

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

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PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
v.	)	No. 83C-769, 83CR-6091,
	)	80C-1916, 88CR-7047,
ALONZO SMITH, ERIC CAINE,	)	84C-667
DERRICK KING, LEONARD KIDD,	)	
GRAYLAND JOHNSON	)	Hon. Paul P. Biebel, Jr.,
	)	Judge Presiding.

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MEMORANDUM OPINION AND ORDER

The underlying cause (No. 2001 Misc. 4) was initiated when several public interest groups and independent citizens of Cook County filed a petition for appointment of a Special Prosecutor to investigate numerous allegations of abuse, torture, and other offenses by Commander Jon Burge (hereinafter "Burge" or "Commander Burge") and police officers under his command at Area 2 and later at Area 3 headquarters in the City of Chicago. In an order dated April 24, 2002, this Court appointed retired Illinois Appellate Court Justice Edward J. Egan as Special State's Attorney and Robert D. Boyle as Assistant Special State's Attorney to investigate these allegations of abuse and torture.

In an order dated April 9, 2003, this Court directed the Illinois Attorney General to assume complete supervision of the defense of post-conviction petitions which included allegations of police misconduct by Burge and/or police officers under his command.

Now, Lisa Madigan, Attorney General of Illinois (hereinafter "Attorney General"), moves to reassign the Burge-related post-conviction petitions of Alonzo Smith, Eric Caine, Derrick King, Leonard Kidd, and Grayland Johnson (hereinafter

“Petitioners”) to the Cook County State’s Attorney’s Office (hereinafter “State’s Attorney”).

### SPECIAL PROSECUTOR CASE HISTORY

#### **I. *In re Appointment of Special Prosecutor*, No. 2001 Misc. 4 (April 24, 2002)**

On April 24, 2002, this Court entered an order finding that Cook County State’s Attorney Richard A. Devine (hereinafter “Devine”) labored under a *per se* conflict of interest in matters involving allegations that Burge and his subordinates engaged in a practice of abuse and torture to coerce confessions out of citizens. Due to this conflict, this Court appointed retired Illinois Appellate Court Justice Edward J. Egan as Special State’s Attorney and Robert D. Boyle as Assistant Special State’s Attorney to investigate these allegations.

This Court noted that Illinois statutory provision 55 ILCS 5/3-9008 allowed for the appointment of a Special Prosecutor. The appointment was necessary because Commander Burge was the primary person alleged to have committed the criminal activity and he was previously represented by Devine and his former law firm. This fact alone created a *per se* conflict of interest. This Court found that this conflict affected all prosecutors in the Cook County State’s Attorney’s Office, citing *People v. Courtney*, 288 Ill. App. 3d 1025, 1034 (3d Dist. 1997).

#### **II. *In re Appointment of Special Prosecutor*, No. 2001 Misc. 4 (April 9, 2003)**

Following this Court’s April 24, 2002 ruling, Devine filed a motion for clarification. In this motion, Devine indicated that as a potential target, Burge had an interest in any post-conviction proceeding which might require Burge’s testimony. Second, Devine announced that he recused himself from all cases involving Burge

defendants, as well as any that might arise in the future. Devine suggested that the Attorney General may have to assist in the defense of cases involving these allegations. Finally, Devine asked this Court to clarify the impact of the April 24, 2002 order on present and future cases involving Burge and police officers under his command.

In response to Devine's motion for clarification, twelve petitioners, along with several public interest groups, requested that this Court appoint another Special State's Attorney to act on behalf of the State of Illinois in the pending cases involving Burge defendants. Additionally, the twelve petitioners and public interest groups requested that this Court reassign the petitions involving Burge defendants to judges outside of Cook County.

Ultimately, in an opinion dated April 9, 2003, this Court denied the petition for appointment of a Special State's Attorney to prosecute these post-conviction matters involving Burge defendants. Rather, this Court directed the Illinois Attorney General to assume complete supervision of defending these matters. This Court also denied the request to reassign these cases to judges sitting outside of Cook County.

### **PROCEDURAL BACKGROUND**

#### **I. Illinois Attorney General's Motion To Reassign:**

On December 8, 2008, the Attorney General filed a *Motion To Reassign To The Cook County State's Attorney's Office* (hereinafter "*Motion to Reassign*"). In the *Motion to Reassign*, the Attorney General notes that on April 9, 2003, this Court directed the Attorney General to supervise twelve petitioners' cases wherein they alleged Burge and

police officers under his supervision abused them.<sup>1</sup> This Court later ordered the Attorney General to assume supervision over nine additional post-conviction cases alleging police misconduct at Areas 2 and 3 under Burge.<sup>2</sup>

These matters were assigned to the Attorney General due to Devine's conflict of interest arising from his prior representation of Burge while Devine was in his private law practice.

The Attorney General notes that of the Burge-related post-conviction proceedings, seven have been resolved.<sup>3</sup> Additionally, the Attorney General has seven other cases before various courts in which her office has investigated the post-conviction claims, filed responsive pleadings, or conducted an evidentiary hearing.<sup>4</sup> The Attorney General states that she does not seek to have these cases reassigned due to the considerable resources already expended, and to avoid undue delay. There are three other cases in which the Attorney General has expended considerable resources and effort to gain familiarity with the underlying facts. In the interest of justice, the Attorney General does not seek to reassign these cases either.<sup>5</sup>

However, as stated above, the Attorney General seeks to reassign the post-conviction cases of the five instant Petitioners to the State's Attorney because they have yet to file amended post-conviction petitions. The Attorney General asserts that she has not reviewed or responded to these Petitioners' claims. Furthermore, she notes that there

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<sup>1</sup> The twelve petitioners were Aaron Patterson, Stanley Howard, Derrick King, Leroy Orange, Ronald Kitchen, Cortez Brown, Graylond Johnson, Alonzo Smith, Eric Caine, Edgar Hope, Alton Logan, and Clarence Trotter.

<sup>2</sup> The nine post-conviction petitioners were David Fautleroy, Leonard Hinton, Leonard Kidd, Robert Ornelas, Marvin Reeves, Tyshawn Ross, James Andrews, Darryl Christian, and Keith Walker.

<sup>3</sup> Petitions from James Andrews, Darryl Christian, Stanley Howard, Alton Logan, Leroy Orange, Aaron Patterson, and Clarence Trotter have been resolved.

<sup>4</sup> These cases include Cortez Brown, Leonard Hinton, Edgar Hope, Ronald Kitchen, Robert Ornelas, Marvin Reeves, and Tyshawn Ross.

<sup>5</sup> Petitions from David Fautleroy, Edgar Hope, and Keith Walker.

are no related codefendants nor is there a conflict preventing the State's Attorney from handling these cases because Anita Alvarez succeeded Devine as the State's Attorney on December 1, 2008. Accordingly, the Attorney General contends that the State's Attorney is the appropriate party to prosecute these cases. 55 ILCS 5/3-9005(a)(1).

**II. Petitioners' Response (Drafted By Harold Winston, Assistant Cook County Public Defender):**

On January 21, 2009, Smith, King, Johnson, Caine, and Kidd filed their *Response To Motion To Reassign To The Cook County State's Attorney's Office* (hereinafter "*Response to Motion to Reassign*").<sup>6</sup> In this response, Petitioners object to the Attorney General's *Motion to Reassign*, noting that present State's Attorney Anita Alvarez and other attorneys currently employed in the Cook County State's Attorney's Office worked under Devine for many years. They contend that even though Devine is no longer the State's Attorney the conflict which was already imputed to all attorneys under Devine, when this Court first appointed the Attorney General to handle these petitions, still exists. Thus, Petitioners argue that the interest of justice and the appearance of impropriety prevent reassignment of these cases to the State's Attorney.

Petitioners contend that there are present and former Cook County State's Attorneys who have been accused of concealing and participating in police torture during the Burge era. Moreover, Petitioners note that in recent history the State's Attorney has hired a number of former police officers suspected of abuse in these cases as investigators, two of whom are still employed by the State's Attorney's Office. Petitioners argue, contrary to the Attorney General's assertion, that amended petitions have been filed in the cases of Kidd and King while discovery has occurred in the matters

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<sup>6</sup> Attached to the *Motion to Reassign* are the following two exhibits: (1) Order entered April 24, 2002 appointing the Special Prosecutor; and (2) Order entered April 9, 2003 appointing the Attorney General to handle Burge Post-Conviction Petition cases.

with Smith and Johnson. Finally, Petitioners contend that reassignment of these five cases will result in additional delay in obtaining justice. For all the reason stated above, Petitioners object to the reassignment of their petitions to the State's Attorney.

**III. Cook County State's Attorney's Response To The Attorney General's Motion To Reassign:**

The State's Attorney also responded to the Attorney General's *Motion to Reassign* in *The Cook County State's Attorney's Office Response To The Attorney General Office's Motion To Reassign Cases*. In this pleading, the State's Attorney relates that her primary concern is the full and fair litigation of these petitions. She also states that since she has not been involved in any related decisions on discovery and other important matters that her office will be at a disadvantage in ensuring the full and fair litigation in these petitions. The State's Attorney maintains that consistency in prosecution and cohesion of prosecutorial conduct are important considerations. Moreover, she posits that there are benefits to having the same office defend all of the Burge-related petitions. Finally, the State's Attorney states that she relies on this Court's discretion and inherent authority to assign cases.

**IV. Amicus Brief In Opposition To The Attorney General's Motion To Reassign:**

On January 28, 2009, the People's Law Office sought leave to file an amicus brief regarding these matters. This Court granted leave and allowed the filing of the *Amicus Brief In Opposition To The Attorney General's Motion To Reassign To The Cook County State's Attorney's Office* (hereinafter the "*Amicus*"). The brief was submitted on behalf of the individuals and organizations who originally petitioned this Court for the appointment of a special prosecutor to investigate these allegations of abuse by Burge and his subordinates. Specifically, the *Amicus* argues that Devine's retirement as the State's

Attorney does not end the conflict of interest. Additionally, it is urged that the standards of professional ethics and public policy require the denial of the Attorney General's *Motion to Reassign*.

**V. Illinois Attorney General's Reply In Support Of Motion To Reassign:**

On February 4, 2009, the Attorney General replied to the State's Attorney's response, Petitioners' joint response, and the *Amicus* in her *Reply In Support Of Motion To Reassign To The Cook County State's Attorney's Office*. There the Attorney General reiterated her reasons for seeking reassignment.

First, the Attorney General notes that the State's Attorney does not challenge the basis for the Attorney General's motion to reassign, nor does the State's Attorney dispute that by statute the State's Attorney is the appropriate entity to prosecute these cases. She observes that the State's Attorney does not contend that a conflict of interest still exists even though Devine is no longer the State's Attorney.

Second, the Attorney General responds to Petitioners' joint response by asserting that State's Attorney Anita Alvarez never personally represented Burge and does not suffer from the conflict of interest that disqualified Devine. Petitioners note that current and former employees of the State's Attorney's Office are accused of participating in this abuse. However, the Attorney General responds that Petitioners fail to explain how this situation differs from any other post-conviction claim of a coerced confession, prosecutorial misconduct, a *Brady* violation, or a *Napue* violation. Claims such as these are regularly defended by the same State's Attorney's Office that originally prosecuted the case. The Attorney General disagrees with Petitioners' contention that considerable discovery has occurred in the instant post-conviction cases and directs this Court to the

procedural history of each case to support this contention. Finally, the Attorney General argues that reassigning these cases to the State's Attorney will not result in a waste of time and resources.

#### **VI. Illinois Attorney General's Supplement To Reply:**

On February 13, 2009, the Attorney General filed a *Supplement To Reply* to respond to the allegations in the *Amicus* criticizing the Attorney General for her handling of these Burge-related matters. The Attorney General notes that her office has expended substantial resources defending these cases, and has given them the highest priority.

In addition, the Attorney General notes that her office has experienced substantial budget cuts and strained resources which support the claim that the office lacks the necessary resources to adequately defend these remaining five cases. According to her, this fact alone may delay the resolution of these cases. Specifically, the Attorney General notes that the budget of her office was cut by 25% last year which resulted in office-wide cutbacks, layoffs, furlough days, and a hiring freeze. The Attorney General also states that the resources of her office have been further depleted due to the responsibility of prosecuting many other serious and complex cases throughout the State. These facts further support the likelihood that resolution of Petitioners' cases will be delayed.

#### **VII. Oral Arguments**

On February 20, 2009, this Court heard oral arguments regarding the Attorney General's *Motion to Reassign*. Addressing the Court were representatives from the Attorney General's Office, the State's Attorney's Office, the Petitioners, and those who filed the *Amicus*. All of these parties elaborated on their respective motions and pleadings while also responding to questions from this Court.



### RESOLUTION

This Court notes that it served in various supervisory capacities in each of the three governmental entities appearing in this matter. The Court is aware of the concerns raised in these various pleadings. It realizes that the budgetary issues that the Attorney General faces are substantial. These post-conviction proceedings are difficult cases to manage and, as the Attorney General notes, require extensive resources to adequately handle.

However, this Court is also aware of the objections presented in support of retaining these cases under the control and supervision of the Attorney General. The various objections presented raise valid concerns. But this Court realizes that these cases must be resolved expeditiously and properly.

In the exercise of its discretion, and realizing the gravity of the matters presented, this Court is providing a remedy which none of the parties have requested. This Court orders the appointment of a Special State's Attorney pursuant to the provisions of 55 ILCS 5/3-9008 to defend the instant post-conviction matters.

The Special State's Attorney whom this Court appoints is a well respected member of the legal community who served with great distinction as a Cook County Circuit Court judge, and, prior to that, performed in an outstanding fashion as an Assistant Cook County Public Defender. This Court names Hon. Stuart A. Nudelman (Ret.) as a Special State's Attorney to undertake the defense of these Burge-related post-conviction petitions. Mr. Nudelman is given the authority to employ other attorneys and non-attorney staff as he deems necessary to assist him in this effort.

ENTERED: Paul P. Biebel Jr 1688

Paul P. Biebel, Jr.  
Presiding Judge, Criminal Division  
Circuit Court of Cook County

DATE: 4-7-09

JUDGE PAUL P. BIEBEL, JR.  
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