UNDER SEAL STATE OF WISCONSIN **UNDER SEAL**

COURT OF APPEALS

DISTRICT IV

Case No. 2013AP002504 W

STATE ex rel. THREE UNNAMED PETITIONERS,

Petitioners,

vs.

THE HONORABLE GREGORY A. PETERSON,
John Doe Judge, THE HONORABLE GREGORY POTTER,
Chief Judge and FRANCIS D. SCHMITZ, as Special Prosecutor,

Respondents.

Case No. 2013AP002505 W

STATE ex rel. THREE UNNAMED PETITIONERS,

Petitioners,

vs.

THE HONORABLE GREGORY A. PETERSON,
John Doe Judge, THE HONORABLE JAMES P. DALEY,
Chief Judge and FRANCIS D. SCHMITZ, as Special Prosecutor,

Respondents.

Case No. 2013AP002506 W

STATE ex rel. THREE UNNAMED PETITIONERS,

Petitioners,

vs.

THE HONORABLE GREGORY A. PETERSON,
John Doe Judge, THE HONORABLE GREGORY POTTER,
Chief Judge and FRANCIS D. SCHMITZ, as Special Prosecutor,

Respondents.

Case No. 2013AP002507 W

STATE ex rel. THREE UNNAMED PETITIONERS,

Petitioners,

vs.

THE HONORABLE GREGORY A. PETERSON,
John Doe Judge, THE HONORABLE JAMES J. DUVALL,
Chief Judge and FRANCIS D. SCHMITZ, as Special Prosecutor,

Respondents.

Case No. 2013AP002508 W

STATE ex rel. THREE UNNAMED PETITIONERS,

Petitioners,

vs.

THE HONORABLE GREGORY A. PETERSON,
John Doe Judge, THE HONORABLE JEFFREY A. KREMERS,
Chief Judge and FRANCIS D. SCHMITZ, as Special Prosecutor,

Respondents.

SPECIAL PROSECUTOR'S RESPONSE TO PETITION FOR SUPERVISORY WRIT AND MOTION TO UNSEAL
(FILED UNDER SEAL)

Francis D. Schmitz
Special Prosecutor
Respondent

P.O. Address
Post Office Box 2143
Milwaukee, WI 53201
(414) 278-4659

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STATE ex rel. THREE UNNAMED PETITIONERS,

Petitioners,

vs.

THE HONORABLE GREGORY A. PETERSON,
John Doe Judge et al,

Respondents.

SPECIAL PROSECUTOR'S RESPONSE TO PETITION FOR SUPERVISORY WRIT AND MOTION TO UNSEAL

I. INTRODUCTION

The five John Doe proceedings at issue here have been conducted within the limits of the law. They are not void *ab initio* and no good reason exists to suppress the investigation evidence.

Proceedings are pending, not by choice but by operation of law, in the county of residence of five individual subjects of this investigation. Presided over by Judge Barbara A. Kluka, the investigation originally

began in Milwaukee County. It soon became apparent that subjects of the investigation resided throughout the state. Therefore the investigation was offered to the Attorney General and the Department of Justice. The Attorney General declined to assist, citing *inter alia* his status as a partisan elected official and the availability of "other state officials who have equal or greater jurisdictional authority," specifically the Wisconsin Government Accountability Board (GAB), an agency with statewide jurisdiction to investigate campaign finance violations. The Attorney General also emphasized that, "as a non-partisan entity, the Government Accountability Board's investigation may inspire more public confidence than an investigation led by partisan-elected officials."

After the Attorney General's declination, the GAB met with the District Attorneys for the Counties of Columbia, Dane, Dodge, Iowa and Milwaukee. The Presiding Judges of these Counties were also consulted. Each of the District Attorneys, having examined information developed in the Milwaukee investigation, decided to commence an investigation in their county. As a matter of judicial economy, the Milwaukee County John Doe Judge was appointed by the judiciary in each county to preside over this single, overall investigation. For reasons set forth in a letter signed by the

five District Attorneys, the John Doe Judge entered orders, memorialized within the John Doe record, stating the reasons for appointment of a sole, non-partisan special prosecutor, Francis D. Schmitz, to serve in these five investigations.

II. ISSUES PRESENTED

A. What is the Basis for the Assignment of a Single Reserve Judge in Five Separate Counties?

By operation of an unusual suite of laws including Wis. Stats. §§11.61(2) and 978.05(1), the John Doe investigation is pending in five separate Counties. In matters involving campaign finance law, Wis. Stats. §§11.61(2) and 978.05(1) require that politicians and their agents have the right to be prosecuted in their home county, regardless of where the crime may have occurred.

Upon a request for assignment of a judge, first in Milwaukee County in September 2012, and then in the Counties of Columbia, Dane, Dodge and Iowa in the Summer of 2013, the Honorable Barbara A. Kluka was appointed to serve as the John Doe Judge by the Director of State Courts.

The investigations in Columbia, Dane, Dodge and Iowa Counties involve issues of fact and law identical to the Milwaukee County proceeding. By the time of her appointment in the four "additional"

counties, the John Doe Judge had already reviewed hundreds of documents and exhibits. The Special Prosecutor believes the decision to appoint a single judge to oversee the Doe proceedings in multiple counties was made on the basis of judicial economy, prosecutorial efficiency and common sense.

B. What is the Basis for the Appointment of the Special Prosecutor and the Scope of his Authority to Act in Five Separate Counties?

Given the statewide importance of this investigation and the fact that it spans five separate counties, the Attorney General and the Wisconsin Department of Justice were presented this investigation and potential prosecution. In a letter dated May 31, 2012, the Attorney General declined the request for assistance by the Milwaukee County District Attorney's Office, suggesting the GAB was an alternative agency with statewide authority. Thereafter, as required by Wis. Stat. §§5.05(2m)(c)4, 11.61(2) and 978.05(1), the GAB met with the District Attorneys for Columbia, Dane, Dodge, Iowa and Milwaukee Counties. The Special Prosecutor's appointment in five separate counties results from the Attorney General declining to exercise the statewide authority of the Department of Justice.

John Doe proceedings were commenced by the elected District Attorneys for each county. The District Attorneys for all five counties

specifically invited the John Doe Judge to consider, under all of the circumstances, the propriety of an appointment of a special prosecutor. Under the authority of *State v. Carlson*, 2002 WI App 44, 250 Wis.2d 562, 641 N.W.2d 451, and using the inherent authority granted to her under *State v. Cummings*, 199 Wis.2d 721, 546 N.W.2d 406 (1996), the John Doe Judge appointed the Special Prosecutor to act in all counties.

C. **Is the Scope of the Secrecy Order Appropriate?**

John Doe law recognizes that Secrecy Orders may vary from proceeding to proceeding. In this proceeding, some witnesses were served with Subpoenas Duces Tecum. These Subpoenas contain extensive information about the subject matter of the investigation and – at least by implication – the persons being investigated.

By Order of the John Doe Judge, a recipient of a John Doe paper may not disclose the contents of that paper to any third party other than their attorney. Virtually all of the stated purposes of the Secrecy Order are advanced by this Order.

To allow a witness to publicly release the contents of the John Doe papers served in this investigation would lead to the identification of the purpose of the investigation and – by implication – the persons being

investigated. To achieve the purposes of the Secrecy Order, the John Doe Judge ordered that recipients of John Doe process not reveal its contents.

D. What is the Appropriate Remedy Assuming the Special Prosecutor was not Properly Appointed?

Arguing that the actions of the John Doe Judge and the Special Prosecutor are void *ab initio*, the Petitioners request the functional equivalent of suppression of all John Doe evidence.

For purposes of the Supervisory Writ before the court of appeals, there can be no dispute that the John Doe Judge was lawfully appointed to serve in Milwaukee County, even though she acted as a Reserve Judge. Since a John Doe Judge has authority to issue process and conduct an investigation anywhere in the State of Wisconsin, her actions are not void *ab initio*.

With respect to the Special Prosecutor, the John Doe proceedings are not void even assuming he was not lawfully appointed. First, he has not taken any direct action, other than in a supervisory sense, resulting in the production of John Doe testimony or documentary evidence. All sworn applications for compulsory process have been done by others, almost exclusively investigators. Second, since under established John Doe law even a non-attorney may appear and question witnesses in a John Doe hearing without tainting the resulting evidence, the supervisory

involvement of the Special Prosecutor does not render the investigation void *ab initio* such that all or any John Doe evidence should be suppressed.

E. Should the Petitioners' Submissions to the Court Remain Under Seal?

As this court ordered, the Special Prosecutor has prepared this response, to the extent possible, without disclosing the details of this investigation and without identifying the Petitioners. Order, page 12.

The Special Prosecutor joins in the request to release the Petitioners' Memorandum and the Special Prosecutor's Response. This Response has been drafted with the expectation it may be made public. Additionally, the Special Prosecutor believes that the Orders Appointing the Special Prosecutor and the related District Attorney Letter should be publicly released with redactions as suggested in the Special Prosecutor's Motion to Unseal. The Orders assigning the judges to hear these John Doe proceedings may also be released.

III. STATEMENT ON PARTIES

The Special Prosecutor joins the Petitioners, supporting their disclosures to the court so that the court may meet its obligations arising under SCR 60.04(4) and Wis. Stat. §757.19.

IV. STATEMENT OF THE PROCEEDING

On August 10, 2012, the State of Wisconsin filed a petition requesting the commencement of a John Doe proceeding in Milwaukee County pursuant to Wis. Stat. §968.26 to investigate suspected Campaign Finance crimes. Affidavit of Francis D. Schmitz ¶3 and Exhibits 1.1 to 1.3 at pp. 008 – 049 (hereinafter "Schmitz Affidavit"). The Honorable Barbara Kluka, Reserve Judge, was appointed to hear the proceeding. By her order as the John Doe Judge, the investigation was commenced on September 5, 2012. Schmitz Affidavit ¶15; Exhibit 32; p. 148.

Evidence adduced during the early stages of the Milwaukee County investigation suggested criminal campaign finance violations may have been committed by residents of Columbia, Dane, Dodge and Iowa Counties.

On January 18, 2013, in a meeting in Madison, Milwaukee County District Attorney John T. Chisholm offered the John Doe investigation to Attorney General J.B. Van Hollen and the Wisconsin Department of Justice. Chisholm Affidavit ¶4.

On June 5, 2013, District Attorney Chisholm received a letter from Attorney General Van Hollen declining involvement. He cited conflict of

interest principles and the potential appearance of impropriety due to his status as a partisan, elected official. He suggested that other state officials had equal or greater jurisdictional authority to investigate this matter, specifically the GAB. Chisholm Affidavit ¶5. See also Schmitz Affidavit Exhibit 16, pp. 124 - 127 (Attorney General Letter).

This is a criminal investigation. Regardless of where any crimes may have occurred, Wis. Stats. §§11.61(2) and 978.05(1) mandate that local district attorneys handle any criminal prosecution. See also *State v. Jensen*, 2010 WI 38, ¶2, 324 Wis.2d 586, 782 N.W.2d 415 (county of residence is proper for prosecution of all allegations "arising from or in relation to ... any matter that involves elections ... under chs. 5 to 12."). Following the Attorney General's declination, on June 26, 2013, the GAB met with the District Attorneys of Columbia, Dane, Dodge, Iowa and Milwaukee Counties. These District Attorneys considered the need for one overall investigation overseen by a single judge and managed by a non-partisan special prosecutor. Chisholm Affidavit ¶6.

The Presiding Judges for the Counties of Columbia, Dane, Dodge and Iowa were next consulted. The need for the commencement of the John Doe proceedings in the four additional counties, the need for a single judge

and the need for a single prosecutor to oversee the investigation were all issues discussed with them. Chisholm Affidavit ¶¶7 - 8.

After consultation with the Presiding Judges and the District Attorneys from Columbia, Dane, Dodge and Iowa Counties, each prosecutor filed separate petitions for the commencement of a John Doe investigation. Schmitz Affidavit ¶4 and Exhibits 2 – 5, pp. 050 – 060. Though fractionated by operation of Wis. Stat. §§11.61(2) and 978.05(1), this is one overall investigation. The petitions and supporting affidavits filed by the district attorneys in the four "additional" counties (Columbia, Dane, Dodge and Iowa) alleged the same subject matter as in the Milwaukee County proceeding. See Schmitz Affidavit ¶¶4 and 6; Exhibits 2 – 5, pp. 050 – 060 and Exhibits 7 – 10, pp. 107 – 114. See also the Milwaukee Affidavits incorporated by reference into these Affidavits at Schmitz Affidavit Exhibit 1.3, pp. 012 – 049, and Exhibit 6, pp. 061 – 106.

Working together, the Presiding Judges, the Chief Judges and the Office of the Director of State Courts, appointed Reserve Judge Barbara A. Kluka to hear the petitions in Columbia, Dane, Dodge and Iowa Counties. Schmitz Affidavit ¶7; Exhibits 11 – 15, pp. 115 – 119.

On August 21, 2013, the John Doe Judge authorized the commencement of a proceeding in each of the four "additional" counties. Schmitz Affidavit ¶15; Exhibits 28 – 31; pp. 144 – 147.

The District Attorneys jointly submitted a letter to the John Doe Judge, dated August 21/22, 2013. The letter cited the statewide nature of the criminal investigation and the need to conduct a unified, efficient, and effective proceeding that could only be facilitated by the appointment of a special prosecutor. Schmitz Affidavit ¶8; Exhibit 16, pp. 120 – 127..

As part of the Order appointing a special prosecutor, the Judge found:

- The Attorney General declined to assume responsibility for this investigation, citing a conflict of interest and the appearance of impropriety;
- A Special Prosecutor will eliminate any appearance of impropriety;
- A John Doe proceeding run by five different local prosecutors, each with partial responsibility for what is and should be one overall investigation and prosecution, is markedly inefficient and ineffective; and
- A Special Prosecutor with jurisdiction across the severally affected counties is required for the efficient and effective conduct of the investigation.

Schmitz Affidavit ¶9; Exhibits 17 – 21, pp. 128 – 137. The John Doe Judge appointed a former federal prosecutor, Attorney Francis D. Schmitz, as Special Prosecutor in all five counties. The order was dated August 23,

2013. The Order was based upon *State v. Carlson*, 2002 WI App 44, 250 Wis.2d 562, 641 N.W.2d 451, and *State v. Cummings*, 199 Wis.2d 721, 735, 546 N.W.2d 406, 411 (1996). Under date of August 26, 2013, the State Prosecutors Office was forwarded a copy of these Orders by United States Mail. Schmitz Affidavit ¶9.

On October 23, 2013, the Special Prosecutor received notice from Judge Barbara A. Kluka that she needed to recuse herself. Schmitz Affidavit ¶10. The Special Prosecutor subsequently learned that the Honorable Gregory A. Peterson was assigned as the John Doe Judge. Schmitz Affidavit ¶11; Exhibits 22 – 27; pp. 138 – 143.

V. STATEMENT OF FACTS

The court has ordered that "to the extent possible, the substance of the response(s) should focus on the general legal issues regarding the scope of the authority of the John Doe judge and special prosecutor, and should not identify the petitioners or the subject matter of any ongoing investigations." Order, page 12.

This Response will originally be filed under seal to allow the court to determine whether it should be released publicly. It was not possible to respond to the petitions without identifying the investigation as involving

possible campaign finance violations. The general subject matter of the investigation accounts for the fact it is pending in five Wisconsin counties. *See* Wis. Stats. §§11.61(2) and 978.05(1).

The court has ordered the parties to provide it with copies of any materials in their possession relevant to issues before it. To preserve the integrity of the Secrecy Order, relevant papers have been filed under seal as Exhibits to the Schmitz Affidavit.

VI. DISCUSSION

A. Supervisory Writ Law in General

A supervisory writ is a blending of the writ of mandamus and the writ of prohibition. It is an extraordinary remedy. A petitioner seeking a supervisory writ for prohibition must show that: (1) the duty of the trial court is plain and the court intends to act in violation of that duty; (2) grave hardship or irreparable harm will result; (3) an appeal is an inadequate remedy; and (4) the request for relief is made promptly and speedily. *State ex rel. Godfrey & Kahn, S.C. v. Circuit Court*, 2012 WI App 120, ¶¶48-49, 344 Wis.2d 610, 823 N.W.2d 816. The decision to issue a supervisory writ is controlled by equitable principles, and the court has the discretion to consider the rights of the public and third parties. *Id.*

B. **One John Doe Judge was Assigned to Act in Five Separate Counties Because of the Special Statutory Provisions Found at §§11.61(2) and 987.05(1) and Because of Considerations of Judicial Economy.**

Judge Barbara A. Kluka, and then Judge Gregory A. Peterson, were appointed by A. John Voelker, the Director of the State Courts on behalf of Chief Justice Shirley Abrahamson, to serve first in Milwaukee and then subsequently in the Counties of Columbia, Dane, Dodge and Iowa. The Special Prosecutor is not privy to the precise procedural mechanisms employed to appoint either Judge. However, each District Attorney and each Presiding Judge was, from the outset, apprised of the intention to bring this overall John Doe investigation before one John Doe Judge managed by one non-partisan Special Prosecutor. Chisholm Affidavit ¶¶6 – 8.

This is one investigation involving multiple subjects. Five John Doe proceedings have been commenced to run "parallel" with one another. Even though this is one investigation, records of the proceedings are maintained in each of the five counties. Schmitz Affidavit ¶13

This "five county" approach results from the application of several statutes. Created by 2007 Wisconsin Act 1, Wis. Stat. §§11.61(2) and 978.05(1), effectively remove the authority of the Dane County District Attorney to prosecute campaign finance and election crimes occurring in

the Capitol. These statutes are part of a suite of laws[1] designed to give politicians and their agents the right to be prosecuted – if they so choose[2] – in the county of their residence. Wis. Stat. §978.05(1) provides that the District Attorney shall:

> prosecute all criminal actions before any court within his or her prosecutorial unit and have sole responsibility for prosecution of all criminal actions arising from violations of chs. 5 to 12 . . . . . that are alleged to be committed by a resident of his or her prosecutorial unit . . . unless another prosecutor is substituted under s. 5.05 (2m) (i) or this chapter or by referral of the government accountability board under s. 5.05 (2m) (c) 15. or 16.

Of course, the statute could not – and does not – go so far as to provide only politicians and their agents the right to be prosecuted in the county of their residence. It applies with equal force to all persons prosecuted under Wisconsin Statutes chs. 5 to 12. While all of the suspected misconduct being investigated arguably occurred in Dane County, the responsibility for prosecuting any potential misconduct rests with prosecutors in five different counties, where various subjects of this investigation reside.

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[1] Chapters 11 and 12 of the Wisconsin Statutes contain similar language. See Wis. Stat. §11.61(2)("Except as otherwise provided in ss. 5.05 (2m) (c) 15. and 16. and (i), 5.08, and 5.081, all prosecutions under this section shall be conducted by the district attorney for the county where the defendant resides . . . ."). See also Wis. Stat.§12.60(4)("Prosecutions under this chapter shall be conducted in accordance with s. 11.61 (2)").

[2] Venue for a criminal proceeding under campaign finance laws is in the county of the defendant's residence [Wis. Stat. §971.19(12)], unless the defendant elects to be tried in the in the county where the offense was committed. Wis. Stat. §971.223(1).

Whatever the reasons for enactment of Wis. Stats. §§11.61(2) and 978.05(1), from the standpoint of judicial administration, the results are chaotic in a John Doe investigation where the subjects live far and wide within the state. The only reasonable approach to the handling of this circumstance is to assign one judge to hear all five John Doe proceedings.

As this court has already ruled, there was nothing improper about the assignment of Reserve Judge Barbara Kluka to hear the initial John Doe proceeding in Milwaukee County. Order, p. 6. After Judge Kluka had already reviewed hundreds of pages of papers in connection with this investigation, it would make no sense to have four other judges preside over four separate and distinct proceedings, all running concurrently involving identical issues. Such duplication of effort is wasteful. It is well recognized that consolidation of trials is an invaluable procedural mechanism for promoting economy and efficiency in the administration of justice. Consolidation avoids repetitious litigation and it also promotes the convenience of witnesses by avoiding repeated appearances in court. *Cranmore v. State*, 85 Wis.2d 722, 755, 271 N.W.2d 402, 419 (Ct. App. 1978). See also *Wisconsin Public Service Commission v. Arby Construction, Inc.*, 2011 WI App 65, ¶14, 333 Wis.2d 184, 798 N.W.2d

715 (discussing judicial economy in the context of the doctrine of claim preclusion). These considerations of judicial economy apply with equal force here. Five proceedings in five counties led by five prosecutors is wasteful and inefficient.

After consultation, the Presiding Judges of Columbia, Dane, Dodge and Iowa Counties took certain procedural steps, the precise nature of which remains unknown to the Special Prosecutor. These procedural steps resulted in the Orders for Special Judicial Assignment, *i.e.*, the Orders appointing the John Doe Judge. Schmitz Affidavit ¶Exhibits 11 – 14; pp. 115 – 118.

C. The Source of the Special Prosecutor's Authority to Act is Grounded in Both the Prior Permission and Consent of Five District Attorneys and the Authorization of the John Doe Judge.

1. District Attorneys and Special Prosecutors

Legitimate prosecutorial authority can derive from an informal act of appointment by the district attorney; anything after that is simply a discussion of who pays for the special prosecutor's work. *In re Bollig*, 222 Wis.2d 558, 571, 587 N.W.2d 908, 913 (Ct. App. 1996) ("[T]he central purpose of appointments under §978.045(1r) is to assure that the State will not have to pay for the services of a special prosecutor under circumstances

not anticipated in the statute."). A district attorney can appoint a special prosecutor for any reason at all "and [he] serves at the pleasure" of that district attorney, simply by virtue of the appointment. Wis. Stat. §978.045(3)(a). A special prosecutor possesses all the powers of the district attorney. *Id.* The action of a "court of record" is not required. No order of any kind is needed. Indeed, no forms or reports are mandated. Compare Wis. Stat. §978.045(1g)(mandating the use of forms provided by the Department of Administration).

The Special Prosecutor has always worked with the express authorization of all five of the elected District Attorneys. That fact alone is sufficient to validate the actions he takes on their behalf. That is to say, the source of his authority is not merely that he was appointed by the John Doe Judge (which of course he was), the Special Prosecutor finds independent authority for his actions in the simple fact that he has the prior authorization of the five District Attorneys.

Any notion that a "court of record" must appoint a special prosecutor is incorrect. See, e.g., Petitioners' Memo at page 14 ("The John Doe magistrate has the powers of a judge, not all the powers of a 'court.' . . . To the extent that the John Doe Judge here played a role in appointing or

enabling the special prosecutor, the appointment failed for that reason.") Action by a "court of record" is not required to validate the actions of a Special Prosecutor. If it was, then Wis. Stat. §978.045 would mandate "court of record" approval when a District Attorney appointed a special prosecutor under §978.045(3)(a). To the contrary, such "court of record" approval is expressly *not* required. §978.045(3)(a). The Petitioners contend there is no legal or factual bases for the lawful actions of the Special Prosecutor. Yet this law, §978.045(3)(a), recognizes that permission to act is itself sufficient. Permission to act was obtained here; that permission is sufficient to imbue the Special Prosecutor with lawful authority.

2. The John Doe Judge's Authority to Appoint a Special Prosecutor

The John Doe Judge based her decision to appoint a special prosecutor under the expansive authority of *State v. Carlson*, 2002 WI App 44, 250 Wis.2d 562, 641 N.W.2d 451. *Carlson* continues a tradition upholding the broad authority of a judge to appoint a special prosecutor.

Carlson involved a "Refusal Hearing" under the Implied Consent law. The circuit court appointed a City Attorney as a Special Prosecutor to handle the hearing which by law a district attorney customarily prosecutes.

The district attorney was not unavailable nor was he or she otherwise prohibited from handling this hearing;[3] none of the circumstances enumerated in Wis. Stat. §978.045(1r) applied. Carlson's refusal to take a chemical test was held unlawful. On appeal, Carlson challenged the court's authority to appoint the City Attorney as a special prosecutor, arguing that an appointment could not be made under §978.045(1r) in a non-criminal case. *Carlson*, 2002 WI App 44 at ¶5. The Court of Appeals rejected the argument, writing:

> [A] complete reading [of §978.045] gives the court almost unfettered authority to appoint a special prosecutor to perform "the duties of the district attorney."

Id. (emphasis added) The *Carlson* court further wrote:

> In the case at bar, the appointment was made by the court on its own motion. A plain reading of the statute tells us that when a court makes this appointment on its own motion, **all that is required** of the court is that it enter an order in the record "stating the cause therefor." Wis. Stat. §978.045(1r). Then, the appointed special prosecutor may "perform, for the time being, or for the trial of the accused person, the duties of the district attorney. An attorney appointed under this subsection shall have all of the powers of the district attorney." *Id.* In short, if a court makes a special prosecutor appointment on its own motion, it is constrained only in that it must enter an order in the record stating the cause for the appointment.

[3] In fact, it was the practice and policy of the trial court to routinely appoint a City Attorney to handle certain Refusal Hearings. *Carlson*, 2002 WI App 44 at ¶9. Presumably, this practice resulted from the fact that City Attorneys routinely appear before the court on first-time Operating While Intoxicated offenses.

Carlson, 2002 WI App 44 at ¶9 (emphasis in original)(footnotes omitted).

The John Doe Judge specifically relied upon the *Carlson* rule in appointing the Special Prosecutor here. Indeed, as *Carlson* requires, an Order was entered into the John Doe record. Reasons were stated for the entry of the Order. The District Attorneys invited her consideration of the issue in a letter. The appointment order was entered by the John Doe Judge after due consideration of all the circumstances presented by this investigation.

Carlson continues a tradition of decisions upholding the authority of a circuit judge to appoint an attorney to act as a special prosecutor. "The judiciary's power to appoint . . . special prosecutors is an inherent power." *State ex rel. Friedrich v. Circuit Court for Dane County*, 192 Wis.2d 1, 17, 531 N.W.2d 32, 37-38 (1995) (referring to the appointment of both prosecutors and guardians ad litem). This is a time-honored principle dating to at least 1935, as expressed in *Guinther v. City of Milwaukee*, 217 Wis. 334, 258 N.W. 865 (1935). In *Guinther*, the City Attorney moved to dismiss a Disorderly Conduct ordinance violation against the defendant. The court denied the motion to dismiss and appointed a private attorney to prosecute the matter. On appeal after being found guilty, the defendant

claimed error because the City was not represented by the City Attorney. The City Attorney, appearing before the supreme court, argued that the Common Council was the only authority able to appoint an attorney to act on behalf of the City. The supreme court disagreed that the trial court was powerless to act. It wrote, "[t]he court properly called to its aid one of its officers." 217 Wis. at 340, 258 N.W.2d at 867.

In *State v. Lloyd*, the Kenosha County District Attorney abandoned a Hit and Run prosecution after the court denied a motion to dismiss "in the public interest." *State v. Lloyd*, 104 Wis.2d 49, 310 N.W.2d 617 (Ct. App. 1981). The court appointed an attorney to serve as a prosecutor in place of the defaulting district attorney. On appeal, the defendant contended that, because the district attorney did not request appointment of a special prosecutor under Wis. Stat. §59.44(2) (the statutory predecessor of §978.045), the court was powerless to act. Although – as here – none of the circumstances enumerated in Wis. Stat. §59.44(2) warranted a special prosecutor appointment, the court's authority to appoint a special prosecutor was nevertheless upheld. *Lloyd*, 104 Wis.2d at 56-57.

Against the background of this precedent, the Petitioners have advanced no persuasive reasons leading to a conclusion that the John Doe Judge's appointment order was unlawful or otherwise improper.

The Petitioners suggest the decision in *In re Jessica J.L.*, 223 Wis.2d 622, 589 N.W.2d 660 (Ct. App. 1998) (Roggensack, J.) limits the court's inherent authority (described in *Lloyd*) to appoint only when one of the enumerated circumstances under Wis. Stat. §978.045 apply. Jessica J.L. was a minor child victim of a sexual assault. *Jessica J.L.* was decided in the context of a *Schiffra*[4] motion where the minor victim objected to the State's waiver of a materiality hearing and asserted a right to "participate in the criminal proceedings in regard to all *Shiffra* determinations . . . ." *In re Jessica J.L.*, 223 Wis.2d at 628. Without discussion and using very broad language, the court rejected this argument, stating the "only attorneys who may prosecute a sexual assault on behalf of the State in circuit court are a district attorney or a special prosecutor appointed pursuant to §978.045." *Id.* at 630.

No court has ever held that the terms of §978.045 represent a limit of a judge's authority to appoint a special prosecutor. In fact and to the

[4] *State v. Shiffra*, 175 Wis.2d 600, 499 N.W.2d 719 (Ct. App.1993).

contrary, that statute has been found to be a "cost management" device having little or no bearing on the legal requirements for the lawful appointment of a special prosecutor. *In re Bollig*, 222 Wis.2d 558, 587 N.W.2d 908 (Ct. App. 1996) (Roggensack, J.) is instructive in this regard. *Bollig* involved a Chapter 980[5] petition filed by an attorney who acted with the authorization of the district attorney but without court appointment. The circuit court dismissed the petition because the attorney had not yet been appointed as a special prosecutor under Wis. Stats §978.045.[6] The court of appeals reversed the trial court, determining that a defect in the appointment of a special prosecutor does not deprive the court of competency to proceed. The court concluded that the failure to follow the specific mandates of §978.045 was not critical to the function of the circuit court.

The *Bollig* court wrote, "the central purpose of appointments under §978.045(1r) is to assure that the State will not have to pay for the services of a special prosecutor under circumstances not anticipated in the statute."

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[5] See Wis. Stat. ch. 980. Proceedings under this chapter address the commitment of sexually violent persons.

[6] An appointment order was executed about a month after the attorney began working on the Chapter 980 matter in early January 1997. The petition was actually filed on February 3, 1997. The appointment was due to the unavailability of the district attorney. *Bollig*, 222 Wis.2d at 561-62, 587 N.W.2d at 909.

Bollig, 222 Wis. 2d at 571. The court found support for this conclusion in the legislative history of the statute, writing:

> The legislative history which surrounds §978.045, Stat., focuses on controlling the costs of a special prosecutor for which DOA will be responsible. This purpose was made most clear when subsection (3)(a) was enacted.

Id. at 570 at note 7. What *is* essential to the statutory scheme is that the power of the district attorney must be exercised with the prior authorization of the elected District Attorney or a judge. *Id.* at 570.

The Petitioners also argue that, in order to exercise inherent authority, there must be a refusal to act by the district attorney. If a refusal to act is needed as a predicate to the exercise of the John Doe Judge's inherent authority, one exists in this proceeding. Here, the Attorney General declined to act. Moreover, the logic behind the inherent authority decisions like *Lloyd* applies here with equal force. The five District Attorneys' ability to act efficiently is significantly hampered, although they did not flatly refuse to act. It is hampered by virtue of ethical considerations, *i.e.*, the possible appearance of impropriety. It is further constrained by virtue of simple logistics, *i.e.*, the inability to conduct an orderly and efficient investigation across five disparate counties. If, as the Petitioners suggest, a special prosecutor must be justified by some prosecutorial "default," the

circumstances of this proceeding, as found to exist by the John Doe Judge, are as compelling as a refusal to act.

The Petitioners submit that a John Doe Judge is incapable of appointing a special prosecutor because a John Doe judge does not sit as a court of record. The "court of record" limitation is an artifact of §978.045 and courts have never construed this "special prosecutor statute" as a limit on a judge's authority. The Special Prosecutor has found no cases holding that a circuit court judge, convened in John Doe session, loses its otherwise inherent authority to appoint a special prosecutor.

3. The appointment was lawful under *State v. Cummings.*

Independent of any other source, the authority to appoint a Special Prosecutor is also to be found in the inherent powers of the John Doe Judge.

The Special Prosecutor was appointed to facilitate the progress of the John Doe proceeding. The John Doe Judge specifically found a special prosecutor was necessary "for the efficient and effective conduct of the investigation." See Schmitz Affidavit Exhibit 17; p. 128. She made this finding knowing the Department of Justice would not be available to assist and superintend this five-county investigation and knowing no other entity

had statewide criminal jurisdiction. As the John Doe Judge also wrote, "I find that a John Doe run by five different local prosecutors, each with partial responsibility for what is and should be one overall investigation . . . is markedly inefficient and ineffective." *Id.*

In *State v. Cummings,* 199 Wis.2d 721, 546 N.W.2d 406 (1996), the supreme court considered whether a John Doe Judge possessed the authority to issue and then seal a search warrant. The supreme court upheld that authority. Not merely relying on the fact that Wis. Stat. §968.12 confers the authority to issue a search warrant on a "judge," the court wrote that the John Doe statute should be "interpreted in a manner which support[s its] underlying purpose." *Cummings*, 199 Wis.2d at 734. The court also ruled "[d]enying John Doe judges the ability to issue search warrants would seriously reduce the investigatory power of the John Doe proceeding." *Id.*

Conducting a single John Doe investigation by a committee of five local prosecutors each with only partial authority would, in the words of *Cummings*, "seriously reduce the investigatory power of the John Doe proceeding." *Id.* The John Doe Judge expressly so found. Since the grant of John Doe jurisdiction "by its very nature includes those powers

necessary to fulfill the jurisdictional mandate," the Judge Doe Judge must be allowed the authority to organize this investigation under one central special prosecutor. *Id.* at 736. While it would have been most appropriate to organize this investigation under the auspices of the Attorney General and the Department of Justice, that option was not available to the Judge.

D. The Scope of the Secrecy Orders

The John Doe Secrecy Orders were mandated by the John Doe Judge expressly for the following reasons:

> 1) To prevent persons from collecting perjured testimony for any future trial.
>
> 2) To prevent those interested in thwarting the inquiry from tampering with prospective testimony or secreting evidence.
>
> 3) To render witnesses more free in their disclosures.
>
> 4) To prevent testimony which may be mistaken, untrue, insubstantial or irrelevant from becoming public.

These Orders[7] further provided:

> IT IS FURTHER ORDERED that secrecy shall be maintained during this John Doe proceeding as to court docket and activity records, court filings, process issued by the court, information concerning the questions asked and the answers given during a John Doe hearing, transcripts of the proceedings, exhibits and other

[7] The language following this footnote in the text of the brief is found in all counties except Milwaukee. The Subpoena Duce Tecum contained in the Petitioners' Supporting Affidavit is captioned with, and therefore governed by, the Secrecy Orders in the Counties of Columbia, Dane, Dodge and Iowa as well as Milwaukee County.

> papers produced during the proceedings, as well as to all other matters observed or heard in the John Doe proceeding.

Petitioners' Affidavit of Todd Graves, Exhibit 1.

The Petitioners object to certain Secrecy Order language contained within papers issued to, and served upon, witnesses in this investigation. The Petitioners claim that this order seeks to bind unknown third parties to the Secrecy Order and that for this reason, it is unsupported in the law. The language as contained in subpoenas provides:

> By order of the court, pursuant to a Secrecy Order that applies to this proceeding, you are hereby commanded and ordered not to disclose to anyone, other than your own attorney, the contents of this subpoena and/or the fact that you have received this subpoena. Violation of this Secrecy Order is punishable as Contempt of Court.

This language is based on the Secrecy Orders entered in the John Doe investigation as quoted above.

At the outset, it is proper to note that the language at issue is directed to the recipient of the process, not to unknown third parties. Thus, the issue presented is whether a John Doe Judge may properly order witnesses not to discuss the process they have received.

The scope of a John Doe secrecy order was examined in *In re John Doe Proceeding*, 2003 WI 30, 260 Wis.2d 653, 660 N.W.2d 260.

It is clear that a John Doe judge has authority to designate a John Doe proceeding as secret and to issue appropriate orders to that effect. The John Doe statute, Wis. Stat. § 968.26, provides in relevant part: "[T]he record of the proceeding and the testimony taken shall not be open to inspection by anyone except the district attorney unless it is used by the prosecution at the preliminary hearing or the trial of the accused and then only to the extent that it is so used."

Indeed, we have recognized that it is sometimes desirable for John Doe proceedings to be carried out in secrecy. There are a number of reasons why secrecy may be vital to the very effectiveness of a John Doe proceeding. These include:

> (1) keeping knowledge from an unarrested defendant which could encourage escape;
> (2) preventing the defendant from collecting perjured testimony for the trial;
> (3) preventing those interested in thwarting the inquiry from tampering with prosecutive testimony or secreting evidence;
> (4) rendering witnesses more free in their disclosures; and
> (5) preventing testimony which may be mistaken or untrue or irrelevant from becoming public.

The precise scope of a permissible secrecy order will, of course, vary from proceeding to proceeding. However, as we observed in *O'Connor*, "[s]ecrecy of John Doe proceedings and the records thereof is not maintained for its own sake." The policy underlying secrecy is directed to promoting the effectiveness of the investigation. Therefore, any secrecy order "should be drawn as narrowly as is reasonably commensurate with its purposes." An allegation that a secrecy order issued in a John Doe proceeding exceeds the scope of the statutory authority provided in Wis. Stat. § 968.26 is subject to review.

In re John Doe Proceeding, 2003 WI 30 at ¶¶59-61 (citations omitted)(emphasis added).

Secrecy orders will vary from case to case, depending upon the nature of the proceeding. *Id.* at ¶61. In many John Doe proceedings, especially those focusing on compelling witness testimony, disclosure of the contents of a subpoena would be harmless. In such cases, a person would be issued a simple Subpoena ad Testificandum requiring an appearance and oral testimony. That subpoena would list a case number, a date, a time and a Judge before whom the witness would be expected to appear. This type of a subpoena imparts nothing regarding the subject matter of the investigation and the persons who are being investigated. If a witness subsequently appears and then learns about such things, there is no question that such information would be covered by the secrecy order. No one would dispute that this witness, should he or she disclose the nature of the proceedings or the persons being investigated, would be subject to contempt proceedings for violating the secrecy of the John Doe proceeding.

In this investigation, the John Doe document at issue imparts a wealth of information about the nature of the investigation and the persons being investigated. Witnesses were served with Subpoenas Duces Tecum, not simple Subpoenas ad Testificandum. The Subpoena Duces Tecum is eight pages long. The very essence of the investigation is apparent from a

review of the Subpoenas Duces Tecum. Its contents reveal the subject matter of the investigation and at least by implication, the persons being investigated.

Under these circumstances, it is entirely appropriate – in fact it is essential – that the contents of the Subpoena Duces Tecum not be published.[8] Indeed, *every one* of the John Doe Judge's reasons for a Secrecy Order is well served by an Order to a witness not to disclose the contents of the Subpoenas Duces Tecum. If charges never issue, details of the investigation, which may affect the reputations of persons investigated, will not be publicized. It assures the witness that his/her document production will be secret within the context of the investigation; such knowledge will encourage full and honest compliance with the Subpoena. To the extent that publication of the contents of the Subpoena Duces Tecum will "tip off" others who will then be able to destroy relevant evidence, the nondisclosure order tends to make it more likely that evidence, not yet subpoenaed or not yet made the object of a Search Warrant, will be preserved. And a nondisclosure order makes it less likely that subjects will conspire to provide perjured testimony.

[8] The court need not look far to find an example of the results of a breach of the Secrecy Order. See Editorial, *Wisconsin Political Speech Raid*, Wall St. J., p.A14, Nov. 16-17, 2013.

A secrecy order "should be drawn as narrowly as is reasonably commensurate with its purposes." *In re John Doe Proceeding*, 2003 WI 30 at ¶61. Prohibiting the disclosure of the contents of the John Doe Subpoenas Duces Tecum is narrowly tailored to accomplish the well-established and well-recognized purposes of the Secrecy Orders entered in these proceedings.

E. **Propriety of Relief Sought**

Petitioners seek relief in the form of Orders that can be fairly characterized as requiring the suppression of any evidence gathered by the John Doe Judge and/or the Special Prosecutor. See generally, Petition pp. 17-21; see especially ¶H. Petitioners offer no authority for this drastic remedy.

As an initial matter, the court has already ruled there was nothing illegal in the appointment of a Reserve Judge to conduct the Milwaukee County proceeding. A judge has authority to issue a search warrant for execution anywhere in the State of Wisconsin. Wis. Stat. §968.12(4). Likewise, a judge may cause a subpoena to be served, at a minimum, anywhere in the State of Wisconsin. If there is any defect in the appointment of the John Doe Judge in the Counties of Columbia, Dane, Dodge or Iowa, and if

actions taken in those counties are somehow tainted, the John Doe Judge was nevertheless acting with appropriate authority based on her Milwaukee appointment.

Any technical defect in the appointment of the Special Prosecutor does not justify suppression of the John Doe evidence as a remedy. No case law supports such a proposition. If any defect does exist, it is *unlike* that found in cases where evidence has been suppressed for violations of a statute. See, *e.g., State v. Popenhagen,* 2008 WI 55, 309 Wis.2d 601, 749 N.W.2d 611 (Suppression of evidence gained by subpoena without a showing of probable cause suppressed as required by Wis. Stat. §968.135). See also *State v. Hess,* 2010 WI 82, 327 Wis.2d 524, 785 N.W.2d 568 (Evidence suppressed where it was obtained through execution of arrest warrant issued by judge without statutory basis and without proper showing by affidavit).

John Doe law offers no support for a suppression remedy. At worst, this case involves a private, licensed lawyer acting as a John Doe prosecutor with the knowledge and consent of the District Attorney. However, even when John Doe proceedings have been conducted by non-lawyers, evidence has not been suppressed, and by analogy, no good reason

exists to do so here. *State v. Noble*, 2002 WI 64, 253 Wis.2d 206, 646 N.W.2d 38. *Noble* involved a prosecution arising out of a John Doe investigation. In the John Doe hearing, a Department of Justice investigator questioned the witness, Debra Noble. The investigator was not licensed to practice law. Subsequently, Ms. Noble was charged with perjury. She moved to suppress the transcript of her John Doe testimony. Noble claimed that Wis. Stat. §757.30 prohibits an unlicensed person from practicing law and, citing a Due Process violation, she argued suppression of the evidence was warranted. The trial court denied the motion, but the court of appeals reversed. The sole issue on review was whether Noble's testimony should be suppressed because her questioning was unlawfully conducted by the investigator, resulting in a Due Process violation. Finding no Due Process violation, the court wrote, "[w]e are not compelled by any statute, constitutional violation or policy considerations to suppress the testimony in this case." *Noble*, 2002 WI 64 at ¶¶1 and 18.

Finally, and perhaps most obviously, using this Writ proceeding to obtain a suppression of evidence ruling is improper. While arguably a Petition would lie to prohibit a John Doe Judge from acting wholly outside her jurisdiction, based upon the submissions under seal to the court and

based upon the foregoing arguments, this is not the case here. As the court can see from a review of the Affidavit materials, the John Doe Judge has acted largely on the basis of submissions received from investigators. Indeed, the Special Prosecutor has not submitted any sworn applications for process to the John Doe Judge. Schmitz Affidavit ¶14. It may be that the Petitioners object to a non-partisan attorney directing the John Doe investigation, and it may be that this investigation will lead to hardship for the Petitioners, but the existence of a private attorney Special Prosecutor, even assuming a defective appointment, does not constitute a violation of rights sufficient to justify the relief requested on this Supervisory Writ.

F. **Sealing of Submissions to the Court of Appeals**

The Petitioners have asked that that the Memorandum Supporting their submissions be released publicly. The Special Prosecutor agrees.

Because the substantive issue regarding the Motion to Stay has already been determined, the Special Prosecutor opposes release of the Motion to Stay.

Accordingly, the Special Prosecutor does not oppose public release of the following documents:

1. The Petitioners' Memorandum in Support of the Petition for Supervisory Writ;

2. The Special Prosecutor's Response to the Petition for Supervisory Writ and Motion to Unseal;

3. The Orders of the Director of State Courts, on behalf of Chief Justice Shirley Abrahamson, appointing the Honorable Barbara A. Kluka as the John Doe Judge;

4. A redacted representative copy of the letter signed by the District Attorneys of the Counties of Columbia, Dane, Dodge, Iowa and Milwaukee;

5. The John Doe Judge's Orders appointing the Special Prosecutor;

6. The Reassignment and Exchange Order signed by Chief Judge Jeffrey Kremers; and

7. The Orders of the Director of State Courts, on behalf of Chief Justice Shirley Abrahamson, appointing the Honorable Gregory A. Peterson as the John Doe Judge.

The reasons for the psotion of the Special Prosecutor are stated in his Motion to Unseal.

VII. CONCLUSION

For all the foregoing reasons, the Special Prosecutor requests that the Petition be denied.

Dated this 20TH day of December 2013.

Respectfully submitted,

Francis D. Schmitz
Special Prosecutor
State Bar No. 1000023

P.O. Address
Post Office Box 2143
Milwaukee, WI 53201
(414) 278-4659

CERTIFICATE OF COMPLIANCE

WITH RULE 809.51(4)

I hereby certify that this Response conforms to the rules contained in Wis. Stat. §§809.51(4) for a brief produced with a proportional serif font. The word count in Sections I to VII of the Response is 7,487.

A copy of this certificate has been served with the paper copies of this Response filed with the court and served on all opposing parties.

December 20, 2013
Date

Francis D. Schmitz
Special Prosecutor
State Bar No. 1000023

P.O. Address
Post Office Box 2143
Milwaukee, WI 53201
(414) 278-4659