

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

RONALD KITCHEN,)	
)	
Plaintiffs,)	
)	
v.)	Case No. 10 C 4093
)	
JON BURGE, et al.,)	Judge John J. Tharp
)	
Defendants.)	Magistrate Judge Maria Valdez

**RICHARD M. DALEY'S RESPONSE TO MOTION TO COMPEL AND CROSS-
MOTION FOR PROTECTIVE ORDER BARRING HIS DEPOSITION BY ORAL
EXAMINATION**

Non-party Richard M. Daley, by his attorney, Terrence M. Burns of Dykema Gossett PLLC, respectfully requests this Court deny plaintiff's motion to compel Mr. Daley's deposition and enter a protective order pursuant to Federal Rule of Civil Procedure 26(c)(1) barring his videotaped deposition by oral examination, and in support thereof, states:

I. INTRODUCTION

1. Somewhat predictably, plaintiff's counsel has once again rekindled a longstanding personal campaign to subject former States Attorney/former Mayor Richard M. Daley, a non-party, to a deposition. This ongoing quest at best is tantamount to a fishing expedition. More ominously, it suggests an unsubtle attempt to orchestrate media attention and generate pre-trial publicity rather than seek legitimate discovery. Not only are plaintiff's proposed reasons for seeking the deposition suspect, he has not demonstrated a compelling need for the deposition.

2. Notwithstanding his lack of personal involvement in or knowledge of the arrest, investigation, or criminal trial of Mr. Kitchen, Mr. Daley offered to submit to a deposition by written questions as contemplated by Fed.R.Civ.P. 31. Plaintiff's counsel, however, flatly rejected this reasonable proposal. Under the circumstances, a deposition of Mr. Daley by oral

examination would not meet a real need, nor would it provide or likely lead to the discovery of admissible evidence against the named defendants that is not available from another source. Moreover, counsel for Mr. Daley have a heightened concern over the potential for misuse of the deposition given the prior public dissemination in this case of selectively chosen snippets of videotaped deposition testimony from certain defendants. As a result, Mr. Daley asks that plaintiff's motion to compel be denied, and he further asks this Court to enter a protective order pursuant to Fed.R.Civ.P. 26(c)(1)(A) quashing the subpoena for his videotaped deposition.

II. LEGAL STANDARDS/APPLICABLE LAW

3. Rule 26(c) of the Federal Rules of Civil Procedure authorizes the entry of a protective order to "protect a party or person from annoyance, embarrassment, oppression or undue burden or expense." Fed.R.Civ.P. 26(c). Under Rule 26(c), this Court has the power to prohibit depositions upon a showing of good cause, and with a "certification that the movant has in good faith conferred or attempted to confer with other parties in an effort to resolve the dispute without court action." Fed.R.Civ.P. 26(c)(1). Terrence Burns, lead counsel for Mr. Daley, has engaged in a number of Rule 37.2 conferences with plaintiff's counsel (Flint Taylor and Locke Bowman, among others) regarding numerous issues pertaining to Mr. Daley's deposition, including alternative avenues of discovery, the scope and duration of the proposed deposition, whether a deposition should be videotaped, plaintiff's intended use of the deposition videotape and transcript, whether the deposition testimony would be maintained as confidential or for attorneys' eyes only, and the number of persons who would attend the proposed deposition. These issues remain unresolved, necessitating the involvement of this Court.

4. As the United States Supreme Court noted:

Liberal discovery is provided for the sole purpose of assisting in the preparation and trial, or the settlement, of litigated disputes. Because of the liberality of pretrial discovery permitted by Rule 26(b)(1), it is necessary for the trial court to

have the authority to issue protective orders conferred by Rule 26(c). It is clear from experience that pretrial discovery by depositions and interrogatories has a significant potential for abuse.

Seattle Times Co. v. Rhinehart, 467 U.S. 20, 34 (1984). Under the circumstances in this particular case, a videotaped deposition of a non-party, former high-ranking government official, without any meaningful limitations on the process itself or protections governing its subsequent use, would present the very significant potential for abuse contemplated by the Supreme Court in *Seattle Times*.

5. The Seventh Circuit follows a well-established rule that high-level government officials should not be subjected to discovery unless such discovery is necessary to prevent injustice and cannot be obtained through other means. *See Stagman v. Ryan*, 176 F.3d 986, 995 (7th Cir. 1999) (barring deposition of the Attorney General); *Olivieri v. Rodriguez*, 122 F.3d 406, 409 (7th Cir. 1997) (denying plaintiff's request for the oral deposition of Superintendent of Police); *Chicago Reader, Inc. v. Sheahan*, 192 F.R.D. 586, 587 (N.D.Ill. 2000) (deposition of Sheriff barred where plaintiff's request to question him about two conversations he had and his role, if any, in decision to exclude could have been simply handled in six written questions pursuant to Rule 31 to be answered at Sheriff's convenience). Such officials "should not have to spend their time giving depositions in cases arising out of the performance of their official duties unless there is some reason to believe that the deposition will produce or lead to admissible evidence." *Olivieri*, 122 F.3d at 409. A party seeking to depose such an official must demonstrate a "real need" for the deposition. *Chicago Reader*, 192 F.R.D. at 587, citing *Olivieri*, 122 F.3d at 409.

6. Courts have extended this principle to cover the requested depositions of former high-ranking officials. As one court observed:

Subjecting former officials' decision-making processes to judicial scrutiny and the possibility of continued participation in lawsuits years after leaving public office would serve as a deterrent to qualified candidates for public service.

United States v. Wal-Mart Stores, 2002 WL 562301 (D. Md. 2002).

III. DISCUSSION

7. As set forth below, plaintiff cannot demonstrate a "real need" to depose Mr. Daley, a non-party in this litigation. A brief discussion of some background information provides necessary context to this motion.¹ Mr. Daley became Cook County State's Attorney in 1981. He left that position to serve as Mayor of Chicago from 1989 through May 2011. The Sepulveda/Rodriguez murders occurred on or around July 26-27, 1988. Plaintiff was taken into custody by Chicago police on August 25, 1988, and he provided the allegedly coerced inculpatory statement to Assistant State's Attorney Mark Lukanich the following day. There are no allegations Mr. Daley, in his position as State's Attorney, was personally involved or participated in the arrest of plaintiff. There is no allegation Mr. Daley personally participated in the criminal investigation of plaintiff. There are no allegations Mr. Daley prosecuted plaintiff at his criminal trial. Plaintiff's pleadings concede Mr. Daley resigned as Cook County State's Attorney and became Mayor in 1989, well before plaintiff's criminal trial, conviction, and death sentence in 1990.

8. There are no allegations in the complaint suggesting then-State's Attorney Daley's personal involvement with some other aspect of the alleged misconduct underlying *plaintiff's* claims. Plaintiff does not allege Mr. Daley was personally involved in obtaining evidence from Willie Williams. Plaintiff does not allege Mr. Daley personally was present at

¹ To avoid any disputes unnecessary for resolution of the issues here, this background information is taken mainly from allegations found in plaintiff's first amended complaint. (Dkt. #229).

Area 3 on August 25-27, 1988, when plaintiff allegedly was tortured and coerced into providing an inculpatory statement. Plaintiff does not claim Mr. Daley personally was present when the alleged physical abuse or “coercive” techniques were purportedly used against him, or that Mr. Daley personally directed or approved any of the alleged misconduct directed against plaintiff. There are no allegations Mr. Daley personally participated in plaintiff’s post-conviction proceedings, particularly in his role as former State’s Attorney. The only “act” attributed in the motion to compel to then-State’s Attorney Daley that specifically pertains to plaintiff is the decision for prosecutors to seek the death penalty in plaintiff’s criminal proceedings. This allegation, addressed in detail below, fails to provide a legitimate basis for Mr. Daley’s deposition. In short, plaintiff’s motion fails to demonstrate a real need for an oral deposition of Mr. Daley concerning his service as Cook County State’s Attorney with respect to plaintiff’s claims against the individual defendants.

9. Indeed, plaintiff previously conceded in this case that his contentions concerning Mr. Daley focused on matters *after* he became Mayor of Chicago. (Plaintiff’s Response to Richard M. Daley’s Motion to Dismiss, Dkt. #86, at 18). With respect to Mr. Daley as Mayor, plaintiff identified four alleged “actions” of which he complained: discrediting the so-called “Goldston Report;” promoting Police Officer Peter Dignan to lieutenant; directing City lawyers to continue to defend Jon Burge in civil lawsuits; and, concealing information regarding alleged Burge torture of others. (*Id.* at 19). These allegations have nothing to do with plaintiff personally, his alleged coercive interrogation, his criminal prosecution and conviction, or his ongoing incarceration. More to the point, these four alleged “actions” simply do not relate to any of plaintiff’s claims in this action against the individual defendants. In dismissing Mr. Daley from this lawsuit back in April 2011, Judge Bucklo determined no causal connection could be

established between the four complained-of “actions” and the alleged violation of plaintiff’s due process rights. *Kitchen v. Burge*, 781 F. Supp. 2d 721, 734 (N.D. Ill. 2011). Plaintiff therefore cannot demonstrate a real need for an oral deposition of Mr. Daley concerning his services as Mayor with respect to his claims against the individual defendants.

10. To the extent plaintiff wishes to depose Mr. Daley concerning municipal policies or practices, that request is inappropriate at this stage. The Court has entered an order bifurcating the *Monell* policy and practice claims against the City, which includes a stay of discovery and trial on those issues. (Dkt. ## 399, 405).

11. This case is not the first time plaintiff’s counsel has attempted in a so-called “Burge case” to subject non-party Mr. Daley to a wide-ranging deposition concerning his years of public service as Cook County State’s Attorney and Mayor of Chicago. Each of those previous efforts was rebuffed by the court. *See, e.g.*, 12/16/04 Transcript of Proceedings, *Patterson v. Burge*, No. 03 C 4433 (N. D. Ill. 2004) at 4 (J. Gottschall) (“[T]he case has not been made for me, and I’m not going to allow this to happen in this case unless I know exactly why the people are being deposed and everybody else does, too, and I have been convinced that there is some reason for it apart from the huge publicity value of it”) (attached as Exhibit A); Statement, *Orange v. Burge*, No. 04 C 168 (N.D. Ill. Nov. 5, 2007) (*Orange* Dkt. #454) (J. Holderman) (“Plaintiff Orange has not made an adequate showing of the real need for the deposition of Mayor Daley *** or that such a deposition would provide or likely lead to the discovery of admissible evidence not available from other people or other sources”) (attached as Exhibit B); *Cannon v. Burge*, No. 05 C 2192, 2007 WL 2410392, *5 (N.D. Ill. Aug. 20, 2007) (J. St. Eve) (Based on “Cannon’s allegations against the individual Defendants and the Court’s stay of *Monell* discovery, Cannon’s proposed areas of inquiry would not lead to or produce

admissible evidence concerning his claims against the individual Defendants”) (attached as Exhibit C). The decisions and supporting rationales provided by Judges Gottschall, Holderman, and St. Eve are equally applicable to plaintiff’s deposition request in this case and support Mr. Daley’s position herein.²

12. Judge St. Eve’s decision in *Cannon* provides persuasive authority and support for this Court to deny the motion to compel and bar the deposition. *Cannon* presented the same issues raised here, under almost identical procedural circumstances. In *Cannon*, as here: plaintiff’s counsel (which included Mr. Bowman and Mr. Taylor) moved to compel the deposition of Mr. Daley; Mr. Daley was a non-party; the plaintiff attempted but was unable to assert a viable claim against Mr. Daley; the plaintiff was asserting claims against Defendants Hillard, Martin, Shines, and Needham; plaintiff alleged a widespread conspiracy against African American men; plaintiff alleged a pattern and practice of torture orchestrated by Defendant Burge; plaintiff asserted a broad, wide-ranging *Monell* claim against the City; and of significance, the *Monell* claim was bifurcated and *Monell* discovery was stayed. The plaintiff in *Cannon* submitted a list of proposed areas of inquiry for Mr. Daley. *Cannon*, 2007 WL 2410392, at *3-*5. Noting that the majority of the plaintiff’s proposed areas of inquiry were “strictly *Monell* related,” Judge St. Eve determined the information being sought was irrelevant to the plaintiff’s non-*Monell* claims against the individual defendants. *Id.* at *5. Judge St. Eve denied the motion to compel Mr. Daley’s deposition, finding the plaintiff’s proposed areas of

² Plaintiff’s motion to compel (at p. 4) misleadingly offers Magistrate Judge Brown’s decision in *Hobley v. Burge*, No. 03 C 3678, 2007 WL 551569 (N.D. Ill. 2007), to suggest then-Mayor Daley was ordered to testify in a deposition in “another Burge torture case.” As an initial observation, *Hobley* is inapplicable here because it involved a request to depose Mr. Daley with respect to *Monell* discovery only. See, e.g., *Cannon*, 2007 WL 2410392 at *2. More importantly, plaintiff’s motion neglects to advise this Court Judge Aspen subsequently overturned Magistrate Judge Brown’s decision, revising and setting aside her order compelling the deposition of Mr. Daley. See 12/7/07 Order, *Hobley v. Burge*, Case No. 03 C 3678 (Dkt. #840) (attached as Exhibit D).

inquiry would not lead to or produce admissible evidence concerning his claims against the individual defendants. *Id.* Many of the identical arguments rejected in *Cannon* are repeated in the present motion to compel. (*See* Paragraph 15, *infra*). The same result reached in *Cannon* is appropriate here. The motion to compel should be denied.

13. In light of this history, why the persistence of plaintiff's counsel in seeking a forum to allow this videotaped deposition? It would appear Judge Gottschall's earlier stated concerns about the "huge publicity value" in seeking Mr. Daley's deposition have proven prescient. Plaintiff's counsel previously have attracted significant media attention to a lawsuit each time they raise the specter of deposing Mr. Daley, and they now appear to be employing the same strategy here. Publicity is not a proper basis for a discovery request. "Discovery involves the use of compulsory process to facilitate orderly preparation for trial, not to educate or titillate the public." *Misc. Docket Matter #1 v. Misc. Docket Matter #2*, 197 F.3d 922, 926 (8th Cir. 1999), *quoting* *Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982).

14. In this particular case, the concern for the possible abuse of the discovery process through misuse of the media is particularly warranted. Counsel for Mr. Daley are aware that selective snippets from the videotaped deposition testimony of certain defendants (*i.e.*, Burge, Byrne, Kill) have been cut and spliced into a video available on the Internet entitled "Ronald Kitchen: Tortured, Framed, Then Sentenced to Death." (*See* Letters, attached as Exhibit E). Putting aside the issue of whether the Internet posting of that video is an improper attempt to taint the potential jury pool with a one-sided presentation of the issues in this case, the potential misuse of videotaped deposition testimony in such a manner requires heightened vigilance from the Court:

Videotapes are subject to a higher degree of potential abuse than transcripts. They can be cut and spliced and used as "sound-bites" on the evening news ***.

The potential embarrassment the Non-Parties would suffer at seeing their deposition performances displayed repeatedly during media accounts of [Defendant] constitutes good cause and requires this court to grant the Non-Parties' motion for a protective order for the videotape.

Felling v. Knight, 2001 WL 1782360, *3 (S.D. Ind. 2001).

15. The motion to compel includes a list of proposed topics to be covered at the proposed deposition. (See Motion to Compel, at 2-3). A brief review of each of the proposed subjects reveals they provide no legitimate basis or real need for a videotaped deposition of Mr. Daley. Indeed, the same proposed topics have been expressly rejected by other courts in previous rulings that found Mr. Daley's deposition would not lead to or produce admissible evidence. (See, e.g., *Cannon, supra*).

- *"Professional Relationships" with Defendants Martin, Shines / Goldston, Sanders reports:* Judge St. Eve previously determined these subjects failed to provide a proper basis for Mr. Daley's deposition under the same circumstances presented here. The relevance of Mr. Daley's "professional relationships" with Defendants Martin or Shines is unclear and unexplained. Next, there is no allegation Mr. Daley had involvement with the creation of the Goldston or Sanders reports. Neither the fact that Mr. Daley was Mayor at the time the reports were written, nor that he made public comment on the Goldston report, provide a basis to depose Mr. Daley as a witness in plaintiff's case against the individual defendants. Finally, as Judge St. Eve correctly concluded, such inquiries are strictly *Monell*-related. *Cannon*, 2007 WL 2410392, at *5. Any information Mr. Daley might have on these subjects therefore is not relevant to plaintiff's non-*Monell* claims against the individual defendants. *Id.*
- *Decision to seek Burge's separation / Burge separation proceedings:* The relevance of this subject matter to plaintiff's claims against the individual defendants is tenuous at best. The Police Board's administrative action in separating Burge arose from allegations related to Andrew Wilson, not plaintiff. Information regarding the actual separation proceedings, if relevant, is readily available to plaintiff from other sources. Mr. Daley's role as Mayor, if any, in the City's decision to pursue Burge's separation is even more remote and has no relevance to plaintiff's claims against Burge or the other individual defendants. Indeed, Judge St. Eve rejected this topic as providing a proper basis for Mr. Daley's deposition, concluding it was strictly *Monell*-related and not relevant to plaintiff's claims against the individual defendants. *Id.*
- *Public statements on Goldston report, 2006 Special Prosecutor's report:* It is not surprising or suspicious that Mr. Daley, as mayor, would be asked to comment publicly on issues involving the Chicago Police Department. It is not surprising or suspicious the Mayor's Office would issue a press release after publication of a much-anticipated report generating

substantial media interest. It would be inappropriate to subject a public official to deposition based on his or her public comments on matters of public interest that occur while that official is in office. Such an outcome would have a chilling effect on the accessibility of officials to the media and their willingness to make important public comment. There is no suggestion Mr. Daley in those statements to the press made any comment concerning plaintiff or plaintiff's case. In any event, a causal link between a mayor's public comments to the press and plaintiff's claims against the individual defendants is not readily apparent. As Judge St. Eve determined, this topic would be strictly *Monell*-related and provides no basis to depose Mr. Daley as a fact witness concerning plaintiff's claims against the individual defendants. *Id.*

- *Decision to seek death penalty in plaintiff's case:* This topic was raised and rejected in *Cannon* as a basis for deposing Mr. Daley. Judge St. Eve found no causal connection between Mr. Daley's administrative decision as Cook County State's Attorney to approve the State's seeking of the death penalty and the claims against the individual defendants. *Id.* In any event, Mr. Daley could not provide testimony in response to questions about the State's decision to seek the death penalty. Counsel for the State's Attorney's Office has asserted an objection based on the deliberative process privilege to all questions pertaining to the death penalty decision-making process in plaintiff's case. (Neither Mr. Daley nor his counsel possess a copy of the "Capital Punishment Case Memorandum" pertaining to plaintiff.) In a deposition, Mr. Daley necessarily would respect the privilege objection asserted by the State's Attorney's Office. And, this Court already has upheld the validity of the deliberative process privilege with respect to plaintiff's underlying criminal proceedings. *See* 2/6/13 Transcript of Proceedings, at 17 (attached as Exhibit F).
- *Knowledge, participation in a "torture and cover-up conspiracy":* As noted above, plaintiff attempted to assert conspiracy claims against Mr. Daley in the complaint, which claims were dismissed by Judge Bucklo. *Kitchen v. Burge, supra*. Plaintiff's reckless allegations in his pleadings, which failed to state a cognizable claim against Mr. Daley, do not somehow justify a deposition of the dismissed party. As further noted above (paragraph 9, *supra*), Judge Bucklo determined the actions alleged against Mr. Daley in furtherance of the putative "conspiracy" had no causal connection to the alleged violation of plaintiff's due process rights. Moreover, plaintiff's motion to compel exposes his quest to depose Mr. Daley about the alleged widespread conspiracy against African American men to be *Monell*-related. *See* Motion to Compel, at 7 ("Plaintiff is entitled to question Mr. Daley concerning his knowledge of these cases and the underlying pattern of victimizing African Americans") (emphasis added). As Judge St. Eve previously found, this area of inquiry is *Monell* related and provides no basis to depose Mr. Daley as a fact witness concerning plaintiff's claims against the individual defendants. *Cannon*, 2007 WL 2410392, at *5.

16. Plaintiff has not demonstrated a "real need" for Mr. Daley's videotaped deposition by oral examination. Mr. Daley is not a defendant. Discovery on *Monell*-related issues has been stayed. Plaintiff's only conceivable basis for seeking Mr. Daley's deposition, apart from the publicity value he has attracted with such a request, appears to be to find out

“what, if anything,” he knows about various matters. Under plaintiff’s “fishing expedition” standard, Mr. Daley could be deposed in an infinite number of cases arising from the time period he served as Mayor (or as State’s Attorney). *See Cannon*, 2007 WL 2410392, *5 (“the Court cannot grant [plaintiff’s] motion to compel merely because Mayor Daley is Chicago’s Mayor and the former Cook County State’s Attorney”).

17. To paraphrase Judge St. Eve, based on plaintiff’s allegations against the individual defendants and the Court’s stay of *Monell* discovery in this matter, plaintiff’s proposed areas of inquiry would not lead to or produce admissible evidence concerning his claims against the individual defendants. *Id.* For that reason alone, plaintiff’s motion to compel should be denied. But there is more. As noted above (paragraph 14, *supra*), counsel for Mr. Daley is particularly concerned about the possible abuse of the discovery process attendant to plaintiff’s request for his deposition. To repeat the clearly-stated admonition of the United States Supreme Court, “Liberal discovery is provided for the *sole purpose* of assisting in the preparation and trial, or the settlement, of litigated disputes.” *Seattle Times*, 467 U.S. at 34 (emphasis added). That “sole purpose” is not served by the Internet posting of snippets of videotaped deposition testimony from defendants in this case, which implicates the “significant potential for abuse” that concerned the Court in *Seattle Times*. *Id.* With respect to Mr. Daley, a non-party, plaintiff’s “offer” to not publicly disclose the videotape “until trial or after settlement” betrays an intention to publicly disclose the videotape later, for reasons that could not possibly relate to the legitimate purposes of discovery stressed in *Seattle Times*.

IV. CONCLUSION

18. In light of the foregoing, this Court should deny plaintiff’s motion to compel and enter a protective order barring Mr. Daley’s deposition by oral examination. There is no “real need” to subject Mr. Daley to the unlimited, unfettered, and unprotected deposition requested by

plaintiff's counsel. Not only has plaintiff's counsel failed to offer a compelling need for Mr. Daley's deposition, the previous public disclosure of other videotaped deposition snippets of party defendants in this case create a real concern for the potential misuse of the proposed deposition for purposes other than legitimate discovery. For the foregoing reasons, Mr. Daley requests that this Court deny plaintiff's motion to compel and enter a protective order barring his deposition by oral examination.

WHEREFORE, Movant, Richard M. Daley, respectfully requests that this Honorable Court deny plaintiff's motion to compel and enter a protective order pursuant to Federal Rule of Civil Procedure 26(c)(1)(A) barring his deposition by oral examination, and/or for any other relief this Court deems appropriate or just.

Dated: March 1, 2013

Respectfully submitted,

By: s/ Terrence M. Burns
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CERTIFICATE OF SERVICE

I hereby certify that on March 1, 2013, I electronically filed the foregoing **Movant Richard M. Daley's Response to Motion to Compel and Cross-Motion for Protective Order Barring His Deposition by Oral Examination** with the Clerk of the Court using the ECF system, which sent electronic notification of the filing on the same day to:

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EXHIBIT A

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

AARON PATTERSON,

Plaintiff,

vs.

JON BURGE, et al.,

Defendants.

No. 03 C 4433

Chicago, Illinois

December 16, 2004

9:30 a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JOAN B. GOTTSCHALL

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EXHIBIT

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1 (Proceedings heard in open court:)

2 THE CLERK: Case 2003 C 4433, Patterson versus
3 Burge, et al.

4 THE COURT: Names, please.

5 MR. TAYLOR: Good morning, Judge. Flint Taylor,
6 Joey Mogul for the plaintiff. Also Kurt Fuerer is here on
7 behalf of the Hobley plaintiffs.

8 MR. HEGEMAN: Louis Hegeman on behalf of State's
9 Attorney Devine and Assistant State's Attorney Troy.

10 MR. MILLER: Good morning, your Honor. Terry
11 Miller on behalf of defendant Leroy Martin and Gayle Shines.

12 MR. ARGER: Good morning, your Honor. Harry Arger
13 for the City of Chicago, Terry Hillard and Thomas Needham.

14 MR. BURNS: Good morning, your Honor. Terrence
15 Burns appearing on behalf of the City of Chicago, the movant
16 in this matter this morning, which is our motion to bar
17 discovery and trial on the Monelle claims that have been
18 raised against it.

19 I believe -- I'm sorry, Jim. I didn't see you
20 there.

21 MR. SOTOS: Good morning, your Honor. I'm Jim
22 Sotos, on behalf of the individual defendants in the Hobley
23 case.

24 THE COURT: Let me start with something else very
25 briefly, which is that I have been trying to get an order out

1 to you on the issue of the depositions of Mayor Daley and
2 State's Attorney Devine and the various lawyers, and I had
3 come to the conclusion, about two days ago or whenever, that
4 I don't feel the plaintiff has given me what I need to know
5 whether or not I should order these depositions.

6 Now, the cases I think strongly indicate that
7 normally depositions of officials like these officials, and I
8 would add to that lawyers -- because lawyers raise different
9 but I think equally difficult problems -- should not be
10 ordered unless there is good reason for it.

11 Now, I am not saying there is no good reason for
12 it, but the case has not been made for me, and I'm not going
13 to allow this to happen in this case unless I know exactly
14 why the people are being deposed and everybody else does,
15 too, and I have been convinced that there is some reason for
16 it apart from the huge publicity value of it.

17 So I was going to -- I don't know, grant the motion
18 for protective order, deny the motion to compel without
19 prejudice and ask the plaintiffs to come back again -- and
20 please do not tell me the whole history of the case; tell me
21 why you want to take these specific depositions. Otherwise I
22 am not going to allow it to go forward.

23 Now, the City's motion or whatever it is that -- is
24 it a motion that the City has now filed to admit --

25 MR. BURNS: Yes, it is, your Honor.

5

1 THE COURT: -- the elements of Monelle liability to
2 avoid discovery and everything else I think just complicates,
3 or assists, or impedes or something this whole matter of
4 these depositions.

5 MR. BURNS: Judge, so it's clear, in terms of
6 admission, what we're saying is that if the plaintiff
7 establishes a constitutional -- the plaintiffs, actually,
8 they establish a constitutional injury, we agree and accept
9 that and will satisfy that judgment.

10 So we forego the need for the practice, policy
11 discovery in these matters by accepting --

12 THE COURT: You have to satisfy the judgment in
13 practical terms anyway. So the question is --

14 MR. BURNS: Compensatory, yes.

15 THE COURT: -- whether there are elements of
16 liability here that are different or -- I mean, this is a
17 complicated matter, and I haven't gotten into it because I
18 thought you could all help me with it. What I'm saying is --
19 let me think how we're going to deal with this.

20 What do the plaintiffs want to do? Do you want to
21 respond in writing to this or what do you want to do?

22 MR. TAYLOR: When I read this motion, it was deja
23 vu, because you denied basically the same motion 14 months
24 ago before --

25 THE COURT: I don't think so. I denied a motion to

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1 sever the Monelle discovery. What's happening here is that
2 the City is saying if you prove a constitutional violation by
3 any of these individual employees we will admit -- what?
4 That it was caused by our policy and practice?

5 MR. BURNS: No, Judge, what we're saying is simply
6 if they establish the constitutional injury, we waive and
7 will accept whatever compensatory damages would flow from
8 that without the need to establish any policy or practice on
9 behalf of the City of Chicago.

10 THE COURT: That's much less than I thought was
11 happening.

12 MR. TAYLOR: It nullifies Monelle, Judge. If there
13 still is a Monelle claim under the Constitution and under
14 1983, then we have a right to proceed on it, and if they want
15 to -- excuse me.

16 THE COURT: I think you need to tell me why that
17 is, okay? I'm not sure that -- I think you need to tell me
18 why that is. That's why I think you need to respond to this.

19 MR. TAYLOR: Fine, Judge.

20 MR. FEUER: On behalf of Hobley and Howard, Kurt
21 Fuerer. For the record, I think we can give you a brief in
22 pretty short order on this. Because I know Loevy and Loevy,
23 they routinely if not virtually in every case have a Monelle
24 component to every complaint, and the City of Chicago in
25 every case files either the motion to bifurcate that was

7

1 filed in all four of these consolidated cases at the outset,
2 or they file the motion that's now before you. They've never
3 done both, to my knowledge, but we do have -- we have briefed
4 this issue before.

5 THE COURT: That would be helpful.

6 MR. FEUER: And I think the City is basically
7 offering nothing here, other than what they're already
8 obligated to do, which is to indemnify these officers.

9 THE COURT: I'll just say this. My clerk and I
10 looked at Monelle again yesterday, and it didn't answer the
11 question of whether the City's -- at least I couldn't find an
12 answer, and if the City's exposure liability in a case like
13 this is simply in terms of respondeat superior, that is to
14 compensate for something an employee has done, or whether --
15 which I think would make this waiver not very significant in
16 terms of discovery, there is a basis for independent
17 liability against the City.

18 That's how -- without having done a lot of
19 research, that's the question that comes to my mind.

20 MR. BURNS: There is a separate count, count 5,
21 that deals with that issue that the City, based upon a
22 Monelle claim, that any injuries as a result of a practice or
23 policy by the City in this case.

24 What we are saying is if you establish your injury,
25 the City accepts whatever judgment for compensatory damages

8

1 that would flow from that and satisfy it. We then focus on
2 the issue at hand, and that's the activity of the officers
3 and the --

4 THE COURT: Well, you file your brief, okay?

5 MR. BURNS: Very well, Judge.

6 THE COURT: I don't have time to hear an argument
7 this morning.

8 MR. BURNS: Very well, Judge.

9 THE COURT: Now, can I get -- I want this brief
10 from you. When can I get it from the plaintiffs?

11 MR. FEUER: I think we can do it --

12 MS. MOGUL: We can do it in 21 days, your Honor.

13 THE COURT: That's fine. Now at the same time, or
14 do you want to hold off on it, if you want to go forward with
15 these depositions, why don't -- you know what I think would
16 be most helpful, I hate to defer it, but I think that I need
17 to rule on the effect of this waiver before I ask you to tell
18 me why you think you get to take these depositions again.
19 Okay?

20 MR. BURNS: All right.

21 THE COURT: If you want to file something more
22 specific with me, tell me what you hope to get from the
23 mayor's deposition, or what subject matters you want to ask
24 the mayor about, I'll take it at any time, but if you want to
25 wait until I've ruled on the issue of this waiver, that's

1 fine, too.

2 MR. TAYLOR: I think we'll proceed to show why we
3 want those depositions..

4 THE COURT: Well, fine.

5 MR. TAYLOR: At least on the same track.

6 THE COURT: Their is granted without prejudice.
7 Your motion on the depositions is denied without prejudice.
8 Any time you want to file something else, you can file
9 something else. Let me get a brief on this waiver thing.
10 And to reply?

11 MR. BURNS: Fourteen days or seven days? Ten?
12 They want twenty-one, Judge.

13 MR. FEUER: I think I've convinced my fellow
14 counsel that we can get it in within fourteen days. Our
15 response to the pending brief.

16 THE COURT: What's that date, Rhonda?

17 THE CLERK: December 30th.

18 THE COURT: December 30th.

19 MR. BURNS: 14 days.

20 THE COURT: 14 days.

21 MR. FEUER: And Judge, on behalf of Hobley again, I
22 have a concern that this is in part a delaying tactic to get
23 an extension of discovery that Judge Brown did not grant last
24 week when that was argued before her. We basically have
25 until the end of January to notice up any discovery.

10

1 MR. BURNS: That's not the purpose of this, your
2 Honor.

3 THE COURT: I can't go here with you today. All
4 your accusations about why somebody else is doing what
5 they're going and what effect this is going to have on Judge
6 Brown, that's for Judge Brown.

7 MR. FEUER: I'm asking to make clear that your
8 order today does not preclude us from taking depositions that
9 have been previously noticed and scheduled but not yet taken.

10 THE COURT: It only relates to the depositions that
11 are the subject of the motion for a protective order.

12 MR. BURNS: Correct. We understand that.

13 THE COURT: Which is the mayor, the state's
14 attorney, what lawyers? A number of lawyers?

15 MR. FEUER: There are some corporate counsel, Mara
16 Georges and Sharon Baldwin.

17 THE COURT: Chief of staff?

18 MR. BURNS: Chief of staff

19 THE COURT: Okay. Nothing else.

20 MR. FEUER: That's all I wanted to make clear,
21 Judge, as long as we can proceed with all other depositions,
22 because we are basically at the end of discovery in the
23 Hobley case, and I don't want this to delay that.

24 MR. BURNS: Very well, your Honor.

25 THE COURT: Okay.

11

1 MR. BURNS: Thank you, your Honor.
2 (End of proceedings.)

3 C E R T I F I C A T E

4
5 I certify that the foregoing is a correct transcript
6 from the record of proceedings in the above-entitled case on
7 December 16, 2004.
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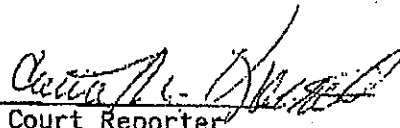
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EXHIBIT B

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	James F. Holderman	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	04 C 168	DATE	11/5/2007
CASE TITLE	Orange vs. Burge, et al.		

DOCKET ENTRY TEXT

City of Chicago's Second Motion for Continued Protective Order Barring the Deposition of Mayor Daley [Dkt. No. 434] is granted. Consistent with Fed. R. Civ. P. 26(e), this order will remain in effect subject to further order of this court, after a more sufficient showing by plaintiff Orange of specific facts demonstrating the real need for the deposition, that the deposition would serve a useful purpose, and that the deposition would produce information reasonably calculated to lead to the discovery of admissible evidence not obtainable from other sources or through another method of discovery.

■ [For further details see text below.]

Docketing to mail notices.

STATEMENT

Plaintiff Orange has not made an adequate showing of the real need for the oral deposition of Mayor Daley, who was Cook County States Attorney at the time of the arrest and criminal prosecution of plaintiff Orange, or that such a deposition would provide or likely lead to the discovery of admissible evidence not available from other people or other sources. Specifically, due to the apparently cumulative nature of any evidence that an oral deposition of Mayor Daley would provide, Orange has not shown what useful purpose such a deposition would serve in this litigation. Moreover, no showing has been made by Orange as to what facts or admissible evidence would be obtained from such a deposition that are not obtainable from other sources or through another method of discovery. *Olivieri v. Rodriguez*, 122 F.3d 406, 407 (7th Cir. 1997); *Stagman v. Ryan*, 176 F.3d 986, 994-95 (7th Cir. 1999).

Courtroom Deputy
Initials:

AMM

EXHIBIT C

Westlaw

Page 1

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(Cite as: 2007 WL 2410392 (N.D.Ill.))

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Only the Westlaw citation is currently available.

United States District Court,
N.D. Illinois,
Eastern Division.
Darrell CANNON, Plaintiff,

v.

Former Chicago Police Lt. Jon BURGE, et al., De-
fendants.

No. 05 C 2192.
Aug. 20, 2007.

Locke E. Bowman, III, Benjamin H. Elson, G. Flint Taylor, Jr., Joey L. Mogul, People's Law Office, Chicago, IL, for Plaintiff.

James Gus Sotos, Christina S. White, Elizabeth A. Ekl, James G. Sotos & Associates, Ltd., Itasca, IL, Stephen L. Garcia, Patrick T. Driscoll, Jr., Paul Anthony Castiglione, John Paul Heil, Jr., Terrence Michael Burns, Daniel Matthew Noland, Harry N. Arger, Paul A. Michalik, Dykema Gossett Rooks Pitts PLLC, Eileen Marie Letts, Kenya A. Jenkins, Allen Price Walker, Kevin Thomas Lee, Martin Peter Greene, Greene & Letts, Chicago, IL, for Defendants.

MEMORANDUM OPINION AND ORDER

AMY J. ST. EVE, District Court Judge.

*1 Before the Court is Plaintiff Darrell Cannon's Motion to Compel the Deposition Testimony of Chicago Mayor Richard M. Daley. In his original Complaint, Cannon alleged that certain personnel with the City of Chicago, the Cook County State's Attorney's Office, Cook County, and the City itself violated his civil rights by torturing him during interrogations held at the Chicago Police Department's Area 2 Detective Division under the direction of Former Chicago Police Lieutenant Jon Burge. In a recent order, the Court granted in part and denied in part Cannon's Motion for Leave to File an Amended Complaint. Relevant to this mo-

tion, the Court denied Cannon's motion to add Mayor Daley and former Chicago Mayor Jane Byrne as Defendants to this lawsuit, and Cannon's attempt to add a claim under the federal Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq.* For the following reasons, the Court denies Cannon's Motion to Compel the Deposition of Mayor Daley without prejudice with leave to re-file if and when the Court lifts the stay of *Monell* discovery in this matter.

LEGAL STANDARD

"Parties may obtain discovery regarding any matter, not privileged, *that is relevant to the claim or defense of any party*.... Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Fed.R.Civ.P. 26(b)(1) (emphasis added). In the context of motions to compel, the Seventh Circuit instructs that a "district court may grant or deny the motion in whole or in part, and similar to ruling on a request for a protective order under Rule 26(c), the district court may fashion a ruling appropriate for the circumstances of the case." *Gile v. United Air Lines, Inc.*, 95 F.3d 492, 496 (7th Cir.1996) (citing Fed.R.Civ.P. 37(a)(4)(B), (C)). "Thus, a district court is not limited to either compelling or not compelling a discovery request; in making its ruling, a district court should independently determine the proper course of discovery based upon the arguments of the parties." *Id.* As with all discovery matters, district courts have broad discretion in determining motions to compel. *See id.*; *see also Reynolds v. Jamison*, 488 F.3d 756, 761 (7th Cir.2007).

BACKGROUND

On November 13, 2006, the Court granted in part and denied in part the City's motion to bar discovery and trial of policy claims brought pursuant to *Monell v. Department of Soc. Servs. of New York*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). (R. 163-1, 11/13/06, *Monell* Discovery Order.) Specifically, the Court stayed "purely *Mon-*

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(Cite as: 2007 WL 2410392 (N.D.Ill.))

ell' fact and expert discovery through the resolution of any summary judgment motions on the liability of the individual defendants." (*Id.* at 1.) The Court also reasoned:

The Court is confident in the ability of parties' counsel to differentiate between "*Monell*" discovery and discovery directed at the claims against the other defendants. While some blurring may occur at the outer boundaries-and Defendants are advised to give Plaintiff leeway in investigating those areas-it generally is not difficult to discern whether discovery is directed at violations committed against Cannon by specific named defendants or at the broad policies and practices of the City of Chicago. The Court accordingly finds that a stay on *Monell* discovery will provide significant efficiency benefits in this case.

*2 (*Id.* at 3.)

On November 10, 2006, Cannon noticed Mayor Daley for a deposition to take place on December 18, 2006. (R. 188-2, Mot.Compel, Ex. A.) The City objected to the deposition notice based on the Court's order staying *Monell* discovery, among other factors. (Mot. Compel, Ex. B, 12/12/06 letter.) Meanwhile, on February 21, 2007, Magistrate Judge Brown ordered Mayor Daley to sit for a deposition concerning *Monell* discovery in a similar matter, *Hobley v. Burge*, No. 03 C 3678, 2007 WL 551569 (N.D.Ill. Feb.22, 2007). Thereafter, Cannon wrote the City seeking reconsideration of its objection based on Judge Brown's decision, as well as Cannon's unsuccessful attempt to add Mayor Daley as a Defendant to this action. (Mot. Compel, Ex. C, 2/26/07 letter.) The City maintains its objection to Mayor Daley's deposition.

ANALYSIS

I. Depositions of Public Officials

As the Seventh Circuit has recognized, "depositions of public officials create unique concerns." *Stagman v. Ryan*, 176 F.3d 986, 994-95 (7th Cir.1999); see also *Crawford-El v. Britton*, 523 U.S. 574, 597-98, 118 S.Ct. 1584, 140 L.Ed.2d 759

(1998) (district court "must exercise its discretion so that officials are not subjected to unnecessary and burdensome discovery or trial proceedings."). Specifically, public officials "should not have to spend their time giving depositions in cases arising out of the performance of their official duties unless there is some reason to believe that the deposition will produce or lead to admissible evidence." *Olivieri v. Rodriguez*, 122 F.3d 406, 409-10 (7th Cir.1997). Thus, the Court must determine whether Mayor Daley's deposition will produce or lead to admissible evidence in this matter within the parameters of the Court's order staying *Monell* discovery. See *Bagley v. Blagojevich*, 486 F.Supp.2d 786, 789 (C.D.Ill.2007); see also *Hobley*, 2007 WL 551569, at *2 ("A party seeking the deposition of a high ranking official should first demonstrate that there is some reason to believe that the deposition will produce or lead to admissible evidence.").

II. Magistrate Judge Brown's Decision

Because Cannon relies on Magistrate Judge Brown's decision in *Hobley*, a summary of the underlying facts and the court's decision concerning Hobley's "Renewed Motion to Compel the Consolidated *Monell* Deposition of Richard M. Daley" is helpful:

Mr. Daley was the State's Attorney during the time when Hobley, an African-American, alleges he was subjected to constitutional violations by Chicago police, including defendant Jon Burge. The State's Attorney and his assistants prosecute criminal charges brought by Chicago police. There is evidence that in February 1982, the State's Attorney's office, and perhaps Mr. Daley personally, was put on notice of allegations of physical abuse of suspects by Chicago police through a letter to Mr. Daley from the then-Superintendent of Police Richard Brzeczek. Mr. Brzeczek's letter states that he is enclosing a letter from the Medical Director of Cermak (Prison) Health Services which describes injuries appearing on defendant Andrew Wilson, an African-American suspected in the murder of Chicago po-

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(Cite as: 2007 WL 2410392 (N.D.Ill.))

lice officers. Apparently, nothing was done to follow up on the issues raised by the two letters. Mr. Wilson's conviction was reversed by the Illinois Supreme Court. *People v. Wilson*, 116 Ill.2d 29, 106 Ill.Dec. 771, 506 N.E.2d 571 (Ill.1987). Recently, the Special Prosecutor who investigated allegations of abuse by Chicago police officers concluded that there was enough evidence of mistreatment of Andrew Wilson by Jon Burge to establish guilt beyond a reasonable doubt. The Special Prosecutor's report also stated, "There are many other cases which lead us to believe or suspect that the claimants were abused, but proof beyond a reasonable doubt is absent."

*3 Since the release of the Special Prosecutor's report, Mr. Daley has stated that he believes Mr. Brzeczek's letter was referred at the time to the appropriate professionals within the State's Attorney's Office. Testimony obtained by the Special Prosecutor from other witnesses suggests that the Brzeczek letter was received and considered by highly-placed members of the State's Attorney's staff, possibly including Mr. Daley. Notably, after Mr. Wilson was convicted, Mr. Daley, in his position as State's Attorney, publicly honored Burge and other police officers for their work on the case. These facts, among other circumstances cited in Hobley's motion, support a conclusion that Mr. Daley may have information about the activities of Burge and other police officers, about who in the City and police administration knew about those activities, and about whether any action was taken on the basis of such knowledge. *Such information could well lead to potentially admissible evidence regarding whether the mistreatment of the African-American suspects reflected a policy or practice by the City that denied equal protection of the laws to those suspects.*

Id., 2007 WL 551569, at *2-3 (internal citations omitted) (emphasis added). Not only did Hobley's motion concern *Monell* discovery, the *Hobley* court did not stay *Monell* fact and expert discovery

through the resolution of the parties' summary judgment motions on the liability of the individual defendants.

III. Cannon's Motion to Compel

In Cannon's motion to compel, he argues that Mayor Daley is an important fact witness, although Cannon did not identify Mayor Daley as a fact witness in his Federal Rule of Civil Procedure 26(a)(1) initial disclosures.^{FN1} (See R. 205-1, City's Resp. Brief, Ex. 3.) Nonetheless, Cannon bases his motion to compel upon information disclosed since the release of the July 19, 2006, Special Prosecutor Investigation Report concerning torture at Chicago Police Department Area 2. Specifically, Cannon sets forth the Brzeczek letter in the Wilson matter arguing that Mayor Daley's deposition would produce or lead to admissible evidence that Mayor Daley knew about exculpatory evidence in Wilson's arrest, and that this evidence is central to Cannon's *Brady* violation claim. (R. 188-1, Pl.'s Mot. Compel, at 3-4.) Cannon, however, fails to explain how exculpatory evidence in the Wilson matter would lead to admissible evidence concerning the facts surrounding his individual *Brady* claim. Cannon also argues that the new evidence uncovered by the Special Prosecutor's report concerns Mayor Daley's decision, as the State's Attorney of Cook County, to seek the death penalty against him. (*Id.* at 5.) Again, Cannon fails to argue how Mayor Daley's decision to seek the death penalty against him implicates Cannon's claims against the individual Defendants in this matter.

FN1. In the *Monell* discovery order, the Court noted:

The recent self-serving effort in Cannon's Amended 26(a) Disclosures to categorize witnesses previously described as *Monell* witnesses as also qualifying as "fact witnesses" or "404(b) witnesses"—a clear effort to create a perception of overlap among *Monell* issues and other issues in the case—does not change the analysis. In fact, the amended disclos-

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ures merely underscore how Cannon and other similarly situated plaintiffs clearly classified these witnesses before the present motion clouded their perspective.

(R. 163-1, 11/13/06, *Monell* Discovery Order, at 3.)

Cannon lists additional areas of inquiry regarding the proposed deposition of Mayor Daley, including:

*4 (1) Daley's and Devine's role in deciding not to prosecute **Burge** for the torture of Andrew Wilson;

(2) Daley's and Devine's role in the disappearance of the original file stamped copy of the Brzeczek letter;

(3) Daley's and Devine's role in suppressing the Brzeczek letter and the torture evidence contained therein from Wilson, Plaintiff **Cannon**, and other criminal defendants who alleged torture by **Burge** and his men;

(4) Daley's and Devine's knowledge of the numerous other torture cases that arose when Daley was State's Attorney and their role in refusing to prosecute **Burge**, Byrne, Dignan, and other Area 2 torturers for any of these acts of torture;

(5) Daley's public statements concerning the Plaintiff after his November 1983 arrest;

(6) Daley's May 1983 public commendation of **Burge** for his role in the Wilson case;

(7) Daley's role in prosecuting Plaintiff and his and Devine's role in prosecuting the numerous other victims of torture; his decision to seek the death penalty in **Cannon's** case and his and Devine's decision to seek the death penalty in numerous other torture victims' cases;

(8) Daley's role in deciding not to investigate or

prosecute **Burge** for the torture of Andrew Wilson after the 1987 Illinois Supreme Court reversal of Wilson's conviction and death sentence on the basis of evidence that he was tortured;

(9) Daley's role in the appointment of Devine's law firm to re-prosecute Wilson after the Supreme Court decision;

(10) Daley's listing by Devine's law firm as a witness for Jon **Burge** in the 1989 Wilson civil torture trials;

(11) Daley's role, with Defendants Martin and Shines, in suppressing, then subsequently attempting to publicly discredit, *inter alia*, by making press statements, the Goldston Report which found that **Burge**, Byrne, Dignan, and other Area 2 detectives engaged in "systematic" torture and abuse at Area 2, that those cases included Plaintiff's, and that command officials, including Defendant Martin, were aware of, condoned, and participated in the torture and abuse;

(12) Daley's and Martin's role in refusing to investigate or prosecute **Burge**, Byrne, Dignan, and other Area 2 detectives for this "systematic" torture after they received the Goldston Report findings;

(13) Daley's 1996 meritorious promotion of Defendant Dignan to Lieutenant, despite the findings of several OPS investigators that Dignan and Byrne had electric shocked and otherwise tortured and abused Plaintiff and several other African American suspects;

(14) Daley's and Devine's involvement in the Special Prosecutors' investigation and their issuance of a report which attempted to discredit Plaintiff and other victims of torture while absolving Daley and Devine of responsibility;

(15) Daley's role in deciding to continue to defend **Burge**, Byrne, and Dignan in **Cannon** and the other civil torture cases against the advice of his Chief of Staff and even after they took the

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Fifth Amendment in their Answers, in their interrogatories, and at their original depositions;

*5 (16) Daley's 2006 statements to the Special Prosecutor, and his June 2006 meeting with Devine and Police Superintendent Cline during which he briefed Devine, who was to give his statement to the Special Prosecutor in the next few days, as to what he had told the Special Prosecutor; and

(17) Daley's July 21, 2006 public statements condemning the "pattern" of torture and abuse at Area 2 as "shameful," accepting his "share of the responsibility," and offering to apologize to the victims.

(Mot. Compel, at 6-7.) The Court notes that the overwhelming majority of Cannon's specific areas of inquiry and arguments in his opening brief are the same arguments made in Hopley's Renewed Motion to Compel the Consolidated *Monell* Deposition of Richard M. Daley. (See 03 C 3678, *Hopley v. Burge*, R. 680-1, Mot. Compel, at 5-16.) In fact, Cannon's arguments in support of his motion to compel mainly focus on Mayor Daley's involvement in the Wilson matter and not Cannon's individual case. (See Mot. Compel, at 2-7.) ^{FN2}

FN2. In his motion to compel, Hopley argued that the Wilson case was the "bedrock" of his *Monell* claims. (03 C 3678, *Hopley v. Burge*, R. 680-1, Mot. Compel, at 5.)

Cannon argues that these areas of examination are relevant to his allegations against Mayor Daley in the First Amended Complaint, but, as discussed, Mayor Daley is not a Defendant in this lawsuit. Meanwhile, Cannon admits that "some" of these areas are also relevant to his *Monell* claims. (Mot. Compel, at 8.) Actually, the majority of these inquiries are strictly *Monell* related, including inquiries 1, 2, 4, 6, 8, 9, 10, 11, 12, 16, and 17. The other inquiries in which Cannon attempts to inject his case into factual matters concerning the Wilson case are questionable at best, especially in light of

Cannon's failure to explain how these areas of inquiry will produce or lead to admissible evidence concerning his claims against the individual Defendants in this lawsuit. See *Chicago Reader, Inc. v. Sheahan*, 192 F.R.D. 586, 587 (N.D.Ill.2000) (question is whether there is "real need" to take deposition in plaintiff's effort to prove case). As such, the information Cannon seeks is not relevant to any of his non-*Monell* claims. See Fed.R.Civ.P. 26(b)(1).

Finally, Cannon argues that the Mayor's deposition is appropriate because he was a *Monell* policy-maker which is in direct contradiction with the Court's order staying *Monell* discovery. As discussed, the overwhelming majority of Cannon's arguments focus on *Monell* discovery and not fact discovery relevant to his other claims. Without more, the Court cannot grant Cannon's motion to compel merely because Mayor Daley is Chicago's Mayor and the former Cook County State's Attorney. ^{FN3}

FN3. The Court recognizes that Mayor Daley's position as a public official cannot be the basis for denying Cannon's motion to compel. See *Clinton v. Jones*, 520 U.S. 681, 703-04, 117 S.Ct. 1636, 137 L.Ed.2d 945 (1997); *United States v. Nixon*, 418 U.S. 683, 706, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974).

As the Seventh Circuit directs, there must be some reason to believe that the deposition of Mayor Daley will lead to or produce admissible evidence in Cannon's claims against the individual Defendants. See *Olivieri*, 122 F.3d at 410. Based on the parties' arguments, see *Gile*, 95 F.3d at 496, as well as Cannon's allegations against the individual Defendants and the Court's stay of *Monell* discovery, Cannon's proposed areas of inquiry would not lead to or produce admissible evidence concerning his claims against the individual Defendants. Cannon's present motion is an obvious attempt to obtain *Monell* discovery. Therefore, the Court denies Cannon's motion to compel Mayor Daley's deposition

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without prejudice with leave to refile if and when the Court lifts the *Monell* discovery stay. The Court's denial without prejudice is not an indication that Cannon's areas of inquiry are discoverable after the Court lifts the *Monell* discovery stay.

CONCLUSION

*6 For these reasons, the Court denies Cannon's Motion to Compel the Deposition Testimony of Chicago Mayor Richard M. Daley without prejudice.

N.D.Ill., 2007.
Cannon v. Burge
Not Reported in F.Supp.2d, 2007 WL 2410392
(N.D.Ill.)

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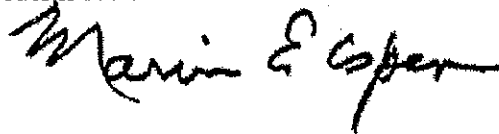
EXHIBIT D

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Marvin Aspen	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	03 C 3678	DATE	12/7/2007
CASE TITLE	Hobley vs. Burge, et al		

DOCKET ENTRY TEXT

The objections of the defendant City of Chicago to the February 27, 2007 Order of Magistrate Judge Geraldine Soat Brown granting plaintiff's motion to compel the deposition of Mayor Richard M. Daley are sustained. Accordingly, Magistrate Judge Brown's Order is revised and set aside. It is so ordered.



Notices mailed by Judicial staff.

Courtroom Deputy Initials:	GL
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EXHIBIT E



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November 28, 2012

VIA EMAIL

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Ms. Alexa Van Brunt
Roderick MacArthur Justice Center
Northwestern University School of Law
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Re: Ronald Kitchen v. Jon Burge, et al., 10 C 4093

Dear Counsel,

It has come to our attention that there is a YouTube video, titled "Ronald Kitchen: Tortured, Framed, Then Sentenced to Death," uploaded by "KosWorks," (<http://youtu.be/A0sJXxPkZLg>). The YouTube video depicts cut and spliced portions of Plaintiff Ronald Kitchen, and Defendants Michael Kill, John Byrne and Jon Burge's videotaped deposition testimony.

Pursuant to Rule 37.2, I respectfully ask that you direct the creator/owner of that video to remove the video from YouTube and that you identify the owner and the person(s) responsible for disseminating the deposition clips to the YouTube Video creator. Further, I request that you provide assurances and identify the steps you are taking to ensure no future dissemination of videotaped deposition footage in this case to third parties during the pendency of this case's discovery process.

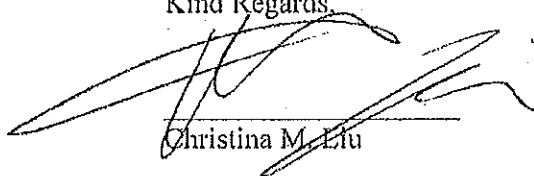
If we do not hear from you by Monday December 3, 2012, we will file a motion for protective order to (1) compel removal of the video from YouTube and (2) prevent future dissemination of any individual defendant's deposition videotaped footage in this case. *See*

andrew M. hale
& associates

Caine v. Burge et al., 11 CV 8996, D.E. 60, June 28, 2012; *Hobley v. Burge et al.*, 225 F.R.D. 221 (N.D. Ill. Nov. 18, 2004). We will also request from Judge Valdez limited discovery to identify and sanction the owner, creator, and any other individuals responsible for disseminating the video and the posting of the video on YouTube.

Thank you for your time and consideration of this matter.

Kind Regards,



Christina M. Liu

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December 3, 2012

Christina Liu
Hale and Associates
53 W. Jackson Street
Chicago, IL 60604

Re: *Kitchen v. Burge, et al.*
No. 10 C 4093

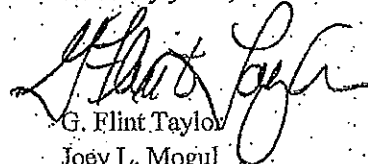
Dear Ms. Liu:

We write in response to your letter of November 28, 2012 concerning the video entitled *Ronald Kitchen, Tortured, Framed, Then Sentenced to Death*. In the letter, you threaten to seek sanctions because the video, which includes excerpts from some of the defendants' depositions, was posted on YouTube. The threat is baseless, for a number of reasons:

1. First and foremost, there is no protective order in this case that prevents the dissemination of the defendants' depositions. In that respect, this case is fundamentally different from *Hobley* and *Caine*, which you cite. In those cases, prior protective orders were entered to bar dissemination of deposition videos (in *Hobley*, the protective order concerned only the deposition videos of non-party witnesses). Whatever the merit of those orders, no similar order has ever been sought or imposed in this case. There is, accordingly, nothing to bar the YouTube posting to which you now object.
2. Second, the dissemination of the video in question is undeniably in the public interest. For example, the video includes an excerpt from the deposition testimony of defendant Michael Kill, a long time public employee assigned to a police station in a predominantly African American section of the City, admitting that he used the term "nigger" "a million times for starters." The public has every interest in viewing and evaluating this testimony. For similar reasons, videos of defendant Burge taking the Fifth Amendment during depositions in this and prior torture cases are also of significant public interest. Images of Burge taking the Fifth have been publicly displayed in the newspapers and on TV, and have been played at public City Council meetings in 2004, 2007 and 2011, all without objection.
3. Finally, the video was tendered to defense counsel in this case a year ago. It has been posted on

YouTube for 11 months. There is, accordingly, reason to suspect that the belated objection voiced in your letter has some ulterior strategic objective. The objection certainly has no facial merit.

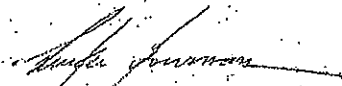
Sincerely yours,



G. Flint Taylor

Joey L. Mogul

Ben H. Elson



Locke E. Bowman

Alexa Van Brunt



J. Samuel Tenenbaum

EXHIBIT F

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Defendants.

) Chicago, Illinois
) February 6, 2013
) 1:37 A.M.

TRANSCRIPT OF PROCEEDINGS - Motions
BEFORE THE HONORABLE MARIA VALDEZ, Magistrate Judge

APPEARANCES:

For the Plaintiff: MacARTHUR JUSTICE CENTER
Northwestern University School of Law
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Chicago, Illinois 60611
BY: MR. LOCKE E. BOWMAN, III

PEOPLE'S LAW OFFICE
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BY: MR. G. FLINT TAYLOR, JR.
MS. JOEY L. MOGUL

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NOTE: Please notify of correct speaker identification.
FAILURE TO SPEAK DIRECTLY INTO THE MICROPHONE MAKES PORTIONS
UNINTELLIGIBLE.

1 **TRANSCRIBED FROM DIGITAL RECORDING**

2 IN THE UNITED STATES DISTRICT COURT
3 NORTHERN DISTRICT OF ILLINOIS
 EASTERN DIVISION

4 RONALD KITCHEN,

5 Plaintiff,

6 vs.

7 JON BURGE, etc., et al.

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No. 10 C 4093

1 **APPEARANCES: Continued**

2 For the Defendants: ANDREW M. HALE & ASSOCIATES, LLC
3 53 West Jackson Boulevard
4 Suite 1800
5 Chicago, Illinois 60604
6 BY: MR. ANDREW M. HALE
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18 BY: MR. MICHAEL D. ARNOLD
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25

1 (Proceedings held in open court:)

2 THE CLERK: 10 C 4093, USA versus -- correction.
3 Kitchen versus Burge, et al., Vincenzo Chimera's motion to
4 quash non-party subpoena; defendant officers's motion to compel
5 plaintiff to produce documents; and defendant officers's motion
6 for Court order to allow the continuation of Eric Wilson's
7 deposition at the Pekin Correctional Institute.

8 Please as you say your name, spell your last name.

9 MR. BOWMAN: My name is Locke Bowman. The last name
10 is spelled B-o-w-m-a-n. I'm here on behalf of Mr. Kitchen.

11 MR. TAYLOR: Flint Taylor as well. T-a-y-l-o-r.

12 MS. MOGUL: Good afternoon. Joey Mogul, M-o-g-u-l,
13 here on behalf of Mr. Kitchen.

14 MS. : (Unintelligible).

15 MR. HALE: Good afternoon, your Honor. Andrew Hale,
16 H-a-l-e, for the police officer defendants.

17 MR. KAMIONSKI: Good morning, your Honor -- good
18 afternoon, your Honor. Avi Kamionski, K-a-m-i-o-n-s-k-i, for
19 defendants.

20 MS. AHN: And good afternoon, your Honor. Joan Ahn,
21 A-h-n.

22 MR. ARNOLD: Good afternoon, your Honor. Mike Arnold
23 A-r-n-o-l-d. I'm here on behalf of Mr. Chimera

24 MR. NOLAND: Good afternoon, your Honor. Daniel
25 Noland, N-o-l-a-n-d, for the city, Hillard, Needham, Shines,

1 Martin.

2 THE COURT: All right. Everybody who doesn't need to
3 be standing when the motions are presented can sit down.
4 Nobody wants to sit.

5 Let's deal with Vincenzo Chimera's motion to quash.
6 All right. The Court has before it the motion to quash the
7 police officer defendants's response to the motion and the
8 plaintiff's response to the motion.

9 I have everything in writing, is that correct?

10 Let me ask the movant to respond to the -- you
11 certainly have not had an opportunity to respond in writing to
12 the two responses. You can do so now.

13 MR. ARNOLD: Your Honor, at this point in light of the
14 responses that have been filed by the parties to this case, the
15 Attorney General's Office does believe that there still needs
16 to be a protective order that would bar the parties from asking
17 Mr. Chimera questions regarding the decision-making process in
18 the Attorney General's office, and Mr. Chimera's or any other
19 member of the office's mental impressions, opinions, evaluation
20 of the case and (unintelligible) deliberations concerning
21 (unintelligible) view of the prosecution or non-prosecution of
22 Mr. Kitchen.

23 We filed this motion asking --

24 THE COURT: Let me just stop you because so far all I
25 have is the police officers's request to question Chimera, not

1 on the decision to nolle, but the decision to not contest the
2 certification.

3 MR. ARNOLD: And, your Honor, we do believe -- and we
4 did cite the case law. We believe that the immunity
5 also -- that the case law says that it also applies in civil
6 cases. Frankly, there is no difference here between -- by a
7 decision by the office to --

8 THE COURT: Focus rather on the deliberative process
9 privilege as opposed to the prosecutorial immunity aspect of
10 it.

11 MR. ARNOLD: You're asking with respect to the
12 certificate of innocence?

13 THE COURT: Well, let me -- you know, when the motion
14 was filed and I read the police officers's response, quite
15 frankly I thought the police officers were asking to question
16 the prosecutor on both the decision to nolle and the decision
17 to not object to the certification of innocence.

18 But that's in fact not what they are asking for.
19 Their motion -- their response to your motion says they don't
20 want to question the prosecutor on the basis for the nolle,
21 they want to just ask the prosecutor to elaborate on his
22 statement in open court as to why he had decided or the office
23 had decided not to challenge the certification of innocence.

24 MR. ARNOLD: Yes, your Honor. And this is also based
25 in part on conversations we have had with attorneys from both

1 sides, but in particular the defendant. What the police
2 officers are interested in is Mr. Chimera's evaluation of
3 Mr. Kitchen's actual innocence in this case. And we believe
4 that the -- any prosecutor's evaluation of the evidence prior
5 to making the decision on how to proceed in this particular
6 case could have to do with whether that person is innocent or
7 not does touch on matters that we believe are --

8 THE COURT: Would it be your position that questioning
9 the prosecutor on elaborating on his open court statement as to
10 why they would not be objecting to the certification of
11 innocence is also implicating the internal decision making as
12 to why they decided to nolle?

13 MR. ARNOLD: We believe in this case that is true.

14 THE COURT: And tell me why the deliberative process
15 privilege would prevent that sort of testimony.

16 MR. ARNOLD: Because, your Honor, if a prosecutor --
17 and again we're talking about a civil proceeding -- is debating
18 -- the prosecutors in the office are debating whether they
19 think they can -- is whether Mr. Kitchen, in this case, could
20 meet the burden, that is necessarily going to touch on whether
21 they think -- that could possibly touch on whether they think
22 he's innocent or not, even though that is not exactly the
23 standard of burden in the certificate of innocence proceeding.

24 We would acknowledge that the prosecutor can be asked
25 about certain events that take place in open court. But in

1 this particular case, based on the facts here, we think that
2 his statements were not vague and that any attempting to go
3 beyond what Mr. Chimera said on the record would necessarily
4 ask for his view, or anyone else in the office's view, on the
5 evidence.

6 The evidence the way -- the way that they saw the
7 evidence might indicate something about Mr. Kitchen or not.
8 They might have touched on how they arrived at their decision,
9 whether to oppose the certificate or not. And, obviously,
10 we'll defer to Mr. Kitchen in terms of relevance argument.
11 We're not going to advance that on behalf of the office.

12 But we don't -- we think that it was pretty straight
13 forward what Mr. Chimera said. The standard for a certificate
14 is the petitioner showing it is more likely than not that they
15 are innocent. Mr. Chimera said, we will acknowledge that he
16 can meet that burden in this case.

17 To try to go beyond that to get at did you think he
18 was actually innocent is going to then go into Mr. Chimera's
19 evaluation of the evidence in the case, and we think that's an
20 improper issue (unintelligible).

21 THE COURT: All right. I'll take your relevancy
22 argument in a second. But I want to hear from the officers.
23 You know, what I read in your response is that you want him to
24 elaborate on the statement in open court. But I'm not quite
25 sure what you expect to find that would not be protected by the

1 deliberative process procedure.

2 MR. KAMIONSKI: We think it is not protected by the
3 deliberative process whether or not they concluded whether or
4 (unintelligible) or not. That mere fact, that conclusion based
5 on the statements that they made we think that the
6 (unintelligible) --

7 THE COURT: So when you said to me you're really not
8 interested in knowing what the process was to arrive at the
9 nolle decision, that's not in fact the case. You do want to
10 know what that process is, you're just now saying --

11 MR. KAMIONSKI: Well --

12 THE COURT: -- it is more of a decision on why to not
13 object to the certification of innocence.

14 MR. KAMIONSKI: In our experience the reason why we're
15 doing with respect to (unintelligible) cases. The plaintiffs
16 reviewed the certificate of innocence stating that the state
17 concluded that the plaintiff was innocent and decided not to
18 object to the certificate because the state made that
19 conclusion.

20 So in order to rebut that, we want to know if
21 (unintelligible) statement that conclusion or not. This is
22 based on prior trial experience on this issue.

23 And the second part is, do we want the state as a part
24 of that is to identify what evidence that they have reviewed in
25 arriving at whatever conclusion that they arrived at. Without

1 asking them about internal discussions in the office, without
2 asking them about mental impressions, just identify the
3 evidence, this is the information that we have in our file,
4 this is what we think, this is what we did that's open in our
5 investigation, this is the conclusion that we arrived at, and
6 this is helping me -- this is our conclusion. Either yes or no
7 on that question.

8 THE COURT: How is it relevant to the issuance of
9 certification? Clearly the prosecutor didn't have anything to
10 do with that because he said, we're not taking a position on
11 that. That was an entirely different process, correct?

12 MR. KAMIONSKI: Right.

13 THE COURT: So how is it relevant what the prosecutor
14 may testify to in deposition on the kinds of questions you
15 intend to ask to -- dealing with, attacking the certification
16 of innocence evidence that the plaintiff intends to rely on?

17 MR. KAMIONSKI: I'm sorry. We think of it is
18 important to rebut the argument at trial that the state
19 conceded that the plaintiff was innocent because that will be
20 the argument that will be presented at trial.

21 And in order to rebut that, we want to establish that
22 the state did not concede that he was innocent, the
23 state decided either, maybe, we're going to ask them in a
24 deposition what they actually decided and elaborate on why
25 they -- on the position that they took at the hearing.

1 In order to rebut the argument that the plaintiff will
2 make, even the state has conceded that the plaintiff is
3 innocent by not objecting to the certificate.

4 THE COURT: Mr. Bowman.

5 MR. BOWMAN: Your Honor, I -- you know, Mr. Kamionski
6 refers to prior trial experience. He and I had this experience
7 most recently together in the Jimenez case in front of Judge
8 Kennelly, and there is also the motion in limine ruling in the
9 Logan case that we attached to our response. And, you know,
10 there have been a series of these cases now. Judge Gottschall
11 had the Patterson case. And what the established procedure is
12 that the plaintiff is allowed to put in the certificate because
13 the plaintiff needs to establish that for purposes of the state
14 law malicious prosecution claim that we typically bring in
15 these cases, that there is a favorable termination, which is
16 not a technicality, but is a termination indicative of
17 innocence. That's what we have to prove.

18 And the rule likewise is equally clear that we're not
19 permitted to argue that this is proof of innocence, we're
20 permitted to put in this determination --

21 THE COURT: As meeting that element under the
22 malicious prosecution.

23 MR. BOWMAN: Exactly. And in fact the judges in this
24 building having been very clear that, you know, the kind of
25 thing that they are anticipating doing, where they would put

1 Mr. Chimera on the stand and basically cross examine the
2 decision to not object to the certification and, you know, did
3 you look at this? Well, did you consider this? And so forth.
4 That that is completely out of bounds. Just as it would be out
5 of bounds for us to put on Mr. Kitchen's counsel to explain why
6 she believed that this certificate was appropriate and why she
7 was arguing for it.

8 The certificate is there. It means what it means,
9 period. And nobody gets the chance to go beyond it because of
10 Rule 803 considerations --

11 THE COURT: But it is not offered for proof of
12 innocence.

13 MR. BOWMAN: It is -- right. It is not, as Judge
14 Gottschall put it in the Patterson opinion that we attached.
15 If the plaintiff is going to prove innocence, he must do it in
16 the old-fashioned way --

17 THE COURT: With other evidence.

18 MR. BOWMAN: -- with evidence, and -- yeah.

19 MR. KAMIONSKI: May I reply, your Honor?

20 THE COURT: Yes.

21 MR. KAMIONSKI: Two points. One is we also have a
22 recent -- with different counsel for the plaintiff. This issue
23 came up before Judge Andersen and Judge Mason in the Oscar
24 Walden case where we were permitted to depose Governor Ryan in
25 questioning going behind the pardon in that case because he

1 felt that it -- Judge Mason and Judge Andersen concluded that
2 it was going to the weight of how much the plaintiff could use
3 the innocence issue at trial.

4 As to the actual innocence issue, we have no problem
5 eliminating the element from the malicious prosecution claim
6 that they don't have to prove favorable termination. And this
7 way we can take -- we don't even need to present the
8 certificate of innocence.

9 THE COURT: Well, he's shaking his head and,
10 obviously, they don't have to -- they are not required to
11 accept that. And by the shaking of the head, I presume that
12 there is your non-acceptance.

13 MR. BOWMAN: That is exactly the indication that my
14 shake of the head was intended to convey.

15 THE COURT: Okay.

16 MR. KAMIONSKI: And the point is so they are not just
17 using it to satisfy the element of malicious prosecution, they
18 are using it to show that the plaintiff is innocent at trial.
19 And so that's why it is relevant for us to be able to find out
20 what on that basis in order to rebut it because it is as the
21 shaking of the head shows --

22 THE COURT: And now you have talked yourself into a
23 deliberative process issue --

24 MR. KAMIONSKI: Well --

25 THE COURT: -- because you keep saying what forms the

1 basis. So the prosecutor's statement in open court you say is
2 not enough for you because he's -- the prosecutor says we take
3 no position. You want the prosecutor then to testify as to why
4 he made that statement, which would implicate the deliberative
5 process privilege.

6 MR. KAMIONSKI: I would ask him what he meant by it
7 and did he make a conclusion, yes or no. And I don't think
8 that question alone, did you conclude, yes or no, not what the
9 discussions were, what the conclusion were. And then the
10 follow-up question on -- can you identify all the materials
11 that you had in reaching your decision either to -- that you
12 made on the record, which is in line, I think, with what Judge
13 Anderson and Judge Mason allowed during the discovery process.
14 Because we're not at the trial stage yet of what Judge Tharp
15 may or may not allow to be admissible at trial, we're just at
16 the discovery stage right now to find out what could be
17 potentially admissible at trial one day.

18 THE COURT: Anything else?

19 MR. BOWMAN: Nothing from us, Judge.

20 MR. ARNOLD: Your Honor, just a few -- one or two
21 things that, it seems the parties -- it seems as though that
22 the parties are in agreement here, and I could be wrong as to
23 what certificate of innocence means, and I can't see why -- or
24 that the parties can't -- again, we're not a party here. The
25 parties in this case can't stipulate to or the trier just can

1 take judicial notice of the -- what the text of the statute is
2 and what was said in the -- in open court in a court
3 proceeding.

4 It is fairly straightforward, this -- by getting the
5 certificate it means, and this is all just a rehash that you
6 have shown more likely than not that you are innocent. It does
7 not -- I'm hearing Mr. Kitchen acknowledge it is -- it doesn't
8 show innocence, and it doesn't mean anything less than that.
9 And that is all that Mr. Chimera indicated. It is absolutely
10 clear from the transcript that the state was not saying we
11 think he's innocent or we don't think he's innocent, they were
12 simply saying he will meet his burden here.

13 We don't see any reason why the prosecutorial immunity
14 should be abrogated here so that the police officer defendants
15 can then step beyond that and start asking about what
16 (unintelligible) did.

17 I'm hearing this now. What materials -- we have cited
18 case law that says if you are talking about the prosecutor's
19 evaluation of the case or mental impressions and opinions and
20 how they prepared the case for presentment to the trier of
21 fact, that's what we think has immunity here.

22 And I'll simply note that there were other topics that
23 were discussed in the briefing that had to do with some factual
24 issues, conversations, if they existed with counsel for
25 Mr. Kitchen --

1 THE COURT: Well, I'm glad you raised that because you
2 -- you know, in your motion you didn't seek to quash on the
3 basis of, you know, Brady issues, information that might come
4 up relevant to Brady or just issues on foundational grounds.

5 MR. ARNOLD: And that is true, your Honor. And the
6 reason why we filed the motion as we did is because, again,
7 based on the conversation we had with -- and I had, frankly,
8 with counsel, we believed that the parties at the time were
9 targeting the decision making process of the Attorney General,
10 and we thought that that would be the best way to protect our
11 interest, we filed a motion to quash.

12 I think we would acknowledge that there may be some
13 limited areas where a deposition could go forward. But we do
14 think a protective order is necessary to block out the areas
15 that I have just discussed with your Honor.

16 MR. KAMIONSKI: Can I just say one last thing for the
17 record?

18 THE COURT: Yes. Please go to the microphone again.

19 MR. KAMIONSKI: Just for the record, we do intend in
20 the motion in limine phase of the -- before the trial to seek
21 to bar admission of the certificate of innocence. That would
22 be our position at trial.

23 THE COURT: It doesn't come as a surprise that that
24 would be your intention. I understand that.

25 Anything?

1 MR. KAMIONSKI: And the last point is we think that
2 the yes-no question does not invoke the deliberative process.
3 And we would seek to be able to ask that at the depositions.

4 THE COURT: So the yes-no of what did you mean by it?

5 MR. KAMIONSKI: Did you conclude he was innocent or
6 not.

7 THE COURT: Oh, I see. And you don't think that that
8 would in -- that would mean that he would then have to explain
9 anything further if he said, yes? You would then stop. You
10 wouldn't ask further questions?

11 MR. KAMIONSKI: We would follow up.

12 THE COURT: Right. You'd follow up by asking about
13 deliberative process privilege questions.

14 MR. KAMIONSKI: And we were asking what materials, not
15 the deliberative process. Tell me, like, all the materials in
16 your case file.

17 THE COURT: And we have got argument from counsel that
18 that also is encompassed under the (unintelligible) privilege.

19 MR. KAMIONSKI: It would be part of what he had in his
20 -- it would be similar to the Brady. It would be what's in is
21 file, what he reviewed. That would be part of it. He wouldn't
22 have to highlight this piece of information persuading more
23 than this piece of information.

24 THE COURT: You know, I'm not going to be providing
25 any protective order on the Brady elements because they have

1 not asked for that. That's not the grounds for the quashing or
2 the protective order. The protective order request is on the
3 basis of any questions on what the prosecutor may have done
4 with respect to the nolle or the certificate of innocence.
5 That's the basis that they are seeking to quash or a protective
6 order.

7 So everything else is arguably fair game, not to say
8 to ask questions that would be obviously -- the -- I'm going to
9 find that -- I'm not quite sure that there is much relevance to
10 asking the prosecutor any -- his illuminating his open court
11 statement to the trial court as to why they are taking no
12 position on the certificate of innocence. Even if there is
13 relevance, it is so marginal. Nonetheless, even if I were to
14 find that it is relevant, I do find that it would be protected
15 by the deliberative process privilege, any responses that he
16 may give.

17 You may be right that a yes or no may not be, but I
18 will assure you that you would not stop there. And so getting
19 a yes or no is not going to be helpful. So the Court is going
20 to grant the protective order on no questions will be allowed
21 on the prosecutor to -- with respect to the decision to nolle
22 or the decision on the certificate of innocence position. That
23 will be the extent of the protective order. Everything else
24 would be arguably fair game.

25 MR. ARNOLD: Thank you.

1 THE COURT: All right. The next motion, defendant
2 officers's motion to compel plaintiff to produce documents
3 withheld. The Court has before it the motion and the
4 plaintiff's response to the motion. And I have reviewed both.

5 Defendant officers, if you want to -- Ms. Ahn, if you
6 want to address the response.

7 MS. AHN: Yes, your Honor. Your Honor, the
8 plaintiff's response relies entirely on the Sixth Circuit's
9 decision in Lott. That decision is both not binding on this
10 Court, and, more importantly, it is wrongly decided.

11 THE COURT: So there is no decision binding on this
12 Court on this issue, is that correct?

13 MS. AHN: That is correct, your Honor.

14 THE COURT: And the only federal decision is the Lott
15 decision?

16 MS. AHN: Yes, your Honor.

17 And our position is that Lott is wrongly decided. The
18 Sixth Circuit in Lott made the mistake, and plaintiff repeated
19 that mistake in his brief, of treating an actual innocence
20 claim like any other claim that a party would make during the
21 course of litigation.

22 Typically a party's statement during the course of
23 litigation would be a party admission. In the case of an
24 evidentiary admission, it would be evidence like any other
25 evidence.

1 That is not the case with an actual innocence claim.
2 Actual innocence is an avenue through which a petitioner, who
3 has already been convicted, he has already exhausted his direct
4 appeals, after all of that it is an avenue through which he can
5 obtain review and possibly get his conviction vacated. And it
6 is justified by the need to prevent fundamental miscarriage of
7 justice in the case of a truly innocent person.

8 And because of the competing interest at stake, the
9 Supreme Court has stated that actual innocence does not simply
10 mean that the state has failed to prove guilt beyond a
11 reasonable doubt, it means factual innocence. And by
12 definition factual innocence cannot be determined without
13 reference to all of the evidence, including that evidence that
14 would normally be inadmissible.

15 Now Mr. Kitchen argues that the Court in Schlup didn't
16 reference privilege. But we would argue that that actually
17 supports our position because the Supreme Court is entirely
18 capable of distinguishing between admissibility and privilege
19 where it deems that appropriate, and it has done so in the
20 past.

21 The fact that this Court stated that actual innocence
22 must be determined or reference to all evidence without
23 creating some kind of a special exception for privilege
24 actually supports our position that no special treatment is
25 required.

1 THE COURT: Well, it is an interesting analysis
2 because one would think that you would look at that case and as
3 the general rule is (unintelligible) privilege information is
4 not to be disclosed. So you're saying, no, the general rule
5 should be, you know, let's not even consider privileges when
6 the Court makes a broad determination. And I would imagine
7 making a broad termination, I'm not including what is naturally
8 privileged, attorney client, attorney work, product things that
9 are -- have been deemed fairly sacrosanct by the courts in
10 terms of the importance of maintaining such a privilege.

11 I certainly understand in the context of other
12 matters, like a 2255 motion on ineffective assistance of
13 counsel where you're getting at the relationship between the
14 counsel and the client, that there the privilege no longer
15 exists.

16 But I'm not convinced in the context of, you know, a
17 declaration of innocence that you get at everything. Because
18 the plaintiff now has to say, I need to provide all of my
19 evidence of innocence. You're presuming that all privileges go
20 away with a broad statement by a Court, instead of the Court
21 presuming that all privileges remain intact, and then they make
22 a broad statement that, you know, all evidence must be
23 conveyed.

24 MS. AHN: Yes, your Honor. Well, our argument would
25 be that an actual innocence claim is really an extraordinary

1 claim. It allows, again, a petitioner who has been convicted,
2 exhausted his appeals, is now seeking collateral relief,
3 collateral review of that conviction. It is an extraordinary
4 (unintelligible) that allows him to obtain relief after all the
5 normal avenues have been exhausted. And for that reason the
6 petitioner should not be allowed to claim that he is actually
7 innocent on the one hand, and then on the other hand obstruct
8 inquiry into whether he is in fact innocent by only providing
9 the evidence that tends to prove his innocence while shielding
10 evidence that tends to prove his guilt from disclosure.

11 THE COURT: So there would be no privileges that would
12 exist once a plaintiff makes a claim of actual innocence --

13 MS. AHN: Yes, your Honor.

14 THE COURT: -- under your reading of the law.

15 MS. AHN: Yes, your Honor.

16 THE COURT: All privileges would go away.

17 MS. AHN: That is correct.

18 THE COURT: Mr. Bowman.

19 MR. BOWMAN: Judge, just very briefly. First, as a
20 point of technical correction, in the Illinois State system,
21 unlike the Federal habeas context in which the Schlup case was
22 decided, the actual innocence analysis does not provide a
23 gatekeeping function. In the State of Illinois, we have an
24 independent freestanding ability to present a claim for
25 innocence, and it is just a technical correction.

1 The main point is that this is a stunning position for
2 which there is no authority whatsoever as the Sixth Circuit
3 said in the Lott case. And as your Honor's questioning
4 indicates, the United States Supreme Court, if it were
5 intending to do away with these time-honored privileges which
6 protect litigants and protect the litigation process in a host
7 of ways, if the Court were intending in the Schlup context to
8 do away with that privilege, they would have done us all the
9 courtesy of telling us that. And there is not a whisper of
10 suggestion in that opinion that any such thing was happening,
11 which is what caused the Sixth Circuit to issue a writ of
12 mandamus against the lower court and say that the decision that
13 had been rendered to this effect was a departure from law and
14 completely inappropriate.

15 The Lott decision is sound. It is right. And this is
16 a motion for which there is no authority that would -- if the
17 Court were to rule, as the police officer defendants ask, would
18 stun everyone in the courtroom and in the nation. I mean, it
19 is just not -- there is just not a basis for it. And certainly
20 Mr. Kitchen had no idea, nor did his counsel, that any such
21 waiver was occurring when this claim was made.

22 THE COURT: Anything further?

23 MS. AHN: Yes, your Honor. I would just briefly
24 respond. Mr. Kitchen's counsel has repeated several times now
25 that there was no authority for our position. The fact is

1 there is only one case on point as to the privilege issue in
2 particular, and the Supreme Court case law on the meaning of an
3 actual innocence claim, as well as the case law on implied
4 waiver, does firmly support our position.

5 THE COURT: So you have three cases that culled
6 together would support your position, but there is no one case
7 that dealt with it directly, other than arguably the case that
8 you rely -- you cited and distinguished In Re Lott.

9 MS. AHN: Correct, your Honor. The privilege issue is
10 one of first impression in this circuit.

11 THE COURT: Okay. Well, the movant certainly bears
12 the burden of demonstrating to the Court why the legal position
13 should win the day. And while I find that you have attempted
14 to cull together a very interesting argument, I don't think you
15 have met your burden to convince this Court that there has been
16 a waiver of the privilege in light of the claim of innocence or
17 the issues of actual innocence.

18 The Court will look at the only federal case that I
19 have before me In Re Lott. While I'm not bound by it, I find
20 it persuasive, and I find that the issues that you have raised
21 to distinguish it to be unavailing at this stage. So the
22 motion will be denied.

23 MS. AHN: Thank you.

24 THE COURT: We have one final motion this morning --
25 today. Defendant officers's motion for a Court order to allow

1 the continuation of the Wilson deposition.

2 Is there any objection to this?

3 MR. BOWMAN: Not on our part, your Honor.

4 THE COURT: Nobody is raising an objection?

5 All right. In the words of my daughter, easy peasy,
6 lemon squeezy. The motion is granted.

7 (Laughter.)

8 THE COURT: All right. We'll take a little break for
9 -- so we can -- we'll start the settlement conference in about
10 five minutes.

11 (Which concluded the proceedings.)

12 CERTIFICATE

13 I certify that the foregoing is a correct transcript
14 from the digital recording of proceedings in the above-entitled
15 matter to the best of my ability, given the limitation of using
16 a digital-recording system.

17
18
19 /s/ *Pamela S. Warren*
20 Official Court Reporter
21 United States District Court
22 Northern District of Illinois
23 Eastern Division
24
25

February 23, 2013
Date