

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

PEOPLE OF THE STATE OF ILLINOIS,

Respondent,

v.

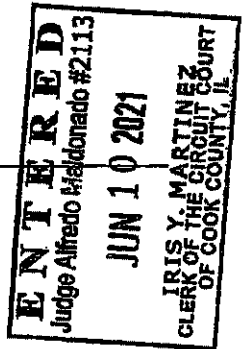
JACKIE WILSON,

Petitioner.

NO. 82 CR 1211
88 CR 7771

Motion for Special Prosecutor

Hon. Alfredo Maldonado
Judge Presiding



**ORDER GRANTING MOTION FOR THE APPOINTMENT OF A SPECIAL
PROSECUTOR**

The petitioner, Jackie Wilson, through his attorneys, requests the appointment of a special prosecutor, pursuant to 55 ILCS 5/3-9008, to investigate the Cook County State's Attorney's prosecution of Wilson in his first two trials in the above captioned matter, the prosecution of Wilson by the Office of the Special Prosecutor in the third trial in the above captioned matter and Nicholas "Nick" Trutenko's alleged perjury that occurred during the third trial. On May 5, 2021, after arguments by the attorneys for Wilson and the Cook County State's Attorney's Office, this court took the matter under advisement. This order now follows.

History

In 1982, the petitioner, Jackie Wilson (hereinafter "Wilson"), and his brother were charged with the murders and armed robberies of Chicago Police officers William Fahey and Richard O'Brien. The Cook County State's Attorney's Office (hereinafter "CCSAO")

prosecuted the case, and Wilson was convicted after a jury trial in 1983. However, the appellate court reversed and remanded the matter for a new trial. *People v. Wilson*, 161 Ill.App.3d 995 (1st Dist. 1987). Assistant state's attorney Nicholas "Nick" Trutenko (hereinafter "Trutenko") led the CCSAO's second prosecution of Wilson. Upon retrial in 1989, William Coleman a/k/a Alfred Clarkson (hereinafter "Coleman"), a jailhouse informant and citizen of the United Kingdom, testified that Wilson admitted the crimes during a conversation in the Cook County Jail when both men were inmates. The jury found Wilson guilty of O'Brien's murder and the armed robbery of both officers but acquitted Wilson of Fahey's murder. Subsequently, the trial court sentenced Wilson to life imprisonment. The convictions and sentence were affirmed on direct appeal. *People v. Wilson*, 257 Ill.App.3d 670 (1st Dist. 1993).

In 2002 and 2003, Judge Paul Biebel, then Presiding Judge of the Criminal Division of the Circuit Court of Cook County, found that a conflict of interest disqualified the CCSAO from all matters related to Chicago Police Commander Jon Burge (hereinafter "Burge") because the then State's Attorney had previously represented Burge. The Illinois Attorney General (hereinafter "AG") was then ordered to assume the responsibility of handling post-conviction matters involving Burge. In 2008, after a new State's Attorney assumed office, the AG sought to transfer responsibility of Burge related matters back to the CCSAO. In 2009, after litigation involving the AG, the CCSAO, the Cook County Public Defender and the People's Law Office (who filed an *amicus* brief), Judge Biebel appointed a special prosecutor to undertake the responsibility of dealing with Burge related post-conviction matters. The appointment order authorized the

special prosecutor to hire other attorney and non-attorney staff to assist in this role. Thus, the Office of the Special Prosecutor (hereinafter "OSP") came into existence.

Because Burge and other members of the Chicago Police Department tortured Wilson after his arrest, Wilson filed a petition with the Illinois Torture Inquiry and Relief Commission (hereinafter "Commission") in 2011. Ultimately, in 2015, the Commission determined that sufficient evidence existed to suggest that Wilson made an involuntary statement because of police torture during his interrogation, and the Commission referred Wilson's petition to the Circuit Court of Cook County for further proceedings. During these proceedings, the OSP represented the State's interests. After lengthy and comprehensive proceedings, Judge William Hooks suppressed Wilson's statements because of the police torture, vacated Wilson's convictions and ordered a third trial where the OSP would prosecute Wilson. The appellate court affirmed Judge Hooks' order granting relief. *People v. Wilson*, 2019 IL App (1st) 181486.

Leading up to the third trial, the parties knew that Coleman was a wanted international conman with an extensive criminal history and a reputation for being a consummate liar. Nonetheless, the OSP indicated that it would rely on Coleman's testimony from Wilson's second trial and designated Coleman an unavailable witness because he was a fugitive who was probably dead. In preparation for Wilson's third trial, Wilson's attorneys subpoenaed the CCSAO for information: a) about criminal charges against William Coleman pending during Wilson's second trial; b) the personnel files of former assistant state's attorneys Larry Hyman and William Kunkle (hereinafter "Kunkle") and then current assistant state's attorney (hereinafter "ASA") Trutenko; and

c) Trutenko's possible testimony at the upcoming trial. The CCSAO assigned ASA Paul Fangman (hereinafter "Fangman"), to represent the CCSAO. Fangman sought to negotiate with Wilson's lawyers about the scope of the subpoenas and tried to quash the subpoena as to Trutenko's personnel file. On September 17, 2020, Judge Hooks denied the attempt to quash the subpoena and ordered production of Trutenko's personnel file. On September 25, 2020, the CCSAO assigned ASA T. Andrew Horvat (hereinafter "Horvat") to represent Trutenko in his role as a witness in Wilson's impending third trial.

Before trial, Wilson's attorneys discovered that Trutenko and Coleman had a close and previously undisclosed relationship that resulted in favorable deals for Coleman in some criminal cases. Moreover, Wilson's defense team learned that Trutenko actually traveled to the United Kingdom in 1992 to become godfather to one of Coleman's children after Wilson's second trial. Once Trutenko's personnel file was produced, Wilson's lawyers also learned about a 2017 incident where Trutenko threatened a witness who refused to testify before a grand jury in an unrelated case. The CCSAO did not disclose this misconduct to anyone, including defense counsel in the unrelated case.

In late September 2020, Wilson chose to have a bench trial before Judge Hooks. On September 30, 2020, at Wilson's third trial, Kunkle, who led the prosecution of Wilson's brother, testified that in 1991 Coleman repeatedly contacted him and that Kunkle was concerned that Coleman would change his story because Coleman was an extortionist. Kunkle never notified either brother's defense counsel about Coleman's repeated contacts. Before Trutenko's October 1, 2020, trial testimony, Horvat, Fangman and the OSP trial prosecutor, Lawrence Rosen (hereinafter "Rosen"), met with Trutenko for trial

preparation. When Trutenko testified on October 1, 2020, Fangman appeared in Judge Hook's courtroom with Horvat and Trutenko. It is important to note, that Trutenko's trial preparation meeting and testimony occurred after Fangman's failed motion to quash the subpoena regarding Trutenko on behalf of the CCSAO.

On October 1, 2020, during his trial testimony, Trutenko admitted to a decades long friendship with Coleman and also admitted to travelling internationally to become godfather to Coleman's child. Trutenko then revealed that he knew Coleman was still alive and that he communicated with Coleman via email during Wilson's third trial. Trutenko acknowledged the witness preparation meeting but denied discussing Coleman during the meeting. Upon this testimony, Judge Hooks recessed the trial momentarily. Horvat, Fangman and Trutenko left the courtroom without informing the court about Trutenko's false testimony. Upon court reconvening, the OSP dismissed the case against Wilson because of the false testimony and informed the court of Trutenko's perjury.

Right after the dismissal, Judge Hooks issued a preservation and disclosure order regarding communications between Trutenko and Coleman. The order was sent to Horvat and Fangman later that evening. Meanwhile, the CCSAO fired Trutenko. Trutenko then erased his work issued cell phone. However, a CCSAO investigator did not retrieve the phone from Trutenko until a week later.

On October 2, 2020, the parties appeared before Judge Hooks, and the OSP disclosed, amongst other things, that Trutenko never revealed to the OSP that Coleman was alive and that Trutenko lied when he testified that he was unaware that he would be

questioned about Coleman because he was told this during the witness preparation meeting. The OSP also informed Judge Hooks that, immediately before Trutenko's testimony, Horvat tried to warn Rosen from asking Trutenko about Coleman. Rosen recounted his discussion with Horvat and said "[w]hen Mr. Horvat came in, he said to me whatever you do, don't ask questions about Mr. Trutenko's contact with Coleman after the trial. And I said the second one back in 1989. And I said why and he said it's nothing illegal, it nothing unethical but it's weird...." October 2, 2020, Tr. 75 at 3-9.

Subsequently, on October 19, 2020, Wilson filed a motion for sanctions. In response, Horvat, who was represented by private counsel, asserted that attorney-client privilege prevented Horvat from disclosing information about Trutenko and Coleman's relationship. However, Fangman stated in an affidavit that, as Trutenko was testifying, Horvat told Fangman that he learned this information the night before at 11:00 p.m. In an affidavit, Horvat indicated that he did not recall the exact details about his October 1, 2020, conversation with Rosen shortly before Trutenko's testimony. In an affidavit, Rosen reaffirmed the substance of his October 2, 2020, courtroom disclosure. On December 18, 2020, Judge Hooks denied the motion for sanctions and indicated that a monetary judgment was not the proper vehicle for the requested comprehensive relief. Instead, Judge Hooks referred the matter to the Presiding Judge of the Criminal Division for the possible appointment of a special prosecutor. After the current presiding judge recused herself, the matter was assigned to this court for further proceedings.

Legal Standard

Article VI, section 19, of the Illinois Constitution provides for the election of a State's Attorney in each county. Ill. Const. 1970, art. VI, § 19. *People v. Lang*, 346 Ill. App. 3d 677, 680-81, 805 N.E.2d 1249, 1252 (2nd Dist. 2004). Section 3-9005 of the Counties Code, 55 ILCS 5/3-9005 (2021), empowers the State's Attorney with the duty to commence and prosecute all criminal or civil actions where the people of the State or county may be concerned in the circuit court. *People v. Pankey*, 94 Ill. 2d 12, 16 (1983). The State's Attorney also has the duty to defend the county and any county employee in all legal actions. 55 ILCS 5/3-9005(a)(4). As a member of the executive branch of government, the State's Attorney possesses exclusive discretion in the initiation and management of a criminal prosecution. *People v. Novak*, 163 Ill. 2d 93, 113 (1994). The State's Attorney must evaluate the evidence and other relevant factors to determine what offenses, if any, can and should properly be charged. *People ex rel. Daley v. Moran*, 94 Ill. 2d 41, 51 (1983). Accordingly, the executive branch controls the extent of criminal investigations, subject only to judicial intervention to protect rights in appropriate cases. *Dellwood Farms, Inc. v. Cargill, Inc.*, 128 F. 3d 1122, 1125 (1997).

Notwithstanding the aforementioned powers and duties of the State's Attorneys for each county, our legislature has codified certain limitations on those powers and duties. 55 ILCS 5/3-9008 (2021). In various iterations, these statutory limitations have long been part of Illinois law. See, e.g., *Lavin v. Board of Commissioners*, 245 Ill. 496 (1910); *Tearney v. Harding*, 335 Ill. 123 (1929). Currently, Section 3-9008 of the Counties Code provides in relevant parts:

(a-5) The court on its own motion, or an interested person in a cause or proceeding, civil or criminal, may file a petition alleging that the State's Attorney is sick, absent, or unable to fulfill his or her duties. The court shall consider the petition, any documents filed in response, and if necessary, grant a hearing to determine whether the State's Attorney is sick, absent, or otherwise unable to fulfill his or her duties. If the court finds that the State's Attorney is sick, absent, or otherwise unable to fulfill his or her duties, the court may appoint some competent attorney to prosecute or defend the cause or proceeding.

(a-10) The court on its own motion, or an interested person in a cause or proceeding, civil or criminal, may file a petition alleging that the State's Attorney has an actual conflict of interest in the cause or proceeding. The court shall consider the petition, any documents filed in response, and if necessary, grant a hearing to determine whether the State's Attorney has an actual conflict of interest in the cause or proceeding. If the court finds that the petitioner has proven by sufficient facts and evidence that the State's Attorney has an actual conflict of interest in a specific case, the court may appoint some competent attorney to prosecute or defend the cause or proceeding.

(a-15) Notwithstanding subsections (a-5) and (a-10) of this Section, the State's Attorney may file a petition to recuse himself or herself from a cause or proceeding for any other reason he or she deems appropriate and the court shall appoint a special prosecutor as provided in this Section.

(a-20) Prior to appointing a private attorney under this Section, the court shall contact public agencies, including, but not limited to, the Office of Attorney General, Office of the State's Attorneys Appellate Prosecutor, or local State's Attorney's Offices throughout the State, to determine a public prosecutor's availability to serve as a special prosecutor at no cost to the county and shall appoint a public agency if they are able and willing to accept the appointment. An attorney so appointed shall have the same power and authority in relation to the cause or proceeding as the State's Attorney would have if present and attending to the cause or proceedings.

These statutory provisions are the mechanism for determining when a State's Attorney should be disqualified from a particular cause or proceeding. See *Farmer v. Cook County State's Attorney's Office (In re Appointment of Special Prosecutor)*, 2019 IL App (1st) 173173, ¶ 22 (addressing the current version of Section 3-9008 which was amended in 2016).

The pre-2016 version of Section 3-9008 was described as serving to "prevent any influence upon the discharge of the duties of the State's Attorney by reason of personal interest." *In re Harris*, 335 Ill. App. 3d 517, 520 (2002), quoting *People v. Morley*, 287 Ill. App. 3d 499, 503-04 (1997). Accordingly, case law extended pre-2016 Section 3-9008's applicability to situations where the State's Attorney had a *per se* conflict of interest in the controversy. *People v. Lanigan*, 353 Ill.App.3d 422, 430 (1st Dist. 2004).¹ As to pre-2016 Section 3-9008, some courts determined that the term "interest" applied in situations where the State's Attorney was a) involved in the litigation as a private individual; b) an actual party to the action; or c) subject to creating an appearance of impropriety with her continued participation. See *People v. Lang*, 346 Ill.App.3d 677, 682-683; See also *People v. Weeks*, 2011 IL App (1st) 100395, ¶ 46. However, *Lang's* holding, that an appearance of impropriety may constitute a basis for disqualification, seemingly conflicts with the Illinois Supreme Court's earlier controlling interpretation of pre-2016 Section 3-9008 that defined only two grounds for disqualification because of "interest": the State's Attorney's interest in the litigation in a personal capacity or the State's Attorney's involvement as an actual party to the action. *Environmental Protection Agency v. Pollution Control Board*, 69 Ill. 2d 394, 400-401 (1977); See *In re Appointment of Special Prosecutor*, 2019 IL App (1st) 173173, ¶ 39 (questioning *Lang's* viability because of the 2016 statutory amendment and incompatibility with supreme court precedent).

¹ Where an attorney has ties to a person or entity that would benefit from an unfavorable outcome for her client, the attorney has a *per se* conflict of interest. *People v. Moore*, 189 Ill.2d 521, 538 (2000) See also *People v. Courtney*, 288 Ill. App. 3d 1025, 1031-32, (1997), quoting *People v. Gerold*, 265 Ill. 448, 477 (1914) ("[a]n attorney cannot represent conflicting interests or undertake to discharge inconsistent duties.").

In its current version, Section 3-9008(a-10) only allows for a special prosecutor when an actual conflict of interest exists for the State's Attorney. *Haney v. Winnebago County Board (In re Appointment of Special State's Atty.)*, 2020 IL App (2d) 190845, ¶ 16. However, the term "actual conflict of interest" is not defined by the statute. When reviewing previous versions of statutes authorizing special prosecutors and the legislative history for the current statute, appellate courts construing the meaning of "actual conflict of interest" have held that nothing suggests that the current version of Section 3-9008 is an abandonment of the Illinois Supreme Court's earlier definition of "interest", i.e. where the State's Attorney is personally involved in the litigation or is an actual party. *Id.* at ¶ 17, citing *Environmental Protection Agency v. Pollution Control Board*, 69 Ill. 2d 394, 400-401 (1977); See also *In re Appointment of Special Prosecutor*, 2019 IL App (1st) 173173, ¶ 39. Therefore, "actual conflict of interest" encompasses situations where the State's Attorney is interested in the litigation as a private party or involved as an actual party.

If the State's Attorney cannot discharge her duties because of a conflict of interest, the circuit court, in its discretion, may appoint an independent special prosecutor to act in her stead. *People v. Bickerstaff*, 403 Ill.App.3d 347, 352 (2nd Dist. 2004). However, before appointing a private attorney as a special prosecutor, the circuit court must first contact public agencies to determine if they are willing and able to accept appointment. 55 ILCS 5/3-9008(a-20) (2021). When appointing a special prosecutor, the circuit court must define the scope of the special prosecutor's authority by "focusing on the particular individuals, matters and time periods to be investigated." *In re Appointment of Special Prosecutor*, 388

Ill.App.3d 220, 234 (3rd Dist. 2009). The authority of the special prosecutor is strictly limited to the matter for which she was appointed. *Franzen v. Birkett (In re Special State's Attorney)*, 305 Ill.App.3d 749, 761 (2nd Dist. 1999). An order granting authority to a special prosecutor must be strictly and narrowly construed by the circuit court. 55 ILCS 5/3-9008(c).

Analysis

In this case, Wilson seeks a special prosecutor because he claims that the CCSAO has a *per se* conflict of interest as to a criminal investigation into alleged prosecutorial misconduct. Instead of characterizing the conflict as *per se*, the CCSAO correctly acknowledges that a factual basis exists for an investigation of former ASA Trutenko's alleged perjury and that the CCSAO has an **actual conflict of interest** as to an investigation of Trutenko. See *Response to the Petition to Appoint a Special Prosecutor*, filed March 24, 2021, ¶ 18. However, the CCSAO opposes the appointment of a special prosecutor to investigate the conduct of ASAs Fangman and Horvat, but, simultaneously, the CCSAO admits that a conflict of interest exists as to an investigation of these two individuals. In essence, the CCSAO is trying play both sides of the fence.

As to the applicable statutory grounds for disqualification, no evidence suggests that the Cook County State's Attorney, Kimberly Foxx, is sick, absent or otherwise unable to fulfill her duties. Consequently, Section 3-9008(a-5) does not apply to this case. 55 ILCS 5/3-9008(a-5). However, the CCSAO's admission of an actual conflict squarely implicates Section 3-9008(a-10). In determining whether Wilson established sufficient facts to warrant the appointment of a special prosecutor under Section 3-9008(a-10), the following

is a fair summary of the facts: The alleged criminal activity, Trutenko's perjury, was perpetrated by him while employed as an assistant state's attorney testifying in Wilson's 2020 criminal trial about matters directly related to Wilson's previous criminal prosecution by the CCSAO. In pre-trial litigation, the CCSAO, through Fangman, sought to prevent disclosure of information about Trutenko that ultimately led to evidence of Trutenko's misconduct in an unrelated criminal case. Before Trutenko's testimony, Horvat, serving as Trutenko's lawyer, tried to warn the OSP not to ask Trutenko about his contacts with Coleman, a key witness in the 1989 trial. Subsequently, in an affidavit, Horvat stated that he did not recall his exact conversation with OSP. During his 2020 trial testimony, Trutenko admitted to an undisclosed relationship with Coleman and then allegedly lied about whether Coleman was discussed during a trial preparation meeting involving Trutenko, Horvath, Fangman and OSP trial attorney, Rosen. As Trutenko revealed the relationship with Coleman on the stand, Horvat leaned over and told Fangman that Horvat learned about this relationship at 11:00 p.m. the night before the testimony. After the alleged perjury, Trutenko, Horvat and Fangman left the courtroom, and Trutenko erased his work issued cell phone. The CCSAO did not retrieve the phone from Trutenko until a week later.

Obviously, as to Trutenko, there is no question that sufficient grounds exist for a criminal investigation and that the CCSAO has an actual, and not *per se*, conflict of interest. Trutenko's alleged perjury occurred while he was an assistant state's attorney testifying about matters within the scope of his employment, a prosecution previously conducted by the CCSAO. See *In re Appointment of a Special Prosecutor*, 2019 IL App (1st)

173173, ¶ 37 (discussing *People v. Courtney* and *Sommer v. Goetze* where actual conflicts of interest existed); See also *People v. Courtney*, 288 Ill. App. 3d 1025, 1034, (1997) (newly appointed state's attorney previously served as defense counsel for defendant); *Sommer v. Goetze*, 102 Ill. App. 3d 117 (3rd Dist. 1981) (assistant state's attorney was witness and complainant). With Horvat and Fangman, the CCSAO also has a clear conflict of interest because their connection to Trutenko's alleged conduct directly resulted from their roles as assistant state's attorneys. Horvat's individual representation of Trutenko hinged on Trutenko's status as an employee of the CCSAO, which is a Cook County governmental entity. Fangman represented the CCSAO regarding Trutenko's effect on the CCSAO's interests outside of Wilson's trial.

When analyzing whether Horvat and Fangman engaged in potential ethical or criminal conduct in this matter, the answer becomes somewhat less clear. As the Cook County State's Attorney with responsibilities in both the criminal and civil arenas, Kimberly Foxx and the attorneys in her office are all bound by the ethical obligations of the Illinois Rules of Professional Conduct (hereinafter "RPC"). RPC 1.6 requires an attorney to maintain the confidentiality of all client information disclosed to the attorney, subject to specific exceptions. Horvat claims that this rule prevented disclosure of Trutenko's confidential information, but Horvat's adherence to RPC 1.6 did not prevent him from trying to warn Rosen about Trutenko's testimony. Titled as the "Special Duties of a Prosecutor", RPC 8.3 mandates that prosecutors must pursue justice and not merely convictions in criminal cases. The special obligation that prosecutors have to seek the truth and justice is fundamental to our criminal justice system. *People v. Beaman*, 229 Ill.

2d 56, 73, (2008) (citing *Strickler v. Greene*, 527 U.S. 263, 281, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999)). RPC 8.3(g) imposes an ongoing duty for prosecutors to disclose to a convicted defendant new, credible and material evidence creating a likelihood that the defendant did not commit the offense. See RPC 3.8(g).

It is important to note that the CCSAO was not prosecuting Wilson in 2020 and that Wilson's convictions were vacated before his third trial, so arguably the requirements of RPC 3.8, including those contained in RPC 3.8(g), might not have applied to the CCSAO. However, the spirit and purpose of RPC 3.8 suggests to this court otherwise.² Notwithstanding the applicability of RPC 3.8, the fact that a disclosure would reveal misconduct by an ASA in a previous murder trial prosecuted by the CCSAO certainly creates a heightened specter of suspicion when nondisclosure of such information comes to light, even if not specifically required by the rules of professional conduct.

² This court was unable to find any cases on point. However, paragraph 7 of the committee comments for RPC 3.8 explains the intent of RPC 3.8(g) as follows:

When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a person outside the prosecutor's jurisdiction was convicted of a crime that the person did not commit, paragraph (g) requires prompt disclosure to the court or other appropriate authority, such as the chief prosecutor where the conviction occurred. If the conviction was obtained in the prosecutor's jurisdiction, paragraph (g) requires the prosecutor to examine the evidence and undertake further reasonable investigation to determine whether the defendant is in fact innocent or make reasonable efforts to cause another appropriate authority to undertake the necessary investigation, and to promptly disclose the evidence to the court and, absent court authorized delay, to the defendant. Consistent with the objectives of Rules 4.2 and 4.3, disclosure to a represented defendant must be made through the defendant's counsel, and, in the case of an unrepresented defendant, would ordinarily be accompanied by a request to a court for the appointment of counsel to assist the defendant in taking such legal measures as may be appropriate.

Because Horvat and Fangman were acting within the scope of their respective duties as assistant state's attorneys by maintaining client confidences during the representation of a county employee who was a litigation witness due to his employment (Horvat) and representing the interests of the CCSAO in the litigation (Fangman), the CCSAO argues that both ASAs did not commit any ethical or criminal violations. Through these assignments, the CCSAO immediately placed Horvat and Fangman in a precarious, perhaps impossible, ethical situation. Before Trutenko's testimony, it is inconceivable that the CCSAO did not realize that its interests and those of Trutenko conflicted with each other. Horvat and Fangman, as assistant states' attorneys, should not have been directly involved with Trutenko when he testified. Yet, both Horvat and Fangman continued with their assignment to Trutenko. The respective distinctions in Horvat's and Fangman's roles, attorney for Trutenko and attorney for the CCSAO, publically unraveled as Trutenko testified because those distinctions never existed in any meaningful way since Horvat and Fangman acted in unison before, during and after Trutenko's alleged perjury.³

The record in this case absolutely calls into question the reasons behind the CCSAO's decisions and conduct regarding Trutenko. At best, the CCSAO acted in a misguided and inept manner as to Trutenko and the ethical crisis created by his misconduct and trial testimony. However, at worst, the actions of the CCSAO, as to

³ Underscoring that this distinction did not exist, Trutenko, who is a licensed attorney, thought that Horvat and Fangman were both his lawyers. Right in the middle of the testimony where he allegedly perjured himself, Trutenko said, "...I would say the Zoom meeting probably lasted a little under one hour, and most of it was driven by my attorneys who are sitting out there right now." October 1, 2020 Tr. 242 at 19-21 [emphasis added].

Trutenko, could have been motivated by unethical and, perhaps, illegal reasons to cover up misconduct. Accordingly, sufficient reason exists to warrant an independent investigation into Trutenko's misconduct and into the actions of the CCSAO, as an institution, related to the substance of Trutenko's trial testimony and his alleged perjury. Consequently, this court rejects the CCSAO's argument to limit the investigation to Trutenko because such a limitation would lead the investigation into an illogical and hypocritical trap. The CCSAO cannot have it both ways by saying an investigation should occur but not as to its members or itself. The OSP is disqualified from the required investigation because it is directly involved in this matter, and the OSP's members, at a minimum, may be witnesses. Therefore, this court will appoint a separate special prosecutor to investigate the circumstances related to Trutenko's trial testimony and also his alleged perjury.

Lastly, this court denies Wilson's blanket request for a special prosecutor to investigate the actions of the CCSAO and the OSP over the last several decades related to the prosecution of Wilson for the murders of Officers Fahey and O'Brien. While the horrific murders of two police officers and the sordid history of the investigation and criminal prosecutions in this case serve as a shameful chapter in Chicago's history, an expansive and holistic review is outside the scope of the statutory framework that empowers the special prosecutor to prosecute or defend a cause or proceeding. Here, the specific cause is Trutenko's trial testimony, his alleged perjury, and any other persons' conduct associated with the substance of his testimony or his alleged perjury. From this

starting point, the special prosecutor will be empowered to initiate any investigations and conduct appropriate criminal prosecutions.

However, the comprehensive governmental study requested by Wilson requires some other legal framework for its authorization. See, e.g., 775 ILCS 40/40-1 *et seq.* (for example the legislature enacted the Illinois Torture Inquiry and Relief Commission Act to create an investigate entity to review claims of police torture). That said, this court agrees with Wilson that police and prosecutorial misconduct cannot be tolerated or allowed to exist in the shadows. A clear understanding of how the criminal justice system in this case functioned, and, sadly, how it malfunctioned would help prevent future cases like Wilson's. However, this court cannot order something beyond what Section 3-9008 currently allows.

Conclusion

Former assistant Cook County State's attorney, Nicholas Trutenko, allegedly committed perjury during his testimony on October 1, 2020, in Jackie Wilson's criminal trial. Accordingly, a sufficient basis exists to investigate whether Trutenko engaged in criminal conduct. Because of the actions of the Cook County State's Attorney's Office before, during and after Trutenko's testimony, a sufficient basis exists to investigate whether any persons, including but not limited to current or former members of the Cook County State's Attorney's Office, engaged in criminal conduct. Since the Cook County State's Attorney's Office is a focal point of the investigation, the Cook County State's Attorney has an actual conflict and cannot investigate this matter nor conduct any appropriate criminal prosecutions. Thus, in the interests of justice, this court will appoint

a special prosecutor to investigate and, if necessary, prosecute any criminal offenses.

Therefore, this court hereby orders:

- A. That a special prosecutor shall be appointed in this matter because the Cook County State's Attorney has an actual conflict of interest as to the substance of Nicholas Trutenko's testimony and his alleged perjury on October 1, 2020, and as to any conduct by current or former members of the Cook County State's Attorney's Office related to the substance of Nicholas Trutenko's testimony and his alleged perjury on October 1, 2020.
- B. That, in the interests of justice, the special prosecutor will be authorized to conduct an independent investigation of the actions of any person, including, but not limited to, any current or former members of the Cook County State's Attorney Office, relative to the substance of Nicholas Trutenko's October 1, 2020 testimony and/or his alleged perjury on October 1, 2020, whether such actions occurred before, during or after his October 1, 2020 testimony.
- C. That, in the interests of justice, the special prosecutor may conduct any criminal prosecutions warranted by the special prosecutor's independent investigation.
- D. That this matter will be continued for at least forty-five (45) days so that the various state's attorneys of each Illinois county, the Office of the Illinois Attorney General and the Office of the State Appellate Prosecutor may be contacted to determine whether they are available to serve as a special prosecutor consistent with the authority granted by this order. If no public prosecutor is available to serve as a special prosecutor, then this court will

appoint a private attorney to serve as a special prosecutor consistent with the authority granted by this order.

Entered:


Associate Judge Alfredo Maldonado
Cook County Circuit Court
Criminal Division

Date: June 10, 2021

