

PEOPLE OF THE STATE OF ILLINOIS,
Respondent,

v.

JOHNNY PLUMMER and VINCENT WADE,
as Representatives of the Class of Petitioners,

SHAWN WHIRL, GEORGE ANDERSON,
ROBERT SMITH, and DARRYL CHRISTIAN,
as Petitioners.

SHAWN WHIRL, GEORGE ANDERSON,
ROBERT SMITH, and DARRYL CHRISTIAN,
as Petitioners.

In 2001, this Court was asked by various Petitioners to initiate and oversee the investigation and, if necessary, the prosecution of members of the criminal justice system in Chicago in response to allegations of widespread torture and other police misconduct under Commander Jon Burge at Area 2 and Area 3 headquarters from 1973 to 2001. On April 24, 2002, this Court appointed retired Appellate Court Justice Edward J. Egan as Special Prosecutor and Robert D. Boyle as Assistant Special Prosecutor.¹ In 2006, the Special Prosecutor issued a report, finding credible claims of police brutality and misconduct within the criminal justice system in the city of Chicago and Cook County.²

¹ *In re Appointment of Special Prosecutor*, No. 2001 Misc. 4, April 24, 2002

² See Report of the Special Prosecutor, July 19, 2006 and Supplement to the Report of the Special Prosecutor, October 17, 2007.

served the Office from 1980-1989, continuing through Richard A. Devine, who served the office from 1996-2008, and continuing to the present State's Attorney, Anita Alvarez, the issue of whether the Office operates under a conflict of interest, *per se* or otherwise, is of critical importance to the just adjudication of these claims.

Since appointing the Special Prosecutor in 2002, this Court has been called upon in two instances to decide issues related to a conflict of interest in the CCSAO in prosecuting Burge-related matters. This Court is called upon, once again, to determine who should be permitted to prosecute the People's interests in the most recent Burge related litigation, a class action lawsuit filed under the Post-Conviction Hearing Act on October 16, 2012. For historical perspective, a brief recitation of the opinions rendered by this Court in those actions appears below.

BACKGROUND

I. Appointing a Special Prosecutor

On April 24, 2002, this Court entered an eight-page order finding a *per se* conflict of interest with regards to the investigation and prosecution of Commander Jon Burge and other police officers under his command at Area 2 and Area 3 headquarters. The *per se* conflict arose from Richard Devine's direct representation of Burge while he was still in private practice with the firm Phelan, Pope & John, Ltd., prior to becoming the Cook County State's Attorney. The firm represented Commander Burge and other Chicago Police Officers in actions alleging police misconduct. For their representation, the City of Chicago paid the firm \$839,250.64. On one occasion, Devine appeared on behalf of Burge in federal court, for which he billed the City \$4,287.50 for 24.5 hours of work.

The petitioners in that cause argued that Devine's representation barred him from prosecuting Burge pursuant to Illinois law and the Illinois Rules of Professional Conduct (IRPC)

because it is not permissible to prosecute a person whom an attorney has defended in the past for the same conduct. The State opposed the motion, saying the substantive legal issue was moot because any prosecution would be barred by the statute of limitations, and therefore the question of appointment of a special prosecutor was not necessary. However, the Court refused to address the State's mootness argument, stating, "[a] distinction must be drawn between the substantive merit of petitioner's claims and the question of whether a special prosecutor should be appointed to investigate those claims." Ultimately, this Court determined that the conflict issue must be dealt with first before any substantive legal issues may be considered.

This Court referenced the "*per se*" conflict rule announced in *People v. Coslet*, 67 Ill. 2d 127, 133 (1977), which states that there is no need to show actual prejudice where there exists a disabling conflict (*i.e.* one cannot represent conflicting interests or undertake to discharge inconsistent duties). Applied to these cases, where Devine directly represented Commander Burge and other Chicago Police Officers for the conduct subject to the investigation, the appearance of the "disabling conflict" was clear. Devine's representation presented a *per se* conflict of interest. Therefore, this Court found that the CCSAO itself suffered a *per se* conflict of interest, and the appointment of a Special Prosecutor was required. Consequently, this Court appointed Illinois Appellate Court Justice Edward J. Egan as Special State's Attorney and Robert D. Boyle as Assistant Special State's Attorney to investigate facts alleged by the petitioners and to determine if any prosecutions were warranted.

II. Addressing Imputed Conflict at CCSAO

On April 9, 2003, this Court issued a second opinion in response to the "State's Attorney's Office's Motion for Clarification." In that motion Devine questioned what impact the order of April 24, 2002 had on present and future cases involving defendants alleging

misconduct and torture under Burge (primarily post-conviction petitions), as distinct from the investigation and prosecution of Burge and officers under his command at Areas 2 and 3. In response, twelve defendants and several public interest groups requested that this Court: (1) appoint an additional Special State's Attorney to represent the People in overseeing all pending cases; and (2) reassign cases to judges outside of Cook County. This Court consolidated all requests and decided the issues raised by all parties simultaneously.

In their filings, the petitioners argued that Illinois Rule of Professional Conduct Rule 1.7 and Rule 1.9, which govern an attorney's duties to current and former clients, governed the conflicts issue arising from Devine's private practice representation of Burge. Petitioners alleged not only that Devine was unable to fairly prosecute those cases due to his ethical obligations, but that he had done everything in his power to oppose the adjudication of the Burge claims.

The petitioners next argued that the State had a real and ongoing personal interest in the adjudication of the Burge related cases because the reputation of the office would suffer if allegations of torture were sustained and the Burge investigation could subject CCSAO employees to criminal and ethical sanctions.

Finally, the petitioners argued that removal of CCSAO was necessary to preserve the appearance of propriety. CCSAO allegedly failed to take necessary action in response to torture claims in the past, and thus it was publicly evident that the CCSAO would not be seen as a fair prosecutorial entity in these cases.

In response to the allegations, the CCSAO made an admission that Devine was conflicted and could not represent the People in Burge-related cases. This was because in post-conviction proceedings the office would be faced with a conflict of interest where petitioners alleged

misconduct by Burge, and the State's Attorney would be called upon to refute those allegations by defending Burge's conduct. CCSAO therefore announced that Devine had recused himself from supervision of all Burge related cases and he attempted to construct a "Chinese wall" in the office by appointing Assistant States Attorney Patrick T. Driscoll, Jr. to stand in his stead and supervise all the Burge-related actions.

Because the CCSAO appointed ASA Driscoll to oversee the post-conviction proceedings the Court had to answer questions pertaining to whether Driscoll operated under a conflict. This query necessarily involved two questions: (1) whether Devine operated under a conflict in the post-conviction proceedings; and (2) if Devine labored under such a conflict, whether the ethical screens instituted after the April 24, 2002 order prevent those possible conflicts from extending to his assistants.

As to the first question: this Court easily concluded that Devine operated under a conflict since the CCSAO openly acknowledged its existence. As to the second question: several Assistant State's Attorneys under Devine's supervision litigated the post-conviction proceedings of some of the named petitioners in the Burge-related matters. CCSAO employed ASA Driscoll during the pre-recusal litigation of the petitioners' post-conviction matters. Thus, the conflict had already taken hold within CCSAO before Devine recused himself and constructed the "Chinese wall". In order to conserve judicial resources, this Court determined that the CCSAO was conflicted from any such prosecutions and appointed the Illinois Attorney General's office (IAG) to handle all Burge-related post-conviction matters, pending and future.

The next significant issue raised was whether the post-conviction petitions should be transferred to judges outside Cook County. At no time prior in any pending post-conviction proceedings had a petitioner alleged judicial bias that would warrant transferring the cases

outside Cook County. In the aftermath of the initial order appointing the Special Prosecutor the petitioners argued for the first time that the judges, many of whom are former Cook County Assistant State's Attorneys or were otherwise involved in the criminal justice system, would not be fair to the petitioners in their post-conviction proceedings. The petitioners hypothesized that some judges might be called to testify and that the judges presiding would be more favorable toward them, or find their testimony more reliable. The Petitioners also argued that the appearance of fairness is a compelling factor in this case, and confidence in the judiciary was a paramount concern warranting removal of these cases from Cook County.

This Court disagreed with the Petitioners that removing the cases from the judiciary of Cook County would promote public confidence. The best remedy for any perceived lack of faith was to allow the Cook County judges to preside over the cases with diligence and impartiality, as they had sworn to do. This Court noted that it is not unusual for judges at the Criminal Courts Building to be called as witnesses. To allow cases to be transferred merely because a judge may be called as a witness would establish a *per se* standard of transfer that would be unprecedented.

III. Appointment of a Special Prosecutor for Post-Conviction Matters

On April 7, 2009, this Court issued a third opinion regarding the CCSAO's ongoing conflict in prosecuting the Burge related matters. The Illinois Attorney General requested this Court to reassign the Burge-related post-conviction petitions of Alonzo Smith, Eric Caine, Derrick King, Leonard Kidd, and Greyland Johnson back to the CCSAO. By this time Devine had left the CCSAO and Alvarez had been elected State's Attorney for Cook County.

The Attorney General's office was initially assigned 22 post-conviction petitions to prosecute. The office fully litigated seven of the post-conviction prosecutions and had expended significant efforts and therefore wanted to retain prosecution of an additional ten post-conviction

matters. In their filing, the IAG sought to re-assign to CCSAO five post-conviction petitions where an amended petition had not yet been filed.

The petitioners objected, arguing that even though Devine was no longer the State's Attorney, the conflict, which had already been imputed to all attorneys under Devine, still existed. The People's Law Office also filed an *amicus* brief in 2009 that agreed with this conclusion. Further, petitioners argued that individuals involved in the allegations of police misconduct still worked with the CCSAO. Specifically, some ASAs in the office had been accused of concealing and participating in police torture during the Burge era. There are also a number of detectives accused of wrongdoing under Burge who worked for the CCSAO as investigators. In their brief, the People's Law Office also cited professional ethics and public policy considerations in arguing for the denial of IAG's motion.

CCSOA responded that they would be at a disadvantage if they resumed prosecution of these post-conviction matters since they had not been involved with those cases and did not have input into discovery and other important matters. Moreover, CCSAO indicated that there is a benefit of continuity in having these cases assigned to the same office for prosecution.

The IAG replied arguing that reassignment of the cases to the CCSAO is not a waste of time and resources, and that CCSAO did not admit to a conflict ongoing. In a supplement to the reply, the IAG ultimately cited budget cuts and a lack of resources as their motivation to seek reassignment of the cases. They claimed the office lacked the necessary resources to adequately represent those clients. If the cases stayed with the IAG, resolution of those claims would have been delayed.

This Court recognized the budgetary issues faced by the IAG's office. This Court also recognized the need to resolve the cases expeditiously and properly. Noting the ongoing conflict

of the CCSAO under Alvarez, this Court fashioned its own remedy, not otherwise proposed by the parties. This Court appointed the remaining post-conviction cases to Special Prosecutor Hon. Stuart A. Nudelman (Ret.) for prosecution on behalf of the People.

IV. **Pleadings in the Case at Bar**

i. Shawn Whirl and George Anderson Motions

Shawn Whirl and George Anderson were the first two petitioners to file motions requesting assignment of their post-conviction matters to Special Prosecutor Nudelman. Both petitioners come to this Court following a finding by the now inoperative and defunded Illinois Torture Relief Inquiry Commission (TRIC) that they both have a credible claim of police torture. Their motions mirror one another.

On September 18, 2012, Shawn Whirl filed a “Motion for Assignment of Area 2 Torture Post-Conviction Petition to Special Prosecutor Stuart Nudelman.” Whirl pled guilty to the 1990 murder and attempted armed robbery of a Chicago cab driver after a motion to suppress his confession was denied. He has always claimed his confession was coerced by police torture at Area 2 headquarters. On January 12, 2012, Whirl filed a second successive post-conviction petition. Honorable Timothy C. Evans assigned the adjudication of the post-conviction case to Judge Jorge Alonso pursuant to the TRIC recommendation and Illinois Statute.

Whirl approvingly refers to the history of appointing a Special Prosecutor to prosecute the interests of the People in these matters. Whirl relies heavily on this Court’s 2003 and 2009 opinions, which appointed a Special Prosecutor in certain pending Area 2 and Area 3 post-conviction proceedings. He argues that his post-conviction petition falls within the parameters of those orders.

George Anderson filed a similar motion on November 8, 2012. Anderson was convicted of two murders and is serving a term of life imprisonment. In 1994, Anderson pled guilty after losing his motion to suppress his confession, a confession he claims is the product of police torture. The TRIC determined that Anderson has a credible claim of police torture and abuse. Similarly, he argues that his post-conviction petition falls under the umbrella of this Court's 2003 and 2009 orders appointing a Special Prosecutor in post-conviction cases of police torture and abuse under Burge.

ii. Vincent Wade and Johnny Plummer, et al

Vincent Wade and Johnny Plummer, as representatives of the purported class of petitioners, adopted the "People's Law Office 2009 Amicus Response to Motion to Reassign." In that *amicus* brief, the People's Law Office argued that Devine's retirement did not end the conflict of interest. They also cited professional ethics and public policy considerations against re-assigning the cases on post-conviction review to CCSAO. According to the petitioners, the appearance of impropriety in these matters is clear since Alvarez has a history of strongly opposing post-conviction claims of alleged torture under Burge. Further, the petitioners point out that Alvarez never prosecuted individuals within the criminal justice system while she was in charge of the Public Integrity Unit of the CCSAO. It is the position of the petitioners that the 2009 order established the precedent in post-conviction matters involving police brutality claims.

iii. The People's Response to the Petitioner's Motion for Appointment of Special Prosecutor

On December 19, 2012, CCSAO filed the People's umbrella response to each of the motions to appoint a special prosecutor in the case at bar. CCSAO argued that petitioners have not pled facts that demonstrate that Alvarez has any conflict or personal interest in the post-

conviction petitions, let alone a *per se* conflict. Further, the office alleges that the conflict issue is now moot because Devine is no longer the Cook County State's Attorney. Further, the conflict is alleged to be personal to Devine because it stems from his representation of Burge while he was in private practice.

In their filing, CCSAO acknowledged that Anita Alvarez represented the People in George Anderson's prosecution. However, they argue that the involvement with his case does not exclude her participation in these post-conviction matters. Out of an "abundance of caution" Alvarez is willing to step aside should this Court determine it is necessary. In such a case, CCSAO supports the appointment of Judge Nudelman as Special Prosecutor.³

iv. *Vincent Wade and Johnny Plummer, et al: Memorandum*

The People's Law Office filed their reply memorandum on January 8, 2013. In their reply they argue the appointment of a Special Prosecutor in this case is necessary because "...the prosecutor in these cases must be clear-eyed and free of any possible taint of conflict." Plummer, Wade, *et al.* take the position that the 2003 order disqualified the CCSAO from responsibility for all Burge-related post-conviction matters. Further, these petitioners argue that this Court ratified the decision to disqualify CCSAO in all Burge related matters in 2009 when it appointed Judge Nudelman as Special Prosecutor even though Devine was no longer associated with the office and Alvarez had been elected State's Attorney in 2008. These petitioners argue that a need exists to instill confidence in the public that the ultimate decisions in this case are based on policy and justice, and not influenced by past relations between Burge and former Cook County State's Attorney Devine. Petitioners conclude that this Court should appoint Judge Nudelman as Special Prosecutor to avoid the appearance of impropriety.

³ The State also points to Public Act 97-982, which compels this Court to first determine whether any of the other prosecuting State agencies are able to handle the representation at no cost to Cook County, *vide infra*.

In support of their argument, petitioners Wade and Plummer note that Devine's retirement from the CCSAO did not end the conflict of interest that had "taken root" in the office. They argue that the initial reassignment was not due to Devine's actual conflict, because he had already created a wall to insulate the office from his taint. Instead, they argue this Court found that the wall had come too late and that the office was disqualified. This finding necessarily means that the conflict extended to Devine's assistants, many of whom, including Alvarez, worked for Devine at the time of the conflict and the failed attempt to create an ethical screen. Petitioners claim that CCSAO can only show no conflict if it can show that no attorney working for Alvarez also worked for Devine.

Petitioners also claim that Alvarez's prosecution of these cases would create a "disabling appearance of impropriety". Specifically, petitioners allege that the public has a perception that CCSAO is not fair because all Assistant State's Attorneys in the CCSAO are successors to the legacy of State's Attorneys Devine and Daley, who had direct involvement in these cases. Petitioners note that Alvarez has been publicly accused of failing to investigate and prosecute Burge while at CCSAO. As Supervisor of the Public Integrity Unit, Alvarez never instituted investigations against Burge despite the Goldston Report (1992) and other well publicized Chicago Police Board hearings into allegations of torture and abuse. According to the petitioners, these accusations played a public role in her election in 2008. Petitioners conclude that this case is followed closely by the media, and thus the public appearance of justice is important.

Ultimately, the petitioners request that this Court find that CCSAO has an ongoing conflict of interest in these matters. They request this Court enter an order directing either the

Illinois Attorney General or Judge Nudelman be appointed as Special Prosecutor to represent the interests of the People.

v. Robert Smith Reply

On January 7, 2013 Robert Smith filed a reply to the State's Response. In his reply, Smith specifically identifies Cook County Assistant State's Attorney Raymond Brogan as the ASA who took his allegedly coerced confession and participated in his interrogation. Smith avers that he told ASA Brogan that he was physically abused, but Brogan did not believe him. He argues that this fact alone necessitates the CCSAO disqualification as prosecutor in these post-conviction proceedings.

Smith also argues that the 2009 order already recognized an ongoing and continuing conflict, and that CCSAO should not be involved in Burge-related matters. He claims that nothing indicates that there has been a change in the circumstances of the imputed conflict.

vi. Shawn Whirl Reply

On January 8, 2013 Shawn Whirl filed his reply to the State's response. Whirl incorporates his first motion and also the memorandum filed by the class in his reply. Whirl, similar to Smith, argues that nothing has happened to abate the conflict that existed in 2009 when this Court appointed Judge Nudelman to represent the interests of the People in these post-conviction petitions. Whirl further argues that the appearance of impropriety requires appointment of a Special Prosecutor because these Burge-related cases are well covered by local media organizations and there exists an allegedly familiar relationship between Burge and CCSAO.

Whirl disagrees with the State's contention that these petitions do not directly involve abuse at the hands of Burge, and therefore a conflict does not exist. He emphasizes the fact that

credible allegations of torture under Burge's command exist and TRIC specifically found that he is a victim of such torture. Whirl argues that Commander Burge and Detective Pienta will necessarily be witnesses at his evidentiary hearing and that therefore the conflict is not only real, but also ripe. Ultimately, Whirl argues that this Court should rule consistently with its 2009 order appointing Judge Nudelman as Special Prosecutor for the Burge-related post-conviction petitions.

vii. Illinois Attorney General's Filing Regarding Conflicts and Class Action Status

On January 22, 2013, the Illinois Attorney General filed a pleading clarifying their position in this matter. The IAG asks this Court to resolve the issue of whether a class action post-conviction petition exists under Illinois law before ruling on the issue of the CCSAO conflict. The IAG argues that, since there are potentially 100 or more members of the class, many of whom are presently unknown, the issue of conflict is purely hypothetical at this point.

The IAG contends that the class issue has a potential impact on prosecutorial offices within the state, and therefore those institutional interests warrant resolving the issue of the class in order to allow all interested entities to file pleadings addressing their individual concerns. The Attorney General also argues that the conflict warranting disqualification of CCSAO is now so remote with the retirement of Devine that the conflict of interest at CCSAO is virtually non-existent. The IAG sees no harm in permitting CCSAO to prosecute these Burge-related post-conviction claims.

V. **Appointment of a Special Prosecutor**

i. *Attorney General's Request to Resolve Class Issue First*

The Illinois Attorney General has requested that this Court resolve the underlying class certification issue prior to resolving the issue of the CCSAO conflict of interest. They argue that

resolution of the class issue is necessary in order to fully understand the nature of any potential conflicts. Without a defined definition of the class members, any discussions of alleged conflicts of interest are purely hypothetical, according to the office. This Court disagrees. The alleged class of individuals is sufficiently definite to understand the nature of the conflict.⁴ The individuals who are subject to potential class representation have been adequately defined over the past decade of litigation in these Burge-related matters to avoid any purely hypothetical discussion of conflicts of interest. While the name of each individual may be unknown, the body of potential class litigants is sufficiently clear to determine whether CCSAO operates under a conflict in prosecuting these cases. This determination is necessary because the interests of the People must be adequately represented by the appointed prosecuting agency as this litigation moves forward toward the resolution of the issue of class certification.

The IAG also argues that the institutional interests of the governmental entities involved in this case, including CCSAO, warrant determination of the class issue first since resolution of this criminal class action will have a long-lasting impact on criminal litigation in this State. IAG argues that all interested governmental parties must be permitted to weigh in on the important question of whether a class action post-conviction petition may be brought under Illinois law. In addition, the IAG proposes that a discussion occur on alternative methods to a class action that may protect the interests of the parties.

This Court acknowledges that the novel class action issue is one that may have a significant impact on the State prosecutorial agencies in the future. This Court encourages such a discussion through briefings from all interested governmental parties regarding the institutional impact as well as any possible alternative methods of resolving these issues beyond class action.

⁴ This Court makes no representation or judgment as to the merits of the underlying class action at this time, but merely points out that the Petitioners' concerns regarding CCSAO conflict are sufficiently well known to make the decision whether to exclude CCSAO from prosecuting these post-conviction matters.

Nothing in this opinion precludes the interested parties from filing *amicus* briefs in support of their positions.

ii. CCSAO Continues to Operate Under a Conflict of Interest

In 2003, this Court determined that the conflict that existed under Devine had infected the entire office because CCSAO had commenced prosecution of the post-conviction matters before Devine had recused himself from these matters and established an ethical screen. The attempt to shield the office from a conflict had come entirely too late, and since Driscoll had been employed in the office prior to the creation of an ethical screen, he too operated under a conflict.

Similar to Driscoll, Alvarez was employed by CCSAO at the time Devine attempted to institute the failed ethical screen. Not only was Alvarez employed by the office, but at the time she held a major position within the office as Supervisor of the Public Integrity Unit. Therefore, it is clear that the conflict which infected Driscoll in 2003, along with the rest of CCSAO, also extended to Alvarez. In 2009, after Alvarez was elected State's Attorney, this Court confirmed its order of 2003 which found that Devine's conflict had infected the entire office in these Burge-related actions.

After reviewing the pleadings in this matter, especially those arguments advanced by CCSAO, it is apparent to this Court that nothing has changed that would alter this Court's opinion as stated in the 2003 and 2009 orders removing CCSAO as the prosecutorial entity in these cases. This Court has already concluded that a special prosecutor is warranted in Burge-related post-conviction matters. Now this Court concludes that the CCSAO continues to operate under a conflict of interest with regards to the class action issues. Therefore, for those reasons discussed in this Court's 2003 and 2009 orders, the appointment of a special prosecutor in the Burge-related post-conviction petition class action is required.

VI. Appointment of Attorney to Perform Duties, 55 ILCS 5/3-9008

The Illinois legislature recently passed Public Act 97-982, which modifies the process for appointing a Special Prosecutor (codified at 55 ILCS 5/3-9008 (West 2013)). Under the Act, if a court determines that the elected State's Attorney is precluded from representing the People, the court shall contact public agencies, including but not limited to the Office of the Attorney General, Office of the State's Attorneys Appellate Prosecutor, and State's Attorney's Offices throughout the state to determine if a public prosecutor will agree to serve as Special Prosecutor at no cost to Cook County. See 55 ILCS 5/3-9008 (West 2013). Accordingly, this Court will contact the following public agencies to determine whether they are willing to represent the People in this action: the Office of the Illinois Attorney General, the Office of the State Appellate Defender, and the State's Attorney's Offices in Champaign, DeKalb, DuPage, Kane, Kankakee, Lake, McHenry, Madison, Sangamon, St. Claire, Will and Winnebago counties.

CONCLUSION

For the reasons discussed above, this Court finds that the appointment of a Special Prosecutor is required in the proposed Burge-related post-conviction class action. This Court will contact the prosecutorial agencies mentioned above to determine if any are able to represent the interests of the People at no charge to Cook County pursuant to the statutory requirements found in 55 ILCS 5/3-9008 (West 2013).

The cause will be continued until May 7, 2013, at 2:30 p.m. for the Court to report on its inquiries.

ENTERED: Paul P. Biebel Jr. 1688
Hon. Paul P. Biebel, Jr.
Presiding Judge
Criminal Division

DATED: April 11, 2013

