

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

UNITED STATES OF AMERICA)
)
vs.) No. 08 CR 846
) Judge Joan Humphrey Lefkow
JON BURGE)

**DEFENDANT’S MEMORANDUM OF LAW IN SUPPORT OF MOTION
FOR CHANGE OF VENUE DUE TO PREJUDICIAL PRETRIAL PUBLICITY**

I. JON BURGE CANNOT RECEIVE A FAIR TRIAL IN THE NORTHERN DISTRICT OF ILLINOIS DUE TO THE LONGSTANDING PREJUDICIAL PUBLICITY

A. Legal Standards

Rule 21(a) of the Federal Rules of Criminal Procedure secures the right to a change of venue due to adverse publicity, providing as follows:

The court upon motion of the defendant shall transfer the proceeding as to that defendant to another district whether or not such district is specified in the defendant’s motion or if the court is satisfied that there exists in the district where the prosecution is pending so great a prejudice against the defendant that the defendant cannot obtain a fair and impartial trial at any place fixed by law for holding court in that district.

The right to change venue is also of constitutional dimension: “[T]he right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, ‘indifferent’ jurors.” *Irvin v. Dowd*, 366 U.S. 717 (1961). Although prospective jurors need not arrive at *voir dire* with *tabula rosas*, the constitutional rights to due process and an impartial jury warrant a change of venue upon a clear and convincing showing of prejudice. *Id.* at 726. In *Irvin*, the Supreme Court found a “pattern of deep and bitter prejudice” existed in the community where the defendant was tried. *Id.* at 727. “It cannot be gainsaid that the force of this continued adverse publicity caused sustained excitement and fostered a strong prejudice among the people” of the

county in which the defendant stood trial, so observed the *Irvin* Court. *Id.* at 726. Accordingly, the Supreme Court ruled that the defendant should have been put to trial “in an atmosphere undisturbed by so huge a wave of public passion.” *Id.* at 728.

Two standards govern motions for change of venue: 1) an actual prejudice standard; and 2) a presumed prejudice standard. *E.g.*, *United States v. Skilling*, 554 F.3d 529, 558 (5th Cir. 2009); *United States v. McVeigh*, 153 F.3d 1166, 1179 (10th Cir. 1998); *Coleman v. Kemp*, 778 F.2d 1487, 1489 (11th Cir. 1986). “Prejudice is presumed from pretrial publicity when pretrial publicity is sufficiently prejudicial and inflammatory and the prejudicial pretrial publicity saturated the community where the trial[] [is] held.” *Coleman*, 778 F.2d at 1490 (citing *Rideau v. Louisiana*, 373 U.S. 723, 726 (1963)). As stated in *Nevers v. Killinger*, 990 F.Supp. 844 (E.D. Mich. 1997):

Although application of the presumed prejudice standard is ‘relatively rare,’ where a defendant brings forth evidence of inflammatory and prejudicial publicity that so pervades the community as to render virtually impossible a fair trial by an impartial jury drawn by that community, jury prejudice is presumed and there is no further duty to establish bias.

Id. at 854; see also *Skilling*, 554 F.3d at 558 (“There was sufficient inflammatory pretrial material to require a finding of presumed prejudice, especially in light of the immense volume of coverage.”). Whether presumed prejudice standard applies is an issue appropriate for consideration at the pretrial stage, *United States v. Saya*, 980 F.Supp. 1157, 1158 (D. Hawaii 1997), while the actual prejudice standard requires analysis of “whether the seated jury could remain impartial in the face of negative pretrial publicity.” *Skilling*, 554 F.3d at 558.

Adverse pretrial publicity has prompted venue changes in prior federal cases. For instance, in *Saya*, the court found that the presumed prejudice standard had been fulfilled and

ordered a change of venue based on “recent, widespread and highly damaging publicity,” coupled with the heightened publicity the case would receive if tried by an anonymous jury. 980 F.Supp. at 1158.

In *United States v. Ebens*, 654 F.Supp. 144 (E.D. Mich. 1987), the court granted the defendant’s motion for change of venue (conditioned upon the defendant’s waiver of the right to trial within the district), stating as follows:

[T]his court finds that because of the saturation [of] publicity which has surrounded this case for five years and continues, there exists in the district in which this prosecution is pending and in all other Michigan districts, as well as in the Northern District of Ohio, so great a prejudice against the defendant that he cannot obtain a fair and impartial trial in any place fixed by law for holding court therein.

Id. at 144.

The court in *United States v. Engleman*, 489 F.Supp. 48 (E.D. Mo. 1980), also granted a change of venue motion. The court determined that “wide dissemination of inflammatory publicity shortly before trial has created an atmosphere of pervasive public prejudice so great that it is impossible for the defendants to obtain a fair trial” in the district. *Id.* at 51. The court further noted that the publicity had not abated, and rejected the government’s argument that the venue transfer motions were premature since prospective jurors could be examined about exposure to publicity. The court stated, “Effective and economic judicial administration is not well served by calling an inordinate and unwieldy number of veniremen to see if an unbiased jury might be obtained, especially when it is already apparent that a substantial chance of intolerable prejudice exists.” *Id.* at 50.

The court in *United States v. Abrahams*, 466 F.Supp. 552 (D. Mass. 1978), transferred venue of some defendants from Boston, Massachusetts to Springfield, Massachusetts. See also

United States v. Abrahams, 453 F.Supp. 749 (D. Mass 1978) (original order changing venue).

With respect to a defendant who had been named “Turkey of the Year” by *Boston Magazine*, the court ordered venue changed to Phoenix, Arizona.

In *United States v. Mazzei*, 400 F.Supp. 17 (W.D. Pa. 1975), the defendant was a former State Senator. A previous criminal trial of the defendant generated statewide publicity. That publicity continued after the trial and spilled over to political issues relating to the defendant’s Senate expulsion. Related trials of other legislators contributed to the publicity. Based on newspaper accounts presented by the defense, the court found that the publicity extended throughout the State and had persisted. The court thus found that transfer outside the State to be “the only effective transfer,” and believed that Delaware to be “least affected by internal affairs in Pennsylvania.” *Id.* at 20.

In the Oklahoma City bombing case, the district court found that it would be impossible for the defendant to receive a fair trial in Oklahoma and transferred venue to Denver, Colorado. See *McVeigh*, 153 F.3d at 1180.

Finally, in *Coleman v. Kemp*, 778 F.2d 1487 (11th Cir. 1986), and *Nevers v. Killinger*, 990 F.Supp. 844 (E.D. Mich. 1997), the courts granted habeas corpus where State courts had refused to change venue. Both courts ordered relief under the presumed prejudice standard.

B. The Pervasive, Adverse Pretrial Publicity Necessitates A Change of Venue

The public domain in the Northern District of Illinois has been saturated with highly prejudicial publicity about Jon Burge for many years. (A Lexis/Nexis search of a media database has resulted in 1,300 hits for the name “Jon Burge” between 1986 and March 2009. Vol. 1 Group Exhibits.) In short, Burge has become the poster boy for “police torture.” As one

Chicago Tribune headline proclaimed, Jon Burge's "[n]ame came to stand for police brutality." Vol. 2 Group Exhibits ("GE") 176. In 2007, a *Chicago Sun Times* article about Burge displayed his picture over the caption "Worst Chicago cop." GE 217; see also GE 276 (article placing Burge among "shameful history of bad cops"). Another 2007 article quoted an alderman as saying that Burge had "ruined the Police Department for 20 years -- and he is still ruining it today." GE 224.

The prejudicial publicity has been so pervasive that Judge Shadur characterized it as "common knowledge that Jon Burge and many officers working under him regularly engaged in the physical abuse and torture of prisoners in order to extract confessions," *United States ex rel. Maxwell v. Gilmore*, 37 F.Supp.2d 1078 (N.D. Ill. 1999) -- a proclamation that itself has been reported in the press. See GE 97, 100, 107. Seventh Circuit Judge Wood has written that "a mountain of evidence indicates that torture was an ordinary occurrence at the Area Two station," and likened the "torture" to what had occurred in the Abu Ghraib prison in Iraq. *Hinton v. Uchtman*, 395 F.3d 810, 822 (7th Cir. 2005) (concurring).

The inflammatory publicity has derived from a variety of sources, including: a series of civil cases against Burge, other Chicago police officers and the City of Chicago (some of which resulted in the City entering into controversial multi-million dollar settlements); Burge's Police Board employment termination proceedings; an anti-death penalty movement that culminated in former Illinois Governor George H. Ryan's blanket death penalty commutations, and pardons of four individuals who had been arrested by Area Two police personnel; community organization and grassroots protests and campaigns calling, *inter alia*, for Burge's indictment; an investigation by Special State's Attorneys ("SSA") that spanned over four years; the actual underlying

criminal cases allegedly investigated by Burge and officers under his command; and the federal investigation, indictment and proceedings in this case.

We have compiled a sampling of local newspaper articles about Burge between 1989 and April 2009. See Vol. 2 GE. The compilation begins with publicity about Andrew Wilson's civil lawsuit against Burge and other officers. Headlines regarding Wilson's suit, as well as suits brought by others, routinely used words such as "brutality" and "torture." GE 1-9, 78; *e.g.*, GE 67 (teenager's suit against Burge); GE 200, 203, 229, 231, 234, 235, 237, 238, 239, 241, 243 (pardoned inmates' suits).

Following the *Wilson* civil suit, the media reported on efforts to terminate Burge from the police force. The articles continued to use the words "brutality" and "torture." Once the Police Board hearing commenced in February 1992, the media regularly ran stories about it. GE 29, 31-34, 36-43, 46, 48-54, 57-60, 63, 65, 69, 79-85, 87. The headlines for these stories often included Burge's name and the word "torture." Burge had no right to remain silent at the Police Board hearing, and, when he testified at the hearing, the media ran stories about the testimony. GE 46, 48, 53-54. The Police Board's decision to discharge Burge resulted in a large front-page picture of Burge, superimposed with the headline "Cop Loses Job Over Torture" in the *Sun Times*. GE 69. The Police Board and the hearing officer held a press conference after the decision was announced. GE 82.

Around the time of the Police Board hearings, two internal OPS reports (the Sanders and Goldston reports) were publicly released, prompting the *Tribune* to run a front-page story with the headline "13 years of cop torture alleged." GE 24. A *Sun Times* article on the same subject stated, "Report cites 12 years of S. Side cop brutality." Burge's name was mentioned in both

articles. GE 26.¹

In the late 1990s, an anti-death penalty movement began to gain momentum in Illinois. The press blamed Burge for leaving “behind a dishonorable and potentially lethal legacy * * * [of] systematic abuse of suspects at Area 2.” GE 93. One convict was described as remaining under a death sentence “through the work of one of the state’s most discredited groups of police officers -- former Burnside Area Cmdr. Jon Burge and some of his detectives on Chicago’s South Side.” GE 94. Activists allied for a moratorium on the death penalty and new trials or freedom for those arrested by Area Two officers. GE 93-106. The movement garnered national and international attention. GE 96. The *Tribune* published a series of articles entitled, “The Failure of the Death Penalty in Illinois,” replete with a picture of Burge and a headline proclaiming that allegations of “police abuse ... played a role in several of the 12 cases in Illinois where a Death Row inmate has been exonerated.” GE 100; see also 267. A *Sun Times* headline stated that “Former cop accused of torture lies low in Fla.” Burge’s photograph was shown along with another headline stating “Some believe men are in prison -- even on Death Row -- because of confessions extracted through abuse by onetime police Cmdr. Jon Burge.” GE 104.

In 2002, the Chief Judge of the Criminal Division of the Circuit Court of Cook County appointed SSAs “to target charges linked to Burge.” GE 107. A *Sun Times* article with the headline “Judge orders torture probe” was accompanied by a large photograph of Burge. GE 108. Another headline said, “For years, cop accused of beatings, abuse.” The cop featured in that article was Burge, described as having been “called a ‘torturer’ virtually as long as he’s been called lieutenant.” GE 111. A *Tribune* article, typical of many, did not even pay lip service to

¹ Unsuccessful efforts by the Fraternal Order of Police (“FOP”) to run a float honoring Burge and other officers in the 1993 St. Patrick’s Day parade drew a lawsuit, media attention and Seventh Circuit mention. GE 70-74, 172; *Wilson v. Chicago*, 6 F.3d 1233, 1236 (7th Cir. 1993).

the presumption of innocence, stating, “Ever since cop-killer Andrew Wilson was tortured by police in a South Side detectives headquarters two decades ago ...” GE 113. Long before the SSA even released a report, another *Tribune* headline declared, “probers believe brutality claims.” GE 115. The article quoted the lead prosecutor as saying one would have to be a “chump” not to believe that something happened. GE 115. Another *Tribune* article, again depicting a picture of Burge, spoke of how the City considered suing Burge and “a public relations campaign to counter continuing negative publicity.” GE 122.

Newspaper articles have repeatedly commented on the invocation of the Fifth Amendment privilege against self-incrimination by Burge and other former officers. GE 124, 126, 127, 129, 129, 131, 133, 135, 163, 200, 222, 224, 250. “Burge, 8 others take Fifth on police torture,” said one *Sun Times* headline. The accompanying article displayed Burge’s photograph and contained statements by People’s Law Office (“PLO”) Attorney G. Flint Taylor, plaintiffs’ counsel in a series of suits against Burge. A different *Tribune* article quoted Taylor as saying Burge “took the 5th Amendment for four hours.” GE 133. Yet another *Tribune* article displayed a large picture of Burge seated in a vehicle above the headline, “Burge repeatedly takes 5th.” GE 135. More recently, a *Sun Times* article spoke of “wide[] criticism” of the Fifth Amendment invocation. GE 200. A 2007 article about Burge displayed his photograph over a caption explaining that he “frequently took the Fifth Amendment during a 2004 deposition.” GE 222.

Other articles, again with pictures of Burge, discussed how Burge was in a Florida court attempting to “block” a subpoena. GE 125. A *Sun Times* article around this time claimed that Burge had attempted to “elud[e] authorities.” GE 127.

Still more topics, inadmissible at a criminal trial, began appearing in the papers in 2005.

Among those were the costs associated with “Burge suits.” A *Sun Times* headline declared, “Burge case costing city millions.” GE 137; see also 90, 220. Of course, Burge’s picture was displayed in the article listing the multi-million dollar costs. Taylor is quoted again. This time he blasted the City for using taxpayer money to “defend the indefensible.” A 2007 *Sun Times* article with Burge’s picture put a \$195 million price tag on the Burge suits. GE 229; see also 226, 236, 238, 240, 250, 253, 269 (additional articles discussing costs). The cost of the SSA inquiry (allegedly \$7 million) also became controversial. See 163, 164, 180, 185, 219. Burge’s pension was not spared, GE 172, 177, 180, with Chicago alderman pressing for its forfeiture, as reported between 2006 and 2008. GE 201, 203, 222, 224, 227, 253.

In 2006, litigation surrounding the release of the SSA’s report, and the release of the report, generated still more publicity. *E.g.*, GE 151, 154, 155, 157, 159, 160, 161, 163, 164, 167, 168, 170, 173, 174, 178, 179, 184, 185, 195, 218, 219, 223. The report even came to be known as “The Burge Report.” GE 184, 185. After the report was released, the press published headlines such as “Probe details extensive abuse by Chicago police in the '70s, '80s,” GE 167, and “Report: Cops tortured suspects.” GE 174; see also 185. One of the SSAs called Burge a “disgrace” during a news conference about the report. GE 178. A *Tribune* editorial about the report appeared under the headline, “Getting away with torture.” GE 179.

Mayor Daley even got in on the act in various capacities. GE 64, 170, 181, 182, 183; 187-189, 191, 197, 198, 207, 211-215, 228, 237, 241, 253. Headlines quoted him as saying “[c]ops responsible for torture.” GE 182. At another point, plaintiffs’ lawyers wanted to hold Daley responsible or at least depose him. Daley’s willingness to submit to a deposition vacillated according to the media. Articles about the subject displayed Burge’s picture. GE 214,

215.

Inmates pardoned by former Governor Ryan filed lawsuits naming Burge as a defendant. These lawsuits -- and the settlement issues -- were also the subject of media attention. GE 203, 229, 231, 234, 235, 237, 238, 239, 241, 243. A \$20 million settlement in December 2007 prompted front-page headlines (with the *Sun Times* running a large, ghoulish-looking photograph of Burge) proclaiming, “End of a ‘nightmare.’” GE 234, 239.

In 2007, after the special prosecutor had found that the statute of limitations barred prosecutions of ancient police abuse allegations, the media began calling for creative ways to prosecute Burge. GE 222, 223, 226, 266. Activist Wallace Bradley, along with Taylor and some aldermen, urged the federal indictment of Burge. GE 232, 233. Again, Burge’s photograph accompanied the articles. The U.S. Attorney’s office spokesperson confirmed that the office had received the SSA report and was reviewing it. GE 205.

The media has blamed Burge for just about anything. Burge’s name has arisen in cases in which he completely lacked involvement. *E.g.*, GE 265. Burge was even used as a vehicle to attempt to block Chicago’s 2016 Olympic bid. In December 2007, Reverend Al Sharpton threatened to lobby the Olympic Committee to reject Chicago’s bid unless Mayor Daley adopted his police brutality ideas. GE 237. In December 2007, Michael Sneed reported that the DOJ was considering taking over administration of the Chicago Police Department. Although Burge was discharged 14 years earlier, the column ran a picture of Burge. GE 242. Burge became an issue in the 2008 State’s Attorney’s Race, even though the winner of the race was in college “in the Burge era.” GE 208. Moderator James Montgomery’s questioning about Burge “drew shouts of approval” – “You go, Jim!” – at the Trinity United Church of Christ. GE 246.

Beginning in 1990, the *Chicago Reader* has published a series of lengthy articles about Burge, Area Two and related topics. These articles are submitted as exhibits. Vol. 3 GE. The detailed articles, often relying on the PLO and Taylor, are totally biased against Burge, and refer to a host of inadmissible matters. The complete lack of objectivity of the articles can be gleaned from the headlines: House of Screams; Tools of Torture; Pre Torture; The Shocking Truth; Deaf to the Screams; The Police Torture Scandal; Blind Justices; The Persistence of Andrew Wilson; Policing the Police; What Price of Freedom; and A Hell of a Deal.

The publicity has been national. “The Burge case unfolded in Chicago while police brutality was a leading issue nationwide, in the wake of the” Rodney King riots in Los Angeles. GE 177. *60 Minutes* has publicized a feature about Burge, Carol Marin reporting. Burge has also been the subject of international publicity. “Plea for Burge probe goes international,” said one headline. GE 138; see also 139, 140, 155.

Local independent moviemakers produced and aired a 60-minute film entitled, “The End of the Nightstick: Confronting Police Brutality in Chicago.” GE 76. “The main focus [of the film was] on Chicago Commander Jon Burge.” GE 76. The film has aired on P.B.S. GE 88.

Burge has also been the subject of local protests. Flyers calling for participation in demonstrations are included in the exhibits. GE 273-279. Various public demonstrations over the years have been reported in the media, including one held upon Burge’s arraignment in this case. GE 44, 118, 123, 127, 154, 158, 166, 232, 237, 249, 256. A national spokesperson for Rainbow-Push has maintained in published commentary about Burge that at least 200 Illinois prisoners have claimed their confessions were the product of “torture.” GE 261.

When the indictment in this case was returned, the circumstances surrounding Burge’s

arrest (in Florida) were widely broadcast largely because federal prosecutorial officials chose to hold a press conference announcing the indictment in this case. This press conference was reported in the print, Internet, radio and television media.

The page-one, above-the-fold headline of the *Tribune* read, “Feds catch up with Burge - Notorious ex-Chicago commander charged with lying about torture.” GE 249. The accompanying article summarized inadmissible and prejudicial topics such as the taxpayer costs of the civil case and Burge’s exercise of the Fifth Amendment. With respect to charges themselves, U.S. Attorney “Fitzgerald made it clear ... that prosecutors believe Burge engaged in torture *** [and that] the government had witnesses to prove that Burge engaged in and knew of torture.” GE 249-50.

Burge’s indictment also resulted in full front-page coverage in the *Sun Times*. Its headline read, “Feds call Jon Burge ONE BAD COP - Former Police Commander Arrested in Torture Cases And It’s Just the Beginning.” GE 252. A photograph of Burge leaving the courthouse after his arrest was displayed inside the newspaper. *E.g.*, GE 253, 261. Like the *Tribune* articles, the *Sun Times* post-indictment articles referred to inadmissible evidence.

The United States Attorney’s comments in this case were alarming to Burge’s right to a fair trial. Like the press conference announcing the arrest of former Illinois Governor Rod Blagojevich, the press conference in this case pushed the envelope. In addition to the prejudicial statements quoted above, Fitzgerald compared Burge to Al Capone: “If Al Capone went down for taxes it’s better than [Burge] going down for nothing.” The Al Capone comment was widely reported and itself garnered a headline in the *Sun Times*. GE 253-254; see also CD disk exhibit. Certainly, the prosecutor’s press conference statements created a substantial likelihood of

material prejudice to Burge's fair trial right, *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991), and were outside the categories of permissible statements under Local Rule 83.53.6.

The publicity has not abated since the return of the indictment. GE 256. One of the latest reported controversies is the FOP's decision to pay for Burge's defense. GE 259, 260. In addition, there has been speculation as to whether other former officers will be charged. *E.g.*, 261, 262. Illinois Attorney General Lisa Madigan has been drawn into the mix after she sought to transfer the prosecution of certain so-called "Burge cases" back to the Cook County State's Attorney's Office. An alderman warned that Madigan "would pay a price" in any future election. GE 263, 264. Lately, Minister Louis Farrakhan, Reverend Michael Pfleger and Alderman Ed Smith have been calling for Burge's testimony in a State case. GE 270, 271. This Court's ruling regarding the admission of Andrew Wilson's prior testimony also has been reported. GE 272.

Burge has more than amply met the presumed prejudice standard. The bell cannot be unring. The prejudicial pretrial publicity has been great, and inescapable to potential jurors in the Northern District of Illinois. The publicity has very often referred to a variety of topics that would be inadmissible at trial, including, but not limited to: alleged incidents of "torture" by individuals who will not be witnesses in this case; findings by various bodies, including the Police Board and the SSA; settlements in civil cases, Fed.R Evid. 408; taxpayer costs of settlements; payments of legal fees; Burge's invocation of the Fifth Amendment; Burge being characterized as the "Worst Chicago Cop" in history; plus a comparison of Burge to the legendary mob boss Al Capone; and statements that Burge committed "torture" by the head

prosecutor. Under the circumstances of this case, it would be impossible for Burge to receive a fair trial in this district. Indeed, “[i]f there were no constitutional right to a change of venue in the instant case, then one can conceive of virtually no case in which a change of venue would be a constitutional necessity.” *Coleman*, 778 F.2d at 1538.

The presumption of prejudice cannot be rebutted. Accordingly, this Court should change venue to a district other than the Northern District of Illinois. See *Skilling*, 554 F.2d at 558 (“It would not have been imprudent for the court to have granted Skilling’s transfer motion.”). Venue should be changed now – before expending resources attempting to pick a jury from a tainted jury pool. See *Engleman*, 489 F.Supp at 50.

Respectfully submitted,

/s/ Marc W. Martin

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