

ENTERED
 JUDGE MICHAEL P. TOOMIN-0501
 APR 06 2012
 DOROTHY BROWN
 CLERK OF THE CIRCUIT COURT
 OF COOK COUNTY, IL
 DEPUTY CLERK

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

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IN RE APPOINTMENT OF SPECIAL PROSECUTOR)	No. 2011 Misc. 46
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)	The Honorable
)	Michael P. Toomin
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MEMORANDUM OF OPINION AND ORDER

Petitioners, Nanci Koschman, Susan Pazderski and Richard Pazderski, have moved for appointment of a special prosecutor to conduct an independent investigation of whether criminal charges should be brought against any person in connection with the the homicide of David Koschman in 2004 or the resulting investigation by the Chicago Police Department and the Cook County State's Attorney's Office. Respondent, Anita Alvarez, State's Attorney of Cook County, denies that the Koschman investigation was compromised or impeded by any illegal or improper action, and further maintains that petitioners have failed to establish any legal or factual basis that warrants disqualification and appointment of a special prosecutor in her stead.

The issues were briefed by the parties and, following oral argument, the matter was taken under advisement. The court now enters the following factual findings and conclusions of law.

BACKGROUND

Petitioners are the next-of-kin of David Koschman. Nanci Koschman is the mother of David Koschman. Susan Pazderski is Nanci Koschman's sister and David's maternal aunt. Richard Pazderski, Susan's husband, is David's uncle. The present petition has its genesis in a confrontation that occurred during the early-morning hours of April 25, 2004. Petitioners' allegations stem from a series of articles published in the Chicago Sun-Times during 2011, as well as redacted Chicago Police Department reports appended to the petition. Respondent counters with excerpts from sworn statements taken from occurrence witnesses by investigators of the Office of the City of Chicago Inspector General. Petitioners have likewise availed themselves of these materials in fashioning their reply. Although this court recognizes that portions of these sources may contain hearsay, rather than "facts" within the semblance of a trial record, the materials provide a backdrop for consideration of the fundamental legal issues raised by the petition¹.

During the evening hours of April 24, 2004, David Koschmann and a group of friends traveled to the area of Chicago commonly referred to as "Rush Street," a popular night-life setting in the city's Gold Coast environs. According to Nanci Koschman, David and a group of friends, including Scott Allen, James Copeland, Dave Francis, and Shaun Hageline, all of whom had recently turned 21-years-old, planned to explore the local bars and clubs.

¹ Hearsay is an out-of-court statement offered for the truth of the matter asserted therein, its value depending upon the credibility of the declarant. *People v. Murphy*, 157 Ill. App. 3d 115, 118, 509 N.E.2d 1323, 1325 (1987); see also Ill. R. Evid. 801 (a)-(c) (eff. Jan. 1, 2011). Yet, certain of such statements may be admissible for other purposes (*People v. Davis*, 130 Ill. App. 3d 41, 53, 473 N.E.2d 387, 396-97 (1984)), including to simply show that a statement was made, to characterize an act, to show its effect on the listener, or to explain the steps in an investigation. See M. Graham, *Graham's Handbook of Illinois Evidence* § 801.5, at 763-78 (10th ed. 2010); and Ill. R. Evid. 803 and 804. Admissions and prior inconsistent statements, which appear prominently in the parties' submissions here, are likewise not considered hearsay. Graham, §§ 801.9 and 801.14; and Ill. R. Evid. 801(d)(1), (2).

Between 2:30 and 3 a.m., after exiting an establishment, then known as Bar Chicago, they began walking westbound on Division toward Dearborn Street. The turn of events that followed was disputed by the participants and witnesses. However, there is no dispute that a confrontation ensued between Koschman's party and another group, including R.J. Vanecko, Craig Denham, and Bridget and Kevin McCarthy. None of the groups' participants were previously known to the other. Nor is it disputed that at the conclusion of the confrontation, Koschman was unconscious on the ground and was taken by ambulance to Northwestern Memorial Hospital where he subsequently died.

According to Scott Allen, " 'We were just walking down the street ... [Koschman] brushed shoulders with some guy. They were drunk. We were drunk as well. Words were exchanged.' " Shaun Hageline described the altercation as " 'arguing' " that continued despite efforts to calm the situation. Bridget McCarthy, the lone female member of the other group, likewise encouraged her companions to walk away from the situation. Hageline further described Koschman's behavior as follows, " 'He wasn't really letting it go. He was being kind of mouthy.' " According to Hageline, Koschman was primarily arguing with the largest member of the other group, allegedly Vanecko. James Copeland then saw that the individual arguing with Koschman " 'just clocks him.' " According to Copeland, " 'There was nothing physical of any kind until this guy throws a punch.' " Dave Francis, who also claimed to have seen the punch, stated that Koschman was " 'kind of walking forward, and he got hit.' " Koschman, who appeared to be knocked out by the blow, fell backwards off the curb, and struck his head on the pavement.

The three older men, including the one who hit Koschman, fled from the scene. However, one of them, Kevin McCarthy, was chased and tackled by Scott Allen, in front of a

police officer. McCarthy and his wife, in an unseemly lapse of candor, initially told the police they did not know the two men who ran away. Vanecko and Denham had already left the area in a cab and headed to another bar. When it was determined that McCarthy had not injured Koschman, he provided contact information to the police and was released.

On April 25, 2004, detectives conducted two interviews of witnesses to the confrontation. The first witness, Kevin McCarthy, described exiting a cab and seeing two groups of men arguing. One group seemed to be in their late teens, while the other appeared to be in their late twenties. The younger group seemed to be the aggressors in the confrontation. The situation escalated when one of the younger males pushed one of the older men into McCarthy's wife. In turn, McCarthy was also pushed by one of the younger males. As McCarthy was being pulled away from the incident by his wife, he turned to see the victim lying on the ground. However, he did not observe how that had happened.

Philip Kohler, an independent witness, was in the area with a friend, Michael Connolly, when they came upon an altercation involving eight men, one group of three and another group of five. According to Kohler, Koschman got into the center of the group and was subsequently pushed or shoved, causing him to fall to the ground. Kohler denied knowing any of the participants. He likewise was unaware of what sparked the incident. Although Kohler admitted having consumed a few alcoholic beverages that night, he denied being intoxicated.

Over the following days, Koschman was treated for his injuries, including three cranial fractures, a subdural hematoma, and cerebral edema or swelling of the brain. Those treatments included two heart procedures, including coronary bypass surgery, and two operations to stem the chronic swelling of his brain. Despite these interventions, Koschman's condition continued

to deteriorate. On May 6, 2004, he was taken off life-support and died moments later from craniocerebral injuries due to blunt trauma.

From April 25th through May 6th, no additional interviews were conducted, despite a notation in police general progress reports indicating efforts would be made to contact other witnesses in what was then classified as a simple battery case. A review of all of the reports created throughout the course of the Koschman investigation reflects: "The inventory confirms that the police investigation came to a complete stop just hours after Koschman was rushed to Northwestern Memorial Hospital, unconscious with a skull fracture, early on April 25, 2004." According to respondent, the interruption in the investigation resulted from previously scheduled furloughs of the two detectives assigned to the case. On May 8, 2004, Koschman's death was ruled a homicide. Consequently, the original battery case was elevated by the detectives to a "Homicide / First Degree Murder" investigation.

After the reclassification, between May 10 and 12, 2004, the investigation proceeded with detectives from Area 3 conducting interviews of the witnesses. Among those interviewed were Koschman's friends: Scott Allen, James Copeland, Dave Francis, and Shaun Hageline; members of the other group, Craig Denham and Bridget and Kevin McCarthy; as well as the two independent bystanders, Philip Kohler and Michael Connolly. Vanecko declined to be interviewed. Although Vanecko, as well as McCarthy and Denham, appeared in a lineup viewed by Koschman's friends and the bystanders, Vanecko was not identified. McCarthy and Denham were both identified by some of the witnesses as having been present for the altercation, but not having pushed or struck Koschman.

Following the interviews and lineups, the detectives contacted Assistant State's Attorney Darren O'Brien, the supervisor of the Felony Review Unit of the Cook County State's

Attorney's Office. He traveled to Area 3, where he was briefed on the course of the investigation and provided with the available reports. O'Brien then interviewed "all available witnesses," other than the bystanders, and conferred with the detectives conducting the investigation. They agreed that charges could not be sought as nobody could identify who shoved or punched Koschman and because the victim was the aggressor in the incident. According to Mr. O'Brien, speaking in 2011:

"This was a case that had three major problems, in my opinion, before I could even think about pulling the trigger on charging anybody. There was contrary information given about the contact that was made between somebody in Vanecko's group and Koschman. Some people said it was a shove. Some people said it was a punch. ... I couldn't find anybody that could identify the shover or pusher."

O'Brien added that he concluded Koschman was the aggressor based on what Koschman's friends told him about Koschman, "when he was drinking, he was an aggressive type of personality. And in this particular case, he was the aggressor. He would not let it go."

In January, 2011, the investigation into Koschman's death was reopened. This time the case was assigned to officers from Area 5 Detective Division. The impetus for the reinvestigation apparently stemmed from a Freedom of Information Act request submitted to the Chicago Police Department by the Chicago Sun-Times on January 4, 2011. After receiving redacted copies of the police reports from 2004, the Sun-Times located and attempted to interview all of the witnesses. Several of the witnesses, particularly Koschman's companions, challenged the veracity of the accounts recorded by the detectives in 2004, particularly

descriptions of Koschman running or lunging at the other group before he was struck. According to Scott Allen: “ ‘It was like a circle of all of us. There was no room to turn.’ ”

Notably, in 2011, Scott Allen and Shaun Hageline insisted they identified the person who struck Koschman at the lineup. In an interview with Chicago Sun-Times reporters, Allen claimed that he believed he picked out the correct person, but was told by police officers that he had selected one of the fillers. Recalling the initial investigation, Hageline told reporters, “ ‘When they were interviewing us, I felt we were going to be the guys on trial. It almost seemed like they were trying to intimidate us.’ ” Additionally, Connolly, one of the bystanders, challenged the report attributed to him describing Koschman as aggressive toward the other group. According to Connolly, this statement was a “ ‘flat-out lie.’ ”

In the course of the reinvestigation, Denham and Kevin McCarthy both relied on their previous statements. However, Bridget McCarthy was directed by her husband not to speak with investigators. Efforts to contact Vanecko were unavailing.

At the conclusion of the reinvestigation, based on the witness interviews in 2004 and 2011, detectives determined that:

“David KOSCHMAN, having yelled, ‘Fuck you! I’ll kick your ass!’ by breaking away from his group of friends and aggressively going after [REDACTED] was clearly the assailant in this incident. These aggressive actions caused [REDACTED] to take action and defend himself. This investigation has shown that [REDACTED] alone, punched David KOSCHMAN, which caused him to fall backwards and injure his head, which ultimately caused his death.”

In turn, the Area 5 detectives sought to have the case classified, “CLEARED CLOSED/EXCEPTIONALLY.” Despite having spoken with Darren O’Brien during the

reinvestigation, the detectives made no additional contact with the State's Attorney's Office concerning the possible filing of any charges. Upon learning of this result, Koschman's friends indicated they were willing to take lie detector tests concerning their accounts of the confrontation.

Following the reinvestigation, the State's Attorney's Office, after reviewing the reports generated, again concluded there was insufficient evidence to warrant the filing of charges in connection with Koschman's death. Specifically, State's Attorney Alvarez released a statement indicating there was no " 'good-faith basis to bring charges.' " According to Ms. Alvarez, the fact that five out of the nine witnesses gave contradictory statements between 2004 and 2011 would make the case difficult to prove. Alvarez reportedly stated that the failure of the witnesses to positively identify who struck Koschman in the police lineups was " 'a fatal flaw' " precluding the filing of charges. Alvarez added, " 'The lineups are significant. ... If you're the accused and you're in a lineup and don't get identified, that's good for you.' " These deficiencies, coupled with the absence of any new evidence, precluded the State's Attorney from bringing charges or taking the case to the grand jury.

On March 24, 2011, the State's Attorney sought the assistance of the Illinois State Police to investigate the handling of the Koschman case by the Chicago Police Department. According to Alvarez, " 'I think there should be an independent police investigation.' " She further added, " 'I would welcome an independent agency looking into this, like the state police, basically to determine if it was a complete investigation and whether the witnesses' statements were accurately recorded . . . I'm unaware of the police department doing anything underhanded.' " Alvarez's letter to then-interim-director of the Illinois State Police, Patrick Keen, cited "new information" based on claims by witnesses about inconsistencies in the investigation, including

Scott Allen's belief that he did, in fact, identify Vanecko in the lineup. At the time of the request, Ms. Alvarez denied having any concerns about her office's initial handling of the case. Alvarez stated, "We handled this case like we would handle any other case." The fact that no one identified Vanecko, coupled with the accounts indicating Koschman was the aggressor, supported the initial conclusion not to seek charges. Having reviewed the official reports and detectives' street files, Alvarez likewise concurred in the 2011 police decision to not pursue charges. Nevertheless, Ms. Alvarez believed an independent investigation was warranted adding, "It would be a much cleaner investigation if it was somebody who hasn't been involved in the case."

According to a March 26, 2011, Chicago Sun-Times article, "Alvarez said her office shouldn't be the agency to examine the police investigation because her staff has been involved in the case from the start, determining in 2004 that there wasn't enough evidence to warrant filing charges against the 6-foot-3, 230-pound Vanecko." Although a file was sent to the State Police and that agency had initially agreed to conduct the investigation requested by Alvarez, on April 4, 2011, the State Police reversed course and returned the case file, informing Alvarez's Chief of Staff Dan Kirk that it was "unwilling to accept the investigation." In response, Alvarez's spokeswoman, Sally Daly, issued the following statement, "We are surprised and disappointed by their decision. It's unclear why they've changed course. The state's attorney remains committed to an independent investigation of this case." In returning the case file, Keen suggested that the investigation should be pursued by naming an independent special prosecutor with the power to convene a grand jury to hear testimony under oath or by another criminal justice entity with similar powers.

Contemporaneously, it was reported that City of Chicago Inspector General Joseph Ferguson had convened his own investigation into the Police Department's handling of the Koschman case. However, Ferguson declined to comment on the veracity of those reports.

Curiously, it later was revealed that the original Chicago Police Department files relating to the Koschman case "were missing for months – possibly years," and had been discovered at Area 3 during the summer of 2011. A news account extrapolated that this discovery meant the Area 5 detectives who reinvestigated the case did so using "an incomplete set of records when they closed the case on March 1, determining for the first time that Vanecko threw the fatal punch but deciding that he shouldn't be charged." However, the contents of the newly discovered files reportedly would not alter the conclusion reached by the reinvestigation. State's Attorney Alvarez's spokeswoman Sally Daly expressed surprise at the revelation and explained, "Given the ongoing investigation by the city's inspector general, the state's attorney's office has contacted that office to inform them of this development and to provide a copy of the materials that were presented to us ... by the Chicago Police Department." Alvarez's office had no additional comment.

Coincidentally, the State's Attorney's Office was likewise afflicted with what might well be regarded as "the missing files syndrome." According to Alvarez, her office could not locate any records relating to the Koschman case. Former State's Attorney Richard Devine, who was State's Attorney in 2004, expressed surprise. He stated, "Normally, if some matter is presented to the state's attorney's office – some kind of investigation or review – there's a record that's part of the system." Included among the missing records were the Felony Review file as well as log entries reflecting consultation between the State's Attorney's Office and the Chicago Police Department. During the time period between April 25, 2004, and May 20, 2004, there

reportedly were 2,268 calls between Chicago police officers and the State's Attorney's Office, but none related to the Koschman case. Additionally, O'Brien himself said he discussed the case with then-chief of criminal prosecutions for the State's Attorney's Office, Bernard Murray, who did not recall discussing it, but did not doubt that he had. Upon being apprised of the missing records, State's Attorney Alvarez suggested that it was possible no case file was ever created. However, as noted, a file had been tendered to the Illinois State Police and subsequently returned.

On August 6, 2011, a Chicago Sun-Times article reported that Alvarez's office was "blocking" Cook County Inspector General Patrick Blanchard's efforts to investigate the Koschman case, contrary to her earlier calls for an independent investigation. According to Blanchard, he requested the opportunity to open an investigation, but was rejected. In response, the State's Attorney's Office indicated that it had not received an official request from Blanchard concerning his desire to pursue one. Blanchard explained that, in meeting with members of Alvarez's staff, he was told he lacked the jurisdiction to investigate the State's Attorney's Office because it "technically is a branch of state government." Nonetheless, at the same time, Alvarez's spokeswoman indicated her office was in full cooperation with the City of Chicago Inspector General's investigation.

Among the revelations derived from the newly discovered general progress reports was a notation describing Vanecko's behavior immediately before striking Koschman as "very aggressive." This entry purportedly was scratched out, but remained legible. Another report, reflecting, "The larger of the three guys now becomes very aggressive," also was scratched out. When inquiry was directed to Detective Ronald Yawger, one of the original Area 3 investigators, he told a reporter, " 'I don't know what you're talking about.' " Additionally, yet another street

file notation entry noted, "V DAILEY [*sic*] SISTER SON," an apparent reference to Vanecko being the son of former-Mayor Richard M. Daley's sister Mary. Finally, one progress report reflected Michael Connolly's uncertainty as to whether Koschman was an " 'aggressor or peacemaker,' " while the final detective report omitted the word "peacemaker."

Detective James Gilger, who was one of the detectives assigned to the 2011 reinvestigation, reported that the missing reports were found in a file discovered at Area 3. Other reports were contained in a file retired Detective Yawger provided to the Chicago Police Department. Yawger denied having anything in his possession that was not in the department's files. In his final report on the matter, Gilger stated that he " 'determined that none of the new information would have changed the outcome of the investigation.' "

As noted, respondent has referenced various witness statements made during the course of the joint investigation undertaken by itself and the Office of the Inspector General for the City of Chicago (OIG). The disclosure of select portions of source documentation prompted petitioners to seek release of those materials for the preparation of their reply. Following briefing by the parties and a hearing, petitioners' motion to compel was granted, after which respondent turned over the referenced documents. In turn, petitioners availed themselves of those materials in fashioning their reply in support of the instant petition. Although the parties differ as to the import of those interviews, suffice it to say each side selects portions supportive of their respective position. In sum, those interviews relate to the witnesses' recollections of the initial incident as well as the veracity of police reports memorializing those statements. Those materials are not of record except insofar as select portions were used by the parties. The content of those excerpts will be addressed as they bear upon the arguments advanced by the parties.

ANALYSIS

The common thread connecting petitioners' claims stems from the belief that the investigation of David Koschman's death was influenced by Mr. Vanecko's membership in the most powerful political family in Cook County. Based upon the broad reach of that relationship, petitioners aver that the investigation was "plagued with inexplicable lapses, false official records, and procedural irregularities" suggesting the possibility that "officials of the Police Department and the State's Attorney's office may have been led by favoritism or other improper motives to obstruct the investigation so that Mayor Daley's nephew did not face criminal charges."

Respondent denies petitioners' contentions of improper influence in the investigation of Koschman's death or the existence of any criminal misconduct or other procedural irregularities. Moreover, as noted, respondent maintains that the instant petition is factually and legally deficient.

Section 3-9005 of the Counties Code cloaks the State's attorney with the duty to commence and prosecute all actions, civil or criminal, in the circuit court for his county in which the people of the State or county may be concerned. 55 ILCS 5/3-9005 (West 2010). As a member of the executive branch of government, the public prosecutor is vested with exclusive discretion in the initiation and management of a criminal prosecution. *People v. Novak*, 163 Ill. 2d 93, 113, 643 N.E.2d 762, 772 (1994). In this regard, it is the responsibility of the State's Attorney to evaluate evidence and other pertinent factors to determine what offenses, if any, can and should properly be charged. *People ex rel. Daley v. Moran*, 94 Ill. 2d 41, 51, 445 N.E.2d 270, 274-75 (1983). As the chief legal officer of the county, the State's Attorney is responsible

for the professional conduct and acts of his or her assistants. *People v. Dread*, 27 Ill. App. 3d 106, 112, 327 N.E.2d 175, 179 (1975).

Although decidedly aware of these fundamental principles, our General Assembly nonetheless has recognized that the State's Attorney's powers and duties are not absolute. Thus, Section 3-9008 of the Counties Code provides:

“Whenever the 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[.]” 55 ILCS 5/3-9008 (West 2010).

This limitation upon the public prosecutor's statutory powers has endured for more than 160 years, providing the standard for determining when a State's Attorney should be removed from a case due to improper interest. See Laws 1847 p. 18, §1; *People v. Lang*, 346 Ill. App. 3d 677, 680-81, 805 N.E.2d 1249, 1252 (2004). The purpose of this enactment is to “prevent any influence upon the discharge of the duties of the State's Attorney by reason of personal interest.” *In re Harris*, 335 Ill. App. 3d 517, 520, 781 N.E.2d 549, 551 (2000), quoting *People v. Morley*, 287 Ill. App. 3d 499, 503-04, 678 N.E.2d 1235, 1237 (1997).

However, as a threshold matter, it should be clear that prosecutorial discretion is an essential component of our criminal justice system. As noted, the State's Attorney is vested with broad prosecutorial discretion inherent in decisions to bring charges or decline prosecution. *Novak*, 163 Ill. 2d at 113, 643 N.E.2d at 772-73. Control of criminal investigations is the prerogative of the executive branch, subject only to judicial intervention to protect rights. *Dellwood Farms, Inc. v. Cargill, Inc.*, 128 F.3d 1122, 1126 (1997). Generally, the exercise of

prosecutorial discretion is not judicially reviewable. *Dellwood Farms*, 128 F.3d at 1125, citing *United States v. Armstrong*, 517 U.S. 456, 464-65, 134 L. Ed. 2d 687, 698-99, 116 S. Ct. 1480, 1486 (1996). Accordingly, the office of special prosecutor cannot be used to second guess the State's Attorney's charging decisions. As the court noted in *Baxter v. Peterlin*, 156 Ill. App. 3d 564, 567, 509 N.E.2d 156, 158 (1987):

“No good purpose would be served by permitting a person in the plaintiff's position to claim impropriety on the part of a prosecutor based upon hindsight, because he disagreed with the prosecutor's conclusions regarding a particular case.” *Baxter*, 156 Ill. App. 3d at 567, 509 N.E.2d at 158.

The term “interested” as used in the disqualification statute has been interpreted by our supreme court to mean that the State's Attorney must be interested as: (1) a private individual; or (2) an actual party to the action. *Environmental Protection Agency v. Pollution Control Board*, 69 Ill. 2d 394, 400-01, 372 N.E.2d 50, 52 (1977). A disabling personal interest was earlier found in *Lavin v. Board of Commissioners of Cook County*, 245 Ill. 496, 92 N.E. 291 (1910), involving vote fraud in ballots cast for the State's Attorney's re-election. Similarly, in *People ex rel. Hutchinson v. Hickman*, 294 Ill. 471, 128 N.E. 484 (1920), appointment of a special prosecutor was proper to pursue perjury charges stemming from an attempt to disbar the duly elected State's Attorney. An identical result obtained in *McDonald v. County Board*, 146 Ill. App. 3d 1051, 497 N.E.2d 509 (1986), where the State's Attorney, having a personal interest in a controversy with the sheriff concerning shared investigative resources, also was faced with the distinct possibility of being called as a witness in the matter.

Over time, the reach of Section 3-9008 has been expanded to include situations in which the State's Attorney has a *per se* conflict of interest in the case. Guidance as to what may

constitute such interest may be found in an unbroken line of precedent. In *People v. Doss*, 384 Ill. 400, 51 N.E.2d 517 (1943) and *People v. Moretti*, 415 Ill. 398, 114 N.E.2d 337 (1953), where the State's Attorney was a potential witness before the grand jury, the appointment of a special prosecutor to act in those cases was the regular and proper procedure to be followed. Likewise, in *Sommer v. Goetze*, 102 Ill. App. 3d 117, 429 N.E.2d 901 (1981), a special prosecutor was mandated in a civil proceeding where an assistant State's Attorney was both the complainant and key witness. See also *People v. Lanigan*, 353 Ill. App. 3d 422, 818 N.E.2d 829 (2004) (State's Attorney's representation of deputy sheriffs on their fee petitions contemporaneously with their prosecution created a *per se* conflict of interest).

Rooted in our criminal justice system is a recognition that “ ‘an attorney cannot represent conflicting interests or undertake to discharge inconsistent duties.’ ” *People v. Courtney*, 288 Ill. App. 3d 1025, 1031-1032, 687 N.E.2d 521, 525 (1997), quoting *People v. Gerold*, 265 Ill. 448, 477, 107 N.E. 165, 177 (1914). “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 between conflicting duties.” *Gerold*, 265 Ill. at 477, 107 N.E. at 177. It is axiomatic that the rule is designed to protect against both an actual conflict of interest and the appearance of such a conflict. *Courtney*, 288 Ill. App. 3d at 1032, 687 N.E.2d at 525.

More recently, our jurisprudence instructs that a disqualifying interest may also be found where the State's Attorney's continued participation in the case would create an appearance of impropriety, thereby undermining the integrity of the criminal justice system. *People v. Bickerstaff*, 403 Ill. App. 3d 347, 352, 941 N.E.2d 896, 900 (2010); see also *Lang*, 346 Ill. App. 3d at 682-83, 805 N.E.2d at 1254, quoting *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 161 n. 3,

128 L. Ed. 2d 89, 98-99 n. 3, 114 S. Ct. 1419, 1438 n. 3 (1994) (Scalia, J. dissenting) (“Wise observers have long understood that the appearance of justice is as important as its reality.”)

Prevailing precedent dictates that the decision to appoint a special prosecutor under section 3-9008 is within the sound discretion of the circuit court. *In re Appointment of Special Prosecutor*, 388 Ill. App. 3d 220, 232, 902 N.E.2d 730, 742 (2009); *In re Harris*, 335 Ill. App. 3d at 520, 781 N.E.2d at 551; and *People v. Arrington*, 297 Ill. App. 3d 1, 3, 696 N.E.2d 1229, 1230-31 (1998). See also *Hutchens v. Wade*, 13 Ill. App. 3d 787, 790, 300 N.E.2d 321, 323 (1973) (“[F]or a meaningful exercise of judicial discretion, the court’s attention must in some way be directed to the subject matter requiring a decision”). Accordingly, the appointment of a special prosecutor is appropriate only where a petitioner pleads and proves “specific facts” showing that the State’s Attorney would not zealously represent the People in a given case due to the alleged conflict. *Harris*, 335 Ill. App. 3d at 522, 781 N.E.2d at 552-53, citing *Baxter*, 156 Ill. App. 3d at 566, 509 N.E.2d at 158.

However, even if such conflict is found, “ ‘the appointment of a special state’s attorney is not mandatory, the statute only requiring that such an appointment “may” be made.’ ” *Lanigan*, 353 Ill. App. 3d at 429-30, 818 N.E.2d at 837, quoting *Sommer*, 102 Ill. App. 3d at 120, 428 N.E.2d at 903. In *Lanigan*, although the trial judge found a disqualifying conflict, because he determined that defendants were not acting within the scope of their duties as deputy sheriffs, denial of attorneys’ fees was upheld as a proper exercise of the court’s discretion. *Lanigan*, 353 Ill. App. 3d at 430, 818 N.E.2d at 837.

The foregoing principles have particular application in the case at hand. Petitioners’ claim of “interest” derives in part from the allegation that the State’s Attorney’s Office faces an institutional conflict of interest arising from the fact that one of its employees, Assistant State’s

Attorney Darren O'Brien, is both (a) a key witness in the investigation into how law enforcement handled the Koschman case and (b) a potential subject of an inquiry into whether obstruction of justice and official misconduct was committed in the course of that investigation. As head of Felony Review and as the assistant State's Attorney assigned to the initial investigation, O'Brien reviewed the police reports, consulted with the original team of detectives and interviewed the key witnesses in the case. O'Brien has stated that he and the police thereafter agreed that no charges should be brought because none of the witnesses could identify the person who had punched or shoved David Koschman and because Koschman's friends "told [O'Brien] that Koschman . . . was the aggressor." See Chicago Sun-Times, March 20, 2011, at 11A.

Petitioners maintain that Mr. O'Brien's connection to the present inquiry is further heightened by what transpired during the 2011 re-investigation. During the course of that inquiry a different team of detectives re-interviewed Koschman's companions, as well as the two independent witnesses. After again concluding that Koschman was the "aggressor," the police determined that Vanecko had properly acted in self-defense and closed the case. As noted, the State's Attorney's Office concurred in that analysis and decision. However, Koschman's friends, as well as an independent witness, Michael Connolly, assailed the integrity of the police investigations, declaring that the statements attributed to them labeling Koschman as the "aggressor" were either false or distorted. By reason of this development, petitioners contend that O'Brien is now a potential key witness in any further inquiry into the matter that may result.

Petitioners charge that Mr. O'Brien's dual role as prosecutor and witness presents the troubling specter of a disqualifying conflict of interest. Arguably, the State's Attorney, through her public pronouncements, has given vitality to this allegation. In March 2011, upon learning

that some of the Koschman witnesses were denying the version of events attributed to them in police reports, Ms. Alvarez, called for an independent investigation:

“Alvarez said her office shouldn’t be the agency to examine the police investigation because her staff has been involved in the case from the start, determining in 2004 that there wasn’t enough evidence to warrant filing charges against the 6-foot-3, 230 pound Vanecko.” Chicago Sun-Times, March 26, 2011, at 10.

The State’s Attorney’s public pronouncements lend support to petitioners’ claim of an institutional conflict of interest. Consider that upon further investigation, Ms. Alvarez, or perhaps her successor in office determines that sufficient evidence exists to warrant charges against Mr. Vanecko. In that event, Koschman’s companions, as well as the independent bystanders, could become prosecution witnesses offered to negate Vanecko’s claim of justifiable force. In turn, Mr. O’Brien, as well as certain detectives, could be called by Vanecko to offer impeaching testimony that the State’s witnesses originally stated that Koschman indeed was the aggressor. Under such circumstances, the State’s Attorney’s theory of prosecution would be contradicted and undermined by the testimony of a key employee, as well as police witnesses. It is difficult to perceive of a more plainly problematic conflict of interest should this potential scenario become a reality. Equally troubling, is a concern that the recognition of such a disabling conflict could militate against a reasoned decision to bring charges against Vanecko.

However, the reality of the foregoing scenario occurring may be belied by respondent’s perceptions of the present posture of the case. The State’s Attorney’s disclosure of an ongoing review of the matter with its “investigative partners” at the OIG professedly undermines petitioners’ claim that occurrence witnesses’ statements were falsely recorded or distorted.

According to respondent, this ongoing investigation involves non-public proceedings that, upon completion, will enter into a good-faith determination of whether any criminal charges are warranted.

Respondent maintains that as a result of these investigative efforts it has now acquired sworn statements of several of the Koschman witnesses directly refuting what reportedly was given to the Sun-Times, even acknowledging that what they told reporters was false. Notably, respondent avers that two of the witnesses who earlier told the Sun-Times they had seen a punch to Koschman have recently stated under oath that this was not true. Similarly, other Koschman witnesses now reportedly state they were not being truthful when they told reporters they were sure that they had picked Richard Vanecko out of the line-up, but the police covered it up.

However, petitioners assert that their review of OIG source material compels a markedly contrary conclusion. In their reply, petitioners present explicit and detailed sworn statements of the various occurrence witnesses obtained by OIG investigators. Essentially, those statements ratify the Sun-Times accounts attributed to those individuals. None of the witnesses lends credence to respondent's contention that David Koschman was to any degree physically aggressive. Moreover, all of the witnesses state or imply that the police reports inaccurately memorialize their statements to police detectives. Petitioners' reliance upon these OIG materials substantially bolsters the claim that occurrence witnesses' statements were indeed falsely recorded or distorted.

Second, petitioners' appraisal necessarily impacts upon their allegations of potential criminal activity by the police or assistant State's Attorney O'Brien. Petitioners aver there is "probable cause to believe that police investigators and ... ASA O'Brien *may have committed* obstruction of justice" and "*could have conspired* to commit official misconduct." (Emphasis

added.) As noted, the underlying basis of such charges rests upon accusations that the police falsified eyewitness accounts of the occurrence and Mr. O'Brien concurred in that action. Respondent chides petitioners' apparent misunderstanding that the probable cause standard could be met by allegations that an individual "may have committed" or "could have conspired." While respondent's contention may have merit, similar language has been employed in other cases. See *In re Special Prosecutor*, 164 Ill. App. 3d 183, 185, 517 N.E.2d 682, 683 (1987) (allegations suggesting that obstruction of justice, perjury, and official misconduct "*may have been committed*" in connection with an inaccurate report prepared by the State's criminal investigator and testimony adduced regarding its contents. (Emphasis added.)) Even assuming that the probable cause standard has not been adequately plead, there remains specific factual allegations that law enforcement officials falsified or distorted occurrence witness' accounts. Here, contrary to the situation in *Harris*, 335 Ill. App. 3d at 525, 781 N.E.2d at 555, there are specific facts or circumstances showing police and prosecutorial misconduct. Because those allegations have not been rebutted by this record, petitioners' claim of an institutional conflict of interest has merit.

Petitioners further contend that State's Attorney Alvarez retains a clear political and personal interest in the case sufficient to warrant appointment of a special prosecutor. This assertion is bottomed on the reviewing court's pronouncement in *Baxter v. Peterlin*, that "a political alliance may create sufficient conflict of interest to require appointment of a special prosecutor." *Baxter*, 156 Ill. App. 3d at 566, 509 N.E.2d at 158. Here, the claim derives from what petitioners characterize as Ms. Alvarez's suspect statements defending the work of the Chicago Police Department and her Felony Review Unit, as well as her concurrence in their appraisal of insufficient evidence to charge Vanecko. Petitioners conclude that because Ms.

Alvarez has already committed herself and her office to the position that employees within the State's Attorney's Office are innocent of any wrongdoing, she is in no position now to conduct the kind of objective "fresh look" that this matter requires.

In *Baxter*, a local police officer sought appointment of a special prosecutor to prosecute alleged wrongdoing by the mayor of Ottawa, Illinois. In his complaint, plaintiff alleged that the defendant State's Attorney had a disqualifying interest in any prosecution of the mayor because of a political relationship between themselves. The complaint specifically averred that defendant:

“ [Believed] that his personal and political fortunes were intertwined with those of [Mayor] James M. Thomas who was and has been a politically popular office holder loyally supported by the Republican party for more than a decade.’ ”

Baxter, 156 Ill. App. 3d at 565, 509 N.E.2d at 157.

Petitioners' reliance on *Baxter v. Peterlin* appears to be misplaced. In *Baxter*, the court first observed that a "political alliance" is an amorphous concept. "It might range from a prosecutor belonging to the same political party as the person he is called upon to prosecute, to a situation in which a prosecutor is clearly beholden to a potential defendant for political reasons." *Baxter*, 156 Ill. App. 3d at 566, 509 N.E.2d at 158. In declining to disqualify the elected State's Attorney, the *Baxter* court recognized:

“Before a court need appoint a special prosecutor because the State's Attorney has a conflict of interest because of a 'political alliance,' a petitioner must plead and prove specific facts regarding the nature of the alliance as well as facts tending to show that the State's Attorney would not zealously represent the People of the

State of Illinois because of this alliance.” *Baxter*, 156 Ill. App. 3d at 566, 509 N.E.2d at 158.

Here, as in *Baxter*, the allegations concerning a political or personal alliance are speculative and conclusory. Petitioners’ reply attempts to buttress their request for a special prosecutor asserting the existence of a relationship between State’s Attorney Alvarez and former-Mayor Richard M. Daley. Support for this claim is purportedly founded upon photographs from Alvarez’s facebook account depicting her with Mr. Daley. One dates from her swearing-in as an assistant State’s Attorney in 1986, when Daley was the State’s Attorney, and the other is from the Mexican Independence Day parade in 2010. These attachments are simply photographic-opportunities depicting where their paths intersected. They no more reflect a relationship, alliance, or affinity than a photograph of John Wayne Gacy with First Lady Rosalind Carter or other political figures. Accordingly, petitioners’ allegations of a disqualifying personal or political interest must fail.

In their third and final ground to disqualify Ms. Alvarez, petitioners argue that a special prosecutor is required here because the State’s Attorney’s continued involvement “would create the appearance of impropriety in the prosecution of a defendant.” See *Bickerstaff*, 403 Ill. App. 3d at 352, 941 N.E.2d at 900; see also *Lang*, 346 Ill. App. 3d at 684, 805 N.E.2d at 1255 (assistant State’s Attorney’s affirmative and surreptitious efforts to prosecute defendant for driving on a revoked license created an appearance that the State’s Attorney’s Office was obsessed with finding evidence to sustain a conviction). Relying upon *People v. Courtney*, 288 Ill. App. 3d at 1032, 687 N.E.2d at 525, petitioners maintain that in the case at hand there is clear and specific evidence demonstrating that the State’s Attorney’s continuing participation in the investigation concerning Koschman’s death would exacerbate the appearance of impropriety and

prevent the fair administration of justice. Respondent, however, denies that any evidence of impropriety exists, asserting that petitioners' allegations amount to nothing more than a disagreement with the State's Attorney's initial assessment of the available evidence in making a charging decision.

Although petitioners do indeed take issue with the State's Attorney's assessment of the evidence, as seen, appointment of a special prosecutor cannot be used to second guess the prosecutor's charging decisions. *Baxter*, 156 Ill. App. 3d at 567, 509 N.E.2d at 158. However, here, other fundamental concerns obtain, lending support for this ground of disqualification. The cornerstone of petitioners' impropriety claim encompasses a series of alleged procedural irregularities that purportedly cast suspicion upon the integrity of the Koschman homicide investigation. Among petitioners' perceived irregularities are the following allegations:

- The absence of any recorded police investigation activity from the immediate aftermath of the assault on April 25, 2004 until May, 10, 2004, four days after the Medical Examiner had classified Koschman's death as a homicide.
- The absence of any attempt to question Vanecko prior to May 20, 2004, despite the fact that Bridget McCarthy had identified him a full week earlier.
- The initial failure of the Chicago Police to identify Vanecko as the person who punched Koschman given that he was the largest of the male whites in the group who matched the description of the offender.
- The false identification of Koschman as the aggressor in police reports prepared in 2004 and 2011.
- The belated discovery, in the summer of 2011, of earlier files reflecting that Vanecko was indeed the aggressor and identifying him as Mayor Daley's nephew.

- The missing Felony Review file of Darren O'Brien, who interviewed occurrence witnesses, as well as the absence of any felony review logs depicting when the Chicago Police Department sought consultation on the Koschman case.

Experienced practitioners in our criminal justice system may well question whether petitioners' perceived deficiencies and irregularities suffice to establish a disqualifying impropriety. Although the allusion may be fleeting, judges and lawyers do periodically encounter irregularities similar to those complained of by petitioners, including inexplicable lapses, recanted statements, changing testimony, missing reports, and others. While perhaps not widespread, these anomalies do occur. Nonetheless, determinations of impropriety should not be confined to those of us who labor within the well of the court. Rather, it is the overriding perception of the public that truly measures and judges those determinations. See *Lang*, 346 Ill. App. 3d at 685, 805 N.E.2d at 1256 (highlighting "the importance of maintaining the public's esteem for the State's Attorney's office and the integrity of the criminal justice system"); and *Courtney*, 288 Ill. Ap. 3d at 1033, 687 N.E.2d at 526 ("Justice and law must rest upon the complete confidence of the thinking public'" (internal quotations and citations omitted)). The admonition of Justice Scalia bears repetition, "Wise observers have long understood that the appearance of justice is as important as its reality." *J.E.B.*, 511 U.S. at 161 n. 3, 128 L. Ed. 2d at 98-99 n. 3, 114 S. Ct. at 1438 n. 3 (Scalia, J. dissenting).

In determining whether a State's Attorney's Office should be disqualified to alleviate the appearance of impropriety courts are guided by the test enunciated in *Bickerstaff* and *Lang*. Under that test, a judge must weigh the concern about the appropriateness of the office's prosecuting the case against countervailing considerations. These include: (1) the burden that would be placed on the State's Attorney's Office if the entire office had to be disqualified; (2)

how remote the connection is between the State's Attorney's Office and the alleged conflict of interest; and (3) to what extent the public is aware of the alleged conflict of interest. *Bickerstaff*, 403 Ill. App. 3d at 352, 941 N.E.2d at 901; *Lang*, 346 Ill. App. 3d at 683, 805 N.E.2d at 1254.

These salutary principles assuredly weigh into the considerations in the case at bar. As noted, here the alleged institutional conflict arises from the conduct of assistant State's Attorney Darren O'Brien as a participant in the Koschman investigation as well as a witness. As noted, O'Brien interviewed all of the Koschman witnesses. Importantly, at least one such witness described feeling more like an accused than a witness during the interview with Mr. O'Brien. Additionally, O'Brien clearly concurred in the self-defense theory, which will be addressed. His interest is self-apparent either as a participant in the recording of false statements or as a key witness.

As in *Lang*, requiring the appointment of a special prosecutor in an extraordinary case such as this would not be overly burdensome. Rather, the dynamics of the situation confirm the understanding that the adverse consequences to the State's Attorney's Office would be minimal. See *Lang*, 346 Ill. App. 3d at 685, 805 N.E.2d at 1256. Given the unique circumstances of petitioners' allegations, the risk of opening the floodgates to burdensome petitions is simply not present here. Moreover, turning this investigation over to an independent prosecutor would relieve State's Attorney Alvarez and her office of any further efforts in this investigation and would also remove the specter of any adverse concerns emanating from her office's continued involvement. Notably, the State's Attorney herself in public declarations has called for an independent investigation.

Likewise, here the relationship between the State's Attorney's Office and the alleged conflict of interest is not remote. As in *Lang*, the conflict is triggered by the actions of the assistant State's Attorney himself. *Lang*, 346 Ill. App. 3d at 684-85, 805 N.E.2d at 1255-56.

Finally, given the widespread media coverage calling for appointment of an independent prosecutor, the public is well aware of the alleged conflict of interest emanating from this case. Manifestly, this case has been front page news on numerous occasions. Nor has that coverage been limited to the print media. Numerous electronic media outlets, extending as far as the blogosphere, have focused attention on this case over the course of the events, even to today. That the public is aware of the nature and scope of these proceedings in broad terms is not a matter of significant doubt.

Perhaps more troubling than the *Lang* considerations is a recognition that from the inception of the case and forward, the evolution of the investigation has raised questions that have yet to be satisfactorily answered. Initially, the police declined prosecution upon a determination that nobody could identify Richard Vanecko and because David Koschman was "clearly the offender." The prospect for instituting charges fared no better in 2011. Despite the unsettling revelation that Vanecko was named by detectives as the individual who killed Koschman, the police made no attempt to take Vanecko into custody. Once again, the detectives reasoned that because Koschman was "clearly the aggressor," Vanecko had justifiably availed himself of the doctrine of self-defense.

In both 2004 and 2011, the State's Attorney's Office, albeit under different administrations, concurred in the police decisions. Nonetheless, in May 2011, the prospect of a full and fair investigation was enhanced by State's Attorney Alvarez's concerns over the

accuracy of police accounts detailing certain witnesses' statements. Accordingly, Ms. Alvarez, for good reason, called for an independent investigation to reach the truth in the matter, stating:

“It would be a much cleaner investigation if it was somebody who hasn't been involved in the case.”

Although the Illinois State Police then agreed to review the Chicago Police investigation, after soon determining that it was not the proper entity to conduct that review, the case file was returned to the State's Attorney's Office with the suggestion that the matter be examined by an “independent special prosecutor who ... if warranted, could convene a grand jury to hear statements under oath.” As noted, the Inspector General for the City of Chicago then commenced a separate investigation eliciting cooperation from the State's Attorney's Office. The efforts of that investigation were significant. As the OIG investigation progressed, no fewer than six witnesses were extensively interviewed. The portions of those interviews included in petitioners' reply demonstrate significant detail and thoughtful questioning on the part of the investigators.

If Ms. Alvarez's actions served to instill public confidence in the integrity of the investigation, that expectation paled with the recent revelation that the further review was undertaken, in part, by an entity that indeed had been involved in the case, namely her office. The mixed signals flowing from this rather novel arrangement could well diminish public confidence in what understandably has been viewed as a high-profile investigation. Rather than calm the troubling waters, the current efforts undertaken by the State's Attorney's Office has raised additional problematic questions. Although respondent offers assurances that its ongoing review has been full and fair, petitioners imply that the claim of impartiality is feigned rather than real. Petitioners' allegation may well have merit, as respondent's contentions and

submissions before this court clearly manifest a decided interest in preventing Vanecko's prosecution.

While professing impartiality, respondent essentially has endeavored to denigrate the evidence against Vanecko, a rather unusual strategy for an objective prosecutor to embrace. As noted, the police and prosecutors initially declined to charge Vanecko in part because his identification was deemed inconclusive. That question no longer remains. Today, the thinking public is acutely aware of the fact that this case is no longer a "who done it." Rather, as Detective Gilger succinctly concluded in early 2011:

"This investigation has shown that [Richard Vanecko] alone, punched David Koschman, which caused him to fall backwards and injure his head, which ultimately cause his death."

Contrary to Gilger's professional opinion, respondent now offers an incongruous argument suggesting that Koschman was pushed, rather than punched. Respondent maintains that if Vanecko had simply shoved Koschman, that minimal contact would be consistent with a claim of self-defense. Objective onlookers might well discern that respondent's argument evokes a difference without a distinction. Whether push or punch, it concededly was the unlawful force Vanecko employed to propel Koschman to his untimely death. Under prevailing law and the undisputed facts in the case at hand, it was indeed force likely to cause great bodily harm, if not death.

Upon being apprised that Koschman met his death at the hand of an identifiable and known assailant, one might reasonably anticipate that law enforcement officials would bring the offender before the bar of justice. Mindful that probable cause determinations mandate that the police and prosecutors also consider the existence of potential defenses, here respondent seems

consumed with finding legal justification for Vanecko's use of deadly force. Yet, the right to employ justifiable force is an affirmative defense, the raising of which necessarily constitutes an admission by an individual that he committed the crime for which he is being prosecuted.

People v. Chatman, 381 Ill. App. 3d 890, 897, 886 N.E.2d 1265, 1272 (2008). Moreover, recourse to controlling principles clearly identifies strong legal and factual impediments to a valid claim of self-defense in the instant case.

Section 7-1 of the Illinois Criminal Code provides:

"A person is justified in the use of force against another when and to the extent that he reasonably believes that such conduct is necessary to defend himself or another against such other's imminent use of unlawful force. However, he is justified in the use of force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or another, or the commission of a forcible felony." 720 ILCS 5/7-1 (West 2002).

Inherent in the ability to raise a legitimate claim of justifiable force is the requirement that a person seeking to avail himself of the defense be able to present some evidence of six salient factors, to wit: (1) force was threatened against a person; (2) the person threatened was not the aggressor; (3) the danger of harm was imminent; (4) the threatened force was unlawful; (5) the person actually and subjectively believed a danger existed that required the use of force applied; and (6) the person's beliefs were objectively reasonable. *People v. Jeffries*, 164 Ill. 2d 104, 127-28, 646 N.E.2d 587, 598 (1995); *People v. Lee*, 311 Ill. App. 3d 363, 367, 724 N.E.2d 557, 561 (2000).

Here, the viability of the self-defense claim imputed to Vanecko by the police and prosecutors rests solely upon the oft-repeated conclusion that Koschman was the aggressor. Yet, that determination derives from conflicting statements provided by Koschman's companions as well as independent witnesses suggesting that Koschman was verbally rather than physically aggressive. Vanecko's friends provided no meaningful insight, claiming their backs were turned when Koschman was struck. However, even assuming Koschman was the aggressor, that determination should only be the start of the inquiry. Adherence to the salient factors noted would have been far more telling. First, there is no credible evidence that Koschman employed any physical force against Vanecko. On the contrary, the quoted materials from the OIG investigation incorporated in petitioners' reply clearly undermine that claim. Second, there is only conflicting evidence that Koschman was the aggressor, albeit verbally. Third, there is no indication that there was any danger of imminent harm to Vanecko, particularly given the disparity in size between himself (6'3", 230 pounds) and Koschman (5'5", 140 pounds). Fourth, the submissions before this court are barren of any suggestion, much less evidence, that Vanecko actually and subjectively believed that a danger existed that required the use of force he applied. If nothing else, one aspect of the police investigation is uncontroverted, no police officer or prosecutor ever interviewed or spoke to Vanecko. In fact, Detective Yawger, in an interview with the Sun-Times, lamented how Vanecko's attorney frustrated his efforts to speak with his client after initially promising Yawger that Vanecko would talk to investigators.

Yet, it is the existence of a person's subjective belief that the evidence must show. *People v. Malvin Washington*, Ill. Sup. Ct., No. 110283, January 20, 2012 ¶48. In the absence of such evidence, an objective observer might well express amazement as to how the police or

prosecutors could so blithely divine the subjective feelings of Vanecko. Clearly, they could not². Under these circumstances, the public could well conclude that the entire claim of self-defense came not from Vanecko, but, rather, was conjured up in the minds of law enforcement. A discerning citizen could well surmise that it simply is an argument made of whole cloth. Whether Vanecko may, in fact, have a valid claim of self-defense should properly be for him to raise, not the police.

Respondent's concurrence in what one might charitably characterize as a rather creative exercise of the police investigative processes offers little confidence in her ability to conduct the kind of objective "fresh look" that this matter requires. This is not to suggest that there is merit to petitioners' claim of political or personal interest. Nonetheless, respondent's efforts to denigrate the evidence against Vanecko, coupled with her recurring calls for an independent investigation evokes a decided interest in the matter sufficient to warrant appointment of a special prosecutor³.

CONCLUSION

Adherence to the reasoned principles discussed herein mandates that a special prosecutor be appointed in this proceeding to conduct an independent investigation of whether criminal charges should be brought against any person in connection with the death of David Koschman or the resulting investigation. Although removal of the duly elected State's Attorney from a case impacts constitutional concerns, the appearance of impropriety and institutional conflict of interest present here warrants the appointment of independent counsel to maintain the public's confidence in the impartiality and integrity of our criminal justice system. This is not to suggest

² "More erroneous conclusions are due to lack of information than to errors of judgment." Justice Louis D. Brandeis, J. Braude, Source Book for Speakers and Writers, §1126, p. 178 (1968).

³ "Self-interest speaks all sorts of tongues, and plays all sorts of roles, even that of disinterestedness," François VI, duc de la Rochefoucauld, J. Bartlett, Familiar Quotations, 355a, 14th ed. (1968).

that Vanecko should or should not be criminally charged in connection with David Koschman's death. That is a decision particularly within the realm of the executive branch. Prosecutorial discretion is an essential component of the criminal justice system. Judicial intervention is not employed here to second guess the State's Attorney's charging decision, but rather to bring transparency to the mixed signals emanating from this troubling case.

Echoing the State's Attorney's candid observation:

“ ‘It would be a much cleaner investigation if it was somebody who hasn't been involved in the case.’ ”

The Petition to Appoint a Special Prosecutor in the Matter of the Death of David Koschman is hereby granted.

ENTERED:



Judge of the Circuit Court of Cook County

DATE:

April 06, 2012

