after nearly 21 years in prison, Kitchen and Reeves walked out of the Cook County Criminal Courthouse as free men. Subsequently, with the Attorney General's agreement, Kitchen and Reeves were awarded Certificates of Innocence by the Court pursuant to 735 ILCS 5/2-702, and this complete exoneration cleared the way for them to collect nearly \$200,000 each from the Illinois Court of Claims. Both Kitchen and Reeves are also contemplating filing 42 U.S.C.A. §1983 lawsuits alleging claims for torture and wrongful conviction.

The Michael Tillman Case

On July 20, 1986 the body of Betty Howard was found in a vacant apartment in the building on the south side of Chicago in which Howard and Michael Tillman both resided. Tillman, who was 20 years old and the father of two young children, was also a custodian in the building. During the previous several days, Tillman and his friend, Steven Bell, had been painting the apartment across the hall from the apartment where Howard's body was found. Howard had been sexually assaulted, and her two-year-old son was found, unharmed, locked in the bathroom of the apartment where his mother was murdered. Several items were missing from Howard's apartment, as was Howard's car. Crime lab investigators found fingerprints on two soda pop cans at the scene. The cause of death was a gunshot wound to the head and a stab wound that penetrated the heart. No semen was found.

On July 21, 1986, at approximately 6:30 a.m., Tillman and his fiancé voluntarily went to Area 2 police headquarters for questioning. Jon Burge, who was about to be promoted to Commander, was in charge of the investigation and briefed the media about its progress. Tillman was taken to an interrogation room at Area 2 and questioned by Midnight Watch detectives Ronald Boffo and Peter Dignan, under the supervision and direction of Sergeant John Byrne. Later that day, Area 2 detectives

Hines and Patton also joined in the investigation and interrogation.

From this point forward, Tillman was subjected to three days of torture and abuse. He was repeatedly punched while handcuffed to a wall, then later punched so violently in the head and stomach that he vomited on his clothes and the floor. After the detectives forced him to take them to look for the physical evidence, Tillman, not knowing where it would be, took them instead to his mother's garage, in the vain hope that he would be able to flee. He was driven to a secluded location where he was forced to his knees, a gun was placed to his head, and the detectives threatened to kill him "like you killed that woman."

After he was returned to Area 2, Tillman was hit on the head with a telephone book, causing his nose to bleed profusely on his clothes and the interrogation room floor. The detectives then gave him paper towels to clean up the blood. Tillman was repeatedly kicked and struck with a flashlight; the detectives also pushed their thumbs against his ears, forcing his head back, and, in a crude form of waterboarding, then poured 7-Up into his nose. Detective Yucaitis, who, together with Burge would later be found guilty of torturing Andrew Wilson, and detective Dignan, who had a long history of allegedly torturing suspects with bags, repeatedly placed a plastic bag over Tillman's head, thereby subjecting him to near suffocation.

On July 21, 1986, at approximately 4:00 p.m., Steven Bell voluntarily went to Area 2 to answer questions about the Howard murder. At the same time the detectives were torturing Tillman, Bell was also being physically abused and tortured in the course of questioning about the Howard murder. Among other things, after Bell denied involvement in the murder, Dignan, Yucaitis, and Byrne told him that his "black brothers" (i.e., detectives Hines and Patton) had left, repeatedly hit Bell on the head with a telephone book, repeatedly kicked Bell in the ribs, and repeatedly struck him in the face and forehead. Detective Boffo was also present in the room during this abuse. As a result of this torture and abuse, Bell agreed to make a statement that falsely implicated himself and Tillman in the Howard murder.

Tillman's torture continued after Bell agreed to cooperate and, as a result of his fear of further torture, Tillman ultimately agreed to cooperate in order to stop the torture, and, according to detective Yucaitis, made oral admissions concerning his involvement in the crime. Tillman has denied that he actually made any such admissions, and he refused to sign a written confession when the Assistant State's Attorney attempted to take one from him. Formal charges were filed against Tillman and Bell on July 25, 1986.

Three weeks after Tillman and Bell were arrested, interrogated, and charged with the Howard rape and murder, Chicago police stopped two men in Betty Howard's vehicle. After a high speed chase, the men were apprehended, and a knife was found in the car. Further questioning and investigation linked two other men to the car. At the residence of one of these men, Boris Flowers, several items of personal property that belonged to Ms. Howard, including her shoe, were recovered, along with a handgun that was later determined to be the gun used in her murder. Flowers told Area 2 detectives that he obtained the property and the gun from Clarence Trotter. When the detectives went to Trotter's apartment, they found more of Howard's property.

Trotter, who has recently been charged on the basis of DNA evidence with a rape and murder that took place in 1981, was taken to Area 2 where he was interrogated over a 31-hour period in a manner which the Appellate Court later found to be coercive. *See, People v. Trotter*, 254 Ill. App. 3d 514 (1993). During this interrogation, Area 2 detectives, including Dignan and Hines, unsuccessfully attempted to get Trotter to identify pictures of Tillman and Bell as participants in the Howard rape and murder. Trotter steadfastly denied knowing either Tillman or Bell, and instead picked out as a participant the picture of a person who was in fact incarcerated at the time of the crime. Trotter later gave a written statement in which he admitted participation in the crime, and possession of the knife, gun, car and the recovered fruits of the crime, but he persisted in refusing to identify Tillman or Bell as having any involvement in the crime. Evidence technicians matched Trotter's fingerprints to fingerprints that were left on the soda cans that were recovered from the scene. None of the property recovered from either Flowers or Trotter was ever connected in any way to Tillman or Bell, nor is there any other evidence linking Trotter or Flowers to either of them. Trotter was then also charged with the Howard murder.

Undeterred by these intervening events, the State also continued to prosecute Tillman and Bell. In November 1986, Cook County Circuit Court Judge Kenneth Gillis conducted a simultaneous hearing on their motions to suppress statements. At that hearing, detectives Boffo, Yucaitis, Dignan, and Hines, and Sergeant Byrne all testified, denying that they had abused Tillman or Bell in any way. They admitted that Tillman had bled from the nose, but claimed that the bleeding came from a spontaneous nose bleed, rather than physical abuse, and that Tillman had admitted to having such nosebleeds in the past. None of the officers was confronted with other acts of similar abuse that they had previously committed against other persons while working in the Area 2 Violent

Crimes Unit under Jon Burge's supervision, Jon Burge was not called to testify, and no evidence or findings of systemic Area 2 torture and abuse was available to, or offered by, Tillman or Bell.

At the conclusion of the evidence, Judge Gillis denied, in pertinent part, Tillman and Bell's motions to suppress. He accepted the testimony of Boffo, Yucaitis, Dignan, Hines, and Byrne and rejected Tillman and Bell's testimony. As to Tillman, Judge Gillis found:

I do not believe that Detective Boffo hit the defendant on the right side of his head as the defendant testified or that Hines hit the defendant on the side of his head or in his stomach or Hines struck or mistreated the defendant in any way ... I do not believe the defendant that he was taken to a railroad track behind the police station or that the defendant was made to get on his knees or that a gun was placed to the defendant's head ... or defendant was threatened in any manner during that return trip ... I do not believe that Yucaitis squirted 7 Up up the defendant's nose or that he was physically hurt or that anyone attempted to hurt the defendant. I do not believe that Yucaitis or Dignan put a plastic bag over the defendant's head, nor do I believe anyone else did that ... I do believe that the defendant was treated humanely and with consideration.

November 24, 1986 Transcript of Motion to Suppress Proceedings, pp. 1039-1043. The Judge made similar findings as to Bell, again emphasizing that Bell "was treated humanely and considerately. Being given food, allowed to rest, taken to the washroom, et cetera." *Id.* at 1052, 1054.

In December of 1986, Tillman and Bell were tried in simultaneous, but severed, bench trials. Bell, who had given a detailed written confession, was acquitted of all charges, on the basis of a documented alibi that placed him at work at the time of the crime. Unfortunately for Tillman, his alibi was less ironclad. He was convicted of murder, aggravated criminal sexual assault, and aggravated kidnapping and sentenced to a term of natural life imprisonment for the murder, 15 years imprisonment for the aggravated kidnapping, and 30 years imprisonment for the aggravated criminal sexual assault. The only evidence connecting Tillman to the crime were the purported oral admissions that were tortured from him, two other statements that he purportedly made which showed minimal knowledge of the crime, a hair recovered in the bathroom that a police criminologist found to be "similar" to Tillman's, and Tillman's proximity to the crime scene. In 1988, Trotter was convicted of murder, aggravated criminal sexual assault,

aggravated kidnapping, residential burglary, and theft and was sentenced to a term of natural life imprisonment for the murder and 15 years imprisonment for the residential burglary. His conviction was later reversed by the Illinois Appellate Court, and he was re-tried and re-convicted.

Tillman appealed his conviction to the Illinois Appellate Court. In 1991, the Appellate Court issued an opinion reversing his conviction, finding that he was denied effective assistance of counsel, and remanding the case for a new trial. *People v. Tillman*, 226 Ill. App. 3d 1 (1st Dist. 1991). The issue of whether Tillman's statements were obtained by torture and abuse was not raised on appeal. In February of 1996, following remand to the trial court, Tillman was again convicted of murdering and raping Betty Howard – this time in a jury trial – and he was again sentenced to life in prison without the possibility of parole. By this time, substantial evidence of a pattern and practice of police torture at Area 2, as well as an internal police investigation finding "systematic abuse" by Burge and his men, had come to light. Nonetheless, no motion to suppress Tillman's oral admissions was filed at this retrial, his attempts to present evidence of systemic Area 2 torture to the jury were denied, his evidence of similar bad acts by the alleged torturers was severely limited, and the oral admissions again provided the primary basis for his conviction.

On June 23, 1999, the Illinois Appellate Court affirmed Tillman's convictions. *People v. Tillman*, No. 1-96-1992 (unpublished order). The issue of his coerced admissions was not raised on appeal and the Court relied on the coerced statements, and the supporting testimony of Tillman's Area 2 interrogators, in affirming his conviction. The Illinois Supreme Court denied Tillman's petition for leave to appeal on October 6, 1999. *People v. Tillman*, 185 Ill. 2d 661 (1999). On appeal, Tillman, who was without funds, was represented by a public defender who informed him that the Supreme Court had denied his petition for leave to appeal and, thereafter, had no further contact with him. While death row prisoners were entitled to appointed counsel to bring post conviction petitions, Tillman was not so entitled. The deadline for Tillman to file a post conviction petition was six months following the Supreme Court's denial, and the deadline passed with no petition filed. Several years later, still without funds and in desperation, Tillman's family asked a non-lawyer activist to help Tillman establish his innocence. Acting on advice from the non-lawyer, who was acting pro bono, Tillman filed a motion seeking "DNA testing in my case to prove my innocence." The trial court denied that motion without conducting a hearing in May of 2005. Tillman's attempted pro se appeal of the trial court's order was rejected as not timely filed.

Subsequently, several sets of lawyers reviewed Tillman's case. Convinced of his innocence, they nonetheless decided that nothing could be done, given the apparent bar of the statute of limitations. Then, in October 2008, Tillman was deposed as a Federal Rule of Evidence 404(b) witness by Burge's lawyers in the case of another Area 2 torture victim who also alleged interrogation abuse by Byrne and Dignan. The deposition convinced People's Law Office attorney Ben Elson, who defended the deposition, that Tillman was both tortured and innocent, and that something had to be done to help him. Later that month, Burge was indicted by the U.S. Attorney, and People's Law Office attorneys began to construct a post-conviction petition that linked Tillman's innocence to the still emerging mountain of evidence of Area 2 torture that was spearheaded by Burge, Byrne, Dignan, and their midnight crew of accused torturers.

On July 23, 2009, twenty three years to the day after Tillman was first taken into custody, lawyers from the People's Law Office and the MacArthur Justice Center, with the assistance of a lawyer from the law firm of McDermott, Will and Emery, filed a lengthy Post-Conviction Petition that documented the evidence, admissions and judicial and administrative findings that had been amassed since Tillman's 1986 motion to suppress, since his 1996 trial, and since his time for filing a post-conviction petition expired in 2000. The evidence included over 100 documented cases where Area 2 detectives, most frequently with Burge, Byrne, Dignan and Boffo in charge and/or participating, allegedly tortured and abused African American suspects, and emphasized that:

Subsequent to the April 6, 2000 post-conviction petition deadline, Burge and a number of Area 2 supervisors and detectives under his command, including Byrne, Dignan and Boffo, elected for the first time to invoke their Fifth Amendment right against self incrimination rather than continuing to falsely deny under oath that they abused African American suspects at Area 2. These invocations of the Fifth Amendment by Burge, Byrne and their underlings constitute an acknowledgment that the continuing denial of the torture at Area 2 would expose them to prosecution for perjury. See *Baxter v. Palmigiano*, 425 U.S. 308 (1976). These officers' invocation of the Fifth Amendment is therefore powerful new evidence that they violated Petitioner's constitutional rights by torturing and abusing him, as Petitioner has alleged since 1986. Petitioner did not possess this new evidence at the time of the post conviction deadline in April of 2000.

Petitioner Tillman's Combined Petition for Relief under the Post Conviction Hearing Act and for Relief from Judgment under Section 2-1401 of the Code of Civil Procedure, p. 45.

As additional post-2000 evidence, Tillman also alleged:

- For the first time, in 2004, certain former Area 2 detectives broke the police code of silence and provided compelling evidence confirming the systemic pattern of torture at Area 2;
- In July 2006, a Special Prosecutor appointed by the Chief Judge of the Criminal Division of the Circuit Court of Cook County issued a report with detailed findings ... confirming the systemic torture of suspects at Area 2, and the primary involvement of the Area 2 Midnight Watch, which was supervised by Sergeant Byrne and featured detectives Dignan, Boffo and Yucaitis;
- In January 2003, the Governor of Illinois pardoned four of the Area 2 torture victims on the grounds of innocence;
- Numerous judicial opinions and findings have acknowledged the systemic abuse of suspects under Burge, both at Area 2 and, subsequently, at Area 3;
- In October of 2008, the torture ringleader, Jon Burge, was indicted for perjury and obstruction of justice for falsely denying that he supervised and participated in systemic torture, and Byrne, Dignan, Boffo, and other Area 2 officers are, on information and belief, the targets of a continuing federal investigation into their alleged culpability for similar offenses; and
- On further information and belief, there is substantial additional evidence relevant to this Petition that has been developed during the ongoing federal investigation that will not become public until, during, or after Burge's perjury trial.

Id. at 45-47.

Relying on this evidence, and case law that established that the statute of limitations was a defense that could be waived by the prosecutor, Tillman argued against procedural default, alleging that he had "not been culpably negligent in failing to earlier pursue post conviction remedies," that the "grounds for relief from the judgment of conviction in this case were fraudulently concealed from him," and that it "would be manifestly unjust for this court to refuse to consider this petition." *Id.* at 44-49. Tillman alleged four substantive claims:

- In the manifest interest of justice, pursuant to the principles of substantive due process, and consistent with the Illinois Supreme Court's opinions in *People v. Patterson*, 192 Ill. 2d 93 (2000) and *People v. King*, 192

Ill. 2d 189 (2000), Petitioner is entitled to a full evidentiary hearing regarding his claim that the oral statements he purportedly gave falsely inculcating himself in the murder and sexual assault of Betty Howard were the involuntary product of police coercion, physical abuse and torture by Sergeant Byrne and detectives Boffo, Dignan, Yucaitis and Hines, under the command of Jon Burge.

- The failure of Petitioner's counsel to conduct a suppression hearing prior to Petitioner's second trial in February 1996 was ineffective assistance of counsel in violation of Petitioner's rights under the Sixth and Fourteenth Amendments of the United States Constitution and Article I, Section 8 of the Illinois Constitution.
- There exists newly discovered evidence of Petitioner's actual innocence of the murder of Betty Howard. That new evidence is of such a conclusive character that it would probably change the result on retrial. *People v. Washington*, 171 Ill. 2d 475 (1996).
- The suppression of evidence that those officers who supervised and implemented the torture of Petitioner were acting pursuant to a systemic pattern and practice of torture and abuse, and corroborating Petitioner's claim that these officers did in fact torture and abuse Petitioner, was in direct violation of Petitioner's right to due process of law and a fair trial under *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the Fourteenth Amendment to the U.S. Constitution, and Article I, Sections 1, 2, 8, and 10 of the Illinois Constitution of 1970 ... If this evidence had been disclosed, there is a reasonable probability that the outcome of Petitioner's trial would have been different.

Id. at 49-52.

A few months prior to Tillman's filing of his Petition, the Chief Judge of the Cook County Criminal Courts had appointed yet another Special Prosecutor to replace Attorney General Lisa Madigan in post conviction torture cases that were in the early stages of litigation or had not yet been filed. The Special Prosecutor whom he appointed, former Judge Stuart Nudelman, unlike those who had preceded him, was not connected to the Daley political machine or the Cook County State's Attorney's Office, and had also previously been an assistant public defender. Fortunately for Tillman, his Petition was assigned to Nudelman, whose assistants studied the voluminous record in the Tillman, Bell and Trotter cases. In November of 2009, Nudelman's assistants informed the Judge and Tillman's counsel off the record that their exhaustive review led them to the conclusion that they believed him to be innocent, that they would not oppose

Tillman's petition either procedurally or on the merits, and that he should be released as soon as possible. They then prepared a 28-page proposed stipulation of facts and law which they tendered to the Judge. In this statement, they conceded that Tillman's nosebleed was the product of "police brutality," that Bell was struck numerous times with a telephone book, leaving permanent scarring, that Bell's confession was "fabricated," and that "should an evidentiary hearing be held, Petitioner would be able to produce evidence sufficient to show that Petitioner is actually innocent of the crimes as charged." *State's Proposed Stipulation of Undisputed Facts and Conclusions of Law*, pp. 16, 18, 28, tendered to the Court on December 15, 2009. When Tillman's attorneys refused to stipulate to the entire document, due to other facts asserted in the Stipulation that they considered to be contested, the State withdrew the Stipulation, and instead filed a modified document which included the following material statements of fact and conclusions of law:

- "Aspects of the inculpatory statements Petitioner gave to the Chicago Police ... are unreliable and/or contradict known facts and details surrounding the murder of Betty Howard;"
- "Events surrounding the inculpatory statements Petitioner allegedly gave to Chicago Police detectives during his period of detention ... suggest that the statements themselves were involuntarily made;"
- Petitioner would be able to produce "newly discovered evidence to meet [his] burden of proving that his confession was the product of coercion;"
- Petitioner "would thus produce incontrovertible evidence to show the deprivation of a constitutional right" and "set forth a prima facie case that his confession was the product of coercion" which "the State would be unable to rebut;"
- "In the absence of the unreliable confession(s), the State would be unable to further sustain its burden of proving Petitioner guilty of the crimes charged;"
- "Evidence existing outside this trial record" that "would lend further support to Petitioner's claim that his confessions were involuntarily taken at a time when there was presence of physical injury," including "findings of a pattern and practice of abuse at Area 2 headquarters during the time period in which Petitioner was detained," is "material, not cumulative to the voluntariness of Petitioner's confession, and is of such conclusive character that it would probably change the result on retrial;"
- The "introduction of the inculpatory statements vitiates the judgment because it violates the Due Process Clause of the Fourteenth Amendment;" and

- Apart from the confessions, there exists insufficient reliable evidence to prove that Michael Tillman committed the acts for which he was convicted.”

State's Statements of Fact and Conclusions of Law, filed January 11, 2010, pp. 3-7.

The State further agreed that Tillman should be granted a new trial, and that the charges against him should be dismissed. On January 14, 2010, the trial Judge, Vincent Gaughan, granted Tillman's Post Conviction Petition, the Special Prosecutor dismissed the case, and Tillman walked out of the court lock-up to the embrace of his mother and sister. His picture graced the front page of the *Chicago Tribune*, and Special Prosecutor Nudelman and his assistants apologized to Tillman's mother and one said that they were “sorry this took as long as it took.” *Chicago Tribune*, January 15, 2009. Tillman's counsel saluted the Special Prosecutor, and emphasized that it was the first time that a Cook County prosecutor had acknowledged that a confession was the product of Area 2 abuse, and had cited “conclusive” evidence of a “pattern and practice” of such abuse. On February 19, 2010, the Chief Judge, finding that Tillman has established “by a preponderance of the evidence that he is innocent of the charges for which he was convicted,” granted him a Certificate of Innocence pursuant to 735 ILCS 5/2-702.

1. In 2003, the Chief Judge of the Cook County Criminal Court, Paul Biebel, had appointed the Illinois Attorney General, Lisa Madigan, to replace State's Attorney Richard Devine in defending the State against post conviction petitions brought by torture victims, after finding that Devine's representation of Burge while in private practice presented a conflict of interest.

2. In April of 2002, Chief Judge Biebel had appointed Special Prosecutors Edward Egan and Robert Boyle to investigate possible criminal violations by Burge and men. After a four-year, \$7 million investigation, Egan and Boyle, citing the statute of limitations, returned no indictments, but instead, in July of 2006, issued a Report that was widely considered to be a “whitewash.” See, PMCRLR, Vol. 8, Nos. 10, 12, and 13.

CASE UPDATES

***Bryan v. McPherson*, 590 F.3d 767 (9th Cir. 2009).**

In *Bryan v. McPherson*, 590 F.3d 767 (9th Cir. 2009), the Ninth Circuit Court of Appeals addressed the question of whether a police officer's use of a taser on a driver at a traffic stop entitled the defendant officer to qualified immunity. Because the Court of Appeals found the use of force was unconstitutionally excessive and in violation of a clearly established right, it affirmed the district court's

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denial of defendant's motion for summary judgment predicated on qualified immunity.

Due to unfortunate circumstances not directly relevant to the incident at issue, Carl Bryan was driving significant distances through the Los Angeles metropolitan area and into San Diego County during the early morning hours wearing just a t-shirt and boxer shorts. When headed to his last stop, dropping his brother off at his parents' house in Coronado, Bryan and his brother were stopped by a state patrolman and issued a ticket for speeding. Bryan was greatly upset by the ticket and was crying, ultimately taking his t-shirt off to wipe his face. 590 F.3d at 771.

At about 7:30 am, they finally crossed the Coronado Bridge and stopped at an intersection in which McPherson was stationed and performing seat belt enforcement. Upon seeing McPherson step in front of the car, Bryan suddenly realized that he had not buckled his seatbelt after being stopped on the highway. McPherson approached the car from the passenger side and asked Bryan if he knew the reason for the stop. Rather than respond to the query, Bryan became angry at himself and just stared ahead. 590 F.3d at 771.

McPherson asked Bryan to pull to the curb, which he did. Still angry, Bryan “hit his steering wheel and yelled expletives to himself.” He then exited the car. By all accounts Bryan was agitated. He stood in his Boxers and t-shirt, “yelling gibberish and hitting his thighs.” By all accounts, Bryan did not verbally threaten anyone, did not attempt to flee, and was 20-25 feet from McPherson at this time. McPherson asserted that he told Bryan to stay in the car, while Bryan denies hearing this directive from McPherson. What happened next is the only point subject to some dispute, but the evidence contradicts McPherson's account.

The one material dispute concerns whether Bryan made any movement toward the officer. Officer McPherson testified that Bryan took “one step” toward him, but Bryan says he did not take any step, and the physical evidence indicates that Bryan was actually facing away from Officer McPherson.

590 F.3d at 771. Then, without warning, McPherson tasered Bryan in the upper left arm. Bryan was immobilized and fell to the ground, fracturing four teeth and suffering facial contusions. He was then taken to the hospital.

Bryan brought suit under 42 U.S.C.A. §1983 against McPherson, the Coronado Police Department, the chief of police, and the city of Coronado alleging violations of his constitutional rights to be free from excessive force, as well as state law based tort claims. The actions against

the entities, based on a failure to train, were the subject of a motion for summary judgment which was granted and not appealed. McPherson's motion for summary judgment, based on qualified immunity was denied by the district court. The court reasoned that:

a reasonable jury could find that Bryan 'presented no immediate danger to [Officer McPherson] and no use of force was necessary.' ... a reasonable jury could find that Bryan was located between fifteen to twenty-five feet from Officer McPherson and was not facing him or advancing toward him. ... that a reasonable officer would have known that the use of the taser would cause pain and, as Bryan was standing on asphalt, that a resulting fall could cause injury.

590 F.3d at 771-2.

The Court of Appeals reviewed the matter *de novo*, applying the basic qualified immunity standard of whether the conduct violated a clearly established constitutional right and whether the right was clearly established in "light of the specific context of the case." 590 F.3d at 772.

The first question involves the right to be free from the use of excessive force under the Fourth Amendment in the context of use of a taser or balancing "the amount of force applied against the need for that force." 590 F.3d at 772, quoting *Meredith v. Erath*, 342 F.3d 1057, 1061 (9th Cir.2003). Looking first at the nature and quality of the intrusion, the Court of Appeals found that the type and amount of force used by McPherson was paralytically incapacitating and excruciating. In addition, the taser probe embedded in Bryan's flesh such that a doctor could only remove it using a scalpel.

The physiological effects, the high levels of pain, and foreseeable risk of physical injury lead us to conclude that the X26 and similar devices are a greater intrusion than other non-lethal methods of force we have confronted. In *Headwaters*, we held that a jury could conclude that pepper spray was more than a "minimal intrusion" as it caused "intense pain ..., an involuntary closing of the eyes, a gagging reflex, and temporary paralysis of the larynx." 240 F.3d at 1200. We rejected the district court's characterization of pepper spray's intrusiveness as "merely the infliction of transient pain without significant risk of physical injury." *Id.* at 1199. We similarly reject any contention that, because the taser results only in the "temporary" infliction of pain, it constitutes a nonintrusive level of force. The pain is intense, is felt throughout the body, and is administered by

effectively commandeering the victim's muscles and nerves. Beyond the experience of pain, tasers result in "immobilization, disorientation, loss of balance, and weakness," even after the electrical current has ended. Moreover, tasing a person may result in serious injuries when intense pain and loss of muscle control cause a sudden and uncontrolled fall.

The X26 thus intrudes upon the victim's physiological functions and physical integrity in a way that other non-lethal uses of force do not. While pepper spray causes an intense pain and acts upon the target's physiology, the effects of the X26 are not limited to the target's eyes or respiratory system. Unlike the police "nonchakus" ... the pain delivered by the X26 is far more intense and is not localized, external, gradual, or within the victim's control. In light of these facts, we agree with the Fourth and Eighth Circuit's characterization of a taser shot as a "painful and frightening blow." *Orem v. Rephann*, 523 F.3d 442, 448 (4th Cir. 2008). We therefore conclude that tasers like the X26 constitute an "intermediate or medium, though not insignificant, quantum of force."

590 F.3d at 774 (citations omitted).

This use of non-lethal force must then be judged by the circumstances surrounding the stop. While a stop warrants a minimal intrusion, the Court of Appeals found that the use of a taser exceeded this baseline. The Court of Appeals judged the government's interest in light of the severity of the crime, the immediate threat to the safety of the officers or others, and the presence of active resistance to arrest or attempt to flee. While Bryan's behavior was unusual, concern in this respect, alone, does not justify the use of significant force. Nor would a desire to resolve a potentially dangerous situation quickly justify that level of force. Neither reflects an immediate threat to the officer or the public. 590 F.3d at 776.

If anything, his attire readily indicated that he was unarmed. Bryan's verbal outbursts were not directed at McPherson. And he stood at a distance and without advancing such that McPherson should not have felt threatened even if Bryan took one step towards him. The Court of Appeals found that there was a genuine issue of fact on whether Bryan took a step, but on this motion the issue had to be decided in Bryan's favor. Moreover, the court held that "even if Bryan had taken a single step toward Officer McPherson, this would not have rendered him an immediate threat justifying an intermediate level of force, as he still would have been roughly nineteen to twenty-

four feet away from Officer McPherson, by the officer's own estimate." 590 F.3d at 776. In addition, the physical evidence from the shooting demonstrated that Bryan was not facing McPherson as one taser probe lodged in the side of his arm. "An unarmed, stationary individual, facing away from an officer at a distance of fifteen to twenty-five feet is far from an "immediate threat" to that officer. ... The circumstances here show that Officer McPherson was confronted by, at most, a disturbed and upset young man, not an immediately threatening one." 590 F.3d at 776.

The Court of Appeals distinguished authority from another circuit in which the plaintiff was non-compliant and heated words were exchanged, as a case in which the combination may have warranted concern that is not present in this case. In the end, neither the traffic stop for not wearing a seatbelt, nor the additional non-violent misdemeanor offenses alleged by McPherson were inherently violent. Thus, "there was no substantial government interest in using significant force to effect Bryan's arrest for these misdemeanor violations that even the State of California has determined are minor." 590 F.3d at 777.

The Court of Appeals further found McPherson's argument that he thought Bryan was mentally ill unconvincing because the government interest in such cases is diminished because the individual is in need of medical attention, not criminal justice detention. The purpose of detention, if any, is to help, not hurt, the individual. "Thus, whether Officer McPherson believed that Bryan had committed a variety of nonviolent misdemeanors or that Bryan was mentally ill, this *Graham* factor does not support the deployment of an intermediate level of force."

In examining Bryan's "resistance," the Court of Appeals found his acts more passive than active. Looking at "the nature of any resistance in light of the actual facts of the case" and "even if we were to consider his degree of compliance solely from the officer's subjective point of

view," this case is closer to the passive resistance in prior cases. "Bizarre" behavior like Bryan's is "a far cry" from an active struggle in the arrest process.

Finally, McPherson failed to warn Bryan that he was going to taser him, and failed to consider other, less intrusive, tactics that would have affected the arrest. Thus,

the government had, at best, a minimal interest in the use of force against Bryan. This interest is insufficient to justify the use of an intermediate level of force against an individual. ... our analysis [cannot be based] on what officers actually felt or believed during an incident. Rather, we must ask if the officers' conduct is " 'objectively reasonable' in light of the facts and circumstances confronting them" without regard for an officer's subjective intentions. *Id.*

We thus conclude that the intermediate level of force employed by Officer McPherson against Bryan was excessive in light of the governmental interests at stake.

590 F.3d at 781.

The Court of Appeals then examined whether McPherson's conduct violated clearly established constitutional rights which a reasonable person would have known. Revisiting the same factors analyzed above, the Court of Appeals found that a "reasonable officer in these circumstances would have known that it was unreasonable to deploy intermediate force. ... [W]here an officer's conduct so clearly offends an individual's constitutional rights, we do not need to find closely analogous case law to show that a right is clearly established." 590 F.3d at 781.

The Court of Appeals affirmed the denial of qualified immunity in the context of defendant's motion for summary judgment.