IN THE CIRCUIT COURT FOR THE FIRST JUDICIAL CIRCUIT
JACKSON COUNTY, ILLINOIS

IN RE APPOINTMENT OF SPECIAL PROSECUTOR	)	No. 15 MR 21

MOTION TO TERMINATE THE APPOINTMENT OF THE SPECIAL PROSECUTOR

NOW COMES Petitioner, GAEGE BETHUNE, and respectfully requests that this Honorable Court disqualify and terminate the special prosecutor appointed in this matter. In support of this request, Petitioner states as follows:

I. INTRODUCTION

The prosecutors appointed herein have asked to continue their role as a "special prosecutor" to "complete their work."[1] The request should be denied. While Mr. Bethune is deeply sympathetic to the pain and suffering resulting from the death of Pravin Varughese, the time has come to end this. Pravin Varughese's death was an unfortunate event that has been distorted by those with agendas into something it is not—a crime. To permit this appointment to continue, open-ended, while the prosecution fishes for another crime with which to charge Mr. Bethune, would be unjust. Moreover, because the original appointment was improper, and there was no hint of partiality or misconduct in the original grand jury's decision to not indict Mr. Bethune, the appointment should be terminated.

[1] As a threshold issue, the request is not properly made. Their prosecutorial appointment and authority flow from this matter, not *People v. Bethune* (17 CF 332), and that court is without jurisdiction to continue this appointment.

II. THE INITIAL APPOINTMENT WAS IMPROPER AND SHOULD BE TERMINATED.

The appointment of a special prosecutor was unnecessary, unmandated, and improper; thus, the Court should terminate the appointment. The criminal matter underlying this appointment had already been adequately investigated by the police and other law enforcement, a grand jury was impaneled, and—after hearing the evidence—determined that no true bill should be returned. Subsequent to that decision, no new information about the case surfaced. The inquiry should have ended there. Nonetheless, a different prosecutor decided that the original grand jury's decision was not to his liking and brought an indictment.

The initial Motion for Appointment of a Special Prosecutor was brought by the Jackson County State's Attorney, pursuant to 55 Ill. Comp. Stat. 5/3-9008. In his Motion, the state's attorney wrote that he was making the request because "this matter has been the subject of an intense national media campaign promoted by the family of Pravin Varughese to prosecute the individual who it is believed was last with Pravin Varughese before he died . . . " and that the "focus of the families campaign for prosecution shifted from the investigation to vague unspecified challenges about my impartiality in reviewing the investigation." Notably, the state's attorney wrote that he did not agree with the family's accusations, that he had indeed been impartial during grand jury proceedings, and that his request "is not required by any law."[2]

Mr. Bethune was not given advance notice of the filing, nor was he afforded the opportunity to weigh in before a special prosecutor was appointed. Instead, an order was entered the same date the Motion was filed.

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[2] "Notwithstanding subsections (a-5) and (a-10) . . . 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 [Section 3-9008]." 55 Ill. Comp. Stat. 5/3-9008.

Pursuant to the statute, the "order granting authority to a special prosecutor must be construed strictly and narrowly by the court." 55 Ill. Comp. Stat. 5/3-9008(c). The order here is void in this case because it failed to adequately define the role of the special prosecutor. It was silent on the issue. Was the prosecutor appointed to investigate Varughese's death and initiate a prosecution, or to investigate a lack of impartiality on behalf of the state's attorney? This carte blanche does not comport with the law's requirement that the order granting authority be strict and narrow. Such unbounded authority allows this prosecutor to do as he pleases rather than as he should be appropriately limited.

Now, the prosecution asks this Court to authorize the continuance of its authority, the boundaries of which are undefined, in perpetuity. That should not be permitted. *See In re Appointment of Special Prosecutor*, 388 Ill. App. 3d 220, 233 (3d Dist. 2009) (holding as error the trial court's decision to appoint a special prosecutor where there was no specific factual basis for the appointment.)

Furthermore, that a victim's family, their media friends, and politicians may disagree with the state's attorney's professional assessment of the evidence—or a grand jury's refusal to return a true bill—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 v. Bear Stearns*, 215 Ill. 2d 466, 477-78 (2005). The state's attorney's authority comes from the Illinois Constitution. *Id.* at 478. Inherent in this constitutional 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.")

Pursuant to this authority, the state's attorney must carefully assess the law and facts of each case, bringing charges only in cases where he 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* Ill. R. Prof. Conduct 3.8(a); *see also* Comment I ("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.")

There are rare occasions when an elected state's attorney is incapable of performing her duties, and the appointment of a special prosecutor is required:

> Whenever the State's Attorney is sick or absent, or unable to attend, or is interested in any cause of 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 of 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.

See 55 Ill. Comp. Stat. 5/3-9008(a-5).

This provision is intended 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 (1st Dist. 2002) (citing *People v. Morley*, 287 Ill. App. 3d 499, 503-04 (2d Dist. 1997)). Here, no personal interest existed. There was pressure and disappointment that the state's attorney did not act, neither of which should have been a basis for his recusal. The state's attorney had a

constitutional obligation to defend the grand jury's "no true bill" decision, and not to run away. *See also Environmental Protection Agency v. Pollution Control Board*, 69 Ill. 2d 394, 400 (1977); *People 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 (2d Dist. 1986).

The recusal provision is for the extraordinary circumstance where, through the state attorney's own conduct, continued participation creates 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 point of potential disqualification, however, is reserved for the most extreme class of cases. 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 continued to prosecute the case himself—even arguing against the defendant's motion to appoint a special prosecutor—and thereafter became the sole witness at trial when another attorney from the same office assumed the responsibility of prosecuting the defendant.

On appeal, the court held that the trial court 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.

The court, however, emphasized that a prosecutor's becoming a witness would not *per se* require appointment of a special prosecutor but that "the specific facts," which "significantly" included the prosecutor's affirmative and surreptitious attempt to catch the defendant in a crime

before becoming the key witness in the prosecution, warranted disqualification. *See People v. Bickerstaff*, 403 Ill. App. 3d 347, 352 (2d Dist. 2010) (the court must weigh concern about the appropriateness of the office's prosecuting the case against countervailing considerations, including (1) the burden that would be placed on the prosecutor's office if the entire office had to be disqualified; (2) the strength of the connection between the State's Attorney's office and the alleged conflict of interest; and (3) the extent of the public's awareness of the conflict).

In the above-cited cases, there is at least the appearance of impropriety. Here, however, there was no such appearance. There was an unhappy mother, a vengeful public, and a recalcitrant State's Attorney; that should not have been enough to warrant the appointment of a special prosecutor. Even now, the special prosecutor has not identified any bias, wrongdoing, or malfeasance by the State's Attorney. He merely has a difference of opinion as to the merits and now desires a third bite of the apple.

Furthermore, in assessing cause to appoint a special prosecutor, "'it is presumed that a public official "performs the functions of his office according to law and that he does his duty." *Rifkin*, 215 Ill. 2d at 481 (quoting *Lyons v. Ryan*, 201 Ill. 2d 529, 539 (2002)) (alteration to original). 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. *Baxter v. Peterlin*, 156 Ill. App. 3d 564, 566 (3d Dist. 1987). 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 represent the People of the State of Illinois because of this [conflict]." *Id.* (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).

The motion filed here was insufficient to properly plead a claim for the appointment of a special prosecutor because the allegations were grounded entirely on a non-party's suspicions, rather than facts, and the allegations were denied in the motion. So the only pleading before the court alleged no partiality and no appearance of impropriety. Similarly, the request to continue will have (or has) no facts, reasons, or basis. 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 (1977). The collective conjecture, speculation, and innuendo did not warrant the appointment of a special prosecutor under the statute, nor does it warrant its continuation.

No appearance of impropriety should be found simply because there was a disagreement with the state's attorney's assessment of the available evidence in making a charging decision. *See McCall v. Devine*, 344 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 police custody. After the medical examiner issued a report concluding that Cole died as a result of a self-inflicted gunshot wound to the mouth, the state's attorney determined that no charges could be filed against any of the 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 Reginal 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 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. The court noted 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 court affirmed the dismissal of the petition, finding that the petitioner failed to plead sufficient facts to warrant the appointment of a special prosecutor. The court reasoned 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:

> 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 statement 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 this matter.

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

Here, as in *McCall*, the evidence showed that the State's Attorney properly considered the evidence and exercised her discretion when initially deciding that charges were not warranted. Since nothing about his conduct or the underlying facts indicates any conflict of interest or requisite appearance of impropriety, there was no lawful basis for the appointment of a special prosecutor in 2015, and none exists now.

This Court need look no further than *Baxter*, where the 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. The *Baxter* court also reasoned 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," concluding 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.

> 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.

That is all that happened in this case. The family, politicians, and outside influences were satisfied—until the state's attorney determined there was no crime. Then, all of a sudden, he was somehow part of an evil conspiracy to deny justice. The petition should have been denied then, and the continuation of the appointment should be denied now. Permitting a state's attorney to recuse himself every time his discretionary decisions are questioned, or pressure to change them exists, sets a dangerous precedent.

Even now, those same forces are at work. Since the court ordered a new trial in this matter, the prosecutors have accused Judge Clarke of corruption and ethical breaches; that the Illinois Supreme Court is corrupt for denying a *mandamus* action; that Illinois Attorney General Lisa Madigan is corrupt for failing to support the *mandamus* action; and even that the re-assignment of the case in light of the trial judge's retirement was nefarious. It is the duty of the state's attorney to stand up to these public pressures, exercise considered judgment, conduct a proper investigation, and seek justice—whatever that may be. If the family is dissatisfied, the remedy is found at the ballot box, not through an indefinite investigation until some needle in a haystack results in a conviction.

III. THERE WAS NO CRIME COMMITTED.

The prosecutors, by their own admission, are going back to square one. Their press release stated they are "currently reviewing the totality of the circumstances in order to determine whether to seek a new indictment," and their motion stated they need to "complete their work." The only crime not now barred by the statute of limitations is murder. The problem is that Illinois law is clear—this is not murder.[3]

The evidence at trial involved a physical altercation between the defendant and Mr. Varughese shortly after midnight on February 13, 2014. This altercation was the only conduct

[3] Mr. Bethune acknowledges that Judge Clarke rejected this assertion. It is renewed here because Mr. Bethune believes his position is correct. The prosecution, in its reply to the petitioner's second post-trial motion, did not discuss the law. Rather, the prosecutors slung insults at the defense, stating that the defense motion was full of misapprehensions and misstatements; that the defense incorrectly stated the law (without mentioning any specifics); and that his legal reasoning was flawed, without citing to authorities to support its allegations. Publicly, the prosecutor characterized a defense filing as "a joke." *See The Southern,* August 10, 2018. Still, implicit in their filing to *nolle prosequi* is a tacit agreement with Mr. Bethune's position.

by the defendant that was alleged in Count One of the indictment—the sole count. This count is for felony murder, predicated upon the underlying forcible felony of aggravated battery.

In Illinois, "a person who kills an individual without lawful justification commits first degree murder if, in performing the acts which cause the death . . . he is attempting or committing a forcible felony other than second degree murder." 720 Ill. Comp. Stat. 5/9-1(a)(3). Aggravated battery, though it is a forcible felony, cannot be used as a predicate act for felony murder when there is only one criminal actor. This is because the predicate forcible felony must have an "independent felonious purpose," which is distinguishable from the intent to engage in the conduct that ultimately caused the death in question and which is not already inherent in the act itself. *People vs. Morgan*, 197 Ill. 2d at 447 ("Where the acts constituting forcible felonies arise from and are inherent in the act of murder itself, those acts cannot serve as predicate felonies for a charge of felony murder"); *People v. Pelt*, 207 Ill. 2d 434, 441, 800 N.E.2d 1193 (2003) ("The predicate felony underlying a charge of felony murder must involve conduct with a felonious purpose other than the killing itself.").

"A battery committed by a single defendant, acting alone, in a direct-attack scenario, cannot be the predicate offense for felony murder based upon the death of the victim of that same battery." *Morgan*, 197 Ill. 2d at 447; *Pelt*, 207 Ill. 2d at 440-42; *People v. Rosenthal*, 394 Ill. App. 3d 499, 914 N.E.2d 694 (1st Dist. 2009) (aggravated battery with a firearm). The independent felonious purpose rule bars a conviction for felony murder under these circumstances (the direct-attack scenario) because the criminal conduct, *i.e.* the battery, is inherent in the murder itself.

It makes sense, because the felony murder statute is designed to limit the violence that *accompanies* the commission of forcible felonies so that anyone engaged in violence will be

subject to a murder prosecution should another person be killed during the commission of the separate forcible felony. *People v. Belk*, 203 Ill. 2d 187, 192, 784 N.E.2d 825 (2003); *People v. Johns*, 345 Ill. App. 3d 237, 242, 802 N.E.2d 305 (3d Dist. 2003) ("Felony murder seeks to deter persons from committing forcible felonies by holding them responsible for murder . . .").

As the Illinois Supreme Court reasoned in *Morgan*:

> [E]very shooting necessarily encompasses conduct constituting aggravated battery . . . [without the independent felonious purpose rule] all fatal shootings could be charged as felony murder based upon aggravated battery . . . The result could be to effectively eliminate the second-degree murder statute and also to eliminate the need for the State to prove an intentional or knowing killing in most murder cases.

Morgan, 197 Ill. 2d at 447. Similarly, in *Pelt*, the Court explained that:

> [T]he act of throwing the infant [against a dresser causing its injuries] forms the basis of defendant's aggravated battery conviction, but it is also the same act underlying the killing . . . it is difficult to conclude that the predicate felony underlying the charge of felony murder involved conduct with a felonious purpose other than the conduct which killed the infant . . .to permit such a felony-murder charge of this nature would eliminate the need for the State to prove an intentional or knowing killing in most murder cases.

Pelt, 207 Ill. 2d at 442.

The petitioner was accused of a physical altercation with Mr. Varughese, which is the only criminal conduct that has ever been asserted as contributing to the death of the victim. Yet, the prosecutor has conceded "the jury did not find that the victim died of the injuries he sustained at the hand of the defendant." Thus, these facts will not support a different murder charge, under 9-1(a) or (2). Simply put, there is no charge still available, so there is no reason for the appointment to continue.

WHEREFORE, based upon the foregoing, Petitioner Gaege Bethune respectfully requests that this Court disqualify or terminate the continued appointment of the special prosecutor, and for such other and further relief as this Court deems just.

Respectfully submitted,

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