

No. 130470

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS	)	On Appeal from the Appellate Court
	)	of Illinois, First Judicial District,
	)	Sixth Division,
Respondent-Appellant,	)	No. 1-22-0372
)	
	)	There on Appeal from the Circuit
vs.	)	Court of Cook County,
	)	Criminal Division,
	)	No. 00 CR 13572
)	
ABDUL MALIK MUHAMMAD,	)	The Honorable
	)	Lawrence Flood,
	)	Leroy K. Martin, Jr., and
Petitioner-Appellee.	)	Erika Reddick, Judges Presiding

**AMICUS BRIEF IN SUPPORT OF
BRIEF AND ARGUMENT OF RESPONDENT-APPELLANT,
THE PEOPLE OF THE STATE OF ILLINOIS**

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NATURE OF THE ACTION

This is a direct appeal from the decision of the Appellate Court, First District, finding the Special Prosecutor had a conflict of interest and remanding the matter for further proceedings. *People v. Muhammad*, 2023 IL App (1st) 220372.

JURISDICTION

This Court allowed the People's petition for leave to appeal on May 29, 2024. This Court has jurisdiction pursuant to Supreme Court Rules 315 and 612(b).

STATEMENT OF INTEREST

The Appellate Court, First District, reversed the judgment of the circuit court and removed the Special Prosecutor, finding he had a conflict of interest pursuant to 55 ILCS 5/3-9008. *People v. Muhammad*, 2023 IL App (1st) 220372. This Court granted leave to appeal on May 29, 2024.

The Illinois State's Attorneys' Association ("ISAA") files this *amicus curiae* in support of the People's challenge to the appellate court majority's broad holding that a prosecutor is disqualified when there is an allegation of misconduct. *People v. Muhammad*, 2023 IL App (1st) 220372. The interest of the ISAA in this action is significant as the 102 State's Attorneys in Illinois are directly affected by the First District's broad language regarding disqualification. The ISAA writes exclusively to address the breadth of the appellate court's holding, which it believes is contrary to the law and has serious ramifications. The consequence of the appellate court's unmeasured language is that special prosecutors will be required for routine challenges that could be made in many cases. The ISAA acknowledges this may not be the outcome the appellate court intended, but language in the decision, taken to its logical conclusion, will impose that outcome.

STATUTE INVOLVED

The Counties Code provides, in pertinent part:

§3-9008. Appointment of attorney to perform duties.

(a-10) The court on its own motion, or an interested person in a cause, proceeding, or other matter arising under the State's Attorney's duties, civil or criminal, may file a petition alleging that the State's Attorney has an actual conflict of interest in the cause, proceeding, or other matter. 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, proceeding, or other matter. 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, proceeding, or other matter.

(55 ILCS 5/3-9008 (a-10)).

ARGUMENT**An allegation of misconduct should not automatically disqualify a State's Attorney.**

In defining “actual conflict of interest in the cause” such that Mr. Milan was disqualified from acting as special prosecutor for the Cook County State’s Attorneys’ Office (“CCSAO”), the appellate court’s broad language arguably dictates disqualification whenever allegations of misconduct are raised. The appellate court diverged from the statutory standard for conflict and created a new standard assessing risk of actual bias. The majority characterized prosecutors as “quasi-judicial” and “interested” when they are involved in any review of a conviction involving allegations of misconduct. Routine post-trial challenges such as alleged *Batson* or *Miranda* violations, *Brady* and *Giglio* claims, and charges of improper argument or improperly admitted evidence will require appointment of a special prosecutor. Hundreds, if not thousands, of special prosecutors will need to be appointed each year. This language presents a potential burden on the court system having to support litigation of special counsel motions and counties who will have to provide funding for appointments. The appellate court’s new standard and designations regarding conflict circumvent 55 ILCS 5/3-9008 and abrogate court precedent interpreting that statute.

Section 5/3-9008(a-10) of the Counties Code sets forth in pertinent part that a special prosecutor will be appointed when the State’s Attorney has an actual conflict of interest in the cause. 55 ILCS 5/3-9008 (a-10). Section 3-9008(a-10) applies to both State’s Attorneys as well as appointed special prosecutors. *Muhammad*, 2023 IL App (1st) 220372 at ¶89. An actual conflict of interest occurs when the state’s attorney is interested in the

case as either 1) a private individual or 2) an actual party to the action. *Muhammad*, 2023 IL App (1st) 220372 at ¶91.

The language of the *Muhammad* opinion regarding Mr. Milan's potential conflict of interest is unnecessarily broad and has serious ramifications beyond this case. Here, the appellate court's holding appears rooted in Mr. Milan's long-standing and high-ranking employment with the Cook County State's Attorney's Office (CCSAO). The CCSAO willingly removed itself as the prosecuting body because a former Chicago Police Department detective alleged to have tortured the defendant had worked for the state's attorney's office as an investigator after his retirement. *Muhammad*, ¶2. The appellate court does not see a distinction between Mr. Milan and the CCSAO for purposes of this case; if the CCSAO believed it had an actual conflict in the case, Mr. Milan would have an actual conflict in the case as well. See, e.g., *Muhammad*, ¶100 ("all the reasons the SAO withdrew apply in every respect to Milan").

Amici does not take a position on the majority's conclusion that Mr. Milan was not competent to serve as a special prosecutor based on his relationship with the disqualified CCSAO, but the majority opinion uses sweeping language and shallow analysis that does not make clear that that relationship is the genesis of the conflict. Instead, it states a new precedent – that a risk of actual bias establishes an actual conflict of interest. And the appellate court uses the terms "quasi-judicial" and "interested" to describe the special prosecutor based on his involvement with supervising those who charged and prosecuted Muhammad's case where those decisions and actions are being challenged. The result of appellate court's language for State's Attorneys is a perilous one. State's Attorneys and their Assistants regularly defend their prosecutions against allegations of misconduct, but

the appellate court's language implies a special prosecutor is necessary whenever an allegation of misconduct is raised. Indeed, the majority opinion concludes "section 3-9008 dictates disqualification of prosecutors alleged to have committed misconduct against petitioners, and the rules of professional conduct and principles of due process also require nothing less." *Muhammad*, ¶123.

Use of the terms "quasi-judicial" and "interested party" to describe Mr. Milan's involvement in the case (See, e.g., *Muhammad*, ¶¶94, 101, 102) are mischaracterizations. When a prosecutor makes the decision to charge a case and that decision is eventually reviewed – on appeal, post-conviction, etc. – that prosecutor's role in the review process is not that of judge of their own decision, but rather that of defender of their decision. The judgment on review is rendered by the court. Suggesting that defending the decision to charge and prosecute is "quasi-judicial" is inaccurate and has far-reaching effect on the way appeals or collateral proceedings will be handled. For the same reasons, a prosecutor does not become an interested party because their case is under review.

The majority opinion creates a new standard for conflict. Where section 5/3-9008 (a-10) requires a showing of an "actual conflict of interest" to remove a State's Attorney as prosecutor, the majority uses a "risk of actual bias" standard. Not only is this standard extra-statutory, it approximates the "appearance of impropriety" standard that was repealed in the 2016 amendment of the section. And it is unworkable.

According to the majority, in the face of allegations of misconduct, a threat to a lawyer's or his former employer's reputation is an adequate basis upon which a "risk of actual bias" may rest. *Muhammad*, ¶109. Such a finding, however, would appear to necessitate a special prosecutor upon any allegation of prosecutorial misconduct, no matter

how dubious or pretextual. A special prosecutor would be required upon any *Batson* challenge, allegation of a *Brady* or *Giglio* violation, allegation of improper argument, or allegation that improper evidence was admitted.

The “quasi-judicial” characterization does not reflect the reality of prosecutors and it is a dangerous holding. State’s Attorneys and their Assistants are not judging themselves or their superiors when they defend convictions, even in the face of allegations of misconduct. As the dissent pointed out, the majority opinion contradicts established case law that a special prosecutor is not automatically required whenever a defendant challenges police or state’s attorney conduct. *Mohammad*, 2023 IL App (1st) 220372 at ¶146-48, (Tailor, J., dissenting) (collecting cases).

The dissent challenged both the “quasi-judicial” characterization and the “risk of actual bias” standard:

Under the majority’s reasoning, a postconviction petition could disqualify a prosecutor by simply alleging a prosecutor or police misconduct because such allegations would call on the prosecutor to “judge” his own conduct or the decision to prosecute or the conduct of the police. But no court has ever adopted such an expansive due process theory of prosecutor conflict. And for good reason. Appointing a special prosecutor implicates the public prosecutor’s duty as an elected officer under the Illinois Constitution to represent the People.

Muhammad, ¶163. As the dissent observed:

Milan was no more a ‘judge’ in this case than any assistant state’s attorney filing a motion to dismiss or an answer in a postconviction proceedings * * * Following the majority’s rationale for its newfound due process right a public prosecutor would be disqualified from representing the People in such proceedings because they would be called upon to judge themselves. However, Milan’s decision that the evidence against Muhammad in this case is overwhelming, and even insufficient to warrant an evidentiary hearing, is no more outcome-determinative than a prosecutor’s decision to defend a conviction in a postconviction proceeding. The circuit court makes the ultimate decision ...

Muhammad, ¶165. These observations are well-taken.

Staffing in the 102 Illinois State's Attorney's offices ranges from a single elected State's Attorney to hundreds of Assistant State's Attorneys. In Pope and Jasper counties, for example, the elected State's Attorney is the only attorney in the office. Monroe County has an elected State's Attorney, two Assistant State's Attorneys and two part-time attorneys. Adams County has eight attorneys. In these smaller offices, the elected State's Attorney is making the charging decisions, following the charge from pre-trial to disposition and then handling any post-judgment and collateral proceedings that are filed. Most Illinois State's Attorneys offices are offices with fewer than 20 attorneys, necessitating the elected State's Attorney's involvement in all aspects of a prosecution. But even in the larger offices, policies and procedures often require consultation with the elected State's Attorney on charging decisions in serious felonies or homicides.

The standard articulated by the appellate court majority would allow an elected State's Attorney to be removed, not upon an evidentiary showing of an actual conflict of interest but upon a risk of actual bias, which in their analysis is established by an allegation of misconduct and the State's Attorney's involvement in the prosecution. Allegations of misconduct are easily made and overwhelmingly rejected. In Illinois' 102 counties the potential for appointment of special prosecutors based on the language in this case undermines the authority and discretion of the elected State's Attorney and denies the elected prosecutor's constitutional duty to represent the People.

CONCLUSION

Based on the foregoing, The Illinois State's Attorneys' Association, *Amici Curiae*, respectfully requests this Honorable Court reverse the judgment of the appellate court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341 (a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 8 pages.

By /s/ Lisa Anne Hoffman _____
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CERTIFICATE OF SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On October 23, 2024, the foregoing Amicus Brief in Support of Respondent-Appellant People of the State of Illinois, including the Appendix was filed with the Clerk of the Supreme Court of Illinois, using the Court's electronic filing system, which provided service to the following:

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