STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

FILED
JAN 31 2012
DOROTHY BROWN
CLERK OF CIRCUIT COURT

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

IN RE APPOINTMENT OF	)	No. 2011 Misc. 46
SPECIAL PROSECUTOR	)	Honorable Michael Toomin

NOTICE OF FILING

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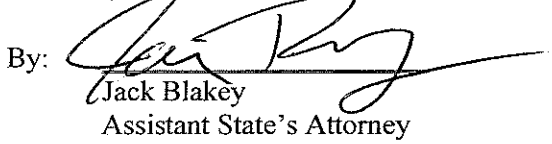
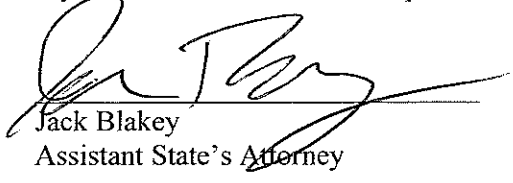
YOU ARE HEREBY NOTIFIED that on January 31, 2012, before 5:00 p.m., the undersigned filed the attached People's Response to Petition to Appoint a Special Prosecutor in the Matter of the Death of David Koschman with the Clerk of the Circuit Court with a copy to the Chambers of Hon. Michael Toomin.

ANITA ALVAREZ
STATE'S ATTORNEY OF COOK COUNTY

By: 
Jack Blakey
Assistant State's Attorney

PROOF OF SERVICE

I, Jack Blakey, Assistant State's Attorney, hereby certify that I caused a copy of the above notice and People's Response to be mailed to all parties on January 31, 2012, at or before 5:00 p.m. with proper postage prepaid.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) No. 2011 Misc. 46
) Honorable Michael Toomin
SPECIAL PROSECUTOR)

PEOPLE'S RESPONSE TO THE PETITION TO APPOINT A SPECIAL PROSECUTOR IN THE MATTER OF THE DEATH OF DAVID KOSCHMAN

NOW COME, the People of the State of Illinois, by their Attorney, ANITA ALVAREZ, through her assistants, Jack Blakey, Alan Spellberg, Michael Golden and John Mahoney, to respectfully request this Honorable Court to deny the Petition to Appoint a Special Prosecutor in the Matter of the Death of David Koschman. In support, the People submit the following:

I. INTRODUCTION

In the petition filed with this Court, the petitioners seek the extraordinary remedy of appointing a special prosecutor to investigate both the tragic death of David Koschman and the ensuing investigation of his death. As the elected, constitutional prosecutor for the People of Cook County, the Cook County State's Attorney remains deeply sympathetic to the pain and suffering that the events of April 25, 2004, have brought to David Koschman's family.

Nevertheless, because the Cook County State's Attorney does not have a conflict of interest, the petition must be denied.

As noted in more detail below, the Chicago Police Department (CPD) investigated the underlying incident both in 2004 and again in 2011, and thereafter, the State's Attorney's Office (SAO) concurred in the determination that, based upon the state of the evidence at the time, no criminal charges could be brought.[1]

Likewise, beginning in 2011 through the present, the SAO has conducted an ongoing re-review of the case (both the CPD investigation and thus the matter underlying it) in conjunction with an independent review being conducted by our investigative partners at the Chicago Office of the Inspector General (hereinafter OIG). The ongoing investigation by the SAO and OIG involves non-public proceedings that have not yet concluded.

Upon completion of this third and most recent re-review, the SAO will again make a good-faith determination whether or not any criminal charges are warranted based upon the evidence, and the OIG will issue its own report and take whatever administrative actions it deems appropriate under its own authority. As always, the ongoing investigation by the SAO and OIG shall pursue the evidence wherever it leads in a professional manner, and do so without regard to partisan politics or any unfounded media pressure.

In their filing, however, the petitioners suggest, among other things, that the initial evaluation of charges by the SAO somehow undermines the objectivity of this Office. Nothing could be further from the truth. Each year the SAO makes tens of thousands of charging decisions, and it has never hesitated to revisit a matter when the facts so warrant. This case is no

[1] While never formally requesting felony charges, the CPD did seek advice from the SAO in 2004 and this Office advised them that no criminal charges were viable. In 2011, this evaluation remained unchanged in the absence of new evidence.

exception, and the SAO remains open to the development of new or additional facts as the current investigation progresses to its conclusion.

Accordingly, even though in this response to the petition's various accusations, the SAO discusses the present state of the evidence developed thus far, the factual assertions contained herein do not demonstrate any bias upon the part of this Office. To the contrary, the willingness of the SAO to review and re-review the matter demonstrates the openness and fairness of the prosecutorial process being employed.

II. THE PETITION FAILS TO DEMONSTRATE ANY BASIS TO APPOINT A SPECIAL PROSECUTOR

As addressed further below, the petitioners' demand for a special prosecutor contains a host of legal misstatements and factual inaccuracies. For example, the petition misstates the basic legal concepts regarding both the relevant standard for the appointment of a special prosecutor under 55 ILCS 5/3-9008, and the law of self-defense in an involuntary manslaughter case. Likewise, this Court deserves a better factual foundation for its ruling than the one offered in the petition.[2] Accordingly, in sharp contrast to the systemic speculation of the petition, the SAO hereby supplements its response by making relevant source materials available (Composite Exhibit A) for an *in camera* inspection, if deemed necessary and so requested by this Court.

[2] Indeed, as discussed herein, the petitioners' misplaced reliance upon newspaper articles cannot form a proper factual foundation for their request. McCall v. Devine, 334 Ill. App. 3d 192, 203 (1st Dist. 2002); 55 ILCS 5/3-9908 (2011). When the immaterial matter is set aside, only police reports and the petitioners' own gross speculation remain – none of which carries the petitioners' burden as a matter of law. As such, the unverified petition should not only be denied, but also be dismissed with prejudice under 735 ILCS 5/2-615 and/or 735 ILCS 5/2-619.

When the legal misstatements and factual inaccuracies of the petition are stripped away, the petitioners' failure to demonstrate any conflict of interest becomes crystal clear. As such, the lack of a conflict requires this Court to deny the extraordinary relief sought in the petition.

A. The Cook County State's Attorney Has No Conflict

Petitioners contend that the appointment of a special prosecutor is necessary because the investigation into the death of David Koschman has been "irregular" in that the police conduct throughout the investigation may have been "incompetent or worse" and because the Cook County State's Attorney suffers from an alleged disabling conflict of interest in the matter.

Specifically, petitioners maintain that the SAO's original 2004 decision not to bring criminal charges against Richard Vanecko (and the State's Attorney's 2011 determination to abide by that decision following a re-review of the evidence) may have been the result of "favoritism or other improper motives to obstruct the investigation so that Mayor Daley's nephew did not face criminal charges." (Petition at 5) Accordingly, petitioners claim that an "objective, unbiased investigation" may lead a special prosecutor to conclude that Vanecko was the aggressor in the April 24, 2004 incident, and that he could therefore be charged with first degree murder or involuntary manslaughter.

They further assert that the State's Attorney is legally "interested" in the matter because one of her current Assistant State's Attorneys (the former head of the Felony Review Unit) was involved in the original evaluation of charges and would therefore be a witness in any prosecution arising out of the incident. Moreover, without any factual support, they also allege that this Assistant State's Attorney may have been involved in a conspiracy with members of the Chicago Police Department to obstruct justice or commit official misconduct.

Finally, petitioners also contend that the State's Attorney is both politically and personally interested in the case simply because Vanecko is a member of former Mayor Daley's family and she is therefore purportedly unable to engage in a proper and dispassionate review of the evidence.

In response, the Cook County State's Attorney maintains that petitioners' motion for a special prosecutor must be denied because it is both factually and legally deficient. As this response makes clear, the SAO has been working in conjunction with the OIG to review not only the 2004 incident but also the original and subsequent investigation into that incident. This current review is, was, and has been conducted by Assistant State's Attorneys in the Special Prosecutions Bureau, who are wholly removed from the Felony Review Unit and the rest of the Criminal Prosecutions Bureau. See In re Harris, 335 Ill. App. 3d 517, 525 (1st Dist. 2002) (noting that there were more than 900 Assistant State's Attorneys in Cook County and that there were "no facts to suggest" that a particular ASA's continued employment "would hinder any investigation" that "the Public Integrity Unit may conduct regarding the petitioner's claims"). Thus, as recognized in other cases, the petitioners' speculation that the SAO would now inherently conduct a biased and incomplete investigation into the matter is entirely without basis.

Likewise, the petition presents no evidentiary foundation to claim the State's Attorney's early evaluation of charges in this matter resulted from favoritism or bias, rather than from an objective and dispassionate review of the evidence. Even though the petitioners and amicus, the Better Government Association, may disagree with the State's Attorney's professional assessment of the evidence, such fact is irrelevant to the question of whether a special prosecutor should be appointed. As the Illinois Supreme Court has long recognized, "'the State's Attorney is a constitutional officer who represents the people in matters affected with a public interest.'"

Cook County ex rel. Rifkin, 215 Ill. 2d at 475 (quoting In re C.J., 166 Ill. 2d 264, 269 (1995)); See also, Ill. Const. 1970, Art. VI, § 19. Just as the Attorney General is vested with all the powers that an attorney general had at common law, which cannot be diminished or transferred to another entity by the legislature, each State's Attorney is similarly vested with common law authority that cannot be transferred to another attorney. See People ex rel. Scott v. Briceland, 65 Ill. 2d 485, 499-500 (1976) (holding that "the Attorney General is the sole officer authorized to represent the People of this State in any litigation in which the People of the State are the real party in interest, absent a contrary constitutional directive") (citing Fergus v. Russel, 270 Ill. 304, 342-43 (1915)); People ex rel. Kuntsman v. Nagano, 389 Ill. 231, 249-50 (1945) (holding that the legislature could not authorize private citizens to bring actions in the name of the People of the State of Illinois to divest aliens of title to real property after the State's Attorney failed to act within a particular period of time).

Inherent in this constitutional and common law authority is "the exclusive discretion to decide which of several charges shall be brought, or whether to prosecute at all." People v. Jamison, 197 Ill. 2d 135, 161-62 (2001); See also People v. Novak, 163 Ill.2d 93, 113 (1994) ("It is settled 'that the State's Attorney, as a member of the executive branch of government, is vested with exclusive discretion in the initiation and management of a criminal prosecution. That discretion includes the decision whether to prosecute at all, as well as to choose which of several charges shall be brought.'") (quoting People ex rel. Daley v. Moran, 94 Ill. 2d 41, 45-46 (1983)). Pursuant to this authority, the State's Attorney must carefully assess the law and facts of each case, and may only bring charges where she has a good faith basis to believe that probable cause exists, and that the admissible evidence could prove the offender's guilt beyond a reasonable doubt. See Illinois Rule of Professional Conduct 3.8(a). See also Comment 1 ("A

prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.").[3]

Nevertheless, because there may be rare occasions when an elected State's Attorney is incapable of performing her duties, the legislature has provided a limited mechanism for the appointment of a special prosecutor. Specifically, Section 3-9008 provides in pertinent part:

> 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, and the attorney so appointed shall have the same power and authority in relation to such cause or proceeding as the State's Attorney would have had if present and attending to the same.

55 ILCS 5/3-9008.

This provision is intended to "'prevent any influence upon the discharge of the duties of the State's Attorney by reason of personal interest.'" Harris, 335 Ill. App. 3d at 520 (quoting People v. Morley, 287 Ill. App. 3d 499, 503-04 (2nd Dist. 1997)). Thus, Illinois courts have long held that before a special prosecutor may be appointed under this provision, the State's Attorney must be interested as either: (1) a private individual; or (2) an actual party to the litigation. See Environmental Protection Agency v. Pollution Control Board, 69 Ill. 2d 394, 400 (1977); People

[3] Ignoring these controlling principles of law, the petition claims that charges of Official Misconduct could supposedly be brought against the police or prosecutors in this case "for intentionally or recklessly failing to perform their mandatory duties as required by law." (Petition at 32). The law, however, imposes no such "mandatory" duty to charge.

v. Lanigan, 353 Ill. App. 3d 422, 430 (1st Dist. 2004); Morley, 287 Ill. App. 3d at 504; McDonald v. County Board, 146 Ill. App. 3d 1051, 1057 (2nd Dist. 1986).[4]

Furthermore, in assessing cause to appoint a special prosecutor, "'it is presumed that a public official 'performs the functions of [her] office according to law and that [she] does [her] duty.'"' County of Cook ex rel. Rifkin, 215 Ill. 2d at 481 (quoting Lyons v. Ryan, 201 Ill. 2d 529, 539 (2002)). Accordingly, to overcome this presumption, a petitioner not only bears the ultimate burden of proof, but also must, at the very outset, plead sufficient cause with specific facts. In the words of the court, the petitioner must "plead and prove specific facts regarding the nature of the [conflict] as well as facts tending to show the State's Attorney would not zealously

[4] In addition, some courts have appointed a special prosecutor in the extraordinary circumstances where, through the State Attorney's own conduct, continued participation created the appearance of impropriety in the prosecution of a defendant. See People v. Lang, 346 Ill. App. 3d 677, 680-81 (2d Dist 2004). This third prong of potential disqualification, however, remains reserved for the most extreme class of cases. As set forth in Lang, after a hearing in proceedings related to the defendant's alleged driving with a revoked license, the prosecutor surreptitiously followed the defendant out of court, saw him drive away from the courthouse, and then contacted police to inform them that the defendant was driving without a license. Id. at 678-79. The prosecutor apparently continued to prosecute the case himself -- he even argued against the defendant's motion to appoint a special prosecutor -- and thereafter became the sole witness at trial (which was prosecuted by another attorney from the same office). On appeal, the court held that the trial court had abused its discretion by declining to appoint a special prosecutor, because even though the prosecutor's "pursuit of the defendant was not wrong in itself, his aggressive behavior toward the defendant created the appearance that the State's Attorney's office was obsessed with finding evidence against the defendant to obtain a conviction against him at all costs." Id. at 684. In so holding, however, the court emphasized that a prosecutor's becoming a witness would not *per se* require appointment of a special prosecutor, but that "the specific facts of" Lang which "significantly" included the prosecutor's affirmatively and surreptitiously working to catch the defendant in a crime and then becoming the key witness in the prosecution warranted disqualification. See also People v. Bickerstaff, 403 Ill. App. 3d 347, 352 (2d Dist. 2010) ("In order to determine whether a State's Attorney's office should be removed in order to alleviate the appearance of impropriety, a court must weigh the concern about the appropriateness of the office's prosecuting the case against 'countervailing considerations' that include: "(1) the burden that would be placed on the prosecutor's office if the entire prosecutor's 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.").

represent the People of the State of Illinois because of this [conflict]." Baxter v. Peterlin, 156 Ill. App. 3d 564, 556 (3rd Dist. 1987). See also People v. Arrington, 297 Ill. App. 3d 1, 3-4 (2nd Dist. 1998) (holding that the party seeking an appointment of a special prosecutor bears the burden of proving the State's Attorney is interested in the proceeding).

Here, the petition is insufficient to properly plead a claim for the appointment of a special prosecutor, as the allegations are grounded entirely on petitioners' suspicions, rather than concrete facts. Illinois is a fact-pleading jurisdiction and a plaintiff must allege facts sufficient to bring his or her claim within the scope of the cause of action asserted. Vernon v. Schuster, 179 Ill. 2d 338, 344 (1997). Petitioners' allegations, which are at best premised upon an inaccurate and incomplete understanding of the facts, fail to demonstrate that the State's Attorney has any personal interest in the litigation or that continued involvement in this matter creates the requisite appearance of impropriety. As such, petitioners' collection of conjecture, speculation and innuendo does not satisfy their pleading requirements to warrant the appointment of a special prosecutor under the statute.

First, petitioners cannot establish that the State's Attorney is legally interested in any potential criminal proceeding. Illinois courts have only authorized the appointment of a special prosecutor under the statute in situations where the State's Attorney was personally interested in the criminal investigation and prosecution itself. See e.g. People v. Moretti, 415 Ill. 398, 402-03 (1953) (Special prosecutor properly appointed to investigate and prosecute a double murder because the elected State's Attorney was a potential witness before the grand jury); People v. Doss, 384 Ill. 400, 404-05 (1943) (appointment of special prosecutor proper where in a criminal libel case the libelous statements were directed at the elected State's Attorney); People v. Courtney, 288 Ill. App. 3d 1025, 1031-34 (3rd Dist. 1997) (special prosecutor was necessary

where the defendant in an aggravated criminal sexual assault case was represented by a lawyer for 14 months who was subsequently elected State's Attorney while his trial was still pending); See also McDonald, 146 Ill. App. 3d at 1056-57 (Special State's Attorney was required where the elected State's Attorney was expected to be called as a witness in a lawsuit between the Sheriff and the County Board over whether the Sheriff was obligated to provide deputy sheriffs to the State's Attorney to serve as criminal investigators).

Contrary to petitioners' assumption, the mere fact that an Assistant State's Attorney could be called as a witness in a prosecution remains insufficient to disqualify the elected State's Attorney and the entire Cook County State's Attorney's Office. Rather, it is well settled that because it is inherent in the role of a prosecutor to interview police officers and witnesses prior to filing charges, and then to testify at trial when appropriate, no special prosecutor is required in such a situation. See, e.g., People v. Tracy, 291 Ill. App. 3d 145, 151 (3d Dist. 1997). Instead, testimony by an Assistant State's Attorney only creates a conflict of interest for the State's Attorney's Office when the testifying prosecutor is also the complaining witness in the case. See People v. Lang, 346 Ill. App. 3d 677, 685-86 (2nd Dist. 2004) (holding that the Lake County State's Attorney's Office labored under an improper conflict of interest based upon the prosecutor's extreme conduct and his status as the sole complaining witnesses at trial); Sommer v. Goetze, 102 Ill. App.3d 117, 120 (3rd Dist. 1981) (appointment of a special prosecutor because the Assistant State's Attorney was "the complainant and key eyewitness" to the incident). Here, it is absolutely undisputed that no member of the State's Attorney's Office is a complaining witness against anyone.[5]

[5] It is significant to note that Felony Review prosecutors routinely advise the police whether criminal charges are viable based upon the evidence accumulated at a particular point in the case. Under the legal theory underlying the petition, however, any police request for legal advice from the SAO would create a

Similarly, petitioners' allegations that a conflict exists simply because charges *could possibly* be brought against a current Assistant State's Attorney must be rejected as nothing more than gross speculation, bordering on defamation.[6] Such crass allegations should not be countenanced by this Court. In fact, as demonstrated herein, there is absolutely no evidence to show (and thus certainly no probable cause to believe) that any member of the SAO engaged in any illegal conduct warranting the appointment of a special prosecutor. See Harris, 335 Ill. App. 3d at 525 (rejecting the petitioner's claims that one Assistant State's Attorney may have conspired with the detectives "to concoct, fabricate, frame and create false and perjured evidence to implicate E.H. and R.G. in the sexual assault and murder of Ryan Harris" as insufficient to trigger the need for a special prosecutor because, "if we adopted the petitioner's position here, we would create a climate whereby the appointment of a special prosecutor would be required in every situation where an allegation of misconduct on the part of the investigating officers or the Assistant State's Attorneys is made"). See also In re Appointment of Special Prosecutor, 388 Ill. App. 3d 220, 233 (3d Dist. 2009) (holding that the trial court erred in appointing a special prosecutor to investigate where there was no "specific factual basis" for the appointment).

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per se conflict precluding any further SAO involvement if charges were not immediately filed. Such an abusrd ruling would undermine the purpose and benefits of Felony Review. As this Court knows, prosecutors assigned to Felony Review serve an important function by appearing early in criminal matters, evaluating evidence, and determining whether charges should be filed. Indeed, Felony Review is a progressive reform designed to ensure that prosecutors get involved in a potential prosecution at an early stage and that they then weed out non-meritorious cases, avoid unnecessary pre-trial detention and promote judicial economy by improving cases and preventing meritless criminal prosecutions before they begin. The vigorous operation of such felony review units (or prosecutors performing similar functions) benefits the public interest. Perhaps unwittingly, petitioners' new rule would not only create a perverse incentive to approve criminal charges when first consulted (as a way of avoiding potential assertions of conflict), but it would also run counter to the whole purpose of exercising prosecutorial discretion to determine what criminal charges, if any, should be brought in the interests of justice.

[6] Misrepresenting the controlling legal standards, the petition tries to manufacture a conflict by merely asserting that there is "probable cause to believe" that individuals in the SAO "*could have* conspired to commit" an offense. (Petition at 13) (Emphasis added).

Also, no appearance of impropriety exists in this case where 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. See McCall v. Devine, 334 Ill. App. 3d 192 (1st Dist. 2002) In McCall, the petitioner filed a petition for the appointment of a special prosecutor to investigate and prosecute unknown Chicago police officers for the fatal shooting of her son Reginald Cole while he was in CPD custody. Specifically, after the medical examiner issued a report concluding that Cole died as a result of a self-inflicted gunshot wound to the mouth, the SAO determined that no charges could be filed against any officers involved in the incident. Id. at 194. The petitioner then filed a motion seeking the appointment of a special prosecutor, claiming an appearance of impropriety because "the State's Attorney and the Chicago police department have a relationship of 'cordiality, compatibility, support, [and] fidelity' and that this relationship makes it impossible for the State's Attorney's office to conduct an 'independent, unbiased, honest and impartial investigation into the shooting death of Reginald Cole.'" Id. at 195. The petition, which cited several newspaper articles as support, further alleged that "certain unknown Chicago police officers, Assistant State's Attorneys and medical examiners conspired to conceal, distort and fabricate the circumstances surrounding Cole's death," and that representatives of the Chicago Police Department publicly provided false and contradictory factual versions of these circumstances. Id.

The trial court, however, granted the State's Attorney's motion to dismiss the petition, finding that there was no disabling conflict of interest for the State's Attorney and that no appearance of impropriety existed, specifically noting that the State's Attorney's Office "'has never hesitated to prosecute law enforcement officials where the evidence warranted criminal charges.'" Id. at 201.

On appeal, the Appellate Court affirmed the dismissal of the petition, holding that the petitioner had failed to plead sufficient facts to warrant the appointment of a special prosecutor. Specifically, the court found that the State's Attorney was not personally interested in the matter, that no sufficient appearance of impropriety existed and that the decision to decline charges was a proper exercise of his lawful authority. Id. at 203-04. Moreover, the court noted that the petitioner's reliance on newspaper articles as proof of a conspiracy or cover up was improper. The court explained:

> It is very obvious that factual matters should not be proven by newspaper reports of occurrences. While there is an inclination on the part of the general public to accept newspaper stories at face value - and the quality of the reporting should be careful enough that such reliance is generally justified - the fact remains that news stories are frequently based on the hearsay statements of others, or on the statements of bystanders, witnesses to the occurrence, public officers, and other informants. Because of this they are often, if not notoriously, apt to be inaccurate. This is not always due to careless reporting or slanting or over-emphasis, but rather to the pressure of haste and to the inherent fact that the news story does not purport to present the results of careful investigations, or at least that it purports to report only, or mostly, what others have said about the matter.

Id. at 203 (quoting R. Steigmann, Illinois Evidence Manual § 14:28, at 365 (2d ed. 1995)).

Here, as in McCall, the evidence shows that the State's Attorney properly considered the evidence and exercised her discretion when initially deciding that charges were not warranted. Since nothing about her conduct or the underlying facts indicates any conflict of interest or requisite appearance of impropriety, there is no lawful basis for the appointment of a special prosecutor in 2012.

Finally, petitioners' bald allegation that the State's Attorney's decision was motivated by political considerations rather than the facts of the case is necessarily insufficient as a matter of law. As the Appellate Court made clear in Baxter, allegations of "political alliances" between

the elected State's Attorney and an influential mayor cannot by themselves warrant the appointment of a special prosecutor. 156 Ill. App. 3d at 566-67. In that case, the petitioner claimed the Mayor of Ottawa had been misappropriating city funds and disagreed with the La Salle County State's Attorney's decision to not seek charges. In affirming the dismissal of the petition for a special prosecutor, the Appellate Court held that an allegation that the State's Attorney "believed that his personal and political fortunes were intertwined with those of [the mayor], who was and has been a politically popular office holder loyally supported by the Republican party for more than a decade," was insufficient to demonstrate that the State's Attorney would not zealously represent the People of the State of Illinois because of this alliance. Id. at 566. "To require a petitioner to plead and prove anything less would open the door to requiring a special prosecutor be appointed any time a public official of whatever rank is suspected of wrongdoing." Id.

Furthermore, the Baxter court recognized the broad prosecutorial discretion inherent in the decision to bring charges or decline prosecution and held that the appointment of a special prosecutor cannot be used to second guess the State's Attorney's decision. Specifically the court noted that the petitioner "did not question the State's Attorney's ability to zealously carry out his duties until after the prosecutor had made a decision concerning the investigation which differed from plaintiff's own conclusion" and concluded that even if there "was probable cause to believe [the mayor] had committed a crime, it was within the bounds of prosecutorial discretion to decline prosecution." Id. at 567. As the court explained:

> Prosecutorial discretion is an essential component of the criminal justice system. 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.

Id.

Here, as in Baxter, petitioners simply disagree with the State's Attorney's assessment of the evidence and seek a special prosecutor in hopes that a different conclusion will be reached. However, Anita Alvarez is the duly elected State's Attorney of Cook County, and the citizens of Cook County have entrusted her to make those decisions. Short of specific proof of a disabling conflict of interest, no special prosecutor can be appointed. As the Court aptly recognized in Harris:

> Disqualification of a duly elected State's Attorney must not be taken lightly, for in essence such action disenfranchises the very electorate who in its wisdom has selected that person for public office. The Office of the State's Attorney is an office of constitutional dimension reposing in the executive branch of government, co-equal to the legislature as well as the judiciary. Although the legislature has empowered judges to effect the removal of the State's Attorney in certain limited situations, respect for the doctrine of separation of powers militates against the exercise of such power unless clearly warranted.

335 Ill. App. 3d at 525.

Therefore, in light of the above, it is clear that the petition for the appointment of a special prosecutor fails to establish any necessity in law or fact for such an order. As explained in more detail below, a closer comparison between the allegations in the petition and the actual evidence in the case further confirms this conclusion.

B. The Petition Lacks An Evidentiary Basis

Lacking any supporting affidavits, the factual allegations contained in the petition possess no legitimate evidentiary foundation. In fact, the petition contains no indication that counsel for the petitioners have even spoken to the persons whose statements they now rely upon in seeking their requested relief. Instead, the petition relies almost exclusively upon a series of articles published in the Chicago Sun-Times as its purported basis for the extraordinary remedy sought

here. Remarkably and without question, the petition apparently accepts as true all of the hearsay statements printed in the Sun-Times articles, even though no proof exists that the portions of the statements published in the Sun-Times are themselves accurate or complete. Not a single one of these news reports contains a verbatim account of what the witnesses actually said to the reporters. Moreover, due to the Illinois Reporter's Privilege (735 ILCS 5/8-901 et. seq.), it is unlikely that any notes of these interviews will ever be made available to the petitioner, the People or this Court. It is even less likely that any of the reporters will ever testify in open court regarding the full interviews they conducted and shaped for their own purposes. Consequently, while such statements may fuel inflammatory newspaper articles, the edited witness accounts contained in the Sun-Times constitute rank hearsay and possess no evidentiary value in this legal proceeding. See McCall v. Devine, 334 Ill. App. 3d 192, 203 (1st Dist. 2002).

Perhaps because the petitioners' attorneys have ostensibly conducted no inquiry beyond comparing a few police reports with newspaper articles, they remain unaware of the other relevant statements made by these same witnesses quoted by the Sun-Times. The inherent danger of relying upon newspaper articles becomes plain after a simple examination of the sworn statements given by the occurrence witnesses to OIG investigators in this case.[7] For example,

[7] As noted above, the current investigation being conducted in conjunction with the OIG remains ongoing, but upon this Court's request, the People shall provide the relevant underlying reports and verbatim transcripts for an *in camera* review by this Court. See Composite Exhibit A. These materials include copies of the transcripts from the sworn interviews and documented statements of the occurrence witnesses. For the purposes of this response, the witnesses are divided into three categories: (1) the friends of David Koschman noted as "Kosch A, B, C, and D"; (2) the friends of Richard Vanecko noted as "Van A, B and C"; and (3) the bystanders noted as "Bystander A and B".

once placed under oath, several of the witnesses have given sworn statements directly refuting the information they purportedly gave to the Sun-Times.[8]

In fact, a series of witnesses have testified that what they said to the reporters was false.[9] For example, Kosch B and Kosch C told the Sun-Times that they saw a punch to the victim, but each has stated under oath to the investigators that this is not true. (Kosch B, at 13, 38; Kosch C, at 30). Moreover, two witnesses stated under oath that they were not being truthful when they told the Sun-Times that they were sure that they picked Richard Vanecko out of the lineup but the police covered it up (Kosch A, at 82-83; Kosch C, at 99-104).

Specifically, in one of the more sensational articles, the Sun-Times reported that Kosch A claimed that he correctly identified Richard Vanecko to the police in a physical lineup. Once placed under oath, however, he admitted in his sworn testimony that the published statement wasn't exactly true: "Yeah, I did say that only because I don't trust the police worth a damn anymore." He went on to add "Being under oath, I can't say 100% that I believe that I picked out Vanecko. But I know I did see him in that building that day." (Kosch A, at 82-3) Kosch A stated that after he failed to make any identification at the 2004 lineups, he saw Vanecko in the hallway standing next to one of Vanecko's friends, and recognized him as the person who

[8] As part of their series of articles, the Sun-Times repeatedly contacted six witnesses who were present at the scene on the night of the incident, sometimes by telephone, sometimes by email, sometimes by unannounced visits to their homes (Kosch A, at 89; Kosch B, at 41-43; Kosch C, at 96-98, Kosch D, at 96-98; Bystander A, at 50; Bystander B, at 7-8).

[9] As this Court is aware, in any potential trial of the underlying incident, such statements would be admissible as substantive evidence under 725 ILCS 5/115-10.1 should any of the witnesses later testify inconsistently. Likewise, prior inconsistent statements made to the investigators would be admissible for impeachment purposes via the live testimony of OIG personnel. For this reason and others, these sworn statements and the investigative reports retain more evidentiary value, than any edited hearsay statement contained within a Sun-Times article.

punched Koschman, but that he never actually mentioned this fact to the detectives in either 2004 or 2011.

According to Kosch A's sworn testimony, his conversations with the Sun-Times led him to refrain from making further statements to the police: "and they [the reporters] didn't say don't talk to the cops. They are like, we are not lawyers. We can't tell you what to do, but this is what we are doing on our end, and there's a lot of missing blanks. So after that, I wasn't talking to the police anymore." (Kosch A, at 65). In fact, based upon the influences of the Sun-Times reporters, the witness not only ceased cooperating with the police, but he also became abusive whenever a police detective would call him with follow-up questions. According to the witness, after meeting with the reporters, he would only tell the police "that their mother was great in bed" or "their mother was great last night." (Kosch A, at 77).

Indeed, the interview tactics of the Sun-Times affected other witnesses as well. For instance, even though certain witnesses could not identify Vanecko in a lineup, the Sun-Times reporters repeatedly confronted those witnesses with Vanecko's picture such that one of the witnesses stated that he got the feeling that the Sun-Times was trying to get him to change his story. The witness, however, refused to do so. (Bystander B, at 7-8). According to the witness, the reporter also played on his emotions by focusing on the agonizing grief suffered by the victim's mother (Bystander B, at 7). Unfortunately, this incident was not the only occasion where the Sun-Times may have influenced the witnesses' perspectives on the case (Kosch A, at 78; Kosch C, at 70-72, 97-99, 107-111; Kosch D, at 99-100). In fact, one eye witness said that it was only after "speaking with" two Sun-Times reporters that he was finally able to figure out "really what was going on." (Kosch A, at 79).

Thus, even if the Sun-Times articles accurately reflect what the witnesses may have told the reporters (which is by no means certain), the published versions of their stories do not provide a sufficient factual basis to divest the State's Attorney of her constitutional authority.[10]

C. The Facts Show No Bias or Conflict Upon the Part of the SAO

Even though the constitutional exercise of prosecutorial discretion is not itself subject to review by the courts, the State's Attorney nevertheless favors appropriate civic transparency, and thus, under the unique circumstances of this proceeding, she now takes this opportunity to assure this Court that the initial evaluation of charges in this case was not the product of "favoritism or other improper motives" as alleged in the petition.

In this regard, it is important to first discuss some general principles that guide a prosecutor's charging decisions. These decisions must be based upon a review of the applicable law and all of the available evidence. The question is not what the prosecutor believes or thinks happened, but what can be proved in court beyond a reasonable doubt with admissible evidence. For this reason, inadmissible forms of evidence, such as hearsay statements, have no practical value when making a charging decision. Furthermore, before charging any accused, a prosecutor must take into account not only the evidence that inculpates the accused, but also that which

[10] As the stories themselves make clear, the shifting sands of the Sun-Times articles cannot form a sound foundation for any reliable decision. On April 13, 2011, the Sun-Times reported that: "Two of Koschman's friends - (Scott Allen and Shaun Hageline) - each picked out a man they said was the man who knocked Koschman to the street. Allen - (who said he was standing next to Koschman) - has told the Sun-times he believes he picked out Vanecko, but the police told him and Hageline that they each picked the wrong man." On July 7, 2011, the Sun-Times reversed course, and stated that: "Allen said the investigators also showed him photographs of the police lineups that he originally viewed on May 20, 2004. He said that now, as then, he couldn't identify Vanecko." On November 21, 2011, the Sun-Times took yet another U-turn, and reported that: "Another Koschman friend, Scott Allen, has said that he believes he identified Vanecko in the line-up. But detectives reported that Allen identified Peter A. Kelly, the police officer who was wearing the white, long-sleeved T-shirt."

could support a specific defense, or that which is otherwise exculpatory or merely undermines the general quality of the state's evidence at trial.

In this review, witness credibility remains an important factor that must be considered in any charging decision. Due to human nature, it is rare that all witnesses will recall events in an identical manner, and some variance is to be expected, even when multiple witnesses are interviewed immediately after observing the same event. Similarly, it is not unusual for a single witness to recount an event slightly differently with each telling. As this Court is aware, a variety of other factors can also affect the ability of each witness to perceive or recall events. In the end, however, where impediments to, or variances between, witnesses' accounts become too great, it may become impossible to prove an individual guilty beyond a reasonable doubt.

(a) The April 25th Incident and the Initial Investigation

With the above principles in mind, the People turn to a review of the available, admissible evidence regarding the initial events flowing from April 25, 2004. The following factual summary below is only meant to highlight some of the early evidentiary issues and obstacles that properly weighed against the immediate filing of charges in this case. As noted above, however, the People do not assert that this response constitutes a final recitation of the facts that occurred that night, because the current re-review of the matter has not yet concluded, and in any event, many inconsistencies still remain among the witness accounts.

Indeed, in many respects, the available evidence cannot prove beyond a reasonable doubt exactly what happened on April 25, 2004. Virtually all of the occurrence witnesses have admitted that they were intoxicated, and some of Koschman's friends have admitted that, in addition to drinking large quantities of alcohol, they also smoked unknown quantities of cannabis. Moreover, many of the witnesses to the incident have given differing accounts to the

police, the OIG and the Sun-Times, and in some instances, witnesses have contradicted each other or their own prior statements. Nevertheless, despite these variances in their stories, most of the witnesses interviewed by the investigators essentially agree on several general points as set forth below.

At approximately 3:00 a.m., on April 25, 2004, David Koschman was walking west on Division Street with four friends. At the same time, Richard Vanecko was walking east on Division Street with three of his friends.[11] As the two groups were passing each other, Koschman made contact with Van C of the Vanecko group. Kosch A claims that this was an accidental bump to the shoulder while Van A and Van C say that, in addition to the bump, Koschman used his hand to flick Van C's glasses from his face. None of the other witnesses actually saw the contact between Koschman and Van C.

Thereafter, an argument ensued between the Koschman group and the three men from the Vanecko group. While this argument was taking place, Bystanders A and B happened by and stopped to watch. At some point, a member of the Vanecko group (allegedly Vanecko) struck Koschman. As with the initial contact, the witnesses again do not agree as to what exactly occurred. Kosch A and Kosch D claim Koschman was punched in the face. Bystander A says Koschman was pushed in the chest. Bystander B and Kosch B each saw Koschman enter a group of others and then fall backwards to the ground, but neither can say if he was pushed or punched. The other four witnesses claim that they did not see the blow to Koschman. Regardless of the type of blow, Koschman then fell and hit his head. He lost consciousness and eventually died days later from a brain injury that he sustained from the fall.

[11] Vanecko is the only person mentioned who has not admitted being present. He was identified as being present, however, by Van A, Van B and Van C, each of whom has, in turn, admitted to being present.

Immediately after Koschman was rendered unconscious that night, the members of the Vanecko group fled the scene. Kosch A chased after Van A and Van B, and told a police officer that Van B had been involved in the incident. As a result, both were brought back to the scene, with Van B in handcuffs. While on scene, the initial responding officer interviewed Kosch C, Bystander A, and Van B. The only description that Kosch C and Bystander A could give of Van C and Vanecko was "male whites." Further, because Van B falsely denied knowing anyone else who was present, the police were left with only minimal information to investigate further at the scene.

The following morning, CPD Detectives Rita O'Leary and Robert Clemens interviewed Van B, Bystander A, and the victim's mother Nancy Koschman. Van B described seeing an altercation between two groups but again denied knowing anyone involved or seeing anyone strike the victim. Bystander A's statement was consistent with his statement to the original responding officer, specifically that an unknown male white pushed Koschman. Nancy Koschman stated that her son suffered a skull fracture and swollen brain. She added that he would be sedated for at least five days. These interviews were documented in the police reports.

Subsequently, CPD detectives Clemens and O'Leary began their scheduled furloughs on April 28, 2004 and returned to work on May 19th and 20th respectively.

On May 6, 2004, without ever regaining consciousness, David Koschman died as a result of the injuries he sustained on April 25, 2004.

On or about May 10, 2004, CPD reassigned the now upgraded death investigation to Detectives Ron Yawger, Anthony Giralamo Jr., Edward Louis and Anthony Villardita. At the time of this reassignment, however, O'Leary and Clemens were still on furlough.

Between May 10th and May 12th, Detectives Yawger, Giralamo, Villardita and Louis interviewed Bystander B, Kosch A, Kosch B, Kosch C, and Kosch D. Each witness described his own recollection of the events of April 25th, but none could provide any new information as to the identity of the offender. These interviews were documented in the police reports.

On May 13, 2004, the detectives interviewed Van A. During this interview, Van A stated that she and her husband were present at the incident with their friends Van C and Richard Vanecko. Based upon the available evidence, this statement remains the first occasion that Vanecko's and Van C's names were mentioned to the police in connection with this case.

At this interview, Van A's attorney told the detectives the name of the attorney representing Vanecko. In the absence of probable cause to arrest Vanecko, and now with knowledge that he was a represented party, the detectives made arrangements with Vanecko's attorney for Vanecko to appear for a lineup and potential voluntary interview.

On May 19, 2004, the detectives interviewed Van B and Van C, each of whom admitted to being present along with Vanecko. All three of Vanecko's friends, however, denied seeing Vanecko, or anyone else, strike Koschman. All three of Vanecko's friends were represented by the same attorney at their respective interviews.

On May 20, 2004, the four members of the Koschman group and the two independent bystanders viewed two separate lineups. One lineup contained Van B and Van C. In this lineup, Kosch A and Kosch B correctly identified Van B as the person who was brought back to the scene in handcuffs that night. Kosch C identified Van C as being present, but thought he was the one placed in handcuffs. Bystander A, Bystander B, and Kosch D were unable to identify either Van B or Van C as being present that night.

The other lineup contained Vanecko and five police officers. None of the six witnesses were able to identify Vanecko as being present when Koschman was struck. In fact, Kosch A and Kosch C each identified a different police officer as being present, although each witness claimed to be uncertain of the identification.

Following the negative lineups, Vanecko through his attorney invoked his Fifth Amendment right to remain silent and left the police station. Upon his invocation of rights and the lack of probable cause, the detectives had no constitutional authority either to detain or question Vanecko.

Despite the petition's unfounded accusations, the SAO could not have brought criminal charges against Vanecko in good faith based upon the record noted above.

(b) The Practical Implications of the Failed Vanecko Line-up

Among the many factors discussed herein, the failure of the witnesses to identify Vanecko as even being present (much less being the offender), supports the good-faith basis for the SAO's reluctance to charge. Such obstacles led the CPD not to seek charges in 2004, a decision with which the SAO rightfully concurred. It bears repeating that the issue is not what the prosecutors or police believe happened, but what the admissible evidence can prove beyond a reasonable doubt at trial.

The failed identifications remain a prime example of this principle in practice. Out of the possible eighteen positive identifications that could have been made at the two lineups (each of six witnesses viewing three people present), the witnesses correctly made only three positive identifications[12] and incorrectly made two identifications. Consequently, any potential criminal

[12] Even this figure assumes that Kosch C's identification of Van C can be deemed correct, despite the fact that he incorrectly thought Van C was the person handcuffed that night.

case would contain thirteen non-identifications. What's more, none of the correct identifications pointed to Vanecko, and both incorrect identifications were made at the lineup in which he stood. Such a dismal performance by the witnesses would certainly undermine any ability to prove beyond a reasonable doubt that it was Vanecko who struck Koschman. Moreover, the cumulative inability of the witnesses to properly identify so many of the other players would also corroborate defense theories of witness impairment and bear negatively upon the SAO's burden of showing the overall ability of the witnesses to correctly perceive and recall the events from that night.

Ignoring the significance of six failed lineups, the petition implies that the failure of these six eyewitnesses to identify Vanecko may be overcome by simply "connecting the dots" and thus, it somehow follows, the SAO's motives in not charging must be suspect. Beyond their failure of logic (i.e., the petition's circumstantial theory of identification does not constitute any evidence of a SAO conflict), the petitioners, at best, overstate what the evidence might prove.

In order to "connect the dots" as urged by the petitioners, they claim that the witnesses establish that the biggest member of the Vanecko group must have been the person who struck Koschman. As with many of the other statements in the petition, this is misleading. Contrary to the petition, of the witnesses present on the scene who actually saw the blow to Koschman, only Kosch A and Kosch D can describe the person that struck Koschman as the largest person of the other group, and their testimony is far from conclusive proof of the matter. Although Kosch C also speculated that the offender was largest person of the other group, he has also admitted under oath that he actually had his back turned and was walking away at the time and, therefore, did not actually see the blow to Koschman. (Kosch C, at 23-24, 30). Likewise, Kosch B admitted under oath that he did not see the victim get hit (Kosch B, at 38), and neither one of the

bystanders has described the person who struck Koschman as the biggest of the group. In fact, when Bystander A was asked to describe which person from the older group pushed Koschman, he stated "I would say that they were all just generally the same height, and then there was a step down to Koschman's group." (Bystander A, at 24)

Subsequent events have also produced additional evidentiary problems in this regard. In 2011, Bystander A received an e-mail from the Sun-Times (which included photos) asking him if he could identify the man who pushed Koschman. Even in 2011, after he had read some of the Sun-Times articles and had seen the published photo of Vanecko, Bystander A was still unable to positively identify Vanecko's photo as the person he saw push Koschman. (Bystander A, at 51).

Likewise, on July 16, 2011, Kosch C told OIG investigators that "it dawned on me, since I didn't know any of these people, maybe Vanecko wasn't even there and he was just a red herring for someone more important than Vanecko . . ." (Kosch C, at 108). Obviously without some evidence, the SAO does not credit this speculation as fact, but the mere notion that the witness still harbors such misgivings about whether Vanecko was even present, does not lend support for filing criminal charges by merely "connecting the dots" – especially where Kosch C claims to have been the most sober of the Koschman group. Once again, the facts illustrate the dangers of making assumptions and adopting conspiracy theories based upon articles appearing in the Sun-Times.[13]

[13] In July 2011, following up on Kosch C's statement, OIG investigators showed Kosch A a photo-array containing the person Kosch C had suggested was present instead of Vanecko. From that photo array, however, Kosch A selected a filler and claimed that person was present for the incident. Here again, the SAO mentions this fact, not to lend credence to any specific theory, but rather to show both that the investigators have continued to pursue all leads in good-faith, and that the witness's ability to otherwise recall the events and properly identify individuals remains, at best, suspect.

Given such evidentiary contradictions and the other obstacles as noted below, the petition cannot carry its burden of proving that the SAO's charging decisions arose from a disabling conflict of interest that prevents this Office from properly performing its constitutional duties.

(c) The Failure of the Available Evidence to Refute Self-Defense

Even assuming, as the petition does, that the evidence could prove beyond a reasonable doubt that it was Vanecko who struck Koschman, the evidence still presents viable issues of self-defense that hinder the filing of charges, and thus the evidence lends further support for both the integrity of the SAO's conduct and the fact that its initial charging evaluation arose from the merits of the case, rather than from "favoritism or other improper motives."

Specifically, while several witnesses have stated that Koschman was not physically aggressive before he was struck, these same witnesses have also described aggressive behavior performed by Koschman, or have otherwise admitted that they made prior statements to the police in 2004 that Koschman was, in fact, acting aggressively. Where the affirmative defense of self-defense is raised, the law requires the People to disprove it beyond a reasonable doubt, and the issue of self-defense may be raised even by the evidence introduced during the People's case in chief. See People v. Jeffries, 164 Ill. 2d 104, 127 (1995). In the present case, because none of the other witnesses can properly identify Vanecko, it would be necessary for the SAO to call at least one of the witnesses from Vanecko's group in order to prove his presence and identity. Because each of those witnesses has described the events leading up to the physical blow in a manner consistent with self-defense, the People must further assume that, when making a charging decision, such a defense would be raised at trial, and thus that it must later be refuted beyond a reasonable doubt.

It is doubtful from the available evidence, however, that the SAO would have the ability to do so. Indeed, prior to the fatal contact, several witnesses have described the two groups as pushing, shoving and pulling people away from one another. For example, Bystander B told detectives that he observed "two groups of male whites appearing to be pushing and shoving each other along with loud verbal exchanges." (Det. Supp. No. 3193543, at 5). He added that he saw Koschman "arguing and pushing one or more of the subjects mentioned in the group." In 2011, Kosch A stated before the fatal contact: "It was just them three, or those four, us five and we were pulling people apart, pulling people apart, and then it just comes back together and everything. But that's just sort of how it all started." (Kosch A, at 11-12) Kosch A then stated that after the initial bump happened:

> [I]t was the other guys that said fuck you and then Dave turns around, no, he's like fuck you and it was just, fuck, fuck, fuck, fuck, fuck, just, you know, left and right and then everybody was all in a, you know, we all got collected and everything and everybody is arguing and in each other's face.

(Kosch A, at 14). According to Kosch A, the members of both groups said "I'll kick your ass" numerous times (Kosch A, at 17), and he described the positioning of the two groups as "it was sort of like they were on their side, we were on our side, and we were all clumped together, so to speak. So at no point in time were any of the people that were arguing further than two, three feet away from each other's faces" (Kosch A, at 14). Immediately before the punch, Kosch A stated "everyone was like grabbing everyone" (Kosch A, at 16). He later added "the only physical things that happened were people pushing people away or just splitting people apart. People pulling people apart, and the punch" (Kosch A, at 52).

In addition, all of Koschman's friends have stated that they were trying to pull Koschman away when he broke free and approached the other group. (Det. Supp. No. 3193543, at 6-8, Det.

Supp 3201023, at 4). In 2004, Kosch C told the detectives that he tried to pull Koschman away a couple times, but that after 10-15 seconds Koschman went back. Kosch D stated in 2004 that "as they were trying to drag the [victim] away from the argument, he got away from them and ran back towards the three male whites." (Det. Supp. No. 3193543, at 7) In 2004, Kosch A stated that "as they got the [victim] about ten feet from the group of three guys, the [victim] broke away and ran back toward them." (Det. Supp. No. 3193543, at 6) Kosch B in 2004 told detectives that after his group got Koschman away from the other group, Koschman lunged at the other group and then immediately came flying backwards (Det. Supp. No. 3193543, at 8).[14] Later in 2011, Kosch B described this lunge as a lean, and he was then asked "if that lean was threatening towards another member of the group?" and he answered: "I suppose it could have been." (Kosch B, at 35-36).

Such testimony is supported by the other witnesses as well. (Det. Supp. No. 3193543, at 9-10, 12) In 2004, Van A and Van B both described seeing Koschman arguing with Van C during which time the two were pushing and shoving each other. Van C also stated that Koschman was pushing him.

Consistent with these accounts, the independent witnesses have also described the events in a similar manner. In 2004, Bystander B stated he observed "the victim charge into the group in an angered state, but was immediately pushed back out into the street." (Det. Supp. No. 3193543, at 5). Bystander A stated he "saw the victim get into the center of the altercation, and then he saw the victim get 'pushed or shoved' from the group and fall to the ground." In 2011, Bystander A stated "I saw David walk, try to step up on the sidewalk and approach one of the

[14] Based upon the available evidence, the detectives memorialized each of these 2004 statements before they had any reason to know of Vanecko's relation to the case.

older guys. But you know, as I've made clear before, I didn't, I didn't feel he was trying to strike anybody, it was more of a, he was continuing this verbal altercation by trying to get in somebody's face. And he did get in somebody's face, and then . . . I thought I saw somebody push him in the chest, to push, one of the older guys push him in the chest to get him out of their face" (Bystander A, at 20). Speaking of the Koschman group in general, Bystander A further stated "They were the aggressors, absolutely. I mean, they were the more aggressive group, verbally, definitely." (Bystander A, at 60).

This type of mutually-combative evidence is further compounded by the fact that the witness testimony contains conflicting descriptions of whether "a push" or "a punch" sent Koschman to the ground. Of the nine witnesses present at the scene, only Kosch A and Kosch D consistently claim to have seen Koschman punched. While both Kosch B and Kosch C have at times described the blow as a punch, both of them have also stated under oath that they did not actually see a punch. Similarly, Bystander B initially described the contact as a push, but in 2011 he stated that he is not sure if it was a punch or push because he "didn't actually see a punch thrown, but it seemed like" the victim was punched.[15] (Bystander B, at 2). On the other hand, from the time of his statement to the initial reporting officer, Bystander A has consistently stated that the victim was pushed in the chest. Meanwhile, Van A, Van B, and Van C all claimed to have had their backs turned and did not see the contact at all. Without proper corroboration, the People submit that simply choosing one account between these disparate versions of events

[15] Obviously, if any of these witnesses were now to testify at trial that they saw a punch, the sworn statements to OIG to the contrary would be admissible as substantive evidence. See 725 ILCS 5/115-10.1

(all provided by admittedly intoxicated witnesses) clearly fails to establish proof beyond a reasonable doubt.[16]

As this Court can see from such evidence, the petition once again simply glosses over the witness statements that are not helpful to their newspaper theories -- something the People cannot ethically do. Here, the distinction between being "punched in the face" or "pushed in the chest" remains significant, because the type of force used tends to affect not only proximate causation but also whether the offender had the requisite mental state necessary for committing a criminal offense. Furthermore, the type and amount of force used is also relevant to a determination of whether the force employed was justified under the law and the factual circumstances of the incident that night. That is, if Koschman and others were pushing each other before the fateful contact, then it is more likely that a person would be deemed reasonable in pushing Koschman back as he approached them in anger.

Given the above, it is highly doubtful that the evidence could sustain the burden of proof with respect to either first or second degree murder. Stated differently, because the evidence cannot prove beyond a reasonable doubt that Koschman was punched, the charging decision must be made based on an assumption that he was pushed. Under these circumstances, the SAO would need to prove beyond a reasonable doubt that either: (1) the offender knew that a mere "push" created a strong probability of death or great bodily harm; or (2), even more unlikely, the mere push somehow establishes that the offender had a specific intent to kill or cause great

[16] The available medical evidence remains inconclusive as to whether Koschman was punched or pushed. While there is a notation in the medical records of blood on Koschman's teeth, there is no indication that the attending physicians observed any cuts, abrasions, swelling or bruising to his face or mouth. Presumably, if Koschman was hit so hard that he was knocked out by the punch, as Kosch A and Kosch D have surmised, the attending physicians would have noted at least some injury to his face. Further, the fractures to Koschman's skull were located on the left side, back of his head, consistent with having been caused by striking his head on the ground. For these reasons, the medical evidence does not provide definitive corroboration for either factual theory.

bodily harm. Given these hurdles to overcome, it would be nearly impossible to prove beyond a reasonable doubt the requisite state of mind in the case of a push to the chest, and even if the evidence could prove beyond a reasonable doubt that Koschman was the victim of a *single* punch (not push), the same two criminally-culpable mental states noted above would remain difficult to prove. For these reasons, neither the law nor the facts support the petition's outrageous accusation that, "but for" the improper motives and alleged conflicts of the SAO, Vanecko would have been charged with either first or second degree murder.

Nevertheless, in an effort to hide such fundamental deficiencies, the petition goes on to employ an incorrect legal standard for self-defense. Under Illinois law, in a homicide prosecution,

> [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(a) (emphasis added). Although the petition correctly quotes the self-defense statute, it thereafter misapplies that statute. For example, the petition *assumes* that the force used was a punch and that it was intended or likely to cause death or great bodily harm (Petition at 12), and then surmises that the only remaining question is "whether Koschman threatened Vanecko with great bodily harm."

This analysis, however, ignores a critical first step, namely whether the evidence initially proves beyond a reasonable doubt that the defensive force used was either intended or likely to cause death or great bodily harm. If the answer is no, then the use of force would have been justified if the offender reasonably believed the defensive force was necessary to prevent the use

of *any* unlawful force against him by the victim. (See e.g., People v. Knox, 116 Ill. App. 2d 427, 436 (2nd Dist. 1969) ("It may be appropriate under proper circumstances to give only the first sentence of the statute in an instruction -- such as where the force used to defend was not likely to kill or cause great bodily harm to another -- but no circumstances have been called to our attention wherein it would be proper to give only the second sentence."); People v. Ellis, 107 Ill. App. 3d 603, 612 (2nd Dist. 1982) ("Since the evidence presented by both the State and the defendant established that the decedent made a "lunge" at defendant, defendant was entitled to the use of some force to repel the attack. One is entitled to the use of force against another when and to the extent he reasonably believes that such conduct is necessary to defend himself against the other's imminent use of unlawful force.") In other words, if the defensive force used was not intended or likely to cause death or great bodily harm, then the offender is justified in the use of such force, *without the restrictions improperly assumed in the petition*, if he reasonably believed that such force was "necessary to defend himself or another against such other's imminent use of unlawful force."

Likewise, the petition's assertion that in a prosecution for involuntary manslaughter "the defense of self-defense would be unavailable" is a material misstatement of the law. (Petition at 12) The petition cites People v. DeMumbree, 98 Ill. App. 3d 22, 25 (1st Dist. 1981) for this erroneous proposition, but even the most basic legal research shows that this is not the law in Illinois. Had petitioners' counsel bothered to *Shepardize* the DeMumbree case, they would have found that the first entry is People v. Thurman, 106 Ill. 2d 326, 331 (1984), wherein the Illinois Supreme Court distinguished DeMumbree and stated:

> We accordingly hold that where, as here, there is evidence of both recklessness and self-defense in a case involving an involuntary-manslaughter count, the issues

> instruction for that offense must include the lawful-justification phraseology. The failure to so instruct this jury constituted reversible error.

Thurman, 106 Ill. 2d at 331. Clearly, Thurman holds that self-defense is available to a defendant charged with involuntary manslaughter, and numerous other cases stand for the same proposition. (See e.g. People v. Everette, 141 Ill. 2d 147, 156-7 (1991) ("We, therefore, hold that a homicide defendant is entitled to an instruction on self-defense where there is some evidence in the record which, if believed by a jury, would support the defense, even where the defendant testifies he accidentally killed the victim."); People v. Joyner, 50 Ill. 2d 302 (1972); People v. Robinson, 187 Ill. App. 3d 754 (1987)). In fact, the Illinois Pattern Jury Instructions for criminal cases specifically provide a sample set of instructions for an involuntary manslaughter charge that includes the "without legal justification" language and a reference to the self-defense instruction. (IPI Crim. 27.06) Because the controlling case law is clear that self-defense remains a viable defense to an involuntary manslaughter charge, the People are not free to disregard the above contradictions in the witnesses' accounts with respect to that charge and defense.

In sum, viewing the evidence in its totality and applying the correct law to those facts (as could be proved beyond a reasonable doubt), there was simply insufficient evidence to charge this case. Consequently, the evaluation of criminal charges remained a proper one upon the merits, and did not result from any bias or illicit motives on the part of the SAO.

D. Unfounded Accusations Fail to Show A Conflict of Interest

Lacking any evidentiary basis, the petition's mere allegations of a conspiracy to obstruct justice fail to establish any conflict of interest. As part of an overarching theme, the petition assumes that Vanecko received special treatment based upon the political offices held by his uncles. As purported proof of this bare assumption, the petition merely points out the offices

held by Vanecko's uncles and the fact that Vanecko was not charged, and then cites to Sun-Times articles in an effort to question the veracity of the police reports. From this conjecture, the petition then somehow concludes that the police and others (as well as an Assistant State's Attorney) all engaged in a spontaneous conspiracy that, in turn, gives rise to a disabling conflict of interest on the part of the SAO. As noted earlier, counsel apparently conducted no investigation beyond comparing the publicly released police reports with the Sun-Times articles, and counsel has failed to attach any affidavits to otherwise support these claims.

Perhaps before filing such defamatory and unfounded accusations in court, counsel could have at least read the police reports to the witnesses and asked if they were accurate. Had counsel done so, as did the OIG investigators in 2011, they would have found that all but one of the key witnesses have either confirmed that the police reports are a substantially accurate summary of their statements, or otherwise do not dispute the reports as accurate. Specifically, the OIG investigators reviewed with each witness the summaries of that witness' various statements as written in the police reports. Some witnesses could not recall exactly who they spoke to or how many times they were interviewed by the police officers and many of the witnesses also could not recall the exact statements they made to the police or whether they used certain words. Nevertheless, with the sole exception of Kosch A, the witnesses each agreed with the general substance of the summaries of their statements as contained in the 2004 detective supplementary reports.[17]

[17] The lone exception is Kosch A, i.e., one of the witnesses who admitted smoking cannabis that night and who later admitted that he actually never told the detective who contacted him in 2011 that, in the hallway on the night he did the line-up, he (Kosch A) recognized the guy who punched his friend. (Kosch A, at 76) Kosch A explained, "No, we never really got into it that much. It was just -- it seemed like the guy was going to call me back in a couple of days and almost like they were going to, you know, bring us back to Chicago and go through the whole questioning process and we were going to deal with the cops again and then all of a sudden we got contacted by the Sun-Times and figured out really what was going

Quite simply, the facts in this case do not undermine the veracity of the police reports. For example, after the OIG investigators reviewed each line of the 2004 police report, they asked Kosch C the following:

> Q: So based on what I just went over with you, was there anything on this report that you thought was inaccurate or - -
> A: No. I mean, for the most part, that's basically what I thought happened. Yeah.

(Kosch C, at 47) Similarly, the OIG investigators reviewed the 2004 report line by line with Kosch B. As to each line, Kosch B either confirmed he said what was attributed to him in the reports, or said that he did not recall if he said it at the time. Notably, he also specifically recalled saying that the victim "lunged at the three guys then just flying back, falling and hitting his head on the curb." (Kosch B, at 24) While reviewing the 2004 reports with Kosch D, the witness stated that he was unsure of the exact words used but generally agreed with the police summary (Kosch D, at 77-84). Additionally, in 2011, the OIG investigators reviewed the detective supplementary report with Bystander A and asked him if it was accurate. Bystander A stated that the report was consistent with his version, but he clarified that when he said the victim's group (and the victim in particular) were the aggressors, he did not mean that the victim was physically aggressive. "I remember saying that I saw (Koschman) moving forward as an aggressor, but never like in a, never to start a fight." (Bystander A, at 48) Bystander A also

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on." (Kosch A, at 76-77) As previously noted herein, after exposure to the Sun-Times reporters, the witness apparently "figured out what was going on" and thereafter, he refused to cooperate with police or answer any follow-up questions. (Kosch A, at 77) He also explained that he had seen copies of a "police report with everything blacked out and I just figured, you know, they are trying to fill in the blanks, trying to cover their own ass and I'm not dealing with the cops anymore." (Kosch A, at 78) Apparently it never occurred to him that portions of the report were merely blacked out to permit public release, and that the unredacted original reports were still in the possession of the Chicago Police Department.

agreed with the substance of the statement attributed to him in Det. O'Leary's supplementary report, but stated that he does not recall speaking with her specifically. (Bystander A, at 58).[18]

Rather than verify whether the police reports are accurate with the witnesses themselves, however, the petition instead creates a red-herring by claiming that at least four witnesses have denied ever telling law enforcement officials that Koschman was "physically aggressive." The People do not dispute that the witnesses never used the phrase "physically aggressive" when describing Koschman's actions that night, and indeed, that phrase does not even appear in the police reports. Rather, the evidence shows that the police reports accurately summarize each witness's description of Koschman's actions preceding the fatal contact, and then the reports contain the detectives' own legal conclusion (on the last page of the closing supplemental report) that Koschman "was clearly the aggressor as corroborated by all of the witnesses" interviewed, because "Koschman continued to attack the group of people" consisting of Van A, Van B Van C, and Richard Vanecko.

A simple reading of the police reports makes clear the distinction between law and fact. Here, the proper inquiry is whether the reports accurately reflect the substance of what the witnesses said at the time (and they do); and, if so, whether the legal characterization of Koschman as the "aggressor" was a reasonable interpretation by the detective based upon the witnesses' description of Koschman's actions (and it was). It is important to differentiate between the legal conclusion that Koschman was the aggressor and the factual summaries of

[18] It should be noted that although Bystander A stated that the reports from 2004 were generally an accurate account of what he said, he was also adamant that he remembers reading a newspaper article about the incident *before* he viewed a lineup. The People note that on May 22, 2004, and again on May 26, 2004, both the Chicago Tribune and the Sun Times each reported for the first time that Vanecko was questioned regarding the death of Koschman. Thus, despite his stated certainty, Bystander A appears to be wrong about that portion of the timeline of events during the investigation.

what the witnesses said. As the 2004 police reports accurately summarize, other than the initial contact between Koschman and Van C, no witness states that Koschman made any additional "physical" contact with the other group.[19]

Nevertheless, as explained above, Koschman might still constitute the "aggressor" as that term applies under the law of self-defense. For example, in interviews with the OIG investigators, five witnesses described Koschman making verbal threats and moving towards the other group. Likewise, even in 2011, five of the witnesses described Koschman as lunging, leaning or stepping toward the other group at the moment he was struck. Koschman's own friend Kosch B told the OIG investigators that "I suppose it could have been seen as threatening by the other group" (Kosch B, at 35-36). While words alone are not enough to justify the use of deadly force, threatening words combined with the above actions are legally sufficient to describe Koschman as an aggressor in a police report.

E. <u>The Missing Records Fail to Demonstrate Any Conflict of Interest</u>

By taking the issue of "missing reports" out of context, the petition overstates the significance of certain misplaced records in a cold-case file, and then draws sinister conclusions in an unfounded attempt to create the appearance of a conflict where none exists. After considering all of the evidence available thus far in the investigation, the mere fact that some documents could not be immediately located, years after the actual incident, has little to no bearing upon the relevant issues at hand.[20]

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[19] It must also be remembered that the police reports are summaries of witness statements and not verbatim accounts. For this reason, the reports do not purport to contain the exact words the witnesses used. What is important is that the substance of the statements is substantially accurate.

[20] At the outset, it must be emphasized that the police reports are not themselves evidence. Instead, as this Court knows, they merely contain summaries of the actual evidence, and sometimes a police officer's own suppositions based upon that evidence. For this reason, the actual evidence admitted at trial consists

Despite the petition's speculation, the course of actual events remains clear. Sometime in early 2011, the Sun-Times filed a request under the Freedom of Information Act (hereinafter "FOIA") for all police reports related to this incident. The CPD initially denied this request in its entirety but later released redacted copies of reports. After subsequent FOIA requests, the CPD released to the Sun-Times additional reports that had not previously been tendered. This delay was apparently due to the inability of certain CPD personnel to have others locate and submit the original case file. Ultimately, however, the original case file was found and secured.

In order to understand the real significance (or rather insignificance) of a temporarily misplaced police file, it is helpful to first understand the relevant types of reports generated by CPD. For purposes of discussion here, these reports were the General Offense Case Report, General Progress Reports and Detective Supplementary Reports. Although each type of report has its own value, they are generated at different times and for different purposes.

The General Offense Case Report (hereinafter "Case Report") consists of a usually handwritten pre-printed form filled out by the initial officer assigned to a case, and these Case Reports only record general information such as witness contact information, suspect identification or description, and a brief summary of the incident. By filling out the Case Report, the assigned officer can then obtain a unique Records Division number (hereinafter "RD") which is also used to help track all other reports later generated in that particular case.

When the initial officer believes that an incident may actually be a felony, he or she notifies the detective division for investigation. During an investigation, the assigned detective will record any notes of his interviews, observations etc. on the second type of police report known as a General Progress Report (hereinafter "GPR"). Essentially, the GPR contains notes of

of live witnesses and tangible exhibits, not police reports. Consequently, there is no reason to believe that any "evidence" has ever been lost or allegedly destroyed in this case at all.

what a witness said as opposed to verbatim accounts, and there is no general rule as to what information must be recorded on a GPR. Accordingly, even though their content varies by the individual detective, the GPRs will contain the same RD number as the Case Report and original case file.

Periodically throughout an investigation, the detectives will also prepare Detective Supplementary Reports (hereinafter "Supp Report"). The number and frequency of these reports will vary depending on the complexity of the case, the length of investigation and the detective assigned. Over time, the detectives incorporate the notes contained on the GPRs into the Supp Report. Supp Reports are prepared using a standardized computer system that assigns a unique report number to each Supp Report. Each of these reports will also contain the same RD number, so that all Supp Reports related to a specific case may be readily accessed by searching the RD number. The detective may also print copies of unapproved drafts of Supp Reports to use as a reference during the investigation. Whenever a Supp Report is printed using the system, the computer automatically prints at the bottom of the page the date and time printed, as well as the name and identification number of the detective printing the report. As a detective prepares a Supp Report on this system, the detective may make corrections, additions and deletions until such time as the report is approved by a supervisor. Once a Supp Report is approved by a supervisor, the computer system stores the report electronically and it may no longer be altered. For this reason, even if the "original" copy of a Supp Report cannot be found, an exact duplicate is available via the secure computer system.

In this case, even though the original case file could not be immediately located, all of the relevant police reports were ultimately found. For example, the officer on the scene generated the Case Report which contained summaries of the information given on scene. Here, the

evidence shows that CPD located this report and released it in redacted form pursuant to the Sun-Times FOIA request, and that it was also otherwise available to the detectives who reinvestigated this case in 2011. Redacted copies of all of the approved Supp Reports were also produced pursuant to the Sun Times FOIA request, and they were available to the detectives who re-investigated the case in 2011. At the time of the initial response to the Sun-Times FOIA request, however, CPD could not locate the original case file and, therefore, they could not release all of the GPRs at that time. For the same reason, some of the GPRs were also initially unavailable to the detectives who re-investigated this case in 2011. Since then, however, the police have located the original case file including all of the GPRs.

According to the petition, however, the temporary misplacement of the original case file somehow forms the basis for appointing a special prosecutor, because a "missing" GPR in that case file related to the initial interview of Kosch A in 2004. Incredibly, the petition maintains this theory, despite the fact the report and case file has since been found, and that the information contained in that GPR was otherwise previously and accurately incorporated into the computerized Supp Report summarizing the same interview.

As part of the ongoing review, OIG investigators have examined the relevant reports. Specifically, a handwritten GPR taken by Detective Yawger during an interview of Kosch A contained a crossed-out phrase "the larger of the three guys becomes very aggressive." Meanwhile, the corresponding Supp Report (which summarizes the same interview as the handwritten notes of the GPR) states "the guy the victim was arguing with" Van C "was with a larger male white that was appearing to get very agitated at the victim as they kept arguing" (Nov. 10, 2004, Supp Report No. 3193543 at 6). During an interview with OIG investigators in 2011, the actual witness (Kosch A) was asked whether the relevant Supp Report was accurate:

> Q. In 2004 did you make the statement that the guy that the victim was arguing with was a larger male, white, that was appearing to get very agitated at the victim as they kept arguing?
> A. Yeah, I can see myself saying that. That sounds about right.

(Kosch A, at 50) Given the fact that, while under oath, the witness confirmed that the Supp Report "sounds about right" when it summarized the substance of his statement to the police in 2004, the handwritten change made to the initial GPR notes remains insignificant.[21]

The alleged discrepancy becomes even less significant to the petition's conspiracy theories, because the evidence indicates that the police wrote the summaries of the Kosch A interview before they ever learned of Vanecko's involvement. In fact, at 8:34 a.m., on May 13, 2004, detectives printed a draft of Supp Report No. 3193543 from the secure computer system. At the time of printing, this draft report had not yet been finalized, but it contained the summaries of the interviews of Bystander B, Kosch A, Kosch B, and Kosch D. This drat Supp Report also listed as "wanted" Van A and Van B, as well as two unnamed male whites with vague, general physical descriptions. This draft Supp Report contained an almost identical version of the witness summaries as is contained within the final Supp Report approved by a supervisor on November 10, 2004 (including the word "agitated"). Later that same day, at 4:07 p.m., on May 13, 2004, the detectives printed another draft of Supp Report No. 3193543. This version differs from the draft printed that morning in that it now included a summary of the interview of Van A conducted at approximately noon on May 13, 2004. Based on this new interview, for the first time the previously "unknown male whites" were now identified in the report as Richard Vanecko and Van C. As with the draft printed on the morning of May 13,

[21] As noted previously herein, the fact that the CPD detectives in 2011 could not ask Kosch A any follow-up questions about this change in the wording on the GPR may be due to the fact that, after his exposure to Sun-Times reporters, Kosch A refused to speak with the detectives, and when called, simply insulted their mothers.

2004, this version also contained summaries of the witness statements that are virtually identical to those in the draft printed that morning and in the final report approved on November 10, 2004. Indeed, the only significant difference between the morning and afternoon drafts is the proper insertion of Vanecko's and Van C's names where appropriate.

This documentary evidence of the draft Supp Reports printed on May 13th is significant for several reasons. First, the computerized draft reports corroborate the fact that the summaries of the witness statements were written before the detectives learned about Vanecko's involvement from Van A. Therefore, at the time the summaries of witness statements were written, the detectives were ostensibly free from the purported "undue influence" as alleged by the petition. For the same reason, the evidence does not support the petition's further allegation that this "undue influence" caused an unnecessary delay in the early investigation. That is, because the evidence indicates that the police had no reason to know that Vanecko was potentially involved in this case until they interviewed Van A at noon on May 13, 2004, his involvement could not have been the cause of any of the alleged irregularities or delays in the investigation beforehand. By the same token, since the police officers wrote the summaries almost contemporaneously with the interviews, and since the various versions remain consistent in the reports, the petition's complaint regarding the delay in submitting the report until November 10, 2004, is likewise immaterial. Especially, where, as here, the actual witness has confirmed the account as accurate.

As with the police reports, the petition also engages in wild speculation and finds grave significance in the fact that the SAO's Felony Review Unit could not locate a file folder in an uncharged case years after the underlying incident. While the Sun-Times has written several inflammatory articles proclaiming the troubling nature of the missing "file" from felony review,

they have never once explained what such a folder would actually contain, or what significance that fact may or may not possess. To educate the petitioners, however, the SAO has attached a copy of a blank felony review folder, and will herein explain what this pre-printed form is in reality, and how its loss has absolutely no meaningful bearing on this case.

A felony review folder is a routine, pre-printed form used to help open a case in one of the SAO's internal docketing systems. As can be seen from the attached exhibit, it consists of a pre-printed two-page manila folder containing fill-in-the-blank spaces to write identifying information (i.e. name, birth date, contact information etc.) for the parties to an investigation (i.e. accused, victim, witnesses etc.). The felony review folder also contains an area where statements of *the accused* can be summarized in a short paragraph, as well as another small area for a brief summary of the events under review. The felony review folder does not contain a space for summaries of the statements of witnesses, nor does it ever take the place of the underlying police reports in the case. Unless an Assistant State's Attorney took a hand-written statement from a witness (something which was not done in this investigation or even alleged to have been done), any witnesses' statements would be summarized in the official police reports, not the felony review folder. This was, and remains, the standard practice followed in thousands of cases reviewed by the Felony Review Unit each year.

Given its content and purpose, the loss of the felony review folder in this matter is not important. In this case, even though a felony review folder could not be located seven years after an uncharged incident, all of the summaries of the witness statements prepared in 2004 are still available within the CPD reports. Most of these summaries have been stored securely on the CPD's computerized report system since 2004. Furthermore, the summaries of interviews contained in the approved version of Supp Report No. 3193543 arose from the initial interviews

and not from the post-lineup interviews, and Detective Yawger's notes taken during the post-lineup interviews were written on GPRs that memorialized the witnesses' statements at that time (which also remained consistent with their earlier interviews).

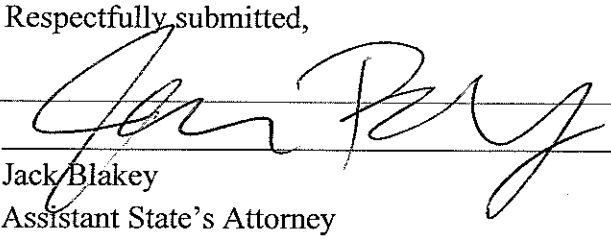
Based upon the above facts, the only things "lost" due to the missing felony review folder are the prosecutor's notes related to witness contact information.[22] Based on the ability of the police to locate these witnesses in 2011, however, this Court can safely conclude that the information allegedly lost has not impeded the investigation in any way, much less established some criminal wrong-doing upon the part of the prosecutor, or more importantly, any disabling conflict as to the SAO as a whole.

[22] In the 2011 interviews, the relevant witnesses did not recall the ASA taking notes (Kosch A, at 61; Kosch D, at 65; Kosch C, at 59), or they did not recall ever speaking with him (Kosch B, at 30; Bystander A, at 44; Bystander B, at 1-8).

III. CONCLUSION

In light of the above, the respondent, Cook County State's Attorney Anita Alvarez, respectfully requests that this Court reject petitioners' arguments and deny the petition.

Respectfully submitted,



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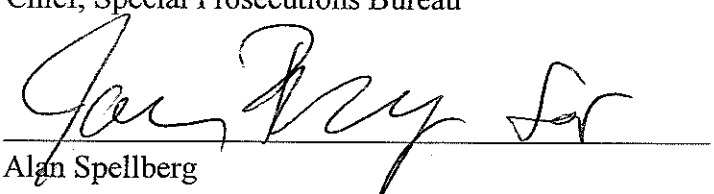

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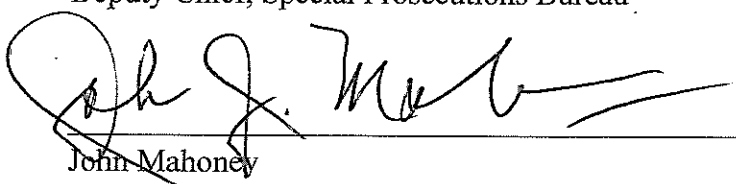

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