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STATE OF WISCONSIN
SUPREME COURT

Nos. 2013AP2504-W through 2508-W,
14AP296-OA, and
14AP-0417-W through 0421-W

STATE OF WISCONSIN EX REL. THREE UNNAMED PETITIONERS,
v.
HON. GREGORY A. PETERSON, *et al.*,

STATE OF WISCONSIN EX REL. TWO UNNAMED PETITIONERS,
v.
HON. GREGORY A. PETERSON, *et al.*,

STATE OF WISCONSIN EX REL. FRANCIS D. SCHMITZ,
v.
HON. GREGORY A. PETERSON.

REPLY BRIEF OF PETITIONER
(UNNAMED MOVANT No. 7)
(Issues 1-5 & 14)

John Doe Investigative Proceeding in Five Counties,
Hon. Gregory A. Peterson, Presiding
Columbia County No. 13-JD-011; Dane County No. 13-JD-009
Dodge County No. 13-JD-006; Iowa County No. 13-JD-001;
Milwaukee County No. 12-JD-023

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REPLY

I. THE CORE ISSUE IS NOT WHO APPOINTED A RESERVE JUDGE: IT IS WHETHER THE FIVE-COUNTY STRUCTURE IS LAWFUL AT ALL. (Issues 1, 2, and 3)

A. *In Substance, this is a Single Five-County John Doe Proceeding, Not Five Separate Proceedings.*

REDACTED returns to the beginning, to frame REDACTED reply. In its December 16, 2014 order, this Court asked:

> Whether Wis. Stat. § 968.26 permits a John Doe judge to convene a John Doe proceeding over multiple counties, which is then coordinated by the district attorney of one of the counties.

Order at 2, Issue No. 3 (December 16, 2014).

Putting form over substance, both the special prosecutor and the respondent judges contend that, because five separate but nearly identical orders appointed Judge Kluka and because she in turn REDACTED, there are five separate John Doe proceedings. Special Prosecutor's Brief at 203-05; Respondent Judges' Brief at 34-36.

This Court's initial observation that the case concerns "a John Doe proceeding over multiple counties" is more sensible, as a matter of substance. There is one judge, one special prosecutor, and one record—albeit cobbled together from the partially overlapping records that two of the five counties, Dane and Milwaukee, maintained.[1]

1. By choice of passive voice, the respondent judges invite assumption that this assemblage somehow sprouted organically, and by appearing on its own became something that a judge had no choice but to manage creatively. *See* Respondent Judges' Brief at 35-36. But of course it did not appear spontaneously. REDACTED deliberately assembled it.

This Court's order rightly recognizes the assemblage for its substance and reality, paper form and superficial appearances

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1 This Court implicitly acknowledged as much at pages 6 and 7 of its December 16, 2014 order, in which it directed the clerks of court in only those two counties to assemble the record. If there is a separate record of "copies" in the other three counties, Special Prosecutor's Brief at 204, the unnamed movants never have seen that record.

notwithstanding. By any name, and in spite of hair-splitting that would cleave an "investigation" from a "proceeding" here, this is "a John Doe proceeding over multiple counties." Order at 2, Issue No. 3.

2. Factual digging supports the Court's description. That there is just one judge for the proceeding in these five counties and just one special prosecutor are facts on the surface. But maybe there is one investigation and yet five proceedings. Well, judges do not run criminal investigations; they run John Doe proceedings. Like the John Doe proceeding itself, REDACTED. *See, e.g.*, Special Prosecutor's App. 23, 26, 27, 29. REDACTED.

For his part, the special prosecutor shares one post office box with the John Doe judge in one county, Milwaukee, not five boxes in five counties. He has one direct-dial telephone number in one district attorney's office, Milwaukee County's, not five telephone numbers in five counties.

REDACTED. Were there really five separate proceedings simply running in parallel, that access would be pointless, even improper.

Finally, as REDACTED noted in REDACTED principal brief and the special prosecutor now concedes, the John Doe judge simply picked one of the five "REDACTED." Special Prosecutor's Brief at 203-04. That effectively cut out four clerks of court—themselves constitutional officers with statutory duties in their respective circuits. *See* REDACTED Brief at 57. If there were five separate John Doe proceedings, four of the five clerks of court REDACTED. In substance, the John Doe judges REDACTED. That cemented the reality: this is one unified John Doe proceeding in five counties, not five separate John Doe proceedings in one county each.

B. *No State Official Had the Power to Create This Five-County Assemblage.*

Before the Court gets to the question of which state official has the power to appoint a John Doe judge in a five-county proceeding, logically it confronts the question whether any state office carries

power to create this five-county assemblage. That is the question at the core.

Subtly, the respondent judges and special prosecutor posit that core question upside down. The judges write, "nothing in Wis. Stat. § 968.26 prevents a John Doe judge presiding over parallel John Doe proceedings in multiple counties from authorizing a single district attorney or special prosecutor to conduct an 'investigation' related to all the John Doe proceedings." Respondent Judges' Brief at 35; *see also* Special Prosecutor's Brief at 203 ("The Special Prosecutor knows of no authority that prohibits a John Doe Judge, who is appointed and acting in five counties, from conducting a John Doe proceeding in each of those five counties;" footnote omitted).

But wait. John Doe inquiries are creatures purely of statute, although the statutory history is long. *See generally* ***State v. Washington***, 83 Wis. 2d 808, 819-28, 266 N.W.2d 597, 603-07 (1978). They have no life or existence outside of the statutes, no deep and mysterious common law roots that might give them a hoary, pre-

statutory vitality. So the question properly is not whether anything in the enabling statute "prevents" or "prohibits" what happened here. The right question is whether anything in the statutes *permits* what happened here.

The answer to that question is no. Not a jot or tittle in any Wisconsin statute invited or permitted this five-county assemblage, crossing appellate districts, edging out clerks of court, and amassing the powers of five district attorneys in one special prosecutor. REDACTED,[2] state officials and REDACTED simply did this.

The respondents point to no statutory authority affirmatively allowing any of it. What they point to in excusing it are venue provisions that apply to the offenses under investigation here. WIS. STAT. §§ 11.61(2), 971.19(12), 978.05(1);[3] *see* Special Prosecutor's

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[2] REDACTED.

[3] Incidentally, with a special prosecutor REDACTED, § 978.05(1) does not advance the respondents' cause far. It provides explicitly that the county district attorney "shall" "have *sole* responsibility for prosecution of all criminal actions arising from violations of chs. 5 to 12 . . ." (Italics added).

Brief at 204, 205 n.226; Respondent Judges' Brief at 28. Those venue provisions, requiring trial where the defendant lives regardless where the crime may have occurred, reduce to a convenience excuse here, bejeweled as efficiency. If most of the investigative gatherings would apply to all of the scattered counties in which potential defendants reside, why not consolidate the investigation or proceedings under one judge and prosecutor for sake of convenience or efficiency?

There is a short but sufficient answer. In approving exactly these venue provisions, this Court wrote:

> Prosecuting a case may be inconvenient for district attorneys in counties distant from where the alleged crime occurred; however, the legislative history of 2007 Senate Bill 1 indicates that the legislature rejected concerns bottomed in inconvenience to district attorneys. After considering [then-District] Attorney Blanchard's testimony regarding his concerns about the venue provision, the legislature voted to pass the bill without amending any portion of it. Accordingly, the legislature in effect rejected Attorney Blanchard's convenience argument.

State v. Jensen, 2010 WI 38, ¶ 40, 324 Wis. 2d 586, 782 N.W.2d 415, 427.

The respondents point to no statutory authority at all for this unified John Doe proceeding and investigation, with one reserve judge and one special prosecutor bundling together five counties for sake of their own convenience or REDACTION. Why? There is no statutory or other authority to find. Whether the chief justice of the Wisconsin Supreme Court, the director of state courts, the chief judges of judicial administrative districts, or someone else, the problem remains: no state official had the power to build this five-county cluster.

C. *A Reserve Judge's Authority to Preside Over a Conventional John Doe Proceeding is Irrelevant Here.*

Both the special prosecutor and the respondent judges defend the power of the chief justice to appoint a reserve judge to preside over a John Doe proceeding. Special Prosecutor's Brief at 200-02; Respondent Judges' Brief at 31-32. In the end, this Court could assume, without deciding, that they are right—as to the conventional John Doe proceeding in one county, conducted by that county's district attorney or her office.

But that is not this case. The amalgam here was not five separate John Doe proceedings running separately but in parallel as both the special prosecutor and the respondent judges insist. Instead, it was a consolidated John Doe proceeding spanning its own five-county supercircuit in substance, even if not in form. That so, the legitimacy of the John Doe judge's role turns fundamentally on something bigger than the identity and authority of the official who appointed that judge. It turns on the legitimacy of the five-county assemblage itself.

In other words, that the chief justice (or for that matter, the director of state courts) has statutory authority to appoint a reserve judge to oversee a John Doe proceeding in one county, with the direct participation of that county's district attorney, resolves nothing here. If the unnamed movants are right about the substance of this five-county amalgam, and therefore its illegitimacy, then no power of the chief justice, of the director of state courts, or of any other state officer

will save this structural stranger to Wisconsin law. What a reserve judge might do in the ordinary John Doe probe is beside the point.

II. THIS SPECIAL PROSECUTOR'S APPOINTMENT WAS UNLAWFUL FROM THE START AND CANNOT CONTINUE IN ANY EVENT. (Issue 4)

Defending the special prosecutor's appointment, the respondents grapple with almost everything but the plain terms of WIS. STAT. § 978.045. Whatever inherent power a court may exercise after charging, when the public interest in continuing a prosecution collides with a district attorney's decision to end it, no inherent power allows a John Doe judge to contradict the terms of § 978.045 and appoint a special prosecutor to her liking before charging.

When they do address the statute, the respondents miss the point. The special prosecutor proffers § 978.045(3), which allows unpaid public-service special prosecutors. Special Prosecutor's Brief at 211-14. That subsection has no place here: the special prosecutor

REDACTED,[4] REDACTED, and can tender nothing that suggests subsection (3) was in play. To their credit, the respondent judges acknowledge that it was not. Respondent Judges' Brief at 39 n.8.

But the respondent judges also miss when they contend that the district attorneys here had a "conflict of interest" within the meaning of § 978.045(1r)(h). Respondent Judges' Brief at 48. No, they did not. The proof of that is REDACTED.[5] Any district attorney acting out of a genuine ethical concern about a conflict (or about appearance of impropriety) REDACTED.

Finally, in endorsing the court of appeals' conclusion that § 978.045(1g) authorized Judge Kluka REDACTED even if § 978.045(1r)

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Consistent with REDACTED, the special prosecutor writes that he will submit vouchers. Special Prosecutor's Brief at 207 n.227.

5

In identical terms, Judge Kluka's September 5, 2012 secrecy order (Milwaukee County) and her four August 21, 2013 secrecy orders (the other four counties) allow district attorneys and staff members access to the John Doe record "to the extent necessary for the performance of their duties, because such access will materially aid the progress of this investigation." Had they stepped aside because of concern about a conflict of interest or its appearance, none of these district attorneys would have any duties to perform as to the John Doe. Their access thus could not materially aid progress of the investigation.

did not, the respondent judges also join the court of appeals in ignoring the very words of § 978.045(1g), which subject it to the limitations of § 978.045(1r). REDACTED explored the statutory terms in REDACTED principal brief. REDACTED Brief at 37-41. REDACTED need not retrace steps here, for the respondent judges and the special prosecutor offer no direct response. They simply do not acknowledge the statute's words.

Recall that Judge Kluka did not acknowledge the statute's words, either. Her REDACTED.

What is left for reply, then, is the respondents' argument that a court's inherent powers both extend to a non-court, a John Doe judge, and supervene express statutory restrictions.[6] REDACTED turns to that argument now.

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[6] The respondent judges contend that Judge Kluka had authority to appoint the special prosecutor under § 978.045(1g). Respondent Judges' Brief at 42-45. They admit that § 978.045(1g) confers its powers only on a "court." What they do not add is that this Court for decades has drawn a sharp distinction between a "court" and a John Doe judge. *See, e.g., **State ex rel. Jackson v. Coffey,*** 18 Wis. 2d 529, 534, 118 N.W.2d 939, 942-43 (1963) ("The problem in these cases arises because a John Doe examination is not conducted by, nor under the supervision of any court. * * * The law ordinarily makes a clear distinction between a magistrate and a court").

A. *Inherent Authority Does Not Allow What a Statute Denies.*

When a statute addresses judicial authority in detail, REDACTED takes it that a court ought to be careful about looking beyond the statute for unwritten "inherent" authority to do more than the legislature allows. It ought to be more careful still, REDACTED supposes, when a claim of inherent authority is all that supports a judicial act that a statute disallows.

Neither REDACTED nor the Court have any need here to reach the hypothetical tough cases. The Court can imagine, for sake of argument, that there could be instances in which the legislature trespasses the separation of powers doctrine, robbing the judiciary by statute of some core power long understood as inseparable from, and essential to, the role of the judiciary. Those would be tough cases.

This one is not tough. In the adversarial justice systems of English-speaking people, the judiciary never has had a robust power to control the executive functions of prosecution or prosecutorial decisionmaking. The judiciary has had some role at the edges, yes: in

Wisconsin, for example, after charging, judges can replace a prosecutor under limited circumstances, when dismissal of existing charges clashes with the public interest. *See, e.g.*, ***Guinther v. City of Milwaukee***, 217 Wis. 334, 258 N.W. 865 (1935); ***State v. Lloyd***, 104 Wis. 2d 49, 56-57, 310 N.W.2d 617, 622 (Ct. App. 1981).

Before charging, though, Wisconsin law is different. The district attorney's discretion then is her own, exercised without judicial choice or control. ***State ex rel. Kurkierewicz v. Cannon***, 42 Wis. 2d 368, 166 N.W.2d 255 (1969). Wisconsin district attorneys enjoy discretion that "approaches the quasi-judicial." ***State v. Kenyon***, 85 Wis. 2d 36, 42, 270 N.W.2d 160, 162 (1978), quoting ***State v. Peterson***, 195 Wis. 351, 359, 218 N.W. 367 (1928); *see also* ***State v. Akins***, 198 Wis. 2d 495, 514, 544 N.W.2d 392, 399 (1996). A district attorney's discretion in deciding whether to start a prosecution is "almost limitless." ***Kenyon***, 85 Wis. 2d at 45, 270 N.W.2d at 164. She answers to no one for that charging discretion other than voters, with one exception: the district attorney is "answerable to specific directions of the legislature." ***State ex rel.***

Kurkierewicz, 42 Wis. 2d at 380, 166 N.W.2d at 261. But a district attorney need not justify decisions to charge or not charge a crime to "any other officer of the state," including a judge. *Id.*, 42 Wis. 2d at 378, 166 N.W.2d at 260.

1. As to a John Doe judge, the judiciary's limited role in deciding whom to investigate or charge cannot be broadened. The John Doe statute does not violate the separation of powers doctrine, *State v. Unnamed Defendant*, 150 Wis. 2d 352, 441 N.W.2d 696 (1989), and the judge does not orchestrate a John Doe investigation: "The John Doe judge is a judicial officer who serves an essentially judicial function." *Washington*, 83 Wis. 2d at 823, 266 N.W.2d at 605. That judge "has no authority to ferret out crime wherever he or she thinks it may exist," *id.* at 822, 266 N.W.2d at 604, in sharp contrast to a prosecutor.

This makes sense. The entire John Doe process is only of the legislature's making, through statute. It invokes inherent judicial authority only within the confines of the John Doe statute itself. A John

Doe judge cannot invoke inherent authority that would expand the judicial role beyond the statute's own doing, or further tip the balance between judicial and executive branches that WIS. STAT. § 968.26 strikes.

2. As to appointment of special prosecutors, WIS. STAT. § 978.045 is plain. Either a court or a district attorney may request appointment of a paid special prosecutor, subsection (1g) provides. One prerequisite is that the court or district attorney must seek assistance from other prosecutors first. A second prerequisite, regardless who makes the request, is that the appointment is "under sub. (1r)." WIS. STAT. § 978.045(1g). Finally, at least after the fact, either court or district attorney must notify the Department of Administration, WIS. STAT. § 978.045(1g), which has the obligation to pay these special prosecutors. WIS. STAT. § 978.045(2).

Subsection (1r) then elaborates the requirements of appointments requested by either actor under subsection (1g). Specifically, at least one of nine conditions precedent for the appointment must exist. WIS. STAT. § 978.045(1r)(a)–(i). And the

judge must enter an order in the record stating the cause for the appointment.

So regardless whether the district attorney or the court requests appointment of a special prosecutor, subsection (1r) applies and limits the circumstances to the nine specific conditions under which taxpayers will pay for a special prosecutor to serve with or instead of the district attorney. All subsection (1g) requests flow through, and are "under," subsection (1r). True, there are two separate ways in which paid special prosecutors are appointed: at the district attorney's request or at the court's choice. Either way, though, paid special prosecutors serve only when subsection (1r) provides a permissible reason. Subsection (1g) appointments are not one way to appoint them, and subsection (1r) appointments another.[7]

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[7] There is a third way in which a special prosecutor may be appointed under the statute, but not a paid one. Public-service special prosecutors, who take no pay from taxpayers, may be appointed under WIS. STAT. § 978.045(3). The district attorney alone makes those appointments. WIS. STAT. § 978.045(3)(a). Those appointments are "not subject to the appointment procedure under subs. (1g) and (1r) or to the compensation under sub. (2)." *Id.* Note that subsection (3)(a) refers to a singular "procedure" under (1g) *and* (1r), not to plural procedures, one for the first subsection and the other for the second.

The court of appeals garbled this scheme in *Carlson*. Missing the subsection (1g) requirement that appointments are "under sub. (1r)," it concluded that the "listed circumstances" in subsection (1r) "relate back to the appointments made at the request of the district attorney," not to appointments made on a court's motion. *Carlson*, 2002 WI App 44, ¶ 8 n.5, 250 Wis. 2d at 571 n.5, 641 N.W.2d at 456 n.5. This half-reading of the statute is unsustainable. It is plainly wrong.

3. Facing *Carlson's* mistake squarely for the first time, this Court should abrogate the court of appeals' misinterpretation of § 978.045(1g). Whether at the district attorney's request or on the court's own motion, at least before any charge is filed a paid special prosecutor's appointment requires one of the nine conditions precedent in subsection (1r).

That does not necessarily mean that the Court also must overrule earlier cases approving appointment of a special prosecutor when a district attorney, contrary to the public interest in a court's view, refuses to continue a prosecution once commenced. *See, e.g.*, *Guinther*, 217 Wis. 334, 258 N.W. 865; *State v. Kenyon*, 85 Wis. 2d 36,

270 N.W.2d 160 (1978); ***State v. Braunsdorf***, 98 Wis. 2d 569, 297 N.W.2d 808 (1980); ***State ex rel. Friedrich v. Dane Co. Circuit Court***, 192 Wis. 2d 1, 12-13, 16-17, 531 N.W.2d 32, 35, 37-38 (1995); ***In re Commitment of Bollig***, 222 Wis. 2d 558, 571, 587 N.W.2d 908, 913 (Ct. App. 1998); ***Lloyd***, 104 Wis. 2d at 56-57, 310 N.W.2d at 622. Those situations might continue to invoke a compatible inherent authority of the judiciary. In any event, those cases are not this one; they are for another day. This appointment came well before any charge, during the time when Wisconsin law quite clearly vests all prosecutorial discretion in a district attorney.

4. That leaves the respondents with ***Cummings***. Of course, on its facts, ***Cummings*** had nothing to do with appointing a special prosecutor. It concerned the traditional judicial functions of issuing and sealing search warrants. But the respondents read it broadly as support for an inherent power to appoint a special prosecutor when "necessary to fulfill the jurisdictional mandate."

Special Prosecutor's Brief at 220, quoting *Cummings*, 199 Wis. 2d at 736; *see also* Respondent Judges' Brief at 41-42.

Even at its broadest, *Cummings* does not support REDACTED.

Arguably, one more lawyer – in the person of the special prosecutor – might have added to convenience or efficiency. Or maybe not; this kitchen may not have needed one more cook. But either way, marginal convenience or efficiency are not necessary to fulfill a jurisdictional mandate. Helpful, maybe; necessary, no. This case offers no license or reason to stretch *Cummings* well past its facts and its logical limits.

B. *The Special Prosecutor Was Not a* De Facto *Officer.*

Alone, the respondent judges argue that the special prosecutor, even if improperly appointed, was a *de facto* officer whose acts evade collateral challenge after the fact. Respondent Judges' Brief at 50-51. The special prosecutor makes no direct attempt to salvage his past acts this way. *But see* Special Prosecutor's Brief at 236-37.

"As a general rule," the court of appeals has explained, "all that is required to make an officer *de facto* is that the individual claiming the office be in possession of it, performing its duties, and claiming to be such officer under color of an election or appointment." ***Joyce v. Town of Tainter,*** 2000 WI App 15, ¶ 7, 232 Wis. 2d 349, 354-55, 606 N.W.2d 284, quoting ***Pamanet v. State,*** 49 Wis. 2d 501, 507 n.11, 182 N.W.2d 459, 464 n.11 (1971). Acts of such officers may not be attacked "collaterally," which in this context means by challenging only the legality of the appointment. ***Joyce,*** 2000 WI App 15, ¶ 13, 232 Wis. 2d at 357.

Instead, the only proper challenge is a "direct proceeding to try his title to the office." ***Walberg v. State,*** 73 Wis. 2d 448, 463, 243 N.W.2d 190, 198 (1976).[8] That direct challenge to a *de facto* public

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[8] This Court later overruled ***Walberg*** on different grounds, not on its discussion of *de facto* officers. ***State v. Smith,*** 131 Wis. 2d 220, 388 N.W.2d 601 (1986). However, the Court should note that the entire discussion of *de facto* officers is Chief Justice Beilfuss' dictum, for a majority of the Court resolved the case on waiver and Chief Justice Beilfuss said that he wrote only for himself after that. ***Walberg,*** 73 Wis. 2d at 462, 243 N.W.2d at 197.

officer is by writ of *quo warranto* under WIS. STAT. § 784.04. ***Joyce,*** 2000 WI App 15, ¶ 8 n.4, 232 Wis. 2d at 355 n.4.

Two principal problems with the respondent judges' argument emerge now. First, the unnamed movants hardly rest their challenges to the John Doe judge's competency REDACTED, and to the substantive correctness of the special prosecutor's theory of criminality, only on the legality of the special prosecutor's appointment. So it is not clear under ***Joyce*** that this is a collateral attack at all.

Second, there is a real question whether the special prosecutor holds a "public office," for purposes of the *de facto* officer doctrine and the *quo warranto* statutes. The *quo warranto* remedy is available in this setting only to oust someone who intrudes into or unlawfully holds or exercises any "public office." WIS. STAT. § 784.04(1)(a).

The statutes do not define "public office." But this Court's most extensive consideration of the question, in ***Martin v. Smith,*** 239 Wis. 314, 1 N.W.2d 163 (1941), leaves serious doubt that the special

prosecutor purports to hold any public office. A public office is not the same as public employment. *Martin*, 239 Wis. 314, 1 N.W.2d at 172. So, for example, neither city superintendents of schools, nor professors at the University of Wisconsin, nor even the president of the University of Wisconsin hold "public offices," although they are public employees. *Id.*, 1 N.W.2d at 171, 172; *see also Sieb v. City of Racine*, 176 Wis. 617, 624, 187 N.W. 989, 992 (1922) (city superintendents of schools).

After a long discussion of earlier cases from Wisconsin and elsewhere, the *Martin* court wrote, "It is certain that a person employed cannot be a public officer, however chosen, unless there is devolved upon him by law the exercise of some portion of the sovereign power of the state in the exercise of which the public has a concern." *Martin*, 1 N.W.2d at 172. The Court cited approvingly a Montana case that set out several criteria, among them: a public office must be created by the constitution or through legislative act; must possess a delegation of a portion of sovereign power to be exercised for the public's benefit; must have some permanency and continuity, and not be only

temporary or occasional; must be entered upon by taking an oath and giving an official bond; and must be held by virtue of a commission or other written authority. *Id.*, quoting *Montana ex rel. Barney v. Hawkins*, 79 Mont. 506, 257 P. 411 (1927).

By measure of *Martin*, the special prosecutor's claim to "public office" is tenuous. He was not elected, his office has no permanency or continuity, the constitution did not create it, and he gave no bond. Agreed, the legislature enabled special prosecutors by statute and that statute gives special prosecutors "all of the powers of the district attorney"—but only if appointed under WIS. STAT. § 978.045(1r). And that is the very statute that the special prosecutor contends does *not* apply to his appointment. Special Prosecutor's Brief at 214.

Further, although he holds his position REDACTED. So whatever help a legislatively-authorized appointment as special prosecutor might have offered in making the case that he is a public

officer, neither the respondent judges nor the special prosecutor can rely on that statute to bolster REDACTED.[9]

Admittedly, the special prosecutor did REDACTED that comports with WIS. CONST. Art. IV, § 28. *See Martin*, 1 N.W.2d at 172; J.A. 45, 47, 49, 51, 53. But then again, he seems not to have given an official bond.

In the end, factors this Court has considered in deciding what is a "public office" point both ways. But given the fact that his appointment REDACTED, and he mostly has defended it only on those grounds, the balance tilts toward the special prosecutor claiming no public office at all. If he does not pretend to a "public office," then the *de facto* officer doctrine necessarily has no application.

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[9] REDACTED acknowledges that the respondent judges do argue in this Court that WIS. STAT. § 978.045(1r) supports the special prosecutor's appointment, even though REDACTED. Respondent Judges' Brief at 46-49. This was a change in the respondent judges' position. In the court of appeals below, they did not argue that § 978.045(1r) justified the appointment.

C. *Even if he Were a* De Facto *Officer, the Special Prosecutor Could Not Continue.*

Now assume instead that the special prosecutor was a *de facto* district attorney or public officeholder. The *de facto* officer doctrine frustrates collateral attacks on the acts of imposter officers after the fact. But of course it does not allow the improper officeholder to remain in a public office after his imposture appears. If the doctrine provides no cure for the past, it also provides no sinecure for the future. So, *de facto* officer or not for yesterday's purposes, the special prosecutor cannot continue in that role today or tomorrow.

III. THE JOHN DOE JUDGE HAD NO COMPETENCY TO PROCEED OUTSIDE MILWAUKEE COUNTY, REGARDLESS WHO PROSECUTES. (Issue 5)

Both the special prosecutor and the respondent judges note REDACTED concession that Judge Kluka was competent to proceed in Milwaukee County, and that Judge Peterson remained competent to proceed there later. Special Prosecutor's Brief at 207-08; Respondent Judges' Brief at 51; REDACTED Brief at 25, 29. That careful concession

is right. State law did allow appointment of a reserve judge to preside over a John Doe proceeding in one county. It just did not allow an assemblage of five counties and the other actions of the reserve judge here.

The limited concession has nothing to do with the legality of the special prosecutor's appointment. A judge competent to proceed nonetheless may make legal errors in how he or she does proceed. It does not follow that a judge competent to proceed in one county REDACTED.

The original appointment in one county was not the flaw "central" to the statutory scheme, then, that deprived the judge of competency. *Village of Trempealeau v. Mikrut*, 2004 WI 79, ¶ 10, 273 Wis. 2d 76, 681 N.W.2d 190. Not even the impropriety of the special prosecutor's appointment did that. It was everything the judge did outside Milwaukee County.

IV. THE JOHN DOE JUDGE DID NOT FAIL A PLAIN, POSITIVE DUTY IN ORDERING RETURN OF SEIZED PROPERTY. (Issue 14)

The special prosecutor proposes that Judge Peterson had a plain, positive duty REDACTED. Special Prosecutor's Brief at 253-54, citing WIS. STAT. § 968.12(1).

Substantive questions of what Chapter 11 does and does not prohibit will resolve that probable cause issue as a practical matter. Good faith or no, this Court presumably would not approve REDACTED.

As to that actual issue, the special prosecutor makes no claim that the John Doe judge had a plain, positive duty REDACTED. Unnamed movants instead showed that he had discretion to order exactly as he did.

V. ADOPTION.

REDACTED adopts the reply briefs of all seven other unnamed movants on Issue Nos. 6 through 14.

CONCLUSION

For all of the reasons she explains here and in REDACTED opening brief, REDACTED again asks this Court to grant the specific relief she requested. More generally, this Court should reverse the court of appeals in Nos. 2013AP2504—2508-W and grant the writ that the Three Unnamed Petitioners sought there. It also should grant the relief that the Two Unnamed Petitioners seek in their original action, No. 2014AP269-OA. Lastly, it should dismiss the special prosecutor's petition, Nos. 2014AP417—421-W, here on bypass.

Respectfully submitted,

UNNAMED MOVANT NO. 7, *Petitioner*

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March 19, 2015.

CERTIFICATION

I certify that this reply brief conforms with the rules contained in WIS. STAT. §§ 809.19(8)(b) and (c), for a brief produced with a proportional serif font. The length of the countable portions of this reply brief is 5,898 words. *See* WIS. STAT. § 809.19(8)(c)2.

Dated this ___ day of March, 2015.

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CERTIFICATION UNDER RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this reply brief which complies with the requirements of WIS. STAT. § 809.19(12). Electronic filing of a searchable PDF file here is pursuant to this Court's specific January 13, 2015 order governing filing in this case.

A copy of this certificate has been served with the paper copies of this reply brief filed with the Court and served on opposing parties.

Dated this ___ day of March, 2015.

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