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LAW REPORT

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JUDGE SENTENCES CHICAGO POLICE COMMANDER JON BURGE IN TORTURE CASE

By G. Flint Taylor*

Facts

In June of 2010, a federal jury convicted former Chicago Police Commander Jon Burge of two counts of obstruction of justice and one count of perjury for making false denials about his knowledge of, and participation in, the torture of numerous African American suspects in interrogatory answers given in a § 1983 suit brought by wrongfully convicted torture victim Madison Hobley. See, September-October 2010 PMCRLR, Volume 9, No. 17 "Chicago Police Commander Convicted of Lying about Torture." Burge remained free pending sentencing on a $475,000 bond, and he faced a maximum cumulative sentence of 45 years. In January of this year, Burge's motions seeking judgment of acquittal and arrest of judgment under Federal Rules of Criminal Procedure 29 and 34 and for a new trial under Federal Rule of Criminal Procedure 33 were denied, as was a highly suspect motion to recuse the trial judge, and Burge's sentencing hearing was set for January 20, 2011. *U.S. v. Burge*, 2011 WL 13471 (N.D. Ill. 2011).

Mr. Taylor is a Chicago police misconduct lawyer with the People's Law Office in Chicago who has been litigating police torture cases for 25 years, and is an editor of PMCRLR.

Presentence Report and Government's Objection

The Federal Probation Office in its Presentence Report treated the case as a simple conviction for perjury and obstruction of justice in a civil proceeding because the false and obstructive answers "were not made to law enforcement officials involved in a criminal investigation or prosecution, nor were the answers presented to a criminal grand jury." PSR, lines 366-75. Hence, it found, under Federal Sentencing Guidelines §§ 2J1.2(a) and 2J1.3(a), the offense category to be 14, with a corresponding recommended sentence of 15 to 21 months. The Government filed a lengthy Objection to the Presentence Report, arguing that the Probation Office should have applied the cross-reference section of the Guidelines, that would have triggered the Accessory After the Fact provision, which in turn would have permitted application of the Civil Rights Guidelines under U.S.S.G. § 2H1.1.

In order to apply cross referencing to the obstruction of justice conviction, the offense must have "involved obstructing the investigation or prosecution of a criminal offense." U.S.S.G. § 2J1.2(c). The Government first argued that Burge's obstructive conduct "included obstructing a criminal investigation," that being the investigation of the Cook County Special Prosecutor, who was conducting a criminal investigation of police torture at the same time that Burge gave his false answers. Government's 11/12/10 Objection, pp. 7-9.

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Alternatively, the Government argued that the cross-reference provision should be applied due to the "scope of the relevant conduct":

> Defendant's obstructive conduct of lying in the Hobley interrogatories was simply an extension of defendant's continued denials of these type of allegations since the 1970's. As demonstrated at trial, the defendant on multiple occasions lied in criminal cases about similar allegations. Thus, defendant's obstructive conduct in the Hobley case was "part of the same course of conduct … or plan"—i.e. denying torturous conduct to avoid detection.

Government's 11/12/10 Objection, p. 10. This course of conduct, according to the Government, "infected numerous criminal prosecutions in which [Burge] participated, and has called into question many other criminal prosecutions, as well as the criminal justice system that allowed his conducted to go unchecked." Government's 11/12/10 Objection, p. 11.

The Government next argued that since Burge "was attempting to obstruct 'the prosecution' of a civil case involving civil rights and was 'covering up' his involvement in the civil rights violations," it was appropriate to apply the Civil Rights Guidelines through the cross referencing provision. Government's 11/12/10 Objection, pp. 13-14. The Government argued that the underlying offense that supported an enhancement of Burge's sentence was the aggravated assault of multiple victims using "methods of torture," including the use of electric shock devices, plastic bags, and firearms, that the conduct required "more than minimal planning," was methodical and calculated, and caused bodily injury and serious pain. Government's 11/12/10 Objection, pp. 12-18. Further enhancement was sought because Burge was a public official acting under color of law when the underlying offenses were committed.

The Government sought further enhancement of Burge's recommended sentence under Chapter 3 of the Sentencing Guidelines. These enhancements were appropriate because Burge's "numerous" victims were "vulnerable" in that they "were in police custody (and typically handcuffed), charged with serious criminal offenses, and under defendant's complete control." Government's 11/12/10 Objection, p. 19. Additionally, Burge took the stand in his defense and falsely denied committing the crimes. Finally,

> [t]he defendant was an organizer or leader of a criminal activity that involved 5 or more participants or was otherwise extensive. Specifically, defendant was the Commander of Area 2 Violent Crimes. At trial, evidence was presented that he supervised several other officers who engaged in torture, including: Peter Dignan, John Byrne, Charles Grunhard, John Yucaitis, and other unidentified officers.

Government's 11/12/10 Objection, p. 19. When all of these proposed enhancements were calculated, the appropriate offense level under the Guidelines, as sought by the Government, was 40, with a corresponding advisory guideline sentence range of 24 to 30 years.

The Government then argued that under the provisions of 18 U.S.C.A. § 3553(a), "in particular the 'nature and circumstances of the offense'; 'the seriousness of the offense'; the need 'to promote respect for the law'; the need to 'provide just punishment for the offense'; and, 'the need to provide adequate deterrence to the criminal conduct' all strongly compel a significant sentence in this case." Government's 11/12/10 Objection, p. 24. In support, the Government set forth the significant and

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continuing financial and societal costs to the City, the police department, and its officers, and further stated:

> Perhaps the greatest cost of the defendant's conduct was the impact on the community's trust and confidence in the criminal justice system. During defendant's reign, the legitimacy of the criminal justice system was severely compromised, and the social issues of that time became more pronounced because of it.

Government's 11/12/10 Objection, pp. 26-27.

In a written decision, the Judge found that the cross-references did not apply. Relying on *United States v. Bova*, 350 F.3d 224 (1st Cir. 2003), and pointing out that Burge took the Fifth Amendment rather than lying before the Special Prosecutor's Grand Jury, the Court first rejected the Government's argument that Burge's conduct was "connected to" or "threatened" the Special Prosecutor's investigation:

> The Guidelines do not give any indication, however, that the cross-reference provisions were meant to be applied in situations where the offense conduct occurred solely in the context of a civil proceeding. The cross-reference provisions plainly state that the offense must "involve," i.e. include, a criminal prosecution or proceeding. Defendant's offense conduct, as charged in the indictment and prosecuted at trial, did not include perjury in the state Special Prosecutor investigation or obstruction of that proceeding. For these reasons, the court will not apply the cross-reference provisions on the grounds that defendant's offense conduct involved obstruction of justice or perjury with respect to the state Special Prosecutor investigation.

U.S. v. Burge, 2011 WL 167230 at *4 (N.D. Ill. 2011).

The Court also rejected the Government's argument that Burge's prior perjury denying torture in eight cases from 1982 to 1989 was "relevant conduct" for purposes of triggering the cross-references, finding that, under U.S.S.G. § 1B1.3(a)(1) "these false statements occurred between 14 and 21 years before the instant offenses and were not committed during the commission of the instant offense or as part of defendant's attempt to avoid responsibility for the instant offense. They relate to persons other than the plaintiff in Hobley. Therefore they do not constitute relevant conduct under § 1B1.3(a)(1)." *U.S. v. Burge,* 2011 WL 167230 at *5 (N.D. Ill. 2011).

The Court also found that under U.S.S.G. § 1B1.3(a)(2), Burge's prior acts of perjury and obstruction were not "part of the same course of conduct or common scheme or plan as the offense of conviction," and therefore not "relevant conduct" under the Guidelines:

> Even taking the unique circumstances of this case into account, *see Hinton v. Uchtman*, 395 F.3d 810, 821 (7th Cir. 2005) (Wood, J., concurring), the court concludes that the probation office was correct that defendant's prior false testimony in the 1980's does not constitute conduct that should be grouped under § 3D1.2(d). The Guidelines do not support the conclusion that distinct instances of perjury and obstruction of justice, involving different proceedings and individuals over the course of several years, qualify as "ongoing" misconduct… . Defendant's prior acts of perjury and obstruction of justice, which lack temporal proximity or clear similarity (other than the fact that they involve the same offense), could be charged and sentenced individually. *Cf. [U.S. v.] Sykes*, 7 F.3d [1331] at 1335 [(7th Cir. 1993)](noting that the Relevant Conduct guideline "is designed to take account of 'a pattern of misconduct that cannot readily be broken into discrete, identifiable units that are meaningful for purposes of sentencing.'" (quoting Background Commentary to U.S.S.G. § 1B1.3)). For these reasons, the defendant's prior acts of perjury do not constitute relevant conduct under the sentencing guidelines.

U.S. v. Burge, 2011 WL 167230 at *6 (N.D. Ill. 2011).

Letters to the Court

As part of the sentencing process, the Court received a large number of letters and a community petition, circulated by the Illinois Coalition Against Torture, with over 1000 signatures. Of the more than 30 letters submitted by Burge and his lawyers, and given to the press the night before the hearing, 19 were from fellow police officers, including letters from a former CPD deputy chief, three former commanders, and 10 detectives who worked under Burge, including former Sergeant John Byrne, who was known as Burge's "right hand man," and headed up Burge's midnight crew, a unit that was known by its members as Burge's "Asskickers," and was found by the Special Prosecutor in his 2006 Report to have tortured "with impunity." 7/19/06 Report of the Cook County Special Prosecutor, p.16. Byrne and several of his "Asskicker" confederates are now under investigation by the federal prosecutors, and have invoked the Fifth Amendment in recent civil proceedings. Nonetheless, quite boldly and ironically, given the evidence that he

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and his midnight crew partner, Peter Dignan, told one government witness that they had "something special for niggers," as they prepared to suffocate him with a plastic bag, argued to the Court that Burge "was no racist," and detailed several investigations where he and Burge purportedly aggressively investigated racist crimes. 1/17/11 Letter to the Court from John Byrne.

Torture Victim and Witness Statements

On the eve of the sentencing hearing, the Judge ruled that the Government would not be allowed to call Burge torture survivors as crime victims, because, in her view, the only victim of Burge's obstruction and perjury was Plaintiff Madison Hobley. However, she further ruled that the four Burge torture survivors who testified against him at trial would be permitted to make statements or give testimony pursuant to her consideration of the provisions of 18 U.S.C.A. § 3553(a). At the outset of the two day hearing, Judge Lefkow announced that she would employ one Chapter 3 enhancement—that Burge took the stand and committed further perjury—and consequently raised the recommended sentence range to 21 to 27 months.

The Government called as its first witness Anthony Holmes, who, as Burge's first known torture victim, had been a powerful witness against him at trial. Reading from a prepared statement, an often emotional Holmes began: "Burge electric shocked me and suffocated me and he forced me to confess to a murder I did not do. And I had to accept that I was in the penitentiary for something I didn't do." 1/20/11 Sentencing Statement of Anthony Holmes. As the emotion in the Courtroom heightened, Holmes continued:

> I still have nightmares … I wake up in a cold sweat. I still fear that I am going back to jail for this again. I see myself falling in a deep hole and no one helping me get out. I felt helpless and hopeless when it happened and when I dream I feel like I'm in that room again, screaming for help and no one comes to help me… .I can never expect when I will have the dream. I just lay down at night and then I wake up and the bed is soaked.

1/20/11 Sentencing Statement of Anthony Holmes.

Holmes said that "I shouldn't have let Burge do that to me, but what could I do? I remember looking around the room at the other officers and I thought one of them would say that was enough, but they never did." 1/20/11 Sentencing Statement of Anthony Holmes. In conclusion, Holmes said "Let him suffer like we suffered. If it had been one of us, we would get the maximum without batting an eye." 1/20/11 Sentencing Statement of Anthony Holmes.

After another severely damaged Burge victim, Melvin Jones, gave a more muted statement in which he also described Burge's fellow officers looking the other way while the torture proceeded, the Government called Sammy Lacey, an African American former detective who worked for Burge at Area 2 Detective Division. Lacey, who had also testified at trial, recounted the well known reputation of Burge's midnight "Asskissers" for torture and abuse, described Burge's racist treatment of the few African American detectives who worked under his command, and revealed the special relationship between the "Asskickers" and the assistant state attorneys who took the confessions that were obtained by the midnight crew.

The Government then called Howard Saffold, an African American former police officer and one of the original leaders of the African American Police League. Saffold talked expansively about his experiences with police racism, brutality, and the police code of silence both on the job and organizationally with the AAPL from the mid 1960s to the present. He characterized Area 2 as "the pits" and Burge as a "cancer." 1/20/11 Testimony of Howard Saffold in *U.S. v. Burge*.

Saffold was followed by University of Chicago African American History Professor Adam Green, who presented riveting testimony about the impact of Burge-led police torture on Chicago's African American community. Setting the historical background, Professor Green, whose specialty is the history of black Chicago, noted that in the 1980s during the height of Burge's torture, Chicago was America's "most segregated city," with an extremely high poverty and jobless rate in much of the African American community. He talked of the dehumanization of this community, and described his preliminary study of the early media coverage of the torture scandal, and how the white mainstream media dismissed those charges, leading to further distrust of the police and its disciplinary process. He compared the torture scandal to the 1969 murders of Chicago Black Panther leaders Fred Hampton and Mark Clark, the beating of Rodney King in Los Angeles in the early 1990s, and the L.A. Ramparts scandal, but concluded that the longstanding and systematic torture was "unprecedented" and a "singular chapter" of "horror." 1/20/11 Testimony of Adam Green in *U.S. v. Burge*.

Green then discussed the difference between police abuse and torture. He underscored the importance of considering the purpose and intent of torture—it is not only intended to achieve a practical result, a confession, or the compliance of those detained, but it is also meant "to establish a sense

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of supremacy, a kind of total control, by one human being over another." 1/20/11 Testimony of Adam Green in *U.S. v. Burge*. Its psychological aspects, Green continued, rest on a capacity to assert to the captive person "because I can do whatever I want to you, I can believe that you are not worth much, and because I can do anything to you, I can lead you to believe that no one cares what I do to you, and therefore no one cares what happens to you in general. You are alone, and you are in my power." 1/20/11 Testimony of Adam Green in *U.S. v. Burge*. Torture, Green testified, "deeply demoralizes" the community and "undercuts its humanity." In conclusion, Green told a rapt courtroom that just punishment, no matter how long it has taken, "reaffirms that each person is a human being," conveys that "nobody is above the law," and is important to the "healing process" of the community. 1/20/11 Testimony of Adam Green in *U.S. v. Burge*.

The Government concluded its case by calling Madison Hobley's sister, Robin, who emotionally spoke of Madison's innocence, and how his conviction impacted him, their mother and family, and the loss of trust in police that they all continue to experience. Burge's defense countered by calling his sister-in-law, his brother Jeff, and Michael Fahey, the brother of one of the officers who was murdered by torture victim Andrew Wilson. Fahey talked about Burge's key role in the murder investigation, and described Burge as an "inspiration" and "hero" to his family. 1/21/11 Statement of Michael Fahey in *U.S. v. Burge*. Burge's brother asserted that Burge was not a racist because he was appointed as the youngest commander in the history of the Chicago Police Department, by a black Superintendent who was a personal friend, and his appointment was approved by Chicago's iconic black Mayor, Harold Washington. He decried the "onslaught of negative publicity" and asserted that Burge had been convicted in the press. He detailed a long list of Burge's health problems, including an "aggressive" form of prostate cancer, for which he faces surgery in April, and told the Judge that "almost any sentence will be a death sentence." 1/21/11 Statement of Jeff Burge in *U.S. v. Burge*. Burge's sister-in-law also emphasized Burge's myriad health problems, and further told the Judge about how Burge changed her skeptical attitude about police officers.

Burge's Statement to the Court

Burge then addressed the court. He said that the Chicago Police Department "meant everything" to him, and that he was "deeply sorry" that this case brought "disrepute" to the Department. He said that the charge that he was a racist "deeply disturbed" him, that he worked a high crime area, and that "race did not matter" to him. He said that there was "nothing further from the truth" than the charge that he framed innocent people. He asserted that he had been the "target of lawyers," had been vilified, and compared to Al Capone. He declared himself "a broken man," but made no admission of wrongdoing. 1/21/11 Jon Burge Statement in *U.S. v. Burge*.

The Court's Sentence

After the hearing concluded, Judge Lefkow called Burge to the podium and began by speaking directly to him:

> You're here today having been convicted by a jury of two counts of obstruction of justice and one count of perjury in connection with making false statements in interrogatories served on you in a lawsuit filed against you in this court. That lawsuit made allegations that individuals under your supervision or command had tortured the plaintiff to confess into confessing to a crime he claims he did not commit. You denied any knowledge of torture of the plaintiff or of any other torture or abuse having occurred under your direction or command. You denied it in answers to the interrogatories, and you maintained that denial under oath in this courtroom where you testified in your own defense. Unfortunately for you the jury did not believe you, and I must agree that I did not either.

U.S. v. Burge, 1/21/11 Sentencing Transcript, pp. 3-4.

The Judge then addressed the factors that she was required to consider under 18 U.S.C.A. § 3553(a). With regard to the nature and circumstances of the offense, the Court first spoke of the terror and suffering of the victims:

> There are many in the community of which the witnesses spoke yesterday, the African American community, and others who support that community by speaking on their behalf, that in light of the circumstances of the offense a sentence within the guideline range of 21 to 27 months in custody would be a mere slap on the wrist. I have read letters and statements from many individuals who were not called to testify at trial but wanted to be heard. Those statements, … describe brutality at your hands or those under your supervision or command, some even more appalling than the torture the witnesses here have testified about. One remarkable thing about the statements was how many came from outside the Chicago area. These people say they had to leave Chicago because they were terrified that the police would do this to them

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> again. One statement from a prisoner, however, will probably haunt me the longest. This man reports that he has been in prison for 30 years. He stated he was 17 when he was arrested while walking down the street and brutally tortured until he confessed to a murder. He said, I had the body of a man; but was a child inside. He remains in prison for a crime he insists he did not commit, being abandoned by family and friends who trusted that the police would not have charged him had he not done the crime. The grandmother, who stood by him, died while he is in prison, a graying, middle-aged adult. Imagine the loss.

U.S. v. Burge, 1/21/11 Sentencing Transcript, pp. 4-5.

Judge Lefkow next addressed the complicity of Burge's confederates:

> I also point out the statement Mr. Holmes made yesterday as particularly moving. He said, "I remember looking around the room at the other officers, and I thought one of them would say, that's enough, but they didn't."

U.S. v. Burge, 1/21/11 Sentencing Transcript, pp. 5-6.

The Judge then addressed the credibility of the victims and the nature of the crime:

> Now when I hear your attorney implying that if someone did the crime, no harm, no foul, they deserved it, I am frankly shocked. Even if counsel only means to say that none of these people can be believed because they are criminals, the mountain of evidence to the contrary completely belies that position. So what does all of this have to do with the crimes of conviction you ask? It demonstrates at the very least a serious lack of respect for the due process of law and your unwillingness to acknowledge the truth in the face of all of this evidence.

U.S. v. Burge, 1/21/11 Sentencing Transcript, p. 6.

Judge Lefkow next addressed the responsibility that public officials bear:

> The freedom that we treasure most of all in this country is the right to live free of governmental abuse of power. Those who represent the government and hold power over other citizens are the embodiment of the principle that we live by, the rule of law. The rule of law holds us together as we live out our great social experiment known as the United States of America. For that reason those of us who are entrusted with governmental power take an oath upon entering office that we will uphold the law. For the police it means to protect the safety of the people so they may go about their lives peaceably and productively as they see fit, and to use their abilities and resources to identify those who commit crimes that threaten that safety. It is obvious that officers who do this important work must operate within the bounds of the law.

U.S. v. Burge, 1/21/11 Sentencing Transcript, p. 6.

Judge Lefkow then addressed the harm to the criminal justice system that Burge's widespread conduct caused:

> When a confession is coerced, the truth of the confession is called into question. When this becomes widespread, as one can infer from the accounts that have been presented here in this court, the administration of justice is undermined irreparably. How can one trust that justice will be served when the justice system has been so defiled? This is why the crimes of obstructing justice and perjury, and even more so when it is about matters relating to the duties of one's office, are serious offenses.

U.S. v. Burge, 1/21/11 Sentencing Transcript, p. 7.

The Court next addressed Burge's rationale for lying in the *Hobley* lawsuit:

> I have also asked myself in practical terms why you would not have asserted your privilege against self-incrimination as you did in the same time frame before the special investigator? I infer that you must have reckoned that doing so would result in an adverse inference against you in the civil suit, bringing the house of cards of denial down around you, further damaging your reputation as a decorated police officer and commander, exposing your long history of misconduct, and undermining your long history of denial that these events occurred.

U.S. v. Burge, 1/21/11 Sentencing Transcript, pp. 7-8.

The Judge also addressed the police code of silence as embodied in police perjury:

> Yet too many times I have seen officers sit in the witness box to my right and give implausible testify to defend themselves or a fellow officer against accusations of wrongdoing. Each time I see it, I feel pain because the office they hold has been diminished.

U.S. v. Burge, 1/21/11 Sentencing Transcript, p. 8.

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Judge Lefkow, who had kept much of the evidence of Burge's racial animus out of the trial, chose not to render an opinion as to whether Burge was a racist, stating:

> There are those who believe you are deeply racist, and there are those who believe you could not possibly have tortured suspects. I doubt that my opinion or what happens here will change anyone's views. You are the person you are, neither all good, nor all evil, just like the rest of us.

U.S. v. Burge, 1/21/11 Sentencing Transcript, p. 9.

In a statement that implicated former Cook County State's Attorneys Richard M. Daley and Richard Devine, as well as a series of Chicago Police Superintendents, the Court condemned the "dismal failure" of police and prosecutorial leadership to act:

> Perhaps the praise, publicity, and commendations you received for solving these awful crimes was seductive and may have led you down this path. On your behalf how I wish that there not been such a dismal failure of leadership in the department that it came to this. As one commentator wrote, if the first time—I'm paraphrasing—if the first time this happened your commander had said, you do that again, and you'll be guarding the parking lot at 35th and State, then you might have enjoyed your retirement without this prosecution over your head, without the reality that you will going to prison in your declining years, when your health is compromised as it is. If others, such as the United States Attorney and the State's Attorney, had given heed long ago, so much pain could have been avoided.

U.S. v. Burge, 1/21/11 Sentencing Transcript, p. 10.

Judge Lefkow then rendered her sentence:

> I am charged with the unhappy duty of imposing a sentence. The sentencing guidelines counsel that a sentence of 21 to 27 months is a starting point for me. And although not presumptively reasonable, one that must be seriously considered, as I have done. I have also considered the so-called 3553 factors, [including your] personal circumstances, the availability of medical care within the Bureau of Prisons. And so I am now prepared to impose a sentence. Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the court that the defendant Jon Burge is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of 54 months on Counts 1, 2, and 3, all to run concurrently. Upon release from prison you shall be placed on supervised release for a term of three years. The term consists of three years on each of Counts 1, 2, and 3, all terms to run concurrently. You must then immediately report upon your release with drug testing and alcohol treatment.

U.S. v. Burge, 1/21/11 Sentencing Transcript, pp.11-12.

Reaction to the Sentence

Both of the mainstream Chicago daily newspapers highlighted the sentence with front page headlines, with the *Chicago Sun Times* trumpeting "Burge's Turn for Prison." Reaction was mixed, with several of the victims and community activists protesting that the sentence was too short, and that it was a "complete injustice." *Chicago Tribune*, 1/22/11 "Burge sentence leaves torn emotions." Anthony Holmes struck a more positive note, stating that "[n]ow, finally, I feel that people will begin to believe, and that's what I'm concerned about because for all these years, nobody listened to what I had to say because they didn't believe me, [b]ut now it's all going to come to the light." *Chicago Tribune*, 1/22/11 "Burge sentence leaves torn emotions." His lawyers called the decision "courageous," pointed the finger directly at Daley and Devine for the decades late and necessarily inadequate sentence, and said that "[t]his is a significant step in the process to bring some justice to all of those people who were tortured, and to get not only Burge, but all of the people who tortured our clients and all of the others, to bring all of them to justice." *Chicago Tribune*, 1/22/11 "Burge sentence leaves torn emotions." U.S. Attorney Patrick Fitzgerald, acknowledging the frustration of many, stated that "justice should have come sooner, but justice delayed isn't justice completely denied." *Chicago Tribune*, 1/22/11 "Burge sentence leaves torn emotions."

Burge's Police Pension

A week later, the Police Pension Board decided that Burge could continue to receive his $3000 per month police pension, despite his conviction. The Board, which is made up of four current or former Chicago police officers and four civilians, split four to four, with the officers concluding that "Jon Burge had no law enforcement duties at the time he was alleged to have committed his crimes of perjury on an interrogatory in a civil deposition," and therefore he was not convicted of a felony "relating to or arising out of or in connection with" service as a police officer, as required by the Pension Code. *Chicago Sun Times*, 1/28/11, "Burge can keep his cop pension." While the Board claimed that the decision was nonappealable,

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Illinois Attorney General Lisa Madigan promptly filed suit in Cook County Circuit Court against defendant Burge and the Police Pension Board seeking an injunction and declaratory relief barring the Board from continuing to pay Burge's pension. Attorney General Madigan, in a press release announcing the filing of the suit, stated:

> Jon Burge forfeited his right to a public pension when he lied about his knowledge of and participation in the torture and physical abuse of suspects. It's this type of criminal conduct by a public servant that our pension forfeiture laws were designed to discourage. The public should never have to pay for the retirement of a corrupt public official.

2/7/11 Press Release of Attorney General Lisa Madigan.

The *Chicago Sun Times*, which had only days before editorialized that the 19 Burge torture victims still in prison should all receive new hearings, (*Chicago Sun Times* Editorial, 2/7/11, "Review cases of tortured suspects"), called the pension decision an "outrage," and lauded Lisa Madigan for "stepping up":

> Fortunately, Illinois Attorney General Lisa Madigan, who could have taken a pass on this one, stepped up to set things right on Monday, filing suit to strip Burge of his pension. Madigan says the city's police pension board got it flat-out wrong late last month when, by a 4-4 vote, it failed to do so. But for his employment as a police officer, Madigan contends, Burge would have had nothing to lie about to begin with. The three felonies for which he was convicted—two counts of obstruction of justice and one count of perjury—all "related, arose out of, and were in connection" with his "service as a policeman."

Chicago Sun Times Editorial, 2/10/11.

The *Sun Times* editorial concluded that:

> [Burge] lied under oath about ugly and sordid matters—physically torturing suspects—that had absolutely everything to do with his official police duties. If he is not stripped of his pension, it will be a legal and moral outrage.

Chicago Sun Times Editorial, 2/10/11.

CASE UPDATES

Ortiz v. Jordan, 131 S.Ct. 884, (2011)

On January 24, 2011, the U.S. Supreme Court handed down *Ortiz v. Jordan*, 131 S.Ct. 884 (2011), a unanimous decision written by Justice Ginsburg, holding in a 42 U.S.C.A. § 1983 case that a party may not appeal a denial of summary judgment after a district court has conducted a full trial on the merits.

Michelle Ortiz, a former inmate at the Ohio Reformatory for Women, maintained that she was sexually assaulted on consecutive nights during her one-year incarceration by Corrections Officer Douglas Schultz. She promptly reported the first incident but prison authorities took no measures to protect her against the second assault. After that assault and in retaliation for accounts she gave of the two episodes, prison officials placed her, shackled and handcuffed, in solitary confinement in a cell without adequate heat, clothing, bedding, or blankets. Ortiz claimed that the treatment she was exposed to violated her Eighth and 14th Amendment rights to reasonable protection from violence while in custody. 131 S.Ct. at 889-890.

The main defendants, Paula Jordan, a case manager at Ortiz's living unit, and Rebecca Bright, a prison investigator, moved for summary judgment on their defense of qualified immunity. The District Court, noting multiple factual disputes material to Ortiz's claims and the officers' defense of qualified immunity, denied summary judgment to Jordan and Bright and neither defendant appealed the District Court's denial of summary judgment. 131 S.Ct. at 890.

The case proceeded to trial and a jury returned a verdict of $350,000 in compensatory and punitive damages against Jordan and $275,000 against Bright. Jordan and Bright sought judgment as a matter of law, pursuant to Rule 50(a), both at the close of Ortiz's evidence and at the close of their own presentation. But they did not contest the jury's liability finding by renewing, under Rule 50(b), their request for judgment as a matter of law. Nor did they request a new trial under Rule 59(a). 131 S.Ct. at 890-891.

Jordan and Bright appealed to the Sixth Circuit Court of Appeals, targeting the denial of their pretrial motion for summary judgment. The Court of Appeals recognized that "courts normally do not review the denial of summary judgment motion after a trial on the merits." Nevertheless, the Court continued, "denial of summary judgment based on qualified immunity is an exception to this rule." The Court of Appeals reversed the judgment entered on the jury's verdict, holding that both defendants were sheltered from Ortiz's suit by qualified immunity. 131 S.Ct. at 891. The Supreme Court granted review to decide the threshold question on which there was a conflict in the circuits—May a party appeal an order denying summary judgment after a full trial on the merits? 131 S.Ct. at 891.

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The Court unanimously answered no. The Court began by explaining the circumstances in which a court of appeals has jurisdiction to hear an appeal from an order denying summary judgment based on qualified immunity:

> Because a plea of qualified immunity can spare an official not only from liability but from trial, we have recognized a limited exception to the categorization of summary judgment denials as nonappealable orders. *Mitchell v. Forsyth*, 472 U.S. 511, 525-526, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985). When summary judgment is denied to a defendant who urges that qualified immunity shelters her from suit, the court's order "finally and conclusively [disposes of] the defendant's claim of right not to stand trial." *Id.*, at 527, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (emphasis deleted). Therefore, *Mitchell* held, an immediate appeal may be pursued. *Ibid.*
>
> We clarified in *Johnson v. Jones*, 515 U.S. 304, 115 S. Ct. 2151, 132 L. Ed. 2d 238 (1995), that immediate appeal from the denial of summary judgment on a qualified immunity plea is available when the appeal presents a "purely legal issue," illustratively, the determination of "what law was 'clearly established'" at the time the defendant acted. *Id.*, at 313, 115 S. Ct. 2151, 132 L. Ed. 2d 238. However, instant appeal is not available, *Johnson* held, when the district court determines that factual issues genuinely in dispute preclude summary adjudication. *Ibid.*

131 S.Ct. at 891.

The Court found that the Sixth Circuit lacked jurisdiction to review the order because the time for filing the appeal expired long before trial. *See* Fed. Rule App. Proc. 4(a)(1)(A) (notice of appeal must generally be filed "within 30 days after the judgment or order appealed from"). 131 S.Ct. at 891-892. The Court further found that the appeal was not properly before the Sixth Circuit because it involved evidentiary sufficiency, which the defendants could have raised by post-trial motion under Rule 50(b) but did not:

> Disputed facts relevant to resolving the officials' immunity pleas included: Was Jordan adequately informed, after the first assault, of the identity of the assailant and of Ortiz's fear of a further assault? What, if anything, could Jordan have done to distance Ortiz from the assailant, thereby insulating her against a second assault? Did Bright place and retain Ortiz in solitary confinement as a retaliatory measure or as a control needed to safeguard the integrity of the investigation?

131 S.Ct. at 892-893 (citations omitted). Since the qualified immunity defenses by Jordan and Bright "do not present neat abstract issues of law," the Court concluded that the Court of Appeals "had no warrant to upset the jury's decision on the officials' liability." 131 S.Ct. at 893.

Justice Thomas, joined by Justices Scalia and Kennedy, concurred in the judgment. They complained that the Court should have limited its decision to the impropriety of appealing a district court's denial of a qualified immunity summary judgment motion after a trial on the merits without getting into the effect of the defendants' post-trial failure to renew their motion for judgment as a matter of law under Rule 50(b). 131 S.Ct. at 894.

Jones v. Clark, 2011 WL 117107 (7th Cir. 2011)

In *Jones v. Clark*, 2011 WL 117107 (7th Cir. 2011), a Fourth Amendment false arrest case, the Seventh Circuit Court of Appeals affirmed the district court's order denying the defendant officers' motion for summary judgment based on qualified immunity. The opinion provides an important discussion of the jurisdictional implications of qualified immunity appeals when there are disputed facts.

Christina Jones was an employee of Commonwealth Edison, which is the major electricity provider in the Chicago area. On August 16, 2005, she was working in her job as a meter reader in Braidwood, Illinois. She had 500 electrical meters to read for ComEd before the end of her shift. Jones carried a pair of binoculars with her so that she could take readings from a distance. A concerned citizen saw Jones using her binoculars, confused her for a construction worker photographing houses along the street, and called the Braidwood Police, reporting that a "person of color" was taking pictures of houses in Braidwood. (Jones is African-American, and Braidwood is almost entirely white). 2011 WL 117101 at *3.

Officers Clark and Kaminski responded. Officer Clark found Jones walking across the street, dressed in a hat, shirt, pants, and a reflective vest, all emblazoned with ComEd's logo. From his car, Officer Clark asked Jones whether she was reading meters, and she said that she was. Officer Clark radioed Officer Kaminski and his dispatcher to explain that Jones was a ComEd worker. Thirty seconds later, Officer Kaminski radioed in. He had stopped to talk with the person who had called the police, and Officer Kaminski too confirmed that Jones was reading meters. 2011 WL 117101 at *3.

Instead of concluding his investigation and allowing Jones to go on with her work, Officer Clark asked Jones

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whether she would speak with him for a moment. Jones agreed to do so. Officer Clark parked his car, approached Jones, and explained that there had been a complaint. Jones gave Officer Clark two ComEd identification cards. Jones commented that her driver's license was in her car, which was parked a few blocks away. After Officer Clark explained that a resident was concerned that someone was taking photographs of houses, Jones realized that her binoculars must have caused the confusion and she showed them to Officer Clark, explaining why she used them. 2011 WL 117101 at *4.

Then Jones turned to walk away. Officer Clark stopped her, asking, "What's the rush?" Jones explained that she was in a hurry because she had a tremendous amount of work to finish before the end of the day. Officer Clark, still unsatisfied, asked Jones for her date of birth. Jones asked why Officer Clark needed the additional information and accused him of harassing her. Then she took a few steps away from Officer Clark, took out her cell phone, and dialed her supervisor. Officer Clark radioed to Officer Kaminski that Jones was refusing to cooperate. 2011 WL 117101 at *4.

Officer Kaminski arrived and saw Jones standing with her phone to her ear, three feet away from Officer Clark. Officer Kaminski was irate and screamed at Jones as he approached and demanded to know whether she had given Officer Clark the information he needed. Jones said that she had, and Officer Kaminski responded, "No, you didn't. Do you want to go to jail?" Jones naturally said no, but it was too late. Officer Kaminski knocked Jones's cell phone from her hand, pulled her arms behind her back, put her in handcuffs, and then threw her against Officer Clark's police car. As Officer Kaminski patted Jones down, Jones said, "[T]his is harassment … . [T]his is happening because I am black in Braidwood." 2011 WL 117101 at *4.

Officers Clark and Kaminski took Jones to the police station for booking. Jones was charged with obstructing a peace officer. She was released on bond that day. The charge had been pending for more than two years when it was terminated with a directed verdict for Jones. 2011 WL 117101 at *4.

Jones sued the officers, alleging that the stop and arrest violated her Fourth Amendment rights. The defendant officers took the position that no constitutional violation had occurred because they had reasonably suspected that Jones was involved in criminal activity at the time of the stop and they had probable cause to arrest her. The parties filed cross-motions for summary judgment, and Officers Clark and Kaminski added that they were entitled to qualified immunity from suit. The district court concluded that factual disputes required a trial on the merits and similarly made it impossible to resolve the immunity question. Officers Clark and Kaminski appealed. 2011 WL 117101 at *1.

The court of appeals began its discussion with a detailed explanation of its jurisdiction to hear qualified immunity appeals. The court recognized that under *Mitchell v. Forsyth*, 472 U.S. 511 (1985), an order denying a motion for summary judgment based on a public official's claim of qualified immunity is immediately appealable to the extent that it turns on an issue of law. The court further noted that *Mitchell* underscored that a qualified immunity appeal must focus exclusively on legal questions about immunity, rather than factual disputes tied up with the merits of the case. 2011 WL 117101 at *1.

The court of appeals explained that in cases where the district court has asserted that factual disputes preclude a defendant's claim of immunity there are limited circumstances in which the court of appeals has jurisdiction:

> An immediate appeal on stipulated facts may still be possible, or the defendant may concede for purposes of the appeal that the plaintiff's version of the facts is correct, or he may accept the district court's view that there are factual disputes but take each disputed fact in the light most favorable to the plaintiff… . In a collateral-order appeal like this one, where the defendants say that they accept the plaintiff's version of the facts, we will take them at their word and consider their legal arguments in that light. If, however, we detect a back-door effort to contest the facts, we will reject it and dismiss the appeal for want of jurisdiction. By the same token, an appeal from a denial of qualified immunity cannot be used as an early way to test the sufficiency of the evidence to reach the trier of fact. In such a case, where there really is no legal question, we will dismiss the appeal for lack of jurisdiction.

2011 WL 117101 at *2 (citations omitted).

The court of appeals found that it had jurisdiction to consider the appeal because the officers chose to concede for purposes of the appeal that the plaintiff's version of the facts was correct:

> Here, as we have already noted, the district court decided that factual disputes prevented resolution of the officers' qualified immunity claim. It said, "[A] factual dispute exists as to whether defendants Officers Clark and Kaminski had probable cause to arrest plaintiff," and it added that "the disputed facts include …

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> whether Officer Clark had reasonable suspicion to stop Jones." *Jones v. Clark*, 2009 WL 3055366, at *5 (N.D. Ill. Sept. 21, 2009). To a large extent, these conclusions represent factual determinations that cannot be disturbed in a collateral-order appeal. Aware of this problem, the officers now insist that their appeal raises only legal questions. In their briefs, they have said that they "concede Plaintiff's version of the facts of this case" and they "have adopted the Plaintiff's version of the facts." At argument they repeated, "We're asking your honors to accept everything [Jones] says. That's what we're asking in this case."These statements, we conclude, are enough to take the disputed facts off the table for jurisdictional purposes.

2011 WL 117101 at *3.

Having found jurisdiction, the court of appeals turned to the qualified immunity analysis—whether the officers violated Jones' constitutional rights, and whether the rights they allegedly violated were clearly established at the time the incident occurred. Since there was no serious dispute that about the second question—that the right to be free from arrest without probable cause was clearly established when the events in question took place—the only question before the court was whether, under Jones's version of the facts, Officers Clark and Kaminski violated these clearly established rights. 2011 WL 117101 at *4.

As to Jones' investigatory stop claim, the court held that the facts as Jones described them demonstrated that Officers Clark and Kaminski violated Jones' Fourth Amendment rights when they stopped and detained her, and so the officers were not entitled to qualified immunity on that claim:

> Officer Clark encountered Jones on the street dressed top to bottom in ComEd gear; she immediately confirmed that she was reading electrical meters; and Officer Clark relayed that information to his colleagues. Officer Kaminski promptly confirmed this fact with the very resident who had placed the 911 call. Jones also forthrightly showed Officer Clark multiple pieces of identification from her employer and explained why she had binoculars. None of this would lead any reasonable person to believe that criminal activity was afoot.

2011 WL 117101 at *5.

As to Jones' claim that her arrest violated the Fourth Amendment, the officers argued that they had (or were reasonably mistaken in their belief that they had) probable cause to arrest Jones for both obstructing a peace officer, the crime Jones was ultimately charged with, and disorderly conduct. With regard to disorderly conduct, the court of appeals found that it was impossible to conclude from Jones' version of events that any police officer could have thought that Jones "knowingly … [did] any act in such unreasonable manner as to alarm or disturb another and to provoke a breach of the peace," which is the definition of disorderly conduct in Illinois. The court quipped, "the only disorderly conduct evident in this case came from Officers Clark and Kaminski." 2011 WL 117101 at *6.

The court also rejected the officers' argument that they had probable cause to arrest Jones for obstructing a peace officer, noting that the Illinois statute prohibiting the obstruction of a peace officer does not criminalize mere argument with a policeman; instead, there must be some physical act which imposes an obstacle which may impede, hinder, interrupt, prevent or delay the performance of the officer's duties. 2011 WL 117101 at *7.

Hill v. Coppleson, 627 F.3d 601 (7th Cir. 2010)

In *Hill v. Coppleson*, 627 F.3d 601 (7th Cir. 2010), a wrongful conviction case, the Seventh Circuit Court of Appeals dismissed a defendant prosecutor's interlocutory appeal from a denial of summary judgment on jurisdictional grounds, finding that it could not decide the prosecutor's claims of absolute and qualified immunity without resolving disputed questions of fact.

On March 20, 1992, Harold Hill (who was 18 years old at the time) was arrested and interrogated by homicide detectives Kenneth Boudreau and John Halloran from the Chicago Police Department's Area 3 Violent Crimes Division, who were investigating the sexual assault and murder of a woman named Kathy Morgan. Boudreau and Halloran took Hill to an interrogation room, handcuffed him to a ring on the wall, and questioned him about the Morgan homicide. Hill repeatedly denied any involvement, and when Boudreau and Halloran became frustrated with his denials, they resorted to physical attacks, including grabbing his shoulders and violently shaking him, slapping him across the face, and punching him in his chest and ribs. After hours of questioning and physical attacks, Hill agreed to confess out of fear of further abuse. 627 F.3d at 603.

The detectives called Assistant State's Attorney Michael Rogers to the police station to take Hill's confession. Rogers claimed that he went to the station after Hill had already implicated himself in the crimes by confessing to the detectives. Hill maintained that he did not confess before Rogers arrived at the station; to the contrary he only told the detectives that he was prepared to confess,

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but did not confess until his meeting with Rogers. According to Hill, when Rogers entered the interrogation room, Hill changed his mind about confessing and instead reasserted his innocence, telling Rogers that he had not been involved in Morgan's sexual assault or murder and that he had no knowledge of the crimes. Hill stated that Rogers ignored his pleas of innocence and began pressuring him to admit some involvement in the crimes by repeatedly asking Hill if he was "ready to confess." Frustrated by Hill's refusal to confess, Rogers then left the room, at which point Boudreau physically attacked Hill. Shortly thereafter, Hill agreed to confess for the second time, and Rogers returned to the interrogation room and fed Hill several details about the Morgan murder to assist in his written confession, which was prepared by Rogers and initialed by Hill. Hill then agreed to give a court reported statement during which Rogers coached him by asking him leading questions, whispering the answers to other questions under his breath, and mouthing to Hill the details of the crime. Rogers denied Hill's claims and stated that he only interacted with Hill briefly and for the limited purpose of approving the criminal charges and questioning him while the court reporter recorded his confession. 627 F.3d at 604.

Hill was ultimately charged with Morgan's sexual assault and murder. During his criminal trial, the state introduced Hill's confession in its case-in-chief; Hill maintained his innocence and testified that his confession had been coerced. The jury convicted Hill on both counts, and he was sentenced to life in prison. Over a decade later, Hill was exonerated after DNA testing revealed that he had not contributed DNA to any piece of evidence recovered from the crime scene. 627 F.3d at 604.

Hill filed suit against the City of Chicago, detectives Boudreau and Halloran, and ASA Rogers, alleging various constitutional violations, including a claim that Boudreau, Halloran, and Rogers had coerced him to falsely confess to the crimes in violation of the Fifth Amendment. Rogers filed a motion for summary judgment asserting that he was entitled to absolute immunity because his actions were taken in connection with his prosecutorial duties, and alternatively, that he was entitled to qualified immunity because his actions did not violate Hill's constitutional rights. 627 F.3d at 604.

The district court determined that Rogers was not entitled to summary judgment based on prosecutorial immunity because genuine issues of fact remained as to Rogers' involvement in the coercion of Hill's confession. The specific evidence that the court considered was the discrepancy about whether Hill confessed to the crimes before or after Rogers arrived at the police station, Hill's testimony that he initially told Rogers that he did not want to confess, and Hill's assertions that Rogers had fed him additional details about the murder to assist Hill during his confession. In his appeal, Hill essentially asked the court of appeals to reassess whether he was entitled to absolute or qualified immunity. 627 F.3d at 604-05.

The court of appeals explained the jurisdictional standard for appeals from a denial of summary judgment on an assertion of absolute or qualified immunity:

> [W]e evaluate the record de novo and determine whether we can decide each immunity question without resolving any disputed questions of fact. If we find that we cannot, then we lack jurisdiction over the appeal of that question … Conversely, if we are able to decide either immunity question based on undisputed facts, then we do have jurisdiction.

627 F.3d at 605 (citations omitted). The court of appeals noted that Rogers' claim of absolute immunity must be analyzed within the framework of the well-established rule that "a prosecutor is absolutely immune from § 1983 civil liability when he acts as an advocate for the state but not when his acts are investigative and unrelated to the preparation and initiation of judicial proceedings." 627 F.3d at 605 (citations omitted). The court of appeals found that the question of whether Rogers was acting in the role of an advocate or an investigator depended in part on whether probable cause for Hill's arrest existed before Rogers' arrival at the police station. And since the probable cause question turned on a disputed issue of fact concerning Hill's confession—whether Rogers arrived at the police station before or after Hill confessed—the court of appeals held that it did not have jurisdiction over Rogers' appeal because it could not resolve the absolute immunity question without resolving the factual dispute. 627 F.3d at 605-06.

As to Rogers' qualified immunity claim, the court of appeals held that since it could not determine whether Rogers coerced Hill's confession without resolving the discrepancies between Hill's and Rogers' accounts of the events, it lacked jurisdiction to consider that claim as well. 627 F.3d at 606.

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