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**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CRIMINAL DIVISION**

IN RE APPOINTMENT OF SPECIAL
PROSECUTOR

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No. 2001 Misc. 4

MEMORANDUM OPINION AND ORDER

This cause was initiated when several public interest groups and independent citizens of Cook County filed a Petition for Appointment of a Special Prosecutor. Petitioners request that this court appoint a Special Prosecutor to investigate numerous allegations of "torture, perjury, obstruction of justice, conspiracy to obstruct justice, and other offenses by police officers under the command of Jon Burge at Area 2 and later Area 3 headquarters in the City of Chicago during the period from 1973 to the present." *Petition for Appointment of a Special Prosecutor*, p.1.

I. History of the Case

Petitioners contend that a Special Prosecutor should be appointed to investigate the abovementioned allegations and to prosecute those persons who may be criminally liable because the Cook County State's Attorney's Office faces a *per se* conflict of interest. They assert that the Cook County State's Attorney's Office is precluded from acting as the investigational and prosecutorial body as to the criminal allegations advanced against Commander Jon Burge and other members of the Chicago Police Department because Richard A. Devine, Cook County State's Attorney "labors under a

per se conflict of interest in investigating and prosecuting any criminality at Area 2 and Area 3 because of his professional relationship with Jon Burge.” *Petition for Appointment of a Special Prosecutor*, p.8.

According to petitioners, this *per se* conflict arises because Mr. Devine was a partner at Phelan, Pope & John, Ltd. during the time in which that law firm represented Commander Burge in two federal suits brought against the City of Chicago, Commander Burge and other Chicago Police Officers. Petitioners claim that the City of Chicago paid the firm \$839,250.64 compensation for its representation.

Beyond the *per se* conflict that arises as a result of his being a partner at Phelan, Pope & John, Ltd. during the seven years it represented Commander Burge, petitioners argue that Mr. Devine has an actual conflict of interest because he personally appeared in federal court on at least one occasion as counsel for Burge and billed the City of Chicago \$4,287.50 for the 24.5 hours he worked on Burge’s case.

Consequently, petitioners argue, Mr. Devine, as the presently-elected Cook County State’s Attorney, is prohibited by Illinois law and the Illinois Rules of Professional Conduct from prosecuting those he has defended for the same conduct.

In response to the allegations raised by petitioners, the Cook County State’s Attorney’s Office (hereinafter “the State”) filed a 2-615 and 2-619 Motion to Dismiss. In that motion, the State never directly addresses whether a *per se* conflict of interest exists in this case. *See Respondents’ Combined Sections 2-615 and 2-619 Motion to Dismiss Petition*. Rather, the State appends an independent analysis of the allegations of criminal activities set forth in the *Petition for Appointment of Special Prosecutor* prepared by John

Barsanti.¹ Mr. Barsanti and the State argue that substantive defenses, including the statute of limitations, defeat petitioners' claims, thereby making the appointment of a Special State's Attorney unnecessary in this case.

II. Analysis

The threshold issue before this court is whether the claim of a *per se* conflict of interest by the State's Attorney must be considered before any of the substantive defenses can be addressed. As noted, the State's Attorney's Office appended an independent analysis of petitioners' claims by John Barsanti in their motion to dismiss. In his analysis, however, Barsanti does not specifically address the allegations of a *per se* conflict. Rather, he seeks to refute the substantive claims advanced by petitioners and concludes that those claims are without merit, thereby challenging petitioners' arguments for the necessity of a Special Prosecutor.

However, a distinction must be drawn between the substantive merit of petitioners' claims and the question of whether a Special Prosecutor need be appointed to investigate those claims. The question of the necessity for an independent investigation arises not from the merit of individual claims, but rather from a determination of whether a conflict of interest exists on the part of the elected State's Attorney. Thus, this court holds that the conflict issue must first be decided before any substantive legal issues may be considered.

The relevant Illinois statutory provision, 55 ILCS 5/3-9008 (West 2001), provides for the appointment of a Special Prosecutor:

¹ Mr. Barsanti was assigned the responsibility of independently reviewing petitioners' claims by Norbert J. Goetten, Director of the State's Attorney's Appellate Prosecutor's Office, who had been asked by Mr. Devine to provide a legal analysis of petitioners' allegations.

—Whenever the attorney general or state's attorney is sick or absent, or unable to attend, or is interested in any cause or proceeding, civil or criminal, which it is or may be his duty to prosecute or defend, the court in which said cause or proceeding is pending may appoint some competent attorney to prosecute or defend such cause or proceeding....

Nevertheless, when the need for a Special Prosecutor arises prior to the commencement of a proceeding, in the absence of specific statutory authority allowing for such an appointment, a court's power to appoint a Special Prosecutor will arise when the appointment is necessary to "prevent a failure of justice" and to protect the due process rights of the citizens of this country. *Wilson v. County of Marshall*, 257 Ill.App. 220, 226 (2nd Dist. 1930); *In re Appointment of Special State's Attorneys*, 42 Ill.App.3d 176, 182 (3rd Dist. 1976); *In re Special Prosecutor*, 164 Ill.App.3d 183, 186 (5th Dist. 1987).

The appointment of a Special Prosecutor is wholly within the discretion of the court; however, before a court can exercise this power of appointment, the court must make an initial inquiry whether "the legal contingency has arisen authorizing the exercise of such power." *Lavin v. Board of Commissioners of Cook County*, 245 Ill. 496, 502 (1910); *Hutchens v. Wade*, 13 Ill.App.3d 787, 789 (4th Dist. 1973).

Illinois courts have long recognized that "a legal contingency has arisen" authorizing the appointment of a Special Prosecutor when the State's Attorney who would normally oversee a prosecution is an "interested party" as defined by Illinois law. In *People ex rel. Hoyne v. Northrup*, 184 Ill.App. 638, 648 (1914), the Appellate Court ruled that the appointment of a Special State's Attorney was appropriate to investigate voting fraud and irregularities in the election for State's Attorney because the elected State's Attorney had an interest in the outcome of the investigation. Similarly, in *People*

v. *Doss*, 384 Ill. 400, 405 (1943), the Supreme Court ruled that the appointment of a Special State's Attorney, prior to the presentation of a case to the Grand Jury, was appropriate since the State's Attorney was the only witness in a libel case and was therefore an interested party (See also *People v. Moretti*, 349 Ill.App. 67, 76 (1st Dist. 1952); *In re Appointment of Special Prosecutor*, 253 Ill.App.3d 218, 220 (5th Dist. 1993)).

Additionally, the Illinois Supreme Court in *People v. Coslet*, 67 Ill.2d 127, 133 (1977), crafted a "per se" conflict of interest rule to describe situations in which an absolute, disabling conflict of interest exists, thereby removing the necessity to prove prejudice.² *Coslet* merely restated in "per se conflict of interest" terms the doctrine set forth in the first Illinois case considering the issue, *People v. Gerold*, 265 Ill. 448 (1914). In *Gerold*, Webb, the prosecutor, had been defendant's attorney earlier in the case and had discussed with the defendant in confidence various matters pertaining to the indictment. In holding that this constituted a conflict of interest, the Supreme Court observed:

The rule has long been firmly established that an attorney cannot represent conflicting interests or undertake to discharge inconsistent duties.... This rule is a rigid one, designed not alone to prevent the dishonest practitioner from fraudulent conduct, but as well to preclude the honest practitioner from putting himself in a position where he may be required to choose

² The reviewing courts of Illinois have utilized the *per se* conflict of interest rule in many other instances. See e.g., *People v. Stoval*, 40 Ill.2d 109 (1968); *People v. Kester*, 66 Ill.2d 162 (1977); *People v. Precup*, 73 Ill.2d 7 (1978); *People v. Fife*, 76 Ill.2d 418 (1979); *People v. Washington*, 101 Ill.2d 104 (1984); and *People v. Spreitzer*, 123 Ill.2d 1 (1988). Most recently, the Appellate Court reversed and remanded a murder conviction because of the *per se* conflict of interest of defendant's attorney who also represented a possible State witness, even though that witness ultimately did not testify at trial. *People v. Morales*, ___ Ill.App.3d ___, 1st Dist. Docket No. 1-99-0033 (March 28, 2002).

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between conflicting duties. He should undertake no adverse employment,
no matter how honest may be his motives and intentions.... [T]he law will
not be less strict in criminal proceedings, especially as to the duty in this
regard resting upon counsel for the state.... It is unnecessary that the
prosecuting attorney be guilty of an attempt to betray confidence; it is
enough if it places him in a position which leaves him open to such
charge....

Id. at 478-79.

In the instant matter, petitioners contend that one of the primary persons involved in the alleged criminal activity was Commander Jon Burge who had earlier been represented by now-State's Attorney Devine and his former law firm. The rationale of the Supreme Court in *Gerold* is directly applicable. Mr. Devine's prior representation of Commander Burge creates the appearance that he may not be entirely objective in his investigation of Burge, thereby constituting a conflict of interest.³ This conflict of interest "affects all the prosecutors" in the Cook County State's Attorney's Office. See *People v. Courtney*, 288 Ill.App.3d 1025, 1034 (3rd Dist. 1997).

In *Courtney*, a case closely analogous to the present case, the Appellate Court held that there was a *per se* conflict of interest where the State's Attorney was an "interested" party. *Id.* The reviewing court held that a Special Prosecutor should have been appointed because a defense attorney who had earlier represented the defendant was then appointed State's Attorney during defendant's prosecution. In its analysis, the *Courtney* court cited several out-of-state cases with the same essential facts as presented

³ See *People v. Stoval*, 40 Ill.2d 109, 113 (1968) (discussing the necessity of avoiding possible conflicts of interest).

here—a former attorney for defendant becomes a chief prosecutor. Each case held that the prosecution of a former client gave rise to an appearance of impropriety which can only be avoided with the appointment of a special prosecutor. *Id.* at 1033-34 (citing *State v. Cooper*, 63 Ohio Misc. 1, 409 N.E.2d 1070 (1980); *Arizona v. Latigue*, 108 Ariz. 521, 502 P.2d 1340 (1972); and *New York v. Shinkle*, 51 N.Y.2d 417, 415 N.E.2d 909, 434 N.Y.S.2d 918 (1980)).

In the present case, there is an appearance of impropriety that creates a similar conflict of interest. Mr. Devine candidly admits his involvement in the representation of Commander Burge while employed by Phelan, Pope & John, but contends that his role was minimal, despite the fact that he appeared in court at least once to represent Burge and billed 24.5 hours on Burge's case. *Respondents' Combined Sections 2-615 and 2-619 Motion to Dismiss Petition, Exhibit A*. However, assuming *arguendo* that Mr. Devine's previous involvement in the representation of Commander Burge was minimal, the mere fact that he was involved in Burge's defense in any respect requires that this court find that a *per se* conflict of interest exists, thereby warranting the appointment of a Special Prosecutor. Furthermore, any knowledge gained by the members of his prior law firm in the defense of Burge is imputed as a matter of law to State's Attorney Devine. *People v. Fife*, 76 Ill.2d 418, 425 (1979); *People v. Karas*, 81 Ill.App.3d 990, 995 (1st Dist., 2nd Div. 1980); *People v. Dace*, 153 Ill.App.3d 891, 896 (3rd Dist. 1987); *Illinois Rules of Professional Conduct* 1.10.

Based on the prior representation of Commander Burge by Mr. Devine and his former law firm, neither he nor the Cook County State's Attorney's Office can be permitted to have further involvement in the instant case, even though he vigorously

argues that the petitioners' claims should be dismissed, primarily on statute of limitation grounds. This disqualification of the Cook County State's Attorney's Office serves to avoid the appearance of impropriety and is consistent with the well-established principle that "[a]n attorney cannot be permitted to assist in the prosecution of a criminal case if by reason of his professional relations with the accused he has acquired a knowledge of the facts upon which the prosecution is predicated or which are closely interwoven therewith." *Gerold, supra*, 265 Ill. at 478.

III. Conclusion

In accordance with Illinois law, this court finds that State's Attorney Richard A. Devine labors under a *per se* conflict of interest in the present case which necessitates the appointment of a Special Prosecutor to investigate the allegations made by petitioners.

This court therefore appoints retired Illinois Appellate Court Justice Edward J. Egan as Special State's Attorney to investigate the facts alleged by petitioners and to determine if any prosecutions are warranted.

After consultation with Justice Egan, this court also appoints Robert D. Boyle as Assistant Special State's Attorney, consistent with the holding in *People v. Moretti*, 349 Ill.App. 67, 77 (1st Dist. 1952).

ENTERED: Paul P. Biebel, Jr.
Paul P. Biebel, Jr. **JUDGE PAUL P. BIEBEL, JR.**
Presiding Judge of the Criminal Division
Circuit Court of Cook County
APR 24 2002

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DATE: 4-24-02