

the court clearly abused its discretion or applied impermissible legal criteria. *P.J.'s Concrete Pumping Serv. v. Nextel W. Corp.*, 345 Ill. App. 3d 992, 1002 (2d Dist. 2004).

A class action may be maintained where a common question of law or fact predominates over the individual questions that may be involved. *Martin v. Heinold Commodities, Inc.*, 139 Ill. App. 3d 1049 (1st Dist. 1985). However, class certification is not appropriate where there are no questions of law or fact common to the members of the class to be litigated and class action would not result in any increased efficiency to the court or to the litigants in the adjudication of the claims. *McCabe v. Burgess*, 75 Ill. 2d 457 (1979). The test to be applied is that the statutory requisites of commonality are met so long as there are questions of fact or law common to the class and these predominate over questions affecting only individual members of such class. *Smith v. Ill. Cent. R.R. Co.*, 223 Ill. 2d 441, 449 (2006)(quoting *O'Sullivan v. Countrywide Home Loans, Inc.*, 319 F.3d 732, 738 (5th Cir. 2003)); *People v. Weiszmann*, 185 Ill. App. 3d 273 (2d Dist. 1989). A common question of fact or law predominates if successful adjudication of the plaintiff's claim will establish a right to recovery in other class members. *Avery v. State Farm Mut. Auto. Ins. Co.*, 216 Ill. 2d 100, 128 (2005); see also *Society of St. Francis v. Dulman*, 98 Ill. App. 3d 16 (1st Dist. 1981).

ANALYSIS

I. The Court is unable to circumvent the laws of this State.

a. Common Questions of Fact or Law Must Predominate

No court in Illinois has approved class certification in a criminal case arising under the Post-Conviction Hearing Act. Consequently, there is very little precedential guidance in this matter. However, the Illinois Supreme Court addressed an analogous class certification question in the 2006 case of *Smith v. Ill. Cent. R.R. Co.*, 223 Ill. 2d 441 (2006). In a matter of first impression, the plaintiffs requested class certification for mass-tort litigation in which they alleged a multitude of individual injuries as a result of one catastrophic event. The appellant-defendants asked the Supreme Court to decide whether the lower courts had correctly applied the Illinois class action rule under Section 2-801. The parallels between the *Smith* case and this present action are evident upon closer inspection.

In 2003, 21 cars of a freight train derailed in the Southern Illinois town of Tamaroa. Tanker cars containing dangerous chemical mixtures ruptured during the derailment, and some of the cars also caught fire. As a result, more than 1,000 individuals were subjected to a mandatory evacuation. The derailment caused a massive amount of damage.

The Circuit Court granted certification to a class of plaintiffs, finding that because the incident arose from the same nucleus of operative fact—the derailment—the commonality required under Illinois Section 2-801 was sufficient for class certification. After an interlocutory appeal by the Railroad, the Appellate Court agreed that class certification was proper, and noted that federal courts applying Federal Rule 23 (on which our own class certification statute Section 2-801 is based) had found that one “catastrophic incident” could serve as a common element for purposes of establishing commonality for certification of a class of litigants. The Appellate Court found that such cases demonstrated that the commonality requirement can be met despite the other significant differences in individual claims.

The Illinois Supreme Court disagreed with the lower courts. In rejecting the reasoning of those courts, the Supreme Court noted that Federal Rule 23 and Illinois’ Section 2-801 impose different standards for class certification with regards to the element of commonality. The Illinois Section 2-801 requirement of “predominance” is actually a higher standard than Federal Rule 23’s “commonality” requirement. “The purpose of the predominance requirement is to ensure that the proposed class is sufficiently cohesive to warrant adjudication by representation, and it is a far more demanding requirement than the commonality requirement of [Federal] Rule 23(a)(2).” *Smith*, 223 Ill. 2d 441,453, quoting *Bell Atlantic Corp. v. AT&T Corp.*, 339 F.3d 294, 301 (5th Cir. 2003).

The Supreme Court reasoned that the catastrophic event that was common to all claims was not enough to meet the predominance requirements of Section 2-801. The lower courts erred when they ignored the highly individualized nature of each plaintiff’s claim. Specifically, the Appellate Court failed to separate the catastrophic event from the relief sought by the plaintiffs when they “equated liability for the derailment with liability for the alleged health consequences arising from exposure to the chemicals.” *Id.* Predominance was lacking in *Smith* because “[p]roof of proximate causation ... will involve highly individualized

variables....” *Id.* at 454. Further, the Supreme Court noted that the plaintiffs failed to establish a predominance of common questions because individual issues would “consume the great bulk of the time at trial. Consequently, the common issues do not predominate.” *Smith*, 223 Ill. 2d 453-54. Therefore, class certification was improper under Section 2-801’s predominance requirement despite the common catastrophic event at the heart of each individual claim.

Much like the train derailment in Tamaroa, Illinois, Commander Burge’s conduct has caused irreparable harm to many persons. Petitioners assert that Burge’s involvement in their individual cases warrants the certification of the class. It is undeniably true that Petitioners’ claims would not have come about in the absence of Jon Burge. His conduct is the catalyst for Petitioners’ legal claims, just as the train derailment was the catalyst in *Smith*. However, the involvement of Burge, alone, is not sufficient under Section 2-801’s requirement of predominance. Like the plaintiffs in *Smith*, each Petitioner’s legal claim is highly individual.

The unchallenged fact that Burge and those under his command coerced confessions from an unknown number of individuals does not, in and of itself, speak to the merits of an individual Petitioner’s legal claim in this proceeding. Rather, an individual’s legal claim under the Post-Conviction Hearing Act stems from his yet-unproven allegation of police misconduct following his arrest. Any judgment of relief will be based on a specific determination that his confession was coerced and that his coerced confession was used against him at trial and in violation of his constitutional rights. Every such determination is highly individualized and must be made on a case-by-case basis despite the common element of the involvement of Burge. The individual nature of these claims precludes class certification under Section 2-801.

Further, it is clear that predominance is lacking in this action because individual issues will consume the bulk of the litigation. Assume, *arguendo*, that this Court certified the class and each Petitioner received a third stage evidentiary hearing under the Post-Conviction Hearing Act. At each individual third stage hearing a petitioner would endeavor to establish that he was a victim of torture and that his conviction should be vacated in light of *People v. Wrice*, 2012 IL 111860. Obviously, the great majority of time expended in these

proceedings will involve litigating each unique claim. The Supreme Court's holding in *Smith* is clear in this regard: certification is not appropriate in this case under Section 2-801's "predominance" standard.

It is also noteworthy that the successful adjudication of one individual's claims will not establish a right to relief for any other member of the class. In Illinois, a common question of fact or law predominates if successful adjudication of the plaintiff's claim will establish a right to recovery in other class members. *Avery v. State Farm Mut. Auto. Ins. Co.*, 216 Ill. 2d 100, 128 (2005). Assuming one Petitioner's post-conviction action is successful and his conviction is vacated, such a remedy is entirely individual. The successful adjudication of his claim of torture will not establish a right to recovery for any other member of the class.

Petitioners have entirely failed to demonstrate that the questions of fact or law common to the class predominate over any questions affecting only individual members. It is clear that the claims of these Petitioners are each highly individualized and the bulk of time expended in court will involve litigating each individual claim. Further, commonality is also defeated because the successful adjudication of the legal claim of one putative class member will not establish a right to relief for any other class member. Therefore, Petitioners are unable to meet the requirements of Section 2-801 for purposes of demonstrating that that class certification is appropriate.

b. The Post-Conviction Hearing Act

Moreover, the Post-Conviction Hearing Act does not provide a mechanism for summary referral of post-conviction claims to a third stage evidentiary hearing. Rather, the Post-Conviction Hearing Act (Act) establishes a three-step process for adjudicating individual claims of deprivations of constitutional rights during the proceedings. 725 ILCS 5/122-1 *et seq.* Initially, a petition must clearly set forth sufficient facts demonstrating the way in which the petitioner's constitutional rights were violated. 725 ILCS 5/122-2. If the court determines that the petition is frivolous or patently without merit, it must summarily dismiss the petition. 725 ILCS 5/122-2.1(a)(2). If the petition is not dismissed, the State is required at the second stage to answer the petition or file a motion to dismiss. 725 ILCS 5/122-5. If the court does not dismiss the petition on the State's motion then an evidentiary hearing is conducted at the third and final stage of the process.

People v. Marquez, 324 Ill. App. 3d 711, 714-715 (1st Dist. 2001). A petitioner must seek leave of court to file a successive petition under the Act, and must demonstrate cause and prejudice. 725 ILCS 5/122-1(f).

The Act establishes a definite procedure for adjudicating an individual's post-conviction claims. There is no statutory mechanism for bypassing the first two stages of review or the restrictions and procedural hurdles involved in filing successive petitions. Petitioners are asking this Court to put aside the law in this case and permit class members to circumvent the parameters of the Post-Conviction Hearing Act. What Petitioners ask is not within the powers of this Court, even for the important issues presented here.

II. The Unpaid Special Master

That being said, it is of highest importance that these remaining possible Burge-related cases be given resolution. As pointed out during the oral arguments, there is no confidence that the Illinois Torture Relief Inquiry Commission will ever have the funding and resources to achieve its intended purpose and give finality to this painful issue.

Therefore, this Court appoints David N. Yellen, Dean of Loyola University Chicago School of Law to serve as an unpaid "Special Master" to help achieve closure. Dean Yellen has graciously agreed to accept this important undertaking at the request of the Court. He is well respected in the legal community of Chicago. Dean Yellen's major area of academic expertise is criminal law, particularly sentencing and juvenile justice. He has written extensively on the federal sentencing guidelines, served as an advisor to President Clinton's transition team on white collar crime, presently serves on the Illinois Sentencing Policy Advisory Council, and has argued a significant case involving the federal mandatory minimum sentencing statute before the United States Supreme Court. (The *curriculum vitae* of Dean Yellen is attached with this order.) His expertise and talents will be welcomed in this endeavor.

The Special Master is instructed to work with Petitioners' attorneys, who have acknowledged their expertise in this regard (Transcript of December 16, 2013 at p. 81), in attempts to locate the individuals with a "valid claim" of a Burge-related coerced confession who are still languishing in Illinois penitentiaries. Petitioners' attorneys developed the definition of a "valid claim" during the certification hearing. Transcript of December 16, 2013 at p. 89. The elements of a "valid claim" include all of the following:

- 1) The individual was convicted based in part upon a confession;
- 2) The confession was the end result of an interrogation in which Burge or officers under his chain of command or direct supervision participated;
- 3) The individual made an allegation of coercion in the context of his original proceedings, either at a motion to suppress or in some other clear and definitive way, that his confession was the product of physical abuse or torture, and those objections were overruled;
- 4) He remains incarcerated today;
- 5) He has never had the opportunity to present his claim of coerced confession with the benefit of the substantial evidence now available to implicate Burge and those who worked under him.

Once the Special Master has identified individuals meeting these criteria he will forward the names to this Court. This Court will appoint respected attorneys as private *pro bono* counsel to represent each identified litigant. *Pro bono* counsel will then assist the petitioners in preparing and litigating their post-conviction petitions in light of their individual claims and in light of what is now known about the actions of Burge and those under his supervision.

Although he will be unpaid, Dean Yellen is permitted to seek reimbursement to compensate for necessary costs incurred in this pursuit of justice. He will also utilize unpaid law students and other personnel from Loyola University Chicago School of Law to assist him.

When faced with the initial decision in 2001 whether to appoint a Special Prosecutor in Burge-related cases, this Court was aware of the obstacles and difficulties that would be involved in resolving these claims. Nevertheless, this Court strongly felt that the issue of alleged police misconduct under Burge deserved to be fully investigated by a Special Prosecutor. This investigation resulted in a lengthy report by the Special Prosecutor Edward J. Egan which concluded that a pattern of misconduct occurred with Burge and his associates.

At this point in time, it is clear that significant concerns still linger with respect to identifying remaining Burge victims and resolving their legal claims. The adjudication of these claims of torture are particularly ripe in light of the recent Illinois Supreme Court decision in *People v. Wrice*, 2012 IL 111806.

There must be a vehicle to address these painful issues stemming from the Burge-related misconduct. The individuals who are still incarcerated as a result of his wrongdoing deserve resolution. Now, 13 years later, I trust that, with the issuance of this order and appointment of the Special Master, we can finally resolve these matters.

CONCLUSION

Therefore, Petitioners' Motion for Class Certification is hereby DENIED. Likewise, Petitioners' Class Action Petition for Relief Under the Post-Conviction Hearing Act is DISMISSED. Dean David N. Yellen is appointed as an unpaid Special Master to identify all incarcerated individuals who have "valid claims" of coerced confessions at the hands of Commander Burge and those under his authority as defined in this Order and to present their names to this Court for the appointment of private *pro bono* counsel to assist them in litigating their individual claims under the Post-Conviction Hearing Act.

ENTERED
JUDGE PAUL BIEBEL JR-1000
MAR 12 2014
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

ENTERED:

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

DATED: March 12, 2014

DAVID N. YELLEN

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EMPLOYMENT

Loyola University Chicago School of Law. Dean and Professor of Law, 2005-present

Hofstra University School of Law. Dean, 2001-04. Max Schmertz Distinguished Professor, 2001-05. Professor, 1988-2005

Villanova University Law School. Reuschlein Distinguished Visiting Professor, 2004-05

New York Law School. Visiting Professor, 2005

Cornell University School of Law. Visiting Professor, 2000

U.S. House of Representatives, Committee on the Judiciary, Subcommittee on Criminal Justice, Washington, DC. Assistant counsel, 1987-88

Schwab, Donnenfeld, Bray & Silbert, Washington, DC. Associate in civil and criminal litigation at trial and appellate levels, 1985-87

U.S. District Judge C. Arlen Beam, Omaha, NE. Law Clerk, 1984-85

Volunteers in Service to America (VISTA). Researcher, National Center for Youth Law, 1980-81

EDUCATION

Cornell University School of Law
J.D. Cum Laude, 1984
Cornell Law Review, Special Project Editor

Princeton University
B.A. Magna Cum Laude in Politics, 1979

PROFESSIONAL ACTIVITIES

American Bar Association Section of Legal Education

- Standards Review Committee, member 2006-2012
- New Deans' Workshop Planning Committee, member 2009-present. Chair, 2011
- Deans' Midyear Workshop, Chair, 2006-07
- Frequent chair of ABA accreditation site visits

American Bar Association Task Force on the Future of Legal Education. Member, 2012-present

American Bar Foundation Fellow, 2009-present

Association of American Law Schools

- Section on the Law School Dean Executive Committee, member 2009-2013. Co-Chair, 2012-2013
- Committee on Libraries and Technology, member 2007-10

Blackburn College, Carlinville, IL. Member of Board of Trustees, 2009-2013. Advisory Board, 2013-present

Chicago Bar Foundation, Postgraduate Academy Steering Committee, 2012-present

Clinton Administration Transition Team. Advisor on white collar crime enforcement priorities for incoming Clinton administration, 1992-93

Constitutional Rights Foundation of Chicago. Member of Board of Directors, 2005-present

The Constitution Project. Reporter for Sentencing Initiative, chaired by former Attorney General Edwin Meese and former Deputy Attorney General Philip Heymann, which advised legislatures and sentencing commissions on sentencing reform issues after U.S. Supreme Court's *Blakely* decision, 2004-2006

Cook County Justice for Children. Member of Board of Directors, 2012-present

Families Against Mandatory Minimums Foundation, Member, Strategic Litigation Advisory Board. 1996-2001

Illinois Sentencing Policy Advisory Council. Appointed member of new state agency created to advise legislature on sentencing issues, 2009-present

United States Supreme Court. Briefed and argued *pro bono* case involving mandatory minimum sentencing statute. *United States v. LaBonte*, 520 U.S. 751 (1997)

SELECTED PUBLICATIONS

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COMMENTARY

Advancing Transparency in Law School Employment Data: The ABA's New Standard 509, The Bar Examiner (Dec. 2012)

Current Crisis Reshapes Legal Education, Chicago Lawyer (September 2012)

Evolving Standards of Accreditation, Chicago Lawyer (August 2011)

The Future of Legal Education in Uncertain Times, Chicago Daily Law Bulletin (March 10, 2010)

How to Choose a Law School, Chicago Lawyer (September 2008)

Occasional blog posts at *Above the Law* (<http://abovethelaw.com>) and *The Faculty Lounge* (www.thefacultylounge.org)

RECENT PRESENTATIONS

Legal Education: Crisis and Transformation, Niagara Foundation, October 2013

Re-imagining the Legal Workforce, NALP/ALI Lawyer Development Institute, October 2013

Deaning in the New Normal, Annual Meeting of the Association of American Law Schools, January 2013

Rules, Rankings and Reform in Legal Education, University of Connecticut Law School Symposium, November 2012

The Current Crisis in Legal Education and the Path Forward, Virginia State Bar Conclave on the Education of Lawyers, April 2012

What Law Schools Can Do to Foster Diversity in the Profession, National Conference of Bar Examiners Annual Conference, April 2012

Law School Accreditation and the Future of Legal Education, Federalist Society's National Lawyer's Convention, November 2011

Is there an Impending Crisis in Legal Education?, Lawyers Club of Chicago, September 2011

New Approaches to Legal Education, Concord Law School commencement address, July 2011

Assessing Student Learning Outcomes, Suffolk University School of Law faculty retreat, May 2011

Leveraging the Tenured Faculty Role, Harvard Law School/New York Law School Future Ed Conference, April 2011